SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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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,

Index No. 904972-22

Petitioners,

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 David Imamura; 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.

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PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO MOVING RESPONDENTS' MOTION TO DISMISS AND IN SUPPORT OF ORDER TO SHOW CAUSE

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Petitioners submit this memorandum of law in opposition to the Motion to Dismiss brought by Independent Redistricting Commissioners Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens (collectively the "Moving Respondents"), pursuant to C.P.L.R. 3211 and C.P.L.R. 7804(f), and in support of Petitioners' Order to Show Cause.

PRELIMINARY STATEMENT

In this action, Petitioners seek a writ of mandamus ordering the New York Independent Redistricting Commission (the "IRC") and its Commissioners to fulfill their constitutional duty under Article III, Sections 4 and 5 of the New York Constitution to submit a second set of congressional plans for consideration by the Legislature. The Moving Respondents have moved to dismiss Petitioners' Amended Petition, but the arguments they make have no merit. The motion to dismiss should be denied.

First, the Moving Respondents argue the Amended Petition fails to state a claim upon which relief can be granted because the February 28, 2022 deadline for IRC action set forth in Article III, Section 4(b) of the Constitution has passed. (Moving Resp'ts' Mem. of Law in Supp. of Mot. to Dismiss ("Mot.") at 10-16, Doc. 109). But the plain language of Article III, Section 4(e) provides that Article III "shall govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e) (emphasis added). Section 4(e) thus authorizes this Court to remedy the IRC's failure to complete its constitutional redistricting duties, notwithstanding the timeframe specified in Section 4(b), by "order[ing] the adoption of . . . a redistricting plan" via the process of the IRC submitting a plan to the Legislature. *Id.* This construction of Section 4(e) is consistent with the intent of the New Yorkers who voted to adopt the Redistricting Amendments. *See Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *7 (N.Y. Apr. 27, 2022) (explaining that the constitutional redistricting process was "carefully crafted to guarantee that redistricting

maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines.").

The Moving Respondents also argue mandamus relief is beyond the IRC's authority or moot because the *Harkenrider* litigation resulted in a congressional map that will be used in the 2022 elections. (Mot. at 16-19). But Respondents miss that Petitioners do not ask for relief for the 2022 election cycle. Petitioners agree that the congressional map put in place following the *Harkenrider* litigation governs the 2022 midterm elections, but neither the Court of Appeals nor the Steuben County Supreme Court addressed whether that map must be used for the remainder of the decade. It cannot be assumed—as it would be inconsistent with the purpose and spirit of the Redistricting Amendments—that New York voters intended for the Redistricting Amendments to result in judicially-drawn maps for the entire decade any time that a redistricting authority failed to complete a constitutionally required duty. Petitioners seek to ensure that the constitutionally contemplated redistricting bodies – the IRC and the Legislature – complete congressional redistricting for future elections this decade.

Next, the Moving Respondents incorrectly argue this suit is barred by the four-month statute of limitations for mandamus actions. (Mot. at 19-20). This is incorrect. This action was commenced on June 28, 2022. (Pet., Doc. 1). Petitioners did not have a "clear legal right" to their requested relief until April 27, when the Court of Appeals held in *Harkenrider*, 2022 WL 1236822, at *1, that Article III's "process for [IRC] submission of electoral maps to the legislature" is "mandatory" and accordingly invalidated a 2021 statute that had given the IRC discretion as to whether to submit a second set of congressional maps to the Legislature. *See Harper v. Angiolillo*, 89 N.Y.2d 761, 765 (1997). While that statute was in effect, Petitioners could not have brought this mandamus action, which is predicated on the IRC having a clear, nondiscretionary duty to

submit a second set of congressional maps to the Legislature. As a result, this action was brought well within the four-month statute of limitations. Moreover, this case is even timely if the Court determines that the statute of limitations began to run on February 28, 2022, which (as the Moving Respondents acknowledge) is the latest day that Article III, Section 4(b) permits the IRC to submit a second set of maps to the Legislature.

Finally, the Moving Respondents argue no relief is available against the individual Commissioners of the IRC. The Moving Respondents cite no support for this contention and ignore that Article 78 mandamus relief is available against both governmental bodies and officers.

