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Court of Appeals

of the

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 –

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICI CURIAE* MARK FAVORS, THEODORE HARRIS AND MARK WEISMAN IN SUPPORT OF PETITIONERS-RESPONDENTS

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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 –

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

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-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

As this Court recognized in *Harkenrider v. Hochul*, it is a "fundamental principle" of New York law that our State's Constitution embodies "the voice of the people speaking in their sovereign capacity, and it must be heeded." 38 N.Y.3d 494, 524 (2022) (quoting *Matter of New York El. R.R. Co.*, 70 N.Y. 327, 342 (1877)). The people of New York spoke clearly in 2014 by ratifying "historic reforms" amending the Constitution (the "2014 Amendments") to establish an Independent Redistricting Commission ("IRC") and mandating that the IRC play a "substantial and constitutionally required role in the map drawing process." *Id.* Article III, § 4(e) directs that the IRC-based process for redistricting "*shall* govern redistricting in this state *except* to the extent that a court is *required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e) (emphases added). "In the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5.

In this case, the Appellate Division, Third Department correctly construed the extraordinary judicial remedy imposed in *Harkenrider*—appointing an individual, out-of-state special master to draw up congressional and State Senate district maps in a matter of weeks—to apply only to the 2022 election that was imminently looming when *Harkenrider* was decided. Echoing the express wording of § 4(e)

quoted above, *Harkenrider* held that a judicial remedy was "*required*" only to allow a special master to quickly create "constitutionally conforming maps *for use in the 2022 election*" and "to safeguard the constitutionally protected right of New Yorkers to a fair *election*" in 2022. 38 N.Y.3d at 502 (emphases added). The 2014 Amendments dictate that any judicial intervention must be narrowly tailored to ensure that the IRC-based process "shall govern" redistricting in New York to the fullest extent possible. This Court honored that constitutional mandate in *Harkenrider* by crafting the judicial remedy necessary to address the immediate legal emergency presented in 2022, without foreclosing the subsequent completion of redistricting maps under the IRC-based process, as enshrined in the New York Constitution, to govern elections for the remainder of the decade.

The undersigned *amici curiae* ("Amici") are registered New York voters committed to the promise of greater "fairness, transparency, and bipartisanship" in redistricting heralded by the 2014 Amendments. *See id.* at 516. Amici respectfully submit that this Court should affirm the sound decision of the Third Department in this case. There is no foundation for Respondents-Appellants' and Intervenors-Appellants' attempt to transform the emergency remedy imposed in *Harkenrider* into a decade-long chokehold on the IRC-based redistricting process. To the contrary, § 4(e) of the Constitution prohibits such an overbroad and anti-democratic judicial remedy. A ten-year judicial takeover of the IRC-based map-drawing process is not

"required," and the IRC process must be allowed to "govern" by giving the New York legislature a "full and fair opportunity to correct" the violation which necessitated this Court's resort to a judicially-supervised remedy for the 2022 election. That opportunity demands that the IRC first perform *its* mandatory constitutional duty by submitting a second redistricting plan.

As a threshold matter, the Appellate Division also correctly held that Petitioners' filing of this mandamus action was timely under CPLR 217(1). The IRC's failure to submit a second plan on January 24, 2022, did not start the mandamus clock under CPLR 217(1), because on that date a statute duly adopted by the New York legislature in 2021 (the "2021 Legislation") provided that the redistricting process under the 2014 Amendments would be completed by the legislature regardless of whether the IRC failed to submit a second plan. Although *Harkenrider* subsequently invalidated the 2021 Legislation, that statute nonetheless enjoyed an "exceedingly strong presumption of constitutionality" in January 2022. *White v. Cuomo*, 38 N.Y.3d 209, 217 (2022) (internal quotation marks omitted). Not until the 2021 Legislation was declared unconstitutional in *Harkenrider* could Petitioners assert "a clear right to relief" compelling the IRC to perform its still-unfulfilled duty to submit a second redistricting plan. *See Matter of Granto v. City of Niagara Falls*, 148 A.D.3d 1694, 1695 (4th Dep't 2017). Petitioners' commencement of this action less than four months later was therefore timely.

