To Be Argued By:
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By Permission of the Court
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

Docket No. CV-22-2265

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-Appellants,

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

against

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT

(Caption Continued on the Reverse)

BRIEF FOR RESPONDENTS-RESPONDENTS KEN JENKINS, IVELISSE CUEVAS-MOLINA AND ELAINE FRAZIER

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

Respondents-Respondents,

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.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Respondents Ken Jenkins, Ivelisse Cuevas-Molina, and Elaine Frazier are three of the Commissioners who make up the ten-person bipartisan Independent Redistricting Commission ("IRC"), created pursuant to a 2014 amendment to the New York State Constitution enacted by New York voters, and now chaired by Respondent Jenkins (hereinafter, the "Jenkins Respondents"). The Jenkins Respondents did not oppose the relief requested by Petitioners below. The Jenkins Respondents submit this brief in their role as IRC Commissioners to provide the Court with relevant background regarding the work carried out pursuant to their constitutional mandate, and to expand upon two particular ways in which Supreme Court's opinion below misconstrues that mandate.

First, the Jenkins Respondents agree with Petitioners that Supreme Court's interpretation of the 2014 amendments to Article III, Sections 4, 5, and 5-b of the New York State Constitution (the "Redistricting Amendments") does not comport with the intent of the Redistricting Amendments. In addition to the reasons set forth in Petitioners' brief—such as Supreme Court's improper reliance on purported stability as an overriding preference to the exclusion of ensuring the maps reflect the input of New York's diverse population through the democratic participation process set forth in the Constitution—Supreme Court's decision runs afoul of a core principle set forth in New York Court of Appeals and United States Supreme Court

precedent on redistricting; namely, that there is a preference for a legislatively enacted map rather than a judicially created map whenever possible. In the decision below, Supreme Court's strained textual reading expresses exactly the opposite preference by holding that a congressional redistricting plan drawn by an out-of-state special master in a truncated proceeding before a single trial court judge must stay in place for the rest of the decade, rather than allowing the completion of the IRC legislative process approved by New York voters in the Constitution's Redistricting Amendments to play out during the ample time available prior to the next election cycle.

Second, Supreme Court's finding that ordering the completion of the IRC process would be futile is contrary to fact, law, and the proper balance between judicial and legislative authority. Although no party below raised futility as a basis for dismissal, Supreme Court improperly concluded that ordering the IRC to propose a second set of congressional district lines pursuant to the process outlined in the Redistricting Amendments would be futile. This holding appears to have been based on the fact that in January 2022, the IRC deadlocked and did not submit a second set of redistricting plans to the Legislature. But at that time, an existing New York law (now struck down) allowed for the Legislature to correct for the lack of a submission and draw the maps on its own. Supreme Court's conclusion that the entire IRC process is futile ignores the months of hard work and public participation engaged

in by the IRC and ignores that in their proposed congressional plans, the IRC had more points of agreement than disagreement. Indeed, the IRC's congressional "Plan A" approved by five Commissioners and "Plan B" approved by the other five Commissioners are far more similar to each other than either plan is to the congressional plan ultimately drawn by the special master and adopted by the trial court in *Harkenrider v. Hochul*. Unlike the trial court and special master, the IRC Commissioners participated in months of public hearings and then sought to implement the preferences of New York voters in their proposed redistricting plans.

Contrary to Supreme Court's conjecture about the futility of the IRC process, the reconstituted IRC is jointly and effectively carrying out its responsibilities at this moment. In September 2022, the Supreme Court, New York County ordered the IRC to propose new State Assembly maps pursuant to the constitutional process to govern elections in 2024 and for the rest of the decade, and on December 1, 2022, the IRC unanimously voted to submit a draft State Assembly plan using 2020 census data to the public. Since early January 2023, the IRC has been holding hearings throughout the State to gather public input on its draft State Assembly plan. This result—which the Appellate Division, First Department recently affirmed was within the Supreme Court's authority and is preferred over reliance on a single court's and special master's maps—is what the public envisioned when it enacted the Redistricting Amendments.

Accordingly, in light of Supreme Court's errors below, the Jenkins Respondents respectfully support Petitioners' request that this Court reverse Supreme Court's order dismissing the Amended Petition.

