

4-25-2022

## April 25 Roundtable Update

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## **NEW YORK REDISTRICTING ROUNDTABLE UPDATE**

### **New York State Redistricting Update: *Harkenrider et al. v. Hochul et al.***

On April 21st, the Appellate Division based in Rochester released a decision holding that the state legislature had the authority to redraw congressional and state legislative district lines but that the congressional plan was impermissibly drawn to advantage Democrats over Republicans. The legislature was provided time to enact a constitutional replacement for the congressional map by April 30, 2022.

The State Court of Appeals will hear an appeal on Tuesday, April 26<sup>th</sup> at 11:00 AM that can be viewed on the court's website.

On April 22, the Republican petitioners submitted a proposed remedial congressional map to the state supreme court's outside expert, Jonathan Cervas. Their map, along with an expert report by Sean Trende, splits 19 counties and, according to their submission, does not show partisan favoritism.

In the Court of Appeals proceedings, attorneys for the Republican petitioners and the state's Democratic legislative leaders and Governor Hochul submitted briefs. Highlights from their briefs include:

- Senate Majority Leader, Andrea Stewart-Cousins:
  - The commission's failure to act did not extinguish the legislature's authority to enact redistricting plans
  - Petitioners failed to prove beyond a reasonable doubt that the congressional plan is an unconstitutional partisan gerrymander
  - Petitioners lack standing because partisan gerrymandering claims are "district specific" unless one lives in the specific district
  - The legislature must be afforded reasonable opportunity to correct any infirmities in the congressional plan
- Petitioners submitted a response brief arguing that:
  - The respondents are wrong to defend the legislature's violation of the constitutional process under the 2014 anti-gerrymandering amendments
  - The petitioners have standing to bring the lawsuit
  - The Court of Appeals lacks the jurisdiction to overturn the supreme court's now-affirmed factual finding that the legislature enacted the congressional map with partisan intent
  - The remedy for the legislature's unconstitutional actions must be for the 2022 elections
- The petitioners submitted a supplemental brief arguing that:

- The Appellate Division's legal conclusion that the legislature can enact redistricting maps despite their failure to follow the constitutional process should be reversed
- The finding that the congressional map was enacted with partisan intent is not reviewable
- Speaker of the Assembly, Carl Heastie argued:
  - The court lacks jurisdiction to review petitioners' contention that the legislature cannot enact remedial maps
  - The court can review whether petitioners proved, beyond a reasonable doubt, that the congressional map is substantively unconstitutional
  - The Appellate Division correctly determined that the legislature's enactment of district maps was not procedurally unconstitutional
  - The evidence in the record is insufficient to support the conclusion that the petitioners proved their case beyond a reasonable doubt, and New York's enacted 2022 congressional plan is constitutional
- The Attorney General, on behalf of the Governor, argued:
  - The Court of Appeals should reject petitioner's argument that the Appellate Division's ruling on the congressional map is not reviewable
  - Petitioners failed to meet their burden of demonstrating beyond a reasonable doubt that the congressional map was a partisan gerrymander
  - If the court grants relief that invalidates the congressional or senate maps, it should defer the implementation of any remedial maps until the next election cycle

For the full Appellate Division decision, please see the attached.

## **Congressional Redistricting Goes to Court of Appeals**

By Jeff Wice (as posted in [www.politicsny.com](http://www.politicsny.com))

The New York State Court of Appeals will be deciding one of the most important election law cases of the decade as early as next week. Following an appellate court ruling on Thursday finding that the state's recently enacted congressional plan was a partisan gerrymander, the Court will have to decide whether to uphold two lower court decisions finding the plan to be politically motivated or to uphold the lines and permit the June primary to proceed as planned.

Congressional district lines must be redrawn every ten years following the decennial census to make all districts equally populated. In fact, New York congressional districts cannot vary from the ideal district population of 776,971 by more than one person for each of the state's 26 new districts.

Following enactment of a new state constitutional amendment in 2014, the state shifted from having the state legislature alone draw the lines to having an advisory commission, (the "Independent Redistricting Commission") draw maps for the legislature to consider and enact into law. The Commission was tasked with sending up to two separate sets of maps to the legislature for consideration. After the legislature rejected the first commission maps, the Commission failed to use its opportunity to submit a second set of maps, leaving the legislature free to create its own maps.

