06-0635-CV

United States Court of Appeals

for the

Second Circuit

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

PLAINTIFFS-APPELLEES,

-V.-

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONAHUE, 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 THE 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 FOR REVERSAL
ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK

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STATEMENT OF INTEREST

The Asian American Bar Association of New York ("AABANY"), a membership organization which represents the interests of approximately 4,000 Asian American attorneys in New York, has, since its incorporation in 1989, taken an active role in advocating and promoting diversity in the judiciary and has taken positions on legal issues that affect the access of Asian Americans and other minorities to the electoral process.

SUMMARY OF ARGUMENT

AABANY respectfully submits this brief as prospective amicus curiae with respect to the appeal from the decision of the United States District Court for the Eastern District of New York ("District Court"), dated January 27, 2006 (the "Order"). The Order (SPA-1) granted injunctive relief to the plaintiffs and overturned the existing system (at odds with U.S. Supreme Court precedent)[1] for the nomination of candidates for New York Supreme Court Justice through a convention system as provided in New York Election Law § 6-106 (SPA-80), § 6-124 (SPA-81), and § 6-158 (SPA-82).[2] The Order also mandated that the

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[1] *See Ayotte v. Planned Parenthood of Northern New England,* __ U.S.__ , 126 S.Ct. 961 (2006).

[2] Documents in the Appellants' Special Appendix are cited as "SPA-__." Documents in the Appellants' Joint Appendix are cited as "JA-__." Volumes 1 through 9 of the Hearing Exhibits and Transcript Volumes are cited as "HE-__." All transcripts referenced herein are reproduced in Volume 10 of Appellants' Hearing Exhibits and Transcript Volumes and are cited as "Tr.__."

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.

AABANY takes no position on the constitutionality of the existing judicial selection process, but files this amicus curiae brief in opposition to the remedy imposed by the District Court. For the reasons set forth below, the District Court imposed its remedy without affording adequate consideration to the extent to which the interests of diversity in the judiciary could be impaired by a partisan open primary system. Instead, the District Court imposed an open primary system after only minimal discovery and fact-finding as to the impact of an open primary system on the interests of diversity and, in particular, on the interests of Asian Americans.

Judicial district-wide partisan elections have the grave potential of leading to a "tyranny of the majority" to the detriment of Asian Americans, one of the least numerous and least powerful ethnic minorities in New York. The existing nominating system, whatever its flaws, does not present Asian Americans with the same barriers that they may face in a partisan election process. The latter process is one in which voting along ethnic lines would most likely prevail to the detriment of small minority groups such as Asian Americans. Relatedly, a partisan

electoral process is one in which cash is king – again an insuperable barrier to the aspirations of many Asian Americans who generally lack the resources and the political clout to raise the hundreds of thousands of dollars needed for judicial races in New York.

As a result of the demographic and fiscal challenges posed by a partisan election system, Asian Americans have been virtually shut out of judgeships in the states where such systems prevail. Eight states, encompassing approximately 25% of the nation's population, have partisan election systems similar to the system that the District Court has imposed.[3] From the point of view of Asian Americans, the experiences of these eight states are striking: out of nearly 2,500 judges in those eight states, only *seven judges* are of Asian American descent.[4] A majority of the states with partisan open primary election systems have *no Asian American judges* whatsoever.[5]

Accordingly, this action should be remanded so that the record can be

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[3] Peter D. Webster, *Selection and Retention of Judges: Is There One Best Method?*, 23 Fla. St. U. L. Rev. 1, n. 80 (Summer 1995). The states with partisan election systems are Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia.

[4] American Bar Association, National Database on Diversity in the State Judiciary, http://www.abanet.org/judind/diversity/national.html#1. The ABA analyzed authorized judgeships in the states for the general jurisdiction appellate and trial court bench.

[5] Webster, *supra,* n. 81. The states are Alabama, Arkansas, Mississippi, North Carolina, and West Virginia.

better developed and a more suitable remedy imposed. Specifically, evidentiary hearings and further fact-finding need to be held to determine if this is a case in which the "cure" may be, from the perspective of Asian Americans, far worse than the alleged disease.

