APL-2023-00121

To be argued by:
ANDREA W. TRENTO
5 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

ANTHONY S. HOFFMANN, et al.,

Petitioners-Respondents,

v.

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, et al.,

Respondents-Respondents,

-and-

INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, et al.,

Respondents-Respondents,

TIM HARKENRIDER, et al.,

Intervenors-Respondents-Appellants.

For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules.

BRIEF FOR KATHY HOCHUL AND LETITIA JAMES AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

LETITIA JAMES
Attorney General
State of New York
Attorney for Amici Curiae
28 Liberty Street
New York, New York 10005
(212) 416-8656
(212) 416-8962 (*f*)
andrea.trento@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
ANDREA W. TRENTO
Assistant Solicitor General
of Counsel

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Supreme Court, Albany County, Index No. 904972-22
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INTEREST OF THE AMICI CURIAE

This appeal concerns the question whether the Appellate Division, Third Department erred in concluding that the independent redistricting commission (IRC) established by the 2014 amendments to the New York Constitution should be reconvened to remedy the constitutional defects in the current, court-drawn congressional map approved by Supreme Court, Steuben County, on May 20, 2022, following this Court's decision and remand in *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022). The Governor, in her capacity as the chief executive officer of the State of New York, and the Attorney General, in her capacity as the chief legal officer of the State, file this amicus brief in support of the petitioners' position that, in accordance with the state Constitution, the IRC must be ordered to reconvene to begin the process of revising the current congressional map.

Both the Governor and the Attorney General have a strong interest in the proper interpretation and application of New York's constitutional and statutory provisions governing the conduct of elections. The Governor has the responsibility to "take care that the

laws [of the State] are properly executed." N.Y. Const., art. IV, § 3. The Governor is also responsible for approving or vetoing legislation implementing a redistricting plan. N.Y. Const., art. III, § 4(b). The Attorney General has the general authority to "prosecute and defend all actions and proceedings in which the state is interested," Executive Law § 63(1). The Attorney General has issued numerous opinions concerning the State's election laws, *see* Office of the N.Y. State Att'y Gen., *Opinions by Subject* (n.d.) (search Subject name: "Elections"),[1] and the Civil Rights Bureau of the Office of the Attorney General (OAG) investigates and prosecutes certain violations of the Election Law, *see, e.g.*, *People ex rel. James v. Schofield*, 199 A.D.3d 5 (3d Dep't 2021).

Both amici are committed to protecting the rights of New York voters to vote in congressional districts created according to the process that the voters enshrined in the Constitution in 2014 by way of constitutional amendment. Though this Court in *Harkenrider*

[1] For sources available online, full URLs appear in the Table of Authorities. All sites last visited October 23, 2023.

was required by the circumstances of the fast-approaching 2022 election to direct the Supreme Court to assume responsibility for the creation of a remedial congressional map, those circumstances do not require that map to remain in place for the four election cycles that follow, where the constraints of the election calendar do not foreclose the constitutional IRC-administered remedy put in place by the voters in 2014. Finally, if this Court has concerns about the form of the proceeding brought by petitioners, it may convert the proceeding to a different form as appropriate to grant relief.

QUESTION PRESENTED

Did the Appellate Division, Third Department err in concluding that the Constitution required the Supreme Court, Albany County to reconvene the IRC for the purpose of remedying the defects in the congressional map approved by Supreme Court, Steuben County, on May 20, 2022, following the Court of Appeals' decision and remand in *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022)?

STATEMENT OF THE CASE

A. Constitutional Background

In 2012 the Legislature passed a resolution proposing to "amend the constitution to reform comprehensively the process and substantive criteria used to establish new state legislative and congressional district lines every ten years." Senate Introducer's Mem., Concurrent Resolution to Amend N.Y. Const. art. 3 (Mar. 15, 2012) (S. 6698/A. 9526). Specifically, the proposed amendment would "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body," i.e., the Independent Redistricting Commission, while at the same time "giv[ing] the voters of New York a voice in the adoption of this new process." *Id.* The amendment was approved by the Legislature a second time in 2013, and became law in 2014 when it was ratified by the voters. *See* N.Y. Const. art. XIX, § 1.

