To Be Argued By:
PETER A. DEVLIN
Time Requested: 15 Minutes

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

New York Supreme Court

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.

CASE NO. 2022-04649

REPLY BRIEF FOR PETITIONERS-APPELLANTS PAUL NICHOLS AND GARY GREENBERG

JIM WALDEN
PETER A. DEVLIN
WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, New York 10281
(212) 335-2030
jwalden@wmhlaw.com
pdevlin@wmhlaw.com

Attorneys for Petitioners-Appellants Paul Nichols and Gary Greenberg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

Speaker Heastie and Senate Majority Leader Stewart-Cousins (together, "Legislative Respondents") and Governor Hochul (collectively, "Respondents") would give the Legislature a second chance to adopt a gerrymandered district map. Their assurances? If the redrawn Assembly map is gerrymandered, someone can bring a new lawsuit to challenge the map in time for the 2024 elections. In other words, Respondents would have the State weather the expense and uncertainty of litigation to again enforce the State Constitution. Their position is meritless and seeks a reward for unconstitutional behavior.

The Court is seeing this same saga play out across the country, as both parties seek to gain—and in fact have gained—political power through various forms of voter suppression, including gerrymandering. The Assembly map was, in fact, manipulated to protect incumbent candidates; this was not a mere "technical" violation of the Constitution. It clearly violated Section 4 of Article III, which prohibits districts from being "drawn to discourage competition or for the purpose of favoring or disfavoring incumbents . . . ." Art. III, § 4(c)(5). In light of the State's constitutional protections, and the Court of Appeals' clarity in *Harkenrider*, this Court must adopt the judicial remedy that the Constitution requires.

ARGUMENT

I. This Court must reverse because the Court of Appeals' decision in *Harkenrider* is controlling.

This Court has already applied *Harkenrider* once to invalidate the Assembly map based on its procedural infirmity. R. 1031. The issue of remedy is no different. *Harkenrider* plainly holds that a court—and only a court—has the power to adopt a new redistricting plan to remedy the Assembly map's constitutional infirmity. *Harkenrider v. Hochul*, 38 N.Y.3d 494, 523 (2022). Legislative Respondents concede that the principles of *Harkenrider* "resonate" here. Br. of Resps.-Resps. Senate Majority Leader Andrea Stewart Cousins & Speaker of the Assembly Carl Heastie (NYSCEF No. 14) (hereinafter, "Legislature's Br.") at 18. Alas, they cite to the wrong principles—namely, the IRC's critical role in the regular redistricting process, rather than what is now needed to remedy the constitutional violation of side-stepping that role in service of voter suppression.

Because of the gravity of that harm, the Court of Appeals found the balancing and protective role of the *courts* to be paramount: "the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality—a function familiar to the courts given their obligation to safeguard the constitutional rights of the People under our tripartite form of government." *Harkenrider*, 38 N.Y.3d at 523. This Court must continue to uphold that role. Just as the congressional and State Senate maps were "incapable of

legislative cure," so too is the Assembly map. *Id.* Just as the Court of Appeals, for that reason, remanded the matter to the Supreme Court to adopt new voting maps, so too must this Court. *Id.* at 524. Respondents cannot escape this conclusion.

They attempt to distinguish *Harkenrider* in three ways, each to no avail.

Legislative Respondents first argue that the only reason *Harkenrider* did not send the district maps back to the Legislature for correction was because the 2022 elections were imminent. Legislature's Br. at 20. Focusing on a sentence from the decision—"[the] procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure"—they posit that "at this juncture" must have been a reference to the imminent 2022 elections.

This is plainly wrong, as the Legislative Respondents chose to ignore and omit the very next sentence of the opinion, where the Court clearly explained what it meant by "at this juncture:" the "deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Harkenrider*, 38 N.Y.3d at 523; *see also id.* at 523 n.19 (elaborating 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"). Plainly, the reason a judicial remedy was necessary was the lapsed constitutional deadlines.

Equally telling that Legislative Respondents misquote *Harkenrider* is what the Court of Appeals did not say. The *Harkenrider* respondents requested another

chance for the Legislature to redraw the district maps, but the Court rejected that request. In rejecting that request, the Court of Appeals makes no reference to the impending 2022 election or timeline. *Id.* at 523. Indeed, Legislative Respondents fail to explain why the Court of Appeals would have thought that the Supreme Court could act faster than the Legislature. The Legislature is also capable of acting on an emergency basis. In short, Legislative Respondents fail to identify *any* language in the *Harkenrider* decision supporting their argument. There simply is none.