Nothing in the New York Constitution or the *Harkenrider* decision prevents the IRC from now fulfilling its constitutional function by preparing and submitting a second redistricting plan to the legislature pursuant to § 4(e). The Constitution does not prohibit "mid-decade redistricting." To the contrary, it demands that any judicial remedy be narrowly tailored, including by allowing the default duration of a remedial plan to be "modified by court order" and limited to what is strictly "required" when the remedy is imposed. And it expressly calls for correction of legal violations by the legislature through the IRC-based process—as demonstrated by the legislature's recent approval and enactment of the second IRC plan for New York Assembly districts, which the IRC prepared after the 2022 election and submitted to the legislature in April 2023. To fulfill the people's intent and purpose in adopting the 2014 Amendments, the burden will remain on the IRC and the legislature to heed the lesson of *Harkenrider* and respect the people's voice by enacting a redistricting plan for congressional and State Senate districts anchored in the IRC map-drawing process. But, as the Third Department concluded, the Constitution commands that this Court afford them that opportunity. Accordingly, the Third Department's order should be affirmed.

INTEREST OF AMICI CURIAE

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

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

Theodore Harris is a New York registered voter who resides in New Rochelle, New York. He is a co-chair of the Minority Voting Rights Committee of the New York Democratic Lawyers Council.

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

FACTUAL BACKGROUND

The facts relevant to this appeal are recited in detail in the Appellate Division's opinion. *See Hoffmann v. New York State Indep. Redistricting Comm'n*, 217 A.D.3d 53, 55-57 (3d Dep't 2023). This Court in *Harkenrider* also discussed the background and purpose of the 2014 Amendments in depth. *See* 38 N.Y.3d at 501-08. Amici highlight below certain facts of particular relevance to their arguments here.

A. The 2014 Amendments to the Constitution Guarantee a Primary Role for the IRC in a Transparent, Bipartisan Redistricting Process.

In adopting the 2014 Amendments, the people of New York expressed their will to fundamentally change the way that district lines are drawn in New York. The 2014 Amendments were "intended to introduce a new era of bipartisanship and transparency through the creation of [the IRC] and the adoption of additional limits on legislative discretion in redistricting, including explicit prohibitions on partisan and racial gerrymandering." *Harkenrider*, 38 N.Y.3d at 503 (citing supporting legislative memoranda). As the legislative record demonstrates, the central purpose of the 2014 Amendments was to reform the redistricting process in New York to "'ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body.'" *Id.* at 514. New York voters resoundingly endorsed

these historic reforms by ratifying the 2014 Amendments by a large majority on November 4, 2014.

In *Harkenrider*, this Court repeatedly emphasized that the paramount goal of the 2014 Amendments was to guarantee the IRC "a substantial and constitutionally required role in the map drawing process." *Id*. at 516; *id.* at 513-14 (2014 Amendments "were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work of [the IRC]"). Under Article III, § 4(b), the legislature may not insert itself into the substantive map-drawing process until after it has held an up-or-down vote on each of two separate rounds of proposed maps as submitted by the IRC, *without amendments*. *See* N.Y. Const. art. III, § 4(b). Only if the legislature rejects two rounds of IRC-submitted plans is the legislature authorized to modify and adopt the IRC maps with amendments the legislature deems "necessary." *Id. Harkenrider* confirmed that these requirements cannot be changed except by constitutional amendment. 38 N.Y.3d at 517.

The 2014 Amendments also secure the IRC's primary role in redistricting by limiting the judiciary's role in remedying violations of the IRC-based map-drawing procedures set forth in, §§ 4 and 5-b. As the majority in *Harkenrider* emphasized, § 4(e) dictates that the IRC-based redistricting process "'*shall* govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.'" *Harkenrider*, 38

N.Y.3d at 515 (quoting § 4(e)) (italics in original); *see also Hoffman*, 217 A.D. 3d at 60. Thus, a court may exercise its remedial power only "to the extent" that is "required" to correct the legal violation at issue. Moreover, a court that finds such a violation must give the legislature "a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5.

B. The 2014 Amendments Result in Broad Public Participation in the IRC-Led Map-Drawing Process Statewide.

As mandated by § 5-b(c), the IRC members who conducted the 2021 redistricting proceedings comprised a varied and representative group of New Yorkers chosen to reflect the "diversity of the residents of [New York] with regard to race, ethnicity, gender, language, and geographic residence." *Id.* § 5-b(c). The IRC was required to maximize opportunities for robust public input into the redistricting process by holding public hearings across the state in New York's major cities—Albany, Buffalo, Syracuse, Rochester, and White Plains—and also in counties in New York City and across Long Island. *Id*. § 4(b)(6). Before submitting its redistricting plans to the legislature, the IRC also was required to "make widely available to the public . . . its draft redistricting plans, relevant data, and related information," and to "report the findings of all such hearings" to the legislature. *Id.* Confirming the broad public interest in the IRC-based process, § 5 provides that "any citizen" of the State of New York may bring suit to remedy any legal violation

in a redistricting plan. *Id.* § 5. An adopted plan remains in place until after the next decennial census, "unless modified by court order." *Id.*

Commencing in 2021, a huge number of New Yorkers seized the opportunity to participate in the IRC redistricting process. After releasing its first set of redistricting maps in September 2021, the IRC conducted 24 public hearings statewide, listened to testimony from over 630 speakers, and received over 2,100 written submissions from New Yorkers. *See* Doc. No. 49 in Case No. 22-cv-2265 at 6. This diverse and voluminous public input was considered by the IRC prior to submitting its first round of maps to the legislature on January 3, 2022. R.275.