COUNTERSTATEMENT OF ADDITIONAL RELEVANT FACTS

I. The IRC's 2021-2022 Drafting Process.

The New York State Constitution was amended in 2014 to establish the bipartisan IRC and set forth procedures for the IRC's submission of New York's district lines for congressional, State Senate, and State Assembly seats. (Pet. Br. 6.) The Constitution provides for the appointment of ten members by a combination of majority and minority leaders in the Legislature and by the other members of the IRC. *See* N.Y. Const. art. III, § 5-b(a). The Constitution further provides that "[t]o the extent practicable, the members of the independent redistricting commission shall reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence." *Id.* § 5-b(c).[1]

The Constitution provides for the process whereby the IRC shall submit a set of redistricting plans to the Legislature. The Constitution further provides that "[i]n the event that the commission is unable to obtain seven votes to approve a redistricting plan . . . the commission shall submit to the legislature that redistricting

[1] As of both now and throughout 2021 and 2022, the ten members of the IRC reflect a strong diversity of race, ethnicity, language, gender, and geographic residence throughout New York. *See Commissioners*, N.Y. State Indep. Redistricting Comm'n, https://www.nyirc.gov/commissioners (last visited Feb. 21, 2023).

plan and implementing legislation that garnered the highest number of votes in support of its approval by the commission with a record of the votes taken." *Id.* § 5-b(g). The Constitution established that in the first instance, this was to occur no later than January 15, 2022. *Id.* § 4(b). If the Legislature failed to approve the IRC's first plan or plans or the Governor vetoed that plan or plans, the IRC then was to submit a second set of redistricting plans and the necessary implementing legislation; in the first instance, this was to occur no later than February 28, 2022. *Id.* If that second set of plans was once again rejected by the Legislature or vetoed, each house of the Legislature could then introduce its own plans. *Id.* The threshold required for the Legislature to approve the relevant plans varies based on whether there is unified or split control of the two houses of the Legislature. *Id.*

As a result of the COVID-19 pandemic, the U.S. Census Bureau did not release the necessary redistricting data to states until August 2021, instead of the customary timeline of releasing data in March. *See* NYS Indep. Redistricting Comm'n, *Statewide Public Meeting*, YouTube (Aug. 15, 2021), https://www.youtube.com/watch?v=TsT112ipPUc. Upon receipt of this data, the IRC engaged in "months of meetings, hearings, and legwork" prior to voting on plans to submit to the Legislature. (R. 275 [Am. Verified Pet. ¶ 35].) The IRC was charged with simultaneously drafting State Assembly, State Senate, and congressional maps. As required by the Constitution, the IRC released its first set

of draft redistricting maps to the public on September 15, 2021. *See* NYS Indep. Redistricting Comm'n, *IRC Meeting on September 15, 2021*, YouTube (Sept. 15, 2021), https://www.youtube.com/watch?v=FAQtFNZW5cc. From the time the IRC released those maps in September 2021, through January 3, 2022, the IRC conducted 24 public hearings, listened to testimony from over 630 speakers, and received over 2,100 written submissions from New Yorkers concerned about their communities and how those communities would be represented through the drawing of district lines for State Assembly, State Senate, and Congress. *See Public Meeting of NYSIRC*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://totalwebcasting.com/view/?func=VOFF&id=nysirc&date=2022-01-03&seq=1.

The IRC then attempted to incorporate all of the information it received into draft redistricting plans. On January 3, 2022, as its initial proposal to the Legislature specifically for congressional redistricting, the IRC voted to send "Plan A," which was approved by five Commissioners, and "Plan B," which was approved by the other five Commissioners, to the Legislature so that the Legislature could select the one it preferred best. (R. 275 [Am. Verified Pet. ¶ 35].) Notwithstanding the IRC's decision to submit two plans for the Legislature's consideration, the IRC had reached substantial agreement on the vast majority of districts, as the two maps were highly similar. As is evident in examining the submitted plans and the data underlying

those plans, the only districts on which congressional "Plan A" and "Plan B" had any meaningful differences were Districts 2, 3, and 4. *See Plans 2021/2022*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://www.nyirc.gov/plans. The IRC Commissioners otherwise had reached substantial agreement as to the remaining congressional districts.[2] Nonetheless, the Legislature rejected both plans, triggering the IRC's obligation to compose a second redistricting plan for the Legislature's review within fifteen days and in no event later than February 28, 2022.

