To be Argued by:
ARIA C. BRANCH
(Time Requested: 20 Minutes)

New York Supreme Court

Appellate Division—Third Department

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

Petitioners-Appellants,

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

– against –

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER IVELISSE CUEVAS-MOLINA, INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAZIER, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT, and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Respondents,

(For Continuation of Caption, See Inside Cover)

Docket No.: CV-22-2265

BRIEF FOR PETITIONERS-APPELLANTS

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Albany County Clerk's Index No. 904972-22

– and –

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

Intervenors-Respondents.

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PRELIMINARY STATEMENT

In 2014, New York voters approved constitutional amendments to reform the congressional and state legislative redistricting processes. The Redistricting Amendments—which amended Article III, Sections 4 and 5 and created Article III, Section 5-b of the New York Constitution—created the Independent Redistricting Commission ("IRC"), whose members are appointed in a bipartisan fashion and reflect the state's ethnic, gender, and geographic diversity. The Redistricting Amendments require that, following a carefully crafted process that includes extensive public comment, the IRC *must* submit proposed redistricting plans to the Legislature for consideration.

The first redistricting cycle that should have been conducted under this transparent and bipartisan process began in 2021, but the process broke down because the IRC failed to complete its constitutional duty. The Legislature attempted to fill the gap, but the Court of Appeals held that, under New York law, the Legislature has no power to craft new redistricting maps without IRC action. As a result, the 2022 general election proceeded under an interim congressional map drawn by the Steuben County Supreme Court. That map, however, strayed dramatically from both the ideals and requirements of the Redistricting Amendments. Instead of providing a transparent process led by diverse and bipartisan New York citizens and informed by meaningful public comment, the

court-ordered map-drawing efforts were rushed, and the map itself was drawn by an out-of-state academic and approved by a single elected judge in a process that largely shut out the views of minority voters.

This consequence could have been avoided—and may still be avoided for future elections—if the IRC completes its constitutional obligations. For this reason, on June 28, 2022, Petitioners brought an Article 78 petition for a writ of mandamus against the IRC and its members, in which they seek to compel the IRC to complete its constitutional duty and submit a second set of congressional redistricting plans to the Legislature for consideration. The Albany County Supreme Court dismissed the suit after concluding that the interim court-drawn map must remain in place for the entire decade.

But that conclusion was legal error: The Steuben County Supreme Court's map was put in place only as a temporary measure to ensure that the 2022 elections were conducted under a congressional plan that complied with the U.S. Constitution's one-person, one-vote population requirement. And the Redistricting Amendments expressly contemplate that a plan can be amended pursuant to a court order—which is precisely what Petitioners seek—consistent with the judiciary's power to compel the IRC to complete its constitutionally mandated redistricting duties. Section 4€ of the Redistricting Amendments specifically provides that the process outlined in the Amendments, including the submission timeline, shall govern

redistricting *except* where judicial action is required to remedy a legal violation. Here, the IRC's failure to discharge what the Court of Appeals has recognized as a mandatory duty requires judicial intervention in the form of a writ of mandamus. Far from being inconsistent with the Redistricting Amendments, such an order would ensure that the fair, transparent, bipartisan goals adopted by New Yorkers when they approved the Amendments are vindicated for the remainder of the decade.

Supreme Court further erred in concluding that ordering the IRC to reconvene would be "futile" because of "the IRC's inherent inability to reach a consensus on a bipartisan plan." R. 19. This conclusion is not only inconsistent with good-faith assumptions that courts must hold regarding coordinate branches of government, but undermines and is inconsistent with both the purpose and text of the Redistricting Amendments themselves. If the futility of any bipartisan enterprise were to be assumed, then the equally divided IRC would be inherently incapable of fulfilling its constitutional mandate. And, indeed, the IRC's response to a court order in parallel litigation addressing the State Assembly maps proves Supreme Court's predictions wrong. Moreover, the Amendments *specifically address* the possibility of disagreement among the IRC's members by directing the IRC to submit whichever plan or plans receive the most votes if the prescribed seven-vote threshold is not cleared. *See* N.Y. Const. art. III, § 5-b(g). Thus, the Court's finding of "futility" was wrong on multiple counts.

By declining to order completion of the process required by the New York Constitution, Supreme Court effectively rejected the reforms approved by New York voters to ensure fair redistricting maps while simultaneously setting a dangerous precedent. If this Court does not reverse, then every ten years, the IRC members representing the Legislature's minority party may simply refuse to act, leaving only the judiciary with power to draw the state's congressional maps. And that power will fall first to a lone supreme court justice, incentivizing forum-shopping and resulting in the drastic departure from the transparent, thoughtful, and deliberative process that New York's voters approved to ensure that the state's diversity is accurately reflected in the districts in which they vote and are represented. This result would thoroughly subvert the objectives and procedures enshrined in the Redistricting Amendments.

Petitioners accordingly ask this Court to reverse Supreme Court's order dismissing their amended petition and, in so doing, ensure that New Yorkers can vote under a constitutionally enacted congressional map for the remainder of this decade—and beyond.

