

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARGARITA LÓPEZ 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,

v.

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.
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**DECLARATION OF JOHN W.
CARROLL IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTIVE
RELIEF**

Index No. CV 04-1129 (JG)

JOHN W. CARROLL declares as follows:

1. I am an attorney and member of Wolfson & Carroll, and a plaintiff in this case. I submit this declaration in support of Plaintiffs' motion for a preliminary injunction.

Background

2. I have been a resident of Brooklyn all of my life (52 years) and now reside in Kensington, Brooklyn. I have voted regularly as an enrolled Democrat for 32 years in Brooklyn.

3. I have also been active in Brooklyn politics for more than 30 years. Specifically, I have served as president and active member of the Central Brooklyn Independent Democrats, one of a tiny handful of independent-minded Democratic

political clubs in Brooklyn. In 2002, I ran unsuccessfully for City Council from the 39th District.

4. As discussed in more detail below, I have served as a Democratic Party judicial delegate and alternate in Brooklyn on numerous occasions and expect to do so again in the future. For example, I was a delegate in 2002 and an alternate in 2003. I expect not to serve in 2004 because I am a member of the reconstituted Democratic Party judicial screening committee.

The Supreme Court Selection Process

5. The following testimony concerning the current system of judicial conventions used to select justices of the Supreme Court is derived from my experiences as a judicial delegate for the Second Judicial District, as a member and past president of a Democratic Party political club in Park Slope, Windsor Terrace, and Kensington that has been heavily involved in Supreme Court elections for over 25 years, as an election lawyer who has represented in court many Democratic Party candidates for various state and New York City offices in their efforts to secure ballot status through petitioning, and as a registered Democratic voter in Brooklyn who has voted regularly in judicial and other elections for over 30 years.

6. Based on my extensive experience, I will explain how the current Supreme Court selection system ensures that a county's party leaders, rather than the rank-and-file party members and voters, maintain full control over the choice of who will be a justice and when.

A. Party Leaders' Control Over Delegate Selection

7. Under N.Y. Elec. L. § 6-124, the first step in the Supreme Court

selection process is the selection of judicial delegates and alternate delegates by Assembly District ("AD"). The voters nominally elect judicial delegates in September (on the same Election Day on which primary elections are held for other offices). With few exceptions, however, the county party leaders rather than the voters effectively control the selection of judicial delegates and alternate delegates. In the Second Judicial District, the party leadership is the executive committee of the Kings County Democratic County Committee chaired by Clarence Norman, Jr., acting through the committee members' roles as district leaders for each AD. The party leaders' hand-picked delegates then nominate the party's Supreme Court candidates by majority vote at a judicial convention.

8. In my experience, virtually every year in the Second Judicial District there have been Supreme Court vacancies to fill. To do so, the 42 district leaders of the Democratic Party in Brooklyn (and a handful in Staten Island) put forth delegate candidates to be selected from their AD and pay for the costs of printing petitions and gathering the necessary signatures to make them delegates. Most of these delegates have strong ties to the Democratic Party district leaders who select them, and many delegates actually work for those leaders or other officials elected to serve in New York State or City government positions from Brooklyn. For this reason, in my experience the delegates almost always follow the wishes of the district leaders who have selected them when it comes to voting for Supreme Court candidates at the convention. In turn, with few exceptions, the district leaders from each AD support the Supreme Court candidates supported by the county party leadership (*i.e.*, Mr. Norman) at the judicial convention. This is because the district leaders can expect benefits from their loyalty to the county

party leaders that include patronage positions, support for candidates who are backed by the loyal district leader in other races including judicial races, and reciprocal support for the district leader in seeking higher political offices.

