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December 11 Roundtable Update

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**WE ARE NEW YORK'S LAW SCHOOL****N.Y. CENSUS & REDISTRICTING ROUNDTABLE UPDATE****LITIGATION****NYC Council Challenge: *Desis Rising v. NYC Districting Commission* Appeal Moves Forward**

To recap: In February, Desis Rising Up and Moving (DRUM), a South Asian and Indo-Caribbean non-profit organization, along with other New Yorkers, filed this challenge alleging that the NYC Council redistricting plan violated the NYC Charter by failing to ensure the fair and effective representation of the Indo-Caribbean and Punjabi South Asian community in Richmond Hill/South Ozone Park. Additionally, the petitioners alleged that the plan failed to prioritize the representation of this protected community by splitting it into three districts (Districts 28, 29, 32), resulting in an unlawful dilution of their voting strength and preventing them from having a reasonable opportunity to elect a preferred candidate. They argued that the decision to certify the plan was arbitrary and capricious and contended that the Districting Commission could have adopted a plan proposed by advocates called the “Unity Map,” which would have comported with the Charter and state/federal law and kept the Richmond Hill/South Ozone Park Asian community intact in District 32.

On May 5, New York County State Supreme Court Judge Erika Edwards issued a decision dismissing the challenge to the NYC districting map. And on June 2, the petitioners (DRUM and others) appealed the decision to the Appellate Division, First Department.

Recent Updates: On December 4, the petitioners submitted their brief arguing that the Appellate Division should vacate (render null and void) the NYC districting map with instructions to redraw the district lines in compliance with Section 52(1)(b) of the NYC Charter. Alternatively, they ask the court to vacate the trial court’s dismissal of their Article 78 petition with instructions to re-evaluate the map “in light of the substantive requirements of Section 52(1)(b).”

To support this, the petitioners present two central arguments:

1. The plan violated Section 52(1) of the NYC Charter by diluting the voting power of the Richmond Hill/South Ozone Park (RHSOP) Asian community.

The petitioners assert that Section 52(1)(b) of the charter requires districting commissions to prioritize the “fair and effective representation” of minority

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groups (such as the RHSOP Asian community) over all other redistricting criteria, aside from “one person, one vote.”

They contend that the court overlooked this violation by interpreting this section of the charter “as a bare procedural requirement” that can be satisfied by holding a “public comment process” and filing a certification, “rather than a substantive framework that binds the Commission’s decision-making.”

With citations to documents from the charter’s framers (those who developed the charter language in 1989), the petitioners argue that the framers intended Section 52(1)(b) to “require the Districting Commission to accord very high priority’ to the ‘need to concentrate’ minority communities ‘into single council districts,’ even if those communities were not large enough to constitute majorities in those districts.”

2. The Commission and the trial court “overlooked basic requirements of NY administrative law.”

The petitioners contend that the trial court did so “by failing to hold the Commission to fundamental standards of agency decision-making.” They assert that the Commission was required, and failed, to provide a reasoned justification for their decision to split the RHSOP Asian community and to support their decision with evidence from the record.

AROUND THE NATION**Georgia: New Maps Subject to Further Court Review**

Georgia Governor Brian Kemp signed off on the state’s newly drawn congressional and legislative district maps last week. The new congressional map maintains the Republican 9-5 advantage in the House and creates a new majority-Black district in the Atlanta metropolitan area.

Georgia legislators were ordered to draw a new congressional map in October by a federal judge who ruled that the state’s district maps diluted the voting strength of Black voters in violation of Section 2 of the Voting Rights Act. The judge gave the legislature until December 8 to enact a new map, which forced the process to move along quickly. The congressional map appears to defy the court’s order by dismantling a majority-minority district currently represented by Rep. Lucy McBath. Republicans defend the move by claiming that they interpret a “minority-opportunity” district to mean majority-Black, an interpretation that many argue is incorrect.

The new state House map is a marginal improvement for Democrats, who would be expected to control 81 of the state’s 180 districts under the map compared to the 78 they currently control under the previous map. The new

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state Senate plan maintains the 33-23 majority enjoyed by Republicans under the previous plan. US District Judge Steve Jones, who ordered the redrawing of the state's maps, will determine whether the new lines comply with his order during a hearing scheduled for December 20.