On January 24, 2022, then-Chairperson of the IRC David Imamura and Commissioners Frazier, Cuevas-Molina, John Flateau, and Eugene Benger released a public statement stating that they had repeatedly attempted to schedule a meeting by January 25, 2022 to vote on district lines for not only Congress, but also the State Assembly and the State Senate, but the remaining Commissioners had refused to meet and therefore had denied the Commission a quorum to finish its work of sending a second set of plans to the Legislature. (R. 359 [Imamura Aff. ¶ 6].) Pursuant to the statutory procedure in place at the time, the IRC's announcement that it was unable to submit a second set of plans meant that the Legislature could

[2] The IRC's "Plan A" and "Plan B," which reflect the input the IRC heard during its months of public hearings, are far more similar to each other than either plan is to the remedial plan drawn by the special master and adopted by the court in Steuben County. *Compare Plan A Congress*, N.Y. State Indep. Redistricting Comm'n, https://www.nyirc.gov/storage/plans/20220103/congress_planA.pdf (Jan. 3, 2022); *Plan B Congress*, N.Y. State Indep. Redistricting Comm'n, https://www.nyirc.gov/storage/plans/20220103/congress_planB.pdf (Jan. 3, 2022), *with 2022 Congressional Maps*, N.Y. State Legis. Task Force on Demographic Rsch. & Reapportionment (June 2, 2022), https://latfor.state.ny.us/maps/?sec=2022_congress.

adopt its own redistricting plans, and the Legislature then did so. (R. 276–77 [Am. Verified Pet. ¶ 40].) The operative legislation at the time provided that "if the commission does not vote on any redistricting plan or plans, for any reason . . . each house shall introduce such implementing legislation with any amendments each house deems necessary." (R. 267 [Am. Verified Pet. ¶ 8].) Thus, rather than exhibiting an inherent inability to carry out the process it had been engaged in for months, the IRC acted reasonably in accordance with that legislation, which had not yet been construed by any court to be in tension with the constitutional procedures for the submission of IRC proposals.

The Legislature's congressional and Senate plans subsequently were challenged in Supreme Court in Steuben County. In *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), the Court of Appeals invalidated the congressional and Senate maps enacted by the Legislature as procedurally unconstitutional, and further held that the congressional map was substantively unconstitutional because it had been drawn with a partisan purpose. *Id.* at 521. The Court held that the unconstitutional maps should not remain in place for the then-rapidly approaching 2022 primary and general elections. *Id.* at 521–22. In determining the appropriate remedy, the Court of Appeals did *not* hold that it would be inherently futile for the IRC to engage in a renewed set of line-drawing. Rather, the Court observed that it must implement a remedy that would overcome the "logistical difficulties" involved with adopting new

district lines so close to date of the upcoming primary and general elections, and found that "[p]rompt judicial intervention" was "necessary and appropriate." *Id.* at 522.

The Court of Appeals thus determined that the remedy for the violation should be a court-ordered map drawn by a court-appointed special master. *Id.* It determined that "[w]ith judicial supervision and the support of a neutral expert designated a special master, there [wa]s sufficient time for the adoption of new district lines" prior to the 2022 primary and general elections. *Id.* The Court further noted that the date for the primary elections would likely need to be postponed, and ordered the Steuben County Supreme Court to "swiftly develop a schedule to facilitate" those primary elections, in consultation with the Board of Elections, once new constitutional maps had been adopted in short order with the assistance of the special master. *Id.* at 522-23.

On remand, the Steuben County Supreme Court appointed as special master Jonathan Cervas, a Pennsylvania resident and postdoctoral fellow at Carnegie Mellon University, who had never worked on redistricting in New York. (R. 231 [May 20, 2022 Report of the Special Master, *Harkenrider v. Hochul*, at 2].) As set forth in more detail in Petitioners' brief, what ensued was a truncated map-drawing process with limited public input, by a special master whose appointment was

inconsistent with the Constitution's requirements that IRC Commissioners reflect the diversity of the residents of New York. (Pet. Br. 15–16.)