Consistent with the requirements of Article III, Section 5 of the New York Constitution, which governs review of "[a]n apportionment by the legislature, or

other body," Petitioners further request that this Court expedite consideration of this appeal.[1]

QUESTIONS PRESENTED

(1) Does the judiciary have authority to issue a writ of mandamus compelling the IRC to submit a second set of congressional plans to the Legislature for consideration?

Answer of the court below: Supreme Court erred in holding that the interim congressional map adopted by the Steuben County Supreme Court must remain in place for the entire decade, and that the IRC was powerless to issue a second redistricting plan after February 28, 2022.

(2) Is the judiciary precluded from issuing an order mandating that the IRC discharge its nondiscretionary constitutional duty because such an order would be futile?

[1] Specifically, Article III, Section 5 provides that

> [a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and *any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings*, and if said court be not in session it shall convene promptly for the disposition of the same. *The court shall render its decision within sixty days after a petition is filed*.

(Emphases added).

Answer of the court below: Supreme Court erred in holding that a writ of mandamus should not issue based on an erroneous assumption that past partisan gridlock would make such an order futile.

STATEMENT OF THE CASE

I. Legal Background

A. The Redistricting Amendments created a new, transparent process for New York's decennial redistricting.

Every 10 years, the district lines for New York's congressional, State Senate, and State Assembly seats are redrawn to adjust for population changes based on the results of the decennial U.S. census. *See* N.Y. Const. art. III, § 4(a). Newly drawn maps must be approved by the Legislature and signed by the Governor before they become effective. *See id.* § 4(b).

In 2014, New York voters amended the state constitution, establishing new procedural and substantive requirements for redistricting. The Redistricting Amendments created the IRC, which retains authority to draw districting plans and submit those plans to the Legislature for approval, rejection, or amendment. *Id.* §§ 4(b), 5-b. The IRC is comprised of 10 commissioners who are appointed in bipartisan fashion: Each party's legislative leaders appoint four commissioners, and a majority of those eight commissioners then appoint the remaining two. *Id.* § 5-b. The Redistricting Amendments require that, "to the extent practicable," commissioners "reflect the diversity of the residents of this state with regard to race,

ethnicity, gender, language, and geographic residence." *Id.* § 5-b(c). To that end, "the appointing authorities" are instructed to "consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission." *Id.*

When both houses of the Legislature are controlled by the same political party—as was the case during the most recent redistricting cycle—the Redistricting Amendments require a seven-vote majority of the IRC to approve a redistricting plan and send it to the Legislature. *Id.* § 5-b(f)(1). If the IRC "is unable to obtain seven votes to approve a redistricting plan on or before January first . . . or as soon as practicable thereafter," it must submit to the Legislature the plan or plans that received the most votes. *Id.* § 5-b(g).

The IRC must submit its first set of approved plans to the Legislature "on or before January first or as soon as practicable thereafter but no later than January fifteenth." *Id.* § 4(b). Each house of the Legislature must then vote on the IRC's submissions "without amendment." *Id.* If the Legislature does not approve the IRC's first set of proposed maps, then the IRC must repeat the process again: The Redistricting Amendments provide that, "[w]ithin fifteen days of [] notification [that the first set of plans was disapproved] and in no case later than February twenty-eighth, the [IRC] shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan." *Id.* Upon receipt of

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

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

Article III, Section 5 contemplates a process for remedying legal deficiencies in redistricting plans, providing that "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen." *Id.* § 5. The Redistricting Amendments added further content to this procedure for judicial review, providing that, "[i]n any judicial proceeding relating to redistricting of congressional or state legislative districts, any law establishing congressional or state legislative districts found to violate the provisions of [Article III] shall be invalid in whole or in part." *Id.* "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." *Id.*

B. The Legislature attempted to fill in a procedural gap left by the Redistricting Amendments.

Notably, the Redistricting Amendments are silent as to what should occur if the IRC fails to even submit maps to the Legislature. In 2021, the Legislature filled in this procedural gap by enacting a bill (the "2021 Legislation") providing that, "if the [IRC] d[oes] not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," the Legislature could proceed to introduce its own redistricting legislation. *See* L 2021, ch 633; *see also Harkenrider v. Hochul* (*Harkenrider II*), 38 N.Y.3d 494, 512 (2022) (describing the 2021 Legislation as "authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps"). The 2021 Legislation also required the IRC to "submit to the legislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based." L 2021, ch 633. This requirement ensured that the Legislature could benefit from the IRC record in adopting new redistricting plans.

II. Factual Background

A. The IRC failed to fulfill its constitutional duties.

The newly established IRC convened in the spring of 2021 as required by the Redistricting Amendments. R. 275. It held hearings throughout the summer and fall

of 2021 to aid its drawing of the state's congressional and state legislative boundaries. *Id.* On January 3, 2022, following months of meetings, hearings, and legwork, the IRC voted on a first set of plans to submit to the Legislature. *Id*. No single map garnered the seven required votes and so, consistent with the Redistricting Amendments, the IRC submitted the plans that received the most votes—a Republican-proposed set of maps and a Democratic-proposed set of maps, each of which received five votes. *Id.* On January 10, 2022, the Legislature rejected both sets of maps and notified the IRC. *Id*.