Legislative Respondents next argue that *Harkenrider* is distinguishable because, they contend, it involved a different question. They argue that the *Harkenrider* respondents had only sought a chance for the Legislature to unilaterally correct the infirm maps, not, as here, that the IRC should be reconvened to submit a new map to the Legislature. Legislature's Br. at 17. Respondent Hochul similarly argues that the question of how to craft a remedy when that remedy has been deferred to the next election was not before the Court in *Harkenrider*. Br. of Resp. Hochul (NYSCEF No. 15) (hereinafter, "Governor's Br.") at 19. The Court of Appeals, Respondent Hochul argues, was instead "narrowly concerned with fashioning emergency relief for the upcoming election." Governor's Br. at 20.

Respondents' argument is a red herring. It also misstates the issue on appeal before this Court. The only issue before this Court is whether the Legislature has a proper role in fixing a violation of the Article III redistricting process. The answer

to that is no. As the Court of Appeals held, the Legislature has no ability to correct the Assembly map because the immutable February 28, 2022 Article III deadline for the IRC to submit maps to the Legislature has passed. *Harkenrider*, 38 N.Y.3d at 523. It makes no difference if a remedy is deferred (as here) or immediate (as in *Harkenrider*), or if the IRC reconvenes (as here) or the court appoints a special master (as in *Harkenrider*). The critical and common requirement "at this juncture," per *Harkenrider*, is that a court adopt a remedial map.[1] *Id.* The Court's decision did not carve out a special exception for "emergency relief" or otherwise. Its decision to remand to the court, and only the court, is on all fours here.

Respondent Hochul also tries to distinguish *Harkenrider* on the grounds that the Court of Appeals did not expressly consider Section 5-b(a) in its analysis of the remedy. Governor's Br. 19-20. This argument is meritless. Section 5-b(a) was not discussed in the Court of Appeals' analysis of remedy because it is irrelevant. *See infra* Part II.1. Assuming, *arguendo*, that Section 5-b(a) is relevant, then Respondent Hochul has only made the point that *Harkenrider* was wrongly decided. Section 5-b(a), if it applies as Respondents contend, would have mandated a different remedy

[1] Petitioners have argued that a special master is better suited to assist the court with a remedy, but Petitioners have consistently maintained that the Trial Court may nonetheless conscript the IRC to help redraw the Assembly map if it wishes. R. 1080, 1284, 1340-41. So long as the court ultimately decides what map to adopt, the Constitution does not prescribe *how* the court redraws that map—whether with the help of a special master, the IRC, or both. Legislative Respondents' assertion that Petitioners' position is "new" is incorrect. *See* Legislature's Br. at 16 n.5.

in *Harkenrider*. Respondents can make their argument to the Court of Appeals. Here, however, *Harkenrider* is binding precedent and requires a judicial remedy.

II. Respondents' interpretation of Article III is fatally flawed, which is a separate and independent basis to reverse.

Respondents argue that the process to redraw an unconstitutional and invalid district map must "mirror[]" the regular Article III decennial redistricting process "as closely as possible." Legislative Br. at 16 n.5; *see also* Governor's Br. at 18. Even if the Court of Appeals' *Harkenrider* decision does not control, Respondents' interpretation of Article III, like the Trial Court's, is fatally flawed.

Respondents' interpretation lacks textual support, modifies express Article III deadlines, and conflicts with the judicial remedy required by Article III. Moreover, that remedy is designed to incentivize the IRC and Legislature to get the redistricting process right in the first instance, thereby deterring gerrymandering and promoting bipartisan compromise. But this design will not work if, as the Trial Court ordered, the Legislature gets a "second bite of the apple." R. 21. Article III could have been drafted as Respondents imagine, but it was not.

1. Respondents' position lacks any textual basis.

Like the Trial Court, Respondents contend that Section 5-b(a) is the textual basis for their interpretation that a remedy must "mirror" as close as possible the regular decennial process. But Section 5-b(a) neither dictates nor authorizes this result. *See* Legislature's Br. at 13, 15; Governor's Br. at 13. It simply does not

apply. Rather, Section 4(e) expressly governs the "remedy for a violation of law," and it specifies that "a court" must order a remedial map. Art. III, § 4(e).

