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 Richards; and Nancy Van Tassel,

Index No. 904972-22

Petitioners,

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

-against-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson David Imamura; Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

Respondents.

-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,

Intervenor-Respondents.

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MEMORANDUM OF LAW IN OPPOSITION TO INTERVENOR-RESPONDENTS' MOTION TO DISMISS

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Petitioners submit this memorandum of law in opposition to the Motion to Dismiss brought by Intervenors Tim Harkenrider, Guy C. Brought, Lawrence Canning, Patricia Clarino, George Dooher, Jr., Stephen Evans, Linda Fanton, Jerry Fishman, Jay Frantz, Lawrence Garvey, Alan Newphew, Susan Rowley, Josephine Thomas, and Marianne Violante (collectively the "Intervenors"), pursuant to CPLR 3211(a)(1), (5), (7) and CPLR 7804(f), and in support of Petitioners' Order to Show Cause.

PRELIMINARY STATEMENT

In this action, Petitioners seek a writ of mandamus ordering the New York Independent Redistricting Commission (the "IRC") and its Commissioners to fulfill their constitutional duty under Article III, Sections 4 and 5 of the New York Constitution to submit a second set of congressional plans for consideration by the Legislature. The Intervenors have moved to dismiss the Amended Petition, but the arguments they make have no merit. The motion should be denied.

First, Intervenors argue this action is an improper "collateral attack" on the judgment they won in the Steuben County Supreme Court. Not so. This Article 78 proceeding involves different parties, different issues, and different requests for relief than the *Harkenrider* action. The only common issue between the two cases—whether the IRC has a mandatory duty to submit a second round of maps to the Legislature after its first submissions are rejected—is a point which the Intervenors argued, *and won*, in *Harkenrider*. Puzzlingly, Intervenors have now abandoned the cause of strict adherence to the constitutional process that they defended so vociferously in the *Harkenrider* litigation.

Second, Intervenors argue that Petitioners' requested relief violates the New York Constitution. To the contrary, Petitioners seek to reassert what Intervenors themselves have previously described as the "primary role" of the IRC in New York's redistricting process. *See* (Medina Aff., Doc. No. 149). And the plain language of Article III, Section 4(e) is consistent with

the relief Petitioners seek, as it provides that 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." N.Y. Const. art. III, § 4(e) (emphasis added). Section 4(e) thus authorizes this Court to remedy the IRC's failure to complete its constitutional redistricting duties, notwithstanding the timeframe specified in Section 4(b), by "order[ing] the adoption of . . . a redistricting plan" via the process of the IRC submitting a plan to the Legislature. *Id.* This construction of Section 4(e) is consistent with the intent of the New Yorkers who voted to adopt the Redistricting Amendments. *See Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *7 (N.Y. Apr. 27, 2022) (explaining that the constitutional redistricting process was "carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines.").

Third, Intervenors argue that this Court should employ its equitable discretion and dismiss Petitioners' suit as untimely. This Court should reject that argument, as this action was timely filed. This action was commenced on June 28, 2022. (Pet., Doc. No. 1). Petitioners did not have a "clear legal right" to their requested relief until April 27, when the Court of Appeals held in *Harkenrider*, 2022 WL 1236822, at *1, that Article III's "process for [IRC] submission of electoral maps to the legislature" is "mandatory" and accordingly invalidated a 2021 statute that had given the IRC discretion as to whether to submit a second set of congressional maps to the Legislature. *See Harper v. Angiolillo*, 89 N.Y.2d 761, 765 (1997). While that statute was in effect, Petitioners could not have brought this mandamus action, which is predicated on the IRC having a clear, nondiscretionary duty to submit a second set of congressional maps to the Legislature. As a result, this action was brought promptly. Moreover, because Petitioners do not seek relief for the

upcoming 2022 elections, this action does not impact Intervenors' purported reliance interests. Finally, the IRC remains operative. And Petitioners do not seek to restart the IRC process, but simply to require that body to send a second set of congressional redistricting maps to the New York Legislature. Thus, the remedial process can be completed expeditiously.