For the reasons set forth herein and in Petitioners' Memorandum of Law in Support of the Amended Verified Petition (Doc. 56), the Court should deny the Moving Respondents' motion to dismiss.

BACKGROUND

In 2014, New York voters approved constitutional amendments (the "Redistricting Amendments") to reform the redistricting process. The Redistricting Amendments required the creation of the IRC and a carefully crafted process by which the IRC would submit proposed redistricting plans to the Legislature for consideration. Following a months-long public comment process, which included comments from three of the Petitioners in this action, the IRC abandoned its constitutional duty and failed to submit a second round of congressional redistricting maps to the Legislature. Shortly thereafter, the Legislature—acting pursuant to L 2021, ch 633 (the "2021 Legislation")—passed a new congressional redistricting map. The 2021 Legislation provided that, "if the [IRC] d[oes] not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," the Legislature could proceed to introduce redistricting legislation. *See* L 2021, ch 633; *see also Harkenrider*, 2022 WL 1236822, at *9 (describing the statute as "authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps").

A group of Republican voters, the same voters who have intervened in this matter, brought suit challenging the legislatively-enacted congressional map, contending that it was (1) invalid from the outset, because the IRC had failed to submit a second round of redistricting maps to the Legislature, and (2) enacted with impermissible partisan intent. (*Harkenrider* Pet. at 58-63, Doc. No. 50). The case was litigated up to the New York Court of Appeals, which, on April 27, 2022, held that the 2021 Legislation was unconstitutional to the extent that it allowed the Legislature to pass a redistricting plan in the absence of a second set of plans submitted by the IRC. *Harkenrider*, 2022 WL 1236822, at *9. The Court of Appeals' decision made clear that the IRC did not complete its constitutionally required redistricting duties because it failed to submit a second round of proposed congressional districting plans to the Legislature for consideration. It also made clear that the Legislature was powerless to enact a new congressional plan once the IRC refused to submit a second set of plans because the 2021 Legislation was unconstitutional. Finally, the Court of Appeals affirmed the Steuben County Supreme Court's decision finding that the legislatively-enacted congressional map was an unconstitutional partisan gerrymander. *Id.* at *11. As a result of the Court of Appeals' decision, New York's constitutional redistricting process had failed, and New York's last validly enacted congressional districts—from the previous decade—were malapportioned.

The Court of Appeals could not have ordered the IRC to complete the constitutional redistricting process in the *Harkenrider* case for several reasons. The Harkenrider Petitioners did not seek such relief, and neither the IRC nor its Commissioners were parties. Moreover, by the time the Court of Appeals issued its decision on April 27, the 2022 midterm elections were fast approaching. As a result, the Court of Appeals ordered the Steuben County Supreme Court—with the assistance of special master Jonathan Cervas—to implement a map pursuant to which the 2022

midterm elections could be held. *See generally*, *Harkenrider* Decision & Order at 5, Doc. No. 55; *Harkenrider*, 2022 WL 1236822, at *13.

Petitioners brought the present Article 78 action for a writ of mandamus against the IRC and its members in their official capacities on June 28, after the Court of Appeals held that the Legislature lacked authority to remedy the IRC's failure to complete the "mandatory process for submission of electoral maps to the legislature[,]" *Harkenrider*, 2022 WL 1236822, at *1. (Pet., Doc. No. 1).[1] Petitioners are New York voters who are injured by the IRC's failure to complete its constitutionally mandated redistricting duties. Petitioners request an order compelling Respondents to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan," (Pet. ¶ 1, Doc. 1). Petitioners do not seek relief for this election cycle; they filed the Petition "to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade." *Id*. In other words, Petitioners do not seek to disturb the judicially-approved map implemented by the *Harkenrider* court to ensure that New Yorkers had a map in place for the 2022 election that did not violate the one-person one-vote requirement. (*Harkenrider* Decision & Order at 3, 5, Doc. No. 55). Petitioners seek relief for future elections, requiring the IRC to execute its mandatory duties in the congressional redistricting process. *See Harkenrider*, 2022 WL 1236822, at *1.

