To Be Argued By:
Misha Tseytlin
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 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,

(Caption Continued on the Reverse)

SUR-REPLY BRIEF FOR INTERVENORS-RESPONDENTS

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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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PRELIMINARY STATEMENT

As Intervenors explained in their Brief, there are four independent bases on which this Court can affirm the Supreme Court's dismissal of this lawsuit. Since Intervenors filed their Brief, Petitioners in their Reply Brief and two different sets of *amici* have offered various, inconsistent theories to try to save this case, including making arguments that no party has previously raised. Given these unusual circumstances, Intervenors appreciate this Court's Order, App. Div. NYSCEF No.71 (Apr. 21, 2023), providing them the opportunity to file this sur-reply.

While Petitioners' lawsuit fails for multiple reasons that Intervenors explained in their Brief and expand upon below, Intervenors respectfully highlight the broader principle at stake here, especially given the Governor's remarkable, belated support of Petitioners. Mid-decade redistricting is an infamous breeding ground for partisan gerrymandering. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Ga. State Conf. of the NAACP v. Georgia*, 312 F. Supp. 3d 1357 (N.D. Ga. 2018); Patricia Marecki, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 Vand. L. Rev. 1935 (2004). Efforts to outlaw this practice nationwide have thus far failed, with Congress for a decade declining to enact the Coretta Scott King Mid-Decade Redistricting Prohibition Act, which would prohibit a "State which has been redistricted in the manner provided by law" from being "redistricted again until after the next apportionment of Representatives under such section,"

absent a violation of the Voting Rights Act or the U.S. Constitution. *See* H.R.42, 118th Cong. (2023).[1] Such reform is unnecessary in New York because, by enacting Article III, Section 4(e), the People mandated that a lawfully adopted map "shall be in force until the effective date of a plan based upon the subsequent federal decennial census," absent a judicial finding that the map is unlawful. N.Y. Const. art. III, § 4(e). After the New York courts adopted the unquestionably lawful *Harkenrider* map—perhaps the most balanced, competitive congressional map in the Nation, Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Ctr. For Justice (Aug. 11, 2022) (noting that "[u]nder New York's court-drawn map, almost one in five seats are competitive, the highest percentage in the country for a large state")[2]—the same Governor who signed the infamously gerrymandered, invalidated congressional map in 2022 now has weighed in to support this effort to authorize a clearly unconstitutional, mid-decade redistricting. The Albany County Supreme Court rejected Petitioners' meritless lawsuit, and that decision should be affirmed.

[1] Available at https://www.congress.gov/bill/118th-congress/house-bill/42. This same bill has been introduced in the House of Representatives in almost every Congress since 2013. *See*, H.R.134, 117th Cong. (2021); H.R.44, 116th Cong. (2019); H.R.75, 114th Cong. (2015); H.R.2490, 113th Cong. (2013).

[2] Available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction.

SUR-REPLY ARGUMENT

I. Point I: Petitioners And Their *Amici* Offer No Coherent Response To The Point That Section 4(e)'s Plain Text Mandates That The Unquestionably Lawful Map That *Harkenrider* Adopted Must Stay In Place Until After The Next Census in 2030

A. Article III, Section 4(e) establishes a clear rule that any lawful map—that is, one infected with no "violation of law"—"shall be in force until the effective date of a plan based upon the subsequent federal decennial census." N.Y. Const. art. III, § 4(e). A validly adopted map may only be "*modified* pursuant to court order" thereafter. *Id.* (emphasis added). Here, the Steuben County Supreme Court adopted New York's congressional map under specific instructions from the Court of Appeals in *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), and given that the map is unquestionably lawful, the Constitution mandates that the map remains through 2030. Brief For Intervenors-Respondents, App. Div. NYSCEF No.52 (Mar. 22, 2023) ("Intervenors' Br."), at 25–35. Notably, the Court of Appeals in *Harkenrider* had before it several other options for remedies for the violation of constitutional procedure, including the very remedy Petitioners now seek, but the Court of Appeals selected the judicially adopted map as its remedy. Intervenors' Br.30. In addition, and independently fatal to their lawsuit, Plaintiffs are not seeking to "modif[y]" the Steuben County Supreme Court's lawfully adopted remedial map under Article III,

Section 4(e), but instead want to launch a process to replace the map. *Id.* On either of these two bases grounded in Article III, Section 4(e)'s text, this lawsuit fails.