Thereafter, the IRC refused to submit a second set of redistricting plans and the necessary implementing legislation "[w]ithin fifteen days of such notification and in no case later than February twenty-eighth," as required by Article III, Section 4(b). *Id*. On January 24, 2022, then-IRC Chair David Imamura announced that the IRC was deadlocked and would not submit a second set of recommended plans to the Legislature. *Id.* Then-Vice Chair Jack Martins, a Republican, claimed that the IRC's Democratic commissioners refused to develop a new proposal, while then-Chair Imamura stated that the Republican commissioners refused to even meet. R. 275-76. In a statement, the IRC's Democratic commissioners explained,

> We have repeatedly attempted to schedule a meeting by [January 25, 2022], and our Republican colleagues have refused. This is the latest in a repeated pattern of Republicans obstructing the Commission doing its job. We have negotiated with our Republican colleagues in good faith for two years to achieve a single consensus plan. At every step, they have refused to agree to a compromise.

R. 276. They added, "The Republicans are intentionally running out the clock to prevent the Commission from voting on second maps by its deadline." *Id*.

Ultimately, February 28, 2022 came and went without any action by the IRC. *Id*. At that point, however, it was not clear that the redistricting process had failed; the 2021 Legislation appeared to give the Legislature the opportunity and authority to pass new redistricting plans.

B. The Legislature's new districting maps were challenged in court.

Following the IRC's failure to vote on and submit a second set of maps, the Legislature assumed control over the redistricting process. *Id.* Pursuant to the 2021 Legislation, the Legislature passed new congressional, State Senate, and State Assembly plans on February 3, 2022. R. 276-77. The Governor signed the three plans into law later that day. *See* A9167/S8196, A9039-A/S8172-A, A9168/S8197, S8185-A/A9040-A, 2022 Leg., Reg. Sess. (N.Y. 2022).

That same day, a group of Republican voters (the "*Harkenrider* petitioners") filed a petition in the Steuben County Supreme Court, claiming that the new congressional plan was unconstitutional. *See generally* R. 51-117 (Pet., *Harkenrider v. Hochul*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. Feb. 3, 2022)). The *Harkenrider* petitioners alleged that the congressional plan was procedurally defective, arguing that the Legislature lacked the authority to enact it because the IRC failed to submit a second set of proposed plans for legislative consideration.

R. 108-10. The petitioners further alleged that, because the Legislature's enacted congressional plan was procedurally invalid, New York's prior congressional map remained in place, rendering the state's congressional districts unconstitutionally malapportioned. R. 110-12. Finally, the petitioners alleged that the legislatively enacted congressional plan was a partisan gerrymander in violation of the New York Constitution. R. 112-13. They later amended their petition to challenge the Legislature's new State Senate plan on the same grounds. *See* R. 118-200.

On March 31, 2022, the Steuben County Supreme Court enjoined use of the legislatively enacted congressional, State Senate, and State Assembly plans for the 2022 elections. R. 217-18. The court agreed with the *Harkenrider* petitioners that the Legislature violated the New York Constitution by enacting redistricting legislation after the IRC failed to submit a second set of proposed maps. R. 210. It also held that the enacted congressional plan was drawn with unconstitutional partisan intent under Article III, Section 4(c)(5). R. 214.

The Steuben County Supreme Court ordered that "the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review", and that it would appoint a neutral expert to draw new maps if the Legislature failed to produce bipartisan maps by that date. R. 218. Soon after, the Fourth Department stayed the Steuben County Supreme Court's order, allowing primary election processes and petitioning to continue under the Legislature's congressional and State

Senate plans. *See* R. 218-21 (Order, *Harkenrider v. Hochul*, No. CAE 22-00506 (4th Dep't Apr. 8, 2022)). Two weeks later, on April 21, the Fourth Department reversed the Steuben County Supreme Court's holding that the new plans were procedurally invalid—but nonetheless struck down the congressional map as an unconstitutional partisan gerrymander. *See Harkenrider v. Hochul* (*Harkenrider I*), 204 A.D.3d 1366, 1369–70, 1374 (4th Dep't 2022).

C. The Court of Appeals invalidated the 2021 Legislation and the Legislature's districting plans.

On April 27, 2022—one week before the New York State Board of Elections' deadline to certify ballots for the state's primary elections—the Court of Appeals held that the 2021 Legislation was unconstitutional and invalidated the congressional and State Senate plans that had been enacted pursuant to the legislation.

The Court of Appeals explained that "the legislature and the IRC deviated from the constitutionally mandated procedure" required by the "plain language" of the Redistricting Amendments. *Harkenrider II*, 38 N.Y.3d at 509. The Court described the "mandatory process for submission of electoral maps to the legislature" as follows:

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

Id. at 501, 511 (quoting N.Y. Const. art. III, § 4(b)). The Court of Appeals emphasized that "the detailed amendments leave no room for legislative discretion regarding the particulars of implementation" and therefore determined that the 2021 Legislation was unconstitutional because "the drafters of the [Redistricting Amendments] and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation." *Id.* at 515, 517. Accordingly, "the IRC's fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting." *Id.* at 514.

Even though the Redistricting Amendments include a provision requiring that the Legislature be given a "full and reasonable opportunity to correct . . . legal infirmities" in redistricting plans, N.Y. Const. art. III, § 5, the Court of Appeals held that "[t]he procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure" because the IRC had not submitted a second set of maps to the Legislature. *Harkenrider II*, 38 N.Y.3d at 523. Instead, the Court ordered the Steuben County Supreme Court to draw new congressional and State Senate maps for the 2022 elections by utilizing a special master. *See id.* at 524.

