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October 16 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

Congressional Case: *Hoffmann v. Independent Redistricting Commission*

State Court of Appeals Judge Caitlin Halligan has recused herself from participating in hearing the N.Y. congressional redistricting case appeal due to her relationship with one of the attorneys in the case. She is being replaced by 1st Department Appellate Division Presiding Judge Dianne Renwick. Judge Renwick was part of a five judge Appellate Court panel that approved New York County State Supreme Court Judge Lawrence Love's decision in *Nichols v. Hochul* to send the state assembly remapping back to the Independent Redistricting Commission and state legislature. The Court of Appeals will hear the appeal in Buffalo on November 15 at 1:00 PM at the Old County Hall, 92 Franklin Street.

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

On September 20, a group of Republican plaintiffs (including organizations and elected officials) filed suit in Albany County State Supreme Court seeking to invalidate the New York Early Mail Voter Act (EMVA) as unconstitutional and seeking to block the implementation of the law.

Preliminary Injunction: The plaintiffs asked the court to issue a preliminary injunction so that the EMVA is temporarily prevented from being implemented until the court makes its final decision in the case. In order to secure a preliminary injunction, plaintiffs must show (1) a likelihood of success on the merits of the case; (2) irreparable harm in the absence of a preliminary injunction; and (3) that the balance of equities (fairness) favors an injunction. These elements are discussed below.

RECENT ACTION

<u>In Support of Defendants & In Support of Early Mail Voting Act</u>:

Governor Kathy Hochul and Attorney General Letitia James' Memo in Opposition to Plaintiffs' Application for a Preliminary Injunction

On October 6, Governor Kathy Hochul and Attorney General Letitia James filed a memo opposing the plaintiffs' application for a preliminary injunction. They argue that:

(1) plaintiffs fail to demonstrate a likelihood of success on the merits by clear and convincing evidence as Governor Hochul is entitled to legislative immunity and the EMVA is constitutional;
(2) plaintiffs cannot establish irreparable harm; and
(3) a balancing of equities does not tip in plaintiffs' favor and injunctive relief is not in the public interest.

New York State Board of Elections Commissioners Douglas A. Kellner and Andrew J. Spano's Memo in Opposition to Preliminary Injunction

On October 6, Commissioners Kellner and Spano filed a memo arguing that the state constitution grants the legislature the authority to adopt laws governing the process of voting, both for the general population as well as for individuals who are ill or absent from their place of residence. The legislature's decision to adopt a voting method for the general public, which was previously only applicable as an exception, does not negate this lawful exercise of legislative authority. They also assert that the plaintiffs do not meet any of the requirements for preliminary relief.

Memo in Support of Proposed Intervenors' Motion to Dismiss

On October 11, proposed intervenor-defendants DCCC, Senator Gillibrand, Representatives Clarke, Meng, Morelle, and Torres, and six New York voters filed a memo arguing that the case should be dismissed because:

(1) Plaintiffs fail to state a claim as a matter of law. The EMVA does not conflict with state constitution Article II, Section 2.
(2) The EMVA falls within the legislature's broad power under Article II, Section 7.
(3) Nothing in New York's constitutional history indicates that the EMVA is unconstitutional.
(a) The history of Section 2 does not show that constitutional amendments have always been required to allow for mail voting.
(b) The failure of Ballot Proposal 4 (proposal that would have amended Section 2 to allow for "no-excuse absentee ballot voting") does not materially impact the EMVA's constitutionality.

Commissioner and Co-Chair of Board of Elections Douglas A. Kellner and Commissioner Andrew J. Spano's Answer

On October 11, Commissioners Kellner and Spano filed an answer to the complaint, in which they denied that the EMVA was enacted in violation of the state constitution or against the will of the people. They also presented an affirmative defense, arguing that the plaintiffs' claims are barred due to failure to state a claim upon which relief can be granted, and they requested that the

court dismiss the complaint.

In Support of Plaintiffs & Opposed to Early Mail Voting Act:

Deputy Counsel to the New York State Board of Elections' Affirmation in Support of Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction

On October 6, on behalf of Commissioner Anthony J. Casale and in support of plaintiffs' lawsuit and motion for permanent injunction, Deputy Counsel to the State Board of Elections, Kevin G. Murphy indicated in his affirmation that Commissioners Kosinski and Casale had urged Governor Hochul to veto the early voting bill, expressing several concerns which have now been similarly raised by the plaintiffs in this case. He also sets forth the following arguments:

- The law requires substantial changes to the election process, and with the presidential primary scheduled for April 2, 2024, implementing the changes on such short notice creates significant burdens on local boards of elections.
- The law places a burden on the State Board of Elections by requiring the board to create and promulgate the rules, forms, and online infrastructure for early mail ballots before the primary, which will be extremely difficult and potentially impossible given the timeline.
- And the law "creates a system of no-excuse absentee voting by another name, with the statute being a near mirror-image of the existing absentee ballot provisions. This is a transparent end-run by the New York State Legislature around the will of the voters of the State of New York, who soundly defeated such a measure at the ballot box in 2021 by over 300,000 votes."