B. In their Reply Brief, Petitioners responded to these arguments for the first time, asserting—unbelievably—that *Harkenrider* never remedied the violation of constitutional procedure that Petitioners raised as Claim 1 in *Harkenrider*, contending that *Harkenrider* only remedied the malapportionment of the 2012 map. Reply Brief For Petitioners-Appellants, App. Div. NYSCEF No.58 (Apr. 3, 2023) ("Appellants' Rep."), at 3–6, 9–15. Further, Petitioners assert that they have always sought to "modif[y]" the Steuben County Supreme Court's map pursuant to Article III, Section 4(e). Appellants' Rep.9. But these arguments fail for multiple reasons.

As an initial matter, Petitioners are plainly incorrect that the Court of Appeals in *Harkenrider* did not remedy the constitutional procedure violation. Intervenors' First Cause Of Action in *Harkenrider* alleged that the IRC and Legislature violated the "*exclusive* process established by the New York Constitution" for redistricting, *Harkenrider* No.18 at 74,[3] and the Steuben County Supreme Court found in Intervenors' favor on that claim, *Harkenrider* No.243 at 8–10. Although the Fourth

[3] Citations to "*Harkenrider* No.___" refer to the e-filings in *Harkenrider v. Hochul*, Index No.E2022-0116CV (Steuben Cnty. Sup. Ct.), which may be found at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all. The Albany County Supreme Court explicitly considered these documents in dismissing Petitioners' Amended Petition. R.19 n.12.

Department reversed the Supreme Court on that point, *Harkenrider v. Hochul*, 204 A.D.3d 1366, 1369–70 (4th Dep't 2022), the Court of Appeals agreed with Intervenors, concluding that "the lack of compliance by the IRC and the legislature with the procedures set forth in the Constitution" resulted in "the legislature's enactment of the 2022 redistricting maps contraven[ing] the Constitution," *Harkenrider*, 38 N.Y.3d at 508–09. As a result, the Court of Appeals ordered the Supreme Court to adopt a map to remedy this violation, *id.* at 521–24. Because Petitioners make no argument that the map that the Steuben County Supreme Court adopted pursuant to the Court of Appeals' instructions is unlawful, that map must stay in place through 2030 under Article III, Section 4(e)'s plain terms.

Notably, Petitioners offer no response to Intervenors' point that the Court of Appeals specifically considered the remedy that they now seek, and necessarily rejected it. The Judges of the Court of Appeals asked Intervenors' counsel numerous questions about why they should not remedy the violation of constitutional procedure by ordering the IRC to submit a second round of maps to the Legislature. Transcript of Oral Argument at 35–44, *Harkenrider v. Hochul*, No.60 (N.Y. Apr. 26, 2022) ("*Harkenrider* Transcript").[4] But *Harkenrider* specifically rejected that

[4] Available at https://www.nycourts.gov/ctapps/arguments/2022/Apr22/Transcripts/042622-60-Oral%20Argument-Transcript.pdf.

approach and instead chose "judicial oversight of remedial action" for the procedural constitutional violation, because that is what "the Constitution explicitly authorizes." *Harkenrider*, 38 N.Y.3d at 523. Petitioners' contention that *Harkenrider* chose a judicially adopted map due to "the imminence of the 2022 midterms," Appellants' Rep.14, makes no sense. Merely ordering the IRC to send second-round maps for the Legislature to vote on surely could (and would) have been completed in a matter of days, well short of the month-long process the Steuben County Supreme Court undertook to complete its mapdrawing process with public input. *See* Intervenors' Br.19–21. After all, the Legislature had just enacted, and the Governor just had signed, the map that the Court invalidated within 10 days of the IRC failing to submit a second-round map, as the Court of Appeals well knew.

Petitioners' response to the other fundamental problem with this case under Article III, Section 4(e)'s text also fails. Petitioners claim for the first time in their Reply Brief that they do want "a court order modifying the current congressional map"—that is, the map that *Harkenrider* adopted. Appellants' Rep.8–10. Even putting aside that this belated reframing of their requested remedy forecloses any argument that this lawsuit is not a collateral attack on the *Harkenrider* map, *see infra* p.23, Petitioners are seeking an entirely new congressional map, from a restart of the IRC-and-Legislature redistricting process, not a mere "modifi[cation]" under Article

III, Section 4(e) of the *Harkenrider* map. And Petitioners' points about the meaning of "amend[ ]" in Article III, Section 5-b(a) are irrelevant. *See* Appellants' Rep.12–13. Because Petitioners seek relief under Section 4(e), the focus is "modif[y]," N.Y. Const. art. III, § 4(e), and Petitioners fail to explain how their requested relief of a new map after restarting the IRC-driven process fits within the term "modify," *id.*

C. *Amici* Governor Kathy Hochul and Attorney General Letitia A. James ("Executive Branch Amici") take a different tack to Intervenors' lead argument, claiming that it was the Court of Appeals' decision in *Harkenrider* that committed a "violation of law," under Article III, Section 4(e), by ordering the adoption of a judicially created map "in a manner inconsistent with constitutional requirements" thereby rendering the map "legally deficient." *See* Brief For The Governor And The Attorney General Of The State Of New York As Amici Curiae In Support Of Petitioners-Appellants, App. Div. NYSCEF No.67 (Apr. 10, 2023) ("Gov. & AG Amici Br."), at 17, 22–23. Executive Branch Amici's arguments fail.

