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April 10 Roundtable Update

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NEW YORK CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

Hoffmann v. Independent Redistricting Commission: Governor and Attorney General Seek New Congressional Map

Governor Hochul and Attorney General James have filed an amicus brief with the Appellate division in Albany seeking to have the state Independent Redistricting Commission redraw the state's congressional map before the 2024 election cycle.

Last year, a court-ordered map drawn by Special Master Jonathan Cervas was used in the 2022 elections. In this new brief, the Governor and Attorney General argue that while the special master's maps may have been appropriate for the 2022 election, there is sufficient time for IRC to create a new map that follows state constitutional requirements.

The IRC failed to submit a second congressional map to the legislature last year. As a result, the legislature was denied the opportunity to consider a map for approval or later amendment. The courts stepped in to finalize a 2022 map because of the short time frame before the 2022 election process.

In their brief, Governor Hochul and Attorney General James maintain that the State Constitution provides the state legislature with the opportunity to remedy electoral maps invalidated by a court. They also argue that there is sufficient time for the IRC and legislature to enact a new plan before the 2024 election process gets underway. The brief urges the Appellate Division to reverse a state Supreme Court order rejecting the plaintiff voters' claim and to order IRC to draw and submit a new congressional map to the legislature as required by the Constitution. Should this happen, the legislature can approve or reject the commission's map. If the map is rejected, the legislature can develop a map of its own, subject to approval by the Governor.

The Appellate Division is expected to hear oral arguments in Albany sometime in late May or early June. The court's decision can be appealed to the Court of Appeals.

Hoffmann: Reply Brief for Petitioners Hoffmann et al

On April 3, Hoffmann petitioners filed a reply brief emphasizing that mandating compliance with the procedural requirements of the constitution's redistricting amendment (IRC-based process) is necessary to safeguard the substantive rights of all New Yorkers. The petitioners maintain that the court should reverse the trial court's dismissal and remand the case for further proceedings based on six arguments in response to those asserted by respondents.

First, the Hoffman petitioners contend, contrary to the respondents' argument, that *Harkenrider* did not

remedy the IRC's procedural violations. They assert that *Harkenrider* only provided relief for the violation of the "one-person, one-vote" requirement caused by the failure to lawfully enact a new map following the 2020 census, making the only validly enacted map the one adopted following the 2010 census.

Second, petitioners dispute the argument that the congressional map must remain in place for the rest of the decade. Petitioners assert that nothing in either the redistricting Amendment or *Harkenrider* requires this. Third, they argue that an IRC-based remedy is consistent with the Redistricting Amendments and *Harkenrider*.

Fourth, petitioners argue that the Appellate Division, First Department in *Nichols* correctly recognized an IRC-based remedy as one that the Constitution favors.

Fifth, petitioners assert that their claim is timely because the four-month statute of limitations began to run no earlier than February 28, 2022, which was the deadline for the IRC to submit its second round of maps. Lastly, petitioners contend that their action is not an improper collateral attack because *Harkenrider* involved different parties, issues, and requested relief.

Monroe County Legislature: *MacDonald v. County of Monroe*

On March 3, in Monroe County State Supreme Court, Kenneth MacDonald brought a challenge alleging Monroe County's newly enacted legislative district map violates at least three of the state's Municipal Home Rule Law § 34 redistricting criteria. MacDonald contends that the county unlawfully engaged in political gerrymandering, racial gerrymandering, and produced a map with districts that are not as compact as possible.

For **political gerrymandering**, MacDonald alleges that the map was drawn to favor incumbents, candidates, and political parties in violation of state law. MacDonald cites an expert analysis that concluded that "there is a 99.87% probability that the current map was deliberately designed to favor incumbents." Additionally, MacDonald argues that the legislators corroborated this analysis by expressly stating their motivations during their map negotiation process. MacDonald describes legislators demanding that certain areas of their districts remain intact or explicitly voicing their objection to adding more members of certain racial groups to their districts. MacDonald also alleges that districts 11 and 18 were deliberately manipulated to allow Republicans to maintain seats despite declining voter enrollment. MacDonald further alleges that, while the map was designed to maximize districts with close to a "one-to-one" Democrat to Republican registration ratio, these districts are not actually competitive due to elections being held in odd-numbered years where Republican turnout is generally higher despite registered Democrats outnumbering registered Republicans 42% to 26% in the county.

Next, for **racial gerrymandering**, MacDonald alleges that the map violates state law by (1) diluting black votes; (2) denying and abridging black voters' equal opportunity to participate in the political process; (3) diminishing black voters' rights to elect candidates of their choosing; and (4) using black voters in majority black districts "to protect non-black incumbents and candidates and to favor political parties." MacDonald contends that districts 22 and 29 were reconfigured to disenfranchise black voters and to favor incumbents and political parties.

Lastly, on **compactness**, MacDonald alleges that numerous districts in the map violate state law because they are not as compact in form as possible.

MacDonald asks the court to declare the current map invalid and direct the county to adopt a new map that complies with all requirements of the law.

On March 17, MacDonald asked the court to grant a temporary restraining order and preliminary injunction so that the county cannot conduct elections or election activities for the county legislature under the current map in relation to the November 2023 general elections and preceding primary elections. MacDonald also proposed a revised schedule for the designating petitioning process for the 2023 elections by pushing certain deadlines back and reducing signature requirements. MacDonald maintains that a revised schedule will allow the county to retain a June primary election with sufficient time to enact a new map.

