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## August 7 Roundtable Update

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## **NEW YORK CENSUS & REDISTRICTING ROUNDTABLE UPDATE**

### **LITIGATION**

#### **Congressional: *Hoffmann v. Independent Redistricting Commission***

#### **Petitioners' Calendar Preference Request & Intervenors' Opposition**

On July 31, Petitioners (Democratic voters) submitted a letter to the Court of Appeals requesting the following calendar preference and an expedited briefing schedule:

- Opening briefs and amicus briefs supporting reversal due Tuesday, August 15;
- Response briefs and amicus briefs supporting affirmance due Tuesday, August 29; and
- Reply briefs due Tuesday, September 5.

They also requested that the Court sets this case for argument during the week of September 12, 2023, or as soon as possible thereafter.

To support this request, Petitioners assert that “the case presents constitutional questions of the highest importance,” including whether voters will continue to vote in districts “drawn by an out-of-state-special master,” or whether they will vote in districts created by the IRC and/or Legislature pursuant to the constitutional process. Petitioners argue that this expedited schedule is necessary to ensure the latter result before the 2024 primary. Additionally, Petitioners contend that the appeal includes questions of law that the parties have already extensively briefed to the Appellate Division, therefore, no party will be prejudiced by the expedited schedule.

The Petitioners also indicated that Democratic Commissioner Respondents support their request, and the Republican Commissioner Respondents have not taken a position on the request.

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The Republican Intervenors (from the original *Harkenrider* case) opposed this request in a letter to the Court filed the same day. In their letter, Intervenors argue that “Petitioners’ request is disrespectful” to the Court and the other parties because the timing issues are of their own making as they created delays throughout the litigation. Intervenors

argue that Petitioners delayed in (1) filing the lawsuit; (2) filing their notice of appeal after the Albany County State Supreme Court dismissed the Petition; and (3) filing their opening brief in the appeal.

Additionally, the Republican intervenors argue that the requested schedule is infeasible given their counsel's numerous deadlines, oral arguments, and other ongoing professional and personal obligations already scheduled.

They contend that they expect their briefing to be substantially different from their Appellate Division arguments given the Appellate Division majority's "multiple errors of law" that they will need to address along with "*stare decisis* considerations" that they argue support the Court of Appeals adhering to *Harkenrider*.

### **Broome County: *Tokos v. County of Broome* Challenge Before Appellate Division**

On July 21, in the Appellate Division, Third Department, the plaintiffs filed a brief asserting that the trial court correctly interpreted the new redistricting criteria included in the 2021 Municipal Home Rule Law (MHRL). They ask the court to modify the lower court's decision by ordering the appointment of a special master to draw a legally compliant map in time for the 2024 election and:

1. Argue, contrary to the County's position, that their claims are not "time barred" because Election Law §16-102 is not applicable as plaintiffs are not challenging any candidate nominations or designations.
2. Contend that the issue of standing is not properly before the court because the county did not raise this issue in the lower court and is raising it for the first time on appeal. However, plaintiffs maintain that if the court does consider the issue of standing, their injuries are "within the zone of interests" protected by the Municipal Home Rule Law.
3. Argue that the plain language of the MHRL requires every local government, including charter counties, to use prisoner reallocation "adjusted" data. Furthermore, plaintiffs argue that the county used the wrong data set and created a map that exceeds the "outer limit" 5% deviation set by the MHRL §34(4)(a). They also contend that the county created districts that are not "as nearly equal in population as is practicable" also in violation of the MHRL as the county had before it at least three maps that demonstrated that greater equality is practicable.

Plaintiffs also dispute the County's argument that achieving "competitive balance" justifies the "excessive population disparity" and division of the Town of Maine. Plaintiffs argue that (1) "competitive balance" is not the overriding objective of the changes to the MHRL; (2) the MHRL does not require districts to be competitive, instead the law prohibits the drawing of districts with the intent of discouraging competition; and (3) the County's argument is not supported by expert testimony.

Additionally, plaintiffs maintain that the county's improper comparisons to other maps regarding the treatment of the Town of Barker, communities of interest, and cores of existing districts do not justify violations of the MHRL §34(4). Plaintiffs assert that justifying violations of objective standards (equality of population and small-town integrity) set by the MHRL with "ambiguous 'considerations'" defeats the purpose of the changes to the law.

Finally, plaintiffs argue that the county's "unsupported" attack on plaintiff expert Professor Krasno's expert opinion, with no expert opinion of their own or any factual objections, should be disregarded.

## **Monroe County: *MacDonald v. County of Monroe*: County Legislative Challenge**

On June 28, in Monroe County State Supreme Court, the County Defendants submitted a memo in support of their motion to dismiss the amended complaint. The County argues that the recently decided Rockland County case, *Parietti v. Day*, is dispositive as the plaintiff in that case sought to have the county legislative map thrown out for the same violations of the MHRL §34(4) alleged here, including favoring incumbents, violating compactness requirements, and diluting the votes of minority voters. In *Parietti*, the trial court dismissed the complaint, finding that the plaintiff lacked standing under Article III of the state constitution and that the plaintiff failed to sufficiently plead any violation of the MHRL. The Appellate Division, Second Department affirmed the dismissal based on lack of standing.