Executive Branch Amici's risible assertion that our State's highest court committed a "violation of law," justifying a remedy under Article III, Section 4(e), *see* Gov. & AG Amici Br.17, 22–23, is obviously a nonstarter. It makes no sense to claim that our State's highest court, interpreting and giving effect to explicit provisions in the Constitution, which falls within the traditional "province of the

[j]udicial branch," *White v. Cuomo*, 38 N.Y.3d 209, 216–17 (2022) (alteration in original), violates the Constitution, such that the Court of Appeals' ruling itself creates a "violation of law" under Article III, Section 4(e), N.Y. Const. art. III, § 4(e). Traditional acts of judicial interpretation of the Constitution and oversight of remedial redistricting proceedings are "function[s] familiar to the courts given their obligation to safeguard the constitutional rights of the People under our tripartite form of government." *Harkenrider*, 38 N.Y.3d at 523.

Executive Branch Amici's argument is, at bottom, the same one that they unsuccessfully made before the Court of Appeals in *Harkenrider*. There, Executive Branch Amici—involved as parties or counsel—argued that remedial mapdrawing could not proceed in the courts and "would require restarting [the IRC-and-legislative redistricting] process from scratch." Supplemental Letter Brief of Governor & Lieutenant Governor, *Harkenrider v. Hochul*, APL 2022-00042 (Apr. 23, 2022), at 4–5.[5] The Court of Appeals rejected this reading of the Constitution, explaining that the relevant text authorizes the judiciary to adopt a redistricting plan when no constitutional plan remains available. *Harkenrider*, 38 N.Y.3d at 521–22 (quoting N.Y. Const. art. III, § 4(e)). And the Court of Appeals

[5] Available at https://courtpass.nycourts.gov/Public_search (search "60" in "Decision No."; select "Harkenrider v Hochul"; select "Harkenrider v Hochul_Res-App_Hochul_BRF").

also rejected Executive Branch Amici's contentions that courts must always give the Legislature a chance to correct a violation of constitutional procedure, because "the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality," a "familiar" task for the courts. *Id.* at 523. That the Court of Appeals rejected Executive Branch Amici's arguments does not make its decision a "violation of law" under Article III, Section 4(e).

Executive Branch Amici's argument also does not work because they do not want a "modifi[cation]," N.Y. Const. art. III, § 4(e), of the Steuben County Supreme Court's map, in any event. Rather, Executive Branch Amici argue that the Steuben County Supreme Court's congressional map "must be redrawn, and the process employed to do so must involve the [IRC]." Gov & AG Amici Br.1. This wholesale "redraw[ing]" and reinstitution of the IRC, *id.*, is not a "modifi[cation]," which is all that Article III, Section 4(e) authorizes. N.Y. Const. art. III, § 4(e).

Executive Branch Amici's reliance on Article III, Section 5-b(a) does not change the analysis. *See* Gov. & AG Amici Br.24–25. There is good reason why Petitioners did not invoke Article III, Section 5-b(a) as the basis for the relief that they seek in this case, relying instead only on Article III, Section 4(e). After all, it is Article III, Section 4(e) that provides the source of, and only exception to, the rule that a map adopted under the Constitution's procedures must stay in place for the

full decade. Article III, Section 5-b(a), on the other hand, permits the IRC to reconvene outside of the every-10-years redistricting process when "a court orders that congressional . . . districts be amended," in response to a successful legal challenge to a map, N.Y. Const. art. III, § 5-b(a). For example, if a court were to hold that a map adopted under the constitutional process in Article III, Section 4(b) violated Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, by not including a majority-minority district mandated under *Thornburg v. Gingles*, 478 U.S. 30 (1986), that court could reestablish the IRC to "amend[ ]" the map, N.Y. Const. art. III, § 5-b(a), to amend that map to include such a majority-minority district. And in the *Nichols* litigation, the First Department declared the State Assembly was never validly enacted, ordered the Supreme Court to "consider[ ] the proper means for redrawing the state assembly map, in accordance with N.Y. Const, art. III, § 5-b," *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022), and then approved the Supreme Court's decision to restart the entire IRC process, with a new round of public hearings, *see Nichols v. Hochul*, 212 A.D.3d 529, 530 (1st Dep't 2023). While Intervenors disagree with *Nichols* in Point II, *see* Intervenors' Br.42–43, whether Article III, Section 5-b(a) is broad enough to authorize the reconvening of the IRC, in order to replace a map that was never lawfully adopted under the Constitution, is not at issue for purposes of Intervenors' Point I.

