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August 28 Roundtable Update

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NEW YORK CENSUS & REDISTRICTING ROUNDTABLE UPDATE

This week's Update is dedicated to Pat Swann of the New York Community Trust in recognition of her encouragement, guidance, and support of the N.Y. Census & Redistricting Institute. Thank you!

LITIGATION

Congressional: *Hoffmann et al v. Independent Redistricting Commission*

What You Need To Know: This case is on appeal before the Court of Appeals, New York's highest court.

The Parties:

Democrats

- **Petitioners**
 - Anthony S. Hoffmann and others are a group of Democratic voters who filed this challenge last year seeking to compel the IRC to submit to the legislature a second congressional map.
- **Jenkins Respondents**
 - IRC Chairperson Ken Jenkins along with IRC Commissioners Ivelisse Cuevas-Molina and Elaine Frazier are Democratic-appointed commissioners who support the Petitioners' position.

Republicans

- **Brady Respondents**
 - IRC Commissioners Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens are Republican-appointed commissioners who appealed the Appellate Division's order
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- **Harkenrider Intervenors**
 - Tim Harkenrider et al are Republican voters who filed the original *Harkenrider v. Hochul* case last year resulting in the appointment of a special master who redrew the state senate and congressional district maps. They are intervenors, meaning they are not original parties to the

case but have joined as they have an interest in the outcome. They support the Brady Respondents' position.

Recent Action: To Stay or Not to Stay?

A stay pending appeal is a way of putting on hold or suspending the enforcement of a judgment until the appellate court has decided whether to affirm or reject the lower court's order.

To recap, the Brady Respondents have taken the position that an automatic stay went into effect right after the Appellate Division order was released. Last week, the Democratic voters (Petitioners) asked the Court of Appeals to remove the automatic stay [if one exists], which would put on hold the IRC moving forward with complying with the Appellate Division's order to go back to work and draw another map or set of maps to submit to the legislature. The Democratic parties want to see the IRC begin work to comply with the order immediately as the appeal proceeds. As an alternative, they asked the Court to clarify that the stay is limited and permits the IRC to meet, discuss the upcoming process, draft maps, and take any other steps necessary to promptly comply with the Appellate Division's order if the Court agrees with the Appellate Division and affirms the decision.

Following this request, on August 21st, the Democratic Commissioners filed a memo supporting the Petitioners' motion, and the GOP Commissioners and the *Harkenrider* Intervenors filed their own memos opposing the motion.

The Details: Here is a summary of the main arguments for/against a stay pending appeal.

Democratic Commissioners' memo supporting the Petitioners' motion to vacate stay.

The Jenkins Respondents echoed the requests made by the Petitioners and argued that the IRC should move forward expeditiously with preparing a second set of congressional lines. They argued that if the IRC waits until November 2023 or later to begin meeting and preparing new lines, "the timeline to implement a 'robust, fair and equitable procedure' sufficiently in advance of the candidate petitioning period beginning in February 2024 will be extremely abbreviated." They noted that the IRC remains fully constituted with all ten commissioners and a full staff available to begin the process.

Alternatively, if the Court decides that a stay should remain in place during the appeal, the Jenkins Respondents asked the Court to clarify that the IRC may begin taking action to prepare for the submission while the appeal is pending. They asked the Court to determine that the stay only prohibits the enforcement of the Appellate Division's order, and that it does not prohibit the IRC from acting in any capacity at all.

GOP Commissioners' memo opposing the Petitioners' motion to vacate stay.

The Brady Respondents argued that:

1. An automatic stay is in place pursuant to CPLR §5519(a)(1) which states that “[s]ervice upon the adverse party of a notice of appeal ... stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where... the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state.” They argued, contrary to the Petitioners’ contention that the IRC does not consist of “officers,” that this provision does apply to the IRC commissioners as “the officers of the commission are also its members” under the definition of “state officer” included in New York Public Officer’s Law § 2.
2. There is no basis to vacate the stay as:
 - a. Petitioners do not establish a likelihood of success on the merits because the decision below is based on the conclusion that *Harkenrider* was only a temporary placeholder remedy that expired upon completion of the 2022 elections which the Brady Respondents believe is “without basis and cannot stand.”
 - b. Petitioners do not establish irreparable harm as “the existing congressional maps are the product of a constitutional process endorsed and approved by this Court.”
 - c. The equities do not balance in the Petitioners’ favor. The Brady Respondents asserted that the Petitioners were merely paying “lip service to the IRC process so as to inevitably return largely unfettered redistricting powers to the Legislature.” They also argued that the Petitioners have engaged in excessive delays.
 - d. The proceeding is time barred as it was commenced on June 28, 2022, over a month after the expiration of the statute of limitations and should have been dismissed for that reason as well.
3. The alternate relief sought by Petitioners is tantamount to the primary relief and should be denied. The Brady Respondents asserted that allowing “preliminary steps” including drafting amended maps is essentially the same as the IRC complying with the order.

