

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
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.
-----X

**DECLARATION OF ROY A.
SCHOTLAND IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTIVE
RELIEF**

Index No. CV 04-1129 (JG)

ROY A. SCHOTLAND declares as follows:

1. I am a professor of law at Georgetown University Law Center. I submit this declaration in support of Plaintiffs' motion for a preliminary injunction.

Background & Disclosures

2. I have taught and studied election law since 1976, with a particular focus on judicial selection in the various states. I have published and lectured extensively on judicial selection as well as campaign finance in judicial elections. A complete list of my publications over the last ten years, as well as certain publications from prior to 1994 that are relevant to this area, is attached as Exhibit A to this declaration.

3. I am currently a senior adviser to the National Center for State Courts. In 2000, I initiated with Chief Justice Thomas Phillips and that Center the

the Summit on Judicial Selection, which explored various issues raised by judicial elections. In 2001, I initiated with Chief Justice Randall Shepard (of Indiana) and the National Center the Symposium on Judicial Campaign Conduct and the First Amendment. In 2002, I co-authored an *amicus curiae* brief to the U.S. Supreme Court for the Conference of Chief Justices, the organization that includes and represents the highest judicial officers of the 50 states and territories, in *Republican Party of Minnesota v. White*, on the regulation of judicial campaign speech. In 2003, I co-authored an *amicus curiae* brief to the Eleventh Circuit for the Conference of Chief Justices, in *Weaver v. Bonner*, on the regulation of judicial campaign speech and fundraising. In June of 1999, at the Florida Circuit Judges' Annual Conference, I was a panelist in a panel concerning Florida's November 2000 ballot proposition choices between electing or appointing trial judges. In 1989-92, I co-chaired (with Washington State's Chief Justice Robert Utter) an American Judicature Society Project on Judicial Election Reforms that involved extensive research into judicial selection rules and activities in Arkansas, California, Georgia, New York, North Carolina and Ohio. In Ohio for the 1990 and 1992 election cycles, and in North Carolina for the 1990 election cycle, I was also active with local citizens' committees whose purpose was to educate voters and oversee judicial campaigns.

4. I am a graduate of Harvard Law School, and clerked for U.S. Supreme Court Justice William J. Brennan, Jr.

5. I have not testified in any case by deposition, by affidavit, or in any court within the last four years.

6. I have been retained in this matter by counsel for the Plaintiffs and

am being compensated at a rate of \$100/hr (\$150/hr for depositions or courtroom testimony) capped at \$6,000.

7. The opinions expressed below are based upon my own research into judicial selection procedures in the 50 states, and upon my knowledge of election law and ballot access rules for non-judicial elective offices in the various states.

New York State's Supreme Court Selection System in Context

8. An analysis of the selection procedures and, where applicable, the ballot access rules for trial courts of general jurisdiction in the 50 states leads inexorably to two significant conclusions that bear directly on the questions before this Court. First, of the 33 states that elect some or all of such trial court judges in contestable elections, New York is the only state that limits potential major party candidates to *a single route onto the ballot*, without a "safety valve" for candidates who may be unable or unwilling to use that route. Second, among those states that elect some or all of such trial judges, only New York uses a convention system, rather than a direct primary election, to select the candidates who will appear on the ballot. As a result, in New York major party voters are effectively removed from the selection process entirely and even popular candidates are shut out if they do not have the backing of a few party leaders. Together, these two facts establish unequivocally that New York State's Supreme Court selection rules impose uniquely severe burdens on challenger candidates who wish to be considered by the voters and, therefore, uniquely constrain voters.

A. Overview of Trial Court Judicial Selection Procedures

9. The 50 states can be divided first between the 11 states that do not

elect any of the judges in their trial courts of general jurisdiction¹, and the 39 states that elect some or all of such judges.

10. Out of the 39 states that in which some or all of such trial court judges face elections of some kind, I would identify four subgroups based on the nature of their election procedures: (1) non-partisan elections, (2) partisan elections, (3) “merit” appointment with retention elections, and (4) mixed procedures. I will address each group of states in turn.

11. **Eighteen** states select all of their general jurisdiction trial court judges through non-partisan elections.² The states in this group hold an initial non-partisan election on the same day that primary elections for other offices are held and then, if none of the candidates obtains a majority, a “general” or run-off election between the top candidates. In these states, no party labels can be associated with the candidates on the ballot itself.

12. **Nine** states, including New York, select all of their general jurisdiction trial court judges through partisan elections.³ In all of these states except for New York, the voters select their party’s nominees for the general election in direct partisan primary elections. The various rules for obtaining access to those primary election ballots, as well as to the non-partisan ballots in other states, are addressed in Plaintiffs’ memorandum of law and below.

¹ In seven states, no trial court judges of any kind are elected: Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Virginia. In four states, only probate and/or family court judges are elected: Connecticut, Maine, South Carolina, and Vermont.

² These 18 states are: Arkansas, California, Florida, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin.

³ These 9 states are: Alabama, Illinois, Louisiana, New York, Ohio, Pennsylvania, Tennessee, Texas, and West Virginia. In Illinois and Pennsylvania, trial court judges are elected in partisan elections initially but then face retention elections after their first term.

13. Six states select all of their general jurisdiction trial court judges through “merit” appointment with subsequent retention elections.⁴ In these states, the governor appoints these judges from a list prepared by a screening committee established in law, and then, after a term on the bench, these judges must stand for “retention” by the voters in the general election.

14. Six states employ various combinations of the three selection methods outlined above. In Arizona, certain general jurisdiction trial court judges are selected through merit appointment with retention elections while others face non-partisan elections. In Kansas and Missouri, certain general jurisdiction trial court judges are selected through merit appointment with retention elections while others face partisan elections. In Indiana, all three methods are used to select such judges, depending on the county in question. In New Mexico and Maryland, the Governor appoints the general jurisdiction trial court judges in the first instance, but after their first term they face partisan and non-partisan elections, respectively. In New Mexico, if a judge wins that partisan election, he or she faces a retention election after that term.

Conclusion

15. In all of the 33 states that elect some or all of their general jurisdiction trial court judges in contestable elections – but not in New York – challenger candidates who do not have the party leaders’ backing can nevertheless get on a primary election ballot to compete directly for votes against any party-backed candidate(s). By contrast, in New York there are *no* alternative paths onto the ballot as a major party candidate if one fails to obtain the party’s nomination at the judicial convention.

16. In addition, as detailed in Plaintiffs’ memorandum of law, the

⁴ These six states are: Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming.

ballot access rules in *all* of those 32 states are much less burdensome on challenger judicial candidates than New York's insurmountable series of rules governing ballot access for delegate candidates. Even if considered alone, New York's cumulative petitioning requirements for delegate candidates are much more severe than the petitioning requirements of the other states for judicial candidates.

17. In sum, New York's selection rules are unique both in allowing only one path onto the ballot (*i.e.*, the judicial convention) *and* in the draconian requirements that must be met to compete at the convention by placing delegate candidates on the ballot.

18. New York State's Supreme Court selection rules thus place much more severe burdens on challenger candidates than any other state in the nation with contestable elections. In my studies of judicial selection over almost three decades, moreover, I have never come upon any legitimate, much less compelling, state interest that could justify the closed nature of New York's anti-democratic system of selecting Supreme Court justices. Indeed, given the fact that New York's rules impose burdens that no other state imposes, in my view it would be inconceivable to suggest that such a compelling state interest exists to justify the present selection rules.

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

Dated: Washington, DC
June 4, 2004


ROY A. SCHOTLAND