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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners-Appellants,

—against—

CASE NO. 2022-04649

GOVERNOR KATHY HOCHUL, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

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STATEMENT OF QUESTIONS PRESENTED

Article III of the Constitution requires the Legislature to follow a prescribed process, with specific deadlines, for redrawing voting maps after a re-apportionment. In *Harkenrider,* in connection with state Senate and Congressional maps, the Court of Appeals held that when the Legislature violates the constitutional process, the only remedy is for the court to adopt a redrawn map. Based on *Harkenrider*, this Court voided the Assembly map because the Legislature violated the Constitution. Does either the Constitution or *Harkenrider* permit the trial court to modify constitutional deadlines to allow the Legislature (and Independent Redistricting Commission) to adopt a redrawn Assembly map instead of the court?

THE TRIAL COURT INCORRECTLY ANSWERED THIS QUESTION IN THE AFFIRMATIVE.

Petitioners-Appellants Paul Nichols, Gavin Wax, and Gary Greenberg respectfully submit this Brief in support of their appeal from the Decision and Order of the Supreme Court, New York County (Love, *J.*) (the "Trial Court"), dated September 29, 2022, and entered on October 12, 2022.

PRELIMINARY STATEMENT

In February 2022, the Legislature engaged in naked gerrymandering, to the great shame of this State. In addition to the affront to core democratic principles, the Legislature also violated the State Constitution by approving redistricting maps without public input, transparency, or independent checks.

As long as the New York Court system remains independent of partisan pressure, efforts like this will never stand. So too here. The Court of Appeals ruled that the Legislature violated the exclusive process set forth in Article III of the Constitution for redistricting. The Court of Appeals thus invalidated the Congressional and state Senate maps (the only maps challenged in that proceeding) and remanded for the court to adopt new maps. Six weeks later, on Petitioners' challenge here, this Court ruled that the Assembly map was likewise unconstitutional and void, and remanded to the Trial Court to consider an appropriate remedy.

The remedy chosen by the Trial Court—giving the Legislature a "second bite at the apple" by allowing it to adopt a redrawn Assembly map—is constitutionally inappropriate for three primary reasons. First, the Trial Court's order defies Article

III of the Constitution and *Harkenrider*. Second, the Trial Court lacked the power to modify constitutional deadlines. Third, the Trial Court's order effectively rewards bad behavior and encourages future gerrymandering.

For these and other reasons set forth below, this Court should reverse.

NATURE OF THE ACTION

A. New Yorkers enact constitutional amendments in 2014 to deter extreme partisanship and gerrymandering.

Defining the boundaries of voting districts—and thus including or excluding certain communities, neighborhoods, and individuals—can effectively predetermine the winners and losers of elections for a decade. R. 30. For that reason, parties have vied for control over the process of defining those boundaries. This power struggle remains subject to political exploitation and abuse: in a word, gerrymandering.

Gerrymandering is the political manipulation of voting district boundaries to serve nakedly partisan ends—shuffling minority party votes into uncompetitive majority-dominant districts (where the minority votes are meaningless); dividing and conquering powerful communities and neighborhoods; and stacking majority-party blocks to flip or secure districts that are considered too "competitive" by the majority party. R. 30. Gerrymandering is vote rigging to ensure dominance by a political party or party incumbents. It erodes democratic norms, disenfranchising voters while representative bodies gravitate towards extreme partisanship.

In 2014, New Yorkers amended the Constitution "in response to criticism of the scourge of hyper-partisanship." *Harkenrider v. Hochul*, No. 60, ---N.E.3d---, 2022 WL 1236822, at *7 (N.Y. Apr. 27, 2022). The 2014 amendments seek to promote citizen participation, fair representation, and confidence in elections, ushering in "a new era of bipartisanship and transparency." *Id.* at *2. The amendments created an independent redistricting commission (the "IRC") consisting of ten members: eight chosen by the legislative leaders of both parties and two chosen by those eight. Art. III, § 5-b(a). The amendments further tasked the IRC with drawing new district maps and submitting them to the Legislature; a process to be completed by February 28, 2022, but no later. Art. III, § 4(b). This process "is the *exclusive* method of redistricting, *absent court intervention following a violation of the law*, incentivizing the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process." *Harkenrider*, 2022 WL 1236822, at *7 (emphasis added).

The "scourge of hyper-partisanship" is now worse than ever. Legislatures across the nation have drawn rigged maps to disenfranchise voters. Political leaders are abusing their public offices to give one party an insurmountable advantage in elections. This has been well-documented by journalists and subject to numerous

legal challenges this year alone.[1] If gerrymandered maps are left to stand, voters will stop participating in the democratic process: they will not vote; they will not be engaged; and the quality of representation will degrade.