In early February, the legislature passed and Governor Hochul approved new maps for the senate, assembly, and congressional districts. Within a day, the plans were challenged in state supreme court in Steuben County. In late March, Judge Patrick McAllister held that the

legislature didn't have the authority to pick up from the commission's failure to submit a second set of maps. He also found that the congressional plan was impermissibly drawn to favor electing more Democrats than Republican. He ordered the legislature to enact new plans with bipartisan support by April 11th.

Instead, the state defendants (including the Governor, Assembly Speaker, and Senate President Pro Tem) obtained a "stay" order from the Appellate Division, thereby putting a hold on enforcing the judge's order. The "stay" enabled candidates circulating petitions for the June 28th primary to continue their campaign efforts.

On April 20th, five state appellate court judges heard arguments by lawyers for the Republican plaintiffs, the Governor, and Democratic state legislative leaders on why the new maps should either (1) be permitted to be used for this year's elections or (2) invalidated and replaced with new maps.

On April 21st, the appellate court, on a 3-2 vote, decided that the legislature had the power to enact new maps. That enabled the new assembly and senate maps to be used in this year's election and in every election through 2030. The court, however, also found that the new congressional plan was an impermissible partisan gerrymander drawn to favor electing more Democrats than Republicans. It directed the state legislature to enact a new congressional map by Saturday, April 30. Democratic legislative leaders immediately filed an appeal with the state Court of Appeals. The high court will hear arguments on the case on Tuesday, April 26. A decision is expected shortly afterwards

In its April 21 decision, the appellate court held that the Democratic Assembly and Senate majorities enacted the congressional plan without input from the Republican minority parties. Moreover, it found that the map discouraged competition and favored Democrats in violation of a new state constitutional criterion that new maps "not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."

The two dissenting justices pointed out that the expert testimony presented by the Republicans and relied on by the majority was "insufficient to establish unconstitutional partisan intent" beyond the reasonable doubt standard required by the courts. They also faulted the majority over relying on the testimony of the Republican expert who had neglected to balance his criticism of partisan favoritism against other state constitutional criteria, including the need to create compact and contiguous districts, reach population equality, consider minority voting rights, keep communities of interest intact, and consider taking the core of existing districts into consideration.

The redistricting fight continues in Albany on Tuesday, April 26 in the Court of Appeals. In past redistricting-related decisions, the Court of Appeals has rejected challenges to redistricting plans, holding that plaintiffs must demonstrate that not only did a redistricting law depart unnecessarily from the state constitutional rules, but that the legislature acted in bad faith in dealing with the conflicts between some constitutional rules and others.

We will look to the Court of Appeals next week to tell us if the new congressional plan passes muster based on past precedents, or whether, this new set of judges, with a new constitutional amendment before it, would order a new map.

In case a new map is ordered, Judge McAllister has already appointed Carnegie-Mellon University's Jonathan Cervas, a redistricting expert, to draw the new map.

## **Cayuga County Legislature Considers Downsizing and Single Member Districts**

The Cayuga County legislature is considering switching from a weighted voting-based 15 member body to an 11 member single member district plan. Read about it as reported here: <https://bit.ly/3k9O664>

## **Westchester Board of Legislators to Hold Redistricting Hearing**

A remote public input session on county Legislative Redistricting will be held on Wednesday, April 27 at 6 p.m. People who wish to speak via Webex can register online at: <https://bit.ly/3Er4Wqu>, Event code: 2427 527 4133; Password: Redistricting. People may also speak by phone by calling 1-844-621-3956 at 6 p.m and enter the meeting access code: 2427 527 4133. Comments may also be submitted via email emailing to: [BOLPublicComments@westchesterlegislators.com](mailto:BOLPublicComments@westchesterlegislators.com) or mailing them to the Clerk of the Board of Legislators, 148 Martine Ave., 8th Floor, White Plains, NY 1060. Written comments must be received by April 27, 2022 at 5 p.m.

## **Upcoming Redistricting Hearings**

Syracuse: Thursday, April 28 at 6 pm