To be Argued by:
CRAIG R. BUCKI
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

PAUL NICHOLS, GAVIN WAX and 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 and NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Respondents.

Appellate Case No.: 2022-04649

BRIEF FOR RESPONDENTS-RESPONDENTS SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS AND SPEAKER OF THE ASSEMBLY CARL HEASTIE

GRAUBARD MILLER
The Chrysler Building
405 Lexington Avenue, 11th Floor
New York, New York 10174
(212) 818-8800
dchill@graubard.com
jlessem@graubard.com
ereich@graubard.com

PHILLIPS LYTLE LLP
One Canalside
125 Main Street
Buffalo, New York 14203
(716) 847-8400
cbucki@phillipslytle.com
ssalcedo@phillipslytle.com
rvalentine@phillipslytle.com

Attorneys for Respondent-Respondent Speaker of the Assembly Carl Heastie

(For Continuation of Appearances See Inside Cover)

New York County Clerk's Index No. 154213/2022

CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
ehecker@chwllp.com
agoldenberg@chwllp.com
areiter@chwllp.com

Attorneys for Respondent-Respondent Senate Majority Leader and President Pro Tempore of The Senate Andrea Stewart-Cousins

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QUESTION PRESENTED, AND ANSWER OF THE TRIAL COURT

1. Q. Given that the State Assembly district map must be redrawn, and given that the redrawn map will take effect more than a year from now, should the map be redrawn pursuant to the mandatory process enshrined in Article III of the New York Constitution, rather than imposed by a judge?

A. The Trial Court correctly answered, "Yes." R. 22-24.

PRELIMINARY STATEMENT

In June 2022, this Court determined that New York's Assembly district map must be redrawn pursuant to Article III, § 5-b, of the New York Constitution. Under Section 5-b and its companion provisions, district maps are adopted by the Legislature with assistance from the Independent Redistricting Commission (the "IRC"). Petitioners, in contrast, argue that only a judge can redraw the Assembly map. The Trial Court disagreed. For several reasons, this Court should affirm.

First, Petitioners' position contradicts itself. Their lawsuit arises from the determination of the New York Court of Appeals that the IRC and the Legislature had failed to follow the constitutionally required redistricting process earlier this year. *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 501 (2022); *accord*, *Matter of Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022). The failure of the process is the only basis for relief asserted in Petitioners' pleadings. Like their submissions before the Trial Court, their opening brief praises the process and condemns the Legislature for not following it. Due to apparent animosity towards the Legislature, however, Petitioners seek to avoid that very same process now. Failure of the process was the harm; commencing the process anew should be the remedy, as the Constitution requires.

Petitioners' position is undemocratic as well as self-contradictory. The People enshrined the mandatory redistricting process in this State's Constitution, with critical roles for both the IRC and the Legislature. They created a framework in which their elected representatives, aided by the IRC, gather data and solicit public input before drawing district lines. Petitioners, by contrast, seek to wrest redistricting out of this framework and place it in the hands of a judge. There is no good reason to do so under the circumstances here.

Finally, Petitioners' position ignores the law. The Constitution's text, as well as longstanding constitutional principles, is clear: the courts may take over the redistricting process only as a last resort. That was the situation in *Harkenrider* — the Court of Appeals ordered an immediate remedy for the 2022 primary elections, which were a mere two months away. There was no time to restart the IRC process, as there is here.

For these reasons, and for the reasons more fully described below, the Trial Court should be affirmed. The IRC and the Legislature, not a judge, should redraw the Assembly district map, as Article III, § 5-b, of the State Constitution prescribes.

STATEMENT OF FACTS

A. Constitutional amendments create a new redistricting process centered on an Independent Redistricting Commission

In 2014, voters ratified amendments to the State Constitution that changed New York's redistricting process. Among the changes was the creation of the IRC, whose structure Article III, § 5-b, of the Constitution governs. Section 5-b(a) provides that the IRC "shall" be convened every ten years "and at any other time a court orders that congressional or state legislative districts be amended."

Once convened, the IRC's job is to propose congressional, Assembly, and State Senate district maps for the Legislature's consideration. During this process, the IRC must hold at least 12 public hearings throughout the State, and it must release "draft redistricting plans, relevant data, and related information" to the public. N.Y. CONST. art. III, § 4(c)(6). After the IRC develops its proposed maps, the Legislature must accept or reject them, without amendment. *Id.* § 4(b). If the Legislature rejects them, or if the Governor vetoes them and the veto is not overridden, then the IRC must propose a second set of proposed maps. *Id.* If this second set is rejected, the Legislature must draft and enact its own maps, "with any amendments each house of the [L]egislature deems necessary." *Id.*

B. The IRC deadlocks on the eve of the 2022 election cycle, so the Legislature enacts its own district maps

After the 2020 Federal Census results were released, the IRC began the redistricting process for the first time. *Harkenrider*, 38 N.Y.3d at 504. The IRC, after failing to reach a consensus, sent the Legislature two sets of proposed maps. *Id.* The Legislature rejected both, obligating the IRC to prepare a second round of maps. *Id.* But in late January 2022, the IRC announced it was deadlocked and, as a result, would not present any additional maps to the Legislature. *Id.* at 504-05. The designating petitioning period for aspiring primary-election candidates, which could not occur until district lines were set, was scheduled to begin about one month later. R. 75.

