06-0635-CV

United States Court of Appeals for the Second Circuit

MARGARITA LOPEZ TORRES, STEVE 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,

-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*
CITIZENS UNION OF THE CITY OF NEW YORK

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FRAP 26.1 STATEMENT

Pursuant to F.R.A.P. 26.1, and to enable judges of the court to evaluate possible disqualification or recusal, *amicus curiae* Citizens Union of the City of New York states that it is a not-for-profit corporation with no corporate parents and no shares owned by any publicly held company.

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INTEREST OF *AMICUS CURIAE*

Citizens Union of the City of New York ("Citizens Union") is an independent, non partisan force dedicated to promoting good government and advancing political reform in the city and state of New York. It serves as a watchdog for the public interest and an advocate for the common good at City Hall and the State Capitol. Citizens Union was founded in 1897 to fight the corruption of Tammany Hall and helped to elect New York City's first reform mayor, Seth Low, in 1901. Over the years Citizens Union has spearheaded efforts for campaign finance reform, historic preservation, improved voting procedures, City Charter revisions, home rule for New York City and proportional representation. Today, we work to ensure fair elections, clean campaigns, and open effective government that is accountable to the citizens of the City of New York.

Citizens Union has long advocated for the reform of New York's method of electing New York Supreme Court Justices. In particular, Citizens Union supports a merit appointment process and is against any process that overly politicizes the selection of the judiciary and/or has the potential of forcing judges into ethical and legal compromises in order to secure a seat on the bench.

Citizens Union submits this *amicus curiae* brief with the consent of all parties pursuant to F.R.A.P. 29(a).[1]

PRELIMINARY STATEMENT

Citizens Union submits this *amicus curiae* brief in support of Judge John Gleeson's decision holding that plaintiffs had made a "compelling showing" and are likely to succeed on their claims that New York's manner of selecting Supreme Court Justices abridges the rights of voters and candidates. This Court should affirm that central holding. With regard to remedy, Citizens Union urges the Court to remind the district court on remand that it has considerably more remedial discretion in formulating a final remedy (and indeed a provisional remedy that may be required for elections in 2008 or beyond) than it seemed to recognize, and that the district court should conduct an evidentiary hearing on remand for purposes of crafting relief should the legislature fail to act.

The decision below correctly found New York's Judicial Convention System unconstitutional. However, the district court also issued a preliminary injunction requiring direct primary election of justices of the New York Supreme Court, if the Legislature fails to act, without conducting an evidentiary hearing or broadly considering the factors, recently canvassed by the United States Supreme Court in *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006), that should inform remedial

[1] All parties have consented to the filing of *amici curiae* briefs submitted on behalf of either side.

discretion in a case such as this. While the press of the schedule (the process for the November 2007 elections starts this coming January) may have effectively foreclosed for the 2006 (and we suspect 2007) elections the fuller consideration Citizens Union believes ordinarily essential, certainly any interim or final remedy affecting subsequent elections needs to be more fully explored.

Citizens Union agrees that the legislature should ultimately reform New York's elections laws, but any interim or indeed permanent remedy for 2008 and beyond, if not 2007, requires more deliberation and attention to all the relevant remedial considerations than the Court undertook. On remand, the district court should be directed to convene an evidentiary hearing in order to craft an injunction that will operate unless and until the legislature takes action. Citizens Union urges this Court to remind the District Court that it has such authority and to encourage its use.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND NEW YORK'S CONVENTION SYSTEM FOR ELECTING SUPREME COURT JUSTICES UNCONSTITUTIONAL.

The district court correctly found that plaintiffs were likely to succeed on their claim that New York's judicial convention system is unconstitutional.

As set forth in detail in Judge Gleeson's decision below, the unique structure of New York's convention system, as it has operated for decades, results in

political party leaders hand picking New York's Supreme Court justices, while New York's voters are denied any significant role in the process. It is correspondingly all but impossible for a person who is not selected by such party leaders to get elected to the Supreme Court. In light of this reality, Judge Gleeson found that:

> A State may not choose to have judicial elections and then stifle the electoral process, whether by suppressing the speech of candidates or, as in this case, by creating electoral practices that effectively keep candidates out of contention entirely, in the name of protecting the judicial office from politics....Put simply, as applied to this case, the state may not pass off the will of party leaders as the will of the people.

