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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF ANTHONY S. HOFFMANN,
ET AL.,

Respondents,

-against-

NO. 90

NYS INDEPENDENT REDISTRICTING
COMMISSIONER, ROSS BRADY ET AL.,

Appellants.

92 Franklin Street
Buffalo, New York
November 15, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
PRESIDING JUSTICE DIANNE T. RENWICK

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: The first case on today's
2 calendar is a matter of Hoffmann v. New York State
3 Independent Redistricting Commission.

4 Counsel?

5 MR. TSEYTLIN: I thank, Your Honor.

6 Misha Tseytlin, for the interveners. I'd like to
7 reserve five minutes for rebuttal.

8 CHIEF JUDGE WILSON: Yes, sir.

9 MR. TSEYTLIN: In Harkenrider, the Steuben County
10 Supreme Court adopted a remedial map under this court's
11 order, which was so fair and lawful that no one even
12 appealed.

13 New Yorkers throughout the state understood that
14 that map was the end of the congressional redistricting
15 cycle for this decade, consistent with the anti-
16 gerrymandering amendment's prohibition against mid-decade
17 redistricting. Yet petitioners ask this court to repudiate
18 Harkenrider, the prohibition against mid-decade
19 redistricting, not to mention the standard four-month limit
20 for bringing mandamus actions, all in the cynical service
21 of giving the legislature a shot to enact another
22 gerrymander.

23 But if petitioners prevail, that inevitable
24 gerrymander that will be challenged in court again, will
25 cause more confusion and will cause embarrassment to the

1 State of New York and its courts for launching the
2 unnecessary fiasco that will follow.

3 JUDGE TROUTMAN: What issue did the Harkenrider
4 court address?

5 MR. TSEYTLIN: Sorry, Your Honor?

6 JUDGE TROUTMAN: What was the issue or the
7 question that the court answered in Harkenrider?

8 MR. TSEYTLIN: Right. So with regard to the
9 remedy, once the court had found that the IRC and
10 legislature had violated the constitutional process, the
11 court had to decide whether it was going to order a
12 legislative remedy or a judicial remedy.

13 And this is what the court said in just two
14 straight sentences: "The procedural and constitutionality
15 of the congressional and senate maps is, at this juncture,
16 incapable of legislative cure". The next sentence, "The
17 deadline in the Constitution for the IRC to submit a second
18 set of maps has long passed."

19 So that was the clear, unambiguous holding of
20 this court in Harkenrider. And this court would have to
21 repudiate that remedial - - -

22 JUDGE RIVERA: But doesn't that - - - doesn't
23 that quote indicate that the court was focused on the
24 timing of the next election? And here we don't have that
25 kind of pressure?

1 MR. TSEYTLIN: With respect, the sentence says
2 the deadline in the constitution for the IRC to act has
3 passed. That does not say the - - - the deadline - - -

4 JUDGE RIVERA: At this - - - at this juncture?

5 MR. TSEYTLIN: Yes.

6 JUDGE RIVERA: That juncture. We're at a
7 different juncture.

8 MR. TSEYTLIN: No, no. The - - - at this
9 juncture was the prior sentence. And then the second
10 sentence explains what this juncture is.

11 It doesn't say that the primary is too soon. And
12 that wouldn't have been a sensible thing for the court to
13 say anyways, because the court, in its opinion,
14 contemplated an August primary. Certainly, there was
15 plenty of time in April if the court wanted to order the
16 IRC to submit a second-round map for the legislature to
17 consider that map and to adopt it if it wanted for an
18 August primary; there was plenty of time for that.

19 And this court, I think, would have clearly said
20 that if that's what it was intending.

21 CHIEF JUDGE WILSON: Can we start back - - -

22 JUDGE RENWICK: Was the focus - - -

23 CHIEF JUDGE WILSON: I'm sorry. Go ahead.

24 JUDGE RENWICK: Was the focus in Harkenrider the
25 unconstitutionality of the legislature's 2021 remedy, both

1 procedurally and substantively? Or was it the focus on the
2 IRC's failure to act?

3 MR. TSEYTLIN: As I could tell from the questions
4 that I got from this court last year at oral argument, once
5 the procedural constitutionality had been found, the focus
6 in that passage was, what are we going to do about it?

7 And there were questions of - - - from this bench
8 about whether it should be sent back to the IRC. There
9 were questions about whether it should be a hybrid
10 solution, where the two IRC maps that had been proposed in
11 the first round should be brought back up with a two-
12 percent limit.

13 And as I read that passage, the court rejected
14 those alternatives and said that the proper solution under
15 the constitution is a judicially-adopted map. But even if
16 Your Honors disagree with my understanding of Harkenrider,
17 there are still two predicate issues here that were not
18 decided in Harkenrider that would cut this lawsuit off from
19 the beginning.

20 One is that they simply - - - my friends simply
21 missed their four-month deadline to file a mandamus
22 petition. Under 2017 C.P.L.R. everybody knows, you want to
23 file a mandamus action, you've got to file within four
24 months of accrual.

25 JUDGE SINGAS: When do you think that clock

1 started? What's your date on that?

2 MR. TSEYTLIN: Sorry?

3 JUDGE SINGAS: When do you think that clock
4 started?

5 MR. TSEYTLIN: Our position is it started on
6 January - - - January 24th, when the - - - when the IRC
7 said that they weren't going to comply with their
8 constitutional duties.

9 CHIEF JUDGE WILSON: That was a few members of
10 the IRC who said that, correct?

11 MR. TSEYTLIN: Right. But I - - - I believe that
12 - - - that if - - - if a mandamus action had been brought
13 at that point and said, look, the IRC, you know, those
14 members are saying it's not going to happen, I don't think
15 any court - - - any supreme court in the state would have
16 said it's not ripe.

17 But if I'm wrong about that, even if it's the
18 fact that it was only the four members - - -

19 CHIEF JUDGE WILSON: Let me ask - - -

20 MR. TSEYTLIN: - - - the next day - - -

21 CHIEF JUDGE WILSON: - - - let me ask you about
22 that.

23 MR. TSEYTLIN: Yes.

24 CHIEF JUDGE WILSON: How - - - how does the
25 presence of the, at that point, still not declared

1 unconstitutional gap-filling statute affect what you just
2 told me about mandamus?

3 MR. TSEYTLIN: It wouldn't have affected it at
4 all, Your Honor.

5 CHIEF JUDGE WILSON: So let me ask - - - let me
6 cycle back then a little bit.

7 Suppose the constitutional amendment that failed,
8 right, in 2012 had actually passed. In that circumstance,
9 could you have mandamused somebody, you know, January 28,
10 let's say?

11 MR. TSEYTLIN: I - - - I don't have the specific
12 wording of that amendment in mind, but I believe you still
13 could have. Because I don't think the amendment said the
14 IRC's obligation is no longer mandatory.

15 It - - - what I believe the amendment said, if it
16 was the same as the statutory language was, if - - - if
17 this violation happens, then the legislature has an
18 additional option.

19 I think it - - -

20 CHIEF JUDGE WILSON: Then that - - - then that's
21 the question. Is that then - - - does that then render the
22 obligation of the IRC not mandatory? Not the sort of thing
23 you reach by compulsion? Because if the IRC doesn't act,
24 the statute, or in this case the constitution, would have
25 provided a different option?

1 MR. TSEYTLIN: Well, it was not in the
2 constitution. But in any - - -

3 CHIEF JUDGE WILSON: Correct.

4 MR. TSEYTLIN: - - - in any - - - in any event.
5 No. Because it would have had to have been worded a
6 different way. It would have had to tell the IRC you don't
7 have that "shall" obligation.

8 And I think - - - there was a lot of disagreement
9 among everyone in Harkenrider. But I think one thing
10 everyone agreed to, and this was in footnote 9 of the
11 opinion, and this was - - - you know, I think counsel for
12 the assembly said this, is that the IRC violated its
13 constitutional duty. And - - - and regardless of whether
14 the legislation - - - what the legislation had purported to
15 do - - -

16 CHIEF JUDGE WILSON: So let's stay there for a
17 second. Would you agree that the preferred method under
18 our constitution is for the IRC to create maps?

19 MR. TSEYTLIN: Absolutely, Your Honor.

20 CHIEF JUDGE WILSON: Go ahead.

21 MR. TSEYTLIN: And then so - - - then what
22 Section 4(e) does is, it says the IRC legislature process
23 shall govern. But if it doesn't, then the court's got to
24 step in.

25 And then the second sentence of Section 4(e) says

1 that that plan regardless of whether that's an IRC
2 legislature plan, which is the preferable one, or the
3 judicial plan, shall be in place for the decade unless
4 modified by a court order.

5 CHIEF JUDGE WILSON: So 4(e) says that the court
6 has to - - - it doesn't quite say it has to step in, but to
7 the extent that a court is required.

8 MR. TSEYTLIN: Um-hum.

9 CHIEF JUDGE WILSON: So does that have any
10 bearing on the temporal nature of what the court can do?

11 MR. TSEYTLIN: So the first sentence doesn't talk
12 about any temporal nature. It just says if you're required
13 to do it, you've got to do it. This court in Harkenrider
14 determined that it was right to do it.

15 CHIEF JUDGE WILSON: Agreed.

16 MR. TSEYTLIN: The temporal nature - - -

17 CHIEF JUDGE WILSON: The first sentence of (e)?

18 MR. TSEYTLIN: The second sentence.

19 CHIEF JUDGE WILSON: The first sentence of (e) is
20 what I'm talking about - - -

21 MR. TSEYTLIN: Yes.

22 CHIEF JUDGE WILSON: - - - which says that the
23 court essentially, "Except to the extent that a court is
24 required to order the adoption of a plan", et cetera.

25 MR. TSEYTLIN: Yes.

1 CHIEF JUDGE WILSON: So what I'm asking is you
2 could - - - that constitutional provision could have been
3 written to say, except to order the adoption of. But
4 instead, it's written, "Except to the extent that a court
5 is required to".

6 And so then the question is, if the preferred
7 method in the constitution is the IRC process not a
8 judicial process, and I think the Supreme Court law from a
9 long way back up to the present, saying this is not a
10 judicial function except if we're in extremis. Right?

11 Is there - - - is there a plausible reading,
12 let's start there, of to the extent that a court is
13 required to - - - to place a temporal restriction on what
14 the court can do? That is, if there's an exigency for an
15 upcoming election, then something is necessary. But if a
16 ten-year order from the court is prohibited, arguably, by
17 this provision; is that colorable or not colorable?

18 MR. TSEYTLIN: It's not - - - if - - - if that
19 was the only sentence in 4(e) - - -

20 CHIEF JUDGE WILSON: Um-hum.

21 MR. HILL: - - - perhaps it could be colorable,
22 but it's not colorable with the addition of the second
23 sentence, which says that that plan - - - refers back to
24 the first sentence plan - - -

25 CHIEF JUDGE WILSON: Um-hum.

1 MR. TSEYTLIN: - - - is in place for the decade.

2 And so it would have been very - - - you would -
3 - - you would think that if they were - - - if the people -
4 - -

5 CHIEF JUDGE WILSON: Now, there's a way to read
6 the second sentence differently, I think, which is that the
7 portion under "unless" - - - right? "Unless modified
8 pursuant to the court order", exempts a plan that is
9 modified by a court order from the ten-year requirement,
10 first part of the sentence.

11 MR. TSEYTLIN: Right, Your Honor. So there's two
12 problems with using that as a basis to justify what they
13 have brought here.

14 First of all, I think, inherent in the structure
15 of the first two sentences is that the fact that the court
16 - - - the map is court ordered under the first sentence,
17 can't be the justification for the modification. Because
18 then the court-ordered plan under the first sentence does
19 not even equal dignity with a - - - with a - - -

20 CHIEF JUDGE WILSON: That's the point. It's
21 whether it's supposed to be given equal dignity. If you
22 read, to the extent a court is required, perhaps it's not.
23 And there is, I think, you acknowledged by nodding,
24 although, maybe, I should get a yes or no on the record,
25 that there is a lot of U.S. Supreme Court law saying that

1 judicial creation of districts is not favored; is that
2 fair?

3 MR. TSEYTLIN: It is fair to say that at the - -
4 - at the federal level, the - - - the preference is for
5 judicial solution - - - for a legislative solution.
6 However, what - - - what had occurred - - -

7 CHIEF JUDGE WILSON: I'm sorry? When you say,
8 "at the federal level", that's as a matter of federal
9 constitutional law?

10 MR. TSEYTLIN: As a matter of federalism, with
11 regard to the interaction between the federal - - -

12 CHIEF JUDGE WILSON: Okay.

13 MR. TSEYTLIN: - - - or judiciary and the states.

14 But what had happened and what the people had
15 seen is, especially in the - - - in the infamous Texas
16 gerry - - - mid-decade gerrymander that Tom DeLay
17 engineered, was that the - - - was that mid-decade
18 redistricting is particularly dangerous. Because, of
19 course, the potential gerrymanders know where the
20 incumbents are, know where the close districts are, and
21 know how to take them out.

22 And so what the second sentence of 4(e) provides
23 is, we're going to take that off the table in New York. If
24 - - - if the people wanted to preserve the option for a
25 mid- - - - mid-decade redistricting, it - - - when you have

1 a judicially drawn map, they would have said that. And
2 while the type of breakdown in the IRC process that last
3 year may have not been top of mind to the people, the
4 potential for a deadlock during the IRC legislature process
5 was obviously top in mind. Two years before the amendments
6 were adopted, there was a deadlock within the legislature
7 such that a judicial map had to be adopted at the federal
8 level. And that kind of deadlock is quite common in New
9 York and other states.

10 So if the people wanted to have a prohibition on
11 mid-decade redistricting that only applied to IRC
12 legislature maps, that's what they would have said.

13 JUDGE GARCIA: Counsel - - -

14 MR. TSEYTLIN: I don't think it's a fair issue -
15 - - yes, Your Honor?

16 JUDGE GARCIA: Counsel, this question about the
17 federal courts. The federal courts - - - Supreme Court has
18 basically thrown up their hands here on political
19 gerrymandering, right?