9. I reviewed the delegate and alternate lists from the 2002 judicial convention and identified delegates and alternates that to my knowledge are relatives of district leaders or Democratic elected officials or their employees. By my cursory count, the delegates included, at a minimum, at least 8 members of the legislature or City Council or their family members; at least 16 current or former employees, or family members of employees, of Democratic elected officials; and at least 8 current or former district leaders or family members of district leaders. (This includes myself, since I am the husband of a former employee of the Assemblyman for the 44th AD.) The alternates included at least 5 legislators, Council members, or family members of legislators or Council members; 13 current or former employees, or family members of employees, of Democratic elected officials; and 6 current or former district leaders or their family members. My knowledge of the political pedigree of my fellow judicial delegates and alternates is quite limited, and for some districts is nonexistent. Therefore, I am sure that the actual numbers of delegates and alternates in these categories are much higher than I stated here. Such personal and professional connections to party leaders are one of several factors that ensure that delegates vote for the Party Chairman's choice of nominees.

B. Barriers to Challenger Supreme Court Candidates at the Delegate Selection Stage

10. Any candidate for Supreme Court who does not have the support of the county party chairman in Brooklyn faces a series of insurmountable structural and

practical barriers inherent in the current statutory selection system that I describe below.

11. First, Supreme Court justices are selected at large from judicial districts, but judicial delegates and alternates are selected separately from each AD. The Second Judicial District alone includes 24 ADs covering two counties (Brooklyn and Staten Island). Typically, each AD includes its own political clubs whose political organizing and other activities are discreet from those in other ADs. For example, the activities and, in many cases, the political views of the Central Brooklyn Independent Democrats (CBID), my political club in Park Slope, Windsor Terrace, and Kensington, is entirely distinct from those of any clubs in any other AD in Brooklyn, even from neighboring ADs.

12. As a result, in order to obtain a meaningful majority of delegates willing to support a Supreme Court candidate not chosen by the county party chairman, that candidate would have to organize, petition, and run slates of delegate and alternate delegate candidates in every AD and elect a majority of delegates across the Judicial District. In the Second Judicial District, currently such a challenge would require running over 300 candidates and electing over 150 delegates and alternates across two counties and 24 ADs. Without victory by a majority of delegates and alternates, individual delegates who are willing to support a judicial candidate not selected by the party chairman could not really affect the outcome of the convention. This was demonstrated in 2002 and 2003 when Civil Court Judge Margarita López Torres attempted to earn the Democratic Party's Supreme Court nomination but failed to come close. Despite support from delegates from my AD and a few other independent-minded delegates, she did not have nearly enough supportive delegates to counter the

overwhelming majority of delegates from other ADs who followed the wishes of the chairman and voted against her.

13. Only the party leadership *for the entire county* of Brooklyn can muster the resources to run delegate slates in all the ADs across the judicial district. The barriers to challenges by candidates that do not have the county party leadership's support ensures that the party leaders can control the majority of delegates at the convention. In my experience, this barrier, in turn, further discourages any individual who would consider running to become a judicial delegate from doing so. Indeed, I know of no judicial delegate contests in my memory that were not motivated by a battle for political control of either an individual Assembly District or the County as a whole; in those cases, the battle for delegates was simply a means of keeping score.

14. Second, the Election Law gives the political parties significant control over the number of the delegates and alternate delegates at the judicial convention. Section 6-124 provides that "the number of delegates and alternates, if any, shall be determined by party rules"; the number of delegates from each AD must be "substantially" proportional to the number of votes cast from that AD for the party's candidate for governor in the most recent gubernatorial election. N.Y. Elec. L. § 6-124. The Democratic Party currently allots each AD one delegate and one alternate delegate, plus an additional delegate and alternate for each 2,500 votes cast for the Democratic gubernatorial candidate at the most recent general election. In the Second Judicial District in 2002 there were 304 judicial delegates and alternates selected for the Democratic Party. In other words, statute permits the parties to create large numbers of delegate positions to fill, and the Democratic Party has used that power to frustrate any

effort by a challenger candidate to elect a majority of delegates and thus effect the convention's results.

