To be argued by:
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15 minutes requested

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

No. 2022-04649

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners-Appellants,

v.

GOVERNOR KATHY HOCHUL, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Respondents.

BRIEF FOR RESPONDENT HOCHUL

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Dated: December 7, 2022

Supreme Court, New York County – Index No. 154213/2022

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PRELIMINARY STATEMENT

When this case was previously before this Court, the Court declared the redistricting map for the State Assembly passed by the Legislature in February 2022 to be constitutionally infirm and remanded the case to the trial court "for consideration of the proper means for redrawing th[at] . . . map, in accordance with NY Const, art III, § 5-b." (Record (R.) 1033.) On remand, Supreme Court, New York County did just that: it ordered the redrawing of the Assembly map in accordance with § 5-b, specifically by ordering the Independent Redistricting Commission (IRC) to reconvene to prepare a new map for submission to the Legislature. (R. 22-24.) Petitioners' challenge to this procedure should be rejected.

First, the approach taken by Supreme Court to redraw the Assembly map is consistent with the State Constitution. Section 5-b of article III calls for the establishment of an IRC "at any . . . time a court orders that congressional or state legislative districts be amended." N.Y. Const. art. III, § 5-b(a). Supreme Court's order directing the IRC to prepare a new Assembly map in accordance with the procedures set forth in § 5-b not only conforms to this requirement, but also gives effect to parallel constitutional requirements calling for the Legislature to be given a "full

and reasonable opportunity" to correct an unconstitutional map's "legal infirmities," *id.* § 5, and for the court to "order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law," *id.* § 4(e). Petitioners' interpretation, by contrast, would both read into the Constitution prohibitions that are not there and read out existing provisions such as § 5-b(a). And nothing in the Court of Appeals' ruling in *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), which was focused on providing relief in time for the 2022 elections rather than what procedure might govern when time is not of the essence, compels a contrary result.

Second, Supreme Court's order is supported by the law of the case, a doctrine that generally precludes a court from overruling an order in the same action by another court of coordinate jurisdiction. Here, this Court's remand order in the prior appeal directed Supreme Court to order the Assembly map redrawn "in accordance with" the requirements of article III, § 5-b. Supreme Court's implementation of that directive should not be disturbed by this Court in this appeal.

QUESTIONS PRESENTED

1. Did the Constitution authorize Supreme Court to direct the IRC to prepare a new Assembly map following this Court's holding that the current map was constitutionally infirm?

2. Does this Court's order in the prior appeal directing Supreme Court to order the adoption of a new Assembly map "in accordance with NY Const art III, § 5-b" constitute the law of the case that should not be disturbed by this Court in this appeal?

STATEMENT OF THE CASE

A. Relevant Constitutional Provisions

In 2014, the New York voters approved constitutional amendments establishing that the redistricting process for Congressional, State Senate, and Assembly maps in the State would flow largely through a bipartisan IRC. *See Matter of Harkenrider*, 38 N.Y.3d at 503. 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).

To that end, 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 obtaining legislative approval of the IRC-established plan in connection with this decennial activity. *Id.* § 4(b). Under these provisions, the IRC must submit its redistricting plans to the legislature no later than January 15 "in the year ending in two" after the census, where it must be voted upon by the Legislature without amendment. *Id.* If the legislation fails, the IRC must prepare and submit a second redistricting plan no later than February 28 of that same year, also to be voted upon without amendment. If that legislation also fails, the Legislature is authorized to introduce amendments as it sees fit. *Id.*

The Constitution specifies that the "process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article 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." *Id.* § 4(e). It also provides that "[i]n the event that a court finds" that a law establishing Congressional or state legislative districts "violate[s] the

provisions of this article," the "legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." *Id.* § 5.

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 were rejected by the Legislature. *See 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. *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—but not the Assembly map—on two grounds. First, the petitioners alleged that the process by which the two maps were adopted violated the State Constitution because the IRC failed to submit a second redistricting plan, and thus the Legislature lacked authority to enact its own plan. *Id.* at 505-06.

