To be Argued by:
ARIA C. BRANCH
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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

(For Continuation of Caption See Inside Cover)

BRIEF FOR PETITIONERS-RESPONDENTS

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and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Appellants,

– 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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STATEMENT OF RELATED LITIGATION

Pursuant to Court of Appeals Rule of Practice 500.13(a), Petitioners-Respondents ("Petitioners") state that they are not aware of any related litigation as of the date of this brief.

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since passed." Intervenors' Br. 46 (quoting *Harkenrider*, 38 N.Y.3d at 523).[5] This language does not carry the weight Intervenors put on it, nor does it foreclose future IRC action.

To begin, Intervenors wrongly assert that there was "no suggestion that the IRC could constitutionally submit a second set of proposed maps following the expiration of its deadline to do so." Intervenors' Br. 46. To the contrary, this Court expressly recognized mandamus as a "course[] of action available to ensure the IRC process is completed as constitutionally intended." *Harkenrider*, 38 N.Y.3d at 515 n.10. A mandamus proceeding 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). Under the unique structure of the IRC's responsibilities, that failure occurs only once its deadline for action has passed. *Harkenrider* thus necessarily allows a suit to compel further IRC action following the constitutional deadline, which is exactly what Petitioners filed here.

[5] Elsewhere, Intervenors reference *their own* Harkenrider *briefing* as indicative of this Court's conclusions, *see, e.g.*, Intervenors' Br. 44, and repeatedly muse as to what the Court *might* have intended—including suggesting, without authority, that the Court could have granted relief that was never requested and ordered nonparties to undertake specific actions, *see, e.g.*, *id.* at 46 ("If this Court in *Harkenrider* believed that the Constitution permitted it to return redistricting to the IRC/Legislature process, it presumably would have so ordered[.]").

Moreover, the Redistricting Amendments themselves foreclose Intervenors' claim that court-drawn maps are the exclusive remedy for legal violations. The constitutional text expressly contemplates 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 permits the IRC to act "at any [] time a court orders" belies Intervenors' assertion that "if the IRC/Legislature process fails and the constitutional deadline passes, then the *only* constitutionally available remedy would be a judicially adopted map." Intervenors' Br. 44. Indeed, section 5-b(a) provided the basis for the First Department's affirmance of an order requiring the IRC to reconvene and redraw assembly maps earlier this year. *See Nichols*, 212 A.D.3d at 530 (finding IRC redrawing of assembly map to be "appropriate remedial measure[] for a constitutional violation" and "consistent with the procedures set forth in the Constitution" notwithstanding that initial IRC deadlines had elapsed).

Intervenors also rely on the *Harkenrider* oral argument to support their view that a judicially adopted map is the exclusive remedy for the IRC's default, *see* Intervenors' Br. 45–46, but the transcript demonstrates that this was not the Court's

conclusion. Judge Rivera's colloquy with Intervenors' counsel concerned a *then-hypothetical* lawsuit in which "petitioners . . . sued the IRC." Oral Argument Transcript at 33:8–10, *Harkenrider v. Hochul*, No. 60 (N.Y. Apr. 26, 2022). That case was *not Harkenrider*, as Intervenors' counsel acknowledged. *See id.* at 33:11 (responding, when asked whether *Harkenrider* petitioners could have sued IRC, "[w]e *could* have" (emphasis added)). The later discussion between Judge Troutman and Intervenors' counsel regarding whether "the remedy [should] match the error" concerned whether *the Legislature* should "get another shot" at remedying any legal violation as section 5 generally requires, not whether the IRC should submit a second set of maps to resume the constitutional process. *Id.* at 40:2–41:14. The discussion of whether recommencement of the IRC/legislative process would be a viable remedy in a suit against the IRC was not only short, but hypothetical. And, at any rate, merely *considering* the remedy would not have compelled the IRC to complete its constitutional duties and redress Petitioners' injury here—that remedy was never actually ordered.

Ultimately, the adoption of a judicially drawn map in *Harkenrider* was a limited remedy tailored to the particular legal violation and exigent situation that the Court faced in 2022. Because the previous decade's map was malapportioned due to changes in population over the 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); *see also Nichols*, 212 A.D.3d at 531 ("In *Harkenrider*, 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. . . . There is much more time available in this case than there was in *Harkenrider* for the IRC and legislative procedures to proceed and conclude prior to the next election cycle, thereby allowing for a reasonable opportunity for the legislature to meet its constitutional requirements." (citation omitted)).[6]

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."