Lopez Torres v. New York State Board of Elections, 411 F. Supp. 2d 212, 254 (E.D.N.Y. January 27, 2006) (the "January 27th Order").

Citizens Union agrees with the substance of Judge Gleeson's decision and that plaintiffs proved a "clear" and "substantial" likelihood of success, and urges affirmance by this Court on the merits.

II. ON REMAND, THIS COURT SHOULD DIRECT THE DISTRICT COURT TO HOLD A HEARING IN ORDER TO FASHION AN APPROPRIATE PERMANENT INJUNCTION

After determining that New York's judicial selection process was unconstitutional, the district court properly observed that, in the first instance, "[t]he choice of a permanent remedy for this constitutional violation does not fall to me, but rather to the legislature of New York State." *Id.* at 255. Correctly discerning that considerations of federalism generally require the court to begin

with the "least intrusive remedy," the Court quickly concluded, without any evidentiary hearing on a remedy, that "the least intrusive course is to require a direct primary election." *Id.* at 256. Although subsequent to the January 27, 2006 Order the parties agreed to a stay which would maintain the status quo for purposes of 2006 elections, which the district court confirmed by order on March 3, 2006, the district court reaffirmed, by order dated April 7, 2006, that direct primary election would be the remedy for the 2007 election cycle and beyond, unless and until the New York legislature acted. *See Lopez Torres v. New York State Board of Elections*, 2006 WL 929363 (EDNY April 7, 2006) (the "April 7th Order").

The court allowed letter briefing on a single narrow topic – the appropriate petitioning requirements for its direct primary elections scheme (*i.e.*, the number of signatures required for a candidate to get on the ballot) – but did not otherwise hold an evidentiary hearing on remedy or receive additional briefing or other guidance, on the nature of an appropriate remedy. It did not invite or consider briefing on whether requiring a direct primary election was in fact the "least intrusive" remedy, or the one that the New York Legislature would likely have selected. *Cf. Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006).

While Citizens Union agrees that, ultimately, the permanent remedy for the constitutional violation should be crafted by the New York legislature, Citizens Union does not agree with the district court's implicit conclusion that it lacked the

power to fashion a permanent or a more deeply considered interim remedy should the Legislature fail to do so. Indeed, the "temporary" remedy the district court imposed without a hearing to explore the remedy will be permanent if the New York legislature does not act — and the New York legislature has an unhappy history of inaction and delay in such areas.

For example, the Help America Vote Act of 2002, Public Law 107-252, 42 U.S.C.§ 15301 *et seq.*, established minimum standards relating to election technology and the administration of federal elections and required states to implement such standards. However, it took the New York legislature three years to create the legal frameworks for implementation of such standards. *See* Electronic Reform Modernization Act, 2005 Sess. Laws of N.Y. Ch. 181; 2005 Sess. Laws of N.Y. Chs. 24 and 179. As a result, New York failed to timely comply with the requirements of HAVA, resulting in the first such suit by the Department of Justice against any state for failure to timely and fully comply with HAVA. *See United States v. New York State Board of Elections*, 06 Civ. 0263 (N.D.N.Y.). Similarly, despite the New York Court of Appeals' holding in 2003 "that New York City schoolchildren were not receiving the opportunity for the sound basic education [required by the New York Constitution], and that there was a causal link between the State's current funding system and such failure," and its remand for the Legislature to adopt a remedy, the parties (and the children of New

York) are still waiting a remedy, due to the Legislature's inability or unwillingness to meet its obligation. *See generally Campaign for Fiscal Equity v. New York State,* 2006 N.Y. App. Div. LEXIS 3598 (First Dep't March 23, 2006).

Federal courts have broad remedial power when a constitutional violation is found. Their power to craft rules to afford appropriate relief, regardless even of state laws not themselves determined to be unconstitutional, are considerable. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 695-96 (1979).[2] On remand, this Court should reaffirm the district court's broad power to fashion a remedy and direct that an evidentiary hearing should be held to determine the appropriate interim remedy (at least for elections in 2008 and beyond) should the Legislature fail to act.

