SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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Anthony S. Hoffmann; Marco Carrión; Courtney Gibbons; Lauren Foley; Mary Kain; Kevin Meggett; Clinton Miller; Seth Pearce; Verity Van Tassel Richard; and Nancy Van Tassel,

Index No. 904972-22

Petitioners,

-against-

The New York State Independent Redistricting Commission, *et al.*,

Respondents

-and-

Tim Harkenrider; Guy C. Brought; Lawrence Canning; Patricia Clarino; George Dooher, Jr.; Stephen Evans; Linda Fanton; Jerry Fishman; Jay Frantz; Lawrence Garvey; Alan Nephew; Susan Rowley; Josephine Thomas; and Marianne Violante,

Intervenors-Respondents.

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HARKENRIDER INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

Proposed Intervenors[1] successfully challenged the Legislature's gerrymandered congressional map early this year, resulting in a Court of Appeals decision "endors[ing]" a process of "judicial oversight of remedial action in the wake of [the] determination of unconstitutionality." *Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822, at *12 (N.Y. Apr. 27, 2022). The Steuben County Supreme Court followed the Court of Appeals' instructions, adopting a remedial map that even the Court of Appeals' dissenting Judges understood will govern congressional elections "for the next 10 years." *Id.* at *14 (Troutman, J., dissenting in part). Petitioners in the present case opposed that result before the Steuben County Supreme Court in May 2022—asking that court to override the Court of Appeals' remedial decision and to limit the remedial map to govern only the 2022 elections—but the Steuben County Supreme Court correctly declined to do so. Petitioners now remarkably come to this Court, asking months later for this Court to launch a process to replace a congressional map that a different court adopted. This Court should dismiss this deeply insulting, improper lawsuit for at least three reasons:

First, Petitioners' lawsuit is an impermissible collateral attack on the Steuben County Supreme Court's judgment in *Harkenrider*. That court adopted a final congressional map for the next decade, while rejecting Petitioners' request that it limit the map's operation to just the 2022 elections. Petitioners' present lawsuit asks this Court to insult the Steuben County Supreme Court and undermine the comity within New York's judicial system by undoing that judgment in this different forum, which is plainly impermissible. If Petitioners want to seek any such relief, they must go back to the Steuben County Supreme Court.

[1] 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.

Second, and in any event, the relief that Petitioners seek would violate the New York Constitution. As the Court of Appeals explained in *Harkenrider*, a failure of the Independent Redistricting Commission ("IRC") process after the IRC's constitutional end date is not remediable through the IRC/legislative processes. Instead, the only permissible constitutional remedy is a court "order[ing] the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e); *see Harkenrider*, 2022 WL 1236822, at *12. The Steuben County Supreme Court already remedied the unconstitutional map that the Legislature attempted to adopt in February 2022, and that map governs New York's congressional elections until the next decennial redistricting. Petitioners' request that this Court reconstitute the now-constitutionally-disabled IRC and adopt yet another map is clearly unconstitutional.

Finally, and at minimum, Petitioners' Article 78 Petition is patently untimely. The IRC announced that it would miss the constitutional deadline to submit second-round maps to the Legislature on January 24, 2022, and the IRC's authority to submit such maps expired on February 28, 2022. Thus, if Petitioners wanted relief in the form of mandamus to compel the IRC to reverse course, they should have filed this lawsuit immediately after January 24, 2022. Because Petitioners decided to wait, the practical problems with their requested relief have mushroomed, including because the IRC apparently no longer has all ten constitutionally mandated commissioners. Indeed, given Petitioners' delay, their requested remedy would be practically impossible until at least mid-2023, under even the most optimistic timeframe, and the timeline is likely to be far longer than that.

This Court should thus dismiss Petitioners' Article 78 Petition For A Writ Of Mandamus.

BACKGROUND[2]

A. The 2014 Anti-Gerrymandering Amendments Set Up An Exclusive, Carefully Crafted Redistricting Process

Before 2014, partisanship and political interests ruled the redistricting process. *See Harkenrider*, 2022 WL 1236822, at *1. Courts interpreted extant provisions of the New York Constitution as not barring partisan gerrymandering, *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280, 284 (2d Dep't 1984), thereby giving politicians carte blanche to draw lines for political gain.

In 2014, the People rejected this failed regime by amending Article III, Sections 4 and 5 of the New York Constitution, and adding a new Section 5-b to the same Article (collectively, "the 2014 Amendments"), "significantly alter[ing] both substantive standards governing the determination of district lines and the redistricting process established to achieve those standards," in order to "introduce a new era of bipartisanship and transparency." *Harkenrider*, 2022 WL 1236822, at *2. Under the 2014 Amendments, the Constitution now vests primary redistricting responsibility in the newly created IRC and establishes procedural and substantive safeguards against gerrymandering. N.Y. Const. art. III, §§ 4(c)(5), 5-b. The Constitution lays out a mandatory process that "*shall govern* redistricting in this state," meaning that redistricting cannot take place outside of this process. *Id.* § 4(b), (e) (emphasis added).

