

8-12-2024

August 12 Elections, Census & Redistricting Update

Jeffrey M. Wice

**WE ARE NEW YORK'S LAW SCHOOL****N.Y. ELECTIONS, CENSUS & REDISTRICTING UPDATE****ELECTIONS****New York Board of Elections Sued Over the Equal Rights Amendment's Ballot Language**

A new law enacted last year requires ballot language for voter referendum questions in New York State to be written in plain language at "no higher than an eighth-grade reading level." The ballot language for the Equal Rights Amendment (ERA), which was approved to appear on the November ballot, has now been scored at a college reading level. The New York State Board of Elections (BOE), who recently approved the ERA's ballot language, acknowledged that state BOE commissioners voted to adopt ballot language that likely violated New York State law.

As a result of this high reading level score, two New York voters named Victoria Fernandez and Katherine Hauser have filed a lawsuit against the state BOE. The voters cite this score as a clear violation of the new law: "The form and abstract certified by the Board unjustifiably exceeds an eighth grade reading level, employs technical language that will confuse voters, and inaccurately and misleadingly represents the scope of Prop 1's protections." The voters hope to change the ballot language before the November election.

The lawsuit also argues that the current ERA ballot language does not include terms such as "abortion" or "LGBT," even though the amendment intends to enshrine abortion protections and rights for the LGBT+ community into the New York State Constitution.

As reported by [City & State](#), Democratic Co-Chair Henry Berger stated that he anticipated the court to review the ballot language. Berger agreed that terms such as "abortion" and "LGBT" would make it easier for the lay reader to understand the amendment and the lawmakers' intent. However, according to Berger, the BOE staff did not recommend either term and "defaulted to the language of the amendment itself."

The lawsuit seeks to compel the state BOE to adopt ballot language recommended by the New York State Attorney General's office or similar language. This language reads, in part: "Protects against unequal treatment by New York and local governments no matter your sex, age, disability status, ethnicity, or national origin. Protects LGBT and pregnant people. Protects abortion."

Robert F. Kennedy Jr. Faces Ballot-Access Lawsuit that Claims He is Not a New Yorker

Independent presidential candidate Robert F. Kennedy Jr. is fighting to be on the New York State ballot after a lawsuit was filed. The lawsuit, filed on behalf of New

New York Elections, Census, and Redistricting Institute

Yorkers and brought by Clear Choice PAC, seeks to invalidate RJK Jr.'s nominating petition, claiming RJK Jr. falsely claimed to live in New York State. The non-jury trial began last Monday and ended on Thursday. A judge is set to issue an immediate decision this week under New York State election law. Any ruling by Justice Christina Ryba, a trial court judge, is expected to be appealed.

In the lawsuit, the plaintiffs claim RJK Jr.'s state nominating petition falsely listed a New York residence, while he has actually lived in Los Angeles since 2014 with his wife and children. Last week, RJK Jr. testified that his move to California ten years ago was "only temporary" and that he intends to move back to New York, where he lived for approximately fifty years. Currently, the presidential candidate rents a room in his friend's home in Katonah, but he testified that he has only slept in that room once due to "constant campaign travel."

If his petition was ruled as invalid, a [spokesperson](#) for the New York State Board of Elections (BOE) stated that the BOE would remove RJK Jr. from the November 2024 ballot. Additionally, RJK Jr. could face similar lawsuits in other states because his campaign listed the same New York address.

CENSUS**U.S. Census Bureau Seeking Feedback on Updated Race & Ethnicity Standards**

On July 12, the U.S. Census Bureau published a 30-day Federal Register notice (FRN) seeking feedback on the Office of Management and Budget's (OMB) updated race and ethnicity standards for the American Community Survey (ACS).

The ACS is an ongoing demographics survey program that collects information nationally each year to keep leaders and communities up-to-date in between decennial censuses. In general, agencies and departments publish proposed rules for public comment for at least 30 days before instituting the rule. This method gives interested individuals an opportunity to provide comments and participate in the rule-making process prior to the adoption of the final rule(s).

For the Census Bureau's new race and ethnicity standards, the two proposed timelines for implementation are: (1) the 2026 ACS with dissemination of data products to begin in 2027, or (2) the 2027 ACS with dissemination of data products to then begin in 2028. In the current proposal, the Census Bureau is targeting the 2027 ACS for implementation with the dissemination of data products to begin in 2028. The Census Bureau will consider responses to evaluate the feasibility of implementing the updated standards into either the 2026 or 2027 ACS.