D. *Amici* Scottie Coads, Mark Favors, and Mark Weisman ("Citizens Amici"), for their part, take their own novel, implausible approach, arguing that the Court of Appeals in *Harkenrider* limited its ordered remedy only to the 2022 election and so Petitioners' request is necessary for New York to have any congressional map at all. Brief For *Amici Curiae* Scottie Coads, Mark Favors And Mark Weisman In Support Of Petitioners-Appellants, App. Div. NYSCEF No.57 (Mar. 31, 2023) ("Citizens Amici Br."), at 19–20, 21–25. On this point, Citizens Amici claim that the Court of Appeals pointedly discussed its remedy with the "limiting phrase 'for use in the 2022 election'" along with "the singular form of 'a fair election'" to "eliminate any doubt that the remedy ordered by the Court was restricted to the 2022 election alone." *Id.* at 19 (quoting *Harkenrider*, 38 N.Y.3d at 502).

Citizens Amici's argument rests upon an entirely implausible reading of the *Harkenrider* decision. The Court of Appeals in *Harkenrider* nowhere limited its remedial decision only to "the 2022 election," depriving the State of a constitutional congressional (or State Senate) map for the 2024 elections and beyond. *Contra* Citizens Amici Br.19. Rather, the portion of the decision that Citizens Amici highlight was in the specific context of resolving arguments of the State respondents there that "no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway," and so "the 2022 congressional

and senate elections [must] be conducted using the unconstitutional maps, deferring any remedy for a future election." *Harkenrider*, 38 N.Y.3d at 521. The Court of Appeals "reject[ed] this invitation to subject the people of this state to an election conducted pursuant to an unconstitutional reapportionment," thereby ordering the Steuben County Supreme Court to adopt a remedial congressional map for *both* 2022 and the remainder of the decade, as Article III, Section 4(e) mandates. *Id.* And Citizens Amici's misinterpretation of *Harkenrider* as limiting the remedy to the 2022 election only would also render utterly nonsensical Judge Troutman's critique of the majority's remedy as ordering maps that would govern "for the next 10 years." *Id.* at 527 (Troutman, J., dissenting in part).

Citizens Amici's novel approach also defeats Petitioners' reliance on Article III, Section 4(e). Citizens Amici argue that the Court of Appeals limited the remedy in *Harkenrider* to 2022, meaning it is not presently in effect. *See* Citizens Amici Br.20–22. If that were true, the result would be that there is no map to "modif[y]" at all under Section 4(e). *See* N.Y. Const. art. III, § 4(e). Citizens Amici never even attempt to reconcile their theory that the *Harkenrider* congressional map is self-destructing after the 2022 elections with their incompatible assertion that the Albany County Supreme Court is constitutionally permitted to "modif[y]" that now-non-existent map under Section 4(e). Citizens Amici Br.20–24. In any event, the

Harkenrider Court clearly explained that the Constitution "authorizes the judiciary to 'order the adoption of, or changes to, a redistricting plan' in the absence of a constitutionally-viable legislative plan" and this "explicitly authorize[d] judicial oversight of remedial action in the wake of a determination of unconstitutionality" is entirely "familiar to the courts given their obligation to safeguard the constitutional rights of the People under our tripartite form of government," *Harkenrider*, 38 N.Y.3d at 522–23 (quoting N.Y. Const. art. III, § 4(e)), and the resulting lawful map must remain in force for 10 years, N.Y. Const. art. III, § 4(e).

Citizens Amici's policy arguments on this score are similarly misplaced. They first rely on precedent predating the 2014 Amendments contending that judicially created maps should be "a last resort." Citizens Amici Br.25–26 (quoting *In re Orans*, 15 N.Y.2d 339, 352 (1965)). But *Harkenrider* resolved that the amended Constitution "explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality." 38 N.Y.3d at 523. And Citizens Amici's reliance on academic articles commending independent redistricting commissions is not inconsistent. Citizens Amici Br.26–27. Although justified optimism for commission success is surely among the reasons the People adopted the 2014 Amendments, *see Harkenrider*, 38 N.Y.3d at 503, the 2014 Amendments also value *stability* within the context of the IRC-driven process, which is anchored

in Article III, Section 4(e)'s clear directive that any map adopted under the Amendments' new process, including by a court if the IRC/Legislature process fails, remains in effect for the full decade, with room only for "modifi[cations]" if a court finds a "violation of law." N.Y. Const. art. III, § 4(e).