Under the 2014 Amendments, the IRC only has constitutional authority to act following each decennial census for the purpose of drawing new districts, with the sole exception being that the IRC may "amend[ ]" district maps in response to a court order. *Id.* §§ 4, 5-b. "On or before February first of each year ending with a zero," the New York Constitution requires the

[2] For simplicity, this section is essentially identical to the background section in Proposed Intervenors' Memorandum of Law In Support of Motion for Leave to Intervene.

establishment of the 10-member IRC, which comprises two members each appointed by the Temporary President of the Senate, the Speaker of the Assembly, the Senate Minority Leader, and the Assembly Minority Leader, and two members appointed by a vote of the politically appointed members. *Id.* § 5-b(a)(1)–(5); *see also Harkenrider*, 2022 WL 1236822, at *5. Thereafter, these ten members must hold twelve public hearings throughout the State, accepting public comments and suggestions on what districts should look like, N.Y. Const. art. III, § 4(c); *Harkenrider*, 2022 WL 1236822, at *5, and then "prepare a redistricting plan to establish senate, assembly, and congressional districts every ten years commencing in two thousand twenty-one," N.Y. Const. art. III, § 4(b). The IRC must submit to the Legislature an initial set of maps and the necessary implementing legislation "as soon as practicable," but in no event "later than January fifteenth in the year ending in two beginning in two thousand twenty-two," after which the Legislature votes on the maps and implementing legislation as provided, without any amendment. *Id.* § 4(b). If the Legislature fails to adopt this first set of maps and implementing legislation, or if the Governor vetoes adopted implementing legislation, then the redistricting process reverts to the IRC. *Id.* § 4(b). The IRC must then submit a second set of maps and implementing legislation to the Legislature, subject to the requirements outlined above, at least "[w]ithin fifteen days" of notification of the first rejection, but "in no case later than February twenty-eighth." *Id.* § 4(b). The Legislature then votes on the second set of proposed maps and implementing legislation, without any amendment. *Id.* § 4(b); *see also Harkenrider*, 2022 WL 1236822, at *2. Only then, if the Legislature fails to adopt the IRC's second set of maps and implementing legislation, or if the Governor vetoes the second adopted implementing legislation, can the Legislature amend the IRC's proposed maps and enact its own maps. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1). Outside of this every-ten-years process, the Constitution only gives the IRC the

constitutional authority to act in one particular instance: if "a court orders that congressional or state legislative districts be *amended*." N.Y. Const. art. III, § 5-b(a) (emphasis added).

If the constitutional deadline for the IRC to submit a second redistricting plan passes without the IRC sending to the Legislature new maps for a second vote, or if there are any other procedural or substantive infirmities in purportedly enacted redistricting legislation, "any citizen" may file suit in the Supreme Court for "review" of the "apportionment." *Id.* § 5. The Constitution requires that the Supreme Court "give precedence" to the redistricting lawsuit "over all other causes and proceedings," and mandates that the Supreme Court "render its decision within sixty days after a petition is filed." *Id*. Upon any showing of a "violation of law" in the enactment of redistricting legislation, the Constitution "require[s]" a reviewing court "to order the adoption of, or changes to, a redistricting plan as a remedy." *Id.* § 4(e). It is only when the reviewing court finds a correctable violation of the constitutional redistricting requirements that "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities," *id.* § 5, whereas when a court determines that there have been procedural infirmities after the conclusion of the timeline for IRC and legislative enactment, the Constitution does not permit giving the Legislature a chance to fix them, because "the legislature is incapable of unilaterally correcting the infirmity," *Harkenrider*, 2022 WL 1236822, at *12 n.19.

B. The Legislature Violates The Anti-Gerrymandering Amendments By Attempting To Enact A Partisan Gerrymandered Congressional Map Outside Of The Amendments' Exclusive Process

In January 2022, the IRC submitted two initial redistricting plans to the Legislature, which plans the Legislature rejected out-of-hand, without even holding any hearings. 2021–2022 N.Y. Reg. Sess. Leg. Bills A.8587, A.8588, A.8589, A.8590, S.7631, S.7632, S.7633, S.7634; *see also Harkenrider*, 2022 WL 1236822, at *2. The IRC subsequently failed to submit revised maps to the Legislature by the constitutional deadline, and announced on January 24, 2022, that it was

deadlocked and would not submit a second redistricting plan to the Legislature. *Harkenrider*, 2022 WL 1236822, at *2. Nevertheless, the Legislature unconstitutionally attempted to enact its own 2022 congressional redistricting map, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A (as technically amended by A.9167), A.9040-A, A.9168, even though it had no authority to do so under the New York Constitution, *Harkenrider*, 2022 WL 1236822, at *5–7. Further, as Proposed Intervenors proved, the map that the Legislature tried to enact outside of New York's constitutional processes was substantively unconstitutional because it was drawn "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5); *see Harkenrider*, 2022 WL 1236822, at *9–11.

