04 CV 1129

United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellees,

-against-

NEW YORK STATE BOARD OF ELECTIONS; NEIL W. KELLEHER, CAROL BERMAN, HELENA MOSES DONOHUE, AND 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, ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE CITY OF NEW YORK AND JUSTICE DAVID DEMAREST, INDIVIDUALLY, AND AS PRESIDENT OF THE STATE ASSOCIATION,

Defendant-Intervenors,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory Intervenor.

An appeal from the United States District Court for the Eastern District of New York.

BRIEF OF AMICI CURIAE FOR REVERSAL

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PRELIMINARY STATEMENT

In its haste, following a truncated hearing, the lower court issued a permanent mandatory injunction sweeping away the New York state judicial convention system that has been in place, with slight interruption, for over a hundred years. The district court failed to narrowly tailor its injunction to address the harms it identified. Eschewing the Burdick balancing test which requires that each burden on ballot access be weighed one-by-one, the district court's shotgun approach of subjecting the entire judicial nominating system to strict scrutiny has left many collateral victims in its wake, most notably, the interest of minorities who seek to achieve full representation on the supreme court bench of New York State.

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INTRODUCTION

The boards of the Metropolitan Black Bar Association, the Dominican Bar Association, the Korean American Lawyers Association of Greater New York and various named individuals[1] submit this amicus brief in support of reversal.[2]

The undersigned minority lawyers are involved in the process of judicial selection in New York County. The bulk of their membership consists of voters registered in the State of New York. They are heavily involved in promoting qualified minority candidates for judgeship, as well as advocating diversity of the New York judiciary at all levels, be they appointed or elected positions. The members[3] of these same bar associations have over the years served on the Independent Judicial Screening Panel of the New York County Democratic Committee, a panel which has historically taken into account the interests of racial diversity.[4]

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[1] James F. Castro-Blanco Esq., Eliezer Rodriguez, Esq., and Fiordaliza A. Rodriguez, Esq.

[2] No motion is necessary because counsel for the parties have consented to allow for the submission of amicus briefs.

[3] The amici have a range of experience serving on other screening panels, involving both elective and appointive judicial positions, including the Mayor's Advisory Committee on the Judiciary, the Housing Advisory Council, the Judiciary Committee of the Association of the Bar of the City of New York, federal judicial screening panels, and others.

[4] The guidelines of the screening panel specify that "the panel shall affirmatively consider the need for qualified judges of diverse backgrounds and the need to provide

The lower court acknowledged that racial diversity of the judiciary is a legitimate state interest, but failed to develop an adequate record on the effect of its injunctive experiment on the ability of minorities to attain judicial office. Minorities are traditionally at a disadvantage in a majoritarian, money-driven system such as a primary, because the ability of minority candidates to raise funds in their communities is far less than white candidates. A March 2006 study of legislative elections demonstrates that white assembly winners in New York raised 61 percent more funds than African Americans and 19 percent more than Latinos.[5] (Asians were completely unrepresented in the state legislature until one wealthy individual financed his campaign largely with his own funds).

The same study indicates that minorities are still struggling to be proportionally represented in the New York legislature.[6] In contrast, minorities have achieved nearly full proportional representation in the state supreme court through the convention system.[7]

A remand of the lower court's decision is necessary so that, at a minimum, full development of a factual record may take place. Should the

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representation on the bench to traditionally underrepresented groups." New York County Democratic Committee, GUIDELINES FOR OPERATION OF INDEPENDENT JUDICIAL SCREENING PANEL, §3(c).

[5] Megan Moore, *Money and Diversity; 2004 State Legislative Elections*, INSTITUTE ON MONEY IN STATE POLITICS, March 2006.

[6] ID., Appendix A.

[7] Defendant Exhibit NNN.

court be mistaken in its suggestion that minority candidates will not be adversely affected by the replacement of the current system with a primary system (dec. at 69), minority communities would most directly pay the price.

THE OPINION BELOW

After a preliminary injunction hearing, the lower court found that challenger candidates faced overly severe burdens when seeking to elect their own delegates, and when seeking to lobby delegates of the judicial convention. These burdens include: an onerous signature requirement; the large number of delegates and alternates; lack of availability of the list of delegates; and a prohibitively small window of time to lobby delegates after the delegates are elected.

