Motion No. 2023-600
APL-2023-00121
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Appellate Division–Third Department Docket No. CV-22-2265

# Court of Appeals

*of the*

# State of New York

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,

*Petitioners-Respondents,*

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

– against –

INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

*Respondents-Appellants,*

*(For Continuation of Caption See Inside Cover)*



## OPPOSITION TO CROSS-MOTION FOR STAY PENDING APPEAL

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– and –

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER IVELISSE CUEVAS-MOLINA and INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAZIER,

*Respondents,*

– and –

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VIOLANTE,

*Intervenors-Respondents-Appellants.*

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## PRELIMINARY STATEMENT

Petitioners brought this action to vindicate a core purpose of the Redistricting Amendments, which demand a congressional map drawn by a diverse group of New Yorkers in a transparent process that protects the interests of all voters, including the state's most marginalized residents. Petitioners invoked this Court's prescribed legal mechanism for obtaining their requested relief: "judicial intervention in the form of a mandamus proceeding," which the Court previously recognized is "available to ensure the IRC process is completed as constitutionally intended." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 515 n.10 (2022). And the Appellate Division ruled in favor of Petitioners, ordering the IRC to finish the work it started in 2021.

Each of the relevant factors weighs heavily against Intervenors' alternative request that this Court issue a stay of the Appellate Division's decision. In attempting to argue to the contrary, Intervenors rewrite history and the plain text of the Redistricting Amendments. They say Petitioners' arguments—arguments that the Appellate Division adjudged to be *correct*—are "obviously and demonstrably false" and have "no likelihood of success." Mem. of Law in Opp'n to Mot. to Vacate Stay Pending Appeal or, in the Alternative, in Supp. of Mot. for Stay Pending Appeal ("Intervenors' Mot.") at 1, 26. But no amount of intemperate language or feigned indignation can change the conclusion that Petitioners are entitled to the relief they seek. Far from precluding this action, the plain dictates of the Redistricting

Amendments entitle Petitioners to the relief they seek, and it properly directed the IRC to complete the work that the Amendments require it to do. The Appellate Division also correctly recognized that nothing about this Court's decision in *Harkenrider* mandates that the Steuben County map remain in place for the remainder of the decade. And as both Supreme Court and the Appellate Division correctly concluded, this action is timely—what matters is when the IRC's failure to perform its duty *injured Petitioners*. For all these reasons, Petitioners are likely to prevail on the ultimate merits. As for the balance of harms, the stay that Intervenors seek would only further frustrate New Yorkers' constitutionally guaranteed right to "broad engagement in a transparent redistricting process" and a fair congressional map. *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, 192 N.Y.S.3d 763, 768 (3d Dep't 2023). Given the public interest at stake and the soundness of the Appellate Division's opinion, Petitioners respectfully urge the Court to deny Intervenors' motion and allow the IRC to resume its work "forthwith." *Id.* at 770.



## ARGUMENT

Intervenors' alternative request for a discretionary stay should be denied. Intervenors' appeal lacks merit, and the balance of harms tips sharply against a stay.

### I. Intervenors are unlikely to succeed on the merits.

As the Appellate Division properly concluded, Intervenors are unlikely to succeed on the merits in this appeal. Petitioners' mandamus action is consistent with

both the New York Constitution and this Court's *Harkenrider* decision and is timely. Because it is *Petitioners* who are substantially likely to prevail in this appeal, no stay should be issued. *See Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990) ("Under [CPLR 5519(c)], there is no entitlement to a stay and, indeed, the court considering the stay application may consider the merits of the appeal."); *Herbert v. City of New York*, 126 A.D.2d 404, 407 (1st Dep't 1987) ("[S]tays pending appeal will not be granted or, where the stay is automatic, continued, in cases where the appeal is meritless.").