C. Proposed Intervenors Successfully Challenge The Legislature's Unconstitutional Maps in *Harkenrider v. Hochul*

Proposed Intervenors challenged the congressional map in Steuben County Supreme Court on the very same day it was enacted, *see Harkenrider* No.1,[3] and the new state Senate map days later, *Harkenrider* No.18. Proposed Intervenors alleged that the congressional map was both procedurally invalid because the Legislature did not follow the exclusive process for adopting replacement redistricting maps set out in Sections 4 and 5 of Article III of the New York Constitution, *see id.* at 73–75; N.Y. Const. art. III, §§ 4–5, and an unconstitutional partisan gerrymander, in violation of Article III, Section 4(c)(5) of the New York Constitution, *see Harkenrider* No.18 at 77–78.

After a three-day trial, the Supreme Court issued its decision on March 31, 2022, within the expedited 60-day window for redistricting challenges. N.Y. Const. art. III, § 5. The court first held that the Legislature failed to follow the exclusive process for enacting replacement maps.

[3] All citations to filings in *Harkenrider v. Hochul*, Index No.E2022-0116CV (Steuben Cnty. Sup. Ct.), may be found at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all. Such documents will be cited as "*Harkenrider* No.XX."

Harkenrider No.243 at 10. Because "the IRC failed to act and submit a second set of maps," the Legislature constitutionally could not step in to draw its own maps. *Id.* The court also held that the congressional map was unconstitutionally gerrymandered beyond a reasonable doubt. *Id.* at 10, 14. The defendants appealed the Supreme Court's decision to the Appellate Division, Fourth Department, which reversed the conclusion of procedural invalidity but affirmed the substantive-violation holding. *Harkenrider v. Hochul*, 204 A.D.3d 1366, 1366–75 (4th Dep't 2022).

The Court of Appeals, ruling on the parties' cross-appeals, then concluded that the congressional map was both procedurally and substantively unconstitutional, and that the congressional map's procedural unconstitutionality was "incapable of a legislative cure." *Harkenrider*, 2022 WL 1236822, at *12. The Court held "the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional," and also found the congressional map to be "substantively unconstitutional as drawn with impermissible partisan purpose," ordering the Supreme Court to adopt new maps. *See Id.* at *11, 13. On the process, the Court held that the Constitution established a single, "constitutionally mandated procedure," which "permits the legislature to undertake the drawing of district lines only after two redistricting plans composed by the IRC have been duly considered and rejected," and which "drawing" would amount only to "'amendments' to such plan, not the wholesale drawing of entirely new maps." *Id.* at *5–6 (emphasis omitted) (quoting N.Y. Const. art. III, § 4(b)). Dissenting in part, Judge Troutman observed that the majority's decision results in a judicially adopted "electoral map" "for the next 10 years." *Id.* at *14 (Troutman, J., dissenting in part). Judge Troutman agreed with the majority that the maps were unconstitutional but believed "the legislature should be ordered to adopt one of the IRC-approved plans on a strict timetable." *Id.* at *13. The majority rejected this

suggestion, pointing out that the Legislature rejected the IRC's initial maps and "the deadline in the Constitution for the IRC to submit a second set of maps has long since passed. *Id.* at *8–9, 12.

D. On Remand In *Harkenrider v. Hochul*, The Supreme Court Adopts A Remedial Congressional Map That Will Govern For The Next Decade, Over The Objections Of Petitioners In The Present Case

On remand, the Supreme Court began the process of adopting a "final enacted [congressional] map[ ]." *Harkenrider* No.696 at 1; *see Harkenrider* No.670. To aid in its creation of preliminary and final maps, the court offered the parties and any other interested persons the opportunity to submit proposed remedial maps, and all interested persons had the opportunity to appear and give public testimony on proposed maps before the Steuben County Supreme Court and the court's appointed Special Master. With the aid of the voluminous testimony submitted to the IRC and the thousands of additional comments submitted to the court, the Special Master drafted preliminary remedial maps.

Several of the Petitioners in the present case—Courtney Gibbons, Lauren Foley, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel—represented by many of the same attorneys as in this case, raised objections to the Special Master's proposed map and urged that the map only govern the 2022 congressional elections. *See* Affirmation of Bennet Moskowitz ("Moskowitz Aff."), Ex.1. In particular, these Petitioners criticized the Supreme Court's process, claiming it "did not provide the public, including minority voters who live in historically marginalized communities, with an opportunity to provide input." *Id.* at 1. They also raised what they claimed were several "serious concerns" they had with the Special Master's proposed congressional map, including that it would break up communities of interest. *Id.* at 1–10. These Petitioners urged the Supreme Court "to ensure that the map drawn by the Special Master only be used for the 2022 congressional election," after which, the Supreme Court should "require the elected representatives of the people—who are best equipped to consider the interests of local

populations and to weigh the specific equities involved—to enact a congressional map that complies with both the United States and New York Constitutions to be used for the rest of the decade." *Id.* at 1, 10–11. In response to this request, Proposed Intervenors pointed out that Petitioners' proposal of limiting the remedial map to only the 2022 elections violated the Court of Appeals' decision and the Constitution. *Harkenrider* No.660 at 3.