On February 3, 2022, the Legislature enacted district maps for the Assembly, State Senate, and Congress, and the Governor signed them into law. *Harkenrider*, 38 N.Y.3d at 505.

C. The Court of Appeals invalidates the Congressional and State Senate maps, emphasizing the IRC's central role in the redistricting process

That same day, Tim Harkenrider and others commenced a lawsuit in Steuben County Supreme Court challenging the constitutionality of the Congressional and State Senate maps. *Harkenrider*, 38 N.Y.3d at 505. They did not challenge the Assembly map. *Id.* at 521 n.15.

The lawsuit reached the New York Court of Appeals, which, in April 2022, invalidated the two maps because it held the IRC process had not been followed. The Court stressed that the 2014 constitutional amendments were "aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by [the IRC]." *Harkenrider*, 38 N.Y.3d at 517. To excuse noncompliance with that mandatory process would "violate the plain intent of the Constitution and disregard the spirit and the purpose of the 2014 constitutional amendments." *Id.* (brackets, ellipses, quotation marks, and citation omitted).[1]

Because the petitioners did not challenge the Assembly map, the Court of Appeals left that map in place. *Id.* at 521 n.15.

Regarding remedy, the *Harkenrider* respondents argued that remedial maps should become effective only after the 2022 election cycle, which was already underway. *Id.* at 521. They further invoked State Constitution Article III, § 5, which gives the Legislature a "full and reasonable opportunity to correct … legal infirmities" in a redistricting plan. *Id.* at 523. But the Court of Appeals declined to delay a remedy, and, because of the imminence of the 2022 elections, it concluded it could not allow the Legislature to redraw the Congressional and State

[1] Additionally, the Court of Appeals affirmed the lower courts' finding that the Congressional map was "substantively unconstitutional as drawn with impermissible partisan purpose." *Harkenrider*, 38 N.Y.3d at 521. The lower courts had also determined that the State Senate map was not substantively unconstitutional; the petitioners did not challenge that finding. *Id.* at 507 n.5.

Senate maps. *Id.* at 522-23. The Court explained that "[t]he procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure." *Id.* at 523 (emphasis added).

Accordingly, the Court of Appeals directed Steuben County Supreme Court to adopt remedial Congressional and State Senate maps with the aid of a special master. *Id.* The two remedial maps were adopted on May 20, 2022. R. 456. The Congressional and State Senate primaries were moved to August, and the State's other primaries, including the Assembly primaries, remained scheduled for June. R. 573-74.

D. In an untimely procedural challenge to the Assembly map, Petitioners seek to disrupt the June 2022 primary elections

In early May 2022 — after the Court of Appeals decision, and while the special-master process was ongoing — two of the Petitioners here moved to intervene in *Harkenrider*. R. 483-87, 501-19. They sought to invalidate the Assembly map, postpone the following month's primary elections, and reopen the ballot access process for all elected offices (not just for Assembly seats). R. 486-87, 517-18. The two Petitioners alleged that the Assembly map was unconstitutional due to noncompliance with the IRC process. R. 486, 517. They did not allege that the map was gerrymandered or was otherwise substantively unconstitutional. *Id.*

Steuben County Supreme Court denied the intervention motion as untimely. R. 561. The Court found that entertaining a challenge to the Assembly map at such a late stage, only a month before the primaries, "would create total confusion." R. 560.

Rather than appeal, Petitioners commenced this special proceeding on May 15, 2022, in New York County Supreme Court (the "Trial Court"). R. 25. Again, they alleged that the Assembly map was procedurally unconstitutional, but neither their Petition nor any accompanying affidavit alleged substantive unconstitutionality. R. 53. Like Steuben County Supreme Court, the Trial Court rejected Petitioners' untimely challenge: "Petitioners filed the instant action after falling asleep at the switch in February when others promptly acted with challenges …. [O]nly now — so late in the election calendar — do they seek to upend the entire New York State election process in an impossible manner." R. 1026.

Petitioners attempted to appeal the Trial Court's decision directly to the Court of Appeals. The Court of Appeals, however, transferred the appeal to this Court because "a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved." *Matter of Nichols v. Hochul*, 38 N.Y.3d 1049, 1049 (2022).

