06-0635 cv

IN THE
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,

Plaintiff-Appellee,

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,

Defendant-Appellant,

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-Intervenor-Appellant.

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 OF THE NEW YORK STATE LEGISLATURE AS AMICUS CURIAE

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INTEREST OF AMICUS

By letter dated May 9, 2006, this Court invited the New York Legislature to participate in this appeal as an amicus curiae.

The New York Legislature is comprised of two houses, the New York State Assembly and the New York State Senate. As the branch of state government responsible for enacting the laws regulating New York elections, the Legislature has a substantial interest in this challenge to the constitutionality of the statutes governing the election of Supreme Court Justices. Moreover, the remedy imposed by the district court in this case unnecessarily usurps the Legislature's authority to regulate state elections. In enjoining all judicial nominating conventions and ordering the State to use a primary system for selecting candidates for the position of Supreme Court Justice, the district court completely discarded the Legislature's constitutionally permissible choice of a convention system. The Legislature thus has a strong interest in reversal of the district court's decision.

SUMMARY OF ARGUMENT

For the reasons stated by Appellants, the statutes governing judicial nominating conventions are constitutional, and the district court's decision should be reversed on that ground alone. However, should this Court nonetheless conclude that the statutes are constitutionally infirm, the preliminary injunction imposed by the district court should be vacated in order to allow

the Legislature an opportunity to address any deficiencies itself.

Principles of federalism and separation of powers dictate that if some part of the New York Election Law is found to be unconstitutional, the New York Legislature — which is accountable at the ballot box to the people of the State of New York — ought to fix the problem, not a single unelected federal district court judge. Regulating state elections is a fundamental state power reserved by the United States Constitution (the "Constitution") to the States, and the district court's sweeping remedy inappropriately interferes with this core legislative function. The court's remedy flouts several fundamental principles: it failed to give the Legislature an opportunity to address any constitutional flaws in the first instance; it failed to tailor the remedy to apply only to the facts and circumstances presented by this case; and it failed to consider legislative intent or other remedial options. The injunction thus exceeds the scope of the district court's authority and should be vacated.

ARGUMENT

The Constitution's most important structural protections are the "separation and independence" of the coordinate branches of government and "a healthy balance of power between the States and the Federal Government." Printz v. United States, 521 U.S. 898,

921 (1997) (internal citation and quotation marks omitted). This "'double security'" prevents an accumulation of excessive power in any one branch of government and reduces the risk of tyranny and abuse from either federal or state government. Id. at 922 (quoting The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed. 1961)). The injunction in this case runs afoul of both of these core constitutional principles by interfering with a power explicitly reserved to the States and by imposing the court's — rather than the Legislature's — choice for fixing the system.

A. Regulation of State Elections is a Power Reserved to the States.

"It is incontestible that the Constitution established a system of 'dual sovereignty.'" Printz, 521 U.S. at 918 (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); Tafflin v. Levitt, 493 U.S. 455, 458 (1990)). The States' retention of their "'residuary and inviolable sovereignty' . . . is reflected throughout the Constitution's text," id. at 919 (quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed. 1961); citing U.S. Const., art. IV, § 2; art. IV, § 3; art. IV, § 4; art. V), and is "implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones," id. (citing U.S. Const., art. I, §

8); see also Alden v. Maine, 527 U.S. 706, 713 (1999) ("The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design."). Moreover, the Tenth and Eleventh Amendments resolve "[a]ny doubt regarding the constitutional role of the States as sovereign entities." Id.; see also Printz, 521 U.S. at 919 (state sovereignty was rendered express by the Tenth Amendment); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (the "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of sovereign immunity in our federal system").

Among the many powers reserved to the States under this system of "dual sovereignty" is the regulation of the times, places, and manner in which elections are held. Indeed, Article I of the Constitution mandates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const., art. I, § 4, cl. 1. While the Constitution grants Congress some authority to alter regulations that apply to these federal Congressional elections, id., it does not grant the federal government authority to intervene with state control over the election process for state offices.