ARGUMENT

I. A Partisan Open Primary Election System Will Likely Disadvantage Asian Americans Because Voting Will Tend To Take Place Along Ethnic Lines

The experience of Asian Americans in states with partisan election systems provides strong support for several of the opinions expressed by the expert of the defendants in this case, Dr. Michael Hechter, Emeritus Professor of Political Sociology at the University of Washington. As Dr. Hechter testified, voting in judicial elections tends to take place along ethnic lines. In such circumstances, "the tyranny of the [majority] is always a problem in direct election. There can be persistent underrepresented minorities who can never win the election because there aren't enough of them .... There are not enough registered voters ever to prevail in that unit. They will always be consistently out voted." (Tr. 1223:8-21). The District Court clearly erred in rejecting Dr. Hechter's testimony in the absence of a fully developed record on the impact of open primaries on Asian Americans and minorities.

Indeed, courts have frequently noted that New York politics is characterized by bloc voting and racial polarization. *See, e.g., Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 796 F. Supp. 681, 693 (E.D.N.Y. 1992) (African American and Latino voters in the state of New York had established the existence of racial bloc voting); *Butts v. City of New York,* 614 F. Supp. 1527, 1547 (E.D.N.Y. 1985) ("racial and ethnic polarization and bloc voting exists in New York City to a significant degree").

In his testimony in this case, New York State Senator Martin Connor attested to the strength of bloc voting in New York, testifying that, in an open primary in the Second Judicial District, "you could not elect an Italian American, an Irish American, maybe have a hard time with a Latino." (Tr. 2124:4-2125:4). *See also* Testimony of Dennis Ward (Tr. 343:23-344:1) (stating that, in the Eighth Judicial District, no ethnic minorities would ever win a party nomination in an open primary system).

For Asian Americans, the picture may be even bleaker. As one of the few Asian Americans to win election to the judiciary in Illinois, Judge Sandra Otaka, has stated:

> [I]f African Americans cannot [elect their candidates] at 22% how in the Sam Heck are we going to do it at 4% when you have the name Fujimoto or Svrapi Punja [on

the ballot] in Illinois.

> I was told to put an apostrophe after my O because if I did that, I would have a greater chance at winning county-wide. The bottom line is in Cook County and I imagine other places.... if it isn't O'Brien or O'Malley or it isn't Smith or it isn't a name that they have a level of comfort with, then it's going to be a lot more difficult for them to get elected. *Let me tell you, having an Asian name does not facilitate access to election through the political process* [emphasis added].[6]

The extent of the uphill battle that Asian Americans may face in seeking elective office is further demonstrated by the fact that recent polls show that as many as 30% of Americans believe that Chinese Americans are more loyal to China than they are to the United States, and that 25% of those polled are unsure.[7] Further evidentiary hearings and fact-finding would permit the District Court to determine whether the open primary system would negatively impact Asian Americans, and if so, to what degree, and how to minimize or eliminate that impact in crafting an appropriate remedy. In particular, a remand would enable the court to assess the validity of empirical evidence regarding the experience of Asian Americans in states with partisan election systems. As one commentator

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[6] Judge Otaka was quoted in Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, at 17.

[7] These figures are presented by Professor Sherrilyn Ifill and appear in Lawyers' Comm. For Civil Rights Under Law, *id.* at 18.

suggested: "I ask you whether the electorate voting for a candidate who is Chinese American running for judicial office is likely to vote for that candidate if they hold those kind of suspicions?"[8]

II. District-wide Judicial Elections In New York State Would Be Prohibitively Expensive

The expense of a partisan open primary system may also adversely affect the prospect of a diverse judiciary. There is every reason to believe that, as the Final Report to the Chief Judge of the State of New York of the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research shows, would serve to further undermine confidence in the judiciary."[9] District-wide judicial elections in New York State would be prohibitively expensive which affects Asian Americans who have a significant population concentration within the New York City metropolitan area – the most expensive media market in the country.[10]

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[8] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, *supra.*

[9] Commission to Promote Public Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York at 3 (Feb. 6, 2006).

[10] *See* SRDS Service Reports (Standard Rate and Data Service).