Section 5-b(a) provides that "[o]n or before February first of each year ending with a zero and at any other time a court orders" that "districts be amended," an IRC "shall be established" to "determine the district lines" for "congressional and state legislative offices." Art. III, § 5-b(a). Respondents argue that when this Court ordered "the formal adoption and implementation of a new legally compliant state assembly map," it was really ordering that Assembly lines be "amended" within the meaning of Section 5-b(a). Legislature's Br. at 15; Governor's Br. at 14.

Not so. Section 5-b(a) plainly does not apply where a redistricting plan, such as the Assembly map, is ruled invalid and must be replaced by court intervention. We begin with the text. *Lubonty v. U.S. Bank Nat'l Ass'n*, 34 N.Y.3d 250, 255 (2019). Section 5-b(a) begins: "On or before February first of each year ending in zero"—a plain reference to the decennial redistricting process. Moreover, Section 5-b(a) refers to amending "districts"—not to amending a "redistricting plan" as that term is used throughout Article III. This difference is significant. "Districts" plainly refers to the existing voting districts from the prior decade, whereas Article III repeatedly uses "redistricting plan" to mean a new district map for the next decade. *See generally* Art. III, § 4. It is a "redistricting plan," *i.e.*, the invalid 2022 Assembly map, that now must be redrawn. If Section 5-b(a) referred to a "redistricting plan,"

it would have said so, consistent with the principle that different words have different meanings. *See United States v. Knauer*, 707 F. Supp. 2d 379, 386 (E.D.N.Y. 2010) (explaining that the use of "different words in similar statutes" is "presumed to be meaningful"); *People v. Fancher*, 50 N.Y. 288, 291 (1872) (explaining that statutory rules of construction apply to the Constitution). Section 5-b(a) is plainly inapt.

Here, a "redistricting plan" was invalidated and is now being redrawn, *i.e.*, the 2022 Assembly map. This Court's decision that the Assembly map "is invalid" and "will be void" is plainly not an order to "amend" "districts"; it is an order to redraw a redistricting plan because the decennial IRC process failed. Thus, when this Court remanded for consideration of the proper means for "redrawing the state assembly map," its decision did not trigger Section 5-b(a). R. 1033.

Respondents argue that because this Court ruled that the Assembly map "will be void and of no effect" upon the adoption of a replacement map, and because the Assembly map was used in the 2022 elections, the map is being "amended" under Section 5-b(a). Legislature's Br. at 15; Governor's Br. at 14. But whether the Assembly map is void now or later is immaterial. The Assembly map is, as this Court held, invalid. It being used in the 2022 elections was an unfortunate practical necessity with no effect on the constitutional remedy.[2]

[2] Legislative Respondents imply that Petitioners are to fault for an unconstitutional Assembly map being used in the 2022 elections. Legislature's Br. at 14. But the record is clear that Petitioners sought relief with utmost haste after the *Harkenrider* Court found that all three district maps

Respondent Hochul also argues that an interpretation of Section 5-b(a) where "amended" does not refer to a court's order invalidating a map for a violation of law would render Sections 5-b and 5 meaningless. Governor's Br. at 15. Not true. Sections 5-b and 5 are used in the regular decennial redistricting process. And, as explained above, the portion of Section 5-b(a) that empowers a court to order districts be amended is an apparent safety valve in case the decennial redistricting process fails to start. That is, should the Legislature neglect to establish an IRC to redraw district lines at the ten-year mark, then a court may initiate that process itself by ordering that district lines be amended.

Respondents' reliance on Section 5-b(a) is flawed for another reason. Using Section 5-b(a) in the remedial phase of redistricting creates absurd consequences that could not have been intended. *See People v. Garson*, 6 N.Y.3d 604, 614 (2006) ("[Courts] must interpret a statute so as to avoid an unreasonable or absurd application of the law." (quotation omitted)). Section 5-b(a) requires that an IRC be "established" to determine district lines. "Establish" means "to make or form; to bring about or into existence." Black's Law Dictionary (11th ed. 2019).[3] But the

enacted in February 2022 were procedurally unconstitutional. Despite *Harkenrider*'s clear holding, Respondents fought vigorously to keep a patently unconstitutional Assembly map in place—not just in 2022, but for the next decade. *See, e.g.*, R. 989-90.