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

Unlike the constitutionally mandated IRC and legislative redistricting processes, the Steuben County Supreme Court provided no meaningful (let alone extensive) opportunity for public comment when it adopted new congressional and State Senate plans. Instead, New Yorkers who wished to have a meaningful voice in the decennial congressional redistricting process were required to travel to Bath, in person, for a one-day hearing—with only a week's notice. This posed a severe hardship for the vast majority of New Yorkers, including and especially minority voters, some of whom live hours away in New York City; voters who do not own cars; and voters whose personal circumstances do not allow them to take an entire day off work to participate in a court hearing. R. 280.

The Redistricting Amendments require that IRC commissioners "reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence" and mandate that, "to the extent practicable the appointing authorities shall consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission." N.Y. Const. art. III, § 5-b(e). By contrast, the Steuben County Supreme Court selected the special master without regard to whether his map-drawing process would reflect New York's diverse population. R. 280-81. And in

the end, it did not. The special master's map-drawing process took place exclusively in Steuben County, which is both geographically removed from New York's major metropolitan areas and one of the least racially diverse areas of the state. R. 280. For example, while New York's statewide non-Hispanic white population is 55.3%, Steuben County's is 93.4%. *Id*. And while the IRC's public-comment opportunities played out over the course of many months as part of an iterative map-drawing process, comments directed at the special master's proposed map were due just two days after it was released—which was followed by the map's ordered implementation just two days later, on May 20, 2022. R. 281.

In a report justifying his map, the special master stated that "[c]ommunities of interest are notoriously difficult to precisely define. Even within a specific minority community there may be issues of what are the boundaries of particular neighborhoods and which neighborhoods most appropriately belong together." R. 244 (Special Master's Report). He also stated that it was "impossible to incorporate most of the suggestions" he received due in part to his desire to minimize county splits. R. 241. And while the special master purportedly considered the public comments previously submitted to the IRC, he also considered unidentified "suggestions given directly to [him] prior to [his] drafting of a preliminary map." R. 244. Those comments were apparently not part of the public record, further underscoring the lack of transparency in the judicial map-drawing process.

The result of this opaque and truncated process—a clear and dramatic departure from the constitutionally mandated map-drawing process adopted by New York voters—was that the Steuben County Supreme Court's adopted plan split longstanding minority communities of interest for reasons that remain unclear. For example, the special master's congressional plan split a predominantly working-class Black community in Prospect Heights, Brooklyn, and combined part of that community with wealthy Manhattan residents in the Financial District and Tribeca. R. 282. The special master's congressional plan also failed to keep Bedford-Stuyvesant, Fort Greene, East New York, and Canarsie together, even though those areas had historically been grouped together in a single congressional district once represented by Shirley Chisholm, the first Black woman elected to Congress. *Id.* And even though "hundreds of citizens" who participated in the IRC process requested that Co-Op City—historically the largest housing cooperative in the world—be placed in the Sixteenth Congressional District, the special master declined to do so based in part on unspecified "other criteria." R. 249.

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

E. Petitioners brought this litigation seeking a writ of mandamus to compel the IRC to complete the constitutionally mandated redistricting process.

Petitioners—New York voters who were injured by the IRC's failure to complete its constitutionally mandated redistricting duties—initiated the underlying Article 78 action for a writ of mandamus against the IRC and its members on June 28, 2022.[2] They seek a court order compelling Respondents to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan," R. 266, to complete the decennial redistricting process as required by the Redistricting Amendments.

Petitioners did not seek relief for the 2022 election cycle; they specifically seek "to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade." R. 269. In other words, Petitioners did not attempt to disturb the judicially approved map that was implemented by the Steuben County Supreme Court to ensure that New Yorkers voted under a congressional map that did not violate the one-person, one-vote requirement during the 2022 elections.

[2] Petitioners filed an amended petition on August 4, 2022. Among other changes, the amended petition limited Petitioners' requested relief to only the state's congressional map, given parallel litigation over the Legislature's enacted State Assembly plan, *see infra* at 19–21, and Petitioners' desire to avoid duplicative and potentially conflicting proceedings in different courts.

On August 23, the *Harkenrider* petitioners moved to intervene in this matter. R 324-27. Supreme Court granted their intervention on September 1. R. 348. Both they and Respondents Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens—the IRC's Republican commissioners—moved to dismiss Petitioners' amended petition. R. 340; R 315-16.

On September 12, Supreme Court held oral argument on the amended petition and motions to dismiss. It ultimately dismissed the amended petition, concluding that the IRC was powerless to submit a second set of redistricting plans after February 28, 2022, and that the congressional map adopted by the Steuben County Supreme Court must remain in place for the remainder of the decade.

F. In parallel litigation over the State Assembly map, the New York County Supreme Court ordered the IRC to reconvene and send a second State Assembly map to the Legislature for consideration.