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

The trial court agreed in large part,[1] but took the additional step of striking the Assembly map sua sponte, because that map was enacted pursuant to the same unconstitutional process as were the challenged maps. *See Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 22176, at 10 (Sup. Ct. Steuben County 2022). The trial court's rulings as to the Congressional and Senate maps were ultimately affirmed by the Court of Appeals. *See Matter of Harkenrider*, 38 N.Y.3d at 521. However, the Court of Appeals declined to invalidate the Assembly map, despite agreeing that it suffered from "procedural infirmity," because the map had not been challenged by the *Harkenrider* petitioners. *See id.* at 521 n.15.

Regarding the remedy, the Court recognized that the Constitution directed that "the legislature must be provided a 'full and reasonable opportunity to correct . . . legal infirmities' in redistricting litigation." *Harkenrider*, 2022 N.Y. Slip Op. 22176, at 12 (quoting N.Y. Const. art. III,

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[1] The court found that petitioners had not met their burden of proof to demonstrate a partisan gerrymander with respect to the senate map. *See Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 22176, at 14 (Sup. Ct. Steuben County 2022).

§ 5). Nevertheless, it concluded that the procedural infirmity that had occurred was "incapable of a legislative cure." *Matter of Harkenrider*, 38 N.Y.3d at 523. Since the IRC itself could not be reconvened to generate new maps in time for the upcoming elections, the Court directed Supreme Court on remand to "order the adoption of . . . a redistricting plan" to remedy the constitutional violations and to do so "with all due haste." *Id.* at 523-24; N.Y. Const. art. III, § 4(e).

C. Petitioners Commence the Current Proceeding and Seek Emergency Relief

On remand, the *Harkenrider* trial court set a deadline of May 20, 2022, for a special master to submit his proposed remedial Congressional and Senate maps and moved the 2022 primary election for Congressional and Senate contests to August 23, 2022.

In the meantime, on May 15, 2022, petitioners commenced this action in Supreme Court, New York County in order to bring the direct challenge to the Assembly map that the Court of Appeals had found was lacking in *Harkenrider*.[2] (R. 25.) Petitioners sought a declaration that the

[2] The petition named as respondents Governor Hochul, Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins, Speaker of the Assembly Carl Heastie, the New York

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Assembly map "is void based upon the constitutional flaws in its adoption previously found by the Court of Appeals" and asked for the appointment of a special master to aid in the development of a new Assembly map. (R. 53.) Petitioners also sought postponement of all primary elections then scheduled for June 28, 2022, to either August 23 or September 13, 2022, and moved for emergency relief enjoining the State from using the current Assembly map in the 2022 election. (R. 54.)

On May 25, 2022, Supreme Court (Love, J.) denied petitioners' emergency application and denied their petition in its entirety.[3] (*See* R. 15.) The court reasoned that, whatever the merits of petitioners' underlying claim, the action was untimely because petitioners had waited months before commencing the litigation, while none of the relief that they were seeking was practically available for the 2022 elections. (R. 1018-1028.)

State Board of Elections, and the New York State Legislative Task Force on Demographic Research and Reapportionment. (R. 25.)

[3] Petitioners had requested the court deny their petition if the court were to decline to enter emergency relief so as to facilitate an appeal to the Court of Appeals. (R. 907-908.)

On appeal, this Court held that the trial court had properly denied the petition to the extent it sought relief for the 2022 election. (R. 1032.) However, it concluded that the general challenge was otherwise timely and meritorious, and remanded the case "for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const art III, § 5-b." (R. 1032-1033.) The Court stated that "upon the formal adoption and implementation of a new legally compliant state assembly map, for use no sooner than the 2024 regular election," the 2022 Assembly map would become "void and of no effect." (R. 1032.)

D. The Proceedings on Remand

On remand, Supreme Court promptly directed the parties to submit briefs and supporting materials "on the issue of how best to accomplish the redrawing of the state assembly map" and heard argument on that issue.[4] (R. 13.) Petitioners contended that the Constitution required the *court* (and not the Legislature or the IRC) to draw the new Assembly map, notwithstanding this Court's reference to article III, § 5-b of the

[4] The court also heard argument at a later date on whether the IRC and its members should be added as respondents in the proceeding and ultimately ordered them to be added. (R. 13.)