The Steuben County Supreme Court released its final congressional map on May 21, 2022, accompanied by the Special Master's detailed report documenting the process and the court's written explanation regarding how it considered objections raised by Petitioners and others, how the final map preserved communities of interest, and how the court utilized the voluminous public testimony and comments in the mapdrawing process. *Harkenrider* No.670 at 1–31. Following certain proposed minor technical corrections, the Supreme Court "ORDERED, ADJUDGED, and DECREED" that the proposed technical changes were approved and the maps "as modified" "become the *final* enacted redistricting maps." *Harkenrider* No.696 at 1 (emphasis added). The court thus declined to adopt Petitioners' request that the court limit the applicability of the remedial congressional map only to the 2022 election. *See id.*; *Harkenrider* No.670 at 1–5.

No interested party, including Petitioners in this case, appealed the Supreme Court's final redistricting order either on the grounds that it unnecessarily split communities of interest or resulted from a flawed process that deprived the public of a sufficient opportunity to be heard, or on the grounds that the Supreme Court did not limit the map to the 2022 elections only.

E. Months Later, Petitioners Bring This Action

On July 28, 2022, Petitioners Anthony S. Hoffmann, Marco Carrión, Courtney Gibbons, Lauren Foley, Mary Kain, Kevin Meggett, Reverend Clinton Miller, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel, many of whom participated in the proceedings in Steuben County, as noted above, filed this Article 78 special proceeding. Pet. ¶ 1. In an Amended Petition

filed on July 14, Petitioners narrowed their focus to attack only the congressional map that the Steuben County Supreme Court had put in place, asking this Court to "compel" the members of the IRC, named as Respondents in this case, "to 'prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan,'" to be put in place "following the 2022 elections" to be "used for subsequent elections this decade." Amend. Pet. ¶ 1. Petitioners submit that because "[t]he IRC failed to complete its mandatory duty to submit a second set of congressional plans to the Legislature for consideration," the IRC must be given another chance to draft and submit a congressional map for the Legislature's vote. Amend. Pet. ¶ 65 & at 20. Petitioners contend that "the Steuben County Supreme Court adopted a congressional plan that unnecessarily shifts residents into new districts and divides long-recognized communities of interest," Amend. Pet. ¶ 56 & at 16, failed to have adequate "transparency," and deprived voters of sufficient participation. Amend. Pet. ¶¶ 52, 55. Petitioners argue that "the IRC's failure to send a second set of maps to the Legislature not only stymied the constitutional procedure . . . , but also resulted in a congressional map that does not properly reflect the substantive redistricting criteria contained in the Redistricting Amendments." Amend. Pet. ¶ 57.

STANDARD OF REVIEW

A court should dismiss an action under CPLR 3211(a)(7) when the pleading "fails to state a cause of action." When addressing such a motion to dismiss, the court accepts the allegations in the complaint as true and determines whether "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Shephard v. Friedlander*, 195 A.D.3d 1191, 1192 (3d Dep't 2021). The "extraordinary remedy" of mandamus is only available to "compel the performance of purely ministerial acts where there is a clear right to the relief sought." *Silverman v. Lobel*, 163 A.D.2d 62, 62 (1st Dep't 1990).

ARGUMENT

I. Petitioners' Requested Relief Is An Impermissible Collateral Attack On The Judgment That Proposed Intervenors Obtained In *Harkenrider*

A. "It is settled that judgments where the normal appellate process has been exhausted may not be collaterally attacked." *Gager v. White*, 53 N.Y.2d 475, 484 n.1 (1981) (citations omitted). When there is no appeal or a direct appeal fails, the only way for a party to challenge a prior judgment is by filing a motion for reconsideration or motion to vacate. *See Divito v. Glennon*, 193 A.D.3d 1326, 1328 (4th Dep't 2021); CPLR 4404(b), 5015. Outside of those narrow avenues, a "collateral attack upon a prior judgment is an attempt to avoid, defeat, or evade a judicial decree, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking the prior judgment." 73 N.Y. Jur. 2d Judgments § 275. "Generally, a judgment is not open to collateral attack where the court had jurisdiction of the subject matter and of the parties, as well as jurisdiction to render the judgment, regardless of whether the judgment was right or wrong." *Id.* The only exceptions to the rule against collateral attacks are extremely narrow: where the judgment was jurisdictionally defective, *see Royal Zenith Corp. v Continental Ins. Co.*, 63 N.Y.2d 975, 977 (1984), or where it was rendered as the result of a fraudulent scheme, *see Specialized Indus. Servs. Corp. v Carter*, 68 A.D.3d 750, 752 (2d Dep't 2009); *see also N.Y.C. Transit Auth. v. Morris J. Eisen, P.C.*, 276 A.D.2d 78, 88 (1st Dep't 2000).