### A. The Appellate Division's ordered relief does not violate the Redistricting Amendments.

As the Appellate Division recognized, "[m]andamus to compel lies where an administrative body has failed to perform a duty enjoined upon it by law," and here, "[t]he IRC had an indisputable duty under the N.Y. Constitution to submit a second set of maps upon the rejection of its first set." *Hoffmann*, 192 N.Y.S.3d at 768–69 (citing N.Y. Const. art. III, § 4(b)). Notably, Intervenors do not seem to dispute either of these points. Instead, they assert that the Appellate Division's ordered relief violates the Redistricting Amendments' "prohibition on mid-decade redistricting." Intervenors' Mot. 17. This argument misreads the constitutional text and mischaracterizes Petitioners' claim. The Court should be reject it.

*First*, although the Redistricting Amendments do set "a clear default duration for electoral maps," *Hoffmann*, 192 N.Y.S.3d at 767, Intervenors overstate the

degree to which mid-decade redistricting is prohibited. Section 4(e) provides that "[a] reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero *unless modified pursuant to court order*." N.Y. Const. art. III, § 4(e) (emphasis added). That is precisely what Petitioners seek here—and what the Appellate Division ordered. That court "direct[ed] the IRC to commence its duties forthwith," *Hoffmann*, 192 N.Y.S.3d at 770, requiring the IRC to fulfill its obligations and submit a second round of congressional maps for the Legislature's consideration. The constitutional redistricting process having been resumed, any new congressional plan that the IRC/legislative process produces will have resulted from a "court order." Because section 4(e) clearly contemplates such a modification, the Appellate Division's ordered relief does not violate this aspect of the Redistricting Amendments.



Insofar as the language stating that a reapportionment plan shall be in force until the subsequent census is intended to impose guardrails on mid-decade interference with redistricting plans, those guardrails are meant to apply to plans *created using the Redistricting Amendments' process*. The first sentence of section 4(e) requires that the "process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article"—in other words, the process set forth in the Redistricting Amendments, which requires

the IRC to send a second map to the Legislature—"*shall* govern redistricting in this state." N.Y. Const. art. III, § 4(e) (emphasis added). Only *after* that preamble does section 4(e) turn to the role of courts.

*Second*, Intervenors argue that only an "illegal" map can be modified mid-decade consistent with the Redistricting Amendments, Intervenors' Mot. 18, 20–21, but this is merely a gloss Intervenors adopt to portray this mandamus action as outside the scope of section 4(e). The word "illegal" appears nowhere in the constitutional text, which similarly does not reserve mid-decade remediation exclusively for substantive issues with maps. *Contra id.* at 21 (suggesting, without textual authority that "[f]or Section 4(e)'s second sentence to [] permit modification of [the current] map, there must be some violation of law that inheres in that judicially drawn map"). Instead, section 4(e) refers generally to "violation[s] of law" and permits "modifi[cation] pursuant to court order"—without limiting or specifying the types of violations or court orders that qualify. N.Y. Const. art. III, § 4(e). Here, there was a violation of law: As the Appellate Division properly found, the IRC failed to perform its duties as required by the Redistricting Amendments to the New York Constitution, which unequivocally required it "to submit a second set of maps upon the rejection of its first set." *Hoffmann*, 192 N.Y.S.3d at 768–69 (citing N.Y. Const. art. III, § 4(b)). Intervenors do not dispute this. Because a violation of law

has occurred, the Appellate Division can order modification of the congressional map consistent with the New York Constitution.

*Third*, Intervenors' assertion that "modif[ications]" to maps are limited to minor changes, Intervenors' Mot. 19, finds no support in the constitutional text. To the contrary, the Redistricting Amendments recognize that the IRC "shall be established" "at *any [] time* a court orders that congressional or state legislative districts be *amended*." N.Y. Const. art. III, § 5-b(a) (emphases added). The relief the Appellate Division has ordered clearly comports with this text. Petitioners do seek to *amend* New York's congressional map—by having its lines redrawn under the procedure required by New York law. And the plain meaning of the term "amend" includes changes that are necessary "to rectify or make right." *Amend*, *Black's Law Dictionary* (11th ed. 2019);[1] *cf. Harkenrider*, 38 N.Y.3d at 509 ("construing the language of the Constitution" requires "giv[ing] to the language used its ordinary meaning" (quoting *Sherrill v. O'Brien,* 188 N.Y. 185, 207 (1907)); *see also Nichols*



