

Election Litigation Highlights

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List Maintenance

NVRA and State Laws

Arcia v. Detzner

- NRVA list maintenance case
- Changes within 90 days of primary or general election for Federal office
- Claim that Florida program was a systematic removal of suspected non-citizens from voter rolls

Arcia v. Detzner

- 2012 primary and general elections
- Two separate programs
 - Program #1 relied on DHSMV records
 - Program #2 relied on DHS SAVE database
- District Court found for FL SOS
- Appealed to 11th Circuit

Arcia v. Detzner

- 11th Circuit reverses and remands
- Standing
 - Individuals - future injury based on "realistic probability" of misidentification
 - Organizational plaintiffs

Arcia v. Detzner

- Interpretation of 90 Day Provision
- Statutory exceptions
 - Request of registrant
 - State law, for criminal conviction or mental incapacity**
 - Death of registrant
- Correction of registration records permitted – but was not argued by FL SOS
- Individualized removals permitted
- Removal of non-citizens not listed . . .

Arcia v. Detzner

- State arguments
- Unconstitutional vote dilution because the 90 day provision prohibits systematic removal of non-citizens (vote dilution of citizens)
- Registrants argument – NVRA only applies to those once entitled to vote, and non-citizens can not be considered “registrants”
- Comparison of general removal provision and 90 day removal provision

Registration

NVRA and State Laws

Arizona v. Inter Tribal Council of AZ

- Proposition 200 and requirement for proof of citizenship at time of voter registration via one of 6 methods
 - State issued driver's license
 - U.S. birth certificate
 - U.S. passport
 - U.S. naturalization document
 - Another immigration document that proves citizenship
 - Bureau of Indian Affairs card number.
- Photo ID when voting at the polls
 - Federal voter mail registration applications per NVRA (EAC form) are no longer provided

Arizona v. Inter Tribal Council of AZ

- Original issue – whether AZ voter ID requirements disproportionately affect minorities and are unconstitutional
- 9th Circuit held that
 - Arizona law does not violate VRA
 - Arizona law does not constitute a poll tax
 - NVRA overrides Arizona law - "accept and use the form"

Arizona v. Inter Tribal Council of AZ

- Appeal argued in US Supreme Court 2013
- Current issue – whether US Circuit Court of Appeals was correct in deciding that the NVRA trumped AZ law
 - Is the NVRA form exclusive and sufficient?
 - Or can states ask for additional information (without changing the federal form)
- Conflict between NVRA and the federal NVRA registration form (signature attesting to citizenship) and AZ law (which requires additional proof)

Arizona v. Inter Tribal Council of AZ

- Points in oral argument
 - NVRA designed in part to streamline registration
 - NVRA does not state that individual states may not impose additional requirements for determining eligibility
 - NVRA does take a clear and particular approach to approving citizenship
 - At least one Justice takes issue with value of the NVRA oath *per se*

Arizona v. Inter Tribal Council of AZ

- Held (2014) that NVRA requirement to "accept and use" the federal form pre-empts state AZ evidence of citizenship requirement
- Elections Clause requires that states establish the time, place, and manner, but Congress has power to pre-empt entirely
- Who can vote/states and how they vote/federal government

Kobach v US EAC

- Follow up to AZ case including KS proof of citizenship
- Request to EAC to include state-specific instructions on the form to reflect KS and AZ requirement
- EAC lacks quorum of commissioners
- Writ of mandamus to compel EAC to modify instructions
- Under APA to compel agency action unlawfully withheld or unreasonably delayed (nondiscretionary acts)

Kobach v US EAC

- Does Congress have the authority to pre-empt state voter registration requirements?
- Has Congress exercised that authority under NVRA?
- States' exclusive constitutional power to set voter qualifications includes the power to enforce them
- Conflict between state and federal law only exists if the two cannot co-exist

Kobach v US EAC

- NVRA silent on documentary proof of citizenship – so the laws “operate harmoniously”
- AZ and KS law not clearly pre-empted; state determination that mere oath is not sufficient is enough
- EAC has a nondiscretionary duty to perform the ministerial function of updating the instructions to reflect each state’s laws

