

06-0635-CV

United States Court of Appeals for the Second Circuit

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PLAINTIFFS-APPELLEES,

- v. -

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,

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,

DEFENDANT-INTERVENORS-APPELLANTS,

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

STATUTORY-INTERVENOR-APPELLANT.

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

BRIEF FOR AMICUS CURIAE WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK

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PRELIMINARY STATEMENT

The Women’s Bar Association of the State of New York (“WBASNY”)¹ respectfully submits this brief as prospective *amicus curiae* with respect to the appeal from the memorandum and order of the Eastern District of New York, dated January 27, 2006 (the “Order”).² The Order (SPA-1) granted plaintiffs a preliminary injunction enjoining defendants from enforcing New York Election Law §6-106 (SPA-80) and from using the procedures set forth in New York Election Law §6-124. (SPA-81) These sections of the Election Law provide for the nomination of candidates for Supreme Court Justice through a convention system. The Order also mandated, in lieu of the convention system, that the nomination of Supreme Court Justices in New York State: “shall be by primary election until the legislature of the State of New York enacts a new statutory scheme.” (SPA-76-77)

¹ WBASNY is a statewide organization of approximately 3500 attorneys, including jurists, academics, and practicing attorneys. It is dedicated to the fair and equal administration of justice, the advancement of equal rights, and the eradication of discrimination against women.

² N.Y. Elec. L. §§6-106 and 6-124 are reproduced in the Special Appendix and cited as “SPA-___”. Documents in the Joint Appendix are cited as “JA-___”. Volumes 1 through 9 of the Hearing Exhibits and Transcript Volumes are cited as “HE-___”. The transcript is reproduced in Volume 10 of the Hearing Exhibits and Transcript Volumes and cited as “Tr. ___”.

For the reasons set forth herein, the remedy imposed by the District Court is overbroad, inappropriate, and harmful to women³ by forcing them into a process where they are unable to compete on an equal footing with the historically more politically entrenched male candidates for Supreme Court Justice. The District Court acted contrary to controlling authority when it failed to hold a hearing on possible remedies for the flaws in the convention system it found, but instead eliminated the process through which women have begun to overcome generations of discrimination and approach equality as members of the judiciary, and through which the bench has begun to reflect the diversity of our society and of litigants. Therefore, this action should be remanded for a hearing on remedies, at which women, and all those affected,⁴ will have an opportunity to be heard.

The District Court enjoined completely the operation of the convention system pursuant to which candidates for Supreme Court Justice have been nominated by the State's political parties for more than 80 years. The District Court did not hold, nor could it, that the convention system itself was constitutionally infirm.

³ WBASNY does not assert a position with respect to any aspect of the Order other than the remedy imposed.

⁴ Although WBASNY's brief focuses on the adverse impact that the Order will have on women, WBASNY believes that the Order will also negatively affect racial and ethnic minority candidates for Supreme Court Justice as well as litigants who expect and deserve to have a diverse and inclusive judiciary.

To the contrary, it is undisputed that the New York State Legislature and many observers of government determined in 1922, when the convention system was established, that a convention system, properly implemented, would be the best method for the selection of the most qualified nominees for the office of Supreme Court Justice. Today, after eight decades experience with the convention system, a distinguished non-partisan Commission appointed by the Chief Judge of the State of New York (the “Feerick Commission”) recommended that the convention system, with improvements, remain as the method for the selection of nominees for the office of Supreme Court Justice. See Final Report to the Chief Judge of the State of New York by the Commission to Promote Public Confidence in Judicial Elections, February 6, 2006 (the “Feerick Commission Report”). (The Feerick Commission Report to the Chief Justice is publicly available at <http://courts.state.ny.us/reports>.) The District Court reached no contrary conclusion, nor could it in the absence of an evidentiary hearing.

The District Court set forth a series of specific, limited flaws in the present convention system: (1) the conventions were being operated in such a way that the county leaders and district leaders of the political parties had a disproportionate influence over (a) the selection of convention delegates and (b) the delegates’ selection of the nominees for Supreme Court Justice, and (2) that a candidate for Supreme Court Justice not supported by the party leaders had no real

chance to (a) elect a slate of delegates from among her supporters, (b) persuade the delegates to vote for her, or (c) otherwise get on the election ballot.

Instead of conducting an evidentiary hearing to determine how the convention system could be maintained while addressing the constitutional issues of concern, the District Court voided the convention system in its entirety. Moreover, the District Court, without a hearing, replaced the convention system with the very system rejected by the New York State Legislature -- direct election of nominees pursuant to contested primary elections. The District Court ignored the disparate, negative impact that a primary system will have on female candidates. Additionally, the District Court ignored recent, unanimous Supreme Court precedent that mandated restraint in the fashioning of injunctive remedies for state statutes found to be unconstitutional. Ayotte v. Planned Parenthood of Northern New England, ___ U.S. ___, 126 S.Ct. 961 (2006).

