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June 17 Roundtable Update

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N.Y. ELECTIONS, CENSUS & REDISTRICTING UPDATE

EVENTS

June 18 Conference- N.Y. Redistricting: What Happened and What's Next?

New York Law School will host a conference on redistricting from 9:30 to Noon at the school (located at 185 W. Broadway in Manhattan's Tribeca neighborhood). 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. 2022 Court Special Master Jonathan Cervas will keynote the event. For more information and a link to register for the event, see: https://www.nyls.edu/events/new-york-redistricting-what-happened-and-whats-next/

N.Y. VOTING RIGHTS ACT LITIGATION

Cheektowaga (Erie County): Young v. Town of Cheektowaga

On June 12, the Town of Cheektowaga filed a notice of cross-motion for summary judgment in *Young v. Town of Cheektowaga*. The Town's requested relief includes an order denying Young's motion for partial summary judgment, granting summary judgment in favor of the Town, dismissing Young's complaint in its entirety, and striking the NYVRA down as unconstitutional.

On June 12, Daniel A. Spitzer filed an affirmation in opposition to Young's motion for partial summary judgment and in support of the Town's cross-motion for summary judgment. Spitzer echoes the relief requested by the Town and provides persuasive lists of facts and reasonings for why the court should rule in the Town's favor.

Spitzer states that the NYVRA tramples upon "several of the rights guaranteed by both the U.S. and New York State Constitutions" by providing voter protections beyond the rights afforded by the U.S. Constitution. Spitzer also states that Young's repeated failures in multiple elections suggest that there are reasons "beyond racially polarized voting," but the Town is prohibited by the NYVRA from considering these rationales. Spitzer argues that by prohibiting the Town from considering other rationales and by coercing the Town into altering its electoral system, the NYVRA violates the 1st Amendment.

On June 12, a memorandum of law was also filed by the Town. The memo focuses on two main points: (1) The court should deny Young's motion for partial summary judgment because the motion is premature and substantively deficient; and (2) the Town is entitled to summary judgment as to its constitutional defenses. On the first point, the Town argues that Young's "premature motion" demands the court to provide advisory opinions and that material issues of fact still exist. On the second

point, the Town argues that it has the capacity to challenge the NYVRA, that the Court is authorized to decide the constitutional challenges brought by the Town against the NYVRA, and that the NYVRA violates the U.S. and New York State Constitutions. If the Town's cross-motion is denied, its counsel asks the Court to deny Young's motion for summary judgment and to order discovery and proceed "in its normal course."

On June 12, the Town of Cheektowaga filed a counterstatement of material facts. The counterstatement denies sufficient knowledge to form a belief on many of Young's material facts, such as Young's race or residency. It disputes the Town's designation as a "political subdivision," as this term is used in the NYVRA and "seeks to draw a legal conclusion." It also disputes that Young was the candidate of choice for the minority population in Cheektowaga. The counterstatement further disputes information from expert Lisa Handley, arguing that the information is opinion-based and therefore inappropriate for a Material Statement of Facts.

VOTING RIGHTS ACT ADMINISTRATION

Attorney General Issues Proposed Voting Rights Law Preclearance Proposed Rule

The New York Voting Rights Act's preclearance section, which requires certain local jurisdictions throughout the state ("covered entities") takes effect on September 22, 2024. This law requires certain local governments to submit certain types of voting- and election-related changes ("covered policies") to the OAG's Civil Rights Bureau ("CRB") or to a designated court before they can be enacted or implemented,

To provide transparency and guidance to covered entities and the general public, and to ensure that preclearance is administered efficiently and effectively, **the Attorney General's office has released a proposed rule, which can be viewed on its website**.

A summary of the proposed rule was published on June 13th in the State Register. The proposed rule contains information regarding preclearance submission and review procedures; the legal standard that will be used to analyze submissions; covered entities; and covered policies.

Comments on the proposed rule can be submitted until **August 12** by email (votingrights@ag.ny.gov) or by mail (ATTN: Voting Rights Section, Civil Rights Bureau, Office of the New York Attorney General, 28 Liberty Street, New York, NY 10005).