Scott v. Schedler/US v. Louisiana

- Access and process at public locations
- Plaintiffs include applicant for benefits and the LA State Conference of NAACP
- Defendants include “voter registration agencies” under NVRA
 - Secretary of State Schedler
 - Secretary of Department of Health and Hospitals (Medicaid/WIC, other)
 - Secretary of Department of Children and Family Services (SNAP/TANF, other)

Scott v. Schedler/US v. Louisiana

- Failure to designate all offices in state including Office of Aging and Adult Services
- Failure to provide clients with declaration/preference forms required by NVRA at each opportunity
- Failure to maintain sufficient supplies at each location; used old forms

Scott v. Schedler/US v. Louisiana

- ❑ Failure to transmit completed voter registration forms to election officials
- ❑ Failure to supervise, train, and monitor
- ❑ Use of statistical measures to support the claim
 - ❑ As claims for public assistance rose, the number of voter registration applications from public assistance and disability services offices fell by number as as percent overall
- ❑ DHHS, DFCS in violation of NVRA and SOS failed to implement
- ❑ Extensive list of changes in internal policy and process

Voting Rights Act

After Shelby County v. Holder 2013

Shelby County v. Holder

- ❑ Struck down Section 4 formula as unconstitutional
- ❑ Section 5 preclearance provisions toothless w/o formula
- ❑ Has prompted new state laws and litigation

Voter ID

Voting Rights Act and Various State Laws/Constitutions

US v. Texas

- Reincarnation of *Texas v. Holder* 2012 (Section 5, striking down)
- SB 14 requires of in-person voters a government-issued photo identification
 - Drivers license, personal ID card, or election identification certificate (EIC) – all issued by DPS
 - Handgun permit – issued by DPS
 - US military ID card
 - US citizenship certificate with photo
 - US passport

US v. Texas

- In order to obtain EIC
 - Expired TX DL or personal ID card
 - Original or certified copy of birth certificate
 - US citizenship or naturalization papers
 - Court order indicating change of name or gender
- Can vote provisionally w/o EIC, but must produce documentation w/in 6 days

US v. Texas

- Claims that SB 14 (2011) violates Section 2 VRA and 14th and 15th Amendments
- Claims that TX legislature passed with discriminatory intent and will have discriminatory result
- TX failed to show lack of retrogressive effect during Section 5 review (pre *Shelby County*)

US v. Texas

- Section 2 prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that that has either the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.
- To date, this section has been used primarily in actions that had overt political consequences, e.g., redistricting

US v. North Carolina

- August 2013 / HB 589
- *Shelby v. Holder* eliminates Section 5 coverage that had applied to 40 counties
- Similar to TX post-*Shelby*
- NC context – in 2008 and 2012, African-American turnout surpassed white rate and in
 - In-person early voting
 - Early period of early voting
 - Same day registration

US v. North Carolina

- HB 589 establishes various election administration changes
 - Reduces # of days for early voting (one-stop) from 17 to 10
 - Eliminates county option for last Saturday prior
 - Requires same overall number of hours as 2012 and 2010
 - All early voting in county except county BOE open same days and hours
 - Eliminates same-day registration during early voting
 - Prohibits counting out-of-precinct provisional ballots
 - New government-issued photo ID requirement for in-person voters
 - Eliminates pre-registration for 16/17-year olds

US v. North Carolina

- Claims under VRA Section 2 (intent, vote dilution), 14th and 15th Amendments
- Extensive record of legislative proceedings
- Extensive options and common-sense exceptions
- Judicially-recognized history of racially-polarized voting
- Statistical reports of racial composition of those with/without particular types of documents
- Racial appeals in some political campaigns

Other HB 589 Cases

- *League of Women Voters of North Carolina v. Howard*
- *NAACP v. McCrory*
- *Currie v. North Carolina*

Applewhite v. Pennsylvania

- State photo voter ID requirement with provisional ballot as default
- Legislative history cited which notes Carter-Baker Commission recommendation for photo ID
- Injunction ordered through 2012 elections
- Trial in July 2013, with injunction continued through 2013 primaries
- Court struck down law, based on actual burdens