B. The Court of Appeals invalidates Congressional and Senate maps because the Legislature violated the 2014 amendments.

With the 2014 amendments, New York was poised to set an example for the rest of the country in the 2020 redistricting cycle. R. 32. But rather than follow the constitutionally mandated process, the Legislature enacted its own Congressional, state Senate, and state Assembly maps without input from the IRC or public. R. 34-36. In the Senate, the maps were passed by the majority Democratic caucus on a party-line vote. R. 919. In the Assembly, the Congressional map was also passed by the majority Democratic caucus in a party-line vote, and the Senate and Assembly maps were passed with two-thirds of Republicans voting against them. R. 919.

[1] *See, e.g.*, Nick Corasaniti & Reid J. Epstein, *As Both Parties Gerrymander Furiously, State Courts Block the Way*, N.Y. Times (Apr. 4, 2022), https://www.nytimes.com/2022/04/02/us/politics/congressional-maps-gerrymandering-midterms.html; Marjorie Hershey, *How This Cycle of Redistricting Is Making Gerrymandered Congressional Districts Even Safer and Undermining Majority Rule*, Conversation (Jan. 25, 2022), https://theconversation.com/how-this-cycle-of-redistricting-is-making-gerrymandered-congressional-districts-even-safer-and-undermining-majority-rule-173103; *Legally Rigging Elections?*, Week (Dec. 5, 2021), https://theweek.com/election/1007682/legally-rigging-elections; David Pepper, *Republicans Are Quietly Rigging Election Maps to Ensure Permanent Rule*, Guardian (Nov. 28, 2021), https://www.theguardian.com/commentisfree/2021/nov/28/republicans-are-quietly-rigging-election-maps-to-ensure-permanent-rule.

After the 2020 Census was released, Democratic and Republican leaders in the Legislature appointed their respective delegations to the IRC, and the IRC commenced drafting new district maps to account for the population change reported in the 2020 Census. R. 34. As required by the Constitution, the IRC held public meetings across the State throughout 2021 to hear public testimony about draft maps and the redistricting process. R. 35; *see* Art. III, § 4(c). After nine meetings, the IRC released initial map drafts on September 15, 2021. Through October and November, the IRC held fourteen more public hearings on the draft maps and redistricting process. It also solicited written comments from the public, where stakeholders and voters voiced further concerns and suggestions. R. 35.

During that time, the Legislature tried, but failed, to enact a constitutional amendment in November 2021 that would have created an end-run around the IRC process created by the amendments the voters enacted in 2014. R. 35. Under this proposed 2021 amendment, the Legislature would have been able to create its own redistricting plan should the IRC submit no map for a vote, effectively removing the IRC and associated public participation from the map-drawing process. New Yorkers voted down the proposed amendment, which would have protected favored candidates and incumbents. R. 35.

Undaunted, the Legislature and the Governor, just three weeks later, enacted a statute that would have given the Legislature the *same* powers as its failed

constitutional amendment to bypass the Article III redistricting process. (This statute would go on to be struck down by the Court of Appeals as "unconstitutional to the extent that it permits the Legislature to avoid a central requirement of the reform amendments." *Harkenrider*, 2022 WL 1236822, at *9.) R. 35-36.

The IRC held its last public hearing on December 5, and solicited public comment on draft maps until December 6. R. 36. With hearings and comments closed, IRC members negotiated amongst themselves to finalize maps to submit to the Legislature. R. 36. But the IRC members were unable to reach agreement or consensus. On January 3, 2022, the Democratic delegation and their appointee voted for one redistricting plan, and the Republican delegation and their appointee voted for another. *Harkenrider*, 2022 WL 1236822, at *2. The Legislature received both plans from the IRC and voted upon them without amendment, rejecting both without public input. *Id.* It notified the IRC of its rejection on January 10. *Id.*

Consequently, under Article III, § 4(b), the IRC was *required* to draft a new redistricting plan to submit to the Legislature within 15 days, by January 25, 2022; and the Legislature was *required* to review and vote on this second plan. But rather than submit a new plan as required, the IRC informed the Legislature that it was deadlocked and would not submit new maps. *Id.* The January 25 deadline passed without the IRC submitting any new maps or the Legislature voting on such maps, as was constitutionally required. *Id.* Instead, over the next week, the Legislature

drafted and enacted its own maps—along a party-line vote without public input. *Id.* The Governor signed these maps into law on February 3, 2022. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040- A and A.9168; Art III, § 4(b).

