

September 4, 2022

To: Members of the Monroe County Legislative Redistricting Commission

From: Joseph T. Burns, Esq.

A handwritten signature in black ink, appearing to read "J. T. Burns", followed by a horizontal line.

Re: analysis of the ARCBridge Map A, Commission Revised Map, and the Bi-
Partisan Map

Attached are my comments and analysis of the three county legislative map proposals. You will see that I have examined them in the context of Section 2 of the Voting Rights Act, and in addition, you will see my comments on the recently enacted John R. Lewis Voting Rights Act of New York (NYVRA).

Should you have any questions or additional requests, please feel free to contact me at any time.

Voting Rights Act

In drawing new districts for the Monroe County Legislature, compliance with the federal Voting Rights Act must be taken into account. The Voting Rights Act — and, more specifically, Section 2¹ of the Voting Rights Act — is a prohibition on discrimination in voting practices and procedures on the basis of race, color or membership in a language-minority group. It applies in every state, and it applies to redistricting, including redistricting for local government legislative bodies. Voting Rights Act Sec. 2 prohibits voting practices and procedures that result in denials of access to the voting and/or political process because of race, color, or membership in a language-minority group. The Voting Rights Act also prohibits practices or procedures that were enacted for the purpose of denying access to the voting and/or political process because of race, color or language-minority status. Section 2 of the Voting Rights Act may be enforced by the U.S. Department of Justice or a private entity.

In determining whether a redistricting plan (or any voting or electoral practice or procedure) has a discriminatory result and, therefore, violates Section 2 of the Voting Rights Act, the Courts will likely look to the framework and tests established in the U.S. Supreme Court decision in *Thornburg v. Gingles*.²

For redistricting matters under *Gingles*, the Courts first look to see if three preconditions are met. First, the the minority group in question must be sufficiently large and geographically compact to constitute a majority of the voting age population in a single-member district for the legislative body at issue. Second, the minority group in

¹ 52 U.S.C. Section 10301

² 478 U.S. 30 (1986)

question must be politically cohesive. Finally, the majority must vote sufficiently as a bloc to allow it usually to defeat the preferred candidate of the minority group.

If these preconditions are met, the Courts then examine the totality of the circumstances in the political subdivision in question. This examination is guided in part by the “Senate Report” from the 1982 Voting Rights Act amendments. These factors include the history of discrimination in the political unit impacting the minority group’s voting and political rights; the degree of racial polarization in voting and elections in the political unit; the use of certain voting practices and procedures in the political unit — such as unusually large districts — that may allow for increased discrimination in voting for the minority group in question; whether members of the minority group in question have been denied access to a candidate slating process if one is used in the political subdivision; whether a history of discrimination against the minority group in question in other areas of life have hindered political participation by the minority group in question; whether political campaigns have included overt or subtle racial messages; and finally the history of members of the minority group in question having been elected to public office. Finally, the Senate Report included two additional factors that have a probative value: a lack of responsiveness by elected officials to the minority group’s needs and whether the political unit’s use of the practice or procedure at issue is tenuous. Other factors beyond this list may also be considered. The facts of each case of a potential Voting Rights Act Section 2 violation are critical to determining if a violation of Section 2 exist.

Recently, the U.S. Supreme Court reaffirmed the significance and importance of *Gingles* and the *Gingles* framework in the case of *Brnovich v. Democratic National*

*Committee.*³ *Gingles* and the analysis established by *Gingles* should guide our examination of the Monroe County Legislative Districts at issue today.

A good “rule of thumb” to use when working towards compliance with Section 2 of the Voting Rights Act is that where racially polarized voting exists, if a district with a majority of minority voting age population can be created, it must be created.

The demographics of three proposed maps were examined — the ARCBridge Map A, the Commission Revised Map, and the Bi-Partisan Map.