II. History of These Proceedings.

Petitioners in this case first filed an Article 78 petition in Supreme Court, Albany County, seeking a writ of mandamus compelling the IRC and its individual Commissioners to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan" for election cycles following the 2022 election cycle. (R. 24–25 [Verified Pet. at 1–2] (quoting N.Y. Const art. III, § 4(b)).) The Petition was then amended on August 4, 2022, and limited its prayer for relief to request a writ of mandamus requiring the submission of a second round of proposed *congressional* redistricting plans. (R. 284 [Am. Verified Pet. at 20].) The Amended Petition alleges that the IRC failed to fulfill its constitutional duty to submit a second set of proposed plans to the Legislature after the Legislature rejected the first set of congressional plans. (R. 275 [*Id.* ¶¶ 35–36].)

With respect to the individual IRC Commissioners, the Amended Petition was brought against eight Commissioners. Petitioners later sought leave on September 2, 2022, to amend the Petition to include Dr. John Flateau, who was previously a member of the IRC and had been renominated following the filing of the Petition, and Eugene Benger, who at the time was a member of the IRC. (Dkt. No. 149 at 2.)

The trial court did not issue the requested order to show cause with respect to the motion. (Dkt. No. 156.)[3]

Respondents Imamura, Cuevas-Molina, and Frazier submitted a Verified Answer on August 26, 2022. (R. 298–314 [Verified Answer].) The Answer largely admitted the allegations in the Amended Petition or referred the court to the documents referenced within the Amended Petition for their contents. The Answer set forth the Jenkins Respondents' efforts to carry out their constitutional duty, including that Respondents Imamura, Cuevas-Molina, and Frazier demanded a meeting to vote on a second set of maps, other Commissioners refused to meet and denied the IRC a quorum, and the Jenkins Respondents "thereafter acted in accord with their understanding of the applicable constitutional and statutory procedures and their duties under the circumstances, which preceded any judicial interpretation of the relevant constitutional and statutory provisions." (R. 299 [Verified Answer ¶ 7]; *see also* R. 305 [Verified Answer ¶ 36]; R. 310 [Verified Answer ¶ 61].)

On September 2, 2022, the trial court granted the motion of the petitioners from the *Harkenrider* action (the "Harkenrider Intervenors") to intervene as Respondents, and ordered the existing Petitioners and Respondents to serve any

[3] Subsequently, Chairperson David Imamura, who was named as a party in the Amended Petition, resigned from the IRC and was replaced by Chairperson Ken Jenkins. This was reflected in a stipulation to substitute parties that was so-ordered by the trial court on December 7, 2022. (R. 398–400 [Stipulation and Order of Substitution].)

papers in opposition to the Harkenrider Intervenors' Motion to Dismiss. (R. 340 [Order to Show Cause at 2].) The Jenkins Respondents submitted a response noting several erroneous statements of fact in the Harkenrider Intervenors' Motion to Dismiss. (R. 353–57 [Response to Order to Show Cause].) The Jenkins Respondents refuted the Harkenrider Intervenors' contention that the IRC was "now-constitutionally-disabled" and "no longer has all ten constitutionally mandated commissioners," and explained that the IRC actually was fully constituted, including with two Commissioners who were appointed to replace those who resigned after the IRC submitted its maps to the Legislature in January 2022. (R. 353–54 [*Id.* at 1–2]). The response also rejected the assertion that the IRC was "lacking key staff" and would need to hire additional staff were the IRC ordered to reconvene, explaining that there are "no current staffing vacancies that would preclude the Commission from expeditiously undertaking the task of submitting a second round of proposed congressional districting plans for consideration by the Legislature." (R. 354 [*Id.* at 2].) Finally, the response rejected the premise that the "IRC declared its decision to violate its constitutional duties on January 24, 2022," instead explaining that on January 24, 2022, Respondents Imamura, Frazier, and Cuevas-Molina and two of their fellow Commissioners had announced that they had repeatedly attempted to schedule a meeting to vote on proposed plans for State Assembly, State Senate, and Congress, and that the other Commissioners had

refused. (*Id.*) The response appended an affidavit from Mr. Imamura, who at the time served as IRC Chair and who testified to the facts set forth in the response. (R. 358–61 [Aff. of David Imamura].)