Casale joins in the arguments submitted by counsel for Commissioner Peter S. Kosinski and supports the plaintiffs' complaint and the relief sought.

Memo of Defendant Peter S. Kosinski in Support of Plaintiffs' Motion for Preliminary Injunction

On October 6, Co-Chair of the State Board of Elections, Kosinski, filed a memo in support of the plaintiffs' motion seeking a preliminary injunction enjoining implementation of the EMVA and the counting of votes cast under the Act until there is a final judgment in this case. Kosinski argues that:

(1) Plaintiffs have shown that they are likely to succeed on the merits as the EMVA is unconstitutional on its face.

a. The Legislature and the Governor intentionally disregarded the constitutional requirements for an amendment by enacting the EMVA, which is precisely the amendment that was previously rejected by voters ("no-excuse absentee voting")

b. The Equivalence Doctrine requires that changes to Absentee Voting be made by an amendment to the constitution. Legislative equivalency mandates that existing legislation may only be amended by the same procedures used to originally enact it. Therefore, the only procedure by which the expansion of voting by mail could be accomplished is by constitutional amendment.
c. Application of the maxim *Expressio Unius Est Exclusio Alterius* requires striking down the Act. This principle holds that when a law describes a particular act, thing or person to which it shall apply, courts shall infer that anything that was left out was intended to be excluded. Because the state constitution expressly identifies voters who are absent from their city or country, or who are too ill to vote in person, all other voters are excluded from the privilege of mail-in voting.

(2) There is a presumption of irreparable harm because the EMVA violates the constitution, and enforcement of the unconstitutional law would irreparably harm Commissioner Kosinski in particular by requiring him to violate his oath of office.

(3) Implementation of the unconstitutional law before a final judgment has been rendered in this case will cause irreparable harm to virtually all New Yorkers as entire elections may be deemed invalid and voters may be disenfranchised.

(4) The equities weigh in favor of granting an injunction

Affidavit of Raymond J. Riley, III behalf of the State Board of Elections and Commissioner Kosinski in Support of Plaintiffs' application for preliminary injunction

On October 6, Co-Executive Director of the Board of Elections, Raymond J. Riley submitted an affidavit arguing that:

(1) The EMVA violates the state constitution because Article II, Section 2 allows only two narrow exceptions to in person voting, known as absentee voting. The EMVA essentially replicates the absentee voting statute, except that it removes the constitutional limitations on those who may vote absentee. Because the constitution may only be amended at the ballot box, not by an act of the legislature, the Board agrees with the plaintiffs that the EMVA violates the constitution and should be struck down.

(2) In the absence of injunctive relief, there will be irreparable harm to the board of elections and the voters of New York. The board would be harmed because enforcement of the EMVA would require it to violate the constitution. Voters would be harmed as they may be inadvertently

disenfranchised if they rely on the EMVA and vote by mail and the act is later deemed unconstitutional.

Plaintiffs' Reply in Support of their Motion for Preliminary Injunction

On October 12, the plaintiffs responded to the defendants' arguments against a preliminary injunction by arguing that:

(1) The preliminary injunction standard requires plaintiffs to show a "probability of success," not proof "beyond a reasonable doubt" or any other "heightened standard" as the defendants misstate.

(2) They have shown a probability of success on the merits because, along with other arguments, New York has always adopted constitutional amendments before expanding the list of citizens who can cast ballots not in person.

(3) They have demonstrated irreparable harm in the absence of an injunction to election official plaintiffs who will be faced with a significant increase in the number of mail-in ballots; candidate and organization plaintiffs who will have to divert existing assets to mail-voting outreach and programs; and the voter plaintiffs who face "the dilution of their votes by the many thousands of constitutionally invalid ballots that would be cast by mail."

(4) The balance of equities favors a preliminary injunction as neither the state nor the public has an interest in enforcing an unconstitutional law.

N.Y. Absentee Voting Challenge: *Amedure et al v. State of New York et al*

On August 31, in Saratoga County State Supreme Court, the New York Republican Party and other plaintiffs filed a challenge to the state absentee voting law. The law allows review of absentee ballots on a rolling basis, requires voters who request absentee ballots but decide to vote in person to vote using a provisional ballot, and prevents legal challenges to ballots that were already cast.

