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November 13 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

Congressional: *Hoffmann v. Independent Redistricting Commission* (IRC)

Wednesday, November 15 - The Court of Appeals will hear arguments in Buffalo, NY at 1:00 PM at Old County Hall, 92 Franklin Street, Buffalo, New York. The hearing is the final stage before a decision is made whether the Independent Redistricting Commission and state legislature will be directed to develop a new congressional district map for the 2024-2030 election cycles.

For complete background information on the case, see the Institute's litigation tracker here: https://redistrictingonline.org/stateredistrictingalmanac/state-redistricting-info-new-york/

***New Filings*: GOP Reply Briefs filed November 6**

Reply Brief for Respondents-Appellants (Brady Respondents)

In their reply brief, the GOP IRC commissioners argue that (1) the congressional map is not interim; (2) the plain meaning of Article III, Section 4(e) of the state constitution controls; and (3) this proceeding is time barred, as the four-month statute of limitations began to run on the day the IRC declared it would not submit a second set of maps (January 24, 2022).

They assert that the *Harkenrider* decision holds that "a court-ordered map is a constitutional map," and the map created pursuant to that decision "was and is constitutional." Therefore, the GOP commissioners maintain that the current congressional districts, in keeping with §4(e), "shall remain in effect for the balance of this decennial census cycle." Furthermore, they contend that there is no constitutional path for the IRC to do what the petitioners seek to compel, i.e., to submit a second set of lines to the legislature.

The GOP commissioners also stress that, in their view, the courts' role in the 2014 Amendments is crucial as it is "a necessary and final protection in service of the Amendments' purposes," one of which, they argue, is to provide a check on abuses of legislative power, such as establishing aggressively gerrymandered plans. They emphasize that while resorting to a court-ordered plan is not ideal, it is not necessarily a bad thing. They argue that "a legislatively drawn map that disregards and rejects all of the IRC proposals

might also be said to be disfavored as counter to the spirit of the Amendments." And yet, this outcome is also explicitly authorized by the same Amendments.

With respect to the petitioners' argument that it does not matter if the court in *Harkenrider* imposed an interim map or not because §4(e) allows courts to modify current maps, the GOP commissioners contend that the argument is erroneous. They argue that this mandamus action is different from the type of action contemplated by §4(e), which is an action wherein a court may order modifications to an existing plan.

Reply Brief for *Harkenrider* Intervenors

The *Harkenrider* intervenors ask the court to reject the petition and make it clear that the "the same rules of constitutional interpretation and four-month deadlines for filing mandamus petitions apply equally to all litigations." The intervenors set forth four central arguments to support their position:

(1) Petitioners' mandamus petition is untimely, and even the Governor appears to recognize this. The intervenors assert that the Governor appeared to acknowledge that the petitioners missed their deadline to file this action as she asks the court to turn the mandamus action into a different lawsuit in order to transform it into a timely challenge to the congressional map under Article III, §5. However, the intervenors argue that transforming the mandamus action into a challenge to the *Harkenrider* map would violate the ban on collaterally attacking (challenging) a prior court decision without first challenging the court that issued the decision. The intervenors contend that given the time-sensitive redistricting context, the petition is also time-barred under equitable principles (principles of justice and fairness) as the petitioners did not file until "well after" the deadlines established in the constitution for the IRC to complete its duties. They argue that allowing petitioners to challenge the IRC's failure after this much delay could create perverse incentives, such as waiting to review a remedial map to see if it aligns with political interests before deciding whether to pursue a challenge.

(2) Petitioners' request violates Article III, §4(e)'s ban on mid-decade redistricting. The intervenors assert that §4(e) recognizes only one exception to the requirement that maps "be in force" for the rest of the decade, and that is when a court orders that a map be "modified," which the intervenors argue means to "make partial or minor changes to something." They argue, contrary to the petitioners' position, that "modify" does not permit restarting the IRC/Legislature process to adopt a new map.

(3) Petitioners have no clear answer to the Court of Appeals' holding that 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 maintain, contrary to the petitioners' assertion, that *Harkenrider* "made no mention of whether there would be enough time for the IRC to submit second-round maps so that the legislature might adopt a replacement map in time for an August primary…instead, what *Harkenrider* held was that the 'procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure' because the constitutional deadline 'for the IRC to submit a second set of maps has long since passed.'"