Supreme Court held a hearing on September 12, 2022. In that hearing, even though neither the other Respondents nor the Harkenrider Intervenors had argued for dismissing the Amended Petition on grounds of futility, the trial court sua sponte raised the question of whether the requested mandamus relief would be futile. (R. 376 [Sept. 12, 2022 Tr. 13:10–22]). Counsel for the Jenkins Respondents rejected this proposition, noting that "[t]here are no staffing shortages that would preclude the Commission from expeditiously undertaking the redrawing of a second set of maps," and stated that unlike when the Commission previously failed to submit a second set of maps, here "the situation would have changed in that the Commission would be under a court order to submit a second set of maps to the Legislature." (R. 378 [*Id.* at Tr. 15:1–9].) Counsel further noted that "if it were sent back to the Commission and the Commission[ers] were under order from this Court," presumably no Commissioner would refuse to comply with the court's order by failing to agree to a meeting or to vote on a redistricting plan. (R. 380 [*Id.* at Tr. 17:1–10].)

Immediately following the hearing, Supreme Court issued an order granting the motions to dismiss the Amended Petition. Supreme Court held that the

Constitution requires redistricting to take place "every ten years commencing in two thousand twenty-one"; in the court's view, this meant that "the Congressional maps approved by the Court . . . are in full force and effect, until redistricting takes place again following the 2030 federal census," and that "there is no authority for the IRC to issue a second redistricting plan after February 28, 2022, in advance of the federal census in 2030." (R. 18 [*Id.* at 11].) It also determined that "directing the IRC to submit a second plan would be futile" given "the record demonstration of the IRC's inherent inability to reach a consensus on a bipartisan plan." (R. 19 [*Id.* at 12].)

III. The IRC's Recent Drawing of Assembly Lines.

On May 15, 2022, Paul Nichols, Gavin Wax, and Gary Greenberg commenced an Article 78 petition in the Supreme Court, New York County, seeking to invalidate the State Assembly lines as unconstitutional on the same procedural grounds addressed in *Harkenrider* with respect to the IRC's failure to submit a second set of redistricting plans to the Legislature. *See Nichols v. Hochul*, 76 Misc. 3d 379, 380 (Sup. Ct., N.Y. Cnty. 2022). The First Department held in June 2022 that the Assembly map was invalid due to the same procedural infirmities addressed in *Harkenrider*, and remanded to the Supreme Court "for consideration of the proper means for redrawing the state assembly map, in accordance with [Section 5-b of the Constitution]." *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022).

On remand, the trial court in *Nichols* held that the proper way to effectuate the First Department's order was to modify the deadlines set forth in the Constitution to permit the IRC to submit a new Assembly redistricting plan in the first instance. *See Nichols v. Hochul*, 77 Misc. 3d 245, 251–52 (Sup. Ct., N.Y. Cnty. 2022). The court determined that such modification was consistent with the language in Section 5-b permitting the establishment of an IRC "at any other time a court orders." *Id.* at 252. The court also rejected an argument that "adherence to the IRC procedure would be futile." *Id.* at 253. The court further emphasized the importance of adhering to the Constitution's designated procedure to have the IRC draw the Assembly districts given that there was sufficient time to do so (unlike in the initial *Harkenrider* litigation). *Id.* at 254–55.

On January 24, 2023, the First Department affirmed the trial court's decision. The First Department held that "[t]he Constitution does not mandate any particular remedial action when a violation of law has occurred," but "favors a legislative resolution when available." *Nichols v. Hochul*, 212 A.D.3d 529, 2023 WL 362975, at *1–2 (1st Dep't Jan. 24, 2023). The court distinguished *Harkenrider* on the grounds that "the constitutional violation [there] could not be cured by a process involving the legislature and the IRC, given the time constraints created by the electoral calendar." *Id.* at *2.