RECENT ACTION

BOE Commissioners Kellner and Spano's Memo

On September 20, defendants BOE Commissioners Douglas Kellner

and Andrew J. Spano filed a memo arguing that the case should be dismissed because:
(1) The court is without authority under Article 16 of the Election Law to alter the canvassing procedure, and legislative definition of the role of the judiciary in election law matters is not a violation of separation of powers.
(2) Petitioners meet none of the requirements for preliminary relief.
(3) The proceeding is barred by laches.
(4) The new canvassing law does not abrogate voter privacy.
(5) The law creates equal dignity of votes.
(6) The Election Law has long circumscribed who can challenge a ballot and for what reason.
(7) There is no constitutional right for a voter to vote on election day after requesting an absentee ballot.
(8) Due process does not require that any particular person have a right to challenge the casting of a ballot.
(9) The new canvassing law does not violate constitutional rights of election commissioners.
(10) Petitioners' claim that the challenged statute conflicts with other provisions of the election law is not correct and if it were correct the more recent enactment controls.

State Assembly, Speaker of the Assembly, and Majority Leader of the Assembly's Memo in Support of Motion to Dismiss

On September 20 and October 2, the state Assembly submitted two memos arguing that the case should be dismissed because:
(1) The claims are barred by the doctrine of laches.
(2) The petition is procedurally defective due to Articles 16 and 78 of the Election Law; lack of standing; lack of a justiciable controversy; and failure to join necessary parties.
(3) Petitioners cannot meet the elements required for injunctive relief, including probability of success on the merits; irreparable injury; and balance of equities.
(4) Petitioners' challenges to the statute have no merit.
(5) The law is constitutional.
(6) There is no conflict of law.
(7) Petitioners' examples of election irregularities are overblown and irrelevant.
(8) Article 16 does not apply.
(9) An order disrupting the election would cause significant harm to the public.

Reply Memo in further support of State of NY and Governor Hochul's Motion to Dismiss

On October 2, the office of the Attorney General submitted a memo arguing that:
(1) The claims against Governor Hochul should be dismissed on legislative immunity grounds as the petitioners do not oppose this argument.
(2) The petitioners fail to meet the requirements for a preliminary injunction as they offer no facts to justify the imposition of the drastic remedy of a preliminary injunction. The 2023 election is demonstrably underway, and imposition of a preliminary injunction would throw the 2023 election into upheaval.
(3) Petitioners' challenges to the statute are meritless as their opposition papers do not advance any new legal arguments.

Reply memo by NYS Senate and Senate Majority Leader and President Pro Tempore

On October 2, the State Senate submitted a memo arguing that the petition should be dismissed and the motion for injunctive relief should be denied because:
(1) The court cannot award relief as to the 2023 election because it is barred by laches, and the injunctive relief sought by petitioners for the 2024 election is premature.
(2) Petitioners fail to engage substantively with the constitutional principles that they cite.
(3) Petitioners' complaints about "conflicts" between election law §9-209 and prior laws are meritless.

Court grants leave for intervention on behalf of Intervenors

On October 5, the court granted DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Democratic voter Declan Taintor's motion to intervene in the case.

AROUND THE NATION

U.S. Supreme Court Hears Arguments On South Carolina's Congressional Map

On October 11, the U.S. Supreme Court heard oral argument in *Alexander v. South Carolina State Conference of the NAACP*. The Court is considering whether a federal three-judge panel correctly held that South Carolina's 1st Congressional District violates the U.S. Constitution's prohibition on racial gerrymandering. Prior Supreme Court precedent forbids the use of race as the predominant factor in placing a significant number of voters within or outside of an electoral district unless there is a compelling state interest in doing so.

During oral argument, the South Carolina NAACP and Black voters repeatedly pointed to the legislature's use of race as a proxy to predict partisan behavior. They argued that the legislature did so when it moved over 193,000 people in and out of the 1st Congressional District but nonetheless maintained the same 17% Black voting-age population within the district.

The state made an effort to identify a series of factual issues that would call for the Supreme Court to reverse the factual findings of the lower court during oral argument, ranging from faulty election data to shortcomings in the methodologies employed by various experts for the plaintiffs. Justice Jackson reasoned that under the clear error standard of *Cooper*, a racial gerrymandering case decided by the Court 6 years ago, the Court must be highly deferential to the factual findings of the lower court, and the Court cannot reverse the lower court's decision merely because they would have decided differently. Other members of the Court, including Justice Alito and Justice Barrett, inquired about the methods employed by the plaintiffs' experts, even though the unrebutted expert testimony had already been reviewed by the lower court.

The Court's 2019 decision in *Rucho*, where it held that federal courts did not have the power to rule on partisan gerrymandering claims, leaves unclear how the justices will land on the issues of race and partisanship in this case.