Constitution in its remand order, because the invalidity of the Assembly map meant that there was nothing to be "amended" for the purposes of § 5-b(a).[5] (R. 1079.) Petitioners also argued that certain of the provisions of article III, § 4 prescribing the schedule and process for IRC to perform its redistricting functions were incompatible with the current posture of the case, and thus both the Legislature and the IRC were "incapable of curing" the map's deficiencies. (R. 1076, 1079.) Finally, petitioners invoked the Supreme Court, Albany County's recent dismissal of a petition seeking to reopen the redistricting process so that the IRC can prepare a new Congressional map, *see Hoffman v. New York State Independent Redistricting Commission*, 2022 N.Y. Slip Op. 33555(U) (Sup. Ct. Albany County 2022), arguing that the court here should similarly reject the effort to convene an off-calendar IRC in favor of a court-driven redistricting process.[6] (R. 1253.)

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[5] As discussed above, article III, § 5-b describes the formation, composition, and operational requirements of the IRC and directs that the IRC be convened during the year the census is to be conducted "and at any other time a court orders that congressional or state legislative districts be amended." N.Y. Const. art. III, § 5-b(a).

[6] Petitioners also argued that the court should not simply rubber-stamp or adopt the existing Assembly map and submitted evidence

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On October 12, 2022, Supreme Court issued its decision and order rejecting petitioners' contentions and ordering the IRC to convene and to prepare a new Assembly map. (R. 10-24.) The court held that the Constitution's directive that the IRC be convened "at any other time a court orders that congressional or state legislative districts be amended," N.Y. Const. art. III, § 5-b, would be rendered meaningless by petitioners' argument that the IRC was constitutionally able to act only during a circumscribed period of time following the census. (R. 17.) The court also noted that it was "specifically instructed to consider" § 5-b—i.e., the subsection governing IRC procedures—by this Court and that thus "the appointment of a special master" to aid in the court's drawing of the map "is clearly disfavored." (R. 17.)

Next, the court distinguished *Hoffman* on the ground that, unlike here, that case involved an effort to have the IRC redraw an *approved* map, which the Constitution requires must remain "in force until the effective date of a plan based upon the subsequent federal decennial census . . . unless modified pursuant to court order." (R. 18 (quoting

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purporting to show that the current map was biased in favor of incumbents in violation of article III, § 4(b)(5) of the Constitution. (R. 1082-1087.)

N.Y. Const. art. III, § 4(e)).) Finally, the court noted that both the majority and dissenting opinions in *Harkenrider* pointed to the importance of the IRC to the constitutional redistricting process and observed that "[w]hile the adoption of a judicially-drawn map [in *Harkenrider*] was previously necessary due to time constraints," there was "sufficient to time to follow, as closely as possible, the constitutionally mandated procedure approved by the people of the State of New York" for drawing the Assembly map in advance of the 2024 election cycle. (R. 19-20.)

Accordingly, the court directed that the IRC:

- prepare a redistricting plan for the Assembly for submission to the Legislature along with implementing legislation no later than April 28, 2023, and, should this plan fail to be adopted, prepare and submit a second redistricting plan within 15 days of the failure, but in any event no later than June 16, 2023;
- conduct at least one public hearing in each of five specific cities and seven specific counties (consistent with the requirements of N.Y. Const. art. III, § 4(c)(6));
- make draft redistricting plans, relevant data, and related information available to the public at least 30 days prior to the first public hearing (also consistent with the requirements of § 4(c)(6)), and in any event no later than December 2, 2022; and
- conduct all votes pursuant to the procedure established in N.Y. Const. art. III, § 4(b).

(R. 22-24.) The court also retained jurisdiction "over this action and any challenges to the procedures of the legislature, the procedures of the [IRC] and/or the resulting assembly map." (R. 24.) This appeal ensued.

ARGUMENT

POINT I

SUPREME COURT ACTED CONSISTENTLY WITH THE CONSTITUTION IN CONVENING THE INDEPENDENT REDISTRICTING COMMISSION TO PREPARE THE REMEDIAL ASSEMBLY MAP IN THE FIRST INSTANCE

The Constitution requires an IRC to be established "[o]n or before February first of each year ending with a zero and at any *other* time a court orders that congressional or state legislative districts be amended." N.Y. Const. art. III, § 5-b(a) (emphasis added). Supreme Court's order directing the IRC to prepare a remedial Assembly map, after this Court declared that map to be constitutional defective, is consistent with this directive.