LEGISLATION

Election Laws Approved by State Legislature

The following bills were approved by the State Assembly and Senate before adjournment:

Bill No.

A3250A**: Epstein** -- Relates to allowing pre-registered voters to apply for an absentee or early mail ballot

A9409: **Wallace** -- Moves the date of the meeting of the electors and the method for the transmission of the certificates of vote

S610: **HOYLMAN-SIGAL** -- Authorizes boards of elections to establish absentee ballot drop-off locations

S612D: **MAYER** -- Prohibits conflicts of interest among board of elections employees

S5943: **SKOUFIS** -- Modifies the order in which candidates appear on the ballot

S6130A: **PARKER** -- Provides that an attorney licensed to practice law in the state may serve as a poll watcher in any city or county in the state

S6199B: **MYRIE** -- Relates to notifying candidates of designation for certain county committees

S8638: **MYRIE** -- Provides that a proceeding challenging apportionment by the legislature shall be brought in certain designated courts

S9678B: **GONZALEZ** -- Relates to materially deceptive media in political communications

S7543B: **GONZALEZ** -- Enacts the legislative oversight of automated decision-making in government act (LOADinG Act)

Thanks to Louie Sawi of New York Votes for the list.

ELECTION LAW

Federal court Finds N.Y. Line Warming Ban Unconstitutional: *Brooklyn Branch of NAACP v. Kosinski*

On May 30, the U.S. District Court for the Southern District of N.Y. held a New York law banning line warming unconstitutional. Line warming – the handing out of food and drink to voters at polling places – has been banned in New York for over 100 years. The most recent line warming ban, N.Y. Elec. Law Section 17-140, was enacted in 1992. It classified line warming as a Class A misdemeanor punishable by up to one year's imprisonment or up to three years' probation and a monetary fine.

The Brooklyn Branch of the NAACP challenged the constitutionality of the Line Warming Ban in its suit against the New York State Board of Elections and the New York City Board of Elections. In its opinion, the court concluded that the Line Warming Ban violated the First and Fourteenth Amendments to the U.S. Constitution because it unduly restricted expressive conduct protected under the First

Amendment, was overbroad in violation of the First Amendment, and was unconstitutionally vague in violation of Due Process Clause of the Fourteenth Amendment.

The First Amendment protects expressive or symbolic conduct when such conduct is intended to convey a particular message and it is likely that the message will be understood by those viewing it. The court agreed with the Brooklyn NAACP's argument that line warming constitutes expressive conduct as it conveys the message that voting is important and it such a message is likely to be understood by voters. It further agreed that the Line Warming Ban was overly restrictive. In its defense of the Ban, State Board of Elections argued that its purpose was to protect voters from undue influence. However, the court held that the law applied to substantially more speech than necessary, and was not therefore sufficiently tailored to accomplish its alleged goal. It further held that the ban was overbroad in violation of the First Amendment on the same grounds.

Under the Due Process Clause, a criminal law is unconstitutionally vague because it either fails to provide individuals with a reasonable opportunity to understand what conduct is prohibited or it allows for arbitrary or discriminatory enforcement. The court held the Line Warming Ban was unconstitutionally vague because it failed to provide sufficient geographical constraints for the average individual to understand what conduct is prohibited and where. In its opinion, the court highlighted that, based on the text of the statute, it is unclear whether it would be illegal to provide voters with snacks while in the parking lot, or if the Brooklyn NAACP could be prosecuted for providing snacks at their headquarters.

Throughout its opinion, the court emphasized the potential impact of the Line Warming Ban in the upcoming 2024 election cycle. New York voters often face long wait times, and those wait times grow longer during high turnout elections. Following the 2020 presidential election, voters complained of wait times as long as five hours. Voters may face equally long wait times in the upcoming 2024 election cycle. Long wait times may work to discourage voters from remaining at the polls, whereas line warming by nonpartisan organizations like the NAACP may support voters and ultimately increase voter turnout.