[1] *See also Amend*, *Black's Law Dictionary* (11th ed. 2019) (defining "amend" as "[t]o correct or make *usu.*"—but not *exclusively*—"small changes to (something written or spoken); to rectify or make right"; or "[t]o change the wording of; specif., to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or *substituting* words" (emphases added)); *Amend*, Merriam-Webster, https://www.merriam-webster.com/dictionary/amend (last visited Sept. 4, 2023) (defining "amend" as "to put right" or "to change or modify (something) for the better," without quantitative qualification). As anyone who has observed the legislative process for any length of time can confirm, amendments to laws might be minor or extensive—or anything in between.

*v. Hochul*, 212 A.D.3d 529, 530 (1st Dep't 2023) (affirming, under section 5-b, supreme court's "order[] that the Assembly map be redrawn through the IRC process").

Nor, for that matter, would Intervenors' overly restrictive interpretation of "modify" in Section 4(e) make sense in the context of redistricting. Whenever a congressional map is "modified" or "amended," whether pursuant to court order or otherwise, the old map is necessarily and inevitably "replaced." Districts must maintain equal populations; any changes to the boundaries of one district, no matter how small, necessarily require changes to the boundaries of neighboring districts, with effects rippling throughout the map. There is thus no principled distinction between "modifying" (or "amending") a map and "replacing" a map—and Intervenors certainly offer no manageable standard for determining how much "modification" is too much.



*Fourth*, Intervenors' concern that relief in this case would usher in a cycle of unchecked annual redistricting, *see* Intervenors' Mot. 22, is unfounded. To begin, it is premised on an absurd hypothetical: that "Petitioners obtain their requested relief here, and the Legislature deadlocks after receiving a second-round map from the IRC, leaving the *Harkenrider* map in place." *Id.* Intervenors never explain what it would mean for the Legislature to "deadlock"—nor do they point to any instance of legislation inaction that suggests the Legislature would be unable or unwilling to

marshal the votes needed to adopt a new congressional map. Moreover, it is not otherwise the case that "any citizen could bring a new lawsuit upon a change in the political composition of the Legislature after 2024, obtaining another judicial order allowing the IRC/Legislature process yet another chance to complete." *Id.* Once the IRC/legislative process has run its course, no further mandatory acts would be left unaccomplished, and mandamus would not lie.

*Fifth*, Intervenors' assertion that Petitioners needed to bring this action in Steuben County, Intervenors' Mot. 19, 23–24, is wrong. Intervenors assume that modifying or amending the Steuben County Supreme Court's *map* under section 4(e) necessarily entails modifying that court's *order*. Not so. Petitioners contend, and the Appellate Division agreed, that the IRC has the express constitutional duty and authority to prepare an amended map. *See* Mot. to Vacate Stay Pending Appeal ("Pet'rs' Mot.") 16–17. If such a map becomes law (after legislative approval or modification), the Steuben County Supreme Court's order will simply be moot. Intervenors' "wrong-court" argument—which is merely a re-statement of their "collateral attack" argument from below—just begs the question already addressed above: whether mid-decade redistricting is allowed at all.[2]



[2] In Supreme Court and the Appellate Division, Intervenors alternated between an express collateral estoppel/res judicata argument and a more freewheeling "prohibition on collateral attacks." Br. for Intervenors-Resp'ts at 54–55 & n.8, *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, No. CV-22-2265 (3d Dep't

Intervenors call their "wrong-court" argument "blackletter" law, Intervenors' Mot. 19, but their citations are all far afield: CPLR 5015(a) addresses relief from judgment; *Donato v. American Locomotive Co.* concerns a collateral attack by a union member on an arbitration judgment in which he was already represented by his union, *see* 283 A.D. 410, 414 (3d Dep't 1954); and *Divito v. Glennon* explains that res judicata requires "identity or privity of parties," 193 A.D.3d 1326, 1328 (4th Dep't 2021).[3] None of these authorities actually supports Intervenors' argument, underscoring that their wrong-court theory is nothing more than their latest spin on an argument that is fundamentally without merit.