E. This Court leaves the Assembly map in place for 2022 but, for future elections, orders a remedial map to be drawn "in accordance with NY Const, art III, § 5-b"

On June 10, 2022, this Court affirmed the Trial Court in part and reversed in part. R. 1033. To the extent Petitioners sought to interfere with the ongoing 2022 elections, their Petition was "barred by the doctrine of laches, given [their] unreasonable and prejudicial delay in bringing [the] proceeding." R. 1032. But this Court held the Assembly map was invalid "based on its procedural infirmity as previously determined by the Court of Appeals in [*Harkenrider*]." R. 1031. Therefore, "upon the formal adoption and implementation of a new legally compliant state assembly map, for use no sooner than the 2024 regular election," this Court ruled that "the February 2022 map will be void and of no effect." R. 1032. The case was remanded to the Trial Court "for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const, art III, § 5-b." R. 1033.

Petitioners again sought review at the Court of Appeals. But the Court again rejected the appeal because "the order appealed from [did] not finally determine the proceeding within the meaning of the Constitution." *Matter of Nichols v. Hochul*, 38 N.Y.3d 1053, 1053 (2022).

F. The Trial Court orders the map to be redrawn through the mandatory constitutional process described in Article III, § 5-b, and its companion provisions

On remand, the Trial Court requested briefing on how the remedial Assembly map should be redrawn. R. 1030. Petitioners argued that "[a] judicial remedy is now the only option," so "the Court should adopt a new Assembly map by appointing a special master to conduct a public and Court-supervised redistricting proceeding." R. 1073, 1088. Respondents, in contrast, contended that the remedial map should be redrawn through the IRC process described in the Constitution. R. 1041, 1069.

The Trial Court also summoned the IRC and solicited the IRC Commissioners' positions. All ten Commissioners, through their attorneys, affirmed that they were prepared to re-commence the constitutional process "expeditiously" and "in good faith." R. 1350-51.[2]

After briefing and oral argument, the Trial Court issued a Decision and Order dated September 29, 2022. In the Decision and Order, the Trial Court denied Petitioners' request for a judge-imposed remedial map. Instead, the Trial Court ordered the IRC to undertake the constitutional process and to develop a remedial Assembly map for the Legislature's consideration. R. 22. It also joined

[2] Two of the ten commissioners had not yet retained an attorney for this lawsuit. R. 1326. But they intended to retain Jessica Ring Amunson, Esq., who already represented three of the commissioners. *Id.* They later did retain Ms. Amunson. *See* NYSCEF Dkt. No. 5.

the IRC members as parties to the lawsuit, thereby obtaining jurisdiction over them. R. 21.

The Trial Court emphasized Article III, § 5-b, of the State Constitution, which this Court had referenced in its June 2022 decision. R. 1033. Section 5-b(a) requires the IRC to be established not only every 10 years, but also "at any other time a court orders that congressional or state legislative districts be amended." R. 13. "Given the amount of time before the next round of New York State assembly designating petitions are due in 2024," the Trial Court wrote, "there is no valid reason to resort to the utterly anti-democratic emergency response necessarily resorted to in *Harkenrider*." R. 20.

The remedy ordered by the Trial Court mirrors the process described in Article III, §§ 4, 5, and 5-b, of the State Constitution. First, the IRC must hold public hearings throughout the State. R. 22. Then, by April 28, 2023, the IRC must submit a proposed Assembly map to the Legislature.[3] *Id.* If that first map is not enacted, the IRC must submit a second proposed map by June 16, 2023. R. 23. And if the second map is not enacted, the Legislature will enact a map "with any

[3] But if "more than one [proposed map] receive[s] the same number of votes for approval, and such number was higher than that for any other plan, then the [IRC] shall submit all plans that obtained such number of votes [to the Legislature]." R. 23. *Accord*, N.Y. CONST. art. III, § 5-b(g).

amendments each house … deems necessary," as provided by the Constitution. R. 23-24; N.Y. CONST. art. III, § 4(b).

The Trial Court retained jurisdiction over this special proceeding and over "any challenges to the procedures of the legislature, the procedures of the [IRC] and/or the resulting assembly map." R. 24.

ARGUMENT

POINT I

THE TRIAL COURT SHOULD BE AFFIRMED

In its June 2022 decision, this Court remanded to the Trial Court "for consideration of the proper means for redrawing the state assembly map, *in accordance with NY Const, art III, § 5-b*." R. 1033 (emphasis added). Section 5-b(a), in turn, provides that the IRC "shall be established" at the beginning of each decade "and at any other time a court orders that congressional or state legislative districts be amended." Further, § 5-b(g) requires the IRC to submit its proposed district maps to the Legislature, which must consider the proposed maps "in accordance with the voting rules set forth in [Article III, § 4(b)]."

