

Litigation Update

NASED Summer 2017

Citizenship requirements

- Kansas, Arizona, Alabama and Georgia have all enacted requirements that voters prove citizenship in order to be registered.
- Rosa Maria Ortega case
- Update on status of
 - Fish v. Kobach
 - League of Women Voters v. Newby

Applicable NVRA text

- 52 U.S.C. 20508(b)
- **(b) CONTENTS OF MAIL VOTER REGISTRATION FORM** The mail voter registration form developed under subsection (a)(2)—**(1) may require only such** identifying information (including the signature of the applicant) and **other information** (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
- **(2) shall include a statement that—(A) specifies each eligibility requirement (including citizenship);**
- **(B) contains an attestation that the applicant meets each such requirement; and**
- **(C) requires the signature of the applicant, under penalty of perjury;**

Applicable NVRA text on Motor Voter

- 52 U.S.C. 20504(c)
- **(1)** Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.
- **(2)** The voter registration application portion of an application for a State motor vehicle driver's license—
- **(B)** may require only the **minimum amount of information necessary** to—...
- **(C)** shall include a statement that—**(i)** states each eligibility requirement (including citizenship);
- **(ii)** contains an attestation that the applicant meets each such requirement; and
- **(iii)** requires the signature of the applicant, under penalty of perjury;

Fish v. Kobach

- Preliminary injunction against requiring DPOC granted by the trial court and appealed to the Tenth Circuit
- Tenth Circuit upheld the injunction on October 20, 2016
 - Elections Clause by its terms says Congress wins when it wants to do so
 - In the NVRA Congress expressed its interest in setting the standard here
 - Minimum necessary means what it says.
 - Attestation of citizenship
 - Under penalty of perjury
 - All that can be required at the DMV
 - To overcome this, the state would have to show evidence of “substantial” numbers of registered non-citizens in spite of attestation requirements
 - No such showing has been made. But there is room for one

Fish v. Kobach

- Plaintiff's filed a MSJ on remand which was denied on 5/4/17
- Discovery battles including trip to 10th circuit for stay and sanctions
- Another MSJ filed by Plaintiffs on 7/14/17 which is pending

LOWV v. Newby

- Order reversing the trial court and granting preliminary injunction issued 9/9/16 and opinion on 9/26
- Federal Form must be accepted for federal elections no matter what a state uses for its own.
- Alabama, Kansas and Georgia all received the greenlight for DPOC instructions on the federal form.
- Newby considered the "necessary" language of NVRA unnecessary to his analysis. Court says this guaranteed LOWV odds of merit success
- NVRA text is not ambiguous and requires DPOC not be required

LOWV v. Newby update

- Cross motions for summary judgment decided 2/24/17
- Court remanded the matter to the EAC for interpretation of its internal directive to determine Newby's authority.
- Court agreed that this matter presents "difficult questions."

Texas voter ID

- 5th Circuit en banc opinion came out July 20, 2016
- Discriminatory effects, but insufficient evidence to support purpose finding
- Remand to district court to craft interim remedy to ameliorate the discriminatory effects until final decision on purpose or amendment of the statute
- 8/10 interim order entered.
- 9/20 subsequent order entered
- 11/8 election

Texas voter ID update

- Legislature passed SB 5 codifying the interim remedy with a few minor changes to go into effect in January 2018
- Court ruled on Wednesday 8/23/17
- Rolling back voter ID in its entirety
- Stay being sought
- Election on November 6th and poll workers have to be trained
- VR certificates need the wording on the back

Mallika Das v. Texas

- Voting Rights Act Case involving interpreters
- Texas treats interpreters as different than assistants under chapter 208. Says they have to be a registered voter of the county.
- District Court ruled for plaintiffs early last summer.
- Currently on appeal, but we changed our processes and training to have interpreters meet same qualifications as assistants for November's election.
- UPDATE: 5th circuit agreed that interpreting is assistance but that trial court's injunction was overbroad.

Stringer v. Cascos

- NVRA motor voter case suing SOS and DPS.
- DPS issues driver licenses and provides opportunity to make changes and do one renewal online.
- When asked if want to register to vote, the driver is sent from DPS website to a site to fill out print and mail in a VR application.
- Argument is that this isn't a "simultaneous" opportunity to register to vote as required by NVRA.
- Discovery is occurring. Not really a factual dispute, but Judge granted a motion for discovery sanctions against Texas yesterday evening.
- Trial later this year.

Fla Democratic Party v. Detzner

- Signature comparison on Ballots by Mail.
- Court issued injunction against signature comparison on 10/16/16.
- At issue was the law that said the voter could fix no signature ballots but had no opportunity to fix mismatched signatures.
- Nothing really since.
- Leg fix?

Redistricting (Perez v. Texas)

- Three judge panel ruled on the 2011 maps earlier this year
- Trial held on the 2013 maps earlier this year
- Court ruled on 8/15/2017 that 2013 maps intentionally discriminated in two congressional districts
- September 5 hearing on new maps set
- Stay being sought in Supreme Court
- Filing for primary set to begin November 11
- No ruling yet on 2013 state house maps

Redistricting (Lopez v. Texas)

- Texas has two final appellate courts that are elected statewide
 - Nine judges each on Court of Criminal Appeals and Texas Supreme Court
 - The argument is that they should be elected by place in order to enable minority voters to elect the justice of their choice
- Discovery is ongoing and nothing resolved yet

Redistricting (Cooper v. Harris)

- North Carolina redistricting case.
- Supreme Court ruled on 5/22/2017 that the state violated 14th Amendment and VRA.
- State admitted that they used race intentionally in drawing two state house districts but believed they were legally justified in doing so.
- Supreme Court said no factual basis for the belief in District 1.
- Supreme Court said the state made a mistake of law in District 12.

Redistricting (Gill v. Whitford)

- Wisconsin redistricting case regarding partisan gerrymandering
- Decision from 3 judge panel on 11/21/16 finding unconstitutional partisan gerrymander.
- Court admitted that the law in this area is “still in its incipient stages.”
- Court believed partisan gerrymander to be an abuse of power.
- Wisconsin followed all applicable “traditional redistricting principles.”
- 1 voter found to have standing to challenge the entire state’s map and not just his own district.

Redistricting (Gill v. Whitford) DISSENT

- Points out that Wisconsin followed all the rules regarding compactness, contiguity, and respect for political subdivision boundaries.
- Long history of partisan gerrymandering in this country. Specifically upheld on worse facts by SCOTUS.
- Plaintiffs want the “efficiency gap” principle to be enshrined in constitutional law.
- The efficiency gap model “begs the question of whether a partisan gerrymander occurred.”
- Efficiency gap model has “practical problems as well.”

Redistricting (Gill v. Whitford)

- SCOTUS took certification
- Argument is scheduled for October 3, 2017
 - Whether there was error in allowing a statewide challenge.
 - Whether the court below violated existing precedent by finding impermissible partisan gerrymander when all traditional principles followed.
 - Whether the court below adopted a watered down version of the plurality test in *Davis v. Bandemer*.
 - Whether WI should have a chance to give evidence under the chosen standard.
 - Whether partisan gerrymander claims are justiciable at all.