For the reasons set forth herein and in Petitioners' Memorandum of Law in Support of the Amended Verified Petition (Doc. No. 56), the Court should deny Intervenors' motion to dismiss.

BACKGROUND

In 2014, New York voters approved constitutional amendments (the "Redistricting Amendments") to reform the redistricting process. The Redistricting Amendments required the creation of the IRC and laid out a carefully crafted process by which the IRC would submit proposed redistricting plans to the Legislature for consideration. Following a months-long public comment process, which included comments from three of the Petitioners in this action, the IRC abandoned its constitutional duty and failed to submit a second round of redistricting maps to the Legislature. Shortly thereafter, the Legislature—acting pursuant to L 2021, ch 633 (the "2021 Legislation")—passed new congressional redistricting maps. The 2021 Legislation provided that, "if the [IRC] d[oes] not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," the Legislature could proceed to introduce redistricting legislation. *See* L 2021, ch 633; *see also Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *6 (N.Y. Apr. 27, 2022) (describing statute as "authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps").

A group of Republican voters, Intervenors here, brought suit challenging the legislatively enacted congressional map, contending that it (1) was invalid from the outset, because the IRC had failed to submit a second round of redistricting maps to the Legislature, and (2) was enacted with impermissible partisan intent. (*Harkenrider* Petition at 58–63, Doc. No. 50). The case was litigated

up to the New York Court of Appeals, which, on April 27, 2022, held that the 2021 Legislation was unconstitutional to the extent that it allowed the Legislature to pass a redistricting plan in the absence of a second set of plans submitted by the IRC. *Harkenrider*, 2022 WL 1236822, at *9. The Court of Appeals' decision made clear that the IRC did not complete its constitutionally required redistricting duties because it failed to submit a second round of proposed congressional redistricting plans to the Legislature for consideration. It also made clear that the Legislature was powerless to enact a new congressional plan once the IRC refused to submit a second set of plans because the 2021 Legislation was unconstitutional. Finally, the Court of Appeals affirmed the Steuben County Supreme Court's decision finding that the legislatively enacted map was an unconstitutional partisan gerrymander. *Id.* at *11. As a result of the Court of Appeals' decision, New York's constitutional redistricting process had failed, and New York's last validly enacted congressional districts—from the previous decade—were malapportioned.

The Court of Appeals could not have ordered the IRC to complete the constitutional redistricting process in the *Harkenrider* case for several reasons. The *Harkenrider* Petitioners did not seek such relief, and neither the IRC nor its Commissioners were parties. Moreover, by the time the Court of Appeals issued its decision on April 27, the 2022 midterm elections were fast approaching. As a result, the Court of Appeals ordered the Steuben County Supreme Court—with the assistance of special master Jonathan Cervas—to implement a map pursuant to which the 2022 midterm elections could be held. *See generally* (*Harkenrider* Decision & Order at 5, Doc. No. 55); *Harkenrider*, 2022 WL 1236822, at *13.

Petitioners brought the present Article 78 action for a writ of mandamus against the IRC and its members in their official capacities on June 28, after the Court of Appeals held that the Legislature lacked authority to remedy the IRC's failure to complete the "mandatory process for

submission of electoral maps to the legislature[,]" *Harkenrider*, 2022 WL 1236822, at *1. (Pet., Doc. No. 1). Petitioners are New York voters who are injured by the IRC's failure to complete its constitutionally mandated redistricting duties. Petitioners request an order compelling Respondents to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan." *Id.* ¶ 1. Petitioners do not seek relief for this election cycle; they filed the Petition "to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade." *Id*. at 19. In other words, Petitioners do not seek to disturb the judicially approved map implemented by the *Harkenrider* court to ensure that New Yorkers had a map in place for the 2022 elections that did not violate the one-person one-vote requirement. (*Harkenrider* Decision & Order at 3, 5, Doc. No. 55). Petitioners seek relief for future elections, requiring the IRC to execute its mandatory duties in the congressional redistricting process. *See Harkenrider*, 2022 WL 1236822, at *1.