A. The Federal Courts Have Broad Remedial Powers

In remedying a constitutional violation, a district court has broad powers to fashion a remedy and is not limited by "the least restrictive means." *See United States v. Yonkers Board of Education*, 837 F.2d 1181, 1236 (2d Cir. 1987). "Once

[2] *See also, e.g., North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971) (disregarding state anti-busing statute); *Griffin v. Country School Board of Prince Edward County*, 377 U.S. 218 (1964) (ordering tax levy); *Labette County Commissioners v. U.S. ex rel. Moulton*, 112 U.S. 217 (1884) (ordering tax levied in contravention of state law); *Graham v Folsom*, 200 U.S. 248 (1906) (ordering local officials to comply with a contract notwithstanding state law forbidding such compliance); *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) (municipality permitted to apply for federal license to dam waters despite state law withholding such power); *Milliken v. Bradley III*, 433 U.S. 267 (1977) (ordering remedial expenditures of funds with no warrant in state law).

a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Id.* (quoting *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971); *see also Milliken v. Bradley*, 433 U.S. 267, 281 (1977) ("[o]nce invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"). Further, the district court can and should be flexible in fashioning a remedy, rather than simply looking for a solution that may cure the constitutional violation, but create its own equitable or practical problems. *See Brown v. Bd. of Education*, 349 U.S. 294, 300 (1955) ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.").

In instances of election-related violations, while the federal courts have generally encouraged the respective legislature to cure the problem, the courts have also fashioned their own interim remedies, based on the unique circumstances of the case, so that, if the legislature fails to timely act, the violation does not continue. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964) (affirming a district court's reapportionment of both houses of the Alabama legislature for purposes of primary and general elections); *Schulz v. Williams*, 44 F.2d 48, 61 (2d

Cir. 1994) (affirming the unconstitutionality of New York Election law § 5-602 and holding that "the district court's entry of a permanent injunction was not an abuse of discretion, as it represented appropriate relief for the plaintiffs based on the harm worked").

For example, in *Hellebust v. Brownback*, 42 F.3d 1331, 1336 (10th Cir. 1994), the district court found, and the 10th Circuit affirmed, that the procedure for electing members of the Kansas State Board of Agriculture (the "Board") was unconstitutional. Over the objections of the defendants that the district court had to defer and wait for legislative action rather than impose a remedy, the district court declared the terms of the then present Board expired and appointed the Governor as receiver, and left to the legislature the prerogative of changing the process in the future. The Tenth Circuit affirmed the lower court's remedy, stating that "it would be the *unusual case* in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan" and found that the district court appropriately "tailor[ed] its relief to the unique circumstances of th[e] case." 42 F.3d at 1335-36 (emphasis in original).

Here, the district court intimated that it did not have the authority to craft a remedy and instead ordered a stop gap measure without holding a hearing on what an appropriate remedy should be. While the perceived need for prompt action (the court at that point considered that there might be time to have its remedy apply in

2006) may have made more extensive consideration of remedy impractical, the court appears to have taken an unduly cramped view of its remedial discretion, and there are significant problems with the temporary remedy ordered by the district court. On remand, we urge a full hearing for purposes of crafting further any necessary further interim remedy or a permanent injunction.

B. The Direct Election of Judges Is Not The Only Appropriate Remedy

While the direct election of judges may avoid the constitutional violations in plaintiffs' complaint, it is not a panacea and can create many of its own problems.

A non-publicly financed direct election with a party primary effectively forces judges to solicit campaign contributions, including contributions from lawyers, whom are likely to appear before the judge if elected, an unedifying approach that has tarnished the judiciary in various states and which New York has resolutely rejected for generations with regard to its court of general trial jurisdiction, the Supreme Court. Direct elections have added drawbacks as well: they draw candidates into addressing substantive issues which they might then be called upon to handle on the bench, and undermine judicial independence by pressuring judges facing re-election to make decisions that are not correct on the law or the facts, but are politically popular. *See generally Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), at 787-88 (noting the American Bar Association's opposition to direct election of judges and stating that such

"opposition may be well taken (it certainly had the support of the Founders of the Federal Government)"), at 788-92 (O'Connor, J., concurring) ("I...write separately to express my concerns about judicial elections generally" and discussing the strain between a desire for impartial judges and the campaigning and fund raising realities of an election: "relying on campaign donations may leave judges feeling indebted to certain parties"). These harms are frequent in some states, and are detailed in the various *amici curiae* briefs submitted to the Supreme Court on both sides of *Republican Party of Minnesota v. White.* Texas is a particularly notorious example, where the prestige and integrity of the Texas state courts have repeatedly been tarnished by campaign contribution scandals. *See generally Judicial Independence: The Cycle of Judicial Elections: Texas as a Case Study*, 29 Fordham Urb. L.J. 907 (2002).