[6] Intervenors call this conclusion "simply preposterous" and claim that it "blinks reality," Intervenors' Br. 47–48 (quoting *Amicus Curiae* Br. for League of Women Voters of New York State in Supp. of Intervenors-Resp'ts-Appellants 7), but it was, of course, the conclusion reached by a majority of the justices on the Appellate Division panel and the First Department in *Nichols*.

N.Y. Const. art. III, § 4(e) (emphases added); *see also Nichols*, 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." (citation omitted)). 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." R.415–16. 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." R.416. And given that those exigent circumstances are no longer present, as in *Nichols*, the IRC/legislative process can be completed, just as the Redistricting Amendments generally admonish. *See supra* at 18–19.[7]

[7] It is not unusual for legislative redistricting processes to recommence following judicial adoption of maps; other states' high courts have recognized in similar circumstances that when a redistricting body "fails to enact a new redistricting plan [within the timeframe provided by the state constitution], it is neither deprived of its authority nor relieved of its obligation to redistrict." *In re Below*, 855 A.2d 459, 462 (N.H. 2004) (per curiam); *see also Lamson v. Sec'y of Commonwealth*, 168 N.E.2d 480, 486 (Mass. 1960) (explaining that while failure of redistricting body to act "thwarts the intention of the Constitution," an "even more serious nullification of constitutional purpose will result under a construction which would" prohibit redistricting body from "return[ing] to reapportion"); *Harris v. Shanahan*, 387 P.2d

C. *Nichols* was correctly decided and supports the Appellate Division's ordered relief.

As a parting shot to their *Harkenrider* argument, Intervenors suggest both that *Nichols* was wrongly decided because it "violates this Court's binding remedial holding in *Harkenrider*" and that it is otherwise distinguishable from Petitioners' case here. Intervenors' Br. 49–52. Neither argument is persuasive.

First, Intervenors' disagreement with the result in *Nichols* is premised on the same misunderstandings of the constitutional text and the *Harkenrider* decision already discussed. They complain that *Nichols* "order[ed] the IRC to restart the redistricting process on the State Assembly map under Section 5(b) many months after the constitutional deadline for IRC action had passed," *id.* at 51, but as discussed above, neither the *Harkenrider* decision nor the Redistricting Amendments preclude IRC action following the initial constitutional deadlines, *see supra* at 17–19, 32–37. To the contrary, as the First Department recognized in *Nichols*, section 5-b "contemplate[s]" precisely the sort of "viable legislative plan" that was ordered in that case—and that the Appellate Division ordered here. 212 A.D.3d at 531; *see also* N.Y. Const. art. III, § 5-b(a) (providing for IRC action "at

771, 795 (Kan. 1963) ("[T]he duty to properly apportion legislative districts is a continuing one, imposed by constitutional mandate . . . , notwithstanding the failure of any previous session to make such a lawful apportionment.").

any [] time a court orders that congressional or state legislative districts be amended").

In response to this straightforward application of section 5-b(a), Intervenors propose yet another distinction that is found nowhere in the constitutional text. They try to distinguish between "amend[ing]" a map under section 5-b(a), which expressly contemplates IRC participation, and "adopt[ing]" or "modif[ying]" a map under section 4(e), which does not. *See* Intervenors' Br. 50–51. Under this theory, a violation of a federal statute would trigger the remedy provided in section 5-b(a), whereas "certain constitutional infirmities" (never explicated) are solely within the ambit of section 4(e). *Id.* at 51. The distinction is not convincing. To support their theory that only courts can remedy "certain constitutional infirmities," Intervenors cite this Court's discussion of whether a legislative cure was possible in *Harkenrider*. *See id.* at 51 (citing *Harkenrider*, 38 N.Y.3d at 523). But there, the Court rejected the argument that "the legislature possesses *exclusive* jurisdiction and unrestricted power over redistricting," noting instead that "the Constitution explicitly *authorizes* judicial oversight of remedial action in the wake of a determination of unconstitutionality." *Harkenrider*, 38 N.Y.3d at 523 (emphases added). That the Redistricting Amendments *permit* judicial remediation does not mean that the courts have any more exclusive authority to remedy unconstitutional redistricting than the Legislature. *See Nichols*, 212 A.D.3d at 530 ("The Constitution

does not mandate any particular remedial action when a violation of law has occurred[.]"). To the contrary, the constitutional text expressly contemplates that both the IRC and the Legislature can play roles in correcting legal violations, without limitation as to the type of violation within their remedial powers. *See* N.Y. Const. art. III, §§ 5, 5-b(a); *supra* at 19–24.