(4) If this court decides that the requested relief seeks a constitutionally allowable *modification* of the *Harkenrider* map under §4(e), then, under the collateral-attack doctrine, this action was filed in the wrong court. This conclusion would require modification of the Steuben County Supreme Court's order adopting the final redistricting plan. Therefore, the intervenors contend that the petitioners would have needed to file this lawsuit in Steuben County.

Congressional: Democratic IRC Commissioners Invite Public Input in Advance of Court of Appeals Decision

Following the Court of Appeals order holding that the stay (against the Appellate Division decision) does not prohibit the IRC from taking any actions, New York Independent Redistricting Commission Chair Kenneth Jenkins, and Commissioners Collado, Cuevas-Molina, Flateau, and Frazier issued a statement inviting public input while awaiting a decision from the Court of Appeals on congressional districting by the Commission:

The public is invited to submit input by emailing submissions@nyirc.gov or by sending mail to Attention: Submissions, Independent Redistricting Commission, 250 Broadway, 22nd Floor, New York, NY 10007. All submissions will be made available to all Commissioners and staff.

AROUND THE NATION

5th Circuit Sets Timeline for Louisiana's Congressional Map

On November 10, the U.S. 5th Circuit Court of Appeals set a timeline for the implementation of a new congressional map in Louisiana, giving the Louisiana Legislature until January 15 to enact a new congressional map or to decide not to adopt a new map. If the legislature opts to not adopt new congressional lines, a trial will be held in the district court on the legality of the currently enacted map. Additionally, if the plaintiffs object to a plan approved

by the legislature, the district court will review the map to determine compliance with the Voting Rights Act.

This decision by the 5th Circuit stems from *Ardoin v. Robinson*, a challenge to Louisiana's congressional map brought under Section 2 of the Voting Rights Act. In *Ardoin*, the plaintiffs argued that the congressional map diluted the voting strength of the state's Black residents due to the map not having a second majority-Black district. In June of 2022, a federal district court blocked the map for likely diluting the voting strength of Black Louisianans in violation of Section 2 and ordered the state to adopt a new map that included a second majority-Black district. State officials requested emergency relief from the U.S. Supreme Court following the decision, arguing that the case presented the same questions as *Allen v. Milligan*. The Supreme Court granted the requested relief, pausing the decision blocking the map pending the outcome of *Allen*, but reinstated the order blocking the map after its decision in *Allen*.

Following the Supreme Court's decision to reinstate the order blocking the map, Louisiana officials asked the 5th Circuit to void the decision that blocked the map and asked for the case to go back to the trial court for a trial on the merits. Oral argument was held in October to determine if the order blocking the map would remain in place as litigation continues. The 5th Circuit vacated the 2022 decision blocking the map, finding that the urgency that justified blocking the map is no longer present. The court held that although the district court made factual findings that the plaintiffs would have ongoing and irreparable harm that will persist until the map is changed, there is time for a trial to be held before the 2024 election to determine which map will be in place.

5th Circuit Questions Galveston County, TX Coalition District

On November 10, the 5th Circuit Court of Appeals called for the reconsideration of its precedent concerning Section 2 of the Voting Rights Act, but affirmed that Galveston County, Texas's Commissioners Court district map violated Section 2 by diluting the voting strength of its Black and Latino residents.

Last month, a district court judge found that Galveston County violated Section 2 when it dismantled the county's sole majority-minority Commissioners Court precinct for the Commissioners Court, which is Galveston County's primary governing body. Black and Latino voters in Galveston County, who make up 40% of the county's population, lost the ability to elect their candidate of choice in any of Galveston County's four Commissioners Court precincts following the elimination of the county's sole majority-minority district. Although the county's Black and Latino populations are not large enough to individually constitute a majority in any single district,

the two communities combined form a politically cohesive coalition protected under Section 2.

The three-judge panel that rendered this decision acknowledged that although it is bound by the 5th Circuit's Section 2 precedent allowing for "minority-coalition claims," it believes that prior decisions permitting such claims are "wrong as a matter of law." The panel called for the precedent allowing for such aggregation to be overturned and called for the case to be reheard en banc to consider overturning this precedent. The court's order means that Galveston County will have to implement a map that complies with Section 2 for the 2024 election, at least for now. However, the 5th Circuit will internally vote on whether the court's entire slate of judges should rehear the case en banc, making the future trajectory of this case as well as the viability of minority-coalition Section 2 claims in the 5th Circuit uncertain.