Louisiana Parties Submit U.S. Supreme Court Briefs in *Robinson v. Ardoin*

Several filings have recently been submitted to the U.S. Supreme Court in *Robinson v. Ardoin*. This case involves a challenge to Louisiana's congressional map. The plaintiffs argued that the map diluted the Black vote in the state by having only one majority-Black district out of six in a state where Black residents make up 33% of the population. In June of 2022 a federal district court blocked the map. This decision was appealed by state officials to the U.S. Supreme Court. The Supreme Court paused the decision that blocked the map pending its decision in *Allen v. Milligan*. Following its decision in *Allen v. Milligan*, the Supreme Court reinstated the decision blocking the map.

After the decision that temporarily blocked the map was reinstated by the Supreme Court, Louisiana state officials asked the district court to cancel its hearing scheduled for October 3-5, but the district court declined their request and found that the only remaining issue was to choose a congressional map and found that there was adequate time to do so. Having exhausted all other legal avenues, Louisiana filed a petition for a writ of mandamus to the 5th Circuit Court of Appeals, asking it to order the district court to cancel its hearing. A writ of mandamus ordering the district court to cancel the hearing

was issued by two conservative judges on the 5th Circuit Court of Appeals, delaying the selection of a map that remedies the state's violation of Section 2 of the Voting Rights Act.

The plaintiffs subsequently filed an emergency request to the U.S. Supreme Court asking the Court to stay the writ of mandamus. They argue that the legislature has enough time to enact a new map before the upcoming election, argue that the plaintiffs' arguments have repeatedly prevailed over those of the state, and also argue on the legal merits of the writ of mandamus itself. The state counterargues that the 5th Circuit's issuance of a writ of mandamus was appropriate and that the plaintiffs cannot meet the legal standard necessary for the Supreme Court to stay the writ of mandamus. The most recent briefings submitted in this case were by the Robinson and Galmon plaintiffs on October 11, and the Court has yet to decide whether to stay the writ of mandamus.

Wisconsin Supreme Court to Hear Redistricting Case on November 21

On October 6, the Wisconsin Supreme Court decided by a 4-3 decision that it will hear a legal challenge to the state's legislative maps that were drawn following the 2020 census. The plaintiffs in *Clarke v. Wisconsin Elections Commission* assert that the legislative maps are extreme partisan gerrymanders that unfairly favor Republicans in violation of the state's constitution. The petitioners argue that a majority of the state's legislative districts run afoul of the Wisconsin Constitution's contiguous territory requirement because they consist of a patchwork of disconnected pieces that do not share a common border with other parts of the same district. They also argue that the Wisconsin Supreme Court intruded upon powers of the executive and legislative branches of government by enacting the map even though Governor Tony Evers had previously vetoed it.

In a separate order, Justice Janet Protasiewicz denied a request from Wisconsin legislators to recuse herself from the lawsuit. Republican legislators have threatened to impeach Protasiewicz for her refusal to recuse herself from redistricting cases, citing her statements regarding Wisconsin having unfair maps while campaigning and her receipt of campaign contribution from the Wisconsin Democratic Party.

The Wisconsin Supreme Court will hear oral argument in *Clarke v. Wisconsin Elections Commission* on November 21.

California Governor Newsom Signs Election Bills into Law

On October 10, Governor Gavin Newsom signed a slate of election-related bills into law. These bills include:

- Assembly Bill 292, which requires that voters who do not wish to indicate a political party preference for presidential primary elections are more clearly informed on how they may request to vote on a partisan ballot.
- Assembly Bill 398, which removes the requirement that a voter seeking a replacement ballot attest under oath that they have failed to receive, lost, or destroyed their ballot. They may now just request a replacement ballot without attesting under oath.
- Assembly Bill 545, which mandates curbside voting at all in-person voting locations and expands the list of required supplies at polling locations to accommodate voters with disabilities.
- Assembly Bill 626, which authorizes voters to vote by mail without including an identification envelop if they return the ballot at the polling place designated for their precinct.
- Assembly Bill 1037, which allows voters to electronically verify their signature on mail-in ballots.
- Assembly Bill 1219, which improve ballot design, makes ballot instructions clearer, and offers election officers flexibility in designing ballots to ensure that they can be provided in languages other than English.
- Assembly Bill 1539, which makes voting, or attempting to vote, in an election in California and an election in another state on the same day a misdemeanor.
- Senate Bill 77, which requires county election officials to notify voters by phone, text or email, as well as by mail at least eight days before the election's certification if a signature does not match or if a signature is missing on their mail-in ballot. Previously, voters were only required to be notified by mail.

The signing of these bills come less than one week after Governor Newsom signed three other bills into law, which are aimed at curbing gerrymandering. These bills include reforms such as establishing redistricting commissions for Orange County and Sacramento, as well as a prohibition on gerrymandering intended to protect incumbents.