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## November 4 Elections, Census & Redistricting Update

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**WE ARE NEW YORK'S LAW SCHOOL****N.Y. ELECTIONS, CENSUS & REDISTRICTING UPDATE****N.Y. VOTING RIGHTS ACT LITIGATION****Orange County: *Clarke et al. v. Town of Newburgh***

This is an ongoing NYVRA action in a challenge filed by Black and Hispanic voters against the Town of Newburgh.

On October 28th, the state supreme court ruled that it would allow the addendum of Dr. Barreto, an expert for the plaintiffs, and any related testimony. Although the disclosure of this expert report was late, the court determined it was necessary. The court adjourned the trial of October 31st to provide the defendants with time to amend their own expert reports and to depose Barreto. A new trial date has not been set yet.

On November 1st, counsel for the town also requested the opportunity to supplement their pending motion for summary judgment to address the Barreto addendum. The court denied this request because (1) the defendants had the addendum months before they filed their motion and (2) the motion to exclude the addendum was filed later.

Newburgh requested a new trial date for no earlier than January 1st due to another trial involving counsel in December. The plaintiffs requested a trial date of December 2nd, citing the NYVRA's requirement of expedited judicial proceedings for these actions. The plaintiffs also emphasized that this matter must be decided for the 2025 election cycle, where petitioning gets underway in February.

**Westchester County: *Serratto et al. v. Town of Mount Pleasant***

This is an ongoing NYVRA action. The lawsuit, which alleges racially polarized voting, was filed by Hispanic voters against the Town of Mount Pleasant.

This action is now scheduled for a court conference on November 7th. Any attorney appearing on behalf of a party is required to be fully versed in the facts of the case and, according to the court, have full settlement authority.

**ELECTION LAW****Court of Appeals Upholds Absentee Voting Law**

New York's highest court has upheld a 3-year-old law that changed how to challenge disputed absentee ballots, including mail-in ballots from the early voting period. The New York State Republican Party filed a lawsuit against the Attorney General last year, arguing that this law unconstitutionally allows election boards to make

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“unilateral decisions on the validity of mail-in ballots.” An appellate court reinstated the law in August, leading to this appeal.

This decision answers what should happen if the central board of canvassers—which includes at least two people and must be equally divided between Democrats and Republicans—disagree on the signature or the validity of a ballot. The new law now requires the board to count the ballot even when there is a split on its validity. If one member believes it is valid while others do not, the new law requires the ballot to be counted. This law was meant to prevent an election’s results from not being finalized for days or weeks due to disagreements over signatures.

The state Republican Party argued that this method violated the New York State Constitution because there must be equal representation of both parties during ballot-counting, and that equal representation requires bipartisan agreement. Counsel also argued that the law does not allow the courts to adjudicate the issue—because the ballot is counted and then entered into a pile of anonymized ballots, the ballot in question cannot be distinguished from the others. The NYAG’s office argued that this presumption of validity is the same presumption that applies to in-person voting.

Last Thursday, the Court rejected the appeal. The Court ruled that because the board is equally divided between Democrats and Republicans, either board member can equally declare a ballot invalid or valid during the initial and subsequent reviews of the ballots. According to the Court: “No single Board member has any more authority than any other member over the canvassing process, and neither party carries more sway over the process than the other.” The Court also stated that the law does not “unconstitutionally constrain the judiciary.”

**Explainer: What Happens After the Polls Close**

Especially since the 2020 elections, national attention has focused on what happens after the polls close on Election Day. The mundane and straightforward task of counting ballots has become a hot button issue as an increased number of public officials have attempted to delay or deny certification of the ballot count. Although media attention has heightened following efforts to challenge the 2020 results, attempts to delay certification have been happening since the earliest days of our nation. However, over one hundred years of court precedent and many state laws define certification as non-discretionary and a ministerial task that signifies the end of the ballot count, known as canvassing.