The county argues:

1. that MacDonald lacks standing to bring any of his causes of action as he has failed to allege any "harmful effect" to himself. The County disputes MacDonald's theory of standing under Article III of the state constitution by asserting that, as the Second Department affirmed in *Parietti*, Article III does not apply to County-level redistricting. Next, the County refutes MacDonald's other theory of standing based on "associational standing" derived from being a registered member of the Democratic Party and a member of the Monroe County Democratic Committee. In addition to the County's argument that MacDonald has failed to meet the pleading requirements of associational standing, the County contends that associational standing only applies to organizations that bring claims on behalf of themselves or their members, and there is no organizational plaintiff in this case.

2. the complaint should be dismissed under the Doctrine of Laches based on the County's view that MacDonald has caused inexplicable and unreasonable delay resulting in prejudice and burdens on the County and the electoral process.

3. that MacDonald has failed to provide sufficient facts in his complaint to survive a motion to dismiss for his claims of political gerrymandering, racial gerrymandering, and compactness.

4. that MacDonald's newly added fourth cause of action (that the map violates his fundamental rights of association and free speech under the First Amendment and the state constitution) fails on its face as he has provided only "legal conclusions with no factual support, whatsoever."

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On July 19, MacDonald responded with his own memo addressing standing, laches, and sufficiency of allegations in his complaint.

1. for standing, MacDonald disagrees with the Second Department's decision in *Parietti* and argues that he has standing to challenge the map because he is a Monroe County voter. MacDonald asserts that MHRL §34(4) is the "county analogue" to Article III, §4 of the state constitution. And because Article III, §5 grants standing to "any citizen" to challenge the state assembly map for violating Art. III, §4, but was interpreted by the Court of Appeals to apply to challenges to state senate and congressional maps as well, "the fact that Article III, §5 does not specifically reference challenges to county redistricting maps should not deter this Court from conferring standing consistent with the state version of the law, *i.e.*, that 'any citizen' of Monroe County has standing to challenge a legislative map as being in violation of [MHRL §34(4)]." Furthermore, MacDonald argues that requiring district-based, individualized injury would make the law unenforceable as no constituent would have standing to challenge the countywide map.

2. citing the 2018 U.S. Supreme Court case, *Gill v. Whitford*, MacDonald argues that he meets the federal requirements for standing in vote dilution cases as he resides in a "packed" district that would be more competitive if drawn using non-partisan criteria. MacDonald also asserts, citing the dissent in 2019 U.S. Supreme Court case *Rucho v. Common Cause*, that the Supreme Court "has recognized that partisan gerrymandering of the type alleged by MacDonald is a cognizable cause of action under the First Amendment's protection of an individual's right of association."

3. for the County's laches argument, MacDonald maintains that the doctrine is not applicable because his complaint alleges a continuing wrong and there is no prejudice to the County as the 2023 elections will continue to proceed under the current map and the County will have enough time to enact a new map before the next election cycle.

4. MacDonald argues that he has sufficiently alleged facts to support each of his causes of action. MacDonald contends that the County criticizes the complaint based mostly on its disagreement with the allegations, which is not the issue in a motion to dismiss.

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On July 25, the County Defendants submitted a reply memo in further support of their motion to dismiss.

1. The County reasserts its position that MacDonald lacks standing as to each of his causes of action. The County argues that MacDonald lacks standing as to his MHRL causes of action as *Parietti* is binding precedent on this court.

2. For his fourth cause of action, the County asserts that MacDonald's standing arguments "rest on gross mischaracterizations" of U.S. Supreme Court decisions as he relies on concurring and dissenting opinions in these cases. Furthermore, the County argues that a First Amendment freedom of association partisan gerrymandering claim was rejected in *Rucho* where the Court held that partisan gerrymandering claims were non-justiciable.

3. Regarding laches, the county asserts that MacDonald mischaracterized his complaint by stating that the case no longer concerns the 2023 election as his prayer for relief asks the court to direct the County to adopt a new map to be used in the 2023 election.

4. The County reasserts that each of MacDonald's causes of action must be dismissed as he has failed to sufficiently plead a cognizable claim for relief.

## **CENSUS**

**New Yorkers Are Leaving (And Moving To) New York. Where'd They Go? The Albany Times Union has created an interactive webpage where you can look to see where New Yorkers are moving to and from by county. According to the paper, "the most stark losses were in New York City with 238,000 more residents leaving than entering in the five counties. Nationally, Kings County had the third highest negative net migration. New York and California counties made up eight out of the top 10 largest net losses."**

You can see the data here: <https://www.timesunion.com/projects/2023/new-york-migration/>

Did You Know?

**According to an August 6<sup>th</sup> New York Times editorial, "The five boroughs have lost nearly half a million people since April 2020, according to an analysis of U.S. census data for The Times by the Citizens Budget Commission, a nonprofit government watchdog.**