B. Petitioners' lawsuit here is plainly an impermissible collateral attack on the judgment that Proposed Intervenors secured in the Steuben County Supreme Court.

Proposed Intervenors obtained a judgment in Steuben County Supreme Court for a remedial congressional map that will govern for this entire decade. The Steuben County Supreme Court issued its decision on March 31, 2022, holding that the Legislature failed to follow the exclusive constitutional process for enacting redistricting maps. *Harkenrider* No.243 at 10. That

court explained that because "the IRC failed to act and submit a second set of maps," the Legislature constitutionally could not step in to draw its own maps. *Id.* It also held that the congressional map was unconstitutionally gerrymandered beyond a reasonable doubt. *Id.* at 10, 14. The Court of Appeals affirmed the Supreme Court's conclusion that the adopted congressional map was doubly unconstitutional, and then directed the Supreme Court to have a special master prepare new maps "with all due haste." *Harkenrider*, 2022 WL 1236822, at *1, 13. All understood that the judicially adopted congressional map would govern "the citizens of this State[ ] for the next 10 years." *Id.* at *14 (Troutman, J., dissenting in part). On remand, the Steuben County Supreme Court did just what the Court of Appeals had instructed, considering voluminous comments from interested persons before it "ORDERED, ADJUDGED, and DECREED" that its congressional map "become the *final* enacted [congressional] redistricting map[ ]" for New York. *Harkenrider* No.696 at 1 (emphasis added). In doing so, the court rejected Petitioners' request asking the court to limit the applicability of the remedial congressional map so as to "only be used for the 2022 congressional election," and thereafter allow the Legislature to "enact a congressional map . . . for the rest of the decade," Moskowitz Aff. Ex.1 at 1, as the court placed no caveat that the congressional map that it was ordering to govern would apply only to the 2022 election cycle, *Harkenrider* Nos.696 at 1, 670 at 1–5.

Given the above, Petitioners' challenge here is a textbook collateral attack that this Court should dismiss. There is already a final judgment from the Steuben County Supreme Court establishing a congressional map for this decade. *Harkenrider* Nos.670, 696. Thus, the only way for Petitioners to challenge that final judgment, in order to convert the congressional map that the court adopted into an interim map that applies only for the 2022 election cycle, is to move in that

court to reopen the case or reconsider that judgment, *Divito*, 193 A.D.3d at 1328; CPLR 4404(b), 5015(a), which Petitioners have not attempted to do. That alone defeats Petitioners' lawsuit.

In addition and independently, Petitioners' lawsuit is also an impermissible collateral attack for the additional reason that it asks this Court to "relitigat[e] [ ] a decided issue" and come to a patently "inconsistent result." *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001). The Steuben County Supreme Court's final judgment establishing a congressional map for the decade occurred after a complete remedial process in which the Steuben County Supreme Court "reviewed" all of the "submitted maps" and thousands of responses from the public and parties, as well as "those comments given before the [IRC], at the in-person hearing before th[at] court, and the written submissions." *Harkenrider* No.670 at 1–2. Petitioners' submission to the Steuben County Supreme Court explicitly requested that the court limit its map "only" to "the 2022 congressional election," Moskowitz Aff. Ex.1 at 1, which that court properly declined to do, *Harkenrider* Nos.670, 696.

In all, if Petitioners wished to challenge the Steuben County Supreme Court's decision and judgment or reopen that ruling to allow convert that court's adopted map into an interim map, they needed to either appeal from that judgment or seek relief from it. *See Divito*, 193 A.D.3d at 1328; CPLR 4404(b), 5015(a). Petitioners did not take any of those actions, and their request that this Court overrule the Steuben County Supreme Court is both deeply insulting to that court, and wholly legally improper.

II. Petitioners' Requested Relief Violates The New York Constitution

A. The New York Constitution sets out a carefully interlocking regime to eliminate partisan gerrymandering, as a procedural matter, with dates and specific responsibilities, which "*shall govern* redistricting in this state." N.Y. Const. art. III, § 4(b), (e) (emphasis added). Under the 2014 Amendments, the IRC takes the initial role in redistricting, with a firm deadline to conduct

and complete its duties. "On or before February first of each year ending with a zero," *id.* § 5-b(a), the IRC's ten members must "prepare a redistricting plan to establish senate, assembly, and congressional districts every ten years commencing in two thousand twenty-one," *id.* § 4(b). Then, before January 15 of the second year after the census, the IRC must submit an initial set of redistricting maps to the Legislature. *Id.* The Legislature must then vote on the maps as submitted, without any amendment. *Id*. If the Legislature does not enact this first set of maps, the redistricting process reverts to the IRC to develop and submit a second set of maps with implementing legislation to the Legislature. *Id*. "Within fifteen days" of the Legislature's rejection of the IRC's first set of maps, "and in no case later than February twenty-eighth," the IRC must submit this second set of maps to the Legislature. *Id.* As with the first set of maps, the Legislature must vote on the second set without any amendment. *Id*. Only if the Legislature takes public accountability for rejecting this second set of maps can it amend the IRC's proposed maps. *Id.*; *see also* N.Y. Legis. Law § 93(1).