Consistent with the Supreme Court's September 2022 order in that case, the IRC has commenced the process of formulating and proposing an Assembly redistricting plan. At a public meeting on December 1, 2022, after unanimously electing a new Chair and Vice-Chair,[4] the IRC unanimously voted to submit to the public a draft redistricting plan for the State Assembly using the 2020 census data. *See Draft Assembly Plan*, N.Y. State Indep. Redistricting Comm'n (Dec. 1, 2022), https://www.nyirc.gov/assembly-plan; *Public Meeting of NYSIRC*, N.Y. State Indep. Redistricting Comm'n (Dec. 1, 2022), https://totalwebcasting.com/view/?func=VIEW&id=nysirc&date=2022-12-01&seq=1. The IRC is currently receiving public comment at a number of hearings across the State and has been ordered by the trial court to provide the Legislature with a proposed Assembly plan in accordance with the constitutional process by April 14, 2023 or as soon as practicable thereafter, and no later than April 28, 2023. *See Nichols*, 77 Misc. 3d at 256; *Meeting Schedule*, N.Y. State Indep. Redistricting Comm'n, https://www.nyirc.gov/meetings (last visited Feb. 21, 2023).

[4] The composition of the Commission has changed since the Commission last engaged in line-drawing in January 2022. Vice Chair Jack Martins resigned and then ran for and later won the seat representing New York State Senate District 7 (a district the IRC was charged with redrawing during the redistricting process). (R. 358–59 [Aff. of David Imamura ¶ 2].) Chairperson Imamura resigned and is presently running for County Legislator in Westchester County. *See* Barrett Seaman, *Irvington's David Imamura to Run for Shimsky's Seat on County Legislature*, Hudson Indep. (Nov. 15, 2022), https://thehudsonindependent.com/irvingtons-david-imamura-to-run-for-shimskys-seat-on-county-legislature/.

ARGUMENT

The Jenkins Respondents remain ready, willing, and able to follow a court order to finish their constitutionally mandated responsibilities for congressional redistricting in accordance with the process adopted by New York's voters. As the Court of Appeals, the United States Supreme Court, and multiple other state supreme courts have held, when feasible, this kind of legislative solution is far preferable to relying on the undemocratic solution of a single judge determining the maps for the entire State for ten years. And Supreme Court's finding that invoking the process set forth in the Redistricting Amendments would be futile runs contrary to abundant governing law, as well as both the facts concerning the IRC's efforts in 2021 and 2022, and their current efforts now. The Jenkins Respondents support Petitioners' arguments that Supreme Court's decision should be reversed.

I. The Constitution Favors A Legislative Solution (The IRC Process) Over Court-Drawn Maps When Available.

Supreme Court dismissed the Amended Petition on the grounds that the judicially created maps used for the 2022 elections cannot be redone, and instead must remain in place for ten years. (R. 18–19 [Sept. 12, 2022 Order at 11–12].) The Jenkins Respondents agree with Petitioners, for the reasons set forth in their brief, that this conclusion is contrary to the plain language and intent of the New York Constitution. (Pet. Br. 23–30.) But that is not all. Supreme Court's holding also runs afoul of the fundamental principle espoused by numerous federal and state

courts that courts should favor a legislative solution—here, the IRC process as set forth in the Constitution—over a map created by a single special master or judge. (*Id.* (citing cases).) Under that principle, a court can, and should, order the IRC to re-submit congressional district lines in the ample time available before the next election cycle.

The U.S. Supreme Court and the New York Court of Appeals have long recognized that the apportionment power is "generally legislative," and the courts should only intervene in redistricting decisions "as a last resort." *In re Orans*, 15 N.Y.2d 339, 352 (1965); *see also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (holding that it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan"). Thus, in weighing the possibility of allowing the legislative redistricting process to go forward as compared to keeping a court-drawn map in place, governing case law places a heavy thumb on the scale for the former. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (affirming legislature's action "to replace a court-drawn plan with one of its own" because "to prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process"). Indeed, the Court of Appeals recognized this in *Harkenrider*, where it cited the longstanding principles that (1) "[l]egislative

enactments, including those implementing redistricting plans, are entitled to a 'strong presumption of constitutionality'" and (2) "redistricting legislation will be declared unconstitutional by the courts 'only when it can be shown beyond reasonable doubt that it conflicts' with the Constitution after 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'" *Harkenrider*, 38 N.Y.3d at 509 (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992)) (some quotation marks omitted).