North Carolina: Black and Latino Voters Bring Suit Challenging New Congressional Map

A group of Black and Latino voters filed a federal lawsuit challenging North Carolina's congressional map that was enacted in October by the state's legislature. The plaintiffs allege that the map cracks and packs minority voters to entrench the state's white majority and argue that the map erases the gains made by voters of color in the 2020 and 2022 election cycles. The plaintiffs also allege that the 1st, 6th, 12th, and 14th Congressional districts are unconstitutional racial gerrymanders in violation of the 14th Amendment's Equal Protection Clause and argue that race was impermissibly used as the predominant factor in drawing the challenged districts without any compelling justification. The plaintiffs also argue that the districts are intentionally discriminatory in violation of the 14th and 15th Amendments, with the plaintiffs pointing to the state's history of racial discrimination in voting and redistricting. The plaintiffs asked the court to declare that the congressional plan is unconstitutional and to order the drawing and adoption of lawful districts.

Louisiana: 5th Circuit Asked to Rehear Congressional Map Case

On December 1, Louisiana asked the 5th U.S. Circuit Court of Appeals to rehear en banc a case challenging Louisiana's congressional map, *Ardoin v. Robinson*. The state is challenging the part of the ruling that affirmed that Section 2 of the Voting Rights Act creates a private right of action. The lawsuit was filed under Section 2 on behalf of Black voters challenging the state's congressional map for diluting the voting strength of Black voters. This move by Louisiana was prompted by the 8th Circuit's ruling on November 20, where the 8th Circuit held that private litigants cannot bring lawsuits under Section 2.

On December 7, the U.S. Department Of Justice filed a notice of intervention in this case. The DOJ is tasked with enforcing the VRA and are entering the case to defend the constitutionality of the law.

Galveston, TX: Plaintiffs Ask U.S. Supreme Court to Lift Stay in County

On December 7, the 5th U.S. Circuit Court of Appeals ruled 11-6 to pause a lower court order that required Galveston County, Texas to implement commissioners court districts that comply with the Voting Rights Act. The

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plaintiffs brought this lawsuit to challenge the redistricting map for Galveston County's Commissioners Court, arguing that it is in violation of Section 2 of the Voting Rights Act because it dilutes Black and Latino voting power. The district court sided with the plaintiffs, holding that the elimination of the county's sole, long-standing majority-minority district, composed of a coalition of Black and Latino voters, violated Section 2.

On appeal, a three-judge 5th Circuit panel affirmed the district court's decision, holding that the panel was bound by 5th Circuit precedent that allowed for minority coalition districts. However, in the same order, the panel requested that the entire 5th Circuit rehear the case en banc to reconsider its precedent on minority-coalition districts. While deciding whether to rehear the case en banc, the 5th Circuit maintained a pause of the district court's decision. Following the 5th Circuit's order to pause the district court's decision, the plaintiffs asked the U.S. Supreme Court to lift the stay on the district court's order.

While the Supreme Court's ruling was pending, the 5th Circuit lifted its pause of the district court's order, making it so Galveston County was immediately required to enact a VRA compliant map, and the Supreme Court dismissed the plaintiff's emergency request to vacate the stay as moot. After the district court's order went back into effect, Galveston County filed a new request in the 5th Circuit, asking the court to freeze the district court's order, which the 5th Circuit granted on December 7. The 5th Circuit's ruling relies on the Purcell Principle, with the court holding that it is too close to the upcoming election to order changes to the map. The majority also held that Galveston County has shown a likelihood of success in its argument that minority coalition districts are impermissible under the Voting Rights Act. The 5th Circuit will rehear the case en banc on May 14, 2024.

On December 8, the plaintiffs filed another emergency request in the U.S. Supreme Court, asking the Court to lift the 5th Circuit's pause of the district court's order. The plaintiffs argued that it is not too close to the next election cycle to enact the maps, argued that they will ultimately prevail when the case is heard en banc by the 5th Circuit, and argued that the minority voters of Galveston County should not be forced to endure another election cycle under an unfair map.

Arkansas: Court Rules that Redistricting Case Can Proceed

A three-judge panel denied a request from the Arkansas attorney general to dismiss a case challenging the state's new congressional map. The lawsuit was filed by a group of Central Arkansas voters and the Christian Ministerial Alliance, who claim that Arkansas's 2nd Congressional District was racially gerrymandered.

