

06-0635-cv

United States Court of Appeals
for the
Second Circuit

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MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO,
JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL,
SUSAN LOEB, DAVID J. LANSNER, COMMON CAUSE/NY,

Plaintiffs-Appellees,

– against –

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER,
CAROL BERMAN, HELEN MOSES DONOHUE, EVELYN J. AQUILA, in their
official capacities as Commissioners of the New York State Board of Elections,

Defendants-Appellants,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF *AMICI CURIAE* FOR AFFIRMANCE
THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND,
THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND,
THE PUERTO RICAN BAR ASSOCIATION,
LATINO LAWYERS ASSOCIATION OF QUEENS COUNTY, INC.,
THE CENTER FOR LAW AND SOCIAL JUSTICE,
THE AMISTAD BLACK BAR ASSOCIATION OF LONG ISLAND,
and THE ROCHESTER BLACK BAR ASSOCIATION**

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NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN
STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT
JUSTICES IN THE CITY AND STATE OF NEW YORK, and JUSTICE DAVID
DEMAREST, individually, and as President of the State Association,

Defendants-Intervenors-Appellants,

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory Intervenor-Appellant.

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PRELIMINARY STATEMENT

There can be no real debate over whether the existing convention system serves diversity. The hard numbers show that it does not. In fact, a close examination of the data lays bare what *amici curiae* – the Asian American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Puerto Rican Bar Association, Latino Lawyers Association of Queens County, Inc., the Center for Law and Social Justice, the Amistad Black Bar Association of Long Island, and the Rochester Black Bar Association – have long known: the number of minority justices throughout the state are dismally low and detrimental to the actual and perceived fairness of the judicial system with respect to the most disadvantaged citizens of New York.

Minorities seeking to become supreme court justices in this state are not served by a closed, back-door system built on cronyism and political favors. No diverse, fair system can be built by such means. As a blue-ribbon task force on diversity in the judiciary found fourteen years ago, opening the system is “*essential* to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be a viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials.” HE-5776 (emphasis supplied).

Keeping minority lawyers from the bench only exacerbates the view by minority litigants and observers that the judicial system has little or nothing to do with them. After nearly a century, the system must be opened so that minorities can meaningfully participate. For that reason, we support Judge Gleeson's ruling to strike down the convention system, and believe his narrow approach to the remedy was appropriate under governing law.

STATEMENT OF INTEREST

The seven organizations that have joined forces through this submission to urge this Court to affirm Judge Gleeson's ruling have long worked on behalf of minority and female lawyers and litigants to achieve fairness in and through the courts of New York. By both affirmatively litigating civil rights cases and undertaking to promote minority lawyers to the bench over the years, all these organizations have an active, daily role in attempting to ensure that the judiciary of New York State is open, fair, and reflects the diversity of those it is meant to serve.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy,

education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

The Puerto Rican Legal Defense and Education Fund (“PRLDEF”) has championed an equitable society since its founding in 1972. Using the power of the law together with advocacy and education, PRLDEF protects opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities.

The Puerto Rican Bar Association (“PRBA”) is a professional organization composed of members of the bar and law students of Latino ancestry as well as other interested persons. The PRBA was founded to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional, and educational advancement of Latino attorneys, the Latino Community and the administration of justice.

The Latino Lawyers Association of Queens County, Inc. (“LLAQC”) is comprised of Latino lawyers. Its purpose includes the advancement of opportunities for Latino lawyers, judges, law professors and law students, and confronting issues being faced by the Latino community.

The Center for Law and Social Justice (“CLSJ”) at Medgar Evers College, City University of New York, is a community-based education, research, and legal organization. It provides quality advocacy, training, and expert legal

services in a personal manner to people of African descent and the disenfranchised.

The Amistad Black Bar Association of Long Island was organized in 1996 specifically to increase the number of African Americans on the bench in Long Island.