Neither *Harkenrider* nor the Redistricting Amendments require the Court to drive a wedge between section 4(e) and section 5-b(a), and Intervenors do not and cannot draw a principled line between these two remedial provisions. Instead, it is more sensible to read them in concert. Section 4(e) is silent as to *who* may "modify" a reapportionment plan "pursuant to court order," and section 5-b(a) addresses this issue: "at any [] 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, §§ 4, 5-b(a).

Second, Intervenors attempt to distinguish this case from *Nichols* by noting that "no Assembly map had yet been lawfully adopted under the first sentence of Section 4(e)" in that case, whereas the Steuben County Supreme Court adopted a congressional map in *Harkenrider*. Intervenors' Br. 51–52. This is a distinction without a difference. It is simply not the case that the "'adopt[ed]' congressional map [] must 'be in force' for the remainder of the decade." *Id.* at 52 (alteration in

original) (quoting N.Y. Const. art. III, § 4(e)). The Redistricting Amendments clearly provide that an adopted plan can be "modified pursuant to court order," N.Y. Const. art. III, § 4(e)—which is exactly what the Appellate Division ordered here, *see supra* at 17–19.

In short, the IRC/legislative remedy employed in *Nichols* was appropriate, as was the similar remedy ordered by the Appellate Division in this case. Neither *Harkenrider* nor the Redistricting Amendments foreclose the requested relief in either case, and the First Department's affirmance in *Nichols* confirms the conclusions of the Appellate Division in this case:

> [I]n the absence of a viable legislative plan, a court *may* order the adoption of a redistricting plan with the assistance of a special master, as an appropriate remedial measure. Yet the Constitution also favors a legislative resolution when available, and does not expressly limit the potential remedies a court may order to facilitate a viable legislative plan.

Nichols, 212 A.D.3d at 530–31 (emphasis added) (citations omitted). Here, as in *Nichols*, the courts are confronted with an unremedied legal violation. And here, as in that case, there is now time and opportunity for a viable legislative plan to draw New Yorkers' district lines for the rest of the decade.

* * *

Both Intervenors and the Brady Respondents repeatedly invoke stare decisis, with the latter devoting an entire section of their brief to the principle. *See* Brady Resp'ts' Br. 27–29. But the Appellate Division's ordered relief is consistent with the

principles of stare decisis because it is consistent with *Harkenrider*—as demonstrated by the fact that affirming the Appellate Division does not require overruling or otherwise disturbing this Court's earlier decision.

POINT III

PETITIONERS TIMELY COMMENCED THIS SUIT.

Appellants collectively raise two alternative timing-related defenses: that Petitioners failed to commence this suit during the applicable statute-of-limitations period and that "general equitable timeliness principles" bar relief. Intervenors' Br. 25–34; *see also* Brady Resp'ts' Br. 29–33. Both Supreme Court *and* the Appellate Division correctly rejected these arguments, and this Court should do the same.

A. Petitioners filed suit within the applicable statute of limitations.

Appellants are incorrect that the underlying Article 78 petition was untimely. As the Appellate Division correctly concluded, Petitioners' claim accrued when the 2021 legislation was declared unconstitutional, and this proceeding was therefore filed well within the applicable four-month statute of limitations period set forth in CPLR 217(1). R.419–21. Even if the 2021 legislation had not been in place, this proceeding is timely because the IRC's constitutional deadline to act did not pass until February 28, and the petition was filed within four months of that date. The statute of limitations thus does not bar relief.