This Court was correct: under § 5-b, which incorporates § 4, the Assembly map must be redrawn by the IRC and Legislature pursuant to the constitutional process. That determination is binding as the law of the case. *See N.H. Ins. Co. v. MF Global Fin. USA Inc.*, 204 A.D.3d 141, 151 (1st Dep't 2022)

("An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court, and operates to foreclose re-examination of the question.") (brackets, ellipses, and citation omitted); *Bd. of Mgrs. of 25 Charles St. Condominium v. Seligson*, 106 A.D.3d 130, 135-36 (1st Dep't 2013) (invoking law-of-the-case doctrine and holding that "[b]ased on our prior determination [of one issue], defendant is now limited to challenging [another issue].").

At oral argument before the Trial Court, Petitioners' counsel tried to downplay this Court's reference to § 5-b as possibly a "mistake" and as a "small little reference." R. 1282, 1339. He also insisted twice that § 5-b "does not apply" here, despite this Court's express invocation of that Section in its remand order. R. 1283, 1291. But even ignoring the law-of-the-case doctrine, as Petitioners would like this Court to do, the Trial Court should be affirmed. The State Constitution's text, the reasoning of the Court of Appeals in *Harkenrider*, and the other considerations explained below dictate that the full IRC process enshrined by the People should receive another chance to succeed.

A. The State Constitution's text requires the Assembly map to be redrawn through the mandatory constitutional process

Petitioners argue that the Trial Court's decision "conflicts with the plain text of Article III [of the State Constitution]." Petitioners' Brief dated

November 7, 2022, at p. 14 ("Pet. Br. ___"). In fact, the opposite is true. The State Constitution compelled the Trial Court to reconvene the IRC.

A key provision is Article III, § 4(e). It provides that "[t]he process for redistricting congressional and state legislative districts established by [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" (emphasis added). Those two words — "shall" and "required" —are as critical as they are unambiguous. They mean redistricting must occur pursuant to the IRC process, with the Legislature approving, rejecting, or amending the IRC's proposed maps. A court may order a deviation from this mandatory process only as a last resort.

Here, deviation from the IRC process is unnecessary. Because Petitioners waited until the middle of the election cycle to challenge the Assembly map, this Court deferred a remedy until 2024 at the earliest. R. 1032. More than a year remains between now and then — ample time for the IRC process to run its course, especially given that the IRC already possesses the "draft redistricting plans, relevant data, and related information" it used in late 2021 and early 2022. N.Y. CONST. art. III, § 4(c). Contrast *Harkenrider*, in which the petitioners timely challenged the congressional and State Senate maps. 38 N.Y.3d at 505. The Court of Appeals imposed a remedy there for the 2022 elections, leaving no time to

restart the IRC process. *Id.* at 522. Thus, a deviation from the process was "required" in *Harkenrider*, but it is not required here.

A second constitutional provision compels a reconvening of the IRC: Article III, § 5-b, which this Court expressly referenced in its June decision. R. 1033. Under that section's first sentence, the IRC "shall be established" at the beginning of each decade "and at any other time a court orders that congressional or state legislative districts be amended." So when, as here, a court orders the amendment of Assembly districts, those districts must be redrawn through the IRC process (unless a court is "required" to order a different remedy pursuant to § 4(e), as in *Harkenrider*).

In an effort to escape § 5-b, Petitioners maintain that "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)." Pet. Br. 20-21. Not so. This Court did not void the Assembly map — it ordered that the map "will be void" at some later date "upon the formal adoption and implementation of a new legally compliant state assembly map." R. 1032. Indeed, the current Assembly map governed the November 2022 elections, so it was obviously not voided by this Court in June 2022. And even if the map were void, the remedial map will still be an amendment. Redistricting is necessarily a process of amending preexisting

maps, given that the IRC must, at least to some extent, attempt to maintain the cores of previous districts. N.Y. CONST. art. III, § 4(c)(5).