The successful petitioners in the *Harkenrider* case—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—sought to intervene in this matter on August 23, 2022, claiming an interest in "protecting" the judgment they obtained from the Steuben County Supreme Court. *See* (Mem. of Law in Support of Proposed Intervenors' Mot. for Leave to Intervene at 12, Doc. No. 66). The Court granted them permissive intervention on September 1. (Order Granting Mot. to Intervene, Doc. No. 140). Intervenors filed their motion to dismiss on September 2, after the Court permitted them to intervene in this action. (Intervenor-Respondents' Mem. of Law in Support of Mot. to Dismiss ("Mot."), Doc. No. 144).

Around the same time, Petitioners also contacted all parties, including Intervenors, requesting that they join a stipulation to add IRC Commissioners John Flateau and Eugene Benger as Respondents. *See* (Medina Aff. ¶ 4–12, Doc. No. 149). Mr. Flateau had resigned from the IRC at the time Petitioners filed this action, and was later re-appointed. *Id.* ¶ 3. Mr. Benger had previously indicated an intent to resign but the effective date of his resignation was uncertain. *Id.* Only Intervenors declined to join the stipulation to add Mr. Flateau and Mr. Benger as Respondents. *See id*. ¶ 12–13. Based upon Intervenors' refusal to stipulate, Petitioners sought leave to amend their petition to add Mr. Flateau without changing the September 9 return date or the September 12 oral argument date. *See* (Petitioners' Mem. of Law in Support of Mot. for Leave to File Second Am. Verified Pet. ("Mot. for Leave to Amend") at 1–2, Doc. No. 155). On September 6, 2022, this Court declined to sign Petitioners' Order to Show Cause for Leave to Amend the Petition. (Doc. No. 156). Petitioners understand that on September 2, Mr. Benger resigned. On September 6, Speaker Carl Heastie appointed his replacement—Yovan Samuel Collado. *See* Letter from Speaker Carl E. Heastie (attached to Affirmation of Aaron M. Mukerjee (Sept. 8, 2022) ("Mukerjee Aff.") as Ex. 1).

On September 6, Petitioners filed their opposition to a motion to dismiss by Respondents' Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens. (Doc. No. 157). Petitioners now file this opposition to Intervenors' motion to dismiss. For the reasons set forth below, the Court should deny the motion.

STANDARD OF REVIEW

In Article 78 proceedings, motions to dismiss and "objections are appropriately afforded review similar in nature to that applied to defenses raised in a pre-answer motion to dismiss pursuant to CPLR 3211." *Lally v. Johnson City Cent. Sch. Dist.*, 962 N.Y.S.2d 508, 511 (3rd Dep't 2013). In assessing a motion to dismiss, the court "must accept [petitioners'] allegations as true,

accord [petitioners] the benefit of every possible favorable inference, and determine only whether plaintiffs have a cause of action." *Connolly v. Long Island Power Auth.*, 94 N.E.3d 471, 476 (N.Y. 2018) (citation omitted). "The relevant inquiry is whether [petitioners] have a cause of action and not whether one has been stated." *Davies v. S.A. Dunn & Co., LLC*, 156 N.Y.S.3d 457, 460 (3rd Dep't 2021) (internal quotation marks and citation omitted).

ARGUMENT

I. The Amended Petition is not a collateral attack on the *Harkenrider* judgment.

This action is not a collateral attack on the *Harkenrider* judgment. The *Harkenrider* action involved different parties and different issues, and thus this suit is not barred as an improper collateral attack.