Certification does not negate challenges to the ballot count. Candidates and voters can contest the results through recounts, audits, and the court system. Ben Berwick of Protect Democracy describes the role of certification as a scorekeeper at a football game: their only job is to record the score, any penalties on the field getting to that score are the job of the referee, who determines if the rules of the game are followed. To date, court orders have required all election officials attempting to delay or deny certification to certify, further enforcing that certification is a ministerial non-discretionary task.

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In New York, the process of what happens after the ballots are cast is an intricate and carefully prescribed process laid out within the 950 pages of the Election Law Rules and Regulations. The following summarizes the process of ballot counting and canvassing found in New York State's Election Laws.

New York State elections are run by the State Board of Elections and county boards of elections (New York City has its own board of elections that covers the city's five counties). The State Board of Elections is composed of four commissioners evenly split between the two largest political parties. The two largest parties are determined by the votes cast at the previous gubernatorial election, currently Republicans and Democrats. The governor appoints the four commissioners, two on nomination of the state party chairs, and two on the nomination of the parties' legislative leaders. Each county board of elections, depending on the size of the county, is composed of two to four election commissioners nominated by the two major political parties. The State Board of Elections oversees the administration of the elections, state voter registration, and state voter rolls and provides campaign finance oversight, election law enforcement, voter education and information, election security and certifying of state election results. The county boards of elections conduct the elections; they also handle local voter registration and local voter rolls, voter education and information, staffing and training poll workers, and certifying local election results.

The election boards are also the boards of canvassers. Canvassers are responsible for counting ballots and providing vote totals. Election districts, various small geographic areas where voters are assigned to vote, have four election inspectors as well as a number of poll clerks and election coordinators. The size of election districts is meant to be relatively small so vote counting is efficient and accurate.

All election officials are equally divided by the major political parties. Watchers from each political party, representatives of the candidates, and independent bodies are allowed to be present throughout the canvass. Although it may seem that election results are known on election night or the next day, the county board of canvassers have up to 25 days to certify the results and send them to the State Board of Elections. In a presidential election year, the State Board of Elections then must get certification to the Electoral College by a prescribed date mid-December.

### **Counting In-Person Votes**

On Election Day, polling sites in New York are required to be open from 6:00 AM to 9:00 PM; and anyone in line at 9:00 PM must be allowed to vote. Once the last vote is cast, the election inspectors start the canvass of Election Day in-person votes.

To start the canvass, an election inspector secures each ballot scanner to prevent additional voting. Inspectors then account for all the paper ballots, including spoiled, unused, and affidavit ballots. If there are ballots in the emergency ballot box, they are removed and scanned. (Emergency ballot boxes are secure boxes used to place ballots that are unable to be scanned, including ballots cast while there was a mechanical issue with the scanner and provisional ballots.) In the presence of any canvass watchers, the inspector prints out a tabulated results tape from each scanner and announces the results.

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Any ballots that were unable to be scanned will be hand-counted and each vote is announced in the presence of the canvass watchers and added to the ballot reconciliation form. The scanners print out the returns; one copy with any hand-counted ballots added, is signed by the inspectors and becomes the official canvass for the election district and is delivered to the county board of elections.

To give the media and public timely, unofficial results, the inspectors will remove a portable thumb drive counter from each ballot scanner. In many counties those results are uploaded at the poll site and transmitted to the county boards; in others the thumb drives are promptly transported to a central location, where they are uploaded to the county's unofficial election night canvass system for posting on the internet.

The thumb drives containing early voting results are not canvassed at the poll sites, but delivered to the county boards before the commencement of Election Day voting. The unofficial early voting returns can be released publicly at the close of Election Day voting.

**Early Mail, Absentee, Military and Special Ballots**

Early voting by mail, absentee, military, and special ballots are counted by a central board of canvassers within four days of receipt or one day after Election Day. Central board of canvassers are a set of poll workers assigned to review the incoming ballots for each election district.

Once it is determined that an individual voter who has voted by mail is properly registered for a mail-in ballot, the envelope is opened, the ballot removed and placed face down in a secure box and held until the appropriate time to scan – either the day before the first day of early voting or after the close of polls on the last day of early voting. These scans will be included in the unofficial reports that can be initially released after the close of the polls on Election Day. As soon as the voter is deemed eligible to vote via early mail, absentee, military or special ballot and their ballot is placed in the secure box, the voter's record is immediately updated that they have voted in the election.