All told, far from foreclosing Petitioners' claim, the Redistricting Amendments expressly allow for a map to be amended when a court orders such relief to remedy a legal violation—which is exactly what the Appellate Division did in this case.



Mar. 22, 2023), NYSCEF Doc. 52. Neither is persuasive: Res judicata does not apply to "a discrete and previously unaddressed issue in a proceeding brought by different parties," *Hoffmann*, 192 N.Y.S.3d at 769 n.5, and "the so-called 'collateral attack doctrine' does not exist apart from . . . collateral estoppel principles," *ABN AMRO Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208, 226 (2011).

[3] Intervenors also inexplicably cite a passage from *Gager v. White* that concerns whether "a specific objection to the assertion of jurisdiction founded on the attachment of the out-of-State defendant's liability insurance policy was preserved by appropriate motion or affirmative defense." 53 N.Y.2d 475, 483 (1981).

### B. The Appellate Division's ordered relief is consistent with this Court's *Harkenrider* decision.

Intervenors misconstrue the Court's *Harkenrider* decision to argue that it forbids the Appellate Division's ordered relief. It does not. On its face, the relief granted by the Appellate Division is entirely consistent with *Harkenrider*.

*First*, contrary to Intervenors' claim, *see* Intervenors' Mot. 20–21, *Harkenrider* did not remedy the injury Petitioners have suffered here. The *Harkenrider* petitioners (Intervenors here) claimed that, because the redistricting maps enacted by the Legislature in 2022 were drawn without legal authority and therefore void, the previous decade's congressional map was the only valid map in existence, and its districts were malapportioned in violation of the one-person, one-vote requirement. The *Harkenrider* litigation thus remedied the Legislature's usurpation of the IRC's authority and the consequent malapportionment—but the IRC's own violation of the Redistricting Amendments was not and has never been redressed. Underscoring this fact is the nature of the relief ordered in *Harkenrider*: the drawing of new redistricting maps by a special master.

In contrast, Petitioners aim to vindicate the Redistricting Amendments' purpose of ensuring that the redistricting process is "democratic, transparent, and conducted by the IRC and the Legislature pursuant to certain procedural and substantive safeguards," which are explicitly laid out and mandated by the

Amendments. R. 268.[4] The special-master process overseen by the Steuben County Supreme Court—though necessary under the exigencies of the moment—achieved none of these goals. It therefore could not have "cured" the violation of law at issue here; namely, the IRC's failure to submit a second set of redistricting maps to the Legislature for consideration.

Intervenors make much of the fact that the first cause of action in their *Harkenrider* petition mentioned the IRC's failure to submit a second set of maps to the Legislature, *see* Intervenors' Mot. 20–21, but neither that claim nor the remedy that Intervenors sought was *directed at* the IRC's failure to comply with its constitutional duties (or otherwise duplicative of Petitioners' claim here). To the contrary, Intervenors' claim in *Harkenrider* was clearly and specifically directed at *the Legislature's* adopted maps and demanded that *the judiciary*—not the Legislature or the IRC—engage in remedial map-drawing. *See* R. 192 ("Since the Legislature had and has no constitutional authority to draw congressional or state Senate districts given the IRC's failure to follow the exclusive, constitutionally mandated procedures, this Court cannot give the Legislature another opportunity to draw curative districts. . . . Thus, this Court should draw its own maps for Congress and state Senate prior to the upcoming deadlines for candidates to gain access to the



[4] Citations to "R." in this memorandum refer to the record on appeal to the Appellate Division. *See* NYSCEF Doc. 35 (3d Dep't).

ballot[.]"). The IRC's unconstitutional abdication was only an incidental detail to that claim. And Intervenors clearly did not seek, as Petitioners do in this mandamus action, to order the IRC to resume its efforts consistent with the Redistricting Amendments. *See* R. 198–99. Nor could they have—neither the IRC nor its constituent commissioners were ever even joined as defendants in *Harkenrider*.