The Constitution now requires that on or before February 1 of each year ending in zero, "and at any other time a court orders that congressional or state legislative districts be amended," an IRC "shall be established to determine the district lines for congres-

sional and state legislative offices." N.Y. Const. art. III, § 5-b(a). The Constitution tasks the IRC with "prepar[ing] a redistricting plan to establish senate, assembly, and congressional districts every ten years," and establishes a procedure and timetable for the IRC to do so, culminating in the submission to the Legislature "in no case later than February twenty-eighth" of the year ending in two by the IRC of its second redistricting plan (should the first plan fail to be approved). *Id.* art. III, § 4(b). The IRC must conduct public hearings on its proposals in each of five specific cities and seven specific counties across the State. *Id.* art. III, § 4(c)(6). And legal challenges to any map must be "give[n] precedence . . . over all other causes and proceedings," with a decision rendered on such a challenge "within sixty days after a petition is filed." *Id.* § 5. Finally, if such a challenge yields a finding that "the provisions of this article" have been violated, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." *Id.*

This IRC-driven process approved by the voters is to "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." *Id.* § 4(e) (emphasis added). Once established, a reapportionment plan "shall be in force" until the redistricting process following the next decennial census "unless modified pursuant to court order." *Id.*

B. Redistricting Following the 2020 Census and the *Harkenrider* Proceeding

The redistricting cycle following the 2020 census was the first opportunity to implement the IRC process established by the voters in 2014. However, that process broke down when the IRC failed to transmit a second redistricting plan after its first set of dueling proposals was rejected by the Legislature. *Matter of Harkenrider*, 38 N.Y.3d at 504-05. Without an IRC proposal to vote on, the Legislature acted to implement congressional, Senate, and Assembly maps on its own, and Governor Hochul signed those maps into law on February 3, 2022.[2] *Id.* at 505.

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[2] Anticipating the possibility that the IRC would deadlock and fail to submit any map to the Legislature, the Legislature enacted a statute in 2021 that purported to authorize the Legislature to act on its own in such circumstances. *See* Ch. 633, 2021 N.Y. Laws. This statute was struck down as unconstitutional by this Court in *Harkenrider*. 38 N.Y.3d at 516-17.

On that same day, several New York voters commenced the *Harkenrider* litigation, challenging the congressional and (eventually) the Senate maps[3] on the grounds that Legislature's adoption of maps following the breakdown of the IRC process violated the Constitution's procedural requirements, while the maps themselves were unconstitutional partisan gerrymanders. *Id.* at 505-06.

The case quickly reached this Court, and on April 27, 2022, this Court ruled in relevant part that the congressional and Senate maps had been adopted by procedurally improper means. *Matter of Harkenrider*, 38 N.Y.3d at 521. This Court held that the plain language of the Constitution required the IRC to submit a second redistricting plan to the Legislature as a precondition to any legisla-

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[3] The Assembly map was not challenged by the *Harkenrider* petitioners. Instead, following the remand in *Harkenrider*, it became the subject of a separate proceeding, *Nichols v. Hochul*, Index No. 154213/2022 (Sup. Ct. N.Y. County), in which the First Department directed Supreme Court to convene the IRC to draw a remedial Assembly map. *See Matter of Nichols v. Hochul*, 212 A.D.3d 529 (1st Dep't), *appeal dismissed*, 39 N.Y.3d 1119 (2023). The IRC fulfilled that duty and the Legislature enacted its plan into law. *See* Ch. 127, 2023 N.Y. Laws; *see also* Zach Williams, *New York State Assembly District Line Approved–Signed into Law by Hochul*, N.Y. Post (Apr. 24, 2023).

tive action, and therefore the Legislature's enactment of a plan in the absence of that IRC action violated these constitutional provisions. *Id.* at 511-12. This Court observed that the relevant constitutional 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," lending further support to its textual conclusion. *Id.* at 513-14. Thus, pursuant to these amendments, "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." *Id.* at 517.

Turning to the remedy, this Court noted that the Constitution authorized the judiciary to "order the adoption of, or changes to, a redistricting plan" where there has been a violation of law, and rejected the respondents' request to delay the remedy until after the fast-approaching 2022 elections. *Id.* at 521-22. This Court noted that the deadlines for IRC action built into the Constitution, coupled

with the directive that any judicial challenges be resolved within 60 days of filing, reflected an intent that defects found by a court be remedied in time for the next election. *Id.* at 522 n.18. However, this Court declined to give the Legislature an opportunity to correct the maps' "legal infirmities" pursuant to article III, § 5 of the Constitution, stating that the "procedural unconstitutionality of the congressional and senate maps [was], at this juncture, incapable of legislative cure." *Id.* at 523 (quotation marks omitted). Instead, "[w]ith judicial supervision and the support of a neutral expert designated a special master, there [was] sufficient time for the adoption of new district lines." *Id.* at 522.

On remand, the *Harkenrider* trial court held exactly one public hearing in Steuben County on the proposed maps it developed with the special master's assistance. On May 20, 2022, the court certified those maps as "the official approved 2022 Congressional map and the 2022 State Senate map." *Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 31471(U), at 5 (Sup. Ct. Steuben County 2022).