Finally, the Constitution allowing for a decade-long, judicially created map upon the failure of the IRC-driven process advances the goal of eliminating the "scourge of hyper-partisanship." *Contra* Citizens Amici Br.27–28 (quoting *Harkenrider*, 38 N.Y.3d at 514). As noted above, mid-decade redistricting provides an especially dangerous breeding ground for political gerrymandering. *See supra* pp.1–2. In addition, the Legislature now surely understands that the courts will enforce the 2014 Amendments and adopt constitutional maps in the face of a breakdown of the IRC-driven process, motivating the Legislature to appoint IRC Commissioners who will do their jobs the first time around, just as Intervenors' counsel explained at the end of the *Harkenrider* oral argument. *Harkenrider* Transcript at 57–58. And if future IRC breakdowns nonetheless occur, the Legislature and interested citizens now know that they must bring a timely mandamus lawsuit to compel the IRC to complete its constitutional obligations before the expiration of the constitutional timeframe if they want to ensure the completion of the IRC-driven process. *See Harkenrider*, 38 N.Y.3d at 515 n.10.

Citizens Amici's position guarantees this system will break down every decade, allowing partisans to wait and hope for the IRC-driven process to fail again, see if the judicially adopted maps are to their partisan liking and, if not, bring a belated lawsuit—as Petitioners did here—hoping for a map better matched to their partisan interests through just the type of mid-decade redistricting that Section 4(e) prohibits.

II. Point II: Neither Petitioners Nor Their *Amici* Have Any Persuasive Response To The Court Of Appeals' Holding In *Harkenrider* That The Only Permissible Remedy For A Violation Of Constitutional Procedure After The Constitutional Deadline Is A Judicially Adopted Map

A. Petitioners' lawsuit fails for the independent reason that *Harkenrider* held that a violation of constitutional procedure can only be remedied by a judicially adopted map once the constitutional deadlines for IRC and Legislature action in the redistricting process have expired. Intervenors' Br.36–38. Article III, Section 4(b) establishes mandatory procedures with deadlines for IRC and Legislature action in the decennial redistricting process, after which deadlines neither the IRC nor Legislature are permitted to act, and only the courts can adopt a map to address a failure of the constitutional process. Intervenors' Br.36–37. Outside of this every-10-years process, courts can only order the reestablishment of the IRC to "amend[ ]" existing districts to address a particular error of law in the extant map. *Id.* But this Court need not decide this Point, thereby not taking a position on whether *Nichols*

was correctly decided; after all, if the Court agrees with Intervenors on Point I, that would resolve this case. *See* Intervenors' Br.34, 42 n.6.

B. Petitioners and their *amici* are incorrect that the Constitution permits their desire relief after the expiration of the period for IRC and Legislature action, Appellants' Rep.11–14, *See* Gov. & AG Amici Br.18–22; Citizens Amici Br.24–25, because *Harkenrider* held that expiration of the constitutional deadlines for the IRC and Legislature requires a judicially adopted map, *Harkenrider*, 38 N.Y.3d at 521–24. The Court of Appeals held that the violation of constitutional procedure was, "at this juncture, incapable of a legislative cure" *precisely because* "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Id.* at 523. The IRC and Legislature work in tandem, with "the IRC's fulfillment of its constitutional obligations . . . unquestionably intended to operate *as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting*." *Id.* at 514 (emphasis added). Thus, when either of the two bodies is no longer permitted to act under the constitutional deadline, that entire avenue for redistricting is foreclosed and only "judicial oversight of remedial action" remains available. *Id.* at 523. And, of course, Petitioners' misinterpretation is irrelevant, given that they want the IRC "to submit a second set of congressional plans *to the Legislature for consideration*," R.283 (emphasis added); *see also* R.284, which then

would require the Legislature to vote on and adopt a new map, *see* N.Y. Const. art. III, § 4(b). The Legislature is no more "[ ]capable of a . . . cure" now than it was back when *Harkenrider* was decided. 38 N.Y.3d at 523.