Intervenors also protest that neither Petitioners nor any other party appealed the map adopted by the Steuben County Supreme Court in *Harkenrider*. *See* Intervenors' Br. 7, 20. But Petitioners were not parties to that litigation. Indeed, five of the Petitioners in this action moved to intervene in *Harkenrider* to defend their interests, but their request was denied. *See* Order, *Harkenrider v. Hochul*, No. 22-00506 (4th Dep't Apr. 14, 2022), NYSCEF Doc. No. 41. In any event, an appeal of that map would not have remedied the IRC's constitutional violation that is the subject of *this* litigation.



*Second*, this Court's observation in *Harkenrider* that "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed," 38 N.Y.3d at 523, does not foreclose the Appellate Division's ordered relief. To begin, this Court expressly recognized mandamus as a "course[] of action available to ensure the IRC process is completed as constitutionally intended." *Id.* at 515 n.10. Given that a mandamus action cannot ripen before the respondent agency fails to undertake its constitutionally obligated duties, *see, e.g.*, *Agoglia v. Benepe*, 84

A.D.3d 1072, 1076 (2d Dep't 2011)—which is to say, blows its deadline—*Harkenrider* necessarily allows for a suit to compel further IRC action following the constitutional deadline. Moreover, the Redistricting Amendments themselves expressly contemplate IRC efforts following the deadlines enumerated in section 4(b), providing that "[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*, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices." N.Y. Const. art. III, § 5-b(a) (emphasis added). That the constitutional text explicitly contemplates that the IRC can act "at any other time a court orders" belies Intervenors' assertion that the expiration of the initial deadline "preclud[es] Petitioners' relief." Intervenors' Mot. 26.[5]



*Third*, Intervenors wrongly claim that the Steuben County Supreme Court's map must stay in place for the remainder of the decade. Intervenors' Mot. 26–27. To the contrary, this Court in *Harkenrider* ordered a limited remedy tailored to the particular legal violation and exigent situation that was before it. Because the previous decade's map was malapportioned due to changes in population over the

[5] Intervenors wave away section 5-b(a) by suggesting that it is "available only when a court needs to 'amend[]' a map" and not "when a court must 'adopt[]' a redistricting plan," Intervenors' Mot. 27 (alterations in original), but this just repeats their unpersuasive "modification" argument, *see supra* at 6–7.

previous decade—and with the midterm election season not only imminent, but *in progress*—if the Steuben County Supreme Court had not expeditiously created remedial maps with the help of a special master, there would have been no constitutional maps in place for 2022. In preventing that outcome, this Court was clear that it was exercising "judicial oversight . . . to facilitate the expeditious creation of constitutionally conforming maps *for use in the 2022 election*." *Harkenrider*, 38 N.Y.3d at 502 (emphasis added).

That limited remedy was consistent with the remedial provision in the Redistricting Amendments, which provides that the IRC process "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). As the Appellate Division recognized, this Court "was required to fashion a remedy that would provide valid maps in time for the 2022 elections, and it did so." *Hoffmann*, 192 N.Y.S.3d at 768. Although the imminence of the midterm elections required the use of a special master in 2022, that necessary deviation from the process prescribed by the Redistricting Amendments does not preclude the IRC from performing its constitutional duties for the remainder of the decade. "Simply put, the Court was not 'required' to divert the constitutional process beyond the then-imminent issue of the 2022 elections." *Id.*

### C. This mandamus action was timely filed.

Intervenors continue to push a statue-of-limitations argument that both Supreme Court and the Appellate Division properly rejected. Their argument replaces the settled standard for the timeliness of mandamus actions with a standard of Intervenors' own invention, and this Court should reject it.