C. Proceedings Below

1. Supreme Court

Meanwhile, on June 28, 2022, the petitioners in this case initiated this C.P.L.R. article 78 proceeding seeking a writ of mandamus against the IRC compelling it to prepare and submit to the Legislature a second congressional map for elections taking place after 2022. (*See* R. 265-284.) Petitioners alleged that because the IRC failed to complete its mandatory duty, under article III, § 4(b) of the Constitution, to submit a second set of maps to the Legislature, it was subject to a writ of mandamus pursuant to C.P.L.R. 7803(1) compelling it to act. (R. 282-283.) Petitioners further alleged that the court-drawn congressional map that had emerged from the *Harkenrider* proceeding was deficient because, among other defects, it "fail[ed] to follow New York's constitutionally required map-drawing process." (R. 281-282.)

The *Harkenrider* petitioners successfully intervened and, along with certain of the IRC respondents,[4] moved to dismiss the

[4] The IRC members that moved to dismiss are the respondents-appellants in this appeal. *See* Br. for Respondents-

petition, contending (inter alia) that the congressional map produced as a result of the *Harkenrider* proceeding marked the end of the 2020 redistricting process, and that therefore the IRC lacked authority to take any further action. (R. 9.) Although Supreme Court found that the petition was timely (R. 16-17) and was not an impermissible collateral attack on the ruling in *Harkenrider* (R. 15-16), it agreed with the movants that the petition failed to state a claim upon which relief could be granted because the court-drawn map from *Harkenrider* was in "full force and effect, until redistricting takes place again following the 2030 federal census." (R. 18.)

2. Appellate Division, Third Department

Petitioners timely appealed (R. 1), and on June 8, 2023, the Appellate Division, Third Department, reversed the judgment of Supreme Court and granted the petition, with two justices dissenting (R. 410-426).

Appellants ("Respondents-Appellants' Br."). The *Harkenrider* petitioners who intervened are the intervenors-appellants in this appeal. *See* Br. for Intervenors-Respondents-Appellants ("Intervenors' Br.").

The court first rejected respondents' arguments that the petition was untimely, holding that petitioners' claim accrued on March 31, 2022, at the earliest—when the *Harkenrider* trial court first ruled unconstitutional the 2021 legislation under which the Legislature promulgated new maps following the IRC's failure to submit a second map in early 2022. (R. 413-414.)

Turning to the merits, the court agreed with the petitioners that the IRC breached its duty in failing to submit a second set of redistricting plans to the Legislature. (R. 414, 416-417.) The court further held that this Court's decision in *Harkenrider* neither addressed that failure nor expressly held that the remedial maps it directed the trial court to prepare would remain in effect for the remainder of the decade. (R. 415-416.) The court reasoned that while the Constitution establishes a "default duration for electoral maps" that extends to the "'subsequent decennial census,'" the same provision "also limits the degree to which judicial remediation should influence" the redistricting process by cabining that authority to circumstances where a court is "'*required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of

law.'" (R. 415 (emphasis in opinion) (quoting N.Y. Const., art. III, § 4(e)).) Because the circumstances confronting this Court in *Harkenrider* in 2022 did not "require" that it direct Supreme Court to draw a decade-long remedial map, the Third Department declined to interpret this Court's silence on the map's duration as providing as much. (R. 416.)

Respondents-appellants and *Harkenrider* intervenors appealed. (R.404-409.)

ARGUMENT

POINT I

THE COURT-DRAWN CONGRESSIONAL MAP CURRENTLY IN PLACE IS LEGALLY DEFICIENT AND SHOULD BE REDRAWN PURSUANT TO AN IRC-DRIVEN PROCESS

A. The Legislature and IRC Have Constitutionally Mandatory Roles in Remedying Defective Redistricting Maps.

At the outset, the constitutional directives that the Legislature "shall have a full and reasonable opportunity" to correct legal deficiencies and that an IRC "shall be established" at "any . . . time a court orders that congressional or state legislative districts be amended" are mandatory and were required to be given effect. *See* N.Y. Const. art. III, §§ 5, 5-b(a).

The verb "shall" has been held by this Court to constitute mandatory language in the absence of circumstances suggesting a contrary legislative intent. *See, e.g.*, *Matter of DeVera*, 32 N.Y.3d 423, 435 (2018) (noting that the "use of 'shall' makes what follows mandatory" (internal alteration omitted)); *Matter of New York Pub. Interest Research Group v. Dinkins*, 83 N.Y.2d 377, 384 (1994); *Matter of Waldbaum's #122 v. Board of Assessors of City of Mount*

Vernon, 58 N.Y.2d 818, 819-20 (1983). Indeed, this Court in *Harkenrider* interpreted the term's appearance elsewhere to impose a mandatory duty on the IRC to act. *See Matter of Harkenrider*, 38 N.Y.3d at 511.