During the 2021 redistricting process, Pulaski County went from being entirely in one district to being divided into three separate districts. The plaintiffs argue that splitting the county went against conventional redistricting principles and allege that the splitting of the county was the result of a racial gerrymander, as the majority-Black area of Pulaski County was split, breaking up the Black voting bloc. The panel's decision not to dismiss the case means that the case will move forward, with the court instructing the parties to agree on a discovery schedule as the case proceeds.

Tennessee: Supreme Court Blocks the Decision to Redraw the State's Senate Maps

On December 8, the Tennessee Supreme Court temporarily blocked a lower court's decision ordering lawmakers to redraw the state's Senate maps. This ruling means the current districts will likely remain in place for the 2024 elections.

Last month, a panel of trial judges ruled that the Senate maps violated the state's constitution because lawmakers incorrectly numbered the seats in Nashville. In response to the panel's ruling, the state appealed seeking a pause of the decision, arguing that the plaintiffs lacked standing to sue and arguing that the state wanted to exhaust its appeal options before having to redraw the map. With this decision to block the lower court's ruling, the map will remain in place as the appeals process plays out, which is a lengthy process that can extend past the 2024 general elections. In arguing against pausing the decision, the plaintiffs contended that lawmakers could have begun working on the map immediately and argued that the state's appeal could have been decided by the state's Supreme Court by mid-January. On the other hand, the state argued that since lawmakers reconvene on January 9 and had a January 31 deadline to draw a new map, there was not enough time to proceed under the timeline. A legal challenge to the state's redistricting maps is still pending in federal court.

Galveston County, Texas: Fifth Circuit will rehear Galveston Redistricting Lawsuit *en banc*

On November 28, the U.S. Court of Appeals for the Fifth Circuit issued an order declaring that the November 10 three-judge panel opinion is vacated, and the case will be reheard *en banc* (meaning all of the judges will hear the case).

The central issue this case presents is whether minority groups, such as Black and Latino voters, may aggregate their populations to form a "coalition district" for the purposes of establishing a vote dilution claim under Section 2 of the Voting Rights Act. There is a split among the federal circuit courts as to

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whether coalition districts are permitted under Section 2 for the purposes of showing a violation of the VRA.

While the November 10 order concluded that the district court appropriately applied Fifth Circuit precedent to allow Black and Hispanic populations in the county to combine in order to assess Section 2 compliance, the panel concluded that “this court’s precedent permitting aggregation should be overturned” and called for the case to be reheard *en banc* to make this determination.

Because the Fifth Circuit tends to lean politically conservative in its decisions, it is likely that the full court will agree with the panel and overrule the precedent, making it more difficult to succeed on a Section 2, vote dilution claim.

New Hampshire: State Court Rejects Partisan Gerrymandering

The plaintiffs in *Brown v. Secretary of State* asserted that the legislature violated the state Constitution by drawing districts that unfairly benefited one political party at the expense of another. In its decision, the state Supreme Court describes redistricting as a “purely political, legislative process” and determined that there is no “discernible and manageable” standard for judicial decision-making when it comes to claims of extreme partisan gerrymandering. In other words, the court held that claims of extreme partisan gerrymandering under the state constitution are something that N.H. state courts cannot and should not decide.

New Mexico, *Republican Party of New Mexico v. Oliver*, in unanimous decision, New Mexico Supreme Court upholds congressional lines.

On November 27, the New Mexico Supreme Court issued a brief, unanimous, affirmance, upholding the state’s Democratic-drawn congressional map, thereby rejecting the Republican lawsuit asserting the map unfairly benefits Democrats. According to the Associated Press, the congressional map, which “divvied up a conservative, oil-producing region and reshaped a district along the U.S. border with Mexico,” “fell short of ‘egregious’ gerrymandering.”

CENSUS NEWS**Comptroller DiNapoli: More New Yorkers Are Leaving**

State Comptroller Thomas DiNapoli released a report last week informing us that more than one of every 100 New York State taxpayers left the state in

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2020, caused in part by the pandemic. This out-migration quadrupled the 2019 rate of taxpayers leaving the state.

New York's personal income tax provides the state with its largest revenue source. In 2021, taxpayers paid the state \$60 billion.

From 2015 to 2019, more taxpayers left New York than moved in, averaging about 28,700 taxpayers over this four year period. In 2021, the number of people moving to the state rebounded and was more than 1.5 times that of 2020. Nonetheless, the number of taxpayers leaving the state was greater, with a result in net-migration of over 39,200, a number greater by one-third over the pre-pandemic average.