Thus, as the Supreme Court has recognized, "States retain the power to regulate their own elections." Burdick v. Takushi, 504 U.S. 428, 433 (1992) (citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986)). Indeed, because election regulation is a fundamental and constitutionally protected state power, a State's interest in regulating its own elections is generally sufficient to justify restrictions on voters, even when First and Fourteenth Amendment rights may be implicated. See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); Burdick, 504 U.S. 433-34.

"The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens" with respect to powers reserved to the States. Alden, 527 U.S. at 751 (internal quotation marks omitted). Accordingly, the federal judiciary — which is even less accountable to a State's citizens than Congress or the President — must be particularly circumspect before imposing a remedy that impacts a core state power. See Missouri v. Jenkins, 495 U.S. 33, 51 (1990) ("one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions"); Ass'n of Surrogates & Supreme Court Reporters within the City of N.Y. v. New York, 966 F.2d 75, 79 (federal court's discretion is "limited

by considerations of federalism, and remedies that intrude unnecessarily on a state's governance of its own affairs should be avoided"), modified on other grounds on reh'g, 969 F.2d 1416 (2d Cir. 1992).

B. The Injunction Imposed by the District Court Amounts to Judicial Legislation.

By enjoining judicial nominating conventions and imposing a primary system — even temporarily — the district court not only interfered with a core state power, it made a choice that is properly reserved to the Legislature. Because that choice was not necessary, limited, or well-informed, the court abused its discretion. Accordingly, if this Court concludes that the challenged provisions are unconstitutional — which, for the reasons given by Appellants, it should not — the district court's remedy should be vacated. See Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 315-16 (2d Cir. 1982) ("an abuse of discretion may be found in the form that the order itself takes, e.g., an injunction may be too broad or too long in duration, or several injunctions may issue where one will due").

Federal courts must be cautious not to blur the separate duties of the judicial and legislative branches of government, particularly when fashioning a remedy to redress a constitutional flaw in a statute. See Ayotte v. Planned Parenthood of N. New

England, 126 S. Ct. 961, 968 (2006) (courts must be "mindful that [their] constitutional mandate and institutional competence are limited"); Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion) ("A ruling of unconstitutionality frustrates the intent of the elected representatives of the people."). Thus, while the finding of a constitutional defect "may easily give rise to a temptation to right the wrong by assuming control of the entire system," Knox v. Salinas, 193 F.3d 123, 130 (2d Cir. 1999) (internal quotation marks omitted), courts should not "use a sledgehammer where a more delicate instrument will suffice, . . . [or] move too quickly where it appears that the state . . . will in its own way adopt reforms bringing its system into compliance with the Constitution," Dean v. Coughlin, 804 F.2d 207, 213 (2d Cir. 1986). Instead, courts must "give the state a reasonable opportunity to remedy a constitutional deficiency, imposing upon it a court-devised solution only if the state plan proves to be unfeasible or inadequate for the purpose." Id.

The district court's immediate imposition of its own solution is contrary to the approach taken in, and required by, comparable cases. For example, in Reynolds v. Sims, 377 U.S. 533, 586-87 (1964), the Supreme Court described "an appropriate and well-considered exercise of judicial power." A three-judge panel concluded that Alabama's apportionment scheme was

unconstitutional but declined either to stay an impending primary election that was subject to the scheme or to immediately impose its own plan. Id. Instead, the court gave the Alabama Legislature an opportunity to design a reapportionment plan that comported with the court's preliminary findings. Id. It was only when the Legislature failed to act that the district court imposed its own plan. Id. at 586. The district court "correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Id.

Like apportionment, the manner in which state elections are held is "primarily a matter for legislative consideration and determination." Id. Thus, where a court concludes that an election law is unconstitutional, it must give the Legislature an adequate opportunity to remedy the problem. See Lewis v. Casey, 518 U.S. 343, 362 & 363 n.8 (1996) (finding injunction imposed by the district court was "inordinately – indeed, wildly – intrusive" where court did not "give the States the first opportunity to correct the errors made in the internal administration of their prisons") (internal quotation marks omitted); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (In

discharging their duty to protect constitutional rights, "courts cannot assume that state legislatures . . . are insensitive to the requirements of the Constitution."); Nicholson v. Scoppetta, 344 F.3d 154, 182-83 (2d Cir. 2003) (Walker, C.J., dissenting) (intrusive court intervention is warranted only in "situations involving deliberate and flagrant violations of a court order by a state or municipal government bent on defying a constitutional mandate"). By failing to give the New York Legislature an opportunity to respond to the court's findings in this case, the district court erred.