The district court concluded that "the chief virtue of the primary system . . . is that it assure[s] that intraparty competition will be resolved in a democratic fashion" (411 F. Supp. 2d at 255 (internal citation omitted)), but the matter is not nearly so simple.[3] The machinery of party politics can effectively control a direct

[3] The district court was quoting from *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); however, a reading of the Supreme Court's decision in context reveals that the Supreme Court did not hold, or even imply, that direct primary election "assures that intraparty competition is resolved in a democratic fashion," much less find it necessary or wise in the context of judicial selection. That case did not involve judicial elections.

election just as effectively as a judicial convention, as party leaders have control over fund raising, mobilizing volunteers, organizing petition challenges, endorsements and other factors. Partisan primary election campaigns can be expensive, particularly in downstate New York, and can create a significant financial burden on candidates, especially if they lack the support of party leaders who can provide the avenue to raise funds. The simple application to Supreme Court elections of statutes providing for direct primary elections of other judges is likely to result in party leaders still effectively selecting the judges, except perhaps in those instances where an opposition candidate has sufficient personal wealth to fund a campaign effectively (and such a scenario raises the unseemly idea of a judge "buying" an election), and even then such a candidate would probably still be at a decided disadvantage to the favored candidate of the party leadership.

The heart of the problem Judge Gleeson identified was the impermissible control of the political party leadership, it is thus important for any remedy to be carefully structured to ensure that the same undemocratic effects that prompted plaintiffs to sue are not simply retained through less direct means.

Regardless, the point here is not to determine the ideal solution on appeal. The point is that a remedy which might effectively become permanent should be established by a process more deliberative than the simple "nearest analogy" approach utilized by Judge Gleeson, and requires a full evidentiary hearing

allowing all interested parties to set forth their views. The same is true for interim remedies when there is time to undertake that consideration (certainly for elections in 2008 and beyond). There should be plenty of time, following remand, for an evidentiary hearing so that a carefully crafted permanent injunction can be in place for at least the 2008 election cycle, in case the legislature does not act (or acts in a constitutionally infirm manner). *See, e.g., M.C. Jeffers v. Clinton*, 730 F. Supp. 196, 199 (E.D. Ark. 1990) (after finding that an apportionment plan violated the Voting Rights Act, the court set a date certain for an evidentiary hearing to determine an appropriate injunction, in the event the legislature had not acted by that time). There are many alternative options that the district court should consider, including the generally lauded procedure for selecting Court of Appeals Judges or other remedies such as non-partisan primary elections or modifications to the judicial convention system.

As regards the legislature, the district court also stated that "I have no authority to direct the legislature to take up the matter immediately, as the plaintiffs have requested." at 255. But assuming *arguendo* that the district court cannot "force" the legislature to pass a law, it is not without authority to induce legislative action. *See, e.g., Hellebust v. Brownback*, 42 F.3d 1331, 1336 (10th Cir. 1994) (suggesting that the district court "establish a deadline by which the legislature must act, to prod the legislature to address [its] orders and to provide the

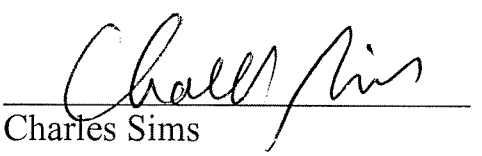
district court an outer limit for its supervision"); *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 (7th Cir. 1990) (on finding a violation of the Voting Rights Act the district court "can permit or even *order* the legislature to submit a proposed remedy") (emphasis added).

CONCLUSION

For the reasons set forth above, Citizens Union urges this Court to affirm the merits of the decision below, and to remind the district court of its broad discretion and power to craft further interim or permanent relief, in case legislative inaction so requires.

May 17, 2006

PROSKAUER ROSE LLP

By: 

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