Actions against governmental bodies or officers, including mandamus proceedings, "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 [an] actual, concrete injury" that "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). Thus, a cause of action for mandamus accrues only when (1) the agency has reached a "definitive" position *and* (2) that position has inflicted an "actual, concrete injury" that "may not be prevented or significantly ameliorated." *Id.*; *see also Smith v. State*, 201 A.D.3d 1225, 1228 (3d Dep't 2022) ("When making the determination as to whether an agency determination is final, courts must consider the completeness of the administrative action and make a pragmatic evaluation as to whether a position has been reached that inflicts an *actual, concrete injury*." (emphasis added) (quoting *Cap. Dist. Reg'l Off-Track Betting Corp. v. N.Y. State Racing & Wagering Bd.*, 97 A.D.3d 1044, 1046 (3d Dep't 2012))). Put more plainly, the statute of limitations begins to run not when a governmental body fails to perform a mandatory duty, but rather when that lapse of duty causes injury.

Here, the IRC did not reach a "definitive" position until its constitutional deadline to act expired on February 28. And that decision did not inflict "actual, concrete injury" on Petitioners until the Legislature's 2021 gap-filling legislation was declared unconstitutional. 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 transparent, democratically accountable IRC/legislative process set forth in the Redistricting Amendments. 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 democratically accountable process required by the New York Constitution would be denied to them and the state's voters. 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.

R.413–14 (alterations in original) (citations omitted) (first quoting L. 2021, ch. 633, § 1; and then quoting *Harkenrider*, 38 N.Y.3d at 517).[8]

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" until the Legislature's gap-filling 2021 legislation was declared unconstitutional. *Best Payphones*, 5 N.Y.3d at 34. Prior to this Court's *Harkenrider* decision, the IRC/legislative 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, "prevented or significantly ameliorated" Petitioners' injury by giving the Legislature the opportunity to act as final arbiter of the IRC's map proposals, just as the Redistricting Amendments contemplate. *Id.* Because the 2021 legislation provided the means of achieving the IRC's constitutional endpoint, it was not "reasonable for

[8] 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). Supreme Court, for its part, concluded that the statute of limitations does not bar relief in this proceeding based on an even *later* date—May 20, 2022, when "the new 2022 Congressional Maps went into effect." R.17. Each of these dates reflects why this matter was timely filed: The cause of action accrued when Petitioners were injured by the denial of the constitutionally mandated IRC/legislative process.

petitioners to demand that the IRC act" before this Court struck down the legislation. R.419 (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)).

By focusing solely on the IRC's default, Appellants misconstrue the nature of Petitioners' alleged injury. It was only when the 2021 legislation was struck down that Petitioners' injuries fully materialized—specifically, when it became clear that both the IRC and the Legislature would be cut out of the redistricting process entirely. The gap-filling procedure outlined in the 2021 legislation "significantly ameliorated" the concerns that gave rise to this lawsuit. *Best Payphones*, 5 N.Y.3d at 34. That procedure required the IRC to "submit to the legislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based." L. 2021, ch. 633, § 1. The 2021 legislation thus "clarified that," if the IRC failed to submit a second set of plans, "the outcome would be the same as if the IRC produced plans that the legislature rejected." *Harkenrider*, 38 N.Y.3d at 544 (Wilson, J., dissenting). The Legislature would have had the benefit of the IRC's work, the voters of New York would have received a congressional map approved by their democratically elected representatives in the Legislature, and the process

would have concluded as the Redistricting Amendments contemplate. The denial of that constitutional IRC/legislative process was the injury that Petitioners suffered, and the statute of limitations therefore began running as of the date that denial became law.

In the end, the necessarily truncated process that resulted from the IRC's deadlock and the invalidation of the 2021 legislation failed to vindicate the purposes of the Redistricting Amendments. The adopted congressional map was hastily drawn by a special master with little transparency, accountability, or opportunity for public comment or input. While the judicial remedy ordered by this Court was appropriate given the exigencies of the 2022 election calendar, this deviation from the ordinary legislative process inflicted a concrete injury on Petitioners. As explained in their amended petition, "the IRC's failure to send a second set of maps to the Legislature not only stymied the constitutional procedure enacted by New York voters, but also resulted in a congressional map that does not properly reflect the substantive redistricting criteria contained in the Redistricting Amendments." R.282. Though Petitioners' claim is procedural in nature and does not challenge the substance of the *Harkenrider* map, "procedural requirements matter and are imposed precisely because, as here, they safeguard substantive rights." *Harkenrider*, 38 N.Y.3d at 512 n.9; *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787,

808 (2015) ("[R]edistricting is a legislative function[.]"); *Nichols*, 212 A.D.3d at 530 ("[T]he Constitution [] favors a legislative resolution when available[.]").