Petitioners' reliance on their point that the Court of Appeals approved of mandamus actions does not help them. Appellants' Rep.15. *Harkenrider* explained that "judicial intervention in the form of a mandamus proceeding . . . [is] among the many courses of action available to ensure the IRC process is completed as constitutionally intended," only when discussing the various mechanisms by which litigants could challenge "gamesmanship by minority members" of the IRC *before the passing of the constitutional deadline for IRC action*, not whether mandamus lies after the deadline for the IRC to act has expired. 38 N.Y.3d at 516 n.10.

III. Point III: Petitioners Have No Valid Explanation For Filing Their Petition Months Too Late, And None Of Their *Amici* Even Attempt To Rebut This Fatal Deficiency

A. The Amended Petition also fails for the independent reason that Petitioners filed it too late, under both CPLR 217(1)'s four-month statute of limitations and general principles of equity. Intervenors' Br.43–49. Once the IRC announced that it would not comply with its constitutionally mandated redistricting duties on January 24, and no later than January 25, when the IRC's deadline to do so expired, it became clear that the IRC would not perform its duty. *Id.* at 44–45. Petitioners

waited over five months to file this Article 78 Petition, outside CPLR 217(1)'s four-month period, and also too late under general equitable principles. *Id.* at 44–46.

B. Petitioners' Reply Brief offers two responses to Intervenors' point that Petitioners filed their lawsuit outside of the CPLR 217(1)'s four-month statute of limitations and too late under equitable principles, but Petitioners are wrong.

First, Petitioners argue that their claim accrued on February 28, exactly four months before they filed their Petition, because that is the final date under the Constitution that the IRC is ever hypothetically permitted to provide the Legislature second-round maps. Appellants' Rep.21. Petitioners' argument misreads the Constitution, which provides that the IRC must send the Legislature a second-round congressional map "[w]ithin fifteen days of" the Legislature's "notification" that the IRC's first-round map "has been disapproved," and "in no case later than February [28]." N.Y. Const. art. III, § 4(b). In 2022, the Legislature rejected the IRC's first-round congressional map on January 10, so the Constitution established *January 25, 2022*, 15 days later, for the IRC to act, not February 28, which is simply the last date that the IRC could act *if* the Legislature has not acted by an earlier date, under the constitutional text. N.Y. Const. art. III, § 4(b); *Harkenrider*, 38 N.Y.3d at 504–05. Thus—and even putting aside as irrelevant, *arguendo*, the IRC's clear statement on January 24 that it was abdicating its constitutional duty—once January 25 passed,

the IRC had clearly "refus[ed] . . . to perform its duty," CPLR 217(1), thereby triggering the four-month limitations period for Petitioners' mandamus action. Petitioners ignore entirely Intervenors' arguments about the January 25 deadline triggering their mandamus claim, nowhere even mentioning this point in their Reply Brief, Appellants' Rep.20–22, claiming only that the IRC's public statements that they would not submit second-round maps *on January 24* were insufficient to communicate a "definitive position on the issue," Appellants' Rep.22 (citation omitted). But January 25 was the definitive constitutional deadline for the IRC to act in 2022, given the Constitution's 15-day deadline to submit a second-round congressional map to the Legislature, N.Y. Const. art. III, § 4(b); *Harkenrider*, 38 N.Y.3d at 504–05, which defeats entirely Petitioners' lawsuit.

Second, Petitioners claim that the Legislature's unconstitutional "gap-filling 2021 legislation," somehow delayed the triggering of their injury until April 27, 2022, the date the Court of Appeals issued *Harkenrider*, which struck that legislation down as unconstitutional. Appellants' Rep.20–21. But that unconstitutional legislation only purported to permit the Legislature to draw its own maps "if the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," L.2021, c. 633, § 1, nowhere excusing the IRC from "its constitutional obligations," which is what Petitioners claim as "*the*

procedural violation at issue in this case." Appellants' Rep.6, 20–21 (emphasis added). After all, Petitioners have specifically alleged that their harms arose from "the IRC's failure to send a second set of maps to the Legislature," R.282, which is true regardless of whether the Legislature's unconstitutional 2021 legislation was in place. Put another way, even if that legislation had been constitutional, *but see Harkenrider*, 38 N.Y.3d at 511–13, it simply has no bearing on whether *the IRC failed to complete its constitutionally mandated duties*, which is the harm Petitioners allege, so the IRC's failure to submit a second-round congressional map on January 25 clearly triggered Petitioners' mandamus claims at that time.

Finally, both groups of *amici*, while engaging with each of Intervenors' other independent arguments for affirmance, ignore entirely this fundamental barrier to Petitioners' relief. *See generally* Citizens Amici Br.; Gov. & AG Amici Br. *Amici*'s failure to offer any response to Intervenors' points about the untimeliness of Petitioners' request for mandamus underscores that no answer is possible.