20 MR. TSEYTLIN: Sorry, Your Honor.

21 JUDGE GARCIA: In Rucho?

22 MR. TSEYTLIN: In Rucho case they said that's not
23 a federal issue.

24 JUDGE GARCIA: So this is really uniquely a state
25 and state court, state legislature issue now?

1 MR. TSEYTLIN: That's exactly right, Your Honor.

2 And what the people did in adopting the anti-
3 gerrymandering amendments, not only did they set up an
4 exclusive process and a prohibition against partisan
5 gerrymandering. They also concluded in the second sentence
6 of 4(e) that mid-decade redistricting is particularly
7 dangerous - - - a particularly dangerous ground for
8 partisan gerrymandering for the reasons that I said, and
9 that's why you prohibited it.

10 All they allowed was a modification - - -

11 JUDGE RIVERA: But - - - but counsel, let's go -
12 - - let's go - - - I'm over here.

13 The language of 4(e), right? The - - - the court
14 is authorized to come up with a remedy for a violation of
15 law. So let's say, just for purpose of this question, that
16 we disagree with your view about what violation Harkenrider
17 was addressing. Say we - - - we view the remedy and the
18 violation that - - - the remedy that Harkenrider adopts and
19 the violation that Harkenrider identified, the violation of
20 the law, is the legislature acting pursuant to a law that
21 it enacted as opposed to the constitution, which the
22 majority decided was counter to the commands of the
23 constitution.

24 If that's the violation, then getting back to the
25 Chief Judge's question, then, isn't this really about the

1 modification? That's the violation you're addressing. And the
2 plan you came up with is the plan you came up with to remedy
3 that violation. And then the modification is one to make clear
4 that you have now addressed that violation.

5 MR. TSEYTLIN: I have - - -

6 JUDGE RIVERA: You got a different violation?

7 MR. TSEYTLIN: I still think the same two answers
8 I gave to the Chief would apply. And I've talked about the
9 first one a little bit, which is that the court-adopted
10 plan has to have equal dignity.

11 But I'd like to talk about the second, which is
12 that it has to be a modification. It can't be an adoption.
13 Adoption is what's allowed under the first sentence.

14 Under the second sentence it has to be a
15 modification. And for something to be modified, something
16 else has to be adopted.

17 JUDGE RIVERA: Let me - - - let me ask you this.
18 Again, if we disagree with you on the violation that's 00
19 that's being cured - - -

20 MR. TSEYTLIN: Um-hum.

21 JUDGE RIVERA: - - - through Harkenrider. And
22 that plan exists for a temporary period of time. Isn't the
23 plan that's in place then the prior plan, which is - - - is
24 not in - - - is that in accord with the constitution, and
25 as a consequence, you are then modifying that plan?

1 MR. TSEYTLIN: Well, that plan was also
2 invalidated in Harkenrider. I think it was our - - -

3 JUDGE RIVERA: So where are we left? If we - - -
4 if we disagree - - - again, if we disagree with you. All
5 we were doing was correcting the violation of what the
6 legislature had done. That's the correction, and the
7 remedy was temporary only for that.

8 Then, is it that the state has no plan in place,
9 or we're left with the prior plan?

10 MR. TSEYTLIN: Well, I'm not - - - my legal
11 position is that courts have no authority to order interim
12 maps under the second sentence of 4(e). But certainly, you
13 wouldn't be - - - you would be left in kind of a
14 constitutional no man's land, because there isn't any prior
15 map. That map - - - the - - - Favors map was also
16 invalidated in Harkenrider, as violating - - -

17 JUDGE RIVERA: That's all I'm saying. If you - - -
18 -

19 MR. TSEYTLIN: - - - the U.S. Constitution.

20 JUDGE RIVERA: - - - if - - - isn't it then a
21 modification of the map that we've recognized is not valid?

22 MR. TSEYTLIN: The - - - the legislature's
23 gerrymandered map that was - - -

24 JUDGE RIVERA: No, no, no. No. No. Because
25 that map, as I say, it sunsets, right?

1 MR. TSEYTLIN: Yes.

2 JUDGE RIVERA: Because you've got a particular
3 remedy in Harkenrider?

4 MR. TSEYTLIN: Yes.

5 JUDGE RIVERA: It's possible to view it that way?

6 MR. TSEYTLIN: I apologize. I'm confused.
7 There's three maps you could be speaking about. There's
8 the - - - the one I was talking about in federal court in
9 2012.

10 JUDGE RIVERA: Yes.

11 MR. TSEYTLIN: That was invalidated by
12 Harkenrider.

13 JUDGE RIVERA: Yes.

14 MR. TSEYTLIN: There's the map that the
15 legislature adopted in - - - in last year, that was also
16 invalidated by Harkenrider.

17 And there's the court-adopted map.

18 JUDGE RIVERA: Right. And my point is, if we
19 disagree with you about the temporal limits of the map that
20 is adopted and approved by supreme court post-Harkenrider,
21 in accordance with the commands of Harkenrider, what - - -
22 what would now be in place?

23 MR. TSEYTLIN: There would be no map at all
24 because every map would have been invalidated. I believe
25 the - - - the 2000 map was invalidated by a Favours district

1 - - - and federal district.

2 JUDGE RIVERA: So - - - so then what would
3 prohibit the court from addressing that particular problem,
4 that violation of law? That being that now there's no map
5 in place and that's the violation; there's no valid map in
6 place.

7 MR. TSEYTLIN: I - - -

8 JUDGE RIVERA: Is the court not able at that
9 point?

10 MR. TSEYTLIN: That's going pretty far down the
11 funnel here - - - that's going pretty far down the funnel,
12 Your Honor. I think, the - - - my friends have framed
13 their case as a request to modify the - - - the Harkenrider
14 judicial map. That's how they framed their case.

15 And then the question, if Your Honor gets down
16 is, are they asking for a modification?

17 JUDGE RENWICK: May I just ask another question -
18 - -

19 MR. TSEYTLIN: Yes.

20 JUDGE RENWICK: - - - at that point? You've
21 already agreed that these plans have a strong preference
22 for the IRC. It was never contemplated that the IRC
23 wouldn't present a plan. So in 4(e) there - - - you - - -
24 it pre-supposes that the IRC has submitted a plan to the
25 legislature. That's what it's talking about when it talks

1 about this ten-year plan.

2 So we have no plan at all, which is where we've
3 arrived. Which is why we're here.

4 MR. TSEYTLIN: I strongly disagree with your
5 premise of your question, Your Honor. This is first time
6 that 4(e) certainly contemplates the potential for a
7 breakdown of the IRC legislature process. That's why it
8 allows for the judicial adoption of a plan.

9 Now, maybe the people had more in mind it breaks
10 down within the legislature, but the structure of the
11 argument would still be the same.

12 JUDGE RENWICK: There's nothing in 4(e) that says
13 there has - - - that requires a particular type of plan or
14 that there has to be a plan or anything else with regard to
15 what the court can require.

16 MR. TSEYTLIN: I - - - I mean, I understand that
17 that's what the Nichols court held. But I - - - I strongly
18 think that - - - that the - - - and this was our third
19 argument, the one I started off with. My read of
20 Harkenrider is saying that once the constitutional deadline
21 for the IRC has passed, the only permissible remedy is the
22 - - - is a judicially adopted map.

23 I know Your Honor disagrees with me that that was
24 the - - - the holding of Nichols, which is why we have the
25 - - - the other two arguments that we do.

1 JUDGE TROUTMAN: When does Section 5-b(a) - - -
2 apply, if at all?

3 MR. TSEYTLIN: It does not. That section permits
4 calling the IRC back in - - - calling in IRC back into
5 effect. And I agree with the League of Women Voters, it
6 would have to be a newly constituted IRC based upon whoever
7 the majority leader and the minority leader were at the
8 time, to help the court in - - - in amending the map. The
9 - - - the - - - that clause of 5-a does not allow for
10 relaunching of the IRC legislature process.

11 It could. It - - - I think it would allow if
12 there was some problem, here, in the in the current map,
13 for example, it didn't have a section 2 VRA, majority-
14 minority district. Then the court could call back an - - -
15 an - - - an IRC, a new one that the current leaders would
16 adopt - - - will appoint. And then that IRC would tell the
17 court, this is the new map that should be adopted that
18 would have the additional majority-minority district. And
19 the court, presumably, would adopt that map.

20 Nothing in - - - in that constitutional provision
21 allows for a relaunching of the specifically time-limited
22 sequenced IRC legislative process. It just requires the -
23 - - the IRC to be brought - - - brought back in. So if
24 Your Honors think that that is the provision they're using,
25 then what needs to happen is the - - - a new IRC needs to

1 be called, and they need to submit a single map to the
2 court. And then that would be the map.

3 Now, we think that's all wrong. We think that
4 the Harkenrider map should take place, but nothing in - - -

5 JUDGE TROUTMAN: With respect to the citizens of
6 the state of New York amending the Constitution to require
7 an IRC process, how - - - did they get that from the
8 Harkenrider decision? Was the IRC involved in the map that
9 ultimately was used?

10 MR. TSEYTLIN: No. There was a breakdown in the
11 IRS legislative process. And obviously, Your Honor - - -

12 JUDGE TROUTMAN: So is it - - - is it ever going
13 to - - - how - - - how does it function, if at all?

14 MR. TSEYTLIN: Well, I think that given
15 Harkenrider and a - - - and a robust enforcement of the
16 Constitution's provisions, the - - - in 2030, the - - -
17 there will be every incentive for folks to - - - for the
18 legislative leaders to appoint IRC commissioners that will
19 do their job. And for people who are unhappy with what the
20 RNC is doing - - -

21 JUDGE RIVERA: But doesn't that encourage the
22 kind of conduct that happened here? Gaming the system of
23 blocking the process by members who are dissatisfied with
24 the way other members are drawing the districts?

25 MR. TSEYTLIN: Well, so - - -



1 JUDGE RIVERA: How can that be what the people of
2 the state of New York want?

3 MR. TSEYTLIN: Footnote 10 of Harkenrider
4 addresses that and said the way you solve that problem is
5 with a mandamus petition. And the way mandamus petitions
6 work in the state, you have to bring them timely within - -
7 - within four months. You don't wait for five and a half
8 months to see if the judicially-drawn map is to your
9 political favor, to see if your little gambits in federal
10 court to try to overrule this - - -

11 JUDGE RIVERA: And of course, that footnote that
12 you're talking about - - -

13 MS. BRANCH: Um-hum.

14 JUDGE RIVERA: - - - is indeed in a case where
15 the majority is deciding, the state legislature took action
16 that it could not.

17 MR. TSEYTLIN: Well - - -

18 JUDGE RIVERA: That footnote can be about moving
19 the future. Now that Harkenrider's majority says that the
20 state statute and what the state legislature did is
21 unconstitutional or - - - or violation of law.

22 MR. TSEYTLIN: Obviously, the - - - the - - -
23 judges of this court know what you all meant in
24 Harkenrider, I'm sure you all discussed that in your
25 conference. But nothing that - - - about that uncertainty

1 which I'm sure is knowable to you all, at all impacts the
2 plain-as-day four-month statutory limit to bring in a
3 mandamus action. And nothing in that discussion impacts
4 the very clear prohibition against mid-decade
5 redistricting.

6 JUDGE RIVERA: What - - - what is your response
7 to the invitation to convert this particular action - - -

8 MR. TSEYTLIN: Well - - -

9 JUDGE RIVERA: - - - to avoid the statute of
10 limitations problem?

11 MR. TSEYTLIN: I think there's a couple of
12 problems with that. First, mandamus is the proper tool to
13 get a body to act in a mandatory manner; that's what
14 mandamus is for. And the only reason that I think the
15 governor is suggesting this is to evade the four-month
16 limit. But the four-month limit makes perfect sense here.
17 You don't want folks sitting on the sidelines, seeing do we
18 like the - - - do we like the map?

19 I mean, under their theory, someone could have
20 waited until the 2022 elections. Okay, well, too many
21 Republicans won close congressional districts, now I'm
22 going to bring that kind of action.

23 I think funneling it through the natural
24 mechanism, which is the mandamus mechanism, with a tight
25 time limit makes all the sense in the world. I think the

1 mischief in allowing parties to wait - - -

2 JUDGE RIVERA: But what if the people are - - -
3 that you're referring to - - - the claimants, are saying,
4 there's a statute in place and that might address the fact
5 that the IRC has not acted in accordance with the
6 constitution, and until a court says that the state
7 couldn't do this, I don't have an action.

8 MR. TSEYTLIN: I don't believe - - -

9 JUDGE RIVERA: Because I don't have an action to
10 command something that a court might say is not what the
11 IRC must do.

12 MR. TSEYTLIN: I do not believe that anybody in
13 Harkenrider was suggesting that the legislature - - -
14 legislation lifted the IRC's unconscionable duty. I think
15 it was common ground among all the judges who asked
16 questions about it and all the advocates that the IRC had
17 done wrong, regardless of whether the legislature was - - -
18 legislation was constitutional. The other - - -

19 JUDGE RIVERA: All I'm saying is, the claimants
20 here don't know that until the court announces that.

21 MR. TSEYTLIN: Nobody - - - I think there's no
22 one that was disagreeing that the IRC had blown its
23 deadlines and that those were still mandatory.

24 JUDGE CANNATARO: No. But I think the question
25 is, was there an understanding at the time Harkenrider was

1 commenced when it was being litigated, or maybe even
2 before, that mandamus relief was available for the
3 violation that we're talking about?

4 MR. TSEYTLIN: I don't think that there was any
5 dispute that if a mandamus had been brought on January 24th
6 or 25th, that anyone would have even argued, let alone
7 succeeded in arguing, that that mandamus petition was - - -
8 was premature.

9 CHIEF JUDGE WILSON: But do you think that would
10 have been timely even if it was brought, let's say, April
11 1st, I think, right?