If there is a failure of the constitutional procedures for redistricting—where, as here, the IRC fails to submit a second set of maps by the constitutional deadline—the Constitution provides only one remedy: a court "order[ing] the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e); *see Harkenrider*, 2022 WL 1236822, at *12. Thus, after the February 28 constitutional deadline for IRC's second-round submissions passes, N.Y. Const. art. III, § 4(b), the "procedural unconstitutionality of the congressional . . . map[ ] is, at th[at] juncture, incapable of a legislative cure," *Harkenrider*, 2022 WL 1236822, at *12. Indeed, in rejecting a suggestion that the Legislature and IRC could remedy such procedural errors by their dissenting in part colleague Judge Troutman, *see id.* at *13–14 (Troutman, J., dissenting in part), the Court of Appeals majority held that "the legislature is incapable of unilaterally correcting" the

errors inherent in any "procedural constitutional violations" after "the expiration of the outer February 28th constitutional deadline for IRC action." *Id.* at *12 n.19; *see also id.* at *12 n.20. Thus, as Judge Troutman noted, the Court's decision mandated a judicially adopted map that applies "for the next 10 years." *Id.* at *14 (Troutman, J., dissenting in part).

Outside of this constitutional schedule for decennial redistricting, the IRC ceases to have *any* constitutional role unless a court later orders that "congressional or state legislative districts be *amended*." N.Y. Const. art. III, § 5-b(a) (emphasis added). This provision does not envision a court ordering the reconstitution of the IRC for wholesale new mapdrawing, in order to create a new congressional map outside of the typical, every-10-year process. *Id.* Instead, this constitutional provision envisions "a court" ordering "*amend[ments]*" to an existing map after it determines there to be some legal infirmity with the existing map. *Id.* (emphasis added).

B. The New York Constitution precludes the relief that Petitioners seek here, as both its plain text and the *Harkenrider* decision clearly establish. Before this Court, Petitioners only contest the IRC's failure to submit second-round maps to the Legislature, while vaguely noting (without actually claiming any constitutional infirmity) that the Steuben County Supreme Court-adopted congressional map was the result of a deficient procedure and "splits longstanding minority communities of interest for reasons that remain unclear," seeking only mandamus relief against the IRC. Amend. Pet. ¶¶ 52–57 & at p.20. The Court of Appeals has already adjudicated the IRC's failure to submit second-round maps to the Legislature, determining both that this rendered the Legislature's enacted congressional map invalid, and that the proper remedy for such constitutional infirmity was the exact "judicial oversight of remedial action" "directed by [the Steuben County] Supreme Court to 'order the adoption of . . . a redistricting plan' with the assistance of a neutral expert, designated a special master, following submissions from the parties,

the legislature, and any interested stakeholders who wish to be heard." *Harkenrider*, 2022 WL 1236822, at *4–5, 12 (quoting N.Y. Const. art. III, § 4(e)). Thus, the IRC's failures have already been fully adjudicated and remedied in the Steuben County Supreme Court action. No more availing are Petitioners' allusions to other issues they have with the court-adopted congressional map, which Petitioners already unsuccessfully raised before the Steuben County Supreme Court, Moskowitz Aff., Ex.1 at 1–11. Petitioners have not made any sustained or substantial argument that the court-adopted map is constitutionally invalid in any of these respects, Amend. Pet. ¶¶ 52–57, and those claims would have needed to be raised possibly on appeal from the Steuben County Supreme Court's final judgment adopting the map, *see supra* Part I.

Nor does Article III, Section 5-b(a)'s provision for reconvening the IRC apply here. Petitioners request that this Court order the IRC to "submit[ ] a second round of proposed congressional districting plans for consideration by the Legislature," Amend. Pet. at 20, meaning that they want a new map from the IRC, not any particular "amend[ments]" to the court-adopted map in order to remedy any supposed constitutional violations, N.Y. Const. art. III, § 5-b(a).

C. Petitioners' various arguments for remanding to the IRC and Legislature to draw maps for 2024 and beyond all fail to pass muster.

