NYPIRG NEW YORK PUBLIC INTEREST RESEARCH GROUP

TESTIMONY
OF THE
NEW YORK PUBLIC INTEREST RESEARCH GROUP
BEFORE THE
JOINT HEARING OF THE
JOINT – LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT (LATFOR),
SENATE STANDING COMMITTEE ON THE JUDICIARY, AND
ASSEMBLY STANDING COMMITTEE ON GOVERNMENTAL OPERATIONS
REGARDING
EVALUATING CONSTITUTIONAL PROVISIONS IMPACTING REDISTRICTING IN 2022
July 15, 2020
Albany, N.Y.

Good morning, my name is Blair Horner and I am executive director of the New York Public Interest Research Group (NYPIRG). NYPIRG is a non-partisan, not-for-profit, research and advocacy organization. Consumer protection, environmental preservation, health care, higher education, and governmental reforms are our principal areas of concern. We appreciate the opportunity to testify on the reforms needed to the state redistricting process.

Since the mid-1960s, there has been debate over whether the Legislature should be allowed to draft its own district lines.[1] The debate has centered on the role that redistricting has played in limiting the electoral options for voters. In short, has redistricting in New York resulted in disenfranchised communities and rigged elections that limit competition?

That debate came to a head in 2012. In the run-up to the redistricting decisions, Governor Cuomo and the State Legislature agreed to allow the Legislature to continue to draft its own maps for 2012 while putting forward a redistricting constitutional amendment and statutory changes that would make changes starting with the 2020 census and 2022 redistricting.

<u>The timetable</u>
The constitutional amendment was approved in a statewide vote in 2014. However, there have been significant changes since then. First, the 2014 amendment to the constitution established a redistricting commission to conduct its work using a certain timetable.

After the commission members are appointed, it is to submit to the legislature its redistricting plan and the implementing legislation no later than January 15, 2022. The amendment then allows the

[1] See The Temporary State Commission on the Constitutional Convention (1967), "Report 14: State Government," discussion on the issue of redistricting reform starts on page 58.

Legislature time to review the plan. If the Legislature rejects it twice, it is empowered to make amendments to the commission's plan.

While it's not entirely clear what the timetable is for finalizing a plan if the commission's plans are rejected, it is likely to take until March of 2022, at the earliest.

In 2012 when the plan was first conceived, state office primaries were held in September. Now those primaries are held in June, with petitions to get on the ballot circulating in February. The result is that under the Constitution's timetable candidates gearing up to run for office may not know which Senate or Assembly (or Congressional) district they live.

Constitutional changes to the timetable would help in the future, but mean little for the current process. The needs of the commission – however flawed – must be a top legislative and budgetary item going forward. Otherwise, it is likely that public participation will suffer in the commission's race to get a plan drafted.

Late census data

Second, the commission is required to hold hearings and make available draft plans for public comment. The commission is required to hold at least one public hearing in each of the following (i) cities: Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties: Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk. The constitutional amendment requires that the commission by mid-September 2021 shall make publicly and widely available its draft redistricting plans, relevant data, and related information. What lawmakers did not consider was how that timetable would be affected if the Census failed to get its information out in a timely fashion.

Due to the COVID-19 pandemic, the U.S. Census cannot get its count of the American population fully conducted and has asked the Congress to allow it to delay submitting its population data to the states until July of next year – months later than normal. Getting the census data late will make it extremely difficult for the commission to meet its constitutional deadlines.

Ironically, the census delay may have helped New York. The independent commission has not yet been fully appointed, appears to have no plan, and has done nothing to date. That the census data will be delayed allows the commission more time to organize itself for the incredible task it has ahead.

Given the timetable crunch, the census data is likely to arrive by August 1, 2021 and the commission has to draft maps, develop tools for the public and organize hearings within that month. After all, with the new primary date of June, the commission will have to do all it can to offer its plan to the Legislature as soon as possible after the hearing process is concluded.

Unconstitutional provisions

The 2014 constitutional amendment kept in place the 19th century formula for determining the size of the New York State Senate.

The preservation of the obsolete provisions could also have vastly worse consequences. If the U.S. Supreme Court should ever weaken or overturn the principles established in the landmark cases *Baker*, *Reynold*s, and their progeny, then the dormant New York State rules that are preserved word-for-word in the 2014 amendment would again come fully into effect.[2]

We never heard a good reason why these unconstitutional provisions were kept in place. The most benign explanation has been that the amendment drafters were preoccupied with legislative negotiations and that they considered these provisions to be "dead wood" due to U.S. Supreme Court decisions. If that optimistic interpretation is correct, now would be a good time to clear it all away.

Population variation

With respect to congressional districts, U.S. Supreme Court rulings have made it clear that they should be of comparable size. In one case, the Court ruled that "the achieving of fair and effective representation for all citizens is … the basic aim of legislative apportionment" and it was for that reason that the decision insisted on substantial equality of population among districts.[3] Essentially mapmakers' goals are to keep Congressional districts as close to the average population size.[4]

Under the U.S. Supreme Court rulings, state legislative districts, on the other hand, are usually allowed to range within 10 percent from smallest population to largest, plus or minus 5 percent of the average size.[5] This means that unlike congressional districts which have only small deviations in population, a voters in state legislative districts in New York are not of equal strength.