Petitioners attempt to escape § 5-b(a) in a second way: by arguing that a court cannot reconvene the IRC once certain constitutional deadlines have passed. Pet. Br. 16. But those deadlines must be interpreted "harmoniously" with the other applicable constitutional provisions, as Petitioners acknowledge. Pet. Br. 21 n.9 (*quoting People* ex rel. *McClelland v. Roberts*, 148 N.Y. 360, 367 (1896)). *See also Flushing Nat'l Bank v. Mun. Assistance Corp*., 40 N.Y.2d 731, 759 (1976) ("In construing the Constitution, it is to be read as a whole and every relevant provision of it is to be construed."). When harmoniously interpreted, it is apparent that the deadlines apply only to the normal, decennial redistricting process. They do not apply when "a court orders that … legislative districts be amended" after the deadlines pass. N.Y. CONST. art. III, § 5-b(a). Any other interpretation would render §§ 4(e) and 5-b(a) meaningless.[4] Consequently, the Trial Court did not truly "modify constitutional deadlines," as Petitioners assert. Pet. Br. 3. Rather, it created reasonable deadlines to implement a remedy required by the Constitution. [5]

[4] The same reasoning applies to the requirement that State Senate and Assembly maps be enacted in a single bill. Pet. Br. 20; N.Y. CONST. art. III, § 4(b). This requirement does not apply if only one of the two maps must be redrawn. In any event, the Legislature could comply with this inapplicable requirement here by enacting the new Assembly map together with the remedial State Senate map imposed in the *Harkenrider* litigation.

[5] In a footnote to their brief, Petitioners now contend that appointment of a special master is optional, as long as it is the court, rather than the Legislature, that enacts the new Assembly map.

B. The Decisions in *Harkenrider* are consistent with the Trial Court's Order

Petitioners assert that the "precise holding of *Harkenrider*" requires a court, not the Legislature, to adopt the remedial Assembly map. Pet. Br. 17. Just as Petitioners misinterpret the Constitution, however, they also misinterpret *Harkenrider*.

Simply put, the circumstances in *Harkenrider* were different from the circumstances here, so that decision's "precise holding" is not on point. In *Harkenrider*, the Court of Appeals ordered an immediate remedy for the 2022 elections, whose primaries were only a few months away. 38 N.Y.3d at 522. The respondents did not argue the IRC should be reconvened. Instead, they requested an opportunity for the Legislature to unilaterally correct the Congressional and State Senate maps' defects. *Id.* at 523. The Court of Appeals denied that request because the Legislature had no ability to unilaterally fix the procedural defect (*i.e.*, the IRC's failure to submit a second set of redistricting maps). *Id.* Again, the circumstances here are different.

To the extent that *Harkenrider* is relevant to this lawsuit, it supports Respondents, not Petitioners. As the Trial Court wrote, "the vital foundational

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See Pet. Br. at 10, n.3. Petitioners' new suggestion, like their prior demand for a special master, ignores that, as the Trial Court correctly recognized, the appropriate remedy is not for the court to redraw the map, but to mirror as closely as possible the procedure set out in Article III, §§ 4 and 5-b, of the New York Constitution.

argument" of *Harkenrider* is the importance of the IRC process. R. 18. The process is so important ("a central requirement of the reform amendments") that noncompliance justified an unprecedented remedy: postponing the Congressional and State Senate primaries, striking down maps drawn by the People's representatives, and handing redistricting authority to a judge. *Harkenrider*, 38 N.Y.3d at 517. The 2014 constitutional amendments, according to the Court of Appeals, were "aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by [the IRC]." *Id.* After reaffirming that the Legislature "retains the ultimate authority to enact districting maps upon completion of the IRC process," the Court determined that "the constitutional reforms were clearly intended to promote fairness, transparency, and bipartisanship by requiring … that the IRC fulfill a substantial and constitutionally required role in the map drawing process." *Id.* at 516. For these reasons, a remedy rendering the IRC process "inconsequential" would "violate the plain intent of the Constitution and disregard the spirt and the purpose" of the 2014 amendments. *Id.* at 517 (brackets, ellipses, and citation omitted).

The same principles resonate here. Petitioners insist that this Court should override the IRC process, and that a judge should take the Legislature's place in that process. But as Judge Troutman wrote in her *Harkenrider* dissent, "[t]he citizens of the state are entitled to a resolution that adheres as closely to the

constitutional process as possible." *Harkenrider*, 38 N.Y.3d at 527.[6] The remedial Assembly map should be redrawn as the People envisioned when they ratified the 2014 amendments: through the all-important IRC process, in which the Legislature has a key role.

Significantly, in *Harkenrider*, both the Supreme Court and the Appellate Division recognized that the Legislature is required to be given a role in rectifying the constitutional infirmities found by those Courts with respect to the redistricting maps.

The Supreme Court's Order stated (capitalization in original):

> ORDERED, ADJUDGED, and DECREED that *the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps* to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements; and it is further
>
> ORDERED, ADJUDGED, and DECREED that *in the event the Legislature fails to submit maps* that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps.

76 Misc. 3d 171, 194 (Sup. Ct. Steuben County 2022) (emphases added).

Similarly, the Appellate Division ordered as follows:

[6] Although Judge Troutman's statement was written in a dissent, the principle expressed therein is one with which the entire Court would agree. The only reason that the Court majority concluded it could not send the Congressional and State Senate maps back to the IRC and Legislature was because of the imminence of the 2022 elections. As the Court majority explained, "[t]he procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure." 38 N.Y.3d at 523 (emphasis added).