Indeed, as the plaintiffs themselves have conceded, New York is one of the most expensive states in which to run a campaign.[11] For example, general election legislative candidates (who run in districts that are often less populous than the areas in which a State Supreme Court Justice would be forced to run) raised a total of more than $50 million in New York State in 2004.[12] Some New York State Senate races have generated spending of more than $3 million per candidate, in one case amounting to more than $51 per vote.[13] Even non-New York City races can cost millions of dollars: the 2005 race for Westchester County Executive cost a total of almost $4 million and the race for Westchester County Clerk cost a total of $673,931.[14]

The expense of campaigning for judicial office may impose disproportionate burdens upon Asian Americans and other members of minority groups. As Geri Palast, Executive Director of Justice at Stake Campaign,[15] has

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[11] *See* Declaration of William Lipton in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, dated June 1, 2004 (JA300).

[12] Common Cause, *The $2100 Club: What New York State Political Campaigns Cost, How Much Those Costs are Rising and Who's Footing the Bill* (March 2006) at 5.

[13] *Id.* at 9.

[14] *Id* at 10.

[15] Justice at Stake Campaign is a "nationwide, nonpartisan partnership of more than thirty judicial, legal and citizen organizations" seeking to "campaign for fair and impartial courts." http://www.faircourts.org/contentviewer.asp?breadcrumb=8,284.

stated, "The high cost of campaigns poses a threat to minority candidates who may not be able to raise as sufficient a war chest to be competitive in these elections."[16] Professor Spencer Overton, a Professor of Journalism at George Washington University School of Law, has also noted that, although minority group members make up almost 30% of the nation's population, they make up less than 1% of the contributors to federal campaigns.[17]

In fact, over 55% of the contributions by candidates in New York State campaigns during 2002, 2004, and 2005 have come via checks written for more than $2,100 (the federal contribution limit) and, thus, would have been illegal in a federal election.[18] As a result, a comprehensive study of nationwide legislative elections found that "white candidates for contested seats typically spent more than minorities in similar states."[19] As Professor Ira Rohter, an Associate Professor of Political Science at the University of Hawaii at Manoa, said, "People in minority groups typically are lower-income, and they don't have

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[16] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, *supra,* at 15.

[17] *Id.*

[18] Common Cause Report, *supra,* at 3.

[19] *See* Mark Niesse, *Study: Minority Candidates for State Office Often Raise Less Money,* Associated Press, March 29, 2006.

access to the kinds of corporate funding that white people normally would." *Id.*

For this reason, the American Bar Association has supported public financing of judicial elections "to create more opportunities for attorneys of all racial and ethnic backgrounds who do not have ... the personal or political connectedness to raise large sums of money for elections."[20] However, the remedy imposed by the District Court does not – and cannot – provide for public financing, and there is no reason to believe that such financing is politically or fiscally feasible in an era of soaring budget deficits.

Professor John D. Feerick of Fordham University was quoted saying: "[t]here was no enthusiasm for a primary without public financing and there is no political reality for a vast public financing system." Jennifer Medina, *Albany Is Split Over a Plan to Pick Judges,* New York Times, February 28, 2006. As stated in the Feerick Commission Report at Page11, "without public financing of judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections."

Thus, for the foreseeable future, if the remedy imposed by the District Court is not substantially modified, it will inflict crushing financial burdens upon

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[20] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, *supra,* at 15 & n.51.

minority candidates seeking judicial office. Accordingly, a remand is warranted so that the District Court can conduct additional fact-finding on the ability of Asian Americans and other minorities to participate in open primary campaigns in light of the prohibitively expensive costs involved.

III. The Injunctive Relief Imposed By The District Court Was Not Narrowly Tailored To Fit The Purported Violations

Finally, the District Court's remedy eliminating the convention system and imposing an open primary system is patently inappropriate because it is not narrowly tailored to fit the purported violations. The District Court's finding of unconstitutionality is based upon specific flaws in the convention system as applied, such as the control of party leaders in the election of delegates (SPA-20), the inability of candidates who are not supported by party leaders to place their own slate of delegates (SPA 14-16), and the inability to have delegates lobby effectively for candidates at the convention (SPA 41-42). To address these perceived flaws, the District Court could have considered alternative, less restrictive means to address those particular concerns instead of eliminating the entire convention system.[21] By throwing the baby out with the bath water, Asian Americans may very well have been left in a worse position than the baby.