The "collateral attack" doctrine—otherwise known as "collateral estoppel"—"may be invoked in a subsequent action or proceeding to prevent a party from relitigating an issue decided against that party in a prior adjudication." *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 152 (1988); *see also ABN AMRO Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208, 226 (2011) ("[T]he so-called 'collateral attack' doctrine does not exist apart from the doctrine[] of . . . administrative collateral estoppel principles."). Collateral estoppel "comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17 (2015) (quotation omitted); *see also Buechel v. Bain*, 97 N.Y.2d 295, 303-04 (2001) ("Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has

necessarily been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling.").[1]

Intervenors are correct that "absent unusual circumstances or explicit statutory authorization, the provisions of a judgment are final and binding on *the parties*, and may be modified only upon direct challenge." *Divito v. Glennon*, 147 N.Y.S.3d 759, 761 (4th Dep't 2021) (emphasis added). For example, in the *Divito* case relied on by Intervenors, the Fourth Department concluded that the plaintiff's claims "constitute an impermissible collateral attack and should have been resolved by either an appeal from or a motion to vacate the judgments" because "this action *involves the same relevant parties* and arises out of the same transaction or series of transactions that served as the basis for those judgments," from which the plaintiff did not appeal. *Id.* (emphasis added). But Petitioners were not parties to the *Harkenrider* case, and collateral estoppel does not apply because they did not have a "full and fair opportunity" in that proceeding to address the issues raised here. That case was brought by the Intervenors against Governor Hochul and leaders of the state legislature, none of whom are parties here.

The Amended Petition also raises new issues that were never litigated or decided in *Harkenrider*. It asks the Court to decide whether a writ of mandamus should issue requiring the IRC and its members to meet and follow the procedures prescribed by Article III Sections 4 and 5 of the New York Constitution. This issue could not have been raised in *Harkenrider* because

[1] Intervenors incorrectly suggest that asking a court to "relitigate a decided issue and come to a patently inconsistent result" is an "independent[]" ground for invoking collateral estoppel. Mot. at 13 (quotations omitted). In fact, "[t]he *policies* underlying [collateral estoppel's] application are avoiding relitigation of a decided issue and the possibility of an inconsistent result." *Buechel*, 97 N.Y.2d at 303 (emphasis added). But the "two requirements" of identity of issues and a full and fair opportunity to contest them must always be met before collateral estoppel can be applied. *Id.* at 303-04. In any event, as explained here, the Amended Petition does not ask the Court to "relitigate a decided issue" or to reach an "inconsistent result."

neither the IRC nor the Commissioners were parties to that case. There is only one common issue of law between *Harkenrider* and this case: whether the requirement that the IRC submit a second set of maps to the legislature is "mandatory." In *Harkenrider*, the Intervenors argued, and the Court of Appeals agreed, that it is. 2022 WL 1236822, at *1. The relief sought in the Amended Petition proceeds from that ruling.

Intervenors mischaracterize the Amended Petition as an attack on the maps drawn by the Steuben County Supreme Court. (Mot. at 12). In fact, however, the relief Petitioners seek is limited. Petitioners do not challenge the substance or validity of the 2022 congressional map, nor do they ask this Court to draw a new map or to "overrule" the Steuben County Supreme Court. (Mot. at 13). Instead, they ask the Court to order the IRC and its members to undertake their "mandatory" duty to meet and submit a set of maps to the Legislature. 2022 WL 1236822, at *1. That this process, which will result in a set of maps drawn according to the constitutionally prescribed procedure, would mean that the *Harkenrider* court-drawn map would not be used in the 2024 election and subsequent elections is not an attack on the validity of the *Harkenrider* judgment. Instead, it is a vindication of the constitutional process chosen by New York voters and bedrock principles of separation of powers. Intervenors' suggestion that Petitioners should have sought relief from the Steuben County Supreme Court therefore makes little sense. (Mot. at 13). Petitioners do not seek to amend the map drawn by the Steuben County Supreme Court.

Finally, Intervenors' collateral estoppel argument arises from a false premise—that the "remedial congressional map" drawn by the Steuben County Supreme Court "will govern for this entire decade." (Mot. at 11). In fact, the Steuben County Supreme Court "Ordered, Adjudged, and Decreed" "the official approved 2022 Congressional map," but did not address whether the map would be in place beyond the 2022 midterm elections. (*Harkenrider* Decision & Order at 5, Doc.