12 MR. TSEYTLIN: For what - - - if it was brought
13 April 1st, 2022?

14 CHIEF JUDGE WILSON: Yeah.

15 MR. TSEYTLIN: It would have been timely for
16 mandamus purposes, but it would have had, I think, we would
17 have had - - - had our laches argument that it was - - -
18 that they shouldn't have waited that long. But yeah, for
19 purposes of the four-month limitation, that would have been
20 within the four-month limitation. We would have said you
21 sat on your rights unnecessarily and - - -

22 CHIEF JUDGE WILSON: But laches requires
23 prejudice to you, no?

24 MR. TSEYTLIN: Certainly the - - - we, having
25 brought and - - - and obtained a - - - a map that we think

1 is fair - - -

2 CHIEF JUDGE WILSON: By April 1st, you wouldn't
3 have done so. My hypothetical?

4 MR. TSEYTLIN: Right. We brought our lawsuit
5 early February.

6 CHIEF JUDGE WILSON: Yeah. But you wouldn't have
7 had a map.

8 MR. TSEYTLIN: That's true.

9 CHIEF JUDGE WILSON: You wouldn't have a decision
10 - - -

11 MR. TSEYTLIN: We would have - - - we already - -
12 -

13 CHIEF JUDGE WILSON: - - - you wouldn't have a
14 decision from us by then.

15 MR. TSEYTLIN: That's true. But we would have
16 won, you know, in - - - in the - - - in the supreme court.

17 CHIEF JUDGE WILSON: And that's - - - that's
18 cognizable prejudice for laches?

19 MR. TSEYTLIN: Well - - - well, in any event,
20 that hypothetical is an April by - - - by - - - by - - -

21 CHIEF JUDGE WILSON: Okay. But - - -

22 MR. TSEYTLIN: - - - by June 28th, then we had
23 our maps.

24 CHIEF JUDGE WILSON: Let me ask you something
25 different.

1 MR. TSEYTLIN: Yeah.

2 CHIEF JUDGE WILSON: What is your understanding
3 of the basis on which we held the gap-filling legislation
4 unconstitutional in Harkenrider?

5 MR. TSEYTLIN: That the constitution says,
6 "shall", and that provides the exclusive process for
7 adopting redistricting maps in a state. That the - - -
8 when the legislature purports to act when it has not
9 received a mandatory submission, it has taken a step that
10 it has no constitutional authority.

11 CHIEF JUDGE WILSON: So what would have been the
12 circumstances - - - maybe what Judge Rivera was asking
13 before, and I just didn't follow the answer. What would
14 have been the circumstance if the gap-filling legislation
15 didn't exist, the IRC did exactly what it did, and the
16 legislature did nothing, and the 28th of February rolled
17 around? What - - - could the legislature have done
18 anything at that point?

19 MR. TSEYTLIN: No. And this is something that we
20 did discuss last year. If nothing had happened at that
21 point and the only map in place would have been the Favors
22 map from 2012, and then we would - - - we would have had
23 only a - - - a claim under the equal protection clause and
24 of course, would have had to adopt the map just like they
25 did in 2012. That's what would have happened.

1 CHIEF JUDGE WILSON: And at that point or later
2 point, could someone have compelled by mandamus, the IRC
3 process or?

4 MR. TSEYTLIN: No. Because that would have been
5 - - - that map would have been subject to the second
6 sentence of 4(e).

7 CHIEF JUDGE WILSON: Thank you.

8 MR. TSEYTLIN: Thank.

9 MR. HILL: Good afternoon, Your Honors. May it
10 please the court. Timothy Hill for the respondents,
11 appellants.

12 In Harkenrider, this court expressed - - - and
13 I'm trying to move to a - - - an even more threshold issue
14 than those that have already been covered. But in
15 Harkenrider, this court expressly held that a judicial
16 exempt remedy was exactly what the people had passed by the
17 2014 amendments.

18 And yes, that is not the preferred method, but
19 that is an explicitly contained part of those
20 constitutional amendments.

21 JUDGE TROUTMAN: But the main part of the
22 constitutional amendment was this IRC process to take
23 politics out of it, wasn't it?

24 MR. HILL: Yes. That was a goal. I think, the
25 goal was specifically to - - -

1 JUDGE TROUTMAN: Was that the main goal or you're
2 saying judicially created maps was the main goal instead?

3 MR. HILL: I think the main goal was to cabin in
4 legislative overreach and abuse by a majority party that
5 had too much control of the process.

6 JUDGE TROUTMAN: So that was the purpose of the
7 creation of the IRC as that vehicle?

8 MR. HILL: Yes. And the - - - the constitutional
9 amendments do that in two ways. Obviously, by making the
10 IRC part of the process, albeit in a advisory role. They
11 don't have final mapmaking authority, which is something
12 that exists elsewhere in California or Arizona. And there
13 was proposals for a constitutional amendment to make that
14 the case in New York that were not approved by the people.

15 The people approved these amendments that include
16 the IRC as a component to inform that process for the
17 purpose of reeling in those legislative overreaches.

18 CHIEF JUDGE WILSON: But the legislative - - -

19 MR. HILL: But another - - -

20 CHIEF JUDGE WILSON: - - - the legislative
21 overreaches had been reeled in in 2010 by the court, right,
22 because there were court-drawn maps and the Favors maps.
23 Is that also true for the several decades prior to that?

24 MR. HILL: Yes. In - - - in the immediately
25 prior decade of Rodriguez v. Pataki - - -

1 CHIEF JUDGE WILSON: And the decade before that,
2 add the decade before that?

3 MR. HILL: Yes.

4 CHIEF JUDGE WILSON: Going back to 1980?

5 MR. HILL: Yes. There - - -

6 CHIEF JUDGE WILSON: So is it - - - is it
7 conceivable to think that the - - - it wasn't simply a
8 question of reining in the legislature because our courts
9 have been doing that for forty years. That there was a
10 desire to put in a process that was neither a judicial
11 process nor a partisan process, but rather a bipartisan
12 process that was the IRC.

13 MR. HILL: Well, yes. I mean, the courts always
14 had that function and specifically the federal courts,
15 because they might be called in to address equal
16 protection.

17 CHIEF JUDGE WILSON: Yeah. I mean, I guess to
18 put a - - - put a point on it a little bit. If the people
19 had been satisfied with the courts reining in the high
20 degree of partisanship in district in New York, they
21 wouldn't have bothered to pass the amendment.

22 MR. HILL: But the amendments critically include
23 the authority of the court in - - - in 4(e) for a judicial
24 remedy. And that's what this court held specifically.

25 CHIEF JUDGE WILSON: Yes. But what I'm saying is

1 if that's really what the people wanted, there was no need
2 to include that because that's what have been going on for
3 decades.

4 MR. HILL: But not for the purposes of what - - -
5 what's at issue here. The - - - as you've said and as the
6 Supreme Court has now had, the - - - you know, the partisan
7 gerrymandering is - - - is out of the federal court's
8 hands.

9 The issue of addressing partisanship and other
10 abuses by the legislature is what is at the root of - - -
11 of these amendments. And built into that process is the
12 role of the judiciary, and it's a critical role. It may
13 not be your first option, but it is the - - - the
14 constitutional backstop that - - - that the amend - - -

15 JUDGE RIVERA: But it is a limited right, is it
16 not? Given the - - - let's stay, with your language. In
17 4(e), since you're referring to it specifically, when it
18 says, "Except to the extent that a court is required to
19 order". It doesn't say to the extent that the court deems
20 it necessary to order. I mean, there - - - it does have
21 some limiting concept behind that particular word.

22 MR. HILL: I agree that there is a limitation in
23 that, but that is not a temporal limitation. That decision
24 to decide whether - - -

25 JUDGE RIVERA: Why not? Why can't it be?

1 CHIEF JUDGE WILSON: How do we - - - yeah. How
2 do we know that?

3 MR. HILL: Because the - - - the entire structure
4 of these amendments is a sequential process. You go in
5 order as they proceed. If there is, at this last phase, a
6 defect that still warrants judicial intervention and
7 remedy, that is - - - and - - - and so this court made the
8 determination that that was required at the time it decided
9 Harkenrider.

10 CHIEF JUDGE WILSON: I guess what I'm - - - what
11 I'm asking, and I asked this before a different way. If
12 the - - - if section 4(e) instead had said, redistricting
13 the state except to order the adoption of or changes to it.
14 That just continues to strike the words, "to the extent
15 that a court is required", it seems to me that would mean
16 the same thing that you're arguing now.

17 MR. HILL: I don't think so, Your Honor. I think
18 - - - I think there has to be a - - - a determination by
19 the court in the first instance, on a case that's brought
20 under 4(e) as - - -

21 CHIEF JUDGE WILSON: But there - - - there's the
22 rest of the sentence ends, to remedy a violation of law.
23 So it is a necessary condition that there has to be a
24 violation of law. So I'm not sure what you're - - - you're
25 reading seems to me to take those other words out of the

1 statute.

2 MR. HILL: The - - - the words, "to the extent
3 required"?

4 CHIEF JUDGE WILSON: Yeah. Yeah.

5 MR. HILL: I think that means that the scope of
6 the remedy, at the time that it's issued is addressed to -
7 - -

8 CHIEF JUDGE WILSON: And why can't scope mean
9 time?

10 MR. HILL: Because the - - - the constitution
11 presents a situation where you're getting to a result.
12 That is a constitutional map that then goes into effect.

13 JUDGE SINGAS: But doesn't the constitution talk
14 about time in the next sentence? I mean, that probably is
15 the only temporal language in this where it says that the
16 plan shall be enforced until the effective date of a plan
17 based upon the subsequent decennial census. It appears to
18 me that the only place that we - - - they are talking about
19 time is in that sentence. Are we free to ignore that?

20 MR. HILL: No. I think that's absolutely right.
21 And I think the plan in the second sentence of 4(e),
22 there's no distinction between a legislative enacted plan
23 or a judicial plan.

24 If there is a plan as a - - - as a product of a
25 judicial remedy in the first sentence of 4(e), that becomes

1 a plan subject to the durational specifics of the sentence.

2 JUDGE RIVERA: And - - - and what if that plan
3 is, for whatever reason, erroneous? You agree that that
4 can be modified? Yes?

5 MR. HILL: I'm sorry I missed a word there.

6 JUDGE RIVERA: If - - - if the judicial plan, the
7 plan that's developed through a judicial process as opposed
8 to the process in the constitution that involves the
9 independent commission and - - - and the legislature and
10 the governor. If that plan has some error in it, you agree
11 that it can be modified by the courts?

12 MR. HILL: Yes. If - - - if - - -

13 JUDGE RIVERA: That's the point of the last
14 sentence in part of 4(e), right?

15 MR. HILL: Right. If - - -

16 JUDGE RIVERA: Okay.

17 MR. HILL: - - - if that violated the VRA - - -

18 JUDGE RIVERA: So - - - so - - -

19 MR. HILL: - - - you could have a - - -

20 JUDGE RIVERA: - - - so let's, for the moment,
21 say that this court determines that the Harkenrider - - -
22 the violation that Harkenrider was addressing, the remedy
23 it came up with, was temporally limited? Okay. Let's just
24 say for one moment that we decide that that's went on. But
25 we accept your view that the court could not have done

1 that. The only maps the court can come up with are
2 decennial maps. You're with me?

3 MR. HILL: I think so.

4 JUDGE RIVERA: Okay. Would that then be a
5 violation of the law that this court could remedy upon
6 realizing the error of its ways?

7 MR. HILL: Yes. But I think that would violate
8 stare decisis. I don't think that this court - - -

9 JUDGE RIVERA: Well, how is that stare decisis?
10 How is that?

11 MR. HILL: The - - - there's no reading of this
12 court's very considered opinion in Harkenrider that does
13 not involve the fact that it was the remedy for the then
14 existing violations. And - - -

15 JUDGE RIVERA: No. I understand that's your
16 position. My question was, assume for one moment we don't
17 agree with you, but that's the way you read Harkenrider.
18 That we read it differently. We agree with you that that
19 might have been - - - that that is error. And all the
20 court could have done is set up the decennial maps based on
21 this. Why can't we resolve that now?

22 MR. HILL: I - - - I don't - - -

23 JUDGE RIVERA: And - - - and resolve that by
24 saying now the IDC gets to do - - - excuse me, the
25 independent commission gets to do its constitutional duty.

1 MR. HILL: I - - - I think this court or a court
2 could remedy a plan that was implemented, such as what was
3 ultimately implemented by the Steuben County court. It
4 wasn't appealed. If there was an error in that, and that -
5 - - that could be the subject of a further judicial review.

6 But I don't think this court can say that we made
7 a mistake when we said what we said not a year ago. There
8 - - - the fact that the IRC is not explicitly part of the -
9 - - the judicial remedy that was the product of
10 Harkenrider, is not an error. There - - - there's no
11 constitutional defect in the fact that the court-ordered
12 plan doesn't have an IRC express - - - you know,
13 contribution to it.

14 That is something that the petitioners have
15 vacillated strongly on. There - - - you - - - there either
16 is a challenge to the current plan or - - - or there isn't.
17 And the fact that this Court held the - - - the - - - it's
18 footnote 20, that the judicial remedy is exactly what is
19 contained in the 2014 amendment.

20 JUDGE CANNATARO: Counsel, to get back to a
21 question you were asked earlier. Is the fact that the
22 remedy that was made in Harkenrider doesn't include an IRC
23 component to it, mean that Harkenrider necessarily wasn't
24 addressing an IRC error? Going back to that question about
25 - - - you know, who's error - - - what - - - what's the

1 error that's being corrected by the court in Harkenrider?
2 Does it preclude that possibility?

3 MR. HILL: No. But I - - - I think as a
4 practical matter and again, in this sequential process that
5 the - - - that the Constitution lays out, the fact that the
6 - - - the commingled sins of the IRC and the legislature,
7 you had to address the one that came last because that's
8 what put into effect, on the books, a map that people are
9 going to vote on in the real world.

10 JUDGE CANNATARO: This is - - - I might be - - -
11 I'm sorry if I'm being difficult to understand. Would a -
12 - - would an error involving the IRC process necessarily
13 require a remedy that also involves the IRC? Or was the
14 remedy given in Harkenrider sufficient, even though it
15 didn't involve the IRC, to correct what might have been a
16 perceived IRC error? Does that make it any more clear?

17 MR. HILL: Yes. I think I would fully agree that
18 a - - - the remedy does not have to identically match what
19 is perceived to be the violation. If the IRC didn't do
20 something it was supposed to do, the remedy is not
21 automatically, you must do that. Particularly when there's
22 a sequential process that's built into the constitution and
23 the time to do the thing - - -

24 JUDGE TROUTMAN: With respect to Harkenrider,
25 what was being remedied? Was it the IRC or - - - the

1 legislature's overreach?

2 MR. HILL: It was the legislature's overreach and
3 ultra vires act with them taking power that was not
4 constitutionally conferred. But that was obviously, you
5 know, intimately intertwined with the fact that they needed
6 the IRC as a predicate to - - - to take that constitutional
7 authority that they didn't have when they enacted that map.
8 That's why - - -

9 JUDGE RIVERA: Well, couldn't it - - - couldn't
10 it be seen as there's a procedural error, the failure to
11 follow the process, as so set out in the constitution. And
12 then, the substantive error, that the claim that the maps
13 that the state legislature came up with are gerrymandered
14 in violation of the constitution? And Harkenrider says,
15 I'm not going to address the procedural error as that time
16 passed in this moment. But we can address the substantive
17 error, and that's the remedy we're going to come up with
18 with respect to substantive error.