Public comments are due by today, August 12, for this matter.

U.S. Census Bureau Releases 2020 Census Counts of Households

New York Elections, Census, and Redistricting Institute

The U.S. Census Bureau has [released](#) 2020 Census counts of households, including information on household type and tenure (i.e., whether the home is rented or owned) for 300 detailed race and ethnicity groups and 1,187 American Indian and Alaska Native tribes and villages.

The 2020 Census Detailed Demographic and Housing Characteristics File B (Detailed DHC-B) provides household information based on the race or ethnicity of the householder, which is the first adult in a household “for whom census responses were provided.” The Detailed DHC-B data is available for the country as a whole, as well as all states, counties, places, census tracts, and American Indian, Alaska Native, and Native Hawaiian (AIANNH) areas.

Jan Vink, a Senior Extension Associate for the Cornell Program on Applied Demographics, created a spreadsheet with the information from the Detailed DHC-B on all New York Counties. Vink also conducted an analysis for homeowners by detailed races in New York State.

Based on the new Census Bureau data and Vink’s analysis, the top three homeowners by detail race groups alone or in combination are:

Detailed Race Group		Population Count	Hholders	Homeowners	Home Ownership
Irish	Alone or in combination	2,503,431	1,026,736	676,164	66%
Italian	Alone or in combination	2,298,495	902,848	619,223	69%
German	Alone or in combination	2,026,546	866,526	583,500	67%

The top three renters by detailed race groups alone or in combination are:

Detailed Race Group		Population Count	Hholders	Renter Occupied	Rentership
Irish	Alone or in combination	2,503,431	1,026,736	350,566	34%
African American	Alone or in combination	1,403,002	476,137	340,374	71%
Italian	Alone or in combination	2,298,495	902,848	283,637	31%

As shown by the data, the rentership rate among African Americans in New York State is extremely high in comparison to the other two highest renters by detailed race groups (alone or in combination).

VOTING RIGHTS

Governor Hochul Signs Voting Bills Into Law, Aims to Improve Voter Accessibility and Protections

On Tuesday, Governor Kathy Hochul signed a package of new election legislation into law, including a total of seven bills. These bills include:

[Bill A3250A](#): Allows pre-registered voters under the age of 18 years old to apply for absentee or early mail ballots, as long as the individual will be 18 years or older on the day of the election when the ballot is cast and counted.

[Bill A9409](#): Moves the date for New York's meeting of its presidential electors to fix a process inconsistency. The bill also changes the method for the transmission of the electors' certificates of vote (to the Capitol in Washington, D.C.) to align with federal law (the 2022 Electoral Count Reform Act).

[Bill A10357](#): Authorizes the Civil Rights Bureau (CRB) of the Office of the Attorney General to make and enforce rules aimed at expanding and protecting the right to vote for protected class members as defined by the New York Voting Rights Act (NYVRA). The bill also clarifies the definition of "protected class" and certain portions of the coverage formula for determining which New York jurisdictions are subject to the NYRA preclearance requirements.

[Bill S5943](#): Modifies the order in which candidates appear on the ballot. Under the prior setup, high offices appeared first, then candidates for state judicial seats appeared next, between the executive officer and the legislative offices. Under the new law, the electoral ballot will be structured with the gubernatorial and presidential offices first, then Congressional and state legislature offices next, and judicial offices last.

[Bill S6130A](#): Expands the definition of a poll watcher across all cities and counties in New York State to provide that New York licensed attorneys may also serve as poll watchers.

[Bill S9763](#): Updates aspects of village election law to bring the law up to compliance with the timeline set by the Legislature in 2019. Relates to when a referendum is required when a village has provided that village elections shall occur on the same day as the general election.

[Bill 9837](#): Adjusts the timeline to "cure" an absentee or early mail ballot, citing delays with mail processed by the U.S. Postal Service. The bill also allows a voter to return the affirmation form to the BOE in person, by mail, or via email.

N.Y. VOTING RIGHTS ACT LITIGATION

Clarke et al. v. Town of Newburgh

New York Elections, Census, and Redistricting Institute

On August 6, a stipulation and order for the production and exchange of confidential information was signed by both counsel for the plaintiffs and counsel for the defendants in *Clarke et al. v. Town of Newburgh*. In January, three Black and three Hispanic residents of Newburgh filed this lawsuit, claiming the town's at-large election system for Town Board elections has prevented Black and Hispanic residents from electing candidates of their choice, and thus violates the New York Voting Rights Act (NYVRA).

