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Redistricting Roundtable Updates

NY Census and Redistricting Institute

9-26-2023

September 26 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

NEW YORK LITIGATION

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

Court of Appeals decides stay (or hold) on Appellate Division ruling

In a technical win for Republicans and procedural win for the Democrats, the Court of Appeals announced that there is an automatic stay of the Appellate Division order that directed the IRC to "commence its duties forthwith" (i.e., to send a second map submission to the legislature) but clarified that the IRC is not prohibited from taking "any actions." The court's order "stayed" or paused the IRC from taking official action, "but the stay does not prohibit the IRC or Independent Redistricting Commissioner its members from taking any actions."

Brief for Respondents-Appellants (GOP IRC Commissioners)

On September 18, the GOP Commissioners filed a brief with five central arguments:

1. **The congressional map that was ordered as the remedy in *Harkenrider* is not interim.**
   They argue that the Court in *Harkenrider* was not "silent" on the issue of duration [how long the remedial congressional map would be in place], but that the Court did not need to articulate the duration of the remedy. The congressional plan emerged from the constitution's §4 process and whether it is a legislative plan or a judicial plan, it is a "plan," meaning it is in place until the next decennial census. They argue that the constitution does not include or contemplate any interim remedy for invalid redistricting plans, and if the Court meant the plan to be interim, it would have said so, and it would have included next steps if required.

2. **The plain meaning of Article III, Section 4(e) of the state constitution does *not* support a finding that "a §4(e) judicial remedy has an effective duration for however long that remedy could be deemed to be necessary or required."**

The GOP commissioners contend that the Petitioners' argument, which focuses on an interpretation of the word "required" in §4(e), has no basis in the constitution's plain language. Additionally, they argue that this interpretation contradicts the plain meaning of the §4(e), which provides that a plan shall remain in effect for the balance of the decade.

3. **Stare decisis supports a holding that adheres to *Harkenrider*.**
   Stare decisis refers to the principle that courts are expected to follow and uphold previous court decisions (precedents) when deciding similar issues. The GOP commissioners assert that adherence to the *Harkenrider* decision is important here because it was just decided last year, reflects a matter that the Court gave thorough consideration, and the remedial phase of the decision was never appealed.

4. **The proceeding is time barred.**
   The GOP commissioners argue that the proceeding should have been dismissed as untimely as a technical and substantive matter. They argue that the proceeding was commenced more than five months after the IRC announced that it would not be submitting a second plan to the legislature, and under NY law for Article 78 mandamus proceedings, the date of the announcement started the running of the four-month statute of limitations period. Furthermore, they contend that:

   - "the Petitioners' delay was a deliberate, wet thumb in the air test of which way the winds were blowing. Petitioners wanted and would have been content if the Legislature's gerrymandered map remained in place, monitored the litigation pertaining to Assembly districts, and appeared even to have entertained the possibility of being rescued by the now-quashed hail mary "independent legislature theory" that was making its way to the Supreme Court in *Moore v. Harper*."

5. **The relief sought is barred by the constitution.**
   The GOP commissioners argue that the act that the Petitioners sought to compel (the IRC reconvening to submit a second map) is precluded by the constitution as its provisions establish deadlines for the performance of this act that have long passed.

Brief for *Harkenrider* Intervenors

On September 18, the *Harkenrider* Intervenors filed a brief with four central arguments:

1. **Petitioners' lawsuit is untimely.**
   Similar to the GOP commissioners' argument, the Intervenors contend that the petition is time-barred because the Petitioners filed it over four months after the IRC announced that it would not send a second plan to the legislature or the following day when the IRC's 15-day window to submit a second-round map expired.

   Alternatively, the Intervenors argue that equitable timeliness principles bar the petition because permitting litigants to file lawsuits months after the expiration of the constitutional deadlines would allow them to await the conclusion of a remedial judicial map-drawing process to see whether they prefer the judicially created maps, which is what happened here.

2. **Petitioners' request violates Article III, Section 4(e)'s prohibition on mid-decade redistricting.**
   The Intervenors assert that the requested relief would violate §4(e) as mid-decade modifications to maps are only permitted when there is a legal infirmity, and the Petitioners do not point to any legal infirmity with the map drawn by the special master.

   Additionally, they argue that the requested relief falls beyond the judicially ordered "modifi[cation]" that §4(e) allows as the term "modify" does not include the judiciary ordering the IRC to send a second-round submission to the legislature, so that the legislature can adopt a replacement map.

   The Intervenors also assert that allowing the Petitioners' interpretation of §4(e) would create constant redistricting and cause voter confusion and opportunities for mid-decade gerrymandering that the voters outlawed with the adoption of §4(e).