Since "the same word should be given the same meaning in the same statute," *Matter of Breslin v. Conners*, 10 A.D.3d 471, 476 (3d Dep't 2004), the duties imposed by the verb "shall" in §§ 5 and 5-b(a) impose the same sort of mandatory duty that this Court invoked to *strike down* the Legislature's effort to address the circumstances where the IRC failed to perform its mandatory duty in § 4.

Moreover, § 4(e) does not excuse a court from the foregoing mandates of §§ 5 and 5-b(a) whenever a legal challenge succeeds and demands the creation of a new map. *See Matter of Nichols*, 212 A.D.3d at 530. Instead, § 4(e) reaffirms that "[t]he process for redistricting congressional and state legislative districts established by this section [four] and sections five and five-b of this article shall govern redistricting in this state," and makes exception only "*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).

A court may indeed be called on to create a remedial map in response to a violation of law through a process that foregoes the IRC and Legislature, but its authority to do so is limited expressly to the "extent" that the court is "required" to do so. *See id.* This Court has long held that "statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous." *Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 271 (2022) (quotation marks omitted); *see also Matter of Harkenrider*, 38 N.Y.3d at 511. Thus, where the commands of §§ 5 and 5-b(a)—that the Legislature and IRC be given roles in the remedial process—*can* be given effect, they *must* be given effect. And that includes circumstances where a court may be required to order a remedial map in time for an upcoming election, but where the Legislature and IRC are otherwise able to assume their constitutional remedial roles in subsequent election cycles.

Respondents-appellants and intervenors would read the remedial roles of the Legislature and IRC enshrined in §§ 5 and 5-b(a) right out of the Constitution. Intervenors contend that this Court's ruling in *Harkenrider* foreclosed any argument that the IRC can play a remedial role after its constitutional deadline for making submissions to the Legislature has passed. Intervenors' Br. at 43-52. But setting aside their incorrect interpretation of this Court's ruling in *Harkenrider* (see *infra* at 23-29), the argument fails to recognize that there will almost *never* be sufficient time in the election calendar for the IRC to reconvene and act as contemplated by § 5-b(a) by the relevant constitutional deadlines following a successful legal challenge to a redistricting map.[5]

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[5] Even if the IRC were to submit its first maps to the Legislature before the initial January 15 deadline, N.Y. Const. art. III, § 4(b), a legal challenge to these maps would not be complete even at the trial level (to say nothing of any appeals) in sufficient time to allow the IRC to reconvene and amend those maps by its constitutional February 28 resubmission deadline, just 44 days later, *see id.* art. III, § 5 (requiring judicial challenges to redistricting maps to be resolved within 60 days). The Constitution also contemplates that the IRC may be called on to submit a second set of maps to the Legislature, *see id.* art. III, § 4(b), but intervenors'

Pivoting, intervenors attempt to distinguish the circumstances in which § 5-b(a) applies by arguing that it "provides for only a specific type of relief": when specific districts in a map "adopted under the constitutional process in Article III, Section 4(b)" are ordered to be "amended," such as "if a court were to hold that a map . . . violated Section 2 of the [federal] Voting Rights Act." Intervenors' Br. at 50. But Intervenors fail to explain why, under their theory, the February 28 deadline for IRC action in the Constitution would not also preclude it from assuming a remedial role in that example.

Moreover, intervenors' reliance on a distinction between a procedural and a substantive violation of the redistricting amendments (*see* Intervenors' Br. at 51) is misplaced. Nothing in § 5 or § 5-b(a) supports the position that the remedial roles of the IRC and Legislature are limited to substantive violations. *See* N.Y. Const. art. III, §§ 5, 5-b(a).

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interpretation would entirely foreclose the application of §§ 5 and 5-b(a) to any challenge to a second such submission by the IRC.

Intervenors are also mistaken in arguing that the "amendment" authorized by § 5-b(a) can mean only limited changes to one or more districts but not the adoption of a new map altogether. *See* Intervenors' Br. at 50. This reading of the term "amendment" is belied by the plain language of § 5-b(a), which equates the process of adopting a map anew after the decennial census with the process of altering districts as a result of a court order—both are described as "amendments." *See* N.Y. Const. art. III, § 5-b(a) (providing that the IRC "shall be established" no later than "February first of each year ending with a zero" and "at any *other* time a court orders that congressional or state legislative districts be *amended*" (emphases added)). Because the term "amendment" is used in the Constitution to cover both situations, the term cannot be limited to minor changes to a map.

B. A Court May Order a Mid-Decade Modification to a Reapportionment Plan Despite the Durational Default.

Once a plan is adopted, § 4(e) instructs that the plan "shall be in force until the effective date" of the plan adopted following the next decennial census, unless it is "modified pursuant to court order" before that time. N.Y. Const. art. III, § 4(e). Thus, a remedial plan that a court was "required" to adopt may be later "modified" by court order once the original exigencies have dissipated, thereby giving effect to the requirements of §§ 5 and 5-b(a) that the Legislature and IRC take part in remedying any violation.