19 MR. HILL: I think that this court in Harkenrider
20 clearly addressed both. It - - - it identified the
21 procedural error and it identified the substantive error in
22 - - - in - - -

23 JUDGE RIVERA: Could - - - but could not
24 Harkenrider be read as, when it's addressing the
25 substantive error that it has a time limit on addressing

1 that, because you can then resolve the procedural error
2 down the road?

3 MR. HILL: I don't see that, Your Honor. If the
4 - - -

5 CHIEF JUDGE WILSON: It does seem to me that your
6 answer to Judge Cannataro's question about whether the
7 remedy could address both the IRC failure and the statute -
8 - - statutory unconstitutionality - - - is inconsistent
9 with the argument that you're making about when the period
10 begins to run for limitations purposes. Did it strike you
11 that way or no?

12 MR. HILL: I don't think so. I think - - - I
13 think the limitations argument is in that regard, not
14 merely a technical defect. It's substantive.

15 CHIEF JUDGE WILSON: But I guess what I'm saying
16 is, if you think that the two were wrapped together enough
17 that the remedy for what was only a violation - - - a
18 constitutional violation through the statute, essentially,
19 the statute is unlawful, not anything where the IRC was a
20 party or there was any attempt to get the IRC to do
21 anything. If the remedy can reach both of those things, it
22 seems to me, then the converse of that is that the presence
23 of the statute doesn't start the running until the statute
24 is declared unlawful.

25 MR. HILL: I would respectfully disagree with

1 that. I don't think the incentive to bring a suit is what
2 determines a statute of limitation's accrual date. You
3 can't say because we think that under - - - if this statute
4 is upheld as constitutional, we have - - - we have - - -

5 CHIEF JUDGE WILSON: No, it's not the - - - I'm
6 not - - - I'm not pointing to the incentive, but rather to
7 the remedy. That is if the scope of the remedy is broad
8 enough to reach whatever injury might have come from the
9 failure of the IRC to act, as well as whatever injury comes
10 from the unconstitutionality of the statute, then that
11 seems to me that it's not particularly appropriate to say
12 that the limitations period runs from the moment the IRC
13 couldn't act, because the remedy that the court is
14 providing in the answer you give to Judge Cannataro
15 encompasses both of those sets of claims.

16 MR. HILL: Yes.

17 CHIEF JUDGE WILSON: So essentially, it's not
18 until that remedy is - - - is entered, that there's the
19 injury.

20 MR. HILL: But that presumes that the - - - a - -
21 - that the action that's brought to accomplish that - - -

22 CHIEF JUDGE WILSON: Um-hum.

23 MR. HILL: - - - is somehow a hybrid, that's both
24 a mandamus proceeding and a invocation of the court's
25 authority under 4(e) for judicial review. And that is

1 something that is markedly absent from this pleading.

2 This is only a mandamus pleading. It only asks
3 the IRC to do an act. All of the petitioners' premises for
4 how they would like 4(e), both sentences, as well as 5-b to
5 be to be interpreted require that the - - - a court order
6 an adoption or amendment or modification of an existing
7 plan.

8 The prayer for relief in this very limited
9 special proceeding does not seek an order to modify or
10 amend or adopt a redistricting plan. It only asks for a
11 discrete act. So none of those provisions come in in the
12 way that they would like them to. This is not under the
13 second sentence of 4(b), the - - - the court order - - -
14 the modified court order that that sentence contemplates.
15 It's not something that this court can deliver. In fact,
16 the proof of that is not only in the pleading and the
17 prayer for the relief there, but in the Third Department's
18 decision, which granted them all the relief that they
19 sought. And that decision is not an order modifying the
20 existing plan. It's simply a direction to take one act.
21 So the form of the pleading matters, and that's been fully
22 ignored except for the last two pages of the governor's
23 amicus brief that asks for some form of judicial rewriting
24 of the pleadings, which, at this late stage and the fact
25 that the petitioners themselves not advanced that notion, I

1 think, is completely, you know, ineffectual.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. HILL: Thank you.

4 MS. BRANCH: May it please the court. Aria
5 Branch for the petitioners, respondents.

6 The promise of the redistricting amendments has
7 been deferred, but it need not be denied - - -

8 JUDGE GARCIA: Counsel, let's talk about the
9 redistricting amendment. It seems like we're putting
10 process above substance here in a way, in talking about the
11 redistricting commission as the be all and end all. And
12 that's what the people were promised.

13 But reading these amendments, it seems to me that
14 the goal, the overarching goal of the constitutional
15 amendments - - - and it's in section 4, was substantively
16 to prevent gerrymandering.

17 "Districts shall not be drawn to discourage
18 competition or for the purpose of favoring or disfavoring
19 incumbents of - - - or other political candidates or
20 political parties." And that particular provision, as I
21 read it, maybe you disagree, applies to the IRC, doesn't
22 it?

23 MS. BRANCH: This court said in Harkenrider that
24 procedural requirements matter because they help to
25 safeguard substantive rights.

1 JUDGE GARCIA: Right. They do. But we can't let
2 the procedural safeguards trump the substantive rights.
3 Right?

4 MS. BRANCH: They don't trump substantive rights.

5 JUDGE GARCIA: You would agree that the goal here
6 are fair maps, right?

7 MS. BRANCH: The goal is for the congressional
8 map to be drawn according to the process - - -

9 JUDGE GARCIA: That's a procedural argument. But
10 you're saying that trumps the substantive provision in the
11 constitution?

12 MS. BRANCH: I'm not saying that trumps the
13 substantive provision in the constitution, but the
14 procedural requirements are important. And we know - - -

15 JUDGE GARCIA: And they failed last time, and we
16 found they failed and we put in place a process to draw
17 maps, which, as I understand it, are not being challenged
18 here.

19 MS. BRANCH: We are not challenging the maps, but
20 the remedy that was ordered in Harkenrider did not cure the
21 procedural violation at issue in this case, which was the
22 failure of the IRC to send a second map to the legislature.

23 JUDGE GARCIA: And when did that failure happen?

24 MS. BRANCH: That failure happened when the
25 deadline passed.

1 JUDGE GARCIA: And what date was that?

2 MS. BRANCH: On February 28th, the IRC lost
3 authority to - - - to say - - -

4 JUDGE GARCIA: I - - - I don't think that's how I
5 read that statute, because - - - or the provision. As I
6 understand it, the first maps were returned to the IRC on
7 the 10th of January; is that right?

8 MS. BRANCH: That's correct.

9 JUDGE GARCIA: And they had fifteen days to
10 submit second maps, right?

11 MS. BRANCH: That's correct.

12 JUDGE GARCIA: That's January 25th, to me.

13 MS. BRANCH: The fifteen-day deadline passed on
14 January 25th. The final outer constitutional deadline
15 passed on - - -

16 JUDGE GARCIA: I read that provision as saying,
17 if you have less than fifteen days, then you get to the
18 28th maximum. Not that that's an outside deadline. So if
19 they had sent the maps back February 20th, you would get
20 the February 28th deadline as a hard stop.

21 MS. BRANCH: I think that is one way to read the
22 constitutional text. But this court did say in Harkenrider
23 that February 28th was the outer constitutional deadline,
24 the interveners in their brief - - -

25 JUDGE GARCIA: We weren't interpreting that

1 provision for purposes of a statute of limitations, right?
2 That's - - - it is an outside deadline, that's true.

3 MS. BRANCH: I think whether the deadline was
4 January 25th or February 28th, at the time that both of
5 those deadlines pass, the 2021 stopgap legislation was in
6 place that allowed the maps to be drawn.

7 JUDGE GARCIA: But that's to me - - - is, it
8 seems, a separate issue, right? I mean, the IRC has failed
9 to act. They have failed on January 25th to submit their
10 second set of maps. That was their deadline. That was our
11 obligation under the constitution. They didn't do it,
12 right?

13 MS. BRANCH: At that time, though, the
14 legislation cured the problem that we complained - - -

15 JUDGE GARCIA: It can't - - - it didn't cure the
16 IRC problem. The - - - it didn't make what the IRC did,
17 okay. I mean, everybody in Harkenrider admitted the IRC
18 had failed.

19 MS. BRANCH: It allowed the maps to be drawn
20 according to the constitutional process - - -

21 JUDGE GARCIA: Different issue, though. You're
22 not challenging that here. You're challenging the original
23 failure of the IRC.

24 MS. BRANCH: What we are challenging here is the
25 failure of maps to be drawn according to the IRC

1 legislative process that is set forth in the onstitution.
2 That process was denied to petitioners. And it wasn't
3 until the April 27th decision in Harkenrider when that
4 legislation was declared unconstitutional.

5 JUDGE TROUTMAN: Then why - - -

6 JUDGE GARCIA: No, but that - - -

7 JUDGE TROUTMAN: - - - that wasn't - - -

8 JUDGE GARCIA: I'm sorry. Go ahead.

9 JUDGE TROUTMAN: Why doesn't laches apply then?

10 MS. BRANCH: Laches doesn't apply because this is
11 a case where we are determining whether or not there was a
12 final and binding determination. And this court said in
13 Best Payphones that that happens when an actual and
14 concrete injury has occurred that cannot be ameliorated by
15 further action. The 2021 legislation ameliorated the
16 injury that we complain of - - -

17 JUDGE GARCIA: You're confusing - - -

18 MS. BRANCH: - - - because it allowed - - -

19 JUDGE GARCIA: - - - I think you're confusing the
20 nature of your mandamus petition because it's time, but
21 it's type. So you're - - - your mandamus is based on a
22 failure to act. And I think you're confusing that with a
23 mandamus challenging a decision which, we would review the
24 things that you're talking about. But you're asking for
25 action.

1 So your timeline starts to run from the time of
2 the failure to act.

3 MS. BRANCH: The - - - the IRC never failed - - -
4 never refused to act in this.

5 JUDGE SINGAS: The IRC on January 24th said we're
6 not going to submit the second set of maps.

7 MS. BRANCH: On January 24th, five commissioners,
8 the Democratic commissioners issued a press statement
9 imploring their Republican colleagues to come back to the
10 table to send a second set of maps.

11 JUDGE CANNATARO: Okay. But if - - - if that's
12 not good enough, on January 25th, which was the actual
13 fifteen-day deadline, they nevertheless failed to produce
14 the second set of maps. My question is, what - - - what
15 more do you need to know in terms of the failure that would
16 bring about - - - that would trigger the mandamus time?

17 MS. BRANCH: There was no refusal. What happened
18 is - - -

19 JUDGE CANNATARO: I'm not - - - I'm not saying
20 there was a refusal. They did not produce the maps by the
21 statutory deadline.

22 MS. BRANCH: And that deadline passed. And
23 courts have treated cases where an agency fails to act by
24 its deadline as final and binding determination cases. The
25 case - - - this case, Bard College, was cited in Mr. Hill's

1 reply brief and in - - - when you're - - - when a court is
2 determining whether a final and binding determination has
3 been made, it matters when the injury occurs.

4 JUDGE GARCIA: But turning - - -

5 JUDGE CANNATARO: To go back to what Judge Garcia
6 said. Instead of him repeating himself, I'll repeat.
7 You're talking about something more in the nature of
8 certiorari, that a final and binding adverse decision has
9 been made. But this was by all accounts, I think everyone
10 agrees, a mandamus proceeding. It's in the nature of
11 mandamus. And you knew that the agency that you were
12 relying upon to do something wasn't going to do it or - - -
13 forget wasn't, didn't do it by the deadline that the
14 constitution provides for them to do it.

15 It seems like your right is perfectly clear at
16 that point.

17 MS. BRANCH: At that time, there was legislation
18 in place that allowed for the injury we complain of here to
19 be ameliorated. But even if you treat this case as a
20 refusal case, the statute 217 talks about refusals upon
21 demand. And here, there was no demand made by the
22 petitioners. So I would suggest that the framework to use
23 is the one that the dissent in the Appellate Division
24 opinion used.

25 We disagree with the way that they applied the

1 framework, but the idea was that the petition in this case
2 constituted the demand. That petition was filed on June
3 28th. Under laches the question is, whether or not the
4 date that we filed that petition was reasonable, and it
5 absolutely was. We filed the petition within four months
6 of suffering the injury and the 2021 legislation
7 significantly ameliorated our injury because it allowed for
8 completion of the process.

9 CHIEF JUDGE WILSON: What would have happened if
10 the IRC had submitted a second set of maps on February 1st?

11 MS. BRANCH: We don't know, right? I think that
12 - - - that the potentially - - - potentially it would have
13 been okay because the February 28th outer constitutional
14 deadline may have governed. I - - - I suggest - - - I
15 surmise that that issue may have been litigated. But I
16 think that given the - - - the priority, the - - - New
17 Yorkers voted for IRC to pass, to send maps to the
18 legislature, for there to be a process by which
19 congressional districts would be drawn according to the IRC
20 legislative process. That perhaps sending a map - - - you
21 know, slightly after the fifteen-day deadline, but before
22 the February 28th outer constitutional deadline, would have
23 been acceptable because it still would have achieved the
24 goals that New Yorkers voted for in the 2014 - - -

25 CHIEF JUDGE WILSON: You know of any law that



1 bears on that one way or the other?

2 MS. BRANCH: I'm sorry?

3 CHIEF JUDGE WILSON: You have any law that bears
4 on that question one way or another? That is, if an agency
5 has an - - - interim deadline by which it's supposed to do
6 something and a final deadline by which it must act. And
7 it act - - - it misses the first but makes the second, how
8 that's treated?

9 MS. BRANCH: I don't have a case to point you to,
10 Your Honor. But I would suggest that the way that the
11 redistricting amendments read, when you look at even the
12 deadline for submitting the first map, right? There the
13 constitutional text says that the IRC shall submit its
14 first map on January 4th - - - on January 1st, but no later
15 than January 15th. And no one has argued that submitting
16 the map after January 1st was unconstitutional.

17 So I think that - - - you know, the redistricting
18 amendments contemplate that the IRC should act by this - -
19 - the deadline set forth in the constitution, but it has
20 provided for outer deadlines.