Soon after the Court of Appeals' *Harkenrider* decision, the First Department similarly invalidated the Legislature's enacted State Assembly plan based on "procedural infirmities in the manner in which it was adopted." *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't), *appeal dismissed*, 38 N.Y.3d 1053 (2022).[3] The First Department declined to delay the June 28, 2022 State Assembly primary election, however, and remanded the case to the New York County Supreme Court

[3] The legislatively-enacted Assembly map was undisturbed by *Harkenrider* because the *Harkenrider* plaintiffs did not raise that challenge to the Court of Appeals. *Harkenrider II*, 38 N.Y. at 521 n.15.

"for consideration of the proper means for redrawing the state assembly map." *Id.* The Legislature's State Assembly map consequently remained in effect for the 2022 general election.

On September 29, 2022, less than one month after Supreme Court dismissed Petitioners' amended petition in this case, the New York County Supreme Court held that "the appointment of a special master is clearly disfavored," *Nichols v. Hochul*, 77 Misc. 3d 245, 252 (N.Y. Cnty. Sup. Ct. 2022), and ordered a remedy similar to the relief Petitioners seek here: specifically, that court ordered that, in accordance with its constitutional obligations, the IRC "shall prepare the redistricting plan to establish assembly districts, and shall submit to the legislature such plan and the implementing legislation therefor on or before April 28, 2023," and then—if that plan is rejected—"shall prepare and submit to the legislature a second redistricting plan" for consideration. *Id*. at 256–57.[4]

The IRC is currently complying with the New York County Supreme Court's order. On December 2, 2022, the IRC reached agreement on a draft State Assembly

[4] The New York County Supreme Court distinguished Supreme Court's decision in this case on the grounds that there was no judicially drawn State Assembly map in place. Absent such a map, the constitutional provision that Supreme Court found dispositive here—specifically, Article III, Section 4(e), which provides that "[a] reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order"—was not relevant in that case. *See Nichols*, 77 Misc. 3d at 252–53. Given this distinction, the New York County Supreme Court did not opine on the primary legal issue before this Court: whether Article III, Section 4(e)'s remedial provision allows a court to order the IRC to submit a second set of redistricting maps to the Legislature.

map, which will now be open to public comment.[5] In short, as a result of the New York County Supreme Court's order in *Nichols*, it now appears that the IRC will complete its constitutionally mandated redistricting obligations with respect to the State Assembly map.

ARGUMENT

New York's judiciary has the authority to compel the IRC to fulfill its constitutional duty to submit a second set of congressional plans to the Legislature. Supreme Court held otherwise based on an incorrect understanding of the text, structure, and purpose of the Redistricting Amendments. And, to the extent Supreme Court's decision rested on the assumption that mandating additional IRC action would be futile, that conclusion is both legally impermissible and contradicted by the IRC's recent agreement on the State Assembly map.

I. Mandamus relief is both necessary and proper in this case.

Supreme Court erred in granting the motions to dismiss and declining to issue a writ of mandamus directing the IRC and its commissioners to fulfill their constitutional duty to submit a second set of proposed congressional plans for consideration by the Legislature. In Article 78 proceedings, motions to dismiss "are appropriately afforded review similar in nature to that applied to defenses raised in

[5] *See* Shantel Destra, *Five Big Takeaways from the New Assembly Draft Map*, City & State N.Y. (Dec. 1, 2022), https://www.cityandstateny.com/politics/2022/12/heres-newly-drawn-draft-map-assembly/380347.

a pre-answer motion to dismiss pursuant to CPLR 3211(a)." *Lally v. Johnson City Cent. Sch. Dist.*, 105 A.D.3d 1129, 1131 (3d Dep't 2013). In assessing a motion to dismiss, the court "must accept [petitioners'] allegations as true, accord [them] the benefit of every possible favorable inference, and determine only whether [they] have a cause of action." *Connolly v. Long Island Power Auth.*, 30 N.Y.3d 719, 728 (2018).

New York law provides for a writ of mandamus where a government "body or officer failed to perform a duty enjoined upon it by law." N.Y. C.P.L.R. 7803. Petitioners must establish "'a clear legal right to the relief demanded' by demonstrating the 'existence of a corresponding nondiscretionary duty' on the part of the" relevant government body. *Waite v. Town of Champion*, 31 N.Y.3d 586, 593 (2018) (quoting *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 757 (1991)); *see also George F. Johnson Mem'l Libr. v. Springer*, 11 A.D.3d 804, 806 (3d Dep't 2004) (per curiam) (granting petition for mandamus under Article 78 because government official did not have "any discretion to refuse" to perform relevant duty). "[T]o the extent that [petitioners] can establish that [respondents] are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing [respondents] to discharge those duties." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 541 (1984).

Petitioners have established that they are entitled to an order directing the IRC and its commissioners to fulfill their constitutional duties. Under the plain language of the Redistricting Amendments, the IRC has a nondiscretionary duty to submit a second set of redistricting plans to the Legislature if its first set of plans is rejected by legislative vote or gubernatorial veto. Indeed, the nondiscretionary nature of the IRC's duty to submit a second set of maps was made clear by the Court of Appeals' *Harkenrider II* decision, in which the Court rejected the "view that the IRC may abandon its constitutional mandate with no impact on the ultimate result" and "that the legislature may seize upon such inaction to bypass the IRC process and compose its own redistricting maps with impunity." 38 N.Y.3d at 517. Mandamus relief is thus appropriate here because the IRC failed to submit a second set of congressional plans to the Legislature for consideration—and thus indisputably failed to complete its nondiscretionary constitutional duty.