Intervenors dispute this, contending that the term "modified" in § 4(e) contemplates only "small changes" made to reapportionment plans by court order after they are adopted, "not the adoption of a new map." Br. at 36-37 (quotation marks omitted). But while dictionary definitions "may be useful as guide posts" in determining the meanings of statutory terms, "they are not controlling." *People v. Badji*, 36 N.Y.3d 393, 400 n.3 (2021). Here, § 4(e) was intended to allow a court to "modify" a plan beyond just by making "small changes" to it; the substantive requirements imposed by § 4(c)

demand as much. For example, an enacted plan that violates the equal population requirements of article III, § 4(c)(2), or the incumbency protection prohibition of § 4(c)(5), could require substantial changes, including "the 'adoption' of a new map" (Intervenors' Br. at 37) altogether. Yet intervenors' interpretation of "modified" in § 4(e) would foreclose such relief.

Accordingly, here "the purpose of the law [is] more helpful than dictionaries in deciding the meaning to be given" the term "modified."[6] *See Bruni v. City of New York*, 2 N.Y.3d 319, 327 (2004); *see also Matter of 89 Christopher Inc. v. Joy*, 44 A.D.2d 417, 422 (1st Dep't) ("we are not obliged to follow literal language where to do so would thwart the obvious legislative intent and lead to unexpected and absurd results"), *aff'd as modified*, 35 N.Y.2d 213 (1974). And

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[6] In any event, the use of the word "modified" in § 4(e) to encompass all manner of changes to redistricting maps fits comfortably with how the U.S. Supreme Court and other courts have characterized redistricting efforts in other States. *See, e.g.*, *Wittman v. Personhuballah*, 578 U.S. 539, 541, 542, (2016) (describing Virginia congressional district 3 as having been "modified" by redistricting following decennial census); *Kentopp v. Anchorage*, 652 P.2d 453, 461 (Alaska 1982) (noting that plan adopted in 1979 would likely need to be "modified" following 1980 census).

"modified" was clearly intended to include changes up to, and including, the adoption of a new map.

For their part, respondents-appellants concede that a court-ordered plan like the one developed in *Harkenrider* is not "blanketly immune from further judicial review," because it, too, could be subject to infirmities that require "invalidat[ion]." Respondents-Appellants' Br. at 27 n.6; *see also* Intervenors' Br. at 40. That concession is fatal. Petitioners here allege that the current map ordered by the *Harkenrider* trial court was marked by a "failure to follow New York's constitutionally required map-drawing process." (R. 282.) The failure to follow the IRC process was not a problem originally, but has become a legal defect now that the circumstances that had excused adherence to that process have passed. A court may thus order modifications to the existing plan to give the IRC and the Legislature the opportunity that was formerly denied to them to discharge their remedial responsibilities.

C. This Court's Decision in *Harkenrider* Should Not Be Read to Foreclose Revision of the Judicially Drawn Remedial Congressional Map.

This Court's ruling in *Harkenrider* is consistent with the foregoing analysis. But at a minimum, the Court did not pass on the issue of whether the court-drawn congressional remedial map would remain in effect beyond the 2022 elections, and thus its decision does not preclude the relief petitioners seek here. As this Court has emphasized, "[o]ur decisions are not to be read as deciding questions that were not before us and that we did not consider." *Matter of Empire Ctr. for N.Y. State Policy v. New York State Teachers' Retirement Sys.*, 23 N.Y.3d 438, 446 (2013).

Harkenrider is best read as turning on the circumstances faced by the Court in April 2022. Because this Court found itself "in the same predicament as if no maps had been enacted" due to the unconstitutionality of the Legislature-passed maps, and because the existing map from 2012 was unconstitutionally malapportioned and contained too many districts, "[p]rompt judicial intervention [was] both necessary and appropriate to guarantee the people's

right to a free and fair election," *Matter of Harkenrider*, 38 N.Y.3d at 522.

But "[t]he procedural unconstitutionality of the . . . maps [was], at th[at] juncture, incapable of a legislative cure." *Id.* at 523. A legislative cure would have required a court to reconvene the IRC; to compel the IRC, which had just deadlocked, to submit a proposal or competing set of proposals to the Legislature; to wait for the Legislature to act on and potentially amend that proposal, and then submit its end product to the Governor for signature or veto; *and* to entertain and resolve any substantive challenges to the resulting map.[7] *See id.* at 523 n.19 ("the legislature is incapable of unilaterally correcting the infirmity"). Not only had the constitutional deadline for the IRC to submit its second set of maps passed by this time, *see id.*, but, as the First Department observed in *Nichols*, "the constitutional violation could not be cured by a process involving

[7] Intervenors contend that IRC and legislative process could have taken less time than the Steuben County Supreme Court took in adopting a new map from scratch. Intervenors' Br. at 47. But they ignore the likelihood of legal challenges to any such map and the time it would take to resolve those.

the legislature and the IRC, given the time constraints created by the electoral calendar," 212 A.D.3d at 531.