21 JUDGE RIVERA: What's the point of saying within
22 fifteen days? What's the point of that? Why not just have
23 the February date?

24 MS. BRANCH: I think - - - you know, I'm not
25 suggesting that the IRC shouldn't have acted by January

1 25th. But the idea is that if it didn't act by that point,
2 potentially, it could have acted by the outer
3 constitutional deadline. And that's - - -

4 JUDGE GARCIA: But then again, to Judge Rivera's
5 question why have fifteen days? Why not just say February
6 28th?

7 MR. HILL: With respect, I think that's just how
8 - - - how the amendments were drafted. I think perhaps - -
9 -

10 JUDGE RIVERA: But they must have been drafted
11 with some intent. The date doesn't come from anywhere,
12 right? Why not say twelve days?

13 MS. BRANCH: I think the - - -

14 JUDGE RIVERA: Why not say twenty days?

15 MS. BRANCH: Sure.

16 JUDGE RIVERA: It has to be - - - there's
17 something - - - there's a reason why that language is
18 there.

19 MS. BRANCH: I think it was important, probably,
20 to build flexibility into the process. Right? The IRC - -
21 - this is a new constitutional process. The IRC is made up
22 of ten commissioners. It's a bipartisan commission.

23 JUDGE CANNATARO: But I really don't understand
24 that - - -

25 MS. BRANCH: The idea would be to give them



1 additional time to reach agreement.

2 JUDGE CANNATARO: They give - - - they give two
3 deadlines. They gave a fifteen-day deadline and then they
4 said, but you can also have a January - - - I'm sorry. Is
5 it February or January? You could have a - - - it's
6 February 28th. You could also have a February 28th
7 deadline?

8 MS. BRANCH: I think that is one way to read - -
9 - to read the amendments.

10 JUDGE CANNATARO: Wouldn't a more reasonable
11 reading be more along the lines of what Judge Garcia said
12 before? That it actually serves to give the legislature
13 time to do what it needs to do.

14 So if they were to reject a set of maps, that
15 would leave not enough time to comply with the fifteen-day
16 deadline, February 28th is absolutely the outer limit in
17 that very specific scenario.

18 MS. BRANCH: I think that is one way to read - -
19 - to read the amendments. But what I would suggest is
20 whether it's January 25th or February 28th, or a date prior
21 to April 27th, the important thing for statute of
22 limitations is when our injury occurred.

23 Yes, the IRC failed to meet its deadline, but
24 there was this stopgap legislation in place that was
25 presumptively constitutional.

1 JUDGE GARCIA: But it - - -

2 MS. BRANCH: We now know it was wrong.

3 JUDGE GARCIA: - - - again, the injury analysis
4 goes to a different type of proceeding. Your mandamus
5 proceeding is to get them to do something. You're
6 confusing that, I believe, with a proceeding to challenge a
7 decision. And that's when your - - - we look at what the
8 injury is.

9 But you are challenging a failure to act. You
10 have a mandamus to compel, and you want them to do what
11 they didn't do in January. So how long can you wait?

12 MS. BRANCH: We brought this action to - - -
13 because we are seeking the completion of the IRC - - -

14 JUDGE GARCIA: Well, first, the maps that got
15 promulgated failed, right? And then you brought this
16 action.

17 MS. BRANCH: The way to obtain completion of the
18 process that New Yorkers voted for is to bring this
19 mandamus - - -

20 JUDGE GARCIA: But New Yorkers voted for an anti-
21 gerrymandering provision. That is, to me, the overarching
22 statement of these amendments that they don't want
23 politically influenced maps to an extent that violates the
24 substantive provision of the constitution. This is a
25 method to do that. The method failed. Now we have maps

1 that are unchallenged.

2 MS. BRANCH: New Yorkers shouldn't have to wait
3 eighteen years from when they voted for the 2014 - - -

4 JUDGE GARCIA: Well, they shouldn't have had to
5 wait ten either. But they - - - you know.

6 MS. BRANCH: The reality is that this Court left
7 unremedied in Harkenrider a violation by the IRC. The IRC
8 has never been held to account for its failure - - -

9 JUDGE GARCIA: And they could have been - - -

10 MS. BRANCH: - - - set of facts in the
11 legislature.

12 JUDGE GARCIA: - - - for failing to act in
13 January of 2022, right?

14 MS. BRANCH: It's not clear that mandamus would
15 have even lied at that point because in order for mandamus
16 to lie, the agency would have had to miss its deadline.

17 JUDGE GARCIA: Well, I think our footnote in
18 Harkenrider pretty much suggests it would, right?

19 MS. BRANCH: If we had brought a mandamus action
20 on January 24th, for instance, it's not clear that that
21 would have been ripe because there would have been
22 additional time under the redistricting amendments for the
23 IRC.

24 JUDGE GARCIA: But you didn't bring it on March
25 1.

1 JUDGE SINGAS: You didn't bring it on February 3,
2 where the leg had given another set, basically neutering
3 the IRC at that point.

4 MS. BRANCH: Because at that time, maps had been
5 drawn according to the IRC legislative process. The
6 process that was in place, we know now, was pursuant to
7 legislation that was wrong at that time - - -

8 JUDGE GARCIA: But that wasn't an IRC process,
9 right?

10 MS. BRANCH: - - - it was presumptively - - -

11 JUDGE GARCIA: I mean, you didn't - - -

12 MS. BRANCH: No.

13 JUDGE GARCIA: - - - get - - - the people of the
14 state of New York didn't get the benefit of their IRC
15 procedure with those maps. But you didn't challenge them.

16 MS. BRANCH: It allowed - - - that 2021
17 legislation allowed the maps to be drawn.

18 JUDGE GARCIA: But they violated the provisions
19 of the constitution in terms of what the IRC was entitled
20 to - - - they didn't adopt an IRC map.

21 MS. BRANCH: But they allowed the maps to be
22 drawn, and according to a process by which the legislature
23 would have been the final arbiter on redistricting maps.
24 Which is precisely - - -

25 JUDGE CANNATARO: But what you said - - -

1 MS. BRANCH: - - - what the - - -

2 JUDGE CANNATARO: - - - at the top of your
3 argument, is that you've come here to vindicate the IRC
4 process, which is what was denied as a result of
5 Harkenrider. What - - - the promulgation of the maps on
6 February 3rd completely took the IRC out of the picture.
7 So it - - - it seems as if you want to kind of have it both
8 ways.

9 Do you want the IRC process or do you just want a
10 set of maps that - - - you know, that complies or conforms
11 to what you think the maps should be?

12 MS. BRANCH: The petitioners want to live in
13 districts that are drawn according to the IRC legislative
14 process that they voted for.

15 JUDGE GARCIA: But that didn't happen last time
16 and you didn't challenge it because you thought, okay, they
17 can - - - the legislature can do this. If the be all and
18 end all really is the IRC, those maps weren't drawn by the
19 IRC.

20 MS. BRANCH: On February 3rd, the map was drawn
21 by the legislature; that's correct. But the - - - it
22 allowed the people's representatives - - - people who are
23 democratically accountable to the people of the state of
24 New York to draw the map. The map was not drawn.

25 JUDGE GARCIA: And we are, in a sense, also

1 accountable to enforce the constitutional provisions. So,
2 I don't understand your point.

3 MS. BRANCH: The 2021 legislation at the time was
4 presumptively constitutional. We know now it was wrong.
5 But at the time the petitioners understood that maps were
6 going to be drawn according to a process that allowed maps
7 to be drawn by the legislature, by people that they
8 elected.

9 JUDGE GARCIA: The - - -

10 MS. BRANCH: That was promise - - -

11 JUDGE GARCIA: - - - judicial process for doing
12 this is also, as we decided in Harkenrider, acknowledged by
13 the constitution. So what this court did in Harkenrider,
14 as we found in the majority decision, was authorized by the
15 constitution.

16 So you have maps that have been drawn according
17 to a constitutional process.

18 MS. BRANCH: And we don't dispute that the maps
19 are - - -

20 JUDGE GARCIA: Same way the - - - you thought the
21 legislature did it, right? You assumed the legislature's
22 maps were constitutional because - - - because they had
23 that statute. Well, these maps, which aren't challenged,
24 are constitutional, and it's the process that we followed
25 in adhering to the constitutional provisions.

1 MS. BRANCH: But the maps were not. The - - -
2 the maps in Harkenrider were drawn by a special master
3 under emergency circumstances. They were put in place
4 pursuant to section 4(e). They can be modified pursuant to
5 court order, which is precisely what we seek here. The - -
6 - the - - -

7 JUDGE GARCIA: It could be modified. I mean, if
8 they were challenged and it turned out the special master
9 drew gerrymandered or racially unbalanced districts, they
10 could be challenged and they could be amended by the court,
11 I would assume.

12 MS. BRANCH: They could. But they could also be
13 amended to cure a procedural violation. But the language
14 in the constitution states that the maps can be modified
15 pursuant to court order and that the IRC shall be
16 established to - - - and at any time that a court orders
17 districts to be amended. It's not specific to - - -

18 JUDGE CANNATARO: Can that be done in a mandamus
19 proceeding?

20 MS. BRANCH: This Court told us in Harkenrider
21 that the way to resume the process to get the IRC to act is
22 to file a mandamus proceeding. And it's undisputed that
23 the IRC failed to undertake its constitutional duty to send
24 a second set of maps.

25 JUDGE CANNATARO: But bringing a mandamus to

1 compel the IRC to do what it is required to do does not
2 guarantee an acceptable map, a constitutionally acceptable
3 map. You would still have a right to challenge the map
4 that came out of that process wherever it ended, whether
5 it's with the IRC or some sort of subsequent legislative
6 action.

7 So it seems to me that the idea of challenging a
8 map and the idea of bringing mandamus to vindicate a
9 constitutional process are two entirely separate notions.

10 MS. BRANCH: The map that comes out of the IRC
11 process could certainly be challenged on substantive
12 grounds.

13 JUDGE CANNATARO: Sure.

14 MS. BRANCH: But the fact is the IRC did not
15 complete its constitutional duty. And - - -

16 JUDGE SINGAS: And then this court - - -

17 MS. BRANCH: - - - we had brought this case - - -

18 JUDGE SINGAS: - - - this court remedied that. I
19 think you're just sort of skimming over that. But that's
20 the real issue here. There has been a remedy dictated by
21 this Court in Harkenrider. And I don't see a basis to
22 overturn that remedy. We can't just say now you're
23 supposed to do part A and part B, that was violated,
24 there's a remedy, but now let's go back and give them a
25 chance to do B.

1 Like, where else in our jurisprudence would we
2 ever separate out these steps? The entirety of it,
3 holistically, is a violation that this court remedied.

4 MS. BRANCH: This court did not remedy the IRC's
5 failure to send the second set of maps.

6 JUDGE TROUTMAN: What was the issue before the
7 Harkenrider court?

8 MS. BRANCH: There were two issues before the
9 Harkenrider court. One is partisan gerrymandering, which
10 is not at issue in this case. The other issue was the
11 legislature's act - - - act outside of its constitutional
12 authority.

13 JUDGE TROUTMAN: And is the court permitted to
14 answer questions that were not before it at the time?

15 MS. BRANCH: Yes, Your Honor. Harkenrider
16 addressed a different procedural violation.

17 JUDGE TROUTMAN: No. Did you hear my question?

18 Can - - - can the court answer questions that are
19 not properly before it? Was the - - - was the issue of
20 whether or not the IRC properly acted in performance of its
21 required duties, was that question specifically before the
22 court?

23 MS. BRANCH: It was not, Your Honor.

24 JUDGE TROUTMAN: And are we allowed to answer
25 questions that are not before us?

1 MS. BRANCH: Your Honor, I don't think so. In
2 that case, there was a claim made against the legislature.
3 The IRC was not a party.

4 JUDGE SINGAS: I don't see how you can say the
5 IRC was not a party to that.

6 MS. BRANCH: The IRC was not.

7 JUDGE SINGAS: The IRC did not do what it was
8 supposed to do. And that was the remedy that the court
9 then - - - the subject matter is the same. I don't think
10 you can parse out the IRC from the legislature. The
11 violation is one violation that - - - that their actions
12 were extra-constitutional.

13 MS. BRANCH: Harkenrider addressed a different
14 procedural violation, and it ordered a remedy that did not
15 cure our injury. In Harkenrider the issue was the
16 legislature acting outside of its constitutional authority
17 when it drew the map.

18 JUDGE GARCIA: To borrow - - - to borrow a
19 question from the Chief Judge. Isn't that inconsistent
20 with your timeliness argument? If Harkenrider had nothing
21 to do with the IRC and what they did or didn't do, why
22 didn't you bring the mandamus when they didn't do it?

23 MS. BRANCH: Because we weren't injured at that
24 time. At that time - - -

25 JUDGE GARCIA: That is a different mandamus.

1 You're mandamus to compel, that's a challenge to inaction,
2 not what they did injured you.

3 MS. BRANCH: Even if this is - - -

4 JUDGE GARCIA: You didn't act - - -

5 MS. BRANCH: - - - treated as mandamus to compel
6 and - - - and the IRC's failure to act.

7 JUDGE GARCIA: Isn't that what you brought here?
8 A mandamus to compel?

9 MS. BRANCH: This action, it - - - it doesn't fit
10 very neatly within either of the two mandamus frameworks.
11 But I think that this - - - the court held in Bard College,
12 that when an agency misses its deadline, the question that
13 the court asks is whether or not that missing of the
14 deadline is a final and binding determination. And part of
15 that inquiry from this court - - -

16 JUDGE GARCIA: But it's not a determination at
17 all. It's a failure to act. And you're challenging a
18 failure to act. They should have acted, they had a
19 constitutional duty to act, "shall" language. And you're
20 challenging their failure to act. You're not challenging
21 their decision.

22 MS. BRANCH: Even if - - -

23 JUDGE GARCIA: For sure you're not.

24 MS. BRANCH: Even if this is treated as a failure
25 to act refusal case.

1 JUDGE GARCIA: But how is it was not a failure to
2 act?

3 MS. BRANCH: Well, because the IRC never refused
4 to act. The question is, it's - - - it's a refusal, right?
5 The statute of limitations occurs when a refusal is made -
6 - -

7 JUDGE GARCIA: They had an obligation to file - -
8 -

9 MS. BRANCH: - - - upon demand.

10 JUDGE GARCIA: - - - a new plan by a certain
11 date. They didn't do it. They had a constitutional duty
12 to do it. They failed to do it. So they don't have to
13 refuse. They just have to do it.

