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July 5 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

Broome County: *Tokos v. Broome County* Challenge Before Appellate Division; County Challenges Use of Prisoner Adjusted Data

On June 23, in the Appellate Division (3rd Department), Broome County filed a brief arguing that the lower court's decision should be revised, and the complaint should be dismissed.

This case represents the first major challenge to the 2021 Municipal Home Rule Law that created new redistricting criteria to be followed by local governments. It is also the first local government challenge to the law enacted in 2010 that requires local governments to relocate prison populations. The prisoner reallocation law was upheld in 2010 after several state senators challenged it in the state courts. It has not been challenged again until this case.

The county contends that because the plaintiffs were seeking to invalidate or effect the candidate designations for the legislature, Election Law §16-102 should apply to this case. Therefore, the county asserts that the statute of limitations has expired as the action was commenced more than 14 days after the last day for filing designating petitions for this year's legislative races.

Second, the County argues that the plaintiffs lack standing because (1) they are not individuals who are currently incarcerated in a prison outside of the county and (2) they have not alleged that they reside in districts that were impacted by the failure to use the prisoner adjusted data set. Furthermore, the county argues that plaintiff Shirley Cothran lacks standing to challenge the division of the Town of Maine as she does not reside in the town, and the remaining plaintiffs lack standing on this issue as they have not pled sufficient facts to establish injury.

Third, the county argues that the data set used by the legislature was proper because, the County contends, Article II, Section 4 of the state constitution, Election Law §5-104, and the Municipal Home Rule Law (MHRL) do not require the county to use the prisoner adjusted data set. Furthermore, the county contends that even if the legislature had used the prisoner adjusted data set, the deviation would only exceed the 5% rule by .34%, and the lower court stated "it could not say that such a minor deviation…did not constitute substantial compliance with the statute that safeguards the one person one vote principle."

Fourth, the County asserts that the court should reject the plaintiff's expert opinion because Professor Krasno's opinion repeatedly states his interpretation of MHRL §34 which is not proper as this is a question of law and should be determined by the court.

Lastly, the County argues that the districts comply with MHRL §34(4) as the map creates competitive districts, maintains communities of interests, and maintains cores of existing districts. Additionally, the county states that the map "was subject to community input, approved by a bipartisan majority of the redistricting committee and approved by the democratic County Executive." The county asserts that this input shows that the process did not exclude participation by the minority party and is evidence that the lines were not drawn to gerrymander districts.

Ballot Access: N.Y. Files Response in U.S. Supreme Court

From Ballot Access News by Richard Winger, reproduced with permission.
On June 30, the New York State Board of Elections filed its response in Libertarian Party of New York v State Board of Elections, 22-893.

Here it is. This is the case that challenges the ballot access changes made in 2020. The changes were: (1) tripling the statewide independent petition from 15,000 signatures to 45,000 signatures, without expanding the six-week petitioning period; (2) making the distribution requirement much more severe; (3) changing the definition of a qualified party from one that polled 50,000 votes for Governor, to one that polled 2% of the vote for the top of the ticket office every two years.

The brief has nothing to say about the fact that when New York in 2020 first required a party to poll a certain share of the vote for president, New York became one of only five states to force qualified parties to perform in the presidential race.

The brief implies that the 2020 changes were to "update" a "century-old" requirement. It says that the 15,000 signature requirement had been passed in 1922. That is factually wrong. The 1922 legislature did not change the number of signatures. The petition had been set at 12,000 in 1918, and then it was raised in 1971 to 20,000, and then in 1992 lowered to 15,000. The text of the brief says the 15,000 signature requirement was set "more than a century ago", but footnote two admits that the 15,000 was set in 1992. But only a careful reader would catch the contradiction.

The brief says that the old petition requirement placed "no meaningful burden" on petitioning groups. Actually, the old law prevented the presidential candidate who placed third in the nation from being on the New York ballot in 1936, 1956, 1972, 1976, and 2004.
The brief says that under the old New York law, the state faced the problem of "ballot clutter" and "voter confusion", but the brief does not single out any year in which the ballot was too crowded. Instead, it says repeatedly that between 1996 and 2020, there were fourteen different unqualified parties that used the statewide petition, but that period includes 13 different election years.

The brief says the New York definition of a qualified party is "in the middle of the pack," and it is true that the median vote test of the 50 states is 2%, and New York's vote test is 2%. But, that ignores the fact that it is far more difficult for a minor party to poll 2% for president than for other statewide offices. The only minor parties that have polled as much as 2% of the national presidential vote in the last 100 years are the Progressive Party of 1924, the Socialist Party of 1932, the States Rights and Progressive Parties of 1948, the American Party of 1968, the Reform Party in 1996, the Green Party in 2000, and the Libertarian Party in 2016.

The brief says New York had to increase the requirements to avoid wasting money on minor party candidates in the new public funding program, without mentioning that the Second Circuit had already ruled in a Connecticut case that states don't need to give money equally in public funding programs.

As to the short petitioning window, the brief says the U.S. Supreme Court seemed to approve of a 25-day petitioning window in California in Storer v Brown. Actually, the U.S. Supreme Court did not uphold the California independent petitioning period; it remanded the case for more facts. More important, California has always allowed an infinite amount of time for its procedure for new parties to get on the ballot. For example, the California Libertarian Party took seven years to complete its registration drive for party status, 1972-1979.

The brief does not acknowledge that New York is one of only eleven states with no procedure for a group to become a qualified party in advance of any particular election.
The Libertarian and Green Parties do have an opportunity to file a reply brief.