But what was not "necessary"—what this Court was not "required" by these exigencies to do and never said that it was doing—was to establish a congressional map that bypassed these constitutionally mandatory requirements for the duration of the remaining decade. Instead, this Court was focused on ensuring "the people's right to a free and fair election" in 2022, because the respondents in that case had proposed deferring the remedy to 2024.[8] *See Matter of Harkenrider*, 38 N.Y.3d at 522. This Court "reject[ed] this invitation to subject the people of this state to an

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[8] Respondents-appellants point to this court-ordered plan as evidence that the parties understood that the court's remedial map "would apply through the 2030 decennial census." Respondents-Appellants' Br. at 25. But what the respondents-appellants omit is that the *Harkenrider* respondents sought to defer the remedy because, in part, they expected that any remedy would involve the *Legislature* crafting the remedial map, eliminating the constitutional problems associated with a decade-long, judicially crafted remedy. *See, e.g.*, Executive Resps.' Suppl. Letter Br. at 5 (Apr. 23, 2022), *Matter of Harkenrider,* No. APL-2022-00042 In any event, the parties' briefs in *Harkenrider* were uniformly silent on the duration of any court-imposed remedial map.

election conducted pursuant to an unconstitutional reapportionment." *Id.* at 521. Similarly, this Court was "not convinced that [it] ha[d] no choice but to allow the 2022 primary election to proceed on unconstitutionally enacted and gerrymandered maps." *Id.* at 522. Finally, this Court expressed confidence that, "in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election." *Id.* at 522.

This Court's pronouncements about the judiciary's authority to adopt a remedy for an unconstitutional map, *see id.* at 523, do not address whether that authority allows for the creation of a map that extends for multiple election cycles, in derogation of competing constitutional requirements that the Legislature (§ 5) and IRC (§ 5-b(a)) be involved in the remedial process. Nor does its observation that the procedural violation was, "at this juncture, incapable of legislative cure," *id.*, given that the 2022 electoral calendar was also weighing heavily on this Court when it said those words. And the majority opinion's colloquy with the arguments raised by the dissents, *see id.* at 523 n.20, does not address Judge Troutman's concern that the Court's remedy "*may* ultimately subject" voters "to

an electoral map created by an unelected individual" "for *the next 10 years*," *id.* at 527 (Troutman, J., dissenting) (emphases added).[9]

Similarly, the fact that this Court did not "expressly designate[] the judicially adopted map as a mere interim map, so as to give guidance to the People" (Intervenors' Br. at 47), does not compel the conclusion that it intended the map to be permanent. The proposed duration of the remedial map was not argued by any of the parties to this Court, and this Court was not compelled by the circumstances to reach the question on its own. Thus, *Harkenrider* should not be read as foreclosing the relief sought here. *See Matter of Empire Ctr.*, 23 N.Y.3d at 446.

By contrast, there is much in this Court's decision that can be read to *support* limiting the remedial map adopted by Supreme

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[9] Intervenors suggest that the parties' briefing in *Harkenrider* presented a clear-cut issue to this Court about whether the judicial remedy is the *only* authorized constitutional remedy for a procedural violation by the IRC. *See* Intervenors' Br. at 43-45. But the question addressed by that briefing was whether the Legislature *absent a lawsuit* could remedy the IRC's procedural violation on its own. *Id.* at 45. By contrast, the remedy contemplated by each of §§ 4(e), 5 and 5-b(a), is triggered by court action.

Court to a single election cycle. This Court explained that the IRC-driven redistricting process approved by the voters in 2014 was intended to break the historical cycle of legislative "stalemates" followed by federal court involvement in the creation of congressional maps. *Harkenrider*, 38 N.Y.3d at 502-03. The Court noted that these 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 513-14 (emphasis added); *see also id.* at 514 (amendments were designed to "*ensure* that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" (emphasis added; quotation marks omitted)). Finally, on remand, the *Harkenrider* trial court "certified" the congressional map developed with the assistance of the special master as "the official approved *2022* Congressional map." *Harkenrider*, 2022 N.Y. Slip Op. 31471(U), at 5 (emphasis added).[10]

[10] Later, the court issued a corrected order in which it made "minor revisions" to the maps to conform to "town-on-boarder"

Because this Court did not address the duration of the remedial map that it ordered in *Harkenrider*, principles of stare decisis (*see* Intervenors' Br. at 48; Respondents-Appellants' Br. at 27-29) do not compel the outcome in this case.[11] Nothing in *Harkenrider* should be construed to foreclose petitioners' challenge here.