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." CPLR 217(1). 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," which "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. & Telecomms.*, 5 N.Y.3d 30, 34 (2005). Put more plainly: the statute of limitations for a mandamus claim begins to run not when a government body fails to perform a mandatory duty, but rather when that lapse of duty *injures the claimant*.



Here, Petitioners are New York voters who are injured because they cannot vote—and, indeed, have never been able to vote—using maps drawn in accordance with the clear directives of New York law. The Redistricting Amendments mandate a transparent, democratically accountable process. That process begins with maps drawn by the IRC and concludes with the People's representatives in the Legislature

approving or modifying those maps. Until the Legislature's 2021 gap-filling legislation was deemed unconstitutional, Petitioners had no reason to anticipate that the map-drawing would be wholly removed from the democratically accountable process required by New York law. As the Appellate Division explained:

> The 2021 legislation in effect at the time of the IRC's failure to submit a second redistricting plan to the Legislature provided that, "[i]f the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the [IRC] shall submit to the [L]egislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and that each house must then "introduce such implementing legislation with any amendments each house deems necessary." In this CPLR article 78 proceeding, petitioners seek strict compliance with the constitutionally enshrined IRC procedure, which does not tolerate a nonvote. Thus, that claim accrued when the 2021 legislation was deemed unconstitutional to the extent that it permitted the Legislature "to avoid a central requirement of the reform amendments," a determination first made by Supreme Court (McAllister, J.) on March 31, 2022. Petitioners commenced this proceeding on June 28, 2022, well within the period in which to do so.



*Hoffmann*, 192 N.Y.S.3d at 766–67 (alterations in original) (citations omitted) (first quoting L. 2021, ch. 633, § 1; and then quoting *Harkenrider*, 38 N.Y.3d at 517).[6]

Put in the terms of the statute-of-limitations caselaw, the IRC's failure to submit a second set of congressional maps did not inflict "actual, concrete injury,"

[6] Whether the precise accrual date is, as the Appellate Division concluded, the date the Steuben County Supreme Court found the 2021 legislation unconstitutional (March 31, 2022) or the date this Court agreed with that conclusion (April 27, 2022), Petitioners' action was timely filed within the four-month window set forth in CPLR 217(1).

*Best Payphones*, 5 N.Y.3d at 34, until this Court declared the Legislature's gap-filling 2021 legislation unconstitutional. The relief sought by Petitioners and granted by the Appellate Division—an order compelling completion of the IRC/legislative redistricting process *mandated by law*—would have been futile prior to that point, since the Legislature would have been able to assume its constitutional role as the final arbiter of proposed maps notwithstanding the IRC's inaction. Until this Court's *Harkenrider* decision, the redistricting process had proceeded as prescribed by the operative law in place at the time. The 2021 legislation, which provided a mechanism for completing the constitutional redistricting process in the event of IRC default, still had the potential to "prevent[] or significantly ameliorate[]" Petitioners' injury. *Id.* It therefore was not "reasonable for petitioners to demand that the IRC act" sooner. *Hoffmann*, 192 N.Y.S.3d at 771 (Pritzker, J., dissenting); *cf. League of Women Voters of N.Y. v. N.Y. State Bd. of Elections*, 206 A.D.3d 1227, 1231 (3d Dep't 2022) (per curiam) ("[I]n the absence of an express judicial order invalidating the 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 respondent[.]" (cleaned up)).



In response to the Appellate Division's conclusion, Intervenors propose two alternative accrual dates: January 24, 2022, when "[t]he IRC announced . . . that it 'would not present a second plan to the legislature' as Article III, Section 4(b)

requires," and January 25, 2022, when the IRC "allowed its constitutionally mandated 15-day deadline to lapse without completing its mandatory duties." Intervenors' Mot. 15–16 (quoting *Harkenrider*, 38 N.Y.3d at 504–05). Neither is the proper accrual date for Petitioners' claim.