Respondents Brady, Conway, Harris, Nesbitt, and Stephens filed the present motion to dismiss on August 26. (Moving Resp'ts' Mem. of Law in Supp. of Mot. to Dismiss ("Mot."), Doc. No. 109). For the reasons set forth below, the Court should deny the motion.

[1] On August 4, Petitioners amended their petition to add additional petitioners and limit the scope of the action to congressional districts. (Am. Pet., Doc. No. 47).

STANDARD OF REVIEW

In Article 78 proceedings, motions to dismiss and "objections are appropriately afforded review similar in nature to that applied to defenses raised in a pre-answer motion to dismiss pursuant to CPLR 3211(a)." *Lally v. Johnson City Cent. Sch. Dist.*, 962 N.Y.S.2d 508, 511 (3d Dep't 2013). In assessing a motion to dismiss, the court "must accept [petitioners'] allegations as true, accord [petitioners] the benefit of every possible favorable inference, and determine only whether plaintiffs have a cause of action." *Connolly v. Long Island Power Auth.*, 70 N.Y.S.3d 909, 915 (2018) (citation omitted). "The relevant inquiry is whether the [petitioners] have a cause of action and not whether one has been stated." *Davies v. S.A. Dunn & Co., LLC*, 156 N.Y.S.3d 457, 460 (2021) (internal quotation marks and citation omitted).

ARGUMENT

I. The Amended Petition states a claim upon which relief can be granted.

New York law provides for a writ of mandamus where a government "body or officer failed to perform a duty enjoined upon it by law." N.Y. C.P.L.R. 7803. Petitioners must establish "'a clear legal right to the relief demanded' by demonstrating the 'existence of a corresponding nondiscretionary duty' on the part of the" relevant body. *Waite v. Town of Champion*, 81 N.Y.S.3d 807, 811 (2018) (quoting *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 570 N.Y.S.2d 474, 477 (1991)); *see also George F. Johnson Mem'l Libr. v. Springer*, 783 N.Y.S.2d 138, 139 (3rd Dep't 2004) (granting petition for mandamus under Article 78 because government official did not have "any discretion to refuse" to perform relevant duty). "[T]o the extent that [petitioners] can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties." *Klostermann v. Cuomo*, 475 N.Y.S.2d 247, 255 (1984).

As explained in the memorandum of law accompanying the Amended Petition, the IRC has a clear, nondiscretionary duty to submit a second set of congressional districting plans to the Legislature if its first congressional plans are rejected by legislative vote or gubernatorial veto. (Pet'rs' Mem. of Law in Supp. of the Am. Verified Pet. at 16, Doc. 56 (quoting N.Y. Const. art. III, § 4(b))).[2] The nondiscretionary nature of the IRC's duty to submit a second set of congressional maps was made clear by the Court of Appeals' April 27 *Harkenrider* decision invalidating the 2021 Legislation. Prior to that order, the 2021 Legislation effectively made the IRC's duty to submit a second set of congressional maps discretionary. *See Glenman Indus. & Com. Contracting Corp. v. N.Y. State Off. of State Comptroller*, 905 N.Y.S.2d 713, 716 (3rd Dep't 2010) (explaining that "mandamus does not lie to enforce the performance of a duty that is discretionary," and that a "discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results" (cleaned up)*; see also League of Women Voters of N.Y. v. N.Y. State Bd. of Elections*, No. 535511, 2022 WL 2070888, at *2 (3rd Dep't June 9, 2022) ("[I]n the absence of an express judicial order invalidating the [state] 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 the respondent' . . . therefore, petitioner is not entitled to the extraordinary remedy of mandamus to compel." (cleaned up)). Mandamus relief is appropriate here because the IRC indisputably failed to submit a second set of congressional plans to the Legislature for consideration, and thus indisputably failed to complete its constitutional duty.