Notwithstanding that Petitioners' injury did not manifest until the 2021 legislation was invalidated, Appellants collectively propose two other accrual dates: January 24, 2022, when five members of the IRC issued a press release seeking to pressure their colleagues to schedule a meeting, and January 25, 2022, "when the IRC's 15-day window to submit a second-round congressional map to the Legislature expired." Intervenors' Br. 26. The Appellate Division correctly rejected these alternatives.

The January 24 press release merely described the situation 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. And it is certainly not a "refus[al] to act" on the part of the IRC. Brady Resp'ts' Br. 32. 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[.]"). Moreover, the signatories of the January 24 statement expressed their *willingness* to perform their constitutional duties and exhorted their colleagues to do the same. In short, the press release did not and could not articulate the IRC's position on anything.

Nor is January 25, 2022, the proper accrual date. Even after that date, the 2021 gap-filling legislation created a procedure for the Legislature to assume its intended role at the end of the constitutional IRC/legislative 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 proceeding commenced within four months of that date.

Even under Intervenors' lapse-of-duty-based approach to accrual—as distinguished from the injury-based approach found in New York caselaw—this proceeding was timely. The Redistricting Amendments require the IRC to submit a second round of map proposals "in no case later than *February twenty-eighth*," N.Y. Const. art. III, § 4(b) (emphasis added), which this Court has described as the "outer end date for the IRC process" and the "outer . . . constitutional deadline for IRC action," *Harkenrider*, 38 N.Y.3d at 522–23 nn.18–19. Indeed, *Intervenors themselves* previously argued that "the Constitution provided that the IRC's

authority to submit such maps expired on February 28, 2022." Harkenrider Intervenors' Memorandum of Law in Support of Motion to Dismiss at 18, *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, No. 904972-22 (Albany Cnty. Sup. Ct. Sept. 2, 2022), NYSCEF Doc. No. 144; *see also* Brief for Intervenors-Respondents at 47, *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, No. CV-22-2265 (3d Dep't Mar. 22, 2023), NYSCEF Doc. No. 52 (describing February 28 as "the date the IRC's constitutional authority to submit [] maps expired"). Accordingly, the IRC had until February 28, 2022, to take "further administrative action," *Best Payphones*, 5 N.Y.3d at 34, and Petitioners commenced this proceeding within four months of that date.[9]

B. Neither laches nor "general equitable timeliness principles" bar this proceeding.

As explained above, Petitioners acted within four months of the accrual of their right to relief. Intervenors, like the dissenting justices in the Appellate Division,

[9] Intervenors misconstrue Petitioners' previous explanation that mandamus against the IRC would not lie until after it "fails to undertake its constitutionally obligated duties." Intervenors' Br. 29 (quoting Opp'n to Cross-Mot. for Stay Pending Appeal 12–13); *see also supra* at 33. This unremarkable assertion does *not* constitute a "conce[ssion]" by Petitioners that their claim accrued on January 25. *Id.* at 30 n.8. As discussed above, the outer deadline for IRC action was February 28, not January 25. And, at any rate, that a mandamus action could not have been brought *before* the deadline does not mean that the deadline itself was the accrual date because, under New York law, the date the IRC's lapse caused Petitioners' *injury*—not the date of the lapse itself—triggers the statute of limitations.

are therefore incorrect that this proceeding is barred by equitable principles apart from the statute of limitations.

First, the Appellate Division dissenters treated the underlying petition in this proceeding as a "demand" within the meaning of CPLR 217(1). R.418–19 (Pritzker, J., dissenting) ("[P]etitioners did not make a demand until June 28, 2022[.]"). Under that view, the four-month statute of limitations did not begin to run until that demand was "refused," and therefore CPLR 217(1) does not bar this proceeding. *See Meegan v. Griffin*, 161 A.D.2d 1143, 1143 (4th Dep't 1990) ("Here, there was no formal demand until petitioners commenced the proceeding. Accordingly, the petition may be construed as the demand and the answer as a refusal, rendering the proceeding timely commenced."); *Gopaul v. N.Y.C. Emps.' Ret. Sys.*, 122 A.D.3d 848, 849 (2d Dep't 2014) (collecting cases and noting that "[t]he filing of a CPLR article 78 petition can itself be construed as a demand"); *Speis v. Penfield Cent. Schs.*, 114 A.D.3d 1181, 1183 (4th Dep't 2014) ("[B]ecause the petition may be construed as the demand, we reject respondent's contention that the proceeding was barred by the statute of limitations.").