No. 55). Intervenors suggest that the Steuben County court's use of the word "final" means that this map is in place for the entire decade. (Mot. at 12). But the word "final" appeared in an order making "minor revisions" to the enacted map. Those revisions thus made that map the "final" version of the "2022 Congressional map," *id.,* not the "final" map for the remainder of the decade. The only other support Intervenors can muster for the proposition that the *Harkenrider* court's map must be in place for the rest of the decade comes from a *dissenting* opinion that in no way concluded the map must be in place until the next census. In that dissent, Judge Troutman noted her disagreement with the Court's remedy on the basis that it "*may* ultimately subject the citizens of this State, for the next 10 years, to an electoral map created by an unelected individual, with no apparent ties to this State, whom our citizens never envisioned having such a profound effect on their democracy." *Harkenrider*, 2022 WL 1236822, at *14 (Troutman, J., dissenting) (emphasis added); *see also* (Mot. at 12) (selectively quoting Judge Troutman's dissenting opinion).

Moreover, there are plenty of examples—including from here in New York—of court-drawn remedial maps being replaced, even in the same congressional cycle, with constitutionally compliant maps that arise later out of the state's legislative branch process for redistricting. In 2002 in New York, for example, a federal court adopted a congressional map and ordered its use for the 2002 elections, but then two weeks later, with enough time before the relevant filing and primary deadlines, the Legislature and Governor agreed to a plan. That legislatively enacted plan mooted and superseded the Court-drawn plan. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 357 (S.D.N.Y. 2004), *aff'd*, 543 U.S. 997 (2004); *see also In re Below*, 151 N.H. 135, 136-37, 150-51 (2004) (allowing a legislatively enacted plan in 2004 to supplant the map used in the 2002 election, which was drawn by the New Hampshire Supreme Court due to impasse, despite clear constitutional language requiring the legislature to reapportion "at its regular session following the

federal decennial census"). Likewise here, the Steuben County Supreme Court's remedial map was a necessary remedy designed to avoid a violation of one person-one vote in the 2022 elections when New York's constitutional redistricting process failed. As with New York's 2002 court-drawn map, however, it would be completely appropriate for the Steuben County map to ultimately be replaced with a constitutional map resulting from the state's legislative branch processes for redistricting. Nothing Intervenors cite supports finding otherwise.

The 2022 congressional map drawn by the Steuben County Supreme Court was a product of exigency, reflecting the reality that the 2022 midterm elections were rapidly approaching and a constitutionally compliant map needed to be in place in time for the primaries. *See Harkenrider*, 2022 WL 1236822, at *12 & n.18. But more than two years will pass before the next congressional elections after 2022, allowing ample time for the IRC—and subsequently, the Legislature—to meet and consider revised maps. There is simply no reason that the People should be deprived for the entire decade of a map drawn according to the democratic process they resoundingly approved in 2014.

II. Petitioners' requested relief is entirely consistent with, and seeks to enforce, the New York Constitution.

New York law provides for a writ of mandamus where a government "body or officer failed to perform a duty enjoined upon it by law." N.Y. C.P.L.R. 7803. "[P]etitioners must establish 'a clear legal right to the relief demanded' by demonstrating the 'existence of a corresponding nondiscretionary duty' on the part of the" relevant body. *Waite v. Town of Champion*, 106 N.E.3d 1167, 1171 (N.Y. 2018) (quoting *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 573 N.E.2d 562 (N.Y. 1991)) (internal alterations omitted); *see also George F. Johnson Mem'l Libr. v. Springer*, 783 N.Y.S.2d 138, 139 (3rd Dep't 2004) (granting petition for mandamus under Article 78 because government official did not have "any discretion to refuse" to perform relevant

duty). "[T]o the extent that [petitioners] can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties." *Klostermann v. Cuomo*, 463 N.E.2d 588, 596 (N.Y. 1984).

