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May 8 Roundtable Update

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NEW YORK REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

NYC Council Challenge Dismissed: *Desis Rising v. NYC Districting Commission*

On May 5, New York County State Supreme Court Judge Erika Edwards issued a decision dismissing the challenge to the NYC districting map. In February, DRUM, a South Asian and Indo-Caribbean non-profit, along with other New Yorkers, filed this challenge alleging that the plan violated the NYC Charter by failing to ensure the fair and effective representation of the Indo-Caribbean and Punjabi South Asian community in Richmond Hill/South Ozone Park. Additionally, Petitioners alleged that the plan failed to prioritize the representation of this protected community by splitting it into three districts (Districts 28, 29, 32), resulting in an unlawful dilution of their voting strength and preventing them from having a reasonable opportunity to elect a preferred candidate. They argued that the decision to certify the plan was arbitrary and capricious and contended that the Districting Commission could have adopted the “Unity Map,” which would have comported with the Charter and state/federal law and kept the Richmond Hill/South Ozone Park Asian community intact in District 32.

The court determined that Petitioners failed to demonstrate that the decision to certify the plan was arbitrary and capricious, violated lawful procedures, or was affected by an error of law because the decision to certify was rationally based after the Commission properly completed the certification process. Additionally, the court found that Petitioners failed to show that the Commission violated the Charter.

The court determined that the Commission properly considered public comments and alternative plans, including the Unity Map, and that the Commission properly weighed the relevant criteria provided by the Charter. Furthermore, the court noted that the Commission retained voting rights expert Dr. Lisa Handley who concluded that the plan complied with the Voting Rights Act and expanded the voting power of Asians in the city. The court emphasized that if it granted Petitioners’ requested relief, candidates, voters, taxpayers, and the city would be extremely prejudiced because neighboring districts would be impacted, the map would have to be redrawn, the Commission would have to be reconvened, the Council primaries would be delayed, there would need to be two primaries, and it would be costly and require a delay of several months. Lastly, the court noted that “although the court always endeavors to protect the rights of racial and language minorities against voting rights violations, here, Petitioners simply failed to demonstrate the merits of their claims.”

Congressional Map: *Hoffmann v. Independent Redistricting Commission*: Reply Brief by Harkenrider GOP Intervenors

On April 28, in the Appellate Division (3rd Dept.), attorneys representing the GOP plaintiffs in the original *Harkenrider* case filed a sur-reply brief asserting that the court should affirm the trial court's dismissal in the case seeking to reopen congressional redistricting.

First, Intervenors argue that Petitioners and Amici (Governor Hochul, Attorney General James, and a group of voters) have not offered any sound response to the argument that Section 4(e) of the State Constitution requires the map adopted in the *Harkenrider* case be in place for the remainder of the decade.

Intervenors argue that Petitioners are incorrect in their assertion that the Court of Appeals in *Harkenrider* did not actually remedy the procedural violation. Intervenors assert that, in fact, the Court of Appeals found that the IRC and the legislature's lack of compliance with the constitutional procedures resulted in the legislature's enactment of the 2022 redistricting maps violating the Constitution, and therefore, ordered the Supreme Court to adopt a map to remedy this procedural violation.

Moreover, Intervenors noted that Petitioners have offered no response to the fact that the Court of Appeals considered the remedy that Petitioners seek and rejected it. Intervenors also argue that Petitioners' "reframing" of their request that they do seek a court order modifying the *Harkenrider* congressional map does not hold up because Petitioners are seeking an entirely new map created through the IRC/Legislature process, not a "modification" of the *Harkenrider* map under Section 4(e). Intervenors contend that, because the map is unquestionably lawful, the Constitution requires that the map remain in place through 2030.

In response to the Governor and Attorney General's argument that the Court of Appeals in *Harkenrider* committed a constitutional violation under Section 4(e) by ordering the adoption of a judicially produced map rendering the map "legally deficient," Intervenors contend that "it makes no sense to claim that our State's highest court, interpreting and giving effect to explicit provisions in the Constitution...violates the Constitution, such that [the] ruling itself creates a 'violation of law' under [the Constitution]." Intervenors also refute Executive Branch Amici's reliance on Section 5-b(a) because, they assert, that section is only relevant where there is a successful legal challenge to a map adopted under the constitutional process, such as a violation of Section 2 of the Voting Rights Act.