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requirements and to facilitate election administration, and ordered the maps, so modified with these revisions, to be the "final enacted redistricting maps." Decision & Order at 1, *Harkenrider v. Hochul*, Index No. E2022-0116CV (Sup. Ct. Steuben County June 2, 2022), NYSCEF Doc. No. 696.

[11] At most, any suggestion that could be gleaned from this Court's *Harkenrider* decision as to the duration of the map that it directed Supreme Court to adopt is nonbinding dicta—not briefed by the parties, not necessary to the Court's holding, and not subject to principles of stare decisis. *See Rohrbach v. Germania Fire Ins. Co.*, 62 N.Y. 47, 58 (1875) ("*Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge . . . .").

D. Petitioners' Requested Relief Is Supported by the Policies Underlying Both the 2014 Amendments and Redistricting More Generally.

Petitioners' challenge is also supported by the policies underlying both the 2014 amendments and redistricting more generally.

The intent of the framers of the 2014 amendments was plain: to center the redistricting process on the work of a bipartisan IRC, at least insofar as a court is not otherwise "required" to conduct that process itself. An interpretation of § 4(e) that duly gives effect to this intent is one that limits the authority of a court "required" to draw a redistricting map to only the election giving rise to that exigency, and that otherwise holds that an IRC should be established pursuant to § 5-b(a) to prepare a map for the remaining elections in the cycle.

This intent is also reflected in the ballot question language presented to voters in 2014. Proposal Number One on the 2014 general election ballot in New York explained that the amendment would "revise[] the redistricting procedure for state legislative and congressional districts," and then broadly summarized the IRC and

legislative roles process the amendment would create and noted that it would provide for "expedited court review of a challenged redistricting plan." *Election 2014: Get a Look at Staten Island's Sample Ballot*, Staten Island Advance (Nov. 3, 2014) (embedding sample ballot for 2014 general election in Staten Island). But the proposal made no reference to the *court* playing any role in drawing maps in the event of a successful legal challenge. Thus, the form of the proposal presented to voters emphasized a role for the IRC that was consistent with the role for it contemplated by § 5-b(a) in the event of a successful legal challenge to a map.

The principle of "stability" does not support reversal of the Appellate Division's ruling. Intervenors suggest that the lower court's interpretation of § 4(e) would create "a path to an annual redistricting process, wreaking havoc on the electoral process." Intervenors' Br. at 42 (quotation marks omitted). That is not so. Petitioners seek an order directing the IRC to cure the deficiency that led the Court in *Harkenrider* to approve judicially drawn maps in derogation of the requirements in §§ 5 and 5-b(a) that the Legislature and IRC, respectively, be involved in the remedial

process. Once cured, a resulting map that survives any subsequent legal challenge will remain in place until the next decennial census.[12] In any event, "stability" is not a reason to disregard the People's right to a map created in conformance with the requirements of *all* of the Constitution's provisions.

The Appellate Division's order is also consistent with longstanding redistricting principles that courts should favor a legislative remedy over a court-drawn map when, as here, a "viable legislative plan is available." *Matter of Nichols*, 212 A.D.3d at 531. It is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements

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[12] Intervenors suggest that the possibility of further legal challenge to an IRC-drawn remedial map demonstrates the superiority of construing the court-drawn *Harkenrider* map to extend until the next census from a stability perspective. Intervenors' Br. at 43. But there was no guarantee that the *Harkenrider* map (or any future court-drawn map under these provisions) would escape legal challenge, just as there is no certainty that the IRC-drawn remedial map would be so challenged. In any event, this policy point was resolved by the 2014 amendments, which directed courts to convene the IRC (and thus enlist the political branches) "any" time it orders that congressional or state legislative districts be amended. N.Y. Const. art. III, § 5-b(a).

by adopting a substitute measure rather than for the federal court to devise and order into effect its own [apportionment] plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.). The state Constitution thus confers on the Legislature a "full and reasonable opportunity to correct the [redistricting] law's legal infirmities." N.Y. Const. art. III, § 5. The People's right to a congressional map that gives effect to the Legislature's right to cure, by employing the IRC process, should not be disregarded for the next *four* congressional elections because of the now dissipated exigencies that required this Court to forgo these procedures in *Harkenrider*.

