

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,

Index No. CV 04-1129 (JG)
(Judge Gleeson)

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,

ATTORNEY GENERAL OF THE STATE OF
NEW YORK; NEW YORK COUNTY
DEMOCRATIC COMMITTEE, NEW YORK
REPUBLICAN STATE COMMITTEE;
ASSOCIATION OF JUSTICES OF THE
SUPREME COURT OF THE STATE OF THE
NEW YORK, ASSOCIATION OF JUSTICES
OF THE SUPREME COURT OF THE CITY OF
NEW YORK and JUSTICE DAVID
DEMAREST, individually, and as President of
the State Association,

Defendant-Intervenors.

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**PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE
TO DEFENDANTS' MOTION FOR A STAY AND OTHER RELIEF**

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**PLAINTIFFS' MEMORANDUM OF LAW
IN RESPONSE TO DEFENDANTS' MOTION FOR A STAY AND OTHER RELIEF**

Plaintiffs respectfully submit that whether to grant a stay of the injunction *for the current election cycle* is a matter within the Court's discretion, taking into account the four factors required for a stay:

- “(1) whether the movant will suffer irreparable injury absent a stay,
- (2) whether a party will suffer substantial injury if a stay is issued,
- (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and
- (4) the public interests that may be affected.”

Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1992) (internal quotation and citations omitted). The degree of likelihood of success that a movant must demonstrate is inversely proportional to the potential injury suffered by the movant absent a stay. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (following *Cuomo v. Nuclear Regulator Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985), and *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). In other words, the movant may still obtain a stay even if it has demonstrated only a relatively limited prospect for success on appeal.

In this case, we remain convinced that the defendants' prospects for success on appeal are quite limited indeed. Defendants focus on supposed procedural defects; they ignore the undisputable evidence that party leaders control the selection of supreme court justices to the exclusion of voters; they ignore the plain truth that the system they defend simply excludes voters from any meaningful role in the judicial selection process; and they ignore the narrower

options available to New York's Legislature to address the state interests they articulated at the hearing.

We acknowledge that the Court does have discretion to postpone the effectiveness of its preliminary injunction for one election cycle, taking into account the harm that an unexpected change in the process might have on incumbents, the relatively short time available for appellate review before the relevant events in the coming election cycle, and the broad public importance of the issues in the case. The formal election process begins in June, and candidates must plan before June to organize support. Some candidates may conclude that they do not wish to invest resources in a primary campaign until the Court's decision is reviewed on appeal. Similarly, the Legislature may be more willing to enact legislation in compliance with the Court's order after it has been reviewed on appeal.

No stay should be granted absent (a) an expedited briefing schedule in the Second Circuit, and (b) agreement that the parties will jointly request the Second Circuit for expedited argument. Moreover, the movants have plainly failed to demonstrate that a stay should be imposed indefinitely.

I. Harm to Movants

A. Cognizable Harms

Defendants offer a potpourri of potential harms, most of which are either speculative or an attack on *elections* rather than the Court's remedy. But defendants do offer one form of harm that the Court should consider—the effect of the *timing* of the remedy on the plans of incumbents up for re-election this year. Three of these incumbents state that they are disadvantaged by the *timing* of the decision and that they would have spent additional time preparing for election had they received more advance warning. For example, Justice Mazzealli points out that she would

have spent six months preparing to run and that even the three weeks in January that she lost was time that would have been useful, and that she feels unfairly surprised by receiving less than nine months' notice. Mazzarelli Declaration ¶¶ 9-10. Justice Kohm of the Eleventh Judicial District also observes that the timing of the decision places him at a practical disadvantage as compared to the degree of his preparedness had he had more notice. Kohm Declaration ¶¶ 4-5. We agree that this type of harm—the timing of the imposition of the remedy—is cognizable in the Court's consideration of the propriety of entering a stay and should be weighed by the Court in its evaluation of the motion for a stay. Of course, non-incumbent candidates may be equally prejudiced in the same way by the timing of the remedy.

Defendants also argue that the Court should permit the Legislature more time to evaluate potential alternatives. This, too, is a matter of the Court's discretion. We note that the Legislature is capable of acting with great rapidity. The State Senate has already passed a bill requiring primaries for judicial nominations. S 50-A. But we do not deny that the Court has discretion to give the Legislature more time to craft a statute narrowly tailored to advance the interests that the defendants identified as those of the State during the preliminary injunction hearing.