C. The Legislature Enacts Its Own Maps in 2022, Without Requiring the IRC to Submit a Second Redistricting Plan.

On January 3, 2022—after dividing on partisan lines and failing to agree on a single set of district maps—the IRC submitted to the legislature two sets of maps each supported by an equal number of IRC commissioners, as permitted under Article III, § 5(g). *Harkenrider*, 38 N.Y.3d at 504-05. The legislature rejected both plans on an up-or-down vote on January 10, thereby triggering the IRC's obligation to prepare and submit a second redistricting plan within 15 days (*i.e.*, on or before January 25, 2022). *Id.* However, as of that date, a duly-enacted New York statute (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 take control of the process by using the IRC's drafts

and data and introducing its own redistricting legislation. *See* L 2021, ch. 633; *see also Harkenrider,* 38 N.Y.3d at 512.

Given the procedural fallback apparently created by the 2021 Legislation, the IRC deadlocked, and on January 24, 2022, announced that it would not submit a second redistricting plan for legislative approval by the January 25 deadline. *See Harkenrider*, 38 N.Y.3d at 504. In response to the IRC's announcement, the legislature invoked the power it then had under the 2021 Legislation to assert control over the redistricting process. *Hoffman*, 217 A.D.3d at 56; *Harkenrider,* 38 N.Y.3d at 505. Only a few days later, on February 3, 2022, the legislature passed its own congressional, State Senate, and State Assembly plans, and Governor Kathy Hochul signed those plans into law later the same day. *Harkenrider*, 38 N.Y.3d at 505.

Also on the very same day, a group of Republican voters commenced the *Harkenrider* litigation in Steuben County, challenging the enacted plans as unconstitutional. *See id.* at 505. With the 2022 Congressional and State primaries and general election approaching, the *Harkenrider* litigation proceeded rapidly up to this Court, which issued its decision on April 27, 2022.

D. A Court-Supervised Judicial Remedy Displaces the IRC Process for the Election of 2022.

In *Harkenrider*, this Court struck down the 2021 Legislation, holding that the 2014 Amendments left no room for discretion as to the IRC-based implementation process; the legislature's attempt to "statutorily amend[] the IRC procedure" by

authorizing legislative takeover of redistricting if the IRC failed to submit a required plan under § 4(b) was therefore unconstitutional. *See id.* at 517. As the Court recognized, the people of New York "intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation." *Id.* The 2021 Legislation impermissibly authorized the legislature to commandeer the redistricting process and bypass the IRC, thereby "encourag[ing] partisans involved in the IRC process to avoid consensus" and stalemate the process. *Id.* The statute thus improperly operated to "render the constitutional IRC process inconsequential" and "'violat[ed] the plain intent of the Constitution and disregard[ed] the spirit and the purpose'" of the 2014 Amendments. *Id.* (quoting *Cohen v. Cuomo,* 19 N.Y.3d 196, 201-02 (2012)) (quotation cleaned up). Consequently, the maps drawn by the legislature in 2022 were invalid *ab initio* because they were the product of an unconstitutional process.[1]

The *Harkenrider* decision was issued in the thick of the 2022 election cycle—only one week before the deadline to certify ballots for the congressional and Senate primary elections. *See Hoffman,* 217 A.D.3d at 59. Reflecting the urgency of the timeline, the Court's April 27, 2022 decision was issued only a day after the Court

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

heard oral argument on April 26. As the Court recognized, its determination that the 2021 Legislation was unconstitutional increased that urgency, "le[aving] the state without constitutional district lines for use *in the 2022 primary and general elections*." *Id.* at 521 (emphasis added). Refusing to "subject the people of this state to *an election* conducted pursuant to an unconstitutional reapportionment," the Court rejected the state respondents' argument that, in light of the election calendar, no remedy should be ordered for the 2022 election cycle. *Id.* (emphasis added). The Court declared that "judicial oversight [wa]s *required* to facilitate the expeditious creation of constitutionally conforming maps *for use in the 2022 election* and to safeguard the constitutionally protected right of New Yorkers *to a fair election*" in 2022. *Id.* at 502 (emphases added).

