

No. 06-766

IN THE
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

—v.—

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF EDWARD I. KOCH AS *AMICUS CURIAE*
FOR AFFIRMANCE IN SUPPORT OF RESPONDENTS**

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**STATEMENT OF *AMICUS CURIAE*
INTEREST OF EDWARD I. KOCH**

I file this brief as an *amicus curiae* in support of Respondents.¹

My political career began in 1956 when I moved to Greenwich Village and volunteered for the presidential campaign of Adlai Stevenson. In 1963, I became the Village's Democratic Party district leader and was subsequently elected to New York City Council (1966) and U.S. Congress (1969-1977). I won election as mayor of New York in 1977 and was reelected in 1981 and 1985. One of my significant achievements as mayor was to implement a merit selection system for criminal and family court judges.

My involvement in all levels of New York politics for the past fifty years has provided me with a unique insight into the election and appointment of public officials in this state. Unfortunately, my personal experiences and observations echo only too accurately the lower courts' conclusions regarding the convention system.

“We mean by ‘politics,’ ” Adlai Stevenson once said, “the people’s business—the most important business there is.” In my opinion, these words still ring true. I began my political career as a reformer, seeking to undermine the grasp of overweening party leaders on

¹ The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of the State of New York, have filed letters with the Court consenting to all amicus briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amicus or his counsel, has made a monetary contribution to the preparation or submission of this brief.

local politics. With these pages, I hope to continue a campaign begun five decades ago against those political leaders who arrogate to themselves choices belonging to the people.

SUMMARY OF ARGUMENT

The reality of election of Justices of the Supreme Court of New York is clear. There can be no serious factual dispute by anyone who has been involved in the system. As much as Petitioners try to shift the focus into an abstract First Amendment conversation on convention systems, the facts remain unchanged (as they have for decades): New York's statutory election scheme creates, fosters, and nurtures a system whereby the very few appoint the Justices. The United States Court of Appeals for the Second Circuit recognized this. Its holding does not signal an end to convention systems in general or even to all convention systems in New York; instead, it appropriately tolls the knell for a one-of-a-kind statutory scheme that has deprived voters and candidates of meaningful participation in the election of New York's Supreme Court Justices.

ARGUMENT

I. Party Leaders, Not Voters, Select Justices of the Supreme Court

One of the charges against King George III listed in the Declaration of Independence was that “[h]e has made Judges dependent on his [w]ill alone.” A similar grievance could be leveled today against New York's local party leaders. As I once pointed out in a 1976 interview, justices of the Supreme Court in New York

are not elected, even though their names are on the ballot. They are selected.²

I witnessed first-hand the influence of county and district leaders when I became involved in Democratic clubs in Greenwich Village during the 1950's and '60's. At that time, the county and district leader, Carmine DeSapio, ruled over the New York County Democratic Party known as "Tammany Hall." As a member of the Democratic club in the Village over which DeSapio presided, I saw how the patronage system flourished in one of this country's most influential and disreputable political machines. DeSapio played kingmaker and, in addition to selecting judges, was reputed to have hand-picked the Democratic Party's candidates for New York City mayor and governor of New York. I became familiar with the mechanics of judicial selection in New York City, by, among other things, attending meetings of district leaders at which judgeships were parceled out—sometimes with an eye to ethnic "quotas" and often as a response to political obligations. While the party leaders' power to select candidates for mayor and governor has waxed and waned over the years as a function of the party leaders' influence, New York's Election Law ensures that a "DeSapio" will always handpick New York's Supreme Court Justices.³

Petitioners can only envision an "unalterable political reality" in which "party leaders can and should have enormous influence." (Brief of Petitioners N.Y. County Democratic Committee et al. at 30.) They write of the First Amendment rights of "the party" as if the cabals of

² Interview by Ed Edwin with Edward I. Koch, Columbia University Oral History Research Office, at 52 (Dec. 13, 1975), *available at* <http://www.columbia.edu/cu/lweb/digital/collections/nny/koche/toc.html>.

³ *See infra* Part II.

a few, empowered by the state, trump the associational rights of all rank-and-file party members. To suggest that party leaders are synonymous with the party is simply arrogance. Surely the suffrage of party members means something more than “the right to vote for the man of another man’s choice.”⁴

I and like-minded reformers challenged this undemocratic vision of politics and Tammany Hall’s subversion of the election process by becoming involved in a reform club—the Village Independent Democrats (“VID”)—in late 1956/early 1957. Democratic reformers from around the state joined forces to elect VID district leaders, a position which I occupied in the Village from 1963 to 1965.