On March 24, the county filed a memorandum in opposition to MacDonald's motion for a temporary restraining order and preliminary injunction. The county contends that MacDonald's proposed timeline is not based on any applicable legal authority and is not realistic. Additionally, the county argues that MacDonald does not have standing and that the doctrine of laches applies because MacDonald waited until March to challenge the map that was signed into law on January 5. Lastly, the county urges the court to rely on the recently dismissed *Parietti v. Rockland County* case for pleading standards in reference to the Municipal Home Rule Law violations. The county argues that MacDonald has failed to meet these standards for all three of his claims. First, the county contends, contrary to MacDonald's allegation of political gerrymandering, that the relevant section of the state law requires "that the consideration of incumbency be weighed with the maintenance of cores of existing districts and political sub-divisions." Next, for MacDonald's racial gerrymandering claim, the county argues that he failed to show that the minority group in question meets the *Gingles* factors. Lastly, the county argues that MacDonald's third cause of action regarding compactness was also insufficiently pled because he included only conclusory opinions rather than fact or evidence-based allegations.

On March 27, the county moved to dismiss the case. The county reiterated its arguments that MacDonald lacks standing, the complaint should be dismissed due to the doctrine of laches, and the three causes of action are insufficiently pled or fail on their face.

On March 28, MacDonald filed a memorandum in response to the county's memo in opposition to MacDonald's motion for injunctive relief. MacDonald argues that he does have standing because he is a voter in Monroe County and the Municipal Home Rule Law grants standing to any citizen of the county to challenge a legislative map for violation of the state law. Next, MacDonald contends that the doctrine of laches does not apply because the county is responsible for the timing as it took the county 15 months to enact a map and it was not transmitted to the Secretary of State until February 23. Furthermore, MacDonald maintains that his three causes of action are sufficiently pled. MacDonald argues that his political gerrymandering claim is supported by specific facts and an expert report. He contends that his racial gerrymandering claim is sufficient without showing the *Gingles* factors, and that the county is barred from making this argument because the county commissioned expert Lisa Handley who concluded that Black voters in Monroe County satisfy the *Gingles* factors. Lastly, MacDonald argues that his compactness claim is sufficient because he included specific references to four clear violations of the law.

Pereira v. Town of North Hempstead: Plaintiffs' Reply Letter

In response to the Town's letter supplementing their motion to dismiss, on April 6, plaintiffs submitted a letter arguing that they do have standing and that the amended complaint sufficiently states claims for both Equal Protection and Due Process. First, plaintiffs assert that the Town improperly asserted its standing argument by first raising it in its reply papers. Next, plaintiffs reiterate their assertion that their federal claims based on Equal Protection and Due Process are not partisan gerrymandering claims, but instead center around the alleged disenfranchisement caused by the Town's arbitrary renumbering of Districts 4 and 5. Next, plaintiffs dispute the Town's standing argument by, among other points, emphasizing that the plaintiffs' injuries were a direct result of the Town's swap of district numbers and the number swap had no connection to redistricting. Plaintiffs next dispute the Town's argument that the Equal Protection claim is invalid because the plaintiffs are in the same position as every other voter who is now in a different district.

Plaintiffs assert that this is false because the residents of Districts 4 and 5, whose district numbers were swapped, are not in the same position as other voters. Plaintiffs contend that these residents had their district numbers swapped, resulting in disenfranchisement, arbitrarily, and not in furtherance of redistricting principles. Lastly, plaintiffs argue that they have sufficiently stated a Due Process claim by asserting an infringement of a fundamental right, the right to vote, without justification.

CENSUS

OMB Extends Comment Deadline on Race & Ethnicity Question

The federal Office of Management and Budget (OMB) published a notice and request for comments on “[Initial Proposals for Updating OMB’s Race and Ethnicity Statistical Standards](#)” in late January. Last week, OMB announced it is extending the public comment period for that notice, which currently closes on April 12, 2023, by 15 days **until April 27, 2023**, to allow additional time for the public to review and comment on the initial proposals.

You can learn more about the possible changes to the census form’s race and ethnicity questions here: <https://bit.ly/3MzKrhD>

Comments can be submitted by clicking and following the instructions here: <https://bit.ly/43goPN4>

EVENTS

CLE Webinar on NYS and NYC Redistricting

Tuesday, April 25, 2023; 5:30 PM – 7:15 PM

2 NY Credits: 2 PP; Transitional and Non-transitional; 2 NJ Credits 2 General

Program co-sponsors: New York Census and Redistricting Institute, and Center for New York City Law at New York Law School and New York County Lawyers Association’s Justice Center

Program Chairs: Jeffrey M. Wice, Adjunct Professor and Senior Fellow, New York Census and Redistricting Institute/New York Law School; Special Counsel, New York City Districting Commission and Hon. Joan Madden (Ret.), JAMS Mediator and Arbitrator, NYCLA’s Justice Center

Moderator: Jeffrey M. Wice, New York Census and Redistricting Institute/New York Law School

Faculty: Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law School; Dr. John Flateau, NYS Redistricting Commission Member, Hon. David Imamura, Past NYS Commission Chair, Fulvia Vargas-De Leon, Latino Justice

The New York State Constitution was amended in 2014 to change the process and rules governing the drawing of district lines for the NYS legislature and NY's congressional districts. The post 2020 census redistricting was the first test for the new plan – yet issues and problems with NYS' electoral system remain.

Register Here: <https://bit.ly/3TLK30K>
NYCLA Member/NYLS Alumni: \$25
Non-Member: \$45
Students/NYLS Faculty: FREE
Non-Attorney (No CLE): FREE