The dissenters nonetheless found that this proceeding is barred by the doctrine of laches, referring to the equitable requirement that an Article 78 petitioner "make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right

to relief." R.419 (quoting *Granto v. City of Niagara Falls*, 148 A.D.3d 1694, 1695 (4th Dep't 2017)). For the reasons explained above, however, Petitioners acted "within a reasonable time" after "facts which g[a]ve [them] a clear right to relief" arose, *Granto*, 148 A.D.3d at 1695—namely, both IRC inaction *and* the subsequent injury caused by the denial of the constitutional IRC/legislative process. Because the 2021 legislation specifically provided for the completion of the IRC/legislative process even if the IRC failed to submit a second set of maps, it was not "reasonable for petitioners to demand that the IRC act" before this Court struck down the legislation. R.419 (Pritzker, J., dissenting). In any event, "[t]he defense of laches is not available to respondents because the relief petitioners seek is not discretionary but, rather, is mandated by law." *Meegan*, 161 A.D.2d at 1143–44; *see also* R.416 ("The language of NY Constitution, article III, § 4 makes clear that this duty [to submit a second set of maps upon the rejection of its first set] is mandatory, not discretionary."). The dissenters' laches conclusion cannot carry the day.

Second, although they do not invoke laches, Intervenors vaguely gesture to "general equitable timeliness principles" as a bar to this suit. Intervenors' Br. 33–34. That argument essentially boils down to a rejection of the statute of limitations in favor of a legal standard of Intervenors' own invention.

Intervenors cite no authority for the novel proposition that "general equitable principles" can somehow *shorten* the statute of limitations for an Article 78

proceeding. Instead, each of their ostensibly supporting citations is either wholly inapposite or merely confirms the unremarkable proposition that an Article 78 proceeding may be dismissed if brought outside the applicable statute of limitations. *See Anderson v. Lockhardt*, 310 N.Y.S.2d 361, 362 (Westchester Cnty. Sup. Ct. 1970) (non-final determinations are not reviewable under Article 78 and courts have "discretion, in any event, to deny review under Article 78 where another adequate remedy exists"); *Ouziel v. State*, 667 N.Y.S.2d 872, 876–77 (Ct. Cl. 1997) (Court of Claims lacked jurisdiction because relief sought was equitable and could have been sought under Article 78); *Hill v. Giuliani*, 272 A.D.2d 157, 157 (1st Dep't 2000) (case dismissed as untimely because it was brought outside applicable four-month state-of-limitations period); *U.S. Bank Nat'l Ass'n v. Losner*, 145 A.D.3d 935, 938 (2d Dep't 2016) (vacating default judgment of foreclosure "in the interest of substantial justice"); *Sheerin v. N.Y. Fire Dep't Articles 1 & 1B Pension Funds*, 46 N.Y.2d 488, 495–96 (1979) (Article 78 relief denied where petitioners waited over two years from issuance of formal agency opinion to make demand).

Moreover, the crux of Intervenors' argument is that Petitioners should have filed no later than February 28, 2022, because that was the constitutional deadline for the IRC to submit a second round of maps.[10] But Petitioners' claim could not

[10] Tellingly, in this appeal, Intervenors do not identify a precise date by which Petitioners should have filed under their "equitable" theory. *See* Intervenors' Br. 34–

have even *accrued* until February 28, at the earliest. *See supra* at 49–50. It cannot be the case that equitable principles require a party seeking mandamus relief to do so *before* an agency's deadline to act. If that were true, an agency could effectively immunize itself from mandamus review by simply running out the clock, like the IRC did here. As the Appellate Division aptly explained, to hold that "the passing of the deadline leaves petitioners with no remedy would render meaningless the distinct constitutional command that the IRC create a second set of maps." R.417.

Finally, Petitioners note that, although this proceeding commenced in June 2022, they did *not* request relief for the 2022 midterm elections. Instead, they sought "to ensure that a lawful plan is in place immediately following the 2022 elections that can be used for subsequent elections this decade." R.269. Far from delaying, Petitioners filed suit more than two years before the next election, thus ensuring that the proceeding would be fully adjudicated with sufficient time to allow for the completion of the IRC/legislative process ahead of the 2024 cycle. There is still time following the resolution of this appeal to implement a remedy that vindicates the constitutional reforms adopted by New York voters.