[3] *See also* "Establish," *Merriam-Webster.com Dictionary*, Merriam-Webster ("establish" means "to bring into existence"), https://www.merriam-webster.com/dictionary/establish (last accessed December 16, 2022).

IRC had already been formed by the time the Trial Court issued its Order. The Trial Court did not "establish" the current IRC; it ordered that the already established IRC reconvene. Section 5-b(a), if applied to the remedial context, would require that the Trial Court "establish" an entirely new IRC—thereby requiring the Legislature to make all new appointments. Such an absurd and inefficient result cannot be what the People contemplated with the 2014 amendments.

Lacking in textual support, Legislative Respondents appeal to constitutional principles. First, Legislative Respondents list several cases for the proposition that legislative redistricting plans are favored over court-imposed plans. Legislature's Br. at 20. These cases are easily distinguished. They are based on different constitutions and different issues. To be sure, a compliant IRC process yielding fair maps in early 2022 would have been far preferable, but that is not what happened. Article III's prescribed remedy is now in play, and it is designed to efficiently resolve the violation of law while deterring bad behavior. The State is at this stage because the Legislature had its chance but failed its obligations.

Legislative Respondents further argue that the Legislature, as a representative body, is better positioned than a single individual to redraw an Assembly map. Legislature's Br. at 23. This argument rings hollow. A ten-member board appointed by elected representatives, the IRC, currently has and will have—even if Petitioners are granted the relief they request on this appeal—an active role in the remedial

process. What is more, the Legislature had its chance, and Article III does not give it a second one. Legislative Respondents cite the Fourth Department and Supreme Court in *Harkenrider* for purported endorsements of a role for the Legislature in remedying the district maps' infirmities. Legislature's Br. at 18-19. But, the Fourth Department was reversed by the Court of Appeals, and the Supreme Court required the Legislature to submit a remedial map *to the court* for review and approval. These non-binding precedents hardly support Legislative Respondents' position.

2. Respondents' position conflicts with Article III deadlines.

Respondents' interpretation is fatally flawed for another, independent reason. Like the Trial Court, they concededly disregard explicit and unambiguous Article III deadlines, and craft entirely new ones. Legislature's Br. at 16; Governor's Br. at 23. For example, February 28, 2022 was the fixed deadline for the IRC to submit a second set of district maps to the Legislature. *See* Art. III, § 4(b). That deadline cannot be modified and must be given its "full effect," foreclosing the IRC from submitting a new map to the Legislature, as *Harkenrider* holds. *Harkenrider*, 38 N.Y.3d at 511, 523 & n.19. Modifying the Constitution is a feat that a court has no power to do. *See* Br. for Pet'rs-App'ts (NYSCEF No. 9) at 19-21.

Legislative Respondents suggest that the Trial Court did not "truly" modify constitutional deadlines (notwithstanding the Trial Court's clear statement to the contrary). Legislature's Br. at 16; *see* R. 17 (holding that the Trial Court must

"modify the deadlines established in the Constitution"). They argue that creating new Article III deadlines is necessary to give effect to Sections 5-b(a) and Section 4(e). But creating new deadlines is neither necessary nor appropriate.

Section 5-b(a) and Section 4(e) can be given full effect while respecting Article III's express deadlines. To establish a new IRC under Section 5-b(a), the Legislature must appoint new members. If the Legislature fails to appoint members "[o]n or before February first of each year ending with a zero," then Section 5-b(a) gives courts the power to order that the prior decade's districts be amended. This power ensures that the decennial redistricting process is timely carried out. Section 4(e) then establishes that decennial redistricting process "shall govern," except insofar as a court "is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." Art. III, § 4(e). A court-ordered map is required here, since the IRC failed to submit a second set of redistricting plans to the Legislature by February 28, 2022. *See Harkenrider*, 38 N.Y.3d at 523 n.20 (holding that Section 4(e) requires a "court-ordered redistricting map").