If ballots require post-election review for lacking specific criteria (ie: voter not registered or no voter name on the envelope), they are set aside. If ballots have curable defects, defects that can be remedied so that the ballot can be counted, including lack of signature, non-matching signature, etc., the voter will be notified via mail within one day. If provided in the voter file, they will also be notified by phone or email.

For curable defects, the voter can sign an affirmation curing the issue and return it by mail, in person or electronically within seven days after the election and their ballot will be counted by the central board of canvassers. If the cure is received prior to Election Day, it will be included in the Election Day canvass. If it arrives the day after Election Day canvas it will be included in the post-election canvass.

Scanned in-person early votes, early mail, absentee, military and special ballots totals may be tabulated as early as one hour prior to the close of the polls on

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Election Day, but no unofficial results can be publicly announced until after the polls close.

**Affidavit Ballots**

If a voter's eligibility to vote at a particular polling place is unable to be verified at the time they arrive to vote, they can cast an affidavit ballot. Affidavit ballots must be reviewed and investigated within four days of the election. If it is determined that the voter was eligible to vote, their ballot is counted.

Once all ballots are accounted for, a majority of members of the board of canvassers signs a statement of canvass, separately detailing the votes cast for each candidate and each ballot proposal. Tabulation tapes of the counted ballots are also submitted with the statement. The statement of canvass must be delivered to the State Board of Elections in Albany within 25 days of the election by personal delivery or certified mail. (In New York City, the NYPD or a peace officer delivers the results to Albany.)

**State Board of Canvassers**

Once all the ballots are thoroughly canvassed and recorded, each board of canvassers must send the certification to the State Board of Elections within 25 days of the election. If the certification is not received by the 25th day, a special messenger will be dispatched to obtain the certification, and the board of canvassers must immediately deliver the certification to the messenger. The State Board of Canvassers (also the State Board of Elections) canvasses the certified copies of the statements from each county board of canvassers on the first Monday after the first Wednesday of December. The process cannot take longer than five days.

If any member of the State Board of Canvassers protests the proceedings, they must state the protest in writing and file with the office of the State Board of Elections. When the canvass is complete, the State Board of Canvassers will create separate tabulated statements, signed by a majority of the board with the total number of votes cast for each candidate and file it in the office of the State Board of Elections. The State Board of Elections will then send a certified copy of the canvass to the U.S. House of Representatives with the results of who won each congressional race in the state. Similarly, the State Board sends notice to the Secretary of the United States Senate. For state legislative and judicial contests, the State Board prepares certificates of election, which are filed with the New York Secretary of State and to each successful candidate.

For presidential elections, the state Board of Canvassers also prepares seven lists with the names of the electors elected for each presidential candidate and a canvass of the votes cast for each slate of electors, signed by the Governor and under seal of the State. Six of these lists will be used by the Electoral College to sign when they meet. One list is sent to the administrator of the National Archives by the most expeditious method available.

**Mandatory Recounts and Audits**



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Each county board of elections conducts a mandatory recanvass of the tabulated results tape, paper ballots that were hand-counted and write-in votes and compares each with the numbers on the return of canvass. Manual recounts are mandatory when the margin of victory is 20 votes or fewer; the margin of victory is 0.5% or less; or in a contest where 1 million votes were cast, and the margin of victory is less than 5,000. Manual recount totals supersede the initial canvass tabulation.

There is also a mandatory audit within 15 days of Election Day. Each county board of elections conducts a mandatory audit of three percent of the voting machines for voter verifiable audit records. Within three days of the election, the State Board of Elections will audit the central count scanners by auditing ballots in three percent of election districts. The certification should not wait for audits to be completed in order to certify the results. If audits affect the results of the canvass, the board of canvassers will reconvene and adjust the canvass as required.