Accordingly, the Order should be modified to vacate the remedy therein, and the action should be remanded to the District Court for an evidentiary hearing with regard to the remedy to be applied.

ARGUMENT

THE DISTRICT COURT ERRED BY FASHIONING AN OVERBROAD REMEDY WITHOUT A HEARING

A. **The Supreme Court Standard for an Injunctive Remedy**

On January 18, 2006, a few days before the issuance of the Order, the Supreme Court in Ayotte, 126 S.Ct. at 967-968, reiterated the three-prong standard to be applied when injunctive relief is sought with respect to an unconstitutional state statute:

Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, see United States v. Raines, 362 U.S. 17, 20-22, 80 S.Ct. 519, 4 L.Ed. 2d 524 (1960), or to sever its problematical portions while leaving the remainder intact, United States v. Booker, 543 U.S. 220, 227-229, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that a "[a] ruling of unconstitutionality frustrates the intent of the elective representatives of the people." Regan v. Time, Inc., 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 47 (1984) (plurality opinion).

* * *

Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements" even as we strive to salvage

it. Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988).

* * *

Third, the touchstone for any decision of a remedy is legislative intent, for a court cannot “use its remedial powers to circumvent the intent of the legislature.” Califano v. Westcott, 443 U.S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (Powell, J., concurring in part and dissenting in part)

The District Court violated all three prongs of Ayotte by failing to consider a remedy that would preserve the convention system while conforming it to constitutional requirements.

B. **The Public Purpose of the Convention System**

The undisputed historical record shows that the legislative purpose behind the convention system was to address problems in the then-existing direct primary election process. State of N.Y. Senate, Report of Special Committee of Senate on Primary Law Submitted with Bill to Establish State Wide Judicial Conventions, S. Doc. No. 34 (1918). The convention system was seen as a mechanism to ensure that the most qualified candidates for Supreme Court Justice were nominated by representatives of the community in convention, free from the control of political bosses and the influence of money on primary campaigns. The New York State Senate, at page 3 of its report, summed up the benefits of the convention system and the flaws in the primary system using language of the time:

“It is inherent in the functions of the judicial office that the office should seek the man, and not the man the office.”

The benefits of the convention system as recognized in the 1920s have been reaffirmed today. In February 2006, a few days after the Order was issued, the Feerick Commission, after years of public hearings and thoughtful analysis, issued its Final Report and called for the continuation of the convention system with reforms that address the very infirmities found by the District Court. The Feerick Commission considered and expressly rejected the primary election option.

C. **The Positive Effect of the Convention System
As a Remedy to Overcome Discrimination
Against Women in the Judicial Selection Process**

The State has a legitimate interest in promoting equal opportunities for women as members of the judiciary. See, Board of Directors of Rotary Intern. v. Rotary Club of Durarte, 481 U.S. 537, 549, 107 S.Ct. 1940, 1948 (1987) (“Even if the Unruh Act does work some slight infringement on Rotary members’ right of expressive association, that infringement is justified because it serves the State’s compelling interest in eliminating discrimination against women.”)

The convention system, with such improvements as may be appropriate, is a permissible exercise of the State’s power to further its interests, because women traditionally have not been able to compete on an equal basis in

open primaries and, if open primaries are mandated, women candidates will be deterred from running.

It is undisputed that women traditionally have not been able to compete on an equal basis in an expensive primary system due to the continuing impact of discrimination against them. In contrast, the convention system has allowed women to be effective candidates without the need for huge expenditures of money. Accordingly, women will be negatively and disproportionately impacted by the elimination of the convention system and the imposition of an open primary system.⁵

The 2002 Democratic Convention in the First Judicial District, provides a clear and compelling example of how the convention system promotes the public interest in gender diversity among State Court Justices. Judicial delegates were required to nominate ten Supreme Court Justice candidates for the general election. The judicial delegates renominated all four incumbents, which included two female Supreme Court Justices. The judicial delegates then filled four of the remaining six seats with women. (HE 2248) Indeed, in a convention floor fight, Troy Weber, a female candidate, was able to beat John A.K. Bradley, a

⁵ The negative impact on women would only be heightened if the primary system were imposed this year.