As explained in the memorandum of law accompanying the Amended Petition, the IRC has a clear, nondiscretionary duty to submit a second set of congressional redistricting plans to the Legislature if its first congressional plans are rejected by legislative vote or gubernatorial veto. (Doc. 56 at 16 (quoting N.Y. Const. art. III, § 4(b))).[2] The nondiscretionary nature of the IRC's duty to submit a second set of congressional maps was made clear by the Court of Appeals' April 27 *Harkenrider* decision invalidating the 2021 Legislation. Prior to that order, the 2021 Legislation effectively made the IRC's duty to submit a second set of congressional maps discretionary. *See Glenman Indus. & Com. Contracting Corp. v. N.Y. State Office of State Comptroller*, 905 N.Y.S.2d 713, 716 (3rd Dep't 2010) (explaining that "mandamus does not lie to enforce the performance of a duty that is discretionary," and that a "discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results"); *see also League of Women Voters of N.Y. v. N.Y. State Bd. of Elections*, 170 N.Y.S.3d 639, 642-43 (3rd Dep't 2022) ("[I]n the absence of an express judicial order invalidating the [state] assembly map, petitioner failed to demonstrate that it had a 'clear legal right to the relief demanded' or that 'there was a corresponding nondiscretionary duty on the part of the respondent' . . . therefore, petitioner is not entitled to the extraordinary remedy of mandamus to compel." (citations omitted)). Mandamus relief is appropriate here because the IRC indisputably failed to submit a second set of congressional plans to the Legislature for consideration, failing to complete its constitutional duty.

[2] Petitioners incorporate by reference the Memorandum of Law in Support of the Amended Verified Petition (Doc. 56), pursuant to CPLR § 2214(c).

Article III, Section 4(e) of the New York Constitution provides a proper basis for Petitioners' requested relief.

Nonetheless, Intervenors claim that compelling the IRC to complete its constitutional duty would be unconstitutional, arguing that after the February 28, 2022 deadline for IRC action, the only available remedy was a judicially adopted map. *See* (Mot. at 13–14). They argue that once this process was completed, the IRC "cease[d] to have *any* constitutional role unless a court later orders" amendments to a redistricting map. (Mot. at 15). They therefore assert that "the IRC's failures have already been fully adjudicated and remedied in the Steuben County Supreme Court action." *Id.* at 16.

Intervenors' motion selectively quotes from the Redistricting Amendments and conveniently omits the sections that underscore the validity of Petitioners' requested relief. Article III, Section 4(e) of the New York Constitution provides that "[t]he process for redistricting congressional and state legislative districts established by [Article III, Sections 4, 5, and 5-b] shall govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e) (emphasis added). Thus, Section 4(e) authorizes courts to vary from the deadlines set forth in the Redistricting Amendments where necessary for a court to address a violation of law. Here, the IRC violated the Constitution by failing to submit a second set of congressional plans to the Legislature for its consideration, as required by Article III, Section 4(b). A court may remedy that violation by "order[ing] the adoption of . . . a redistricting plan" via the process of the IRC submitting a plan to the Legislature. N.Y. Const. art. III, § 4(e). The timeframe specified in Section 4(b) does not bar such remedial action, as Section 4(e) specifically provides that the process in

Section 4 "shall govern redistricting in this state *except* to the extent" required to remedy a violation of law. N.Y. Const. art. III, § 4(e).

This construction of Section 4(e) is consistent with the intent of the New Yorkers who voted to adopt the Redistricting Amendments. "In construing the language of the Constitution . . . [the court] look[s] for the intention of the People and give[s] to the language used its ordinary meaning." *Harkenrider*, 2022 WL 1236822, at *5; *see also Pfingst v. State*, 393 N.Y.S.2d 803, 805 (3rd Dep't 1977) ("It is a cardinal rule of construction that no part of the Constitution should be construed so as to defeat its purpose of the intent of the people adopting it."). As the Court of Appeals explained just a few months ago, "the text of section 4 contemplates that any redistricting act ultimately adopted must be founded upon a plan submitted by the IRC." *Harkenrider*, 2022 WL 1236822, at *6. This is because the Redistricting Amendments "were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines." *Id.* at *7; *see also id.* at *9 ("Through the [Redistricting Amendments], the People of this state adopted substantial redistricting reforms aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines.").