The parties to the suit have until June 14th to submit a joint proposal regarding the next steps in the litigation. A permanent injunction against the Line Warming Ban is in place as of the May 30 ruling.

2024 ELECTIONS

New York voters will only see three presidential candidates on the November ballot.

Last week, the State Board of Elections determined that Green Party candidate Jill Stein failed to submit the required 45,000 signatures (or signatures equal to 1% of the total number of votes in the last gubernatorial election). Stein also failed to submit a list of electors. Only President Joe Biden (D), Robert F. Kennedy, Jr. (Independent), and Donald Trump (R) will appear on the ballot.

EMPLOYMENT

The **New York City Campaign Finance Board** is hiring a general counsel. Read about and apply for the position here: https://cityjobs.nyc.gov/job/general-counsel-in-manhattan-jid-23401

AROUND THE NATION

Florida: A federal court has decided not to review a March decision that upheld a new Florida congressional district that eliminated a historically Black district. The plaintiffs alleged that the 2022 map violated the 14th and 15th Amendments because of intentional race discrimination. The Black voters, once in one district, are now spread throughout four majority-white districts.

In March, a federal 3-judge panel concluded the plaintiffs had not proven that the Legislature "acted with race as a motivating factor." The court stated that even if DeSantis acted with "some unlawful discriminatory motive" in creating the map, that does not mean the Legislature shared the same motive. In April, the plaintiffs filed a motion asking the court to reconsider the case, noting that DeSantis should not be treated as an "outsider to the legislative process" because he is a state actor whose position allows him to partake in legislative functions.

On June 11, the court denied their motion and effectively closed the case. However, pro-voting groups filed a separate case in April 2022, arguing the map violates the state constitution. In September 2023, a trial court struck down the map for violating the Florida Constitution by diminishing Black voting power in northern Florida. On appeal in December, the court reversed the trial court's decision, ruling that the map should be upheld.

The plaintiffs appealed that ruling, and in January, the Florida Supreme Court agreed to hear the case. However, the court denied the plaintiffs' motion to expedite the proceedings and a date has not yet been set for oral argument.

Louisiana: Voters in Louisiana still do not have new legislative maps months after a federal district court struck down Louisiana's electoral districts for violating Section 2 of the Voting Rights Act. This delay is partly because the state is waiting for the 5th U.S. Circuit Court of Appeals to rule on whether private parties are allowed to bring claims under the federal provision of Section 2. However, the court has not announced whether it will hold the requested hearing.

In April, Louisiana officials filed a petition for a 5th Circuit hearing after the 8th U.S. Circuit Court of Appeals ruled in a separate case that private litigants can no longer bring lawsuits under Section 2, only the U.S. Attorney General. Louisiana officials are seeking the same conclusion from the 5th Circuit. This ruling would jeopardize the plaintiffs' standing in this case and other redistricting cases in Louisiana, Mississippi, and Texas, all covered by the 5th Circuit.

In May, the federal district court stated that the court would grant the plaintiffs' motion to have the court schedule deadlines for remedial proceedings if the Legislature did

not pass a VRA-compliant map by the end of the legislative session on June 3. The court stated that pending appellate review does not "absolve the state of their obligation" to comply with the order of the federal district court.

North Carolina: On June 13, a hearing was held in a challenge to the state's new congressional and legislative maps. The lawsuit was filed on behalf of North Carolina's voters and challenged the state House and state Senate maps that were redrawn by the Legislature in October 2023.

The plaintiffs argue that these maps created an unfair partisan advantage for Republican candidates, and that the right to "frequent" and "free" elections surely guarantee them the right to "fair" elections as well. The challenged districts allegedly violate the rights of North Carolina voters to "fair" elections under the state constitution. The lawsuit asks the court to rule that "the citizens of North Carolina have an unenumerated constitutional right to fair elections" and to strike down the maps for violating this right.

The N.Y. Census & Redistricting Institute is supported by grants from the New York Community Trust, New York Census Equity Fund, the Alfred P. Sloan Foundation, and the New York City Council. This report was prepared by Jeff Wice, Alexis Marking, & Beau van der Meulen.