

2022

## Matter of Harkenrider v. Hochul - Case Brief

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Case Briefing

Citation

**Matter of Harkenrider v. Hochul, No. 60, 2022 N.Y. LEXIS 874, at \*1 (N.Y. Apr. 27, 2022).**

Judicial Breakdown / Partisan or Nonpartisan

- Di Fiore, C.J. (D), issued the 4-3 opinion.<sup>1</sup>
- Judges Garcia (R), Singas (D) and Cannataro (D) concur.
- Judge Troutman (D) dissents in part in an opinion, in which Judge Wilson (D) concurs in part in a dissenting opinion, in which Judge Rivera (D) concurs in part.
- Judge Rivera dissents in a separate dissenting opinion, in which Judge Wilson concurs.

Procedural History

- On 2/3/2022 (the same day that the Governor signed the Legislature's redistricting plan), petitioners—NY voters residing in several different congressional districts—commenced this special proceeding under Article III, § 5 of the State Constitution and Unconsolidated Laws § 4221.
- Petitioners alleged that the process was constitutionally defective because the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments and, as such, the legislature lacked authority to compose and enact its own plan.
- Petitioners also asserted that the congressional map was unconstitutionally gerrymandered in favor of the majority party.
- State respondents answered that petitioners lacked standing to challenge most of the districts they claimed were gerrymandered, that the IRC's failure to perform its duty did not strip the legislature of its enduring authority to enact redistricting plans, and that petitioners could not meet their burden of proving that the maps were unconstitutionally partisan.
- At trial, expert testimony was heard from both parties.
- Subsequently, the State Supreme Court declared the congressional, state senate, and state assembly maps "void," reasoning that the legislature's enactment of maps absent submission of a second redistricting plan by the IRC was unconstitutional

and that the 2021 Legislation purporting to authorize the enactment was also unconstitutional.

- Further, crediting petitioner’s expert testimony, the State Supreme Court found that petitioners had proven that the congressional map violated the constitutional prohibition on partisan gerrymandering.
- State respondents appealed, and, in a divided decision, the Appellate Division modified the Supreme Court’s order by denying the petition, in part, vacating the declaration that the senate and assembly maps and the 2021 legislation were unconstitutional, but otherwise affirmed and remitted.
- Both parties cross-appealed the Appellate Division’s order.

### Disposition

- As modified, affirmed. The congressional and senate maps are void.
- Judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.

### Facts

- In 2014, the People of the State of New York voted to adopt historic reforms to the redistricting process by establishing an Independent Redistricting Commission (IRC), and by “declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering.”
- Following receipt of the results of the 2020 federal census, the redistricting process began.
- Due to shifts in NY’s population, the state lost 1 congressional seat and other districts became malapportioned.
- Throughout 2021, the IRC held public hearings, gathering input from stakeholders and voters across the state.
- In 12/2021 and 1/2022, negotiations between the IRC members deteriorated and the IRC, split along party lines, was unable to agree upon consensus maps.
- As a result of their disagreements, the IRC submitted, as a first set of maps, two proposed redistricting plans to the legislature—maps from each party delegation.
- The legislature voted on this first set of plans without amendment as required by the Constitution and rejected both plans.
- The legislature notified the IRC of that rejection, triggering the IRC’s obligation to compose within 15 days a second redistricting plan.

- On 1/24/2022—the day before the 15-day deadline but more than one month before the 2/8/2022 deadline—the IRC announced that it was deadlocked and would not present a second plan to the legislature.
- Within a week, the Democrats in the legislature—in control of both the senate and assembly—composed and enacted new congressional, senate, and assembly redistricting maps without participation by the minority Republican Party.
- On 2/3/2022, the Governor signed into law the new redistricting legislation, which also “superseded” the 2% limitation imposed in 2012 on the legislature’s authority to amend IRC plans.

#### Issue(s) or Question(s) Presented

- (1) Whether the legislature’s failure to follow the prescribed constitutional procedure warrants invalidation of the legislature’s congressional and state senate maps; and
- (2) Whether there is record support for the determination of both courts below that the district lines for congressional races were drawn with an unconstitutional partisan intent.