14 MS. BRANCH: Right. And the question is whether
15 that failure to do it was final and binding. That's what
16 the Bard College case says. But even if this is - - -

17 JUDGE GARCIA: Final and binding on - - - on who?
18 I mean, it was a refusal to act and you're challenging a
19 refusal to act.

20 MS. BRANCH: And the statute talks about a
21 refusal upon the petitioner's demand. There was no demand
22 filed.

23 JUDGE GARCIA: Would you have waited six more
24 years and made that demand?

25 MS. BRANCH: The question is whether when we

1 filed our demand was reasonable under the laches framework,
2 and that's the - - - the framework that the dissent in the
3 Appellate Division applied.

4 JUDGE GARCIA: Have we ever applied that as - - -
5 as a court in this context? Have we ever applied laches
6 rather than a straightforward statute of limitations from
7 the time of inaction?

8 MS. BRANCH: I think you have and for example,
9 the Meegan case, where the question was when was the - - -
10 when was the demand made? And the demand was made when the
11 petition was filed. And the question is, was the petition
12 filed at a reasonable time? And we would submit it
13 absolutely was because it was filed within four months of
14 our injury.

15 JUDGE RIVERA: So counsel, I see your red light
16 is on. With the Chief Judge's permission, I just wanted to
17 ask you if you could briefly address the argument that
18 Harkenrider was - - - was not temporally limited to that
19 upcoming election?

20 MS. BRANCH: And I think that and pursuant to
21 section 4(e), this court in Harkenrider provided a remedy
22 to the extent it was required. It was required to provide
23 that remedy because of the constraints of the electoral
24 calendar in 2022. The election was already underway. That
25 emergency has subsided. It is no longer - - -

1 JUDGE SINGAS: But don't you think you would have
2 said because it was an interim remedy, we should have said
3 so? Because at some point we would have to give guidance
4 to the electorate, to the citizenry of New York State about
5 how to proceed once that 2022 election passed. And we
6 didn't do that. I mean, do you find it odd that this high
7 court would decide, you know what? Let's - - - let's leave
8 this topic and leave the state unmoored so that they're at
9 their own devices to figure out what happens after 2022.

10 MS. BRANCH: We're not arguing that the map that
11 was put in place in Harkenrider had an expiration date on
12 it. It would remain in place had it not been - - - if it
13 was not successfully challenged.

14 JUDGE SINGAS: So we had to wait for this lawsuit
15 to then clarify what we meant? And if it didn't happen,
16 what?

17 MS. BRANCH: That map has in place pursuant to
18 4(e), unless it's modified pursuant to court order, which
19 is precisely what we seek here. I think one way to read
20 what the court said in Harkenrider is that it was required
21 to act under Section 4(e) in order to remedy the
22 constitutional violation, the mal-apportionment injury that
23 had occurred in that case, and that the court is no longer
24 - - - that map is no longer required to be in place. It's
25 not required to be in place for the remainder of the - - -

1 JUDGE SINGAS: You can't read only half of 4(e).
2 You have to read the rest of Harkenrider that says, and now
3 those maps are good for ten years.

4 MS. BRANCH: That's correct. Unless they are
5 modified pursuant to court order. And I would suggest that
6 my friends on the other side read that language out of the
7 constitution. 4(e) doesn't say who has to modify the maps.
8 You read the constitution together. We have to read
9 sections 5-b(a), 4(e) and 5 together. 4(e) is silent on
10 who modifies that - - -

11 JUDGE CANNATARO: But isn't the way to modify
12 that map to challenge that map?

13 MS. BRANCH: We - - - that is one way to modify
14 the map. Absolutely. We haven't brought that challenge.

15 JUDGE CANNATARO: Your argument is that mandamus
16 to compel the IRC to produce a new map is another way to
17 challenge the map that was produced as a result of
18 Harkenrider?

19 MS. BRANCH: This isn't a challenge to the map,
20 but it still fits within the constitutional text, which
21 allows the map to be modified pursuant to court order.

22 It doesn't say that a court order has to modify
23 the map. What will happen - - - what happened based on the
24 order issued by the Appellate Division is that it ordered
25 that the IRC resume its duties, which would result in a map

1 modified pursuant to that order.

2 4(e) doesn't say who has to do the modifying, but
3 5-b(a) and 5 answer that question. 5-b(a) says that the
4 IRC shall be established to determine the district lines to
5 remedy a - - - a violation of law. Section 5 says that the
6 legislature shall have a full and reasonable opportunity to
7 correct the law's legal infirmities.

8 If you read the constitution all together, as we
9 must, it's clear that the IRC and the legislature can draw
10 maps at the beginning of the decade, but they can also draw
11 maps to remedy violations of law.

12 CHIEF JUDGE WILSON: Thank you.

13 MS. BRANCH: Thank you, Your Honor.

14 MS. RING AMUNSON: Good afternoon, Your honors.

15 My name is Jessica Ring Amunson, and I represent
16 the chair of New York's Independent Redistricting
17 Commission, Ken Jenkins, as well as Commissioners Cuevas-
18 Molina and Frazier.

19 Your Honors, my clients are aligned with
20 petitioners in this case because above all, they want to
21 see that the citizens of New York receive what they voted
22 for in 2014. As this Court described what those 2014
23 amendments were meant to do, they were carefully crafted to
24 guarantee that redistricting maps have their origin in - -
25 -



1 JUDGE TROUTMAN: Why is this timely?

2 MS. RING AMUNSON: Your Honor, we have deferred
3 to the - - - to the petitioners in making their timely - -
4 - in their making their statute of limitations arguments.
5 But we agree with the Third Department below that - - -
6 that it was when the legislation was declared
7 unconstitutional.

8 However, since we are technically respondents in
9 this matter, we've deferred to the petitioners with respect
10 to their statute of limitations arguments.

11 JUDGE CANNATARO: Would you agree that you were
12 susceptible to a mandamus petition on or - - - I'm sorry,
13 not you, the IRC, on or about January 24th, or possibly the
14 25th of 2022?

15 MS. RING AMUNSON: Certainly not January 24th,
16 Your Honor, because all that happened on January 24th were
17 dueling statements by various members about - - -

18 JUDGE GARCIA: How about the day after?

19 JUDGE CANNATARO: I agree. I actually agree with
20 you. But what about January 25th?

21 MS. RING AMUNSON: On January 25th, the
22 legislation was still in effect that allowed the
23 legislature to take over. And it's important to remember
24 that - - -

25 JUDGE GARCIA: Had you failed - - - had your

1 group failed to perform their constitutional duty as of the
2 25th?

3 MS. RING AMUNSON: I don't believe so, Your
4 Honor.

5 JUDGE GARCIA: How had you not? You had an
6 obligation to file a plan in fifteen days.

7 MS. RING AMUNSON: Within fifteen days, or by the
8 outer limit of February 28th - - -

9 JUDGE GARCIA: Well, we've been back and forth on
10 that point, right?

11 MS. RING AMUNSON: Well - - -

12 JUDGE GARCIA: The way we read that is, then the
13 fifteen days doesn't really mean anything.

14 MS. RING AMUNSON: Well, Your Honor, I think if
15 you look also at the constitutional text, it also asks that
16 the IRC submit a plan by January 1st or by no later than
17 January 15th. Certainly, with the Board of Elections
18 needing to establish election districts earlier is better.
19 But there has to be an outer deadline by which the IRC has
20 to act.

21 JUDGE GARCIA: So the 28th is essentially just a
22 cutoff date, if you have less than fifteen days, is how I
23 read that.

24 MS. RING AMUNSON: That's one way to read it.
25 The other way to read it is February 28th is absolutely the

1 date by which the Board of Elections needs to have
2 information. So that - - -

3 JUDGE GARCIA: Well, way I read it, though,
4 actually gives meaning to the fifteen-day limit.

5 MS. RING AMUNSON: I'm sorry, Your Honor?

6 JUDGE GARCIA: The way I read it gives some
7 meaning to having a fifteen-day limit in addition to having
8 the 28th. The way you want us to read it, I think reads
9 the fifteen days out of the provision.

10 MS. RING AMUNSON: Your Honor, I think it
11 encourages the IRC to act as soon as possible, given that
12 time is of the essence in terms of getting - - -

13 JUDGE GARCIA: But a suggestion.

14 MS. RING AMUNSON: But that February 28th is the
15 outer limit.

16 But, in any event, the legislation was still in
17 effect at that time. That - - - and I think the court to
18 clarify - - -

19 JUDGE GARCIA: But it seems the crux of this
20 argument, this mandamus petition, is to mandamus the IRC to
21 act. And at that point you fail to act.

22 Now, we've heard a lot about the people wanting
23 this process. That this process is really what these
24 amendments were about. And at that point in time, on the
25 25th, the process, your group failed. So?

1 MS. RING AMUNSON: The process had broken down.
2 However, the legislation at the time allowed the
3 legislature to assume the responsibility of redistricting -
4 - -

5 JUDGE GARCIA: But could that make up for the
6 people not getting what they voted for in the constitution?

7 MS. RING AMUNSON: Well, importantly, Your Honor,
8 that same legislation also provided that the IRC should
9 send over to the legislature, and in fact, it did all of
10 the draft maps that were currently under consideration so
11 that the legislature would have them to act upon - - -

12 JUDGE GARCIA: Did they act on the drafts?

13 MS. RING AMUNSON: - - - responsibilities.

14 Your Honor, the legislature enacted a new map on
15 February 3rd. However, what is important here is what the
16 voters voted for in 2014, which was a bipartisan,
17 transparent process. The voters have not received the
18 benefit of that guaranteed right with respect to their
19 congressional districts.

20 JUDGE GARCIA: Well, what the voters, we found,
21 didn't receive last year, we found was - - - was they
22 didn't receive maps that complied with the substantive
23 provisions of the constitution that they implemented,
24 saying you can't politically gerrymander the districts.
25 That's, I think, was what - - - how this court interpreted

1 that.

2 So these other things are processes put in place
3 to address that goal. Goal is to have fair maps that
4 aren't gerrymandered.

5 MS. RING AMUNSON: The goal - - -

6 JUDGE GARCIA: It seems like yours now, saying
7 the process is what's really the goal here and the fact
8 that we now have unchallenged maps is not as important.

9 MS. RING AMUNSON: Your Honor, the goal is to
10 have fair maps that are drawn through a transparent process
11 by a group of New Yorkers, who are selected based in
12 consultation with community groups and with groups that
13 protect minority rights. The goal is to have the process
14 play out where those individuals travel the entire state,
15 as these individuals did at twenty-four public hearings,
16 listening to thousands of people, so that people actually
17 have a voice - - -

18 JUDGE GARCIA: And we have a different
19 obligation. It certainly is what's set out in - - - and
20 our constitutional obligations are somewhat different. And
21 as we held in Harkenrider, those are implicated by what
22 happened here.

23 So I think we all agree it's unfortunate when the
24 court has to get involved in this type of dispute. But the
25 court held last time that we did get involved, and that

1 that was specifically authorized by these same provisions
2 of the constitution, with the goal of ensuring that maps
3 weren't gerrymandered - - -

4 MS. RING AMUNSON: What the - - -

5 JUDGE GARCIA: - - - and our process function
6 that way.

7 MS. RING AMUNSON: I apologize for interrupting.

8 JUDGE GARCIA: Oh, no, no. I think I interrupted
9 you.

10 MS. RING AMUNSON: What the court did in
11 Harkenrider did not remedy the violation by the IRC. And
12 we know that, both, procedurally and substantively.
13 Procedurally, the IRC and its members were not before the
14 court as respondents. The court did not have authority to
15 order the IRC to do anything in its decision.

16 Substantively - - -

17 JUDGE TROUTMAN: So are you saying that until it
18 was determined that the legislation was invalid, there was
19 no duty for them to act, so there was no reason for you to
20 bring mandamus?

21 MS. RING AMUNSON: That's correct, Your Honor.
22 And - - -

23 JUDGE GARCIA: Because the IRC process had
24 worked?

25 MS. RING AMUNSON: No. The IRC process had not

1 worked. However, the legislation allowed the IRC's draft
2 maps to be sent to the legislature and the legislature - -
3 -

4 JUDGE GARCIA: By February 3rd, at the latest,
5 they rejected those, right?

6 MS. RING AMUNSON: Well, Your Honor, what's
7 important here is that the - - - what the court did in
8 Harkenrider, the IRC was not before the court. Neither did
9 - - - did the court's remedy actually address the problem
10 here. How could the court address the failure of a
11 transparent bipartisan process by ordering these remedies
12 to send it to a special master?

13 JUDGE GARCIA: Agreed. That should have been a
14 mandamus proceeding to challenge that, the failure of the
15 IRC process, and it was not a mandamus proceeding to
16 challenge that before us. What was before us was making
17 sure the maps complied with the substantive - - -
18 procedural and substantive provisions of the constitution,
19 right?

20 MS. RING AMUNSON: Right. And what the court
21 found was that the legislature acted without authorization
22 and that the 2021 legislation was invalid.

23 CHIEF JUDGE WILSON: Let me - - -

24 MS. RING AMUNSON: However, that - - -

25 CHIEF JUDGE WILSON: - - - let me shift gears

1 here a little bit for a second. Although, if you want to
2 complete your thought, go ahead and then I'll - - - I'll
3 jump in.

4 MS. RING AMUNSON: I was just going to say,
5 however, that did not remedy the - - - the violation by the
6 IRC, which again, is what this court said in in
7 Harkenrider. These procedures protect substance.

8 CHIEF JUDGE WILSON: So speaking of substance,
9 which is exactly what I was going to ask you, would you
10 agree that our decision in Harkenrider determined that the
11 legislative - - - legislatively created districts were
12 substantively unconstitutional?

13 MS. RING AMUNSON: Yes.

14 CHIEF JUDGE WILSON: Yes. So were we
15 hypothetically, to say the IRC can now go forward, would
16 you agree that it could not adopt this - - - - those
17 districts? Let's start there.

18 MS. RING AMUNSON: Certainly.

19 CHIEF JUDGE WILSON: And it couldn't adopt
20 districts that were substantially like those districts?

21 MS. RING AMUNSON: Certainly, the - - - the IRC
22 in - - - in acting would fully comply with - - -

23 CHIEF JUDGE WILSON: It has to be constrained by
24 the substantive holding that the districts drawn by the
25 legislature the last time were not constitutional?