In 2020, there was a sharp increase in taxpayers leaving New York City. Over two in every 100 city residents moved out in the pandemic year. New York City residents represented 71.5% of the state's out-migration since 2020.

These numbers are in sharp contrast to numbers released by the U.S. Census Bureau that reflected increases in the state's 2020 decennial census population. The Bureau reported in 2022 that New York State may have been overcounted by 3.44% in 2020. In late 2021, the Bureau reported New York had the steepest decline in population in the United States from July 2020 to July 2021, losing 1.5% of its residents.

Read the report here: <https://bit.ly/3TjNDB2>

Fiscal Policy Institute: Who Is Leaving New York?

If high earners leave the state in search of lower taxes, does this limit how high the state can raise its tax rates? Does a decline in the total high earner population result in a revenue loss, destabilizing the state's finances? Does high earner out-migration create a negative economic indicator for the state?

In a new report by the Fiscal Policy Institute, each question is refuted. The report finds that "outside of the Covid pandemic years, high earners move at a lower rate than working- and middle-class New Yorkers. This is true for the three years prior to Covid as well as 2022, the most recent year for which data is available. Further, following two increases in the effective tax rates imposed on high earners— in 2017 and 2021 — there was no behavioral response among high earners that indicated migration out of the state. When high earners do move, they are more likely to move to another high tax state than to a low tax state, indicating that taxes are relatively low on the list of motivating factors in high earners' moving decisions."

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From the report:

1. High-earner migration out of New York during Covid was temporary, and primarily driven by work-from-home and flight from New York City.
2. In 2022, after two years of elevated, pandemic-induced out-migration, high earners' migration rates returned to pre-Covid levels.
3. Despite some millionaires leaving during Covid, New York's millionaire population grew significantly.
4. The wealthiest New Yorkers typically move at lower rates than the rest of New Yorkers in non-Covid years.
5. Raising taxes on the wealthy does not increase their rate of leaving New York.
6. When high earners do move out of New York, they are more likely to move to other relatively high tax states.
7. New York's population of wealthy New Yorkers rose after the two most recent effective income tax hikes.

Read the report here: <https://fiscalpolicy.org/migration>

ELECTION NEWS AROUND THE NATION**Nevada: Voters File Lawsuit Challenging Republican-Backed Ballot Initiative**

On December 4, a lawsuit challenging a 2024 ballot initiative that would create strict photo ID requirements for voting was filed in Nevada. The initiative would impose photo ID requirements for in-person voting and would require voters voting by mail to include an ID number with their mail-in ballot. The plaintiff argues that the ballot initiative violates Nevada law due to being deceptive, being misleading, and due to the initiative not explaining its consequences to properly inform voters. They also argue that the initiative violates the Nevada Constitution because it would require government spending even though the law itself does not provide how revenue would be raised. The plaintiff also argues that the initiative could only be constitutional if Nevada were to provide free photo ID to all voters.

The plaintiff asks for the court to prohibit Nevada's secretary of state from putting the photo ID initiative on the 2024 general election ballot. This

initiative is one of several attempts by Nevada Republicans to put a photo ID initiative on the ballot in recent years, with earlier attempts being ultimately unsuccessful due to similar lawsuits.

Wisconsin: Republicans Seek to Abolish the State's Bipartisan Elections Commission

Wisconsin Republicans have introduced legislation to abolish the Wisconsin Elections Commission. The legislation, if passed, would dissolve the commission effective June 30, 2024, and hand off the commission's responsibilities to Wisconsin's secretary of state. A key provision in the legislation would prohibit the secretary of state from taking any action relating to election administration without prior approval from the committees in the state legislature that oversee election administration. Both committees are controlled by Republicans, effectively giving Republicans full control of election administration in the state if this legislation is passed.

The Wisconsin Elections Commission (WEC) serves as the state's election regulatory agency that administers and enforces state election laws. It has come under fire by Republicans following the 2020 presidential election. Prior to the creation of the WEC in 2015, Wisconsin elections were administered and enforced by the nonpartisan Wisconsin Government Accountability Board, which consisted of six former judges appointed by the governor and confirmed by the state Senate. Governor Tony Evers has indicated that the bill would be vetoed.