Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of

ANTHONY S. HOFFMANN,

Petitioners-Appellants,

v.

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION,

Respondents-Respondents,

TIM HARKENRIDER,

Intervenors-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

No. CV-22-2265

(*Caption continues inside front cover*)

BRIEF FOR THE GOVERNOR AND THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICI CURIAE IN SUPPORT OF PETITIONERS-APPELLANTS

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Dated: April 7, 2023

Supreme Court, Albany County – Index No. 904972-22

(*Caption continues from front cover*)

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

Petitioners-Appellants,

v.

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

Respondents-Respondents,

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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INTERESTS OF THE AMICUS CURIAE

This appeal concerns the question whether Supreme Court, Albany County (Lynch, J.), erred in concluding that the congressional map approved by Supreme Court, Steuben County, on May 20, 2022, following the Court of Appeals' decision and remand in *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), must remain in effect until after the next decennial census in 2030. The Governor, in her capacity as the chief executive officer of the State of New York, and the Attorney General, in her capacity as the chief legal officer of the State, file this amicus brief in support of petitioners' position that, in accordance with the state Constitution, the current congressional map—the product of a court-administered process, undertaken with little time for public input and even less public accountability, but necessitated by the exigencies of the 2022 election calendar—may not remain in effect until 2030. Instead, that map must be redrawn, and the process employed to do so must involve the Independent Redistricting Commission (IRC).

Both the Governor and the Attorney General have a strong interest in the proper interpretation and application of New York's constitutional and statutory provisions governing the conduct of elections. The Governor

has the responsibility to "take care that the laws [of the State] are faithfully executed." N.Y. Const. art. IV, § 3. The Governor is also responsible for approving or vetoing legislation implementing a redistricting plan. *Id.* art. III, § 4(b). The Attorney General has the general authority to "[p]rosecute and defend all actions and proceedings in which the state is interested." Executive Law § 63(1). The Attorney General has issued numerous opinions concerning the State's election laws, *see* Off. of the N.Y. State Att'y Gen. (OAG), *Opinions by Subject* (search Subject name: "Elections"),[1] and the Civil Rights Bureau of the Office of the Attorney General (OAG) investigates and prosecutes violations of the Election Law, *see, e.g.*, *Matter of People v. Schofield*, 199 A.D.3d 5 (3d Dep't 2021) (proceeding against commissioner of county board of elections to challenge the board's unlawful placement of early voting polling place).

Both amici are committed to protecting the rights of all New York voters to vote in congressional districts created according to the process that the voters themselves enshrined in the Constitution in 2014 by way of constitutional amendment approved at the ballot box. Though the court

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[1] For sources available online, full URLs appear in the Table of Authorities. All URLs were last visited on April 7, 2023.

in *Harkenrider* was required by the circumstances of the fast-approaching 2022 election to assume responsibility for the creation of a remedial congressional map, those circumstances do not require that map to remain in place for the four election cycles that follow, where the constraints of the election calendar do not foreclose the constitutional IRC-administered remedy put in place by the voters in 2014.

QUESTION PRESENTED

Did Supreme Court, Albany County (Lynch, J.), err in concluding that the congressional map approved by Supreme Court, Steuben County, on May 20, 2022, following the Court of Appeals' decision and remand in *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), was required to remain in effect until after the next decennial census in 2030?

Supreme Court determined that the judicial remedy by which the 2022 congressional map was created yielded an "approved map" that must remain in effect until a subsequent map is adopted after the next decennial census. (Record on Appeal (R.) 18-19.)

STATEMENT OF THE CASE

A. Constitutional Background

"Every 10 years, following the federal census, reapportionment of the state senate, assembly, and congressional districts in New York must be undertaken to account for population shifts and potential changes in the state's allocated number of congressional representatives." *Matter of Harkenrider*, 38 N.Y.3d at 502; *see* N.Y. Const, art. III, § 4. But this "redistricting" process—which, historically, has been a legislative function—in recent years has often resulted in political stalemates, necessitating federal court involvement in the development of New York's congressional maps. *Matter of Harkenrider*, 38 N.Y.3d at 502.

To address these developments, in 2012 the Legislature passed a resolution which, if passed again in 2013 and subsequently approved by the voters at the ballot box, would "amend the constitution to reform comprehensively the process and substantive criteria used to establish new state legislative and congressional district lines every ten years." Senate Introducer's Mem., Concurrent Resolution to Amend N.Y. Const. art. 3 (Mar. 15, 2012) (S. 6698/A. 9526); *see* N.Y. Const. art. XIX, § 1. Specifically, the proposed amendment would "ensure that the drawing of

legislative district lines in New York will be done by a bipartisan, independent body," i.e., the Independent Redistricting Commission (IRC), while at the same time "giv[ing] the voters of New York a voice in the adoption of this new process." Senate Introducer's Mem., *supra*. The role of the Legislature would not be supplanted by this new IRC so much as displaced to a different stage of the process. The IRC would begin the process of establishing new district lines by submitting a first set of proposed electoral maps, which the Legislature could accept or reject in toto. If the Legislature rejected that submission, the IRC would be directed to make a second submission. If the Legislature rejected that second submission, it would be permitted to amend that proposal from the IRC. *Matter of Harkenrider*, 38 N.Y.3d at 514-15.