Petitioners point out that Article III, Section 4(b) imposes on the IRC a nondiscretionary duty to submit a second set of redistricting maps to the Legislature, explaining that *Harkenrider* "eliminated any doubt as to the mandatory nature of the IRC's obligation to submit a second round of redistricting plans." Petitioners' Memorandum Of Law ("Pet. MOL") at 16. But the Constitution always explicitly requires the IRC to complete its "mandatory" obligations, *id.*, "in no case later than February twenty-eighth," meaning that is the absolute deadline for the IRC to submit second-round maps, N.Y. Const. art. III, § 4(b). *Harkenrider* correctly confirmed what the

Constitution's text unambiguously provides, explaining that "due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, the legislature is incapable of unilaterally correcting the infirmity," and so only "judicial oversight of remedial action in the wake of a determination of [procedural] unconstitutionality" is "explicitly authorize[d]" in this particular instance. 2022 WL 1236822, at *12 & n.19.

Petitioners also argue that other states' high courts have recognized a reversion of redistricting authority to non-judicial redistricting bodies following a finding of unconstitutionality, Pet. MOL at 17 (citing *In re Below*, 855 A.2d 459, 462 (N.H. 2004) (per curiam); *Lamson v. Sec'y of Commonwealth*, 168 N.E.2d 480, 486 (Mass. 1960); *Harris v. Shanahan*, 192 Kan. 183, 213 (1963)), while noting that the New York Constitution allows a redistricting plan to be "modified pursuant to court order" before the next decennial census, *id.* (quoting N.Y. Const. art. III, § 4(e)). None of those other states' constitutions vested exclusive authority to draw remedial redistricting plans in the courts after a certain point, like New York's does, wholly defeating any attempted analogy to these out-of-state authorities. *Below*, 855 A.2d at 462 (New Hampshire Constitution "neither deprived . . . nor relieved" the legislature of redistricting obligation following initial failure and court-ordered remedy); *Lamson*, 168 N.E.2d at 485 (observing that constitutional redistricting provisions did *not* contain specifications "respecting the time when, or prior to which, powers may be exercised, [which if they had] must be presumed to have been designed by the people to describe the only time at which such powers may be exercised"); *Harris*, 192 Kan. at 213 (citing constitutional authority to at any point convene special session for reapportionment after initial failure). And as to the New York Constitution, Petitioners have not asked this Court to "modif[y]" the Steuben County Supreme Court's map, Pet. MOL at 18 (citation omitted)—which, would, of course, be impermissible and insulting to that

court—but have asked this Court to launch a process to adopt a wholly different map, without the Steuben County Supreme Court's involvement.

III. Alternatively, This Court Should Dismiss The Petition As Untimely

A. Because the relief sought under Article 78 is equitable in nature, "the court has discretion . . . to deny review under article 78." *Anderson v. Lockhardt*, 310 N.Y.S.2d 361, 362 (Westchester Cnty. Sup. Ct. 1970); *see Ouziel v. State*, 667 N.Y.S.2d 872, 876 (Ct. Cl. 1997). In particular and most relevant here, this Court has discretion in an Article 78 proceeding to "dismiss[ ] as untimely" any action for mandamus to compel filed outside the time for when relief may be granted. *See Hill v. Giuliani*, 272 A.D.2d 157, 157 (1st Dep't 2000).

B. This Court should dismiss as untimely Petitioners' request for this Court to order a writ of mandamus against the IRC to draft and submit to the Legislature a new congressional map.

Petitioners brought their lawsuit more than half a year too late. The IRC declared its decision to violate its constitutional duties on January 24, 2022, *Harkenrider*, 2022 WL 1236822, at *2, and the Constitution provided that the IRC's authority to submit such maps expired on February 28, 2022, N.Y. Const. art. III, § 4(b); *see also Harkenrider*, 2022 WL 1236822, at *12 & n.19. Thus, if Petitioners wished to seek mandamus, ordering the IRC to submit a second-round map to the Legislature, they should have done so immediately after the IRC announced it would not proceed with the mandatory process on or immediately after January 24. *Harkenrider*, 2022 WL 1236822, at *2. Filing this lawsuit now, more than half a year later, is obviously and egregiously untimely, *Hill*, 272 A.D.2d at 157, and this untimeliness provides an ample basis for this Court to dismiss Petitioners' request for the "extraordinary remedy" of mandamus, *see Silverman*, 163 A.D.2d at 62.

Petitioners' inexplicable delay has created statewide reliance. Incumbents and congressional candidates have campaigned in these new districts, picking particular seats based

upon the understanding that the Steuben County Supreme Court's final decision established this congressional map for the whole decade, not just one election cycle. And Proposed Intervenors, who regularly engage in campaign activity in support of "Republican candidates . . . running for Congress," have continued those efforts in the districts established by the Steuben County Supreme Court, operating under the belief that such districts will maintain throughout the decade, and expending significant time, energy, and funds based upon the continuation of the congressional map, which remedies the prior map's effect of "undermin[ing] [their] efforts throughout New York to elect Republican candidates." *Harkenrider* Nos.29, 107–17.