Even if the Article III's deadlines made parts of Section 5-b(a) meaningless, that does not justify rewriting the text. The so-called principle of superfluity does not sanction revising plain and unambiguous text, such as Article III's deadlines. The "literal language" of the text is "generally controlling" unless "the plain intent and purpose" would "otherwise be defeated." *Anonymous v. Molik*, 32 N.Y.3d 30,

37 (2018) (quoting *Bright Homes, Inc. v. Wright*, 8 N.Y.2d 157, 161 (1960)); *see United States v. Ahmed*, 94 F. Supp. 3d 394, 427 (E.D.N.Y. 2015) ("[T]he principle that a statute should be read to avoid rendering any portion of it superfluous . . . [is] inapplicable because this statute is not ambiguous.").

3. Section 4(e) requires a court to adopt a remedial map.

Section 4(e) is directly applicable here, and it requires that "a court," not the Legislature, adopt a remedial map. Section 4(e) prescribes what happens to a "redistricting plan," such as the Assembly map, when that redistricting plan is declared invalid: "article [III] 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." Art. III, § 4(e). Failing to follow Section 4(e) is sufficient reason for this Court to reverse the Trial Court's Order.

Respondent Hochul argues that Section 4(e) authorizes the Trial Court's Order. Governor's Br. at 18-19. Respondent Hochul asserts, without support or authority, that the Trial Court allowing the Legislature to adopt a remedial map is equivalent to a court "order[ing] the adoption of" a remedial map.

This argument defies basic sense and constitutional principles of separation of powers. Section 4(e) expressly reserves power to "a court" to adopt a remedial map; but the Trial Court's Order cedes that power to the Legislature. Section 4(e) is designed to balance power in "our tripartite form of government," as it "explicitly

authorizes judicial oversight of remedial action." *Harkenrider*, 38 N.Y.3d at 523. *Harkenrider* is thus unequivocal that Section 4(e) means "a *court-ordered*" remedial map: "a *court-ordered* redistricting map" is "exactly what the People have approved in the State Constitution as a remedy by declaring that the IRC 'process . . . shall govern . . . except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.'" *Id.* at 523 n.20 (quoting Art. III, § 4(e)) (emphasis added) (ellipses in original). Indeed, Article III, Section 5 already provides a mechanism for a potential Legislative cure, but that mechanism is not available here because the constitutional deadlines have passed.

The independent expert study Petitioners commissioned, which shows that the Assembly map was gerrymandered to protect incumbents, underscores this declared judicial role to oversee remedial action and thereby share power among the different branches of government. Contrary to Respondents' arguments, the study's evidence of incumbent protection is neither waived, irrelevant, nor flawed.

Legislative Respondents argue that the results of the 2022 State Assembly elections disprove Dr. Clelland's study because some incumbents were unseated. Legislature's Br. at 25. Far from it. A district map that was drawn to protect incumbents does not guarantee that an incumbent will win. Such a map likely prevents non-incumbents from running in the first place while securing at least some seats for incumbents that they would have lost without a weight on the scales. The

Constitution forbids drawing districts with the purpose of favoring or disfavoring incumbents. Art. III, § 4 (e). Whether that succeeds is irrelevant.

Legislative Respondents also contend that Petitioners' argument is waived because Petitioners did not assert a gerrymandering claim in the original Petition. Legislature's Br. at 24. Petitioners' argument that this Court should consider how the Assembly map was designed to protect incumbents is not waived. Legislative Respondents conflate the separate doctrines of claim waiver and argument waiver. In short, Petitioners do not need to assert specific claims to raise arguments about issues relating to the claims asserted. *See, e.g.*, *Matter of Gill v. N.Y. State Racing & Wagering Bd.*, 50 A.D.3d 494, 495 (1st Dep't 2008) (arguments challenging claims on statute of limitations grounds not waived because asserted below).

Legislative Respondents argue that Petitioners' evidence of gerrymandering is irrelevant because, they say, Section 5 provides the Legislature an opportunity to fix a gerrymandered map. Legislature's Br. at 24. Legislative Respondents seem to have misunderstood the import of Petitioners' evidence. The gerrymandered Assembly shows that the Legislature has a propensity to gerrymander and shows that shortcutting the Article III redistricting process enables abuses. Thus, it would be folly to give the Legislature a second chance to redo that process. The Article III process is the State's primary and preventative safeguard against gerrymandering. Individual plaintiffs of course can sue after the fact to challenge a gerrymander, but

that is costly, disruptive, and demands emergency action from the courts. Enforcing the Article III process as written—with a redo foreclosed—is thus vital. Allowing the Legislature to redo that process now means that it will have walked away without consequence and another chance to enact a gerrymandered Assembly map.