***Harkenrider* Intervenors' memo opposing the Petitioners' motion and alternatively cross-moving for a stay pending the appeal.**

The Republican Intervenors echoed the GOP Commissioners’ argument that given the Petitioners’ inexplicable delays in filing and litigating this case, the Court should not entertain their motion. They also reiterated the argument that CPLR §5519(a)(1) plainly does apply, making the stay automatic upon appeal. They also argued, similar to the GOP Commissioners, that the Petitioners have not met their burden for vacating the stay as Petitioners have no likelihood of success on the merits. They argued that the proceeding is untimely and that the requested relief violates the state constitution’s prohibition against mid-decade redistricting found in Section 4(e). Additionally, they

argued that the relief requested is unconstitutional as *Harkenrider* held that the deadlines for the IRC to submit a second set of maps have long since passed.

Last, if the Court holds that there is no stay currently in place, which they believe is “extraordinarily unlikely,” the Intervenor asks the Court to stay the Appellate Division’s decision. They argue that they are likely to succeed on the merits of the appeal because the action was untimely, the relief requested violates the state constitution, and because that relief is now unavailable as the constitutionally mandated deadlines have long passed. They also argued that the equities strongly favor a stay as Petitioners were “entirely at fault for this case not completing yet” and if the IRC must begin an “unconstitutional mid-decade redistricting, that will undermine Intervenor’s and the public’s interest in stability and cause needless voter and candidate confusion.”

Monroe County Legislature: *MacDonald v. County of Monroe* Challenge Dismissed

On August 17th, State Supreme Court Judge Daniel J. Doyle released a decision dismissing Kenneth MacDonald’s challenge to Monroe County’s legislative districts. MacDonald sought to invalidate the district map that was adopted earlier this year, alleging the map (1) contained districts favoring incumbents, (2) denied the voting rights of Black voters, and (3) contained districts that were not as compact as practicable, in violation of the state’s Municipal Home Rule Law §34(4). For his fourth cause of action, MacDonald alleged that his state and federal constitutional rights to freedom of association and speech were violated.

The County asked the court to dismiss the case, arguing that MacDonald lacks standing, the doctrine of laches (delay) necessitates dismissal, and MacDonald failed to state a cause of action. In other words, the County argued that the MacDonald’s challenge should be dismissed because (1) MacDonald does not have a direct enough connection to the claims; (2) he engaged in unreasonable delay; and (3) he did not provide enough facts in his complaint to support his claims.

The August 17th decision explains the court’s reasoning for its dismissal of the case. The court found that:

1. The Doctrine of Laches does not apply. The court held that although the doctrine did apply to prevent the court from granting MacDonald’s request for a temporary restraining order, allowing MacDonald to proceed with pursuing his underlying causes of action would not result in any prejudice to the County or its voters. Therefore, the court did not agree with the County’s argument that the case should be dismissed based on this Doctrine.
2. However, the court did agree with the County regarding MacDonald’s lack of standing as to his 1st, 2nd, and 3rd causes of action. The court held that MacDonald does not have standing to support these claims under either the federal standard for standing in gerrymandering cases, or under a challenge to

MHRL §34(4). The court explained that MacDonald lacks standing because he did not specify that his own district was racially or politically gerrymandered or non-compact. Additionally, the court agreed with the County regarding MacDonald's other standing argument, holding that Article III, Section 5 of NY's constitution does not provide standing in this case because that provision applies only to State legislative maps, not county districts. The court also agreed with the County regarding MacDonald's argument for "associational standing." The court found that associational standing provides standing to an organization or association on behalf of its members, and MacDonald is not an organization or association. Therefore, the court granted the County's motion to dismiss these causes of action.

3. The court also held that MacDonald failed to state a claim as to his fourth cause of action (violation of his constitutional rights to freedom of speech and association). The court found that MacDonald failed to allege *how* his freedom of speech and association have been violated as he provided no facts that he or the Monroe County Democratic Party suffered any harms to their association or free speech rights. Therefore, the court granted the County's motion to dismiss this last cause of action.

OPINION

Is The End Finally Near For New York's Congressional Redistricting?

Jeff Wice and Piper Benedict look at what's going on in the almost never-ending congressional redistricting case in *City & State New York* here: <https://bit.ly/3qMbZb1>

"The redistricting process created by the 2014 state constitutional amendment brought us to today's situation. The amendment's poorly developed and incomplete language should compel legislators and the public to look for a better method after 2030. There is still time to amend the constitution again, hopefully with a more workable and independent process that can be the model of reform that the 2014 amendment failed to accomplish."