The court's error is not lessened by the so-called preliminary nature of its injunction. Leaving "[t]he choice of a permanent remedy . . . to the legislature of New York State" (SPA-75) (emphasis added) is not sufficient where, as here, the court's remedy becomes effective immediately and indefinitely.[1] When a court concludes that a statute is unconstitutional, "[t]he typical remedy afforded . . . is an injunction enjoining [the statute's] enforcement." Schulz v. Williams, 44 F.3d 48, 60 (2d Cir. 1994). There is no reason why the district court should have deviated here from the "typical remedy" to impose an election system of its own.

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[1] While the district court stayed its order for the 2006 election cycle, the remedy will impact the 2007 election cycle unless a further stay is granted or an alternative system is adopted beforehand.

Nor is this a case in which extraordinary judicial relief was necessary because of exigent or other special circumstances. Brown v. Chote, 411 U.S. 452, 456 (1973) (in the "exigent circumstances, the grant of extraordinary interim relief was a permissible choice"); see also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 357 F.3d 260, 262 (2d Cir. 2004) (district court had authority to order a single special election where redistricting plan was not approved in time to be implemented for the normal November elections); Schulz, 44 F.3d at 61 (injunction extended the time for plaintiff to submit valid petition signatures because enjoining enforcement of the unconstitutional statute would not alone remedy the harm the plaintiff had already suffered). There was no evidence adduced below, for example, that a particular candidate was at risk of losing a nomination because of a constitutional infirmity, nor was there an election so imminent that the Legislature could not respond in some way.

Moreover, even where immediate relief is required, courts must "limit the solution to the problem" and "try not to nullify more of a legislature's work than is necessary." Ayotte, 126 S. Ct. at 967. Accordingly, the scope of the injunctions entered in such cases is narrow. See, e.g., Green Party of N.Y. State v. N.Y. State Bd. of Elections, 389 F.3d 411, 422 (2d Cir. 2004) (plaintiffs could be included on voter registration form, but

court is "not at liberty to set out a rule regarding where a state must draw a bright line" in regulating which parties are included on voter registration form in the future). Here, the scope of the remedy was anything but narrow. The court invalidated judicial nominating conventions in their entirety — not as applied to the parties in this case, and not as applied to a specific upcoming election — and decided for the State which of many alternatives should be implemented in lieu of conventions. And it did so without a full hearing and without any express consideration of legislative intent. Ayotte, 126 S. Ct. at 968 ("the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial power to circumvent the intent of the legislature") (internal quotation marks omitted).

As demonstrated by the number and variety of other amici in this case, selection of trial court judges is a matter of substantial public debate in New York, and that debate has resulted in a multitude of studies and proposals with respect to how the State of New York should select its jurists. See, e.g., Comm'n to Promote Pub. Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York (Feb. 6, 2006), available at http://www.nycourts.gov/reports/Ferrick JudicialElection.pdf; Judith S. Kaye, The State of the Judiciary 2006 (Feb. 6, 2006), available at http://nycourts.gov/admin/

stateofjudiciary/soj2006.pdf; Judicial Selection Task Force, Ass'n of the Bar of the City of N.Y., Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York (Oct. 2003), available at http://www.abcny.org/pdf/report/Judicial%20selection%20task%20force.pdf. In light of this ongoing debate, and as the political body accountable to the citizens of New York, the Legislature will continue — as it has throughout history – to seriously consider and debate the issues raised by this case. And should this Court conclude that the current statutory framework fails to comport with the federal Constitution, the Legislature will move as expeditiously as necessary to devise a workable solution.

CONCLUSION

For the foregoing reasons, the New York Legislature urges that this Court reverse the decision and order of the district court.

Dated: New York, New York
June 2, 2006

Respectfully submitted,

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