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POLICY DEPARTMENT

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Over the past nearly two decades, several provisions of the New York Election Law have been deemed unconstitutional, in whole or in part, by the Court of Appeals or by federal courts or state courts below the Court of Appeals. Although the Court of Appeals has not weighed in on the constitutionality of all of the provisions identified below, the New York State Board of Elections and local boards have generally adhered to determinations made by the lower New York state courts and federal courts that such provisions are unconstitutional. However, these provisions continue to reside in State law, adding an unnecessary obstacle to those persons seeking to comply with the law and giving more experienced persons an unfair advantage in elections. This report summarizes the provisions, as well as the court decisions rendering them invalid, to encourage their review by the State legislature and ultimately enactment of a 'clean up' bill.

1. Witness Residence Requirements for Petitioning**a. Designating Petitions**

Election Law § 6-132(2) requires that a subscribing witness to a designating petition be (1) a duly qualified voter of the State, (2) an enrolled voter of the same political party as the voters qualified to sign, and (3) “a resident of the political subdivision in which the office or position is to be voted for.”

In Lerman v. Bd. of Elections, 232 F.3d 135 (2000), the Court of Appeals for the Second Circuit held that the third prong significantly burdens interactive political speech and political association without advancing any legitimate state interest and, therefore, violates the First Amendment. See also LaBrake v. Dukes, 96 N.Y.2d 913 (2001) (finding that although the State has a compelling interest in ensuring that subscribing witnesses be residents of New York State, it provided no compelling justification for insisting that they reside in the political units to which the petitions pertain).

b. Nominating Petitions

Election Law § 6-140(1)(b) states that a subscribing witness who circulates an independent nominating petition must be “qualified to sign the petition.” An individual cannot

sign an independent nominating petition unless he or she is a “registered voter of the political unit for which a nomination is made.” Election Law § 6-138(1). Accordingly, subscribing witnesses must reside in the same political subdivision as the office sought by the candidates supported by the nominating petitions.

Applying the same reasoning as in LaBrake, supra, the Court of Appeals held that Election Law § 6-140(1)(b) is invalid on its face because it severely burdens free speech and associational rights by limiting the number of people who can witness petitions to persons who reside in the political units to which the petitions pertain without promoting any compelling state interest. McGuire v. Gamache, 5 N.Y.3d 444 (2005); see also Chou v. New York State Board of Elections, 332 F. Supp.2d 510 (E.D.N.Y. 2004).

2. Political Party Expenditures in a Primary

Election Law § 2-126 provides in full:

No contributions of money, or the equivalent thereof, made, directly or indirectly, to any party, or to any party committee or to any person representing or acting on behalf of a party or party committee, or any moneys in the treasury of any party, or party committee, shall be expended in aid of the designation or nomination of any person to be voted for at a primary election either as a candidate for nomination for public office, or for any party position.

In Kermani v. New York State Bd. of Elections, 487 F. Supp. 2d 101 (N.D.N.Y. 2006), a county party chair, on behalf of the county party and county committee, wished to make independent and coordinated expenditures on behalf of the party’s chosen candidates in the primary. The plaintiff sought to enjoin enforcement of Election Law § 2-126, arguing that it violated the First Amendment. The court held that the plaintiff will likely succeed in proving that the prohibition on independent expenditures is unconstitutional *at any amount* and the prohibition on coordinated expenditures/contributions is unconstitutional *at a zero-dollar amount*.

Regarding coordinated activity, the Kermani court noted: Although the constitutional hurdle for political contribution limits is not as high as that for independent expenditures, the statute must still be “‘closely drawn’ to match a ‘sufficiently important interest.’” It found that the statute is not narrowly tailored because “the Legislature has targeted a specific group (political parties), and has completely eliminated that group’s ability to communicate and affiliate through coordinated expenditures and contributions.” The court, however, did not pass judgment as to what level of contribution or coordinated expenditure limitation should be set, reasoning that “[t]hat determination, and the public policy justifications for said limitation, is best made” by the legislature.

See also Avella v. Batt, 33 A.D.3d 77 (3d Dep't 2006) (holding that Election Law § 2-126 is unconstitutional as applied to a party's independent expenditures in support of a candidate in the primary election of *another* political party).

3. Open Primaries

Election Law § 8-302(4) provides that “at a primary election, a [registered] voter ... shall be permitted to vote only in the primary of the party in which [the registration] record shows him to be enrolled.”

In Rosario v. Rockefeller, 410 U.S. 752 (1973), the Supreme Court upheld New York's closed-primary system as well as the requirement that a voter who wished to change his party affiliation do so before the general election of the previous year, to protect against legitimate state interest of preventing “party raiding,” which is the phenomenon of insincere party switching in order to upset the other party's choice of candidate. However, when a political party actually *invites* nonparty members to participate in a primary, the Supreme Court held in Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986), that the freedom of association protected by the First and Fourteenth Amendments includes the right of a political party to determine who can vote in that party's primary election. Specifically, it held that a Connecticut statute that restricted voting in a party's primary election to those voters who had registered as members of that party unconstitutionally interfered with the decision of the Connecticut Republican Party to open its primary to voters who had registered as unaffiliated with any party.