B. "Harms" That Are Not Cognizable

The other forms of injury offered by defendants are not substantial, and the Court should reject them expressly. *First*, the incumbents state that if they are forced to compete in a primary election, they would have to devote time and attention to the electoral process and might lose the election. Mazzarelli Declaration ¶ 2; Lobis Declaration ¶¶ 8, 13-14. We respectfully submit that this is not a cognizable form of injury for purposes of the Court's inquiry. We do not doubt that the prospect of a competitive election is potentially burdensome for a judicial officer who has

served with merit, who wishes to continue to serve, and who expected “incumbent’s courtesy” and cross-endorsements at the judicial nominating conventions. We agree that the loss of an election would be irreparable, insofar as an incumbent who loses would have to wait a year to attempt to regain the bench.

But these harms fall upon from *any* incumbent for elective judicial office. They are not a genuine function of the Court’s remedy (except to the extent of the timing issues acknowledged above); they are a function of the State of New York’s determination that Justices of the Supreme Court should stand for re-election after serving limited, rather than lifetime, terms.

To the extent that incumbents now expect to retain their seats for a lifetime, this fact confirms the power of party insiders to control the election, and, as this Court found “may protect [incumbents] too much.” Slip op. 72 n.41 (“[T]he county leader in 2004 in the Second District required the convention to re-nominate a sitting justice that the recently-strengthened screening panel had found unqualified.”); *id.* at 48. As one of defendant’s witnesses testified, protecting incumbents is not a compelling state interest. Tr. 1650:20-1651:1; 1652:16-1653:6 (Kellner). Indeed, the Court may take judicial notice that at least one incumbent whose term expires this year, Michael Garson, is currently under felony indictment for grand larceny and other charges. Kings Supreme Criminal Docket No. 7068/04.

Second, incumbent judges consider themselves disadvantaged by the judiciary’s self-imposed rules against engaging in political activity except for a nine-month “window period” prior to a primary election. Mazzaelli Declaration ¶¶ 7-8; Kohm Declaration ¶ 3; Lobis Declaration ¶ 10. Again, other than the timing of the remedy, this form of harm is a function of New York’s decision that judges should serve limited, rather than lifetime, terms. Moreover, as the Court has further observed, the Legislature has options to protect incumbents even beyond

the 14-year term provided to them. Slip op. 73-74 (“As Justice Freedman observed, retention elections would not be, in substance, a big change from the current system, in which sitting justices typically receive cross-endorsements at re-election time.”).

Third, defendants contend (without advancing any specifics) that primaries will be expensive. Gangel-Jacob Declaration ¶ 5 (“I am told that a county-wide primary must necessarily cost in the neighborhood of \$500,000.”). This is not a cognizable harm either in the constitutional analysis (as the Court held, slip op. 74) or in evaluating a motion for a stay. Even if the candidates would spend their own funds on a primary—an assumption that defendants do not offer any evidence to support—“[m]onetary loss alone will generally not amount to irreparable harm.” *Borey v. Nat’l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) (finding no irreparable harm and accordingly vacating preliminary injunction); *see also Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987); *Wisc. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Fourth, defendants contend that the voters of Staten Island will be “disenfranchised” by a primary system. Birch Declaration ¶ 6. This claim stems from the unsupported assumption that the only basis on which voters will distinguish among candidates is their county of residence, an assumption for which no evidence is offered. On a motion for a stay, the injury alleged must be “neither remote nor speculative, but actual and imminent.” *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005) (internal quotation omitted); *Ohio ex rel. Celebrezze*, 812 F.2d at 290 (“the harm alleged must be both certain and great, rather than speculative or theoretical”) (citation omitted); *Wisc. Gas Co.*, 758 F.2d at 674 (same). Moreover, the current system can hardly be said to “enfranchise” the voters of Staten Island. According to defendants’

own witness, Richmond County has 17% of the registered voters in the Second Judicial District but only 8.4% of the elected Justices. Pl. Ex. 69 at ¶ 94 (Hechter Report).

Fifth, defendants express concern about the dangers of “party raiding” and a concomitant loss of associational rights absent a stay. The evidence on this point is rather thin. In fact, defendants submitted evidence that the incumbents up for re-election expect to receive cross-endorsements from both major parties. (Defendants do not say whether Justice Garson is among those expected to receive the cross-endorsements.) In any event, the dangers of “party raiding” in judicial elections appear unimportant to the State of New York, which has not extended the Wilson-Pakula law to judicial elections. N.Y. Election Law 6-120(4).

* * *

Even if any of the foregoing harms were cognizable—and they are not—these harms could all be address more effectively and narrowly with appropriate legislation than by retaining a system most fairly described as an unconstitutional relic of an era in which Tammany Hall dominated the governance of our State. The legislature is free to enact a system of retention elections in which incumbents run unopposed; it is free to enact a system of campaign finance laws similar to those in effect within New York City; it is free to draw smaller judicial districts. Most important, none of the defendants are without a voice in Albany. If the defendants are truly united in genuine concern about these forms of harm—which are utterly irrelevant to this motion—that concern should be addressed to the Legislature, rather than the Court.