IV. Point IV: The Arguments That Petitioners And Their *Amici* Raise Only Further Confirm That The Petition Is An Impermissible Collateral Attack On The Steuben County Supreme Court's Remedial Order

A. Intervenors explained that Petitioners' lawsuit is also a legally impermissible collateral attack on the final judgment of the Steuben County Supreme Court. Intervenors' Br.49–56. Any order from the Albany County Supreme Court granting Petitioners the relief they seek would need to (1) require the

IRC to submit a second congressional map to the Legislature *and* (2) limit the Steuben County Supreme Court map's applicability only to the 2022 election. *Id.* at 50–54. The second of those two necessary elements to their relief inescapably amends the Steuben County Supreme Court's judgment, which the Albany County Supreme Court has no authority to do. *Id.* at 50–54.

B. Petitioners' Reply Brief only confirms this defect in their lawsuit, now claiming that they "seek a court order modifying the current congressional map." Appellants' Rep.9. It is well "settled that judgments where the normal appellate process has been exhausted may not be collaterally attacked," *Gager v. White*, 53 N.Y.2d 475, 484 n.1 (1981), and the doctrine precluding such collateral attacks extends to "attempt[s] to avoid, defeat, or evade a judicial decree, or deny its force and effect," 73 N.Y. Jur. 2d Judgments § 275. Modifying the Steuben County Supreme Court's map, which is now what Petitioners claim to want the Albany County Supreme Court to do, clearly violates this prohibition. *See Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 83 A.D.3d 1060, 1061 (2d Dep't 2011).

Petitioners' argument that the collateral attack doctrine does not exist outside of collateral estoppel principles is wrong. As the Court of Appeals has explained, CPLR 5015's requirement that any such attacks on a judgment to be filed in the original "court which rendered a judgment or order," CPLR 5015(a), "was intended

to assure that a broad class of persons, not limited to parties in the formal sense, could move in the original action on grounds vastly broader than permitted at common law or under prior practice, thus to minimize the necessity for use of independent procedures of collateral attack upon a judgment," *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 603 (1979) (footnote omitted). Thus, the collateral attack doctrine extends to "a broad class of persons," *id.*, regardless of whether they were parties to the original lawsuit, well beyond the narrow framework of collateral estoppel, which applies only to parties, *see Calabrese Bakeries*, 83 A.D.3d at 1061.

ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208 (2011), upon which Petitioners rely, does not support any contrary conclusion. *See* Appellants' Rep.24. *ABN AMRO Bank* was addressing the "preclusive effect, if any, of" an administrative decisionmaking prior to the filing of a lawsuit in court, which "inquiry require[d] an analysis of *administrative* collateral estoppel principles." 17 N.Y.3d at 225 (emphasis added). In discussing these administrative collateral estoppel principles, *ABN AMRO Bank* noted that "the so-called 'collateral attack doctrine' does not exist apart from the doctrines of exclusive original jurisdiction and administrative collateral estoppel principles," because they "build in protections of notice and opportunity to be heard for affected constituencies." *Id.* at 226. But, of course, this case does not implicate *administrative* collateral estoppel principles at all, so *ABN*

AMRO Bank in inapplicable. And none of *ABN AMRO Bank*'s concerns about the "protections of notice and opportunity to be heard for affected constituencies," *id.*, caution against requiring Petitioners to raise their meritless lawsuit before the Steuben County Supreme Court. Petitioners have shown their ability to file in the Steuben County Supreme Court raising their arguments and concerns about the congressional map, R.328–38, and can surely do so again if they so wish.

Petitioners' claim that this lawsuit is not a collateral attack on the Steuben County Supreme Court's order also renders their arguments internally inconsistent. *See* Appellants' Rep.26. Petitioners argue that they "do not challenge the validity of the 2022 congressional map or ask any court to 'overrule' the Steuben County Supreme Court." Appellants' Rep.26. But seventeen pages earlier in the same brief, they assert that they "seek a court order modifying the current congressional map to remedy a violation of law," Appellants' Rep.9, as is necessary to seek relief under Article III, Section 4(e). Petitioners cannot have it both ways: either they seek to "modif[y]" the Steuben County Supreme Court map, *see* N.Y. Const. art. III, § 4(e), making this a collateral attack upon that Court's order, or they do not seek to modify the map, meaning that their requested relief is not available under Section 4(e), *see* Intervenors' Br.29–30; *supra* pp.3–4, 6–7, 12–13. Either way, Petitioners lose.