In response to Amici voters Coats, Favors, and Weisman's argument that the Court of Appeals in *Harkenrider* limited the remedy to only the 2022 election, Intervenors contend that this reading of the decision is "entirely implausible" and assert that the

Court of Appeals ordered the Steuben County Supreme Court to adopt a “congressional map for *both* 2022 and the remainder of the decade, as Section 4(e) mandates.”

Next, Intervenor asserts that Petitioners and Amici have not provided any compelling response to the Court of Appeals’ finding in *Harkenrider* that the only remedy for a violation of constitutional procedure after the constitutional deadline is a judicially adopted plan. Additionally, Intervenor argues that Petitioners and Amici do not have any valid explanation for Petitioners filing their petition months too late.

Lastly, Intervenor argues that Petitioners’ and Amici’s arguments further confirm the assertion that the petition is an impermissible collateral attack on the Steuben County Supreme Court’s remedial order in *Harkenrider*. Intervenor argues that Petitioners’ claim that they are seeking a court order modifying the Steuben County Supreme Court’s map (current congressional map) is impermissible because the normal appellate process has been exhausted.

Sur-Reply Brief Filed by GOP IRC Commissioners

On the same day, IRC Commissioners Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens, filed a sur-reply brief also arguing that the trial court’s decision dismissing the case should be affirmed. Commissioners assert that the Governor and Attorney General’s amicus brief should serve to aid the court, but only because it illustrates that the remedy that Petitioners seek is “fatally disconnected from and completely unavailable within the limited proceeding that they commenced.”

First, commissioners argue that because this is a limited Article 78 mandamus proceeding asking the court to order the IRC to complete its Constitutional duty (a procedural violation that has already been remedied by judicial action authorized by the Constitution), it cannot be a vehicle for judicial review of the maps adopted in *Harkenrider*. In other words, Commissioners contend that this proceeding is not, and cannot be, a challenge to the current congressional lines and does not include prayer for relief to invalidate or modify the current districts. Additionally, Commissioners argue that there is no language in the State Constitution that suggests additional judicial review where the prior action resulted in a remedy for the same procedural violation that is at issue in this proceeding. Furthermore, Commissioners explain that while Petitioners and Amici cite Section 4 of the State Constitution which provides that a constitutionally enacted plan must remain in effect until the next decennial census “unless modified pursuant to court order,” this provision actually hurts Petitioners because this is a mandamus proceeding, not a challenge to the existing congressional lines and the petition does not ask the court to modify the current congressional lines. Therefore, Commissioners contend that the current congressional map must remain in place through 2030 pursuant to the plain language of Section 4 of the Constitution. Commissioners also point out that, while the Governor and Attorney General noted their strong interest in a proper interpretation of the State Constitution, when presented with

a procedurally deficient plan, Governor Hochul did not veto the plan but instead approved it.

Next, Commissioners contend that the current congressional map is not an interim map but a constitutionally adopted map under Section 4(e) that must remain in effect until after the 2030 census. Commissioners argue that Section 5-b(a) (a provision that allows the use of the IRC at some point outside of the regular decennial cycle when “a court orders that...districts be amended”) is inapplicable here because (1) the constitutional remedy was already applied, pursuant to Section 4(e), to address the procedural infirmities; (2) no court has ordered that the current districts be modified; and (3) the mandamus proceeding here is not, and cannot be, a proceeding asking that the current congressional districts be amended.

Lastly, Commissioners assert that Amici’s argument that the Constitution requires the Legislature to have an opportunity to correct a legal deficiency fails because during the *Harkenrider* litigation the Legislature was invited twice to prepare corrective maps and declined both times. Additionally, Commissioners argue that this assertion would be another critique of the *Harkenrider* procedures which would be outside of this limited proceeding.

REDISTRICTING

NYC Campaign Finance Board Releases Voting & NYC Council Redistricting Analysis

The NYC Campaign Finance Board released its’ 2022-2023 Voter Analysis Report last week that reviewed the 2022 elections and recent city councilmanic redistricting process. The report takes an in-depth look at the public testimony submitted to the city’s Districting Commission, finding that the testimony presented by the public to the commission had a major impact on how the districts were redrawn. The report also suggests that local elections be aligned with gubernatorial or presidential races as a way to increase voter turnout. The report also suggests that all state and local ballot proposals be written in plain language.

The report can be read here: <https://bit.ly/3NPzpp4>