#### The Rule(s)

N.Y. CONST. art. III, § 4(b)

- The IRC—a bipartisan commission working under a constitutionally mandated timeline—is charged with the obligation of drawing a set of redistricting maps that, with appropriate implementing legislation, must be submitted to the legislature for a vote, without amendment.
- If this first set of maps is rejected, the IRC is required to prepare a second set that, again, would be subject to an up or down vote by the legislature, without amendment.
- Only upon rejection of a second set of IRC maps is the legislature free to offer amendments to the maps created by the IRC, and, even then, a statutory restriction enacted as a companion to the constitutional reforms precluded legislative alterations that would affect more than two percent of the population in any district. *Id.* at \*5 (citing Senate Introducer’s Mem. in Support, Bill Jacket, L 2012, ch. 17, at 15) (Redistricting Reform Act of 2012).

N.Y. CONST. art. III, § 4(c)(5) (prohibition of partisan gerrymandering)

- “Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.”
- To prevail on such claim, petitioners bear the burden of proving beyond a reasonable doubt that the congressional districts were drawn with a particular impermissible intent or motive.

#### Holding(s)

- (1) Court held that the legislature's failure to follow the prescribed constitutional procedure warrants invalidation of the legislature's congressional and state senate maps; and
- (2) Court held that there is record support for the determination of both courts below that the district lines for congressional races were drawn with an unconstitutional partisan intent.

### Rationale

- Petitioners have standing despite not residing in certain challenged districts because standing is expressly conferred by constitution and statute.
- Article III, § 5 of the NY Constitution provides that “[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe.”
- Moreover, Unconsolidated Laws § 4221 likewise authorizes “any citizen” of the state to seek judicial review of a legislative act establishing electoral districts.
- Upon careful review of the plain language of the Constitution and the history pertaining to the adoption of the 2014 reforms, the legislature and the IRC deviated from the constitutionally mandated procedure.
- “Article III, § 4 is permeated with language that, when given its full effect, permits the legislature to undertake the drawing of district lines only after two redistricting plans composed by the IRC have been duly considered and rejected. Moreover, the text of section 4 contemplates that any redistricting act ultimately adopted must be founded upon a plan submitted by the IRC. . . .” Id. at \*15.
- It does not provide for the wholesale redrawing of new maps by the Legislature.
- “As reflected in the legislative record, the IRC’s fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature’s exercise of its discretion in redistricting.”
- “Contrary to the State respondents’ contentions, the detailed amendments leave no room for legislative discretion regarding the particulars of implementation; this is not a scenario where the Constitution fails to provide ‘specific guidance’ or is ‘silen[t] on the issue[.]’”
- The IRC-based process “shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law [emphasis added].” N.Y. CONST. art. III, § 4(e).
- The rigid framework serves to “incentiviz[e] the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process.”
- Forecasting that the IRC would not comply with its constitutional obligations, in the summer of 2021, the legislature attempted to amend the constitution to add language authorizing it to introduce redistricting legislation; after New York voters rejected this constitutional amendment, the legislature attempted to fill a purported “gap” in constitutional language by statutorily amending the IRC procedure in the same manner.
- However, “the bipartisan process was placed in the State Constitution specifically to insulate it from capricious legislative action. . . .”

- The 2021 legislation is therefore unconstitutional to the extent that it permits the legislature to avoid a central requirement of the reform amendments.
- Court rejected the State respondents' arguments that the evidence was legally insufficient to establish an unconstitutional purpose.
- At the conclusion of the non-jury trial, the Supreme Court—based on the partisan process, the map enacted by the legislature itself, and the expert testimony proffered by petitioners—found by “clear evidence and beyond a reasonable doubt that the congressional map was unconstitutionally drawn with political bias” to “significantly reduce[]” the number of competitive districts.
- The Appellate Division affirmed, similarly drawing an inference of invidious partisan purpose based on “evidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende,” finding that “the 2022 congressional map was drawn to discourage competition and favor democrats.”
- Therefore, there is record support in the undisputed facts and evidence presented by petitioners for the affirmed finding that the 2022 congressional map was drawn to discourage competition.
- Court rejected the State respondents' Purcell argument,<sup>2</sup> refusing to “subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment.”
- With judicial supervision and the support of a neutral expert designated as a special master, there is sufficient time for the adoption of new district lines—although it will likely be necessary to move the congressional and senate primary elections to August.
- Court rejected the State respondents' argument that the Legislature be given a reasonable period to cure because the deadline for the IRC to submit a second set of maps “ha[d] long since passed” and was, at that time, incapable of cure.