1 MS. RING AMUNSON: Right. And so the - - - and
2 the legislature, just as the IRC is, is bound by all of the
3 provisions of the Constitution about competition and
4 partisan gerrymandering.

5 CHIEF JUDGE WILSON: Well, and I'm not asking
6 about those. I'm asking about by our decision.

7 MS. RING AMUNSON: By your decision, the
8 legislature could not adopt the same map.

9 CHIEF JUDGE WILSON: Or something substantially
10 similar?

11 MS. RING AMUNSON: I - - - I believe that's
12 correct, Your Honor. But the IRC certainly - - - and I
13 think when my friend on the other side talks about an
14 inevitable gerrymander, I think it's also important to look
15 at what has happened with respect to the assembly map.
16 Once the court ordered that the - - - that the IRC
17 undertake a redrawing of the assembly map. The IRC was
18 able to do so in a bipartisan fashion. They submitted a
19 map to the legislature on a vote of nine to one. The
20 legislature adopted that map. The governor signed that
21 map. No one has challenged that map.

22 And so the IRC process, when it is allowed to
23 play out and actually give the voters what they voted for
24 in terms of a transparent bipartisan process, does work.

25 CHIEF JUDGE WILSON: And so we - - -

1 JUDGE GARCIA: Has there ever been a challenge
2 the assembly maps? The oldest - - - you know, no court has
3 ever declared any assembly map unconstitutional, have they?

4 MS. RING AMUNSON: Your Honor, I'm simply saying
5 that - - - that we have proof here that the IRC process
6 works.

7 CHIEF JUDGE WILSON: Let me ask you - - - let me
8 ask you this. If we were to order the IRC to move forward,
9 and the IRC broke down again, could we hold its members in
10 contempt?

11 MS. RING AMUNSON: Your Honor, I think that the
12 court potentially would have the power to enforce its order
13 against the IRC. That has happened in other courts where -
14 - - where members of commissions have been - - - it has
15 been at least contemplated to hold independent
16 redistricting commission members in contempt for not
17 fulfilling their duties. And in fact, in the Nichols
18 litigation, the trial court - - - supreme court, did retain
19 jurisdiction when it remanded to the IRC in order to
20 enforce its order if the remedial process wasn't followed.

21 CHIEF JUDGE WILSON: Thank you.

22 MS. RING AMUNSON: If the court has no further
23 questions, we ask that the - - - that the lower court be
24 affirmed, and we respectfully request that the court set a
25 deadline for the submission of a second plan to the

1 legislature. Thank you.

2 MR. TRENTO: Afternoon, Your Honors. Andrea
3 Trento from the Office of the Attorney General for the
4 Amici, the attorney general and the governor.

5 2014, Your Honors, voters enshrined into a - - -
6 into the constitution, a process not only for drawing, but
7 for remedying congressional district maps that centered on
8 the work of an independent redistricting commission to
9 develop proposals for consideration by the legislature.

10 The petitioners here are entitled to relief
11 because the current congressional map, to the extent it is
12 used in elections that - - - that go beyond - - - take
13 place in 2024 and beyond, fails to conform to that process
14 enacted by the voters and therefore must be remedied.

15 JUDGE GARCIA: So to use that map in the next
16 election, in your view, is a constitutional violation?

17 MR. TRENTO: In our view, Your Honor, that map is
18 defective.

19 JUDGE GARCIA: No, no. Answer my question now,
20 is it constitutionally defective?

21 MR. TRENTO: It is constitutionally defective.

22 JUDGE GARCIA: So it would be an unconstitutional
23 election, in your view, for the - - - that map to be used
24 in 2024?

25 MR. TRENTO: If that map is not remedied, that's



1 - - - that's - - -

2 JUDGE GARCIA: Remedied, in what sense? So
3 remedied in terms of giving the IRC another shot?

4 MR. TRENTO: Remedied in terms of adhering to the
5 remedial process prescribed by the constitution.

6 JUDGE GARCIA: Which is something other than
7 giving the IRC another shot?

8 MR. TRENTO: No, it is, Your Honor. It's giving
9 the IRC another shot. But giving the IRC another shot and
10 giving a - - - giving the legislature, as well, its
11 authority under section 5 of article 3, to - - - to remedy
12 violations of law. And that happens through the IRC.

13 JUDGE GARCIA: And where in the constitution do
14 you have this view that using that map is unconstitutional?

15 MR. TRENTO: Because when this court in
16 Harkenrider ordered that the judicially - - - ordered that
17 the Steuben County court draw the map for use in the
18 election in 2022, it had the authority only to the extent
19 it was required to do that. And to forgo the requirements
20 of section 4, section 5, and section 5-b.

21 My colleagues refer to section 4(e) as - - - the
22 first part of that first sentence, referring to the IRC
23 process. But then, if something should go wrong, if the
24 court needs to order a remedy as a result of a violation of
25 law, then the second part of that sentence comes in.

1 JUDGE GARCIA: So your view would be if we had
2 said in Harkenrider that these maps are good until the next
3 census, that would have been unconstitutional?

4 MR. TRENTO: Your Honor, the map would not have
5 been proper. Yes. That's the answer.

6 JUDGE GARCIA: So this court did not have the
7 authority to do that under the constitution?

8 MR. TRENTO: That's correct. It was not required
9 to prescribe a map for the duration of the remainder of the
10 - - -

11 CHIEF JUDGE WILSON: Can you imagine
12 circumstances in which a court, not our court but let's say
13 a lower court, might have found, as a factual matter, that
14 keeping a- - - let's say, this map in place or that map in
15 place for a decade was required?

16 MR. TRENTO: Off the top of my head, no, Your
17 Honor. The - - - the amendments contemplate that at any
18 time - - - and this is referring to section 5-b(a). And I
19 - - - I want - - - the point I wanted to make about section
20 4(e) is the first part of section 4(e) refers to the - - -
21 states that the process for redistricting congressional and
22 state legislative districts established by this section and
23 sections 5 and 5-b of this article. Shorthand for that is
24 potentially the IRC process, but sections 5 and 5-b also
25 refer to remedial - - - a remedial process. And that's the

1 remedial process that involves the IRC.

2 5-b(a) says, "At any time a court orders that
3 congressional or state legislative district - - - districts
4 be amended, an independent redistricting commission shall
5 be established to determine the district lines".

6 Section 5 says, "In the event that a court finds
7 a violation of law, the legislature shall have a full and
8 reasonable opportunity to correct the law's legal infirmity
9 - - - infirmities". To the extent that those provisions
10 can be upheld, can be observed by a court ordering a
11 remedy, they must be.

12 JUDGE GARCIA: And so counsel, if this - - - if
13 we agree with you and this goes back to the IRC process, I
14 assume you agree that the IRC legislature are bound by the
15 substantive anti-gerrymandering provisions, yes?

16 MR. TRENTO: Correct.

17 JUDGE GARCIA: That new map - - - it's
18 hypothetical - - - gets challenged and ultimately declared
19 also in violation of substantive, more procedural
20 requirements. Could we use the other maps again? Would it
21 be a constitutional violation at that point?

22 MR. TRENTO: Well, it depends on how, at what - -
23 - what time in the election calendar that takes place. I
24 think the - - - the body charged with remedying that
25 constitutional violation would certainly have the option, I

1 would suspect, the option to go back to the original maps
2 available to it. But it need not be the case. It would be
3 up to the body then charged with remedying that violation.

4 JUDGE GARCIA: So yeah, the courts. And then
5 let's say we decide the remedy is that we're going to use
6 the maps that we have now and it goes back, then we should
7 send it back to the IRC again. And then they would do this
8 again, and then it would be challenged. And depending on
9 the timing, if it's constitutional or not, then we would
10 decide if we're going to use those maps for the third time
11 or not.

12 MR. TRENTO: I understand where Your Honor is
13 going with this parade of horribles that we're hearing
14 here. But I think, I would - - - I would point, as my
15 colleague did, to the experience the IRC had with drawing
16 the assembly map.

17 JUDGE GARCIA: That map was never challenged,
18 right? I mean, the assembly maps were never an issue here.
19 The senate maps were, I think, but not the assembly.
20 Right?

21 MR. TRENTO: Well, I - - - I think the point,
22 Your Honor, is that even in the event of a challenge, the -
23 - - the - - - the map may be upheld and then that map would
24 be the map for the rest of the decade.

25 CHIEF JUDGE WILSON: Counsel, I remember the - -

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JUDGE CANNATARO: Would the obvious implication of that argument be that any time there's a judicially created map that doesn't involve the necessary legislative IRC input, it would only be good for one election cycle? Is there - - - is there a circumstance under which a judicially created map that doesn't include the legislature survives more than a year?

MR. TRENTO: I do agree that under section 4(e) had that map in Harkenrider that was created by Steuben County court with the help of the special master - - - had that map not been challenged, then it would be the extant map for as - - - as long as it - - - until the next decade or until such time as somebody did bring a challenge to it. Making the point that - - -

JUDGE CANNATARO: Your view is that map has been challenged.

MR. TRENTO: That map has - - -

JUDGE CANNATARO: Vis-a-vis this proceeding?

MR. TRENTO: These petitioners here are seeking, via the same mechanism and the same relief that a petitioner would in challenging that map. And so I - - - I do think and in page 282 of the record, their complaint or their petition - - - amended petition does reference defects in the court drawn map, including the procedural

1 fact that it wasn't drawn according to the process set
2 forth in the constitution.

3 JUDGE RIVERA: So let - - - let's go back to the
4 hypothetical about the seriatim challenges. Isn't there in
5 that hypothetical, though, a built-in - - - I just want
6 your view on this, a built-in disincentive? Because if the
7 court is going to continue to step in and say that you
8 violated the constitution, at some point that - - - you're
9 - - - you're going to be reined in, which was my question
10 to the other side.

11 Aren't they incentivizing with their approach,
12 this IRC not complying with their constitutional duty? I
13 mean, I'm finding it difficult to accept this argument when
14 all it does is encourage the very behavior that they
15 acknowledge is unconstitutional.

16 MR. TRENTO: I think that's correct, Your Honor.
17 And I appreciate that the assembly map is maybe a different
18 question than the congressional map, but we saw that play
19 out with regard to the assembly map.

20 The assembly map was a map that the IRC could not
21 get together and submit a second version of to the
22 legislature. But they did the time they were ordered by
23 the court to do so. And so I would - - - our view is that
24 the same - - - well, who can predict? But - - - but I
25 think there is a disciplining effect that a court order to

1 convene and submit a map to the legislature could have.

2 JUDGE GARCIA: I guess the question is, how much
3 discipline do you need? Right?

4 JUDGE RIVERA: Well, contempt seems to - - -

5 JUDGE GARCIA: At a certain point, the process -
6 - -

7 JUDGE RIVERA: - - - have something.

8 JUDGE GARCIA: - - - at a certain point the
9 process itself, to me, seems to undermine the - - - what I
10 believe is the overarching goal of these constitutional
11 amendments, which is fair maps that aren't politically
12 gerrymandered.

13 MR. TRENTO: Well, Your Honor, I - - - I agree
14 that that was one of the goals.

15 JUDGE GARCIA: That's - - -

16 MR. TRENTO: But - - - but the - - - but the
17 process by which that one goal is to be achieved, there
18 were more efficient ways for that process to be achieved.
19 It - - - the voters could have been - - - what could have
20 been proposed to the voters is just have it - - - have the
21 courts do it every time. And that way there would be
22 certainty that there would be no - - -

23 JUDGE GARCIA: Nobody thinks - - - I mean, I've
24 heard that, but nobody thinks that's a good idea. The
25 courts are a fallback position provided for in the

1 constitution, as we've been discussing and as we said in
2 Harkenrider. But it's kind of the - - - you know, okay,
3 this thing has now failed and we are going to step in. And
4 that's been going on for many, many years previous to this.

5 I don't think there's a realistic to say, well,
6 we have written a constitutional provision to say that
7 courts are going to draw them. That's really not our - - -
8 our primary role here. It's as a check to enforce the
9 provisions. And I think, I'm hearing you say that the
10 anti-gerrymandering are a - - -and you know, racially
11 gerrymander, you can't politically gerrymander. Those are
12 just some goals. You wouldn't say those are on a par with
13 the procedural sections?

14 MR. TRENTO: Well, certainly, to have a process
15 that's transparent, a step removed from the political
16 actors, but not totally disassociated from the political
17 actors, and retains some accountability for the voters, I
18 think, was one of the goals of the - - - of the process - -
19 - of the amendments. But there are other substantive
20 goals, too. There's the incumbency, anti-incumbency
21 protections. There are the - - - you know, communities of
22 interest. And there are a whole series of goals that the
23 amendments seek to enshrine into the constitution.

24 JUDGE GARCIA: So racial gerrymandering would be
25 a goal, right? We agree that's prohibited by the

1 constitution, right?

2 MR. TRENTO: Yes, Your Honor.

3 JUDGE GARCIA: So you would agree, though, that
4 that goal is more important than any process that we would
5 put in place for transparency reasons, right? The ultimate
6 goal is fair district.

7 MR. TRENTO: Process is one way for the public to
8 have transparency into and for the legislative leaders
9 should be accountable to the public in fulfilling those
10 goals.

11 JUDGE RIVERA: Are they - - -

12 MR. TRENTO: And so I do think the process - - -

13 JUDGE RIVERA: - - - are they mutually exclusive?

14 MR. TRENTO: They're not mutually - - -

15 JUDGE RIVERA: Are they mutually exclusive to
16 have a robust process, whatever the electors decided, that
17 ends up with a non-gerrymandered map?

18 MR. TRENTO: They're not mutually exclusive. The
19 process - - - the - - - the process plays a - - - an
20 important role and the substantive requirements play an
21 important role in furthering the goals of the amendments.

22 And if I could - - - I see my time is up. But
23 Your Honor had asked one of my colleagues, Chief Judge
24 Wilson, about the source of law that - - - a source of - -
25 - a potential source of law that would allow or that would

1 view an internal deadline versus an - - - a - - - a final
2 deadline for an agency to act. And I think there is a
3 pretty well-developed source of law that speaks to that.
4 And that's the issue of directory versus mandatory duties,
5 which, this court has encountered. And what that - - -
6 when that arises is when - - - when time limits relating to
7 the conduct of government business impose or imposed on
8 officials or agencies. And the question for the courts to
9 look at whether an internal deadline or a time limit within
10 which an agency needs to act is a - - - is a mandatory
11 duty, is whether it divests that body of jurisdiction over
12 the matter.