Article III, Section 4(e) of the New York Constitution provides a proper basis for Petitioners' requested relief. The Moving Respondents erroneously claim that compelling the IRC

[2] Petitioners incorporate by reference the Memorandum of Law in Support of their Amended Verified Petition (Doc. 56), pursuant to CPLR § 2214(c).

to complete its constitutional duty at a date beyond February 28, 2022, would be unconstitutional, impossible, moot, or beyond the IRC's authority. *See* Mot. at 10-19. But the Redistricting Amendments authorize the remedy that Petitioners seek. Article III, Section 4(e) of the New York Constitution provides that, "[t]he process for redistricting congressional and state legislative districts established by [Article III, Sections 4, 5, and 5-b] shall govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e) (emphasis added). Thus, Section 4(e) authorizes courts to vary from the deadlines set forth in the Redistricting Amendments where necessary for a court to address a violation of law. Here, the IRC violated the Constitution by failing to submit a second set of congressional plans to the Legislature for its consideration, as required by Article III, Section 4(b). A court may remedy that violation by "order[ing] the adoption of . . . a redistricting plan" via the process of the IRC submitting a plan to the Legislature. The timeframe specified in Section 4(b) does not bar such remedial action, as Section 4(e) specifically provides that the process in Section 4 "shall govern redistricting in this state *except* to the extent" required to remedy a violation of law. *Id*.

This construction of Section 4(e) is consistent with the intent of the New Yorkers who voted to adopt the Redistricting Amendments. "In construing the language of the Constitution . . . [the court] look[s] for the intention of the People and give[s] to the language used its ordinary meaning." *Harkenrider*, 2022 WL 1236822, at *4; *see also Pfingst v. State*, 393 N.Y.S.2d 803, 805 (3d Dep't 1977) ("It is a cardinal rule of construction that no part of the Constitution should be construed so as to defeat its purpose or the intent of the people adopting it."). As the Court of Appeals explained just a few months ago, "the text of section 4 contemplates that any redistricting act ultimately adopted must be founded upon a plan submitted by the IRC." *Harkenrider*, 2022

WL 1236822, at *6. This is because the Redistricting Amendments "were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines." *Id.* at *7; *see also id.* at *9 ("Through the [Redistricting Amendments], the People of this state adopted substantial redistricting reforms aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines."). The proper interpretation of Section 4(e) is that it permits the mandamus relief requested here—namely, to compel the IRC to complete its redistricting duties. Indeed, the Court of Appeals even contemplated in *Harkenrider* 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." *Id.* at * 8 n.10; *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").

The Moving Respondents mischaracterize Section 4(e) by claiming, no fewer than seven times, that it mandates a court-drawn redistricting map as the *exclusive* judicial remedy for a violation of the Redistricting Amendments. Mot. at 11, 12, 14, 15, 16. But this reads an exclusive remedy into the text of the Constitution that simply is not there. Section 4(e) authorizes courts to "order the adoption of . . . a redistricting plan as *a* remedy for a violation of law." (emphasis added). The Constitution does not make the adoption of a court-drawn map the exclusive remedy for a violation of law, and the provision's use of "a" as opposed to "the" before the word "remedy"

clearly indicates that courts remain free to order other remedies as well, including ordering the entities that the people gave the authority to adopt a map (the IRC and the Legislature acting together) to do what the Constitution requires them to do. Nor is there any language in the Court of Appeals' *Harkenrider* decision mandating a court-drawn map as the exclusive remedy. The footnote cited by Moving Respondents as support for this argument merely reiterates that the Legislature cannot act in the absence of the IRC's submission of plans, a conclusion that Petitioners do not contest. *See* Mot. at 14 (citing *Harkenrider*, 2022 WL 1236822, at *12 n. 20). Petitioners likewise do not dispute Moving Respondents' claim that "the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality," *id*. at 13 (citing *Harkenrider,* 2022 WL 1236822, at *12). Petitioners seek precisely that remedy in this action – a judicial order compelling the IRC to remedy its legal violation by submitting a second set of congressional maps to the Legislature, over which the court would retain jurisdiction to ensure its order was implemented. Neither Section 4(e) nor any other portion of the Redistricting Amendments bars mandamus relief in this case.

