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July 10 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

Congressional Challenge: *Hoffman v. Independent Redistricting Commission*

GOP Voters (Intervenors): On July 3rd, In the Appellate Division (3rd Dept.), *Harkenrider* Intervenors-Respondents (representing GOP voters) filed a post-argument letter providing additional arguments why Article III, Section 4(e) of the NY Constitution does not permit a court to restart the IRC/Legislature process "and replace a reapportionment plan that a court lawfully adopted under…Section 4(e)."

They base their argument on the U.S. Supreme Court's recent interpretation of the word **"modify"** in the case involving the Biden administration's student loan forgiveness plan, *Biden v. Nebraska* (June 30, 2023), and ask that the court take notice of this decision. They note that the Court found that the word "modify" in a statute allowing the Secretary of Education to "waive or *modify* any statutory or regulatory provision applicable to the student financial assistance program…" "does not authorize 'basic and fundamental changes in the scheme' designed by Congress." Additionally, the Court held that "modify" "must be read to mean 'to change moderately or in minor fashion.'" Furthermore, the Court found that "[t]he authority to 'modify' statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, *not transform them*."

The attorneys for the Republican voters note that Article III, Section 4(e) of the state constitution provides that a reapportionment plan, including a court-adopted plan, "shall be in force until the effective date of a plan based upon the subsequent federal decennial census…unless *modified* pursuant to court order." They argue that, based on the Supreme Court's interpretation of "modify" in *Biden v. Nebraska*, restarting the IRC/Legislature process and replacing the court-adopted plan "is simply not the type of 'minor changes in the form or structure of,' or 'alter[ation] without transforming,' or 'small changes to,' a map.

Democratic Voters: On July 6th, attorneys for the Hoffman Petitioners (Democratic voters) responded to this post-argument submission by asserting that Intervenors' argument is "illogical" and arguing that the Supreme Court's interpretation of "modify" "has no bearing on this case" as the Court was interpreting a *federal* statute that "had

nothing to do with redistricting." Additionally, Petitioners clarify that they only contend that the IRC must send a second set of maps to the legislature, they do not make any claims regarding how much or how little the IRC should "modify" the existing plan. Petitioners also argue that "there is no principled distinction between 'modifying' and 'replacing' redistricting maps" as any change to a district, no matter how small, will alter neighboring districts as well. Furthermore, Petitioners distinguish this case from *Biden v. Nebraska* by asserting that the Secretary of Education's "administrative 'rewrit[ing]' of a federal statute" is different from Petitioners' request "which is expressly authorized by" Article III, Section 4(e) which allows redistricting plans to be "modified" to remedy legal violations pursuant to court order. Petitioners note that Section 4(e) does not indicate who may do this "modifying," but they argue that other provisions of the Redistricting Amendments express a preference for the IRC/Legislature process. Petitioners conclude by asking the court to give no weight to Intervenors' submission.

Democratic IRC Commissioners: On July 7th, Respondents IRC Chair Ken Jenkins and Commissioners Ivelisse Cuevas-Molina and Elaine Frazier ("Jenkins Respondents" who are all Democratic IRC commissioners) also responded to *Harkenrider* Intervenors' post-argument submission by asserting that *Biden v. Nebraska* has no relevance to this case as the Supreme Court "did not address what it means to 'modify' a redistricting plan, but rather was construing a grant of authority to the Secretary of Education to 'waive or modify' certain provisions relating to student financial assistance programs." Additionally, they note that, at argument, there was agreement among all parties regarding the court's ability, at any time during the decade, to issue an order requiring the modification of a plan to correct a violation of law. Jenkins Respondents assert that the disagreement was only whether the court has the power now to redress the violation of law that occurred when the IRC failed to submit a second set of lines to the legislature. They conclude by asserting that "the term 'modified' in Section 4(e) does not constrain a court's ability to order the Independent Redistricting Commission to reconvene as a remedy for the violation of law."

Democratic Voters amici: At press time, attorneys for the Democratic amici voters also filed a letter with the court arguing that New York voters are entitled to have valid maps through an IRC-based procedure for use in Congressional elections through the remainder of this decade. They ask the court to direct the IRC to get back to work without delay.