Ultimately, to the extent the equities are relevant here, they weigh *in favor* of Petitioners' effort to give life to the Redistricting Amendments by ordering the IRC

35. But in Supreme Court and at the Appellate Division, they identified February 28 as the supposed equitable deadline. *See supra* at 49–50.

to complete the constitutionally mandated redistricting process that voters enshrined in the New York Constitution nearly a decade ago. At any rate, timeliness is not a bar to Petitioners' success in this appeal. Both the Appellate Division and Supreme Court correctly rejected Appellants' attempt to avoid adjudication on these grounds, and this Court should follow suit.[11]

POINT IV

THIS PROCEEDING IS NOT AN IMPROPER "COLLATERAL ATTACK."

Intervenors' reliance on a purported "collateral attack doctrine," Intervenors' Br. 52–54, is entirely misplaced and was correctly rejected by both Supreme Court and the Appellate Division, *see* R.15; R.417 n.5.

As this Court has explained, "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). Intervenors have not argued, and cannot show, that collateral estoppel principles bar this proceeding. Collateral estoppel may be invoked only "in a subsequent action or proceeding to prevent *a party from*

[11] The amicus brief filed by the Lawyers Democracy Fund raises another timing-related issue: that it is too late to implement a new congressional map for 2024. Setting aside that this limited objection is no reason to foreclose relief for the remainder of the decade, the point is negated by the fact that the Redistricting Amendments specifically contemplate that the IRC might not complete its constitutional role until February 28 of an election year. *See* N.Y. Const. art. III, § 4(b). (The Lawyers Democracy Fund's other primary contribution—the rather outrageous notion that New York election officials are too inept and dysfunctional to implement a remedial plan—will pass without comment.)

relitigating an identical issue decided against that party in a prior adjudication." *Id.* (cleaned up) (emphasis added). Petitioners here did not participate as parties in the *Harkenrider* litigation; indeed, several *tried* to intervene, but their motion was denied. *See supra* at 32 n.4. Moreover, *Harkenrider* was not a proceeding in mandamus against the IRC, and so the issues in that case and this one are not identical. *See supra* at 28–32.

Intervenors' cited authorities are all off point, and certainly do not refute this Court's clear statement in *ABN AMRO Bank* that New York courts do not recognize any freewheeling "collateral attack doctrine." *Gager v. White* concerned retroactivity, not collateral estoppel or res judicata, 53 N.Y.2d 475, 484 (1981); the footnoted dictum Intervenors seem to be relying on, *see id.* at 484 n.1, addressed *federal* precedent about collateral attacks in bankruptcy actions, *see Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). *Divito v. Glennon* explained that res judicata requires "identity or privity of parties," 193 A.D.3d 1326, 1328 (4th Dep't 2021), which does not help Intervenors since Petitioners were not parties to the *Harkenrider* litigation. *Donato v. American Locomotive Co.* concerned a collateral attack by a union member on an arbitration judgment in which he was already represented by his union, 283 A.D. 410, 414 (3d Dep't 1954), and is thus wholly inapposite. And CPLR 4404(b), CPLR 5015, and *Calabrese Bakeries, Inc.*

v. Rockland Bakery, Inc., 83 A.D.3d 1060, 1061 (2d Dep't 2011), all concern relief from judgment.

Intervenors also claim that "any modification of a judicially adopted map is necessarily a request to modify the *order* adopting that map." Intervenors' Br. 53 (emphasis added). That utterly misunderstands the Appellate Division's mandate. The Appellate Division did not purport to modify the Steuben County Supreme Court's order; instead, it instructed *the IRC* to perform its mandatory duty to submit a second round of redistricting plans to the Legislature. *See* R.417 & n.5. If a map based on that submission becomes law (after legislative approval or amendment), New York's congressional map will be modified, but the Steuben County Supreme Court's order will not—rather, it will be *mooted*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court affirm the Appellate Division's order and thus "return the matter to its constitutional design." R.417.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Court of Appeals Rules of Practice 500.1(j) and 500.13(c)(1), the undersigned certifies that the foregoing brief uses a proportionally spaced typeface (Times New Roman) in 14-point type and contains 13,517 words, exclusive of the contents listed in Rule of Practice 500.13(c)(3).

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