II. Mandamus relief is available and appropriate in this case.

In addition to incorrectly arguing that mandamus relief is barred by Section 4(e), Moving Respondents also argue such relief is beyond the IRC's authority or moot because the *Harkenrider* litigation resulted in a congressional map for the 2022 elections. But Petitioners do not ask for relief for 2022; they seek relief following the 2022 midterm elections, to ensure that the remaining elections in New York in this redistricting cycle are conducted under a map enacted pursuant to the processes that the people demanded with the Redistricting Amendments. As discussed in Petitioners' memorandum of law accompanying the Amended Petition, there are numerous examples in which state high courts have recognized that when a redistricting body "fails to enact

a new redistricting plan [within the timeframe provided by the state constitution, and the court has to implement a remedial map for fast-approaching elections,] 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); *see also Lamson*, 168 N.E.2d at 486 (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 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."). New York's Redistricting Amendments expressly gave redistricting authority to the IRC and Legislature, and there is no indication that the Court of Appeals intended, with the *Harkenrider* decision, to deprive those bodies of authority to enact a congressional plan to govern after the 2022 election.[3]

Moving Respondents provide no response to these authorities. Instead, they cite a string of cases that have no application to or bearing on this case. *See Matter of Council of City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 388 (2006) (holding that an officer may defend against mandamus on the grounds that the legislation at issue is unconstitutional, which has no relevance in a case such as this one, which seeks to enforce a constitutional duty); *Matter of Altamore Barrios-Paoli*, 90

[3] Indeed, the Redistricting Amendments do not include any provision dissolving the IRC or liming the individual Commissioners' service to a certain date or time period. And Article III, Section 5-b(d) provides that "[v]acancies in the membership of the commission shall be filed within thirty days in the manner provided for in the original appointments." One Commissioner, John Flateau, was reappointed in accordance with that provision in August 2022 after having previously resigned, (Attorney Aff. of Richard A. Medina in Support of Mot. for Leave to Amend Pet., Doc. No. 149), indicating that the IRC has remained in force even after the elapse of the timeframes for IRC action outlined in Article III, Section 4.

N.Y.2d 378, 384-85 (1997) (denying mandamus where respondent had already completed its required legal duties, and petitioners sought to compel additional governmental action); *Matter of Thorsen v. Nassau Cnty. Civ. Serv. Comm'n*, 821 N.Y.S.2d 273, 275 (2d Dep't 2006) (denying mandamus where "the petitioner failed to demonstrate how any action or inaction of the respondent defeated, impaired, impeded, or prejudiced his rights").

Moving Respondents also argue incorrectly that Petitioners' claim is moot because they claim—without support—that the remedial map resulting from the *Harkenrider* litigation must remain in place for the remainder of the decade. *See* Mot. at 12, 15 17-18. Neither the Court of Appeals nor the Steuben County Supreme Court addressed the question of how long the special master's 2022 congressional plan would be in place. It cannot be assumed—as it would be inconsistent with the purpose and spirit of the Redistricting Amendments—that New York voters intended for the Redistricting Amendments to result in judicially-drawn maps for the entire decade any time that a redistricting authority failed to complete a constitutionally required duty. Indeed, the Steuben County Supreme Court "Ordered, Adjudged, and Decreed" "the official approved 2022 Congressional map," but did not address whether the map would be in place beyond the 2022 midterm elections. (*Harkenrider* Decision & Order at 5, Doc. No. 55). And the only support that Moving Respondents can muster for the proposition that the remedial plan has been ordered to be in place for the rest of the decade comes from dicta in a dissenting opinion at the Court of Appeals. *See* Mot. at 19 (citing *Harkenrider*, 2022 WL 1236822, at *14 (Troutman, J., dissenting)). Moving Respondents claim Petitioners seek to overturn the special master's congressional plan or to act as if the 2021 Legislation hadn't been stricken. Mot. at 18-19. To the contrary, Petitioners simply seek completion of the constitutionally-required redistricting process.