This matter came before the court by stipulation of all parties for the entry of a protective order, which would limit the review, copying, dissemination, and filing of confidential and/or proprietary documents and information that is produced by any party and their respective counsel (or by any non-party to the case) during the period of discovery. Between and among the counsel for the plaintiffs and defendants, the parties agreed upon terms for this stipulation regarding confidentiality. This "request to do so" order now awaits the signature of the presiding judge.

Serratto et al. v. Town of Mount Pleasant

On August 5, counsel for the plaintiffs requested in a letter of correspondence to the judge requesting that the court schedule a trial date during a court conference on August 6. The lawsuit was filed in January by the Mount Pleasant Hispanic community, which asserted that the Town's use of an at-large method of election, where all voters elect the Town Supervisor and all four Town Board members, led to racially polarized voting. As a result, Hispanic voters were prevented from electing the candidate of their choice.

According to Election Law § 17-216, a section of the New York Voting Rights Act (NYVRA), this case "shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference" because of "the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potential unlawful conditions that benefit incumbent officials." The plaintiffs state that petition collection for the 2025 Town of Mount Pleasant candidates begins in February 2025. Due to the modification of the election structure, the plaintiffs argue that the court would need to hold a trial, decide on a remedy, and all appellate review would need to be completed prior to February.

Additionally, on August 7, a briefing schedule was announced. It was stipulated and agreed upon by the counsel for the plaintiffs and counsel for the defendants that any parties' motion for summary judgment and any accompanying memorandum of law must be served via NYSCEF by August 13, 2024. The parties also stipulated and agreed that opposition papers and amicus briefs (if any) must be served via NYSCEF by September 12, and reply papers must be served by September 26, 2024. Memoranda of law for initial motions and oppositions is limited to 10,000 words each, and reply memoranda are limited to 5,000 words each. Lastly, the deadline to depose non-parties, "selected as potential trial witnesses by the parties," is extended to October 4, 2024.

Nassau County Legislature: *Coads et al. v. Nassau County & NY Communities for Change v. Nassau County*

These two actions, *Coads et al. v. Nassau County* and *NY Communities for Change v. Nassau County*, arose from challenges to the 2023 redistricting map for the Nassau County Legislature, which went into effect on February 28. On August 2, the court held a virtual conference at which counsel for all parties in both actions made virtual appearances. The court heard arguments on the scope of its order from July 31, which denied two motions to quash with exceptions, as well as other case-related disputes. The following is a summary of the proposed order.

The first argument was regarding non-party Dr. Sean Trende's motion in *Coads et al.* to quash his subpoena and for a protective order. The court denied this motion except to the extent that the plaintiffs shall limit their inquiry during his depositions. He informed the firm's legal advice as a redistricting expert and litigation consultant.

The second argument was regarding attorney Misha Tseytlin's motion in *NY Communities for Change* to quash his subpoena and for a protective order. The motion was denied except that the plaintiffs may not pose questions related to "Richard Nicolletto's motivations or deliberations." Nicolletto served as the Nassau County Legislature's majority leader during the redistricting process.

Counsel for the movants and defendants, who joined the motions, advised the court that they will appeal the order from July 31. Counsel advised the court that Dr. Trende and Mr. Tseytlin would not appear for their depositions unless ordered by the court. The court then issued an order compelling Dr. Trende and Mr. Tseytlin to appear for their depositions no later than August 30.

Next, the court heard matters regarding a joint letter dated May 14, 2024. The court reserved judgment with one exception: the court ruled that the defendants may not withhold the name of an individual whose name was redacted from their March 15 production that the Court has accepted for in-camera review.

The court also heard from all parties on whether or to what extent the parties may continue to propound requests for admissions despite the expiration of the fact discovery deadline. The court ordered the *NYCC* plaintiffs to file the new requests for admissions they seek to propound on *NYSCEF*, with any confidentiality redactions made, and to identify whether and to what extent the Defendants should be required to answer previous requests for admission of which there are disputes.

The court also heard from all parties on scheduling issues and tentatively reserved the dates December 9 through December 20, 2024, for a potential trial in this matter. Expert depositions shall be completed by September 30, 2024, and any motions for summary judgment shall be filed by October 21, 2024.

The N.Y. Elections, 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.