Finally, there is ample time in the election calendar to effectuate the remedy sought by petitioners. The Constitution contemplates that the second submission of legislative maps by the IRC to the Legislature could occur as late as February 28 of an election year—a date that is still more than three months later than the date this appeal will be heard. Moreover, the state and local boards of election will have only one new map (as opposed to three) to implement. Although no election is perfect, the 2022 elections were administered without "major election administration failures"

(Br. of Lawyers Democracy Fund as *Amicus Curiae* in Support of Intervenors-Resps. at 15), despite the several new maps and the impact of the *Harkenrider* litigation to contend with. There is no reason to doubt the ability of the boards of elections of this State to implement any remedial map in time for the 2024 elections.

POINT II

THIS COURT MAY CONSTRUE THE PETITION LIBERALLY TO CONSTITUTE A CHALLENGE TO THE COURT-DRAWN CONGRESSIONAL MAP

This Court "may construe the allegations of a complaint liberally and at times disregard the form of relief sought, if the essential elements of right to relief exist." *Quintal v. Kellner*, 264 N.Y. 32, 39 (1934). Petitioners have put forth a compelling case that they are entitled to a mandamus order compelling the IRC to reconvene. But to the extent the Court has any doubts about the form of the proceeding or the specific relief sought by petitioners, it may construe the petition for what, at bottom, it is: a timely challenge to the current congressional map pursuant to article III, § 5 of the Constitution and to the Unconsolidated Laws §§ 4221-

4225 (L. 1911, ch. 773, as amended). Any defects in the form of the proceeding should not bar this challenge.

Article III, § 5 provides that "[a]n apportionment by the legislature, *or other body*, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe." N.Y. Const. art. III, § 5, cl. 5 (emphasis added). A petition challenging the constitutionality of an apportionment may be brought by "any citizen to the supreme court where any such petitioner resides," Uncons. Laws §§ 4221, 4222, and may be brought at any time "during which such apportionment is in force," *id.* § 4225.

The petition here seeks mandamus relief against the members of the IRC in the form of an order compelling them to meet and to submit a second congressional map to the Legislature. (R. 282-284.) In support of that request, the petition alleges that the court-drawn map implemented as a result of the *Harkenrider* litigation was constitutionally deficient because it "fail[ed] to follow New York's constitutionally required map-drawing process." (R. 282.) This proceeding was timely commenced because the

challenged congressional map remains in force. *See* Uncons. Laws § 4225. And the members of the IRC are proper respondents in this action so that an "'effective judgment may be rendered.'"[13] *Cf. Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals*, 5 N.Y.3d 452, 458 (2005) (quoting and discussing C.P.L.R. 1001 and joinder of necessary parties).

"[A] pleading is deemed to allege whatever can be implied from its statement by fair intendment." *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 562 (1968). To the extent a court has concerns about the form in which a civil judicial proceeding has been brought, "the court shall make whatever order is required for its proper prosecution," including by "convert[ing] a motion into a special proceeding, or vice-versa, upon such terms as may be just." C.P.L.R. 103(c). That is precisely what this Court did in *Matter of Katherine*

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[13] Pursuant to § 5-b(a), the Appellate Division's remedial order in this case required the IRC to convene. (R. 417.) Where, as here, the author of the challenged map was neither a legislative body nor any other "body" composed of a "presiding officer" or "members," the court is authorized to "direct" that service is effected as it sees fit. Uncons. Laws § 4222.

B. v. Cataldo, where it converted an improper article 78 petition to a civil appeal, since the petitioners had "served the petition on the same individuals who would have been parties on appeal and included the same materials in the petition as would have comprised the appellate record." 5 N.Y.3d 196, 201 n.1 (2005). Similarly, in *First National City Bank v. City of New York Finance Administration*, this Court converted a time-barred article 78 proceeding brought to recover taxes paid pursuant to an unconstitutional statute to a plenary action to recover moneys hand and received, for which timely relief was still available. 36 N.Y.2d 87, 93-94 (1975).

Here, to the extent the Court has concerns regarding the form of the proceeding or the relief sought by petitioners—including any concern regarding the petition's compliance with the statute of limitations applicable to article 78 proceedings—it may convert the proceeding, pursuant to C.P.L.R. 103(c), to a declaratory judgment action brought under Unconsolidated Law § 4221 and article III, § 5 of the Constitution challenging the constitutionality of the current congressional map.

CONCLUSION

For the foregoing reasons, the Appellate Division's order should be affirmed.

Dated: New York, New York
October 23, 2023

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Amici Curiae
Hochul and James

By: */s/ Andrea W. Trento*
ANDREA W. TRENTO
Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
ANDREA W. TRENTO
Assistant Solicitor General
of Counsel

28 Liberty Street
New York, New York 10005
(212) 416-8656

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Andrea W. Trento, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,963 words, which complies with the limitations stated in § 500.13(c)(1).

/s/ Andrea W. Trento
Andrea W. Trento