If there is any question by a candidate or voter to the validity of a vote or the canvass, they can contest through the court system. Certification can be updated through the post-election process at any time if deemed necessary by the courts.

### **Electoral College**

Once the State Board of Elections has received the certified ballot totals from every county election board, the electors of the party of the presidential candidate that won the state popular vote convene in the state capital on the first Tuesday after the second Wednesday in December. Electoral college membership from the state is composed of electors nominated by their party before the general election and equals the total number of New York State representatives in Congress (currently 26 members in the House of Representatives and two Senate seats, making 28 total). In New York, the party whose presidential and vice presidential ticket wins the popular vote in the state wins all the electoral votes.

Electors are party loyalists, activists, and local leaders. Any vacancies in the electoral college caused by death, refusal to serve, or neglect are filled immediately when the electors meet at the Capitol by a majority vote of the electors for newly nominated electors.

The electors vote separately and non-anonymously for the president and vice president. If an elector fails to vote for the candidate they were nominated to represent, this constitutes a resignation from their position, their vote is not recorded and their position is immediately filled by a majority vote of a new nominee. Once ballots with the name of each elector are placed separately for the president and vice president, each elector signs the six certificates to be submitted with the six lists provided by the State Board of Elections. The certificates are immediately distributed via the most expeditious method available. One certificate is sent to the President of the United States Senate; two are delivered to the State Board of Elections, with one to remain public for inspection; one is delivered to the Chief Judge of the United States District Court of the Northern District of New York; and two are delivered to the National Archive.

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By federal law, national certification of the election is on January 6th (if January 6th falls on a Sunday, the law is changed for that year). Congress meets for a joint session to ceremoniously count the electoral votes. As the final step of the election process, the President-elect and Vice President-elect take the Oath of Office at noon on January 20th, becoming the President and Vice President at that time. If January 20th falls on a Sunday, inauguration is on Monday, January 21st.

From county board of elections to the State Board of Elections and ending with the electoral college, the process of canvassing and certifying the election in New York State is a ministerial, arithmetical duty that ensures every legal ballot cast is counted. Automatic audits and recounts are embedded in the process to fully ensure accurate results. The system allows for contests alleging irregularities in the voting process to be solved expeditiously through the courts. If judicial decisions affect ballot totals, certified results can still be adjusted. New Yorkers can rest assured that the system's multi-tiered checks and balances make it so that the ballot counting process is straightforward, transparent, thorough, and secure.

### NYS & NYC Ballot Questions Summarized

**Proposal 1** will be on every New Yorker's ballot seeks to amend the state constitution, protecting reproductive rights. After the Supreme Court overturned *Roe v. Wade*, many states around the country introduced new language to the constitution to protect reproductive rights, including both abortion, contraception, and in vitro fertilization. By voting "Yes," the state's Constitution would be amended to include protections against "discrimination based on ethnicity, national origin, age, disability, sex, sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, reproductive health care and autonomy." By voting "No," the state Constitution remains unchanged.

**Proposals 2 through 6** will appear only on New York City voter's ballots.

**Proposal 2** aims to enhance the Department of Sanitation's (DSNY) authority to maintain cleanliness across city properties, including parks and highway medians, while ensuring street vendors adhere to regulations. It also seeks to regulate how residents dispose of their garbage. Supporters believe this will lead to a cleaner city through better waste management and increased trash collection. Critics worry it may expand DSNY's police powers and negatively affect street vendors. A "Yes" vote would clarify and expand DSNY's responsibilities; a "No" vote would leave current laws unchanged.

**Proposal 3** proposes changes to the City Charter to require financial analysis from the City Council before they hold hearings and vote on new laws. It would also let the Mayor's Office of Management and Budget provide their own cost estimates and require the Council to share their estimates before public hearings. The proposal would require the Council to notify the Mayor's office before any hearings or votes. Additionally, it would extend deadlines for certain budget reports during the first year of a new Mayor and change the deadline for the Mayor to publish the annual City budget. Opponents worry that this change could slow down government responsiveness and make the lawmaking process more complicated. A "Yes" vote would put these changes in place; a "No" vote would leave current laws unchanged.