[21] See Representation of Minority Lawyers on the New York State Supreme Court (Defts. Ex. NNN) (HE7667),

The District Court failed to heed the U.S. Supreme Court's direction that federal courts should not "nullify more of the legislature's work than is necessary." *Ayotte v. Planned Parenthood of Northern New England,* __ U.S.__ , 126 S.Ct. 961, 967 (2006). Thus, "[i]njunctive relief should be narrowly tailored to fit legal violations." *Waldhill Pub. Corp. v. Landoll Inc,* 43 F.3d 775, 785 (2d Cir. 1994). Here, the District Court unreasonably imposed the primary system in one broad stroke without sufficient consideration of its impact on Asian Americans.

Initially, the District Court properly recognized that diversity in the judicial selection process is "a legitimate state interest." *Lopez Torres v. New York State Bd. of Elections*, 411 F. Supp.2d 212, 253 (E.D.N.Y. 2006). Asian Americans are, of course, a significant part of that diversity. However, the District Court did not take into account that interest in diversity when it imposed its remedy. It did not impose "the least intrusive course." *Id.* at 258. Although the District Court recognized that diversity is a "legitimate state interest," the court failed to consider that diversity when fashioning a remedy. Instead, as set forth at Points I and II above, insofar as the interests of Asian Americans are concerned, the open primary system may be precisely the sort of intrusive remedy the District Court should have avoided.

The matter before the District Court was simply a motion – a motion seeking preliminary injunctive relief. There was no trial. There was no separate hearing on remedies. Discovery was limited. Much of the evidence was even hearsay in nature. SPA 33-35; Exs. 70-74, 77-79, 90. In contravention of Fed. R. Civ. P. 65(a)(2), there was no prior notice that a full decision on the merits would be rendered. As a result, the impact upon minority candidates, and in particular, Asian Americans, was not fully considered. Consequently, the record below provided an incomplete and inadequate basis upon which to support the imposition of a statewide open primary system as the remedy for the adjudged constitutional violations. The potential disproportionate effects on, and disadvantages faced by, Asian Americans in an open primary system without public financing render the District Court's remedy wholly inappropriate. Hence, it was unreasonable for the District Court to have imposed such a drastic remedy in view of the concerns discussed herein. For example, in *Molinari v. Powers,* 82 F. Supp. 2d 57 (E.D.N.Y. 2000), the court invalidated only the section of the New York State Election Law that raised constitutional concerns. In doing so, the court excised only that much of the statute that it deemed to be unconstitutional so that the structure enacted by the legislature for the selection of delegates would remain in place. Therefore, AABANY submits that the District Court should have

engaged in additional fact-finding to develop a more complete record upon which to determine whether the convention nomination system could have been modified, or portions of the enabling statutes severed, rather than eliminated completely.

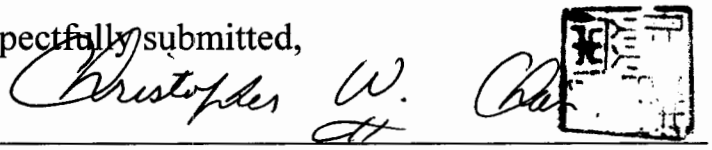
Of course, such additional fact-finding should be guided by the U.S. Supreme Court's admonition in the election law context that judicial remedies be narrowly tailored to avoid "reject[ing] state policy choices more than was necessary to meet the constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (U.S. 1982) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971)); *accord Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 n.5 (7th Cir. 1991) ("Any court remedy must be narrowly tailored to include only those measures necessary to cure the effect"). Thus, in cases such as *United States v. Booker*, 543 U.S. 220 (2005), the court took great pains to sever and excise only those portions of Title 18 of the United States Code that rendered the Sentencing Guidelines unconstitutional, while scrupulously leaving in place the applicability of the Guidelines to the federal sentencing scheme. Similarly, the District Court could have and should have used a like surgical technique by only excising any allegedly offending provision.

CONCLUSION

For the foregoing reasons, this Court should vacate the remedy imposed by the District Court ordering that New York State's judicial nominating convention system be replaced by a direct open primary election, and remand the case for an evidentiary hearing so that the District Court can fashion a more appropriate remedy commensurate with the alleged violations found by the District Court.

Dated: May 8, 2006

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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 3,389 words and complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 29(d).

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CERTIFICATE OF SERVICE

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