Caucasian male candidate, by a delegate vote of 68 judicial delegates to 35 judicial delegates. (HE 2448)

Conversely, one of the female Supreme Court Justices who was re-nominated at the 2002 convention testified that a primary system would have deterred her from running for office. (Tr. 1771-1778) (Freedman).

While true gender equality has not been achieved, evidence at the preliminary hearing supports the conclusion that, where women have significant representation in the bar, such as the First Judicial District, women have been making remarkable progress in gaining representation on the bench. See Tr. 1988:6-14 (Giske). Thus, in the past five years, the percentage of women justices has increased from 42% of the Supreme Court bench in the First Judicial District in 2001 – the year that the plaintiffs relied upon for the statistics supporting their claims – to over 50% today. Defendants’ Corrected Surreply Proposed Findings of Fact, ¶168; 2004-2005 Green Book, Official Directory of the City of New York, pp. 352-353.⁶

⁶ There is disparity among the judicial districts in their history of nominating women to be Supreme Court Justices. For example, at the 2000 judicial convention in the 8th District, when less than 20% of Supreme Court Justices in that District were women, delegates nominated two women out of four candidates. Ward Decl. ¶13. If a hearing on remedies occurs as WBASNY requests, remedies for the imbalances among judicial districts can and should be explored.

The evidence also establishes that female candidates for judicial office have often come from public service backgrounds in which the pay scale is significantly lower than in private practice, but where women rise to leadership positions. For example, the April 10, 2002 report of the New York State Judicial Committee on Women in the Courts (“2002 NYJWC Report”) found that women are well represented in legal services organizations, such as the Legal Aid Society, where female attorneys comprise half the attorney staff and the heads of four out of the Society’s five divisions. (The 2002 NYJWC Report is publicly available at <http://courts.state.ny.us/reports>.) In contrast, women are still woefully underrepresented in partnership and leadership positions in large firms. 2002 NYJWC Report at 33.

Despite having modest incomes, female public service attorneys have been successful candidates for the bench under the convention system. For example, Justice Sheila Abdus-Salaam, Justice Helen Freedman, and plaintiff Judge Margarita Lopez Torres testified that they came from public service backgrounds. Tr:1850:20-1851:15 (Abdus-Salaam); 1462:15-1465:10 (Freedman); Lopez Torres Decl. ¶3. Accordingly, the economic disparity between women in public service positions, who have not accumulated wealth, and men, who still dominate private practice, will impair the opportunity for women to compete in primary elections. Thus, women who have had successful public service careers

would be disproportionately impacted by the District Court's remedy of expensive direct primaries.

In contrast to the direct primary elections, where men will have a dollar-for-dollar advantage over women, the convention system substantially reduces the monetary advantage that wealthy people normally enjoy in such races by affording opportunities for individuals who are not wealthy to compete for a Supreme Court nomination. Tr. 2013:12-2014:5 (Giske).

Female Supreme Court Justices testified that they spent on average only \$3,000 to \$5,000 for an entire campaign for office in the convention system. Justice Freedman testified that the cost of her 2002 campaign for reelection to the Supreme Court through the convention system cost about \$1,800. Tr. 1771:16-18 (Freedman). Justice Phyllis Gangel-Jacob testified that she spent \$100,000.00 in a primary campaign for Civil Court (in 1984 dollars) in contrast to the total of approximately \$24,000.00 in four separate attempts to win a nomination to the Supreme Court through the convention system. Tr. 1803:11-20, Tr. 25:23-1826:16 (Gangel-Jacob). Justice Abdus-Salaam testified that she spent less than \$2,000.00 for her campaign for the Supreme Court nomination through the convention system. Justice Abdus-Salaam further testified that she is certain that, under a primary system, she would have been forced to spend substantially more. Tr. 1887:10-24 (Abdus-Salaam). She further testified that it would be difficult to raise

the \$150,000 to \$200,000 to run in a primary campaign for the Supreme Court nomination, in part because she did not have wealthy relatives, and because she has been on the bench so long. Tr. 1888:10-22 (Abdus-Salaam).

Although the District Court correctly assumed that the State had a legitimate interest in promoting racial and ethnic diversity among the judiciary, the District Court characterized the actual nominations of racial and ethnic minorities in New York City (and, we submit, by extension women on a state-wide basis) as being little more than the result of demographics.⁷ (SPA-68) In its report, however, the Feerick Commission recognized that primary elections would favor those with access to large sums of money and, over time, lessen public confidence in a judiciary that would be seen as not comprised of well qualified, independent, public servants, but of judges who might favor those who have contributed to their election campaigns. Feerick Commission Report, pp. 15-16, 22. Thus, the District Court erred by failing to recognize and address the negative impact of the remedy, and a hearing to determine the most appropriate remedy is mandatory.

