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May 9 Roundtable Update

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NEW YORK REDISTRICTING ROUNDTABLE UPDATE

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

On **May 1**, NY Young Republican activist Gavin Wax filed papers with Judge McAllister in Steuben County State Supreme Court seeking to intervene in the ongoing *Harkenrider* case and to invalidate the state assembly map. He argues that the court should follow the rationale set by the Court of Appeals decision in invalidating the congressional and senate plans where the court struck down the Assembly map as unconstitutional. On May 3, Greene County resident and one-time Democratic state senate candidate Gary Greenberg submitted a motion intervention to also invalidate the Assembly map. Greenberg requested that the court enjoin the holding of the Assembly primary elections until August 23, 2022, pending resolution of the Assembly map issue.

On **May 4**, in New York's Southern District Federal Court, Judge Lewis Kaplan denied a motion for a temporary restraining order to prevent the August 23 Congressional primary. On May 5, the New York State Board of Election filed a Proposed Supplemental Order in the United States District Court for the Northern District of New York requesting that New York's congressional primary be held on August 23rd. The court directed that the congressional primary be held in June in order to comply with military overseas voting deadlines.

A more detailed description of the proposed supplemental order, and the BOE's letter to Judge Sharpe accompanying the order are attached. On **May 6**, a group of prospective intervenors wrote to Judge Sharpe stating an intention to file a motion to intervene and to oppose the request of the New York State Board of Elections for a supplemental order.

On **May 6**, the Supreme Court in Steuben County conducted a hearing by Special Master Jonathan Cervas to hear testimony on how to draw the congressional and senate maps. This hearing followed submissions by the public and organizations ahead of the hearing. For more information on the submission and the witness remarks, please see the attached **May 9** update document.

On **May 6,** the Supreme Court in Steuben County also heard from the parties in Harkenrider v. Hochul. Each side presented arguments concerning their remedial maps.

A court hearing will be held on **May 10** by Judge McAllister on the intervenor motions to invalidate the Assembly map.

On **May 16,** Special Master Jonathan Cervas will release draft senate and congressional maps. **May 18** is the deadline for public comment on the Special Master's maps.

On **May 20**, Judge McAllister is set to approve the final maps.

Where Do We Go From Here? ***From Twentyeagle.com***

By Jeffrey M. Wice

Last week's decision by the state Court of Appeals invalidating New York's redistricting maps makes a striking break from the court's own precedents and sets the stage for potential perpetual chaos in the future.

The state constitutional redistricting rules in sections 4 and 5 of Article III, remain largely as they were adopted in 1894. A 1969 amendment added section 5-a, which makes the whole population the basis for apportionment—ending the practice of excluding aliens from the apportionment calculus. A 2014 amendment made additional changes to sections 4 and added section 5-b, but left the basic framework intact. It's almost an impossibility to figure out the actual rules that now govern this process. The Court of Appeals certainly didn't do a good job.

After the 1894 Constitution went into effect, the Court of Appeals interpreted the Constitution's redistricting provisions carefully. It invalidated the reapportionment acts of 1906 (in part for violating the compactness rule) and 1916 (for violating the "block-on-border" rule for town and city boundaries). In 1965, the court decided that the rules in sections 4 and 5 of Article III remained in effect except when they conflicted with more recent U.S. Supreme Court decisions following the 1962 *Baker v. Carr* line of decisions mandating "one person/one vote" population equality.

In 1982, the Court of Appeals rejected a gerrymandering claim by defining "practicable" to mean that any districts conforming to the other federal and state constitutional rules could be configured in any way the legislature chose. In *Wolpoff v. Cuomo* (1992), and *Cohen v. Cuomo* (2012), the Court rejected challenges to state senate districts enacted in those years. The Court required that plaintiffs show more than a redistricting law departed unnecessarily from the state constitutional rules, but also that the legislature acted in bad faith balancing the conflicts between a few constitutional rules and others. The requirement that plaintiffs prove their claims beyond a reasonable doubt imposes in redistricting cases a more demanding challenge than simply overcoming the presumption of constitutionality that usually attaches to legislative acts.

The court's "bad faith" test originated in *Schneider v. Rockefeller* (1972) and was relied upon by the court in *Wolpoff*:

"The Majority Leader has marshaled a considerable amount of statistical and demographic data to support his contention that these districts were drawn in a "good faith effort" to comply with *Reynolds v Sims* and the Voting Rights Act and not for partisan political reasons, as petitioners argue. . . . Although we are troubled by the number of divided counties in the new plan and by the four bi-county pairings, it is not appropriate for us to substitute our evaluation of the relevant statistical data for that of the Legislature. We are satisfied that in balancing State and Federal requirements, the respondent has complied with the State Constitution as far as practicable, and we cannot conclude on this record that the Legislature acted in bad faith in approving this redistricting plan. Having made that determination, our review is ended."