First, the trial court's order is authorized by § 5-b(a). This Court's order requiring the "formal adoption and implementation of a new state assembly map," upon which "the February 2022 assembly map will become void and of no effect" (R. 1032), is an order that the existing, constitutionally infirm Assembly map "be amended" for the purposes of

§ 5-b(a). Section 5-b(a) refers to two points at which an IRC "shall be" convened: in the February of the federal census year and at "any *other* time" that Congressional or state legislative districts are ordered to "be amended." N.Y. Const. art. III, § 5-b(a) (emphasis added). Since § 5-b(a) characterizes both the decennial redrawing of Congressional and state legislative districts and instances where a court may order changes to a map as "amend[ments]," this Court's call for the "adoption and implementation" of a new map—which is exactly what happens following each census—constitutes an order that the Assembly map "be amended" for purposes of § 5-b(a).

Petitioners' contrary argument that "no Assembly map exists that can now be 'amended' pursuant to Section 5-b(a)" (Br. for Pet'rs-Appellants (Br.) at 20-21) is without merit; in fact, the current Assembly map was utilized in the 2022 election, and "will become void and of no effect" only upon the adoption of its replacement (R. 1032). In any event, the circumstances here are indistinguishable from those that result when the decennial census requires a reapportionment and redistricting based on population changes: there, too, the legacy maps are unconstitutional because (at minimum) they are malapportioned, but must nevertheless

be "amended" via the constitutional IRC process. *See* N.Y. Const. art. III, § 5-b(a).

Second, the trial court's interpretation of § 5-b(a) gives effect not only to that provision, but also to parallel requirements found in §§ 4(e) and 5. *See People ex rel. Balcom v. Mosher*, 163 N.Y. 32, 36 (1900) (holding that the Constitution must "be considered as a whole" and that "force is to be given to every provision contained in it"). The court's order conforms with § 4(e) by "order[ing] the adoption of . . . a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e). And the order gives the Legislature "a full and reasonable opportunity to correct the law's legal infirmities," *id.* § 5, by directing the IRC to prepare a remedial map according to constitutional procedures, to be either approved or amended by the Legislature. *See id.* § 4(b).

By contrast, petitioners' interpretation of §4(e) would effectively read §§ 5 and 5-b(a) out of the Constitution. Petitioners interpret §4(e) to mean that a court—and only a court—may draw a remedial map *unless* there is sufficient time for the IRC to act according to the schedule set forth in § 4(b). *See* Br. at 19, 21. But there will almost never be sufficient time on that schedule for the IRC to reconvene (§ 5-b(a)) and for the

Legislature to be given a full and fair opportunity to cure a legal deficiency found by a court (§ 5). Article III, § 5 of the Constitution requires a court to render a verdict in a redistricting challenge within 60 days of the petition's filing. Even if the IRC were to submit its first maps before the constitutional January 15 deadline,[7] it is unlikely that a legal challenge to these maps would 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.[8] *Cf. Matter of Harkenrider*, 38 N.Y.3d at 494, 521 ("expedited judicial review" of 2022 redistricting plan resolved by trial court on March 31, 2022, and Court of Appeals on April 27, 2022—59 and 87 days, respectively, from date of filing).

Under petitioners' interpretation, therefore, §§ 5 and 5-b(a) would never be given effect. That alone is good reason to reject it. *See Columbia*

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[7] The legislative session generally runs from January to June. *See People v. Ohrenstein*, 153 A.D.2d 342, 348 (1st Dep't 1989). Thus, even an early submission by the IRC would not likely be considered by the Legislature until, at the earliest, the first week of January.

[8] Moreover, this scenario assumes that the IRC's first submitted maps are approved by the Legislature. Petitioners' interpretation would entirely foreclose the application of §§ 5 and 5-b(a) to any challenge to a second submission by the IRC, in the event its first submission is rejected.