While not illegal, New York has legislative district lines that can be dramatically different in population. Our analysis of district populations created in 2012 finds that State Assembly districts ranged in size by over 10,000 people from 124,223[6] to 134,333.[7] In the State Senate districts ranged in size by over 27,000 people, from 292,081[8] to 319,115.[9] And, unlike the drawing of Congressional boundaries, which require that districts contain nearly the exact number of people, New York's system allows up to a 10 percent variation in population size. Another tool for mapmakers to rig the system to benefit the political parties.

In terms of constitutional changes, this should be a top priority.[10] We urge adoption of the Congressional standard in the drawing of state legislative districts and that a strict policy of "one person, one vote" be enshrined in the state constitution.

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[2] Wice, J. and Breitbart, T., "These Seats May Not Be Saved A Fair and Rule-Bound Legislative Reapportionment Process," (Chapter from "New York's Broken Constitution" SUNY Press, 2016)

[3] U.S. Supreme Court, Reynolds v. Sims, 1964.

[4] Source of Congressional district information obtained from the New York State Legislative Task Force on Demographic Research and Reapportionment, see http://www.latfor.state.ny.us/maps/, we used the population figures from each Congressional district map.

[5] U.S. Supreme Court, Gaffney v. Cummings, 412 U.S. 735 (1973).

[6] Assembly district 47.

[7] Assembly district 150.

[8] Senate district 57

[9] Senate district 13.

[10] On a related note, there is clear tension between the constitutional requirement that lines be drawn "for the purpose of favoring or disfavoring incumbents" and that the commission "shall consider the maintenance of cores of existing districts" in its plan.

A not independent commission

The commission itself is not independent – it's appointed by the legislative leaders. And the notion that the 2014 constitutional amendment creates an "independent" process was rejected by the courts.

In a case challenging the ballot question's statement that the commission is "independent," a court ruled otherwise stating, "not only can the Legislature disapprove the Commission's decision, but it can do so without giving any reason or instruction for future consideration of these new principles. The plan can be rejected for the purely partisan reasons that this Commission was designed to avoid. . . . [T]he Commission's plan is little more than a recommendation to the Legislature, which can reject it for unstated reasons and draw its own lines."[11]

The judge cited that the recommendations of the commission were just that, a "recommendation." The provision that restricts the Legislature to altering the district lines in a way that affects no more than 2 percent of the population is flawed since there is nothing in the amendment that limits population deviation in the first place. Thus, the most significant weakness of the amendment is what it *ignores*.

Moreover, the entire structure of the commission and its staff look eerily like the ones found in the roundly-criticized State Board of Elections. The commission would be overseen by two partisan co-executive directors. The directors would be appointed by a majority vote of the commission. One co-executive director shall be a Democrat and the other a Republican.

Obviously, the structure of the commission can best be described as bipartisan, not independent. And if the history of the State Board of Elections is a guide, the commission will not only be beholden to the political parties, but likely to fail through partisan gridlock as well. Indeed, the current failure of the eight redistricting commissioners to agree on the appointment of the additional two needed may be the first indication that a political commission will suffer from gridlock.

The 2014 amendment enshrines different voting rules depending on whether or not both houses of the Legislature are controlled by one party. Similarly, there are separate voting rules for passing the plans through the Legislature once they are approved by the commission.

On its surface, this seems like a reasonable arrangement. These voting rules provide protection for the minority party if both houses are controlled by another party. In New York, given demographic realities, the only conceivable such situation in the foreseeable future is control of both houses by Democrats.

But if the Assembly is controlled by Democrats and the Senate returns to control by Republicans, as has been the case in redistricting cycles going back decades in New York, there is little protection for the minority Assembly Republicans and Senate Democrats, as the plans can be passed by simple majority vote in the Legislature.

[11] *Leib v. Walsh*, 45 Misc.3d 874, 881 (Sup. Ct. 2014).

Our view is that enshrining in the state constitution both the commission's partisan structure and its complicated – and partisan – voting procedures should be removed. We urge that you instead construct an independent commission – one that is free from political interests, one whose primary interest is what's best for the public, and one which is empowered to draft the final legislative boundaries.

Problem with the standard for judicial review

The current standard for judicial review that requires that plaintiffs show not only that an enacted redistricting law departed unnecessarily from the state constitutional rules, but that the Legislature acted in bad faith in dealing with the conflicts between some constitutional rules and others. And the requirement that they prove this beyond a reasonable doubt imposes in redistricting cases a standard much more demanding than simply overcoming the strong presumption of constitutionality that generally attaches to legislative acts.[12] This traditional presumption standard on its own has effectively drastically limited judicial action in reviewing previous plans—the new requirement of showing bad faith erects an enormous barrier to meaningful review by a court.

This does not *need* a constitutional change, but it is a change that *should* be made.

Problem with a lack of a requirement ending prison-gerrymandering

The 2010 law requiring that, for redistricting purposes, prison populations be subtracted from the places of incarceration and re-allocated, where possible, to the prisoners' permanent home addresses. This reform was enacted by statute prior to 2014, and could be reversed. It should be incorporated into the state Constitution.

Ever-expanding number of Senate seats

The state Constitution allows for an ever-increasing number of state Senate seats. When this provision of the Constitution was originally drafted, New York had 50 Senators. There are 63 now and the additional seats were often part of a strategy to rig the redistricting process. Cap the number and put it in the Constitution.

Thank you for the opportunity to testify.

[12] For a more detailed legal discussion, see Wice, J. and Breitbart, T., "These Seats May Not Be Saved A Fair and Rule-Bound Legislative Reapportionment Process," (Chapter from "New York's Broken Constitution" SUNY Press, 2016)