The VID was much more open and less hierarchical than its Tammany Hall predecessor; but, even under the VID, the selection of Supreme Court Justices remained in the hands of party leaders. We could have done little to make the election scheme of Supreme Court Justices more democratic because New York’s Election Law insulated the process from rank-and-file party members.

Petitioners’ briefs suggest that New York convention system for Supreme Court Justices rises to the lofty ideal expressed by Alexander Hamilton in Federalist No. 10, in which republic institutions may “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country. . . .” THE FEDERALIST No. 10. Whatever the intention of New York’s legislature in designing the system, the reality of New York’s statutory scheme could not be further from Petitioners’ abstract discussion. The risk to republican

⁴ Ambrose Bierce, *The Devil’s Dictionary* 172 (NuVision Publ’ns 2007).

institutions recognized by Hamilton has become the reality of New York's judicial conventions, where "[m]en of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people." *Id.*

Despite Petitioners' efforts to argue otherwise, this case does not concern whether the First Amendment accords protection to the internal process, independent of a statutory scheme, by which a political party selects its standard bearer. To frame the issue this way is to divorce the factual reality as it exists (and has existed since I have been involved) and was found by the trial court, and transforms the issue into a hypothetical First Amendment analysis. Who is to say that Judge Lopez Torres—who had won two county-wide elections for judicial office—did not better represent her party than a leader whose disfavor Judge Lopez Torres had incurred by failing to participate in a patronage system? My 50 years as a member of the Democratic Party leads me to believe that Judge Lopez Torres represents the Democratic Party's ideologies and preferences more accurately than the political boss of whom she ran afoul.

II. The Unconstitutional Infringement upon Voters and Candidates' First Amendment Rights Is the Inevitable Consequence of New York's Election Statute

New York's convention system for electing Supreme Court Justices has gone largely unchanged for the forty-plus years that I have been familiar with it. The undemocratic, boss-run system that I observed in the 1960s appears to operate no differently today than it did back then. Surely it is not happenstance that no Democratic or Republican insurgent candidate has ever been nominated

under this system, absent a massive split within the party's leadership.

This is because the First Amendment violations found by the Second Circuit result not from private individuals' political power but from the overly burdensome combination of Sections 6-106 and 6-124 of the New York Election Law. In other words, they are inherent in the statutory scheme.

A report issued by the New York State Commission to Promote Public Confidence in Judicial Elections ("Feerick Commission Report"),⁵ recently authored by a Commission that included ten sitting or former New York judges and several former state legislators, unequivocally supports this conclusion. In particular, the Feerick Commission Report noted that delegates lack the opportunity to meaningfully elect candidates for Supreme Court Justice. Under New York law, the delegates are in office for only one or two weeks before the parties hold their judicial nominating conventions, after which their job is over. The Feerick Commission wrote,

Delegates do not have time to interview judicial candidates, to investigate the reports of bar association screening panels or to learn the skills required to perform their duties. Moreover, the fact that delegates are required to run annually fails to provide an incentive to pull individual public-spirited citizens into the race for the office of delegate.

(Feerick Commission Report at 25.) Indeed, my experience echoes these findings. Delegates are generally party club faithfuls who agree to serve as delegates as a favor to their clubs. They license their names for use by the party leaders. Given the delegates' interest in following

⁵ Dated February 6, 2006 and available at <http://law.fordham.edu/commission/judicialections/images/jud-finreport.pdf>.

the local party leadership, their votes are often determined before they even set foot in the convention.

Second, the Election Law's petitioning provisions favor "institutional party support" by requiring the collection of thousands of signatures across multiple assembly districts. (*Id.* at 26-7.) Third, large numbers of delegates during the quick-paced conventions "all but guarantee that deliberate, thoughtful action will be foreclosed." (*Id.* at 26.) There exists a "near-total vacuum of information about judicial candidates," and delegates merely "rubber stamp[] decisions already reached by political party insiders." (*Id.* at 19.) It was because the Election Law excluded rank-and-file members from any meaningful participation in the nomination and election of Supreme Court Justices that the Feerick Commission proposed changes to the Election Law, itself. (*Id.* at 28-9.) It is nothing less than *chutzpah* for the defendants to champion that report on account of its recommendation that the convention system be left in place with some modest revisions, rather than abolished altogether. (Brief of Petitioners N.Y. County Democratic Committee et al. at 3.)⁶