Applewhite v. Pennsylvania

- Ban upheld on appeal
 - Location of offices, and lack of offices, throughout PA counties
 - Links between locations and public transportation options
 - Limited hours of operation
 - Wait times
 - Lack of accommodations for voters with disabilities and elderly throughout
 - Lack of outreach alternatives (e.g., mobile vans)

Minority Language Provisions

Voting Rights Act Section 203, Section 4

Language Assistance

- US v. Orange County BOE (NY)
- Consent decree under action filed by US DOJ
 - Puerto Rican-educated language minorities
 - No assistance from 2009-2011, despite request
- No Spanish-language
 - Ballot
 - Election notices
 - Election related information on website

Language Assistance

- Consent decree for April 2012 primary
- Develop sample bi-lingual Spanish ballot to be posted on public web site
- Translate into Spanish instructions on how to use voting equipment
- Identify and track bilingual ability of all inspectors who apply or volunteer to serve as election inspectors

Language Assistance

- Consent decree – all subsequent elections
- Translation and dissemination of election-related materials
 - All election material in both English and Spanish
 - Translations of materials and announcements
 - Signage and notifications of changes
- Bilingual election inspectors
 - Recruit, train, numerical requirements for assignment to PPs

Language Assistance

- Election official training including records of attendance
- Bilingual programs coordinator and records of outreach
- Spanish-language Advisory Group
 - Meet regularly
 - Open to the public, minutes, post on website
 - Written record of BOE disposition of Advisory Group recommendations
- Federal observers
- Records retention and pre- and post-election reporting

Language Assistance

- Additional cases - perhaps new attention resulting from ACS data and 10,000 person threshold
- Essentially the same consent decree/settlement language with addition of bi-lingual pollworkers
- Colfax County, NE
 - VRA Section 203
- Lorain County, OH
 - VRA Section 4(e) - Puerto Ricans educated in American flag schools

Language Assistance

- Alameda County, CA (VRA Section 203)
- Spanish and Chinese since 1992 - failure with respect to both - 1995 settlement agreement on same
- Indication of lower limits for bilingual pollworker
 - drop if less than 3% at the Census block group level
 - drop if less than 10 requests for translated materials
- Chinese in Mandarin and/or Cantonese depending on population preference

Election Calendar Consent Decrees

UOCAVA

UOCAVA

- Various state provisions in conflict with UOCAVA requirement for transmission to voters by 45 days prior
 - Election calendars for special elections
 - Certification of candidates to the ballot
 - For mailed ballots, State Write-in Absentee Ballot (SWAB) does not include certified candidates
 - Electronic information on candidates typically made available
- Consent decrees
 - IL - special election to fill the Congressional seat vacated by Jesse Jackson, Jr.
 - GA - federal primary runoff plan for potential runoffs in multiple Congressional districts

UOCAVA

- UOCAVA provides for FWAB but not SWAB
- Neither write-in ballot lists candidates; voters must obtain candidate lists from other sources
- Question - whether FWAB is a fail safe emergency back up or a replacement for the regular ballot
- Current consent decrees suggest that SWAB is not a replacement (analogy made to mailing voters a blank sheet of paper)

UOCAVA

- Typical consent decrees strike balance in favor of UOCAVA voters over time/costs/inconvenience:
 - Amended election calendars and state deadlines
 - Expanded press notification
 - Reporting on UOCAVA ballots transmitted, received, counted, and methods
 - Website posting of official election results
 - Website notice of right to request SWAB + necessary candidate information or official absentee ballot

UOCAVA

- Outgoing express ballot transmission
- Electronic and express ballot return and notice
- Ballot counting procedures and notice for situations that can involve multiple ballots
- Training of county election officials
- Coordination with FVAP to accomplish notices
- Press statements

Provisional Ballots

State law questions

SEIU v. Husted

- Ohio election code required rejection of provisional ballots cast in the wrong precinct even if due to poll worker error
- Ballots usually were cast by voters whose names do not appear on the voter roll, or whose registration address is not current – practice was to hold, verify, and then count
- In 2011, Ohio voters cast 3,380 ballots in wrong precinct but were otherwise in correct polling location – 1,800+ ballots not counted