While acknowledging that its ruling would disrupt the calendar for the then-imminent 2022 primary election, the Court held that "there [wa]s sufficient time" to develop and adopt new district lines "[w]ith judicial supervision and the support of a neutral expert designated [as] a special master," and to "swiftly" implement a judicial remedy for the 2022 election. *Id.* at 522-23. In contrast, the urgency of the schedule made the alternative "legislative cure" sought by the state respondents infeasible "at this juncture." *Id.* at 523. Given that the IRC's submission of a second redistricting plan was an essential prerequisite of any legislative cure, the Court noted that the deadline for the IRC to act "ha[d] long since passed," leaving

insufficient time to permit the IRC and the legislature to remedy the redistricting plan's "infirmities" in time for the 2022 election. *Id.* The Court said nothing about any elections beyond 2022 and sent the case back to the Supreme Court to implement the judicial remedy "with all due haste." *Id.* at 524.

On remand, the Supreme Court implemented this Court's remedial instructions by appointing a Pennsylvania-based special master, Jonathan Cervas, who completed a new map-drawing process for the 2022 congressional and Senate election in less than one month. *See* R.225-29 ("Sup. Ct. Op. & Order"). The special master prepared new maps essentially from scratch: the court developed its own purportedly "unbiased independent maps" rather than relying upon the existing IRC-drawn maps or attempting to reconcile the two competing sets of IRC maps submitted to the legislature in January 2022. *Id.* at 3. The redistricting process overseen by the Supreme Court included only one in-person public hearing, held in Bath, New York. R.280-82. Commenting on the rushed nature of its process, the Supreme Court declared it "[f]rankly . . . remarkable that special master Cervas was able to create both the Congressional and State Senate maps in such a short period of time." Sup. Ct. Op. & Order at 3.

Consistent with this Court's opinion and the Supreme Court's foreshortened map-drawing process, the Supreme Court's Decision and Order certified the remedial maps "as being the official approved *2022* Congressional map and the *2022*

New York State Senate map." *Id.* at 5 (emphases added); *see also Hoffman*, 217 A.D.3d at 57 (noting that court made minor revisions and ordered the "2022 map[s]," as modified, to be "the final enacted redistricting maps" (quoting *Harkenrider v. Hochul*, 2022 WL 20527506, at *1 (Sup. Ct. Steuben Cty., June 2, 2022))).

E. After the 2022 Election, the IRC Submits and the Legislature Approves a Fresh Plan for Assembly Districts to Govern Elections Through 2030.

The *Harkenrider* petitioners challenged only the congressional and State Senate maps adopted by the legislature prior to the 2022 election; they did not challenge the State Assembly maps. 38 N.Y.3d at 521 n.15. In parallel litigation addressing the State Assembly maps, *see Nichols v. Hochul*, the First Department concluded that, in light of the limited scope of the *Harkenrider* decision, the legislature's 2022 Assembly lines would remain in effect for the 2022 Assembly election cycle. 206 A.D.3d 463, 463 (1st Dep't), *appeal dismissed*, 38 N.Y.3d 1053 (2022). However, since the 2022 State Assembly redistricting plan was tainted by the same "procedural infirmity" identified in *Harkenrider*, the First Department unanimously directed that, "upon the formal adoption and implementation of a new legally compliant State Assembly map, for use no sooner than the 2024 regular election, the February 2022 map will be void and of no effect." *Id.* at 463-64. The First Department remanded the case to the New York County Supreme Court to

determine "the proper means for redrawing the State Assembly maps in accordance with N.Y. Const., art III, § 5-b." *Id.* at 464.

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

Noting that § 5-b of the 2014 Amendments "allow[ed]," and the First Department's ruling "require[d]," the court to "modify the deadlines in the Constitution in order to remedy a violation of law," the court also rejected the suggestion that the stated constitutional deadlines could not be adjusted, since "[w]ithout [the] ability [to modify deadlines], the text of section 5-b . . . would be rendered meaningless." *Id.* at 252. While "the adoption of a judicially-drawn map was previously necessary due to time constraints," the court stated that "the

landscape has changed dramatically providing significantly more time to implement a new Assembly map for the 2024 election cycle." *Id*. at 254.

Thereafter, the IRC re-convened pursuant to the *Nichols* order and timely submitted a new proposed redistricting plan for the New York Assembly to govern the rest of the decade. The IRC's proposed map was adopted by the legislature and signed into law by Governor Hochul on April 20, 2023.

