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November 20 Roundtable Update

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N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE

LITIGATION

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

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

Court of Appeals Hearing: A New Map?

From City and State, by Jeff Wice. Read the full oped here; http://bit.ly/3sDSI1P

"Thursday's spirited, nearly two-hour court hearing may lead to a very closely divided court decision. Chief Judge Rowan Wilson and Associate Justices Jenny Rivera and Shirley Troutman all dissented in last year's ruling, and stated that redistricting is, in the end, a state legislative responsibility. Judges Wilson and Rivera appeared sympathetic to the Democratic arguments. Judges Anthony Cannataro, Michael Garcia and Madeline Singas peppered the Democratic lawyers with concerns over replacing the 2022 map as unnecessary and motivated more by process concerns over substantive issues.

After new Associate Judge Caitlin Halligan recused herself from this case, Manhattan Appellate Court Judge Dianne Renwick took her place and may end up as the swing vote. It's important to note that Renwick was part of an appellate panel that supported having the Independent Redistricting Commission and Legislature redraw the Assembly map last year.

We're likely to get a decision by December, leaving enough time for the Commission and Legislature to enact a new map in time for the start of the 2024 campaign in late February when petitioning gets underway for the June primary. That's if the Court of Appeals agrees with the Democrats. Should the Republican arguments carry the day, the protracted post-2020 redistricting process should finally end and leave the court ordered 2022 map in place through the end of the decade.

But in today's supercharged political climate, we're left to expect the unexpected."

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.

RECENT ACTION

November 13, 2023: Two memos filed in support of plaintiffs & opposed to the Early Mail Voting Act.

Memo in Opposition to Motions to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment

The plaintiffs contend that the EMVA is inconsistent with the text, structure, and history of Article II, Section 2 of the state constitution and that they have standing to challenge it. They argue that the EMVA violates the state constitution because, in their view, Article II, Section 2 limits absentee voting to those who are absent from their county on election day, voters who are ill, and voters who are disabled. They further assert that mail voting, by definition, is a form of absentee voting. They contend that this is the way New Yorkers have interpreted the state constitution for a century and a half.

On the issue of standing, the plaintiffs assert that the court does not need to address whether the candidate, organizational, or commissioner plaintiffs have standing because even the State appears to agree that the voter plaintiffs have standing as they "plainly suffer redressable injury when an unconstitutional law 'dilutes' the weight of their votes, whether 'by a false tally or by a stuffing of the ballot box.'" Therefore, the plaintiffs ask the court to deny the motions to dismiss and grant their cross-motion for summary judgment.

Defendant Peter S. Kosinski's Memo in Opposition to Motions to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment

Co-Chair of the NY State Board of Elections, Commissioner Kosinski, argues that the EMVA is unconstitutional because the legislature ignored the state constitution's requirement for amendment of its absentee voting provisions. He asserts that after New Yorkers rejected the proposed amendment related

to “no-excuse absentee voting,” the legislature disregarded the constitutional amendment procedure and the will of the People and enacted the EMVA, which Commissioner Kosinski maintains is “the exact same bill cloaked euphemistically (if not disingenuously) with a different name.”

Commissioner Kosinski also argues, contrary to the defendants’ position, that the Court of Appeals has already held that Article II, Section 7 does not grant the legislature plenary (complete/absolute) power to authorize no-excuse absentee voting. He contends that Section 7 is limited and was enacted to allow “solely” the substitution of voting machines in place of paper ballots.

He also asserts that the State is judicially estopped [prohibited from making a certain argument because they took a contradictory position in another case] from arguing that the state constitution grants the legislature plenary authority to allow mail in voting under Article II, Section 7 because the State previously succeeded in arguing that the constitution requires in-person voting except where absentee voting is authorized by Article II, Section 2.

Commissioner Kosinski concludes by arguing that the Defendants’ justification for the EMVA’s constitutionality defies multiple accepted principles of statutory interpretation.

