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October 23 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

N.Y. VOTING RIGHTS

New York Attorney General Certifies Preclearance Process Under State Voting Rights Act

In a letter to Governor Kathy Hochul and state legislative leaders, Attorney General Letitia James indicated that the new "preclearance" process will take effect on September 22, 2024. As part of the state's new John R. Lewis Voting Rights Act, some local governments will be required to submit certain types of election-related changes to her office for approval prior to enactment or implementation. The law required the Attorney General to provide one-year advance notification as to when the new "preclearance" process is to go into effect.

The Attorney General's office is also developing a list of localities most likely to be subject to the "preclearance" process. This includes localities with histories of racial discrimination. A copy of the Attorney General's letter is attached.

REDISTRICTING

New York Scores a "D" For Redistricting Process

New York's new redistricting process received a "D" grade from several reform groups who scored each state's post-2020 redistrictings. The 50-state report was organized by CHARGE, a coalition of state and local organizations seeking more public participation in the redistricting process.

Several factors led to New York's nearly failing grade: a lack of public access options, a perceived lack of interest in public input by the Independent Redistricting Commission (IRC),and a poorly executed IRC process. The report also highlights lessons learned: community-based organizations led to several victories (new state legislative districts helped elect Asian American candidates), translation services need to be accessible, accessible data and analysis are important for education, and comprehensive and extended funding beyond a redistricting year is critical for community-based organizations.

New York's report can be read here: https://www.commoncause.org/resource/charge-new-york/

LITIGATION

Congressional Case: *Hoffmann v. Independent Redistricting Commission*

Mark Favors, Theodore Harris and Mark Weisman Amicus Brief in Support of Petitioners-Respondents

On October 12, New York voters Mark Favors, Theodore Harris, and Mark Weisman ("amici") filed an amicus brief in support of the petitioners (Democratic voters). They argue that the Court of Appeals should affirm the Appellate Division, Third Department's decision because, in their view, the outcome of *Harkenrider* (special master-drawn districts) was an emergency judicial remedy and not intended to be "a decade-long chokehold on the IRC-based redistricting process," and returning the process to the IRC is "required by the plain language of the 2014 Amendments." To support this position, they assert the following:

(1) The Third Department correctly concluded that *Harkenrider* does not deprive New Yorkers of their right to IRC-based redistricting for the rest of the decade.
In addition to noting the *Harkenrider* majority opinion's repeated acknowledgment of the intent of the constitutional IRC process, the amici also point to several statements in the decision that they argue support their interpretation that the court did not intent to displace the IRC process for the whole decade. For example, that the remedy would need to be "swift," "expeditious," "with all due haste," and that only with "judicial supervision and the support of…a special master" would there be "sufficient time." Notably, the amici point to the court's conclusion that a judicial remedy was "required" to ensure "the expeditious creation of constitutionally conforming maps *for use in the 2022 election*." They maintain that the limiting language—"for use in the 2022 election"—is consistent with an emergency remedy that is limited to the 2022 election only.

(2) The 2014 amendments require this court to limit the prior judicial remedy and return the redistricting process to the IRC and the legislature.
The amici argue that because the 2022 election emergency is over, there is no basis under the state constitution to deny the people's right to an IRC-based process. They assert that the plain language of §4(e) requires the adoption of the narrowest judicial remedy necessary to correct a specific violation, and the legislature's authority to correct the violation must not be unnecessarily restricted. Because no curtailment of the IRC-based process is "required" beyond the 2022 election, §4(e) does not allow a more expansive remedy.

(3) The Third Department correctly determined that the petitioners' filing of this mandamus action was timely under CPLR 217(1). (i.e., it was filed within the applicable statute of limitations)
The amici argue that the petitioners could not assert a right to relief until the 2021 redistricting legislation was declared unconstitutional in *Harkenrider*. Because they filed this case less than four months after that date, the action was timely.

(4) Mandamus relief to vindicate the people's right to an IRC-based redistricting plan is also needed to relieve the scourge of hyper-partisanship in New York.
The amici conclude by stating that "[b]y holding the IRC to its duties, this Court will ensure that IRC members must come together to make the process work and produce redistricting maps for legislative approval. It will also call upon the legislature to heed the lesson of *Harkenrider* and enact a final redistricting plan grounded in the IRC-based process and reflective of the broad public participation that process guarantees. With ample time remaining before the 2024 election, this Court should send the IRC back to the drawing board to complete the process as prescribed by the 2014 Amendments."