Contrary to Supreme Court's conclusion, Article III, Section 4(e) supports Petitioners' requested relief. Supreme Court erroneously determined that "there is no enforceable remedy available to Petitioners . . . to compel the IRC to submit a second redistricting plan corresponding to the 2020 federal census." R. 12. But the Redistricting Amendments expressly provide that "[t]he process for redistricting congressional and state legislative districts established by [Article III, Sections 4, 5, and 5-b] shall govern redistricting in this state *except* to the extent that a court is

required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e) (emphasis added). Here, the IRC violated the New York Constitution by failing to submit a second set of congressional plans to the Legislature for its consideration, and Article 78 provides a judicial mechanism to remedy that failure—namely, a writ of mandamus. Supreme Court can thus remedy "a violation of law" by "order[ing] the adoption of . . . a redistricting plan" through the otherwise-mandated IRC map-drawing process. *Id*. That this remedy necessarily involves a departure from the deadlines specified in the Redistricting Amendments is not fatal—Section 4(e) specifically provides that the process outlined in Section 4 (including the February 28, 2022, deadline) shall govern redistricting *except* where, as here, judicial action is required to remedy a legal violation.

This interpretation of Section 4(e) is consistent with the intent of the New Yorkers who voted to adopt the Redistricting Amendments. "In construing the language of the Constitution," courts "look for the intention of the People and give to the language used its ordinary meaning." *Harkenrider II*, 38 N.Y.3d at 509; *see also Pfingst v. State*, 57 A.D.2d 163, 165 (3d Dep't 1977) (per curiam) ("It is a cardinal rule of construction that no part of the Constitution should be construed so as to defeat its purpose or the intent of the people adopting it."). As the Court of Appeals explained in *Harkenrider II*, "the text of section 4 contemplates that any

redistricting act ultimately adopted must be founded upon a plan submitted by the IRC." 38 N.Y.3d at 511–12. This is because the Redistricting Amendments "were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines." *Id.* at 513–14; *see also id.* at 517 ("Through the [Redistricting Amendments], the People of this state adopted substantial redistricting reforms aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines.").

The proper interpretation of Section 4(e) is thus that it permits the mandamus relief requested here—namely, to compel the IRC to complete its redistricting duties and thus vindicate the purpose of the Redistricting Amendments. The Court of Appeals specifically contemplated in *Harkenrider II* that "judicial intervention in the form of a mandamus proceeding . . . [is] among the many courses of action available to ensure the IRC process is completed as constitutionally intended." *Id.* at 515 n.10. Other states' high courts have similarly recognized that, when a redistricting body "fails to enact a new redistricting plan [within the timeframe provided by the state constitution], it is neither deprived of its authority nor relieved of its obligation to redistrict." *In re Below*, 151 N.H. 135, 137 (2004) (per curiam);

see also Lamson v. Sec'y of Commonwealth, 168 N.E.2d 480, 486 (1960) (explaining that, while failure of redistricting body to act "thwarts the intention of the Constitution," an "even more serious nullification of constitutional purpose will result under a construction which would" prohibit redistricting body from "return[ing] to reapportion"); *Harris v. Shanahan*, 387 P.2d 771, 795 (1963) ("[T]he duty to properly apportion legislative districts is a continuing one, imposed by constitutional mandate . . . , notwithstanding the failure of any previous session to make such a lawful apportionment.").

In short, the judiciary has the authority to issue a writ of mandamus in this case. And, as described below, none of the reasons cited by Supreme Court in denying the motions to dismiss counsel otherwise.

II. Supreme Court denied Petitioners' requested relief based on an incorrect interpretation of the Redistricting Amendments.

Supreme Court granted the motions to dismiss based on an interpretation of the Redistricting Amendments that runs contrary to their text and purpose.

Supreme Court held that Petitioners' requested relief "violates the constitutional mandate that an approved map be in effect until a subsequent map is adopted after the federal decennial census." R. 11. But the court created this rule out of thin air; it appears nowhere in the text of the Redistricting Amendments, and, in fact, is directly contradicted by them. Section 4(e) provides that "[a] reapportionment plan and the districts contained in such plan shall be in force until

the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero *unless modified pursuant to court order*." N.Y. Const. art. III, § 4(e) (emphasis added). Whatever an "approved map" might be—and Supreme Court neither defines the term nor finds it in the constitutional text[6]—the Redistricting Amendments expressly contemplate that a redistricting plan can be modified by court order (which, again, is precisely what Petitioners seek here). Supreme Court never grappled with that exception or recognized that the writ of mandamus Petitioners seek would indisputably qualify as a court order that could modify an adopted map consistent with Section 4(e). At no point do the Redistricting Amendments suggest that a redistricting plan is at any point beyond the reach of judicial action. To the contrary, they provide the opposite conclusion.[7]

[6] The Redistricting Amendments describe the process by which the Legislature may "approve" plans proposed by the IRC, *see* N.Y. Const. art. III, § 4(b), but they do not specify that the IRC's refusal to act must be remedied by a court-drawn map or refer to such a court-drawn map as an "approved map"—let alone state that such a map cannot be modified until the next decade.