#### Arguments of Parties

- **Petitioners**
- Assert that, in light of the lack of compliance by the IRC and the legislature with the procedures set forth in the Constitution, the legislature's enactment of the 2022 redistricting maps contravened the Constitution.
- Along with being procedurally flawed, the 2022 congressional map enacted by the legislature violates the constitutional provision prohibiting partisan gerrymandering.
- **State Respondents**
- Asserted that petitioners lack standing to challenge many of the districts that they claim reflect unconstitutional partisan gerrymandering because none of the individual petitioners reside in those districts.
- Argued it is wrong to interpret the 2014 constitutional amendments as requiring two separate IRC plans as a precondition to the legislature's exercise of its longstanding and historically unbridled authority to enact redistricting legislation.
- Rely on the 2021 legislation authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps as permissibly filling a purported gap in the constitutional design.
- Argued that the 2022 election cycle is already underway.

- Argued that the legislature must be provided a “full and reasonable opportunity to correct . . . legal infirmities” in redistricting legislation.
- Dissenting in Part: Troutman, J.
- “I dissent as to the majority’s advisory opinion on the substantive issue of whether the plans constitute political gerrymandering and as to the remedy.”
- “Once this Court holds that the 2022 plans were unconstitutionally enacted [procedurally] and must be stricken on that threshold basis, it should not then step out of its judicial role to further opine on the purely academic issue of whether the 2022 congressional map failed to comply with the substantive requirements of section 4(c)(5).”
- Given the procedural violation flowing from the breakdown in the constitutional process, the court must fashion a remedy that matches the error.
- The Court should order the legislature to adopt either of the two plans that the IRC has already approved pursuant to section 5-b(g).
- Given the existence of these IRC-approved plans, there is no need for a redistricting plan to be crafted out of whole cloth and adopted by a court.
- The remedy ordered by the majority takes the ultimate decision-making authority out of the hands of the legislature and entrusts it to a single trial court judge.
- It may ultimately subject the citizens of this State, for the next 10 years, to an electoral map created by an unelected individual, with no apparent ties to this State, whom our citizens never envisioned having such a profound effect on their democracy.
- That is simply not what the people voted for when they enacted the constitutional provision at issue; although the IRC process is not perfect, it is preferable to a process that removes the people’s representatives entirely from the process.
- Dissenting: Wilson, J.
- “I agree with Judge Troutman that Article III, Section 5 of the Constitution means that the majority’s referral of this matter to a special referee is not allowable, and I further agree that her proposed solution of requiring the Legislature to act on the Independent Redistricting Commission (“IRC”) maps that have been submitted, though novel, would be acceptable in the unusual circumstances presented here.”
- She also fully concurs in Judge Rivera’s dissenting opinion, though does not view it as inconsistent with Judge Troutman’s.
- The 2022 redistricting plan itself did not violate the Constitution.
- The burden a plaintiff must meet to overturn legislative action as violative of the New York Constitution is extraordinarily high (beyond a reasonable doubt standard).
- The majority incorrectly treats the lower courts’ review of the evidence as an unreviewable question of fact, as opposed to a reviewable question of law—it is inaccurate to suggest that the Court is without power to review the Appellate Division’s ruling on the partisan gerrymander claim, because the case is before the court as an appeal as of right based on CPLR 5601(b) (see Cayuga Indian Nation of New York
- Gould, 14 N.Y.3d 614, 635 (2010) (“[A] query concerning the scope and interpretation of a statute or a challenge to its constitutional validity” is a “pure question of law”)).
- Rejects the petitioners’ evidence which fell into three categories.

- (1) At best, Mr. Trende's (petitioners' expert elections analyst and doctoral candidate) results are incomplete and inconclusive, and are thus legally insufficient to meet the above standard.

If a given map ends up discouraging competition or favoring a political party, that map does not necessarily run afoul of the Constitution's prohibition. Instead, an intent to discourage competition or to favor that political party must be shown for the map to violate the Constitution.