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

Memo in Support of the State of New York and Governor Kathy Hochul's Motion to Dismiss

On October 16, Governor Kathy Hochul and Attorney General Letitia James filed a memo arguing that their motion to dismiss should be granted because (1) Governor Hochul is entitled to legislative immunity; (2) the complaint fails to state a claim; and (3) the plaintiffs lack standing to challenge the constitutionality of the New York Early Mail Voter Act.

AROUND THE NATION

North Carolina: Lawmakers Propose New Congressional Maps

On October 18, North Carolina Republican lawmakers proposed new maps for the state's congressional districts, which would be enacted for the 2024 election. Their proposal includes two separate proposed maps. These proposals are significant departures from the current districts, which were drawn by the courts and led to an even split of seven Democrats and seven Republicans being elected to the U.S. House of Representatives in 2022. One of the proposed maps would make it easier for Republicans to flip three

of North Carolina's House seats currently held by Democrats, while the other will make it easier for Republicans to flip four Democratic seats. The state House and Senate hope to enact a new congressional district plan by the end of this month. The district plan that is ultimately enacted will likely be the subject of litigation following its enactment.

The congressional map that is currently in place was the product of state trial judges declaring that lawmakers had to comply with a February 2022 ruling by the North Carolina Supreme Court that determined that the state constitution outlawed extensive partisan gerrymandering. The North Carolina Supreme Court has since flipped to a Republican majority. It overruled its February 2022 ruling in April, determining that the state constitution does not limit partisan gerrymandering. The court is allowing the state legislature another chance to draw and enact a congressional map because of the court's determination that their 2022 decision which found that the state constitution outlawed extensive partisan gerrymandering was wrongly decided.

Louisiana: U.S. Supreme Court Denies Emergency Relief to Petitioners

On October 19, the U.S. Supreme Court denied pro-voting parties' emergency applications that asked the Court to pause and reverse a ruling from the 5thCircuit Court of Appeals that would delay the implementation of fair congressional maps in Louisiana. In late September, two conservative judges on the 5th Circuit issued a writ of mandamus ordering the district court to cancel the hearing that was supposed to cover the issue of drawing and enacting a new congressional map in Louisiana that would comply with the Voting Rights Act. The petitioners who brought the lawsuit asked the Supreme Court to pause the 5th Circuit's mandamus order, arguing that the 5th Circuit's order suffers several major flaws and "reflects a series of egregious mistakes that must be corrected." In addition to asking the Supreme Court to pause the 5th Circuit's order, they also asked the Supreme Court to reverse the order. The Supreme Court declined to do either. As the date of the hearing has already passed, this decision does not change the status quo of the case. As Justice Jackson pointed out, "The District Court will presumably resume the remedial process while the Fifth Circuit considers the State's appeal of the preliminary injunction."

Galveston County, TX: U.S. 5th Circuit Court of Appeals Stays a District Court Ruling that Requires Lawmakers to Submit a New Map that Complies with the Voting Rights Act

The Fifth Circuit Court of Appeals has stayed a district court ruling that ordered Galveston County to file a redistricting plan that complies with

Section 2 of the Voting Rights Act. On October 13, Judge Jeffrey Vincent Brown of the United States District Court for the Southern District of Texas found that Galveston County's 2021 redistricting plan violated Section 2 because the map diluted the African American and Latino vote. The map enacted in 2021 eliminated the only majority African American and Latino district that was in previous maps. The court found that this violated Section 2 because although the African American and Latino populations were not individually large or compact enough to make up their own separate districts, when treated as a coalition the African American and Latino population was sufficiently large and compact to comprise a majority-minority commissioners precinct. In addition, Judge Brown also found that the plaintiffs were able to satisfy the remaining *Gingles* factors that are necessary to succeed in a challenge to a district plan under Section 2.

The district court initially ordered Galveston County to file a redistricting plan that complied with Section 2 by October 20 but later extended this deadline to October 27.

Galveston County appealed the district court's decision to the Fifth Circuit on November 14 and also requested a stay of the district's court decision pending appeal. On October 20, The Fifth Circuit stayed the district court's ruling until November 10 to give the court time to consider the parties' arguments.