The Rochester Black Bar Association (“RBBA”), an affiliate of the National Bar Association, serves to promote and enhance participation by lawyers in the greater Rochester community. The RBBA promotes ethical standards, legal education and an equal opportunity for African American lawyers who are engaged in the practice of law in the greater Rochester area. The RBBA, which currently has over 60 members, consists not only of attorneys but also of law students, paralegals, and court personnel.

ARGUMENT

I. The Convention System Fails to Serve Diversity

Defendants argue that the convention system serves the state interest of promoting racial diversity on the bench. Appellants’ Br. at 73. The district court rejected that argument, finding that statistics presented by defendants with respect to the convention system did not support their argument, and rejecting as

“flatly incorrect” the thesis of their expert with respect to whether a primary system would serve diversity. SPA-68-70.

In fact, the numbers of minority justices spread throughout the state’s twelve judicial districts are not in dispute. *Every* judicial district in New York State has a substantial minority voting-age population, but many districts have *no minority justices at all*, including, as of 2001, the Ninth Judicial District, whose voting-age population is more than one quarter minorities. HE-6769. In particular, five of the districts, which together have 81 authorized supreme court justice seats, have *no* minority justices, while another three districts, which together have 90 seats, have a grand total of five minority justices, representing a far lower percentage of the overall bench than the comparable percentage of minorities in those districts’ voting-age populations.¹ HE-6769.

Defendants attempt to dilute the stark reality of the numbers by arguing that rather than comparing the relevant percentages of minority justices to minority voting-age populations, the comparison should be between the percentage of minority justices and the qualified pool of minority attorneys. Appellants Br. at 74-75. At best, this argument reveals defendants’ lack of

¹ The five districts that, as of 2001, had *no* minority justices are the Third, Fourth, Sixth, Seventh and Ninth, while the three districts with a combined total of five minority justices (or 5.5% of the total authorized seats) are the Fifth, Eighth, and Tenth districts, which respectively have the following percentages of overall minority voting-age population: 10.3%, 13.1% and 21.8%.

sensitivity to the hurdles and prejudices faced by minorities both entering and advancing through the legal profession, while at worst, it is adopted as a means of ensuring the cumulative negative effect of such hurdles. Taken to its logical conclusion, defendants essentially argue that the fact that minorities comprise a far lower percentage of law school graduates than their comparable percentages in the population as a whole is an affirmative basis for keeping such minorities off the bench. Such logic cannot be accepted. Defendants should be ashamed of adopting it.

Moreover, while the defenders of the existing *status quo* repeatedly tout the numbers of minority justices in the districts which comprise New York City, a proper examination of the data against the backdrop of the diversity of New York City itself reveals that even these numbers fail to support the convention system as the benevolent boon for minorities which defendants try to cast it as.

As defendants are wont to repeat, the percentage of minorities in the New York City judicial districts range from 31 to 44 percent based on 2001 numbers. See HE-7667; Appellants' Br. at 74-75. But the comparative percentages of the voting-age population for these districts belie the significance of even these numbers: minorities comprise from 50 to 82 percent of these districts' overall voting-age populations. HE-7667. And the party bosses' relative benevolence to minorities in New York City only serves to accent the system's

overall dismal record: it is New York City’s judicial districts (the First, Second, Eleventh and Twelfth) which elect 92% – 57 out of 62 – of all the minority justices of the Supreme Court in New York State. JA-1776 ¶ 99, HE-6769.

As the district court found, “the evidence the defendants have marshaled in support of this claim [that the convention system advances racial diversity] shows little more than that in New York City, where racial minorities exist in sufficient numbers that minority candidates do well in primary elections for Civil Court and other public offices, such candidates have also achieved success in obtaining Supreme Court nominations through the convention system. In other parts of the state, where minorities are present in much fewer numbers, minority representation among Supreme Court Justices is hardly remarkable.” SPA-68.