On April 27, 2022, the Court of Appeals invalidated the Congressional and state Senate maps. The Court held that the Legislature violated the exclusive constitutional process for redistricting by unilaterally drawing district lines and, with respect to the Congressional map, drawing them with an impermissible partisan purpose. *Harkenrider*, 2022 WL 1236822, at *11 & n.15. Although the Court invalidated the Congressional and Senate maps, it left the Assembly map alone—"despite its procedural infirmity"—because the *Harkenrider* petitioners had not challenged the Assembly map. *Id.* The Court nonetheless made clear that the same rationale—and the same ruling—necessarily applies to the Assembly map, as all three maps were enacted using the same unconstitutional procedure. *Id.*

The Court of Appeals remanded to the trial court to adopt new Congressional and Senate maps. In doing so, the Court rejected respondents' bid to give the Legislature a second chance. The final constitutional deadline for the IRC to submit redistricting maps—February 28, 2022—had passed; as such, the Legislature's unconstitutional maps were "incapable of a legislative cure." *Id.* at *12.

C. Petitioners challenge the Assembly map on the same grounds and succeed in the First Department.

Petitioners commenced this special proceeding in the Supreme Court, New York County on May 15, 2022, to fill the gap left by *Harkenrider*. The Petition sought to invalidate the Assembly map, among other relief, on the same grounds that the Court of Appeals invalidated the Congressional and Senate maps—its procedural infirmity. The Trial Court denied the Petition on May 25. Contrary to the plain language of *Harkenrider*, the Trial Court held that "[n]othing [in *Harkenrider*] was directed at the validity of the assembly map." R. 1023.

On June 10, 2022, this Court reversed.[2] This Court granted the Petition and invalidated the Assembly map "based on its procedural infirmity as previously determined by the Court of Appeals" in *Harkenrider*. R. 1031. Although Petitioners requested that a new map be adopted in time for the 2022 elections, this Court held that insufficient time existed to draw a new Assembly map, and that the Petition was barred by laches with respect to the 2022 election cycle. R. 1032. But, "upon the formal adoption and implementation of a new state assembly map that conforms with the procedural and substantive constitutional and statutory requirements, the

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[2] This Court heard the appeal on transfer from the Court of Appeals. Petitioners had sought a direct appeal to the Court of Appeals from the Trial Court's decision under CPLR 5601(b)(2). The Court of Appeals found that jurisdiction did not lie because "questions other than the constitutional validity of a statutory provision are involved" and transferred the appeal to this Court. *Nichols v. Hochul*, Case No. 2022-2301 (1st Dep't May 27, 2022) (NYSCEF No. 1).

February 2022 assembly map will become void and of no effect." R. 1032. This Court remanded the matter "for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const, art III, § 5-b." R. 1033.

D. The Trial Court's decision on remand.

On June 29, the Trial Court directed the parties to submit briefs to address "the proper means by which to redraw the state assembly map as ordered by the Appellate Division." R. 1030. Petitioners argued that any remedy must be judicial, given that Article III requires the remedial map to be court-ordered; accordingly, Petitioners argued that reconvening the IRC to submit a new map to the Legislature was not an option. R. 1076. Petitioners further suggested that the Trial Court should, in its discretion, appoint a neutral special master to redraw the map.[3] R. 1080. Respondents, by contrast, argued that the Trial Court should restart the Article III process with modified constitutional deadlines, whereby the IRC would submit a new map to the Legislature, and the Legislature would have the final say. R. 1041.

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[3] The Trial Court, respectfully, misstated Petitioners' position on remand as being that "the Court *must* appoint a Special Master as in *Harkenrider*." R. 16 (emphasis added). Petitioners had only argued that the remedy must be a court-ordered map, and that the Trial Court "should appoint," and Petitioners "respectfully request" that it appoint, a special master to draw a new map. R. 1080. Petitioners at oral argument specifically proposed that, if the Trial Court was inclined to command the help of the IRC, it could order that the IRC draw a map in the first instance, then submit this map to the Trial Court for review and eventual decision of what map to adopt. R. 1284, 1340-41. Such a remedy would comply with Article III's requirement that a remedy for a violation of law be a court-adopted map, and is the modification to the Trial Court's Order that Petitioners now seek on appeal.

Respondents also moved by order to show cause to add the members of the IRC to the proceeding as respondents. R. 1049. Petitioners had no objection, but requested that the IRC Commissioners also be ordered to provide their views for the Court's benefit. R. 1183. Their views are particularly relevant because, in continued litigation in Albany County regarding the Congressional and Senate maps, five IRC Commissioners (the Republican delegation and their appointee) had taken the *same* position as Petitioners here: that the full Article III process could not be redone because constitutional deadlines had passed.[4] R. 1189.