ARGUMENT

This Court should affirm the Third Department's conclusion that *Harkenrider* did not cancel the IRC-based redistricting process until 2032, nor consign the people of New York to live under a judicially-imposed redistricting regime for an entire decade. The Court's decision in *Harkenrider* properly addressed only the specific constitutional emergency presented in that case, and it crafted a judicial remedy narrowly tailored to produce valid congressional and State Senate maps in a matter of weeks "for use in the 2022 election." 38 N.Y.3d at 502. Even if the majority in *Harkenrider* arguably contemplated a longer-lasting remedy—one that is not discernible from the words of the decision—the 2014 Amendments dictate that responsibility for congressional and State Senate redistricting must now be restored to the IRC and the legislature. This Court should heed the people's voice expressed through the 2014 Amendments and reinforce the *Harkenrider* Court's refusal to "render the constitutional IRC process inconsequential." *Id.* at 517. Mandamus

directing the IRC to submit a second plan is necessary to preserve the people's clear constitutional right to redistricting under the IRC-based process, as set forth in the 2014 Amendments. *See Hoffman*, 217 A.D.3d at 62.

I. The Appellate Division Correctly Concluded That *Harkenrider* Does Not Deprive New Yorkers of Their Right to IRC-Based Redistricting for the Rest of This Decade.

The Third Department correctly held that the judicial remedy ordered in *Harkenrider* should be read as limited to 2022 and therefore does not foreclose the relief sought by Petitioners. In the absence of any explicit language specifying a longer duration, the *Harkenrider* Court's emphasis on both the fundamental importance of the IRC process and the unique urgency of the circumstances necessitating a judicial remedy for the 2022 election make clear the Court did not intend to override New Yorkers' right to have district lines drawn pursuant to the IRC-based process after that election. The sweeping reading of *Harkenrider* advanced by Respondents-Appellants and Intervenors-Appellants (collectively, "Appellants") would deprive New Yorkers of that right for an entire decade, until 2032. Nothing in the decision warrants, much less directs, such an anti-democratic result.

As the Third Department recognized, the majority opinion in *Harkenrider* repeatedly acknowledged the intent of the 2014 Amendments to "ensure that the drawing of legislative district lines in New York will be done by a bipartisan,

independent body" and, "by enshrining it in the constitution, [to] ensure that the process will not be changed without due consideration." *Id.* at 58-59. The *Harkenrider* majority stressed the Court's determination to "adhere[] to the will of the People of this State and give[] meaningful effect to the 2014 constitutional amendments," 38 N.Y.3d at 524. The Court emphasized (with its own italics) § 4(e)'s broad directive that the IRC-based process "'*shall* govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.'" *Id.* at 515 (quoting § 4(e)). As the Court recognized, judicial intervention under § 4(e) must be narrowly tailored to minimize any departure from the constitutionally-mandated IRC-based process. *Cf. id.* at 527 (Troutman, J., dissenting in part) ("The citizens of the state are entitled to a resolution that adheres as closely to the constitutional process as possible.").

In light of the above, the Third Department correctly declined to read *Harkenrider* as intending to displace the IRC process for an entire decade. Multiple statements in *Harkenrider* reflect the Court's primary focus on providing an expedited remedy tailored to meet the then-imminent 2022 election and related deadlines. The Court recognized that the remedy would have to be "swift[]," "expeditious," and conducted "with all due haste," and that only with "judicial supervision and the support of . . . a special master" would there be "sufficient time"

to protect the people's right to constitutional maps in 2022. *Id.* at 522, 524. The Court concluded that a judicial remedy for the violations found was "required" to ensure "the expeditious creation of constitutionally conforming maps *for use in the 2022 election*," and "to safeguard the constitutionally protected right of New Yorkers *to a fair election*." *Id*. at 502 (emphases added). The limiting phrase "for use in the 2022 election" and the singular form of "a fair election" in the foregoing quotation are consistent with an emergency remedy limited to the 2022 election alone. *See id.* at 521 (describing necessity of judicial remedy to protect "the people's right to a free and fair *election*") (emphasis added).

The *Harkenrider* Court's judiciously tailored language does not impose a judicial remedy that extends beyond 2022, let alone for an entire decade. Appellants and their amici fail to identify any language in *Harkenrider* supporting their attempt to drastically expand the temporal scope of that remedy. In an effort to impute some talismanic significance to the *Harkenrider* majority's conclusion that the constitutional violation was "*at this juncture*, incapable of a legislative cure," *id.* at 523 (emphasis added), Appellants cut the words off from their context. While the Court noted that "[t]he deadline in the Constitution for the IRC to submit a second set of maps ha[d] long since passed," that statement merely acknowledged the severity of the time pressure that, *at that juncture*, persuaded the Court in April 2022 to impose a judicial remedy for the 2022 election. Both of these statements are

consistent with a narrowly crafted remedy of limited duration tied to the immediate emergency circumstances then facing the Court. *Cf. Nichols*, 77 Misc.3d at 254 ("emergency response . . . resorted to in *Harkenrider*" was no longer necessary for 2023 Assembly redistricting). With the 2022 election behind us, those circumstances have changed.