It appears that the Bi-Partisan Map was able to create five districts with a majority voting age population that is Black. These districts are Legislative Districts 22, 25, 27, 28 and 29. It is my understanding that, for the existing county legislative districts that were drawn a decade ago after the 2010 census, there are currently only two that have a majority voting age population that is Black. None of the currently existing districts have a voting age population that is majority Hispanic.

It appears that for the Commission Revised Map, only two districts — 25 and 27 — have a majority voting age population that is Black. None of the districts have a voting age population that is majority Hispanic.

The final map to examine is the ARCBridge Map A. It appears that only one district — district 27 — has a majority of voting age population that is Black, and it appears that no district in ARCBridge Map A has a voting age population that is majority Hispanic.

It’s not possible to say definitively that a map would or wouldn’t survive a challenge under Voting Rights Act Section 2. It might, however, be fair to say that map

³ 141 S. Ct. 2321 (2021)

likely has a better chance of surviving a Sec. 2 challenge than another map. As stated earlier, the specific facts of each map and political unit matter in determining if there is a violation of Section 2 or not.

The Bi-Partisan Map has shown it's entirely feasible to draw 5 districts with a voting age population that is majority Black. Neither the Commission Revised Map nor the ARCBridge Map create nearly as many districts with a majority voting age population that is Black, and one map — the ARCBridge Map — actually has fewer districts with a majority Black voting age population than the current county legislative map. While it cannot be said definitively that the Commission Revised Map and the ARCBridge Map would not survive a Section 2 challenge, they would likely have far greater hurdles to overcome than the Bi-Partisan Map. If, for instance, it could be demonstrated that racially polarized voting exists, it would likely be more difficult for the Commission Revised Map and the ARCBridge Map to survive when additional majority-minority districts could have (fairly easily) been created.

So, it might be fair to say that with five majority-minority districts (instead of the two or one that were created by the other proposed maps), the odds of the Bi-Partisan Map surviving a Section 2 challenge are higher than the other two proposed maps.

Finally, it should be noted that no map proposal was able to establish a majority Hispanic Legislative District. It is entirely possible that because of where Hispanic voters reside (a lack of geographic compactness), it isn't possible to draw one majority Hispanic Legislative District. As was stated earlier, where it isn't possible to create a geographically compact district with a majority voting age population of a racial, color or

language-minority group, Section 2 would not mandate that one be created. So, at this time, it simply may not be possible or feasible to create a Legislative District with a voting age population that is majority Hispanic.

John R. Lewis Voting Rights Act

On June 20, 2022, Gov. Hochul signed into law the John R. Lewis Voting Rights Act.⁴

This legislation adds a new Title 2 to Article 17 of the Election Law. Among other things, this legislation endeavors to “Encourage participation in the elective franchise by all eligible voters to the maximum extent” and to “Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state....”⁵

The new Election Law Sec. 17-206 includes prohibitions — which apply to county governments and county Boards of Elections — on vote dilution and voter disenfranchisement. Additionally, the Attorney General, aggrieved voters, and certain aggrieved organizations are given the ability to enforce these provisions through a proceeding in New York State Supreme Court.

Its should be noted that in Governor’s Approval Memo No. 8, the Governor stated that due to a number of fiscal concerns, including the concerns of local governments, through an agreement with the leaders of the state legislature, implementation of the

⁴ Chapter 226 of the Laws of 2022

⁵ Election Law Sec. 17-200

state Voting Rights Act would be delayed until July 1, 2023. This would be done through additional legislation delaying the effective date of this proposal. It does not appear that this has occurred, but that should not be a surprise since the state legislature isn't scheduled to be in session until January.

Even with this likely delay in implementation, the members of the county legislature should keep compliance with the state Voting Rights Act in mind when voting on new county legislative district maps. The map adopted by the county legislature would have to comply with the provisions of the state Voting Rights Act when it takes effect on July 1, 2023. The new state Voting Rights Act is likely to be a powerful tool for anyone seeking to challenge a county legislative map because of a failure to draw an appropriate number of majority-minority districts or the dilution of racial minority voting strength.