15. Third, the current system precludes voters from choosing delegates based upon an indication on the ballot of which Supreme Court candidates they intend to support at the convention. Unlike the presidential primary system, delegate selection occurs *before* any Supreme Court candidates are even identified, much less chosen by anyone. Moreover, the September ballot on which such delegate candidates would appear cannot indicate their support for a particular Supreme Court candidate. *Compare* N.Y. Elec. L. § 2-122-b with § 7-114; *see also Fallon v. State Board of Elections*, 51 A.D.2d 1063 (3rd Dep't 1976) (holding that the Board of Elections lacked the authority to identify on the ballot which presidential candidate each delegate candidate supported, at a time when state law did not require that information to appear on the ballot).

16. Fourth, the petitioning rules with which a challenger Supreme Court candidate would have to comply to run delegate candidates in each AD across a judicial district are insurmountable. For an individual to petition onto the ballot as a Democratic candidate for delegate in Brooklyn, 500 signatures must be gathered from members of the individual's political party who live within the AD. N.Y. Elec. L. § 6-136(2)(i), (3). In my experience as both an election lawyer representing candidates for elective office and a candidate for City Council, you must gather at least twice and most often three times the number of signatures required by law to withstand the inevitable legal challenges to such petitions from opponents or, in this case, from the party leadership.

17. In order to resist legal challenges, a challenger Supreme Court

candidate would need to gather at least 1,500 signatures per AD, for a total of 36,000 signatures, assuming the challenger delegate candidates were organized as slates. The difficulties are even more severe than the overall number requirement suggests, because the signatures must be equally distributed across the ADs and no party member can sign more than one petition for a slate of delegates, with the resulting effect that the pool of eligible party members shrinks as the signatures are gathered.

18. In addition to the costs of petitioning each slate of challenger delegate candidates onto the ballot, a separate campaign costing a substantial amount of money would be necessary in each of the 24 ADs.

19. Paying the high costs to gather those signatures and run campaigns in every AD would still not allow a challenger candidate to match the experienced, countywide campaign and get-out-the-vote operations controlled by the county party and district leaders across the district. On Election Day, in my experience those operational advantages are extremely significant, especially in contests like those for judicial delegate that are low profile and generally experience a significant drop off from the number of votes cast for races at the top of the ballot. In essence, a successful challenger candidate would need an operation that only the two most popular and well-financed political parties – the Democratic and Republican Parties – have developed over the decades.

20. In sum, the barriers to Supreme Court challenger candidates at this stage in the process – both financial and organizational – impossibly burden their efforts to obtain their party's nomination and party members' rights to choose among candidates with significant support.

21. For all of these reasons, in my lifetime in Brooklyn, delegate races

have been extremely rare and, when they have occurred, they have been the result of battles for control between Democratic Party political clubs. They have never produced sufficient challenges to the overall composition of the Second Judicial District's delegates at the judicial convention to mount a successful challenge to the county party chairman's control over Supreme Court nominations.

C. The Nomination Process at Judicial Conventions

22. Essentially, in my experience, the judicial conventions have served to rubber stamp the county party chairman's choice of Supreme Court candidates for the party's nomination. Judicial candidates who do not have the county party leaders' backing have no realistic opportunity to earn a place on the ballot for several reasons beyond simply the leadership's control over delegate selection.

23. First, the unique statutory timetable for Supreme Court selection in New York State exacerbates the already insurmountable burdens on potential challenger candidates. By law, judicial delegates are selected in the first week of September, the judicial convention occurs in the third week of September, and the general election is in the first week November. *See* N.Y. Elec. L. § 6-158(5). For this reason, Supreme Court candidates cannot know whether voters will even see their name on the ballot until the convention roughly five weeks prior to the election. Because the voters reliably rubber-stamp the Democratic nominee, the timetable presents an important barrier to challenger candidates because there are only the two weeks between the nomination of delegates and the convention, during which time a challenger would have to identify, contact, and lobby delegates for their votes at the convention. Even if a prospective candidate were to identify all potential delegates by expending the resources to review nominating petitions

as they are filed this would only add two months to the process during the height of the summer when most people are preoccupied with vacation and are difficult to contact.