III. The Amended Petition is timely.

Petitioners timely filed this Article 78 petition within the four-month limitations period provided in C.P.L.R. 217(1). The limitations period began accruing on April 27, 2022, when the Court of Appeals in *Harkenrider* invalidated the 2021 Legislation, which was the legislature's fix for the IRC's inaction and which, while in force, relieved IRC of its otherwise nondiscretionary duty to submit a second set of congressional maps to the Legislature. Actions against governmental bodies or officers, including mandamus actions, "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . ." N.Y. C.P.L.R. 217(1). An agency action is not "final and binding upon the petitioner" until the agency has "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted 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. & Telecomm. of City of N.Y.*, 5 N.Y.3d 30, 34 (2005). An Article 78 mandamus petition lies only "where there is a clear legal right to the relief sought." *Harper v. Angiolillo*, 89 N.Y.2d 761, 765 (1997) (quotation omitted).

Here, the "clear legal right" to Petitioners' requested relief did not arise until April 27, when the Court of Appeals held that the "process for [IRC] submission of electoral maps to the legislature" designated by Article III is, in fact "mandatory" and thus the congressional map enacted by the Legislature was invalid. *Harkenrider*, 2022 WL 1236822, at *1; *see also League of Women Voters of N.Y.*, 2022 WL 2070888, at *2 ("[I]n the absence of an express judicial order invalidating the [state] 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 the respondent' . . . therefore, petitioner is not entitled to the extraordinary remedy of mandamus

to compel." (cleaned up)). By invalidating the 2021 Legislation, the Court of Appeals made clear that the IRC's submission of a second set of maps to the Legislature is "a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting." *Harkenrider,* 2022 WL 1236822, at *7.

Relatedly, the IRC's failure to submit a second set of congressional maps did not inflict "actual, concrete injury" until the Court of Appeals invalidated the 2021 Legislation on April 27, 2022. Until the Court of Appeals' decision in *Harkenrider*, the 2021 Legislation effectively gave the IRC discretion as to whether to submit a second set of congressional maps to the Legislature. Mandamus relief is not available for "[d]iscretionary acts" that "are not mandated and involve the exercise of reasoned judgment, which could typically produce different acceptable results." *All. to End Chickens as Kaporos v. N.Y.C. Police Dep't*, 55 N.Y.S.3d 31, 34 (1st Dep't 2017). Prior to the Court of Appeals' decision, the mandamus relief sought by Petitioners—completion of the steps necessary to place redistricting in the hands of the Legislature and ensure that maps would be drawn according to the procedures in Article III—would have been unavailable because the 2021 Legislation created an alternative procedure. The 2021 Legislation filled the gap left by the Commission's failure to act and "prevented or significantly ameliorated" Petitioners' injury. *Best Payphones*, 5 N.Y.3d at 34.

But even if Petitioners could have sought relief before the Court of Appeals issued its *Harkenrider* decision on April 27, their claims could not have accrued until, at the earliest, February 28, 2022—four months before this action was commenced on June 28, 2022. As Respondents acknowledge, that was the "constitutional deadline" for the IRC to submit its second set of proposed maps. Mot. at 19; *see also* N.Y. Const. art. III, § 4(b) ("[I]n no case later than

February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.").

For similar reasons, Petitioners' requested relief is not barred by the doctrine of laches. Petitioners acted expeditiously by filing their Petition within two months of the date that their injury became apparent and within four months of the last opportunity for the IRC to correct its failure of its own accord.

IV. Relief is available against each of the Respondents.

"[A] CPLR article 78 proceeding is brought . . . against the state and governmental subdivisions *including their officers*, departments, and agencies." *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 924 N.Y.S.2d 499, 505 (2011) (citations omitted) (emphasis added). Moving Respondents nevertheless claim in a conclusory fashion that the "mandamus relief sought by the Petition cannot be deemed to apply to compel any one individual . . . to take an action that can only be taken by the IRC as a whole, or at minimum, by a quorum thereof." Respondents provide no legal support for this contention. Mandamus relief is available against both the IRC and its individual Commissioners. *See Mansfield v. Epstein*, 5 N.Y.2d 70, 72 (1958) (granting mandamus relief ordering multiple election commissioners to perform a ministerial act, where the commissioners could not agree on the validity of petitions).

CONCLUSION

Accordingly, this Court should deny the Moving Respondents' motion to dismiss and grant the relief requested in the Amended Petition.

Dated: September 6, 2022

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CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b(a). According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 4,885 words.

Dated: September 6, 2022

/s/ James R. Peluso
James R. Peluso