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[4] The five Commissioners are: Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens. In the Albany County action, ten New York voters filed a verified petition against the IRC seeking a mandamus order requiring the IRC to reconvene and submit a new Congressional map to the Legislature. *See Hoffman v. N.Y. State Independent Redistricting Comm'n*, No. 904972-22 (Sup. Ct. Albany Cnty. Aug. 4, 2022). The five Commissioners moved to dismiss the petition, arguing that the requested remedy would be unconstitutional. Just as Petitioners argue here, the five Commissioners argued in the Albany County action that both Article III's plain text and the Court of Appeals' decision in *Harkenrider* foreclose the requested remedy because a court-ordered map is the exclusive remedy authorized in Article III, and, further, Article III contains an immovable deadline of February 28, 2022, for the IRC to submit maps to the Legislature:

> The last date that the IRC could have possibly and lawfully submitted a second set of maps to the legislature was, under the explicit language of the Constitution, February 28, 2022 (six months ago). This deadline, as the Court of Appeals emphatically noted, "has long since passed." *Harkenrider*, at *12. There is no provision in the Constitution that would allow for a post-hoc reconvening of the IRC for the purpose of doing that which could only have been constitutionally performed on or before February 28, 2022. . . .
>
> A court-ordered redistricting plan . . . is not only contemplated by the Constitution, it is the exclusive remedial action authorized by the Constitution for procedural or substantive violations in the redistricting process, such as, as here, the IRC's noncompliance with the mandate to timely submit a second set of plans upon the Legislature's rejection of its first set, or the Legislature's

After argument on the question of remedy on August 24, 2022, the Trial Court entered an Order to Show Cause dated August 25, which ordered that the IRC and its members show cause why they should not be added to this proceeding. R. 1034. A second argument was held on September 16, where, in a remarkable about-face, the same five IRC Commissioners took the position that the IRC could be compelled to submit a new Assembly map to the Legislature. R. 1350. Petitioners maintained that the Commissioners' views should be heard on formal briefing. R. 1329.

Subsequently, the Trial Court ordered that the IRC reconvene to draw a proposed Assembly map(s) and submit such map(s) and implementing legislation to the Legislature for consideration and approval. R. 10, 22. The court also allowed the Legislature to draw its own maps if it twice rejected the IRC's proposed maps. R. 23-24. The court reasoned that "it is always preferable to allow the Legislature, or in this case the IRC, a reasonable opportunity to adopt an appropriate redistricting map rather than resorting to a court-drawn map." R. 15. The court further opined that there is "no valid reason to resort to the utterly anti-democratic emergency response necessarily resorted to in *Harkenrider*," agreeing with the sentiment of

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> unauthorized and unilateral usurpation of the redistricting authority, or both.

R. 1201, 1203.

On September 12, 2022, the Albany County court rested its decision on different grounds; namely, that the supreme court in *Harkenrider*, on remand, had already ordered the adoption of new Congressional and Senate maps, and Article III required that they remain in place for the next ten years. R. 1265.

Judge Troutman's dissent that ". . . citizens of the State are entitled to a resolution that adheres as closely to the constitutional process as possible." R. 20. Before issuing its decision, the Trial Court did not request written submissions from the IRC Commissioners on their views of the constitutionally appropriate remedy, or why the five IRC Commissioners had changed their position here.

The Trial Court also observed, correctly, that in *Harkenrider* the Legislature was not allowed to cure the infirm maps because "the deadline in the Constitution for the IRC to submit a second set of maps had passed and as such was incapable of legislative cure." R. 15. But the court found that "[s]uch reasoning is irrelevant to the instant action as here there is more than enough time for the IRC to produce an appropriate map and faithfully follow the constitutionally mandated procedure before the 2024 election cycle," notwithstanding the constitutionally fixed February 28, 2022, deadline for that procedure to occur. R. 15.

The Trial Court thus "modif[ied] the deadlines established in the Constitution in order to remedy a violation of law" and opted to give the Legislature "a second bite of the apple." R. 17, 21. The IRC was ordered to draw a new map(s) and submit it to *the Legislature* "no later than April 28, 2023." R. 22.

Petitioners timely appealed. R. 2.

ARGUMENT

Article III and the Court of Appeals decision in *Harkenrider* foreclose a second chance for the Legislature to pass an Assembly map. *Harkenrider* holds that a district map may be adopted in just one of three ways. *First*, the Legislature may adopt a map through the process established in Article III. *Second*, the Legislature may fix a legal infirmity in a map after it has been invalidated—*but only if it is possible to fix the infirmity*. *Third*, if it is not possible to fix the infirmity, then a court must adopt a new map as a remedy for a violation of law.

Neither the Article III process nor a legislative fix are viable options now. The only remaining option under *Harkenrider* and the Constitution is a court-ordered remedial map because Article III's final February 28, 2022, deadline has passed. The Trial Court's Order erroneously creates a fourth, uncontemplated path. It gives the Legislature a "second bite of the apple" by "modif[ying] the deadlines established in the Constitution in order to remedy a violation of law." R. 17, 21. This ruling conflicts with the plain text of Article III, *Harkenrider*'s holding that a judicial remedy is necessary when specified Article III deadlines have lapsed, and basic limits on a court's power to interpret the Constitution as written.