24. By contrast, the party conventions to nominate candidates for statewide office are held in June in election years, a primary election for the candidates for those offices (rather than for delegates to the convention) is held in September, and the general election is held in November. Similarly, the New York State Assembly and Senate elections schedule allows candidates to petition onto the ballot at least nine weeks prior to the September primary election. Candidates for these offices thus have ample opportunity to contact, lobby, and obtain commitments from both party delegates (*i.e.*, state party committee members whose identity is known for at least eight months prior to the convention) prior to the party's convention and from voters prior to the primary election.

25. For many years, Mr. Norman has relied upon a judicial screening committee to review potential candidates for Supreme Court judgeships. Until this past year, Mr. Norman approved all the screening committee's members. Similarly, until this past year, the screening committee's formal rules stated under the heading "Sources of Candidates" that the County Chairman (*i.e.*, Mr. Norman himself) was entitled to name all of the candidates for the committee's consideration. The screening committee then reviewed the candidates, interviewed them, and determined by majority vote whether to deem them "qualified at this time" or simply to take no action. It has always been understood that Mr. Norman will not nominate any candidate for approval at a convention who has not been deemed "qualified" by the screening committee, but to my knowledge the screening committee has never rejected any potential candidates. In any

event, because Mr. Norman selected all of the candidates in the first place, even if the screening committee failed to act on any particular candidate, it would not meaningfully undermine his control over the process.

26. In the wake of the extensive negative press coverage of alleged corruption in Brooklyn's judicial selection process and on the bench itself in 2002-03, Mr. Norman was pressured by rank-and-file party members to implement changes in the judicial screening committee process in October of 2003. The principal reforms included a significant diversification of the membership of the screening committee to be appointed not only by the party's Executive Committee but also by independent organizations such as various bar associations and associations of lawyers within New York City and the Second Judicial District, and an open application process that allows any lawyer in good standing to apply for consideration by the screening committee for Supreme Court. I have been appointed to serve on the reconstituted screening committee.

27. Despite these reforms, however, the screening committee will not fundamentally open up the system to challenger candidates. The delegates will still be chosen in the same manner and will still remain systemically predisposed against Supreme Court candidates who are not supported by the Executive Committee and its Chairman. The screening committee itself simply provides information to the Executive Committee to inform its endorsements and the committee's conclusions do not bind the delegates at the convention. In short, while the reforms to the screening committee in Brooklyn may improve public confidence in the system superficially, it will not change in any respect the structural ways in which the current Supreme Court selection system keeps challengers off the ballot and party members and voters from having any choice of

candidates.

28. In addition, the convention itself is designed to ensure that the county party leadership controls which candidates are nominated.

29. The Chairman of the Democratic State Committee notifies the selected delegates and alternates of the date and time of the convention only days prior to the convention. The conventions in the Second Judicial District are always held at the State Supreme Court itself or in another downtown Brooklyn location during a weekday lunch hour rather than in the early morning, early evening, or on a weekend. The combination of such short notice and the routinely inconvenient time ensures that many delegates and alternates are unable to attend the convention for which they were selected. If neither a delegate nor an alternate from an AD is present to fill a delegate seat at the judicial convention, district leaders or other delegates from the AD appoint replacement delegates at the convention, without submitting their names (much less voter-signed petitions) to the board of elections.

30. The selection process at the conventions is virtually all formalized procedure, with no substantive discussion or debate by the delegates. The participants follow a scripted format from which they rarely deviate. As a result, the conventions are usually concluded in very little time (often under a half hour).

31. At the appointed hour, the convenor calls the convention to order and obtains a roll call to ascertain whether a quorum of delegates is present. If a quorum is not present, alternates and even others may be appointed to replace absentees.

32. Next, the convention delegates elect a temporary chairperson and then a temporary secretary, whose only function is to oversee the subsequent election of a

permanent chairperson and secretary. In most cases, the chairperson who presides over the convention is selected in advance by the county chairman and often performs this function year after year. In my experience, there has never been a successful challenge to the anointed chairperson at a judicial convention.