Also without foundation is Appellants' strained attempt to infer support for their position from the concern expressed by Judge Troutman that the Court's remedy "may" subject New Yorkers to an electoral map created by an unelected, out-of-state individual "for the next 10 years." *Harkenrider*, 38 N.Y.3d at 527 (Troutman, J., dissenting in part). To the contrary, "may" does not mean "will." Moreover, the stated concern was understandable given the majority opinion's lack of any *explicit* limitation of its remedy to 2022, as well as the unpredictability of potential future litigation on the very issue presently before this Court. As Judge Troutman noted in dissent as to the Court's remedy, the majority's rejection of a legislative cure in 2022 bestowed immense power upon an unelected special master "whom our citizens never envisioned having such a profound effect on their democracy." *Id.* The Court here has the opportunity to ensure that this fear of a decade-long, anti-democratic redistricting regime will not come true.

The impact of *Harkenrider* should not depend on an effort to divine the unexpressed subjective understanding or "intent" of the individual members of this

Court who comprised the *Harkenrider* majority. *Cf.* Br. of Respondents-Appellants at 19 (confusing analysis of court precedent with statutory interpretation). On its face, the restrained wording of the Court's majority opinion did not explicitly extend the duration of the remedy beyond the emergency presented for the 2022 election. Moreover, the disagreement within the *Harkenrider* Court regarding the appropriate remedy focused on the propriety of appointing an unelected special master *at all*, even for one election in 2022—not the extension of that remedy *beyond* 2022. *See* 38 N.Y.3d at 546 (Wilson, J., dissenting) (arguing that *legislative* cure was required *for 2022*, and the majority had failed to heed "the Constitution's command that the legislature must be given a 'full and fair opportunity' to address the legal infirmities identified"); *id.* at 525-26 (Troutman, J., dissenting in part) (advocating judicial remedy directing use of IRC-drawn plan for 2022). In light of this focus and the majority's repeated limiting references to the 2022 election alone, and the plain language of the 2014 Amendments, the remedy should be confined to that emergency. This reading of *Harkenrider* is also consistent with "a fundamental principle of [this Court's] jurisprudence": that the Court rules only on the specific constitutional issue presented and requiring decision at the time. *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713-14 (1980).

II. The 2014 Amendments Require This Court to Limit the Prior Judicial Remedy and Return the Redistricting Process to the IRC and the Legislature.

Now that the 2022 election emergency has passed, there is no basis under the 2014 Amendments to deny the people's right to a redistricting plan drawn pursuant to the IRC-based process. Even if the *Harkenrider* decision could reasonably be construed to contemplate a wholesale derailment of the IRC-based process, the plain language of the 2014 Amendments prohibits that result here. The words "shall govern" in § 4(e) and "shall have" in § 5 are mandatory and must be given effect. *See* 38 N.Y.3d at 511 (emphasizing mandatory impact of words "shall prepare" under § 5); *see also People v. Schonfeld*, 74 N.Y.2d 324, 328 (1989) ("shall" means compulsory). "[P]lain and precise" constitutional language must be effectuated without "'interstitial or interpretative gloss . . . that alters the specified law-making regimen' set forth in the Constitution," *Harkenrider*, 38 N.Y.3d at 511 (quoting *Matter of King v. Cuomo*, 81 N.Y.2d 247, 253 (1993)). The plain and precise language of § 4(e) compels the adoption of the narrowest judicial remedy necessary to correct a specific violation, and the legislature's authority to correct such a violation must not be unnecessarily curtailed. Whatever the Court may have contemplated at the time, *Harkenrider*'s conclusion that a judicial remedy was

"required" in 2022 cannot justify an unconstitutional extension of that remedy until 2032.

To the contrary, no curtailment of the IRC-based process is "required" beyond the 2022 election; § 4(e) therefore prohibits a broader remedy. Section 4(e) also plainly permits foreshortening of the default duration of a reapportionment plan, stating that a plan "shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero *unless modified pursuant to court order*." *Id.* (emphasis added). Here, the Steuben County Supreme Court's certification of the Special Master's maps "as being the *2022* Congressional and the *2022* State Senate maps" is fully consistent with a "modified" order limiting that certification to the 2022 election alone. Sup. Ct. Op. & Order at 5 (emphases added). Such a durational limit plainly falls within the meaning of the word "modified." Moreover, § 4(e) imposes no limit on the scope of any modifications that this Court may make to a judicially-created plan, including a temporal limitation on its validity. *Cf. Nichols*, 206 A.D.3d at 464 (declaring legislature's February 2022 Assembly maps "void and of no effect" after 2022, and ordering IRC to prepare new maps). Mandamus relief ordering the IRC to perform its constitutional duty, and

enabling the legislature to complete its work, would result in the plan being "modified pursuant to court order" within the plain meaning of that phrase.