3. **Petitioners' requested relief is unconstitutional because, according to the *Harkenrider* decision, only a court can adopt a map to remedy a violation of the IRC/Legislature process after "the deadline in the constitution for the IRC to submit a second set of maps has…passed."**
   The Intervenors argue that the "binding holding in *Harkenrider* ends this lawsuit." They cite the *Harkenrider* decision, which states that "the procedural unconstitutionality of the congressional and senate maps is,

at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed."

4. **If this court concludes that the requested relief seeks a constitutionally permissible "modifi[cation]" of the *Harkenrider* map under Section 4(e), then this lawsuit was filed in the wrong court.**
   The Intervenors contend that if the Court concludes that the requested relief is a permissible "modification" under §4(e) of the *Harkenrider* remedial map, the Court of Appeals should reverse the Appellate Division's order under the *collateral attack doctrine* because this would be a request to modify the decision that adopted that map. Therefore, this modification would be a collateral attack and under the collateral attack doctrine, parties seeking to modify a ruling must file in the same court in which the ruling was rendered (Steuben County).

Nassau County Legislature: *Coads et al v. Nassau County et al*

Plaintiffs' Response in Opposition to the Defendants' Motion to Dismiss

Main issue: Is the *Doctrine of Laches* grounds for dismissal?

On September 20, in Nassau County State Supreme Court, the group of Democratic voters (the plaintiffs) who brought this challenge to the county's 2023 redistricting map filed a memo explaining why they disagree with the County's argument that the case should be dismissed.

To recap, on August 31, the County filed a motion to dismiss the case based on the *doctrine of laches*. Laches refers to the principle that if plaintiffs wait too long to assert their rights (file a case), they may forfeit their ability to do so, especially if their delay causes prejudice to others.

The county argued that the plaintiffs took nearly five months to file this challenge, seeking relief that would compel the Legislature to engage in mid-decade redistricting in consecutive election cycles. They argued that the delay was inexplicable and if the plaintiffs were to succeed in this case, it would severely prejudice the county and the public by confusing voters and candidates and requiring significant expenditures.

In their September 20 memo, the Plaintiffs argue that the case should not be dismissed because:

(1) The doctrine of laches does not apply to continuing violations like unlawful redistricting maps.
The plaintiffs contend that New York courts recognize that the laches doctrine does not apply to continuing violations, and gerrymandering claims, like the one here, generally involve continuing violations. In other words, instead of past harms that can be barred by laches, continuing violations, such as invalid redistristricting maps, create recurring harms to voters each election that "reset the clock" each time they occur. "A gerrymander debases their votes again and again and again."

(2) Even if the doctrine did apply, the county could not establish all the elements.
The plaintiffs assert that the county failed to establish all of the elements of laches, including that the county was unaware that a claim would be filed. The Plaintiffs argue that the county was aware of the litigation all along as several legislators warned of impending lawsuits if they moved forward with the allegedly unlawful map.

Additionally, the plaintiffs argue that the county cannot show that the timing of the suit was unreasonable under the circumstances. They point to a concurrent lawsuit in Nassau County, *League of Women Voters v. Nassau County Legislature*, where the League is seeking disclosure of the expert analysis that the legislature used to justify the map. The plaintiffs contend that the county cannot establish that the timing of the suit was unreasonable because the county's failure to disclose the analysis has contributed to the delay in filing this case as much as anything.

The plaintiffs also argue that the County cannot establish prejudice due to the delay because there is no evidence of voter confusion, disenfranchisement, or that "any candidate for election in 2023 has spent money on an election with the expectation that the same lines would be in place until at least 2031." They also contend that voter confusion is not enough to defeat a voting rights case and any expense that the county would incur due to mid-decade redistricting would result from the County's own unlawful conduct, which does not count as prejudice for the purposes of laches.

N.Y. Early Voting Law Challenged: *Stefanik v. Hochul*

On September 20, a group of Republican plaintiffs including organizations and elected officials filed suit in Albany County State Supreme Court seeking a declaration that the New York Early Mail Voter Act is unconstitutional and seeking to block the implementation of the law. This law is one of several election laws signed by Governor Hochul on September 20 at New York Law School.

The plaintiffs argue that the law is in violation of the state's constitution because the constitution requires voters to vote in person unless one of two exceptions apply:
(a) the voter is absent from their county of residence (or the City of New York if they reside in New York City) or
(b) they are unable to appear at the polling station due to illness or physical disability.

