
ARNOLD & PORTER LLP

Kent A. Yalowitz
Kent_Yalowitz@aporter.com
212.715.1113
212.715.1399 Fax
399 Park Avenue
New York, NY 10022-4690

February 13, 2006

BY HAND

Honorable John Gleeson
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Lopez Torres, et al. v. New York State Board of Elections, et al.*,
No. CV-04-1129 (JG)

Dear Judge Gleeson:

I write on behalf of plaintiffs in response to Mr. Valentine's letter of February 8, 2006. Mr. Valentine's letter suggests that it is up to the New York State Board of Elections to implement the remedial portion of this Court's injunction on its own schedule, and that the New York State Board of Elections should be free to apply section 6-136 unless such application would be unconstitutional on its face.

We disagree. The proper question here is not "what does § 6-136 require?" as defendants suggest; but rather, "what remedy is appropriate to carry into effect this Court's injunction, and, in particular, what minimum petitioning requirement should be necessary to demonstrate whether there is reason to assume the requisite community support for a judicial candidate?" The Court has broad equitable power and a concomitant duty to fashion an appropriate injunction to remedy the constitutional violation. *McCarthy v. Briscoe*, 429 U.S. 1317, 1322 (1976).

The injunction granted in *McCarthy* is instructive. There, courts held that Texas's election law was unconstitutional in denying independent Presidential candidate Eugene McCarthy a line on the ballot. The Fifth Circuit had recognized that it had the power to "devise a petition requirement" but lacked sufficient time to do so before the election and so denied an injunction. However, Justice Powell, acting as Circuit Justice, entered an injunction requiring the candidate's name placed on the ballot, explaining:

In determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access, a court should be sensitive to the State's legitimate interest in preventing "laundry list" ballots that "discourage voter

ARNOLD & PORTER LLP

The Honorable John Gleeson
February 13, 2006
Page 2

participation and confuse and frustrate those who do participate.” But where a State forecloses independent candidacy in Presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, **a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support.**

429 U.S. at 1321-22 (citation omitted, emphasis supplied). The Second Circuit has also upheld injunctions tailored to forbid inappropriate application of state election law. For example, in *Williams v. Salerno*, 792 F.2d 323, 328 (2d Cir. 1986), the Court upheld an injunction to prevent unconstitutional application of Election Law § 5-104, even though the Court had earlier held that the statute was facially valid. In *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994), the Court affirmed an injunction in which District Court “crafted a provisional remedy” relieving the plaintiffs of certain time limitations and informational requirements ordinarily required by the Election Law. More generally, the Second Circuit has observed that the District Courts’ equitable powers give them broad remedial power to fashion appropriate injunctive remedies. *See, e.g., S.E.C. v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994); *Barnett v. Bowen*, 794 F.2d 17, 23 (2d Cir. 1986).

We have no doubt that the defendants, who are on the cusp of seeking a stay of this Court’s injunction, intend to argue that a stay is warranted because of the burdens of requiring judicial candidates to participate in primary elections after expiration of their terms. How ironic that these defendants demand that the Court limit its injunctive remedy in a way that imposes unusually harsh and obviously unintended burdens on those same judicial candidates. The Court has just enjoined a long-standing barrier between voters and candidates. That the defendants now wish to impose new burdens, unintended by the Legislature, speaks volumes about their continued desire to limit access to the ballot.

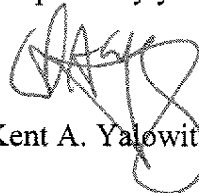
In view of the large geographic territory of the upstate judicial districts, as well as the unrebutted testimony that candidates are routinely advised to secure three times the statutory limit of petition signatures, we believe that section 6-136 would likely be unconstitutional if applied slavishly to certain candidates in certain judicial districts, because it would require signature gathering far out of proportion to the state’s legitimate interest in assuring that the candidates have a the “requisite community support.” A remedy that avoids that question surely should be preferred to one that invites it.

ARNOLD & PORTER LLP

The Honorable John Gleeson
February 13, 2006
Page 3

Finally, as a matter of state law, defendants are not correct that all statutes must always be construed literally when doing so creates consequences that the Legislature quite obviously did not intend. *See, e.g., Council of City of New York v. Giuliani*, 93 N.Y.2d 60, 69 (1999) (following maxim that “Literal meanings of words are not to be adhered to or suffered to ‘defeat the general purpose and manifest policy intended to be promoted’”); *City of New York v. State of New York*, 282 A.D.2d 134, 141 (1st Dept. 2001) (collecting cases and authorities); *see generally* McKinney’s Cons. Laws of New York, Book 1, *Statutes* § 111 (“The courts may in a proper case indulge in a departure from literal construction and will sustain the legislative intention although it is contrary to the literal letter of the statute.”).

Respectfully yours,



Kent A. Yalowitz

cc: Clerk of the Court
All Counsel of Record