In State Committee of Indep. Party of NY v. Berman, 294 F. Supp. 2d 518 (S.D.N.Y. 2003), the court found this provision unconstitutional as applied to the Independence Party, which permitted voters who were registered as unaffiliated with any party to vote in its primary elections for statewide offices. In a footnote, the court noted that while it is “only holding § 8-302(4) unconstitutional as here applied (which is all that plaintiffs requested), the continuing existence of this statutory provision so directly at odds with the holding of Tashjian seemingly could have such a ‘chilling effect’ on the exercise of constitutional rights of association as would render it facially unconstitutional if such relief were requested in a proper case.”

In Van Allen v. Democratic State Comm. of State of New York, 1 Misc. 3d 734 (Sup. Ct. Albany Co. 2003), the court held Election Law § 8-302(4) unconstitutional as applied to voters without party enrollment who were seeking to vote in the Independence Party primary. Regarding the limited reach of the decision, the court, citing Tashjian, noted that different circumstances, such as a party seeking to open its primary to all voters or a situation in which independent voters sought to vote in more than one party primary, would raise a different combination of considerations.

4. Voter Enrollment Scheme

A political organization is designated as a “party” if, at the last gubernatorial election, such organization's candidate for governor received at least 50,000 votes. Election Law § 1-104(3). If a Party fails to receive 50,000 votes for its gubernatorial candidate in an election, it

will be treated as an independent body, and not a Party, in the next election. Election Law § 1–104(12). As a result of this change in status, the Board of Elections is required to remove that political party’s name from the voter registration form and erase the enrollment information of any member of a former Party and change the status of that individual to non-affiliated on the registration poll record. Election Law § 5–302(1).

In Green Party of New York State v. New York State Bd. of Elections, 267 F. Supp. 2d 342 (E.D.N.Y. 2003) modified, No. 02-CV-6465 (JG), 2003 WL 22170603 (E.D.N.Y. Sept. 18, 2003) and aff’d, 389 F.3d 411 (2d Cir. 2004), plaintiff-political parties, three of which lost their status as a “party” as a result of the 2002 elections and two of which had never won recognition as a “party” but had placed candidates on the statewide ballot in the 2002 elections, challenged Election Law § 5-302(1) as violating their First Amendment and Fourteenth Amendment rights.

Finding that the plaintiffs had a substantial likelihood of success on the merits, the court issued, and the Second Circuit upheld, a preliminary injunction ordering the state Board of Elections (“BOE”) to: (a) revise the voter registration form to include an option labeled “Other (write in)” that would be followed by a blank line permitting voters to declare their political affiliation with any political organization, as well as instruction notifying voters that they could use such line to enroll in a political organization that was not one of the “parties” identified on the form; and (b) ensure that local boards of elections maintain the enrollment status of voters who had enrolled in the plaintiffs’ political parties in the past and continue to enroll such voters in the future, at least through the 2006 gubernatorial election.

BOE argued that the scheme prevented voter confusion, i.e., voters who enroll as a member of a political party would think that they were members of an official Party when actually they were not. BOE further argued that the injunction would be burdensome and not remedy voter confusion because there are many small and undeveloped parties that have yet to show that they have any support and thus do not deserve to have the state maintain their enrollment information, or have such information clutter the enrollment lists. As the injunction only applies to the five plaintiff-parties, the court stated: “the ability to meet the requirements for placing a candidate on the statewide ballot is enough of an indication of support to overcome the state’s interest in preventing voter confusion.”

5. Independent Expenditures

A “corporation doing business in New York may make contributions of up to \$5,000 in any year for purposes related to elections for New York State office, local office, or party positions.” Election Law § 14-116(2). An individual may make contributions, loans, or guarantees of funds of up to \$150,000 in any year “in connection with the nomination or election of persons to state and local public offices and party positions within the state of New York in any one calendar year.” Election Law § 14-114(8).

The state Board of Elections interpreted these statutes to impose the contribution limits against entities that only make independent expenditures.

In Hispanic Leadership Fund, Inc. v. Walsh, 42 F.Supp.3d 365 (N.D.N.Y. 2014), the court held that the limits were unconstitutional as applied to the plaintiffs, a 501(c)(4) social welfare organization that wanted to make contributions to an independent expenditure only committee in excess of \$5,000, and an independent expenditure only committee that wanted to solicit and accept corporate contributions in excess of \$5,000, and more than \$150,000 from individual contributors.

See also New York Progress & Prot. PAC v. Walsh, 17 F. Supp. 3d 319 (S.D.N.Y. 2014) (finding that the individual contribution limit contained in Election Law § 14-114(8) as applied to committees that make only independent expenditures is unconstitutional).

Election Law Committee
Martin E. Connor, Chair

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