In fact, the available data suggests that within New York City, specific minorities would likely increase their numbers substantially if the district court is affirmed and the convention system is enjoined.² Although as of 2001 in

² There is some support for the view that minorities and women can and do achieve positions through primaries. For example, as early as 1987, two Asian American candidates, Dorothy Chin Brandt and Peter Tom, defeated two white candidates in a county-wide Civil Court primary, *Primary Races: New York Tally*, N.Y. Times, Sept. 17, 1987, at B2. HE-6762. Plaintiff Margarita Lopez-Torres, a Puerto Rican woman, won contested county-wide Civil Court primaries as recently as 2004, and prevailed against a white female candidate for re-election to a countywide Civil Court seat in 2002. Hon. Diccia T. Pineda-Kirwan, a member of

the Bronx (the Twelfth Judicial District) 45.% of the voting-age population was Hispanic, only 16.7% of the Supreme Court justices were Hispanic. HE-6766. Queens – the Eleventh Judicial District – had just a single Hispanic Supreme Court justice (2.6%) despite having a Hispanic voting-age population of 23.4%. Id. Moreover, that single justice (Hon. Jaime Rios) now sits in the Appellate Division – so there is not a single Hispanic justice sitting as a Supreme Court Justice in the Criminal or Civil Term, despite the rising Hispanic population of Queens. Hispanic voters are underrepresented in all four of New York City’s judicial districts on the Supreme Court. Id.

In 2001, Asian Americans comprised 17.5% of the voting-age population in Queens, but just one justice out of 38 – or 2.6% – is an Asian American. HE-6767. And despite constituting 9.8% of the voting-age population in Manhattan, again only one justice, or 2.6% of the supreme court bench is Asian American. Id. In the Second Judicial District, Asian Americans constitute 7.4%

the Latino Lawyers Association of Queens County, was elected to Civil Court in Queens County. And African American borough presidents have been elected in Manhattan on numerous occasions extending back as far as the 1970s. In the Bronx, Fernando Ferrer and Adolpho Carrion, both Latino, were elected to that countywide office, while in Queens, Councilman John Liu and Assemblyman Jimmy Meng both won primaries in 2001 and 2004.

of the voting-age population, but do not have a single Supreme Court justice on the bench. Id.

And, although African Americans have obtained representation in the First and Eleventh Judicial Districts beyond their proportions in those districts' voting-age population, they remained underrepresented in the Second and Twelfth Judicial Districts. HE-6768.

And again, even the relative success in parts of New York City is called into doubt by certain data outside the City – such as the fact that as of 2001, there were *no* African American justices in the Ninth Judicial District even though African Americans are 10.3% of the voting-age population. Id. The experience of *amicus curiae* Amistad Black Bar Association of Long Island is on point. All judges of color in Long Island – eight to be exact – are members of the association. Only one, Hon. Michele M. Woodard, sits in the Supreme Court. Prior to her election there was one other minority in the Supreme Court, the Hon. Marquette Floyd, who retired in 2002. Four of the eight judges of color sit in District Court, one in Family Court and one in County Court and one in the Court of Claims. Although the Amistad Black Bar Association has seen some new faces on the bench, the *status quo* still remains in that there has not been an increase in the number; instead new minority judges have simply replaced those who retired.

These more recent numbers only confirm that the findings made fourteen years ago, by a blue-ribbon Task Force on Diversity in the Judiciary appointed by Governor Cuomo remain true today. In 1992, the task force found:

We believe that another major cause of lack of diversity in the judiciary is the closed nature of the system now used in New York State to select judges.

As we all know, our system is only nominally one of election. In practice, it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election.

The Task Force believes that opening up this system is essential to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials. They may be political independents, or members of a party that is not dominant in the area or, if party members, may not have been active in the organization in power. Rightly or wrongly, these lawyers perceive themselves as having no chance of becoming a judge under the current system for the “election” of judges. Our own experience is that their perception is well founded.

HE-5775 to 5776. A few years later, in 1996, the New York State Committee on Women in the Courts, appointed by the Chief Judge, similarly concluded that while there had been progress in increasing gender diversity on other courts in New York State, there had been virtually no progress with respect to the Supreme Court. HE-6758. In their next report in 2002, the Committee pointed to statistics revealing that the Supreme Court bench had a lower percentage of women than

any other court in New York except for the upstate county courts – only 17% statewide.³ HE-5755.