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

Third, petitioners' interpretation is inconsistent with the text of § 4(e) itself. Section 4(e) provides that the redistricting process set forth in §§ 4, 5, and 5-b "shall govern . . . *except* to the extent 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). Petitioners take this language to mean that the "duty" to draw a new map due to a legal violation "falls solely to the court" (Br. at 16), at least once the deadlines for IRC action in § 4(b) have passed. But nothing in § 4(e) restricts how a court may discharge that duty. In particular, nothing prevents a court from requesting that the IRC and Legislature "adopt[]" or make "changes to" a redistricting plan according to the procedures set forth in the Constitution directly for that purpose. That prohibition is grafted onto § 4(e) by petitioners, who nonetheless ignore the provisions

in §§ 5 and 5-b(a) that *do* identify entities (the IRC and Legislature) who may be called on to act when a court orders a map to be amended.

Instead, § 4(e) gives the court flexibility in fashioning a remedy, given that (as here) it may be impossible to adhere precisely to the letter of the provisions outlining the IRC process in advance of an election, *see Matter of Harkenrider*, 38 N.Y.3d at 523, and that certain of the terms outlining that process may be incompatible on their face with a court-ordered remedy even within the IRC schedule contemplated by § 4(b). *See, e.g.*, N.Y. Const. art. III, § 4(b) (authorizing the IRC to "prepare and submit to the legislature a second redistricting plan" only upon "notification" that the initial redistricting plan has been "disapproved" by the Legislature or the Governor and requiring plans for the assembly and senate to be voted on in a single bill). Supreme Court's order takes advantage of this flexibility and gives effect to §§ 5 and 5-b(a) by prescribing a process that hews as closely as possible to constitutional redistricting requirements. Indeed, even if petitioners were correct that § 4(e) is the exclusive mechanism for establishing a remedial map once the IRC deadlines in § 4(b) have passed, the trial court's order that the

constitutional process be followed, while retaining ultimate jurisdiction over the action, was an appropriate exercise of its § 4(e) authority.

Contrary to petitioners' argument (*see* Br. at 17), the Court of Appeals' decision in *Harkenrider* does not compel a contrary result. There, after concluding that the Senate and Congressional maps passed by the Legislature in February 2022 were constitutionally deficient, the Court considered whether to "defer[] [the] remedy for a future election" (as the State respondents had requested) or affirm the trial court's order that the court draw the map with the aid of a special master in time for the 2022 election cycle. *Matter of Harkenrider*, 38 N.Y.3d at 521. The Court took the latter course, reasoning that the Constitution demanded immediate remedial action and the Legislature was not capable "at this juncture" of providing such a remedy. *Id.* at 523. But the question of how to craft a remedy once it has been deferred to the next election, and thus in the absence of the need for immediate action, was not before the Court in *Harkenrider*. By contrast, that is the question here, which *Harkenrider* does not answer.

Petitioners misplace reliance on the *Harkenrider* Court's reference to "the expiration of the outer February 28th constitutional deadline for

IRC action" when the Court concluded that "the legislature [was] incapable of unilaterally correcting the infirmity" with the Senate and Congressional maps. *See* Br. at 17 (quoting *Matter of Harkenrider*, 38 N.Y.3d at 523 n.19). But the *Harkenrider* Court did not consider, as part of its remedial analysis, the IRC's authority under § 5-b(a) to convene "at any other time a court orders that congressional or state legislative districts be amended." This omission supports the conclusion that the Court in *Harkenrider* was narrowly concerned with fashioning emergency relief in time for the upcoming election, rather than articulating a broad constitutional rule applicable to all redistricting remedies going forward.