The January 24 press release is legally insignificant because it simply described the state of affairs at that time, stating that five members of the IRC "have repeatedly attempted to schedule a meeting by [January 25, 2022], and our Republican colleagues have refused. This is the latest in a repeated pattern of Republicans obstructing the Commission doing its job." R. 359. A press release by five members of the ten-member IRC describing their efforts to schedule a meeting is neither a "final and binding" determination that the IRC will not act nor a communication of the IRC's "definitive position." *Best Payphones*, 5 N.Y.3d at 34. Indeed, the five commissioners who signed the January 24 statement could *not* bind the IRC under the Redistricting Amendments. *See* N.Y. Const. art. III, § 5-b(f) ("[N]o exercise of any power of the independent redistricting commission shall occur without the affirmative vote of at least a majority of the members[.]").



Nor is January 25, 2022, the proper accrual date. Even after the January 25 deadline passed, the 2021 gap-filling legislation created a procedure for the Legislature to assume its role at the end of the constitutional process, which "prevented or significantly ameliorated" Petitioners' injury. *Best Payphones*, 5

N.Y.3d at 34. The Appellate Division was therefore correct: Petitioners did not suffer the injury for which they now seek mandamus relief until the gap-filling legislation was deemed unconstitutional. And this action commenced within four months of that date.

Finally, even under Intervenors' lapse-of-duty-based approach to timeliness—as distinguished from the injury-based approach found in New York caselaw—this action was timely. *See* Pet'rs' Mot. 24 n.5. This Court—in *Harkenrider*, no less—described February 28 as the "outer end date for the IRC process" and the "outer . . . constitutional deadline for IRC action." 38 N.Y.3d at 522–23 nn.18–19; *see also* N.Y. Const. art. III, § 4(b). Petitioners commenced this action within four months of February 28, 2022.



## II. The balance of harms and public interest militate against a stay.

None of Intervenors' equitable arguments can support issuing a stay. Among other things, Intervenors fail to demonstrate that they would be irreparably harmed absent a stay, or that the public interest weighs against enforcing the Redistricting Amendments' prescribed procedure. *See, e.g.*, *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975) (considering "the prospect of irreparable harm" in declining to vacate stay of injunction pending appeal); *Deutsche Bank Nat'l Tr. Co. v. Royal Blue Realty Holdings, Inc.*, 2016 N.Y. Slip Op. 31510(U), *4, 2016 WL 4194201 (Sup. Ct., N.Y. Cnty. Aug. 8, 2016) (court's discretion in granting stay

under 5519(c) should be guided by "any exigency or hardship confronting any party" (quoting Richard C. Reilly, Practice Commentaries, McKinney's Cons. Laws of N.Y., CPLR 5519)); *Schaffer v. VSB Bancorp, Inc.*, 68 Misc. 3d 827, 834 (Sup. Ct., Richmond Cnty. 2020) (same).

Most notably, Intervenors spend much of their brief complaining that Petitioners needlessly delayed in the prosecution of this appeal. But Intervenors do not explain why that is relevant to the balance of harms or the public interest in granting or denying a stay. As both this Court in *Harkenrider* and the Appellate Division have now held, New York voters have a right to a congressional map drawn pursuant to the constitutionally mandated process. Further delaying compliance with that process threatens to deprive New Yorkers of their rights for yet another election cycle. Indeed, it was precisely this sort of delay and obstructionism that gave rise to the IRC's default in 2021. A minority of the IRC commissioners should not be allowed to run out the clock yet again.[7]



[7] Even if the Court were inclined to decide this motion based on Intervenors' aspersions rather than the harmful effects on New York voters that a stay would cause, Intervenors' math is decidedly fuzzy. They impute "perhaps more than a full year" of delay to Petitioners. Intervenors' Mot. 11. But that number seems to include the *entire* pre-filing period covered by their meritless statute-of-limitations argument. And Intervenors ignore their own extension request and other delaying actions. *See*, *e.g.*, Letter from Misha Tseytlin, *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, No. CV-22-2265 (3d Dep't Feb. 3, 2023), NYSCEF Doc. 42.