> [W]e conclude that *the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities*. Consistent with this Court's prior order entered upon respondents' motion to stay Supreme Court's order pending this appeal, *the legislature has until April 30, 2022 to enact a constitutional replacement for the congressional map*.

204 A.D.3d 1366, 1375 (4th Dep't 2022) (emphases added).

Indeed, the only reason that the Court of Appeals did not give the Legislature a first opportunity to correct the constitutional infirmities in the Congressional and State Senate maps was because, by the time of that Court's decision, there was no longer sufficient time to do so in light of the impending election. As the Court of Appeals explained, "[t]he procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure." 38 N.Y.3d at 523 (emphasis added).

C. A judicial takeover of redistricting is a last-resort remedy that is unnecessary here

Courts have long recognized that redistricting plans developed in accordance with the State's redistricting process are favored over court-imposed plans. *E.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) ("[T]o prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process."); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[I]t is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional

requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."); In re *Orans*, 15 N.Y.2d 339, 352 (1965) ("[T]he Legislature is under an obligation to reapportion and . . . courts move in only as a last resort."). *See also Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it."); *Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992) ("It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people.").

This preference for legislative corrective action is expressly enshrined in the New York State Constitution:

> In 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 this article shall be invalid in whole or in part. *In the event that a court finds such a violation the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities*.

N.Y. CONST. art. III, § 5 (emphasis added).

For this reason, as noted above, in the *Harkenrider* litigation, Supreme Court and the Appellate Division both would have afforded the Legislature an opportunity to re-draw the substantively unconstitutional Congressional district map. *See supra* pp. 19-20. The Court of Appeals declined

to do so only because "[t]he procedural unconstitutionality of the congressional and senate maps [was], *at this juncture*, incapable of a legislative cure." *Harkenrider*, 38 N.Y.3d at 523 (emphasis added).

It is a fundamental principle of law that "[b]alancing the myriad requirements [for enacting legislative districts] imposed by both the State and the Federal Constitution is a function entrusted to the Legislature." *Wolpoff*, 80 N.Y.2d at 77-80. As recognized long ago, "the presumption lying at the foundation of representative government is that the Legislature will act wisely, and in the interests of all of the people." *Viemeister v. White*, 88 A.D. 44, 46, 84 N.Y.S. 712, 714 (2d Dep't 1903), *aff'd*, 179 N.Y. 235 (1904). *See also Salsburg v. State of Maryland*, 346 U.S. 545, 554, (1954) ("It is … a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole.").

Petitioners seek to upend the long-standing principle that the popularly elected Legislature is the arm of government that best expresses the will of the People. Petitioners ask this Court to presume that a majority of the members Legislature would knowingly and deliberately violate their oaths to "support the constitution of the United States, and the constitution of the State of New York,"

see N.Y. CONST. art. XIII, § 1, by adopting a state Assembly map they know to be substantively unconstitutional.

Redistricting involves balancing different, and sometimes competing, concerns. It is a fallacy to believe that a court-appointed special master — or any one person — can be completely neutral in devising a State Assembly map. Any special master will necessarily bring to the task of redistricting his or her own personal experience, values, and even prejudices, which is why no two persons, if named as special master, would design exactly the same map.

The differing concerns in fashioning a legislative map are best balanced by having a representative group of persons develop it. The IRC is designed by Article III, § 5-b, of the New York Constitution to be that group. Ultimately, however, the group of persons who best represent the differing and competing concerns in drawing a legislative map are the persons selected by the people as their elected representatives, *i.e.*, the Legislature. Simply put, the Trial Court was correct: Petitioners' proposed remedy here is "utterly anti-democratic" and should be imposed only as a last resort "emergency response." R. 20.

D. This Court should reject Petitioners' additional arguments

1. Petitioners' eleventh-hour gerrymandering allegation does not justify circumventing the mandatory constitutional process

The *Harkenrider* petitioners felt no need to challenge the Assembly map, and no court has found that map to be substantively flawed. Even so, at this

late stage of the 2020 redistricting cycle, Petitioners now allege that the Assembly map was unconstitutionally drawn "to protect incumbents." Pet. Br. 15. They further assert that, due to this supposed infirmity, this Court must remove the Legislature from its constitutional role in the IRC redistricting process. *Id.* Petitioners' arguments, however, are waived, flawed, and irrelevant.