The default duration of redistricting plans under § 4(e) cannot be read to override the fundamental importance of the IRC-based process or preempt enforcement of other provisions in the 2014 Amendments. Nor can Appellants escape that process merely on the ground that the IRC's original February 28, 2022 deadline for submitting a second plan was not met. Under Appellants' theory, any official or body charged with constitutional duties could irremediably upend the Constitution simply by failing to act within a specified deadline. The remedy for such a failure is a court order to comply, not a blanket forfeiture of responsibilities to the judiciary. *Cf. Id.* at 464; *Nichols*, 77 Misc.3d at 252 (recognizing that deadlines must be adjusted to avoid rendering other constitutional provisions "meaningless").

III. The Third Department Correctly Determined That Petitioners' Filing of This Mandamus Action Was Timely Under CPLR 217(1).

Appellants' effort to thwart this mandamus action—and the IRC process—at the threshold, based on the statute of limitations under CPLR 217(1) fares no better than their substantive arguments. The Third Department correctly held that it was not until, at the earliest, March 31, 2022, when the Steuben County Supreme Court held the 2021 Legislation unconstitutional, that Petitioners knew or should have known of the facts which gave them a clear right to mandamus relief against the IRC.

See Hoffman, 217 A.D.3d at 58. Petitioners' commencement of this action on June 28, 2022, was therefore well within the time allowed under CPLR 217(1).

In contending otherwise, the dissenting opinion below ignores the fact that, when the IRC failed to submit a second redistricting plan on January 25, 2022, the 2021 Legislation purported to provide a valid mechanism for completion of the IRC-based redistricting process, without requiring that second submission. At the time, the 2021 Legislation enjoyed an "'exceedingly strong presumption of constitutionality.'" *White*, 38 N.Y.3d at 217 (quoting *I.L.F.Y. Co. v. Temp. State Hous. Rent Comm'n*, 10 N.Y.2d 263, 269 (1961)); *see also Harkenrider v Hochul*, 173 N.Y.S.3d 109, 117 (N.Y. Sup. Ct. 2022) (noting presumption with respect to 2021 Legislation); *People v. Arez*, 314 N.Y.S.2d 504, 506 (1st Dep't 1970), *aff'd sub nom.* 28 N.Y.2d 764 (1971) (statute's "repugnancy to the constitution" must "clearly appear[]" and "every rational and reasonable presumption must first be indulged in [its] favor"). Moreover, the legislature immediately invoked its authority as provided under the 2021 Legislation, resulting in a fully enacted legislative redistricting plan signed into law by Governor Hochul on February 3, 2022—just over one week later. *See Harkenrider*, 38 N.Y.3d at 505.

In New York, "mandamus does not lie to enforce the performance of a duty that is discretionary." *New York Civil Liberties Union v. State*, 4 N.Y.3d 175, 184 (2005). Notwithstanding the language of § 5, the 2021 Legislation purported to

assure the IRC and the public that the IRC-based redistricting process would proceed to completion even if the IRC did not submit a second plan. That legislation was presumptively constitutional and therefore valid. Only later, when the 2021 Legislation was held by a court to be unconstitutional on March 31, 2022, did it appear that the IRC's duty was *not* discretionary, but rather a mandatory precondition to completion of redistricting under the 2014 Amendments. *See Harkenrider v. Hochul*, 173 N.Y.S.3d 109, 117 (Steuben Cty. Sup. Ct. 2022) (holding that 2021 Legislation violated "exclusive process" for redistricting under 2014 Amendments).

Furthermore, once the *Harkenrider* litigation had been initiated, Petitioners at the time could not reasonably have foreseen that the court would craft a remedy that imposed a judicially-created redistricting plan for 2022, rather than, for example, ordering expedited completion of the IRC-based process, including the IRC's submission of a second plan. It was therefore not foreseeable until at least March 31, 2022, that the *Harkenrider* litigation would leave the IRC's original failure of duty un-remedied, much less that a mandamus action would be needed to force certain IRC commissioners to perform that duty. The *Harkenrider* litigation was commenced on February 3, 2022—the very same day that the legislature's redistricting plan became law. Petitioners could not predict that the presumptively constitutional 2021 Legislation would be invalidated, nor that the judicial remedy

imposed would not expressly forbid Respondents' (still ongoing) dereliction of duty. Petitioners commenced this action promptly after their right to relief became clear.