Respondents dismiss these points for two cynical reasons. *See* Legislature's Br. at 27-28; Governor's Br. at 20-21. They first argue that a new lawsuit can be filed in 2023 if the Legislature again gerrymanders the Assembly map. This is cold comfort. There is no guarantee there will be a chance to challenge a gerrymandered map before the next election. Under the Trial Court's Order, the Legislature and the Governor can delay until the eve of the 2024 elections before enacting new Assembly lines to avoid a new challenge. Even if they could not delay, Respondents would have the State suffer through the expense and uncertainty of another round of litigation rather than fix the issue now and bring repose.

Respondents also argue that the Legislature has already been adequately incentivized, having faced consequences in *Harkenrider*, so no further incentives are necessary here. But that was a different lawsuit. The fact that the Legislature faced consequences in *Harkenrider* does not affect the remedy for the unconstitutional Assembly map. Respondents' argument is also mistaken because it is based on the erroneous assumption that *Harkenrider* fixed everything. It did not. The outcome in *Harkenrider* does not guarantee what will happen in the next redistricting cycle.

In fact, the Trial Court's Order actively undermines the effects of *Harkenrider*. If the Legislature gets a second chance to redraw a map so long as there is time, then the Legislature will be incentivized to delay the resolution of a lawsuit it is no longer possible to implement a remedy for the immediate election.

III. Respondents' law of the case argument is waived and meritless.

Respondents argue that the law of the case doctrine bars further consideration of the issue currently on appeal. Legislature's Br. at 12-13; Governor's Br. at 21-23. This argument is both waived and meritless.

In front of the Trial Court, Respondents briefed and twice argued the issue of remedy raised in this appeal. They did not once argue that the proper remedy was already decided by this Court in its decision invalidating the Assembly map. Their argument is therefore waived. It is well settled that where, as here, a party fails to raise an argument before a trial court, it has both waived that argument below and failed to preserve it for appeal. *See, e.g.*, *Bd. of Managers of Porter House Condo. v. Delshah 60 Ninth LLC*, 192 A.D.3d 415, 416 (1st Dep't 2021) (arguments not raised in trial court opening brief could not be considered below or on appeal); *RSB Bedford Assocs., LLC v. Ricky's Williamsburg, Inc.*, 91 A.D.3d 16, 23 n.1 (1st Dep't 2011) (argument not raised in trial court brief is not properly before the court); *Feliz v. Fragosa*, 85 A.D.3d 417, 418 (1st Dep't 2011) (refusing to consider argument "improperly raise[d] for the first time on appeal").

Even if it were not waived, Respondents' argument is meritless. The law of the case doctrine is "a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned." *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975). This Court plainly did not decide the issue here: Does Article III permit the Legislature to redraw the invalid Assembly map? Instead, this Court *remanded* the matter for consideration of the proper remedy. *See* R. 1033 (remanding "for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const, art III, § 5-b").

Although this Court referenced Section 5-b in its remand instructions, that reference did not "judicially determine[]" the issue. *Martin*, 37 N.Y.2d at 165. This Court did not opine on, directly or indirectly, what Section 5-b requires. This Court did not issue any holding or decision interpreting Section 5-b. And nor did this Court cite any binding or even relevant caselaw. Moreover, Section 5-b incorporates Section 5 and Section 4 of Article III; thus, this Court's remand instructions likewise incorporates those sections. *See also People* ex rel. *McClelland v. Roberts*, 148 N.Y. 360, 367 (1896) (explaining that Constitution must be interpreted as a whole).

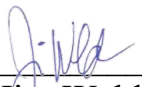
In short, it strains credulity that this Court would have decided a novel issue of constitutional interpretation *sub silentio* in its instructions for remand.

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
December 16, 2022

Respectfully submitted,



By: Jim Walden
Peter A. Devlin
WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, NY 10281
Tel: (212) 335-2030

Attorneys for Petitioners-Appellants Paul Nichols and Gary Greenberg

APPELLATE DIVISION – FIRST DEPARTMENT
PRINTING SPECIFICATION STATEMENT

I hereby certify pursuant to 22 NYCRR § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, and this Statement is 4,615 as calculated by the word processing system.

Dated: New York, New York
December 16, 2022