The lower court cited several precedents which addressed some of the same ballot access issues found here. Then the court granted an injunction that was disconnected from its factual findings. Instead of focusing one-by-one on the specific ballot access barriers on which the court made factual findings, the court, in effect, legislated from the bench, effectively abolishing the entire statewide judicial convention system, and imposing a primary system until the legislature replaces the pre-existing process with one that meets the court's requirements.

In essence, the lower court essentially created a constitutional right to have a primary. The court arrived at this outcome even though it acknowledged the well-settled law that the states have the choice to settle intraparty competition either through primary election or through party convention (dec. at 59). Based upon the record from a preliminary injunction hearing, which included hearsay and other inadmissible evidence, the lower court arrogated to itself the power to dictate statewide judicial nominating standards "until the legislature of the State of New York enacts a new statutory scheme."

The allegedly temporary nature of the court's injunction does not excuse its trespass beyond the bounds of judicial restraint. A preliminary injunction should respond to an emergency; it should not create one for the legislature.

ARGUMENT

THE LOWER COURT'S UNWARRANTED HASTE IN ISSUING A PERMANENT MANDATORY INJUNCTION AFTER A PRELIMINARY INJUNCTION HEARING DIRECTLY PREJUDICED THE INTERESTS OF MINORITIES.

The lower court swept away the entire statewide nominating convention system after only a truncated preliminary injunction hearing, rather than the requisite trial on the merits. Although the lower court acknowledged that racial diversity in the judiciary is a legitimate state interest, its summary process failed to permit full discovery into, and the development of, a proper factual record on the importance that minorities place on the judicial nominating convention. At a minimum, these amici urge that reversal be granted so that a complete record can be developed on the issue of whether elimination of the convention system would adversely affect minorities' progress in promoting racial diversity in the judiciary.

A preliminary injunction hearing is designed to preserve the status quo pending a trial on the merits. Instead of accomplishing this limited goal – and without providing any advance notice that it was considering such a draconian remedy -- the trial court issued a sweeping mandatory injunction, which effectively displaces the judicial nominating system chosen by the

elected representatives of the people of the State of New York. Although the lower court's ruling is ostensibly temporary, it does not preserve the status quo, but rather, imposes by judicial fiat a primary system until such time as the legislature comes up with an alternative system that meets the trial court's standards.

Injunctive relief is an extraordinary and drastic remedy which should not be routinely granted. Pride v. Community School Board, 482 F.2d 257, 264 (2d Cir. 1973). It is well-settled that a mandatory injunction (i.e., an injunction which alters the status quo) must meet a higher standard than a typical prohibitive injunction, and should issue "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F.3d 27, 34 (2d Cir. 1995).

Preliminary injunctions are used in election cases because of the exigent nature of a pending election. See, e.g., Rockefeller v. Powers I, 909 F.Supp. 863 (E.D.N.Y. 1995), *reversed*; Rockefeller v. Powers II, 74 F.2d 1367 (2d Cir. 1995); Rockefeller v. Powers III, 917 F. Supp. 155 (E.D.N.Y. 1996); Rockefeller v. Powers IV, 78 F.3d 44, 45 (2d Cir. 1996) ("Because the New York presidential primary is scheduled for March 7, 1996, our decision will be rendered with considerably less elaboration than is found in

a typical opinion."). Clearly, these cases do not stand for the proposition that a preliminary injunction is to be the default remedy for ballot access cases. In an election case in which the plaintiffs are not candidates for a specific upcoming election, a preliminary injunction is seldom required.

Thus, unlike the situation in the *Rockefeller* cases, no clear showing of emergency was established here. In fact, following its decision, the lower court granted a stay of its own decision pending this appeal. In doing so, the court excluded from its injunction the 2006 judicial conventions and general elections. In granting this stay, the lower court effectively acknowledged that no extreme or serious damage looms over the Plaintiffs, belying the finding that the extraordinary remedy was necessary in the first place.

In addition to the lack of exigency, the lower court failed to make the requisite "clear showing" of an entitlement to relief. In its haste, the lower court focused on improprieties which occurred in recent elections in Brooklyn, and other anecdotes from New York County, without any showing that any of the cited problems were endemic statewide.

Additionally, the lower court failed to take into account the extent to which the convention system serves the interest of racial diversity. The accomplishment of racial diversity in the judiciary is a state interest which the lower court should have taken into account. However, in the frantic

preliminary injunction process, very little discovery or factual development of that issue occurred. For this reason alone, reversal is warranted so that a proper record can be developed as to the effect on minority voters, an important regulatory interest which might well justify the purported restrictions on the rights of votes imposed by the nominating conventions. Burdick, 504 U.S. at 434 (if the regulation imposes only reasonable restrictions, "the State's important regulatory interests are generally sufficient to justify the restrictions"); Prestia v. O'Connor, 178 F.3d 86 (2d Cir. 1999).

