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April 17 Roundtable Update

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NEW YORK CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

Congressional Redistricting and the Court of Appeals

With so much public attention focused on the Court of Appeals nominations for Chief and Associate Judges and the *Hoffmann* case that would send the congressional mapping back to the state redistricting commission and legislature (pending before the Appellate Division, 3rd Department, for an early June hearing), it's worth looking at the *Harkenrider* dissents filed by Judges Shirley Troutman, Rowan Wilson, and Jenny Rivera. The April 2022 *Harkenrider* decision invalidated the congressional (and senate map) enacted by the state legislature in February 2022 by a 4-3 vote of the Court. The Court only found the congressional map to have been a partisan gerrymander.

A final ruling by the state Appellate Division or Court of Appeals reversing the *Hoffman* trial court decision (rejecting the attempt to reopen congressional redistricting) would not necessarily invalidate *Harkenrider* but would permit the commission and legislature to complete the redistricting process that it failed to do last year.

Judge Troutman's Dissent

Judge Troutman agreed with the majority's finding that the 2022 congressional and state senate redistricting plans were not enacted in accordance with the constitutional procedure. However, she disagreed with the majority regarding partisan gerrymandering and the remedy.

On partisan gerrymandering, Judge Troutman asserted that, because the plans were declared void, they were no longer substantively at issue. While the majority claimed to be providing necessary mapmaking guidance through its assessment of political gerrymandering, it failed to conduct the type of meticulous district-specific analysis necessary to provide functional guidance to a mapmaker.

Regarding the remedy, Judge Troutman argued that the court must develop a remedy that corresponds with the procedural error. She noted that the constitution states that, in ordering a new plan be adopted, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." She also contended that the court should order the legislature, on a strict timetable and with limited power to amend the maps, to adopt one of the two IRC-approved plans as they demonstrated significant bipartisan agreement in certain areas of the state and would remove the need to produce an entirely new plan. She further asserted that this remedy (1) adheres more closely to the constitutional process; (2) discourages political scheming; and (3) minimizes the impact on voters and candidates who relied on the void plans. Moreover, Troutman criticized the majority's remedy for giving ultimate authority to a single trial court judge

instead of the legislature, and ultimately subjecting New Yorkers to the possibility of 10 years of lines drawn by “an unelected individual, with no apparent ties to this State.”

Judge Wilson’s Dissent

Judge Wilson agreed with Judges Troutman and Rivera that the majority’s remedy was inconsistent with Article III, Section 5 of the constitution which states, “In any judicial proceeding relating to redistricting . . . [i]n the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law’s legal infirmities.” Wilson also agreed that Troutman’s proposed remedy of requiring the legislature to act on the IRC-approved maps would be appropriate under these circumstances. Additionally, Judge Wilson agreed with Judge Rivera that the state constitution ultimately left redistricting power in the hands of the legislature.

On the gerrymandering claim, Judge Wilson argued that the petitioners failed to provide sufficient evidence to show political gerrymandering beyond a reasonable doubt.

Judge Rivera’s Dissent

Judge Rivera disagreed with the majority’s holding regarding both the procedural and substantive violations.

On procedure, Judge Rivera asserted that the legislature acted within its power by enacting redistricting legislation after the IRC decided not to provide maps by the second deadline. Therefore, Rivera contended, there was no procedural violation that would render the challenged plans void.

She offered two analytical viewpoints to support this assertion.

First, Judge Rivera argued that the legislature’s actions comport with the text and purpose of the redistricting amendments because the IRC did submit two plans, they just happened to be submitted all at once, and regardless, the legislature is not required to approve an IRC plan as drafted. Moreover, she asserted that there is nothing in the constitution that explicitly forbids the legislature from acting if the IRC does not submit another plan after the legislature considered and failed to approve the previous plans that the IRC provided.

She also argued that the majority’s decision leaves the legislature at the mercy of the IRC and encourages political gamesmanship by the IRC. Additionally, Judge Rivera asserted that the legislature has a constitutional duty to make sure NY’s districts comply with constitutional redistricting factors along with state and federal law, and the legislature was

not required to ignore its mandate when the IRC process broke down. Second, Judge Rivera argued that even if the text of the constitution did not support the legislature's actions, the amended Redistricting Reform Act of 2012 controls and explicitly gives the legislature the authority to act as it did.

Regarding the majority's finding that the congressional plan was impermissibly gerrymandered, Rivera argued that the Petitioners failed to demonstrate, beyond a reasonable doubt, that the legislature's congressional map violated the constitution.

Hoffmann v. Independent Redistricting Commission (IRC): **Congressional Redistricting**

Letter to Court in Support of Motion to File *Amicus Curiae* Brief

Following last week's letter from the *Harkenrider* Intervenor attorneys opposing an amicus brief from being submitted to the court, attorney Benjamin Duke (for Amici Scottie Coads, Mark Favors, and Mark Weisman) submitted a letter to the Appellate Division supporting their motion to file their brief supporting the Hoffman Petitioners. First, Amici argue that their motion was not untimely. Next, they assert that their proposed brief does not improperly raise new legal issues but provides a "different approach" for analyzing the main issue which the court might not otherwise consider. Furthermore, Amici contend that leave is generally granted for amicus briefs in cases, such as this, involving important issues of public interest.

Harkenrider Attorneys Oppose Hochul/James Amicus Brief

On April 13, *Harkenrider* Intervenors filed papers opposing Governor Hochul and Attorney General James's motion to file their amicus curiae brief. Intervenors contend that their motion should be rejected because (1) they filed their motion after the deadline for amicus submissions and (2) their proposed brief impermissibly raises new arguments that have not been asserted by the parties.

CENSUS

70% of New Yorkers Happy They Live in NY; 30% Are Not

Seventy percent of New Yorkers report that are pleased to live in New York while 30% are not so pleased according to a report released last week by the Siena College Research Institute (SCRI). 71% plan to continue to stay and 27% say that they will leave the state. Sixty percent plan to retire in New York and 31% will retire somewhere else.

-More than 70% rated the state as either excellent or good on the availability of leisure activities (79%),

-77% enjoy other New Yorkers,

-73% like the access to quality education and 72% like the access to quality healthcare)

According to Siena's report "majorities rate New York State no better than only fair, or poor on affordability (67%), as a place to retire (60%) and as a place where the political system works

for people like them (57%). Residents are split – 51% excellent or good but 49% only fair or poor – on New York being a place where they feel safe from crime.”

To read the complete report from Siena, click here: <https://bit.ly/40gabTf>

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