Mr. Trende's analysis may show the what, but it cannot show the why (i.e., the intent).

The novelty of Dr. Imai's (non-peer reviewed) (based on thousands of non-existent simulated maps) algorithm and the opacity of Mr. Trende's implementation of it create very substantial doubt as to his conclusions.

Mr. Trende did not use the accepted Markov Chain Monte Carlo simulation to compare his results, nor did he provide the models, inputs, data sets, or output maps that formed the basis for his analysis.

Mr. Trende admittedly did not attempt to have his simulations account for several of the constitutionally required factors, such as the protection of racial and language minority voting rights and communities of interest, which could largely explain what he found as gerrymandering.

The models also overweighted compactness and county integrity, and Mr. Trende failed to give sufficient reasoning to explain his methodology.

Mr. Trende, in suggesting that the State respondents should find and fix the problems with his model, also improperly attempted to shift the burden of proof from the petitioners to the State respondents, which itself is legal error requiring reversal.

- (2) The projected loss of 4 Republican Congressional seats (out of 8 that currently exist) assumes that factors unrelated to how the districts were drawn have not caused the result.

The 2012 districts are obsolete and not a relevant source of comparison; population and registration shifts demonstrate that New York's voting populace has changed in the Democrats' favor.

- (3) The contention that Republicans were excluded from the process, without more, does not meet the high bar to invalidate the 2022 plan.

- That the process was dominated by one party is a result of the current political reality of the Legislature.
- While that may be "partisan" in one sense, it is not in the sense that would be necessary to show an intent to violate the Constitution.
- Also, the adoption of the 2021 Legislation and the failed constitutional amendment are not particularly probative as to intent.
- It is equally possible that the Legislature, seeing the possibility of electoral chaos in the event that the IRC failed to act as required, clarified that the outcome would be the same as if the IRC produced plans that the Legislature rejected.
- Dissenting: Rivera, J.



- “I would reverse the Appellate Division judgment because petitioners failed to establish that the legislature violated the state’s redistricting procedures or constitutional mandates.”
- First, the legislature acted within its authority by adopting the redistricting legislation challenged here after the Independent Redistricting Commission (IRC) chose not to submit a redistricting plan by the second constitutional deadline. Thus, there is no procedural error rendering the redistricting legislation void ab initio. There are two supportable analytic paths:

- (1) the process followed by the legislature here does not violate the text or purpose of article III because the IRC in fact submitted two plans, albeit all at once, in furtherance of the purpose of section 4, and, in any case, the legislature is not bound to approve an IRC plan as drafted.

The Constitution is simply silent on how to address the IRC’s choice to forego submission of a redistricting plan and implementing legislation before the second deadline.

The constitutional framework does not command that the legislature remain idle in the face of an IRC decision not to submit a plan despite section 4(b)’s mandatory language setting forth deadlines for submission.

The majority’s decision leaves the legislature hostage to the IRC, and thus incentivizes political gamesmanship by the IRC members.

The majority’s interpretation ignores that legislative plans may include “any amendments” that are “deem[ed] necessary” (NY Const, art III, § 4 [b]), giving the legislature significant discretion to reject the IRC’s proposals.

Likewise, the two percent rule—which the majority seems to interpret as a constitutional requirement—is also not properly before us, and in any case, that statutory rule applies only when the IRC submits a plan by the second deadline, which concededly it did not do.

- (2) The constitution is silent as to how to respond when the IRC does not submit a plan in accordance with Article III, as in this case where the IRC chooses not to make a second deadline submission.

Thus, the 2021 legislation that anticipated the stalemate—properly enacted—controls.

Second, Petitioners’ claim of a substantive violation based on gerrymandering is also without merit as their evidence fell far short of proving that the legislature’s congressional map was unconstitutional beyond a reasonable doubt.

“For reasons discussed at length in Judge Wilson’s thorough and compelling analysis of petitioner’s evidence and gerrymandering claim, which I fully join, petitioners failed to carry their burden.”

The political party designations of the judges were obtained via Google desktop searches, which may not be entirely accurate.↵

See *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The Purcell doctrine cautions federal courts against interfering with state election laws when an election is imminent.↵