The amici submit that the lower court's rush to justice gives short shrift to the interests of minority representation, an interest which could serve, at a minimum, as a rational basis for upholding the present judicial nominating system.

THE COURT'S OVERBROAD INJUNCTION VIOLATES THE PRINCIPLE OF JUDICIAL RESTRAINT AND USURPS THE POWER OF THE DEMOCRATIC BRANCHES OF STATE GOVERNMENT TO CHOOSE THE NOMINATION SYSTEM.

The lower court's injunction is not narrowly tailored to remedy the ballot access issues considered at trial. Although it was intended to relieve the burden upon challengers seeking party nomination, the overbroad

injunction unnecessarily impinges on many interests, including the interests of racial diversity in the judiciary.

Injunctive relief should be no more burdensome to defendants than necessary to provide complete relief to plaintiffs. Madsen v. Women's Health Ctr., Inc. 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed. 593 (1994). See also NAACP v. Button, 371 U. S. 415, 438 (1963) (when "conduct occurs in the context of constitutionally protected activity . . . `precision of regulation' is demanded"). "Injunctive relief should be narrowly tailored to fit specific legal violations." Waldman Corp. v. Landoll, Inc., 43 F.3d 775, 785 (2d Cir. 1994); Patsy's Brand, Inc. v. I.O.B. Realty, Inc., 317 F.3d 209 (2d Cir. 2003); Brooks v. Giuliani, 84 F.3d 1454 (2d Cir. 1996), cert. denied, 117 S.Ct. 480. "Accordingly, an injunction should not impose unnecessary burdens on lawful activity." Id.

The lower court's action ignores the foregoing principles which are firmly grounded in notions of judicial restraint. In overturning the statewide nominating system, the lower court made sweeping policy choices completely disproportionate to the alleged ballot access issues that it identified. The lower court's factual findings focused on such issues as signature requirements and the difficulty of fielding and lobbying delegates in the existing convention system. Instead of addressing these specific

issues, the lower court eliminated the entire convention system. When federal courts go beyond the necessities of remedying legal violations, they take decisionmaking power out of the hands of the democratic branches without a constitutional mandate to do so.[8]

More significantly, the lower court issued its decision without tailoring its remedy to take into account numerous state interests which may support the current nominating system. Among these interests is the goal of diversity and the interests of minority groups in New York State who are stakeholders in the existing judicial selection process. This decision to eliminate the entire nominating convention system without tailoring the remedy to accommodate competing groups which have an interest in the existing system is reversible error.

In fact, the lower court's decision to eliminate the entire nominating system cannot be reconciled with the leading court decisions. In those cases, even if the courts found that ballot access was unduly restricted, they focused on specific restrictions and left the remainder of the nominating system intact. The courts have invariably followed this restrictive view of injunctions when applied to ballot access.

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[8] Comment, *Federal Jurisdiction and Procedure – Equitable Remedies; School Desegregation*, 109 HARV. L. REV. 239, at 246, Nov. 1995.

In Rockefeller IV, 78 F.3d 44 (2d Cir. 1996), the court held the signature requirements in the Republican presidential primary unconstitutional because they imposed an unduly severe limitation on the challengers. The court kept the nomination system intact but reduced the signature requirement, and even then, in only four districts.

Similarly, in Molinari v. Powers, 82 F. Supp. 2d 57 (2000) the lower court held unconstitutional a provision which invalidated petition signatures based on the town/city trap (i.e., stating one's borough or county on the space designated for town, e.g., stating Brooklyn instead of New York City) and upon a requirement that witnesses to the petitions be residents of the respective districts. The court kept the nomination system intact, but struck down the requirements and allowed John McCain, Steve Forbes, and Alan Keyes the opportunity to be on the primary ballot.

Under Rockefeller and Molinari, the district court properly identified the burdensome restrictions and narrowly tailored a remedy to redress those restrictions. In this case, the court identified the burdensome restrictions to be, inter alia, the alleged signature requirements and the alleged restrictions on delegate selection and lobbying. However, rather than tailor the remedy consistent with the case law, the lower court, in the context of a preliminary injunction hearing, replaced the state's chosen nomination system with a

different system of the court's choosing and thereby substituted its judgment for that of the legislature.

