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May 6 Roundtable Update

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

On May 2, the Appellate Division (First Department) heard oral arguments in the case challenging the NYC Council districts. To recap, last year, Desis Rising Up & Moving (DRUM), a South Asian and Indo-Caribbean non-profit, filed this challenge alleging that the 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 and South Ozone Park. Last May, the trial court dismissed the challenge, finding that the petitioners failed to demonstrate that the Districting Commission violated the Charter.

During oral arguments before the appellate division, the justices drilled down on the language of the charter and questioned whether adherence to the requirement of “ensuring fair and effective representation of racial and language minority groups” should be analyzed on a citywide scale, “in totality,” as one justice put it, based on how many majority Asian districts were created, for example, or if this factor is a “local inquiry” as attorney for the DRUM petitioners argued.

Another justice pointed to expert Dr. Lisa Handley’s report as the basis for the commission’s adherence to this factor. However, attorney for the petitioners contended that Dr. Handley’s analyses addressed the federal voting rights act (VRA), not the charter. Furthermore, attorney for the petitioners argued that while the federal VRA ensures that minority groups are able to elect their candidates of choice, the framers of the charter chose a “different and broader approach”: ensuring “fair and effective representation.” Attorney for the petitioners asserted that “fair and effective representation” means “having a representative in city government who is going to be responsive to that groups’ concerns.”

The attorney for the commission emphasized the incredibly complex nature of redistricting in NYC, the commission’s “unprecedented” public outreach specifically to minority communities, and the resulting 29 minority opportunity districts and an increase in the amount of Asian opportunity districts. The attorney for the commission also pointed to the language in the charter provision that states “such districting *plan* shall...” ensure “fair and effective representation” to support his assertion that this criterion is *not* a district-by-

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district inquiry as the other side argued, it is a holistic analysis. In response, one justice questioned how we can then ensure representation for “folks of color in a particular area.” Another justice mentioned the alleged arbitrary division of a community and whether the map complies with the third charter criterion (keeping communities of interest intact) as opposed to the proposed Unity Map. The attorney for the commission noted the complicated task of keeping communities intact in Queens and pointed again to the commission’s extensive public outreach to these groups. He also emphasized that the commission stated on the record that it was concerned that the Unity Map would not provide sufficient opportunities for Asian voters to elect their candidates of choice.

N.Y. VOTING RIGHTS ACT LITIGATION**Nassau County Legislative Map Challenges**Memos Supporting Non-Parties’ Motions to Quash Subpoenas

Last week, Nassau filed two reply memos supporting non-parties Francis Moroney’s and Richard Nicoletto’s motions to quash their subpoenas. The county argued that the subpoenas seek testimony that is protected by legislative privilege including how and why they formulated draft maps for the legislature to consider. The county argued that the plaintiffs seek to question former chairperson (Moroney) of the advisory commission—“a committee specifically designed to assist the Legislature in crafting legislation—about his conversations, conduct, intent, motivations, and knowledge regarding that crafting of proposed legislation. This aims directly at the heart of legislative independence that the privilege is designed to protect, and will directly ‘impede legislative action’ moving forward.”

Regarding former Presiding Officer of the Legislature Nicoletto, the county asserted that the plaintiffs “seek to question [him] about his conversations, conduct, intent, and knowledge undergirding the crafting of proposed legislation. That aims at the core of what legislative independence was designed to protect against, directly ‘impeding legislative action’ moving forward.” Additionally, the county reiterated Nicoletto’s argument that the subpoena seeks testimony that is protected by attorney-client privilege including communications with law firm Troutman Pepper during the redistricting process.

Letter to the Court on Discovery Dispute

In response to the plaintiffs’ letter to the court about the discovery dispute regarding Dr. Sean Trende, the county wrote to the court requesting that the court not rule on any issues raised by the plaintiffs until after Trende has been able to appear and file his motion to quash the subpoena. The county

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contended that “Dr. Trende will sit for a deposition as an expert witness at the appropriate time; this is not an effort to avoid a deposition of Dr. Trende altogether.”

Newburgh: *Oral Clarke et al v. Town of Newburgh*

On April 30, N.Y. State Attorney General Letitia James filed a memo supporting her request to participate in the case as *amicus curiae* in opposition to Newburgh’s motion to dismiss. The Attorney General explained that this case presents an important question related to the NYVRA that has never been addressed: whether a town or other political subdivision may receive the benefit of a 90-day protection from litigation (“safe harbor”) when it does not “meaningfully commit” to enacting a remedy during the 90-day period, but instead only commits to consider the issue further. The Attorney General emphasized that if the court were to answer “yes” to this question, “it would undermine the text and purposes of the NYVRA, enable delay of judicial remedies, and increase the risk of elections proceeding under unlawful conditions.”