Petitioners also erroneously contend that the Court of Appeals never resolved whether the remedial court-drawn map would continue for the remainder of the decade beyond the 2022 elections, meaning that the adoption of a new map would not implicate the Steuben County Supreme Court's order. *See* Appellants' Rep.7. But the Court of Appeals explicitly directed the Steuben County Supreme Court to adopt a remedial congressional map, *Harkenrider*, 38 N.Y.3d at 523–24, and Article III, Section 4(e)'s clear mandate requires that map to remain "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). Moreover, *Harkenrider* rejected the State respondents' proposal to defer a remedy to 2024, refusing "to subject the people of this state to an election conducted pursuant to an unconstitutional reapportionment." 38 N.Y.3d at 521. Therefore, the best reading of *Harkenrider* is that the Court of Appeals ordered the Steuben County Supreme Court to adopt a map that would govern for *both* 2022 and all of "the next 10 years," *Harkenrider*, 38 N.Y.2d at 521–24; *id.* at 527 (Troutman, J., dissenting in part), because that is what Article III, Section 4(e) requires. In any event, even if Intervenors were incorrect about this reading of *Harkenrider*, that would not undercut the conclusion that Petitioners' claim is still a collateral attack on the Steuben County Supreme Court order under Petitioners' and Executive Branch

Amici's framing, given that they both claim to seek a "modifi[cation]" of that map under Section 4(e). *See* Appellants' Rep.9; Gov. & AG Amici Br.22–23.

Petitioners' argument that the Steuben County Supreme Court's order failed to address whether the judicially adopted map would remain in place beyond 2022, Appellants' Rep.8, both ignores the order's plain language, and the incorporated constitutional requirement that it remain in place for the entire decade. As Intervenors explained, Intervenors' Br.51–52, the order's plain text "ORDERED, ADJUDGED, and DECREED that" the resulting maps "become the final enacted [congressional] redistricting map[ ]" for the State with no temporal restriction, *Harkenrider* No.696 at 1, bolstering the conclusion that the Steuben County Supreme Court's intent was for its map to both be "final" and not limited to only the 2022 elections. This is also consistent with the constitutional requirement that any final adopted "plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census." N.Y. Const. art. III, § 4(e).

C. Executive Branch Amici's merits arguments, if accepted, would also be a collateral attack on the Steuben County Supreme Court's judgment. If this Court accepts Executive Branch Amici's argument that the *Harkenrider* map is the "violation of law" that must be remedied in this case, *see* N.Y. Const. art. III, § 4(e);

Gov. & AG Amici Br.8, 11, then there can be no doubt that this lawsuit attacks that judgment in these collateral proceedings, *see Gager*, 53 N.Y.2d at 484 n.1.

D. Citizens Amici take an even more aggressive approach to this problem, contending that Petitioners' claims cannot be a collateral attack on the Steuben County Supreme Court's order adopting the remedial congressional map, because that order "could not be more clear in certifying those maps as the 2022 Congressional and the 2022 State Senate maps," and that "the Steuben County Court orders were and are self-limiting on their face" to only the 2022 elections. Citizens Amici Br.20 & 21 n.3 (citation omitted). But the Steuben County Supreme Court's labels merely referred to the years in which various maps were adopted, and did not indicate any temporal limitation, negating Citizens Amici's contention.

Citizens Amici's argument centers on the Steuben County Supreme Court's label of the map "the official approved *2022* Congressional Map." Citizens Amici Br.20–21. The Steuben County Supreme Court routinely used those labels to refer to maps based upon their year of adoption, including for the judicially adopted map that governed New York's congressional elections during the prior decennial, where one of these very *amici* was the lead plaintiff. *Compare* R.214 (discussing the unconstitutionality of the "2012 congressional map"), *and* R.227 ("The 2012 Congressional maps are no longer constitutional."), *with* R.229 "("Attached are the

maps that this court hereby certifies as being the 2022 Congressional and 2022 New York State Senate maps."). The Steuben County Supreme Court identically referred to the Legislature's unconstitutionally adopted map as "the 2022 Congressional Map," despite the fact that no one believed that map was supposed to be limited to only the 2022 elections in this decennial cycle. *See, e.g.*, R.208. Thus, the far better reading of the Steuben County Supreme Court's order was that it adopted "the *final* enacted [congressional] redistricting map[ ]" for the State without any temporal restriction, *Harkenrider* No.696 at 1 (emphasis added), notwithstanding Petitioners' explicit request that that Court limit the map only to the 2022 election, R.328.

CONCLUSION

The Court should affirm the judgment of the Albany County Supreme Court dismissing Petitioners' Article 78 Petition.

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Respectfully Submitted,

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