II. Harm to Plaintiffs

Defendants give improperly short shrift to the harms to plaintiffs that would be caused by a stay. “By limiting the choices available to voters, the State impairs the voters’ ability to express their political preferences.” Slip op. at 54 (quoting *Ill. State Bd. of Elections v. Socialist*

Workers Party, 440 U.S. 173, 184 (1979)); accord *Hirschfeld*, 984 F.2d at 40 (recognizing the public's interest in having additional choices on a ballot).

Thus, plaintiffs, too, would suffer irreparable harm from a postponement of the Court's remedy. Worthy candidates who wish to compete for open seats on the Supreme Court bench could not do so this year. Voters who wish to support such candidates will continue to remain disenfranchised. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004) ("[W]here a First Amendment right has been violated, the irreparable harm requirement for the issuance of a preliminary injunction has been satisfied.").

These harms must be weighed by the Court, along with the broad public importance of the issues at stake, in considering the timing of its implementation of a remedy absent legislative action eliminating the constitutional infirmity, and these harms counsel strongly against entry of the limitless stay defendants seek.

III. Likelihood of Success

A district court's grant of a preliminary injunction will be reviewed "for abuse of discretion, overturning its decision only if it rested on an error of law or on a clearly erroneous factual finding." *Green Party*, 389 F.3d at 418 (citation omitted). This is a rigorous standard. No one is in a better position than this Court to evaluate defendants' likelihood of success. In our view, the Court powerfully and properly rejected the defendants' arguments against a preliminary injunction. Nonetheless, the Court expressed its view about the importance and novelty of the legal issues in the case when it said: "[w]hether a state that has established a system for electing judges has the authority systematically to remove the voters from the

determinative elements of that process in the name of judicial independence and impartiality presents a question of considerable difficulty, upon which the Supreme Court has recently shed some light.” Slip op. at 72. This Court concluded for—and eloquently articulated—the principled reasons why the old closed convention system violates the rights of voters and candidates. We believe that the Second Circuit will categorically reject defendant’s arguments on the merits, and we are more convinced than ever that defendants are highly *unlikely* to succeed on the merits of their appeal. But we cannot say that it would be an abuse of discretion to conclude that defendants should have an opportunity to present their case to the Second Circuit before the Court implements a remedy.

Defendants’ submission of declarations from two witnesses claiming that the Court “misunderstood” their testimony offers no reason to revisit the Court’s extensive and amply supported factual findings, based on all the extensive evidence in the record. In view of their admissions on cross-examination, the Court was quite restrained in its discussion of these witnesses’ testimony. It is unfortunate that they have not reciprocated, particularly in view of the fact that the Court had before it a vast record, and the witnesses had only their own personal experiences to draw from. In any event, neither of these two witnesses undercuts the Court’s conclusions even with regard to the two episodes to which they testified: neither claims that she achieved the nomination over the objection of Farrell. Schlesinger Declaration ¶ 6. Both confirm even now that they counted on the support of district leaders, though they disagree with the inference that the finder of fact drew after seeing the witnesses testify. Gangel-Jacob Declaration ¶ 7 (discussing husband’s power and duties as district leader); Schlesinger Declaration ¶ 6 (“My husband’s role of campaign manager was much more important than his status as district leader.”).

IV. Public Interests

Defendants misunderstand the application of the public interest factor. “[T]he public interest clearly favors the protection of constitutional rights, including the voting and associational rights.” *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997); *Family Trust Found. of Ky. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224, 228 (6th Cir. 2004) (public interest weighs in favor of informed electorate in judicial elections); *Lopez v. Monterey County, Calif.*, 519 U.S. 9, 20-25 (1996) (error to permit judicial election to go forward where county had failed to obtain required pre-clearance under Voting Rights Act); *Clark v. Roemer*, 500 U.S. 646, 652-55 (1991) (same). The public interest does not favor the continuation of elections in which voters have no meaningful input. Again, though we cannot say that the Court would be abusing its discretion in postponing the effective date of its decision for one final election cycle to permit appellate review of this issue of broad public importance—if such a stay were conditioned on an expedited appeal.

CONCLUSION

For the foregoing reasons, defendants’ motion to stay should be denied to the extent that it seeks an indefinite stay, and should be considered by the Court in its discretion to the extent that it seeks postponement of the effective date of the injunction for one final election cycle and conditioned on expedited appeal.

Dated: New York, New York
March 1, 2006

Respectfully submitted,

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¹ Jeremy M. Creelan recently left the Brennan Center and is joining Jenner & Block LLP. We expect that Jenner & Block will file a notice of appearance in due course.