**D. The District Court Found Discrete
Flaws in the Convention System
Not A Total System Failure**

The District Court did not determine that the convention system in and of itself is fatally flawed. To the contrary, the District Court's finding of

⁷ The Order is silent as to the effect of the remedy on women as candidates, as litigants, and as members of society.

unconstitutionality is grounded on certain limited determinations about the manner in which conventions have been administered.

The District Court found that party leaders controlled the election of the delegates to the conventions and their choice of judicial candidates (SPA-20). In addition, it found that there was no effective way for candidates not supported by party leaders to put forth their own slates of delegates for election to serve at the conventions. (SPA-14-16) Also, the District Court found that there was no effective way for candidates not supported by the party leaders to lobby the delegates to vote for them at the convention. (SPA-41-42) Despite the fact that it found specific, limited flaws in the convention system, which made that system constitutionally infirm, the District Court did not fashion a specific, limited remedy.

E. **The Overbroad and Inappropriate Remedy**

The District Court did not attempt to fashion a remedy that retained the convention system enacted by the Legislature of the State of New York. Instead, the District Court enjoined the convention system in its entirety without conducting a hearing to explore possible alternatives, and replaced it with a primary election process that had been expressly rejected by the New York State Legislature.

The District Court erred by not crafting injunctive relief to address the flaws in the convention system that it identified. Ayotte; see also, Rockefeller v. Powers, 78 F.3d 44 (2d Cir. 1996) (injunction granted, modifying petition signature requirements); Molinari v. Powers, 82 F.Supp.2d 57 (E.D.N.Y. 2000) (injunction granted, modifying petition requirements). With its broad sweeping approach, the District Court ignored the legislative intent to select nominees for Supreme Court Justice by convention and to avoid expensive primaries for Supreme Court Justices. The District Court also ignored the benefits of the convention system with respect to the nomination of qualified female candidates for the position of Supreme Court Justice. The District Court had an obligation to consider remedies that would preserve the convention system and erred by failing to conduct a hearing on remedies where less drastic measures than a complete dismantling of the convention system could be considered.

The District Court's description of its remedy as "temporary" until the legislature acts does not cure its error or make it so. The legislature can always enact new laws. The fact that the District Court's remedy may someday become moot did not lessen the obligation of the District Court under Ayotte to consider injunctive remedies that might preserve the convention system.

Similarly, the fact that New York State law allows primary elections for certain courts of limited and lesser jurisdiction (e.g., city and county courts) , or

that the selection process for judges in New York differs from other states, does not sustain or support the remedy imposed. The Supreme Court is New York's court of general jurisdiction hearing all manner of criminal and civil actions. The legislature made a clear and conscious choice in providing for primaries for courts of lesser jurisdiction and nominating conventions for Supreme Court Justices. The legislature's policy determinations with respect to courts of lesser jurisdiction are irrelevant to the District Court's decision given the legislature's adoption of a convention system for Supreme Court Justices.

The remedy imposed by the District Court is drastic by any measure. The convention nominating system that was created after great deliberation in the 1920s and continued thereafter is replaced by the rejected and still disfavored primary system. In these circumstances, the District Court should be directed to review the remedy in light of the Ayotte decision, in light of the Feerick Commission Report, and in light of the disproportionate impact of the remedy on women. Accordingly, the Order should be vacated as to the remedy therein and the case remanded to the District Court for a hearing and further order.

CONCLUSION

For all the foregoing reasons, the Order should be vacated as to the relief granted therein and the case should be remanded to the District Court for a hearing and further order on the remedy with consideration given to the Ayotte decision, the Feerick Commission Report, and such other and further evidence and arguments as may be submitted.

Dated: May 1, 2006

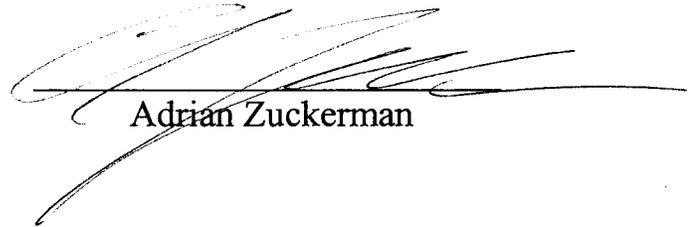
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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,706 words and complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 29(d).



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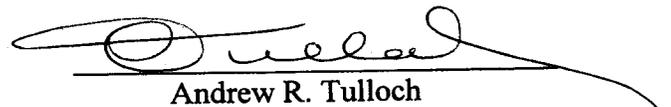
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