First, and most important, Petitioners' gerrymandering allegation is irrelevant. It is unclear why they attack a map this Court already deemed unconstitutional. But they seem to argue that, because the Legislature supposedly gerrymandered the Assembly map, it cannot be trusted to play a role in drawing the remedial map. As they themselves acknowledge, however, the Constitution guarantees the Legislature a "full and reasonable opportunity" to *unilaterally* remedy a gerrymandered map. Pet. Br. 16 (*quoting* N.Y. CONST. art. III, § 5). Logically, then, a last-minute gerrymandering allegation cannot bar the Legislature from enacting a map at the conclusion of the IRC process.

In any event, Petitioners waived the argument by not raising it until months after the litigation began. Their Petition and accompanying affidavits allege procedural unconstitutionality only, with no allegation of gerrymandering or any other substantive flaw. R. 53. During oral argument before the Trial Court in May, Petitioners' counsel was "crystal clear" that his clients were not alleging substantive unconstitutionality (R. 994-95, capitalization in original):

> THE COURT: [I]s your only claim to strike the Assembly map[ ] and to do the other items based upon the perceived procedural unconstitutionality or are you seeking a claim that there are issues in terms of potential gerrymandering …?
>
> MR. WALDEN: Your Honor, to be crystal clear, again, I'm sorry if I wasn't crystal clear before, the issue here is what everybody here is referring to as procedural unconstitutionality.

Petitioners' newfound substantive claim is not only waived — it is flawed, as well. It relies on the report of their purported expert from Colorado, Dr. Jeanne Clelland, whom Petitioners first revealed in August 2022. R. 1090. Because of Petitioners' 11th-hour submission of a purported expert report, Respondents had no opportunity to cross-examine Dr. Clelland or to retain a rebuttal expert. In any event, the November 2022 election results contradict Petitioners' conclusion that the Assembly map protects incumbents.[7] Various Assembly incumbents, including 30-year incumbent Steve Englebright, lost their seats under this supposedly protective map. Incumbents performed comparably

[7] Petitioners' assumption that the Assembly map somehow guarantees the reelection of incumbents ignores political realities. No two Legislatures are ever likely to be identical. Assembly members and State Senators regularly leave office via, *e.g.*, retirement, death, appointment to other office — and, as the political winds are always changing, by defeat at the polls.

under the Court-imposed State Senate map as they did under the Legislature-drawn Assembly map.[8]

2. The *Hoffmann* lawsuit is materially different from this one

In a footnote spanning two pages, Petitioners discuss *Matter of Hoffmann v. New York State Independent Redistricting Commission*, Albany County Supreme Court Index Number 904972-22. Pet. Br. 11-12 n.4. That case, like *Harkenrider*, arose from very different circumstances than those at issue here. The *Hoffmann* petitioners sought to resume the IRC process to draw a remedial map for New York's Congressional districts — even though Steuben County Supreme Court had already imposed a remedial Congressional map in the *Harkenrider* litigation. R. 1256, 1259. In *Hoffmann*, Albany County Supreme Court held that the already-imposed remedial map will be effective until the decennial redistricting process that will follow the 2030 Census; "there is no authority" under the New York Constitution (at least according to the *Hoffmann* Court) for the development of a second remedial map. R. 1265. Here, by contrast, the IRC process will produce the first and only remedial Assembly map; it will replace a map this Court has ruled unconstitutional. In short, the outcome in *Hoffmann* is irrelevant to what the outcome should be here.

[8] Bobby Cuza, *Republicans chip away at Assembly Democratic majority, fall short of state Senate expectations*, Spectrum News (Nov. 9, 2022), available at https://www.ny1.com/nyc/all-boroughs/politics/2022/11/10/republicans-chip-away-at-assembly-democratic-majority--fall-short-of-state-senate-expectations (last visited Nov. 19, 2022).

Petitioners do not seriously dispute this. Instead, they dwell on arguments made by five IRC members in *Hoffmann*, claiming those arguments contradict their position here. Pet. Br. 11-12. First and foremost, any supposed inconsistency in their arguments does not matter. What matters is the Constitution and its application to this litigation. For what it's worth, however, the attorney for those IRC members explained before the Trial Court that "there is not an inconsistency in positions." R. 1323, 1350. And those members, through their attorney, did not object to the relief Petitioners requested here. R. 1351.

3. Restarting the process will not incentivize future gerrymandering

Petitioners insist that restarting the IRC process will "encourage further gerrymandering attempts in the future" and "allow the Legislature to effectively re-adopt the invalid Assembly map with no consequence." Pet. Br. 15, 22. This is nonsense.