On May 1, Newburgh submitted a reply memo supporting its motion to dismiss the case. Newburgh argued that the plaintiffs filed their challenge in violation of the NYVRA’s 90-day safe harbor provision as the town board passed the required resolution within the prescribed time period and included the necessary elements in that resolution (intention to implement a remedy for a potential violation of the NYVRA; specific steps the town will take to implement such remedy; and a schedule for implementing a remedy). While the plaintiffs argued that the town’s resolution was insufficient because it doesn’t declare the town’s intention to implement a remedy, Newburgh contended that the resolution complies with the NYVRA’s requirements by explicitly stating that the town board “‘intends to proactively review the town’s current at-large election system...and implement remedies for any potential violation of the NYVRA that may exist,’” and “‘affirming that the town intends to enact and implement the appropriate remedies’ if ‘the town board concludes that there may be a violation of the NYVRA.’” Newburgh further asserted that the plaintiffs’ argument that the NYVRA requires the town to “pre-commit” to enacting a remedy to an alleged violation, even before the town has determined whether the allegations have merit, is unreasonable.

ELECTION LAW LITIGATION

Even Year Election Law Challenges: In December 2023, Governor Kathy Hochul approved legislation that moved most county and town elections from odd- to even-numbered years. The goal was to improve voter turnout by holding more even-year elections when voter turnout is statistically much higher. Six counties have now filed lawsuits against the state to block the law,

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including Onondaga, Nassau, Oneida, Rensselaer, Dutchess, and Rockland Counties.

The counties all argue the new law violates Article IX of the N.Y.S. Constitution, which gives local governments the authority to determine when local elections are held. Each challenge asserts that the Legislature exceeded its authority to “meddle” in local government affairs since the even year election law was neither a general or special law.

Onondaga and Oneida counties argue that a clause in Article IX protects all local laws passed before 1963, and the counties’ charters (both passed in 1961) scheduled local elections for odd-numbered years. Nassau County claims its local election years were established by a charter and referendum in 1936, so the county can only change its election years via a similar process.

Despite several nuances in the arguments, Onondaga and Nassau Counties may consolidate their cases. There is also a strong possibility that all six counties will consolidate their lawsuits into a singular case against the state. New York has not yet responded to any of these lawsuits.

CENSUS**U.S. House To Vote on Bill to Add Census Citizenship Question & Adjust Reapportionment**

The U.S. House Oversight and Accountability Committee recently approved [H.R. 7109](#), a bill to add a citizenship question to the decennial census and exclude noncitizens from the count used for congressional apportionment. It would also make it possible for states to redistrict based on either citizen or citizen voting age populations (and thereby excluding large populations, such as non-citizen Hispanic residents).

The bill will be considered by the full House for a vote on Thursday, May 9th.

While it is permissible to ask a citizenship question on the census form, it is likely unconstitutional to exclude non-citizens from the census count for congressional reapportionment purposes. Article 1, Section 2 of the U.S. Constitution requires that the reapportionment of districts among the states be based on the whole count of all persons residing in the country. This bill has the potential impact of costing New York the loss of congressional districts after the 2030 census. Two New York Members of Congress are bill co-sponsors (Congress Members Nicholas Langworthy and Anthony D’Esposito).

Dr. Andrew Beveridge at Social Explorer has developed a website providing information on the impact switching to citizen-based redistricting would have

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for congressional and state legislative districts in every state. Link to this tool here: <https://www.socialexplorer.com/evenwel/>

While New York could potentially lose congressional districts if this bill becomes law, the state constitution requires that districts within the state be based on the total number of residents (including non-citizens). New York State ended the practice of drawing districts based on citizenship in 1969.

According to Dr. Beveridge, if this bill had been enacted into law in 2020 and assuming that the American Community Survey was a good representation of citizens from 2018 to 2022, California would lose three congressional seats, Florida would lose one and Texas would lose one while Ohio, Pennsylvania, Idaho, Michigan and West Virginia, would each win a seat.

Based on preliminary calculations, Dr. Beveridge also found that by switching to either citizens or citizens of voting age (CVAP) as the redistricting denominator, there "would (be) a substantial effect on redistricting for Congress. Put simply the Democrats would on average need to add over 17,000 citizens or over 14,000 citizens of voting age to balance their congressional districts, meanwhile the Republicans would need to reduce the size of their districts by over 15,000 on average for citizens and over 13,000 for citizens of voting age."

REDISTRICTING AROUND THE NATION

Louisiana: Black voters and civil rights groups have asked the U.S. Supreme Court to review a decision made by a federal 3-judge panel that struck down Louisiana's new congressional map, ruling the map was an unconstitutional gerrymander.

Last year, Louisiana was ordered to enact a congressional map with two majority-Black districts after the courts found that the original map violated Section 2 of the Voting Rights Act. In January, Louisiana enacted a new congressional map that met the court's requirements. A lawsuit was filed by "non African-American voters" (as the voters self-identified) in response.

The lawsuit aimed to block the new map, alleging that the map was a racial gerrymander. After a trial in mid-April, the federal 3-judge panel found that the new districts—aimed at better representing the state's Black population—were racially gerrymandered. The panel blocked the map from use in the 2024 elections.

The notice of appeal lists numerous reasons why the Court should review the case. Black voters and the NAACP Legal Defense Fund argue the federal panel did not follow the proper procedure and heard the case without any input from the Black voters who originally challenged Louisiana's

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congressional map. While the parties await the Supreme Court's decision to review, the state must enact a new map by May 15.

EVENTS

June 18- New York Law School will host a conference on redistricting from 9:30 to Noon at the school. Panels will focus on the 2014 constitutional amendment, the post-2020 process and what happened, and next steps for a new constitutional amendment before the post-2030 process gets underway. More information will be provided in future updates.