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July 17 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

Congressional: *Hoffmann v. Independent Redistricting Commission*

On July 13, the Appellate Division (Third Department) issued its decision ruling in favor of Petitioners (Democratic voters). Presiding Justice Elizabeth Garry penned the decision and Justices Molly Reynolds Fitzgerald and Eddie McShan joined. Justice Stan Pritzker dissented, joined by Justice John Egan Jr.

The decision moves several processes forward with no clear end date before 2024 primary petitioning begins (by early March 2024). The GOP intervenors and GOP Independent Commission members are expected to appeal the decision at the Court of Appeals. The Independent Redistricting commission was directed to go back to work and develop a second congressional map. If the appeal fails, the legislature will also need to schedule a session to address redistricting later this year or early next year/ With anticipated public hearings, commission action, and the appeal, the late Summer to Fall months promise to be busy with redistricting activity.

The Appellate court rejected the GOP Respondents' contention that the proceeding was untimely. The court found that the claim accrued on March 31, 2022, when New York Supreme Court judge McAllister determined that the 2021 redistricting legislation was unconstitutional. The court explained that Petitioners began this proceeding on June 28, 2022, which was well within the statute of limitations.

Next, the court acknowledged that this case puts the court in the "uncomfortable position" of determining what the Court of Appeals in *Harkenrider* meant by its silence regarding how long it intended for the judicial remedy (map drawn by the special master) to remain in place—only for the 2022 elections or for the remainder of the decade. The court further emphasized that, in making this determination, it "must be guided by the overarching policy of the constitutional provision: broad engagement in a transparent redistricting process."

On this question of duration, the court refused to conclude that the *Harkenrider* decision precludes Petitioners' requested relief. The court pointed to the state constitution's "limiting language in the provision that grants the courts the power to intervene" in the redistricting process: "[t]he process for redistricting…established by [the redistricting

amendments] shall govern redistricting…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." Because the Court of Appeals was not "required" to alter the redistricting process beyond the imminent issue at the time (the 2022 elections), the court declined to determine that the Court of Appeals intended to create further repercussions on the process than was strictly "required."

Next, the court held that under Article III, §4(b) of the state constitution, the IRC had an "indisputable" and "mandatory" duty to submit a second set of maps after the rejection of the first set, and it is undisputed that the IRC failed to carry out this duty. Furthermore, the court agreed with Petitioners that *Harkenrider* did not remedy this failure as it only addressed the "Legislature's unconstitutional reaction to the IRC's failure to submit maps" and not the IRC's failure itself.

Based on the above reasons, the court held that Petitioners "demonstrated a clear legal right to the relief sought." The court emphasized that this decision "honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York."

The decision concluded by stating that "the right to participate in the democratic process is the most essential right in our system of governance. The procedures governing the redistricting process, all too easily abused by those who would seek to minimize the voters' voice and entrench themselves in the seats of power, must be guarded as jealously as the right to vote itself; in granting this petition, we return the matter to its constitutional design. Accordingly, we direct the IRC to commence its duties forthwith."

Town of North Hempstead (Nassau County): *Pereira v. Town of North Hempstead*

On July 13, U.S. District Court for the Eastern District of NY issued its decision granting the Town Defendants' motion to dismiss for lack of jurisdiction and failure to state a claim.

First, the court found that only Plaintiff McHugh has standing as he is the only plaintiff directly impacted by the swapping of Districts 4 and 5 numbering. McHugh, who was previously a resident of District 5 and is now in 4, alleged that he will be in a different district, with a new representative, and will be represented for only two years by his current councilperson instead of the usual four. Essentially, the court explained, because of the town's staggered term system, those who were previously in District 4 and are now in District 5 will not be able to vote for a new representative for six years, while those like McHugh will have an opportunity to vote for a new representative two years earlier than would be the case without this swap. Based on Plaintiffs' allegations of McHugh's injuries and referencing other cases with similarly situated plaintiffs, the court found that McHugh has standing to assert claims under the federal constitution. However, the court held that the remaining plaintiffs do not have standing as they have

not been impacted in any “concrete and particularized way” by the swapping of these two districts.

Next, the court addressed McHugh’s equal protection claim. The court found that plaintiffs were not presenting a vote dilution claim but instead are claiming that McHugh’s representation is unequal because he is no longer represented by the councilperson he voted for in his former district’s most recent election, and now has a councilperson with a shorter remaining term than he had before. The court held that this claim is analogous to other federal cases involving the impact of redistricting on staggered terms. In these cases, courts apply rational basis scrutiny. The court found that there are rational governmental interests furthered by this swap, including following public comment or creating a new district providing Asian American voters with the opportunity to elect a preferred candidate. Therefore, the court held that McHugh has failed to state a claim under the Equal Protection Clause as the swapping of Districts 4 and 5 survives rational basis review.

Next, the court examined McHugh’s due process claim. Plaintiffs assert that McHugh’s substantive due process right to vote was violated by the swapping of these districts. The court held that the complaint does not establish an impairment of McHugh’s substantive due process right to vote because plaintiffs have not plausibly alleged that the town engaged in “willful conduct [to] undermine the organic processes by which candidates are elected.” Furthermore, the court explained that redistricting always results in some individuals having the representative they voted for in the last election essentially taken away as they are moved to a new district. The court held that while the Town did impact McHugh by swapping the districts, Plaintiffs’ allegations do not plausibly demonstrate that this was “intentional state conduct directed at impairing [his] right to vote.”

Regarding the state claims under Municipal Home Rule Law, Sections 10 and 23, and the state constitution, the court declined to exercise supplemental jurisdiction and dismissed these claims as well.

Orleans County: *Lewis et al v. Orleans County Legislature et al*

On June 12, in Orleans County State Supreme Court, County Respondents filed a reply affidavit from mapping expert David Schaefer. First, Schaefer asserts that petitioners’ reliance on summary data and population estimates rather than official census data is improper. Next, Schaefer argues that petitioners’ claim that a majority-minority district can be created in the county is incorrect due to demographic composition. Furthermore, Schaefer contends that the evidence provided by petitioners regarding political cohesion among minority groups and white voters voting as a bloc to defeat minority-preferred candidates is insufficient.

On the same day, the County filed a reply affirmation of attorney for County Respondents, Michael McClaren, arguing that the amended petition should be dismissed in its entirety. McClaren argues that petitioners have ignored well settled law

that is contrary to their position and have offered no evidence to support their claims. He contends that the census data clearly shows that it is not possible to create a majority-minority district and petitioners' VRA claim is frivolous. Furthermore, McClaren maintains that petitioners' constitutional challenge to the structure of the legislature is also frivolous as the amended petition disregards pertinent caselaw from the U.S. Supreme Court and NY Court of Appeals.

Lastly, also on July 12, the County submitted a reply memorandum further expounding on the above arguments that the county has not engaged in vote dilution; its legislative structure is constitutional; and Petitioners have not provided any evidence or legal authority to the contrary.