For one thing, the IRC and Legislature cannot adopt a gerrymandered map "with no consequence." Petitioners may bring a substantive challenge when the constitutional process is complete. The Trial Court, in fact, expressly acknowledged that possibility. R. 20-21. It also crafted deadlines that leave time for a potential substantive challenge before the 2024 elections. R. 23. Based on those deadlines, the new map will be in place by the summer of 2023 — some six months before the 2024 designating petitioning period begins. *Id.* For

comparison, the *Harkenrider* litigation began less than one month before 2022 petitioning began. R. 75.

Moreover, it is unclear how the remedy in this case could possibly "encourage" gerrymandering in future decades. As *Harkenrider* demonstrates, failure to comply with the constitutional process will result in a court-imposed map — so long as a procedural challenge is timely brought. And if a map is gerrymandered in the future, it will be invalidated under Article III, § 4, of the New York Constitution. *See Harkenrider*, 204 A.D.3d at 1375 (invalidating congressional map based on substantive unconstitutionality). In short, Petitioners' contention here is utterly without merit.

4. Restarting the process is not futile, and it will serve an important democratic function

Before the Trial Court, Petitioners argued the IRC will inevitably deadlock again, so restarting the constitutional process would be pointless. R. 1334, 1340, 1356. They apparently abandon that argument on appeal. For good reason — the IRC is more likely to reach an agreement this time.

For one thing, *Harkenrider* changed the negotiating landscape. Before *Harkenrider*, a statute allowed the Legislature to draw the legislative-district maps if the IRC deadlocked. *Harkenrider*, 38 N.Y.3d at 512. But *Harkenrider* invalidated that statute, and the Trial Court made clear it will impose an Assembly map if the IRC process fails again. *Id.* at 517; R. 21. Moreover, the

Court of Appeals in *Harkenrider* endorsed several types of judicial intervention, including a mandamus proceeding, that could prevent deadlock this time. 38 N.Y.3d at 515 n.10.

Additionally, only the Assembly map is at issue this time, and the current Assembly map received bipartisan support. R. 776-837. Former IRC Chair David Imamura recently stated that "if we are only looking at the Assembly maps, I think there is room for a compromise."[9] His replacement on the IRC, Ken Jenkins, expressed similar optimism: "At the end of the day, there's going to be a few areas around the state that have some challenges, but those challenges can be overcome through compromise. I'm looking forward to working together to do that."[10] The IRC, in fact, has already made great progress during the pendency of this appeal: on December 1, Republican and Democratic IRC members approved a single proposed Assembly map. Public hearings based on that bipartisan map begin in January.[11]

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[9] Kate Lisa, *Clashing arguments push court to choose author of new Assembly lines*, Spectrum News (Aug. 9, 2022), available at https://spectrumlocalnews.com/nys/central-ny/politics/2022/08/10/arguments-push-court-to-choose-author-of-new-assembly-lines (last visited Nov. 19, 2022).

[10] Kate Lisa, *Redistricting commissioners start Assembly maps, say they'll make court deadline*, Spectrum News (Nov. 18, 2022), available at: https://spectrumlocalnews.com/nys/central-ny/politics/2022/11/19/redistricting-commissioners-start-assembly-map--say-they-ll-make-court-deadline (last visited Nov. 23, 2022).

[11] Nick Reisman, *New York's redistricting panel advances new proposed map for state Assembly*, Spectrum News (Dec. 1, 2022), available at

Finally, allowing the IRC and Legislature to try again will serve a critical democratic function. This is a golden opportunity — an experiment to demonstrate whether, given the lessons of *Harkenrider*, the IRC process can work. The People deserve the results of this experiment before deciding whether and how to reform the redistricting process for 2030.

CONCLUSION

Restarting the IRC process, and preserving the Legislature's role in that process, is required by the 2014 constitutional amendments and by longstanding constitutional principles, and it is also consistent with the decisions in *Harkenrider*. The Trial Court should be affirmed.

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https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/12/01/new-york-s-redistricting-panel-advances-new-proposed-map-for-state-assembly (last visited Dec. 3, 2022).

Dated: New York, New York
December 7, 2022

GRAUBARD MILLER

By: _____
C. Daniel Chill
Elaine Reich
The Chrysler Building
405 Lexington Avenue, 11th Floor
New York, New York 10174
Telephone No. (212) 818-8800
dchill@graubard.com
ereich@graubard.com

Dated: Buffalo, New York
December 7, 2022

PHILLIPS LYTLE LLP

By: _____
Craig R. Bucki
Steven B. Salcedo
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400
cbucki@phillipslytle.com
ssalcedo@phillipslytle.com

Dated: New York, New York
December 7, 2022

CUTI HECKER WANG LLP

By: _____
Eric Hecker
Alexander Goldenberg
Alice G. Reiter
305 Broadway, Suite 607
New York, New York 10007
Telephone No. (212) 620-2600
ehecker@chwllp.com
agoldenberg@chwllp.com
areiter@chwllp.com

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