This preference for allowing a legislative remedy over judicially drawn maps is expressly enshrined in the New York State Constitution:

> In any judicial proceeding relating to redistricting of congressional or state legislative districts, any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part. *In the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities.*

N.Y. Const. art. III, § 5 (emphasis added). Accordingly, following the Court of Appeals' conclusion in *Harkenrider* that the congressional maps were drawn in a manner that violates the State Constitution, the IRC and the Legislature should be given an opportunity to correct those violations.

The Court of Appeals' decision in *Harkenrider* to order the drawing of maps "[w]ith judicial supervision and the support of a neutral expert designated a special master" does not preclude the Petitioners' requested relief in this action. 38 N.Y.3d

at 522. Because the Court held that the 2022 elections could not move forward with unconstitutional maps, it had to order drastic actions for new maps to be in effect by the fall, including moving the dates of primary elections, ordering the adoption of new congressional and Senate maps, and disseminating that information to voters in the span of a few months. *Id.* at 522–23. These exigent circumstances were the very definition of the "last resort," *Orans*, 15 N.Y.2d at 352, when it was appropriate for a court to step in because it was not "practicable," *Wise*, 437 U.S. at 540, for the legislative process to play out in time for the then-upcoming elections.

The Appellate Division, First Department recently reached this very conclusion. As set forth above, the First Department addressed whether Supreme Court should have ordered the IRC, in September 2022, to propose new Assembly maps for the 2024 election cycle and thereafter in order to correct the prior procedural infirmity whereby the IRC never submitted a second set of maps to the Legislature. *See supra* pages 14–16. The First Department affirmed the lower court's order, holding that "the Constitution . . . favors a legislative resolution when available," and the "viable legislative plan" contemplated by Article III, Section 5-b of the Constitution was available, whereas it was not in *Harkenrider* due to the "time constraints created by the electoral calendar." *Nichols v. Hochul*, 2023 WL 362975, at *1–2. Accordingly, the IRC is presently carrying out the constitutional

process for proposing new Assembly maps, and there is still ample time to do so for the congressional maps.[5]

New Yorkers voted in 2014 that they should have a meaningful voice in the redistricting process, and with line-drawers who "reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence." N.Y. Const. art. III, §5-b(c). There is still time for their will to be carried out, rather than leaving in place for ten years the maps created by a single out-of-state special master, without meaningful public input. (*See* Pet. Br. 15–17 (describing special master's "opaque and truncated process").) Governing law and the Constitution both favor this result.

II. A Court-Ordered IRC Line-Drawing Process Would Not Be Futile.

As detailed above, the trial court also dismissed the Amended Petition in part on the grounds that "directing the IRC to submit a second plan would be futile." (R. 19 [Sept. 12, 2022 Order at 12].) No Respondent or Respondent-Intervenor raised this as a basis for dismissing the Amended Petition, and neither the Amended Petition's allegations nor the record before the trial court support such a conclusion.

[5] The First Department's decision properly recognized that the IRC process may resume pursuant to a court order notwithstanding the Constitution's initial deadline of February 28, 2022 for the IRC to submit a second redistricting plan. *See Nichols*, 2023 WL 362975, at *1 (recognizing that Supreme Court in that case set new deadlines because the constitutional deadlines had passed). The Jenkins Respondents agree with Petitioners' conclusion that the Constitution does not prohibit a court from modifying the constitutional timeline through court order, and does not impose any requirement that an approved map be in effect until a subsequent map is adopted after the next decennial census. (Pet. Br. 26–29.)