The proper interpretation of Section 4(e) is that it permits the mandamus relief requested here—namely, to compel the IRC to complete its redistricting duties. Indeed, the Court of Appeals even contemplated in *Harkenrider* that "judicial intervention in the form of a mandamus proceeding . . . [is] among the many courses of action available to ensure the IRC process is completed as constitutionally intended." *Id.* at *8 n.10; *see also Lamson v. Sec'y of*

Commonwealth, 168 N.E.2d 480, 486 (Mass. 1960) (explaining that while failure of redistricting body to act "thwarts the intention of the Constitution," an "even more serious nullification of constitutional purpose will result under a construction which would" prohibit redistricting body from "return[ing] to reapportion").

The Constitution does not make the adoption of a court-drawn map the exclusive remedy for a violation of law, and the provision's use of "a" as opposed to "the" before the word "remedy" clearly indicates that courts remain free to order other remedies as well, including ordering the entities that the people gave the authority to adopt a map (the IRC and the Legislature acting together) to do what the Constitution requires them to do. Nor is there any language in the Court of Appeals' *Harkenrider* decision mandating a court-drawn map as the exclusive remedy.

III. The Amended Petition is timely.

Intervenors ask this Court, as a matter of equitable discretion, to dismiss this action as untimely. (Mot. at 18). This Court should reject that argument because Petitioners timely filed this Article 78 petition. Actions against governmental bodies or officers, including mandamus actions, "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . ." N.Y. CPLR 217(1). But an agency action is not "final and binding upon the petitioner" until the agency has "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Best Payphones, Inc. v. Dep't of Info. Tech. & Telecommunications of City of New York*, 5 N.Y.3d 30, 34 (2005). An Article 78 mandamus petition lies only "where there is a clear legal right to the relief sought." *Harper v. Angiolillo*, 89 N.Y.2d 761, 765 (1997) (quotation omitted).

Here, the "clear legal right" to Petitioners' requested relief did not arise until April 27, when the Court of Appeals held that the "process for [IRC] submission of electoral maps to the legislature" designated by Article III is, in fact "mandatory" and thus the congressional map enacted by the Legislature was invalid. *Harkenrider*, 2022 WL 1236822, at *1; *see also League of Women Voters of N.Y. v. N.Y. State Bd. of Elections*, 170 N.Y.S.3d 639, 642–43 (3rd Dep't 2022) ("[I]n the absence of an express judicial order invalidating the [state] assembly map, petitioner failed to demonstrate that it had a 'clear legal right to the relief demanded' or that 'there was a corresponding nondiscretionary duty on the part of the respondent' . . . therefore, petitioner is not entitled to the extraordinary remedy of mandamus to compel." (citations omitted)). By invalidating the 2021 Legislation, the Court of Appeals made clear that the IRC's submission of a second set of maps to the Legislature is "a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting." *Harkenrider*, 2022 WL 1236822 at *7.

Relatedly, the IRC's failure to submit a second set of congressional maps did not inflict "actual, concrete injury" until the Court of Appeals invalidated the 2021 Legislation on April 27, 2022. Until the Court of Appeals' decision in *Harkenrider*, the 2021 Legislation effectively gave the IRC discretion as to whether to submit a second set of congressional maps to the Legislature. Mandamus relief is not available for "[d]iscretionary acts" that "are not mandated and involve the exercise of reasoned judgment, which could typically produce different acceptable results." *All. to End Chickens as Kaporos v. N.Y.C. Police Dep't*, 152 A.D.3d 113, 117 (1st Dep't 2017). Prior to the Court of Appeals' decision, the mandamus relief sought by Petitioners—completion of the steps necessary to place redistricting in the hands of the Legislature and ensure that maps would be drawn according to the procedures in Article III—would have been unavailable because the 2021 Legislation created an alternative procedure. The 2021 Legislation filled the gap left by the

Commission's failure to act and "prevented or significantly ameliorated" Petitioners' injury. *Best Payphones*, 5 N.Y.3d at 34.