They further argue that the law subverts the will of the people because a proposed amendment to the state's constitution that would have expanded absentee voting to everyone, regardless of whether they fell within one of the two exceptions, was put to the voters in 2021 and did not pass, with 55% of voters voting against it. Finally, the plaintiffs argue that no distinction should be made between absentee voting and mail voting, arguing that they are functionally the same, and since they are functionally the same, the same restrictions imposed on absentee voting by the state's constitution should also be imposed on mail voting.

NEW YORK LEGISLATION

New York: Governor Hochul Signs a Package of 10 Voting Rights Laws

On September 20, Governor Hochul signed a package of voting rights laws that aims to expand voting rights and promote democracy in New York. These laws:

1. allow voters to vote by mail during the early voting period;

2. implement one extra day to register to vote on the first day of the early voting period, known as Golden Day;

3. require schools to adopt policies to promote student voter registration and pre-registration before students turn 18;

4. mandates correctional facilities to inform people convicted of felonies that their voting rights are restored upon release, provide such people with a form of application for voter registration and a declination form, offer such people assistance in filling out the appropriate form, and provide such people with information on the importance and mechanics of voting;

5. cracks down on faithless electors by requiring electors to vote for the candidate nominated by their party in presidential elections;

6. amends curing standards so that voters do not have to fix their ballots if the envelopes are sealed with tape, paster, or any other binding agent and have no indication of tampering;

7. changes the legal venue for where constitutional challenges to election laws can be brought;

8. require the state board of elections to develop and provide training materials to be given to each county to set up a training program for poll workers;

9. establishes a 48-hour deadline to change early voting polling stations unless there is a disaster or a declared state of emergency; and

10. scheduled the state's presidential primary for April 2, 2024.

REDISTRICTING AROUND THE NATION

Wisconsin: GOP Reform Effort Rejected by Governor

Wisconsin Governor Tony Evers shot down a Republican plan that would have implemented an "Iowa-style nonpartisan redistricting" model in the state. Under the proposed plan, maps would be drawn by nonpartisan staff, and once completed the state legislature would vote on the map. If passed by the legislature, the map would then go to the governor for approval. The bill also states that the maps drawn could not favor a political party, incumbents, or any other person or group. Two lawsuits that seek to toss the state's current maps are being considered by the state's judiciary. Republicans could have bypassed these lawsuits through the passage of this bill.

Wisconsin Republicans have threatened to impeach Wisconsin Supreme Court Justice Janet Protasiewicz unless she recuses herself from all cases that involve redistricting. Republicans cite concerns about her campaign and its funding, as she called the current maps "unfair" and "rigged" while campaigning and accepted nearly $10 million in campaign donations from the Wisconsin Democratic Party. Her election to the state's highest court this year flipped the court to a 4-3 liberal majority, which could be bad news for state Republicans who are fighting Democratic efforts for fairer legislative maps and redistricting reform.

Alabama: *Allen v. Milligan*- Remedial Congressional Map Delays Sought

On September 19, the attorneys representing the plaintiffs in *Allen v. Milligan* filed a response to the U.S. Supreme Court asking the Court to deny

Alabama's emergency request for a stay. Earlier this month, a panel of three federal judges refused to pause a decision that blocked Alabama from implementing its new congressional map. The same three-judge panel had blocked the implementation of the map because it lacked a second majority-Black district.

This failure to include a second majority-Black district was in defiance of a court order from the U.S. Supreme Court that required a second majority-Black district to be added to the map.

Alabama asked the district court to pause its decision while it once again appeals to the U.S. Supreme Court, arguing that the appeal is likely to succeed on the merits. The court rejected this argument and stated that it was "deeply troubled that the State enacted a map that the Secretary readily admits does not provide the remedy we said federal law requires" and that "under these circumstances, we cannot understand why it would be a reasonable exercise of our discretion to order a stay pending the Secretary's second appeal."Following the decision by the district court to refuse to pause the decision, Alabama asked the U.S. Supreme Court for a stay on the district court's ruling while its appeal is ongoing. The plaintiffs in the suit stressed in their response to the U.S. Supreme Court that Alabama defied both the district court and the Supreme Court's previous rulings by failing to implement a second majority-Black district.

The Special Master presented several maps to the court on September 25.

Missouri: *Faatz v. Ashcroft*-State Senate Map Upheld

Missouri Circuit Court Judge Jon E. Beetem upheld the constitutionality of the state's senate districts on September 12. The case provided the first legal test of the revised redistricting criteria recently approved by Missouri voters. The court rejected the plaintiffs' argument that the senate map violated the state's constitution by failing to preserve communities, which the plaintiffs allege occurred when one municipality and one county were divided into multiple senate districts. Judge Beetem stated that "the evidence clearly shows that to the extent any political subdivision lines were crossed, the Judicial Commission chose districts that were more compact." The plaintiffs are planning to appeal the court's decision.