These earlier cases demonstrated the Court's deference to state legislative enactments and authority.

Last week's decision upended the state's redistricting world. Instead of permitting the legislature to complete the redistricting process, the Court read the 2014 amendment's language to mean that the Independent Redistricting Commission (IRC) was required to submit a second set of maps to the legislature after the first set was rejected by the legislature. While the constitution's use of the directive "shall" was read to mean that the commission "must" act, the IRC's failure to act has resulted in preventing the legislature from further considering redistricting legislation.

Unless the drafters of the amendment intended for redistricting to be left to the courts if the IRC failed to complete its tasks, there were no other alternatives available for the enactment of new redistricting maps this year. How could the legislature have forced a so-called independent commission to submit a second set of maps when so many referred to the commission as independent? From most accounts, the legislature and IRC maintained complete separation from each other throughout the commission's lifetime (at least after the legislature provided for funding, staff, and office space).

We are now left in a position where the legislature can only submit plans to the state court as a party plan submission, just like anyone else. Judge Patrick McAllister, tasked with deciding on the maps as directed by the Court of Appeals, has been presented with maps from the plaintiffs, state legislative defendants, Common Cause NY, the Unity Coalition, a high school student, and several others.

Since the plaintiffs didn't challenge the Assembly map during the appeals process, the Assembly map gets to be used in the April 28 primary. The Senate plan, enacted in the same bill as the Assembly plan, must be redrawn. Based on this technicality over the failure to challenge the Assembly plan, two parties have come forward to challenge the use of the Assembly plan in the past few days. The challenges are based on the assumption that the Assembly plan must fall as the Senate plan did only because the legislature didn't have the authority to enact "any" plans. Judge McAllister will consider what to do about the Assembly challenge after a court hearing on May 10th.

Elsewhere, a group of plaintiffs have filed a motion in the Southern District of New York federal district court seeking to enjoin the state from conducting the congressional primary on any date except June 28, a date determined by a 2012 federal court order that faulted the state for not complying with federal military overseas voting deadline requirements. The plaintiffs argue that only the state legislature can change the date, not a state court. The strategy here may be to fast-track this case directly to the U.S. Supreme court where the Court has already stayed use of new state maps already invalidated because the remedial stages fall too close to 2022 election calendar deadlines. The plaintiffs also ask the federal court to use the state court-invalidated congressional plan in the April 28 primary.

So where are we now? We are essentially in a quickly changing situation where many things have yet to happen before we know how things will end.

Where do we go from here?

After the dust settles and new maps are in place for the 2022 elections, the legislature will need to reconsider what to do from preventing the courts to take over redistricting each time the IRC fails to do its job. This requires robust discussion and debate over what kind of redistricting process New Yorkers really want. The 2014 amendment creating the IRC was poorly worded, complex, cumbersome, and designed to fail. It performed as it was designed.

The legislature should consider reforming the redistricting process to create a system where priority is placed on real criteria that works, not a hodgepodge of criteria standards without prioritization. The IRC must be reformed so that it can actually work. An odd number of commission members will avoid deadlock. Removing the vote requirements that depend on partisan control of the legislature is another reform that should be made. Changing the commission's deadlines to confirm with a Spring primary is another. The major reform would be to make the commission work in a way that would avoid bypassing the legislature if deadlock

results again. Judges should not draw maps unless the legislative or commission process fails or creates an invalidated map.

With whatever changes might be made, the redistricting criteria should include: (a) rationalization and prioritization (ranking) of the rules; (b) prevention of regional malapportionment; (c) a fixed number of senate districts; (d) a permanent end to prison-based gerrymandering for congressional and state legislative districts; and (e) repeal of obsolete provisions.

Perhaps the major question facing New Yorkers will be how and whether to further amend the state constitution through a new completely independent process or one that provides the legislature with a role but make the IRC a viable party to the process.

New York City Districting Commission Sets May 11th Meeting

The next meeting of the New York City Districting Commission will be on Wednesday, May 11th at 6:00 PM at 22 Reade Street in Manhattan.

Tompkins County Redistricting

The Tomkins County redistricting committee released a map proposed and is seeking the widest possible discussion among members of the County Legislature, municipal officials, neighborhood and civic organizations, and the general public. The committee invites the public either to comment at its next meeting on May 10 at 5:30 p.m. or to submit written comments via the Tompkins County Redistricting website.

Other Upcoming Redistricting Hearings

Syracuse, May 22, 3:00 pm
Syracuse, May 23, 5:30 pm
Syracuse, May 24, 5:30 pm
Albany County, May 26, 5:00 pm