Further, this Court should not countenance the Legislature's disregard of the Article III process to draw a gerrymandered map. Article III was designed to prevent gerrymandering and "encourage and support fair bipartisan participation and

compromise." *Harkenrider*, 2022 WL 1236822, at *8. Bypassing that process undermines democratic institutions and voters' confidence in elections. The Order thus enables the very abuses that Article III was designed to prevent because it gives the Legislature a second chance notwithstanding its prior, fatal missteps.

The danger of gerrymandering is far from academic. The Legislature drew the Congressional map with partisan bias, and it drew the Assembly map to protect incumbents, ossifying representative bodies that should be responsive to voters. On remand, Petitioners commissioned a study from a nationally recognized expert in redistricting. The expert study proves that the Assembly map was drawn to eliminate competition and favor incumbents, and thus the Legislature has violated Article III for that reason as well. *See* Art. III, § 4(b)(5) (prohibiting the drawing of districts to discourage competition or favor incumbents).

This second constitutional violation underscores why this Court must enforce Article III's remedial scheme as written: to deter anti-democratic behavior. Failing to craft the appropriate remedy will allow the Legislature to effectively re-adopt the invalid Assembly map with no consequence. This will encourage similar brazen acts in the future while discouraging compromise, and it will cast a pall of suspicion over elected officials for the next decade. The court may use whatever process to draw a remedial map that it deems best—whether that involves assistance from the

IRC, a special master, or a combination thereof—but the Constitution requires that the court, not the Legislature, have the final word.

I. Under Article III and *Harkenrider*, only the court may now adopt a remedial Assembly map.

The Constitution plainly establishes a three-part structure for redistricting. *First*, Article III mandates that the IRC process in Article III "shall" be the process for redistricting, which expressly includes submitting maps to the Legislature before February 28, 2022, for consideration and approval. Art. III, § 4(e). *Second*, if the resulting map is legally infirm (and thus invalid), then the Legislature "shall have a full and reasonable *opportunity* to correct the [map's] legal infirmities." Art. III, § 5 (emphasis added). Namely, the Legislature may fix defects in a map—though *only if the defects are fixable*, as when a map is drawn with partisan bias, but not when the Legislature misses the deadlines to complete the Article III IRC process. An "opportunity" is not a guarantee that the Legislature can adopt a new map, it is only a "*chance*."[5] But when the Article III process itself has been violated, and its deadlines have passed, then that duty falls solely to a court.

So, *third*—the scenario currently before this Court—a court is then "required to *order the adoption of, or changes to, a redistricting plan* as a remedy for a violation of law." Art. III, § 4(e) (emphasis added). The Constitution's text is "plain

[5] "Opportunity," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/opportunity (last accessed October 23, 2022).

and precise" and must therefore "be given its full effect." *Harkenrider*, 2022 WL 1236822, at *5 (quoting *People v. Rathbone*, 145 N.Y. 434, 438 (1895)).

This structure is also the precise holding of *Harkenrider*. In *Harkenrider*, the Legislature was not given an "opportunity" to fix the procedural violations because it could not fix them, as the constitutional deadlines had passed. The Court of Appeals reasoned that "due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, *the Legislature is incapable of unilaterally correcting the infirmity*." *Id.* at *10 n.19 (emphasis added). Article III sets forth the "exclusive" process for redistricting—deadlines and all. *Id.* at *8. The constitutional timetable, among other requirements, for the IRC to submit a plan to the Legislature had lapsed.

The Court of Appeals thus rejected Respondents' argument that the Legislature be given an opportunity to redraw the maps: "[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*."[6] *Id.* at *10 (emphasis added). Likewise, the Court rejected Judge Troutman's dissenting view, which, as the majority summarized, was that the Court of Appeals "should now order the

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[6] Respondents before the Court of Appeals in *Harkenrider* were: Governor Kathy Hochul, Senate Majority Leader Andrea Stewart-Cousins, and Speaker of the Assembly Carl Heastie.

Legislature to enact redistricting legislation despite their inability to cure the procedural violation." *Id.* at *10 n.20. This Court must follow *Harkenrider* and likewise decline to give the Legislature a second chance to adopt a redrawn map.

The now-void Assembly map is in the same remedial posture. It is, "at this juncture," also "incapable of legislative cure" because the "deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Id.* at *10. Indeed, the Trial Court correctly recognized that the reason "the Legislature [was denied] an opportunity [in *Harkenrider*] to submit a legislative cure was that the deadline in the Constitution for the IRC to submit a second set of maps had passed and as such was incapable of legislative cure." R. 15. That deadline was February 28, 2022. Art. III, § 4(b). But the Trial Court erred in distinguishing *Harkenrider* on the ground that there is "significantly more time [here] to implement a new assembly map for the 2024 election cycle." R. 19. True, but irrelevant.