After the Legislature again passed the concurrent resolution to amend the Constitution in 2013, the proposed amendment was submitted to the voters via ballot question in 2014. The State Board of Elections is responsible for certifying the language of ballot proposals to amend the Constitution submitted to the voters. *See* Election Law § 4-108(1)(a). The language of the proposal must consist of "an abbreviated title indicating generally and briefly, and in a clear and coherent manner using words

with common and every-day meanings, the subject matter of the amendment." *Id.* § 4-108(2). The Attorney General provides advice regarding the form of the proposal, *id.* § 4-108(3), and the certified language may be subject to legal challenge, *see, e.g.*, *Leib v. Walsh*, 45 Misc. 3d 874, 879-80, 882 (Sup. Ct. Albany County 2014) (ordering that language of 2014 ballot proposal be amended to remove the word "independent" from references to IRC, given that 8 out of 10 members were to be appointed by legislators).

Proposal Number One on the general election ballot that November stated, among other things, that the proposed amendment "revises the redistricting procedure for state legislative and congressional districts" and, to that end, would "establish[] a redistricting commission every 10 years beginning in 2020"; would require public hearings on commission-proposed redistricting plans; would subject the commission's plan to legislative enactment, permitting legislative amendments to a commission plan only after two failed submissions to the Legislature; and would provide for "expedited court review of a challenged redistricting plan." Staten Is. Advance Staff, *Election 2014: Get a Look at Staten Island's*

Sample Ballot, Staten Is. Advance (Nov. 3, 2014) (embedding sample ballot for 2014 general election in Staten Island).

Proposal Number One passed, and the amendment became law the following year. *See* N.Y. Const. art. XIX, § 1. The Constitution now requires that on or before February 1 of each year ending in zero, "and at any other time a court orders that congressional or state legislative districts be amended," an IRC "shall be established to determine the district lines for congressional and state legislative offices." N.Y. Const. art. III, § 5-b(a). The Constitution tasks the IRC with "prepar[ing] a redistricting plan to establish senate, assembly, and congressional districts every ten years," and establishes a procedure and timetable for the IRC to do so, culminating in the submission to the Legislature "in no case later than February twenty-eighth" of the year ending in two by the IRC of its second redistricting plan (should the first one fail to be approved).[2] *Id.* art. III, § 4(b). The IRC must conduct public hearings on its proposals in each of five specific cities and seven specific counties across the State. *Id.*

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[2] If the IRC is unable to pass a redistricting plan by its constitutionally required supermajority, the proposal(s) receiving the highest number of votes must be submitted to the Legislature. N.Y. Const. art. III, § 5-b(g).

art. III, § 4(c)(6). And legal challenges to any map must be "give[n] precedence . . . over all other causes and proceedings," with a decision rendered on such a challenge "within sixty days after a petition is filed." *Id.* art. III, § 5. Finally, if such a challenge yields a finding that "the provisions of this article" have been violated, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." *Id.*

This IRC-driven process approved by the voters is to "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." *Id.* art. III, § 4(e) (emphasis added). Once established, a reapportionment plan "shall be in force" until the redistricting process following the next decennial census "unless modified pursuant to court order." *Id.*

B. Redistricting Following the 2020 Census and the *Harkenrider* Proceeding

The redistricting cycle following the 2020 census was the first opportunity to implement the IRC process established by the voters in 2014. However, that process broke down when the IRC failed to transmit a second redistricting plan after its first set of dueling proposals was

rejected by the Legislature. *Matter of Harkenrider*, 38 N.Y.3d at 504-05. Without an IRC proposal to vote on, the Legislature acted to implement congressional, Senate, and Assembly maps on its own, and Governor Hochul signed those maps into law on February 3, 2022.[3] *Id.* at 505.

On that same day, several New York voters commenced what would become the *Harkenrider* litigation, challenging the congressional and, by amended petition shortly thereafter, the Senate maps on two grounds.[4] First, the petitioners alleged that the process by which the two maps were adopted violated the state Constitution because the IRC had failed to submit a second redistricting plan, and thus the Legislature lacked authority to enact its own plan. *Id.* at 505-06. Second, the petitioners

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[3] Anticipating the possibility that the IRC would deadlock and fail to submit any map to the Legislature—a possibility not expressly addressed by the Constitution—the Legislature filled that perceived gap in 2021 by purportedly authorizing the Legislature to act on its own in such circumstances. *See* Ch. 633, 2021 N.Y. Laws. This statute was struck down as unconstitutional by the Court of Appeals in *Harkenrider*, 38 N.Y.3d at 516-17.