33. After several formalities, the chairperson then calls for nominations for Supreme Court Justices. As a technical matter, all nominations are “from the floor,” but in practice the Executive Committee gives an index card in advance to certain predetermined delegates who read the nominations verbatim from the cards.

34. The chairperson then invites a motion to close nominations for that position, the motion passes by voice vote (virtually always unanimous), and the candidate is announced as the party’s nominee. A judicial candidate must receive at least a majority of the delegates’ votes to obtain the party’s nomination. The convention repeats this process for each open Supreme Court seat.

35. In my many years in Brooklyn politics and as a delegate and alternate, I recall only two attempts by delegates to nominate a Supreme Court candidate from the floor of the convention: both attempts involved Civil Court Judge Margarita López Torres (in 2002 and 2003), and both failed by a wide margin. I was elected a delegate in 2002, but did not attend the convention. I was an alternate in 2003. In both years, only a tiny handful of delegates voted for her. Despite extensive press coverage, impassioned speeches from the floor, and an effort to communicate with delegates and alternates by mail, the delegates followed the will of the chairman and the overwhelming majority of district leaders who are loyal to him and asked their AD’s delegates to vote accordingly. In other words, even a candidate as well qualified as Judge López Torres

who had been trying to obtain the Democratic Party nomination for several years and who had obtained extensive positive press coverage for her efforts to challenge the closed Supreme Court selection process has no realistic chance under the current system to get on the ballot as a Democratic nominee without the county party leadership's support.

D. The General "Election"

36. Those candidates who obtain the Democratic Party's nomination at the judicial convention go on to become Supreme Court justices.

37. This means that the Democratic Party convention is, for all intents and purposes, the exclusive mechanism for selecting Supreme Court justices in the Second Judicial District. The insurmountable barriers to getting on the ballot through the convention without the county party leadership's support thus deprive not only rank-and-file Democratic Party members, but all voters, of any meaningful choice among candidates for Supreme Court.

The Irreparable Burdens Imposed by the Current Supreme Court Selection System

38. Like all past and future voters in the Second Judicial District, I have been deprived by the current system of any opportunities to choose among Supreme Court candidates of my political party. Unlike every other elected office in New York, Supreme Court selection does not involve any primary election for candidates. Nor has the ability to vote for delegates in any way remedied this burden. As I noted already, voters virtually never actually have an opportunity to elect judicial delegates; they rarely appear on the ballot at all. The many structural barriers faced by independent-minded delegate candidates who might consider running leaves voters without any choice of delegates. By the time voters see the Supreme Court candidates on the general election

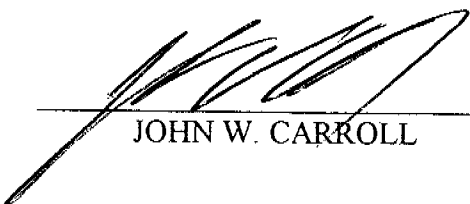
ballot, we not only have no choice among candidates of our party but also have no meaningful choice even between candidates of different parties. In short, the current system ensures that voters have no input, much less a meaningful choice, in determining who becomes a Supreme Court justice.

39. As a past and future judicial delegate for the Democratic Party, the current Supreme Court selection system renders my vote at the convention entirely illusory. Challenger Supreme Court candidates cannot elect sufficient delegates, or have any realistic opportunity to convince other delegates, to mount any successful challenge to those Supreme Court candidates supported by the county party chairman. For this reason, for example, my own support for Judge López Torres was entirely futile because the independent-minded delegates and alternates (like myself) from the 44th AD were vastly outnumbered by those delegates from the other ADs who supported the county party leaders' candidates.

40. For this reason, I have joined this lawsuit as a plaintiff to reform the system to allow me as a voter, party member, and judicial delegate to choose from among my party's candidates.

I swear under penalty of perjury that the foregoing is true and correct.

Dated: Brooklyn, New York
June 2, 2004



JOHN W. CARROLL