The holding in *Harkenrider* was based on lapsed Article III deadlines, not the urgency of implementing new maps for the 2022 election cycle. The Legislature has violated the Article III process both here and in *Harkenrider*, including Article III's deadlines, and Article III sets out a specific remedy for this violation of law. Because the Legislature can no longer meet the February 28, 2022, deadline, the authority to adopt a remedial Assembly map rests solely with the court. Art. III, § 4(e).

The Trial Court thus misunderstood *Harkenrider*'s import. The Assembly map was invalidated because of the same procedural infirmity as the Congressional and Senate maps and is now in the same remedial posture as those maps.[7] As in *Harkenrider*, there is no option to give the Legislature an "opportunity" to adopt an Assembly map, since constitutional deadlines have passed. The only option now is for the court to adopt a remedial map for the Assembly.

II. The Trial Court's Order exceeds basic limits on judicial power and renders Article III's remedies superfluous.

The Trial Court decided to "modify the deadlines established in the Constitution in order to remedy a violation of law." R. 17. This holding is fatally flawed for three independent reasons. It conflicts with black letter law, is based on fallacious reasoning, and renders Article III's remedial scheme superfluous.

It is black letter constitutional law that only the people of New York have the power to change the State's Constitution. *See* Art. XIX, §§ 1, 2. A court's power is limited to interpreting the Constitution "as it is written, and not as [the court] think[s] it might have been written." *People v. Tremaine*, 281 N.Y. 1, 12 (1939); *see also Canteline v. McClellan*, 282 N.Y. 166, 171 (1940) ("The duty of the courts is to

[7] The Congressional map was found to be both procedurally and substantively unconstitutional; the Senate map was found to be procedurally unconstitutional. *Harkenrider*, 2022 WL 1236822, at *11. In *Harkenrider*, both the Congressional and Senate maps were redrawn with the assistance of a special master, pursuant to a court-supervised process.

construe, not to adopt, a Constitution."). The Order exceeds this fundamental limit by changing the unambiguous February 28, 2022, deadline in Article III.

Indeed, the Order re-writes multiple constitutional provisions. The Order re-writes other Article III deadlines: § 4(b) ("no later than January fifteenth in the year ending in two beginning in two thousand twenty-two"); § 4(c) ("no later than September fifteenth of the year ending in one or as soon as practicable thereafter"); § 5-b(g) ("on or before January first in the year ending in two or as soon as practicable thereafter"). The Order also re-writes the requirement that plans for *both* "the assembly and the senate shall be contained in and voted upon by the Legislature in a single bill," Art. III, § 4(b), as the Order requires only that a new Assembly map be submitted to the Legislature for consideration and approval. R. 23.

To exceed this basic limit on judicial power, the Trial Court reasoned that "[w]ithout [the ability to modify constitutional deadlines], the text of § 5-b . . . would be rendered meaningless." R. 17. Section 5-b provides that an IRC "shall be established to determine" district lines "[o]n or before February first of each year ending with a zero and at any other time a court orders that congressional or state legislative districts be amended." Art. III, § 5-b(a).

But revising constitutional deadlines is neither necessary nor appropriate to give effect to § 5-b for three independent reasons. *First*, Section 5-b(a) is inapt because this Court voided the Assembly map and ordered that a map be redrawn; no

Assembly map exists that can now be "amended" pursuant to Section 5-b(a).[8] *Second*, changing constitutional deadlines is not necessary to give effect to § 5-b(a); maps can be "amended" before deadlines have passed. *Third*, unambiguous constitutional text—including deadlines—must "be given its full effect," so the Order simply cannot justify ignoring Article III's clear deadlines. *Harkenrider*, 2022 WL 1236822, at *5 (quoting *Rathbone*, 145 N.Y. at 438).

In its misdirected attempt to give effect to Section 5-b, the Order renders other provisions of Article III meaningless; namely, the entire remedial scheme of Article III. Sections 4(e) and 5 of Article III specifically address the remedy for a "violation of law." *See supra* Part I. Section 5-b, by contrast, sets forth the composition of the IRC. To the extent all sections are relevant, a specific provision trumps a general one.[9] *Isaacs v. Westchester Wood Works*, *Inc.*, 278 A.D.2d 184, 185 (1st Dep't 2000). The remedial scheme of Sections 4(e) and 5, moreover, should not be

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[8] The Trial Court itself agreed that it "is undoubtedly true" that the Trial Court could not direct the IRC to "amend" the original Assembly map, because it no longer exists. R. 16.