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**Proposal 4** would require the City Council to give 30 days' notice before voting on any public safety laws that affect the Police, Fire, or Correction Departments. During this notice period, the Mayor and relevant agencies could hold public hearings to gather input. Supporters argue this will enhance public awareness and involvement in safety decisions. Critics fear it could create unnecessary bureaucracy and allow the Mayor to delay votes, potentially impacting timely responses to safety issues. A “Yes” vote would enforce this notice requirement; a “No” vote would keep current laws unchanged.

**Proposal 5** would change the City Charter to require more detailed assessments of City facilities and ensure that these assessments influence capital planning. This means the City would need to evaluate the costs of maintaining its buildings and infrastructure and include these details in planning reports. The proposal would also adjust deadlines for these reports and the related public hearings. Critics argue the wording is unclear and believe it won't actually improve transparency or infrastructure planning. A “Yes” vote would enforce these requirements; a “No” vote would leave current laws unchanged.

**Proposal 6** aims to change the City Charter to create a Chief Business Diversity Officer (CBDO), allow the Mayor to choose which agency issues film permits, and merge two archive boards. This would create a new role to support minority- and women-owned businesses, streamline the film permitting process, and consolidate record management. Critics argue that the proposal mixes unrelated issues and doesn't necessarily improve government efficiency, suggesting that merging boards could be done without a Charter change. A “Yes” vote would establish the CBDO, give the Mayor authority over film permits, and combine the archive boards; a “No” vote would keep current laws in place.

### AROUND THE NATION

**U.S. Supreme Court Restores Virginia’s Voter Purge Program:** In a 6-3 order, the U.S. Supreme Court has agreed to reinstate Governor Glenn Youngkin’s voter purge program, which was issued via an executive order in early August. The U.S. Department of Justice filed this lawsuit in response to the order, accusing Virginia of violating federal law.

The executive order, which was issued less than ninety days before the general election, requires daily updates to remove ineligible voters from voting lists. This process includes removing people who are “unable to verify that they are citizens” to the state’s DMV from the statewide voter registration list. The Justice Department alleges that the DMV data can often be outdated or inaccurate—leading to mistakes where citizens are removed instead—and officials have not been taking any additional steps to verify a person’s alleged non-citizen status prior to canceling their voter eligibility.

The National Registration Act (NVRA) requires a ninety-day “quiet period” for the maintenance of voter rolls ahead of elections. Both a federal district court judge and the 4th U.S. Circuit Court of Appeals agreed that Youngkin’s order likely violates the NVRA’s quiet period.

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Virginia then asked the U.S. Supreme Court to halt the lower court's order. In its stay request, the state argued that the 1,600 voters at issue "self-identified" as "noncitizens" and that the NVRA's ninety-day quiet period does not apply to the removal of noncitizens. The district court had previously determined that this claim (people "self-identifying" as noncitizens) was unsubstantiated by the facts in this case.

The Court granted Virginia's stay request, but did not include an explanation (which is common for emergency applications). Here, the *Purcell* doctrine is an important factor. Based on this doctrine, courts should use extreme caution in changing electoral rules before an election because doing so could confuse voters and/or create issues for election officials.

**Supreme Court Rejects Challenge to Pennsylvania's Provisional Ballots:** The U.S. Supreme Court has rejected a challenge from the Republican National Committee and will not block Pennsylvania voters (whose mail votes are voided for technical reasons) from casting provisional ballots at their polling place on Election Day.

The Court affirmed a 4-3 ruling from the Pennsylvania Supreme Court, which provided voters with an alternative to still participate in the election when they return their mail ballot with an issue, such as without a secrecy envelope.

Consistent with emergency applications, the Court did not provide an explanation. However, Justices Alito, Thomas, and Gorsuch wrote a two-paragraph statement about the decision. Alito stated that because the "lower court's judgment concerns just two votes in the long-completed Pennsylvania primary," placing the appeal on hold "would not impose any binding obligation on any of the Pennsylvania officials who are responsible for the conduct of this year's election."

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