But even if Petitioners could have sought relief before the Court of Appeals issued its *Harkenrider* decision on April 27, their claims could not have accrued until, at the earliest, February 28, 2022—four months before this action was commenced on June 28. As Respondents acknowledge, that was the "constitutional deadline" for the IRC to submit its second set of proposed maps. (Mot. at 15, 17); *see also* N.Y. Const. art. III, § 4(b) ("[I]n no case later than February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.").

In other words, Petitioners acted expeditiously—filing their Petition within two months of the date that their injury became apparent and within four months of the last opportunity for the IRC to correct its failure of its own accord.[3]

Moreover, Intervenors' argument that a remedial process will simply take too long does not render this litigation untimely. Intervenors are mistaken about the steps required to implement a new redistricting map through mandamus relief against the IRC. The Redistricting Amendments do not include any provision dissolving the IRC or limiting the individual Commissioners' service to a certain date or time period. And Article III, Section 5-b(d) provides that "[v]acancies in the membership of the commission shall be filed within thirty days in the manner provided for in the

[3] It is unclear how granting Petitioners' requested relief would undermine Intervenors' supposed "reliance" interests ostensibly developed through their participation in political campaigns. Mot. at 18–19. Presumably, Intervenors have engaged in campaign activities related to the 2022 congressional elections, which no one disputes will take place under the Steuben County Supreme Court's map. It strains credulity to conclude that campaign-related activities relative to the 2022 midterm elections create a concrete reliance interest in the congressional districts governing the 2024 elections. Even if that were true, Intervenors have offered no explanation as to why—as a legal matter—that interest would supersede the IRC's obligation to comply with its constitutional prerogative.

original appointments." N.Y. Const. art. III, § 5-b. One Commissioner, John Flateau, was reappointed in accordance with that provision in August 2022 after having previously resigned, (Medina Aff. ¶ 3, Doc. No. 149), indicating that the IRC has remained in force even after the elapse of the timeframes for IRC action outlined in Article III, Section 4. And following Eugene Benger's resignation on September 2, Speaker Heastie appointed a new member—Yovan Samuel Collado—just this week. *See* Letter from Speaker Carl E. Heastie (attached to Mukerjee Aff. as Ex. 1).

In other words, the IRC currently has all ten members; it need not be reconstituted because it is already at full strength. This Court can simply order the IRC, as constituted, to pick up where it left off. That is, it can order the IRC to expeditiously send a second round of congressional redistricting maps to the Legislature for consideration. Petitioners would propose that, in accordance with the 15-day timeline contemplated by the Constitution for IRC action following the Legislature's rejection of a first round of maps, the IRC be given 15 days to propose a new set of maps. *See* N.Y. Const. art. III, § 4(b). The Legislature, together with the Governor, will then have the opportunity to either enact the IRC's proposal, or to reject it. N.Y. Const. art. III, § 4(b). If the Legislature declines to adopt, or the Governor vetoes, the IRC's proposal, then the Legislature can pass its own maps by either a two-thirds vote (if one party controls both chambers at that time) or a simple majority vote (if there is divided control). *Id.* § 4(b)(1)-(3). Even allowing time for appeals to play out in this litigation, this entire process could and should be concluded well in advance of the 2024 congressional elections.

Contrary to Intervenors' suggestion, Petitioners do not propose that the IRC restart the public hearing process. *See* (Mot. at 19–21) (describing the remedial process proposed by the Legislature in the *Nichols v. Hochul* litigation related to State Assembly districts). That is because this action and the relief sought is entirely distinct from that in *Nichols*. In *Nichols*, the court

invalidated the legislatively enacted State Assembly map and is now determining the appropriate remedial process for developing a new one. By contrast, Petitioners in this mandamus action seek simpler relief—namely, an order compelling the IRC to send a second round of congressional maps to the Legislature.

In short, Petitioners acted on their rights expeditiously, and any remedy can be carried out in a timely fashion. There is simply no reason for this Court to allow the IRC's constitutional violation to go unredressed.

CONCLUSION

Accordingly, this Court should deny the Intervenors' motion to dismiss and grant the relief requested in the Amended Petition.

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