[9] Although only Section 5-b was referenced in the remand instructions from this Court, that does not require the Trial Court or this Court to ignore the rest of Article III. It is axiomatic that a court has a duty to interpret the Constitution as a whole. *See People* ex rel. *McClelland v. Roberts*, 148 N.Y. 360, 367 (1896) ("The constitution, as it now exists, must be read and considered in all its different parts, and each provision must be given its appropriate place in the system, and some office to perform, and at the same time all must be so construed as to operate harmoniously."). Respondents concede the relevancy of the other provisions; they argued that the court "further order that the procedures set forth in Article III, §§ 4 and 5-b be followed with respect to the adoption of such amended state assembly map." R. 1041. At most, the remand instruction was a suggestion that the IRC should be involved in some capacity.

rendered meaningless, *id.*, but that is precisely what the Order does in giving the Legislature a second chance to adopt a redrawn Assembly map.

III. The Trial Court's Order encourages future violations.

A second chance will further incentivize dilatory and unlawful conduct. The Legislature will have no reason to act differently if it believes that courts will look away and decline to enforce a meaningful remedy. Allowing the Legislature to step in "at this juncture" (contrary to the clear holding of *Harkenrider*) and pen a new Assembly map would be the same as granting no remedy at all.

The exclusive redistricting process of Article III is not a mere procedural formality. Adherence to that process as written—including its deadlines—"incentiviz[es] the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process." *Harkenrider*, 2022 WL 1236822, at *8. Giving the legislature another "bite at the apple" now will encourage further gerrymandering attempts in the future, and voters will see that the same wrongdoer, the Legislature, is allowed to redraw maps with no consequence. It is no wonder that many of this State's eligible voters refuse or do not care to vote and are disillusioned with the State's political system. R. 1075.

Good government groups in New York, including the League of Women Voters and Common Cause, have expressed the same fear. R. 1147, 1153, 1248. The League, for example, observed as *amicus curiae* in *Harkenrider* that

incentivizing compromises in the IRC and Legislature—specifically by enforcing § 4(e)'s plain requirement that *a court* adopt a remedial plan—"would reduce the possibility of abusive gerrymandering." R. 1172. That danger is real. The Congressional map, the Court of Appeals found, was a partisan gerrymander. The Assembly map, too, was an unconstitutional gerrymander, as it was invariably designed to protect incumbents and eliminate competition. Just as the Court of Appeals did, this Court must dispel voters' doubts and incentivize elected officials and their appointees to obey the Constitution.

On remand, Petitioners commissioned an expert study, which, in addition to the gerrymandered Congressional map in *Harkenrider*, proves that those fears are anything but hypothetical. The expert study demonstrates that the purpose of the unconstitutionally drawn Assembly map was a gerrymander to protect incumbents, and thus violated the Constitution for that reason as well. *See* Art. III, § 4(b)(5) (forbidding map drawing to stifle competition).

To assess the 2022 Assembly map's incumbent-bias, Petitioners engaged Dr. Jeanne Clelland to analyze the map using ensemble analysis.[10] Dr. Clelland is a

[10] Ensemble analysis was used by the *Harkenrider* petitioners' expert to prove that the Congressional map was a partisan gerrymander. The expert's ensemble analysis was credited by the supreme court, the Fourth Department, and the Court of Appeals, and relied upon by all to hold and affirm that the Congressional map was substantively unconstitutional. *See Harkenrider v. Hochul*, 204 A.D.3d 1366, 1371 (4th Dep't 2022) ("[T]he testimony of Trende was probative and confirmed the inference from the above two points that the legislature engaged in unconstitutional partisan gerrymandering when enacting the 2022 congressional map.").

Professor of Mathematics at University of Colorado Boulder, where she has been a faculty member since 1998, and is the author of a graduate-level textbook and 29 peer-reviewed articles. R. 1090. Dr. Clelland researches the mathematical analysis of redistricting; in particular, ensemble analysis, which is the algorithmic sampling of district plans to identify plans with extreme properties, such as partisan or incumbent bias. R. 1091. The Trial Court found that "Dr. Clelland is no doubt a qualified expert on the subject," but erroneously disregarded her study as "moot and irrelevant" because it relates to the now-void 2022 Assembly map. R. 16.

Dr. Clelland performed two independent and complementary analyses of the map. R. 1091. Both analyses independently led Dr. Clelland to conclude that it "is almost certain that the 2022 Assembly plan was deliberately designed in part to maximize the number of districts containing a single incumbent Assembly member." R. 1092, 1123. The probability, Dr. Clelland determined, "of this outcome occurring by chance" is less than 0.01% "if the 2022 Assembly plan had not been deliberately designed to accommodate incumbent addresses." R. 1122.