[7] Other provisions of the Redistricting Amendments also contemplate that additional redistricting activities may occur after a plan is initially adopted. Section 5 states that, if a court finds a "law establishing congressional or state legislative districts . . . to violate the provisions of" the Redistricting Amendments, then "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5. Section 5-b further provides that the IRC "shall be established to determine the district lines for congressional and state legislative offices" "[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." N.Y. Const. art. III, § 5-b(a) (emphasis added). The Redistricting Amendments' explicit recognition that redistricting plans may be amended belies Supreme Court's characterization of a "Constitutional mandate that approved redistricting maps be in place for . . . ten years." R. 12.

Supreme Court also wrongly suggested that a judicial map is the exclusive remedy "in the event of an IRC impasse," and that the Court of Appeals disagreed with the Fourth Department's conclusion that the New York "Constitution was 'silent' relative to the procedure to follow" when the IRC refuses to act. R. 4. (quoting *Harkenrider I*, 204 A.D.3d at 1369). The portion of *Harkenrider II* quoted by Supreme Court on this point did not address the IRC's refusal to act, but rather whether the Legislature had discretion to assume the primary redistricting role prior to the IRC's completion of its constitutional obligations. *See* R. 4-5 (quoting *Harkenrider II*, 38 N.Y.3d at 449). The Court of Appeals did not hold that a judicially drawn map was the sole remedy in the event of IRC obstruction—let alone that such a map could never be modified by subsequent court order.

Indeed, the New York County Supreme Court's remedial order in *Nichols*, and the IRC's subsequent compliance with that court's directive, illustrate that the IRC itself can both legally and practically remedy its own inaction. *See* 77 Misc. 3d at 256–57. This remedy is consistent not only with Section 4(e)—which allows "modifi[cations] pursuant to court order," without limiting or qualifying what a "court order" might be—but the overall purpose of the Redistricting Amendments, which "ensur[e] transparency and giv[e] New Yorkers a voice in the redistricting process." *Harkenrider II*, 38 N.Y.3d at 510.

There is, in short, nothing in either the Redistricting Amendments' text or the Court of Appeals' *Harkenrider II* decision that supports Supreme Court's erroneous conclusion that "the Congressional maps approved by the Court on May 20, 2022 . . . are in full force and effect, until redistricting takes place again following the 2030 federal census." R. 11.

Supreme Court's faulty textual interpretation is compounded by an incorrect understanding of the purpose of the Redistricting Amendments. It stated that the "intent of the Constitution [is] that approved plans be in place for 10 years." R. 7; *see also* R. 11 ("[T]he Constitutional mandate that approved redistricting maps be in place for a reasoned period, ten years, is to provide stability in the election process."). But Supreme Court cites no basis in the text or legislative history for this framing. To the contrary, the legislative history makes clear that the primary goal of the Redistricting Amendments was to ensure democratic input into the redistricting process, not stability for its own sake. The sponsors of the Redistricting Amendments repeatedly explained that the amendments would "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body." N.Y. State Senate, Mem. in Support of S6698, available at https://tinyurl.com/bdzzm58b (accessed Jan. 19, 2022); N.Y. State Assembly, Mem. in Support of A9526, available at https://tinyurl.com/ye25b27n (accessed Jan. 19, 2022). And they reiterated during floor debate that the Redistricting Amendments

would "provide increased public participation in the redistricting process." N.Y. State Assembly, 3-14 & 3-15 2012 Session at 3:14:23–3:14:29, https://tinyurl.com/4h3ytbs4 (accessed Jan. 19, 2022). Petitioners' requested relief is therefore consistent with the Redistricting Amendments' central objective of ensuring that New York's district lines are drawn in the first instance by the IRC—a bipartisan, independent entity that reflects the state's diversity.

To the extent that stability in the redistricting process is a laudable goal (albeit one that is not reflected in the legislative history of the Redistricting Amendments), Supreme Court's concern regarding the effect of Petitioners' requested relief is misplaced. Supreme Court warned that mandamus relief would "provide a path to an annual redistricting process." R. 12. But once a government body has been mandated to complete its legal duty, there is no basis to repeatedly compel it to do so. Here, the IRC has *never* been mandated to produce a second set of congressional plans. Petitioners simply seek to compel IRC to complete that duty in the first instance. Once done, the redistricting process will have been effectuated consistent with the Redistricting Amendments—and, with the IRC having performed its nondiscretionary duty, future mandamus actions against it would not yield valid court orders to prompt modifications of the congressional map produced by the properly completed redistricting process.

III. Supreme Court wrongly assumed that future IRC action would be futile.

Finally, Supreme Court suggested that, even setting aside the (misconstrued) constitutional mandate at issue, "Petitioner[s] fail[] to account for the record demonstration of the IRC's inherent inability to reach a consensus on a bipartisan plan. Put another way, directing the IRC to submit a second plan would be futile!" R. 12. This conclusion is inconsistent not only with the assumptions that properly undergird the relationship between the judiciary and other public officials, but also the facts as borne out by subsequent events involving the IRC.