Despite the overwhelming evidence to the contrary, Petitioners' amicus curiae, The Republic National Committee wrote that "[t]here is nothing to stop rank-and-file party members from running to be convention delegates." (Brief Amicus Curiae of the Republican National Committee in Support of Petitioners at 12.) There is "nothing" to stop them but a difficult petitioning process

⁶ Although my political experiences largely echo the Feerick Commission Report's conclusions, I disagree with the Commission's recommendation that a convention system be left in place. With due respect to the Commission, I have been in and around politics long enough to know that tinkering with a system as deeply flawed as this one will not cure it.

leading to a brief position as one uninformed decision-maker among many. In fact, New York's Election Law could hardly be more discouraging towards rank-and-file party members who seek to have a meaningful voice as convention delegates. Petitioners write that "[t]he only direct say voters have in this process [of nominating Supreme Court Justices] is in the selection of the delegates who serve as voters' party representatives in the judicial nominating process." (Brief of Petitioners N.Y. County Democratic Committee et al. at 22.) Given the marginalization of delegates, a voter's voice in the nomination of Supreme Court Justices cannot rise above an inaudible and ineffective whisper.

III. New York's Convention System for State-Wide Office Belies the Argument that the Second Circuit's Holding Imperils All Convention Systems

Although Petitioners argue that the Second Circuit's opinion places all "conventions for state, local and national office . . . in jeopardy," (*id.* at 20), the Second Circuit clearly stated that "a convention-based system is, in the abstract, a perfectly acceptable method of nomination." However it correctly rejected the notion that "all such systems, regardless of how they are implemented, are constitutional." (Pet. App. at 46.)

In fact, New York uses a convention system to select party candidates for "any office to be filled by the voters of the entire state." N.Y. Elec. L. § 6-104. The positions of governor and state comptroller are filled according to this statute. But it is telling that this system differs from and lacks the infirmities of the convention system used to nominate Supreme Court Justices. For party candidates for a state-wide office, the "person receiving the majority vote shall be the party's designated candidate for nomination. . . ." *Id.* Even if a candidate fails to win the majority vote, he may appear as a

party candidate on the primary ballot if he receives at least twenty-five percent of the votes at the convention. *Id.* Assuming that a party candidate does not win even twenty-five percent of the votes at the convention, he may nonetheless petition onto the primary ballot by obtaining the signatures of the lesser of fifteen thousand or five percent of the party's enrolled voters, provided that the lesser of one hundred or five percent of these signatures come from voters residing in one-half of the state's congressional districts. *Id.* § 6-136(1). In contrast, Judge Gleeson found that a challenger candidate for the Supreme Court in Brooklyn or Staten Island would need to gather 24,000 to 36,000 signatures drawn equally from 24 Assembly Districts in order to run a slate of delegates. (Pet. App. at 108.)

By offering these two mechanisms for party candidates to appear on the primary ballot (in addition to the possibility of winning a majority of votes at the convention), New York's convention system for state-wide office ensures that a *de jure* election does not turn into a *de facto* appointment. Moreover, New York's choice of a less burdensome convention system for positions as important as governor belies the argument that the judicial nominating convention necessarily "advances the important First Amendment right of the party and its members to associate with candidates who, the party has determined, reflect the party's ideals." (Brief of Petitioners N.Y. County Democratic Committee et al. at 32.) If the party's convention system for state-wide offices enables party leaders to organize the rank-and-file and endorse candidates whom they feel best advance the goals of the party—all while respecting the associational rights of the party's rank-and-file—then what is the compelling state interest behind the "byzantine and onerous network of nominating phase regulations" (Pet. App. at 69) characteristic of elections for Supreme Court Jus-

tice? Petitioners offer no valid reason—and I can think of none—for the disparity in statutory burdens between conventions for Supreme Court Justice and other judicial and non-judicial offices. *See Norman v. Reed*, 502 U.S. 279, 294 (1992) (finding no “serious state interest” or “narrow” tailoring of statute where disparity existed between laws providing right of access to state as opposed to county ballots).

CONCLUSION

For the above reasons, along with those urged in the Respondents’ brief, I respectfully request this Court to uphold the order and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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