[4] The Assembly map was not challenged by the *Harkenrider* petitioners. Instead, following the remand in *Harkenrider*, it became the subject of a separate proceeding, *Nichols v. Hochul*, Index No. 154213/2022 (Sup. Ct. N.Y. County), which is discussed below.

alleged that the maps themselves were unconstitutional partisan gerrymanders. *Id.* at 506.

The case quickly reached the Court of Appeals, and on April 27, 2022, the Court ruled that the congressional and Senate maps had been adopted by procedurally improper means.[5] *Id.* at 521. The Court held that the plain language of the Constitution required the IRC to submit a second redistricting plan to the Legislature as a precondition to any legislative action, and therefore the Legislature's enactment of a plan in the absence of that IRC action violated these constitutional provisions. *Id.* at 511-12. The Court observed that "the constitutional amendments adopted by the two consecutive legislatures and the voters" between 2012 and 2014 "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," lending further support to its textual conclusion. *Id.* at 513-14. Thus, pursuant to these amendments, "the starting point for redistricting

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[5] The Court also found that the congressional map violated substantive prohibitions against drawing maps for partisan purposes. *Matter of Harkenrider*, 38 N.Y.3d at 521.

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." *Id.* at 517.

Turning to the remedy, the Court noted that the Constitution authorized the judiciary to "'order the adoption of, or changes to, a redistricting plan'" where there has been a violation of law, and rejected the respondents' request to delay the remedy until after the fast-approaching 2022 elections. *Id.* at 521-22 (quoting N.Y. Const. art. III, § 4(e)). The Court noted that the deadlines for IRC action built into the Constitution, coupled with the directive that any judicial challenges be "expedited" so that they are resolved within 60 days of filing, reflected an intent that any defects found by a court be remedied in time for the next election. *Id.* at 522 n.18. However, the Court declined to give the Legislature an opportunity to correct the maps' "legal infirmities" pursuant to article III, § 5 of the Constitution, stating that the "procedural unconstitutionality of the congressional and senate maps [was], at this juncture, incapable of legislative cure." *Id.* at 523 (quotation marks omitted). Instead, "[w]ith judicial supervision and the support of a neutral expert

designated a special master, there [was] sufficient time for the adoption of new district lines." *Id.* at 522.

On remand, the *Harkenrider* trial court set about to redraw the congressional and senate maps with the assistance of a special master. The court held exactly one public hearing in Steuben County on the proposed map. On May 20, 2022, the court certified the congressional and senate maps prepared by the special master as "the official approved 2022 Congressional map and the 2022 State Senate map." *Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 31471(U), at 5 (Sup. Ct. Steuben County 2022).

C. The IRC Is Convened to Redraw the Assembly Map for 2024

On May 15, 2022, several petitioners challenged the assembly map on the basis of the Court of Appeals' ruling in *Harkenrider* that the congressional and senate maps were procedurally infirm. *See Matter of Nichols v. Hochul*, 206 A.D.3d 463 (1st Dep't) (*Nichols I*), *appeal dismissed*, 38 N.Y.3d 1053 (2022). The claims were initially dismissed as untimely and/or barred by laches by the trial court, but the First Department reinstated the claims. *See id.* at 464. While the court declined to provide relief in time for the 2022 elections, it ordered the map to be redrawn in

time for the 2024 election cycle and directed the trial court to determine "the proper means for redrawing" the map "in accordance with" article III, § 5-b of the Constitution. *See id.*

On remand, the trial court directed the IRC to initiate the constitutional map-drawing process laid out in §§ 4, 5, and 5-b of article III, modifying only the deadlines for the various steps in that process to be completed, and the First Department affirmed. *Matter of Nichols v. Hochul*, 212 A.D.3d 529 (1st Dep't) (*Nichols II*), *appeal filed*, No. APL-2023-00032 (N.Y. Feb. 15, 2023) (pending jurisdictional inquiry into petitioners' appeal). The First Department reasoned that § 5-b "requires that an IRC be established to determine district lines, including in cases such as this, where a court has ordered that districts be amended." *Id.* at 530; *see* N.Y. Const. art. III, § 5-b(a). Since the "Constitution . . . favors a legislative resolution when available," and since, unlike in *Harkenrider*, a "viable legislative plan [was] available" in *Nichols* given the ample time before the next election to follow the IRC process, "the remedial measures chosen by the court in *Harkenrider* [we]re not required here." *Nichols II*, 212 A.D.3d at 531.