None of the cases relied on by Appellants involved factual circumstances similar to those at issue here. Appellants' attempts to impute to Petitioners some improper partisan motivation for not bringing this claim earlier, *see* Br. of Intervenors at 27–28; Br. of Respondents-Appellants at 31, are rank speculation and, in any event, irrelevant. The reality is far simpler: Petitioners' claim accrued on March 31, 2022, when it became clear that the IRC's duty to act was not discretionary and must occur to complete the IRC-based process. Petitioners timely commenced the action within the four-month statutory period. The Third Department's ruling on this issue therefore should be affirmed.

IV. Mandamus Relief to Vindicate the People's Right to an IRC-Based Redistricting Plan Is Needed to Relieve the Scourge of Hyper-Partisanship in New York.

As demonstrated above, mandamus relief directing the IRC to fulfill its constitutional mandate is not only consistent with *Harkenrider* but also required by the plain language of the 2014 Amendments. There is no foundation for Appellants' and their amici's contention that the IRC, the legislature, and New York election administrators cannot complete the IRC process and adopt and implement constitutionally valid maps for the 2024 election. Moreover, having refused to do anything during the pendency of this appeal despite this Court's stay order expressly

authorizing the IRC to take action, Respondents and their supporters should not be heard to protest about the schedule.

The 2014 Amendments were intended to guarantee that "the drawing of legislative district lines in New York will be done by a bipartisan, independent body," and to "ensur[e] each political party and all interested persons a voice in the composition of those lines." *Harkenrider,* 38 N.Y.3d at 514, 517 (internal quotation marks omitted). Contrary to Appellants' assertions, forcing New Yorkers to submit to the judicially-imposed special master plan for the next ten years would not reduce hyper-partisanship in our State. It would exacerbate it.

Courts have long recognized that judicial restraint is necessary when reviewing disputes related to redistricting, given the inherent political nature of such disputes. *See In re Orans* 15 N.Y.2d 339, 352 (1965) ("the Legislature is under an obligation to reapportion and . . . the Federal courts move in only as a last resort"). As *Harkenrider* emphasized, the 2014 Amendments (and the Redistricting Reform Act of 2012) were "enacted in response to criticism of the scourge of hyper-partisanship, which the United States Supreme Court has recognized as 'incompatible with democratic principles.'" 38 N.Y.3d at 514 (quoting *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). Scholars who have studied independent redistricting commissions recognize that they are a vital tool for increasing trust in the redistricting process.

See, e.g., Christian R. Grose & Matthew Nelson, *Independent Redistricting Commissions Increase Voter Perceptions of Fairness*, at 2 (June 1, 2021), available at http://dx.doi.org/10.2139/ssrn.3865702. Depriving New York voters of IRC-based redistricting for a decade would unfairly punish voters for politicians' errors and sow increased distrust.

While the judicial remedy ordered in *Harkenrider* was found necessary to provide constitutionally valid maps for use in the 2022 election, the scourge of hyper-partisanship that thwarted implementation of the 2014 Amendments last year will not be healed by leaving that remedy in place through 2032. The 2014 Amendments direct courts to insist that both the IRC and the legislature correct their errors and fulfill their respective duties by delivering constitutionally valid maps to the public *through the IRC-based redistricting process*. Neutering the IRC for an entire decade would entrench a negative example of hyper-partisan breakdown and provide a roadmap for future IRC commissioners to derail the redistricting process in a gamble for partisan advantage. By prolonging this Court's displacement of the democratically-adopted IRC-based process, it would also draw this Court into politics, while increasing the likelihood of more partisan overreach and strategic stonewalling in the future.

In *Harkenrider*, this Court stepped in by rejecting the legislature's unconstitutional attempt to draw district lines without first holding the IRC to its

duties, declaring that to countenance such action would encourage partisans to disrupt the IRC process and defeat the purpose of the 2014 Amendments. But this undesirable risk of disruption would also ensue from *judicial* preemption of the IRC process for an entire decade. By holding the IRC to its duties, this Court will ensure that IRC members must come together to make the process work and produce redistricting maps for legislative approval. It will also call upon the legislature to heed the lesson of *Harkenrider* and enact a final redistricting plan grounded in the IRC-based process and reflective of the broad public participation that process guarantees. With ample time remaining before the 2024 election, this Court should send the IRC back to the drawing board to complete the process as prescribed by the 2014 Amendments.

CONCLUSION

For the above reasons, Amici support Petitioners' request that the Court affirm the order of the Appellate Division, Third Department granting the mandamus relief sought by Petitioners.

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word

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