THE COURT'S DECISION TO APPLY STRICT SCRUTINY TO THE ENTIRE NEW YORK CONVENTION SYSTEM IS NOT ALLOWED UNDER THE BURDICK BALANCING TEST.

The lower court lumped all the burdens on ballot access together, and placed the entire nominating system on trial, applying a strict scrutiny standard. As such, the lower court failed to follow the approach under Burdick v. Takushi, 504 U.S. 428, 434 (1992), which requires the court to balance the individual burdens of the system against the corresponding state interests that justify them.

In assessing the constitutionality of a state election law, the court must balance the regulation's burden on the First and Fourteenth Amendment rights of the voters against the state interests advanced by the regulation, taking into consideration the extent to which the burden is necessary to the advancement of those interests. Burdick v. Takushi, 504 U.S. 428, 434 (1992). If the regulation severely burdens those rights, it must be narrowly drawn to protect those interests, but where the regulation imposes only reasonable restrictions, "the State's important regulatory

interests are generally sufficient to justify the restrictions." Id., quoted in Prestia v. O'Connor, 178 F.3d 86 (2d Cir. 1999).

The balancing test clearly contemplates that the court would assess the burdens *individually*, and based on their severity, apply the proper test, whether it be strict scrutiny or legitimate interest. Instead, the court applied a strict scrutiny test to the entire judicial nominating convention system, and once it found strict scrutiny appropriate for some of the provisions or practices, abolished the system. Included in the list of collateral victims to this blunderbuss approach are provisions and practices that do not constitute a severe burden, or do not constitute a burden on challengers at all.

The lower court's failure to address the alleged ballot access barriers one-by-one and balance the state's interests (such as the interests of minority judicial candidates and voters) against the purported burdens imposed by the nominating convention is virtually without precedent. The court's analytical shotgun is anathema to the surgical precision required by the balancing test under Burdick. The amici are especially troubled that, by imposing primaries, the lower court has nullified the role of nominating conventions in jurisdictions for which no evidence was introduced in the lower court's preliminary injunction hearing. In addition, the lower court has set aside the role of independent screening panels that serve in

connection with the current judicial nominating process, such as the New York County Independent Screening Panel, the constitutionality of which was not even in question. There is no precedent whatsoever for a federal court to strike down one provision on the grounds that it finds the application of another provision in an earlier stage of the ballot process unconstitutional.

The lower court suggests that the restrictions on challengers are so pervasive that the judicial nominating convention in its entirety is subject to strict scrutiny and therefore unconstitutional. The lower court's reasoning is that, even if the signature requirement were modified, the number of delegates and alternates reduced, the time period for lobbying enlarged, and the challenger candidate given equal time on the floor of the convention, the challenger would *still* have no reasonable chance of getting on the ballot, because "the delegates and alternates selected and installed in office by the party leaders simply do their leaders' bidding." (dec. at 55).

The court's theory – that the state's chosen system is rotten to the core – manifests several problems. First, the court failed to make what would seem to be a necessary finding, that the barriers it describes are inherent in the convention system. On the contrary, the lower court acknowledged that conventions are a permissible method of selecting nominees. Second, since

challengers have never (in the court's view) had the opportunity to lobby the delegates, then the supposition that the delegates "simply do their leaders' bidding" is purely speculative. Third, there are copious precedents for courts restricting unreasonable burdens to ballot access, but there is no precedent, to our knowledge, that projects the court's scrutiny into how delegates in a convention tend to vote once those burdens are lifted.[9]

CONCLUSION

The amici ask that the lower court's decision be REVERSED.

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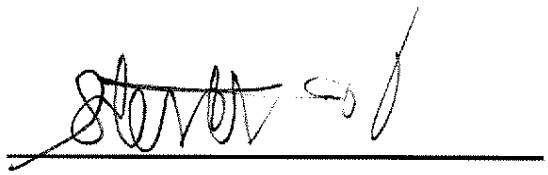
[9] In Rockefeller III, the Second Circuit focused not on whether delegates will do the party leaders' bidding, but on whether the voters in a convention system are deprived of their ability to "cast their votes effectively." "Republican voters . . . will select delegates who may or may not vote at a subsequent party convention for the presidential candidate listed next to the delegate's name on the ballot, or who may be uncommitted from the start." 74 F.3d at 1381.

CERTIFICATE UNDER RULE 32(A)(7)(B)

The undersigned attorney hereby certifies that this brief does not exceed the type-volume limitation of this court.



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