The trial court's sua sponte futility determination contravened over a century of precedent holding that government officials are entitled to a presumption that they will act in good faith and in compliance with the law. *See, e.g.*, *Smyth v. Munroe*, 84 N.Y. (39 Sickels) 354, 360 (1881) (noting "the presumption, which is always to be indulged, that a public officer acts in good faith until the contrary is proved"); *Hood v. Guar. Tr. Co. of N.Y.*, 270 N.Y. 17, 28 (1936) ("The presumption lies that the Commissioner of Banks, being a public official, acted in compliance with law."). No precedent exists for bypassing a democratically enacted constitutional amendment in this way. In the separate context of determining whether exhaustion of administrative remedies through an administrative agency would be futile, where there is a well-established body of law, this Court has looked to factors such as whether "the issue was predetermined," *see Harrison v. Leonardo*, 183 A.D.2d 983, 983 (3d Dep't 1992) (citing *Symmonds v. Leonardo*, 138 A.D.2d 810, 810–11 (3d Dep't 1988)); or whether the respondent had "construed the relevant regulation in a way that would dictate an adverse result," *Grattan v. Dep't of Soc. Servs. of State of N.Y.*, 131 A.D.2d 191, 193 (3d Dep't 1987). Supreme Court assessed no similar considerations here.

Nothing in the Amended Petition or the record before the trial court supported its determination that the IRC process is inherently futile; to the contrary, the Jenkins Respondents assured the trial court that the IRC was fully constituted and adequately

staffed to carry out its constitutional duties. *See supra* pages 12–13. No IRC Commissioner indicated to the court that if the court had ordered the IRC to re-initiate the line-drawing process and to submit a proposed plan or plans to the Legislature, the IRC would fail to comply.

The trial court's analysis in *Nichols*, affirmed by the First Department, is exactly on point: a futility determination at this stage is "clearly premature." *Nichols*, 77 Misc. 3d at 253. Just because the IRC at one point failed to submit a second set of maps, "there is no basis to predetermine that they have failed again," particularly because "the composition of the IRC has altered . . . [,] and [the] IRC members are now subject to this [C]ourt's jurisdiction." *Id.* Moreover, the legal framework that was in place at the time of the IRC's initial line-drawing—which expressly permitted the Legislature to draw its own lines if the IRC failed to vote on its own proposal—has since been invalidated in *Harkenrider*. Indeed, *Harkenrider* explicitly recognized the availability of mandamus relief if members of the IRC do not perform their constitutional duties, a remedy that was not clearly available at the time the IRC was negotiating over a second set of redistricting plans. *See Harkenrider*, 38 N.Y.3d at 515 n.10. There is no basis to conclude that, given the definitive ruling in *Harkenrider* regarding the requirement that the IRC submit a second set of plans and the availability of mandamus if the IRC fails in that duty, the

IRC would fail to submit a second set of congressional lines to the Legislature if ordered to do so by the court.

Indeed, the IRC has already been moving forward with its constitutional duties following the trial court's order in *Nichols* and has put out to the public for comment a unanimously approved draft State Assembly plan. There is no countervailing reason to believe that the IRC's treatment of the congressional lines would for some reason be different were it ordered to engage in a renewed line-drawing process following a disposition in this case.

Finally, stripping line-drawing authority from the IRC on the grounds of futility and placing it in the hands of a single special master would generate untenable incentives going forward that would render the Redistricting Amendments a nullity. When the IRC is fully constituted with ten members, the Constitution requires that seven members be present to constitute a quorum. *See* N.Y. Const. art. III, § 5-b(f). Establishing as a matter of law that the IRC process is futile based on past membership's refusal to meet and generate a quorum, *see supra* page 7, would only incentivize members of the minority party in the future to prevent IRC proceedings from moving forward in the hopes that a court-appointed special master would generate a set of lines more to their liking. Conversely, as is being borne out in relation to the *Nichols* litigation, IRC members are more than capable of cooperating in good faith after being ordered to do so by a court.

CONCLUSION

For the above reasons, the Jenkins Respondents support Petitioners' request that the Court reverse the dismissal of the Amended Petition.

Dated: February 21, 2023

Respectfully submitted,

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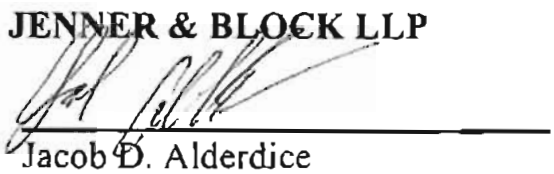

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