While the *Nichols II* appeal was pending, the IRC convened and began the process of developing an assembly map pursuant to the trial court's order. It developed and, on December 1, 2022, published a draft assembly map for public comment. *See* Press Release, IRC, *New York State Independent Redistricting Commission Votes to Release Draft Assembly Plan to the Public* (Dec. 1, 2022). It also conducted twelve public meetings across the state between January 9 and March 1, 2023, where it received public comment on its draft. *See* Press Release, IRC, *New York State Independent Redistricting Commission - Updated 2023 Public Hearing Schedule* (Dec. 23, 2022). Pursuant to the schedule ordered by the trial court, the IRC must submit its final assembly map to the Legislature no later than April 28, 2023. *Nichols v. Hochul*, 77 Misc. 3d 245, 256-57 (Sup. Ct. N.Y. County 2022), *aff'd*, 212 A.D.3d 529.

D. Proceedings Below

Meanwhile, on June 28, 2022, the petitioners in this case initiated this C.P.L.R. article 78 proceeding seeking a writ of mandamus against the IRC and its members compelling it to prepare and submit to the Legislature a second redistricting plan for elections taking place after

2022.[6] (*See* R. 265-284.) Petitioners alleged that because the IRC failed to complete its mandatory duty, under article III, § 4(b) of the Constitution, to submit a second set of maps to the Legislature, it was subject to a writ of mandamus pursuant to C.P.L.R. 7803(1) compelling it to act. (R. 282-283.) Petitioners further alleged that the court-drawn congressional map that had emerged from the *Harkenrider* proceeding was deficient because (a) it was developed with minimal opportunity for public comment, (b) it was produced in part based on ex parte information that was outside the public record, and (c) it impermissibly split longstanding minority communities of interest. (R. 281-282.)

The *Harkenrider* petitioners successfully intervened and, along with certain of the IRC respondents,[7] moved to dismiss the petition, contending (inter alia) that the congressional map produced as a result

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[6] Initially, petitioners sought relief as to the congressional, Senate, and Assembly maps (R. 24-42), but on August 4, 2022 they amended their petition to seek relief only as to the congressional map.

[7] The IRC respondents have appeared separately in this proceeding, in two groups. The "Brady respondents"—the group that moved to dismiss—are IRC members Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens. *See* Br. for Resp'ts-Resp'ts Ross Brady et al. ("Brady Resp'ts' Br."). The "Jenkins respondents" are IRC members Ken Jenkins, Ivelisse Cuevas-Molina, and Elaine Frazier. *See* Br. for Resp'ts-Resp'ts Ken Jenkins et al. ("Jenkins Resp'ts' Br.).

of the *Harkenrider* proceeding marked the end of the redistricting process based on the 2020 federal census, and that therefore the IRC lacked authority to take any further action with regard to that map. (R. 9.)

On September 12, 2022, Supreme Court granted the motions to dismiss. (R. 8-19.) Although it found that the petition was not an impermissible collateral attack on the ruling in *Harkenrider* (R. 15-16), and further concluded that the petition was timely (R. 16-17), it agreed with the movants that the petition failed to state a claim upon which relief could be granted (R. 17-19). The court concluded that the maps developed by the Supreme Court in *Harkenrider* "are in full force and effect, until redistricting takes place again following the 2030 federal census." (R. 18.) Accordingly, there was no authority (much less any mandate) for the IRC to resume and complete its unfinished tasks from the 2020 redistricting cycle. (R. 18.) The court further noted that the relief sought by petitioners "would provide a path to an annual redistricting process, wreaking havoc on the electoral process," and in any event was futile in light of the IRC's failure to complete its duties during its first redistricting effort. (R. 19.) This appeal ensued.

ARGUMENT

THE COURT-DRAWN CONGRESSIONAL MAP CURRENTLY IN PLACE IS LEGALLY DEFICIENT AND SHOULD BE REDRAWN PURSUANT TO AN IRC-DRIVEN PROCESS

The state Constitution directs that the Legislature "*shall* have a full and reasonable opportunity to correct" the "legal infirmities" in any redistricting law "found to violate the provisions of" article III. N.Y. Const. art. III, § 5 (emphasis added). The Constitution also requires that "an [IRC] *shall* be established to determine the district lines for congressional and state legislative offices" whenever "a court orders that congressional or state legislative districts be amended." *Id.* art. III, § 5-b(a) (emphasis added). There is no dispute that the current congressional map was the product of a judicial proceeding and resulting court order that failed to adhere to either of those mandatory provisions. To be sure, § 4(e) permits a court to forgo the remedial procedures established in §§ 4, 5, and 5(b) where a court is "required" to order the adoption of a redistricting plan as a remedy for a violation of law. *Id.* art. III, § 4(e). The Court of Appeals in *Harkenrider* concluded it was indeed "required" by the exigencies of the election calendar to forgo these remedial procedures in order to establish a map that adhered to substantive constitutional requirements for

the 2022 elections. But the Court was silent about whether the map drawn by the special-master process would continue in effect for the remainder of the decennial period. Because those exigencies have now dissipated, there is no longer any valid basis to ignore the Constitution's remedial procedures for elections taking place over the remainder of the decade. Accordingly, Supreme Court erred in concluding that it was powerless to order that the *Harkenrider* court-drawn congressional be amended. To the contrary, upon petitioners' challenge it was required to do so.