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 petitioners filed a challenge to the state absentee voting law (Chapter 763 of the Laws of 2021). 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

Petitioners’ Memo in Support of Motion for Preliminary Injunction

On November 15, Rich Amedure and other Republican petitioners filed a memo asking the court to grant them a preliminary injunction declaring state absentee voting law (Chapter 763 of the Laws of 2021) unconstitutional as to the 2024 election cycle.

To secure a preliminary injunction, petitioners must show (1) a likelihood of success on the merits; (2) irreparable injury in the absence of a preliminary injunction; (3) that the balance of hardships favors the plaintiffs; and (4) that granting the relief would not be outweighed by public policy considerations.

The petitioners argue that they have shown a likelihood of success on the merits because in 2022 the trial court held that Chapter 763 is unconstitutional, and that holding is still the law of this courthouse because the Appellate Division dismissed the petition based on timeliness, not the merits.

They also argue that they will be irreparably harmed by the law if the court does not grant an injunction because "the continual application of this unconstitutional statute will supplant the rights of the petitioners guaranteed to them by the Constitution."

The petitioners also assert that any "perceived prejudice" that could occur by granting a preliminary injunction is outweighed by the prejudice inherent in the "trampling of constitutionally protected rights."

They conclude by stating that "Accuracy counts. Instant gratification is not the answer. We need to assure the public that the results are true, even if it takes some time to scrutinize the ballots, and give the candidates due process and an opportunity for judicial review. This is why the Respondents must be enjoined from enforcing…Chapter 763."

AROUND THE NATION

North Dakota's Map Dilutes the Native American Vote

On November 17, a federal judge ruled that North Dakota's 2021 legislative redistricting plan violates the rights of two Native American tribes by diluting their voting strength. The judge has given the state legislature and Secretary of State until December 22 to adopt a plan to remedy the violation, after which the tribes may file objections.

During the 2021 redistricting process, the state legislature split the 9thLegislative District in half for the first time in the state's history, splitting it into Subdistrict 9A and 9B, with each subdistrict electing a state House member. The tribes alleged that the redistricting plan unlawfully packed House Subdistrict 9A with a supermajority of Native Americans and cracked the remaining Native American voters in the region into other districts, including the 15th district. The state maintained that the two subdistricts were created to allow tribal nations to elect their candidate of choice.

The court held that the plan prevented Native American voters from having an equal opportunity to elect a candidate of their choice, violating Section 2 of the Voting Rights Act. The opinion acknowledged that voting in the Northeastern portion of the state is racially polarized, with Native American

voters preferring different candidates than their White counterparts, and it also referenced the historic discrimination faced by Native American voters.

Galveston County TX Voters Submit Emergency Application to the Supreme Court

On November 16, voting groups asked the U.S. Supreme Court to lift the 5thCircuit Court of Appeal's pause of the decision ordering Galveston County, Texas to redraw its commissioners court districts to comply with Section 2 of the Voting Rights Act. The panel acknowledged that while it was bound by its precedent allowing for minority coalition claims, it believed that permitting such claims is "wrong as a matter of law" and called for the case to be reheard by the 5th Circuit en banc to reconsider this precedent. The panel issued a separate order that extended its temporary pause of the district court's decision requiring the county to redraw its commissioners district for the 2024 election. The order remains in effect pending a decision from the entire 5th Circuit regarding whether it will rehear the case en banc.

In the emergency application, Galveston County voters argue that the 5thCircuit's extension of a temporary pause is delaying the implementation of VRA complaint districts. They also stressed that under the *Purcell* principle, which prohibits changes to maps or voting rules too close to an election, the urgency of adopting a new map in advance of the 2024 election is even more pronounced.

The emergency application is addressed to Justice Samuel Alito, who oversees all emergency applications for the 5th Circuit. Justice Alito can decide to grant or deny the stay himself or refer the matter to the entire Supreme Court. If the full court considers the application, the votes of five justices are required to grant the emergency application.