Although Dr. Clelland's study concerns the now-void map, it nonetheless demonstrates that the Legislature must be incentivized to comply with Article III; else, the Legislature is likely to produce another unconstitutional gerrymander, either through the remedy that the Trial Court ordered or in future redistricting cycles. Following the Article III process and its remedies is constitutionally required; it also

creates incentives and safeguards that prevent substantive gerrymandering. When that process falls apart, the resulting map is more likely to be gerrymandered. Thus, if the Legislature is allowed a "second bite of the apple," it will never have to face the risk of losing the privilege to determine district lines, or deal with the uncertainty of how a judicially adopted map may look. R. 21. Having failed to follow the required procedure, and passing a gerrymandered map to protect its members, the Legislature is hardly deserving of a second chance.

Dr. Clelland's study shows that the Assembly map was intentionally drawn by the Legislature to protect incumbents. The map gave each incumbent their own district, such that they would not be forced to run against another incumbent, entrenching the status quo and violating Section 4(b) of Article III. R. 1112-13, 1120-21. Departing from the plain constitutional remedy will encourage similar brazen acts, as the Legislature's two-fold violation will go unpunished.

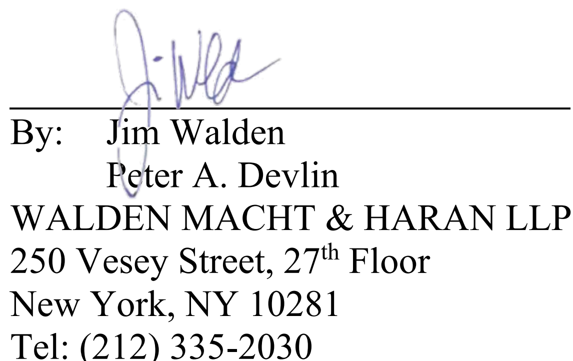
The Article III process—deadlines and all—was designed to prevent gerrymandering, a singular evil eroding democracy across the country. But the Order rewrites the constitutional text and negates the careful incentives in Article III's design. It allows the legislature a second chance to effectively "ratify" a map that this Court has already invalidated. New York needs a remedy that deters the Legislature's anti-democratic behavior and gives full effect to the design of Article III of the Constitution, which only a judicial remedy can do.

CONCLUSION

For the reasons given, this Court should reverse and remand to the Trial Court to order a remedy whereby the Trial Court, with input from the IRC and/or a special master, adopts a redrawn Assembly map for the 2024 elections.

Dated: New York, New York
November 7, 2022

Respectfully submitted,



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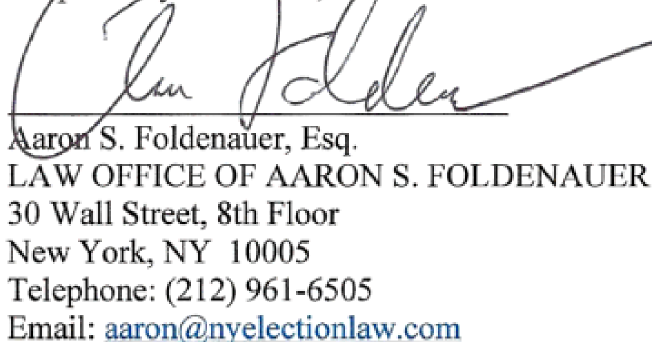

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APPELLATE DIVISION – FIRST DEPARTMENT
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Dated: New York, New York
November 7, 2022

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners-Appellants,

—against—

GOVERNOR KATHY HOCHUL, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Respondents.

New York County Clerk's Index No. 154213/22

Appellate Division Case No. 2022-04649

1. The index number of the case is 154213/22.

2. The full names of the original parties are: Governor Kathy Hochul, Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins, Speaker of the Assembly Carl Heastie, New York State Board of Elections, and The New York State Legislative Task Force on Demographic Research and Reapportionment. On September 29, 2022, the Supreme Court ordered that the following parties be added as Respondents: New York State Independent Redistricting Commission, David Imamura, Dr. John Flateau, Yovan Samuel Collado, Ivelisse Cuevas-Molina, Elaine Frazier, Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Steven. The Order was entered and served upon the Supreme Court Clerk and County Clerk on October 12, 2022. The caption was amended on October 17, 2022.

3. The action was commenced in Supreme Court, New York County.

4. This action was commenced on May 15, 2022, by filing of the instant Petition. The motion to dismiss of Respondent Heastie was served on May 22, 2022; the answer of Respondent Hochul was served on May 23, 2022; and the motion to dismiss of Respondent Stewart-Cousins was served on May 23, 2022.

5. The nature and object of the action is a constitutional challenge to the legislative reapportionment of Assembly districts enacted on February 3, 2022.

6. This appeal is from a Decision and Order of the Honorable Laurence L. Love dated September 29, 2022, and entered on October 12, 2022.

7. The appeal is on a full reproduced record.