A. The Legislature and IRC Have Constitutionally Mandatory Roles in Remedying Defective Redistricting Maps.

At the outset, the constitutional directives for a court to provide the Legislature with a "full and reasonable opportunity" to correct legal deficiencies and for a court to convene the IRC when it orders a map to be amended are mandatory and were required to be given effect. *See* N.Y. Const. art. III, §§ 5, 5-b(a).

The verb "shall" has been held by this Court to constitute "mandatory language that, although not determinative, 'is ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent.'" *Matter of Laertes Solar, LLC v. Assessor of Town of*

Hartford, 182 A.D.3d 826, 827-28 (3d Dep't 2020) (quoting *People v. Schonfeld*, 74 N.Y.2d 324, 328 (1989)).[8] In *Harkenrider*, the Court of Appeals pointed to similar language in article III, § 4 (e.g., the IRC "shall prepare," N.Y. Const. art. III, § 4(b)), to support its conclusion that the Constitution *required* the IRC to act before the Legislature was authorized to enact its own maps. *See Matter of Harkenrider*, 38 N.Y.3d at 511 ("Article III, § 4 is permeated with language that, when given its full effect, 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."). Since "the same word should be given the same meaning in the same statute," *Matter of Breslin v. Conners*, 10 A.D.3d 471, 476 (3d Dep't 2004), the word "shall" in §§ 5 ("the legislature *shall* have a full and reasonable opportunity to correct the law's legal infirmities") and 5-b(a) (an IRC "shall be established" "at any . . . time a court orders that congressional or state legislative districts be amended") should similarly be interpreted to impose mandatory duties, *see* N.Y. Const. art. III, §§ 5, 5-(b)(a) (emphasis added).

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[8] *See also People v. Fancher*, 50 N.Y. 288, 291-92 (1872) (rules for interpretation of statutes also generally apply to Constitution).

Moreover, § 4(e) does not excuse a court from the foregoing mandates of §§ 5 and 5-b(a) whenever a legal challenge succeeds and demands the creation of a new map. *See Nichols II*, 212 A.D.3d at 530 ("The IRC procedures control the redistricting process, except to the extent that a court is *required* to forgo them in order to adopt a plan as a remedy for a violation of law."). Instead, § 4(e) reaffirms that "[t]he process for redistricting congressional and state legislative districts established by this section [four] and sections five and five-b of this article"—i.e., the IRC-initiated process followed by legislative ratification or, ultimately, amendment—"shall govern redistricting in this state," and makes exception only for those circumstances where "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).

That was the situation in *Harkenrider*: the Court of Appeals was "required" to direct the trial court to implement its own remedial map because "[t]he procedural unconstitutionality of the . . . maps [was], at th[at] juncture, incapable of legislative cure." 38 N.Y.3d at 523. There was simply too much to accomplish in too little time. A legislative cure would have required a court to reconvene the IRC; to compel the IRC,

which had just deadlocked, to submit a proposal or competing set of proposals to the Legislature; to wait for the Legislature to act on and potentially amend that proposal, and then submit its end product to the Governor for signature or veto. *See id.* at 523 n.19 ("the legislature is incapable of unilaterally correcting the infirmity"). Not only had the constitutional deadline for the IRC to submit its second set of maps passed by this time, *see id.*, but "the constitutional violation could not be cured by a process involving the legislature and the IRC, given the time constraints created by the electoral calendar," *Nichols II*, 212 A.D.3d at 531.

Because the Court of Appeals found itself "in the same predicament as if no maps had been enacted" due to the unconstitutionality of the legislature-passed maps, *Matter of Harkenrider*, 38 N.Y.3d at 522, and because the existing map from 2012 was unconstitutionally malapportioned and contained too many districts, *see id.* at 504, "[p]rompt judicial intervention [was] both necessary and appropriate to guarantee the people's right to a free and fair election," *id.* at 522. But what was not "necessary"—what the Court was not "required" by these exigencies to do and never said that it was doing—was to establish a congressional map

that bypassed these constitutionally mandatory requirements for the duration of the remaining decade.

Nor is the *Harkenrider* court-drawn congressional map required to remain in force "until redistricting takes place again following the 2030 federal census." (*See* R. 18.) Section 4(e) provides that a "reapportionment plan and the districts contained in such plain shall be in force until the effective date of a plan based upon the subsequent federal census . . . *unless modified pursuant to court order*." N.Y. Const. art. III, § 4(e) (emphasis added). Thus, where a map suffers from a legal defect—here, that the map was drawn without providing the Legislature a "full and reasonable" opportunity to correct the prior defect, and without convening the IRC, *see id.* art. III, §§ 5, 5-b(a), under circumstances where the court is not "required" to forgo these mandates—a court may order modifications to an existing plan consistent with the requirements of §§ 5 and 5-b(a).