13 And the questioning did sort of touch on that
14 issue, which was had the IRC convened on the 30th of
15 January, changed their mind and decided they could get this
16 done, did they lack the jurisdiction to do that because of
17 the passage of that January 25th deadline? And we would
18 submit that they did not. That would have been something
19 that - - - that would have been - - - would have - - -
20 would have gone forward.

21 CHIEF JUDGE WILSON: The reason I asked is it
22 seems to me that plays into the question of the
23 availability of mandamus relief at that point, because
24 unless there is a clear right to the mandamus, it doesn't
25 lie.

1 MR. TRENTO: That's correct, Your Honor. Under
2 this doctrine, mandamus relief flows from the expiration of
3 a mandatory duty, not a directory duty.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. TRENTO: Unless you have other questions,
6 thank you.

7 MR. TSEYTLIN: Your Honor, I had reserved five
8 minutes, but I believe we went well beyond that. So I'm
9 not sure how much time I have.

10 But I - I do have - - -

11 CHIEF JUDGE WILSON: We'll let you go until we
12 get tired of you.

13 MR. TSEYTLIN: - - - I do have three - - - three
14 - - - three - - - three points to make.

15 First, the question on statute of limitations is
16 when did it accrue? When could the lawsuit have been
17 brought? Take yourselves back to January 25th, 2020 - - -

18 JUDGE RIVERA: Yes. But for - - - for a claim to
19 accrue, to be able to bring a cause of action, you have to
20 have the injury, which is where there is disagreement.

21 MR. TSEYTLIN: Right.

22 JUDGE RIVERA: You're counting from the failure
23 to act and if I - - - unless I've misunderstood her,
24 they're counting from when one would say, now they've
25 actually been harmed?

1 MR. TSEYTLIN: Yes. It's accrual went - - -
2 could you have - - - when accrual involves injury. I
3 believe that if a lawsuit had been brought on January 25th,
4 2022, against the IRC on mandamus, there would have been
5 zero votes in this court to say that that was too
6 premature. It would have - - - it would have been such a -
7 - - I don't want to use frivolous, but it would be close
8 to a frivolous argument that no one would have made it,
9 that you couldn't bring it on January 25th.

10 So therefore, the four months started on January
11 25th. It expired in May - - - May 25th. They blew their
12 deadline by - - -

13 JUDGE RIVERA: But would we have had to decide
14 whether or not the legislation, the stopgap legislation was
15 constitutional, in that proceeding that you're describing?
16 The hypothetical proceeding you're describing?

17 MR. TSEYTLIN: Absolutely not, because the
18 legislation is irrelevant if the constitutional obligation
19 of the IRC is completed. If the IRC submits a second-round
20 map, then the legislation is irrelevant.

21 The legislation only purported to require - - -
22 allow the legislature to act when that constitutionally
23 required act by the IRC had not occurred. If that lawsuit
24 had been brought timely, IRC would have done its duty and
25 the legislation's constitutionality would have been a - - -

1 would have been an academic exercise.

2 So it's clear to me that a politically neutral
3 enforcement of the standard four months - - -

4 JUDGE RIVERA: You're saying that statute is not
5 tied to the deadline, it's tied to the act?

6 MR. TSEYTLIN: That's exactly right.

7 JUDGE RIVERA: Did I hear you right?

8 MR. TSEYTLIN: And - - - and further - - -

9 JUDGE RIVERA: How long could the state have
10 waited? How long could the state legislators have waited
11 to figure out, you know, it looks like they're really not
12 going to act?

13 MR. TSEYTLIN: Well, the 25th is the date in this
14 - - -

15 JUDGE RIVERA: Okay.

16 MR. TSEYTLIN: - - - in the constitution. But
17 even if Your Honors disagree with me, I think the statute
18 has some import. And that just brings in the question of
19 laches. You know, we - - -

20 CHIEF JUDGE WILSON: Just before you get laches,
21 there's one thing that occurred to me, I wanted to ask you.
22 Suppose that the - - - the 25th or the 26th of January
23 filing was premature, but by the time a court could act on
24 it, February 28th had rolled around. What - - - is there
25 any law about that?

1 MR. TSEYTLIN: No. But I do think that there
2 this court does have law that mandamus is an equitable
3 proceeding. So if the lawsuit - - - if the proceeding had
4 been brought in a timely, the court would have all the
5 equitable power?

6 CHIEF JUDGE WILSON: No. I guess - - - what I'm
7 asking is, if it had been brought prematurely, but it
8 became not premature during the pendency of the petition,
9 what's the effect there? Will we throw it out because it
10 was brought too early? Or we say it's - - - it's ripe now,
11 even though it wasn't before?

12 MR. TSEYTLIN: I mean, maybe there would've been
13 it would have been a - - - it would have been a dismissal
14 for prematurity and then it - - - without prejudice to
15 refile. But I think that there wouldn't even have even
16 been an - - - I mean, I know we're here and you know,
17 there's a political goal that's being achieved here, but I
18 don't think that there would have even been an argument
19 that you couldn't have brought it in the 25th. No one
20 would have even imagined that argument.

21 CHIEF JUDGE WILSON: I guess what I'm asking is
22 whether nobody would have imagined it, because it would
23 have - - - that argument to whatever extent extended had
24 force, would have become moot by the time the court could
25 have acted on anyway?

1 MR. TSEYTLIN: No. Because the IRC said it
2 wasn't going to do it. Its deadline was here. Everyone
3 would have said, yeah, this is the proceeding. This is the
4 one that was referenced in footnote 10.

5 But even if Your Honors disagree with that, at -
6 - - at latest, under their theory of the legislation, which
7 I still don't understand how it makes any sense, they
8 should have brought their lawsuit in April. They waited
9 two months. So we made an accusation in our papers. We
10 said they waited two months because they wanted to see if
11 the court-adopted map was going to be in their political
12 favor. They didn't even dispute that.

13 If laches is ever going to apply, it's when you
14 have an accusation that you sat on your rights for a
15 minimum two months, we think five, for political expediency
16 reasons. And then - - - only then, when you saw the map
17 that you didn't like, then you sued. I understand there
18 might be some unhappiness with that result, but we've got
19 four mass action limitations. We've got laches. They need
20 to apply neutrally - - - politically neutrally, no matter
21 who the party is, no matter whose ox is being gored.

22 Second, you heard - - - we haven't had much
23 discussion on this today, but in order for them to prevail,
24 they need to fit into what they're doing, into the word
25 modify. There's just no linguistically possible way that

1 this lawsuit, asking for a relaunch of the IRC legislative
2 process, is a modification of the Steuben County map. It's
3 just not.

4 And on the final point I wanted to make is - - -

5 JUDGE RIVERA: If we disagree with you on that,
6 do you lose?

7 MR. TSEYTLIN: No, Your Honor, because then we
8 still have our argument about untimeliness. We have our
9 argument that a court-adopted map is not subject to
10 modification just because it's a court-adopted map. There
11 has to be some other reason. And then - - - and then
12 finally, the question of what was the main goal? Now,
13 Judge Troutman, you asked about that. The main goal was to
14 avoid political gerrymander.

15 So the way it's done in the first instance is the
16 IRC driven process. If that fails, it goes to the court.
17 Then the worst-case scenario, the one that is completely
18 out of bounds, is to have a mid-decade redistricting by the
19 legislature, regardless of whether the - - - whether IRC
20 involved. That's a recipe for another festival or
21 gerrymander. And the most dangerous kind where they know
22 where the - - - where the incumbents are.

23 Chief Judge, they wouldn't do the same
24 gerrymander. That wouldn't be the smart thing to do. They
25 would see where the close Republican races were. They

1 would target those individual congressmen in order to make
2 those districts uncompetitive. We'd have another lawsuit,
3 of course, and then either that law - - - if that lawsuit
4 succeeds, then we'd have another fiasco.

5 It's entirely unnecessary, Your Honors. If Your
6 Honors really wants to come up with something that brings
7 the IRC back in, which we think is completely out of
8 bounds, past the statute of limitations - - -

9 CHIEF JUDGE WILSON: Counsel, but your - - - your
10 - - - your explanation about what would happen really says
11 that we should - - - that the IRC process is never going to
12 work, despite the fact that it's in the constitution?

13 MR. TSEYTLIN: Not at Your Honor. The - - - the
14 people determined in the second section - - - sentence of
15 4(e) that mid-decade redistricting - - -

16 CHIEF JUDGE WILSON: I understand. But why - - -

17 MR. TSEYTLIN: - - - is so dangerous.

18 CHIEF JUDGE WILSON: - - - why would the
19 motivation be different mid-district than when the next
20 decennial census comes up? I mean, you're - - - you're - -
21 - you're essentially concluding that the IRC process may be
22 coupled with the - - - if the legislature rejects it and
23 modifies the map as allowed in the constitution, is going
24 to incentivize the majority party cherry-picking races, and
25 drawing the districts to destroy competition.

1 And that may be true, but I don't see why it's
2 truer mid- - - - mid-decade than at the end of a decade.

3 MR. TSEYTLIN: Certainly the - - - the people
4 were aware of the possibility of gerrymandering and they -
5 - - they set out an IRC legislative process at the
6 beginning, the judicial backstop. But the people did not
7 want to have two rounds of this. Certainly, we had a lot
8 of problems - - -

9 CHIEF JUDGE WILSON: They probably didn't want to
10 have any rounds. But I guess, what I'm still getting at is
11 it really sounds to me as if you're saying the
12 constitutional process is a failure and it's going to fail
13 no matter what time of year we're talking about.

14 MR. TSEYTLIN: Absolutely not, Your Honor. The -
15 - - the way the people designed this is, they thought there
16 was a gooder chance that the IRC legislature process would
17 succeed in the first round. However, they did create a
18 judicial backstop. What they said is a red light, no way,
19 is that to have a mid-decade redistricting. There is no
20 provision in the constitution that contemplates the
21 legislature's involvement in mid-decade. Judge Troutman
22 made reference to 5-b(a), that allows the IRC to be called
23 back in - - - an IRC, but that doesn't involve the
24 legislature getting involved. That allows the court to
25 call the IRC back here and say there's a problem with this

1 map.

2 The IRC will come back in and tell the
3 legislature - - - tell the court this is - - - this is the
4 map that you should adopt. Now, I think that there's no
5 reason to have any of that here.

6 JUDGE RIVERA: As I said, why - - - I asked you,
7 I think before, and if not, I'm asking you now. I
8 understand you take a different position. Assume for the
9 moment that we view it that there is no map because the
10 maps had a temporal limitation. Can't then the court - - -
11 under what your description of what the section provides
12 for, can't the court then order the IRC? If someone comes
13 in and says, we need a map.

14 MR. TSEYTLIN: If - - - if Your Honors take that
15 approach, I think there's a tabula rasa. Then an order
16 needs a remedy, and I think there's some problem with the
17 Steuben County map, which I think is very competitive and
18 praised across the political spectrum. And it wants the
19 IRC involved.

20 I think the - - - then what should happen is the
21 court should say, hey, IRC under 5-b, give a court to the -
22 - - give a map to the court, and that will be the court - -
23 - that would be the map.

24 The worst-case scenario - - - the absolute worst-
25 case scenario - - -

1 JUDGE RIVERA: Why - - - why would we do that?

2 MR. TSEYTLIN: Because 5-b(a), the one that
3 allows the calling back on the IRC, doesn't involve the
4 legislature mid-decade at all. It involves the court and
5 the IRC. And so what they've asked - - -

6 JUDGE RIVERA: Are we're prohibited from doing
7 that?

8 MR. TSEYTLIN: There is no provision in the
9 constitution that allows the legislature to get any
10 involvement - - -

11 JUDGE RIVERA: At all?

12 MR. TSEYTLIN: About - - - past the - - -

13 JUDGE RIVERA: Even if the court orders it?

14 MR. TSEYTLIN: Absolutely, Your Honor. The - - -
15 the constitution has only a certain time prescribed for the
16 legislature to act, which is at the beginning of the
17 process. If Your Honors think that all the maps are gone
18 here and you want something to do with the IRC, the worst-
19 case scenario is to have the IRC to just send it to the
20 legislature. Which, by the way, in this decennial has
21 shown that it's not to be trusted, not only with everything
22 that it did before Harkenrider, but then after Harkenrider
23 when it went to the Steuben - - - Steuben County Court and
24 said, basically adopt the same gerrymander that the court
25 rejected. And then afterwards its leaders had badmouthed

1 this court and said, well, what this court did in
2 Harkenrider was political.

3 There is nothing to - - - to show that that
4 legislature has learned its - - - learned its lesson, and
5 that it's not going to engage in a festival of
6 gerrymandering if this court lets it rip. Though we think
7 that they missed their deadline, we think it's
8 unconstitutional what they're asking for here.

9 JUDGE RIVERA: Yes. But of course - - -

10 MR. TSEYTLIN: If Your Honors wants - - -

11 JUDGE RIVERA: - - - if - - - if the IRC process
12 complies with the constitution. If we were to order that,
13 and they didn't have to be held in contempt for that to
14 happen. And then, as you say, the state legislature, the
15 majority party nevertheless draws maps that are
16 gerrymandered, you got a lawsuit. But you've taken out the
17 procedural challenge. Just have the substantive challenge.

18 They take the risk that the court is going to say
19 it's substantively a violation of the constitution, right?

20 MR. TSEYTLIN: Yeah. They will take the risk,
21 but they would be all upset for them because they - - - you
22 would have the Harkenrider back, which they have now, or
23 they would have their dream gerrymandered map that takes
24 out all those competitive - - -

25 JUDGE RIVERA: No. But the court may very well

1 order a remedy that they're not going to be happy with.

2 MR. TSEYTLIN: Well, they already know - - -

3 JUDGE RIVERA: That's the risk.

4 MR. TSEYTLIN: I mean, I suppose there could be
5 another special master, although I don't see why they would
6 have to - - - that would be another - - - why there would
7 be another special master. We already have a perfectly
8 good map that's the backstop to begin with.

9 But again, nothing in the constitution at all
10 contemplates the legislature's involvement mid-decade.
11 That's - - - that's the most dangerous situation.

12 I thank Your Honors.

13 CHIEF JUDGE WILSON: Thank you.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Hoffmann v. NYS Independent Redistricting Commission, No. 90 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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