Finally, this Court should disregard petitioners' ill-founded policy argument. The trial court's order entrusting the drawing of a remedial Assembly map to the constitutional IRC process will not (as petitioners contend) "encourage further gerrymandering attempts in the future" by showing that "courts will look away and decline to enforce a meaningful remedy." *See* Br. at 22. In fact, the Legislature's Senate and Congressional maps were overturned and redrawn by the *Harkenrider* trial court, and the Assembly map was spared only by the absence of a timely challenge. Thus, to suggest (as petitioners do) that there will be "no consequence" to

the Legislature's unlawful 2022 redistricting effort if the constitutional IRC remedial process is followed (Br. at 22) strains credulity. And to suggest that following the IRC process now will only embolden the Legislature and IRC to engage in similar purported misconduct in the future (*id.*) also defies common sense, as it depends on the Legislature and IRC acting on the expectation—against reason and history—that their maps will not face timely challenges. The Court should reject petitioners' attempt to override plain constitutional text by appeal to baseless policy concerns.[9]

POINT II

THE LAW OF THE CASE SUPPORTS AFFIRMANCE

Even if there were some ambiguity in the propriety of the approach taken by Supreme Court (though there is not), that approach reflects the law of the case and should not be disturbed by this Court.

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[9] Petitioners also contend that the current Assembly map is gerrymandered to protect incumbents (Br. 23-25), but even if this were true it is irrelevant. The current Assembly map has been declared unconstitutional and will now be redrawn.

The law of the case doctrine "addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment." *People v. Evans*, 94 N.Y.2d 499, 502 (2000). It is "designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case." *Id.* at 504. Thus, so long as the parties "had a full and fair opportunity to litigate the initial determination," *id.* at 502 (quotation marks omitted), "a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction, *id.* at 504 (quoting *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976)). In short, "[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding" not only "on the Supreme Court" on remand, but "as well as on the appellate court" in a subsequent appeal. *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, 809 (2d Dep't 2007); *accord Kenney v. City of New York*, 74 A.D.3d 630, 630-31 (1st Dep't 2010).

In the earlier appeal in this proceeding, one of the issues raised by the parties was whether the IRC should be convened to redraw the Assembly map in time for the 2024 election cycle in the event the map

were found to be unconstitutional. *See, e.g.*, Br. for Resp'ts-Resp'ts Speaker of the Assembly Carl Heastie & Senate Majority Leader & President Pro Tempore of the Senate Andrea Stewart-Cousins at 35, *Nichols v. Hochul*, No. 2022-02301 (1st Dep't June 6, 2022), NYSCEF No. 11; Oral Arg. at 46:40-47:57, 1:00:00-1:00:45 (June 9, 2022), *Nichols*, No. 2022-02301. This Court agreed that the Constitution compelled that result, remanding the matter to the trial court "for consideration of the proper means for redrawing the state assembly map, *in accordance with NY Const, art III, § 5-b*." (R. 1033 (emphasis added).)

This Court's remand order leaves little room for ambiguity, as Supreme Court recognized. (R. 17 (holding that the language of the Constitution "and the guidance of the Appellate Division's opinion in *Nichols v. Hochul* . . . clearly allows, *nay requires*, this Court to modify the deadlines established in the Constitution" to facilitate the operation of the IRC (emphasis added)).) Section 5-b of article III prescribes the procedure for the conduct of the IRC, and § 5-b(a) expressly directs that the IRC "shall be established" during the year of the census "and at any other time a court orders that congressional or state legislative districts be amended." N.Y. Const. art. III, § 5-b. As Supreme Court recognized,

this language "require[d]" it to follow the IRC process in crafting a remedy in this case. (R. 17.) The directive by "another court of coordinate jurisdiction"—i.e., this Court in the prior appeal in this proceeding—that the trial court follow § 5-b in determining the proper means for redrawing the Assembly map should be given effect as the law of the case and should not be disturbed in this appeal.

CONCLUSION

For all of the foregoing reasons, Supreme Court's order should be affirmed.

Dated: New York, New York
December 7, 2022

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 4,942.

AFFIRMATION OF SERVICE

Andrea W. Trento affirms upon penalty of perjury:

I am over eighteen years of age and an employee in the Office of the Attorney General of the State of New York, attorney for the Respondent Hochul herein.

Pursuant to the Electronic Filing Rules of the Appellate Division (22 N.Y.C.R.R. pt. 1245), I electronically filed the accompanying Brief for Respondent Hochul by using the New York State Courts Electronic Filing system on December 7, 2022, and service was accomplished by that system. No litigant or attorney in the matter is exempt from e-filing.

Dated: New York, NY
December 7, 2022

Andrea W. Trento