The intervenors-respondents concede that an "unremedied legal violation" would "allow a court to 'modif[y]' the map that the [court] . . . put in place in *Harkenrider*" before the next census under § 4(e). Br. for Intervenors-Resp'ts (Intervenors-Resp'ts Br.) at 27. That is precisely the

situation here: the *Harkenrider* Court drew a map in a manner inconsistent with constitutional requirements, and though those inconsistencies may have been "required" to ensure implementation of a map that met substantive constitutional requirements for the 2022 elections, they were not "required" to be perpetuated for the remainder of the decade.

Both the Brady respondents and intervenors-respondents contend that a court-drawn map pursuant to article III, § 4(e) is the only available remedy for a procedural violation involving the IRC, because the constitutional deadline for the IRC to perform its last official act—in this case, to submit its second map or set of maps to the Legislature—passed on February 28, 2022. *See* Brady Resp'ts' Br. at 9; Intervenors-Resp'ts' Br. at 35-43. But this argument, if accepted, would render virtually a dead letter § 5-b(a)'s requirement that the IRC be established "at any other time a court orders that congressional or state legislative districts be amended." *See* N.Y. Const. art. III, § 5-b(a); *see also Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 271 (2022) ("statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous" (quotation marks omitted)); *Matter of Harkenrider*, 38 N.Y.3d at 511 ("'In the construction of constitu-

tional provisions, the language used, if plain and precise, should be given its full effect' . . . ." (quoting *People v. Rathbone*, 145 N.Y. 434, 438 (1895))). That is because there will almost never be sufficient time in the election calendar for the IRC to reconvene and act by its constitutional deadline of February 28, following a successful legal challenge to a redistricting map.[9] Instead, as the First Department recently held in *Nichols II*, where a "viable legislative plan is available," the requirements of § 5-b(a)—beginning with the establishment of an IRC—must be given effect. *Nichols II*, 212 A.D.3d at 531.

The intervenors-respondents also suggest an IRC may be reestablished pursuant to § 5-b(a) only "when necessary to 'amend[ ]' the districts

[9] Even if the IRC were to submit its first maps to the Legislature before the initial January 15 deadline, N.Y. Const. art. III, § 4(b), a legal challenge to these maps would not be complete even at the trial level (to say nothing of any appeals) in sufficient time to allow the IRC to reconvene and amend those maps by its constitutional February 28 resubmission deadline, just 44 days later, *see id.* art. III, § 5 (requiring judicial challenges to redistricting maps to be resolved within 60 days); *see also Matter of Harkenrider*, 38 N.Y.3d at 521 ("expedited judicial review" of 2022 redistricting plan resolved by trial court on March 31, 2022, and Court of Appeals on April 27, 2022—56 and 83 days, respectively, from date of filing). And respondents' interpretation would entirely foreclose the application of §§ 5 and 5-b(a) to any challenge to a second submission by the IRC.

within an existing congressional map," not "to restart the mapdrawing process in tandem with the Legislature." Intervenors-Resp'ts' Br. at 39. In other words, on this view, "amending districts" means only limited alterations to an otherwise valid, existing map but not a wholesale revision of the map. This narrow reading of "amend" finds no support in the plain text of § 5-b(a), which equates those two processes: it provides that the IRC "shall be established" no later than "February first of each year ending with a zero"—a clear reference to the decennial redistricting process that takes place following the census—and "at any *other* time a court orders that congressional or state legislative districts be *amended*." *See* N.Y. Const. art. III, § 5-b(a) (emphasis added). This provision thus contemplates two occasions when legislative districts are "amended": the decennial redistricting process, and when a court otherwise so orders it. Accordingly, when the *Harkenrider* Court struck down the Legislature's congressional map and ordered a new map to be drawn, it ordered that the congressional districts be "amended" for the purposes of § 5-b(a), though

the circumstances of the fast-approaching 2022 election "required" it to order a court-drawn map for that election.[10]

Finally, nothing in *Harkenrider* entails that the court-drawn congressional map that emerged from that litigation must remain in effect for the remainder of the decade.[11] Instead, the Court was focused on ensuring "the people's right to a free and fair election" in 2022, because the respondents in that case had proposed deferring the remedy to 2024. *See* 38 N.Y.3d at 522. The Court "reject[ed] this invitation to subject the people of this state to an election conducted pursuant to an unconstitutional reapportionment." *Id.* at 521. Similarly, the Court was "not convinced that [it] ha[d] no choice but to allow the 2022 primary election to proceed on unconstitutionally enacted and gerrymandered maps." *Id.*

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[10] Intervenors-respondents' interpretation of § 5-b(a) is also illogical, in that it would require convening the IRC (a) when wholesale changes to legislative maps are made as part of the decennial redistricting map, and (b) when minor changes are made to districts as a result of a court order, but not (c) when wholesale changes to legislative maps are made outside of the decennial redistricting process as a result of a court order.