SEIU v. Husted

- Plaintiffs included several labor unions and advocates
- Before this case, Ohio counties rejected ballots by verified voters who cast their ballots in the correct polling place but in the wrong precinct – often (per allegations) because of mistaken directions by poll workers
- Now count provisional ballots for every race in which the voter would have been eligible to vote had the ballot been cast in the correct precinct

Voted Ballots as Public Records

Open Records Laws

Citizen Center v. Gessler

- Colorado Secretary of State and 6 County Clerk and Recorders (Boulder, Chaffee, Eagle, Mesa, Larimer, Jefferson)
- Creating, compiling, and maintaining after an election information that permits voted ballots to be traced to individual voters
 - Random and systematic deprivation of constitutional rights to "secret ballot"

Citizen Center v. Gessler

- Claim fundamental right to vote secretly under US and Colorado Constitutions, federal civil rights statutes
- Cite various processing practices for mail-in ballot
 - Maintaining voted ballots in batches accompanied by batch sheet or similar document that lists names in order that ballots were voted
 - Comparison of batch sheet/statewide database/voter-signed mail ballot return envelopes

Citizen Center v. Gessler

- Allegations of identification "with certainty" of individual voters who vote on particular equipment
- Example - Unique distinguishing bar code/set of numerals
 - Can observe and then associate with specific voters
- Example - DRE voting machines and comparison against statewide database
 - Unique identifiers
 - Precinct number
 - Ballot style

Citizen Center v. Gessler

- Burdens and infringements that cannot be justified by or needed to promote state interests that cannot be accomplished by less restrictive means
- CO state law
 - Traceability - prohibits the marking of paper ballots "whereby the ballot can be identified as the ballot of the person casting it"
 - Secrecy - requires preservation of "secrecy in voting"
 - Non-disclosure - officials prohibited from disclosing voter identity

Citizen Center v. Gessler

- Subsequent change in CO law
 - HB 12-1036
 - County clerks review all ballots to determine whether individually identifiable
 - Redact information or withhold from public inspection
- Concern is not that individual voter identity can be known, but that it not be disclosed
- No absolute right to anonymous voting

Voting for America v. Andrade

- Regulation of 3rd party voter registration drives
- Since 1987, in order to assist in registering others, must be appointed as voluntary deputy registrar (VDR)
- SOS interpretation of VDR appointment
 - Carry signed certificate of appointment
 - Review applications for completeness
 - Approved in every county in which they will conduct voter registration
 - Personal delivery required w/in 5 days of receipt (crime)
 - Photocopying prohibited

Continuing Questions

- Can states be treated differently?
- Under what conditions can federal government intervene?
- Are some laws no longer needed – and who can decide?
- Are laws unconstitutional because there is insufficient evidence of need?
- What election powers are left to the states?

League of Women Voters v. Detzner

- Florida
- State law restricting voter registration drives with 48 hour turn-in requirement
- US District Court issued order indicating that it would grant a permanent injunction and issued preliminary injunction
- “Harsh and impractical”
- Violation of NVRA, 1st and 14th Amendments

Emerging Litigation Strategies

- VRA pre-election - show racial disparity in application, e.g., rates of possession of valid forms of ID
- VRA post-election – show racial disparity in application, e.g., rates of rejection of provisional ballots
- VRA pre- or post-election - seek findings that support Section 3 “ball in” if violate 14th or 15th Amendment
- State court challenges based on state constitutions

Other SB 14 Cases

- ▣ *Veasey v. Perry* (includes LULAC and Campaign Legal Center)
- ▣ *TX State Conference of NAACP Branches v. Steen* (includes Mexican American Legislative Caucus and Brennan Center)

Wisconsin Voter ID Cases

- ▣ *Frank v. Walker*
- ▣ *Jones v. Deininger*
- ▣ *Milwaukee NAACP v. Walker*
- ▣ *League of Women Voters of Wisconsin v. Walker*