Petitioners' delay also created substantial difficulties that will ensure that this would be a far longer litigation timeline than if they had acted timely. Had Petitioners filed this lawsuit back in January 2022, the IRC would have been fully constituted and prepared to consider and submit new maps to the Legislature, upon the court's order. *See* N.Y. Senate, *Senate Majority Announces Highlights of 2021–22 Budget* (Apr. 6, 2021).[4] Now, however, Commissioner John Flateau has apparently resigned from the IRC, meaning that the IRC currently apparently only has nine commissioners, while also now lacking key staff. Commissioners, N.Y. Indep. Redistricting Comm'n.[5] Should this Court order the IRC to reconvene, a new commissioner would seemingly need to be appointed in accordance with the Constitution before the IRC can begin any redistricting work, *see* N.Y. Const. art. III, § 5-b(a), and additional staff would likely need to be hired.

Petitioners' delay in filing this lawsuit means that it will be many more months (or even years) before the IRC and the Legislature could enact a new congressional map, as evidenced by legislative leaders' and the Governor's overly optimistic proposed timeline in a lawsuit dealing

[4] Available at https://www.nysenate.gov/newsroom/press-releases/senate-majority-announces-highlights-2021-22-budget.

[5] Available at https://www.nyirc.gov/commissioners.

with the Assembly districts that Proposed Intervenor did not challenge in *Harkenrider*. In submissions to the court in *Nichols v. Hochul*, Index No.154213/2022 (N.Y. Cnty. Sup. Ct.), NYSCEF Nos.100, 106,[6] the Legislature offered a proposed timeline for IRC and Legislature redistricting proceedings as to the Assembly districts, if the *Nichols* court chooses to utilize the IRC (an option Proposed Intervenors believe would be unconstitutional, *see supra* Part II, but would at least not be a collateral attack upon another court's judgment, *see supra* Part I):

> 1. No later than September 15, 2022, or as soon as practicable thereafter, the IRC shall make widely available to the public, in print form and using the best available technology, its draft redistricting plans, relevant data, and related information.
>
> 2. Commencing 30 days after its draft redistricting plan is released, the IRC shall hold public hearings on proposals for the redistricting of state Assembly districts in each of the following: (i) cities of Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties of Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk. Notice of all such hearings shall be widely published using the best available means and media a reasonable time before every hearing.
>
> 3. On January 1, 2023, or as soon as practicable thereafter, but no later than January 15, 2023, the IRC shall submit to the Legislature that Assembly redistricting plan and implementing legislation therefor that garnered the highest number of votes in support of its approval by the IRC with a record of the votes taken. In the event that more than one plan received 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.
>
> 4. If the Legislature fails to approve the first plan and implementing legislation therefor submitted to it by the IRC, or if the governor shall veto such legislation and the Legislature shall fail to override such veto, each house or the governor if the governor vetoes it, shall promptly notify the IRC that such legislation has been disapproved.
>
> 5. Within fifteen (15) days of such of such notification and in no case later than February 28, 2023, the IRC shall prepare and submit to the Legislature a second redistricting plan and the necessary implementing legislation for such plan.
>
> 6. If the Legislature fails to approve any second redistricting plan and implementing legislation therefor submitted to it by the IRC, or if the governor shall veto such legislation and the Legislature shall fail to override such veto, each house shall

[6] Available at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=64SbcB4I9tqtbXXqzEz1cQ==&display=all.

> introduce such implementing legislation with any amendments each house of the Legislature deems necessary. All such amendments shall comply with the provisions of Article III of the New York State Constitution. If approved by both houses, such legislation shall be presented to the governor for action.

Nichols No.100 at 11–12. Thus, the legislative leaders' and the Governors' proposed timeline in *Nichols*, which lawsuit is already in the remedial stage, extends into March 2023.

This already overly optimistic proposal would be impossible in this later-filed lawsuit, as it nowhere includes time for appointing any necessary commissioner(s) and key staff, *supra* p.19, as well as the appeals that would follow from this Court's decision ordering a new mapdrawing process that would convert the Steuben County Supreme Court's map into an interim map, including the automatic stay of the Court's order that would necessarily come with such appeals, *see* CPLR 5519(a)(1). Thus, the timeline for adoption of Petitioners' requested replacement congressional map would likely extend well into mid-2023 or even 2024, a situation that Petitioners' delay created.

CONCLUSION

For the foregoing reasons, the Court should dismiss Petitioners' Article 78 Petition.

Dated: New York, New York
August 23, 2022

TROUTMAN PEPPER HAMILTON
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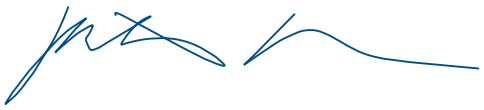
By: 

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the word count limitations set forth in 22 NYCRR § 202.8-b(a). According to the word-processing system used to prepare this memorandum of law, it contains 6,819 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
August 23, 2022

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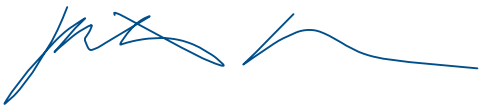
By: 

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