In the absence of any credible claim to actual harm that they or the public might suffer absent a stay, Intervenors instead rehash their atextual legal argument that allowing the IRC to comply with the Appellate Division's order will violate the constitutional "prohibition on mid-decade redistricting." Intervenors' Mot. 28. But, as already established Section 4(e) does *not* preclude the Appellate Division's ordered relief. *See supra* at 3–9. And it similarly does not bear on the equities of Intervenors' requested stay.

Intervenors further argue that denying a stay would "throw the *Harkenrider* map into doubt," causing confusion for voters and candidates who "would no longer be sure of their district lines going forward." Intervenors' Mot. 28–29. This ignores that the Appellate Division has *already* ordered that the current map be amended by the IRC and Legislature in accordance with the constitutionally prescribed process. The cat is out of the bag: That order has been widely reported.[8] Injecting further uncertainty by staying the Appellate Division's order while this appeal is considered



[8] *See, e.g.*, Nicholas Fandos, *New York Is Ordered by Appeals Court to Redraw House Map*, N.Y. Times (July 13, 2023), https://www.nytimes.com/2023/07/13/nyregion/redistricting-democrats-ny.html; Ian Pickus, *New York Redistricting Saga Continues*, WAMC (July 23, 2023), https://www.wamc.org/news/2023-07-23/new-york-redistricting-saga-continues; Joshua Solomon, *Redistricting Case to Be Argued Before Court of Appeals in November*, Albany Times Union (Aug. 14 2023), https://www.timesunion.com/state/article/redistricting-case-set-head-court-appeals-18295255.php; Maegan Vazquez, *New York Congressional Map Must Be Redrawn, Court Rules*, Wash. Post (July 13, 2023), https://www.washingtonpost.com/politics/2023/07/13/new-york-congressional-map-redrawn.

will not remedy any confusion that already exists, and therefore counsels *against* a stay. The better course is to allow the IRC to take the necessary steps to produce a compliant map so that voters and candidates will know their new districts as quickly as possible if this Court affirms the Appellate Division's order.

Indeed, while Intervenors have failed to show that they, or the public, would suffer any harm absent a stay, imposing a stay here would impose significant harm—particularly to the public interest. Most importantly, a stay would make it far more difficult for the IRC to quickly effectuate the Appellate Division's ordered relief should this Court affirm—and for candidates and voters to plan for 2024. None of Intervenors' equitable arguments demonstrates otherwise. The IRC is presently constituted and fully capable of complying with the Appellate Division's order. *See* Resp. of Indep. Redistricting Comm'n Chairperson Ken Jenkins et al. to Mot. to Vacate Stay Pending Appeal 2–3. There is no reason why its commissioners and staff—who are still drawing taxpayer-funded salaries—should not begin drawing new maps.



## CONCLUSION

For the reasons stated above, the Court should deny Intervenors' request for a stay pending the determination of this appeal.

Alternatively, should the Court decide to stay the Appellate Division's order pending this appeal, Petitioners request that the Court clarify that any stay would not

preclude the IRC from taking the preliminary steps needed to prepare a second set of congressional maps in the event the Court affirms (such as informing the public of the Appellate Division's decision, convening a meeting of the IRC to discuss the map-drawing process, and beginning the process of drafting amended maps). *See* Pet'rs' Mot. 28–29.

Dated: September 5, 2023

Respectfully submitted,

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| STATE OF NEW YORK ) | | **AFFIDAVIT OF SERVICE** |
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| COUNTY OF NEW YORK ) | | **EXPRESS NEXT DAY AIR** |

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

**On September 5, 2023**

deponent served the within: **OPPOSITION TO CROSS-NOTICE OF MOTION FOR STAY PENDING APPEAL**

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on the 5th day of September 2023**

**MARIANNA BUFFOLINO**
Notary Public State of New York
No. 01BU6285846
Qualified in Nassau County
Commission Expires July 15, 2025

**Job# 323617**