As a matter of first principles, New York courts have long maintained that "[t]he law assumes that public officials will do their duty"; indeed, "it is an affront to the court to ask it to assume that [] high public officials will . . . do aught but their full duty. Such a proposition would be amazing if it came from any other source." *Barnes v. Roosevelt*, 164 A.D. 540, 544 (3d Dep't 1914); *see also Brandt v. Winchell*, 3 N.Y.2d 628, 633 (1958) ("[W]e must assume that the public officials acted against plaintiff only after they had, in good faith, made independent inquiry . . . and that their action was a proper exercise of their official powers."); *Matter of Comm. of Common Council of City of N. Tonawanda*, 257 A.D. 921, 921 (4th Dep't 1939) (per curiam) ("The courts cannot assume to pass upon the good faith of public officials in the discharge of their functions."). This assumption applies not only to the courts, but also to the legislatures that empower public officials in the first place. *See*

Emerson v. Buck, 230 N.Y. 380, 389 (1921) ("The Legislature rightfully assumes that public officials will perform their duties in good faith and with proper regard to the interests committed to them.").

Here, Supreme Court's conclusion that any additional IRC action would be futile—that, in other words, the IRC would fail to complete its constitutionally mandated redistricting obligations—is necessarily premised on the belief that the IRC will act in bad faith or otherwise abdicate its duties. Such a conclusion is not only misguided, as discussed below, but also plainly inconsistent with longstanding judicial assumptions about the good faith of public officials.

Moreover, Supreme Court's reasoning is inconsistent with the text and predicates of the Redistricting Amendments. The possibility of disagreement among the IRC's members is not a cause for undue pessimism; that eventuality is specifically contemplated by the amendments, which provide that the IRC may submit whichever plan or plans receive the most votes if the prescribed seven-vote threshold is not cleared. *See* N.Y. Const. art. III, § 5-b(g). The "inability to reach a consensus on a bipartisan plan" is not a mark of futility, as Supreme Court concluded, R. 12; that possibility is inherent in the Redistricting Amendments. Similarly, Supreme Court's suggestion that "the judicial remedy exists within the Constitutional structure" to cure such purported futility is off base. The purpose of the judicial remedy is to adopt or change a redistricting plan as needed to "remedy

[] a violation of law." N.Y. Const. art. III, § 4(e). It is *not* intended to mandate judicial intervention (and, as occurred in this case, a subversion of the substantive policies underlying the Redistricting Amendments) whenever the IRC experiences disagreement.

In the analogous context of superfluity, then-Judge Cardozo once admonished that the courts "cannot impute to the lawmakers a futile and frivolous intent." *In re Rouss*, 221 N.Y. 81, 90 (1917); *see also People v. Galindo*, 38 N.Y.3d 199, 205–06 (2022). In assuming that future action on the part of the IRC would be futile, Supreme Court violated this pronouncement. Setting aside that courts should, by and large, avoid making prognostications about what is and is not likely in the political arena, *see, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (plurality opinion) (rejecting standard that "would place courts in the untenable position of predicting many political variables"), the possibility of IRC disagreement was contemplated by the Redistricting Amendments—and *not* as a fatal result necessitating judicial intervention in the form of a special master. It is hardly surprising that the amendments would permit some degree of disagreement by the IRC, given that a commission composed of members of both major political parties will inevitably experience some degree of discord. But that is how the Redistricting Amendments designed the IRC. By assuming that a past failure of consensus necessarily means that all future IRC action is "futile," Supreme Court presumed the futility of the

entire redistricting process as conceived by the Redistricting Amendments—a judgment it was not at liberty to make.

Supreme Court's overly pessimistic outlook was also ultimately belied by subsequent IRC action. On September 29, 2022, the *Nichols* court ordered that, in accordance with its constitutional obligations, "the New York State Independent Redistricting Commission shall prepare the redistricting plan to establish assembly districts, and shall submit to the legislature such plan and the implementing legislation therefor on or before April 28, 2023" and then—if that plan is rejected—the IRC "shall prepare and submit to the legislature a second redistricting plan" to the Legislature for consideration. *Nichols*, 77 Misc. 3d at 256–57. The IRC complied with the court's order and, on December 2, 2022, reached agreement on a draft State Assembly map.[8]

In sum, Supreme Court's futility-based reservations were misguided as a matter of first principles and as a matter of fact. Those concerns did not then—and should not now—militate against the relief Petitioners seek: completion of the constitutionally prescribed redistricting process by the institution mandated with that responsibility. Endorsing Supreme Court's belief that reliance on the constitutionally required IRC process is futile would set an alarming precedent: Simply put, it would *invite* futility during future redistricting cycles, as the

[8] Destra, *supra* note 5.

commissioners representing whichever party is out of power in the Legislature could choose obstinacy over compromise and allow a court to draw a new map rather than the IRC and Legislature in coordination. The People of New York were clear when they approved the Redistricting Amendments: Redistricting in this state should be undertaken in an open, bipartisan manner that recognizes the state's racial, ethnic, and geographic diversity—*not* a closed, compressed procedure undertaken by a single special master appointed by a single elected judge. The judiciary should require the completion of that process—and, in so doing, ensure the vindication of the Redistricting Amendments' goals now and in decades to come.

CONCLUSION

Accordingly, Petitioners request that this Court reverse Supreme Court's orders as to the motions to dismiss and remand this case for further proceedings.

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Respectfully submitted,

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