[11] For this reason, in addition to the grounds articulated by the court below in rejecting this argument (R. 15-16), there is no merit to the contention (*see* Intervenors-Resp'ts' Br. at 49-56) that the petition is an impermissible collateral attack on the *Harkenrider* decision. The relief sought by petitioners is not inconsistent with the ruling in *Harkenrider*.

at 522. Finally, the Court expressed confidence that, "in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws." *Id.* at 522-23.

The Court's pronouncements about the judiciary's authority to adopt a remedy for an unconstitutional map, *see id.* at 523 (citing N.Y. Const. art. III, § 4(e)), do not address, one way or the other, whether that authority allows for the creation of a map that extends for multiple election cycles, in derogation of competing constitutional requirements that the Legislature (§ 5) and IRC (§ 5-b(a)) be involved in the remedial process. And the majority opinion's colloquy with the arguments raised by the dissents, *see id.* at 523 n.20, does not address Judge Troutman's concern that the Court's remedy "*may* ultimately subject" voters "to an electoral map created by an unelected individual" "for *the next 10 years*," *id.* at 527 (Troutman, J., dissenting) (emphases added). That question was simply not before the Court, and it did not expressly address it.

Despite the Court of Appeals' silence on the question of the duration of its remedy, there is much in *Harkenrider* that can be read to support limiting its court-drawn congressional map to a single election cycle. The Court explained that the IRC-driven redistricting process approved by the voters in 2014 was intended to break the historical cycle of legislative "stalemates" followed by "federal court involvement" in the creation of congressional maps. *Id.* at 502-03. The Court noted that these amendments were "carefully crafted to *guarantee* that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines." *Id.* at 513-14 (emphasis added); *see also id.* at 514 (amendments were designed to "*ensure* that the drawing of legislative district lines in New York will be done by a bipartisan, independent body'" (emphasis added) (quoting Assembly Sponsor's Mem., Concurrent Resolution to Amend N.Y. Const. art. 3 (Mar. 15, 2012) (S. 6698/A. 9526))).

Finally, on remand, the *Harkenrider* trial court "certified" the congressional map developed with the assistance of the special master as "the official approved *2022* Congressional map." *Harkenrider*, 2022 N.Y.

Slip Op. 31471(U), at 5 (emphasis added).[12] While the trial court did not hold that the map was *limited* in applicability to the 2022 congressional election, neither did it hold that the map would remain in effect until the next decennial redistricting cycle. Nothing in *Harkenrider* should be construed to foreclose petitioners' challenge here.

[12] Later, the court issued a corrected order in which it made "minor revisions" to the maps to conform to "town-on-boarder" requirements and to facilitate election administration, and ordered the maps, so modified with these revisions, to be the "final enacted redistricting maps." Decision & Order at 1, *Harkenrider v. Hochul*, Index No. E2022-0116CV (Sup. Ct. Steuben County June 2, 2022), NYSCEF Doc. No. 696. The intervenors-respondents contend that this subsequent order—which did not purport to address the temporal scope of the relief—"necessarily rejected the Petitioners' explicit request in that case that the Court limit the remedial map's applicability to the 2022 election alone." Intervenors-Resp'ts' Br. at 51. But the revised order explicitly identified what it was modifying from the initial order, and made no reference to its prior order certifying the map as the "approved *2022* Congressional map." *See Harkenrider*, 2022 N.Y. Slip Op. 31471(U), at 5 (emphasis added).

B. Petitioners' Requested Relief Is Supported by the Policies Underlying Both the 2014 Amendments and Redistricting More Generally.

As set forth above, petitioners' challenge is supported by the text of the Constitution and is not foreclosed by the Court of Appeals' decision in *Harkenrider*. It is also supported by the policies underlying both the 2014 amendments and redistricting more generally.

The 2014 amendments were intended to "*ensure* that the drawing of legislative district lines in New York will be done by a bipartisan, independent body." Senate Introducer's Mem., *supra* (emphasis added). They "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." *Matter of Harkenrider*, 38 N.Y.3d at 513-14 (emphasis added). The intent of the framers of the 2014 amendments was plain: to center the redistricting process on the work of a bipartisan IRC, at least insofar as a court is not otherwise "required" to conduct that process itself. An interpretation of § 4(e) that duly gives effect to this intent is one that limits the authority of a court "required" to draw a redistricting map to only the election giving rise to that exigency, and that otherwise holds

that an IRC should be established pursuant to § 5-b(a) to prepare a map for the remaining elections in the cycle.