All of this data fully corroborates the direct experiences of *amici* in dealing with the existing convention system. Over and over again, our members and constituents – minority attorneys and litigants alike – experience the system as being controlled by a powerful network that fails to overlap with their own communities and interests.

The experience of plaintiff Margarita Lopez Torres is exemplary. Unwilling to do the local party boss' bidding, she was shut out from a Supreme Court Justice position for years. As the district court found: "Lopez Torres's seven-year effort to obtain her party's nomination for Supreme Court Justice is the selection process in a microcosm. The path to the office of Supreme Court Justice runs through the county leader of the major party that dominates in that part of New York State. Without his or her support, neither superior qualifications nor

³ While certain *amici* in support of defendants assert that women will suffer if the current injunction stands, there is likewise support for the proposition that women can and do succeed through primaries. As early as 1977, a slate of female candidates, including Carol Bellamy, Marie Lambert and Ruth Messinger, all won contested primaries throughout New York City. N.Y. Times (Abstracts) 29, 1977 WLNR 112171 (Sept. 9, 1977) (reporting Lambert upset win); N.Y. Times (Abstracts) 21, 1977 WLNR 106221 (Sept. 21, 1977) (Bellamy); N.Y. Times (Abstracts) 29, 1977 WLNR 112177 (Sept. 9, 1977) (Messinger).

widespread support among the party's registered voters matters." SPA-42
(footnote omitted).

II. The District Court's Preliminary Injunction Should Be Affirmed

The existing convention system is detrimental to the members and constituents *amici curiae* serve, precisely because it is a system which shuts out minorities and requires political boss's *imprimatur*. See SPA-33. Because the data – which is undisputed – supports our own experience of the system as one that is closed and fails to promote diversity in the judiciary, the Asian American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Puerto Rican Bar Association, Latino Lawyers Association of Queens County, Inc., the Center for Law and Social Justice, the Amistad Black Bar Association of Long Island, and the Rochester Black Bar Association all support the affirmance of the district court's preliminary injunction. Although certain *amici curiae* supporting defendants have called for a reversal and remand to the district court solely for a hearing on remedy, there does not appear to be support for that in the law. The district court found the convention system inherently unconstitutional, precisely because it functions to shut voters out from the process. It then followed the principles long-espoused by the Supreme Court, both by striking as little of the statute as possible under the circumstances, and

refraining from “rewrit[ing] state law to conform it to constitutional requirements.”” Ayote v. Planned Parenthood of Northern New England, __ U.S. __, 126 S. Ct. 961, 968 (2006) (quoting Virginia v. American Booksellers Ass’n, Inc., 484 U.S. 383, 397 (1988)). Because it is not the district court’s role to redraft unconstitutional statutes, *amici* believe Judge Gleeson’s preliminary injunction should be affirmed.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's preliminary injunction.

Dated: May 18, 2006
New York, New York

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By: _____
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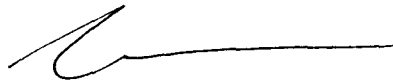
Attorneys for Amici Curiae the Asian American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Puerto Rican Bar Association, Latino Lawyers Association of Queens County, Inc., the Center for Law and Social Justice, the Amistad Black Bar Association of Long Island, and the Rochester Black Bar Association

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This brief is in compliance with the type-volume limitation of Fed. R. App. P.

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Attorney for Appellant

Dated: May 18, 2006

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See Second Circuit Local Rule 32(a)(1)(E)

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Brief of Amici Curiae for Affirmance
The Asian American Legal Defense and Education Fund, The Puerto Rican
Legal Defense and Education Fund, The Puerto Rican Bar Association,
Latino Lawyers Association of Queens, Inc., The Center for law and Social
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upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

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upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

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upon the attorneys, and by the method designated below, who represent the indicated parties in this action, and at the addresses below stated, which are those that have been designated by said attorneys for that purpose.

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Names of attorneys served, together within the names of the clients represented and the attorney's designated addresses.

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