This intent is also reflected in the ballot question language presented to voters in 2014. Proposal Number One on the 2014 general election ballot in New York explained that the amendment would "revise[] the redistricting procedure for state legislative and congressional districts," and then broadly summarized the IRC process the amendment would create and noted that it would provide for "expedited court review of a challenged redistricting plan." *Election 2014*, *supra*. But after describing the IRC as the starting point for redistricting plans in the State under this amendment, and then identifying the Legislature's role in that process, it made no reference to the *court* playing any role in drawing maps in the event of a successful legal challenge. Thus, while it is true that the People approved a constitutional amendment with terms providing that the IRC "process . . . shall govern . . . except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law," *Matter of Harkenrider*, 38 N.Y.3d at 523 n.20 (quoting N.Y. Const. art. III, § 4(e)), they also approved an amendment that required the IRC to be established "any . . . time a court

orders that congressional or state legislative districts be amended," N.Y. Const. art. III, § 5-b(a). And the form of the proposal presented to voters emphasized a role for the IRC that was consistent with the role contemplated for it by § 5-b(a) in the event of a successful legal challenge to a map.

Contrary to Supreme Court's conclusion (R. 19), the principle of "stability" does not support the result below. The court suggested that if petitioners' requested relief were granted "it would provide a path to an annual redistricting process, wreaking havoc on the electoral process." (R. 19.) That is not so. Petitioners are seeking an order directing the IRC to cure the deficiency that led the Court in *Harkenrider* to approve judicially drawn maps—in derogation of the requirements in §§ 5 and 5-b(a) that the Legislature and IRC, respectively, be involved in the remedial process. In any event, "stability" is not a reason to disregard the People's right to a map created in conformance with the requirements of *all* of the Constitution's provisions, now that a "viable legislative plan is available," *Nichols II*, 212 A.D.3d at 531.

Nor do principles of "futility" support Supreme Court's dismissal of petitioner's claims. Supreme Court concluded that petitioners' requested relief was "futile" due to "the record demonstration of the IRC's inherent

inability to reach a consensus on a bipartisan plan" compel affirmance here (R. 19). But nothing in the record suggests that the IRC's failure to reach consensus on a congressional map in 2022 was "inherent."[13] Nor is there anything in the record that suggests that the IRC has "predetermined" that it will not reach agreement on a plan, or that it has construed the Constitution in a way that would dictate that outcome.[14] *Cf. Matter of Grattan v. Department of Social Servs. of State of N.Y.*, 131 A.D.2d 191, 193 (3d Dep't 1987) (articulating standard for futility exception to administrative exhaustion requirement). Indeed, the Court of Appeals in *Matter of Harkenrider* noted that a mandamus petition against the IRC would have been an available remedy to the Legislature to force it to fulfill its constitutional duty. 38 N.Y.3d at 515 n.10. This remedy exactly what petitioners have sought here.

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[13] The IRC's recent work in preparing and approving a draft Assembly map on a bipartisan basis shows that there is nothing "inherent" in its structure or composition that prevents it from approving a congressional redistricting map.

[14] It is noteworthy that, in asking this Court to affirm the dismissal of petitioners' claims, the Brady Respondents do not adopt Supreme Court's conclusion that the petitioners' requested relief would be futile. *See* Brady Resp'ts' Br. For their part, the Jenkins Respondents state that they are "ready, willing, and able" to fulfill their constitutional responsibilities should this Court order it. Jenkins Resp'ts' Br. at 17.

In any event, the IRC's failure to "reach consensus on a bipartisan plan" is an outcome that *the Constitution itself contemplates*. Section 5-b(g) provides that if the IRC is unable to agree on a map with the requisite bipartisan supermajority, it must "submit to the legislature that redistricting plan [or plans] and implementing legislation that garnered the highest number of votes." N.Y. Const. art. III, § 5-b(g). Thus, even if Supreme Court's concerns were realized, the Constitution prescribes a way forward that does not depend on the IRC "reaching consensus on a bipartisan plan."

Finally, Supreme Court's order is at odds with longstanding redistricting principles that courts should favor a legislative remedy over a court-drawn map when, as here, a "viable legislative plan is available." *Nichols II*, 212 A.D.3d at 531; *see* Br. for Pet'rs-Appellants at 23-30; Jenkins Resp'ts' Br. at 17-21. The Constitution confers on the Legislature a "full and reasonable opportunity to correct the [redistricting] law's legal infirmities." N.Y. Const. art. III, § 5. The People's right to a congressional map that gives effect to the Legislature's right to cure, by employing the IRC process, should not be disregarded for the next *four* congressional elections because of the now dissipated exigencies that required the *Harkenrider* Court to forego these procedures.

CONCLUSION

For the foregoing reasons, Supreme Court's order dismissing the petitioners' claims should be reversed.

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