Requirement That Ballot-Petition Witnesses for a Primary Election Be Members of the Party

Kaloshi v. New York City Board of Elections (Sterling Johnson, Jr., 1:02-cv-4762), Brown v. New York City Board of Elections (Raymond J. Dearie, 1:04-cv-3662), and Maslow v. Wilson (Edward R. Korman and Nicholas G. Garaufis, 1:06-cv-3683) (E.D.N.Y.)

A district judge ordered a candidate's name added to a 2002 primary-election ballot for state senate on a finding that it was unconstitutional to require that ballot-petition signature witnesses be registered members of the party. After the election, the court of appeals vacated the holding, determining that the candidate, who did not prevail in the election, did not have enough signatures to qualify for the ballot after all, even after invalidations for the unconstitutional requirement were taken into account. An action filed in 2004 in the same court challenging the party-membership requirement was unsuccessful, because the second district judge did not agree with the first judge's conclusion. Neither did a district judge presiding over a case filed in 2006, and the court of appeals affirmed the last judge's ruling.

Subject: Getting on the ballot. *Topics:* Getting on the ballot; primary election; intervention; matters for state courts; case assignment.

On August 28, 2002, six prospective candidates in September Democratic primary elections in New York for state senate, assembly, and party committee filed a federal complaint in the Eastern District of New York seeking an injunction placing their names on the ballot.[1]

Judge Sterling Johnson, Jr., held a show-cause hearing on September 3 and 4.[2] Voters and the state's attorney general were permitted to intervene.[3] On September 6, Judge Johnson ordered one of the plaintiffs on the ballot for state senate.[4]

The senate candidate needed 1,000 signatures to qualify for the ballot, and he submitted 1,609.[5]

1. Complaint, Kaloshi v. N.Y. City Bd. of Elections, No. 1:02-cv-4762 (E.D.N.Y. Aug. 28, 2002), D.E. 1.

2. Docket Sheet, *id.* (Aug. 28, 2002) (D.E. 2, 3).

Judge Johnson died on October 10, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3. Order, *Kaloshi* , No. 1:02-cv-4762 (E.D.N.Y. Sept. 9, 2002), D.E. 5; Amended Opinion at 9, *id.* (Sept. 13, 2002), D.E. 9 [hereinafter *Kaloshi* Amended Opinion], 2002 WL 31051530 (observing that the voters' claims would not be precluded by the candidates' unsuccessful actions in state court).

4. *Kaloshi* Amended Opinion, *supra* note 3.

5. *Id.* at 3.

One challenge resulted in a finding of 350 valid signatures.[6] A second challenge resulted in a finding of 504 valid signatures.[7] Judge Johnson held unconstitutional a requirement that signature witnesses be registered members of the party.[8] As a result of the first challenge to the candidate's signatures, 666 signatures were invalidated for the unconstitutional reason, so Judge Johnson determined that the candidate had 350 plus 666 or 1,016 valid signatures.[9]

Judge Johnson denied relief to candidates left off of their ballots for providing the wrong position sought on their application papers, and he denied relief to an assembly candidate who did not have enough signatures even accounting for the unconstitutional requirement.[10] Judge Johnson also denied relief for a claimed failure to preclear a change in the dates of signature collection under section 5 of the Voting Rights Act,[11] on a finding that the change had been precleared.[12]

The successful plaintiff came in fifth in a field of five, with 3.2% of the vote.[13]

On July 1, 2003, the court of appeals vacated the candidate's relief for lack of standing, because the court determined that the candidate's insufficient signatures did not result from the unconstitutional requirement.[14] The court of appeals found that the signature challenge yielding 504 valid signatures resulted from invalidations having nothing to do with the unconstitutional requirement, so there was no injury.[15]

Relying on Judge Johnson's 2002 decision, seven voters filed a federal complaint on August 24, 2004, challenging the ballot exclusion of a slate of candidates for Congress, the state assembly, and other offices, alleging, among other things, the unconstitutionality of the requirement that ballot-petition signature witnesses for a primary election be party members.[16] Judge Raymond J. Dearie set the case for hearing on September 1.[17]

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6. *Id.* at 4.

7. *Id.*

8. *Id.* at 28.

9. *Id.* at 28–29.

10. *Id.* at 16–18, 29.

11. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

12. *Kaloshi* Amended Opinion, *supra* note 3, at 18–19.

13. Kaloshi v. Spitzer, 69 F. App'x 17, 18 n.1 (2d Cir. 2003).

14. *Id.* at 19.

15. *Id.*

16. Complaint, Brown v. N.Y. City Bd. of Elections, No. 1:04-cv-3662 (E.D.N.Y. Aug. 24, 2004), D.E. 1; *id.* at 4 (citing Judge Johnson's ruling).

17. Order to Show Cause, *id.* (Aug. 24, 2004), D.E. 2.

Defendants were the city's board of elections and its commissioners, who argued in their brief that Judge Johnson's opinion was nonprecedential, because it had been vacated by the court of appeals.[18] At the hearing, Judge Dearie informed the parties that he did not agree with Judge Johnson's opinion[19] and concluded, "I do not have any reservation about the constitutionality of the provision in question."[20] Judge Dearie granted the defendants' motion to dismiss the case.[21]

A July 27, 2006, federal complaint challenged the party-membership requirement for the September 12 primary-election ballot-petition signature witnesses.[22] Among the relief sought was an injunction putting one plaintiff on the ballot for state assembly and two other plaintiffs on the ballot for civil-court judge.[23] The complaint observed that in 2000, Judge Edward R. Korman found a witness-residence requirement to be an undue burden on First Amendment rights.[24] The court initially assigned the 2006 case to Judge Korman as related to his case resolved in 2000 and filed in 1999.[25] The 2006 parties appeared in court on the day that the complaint was filed and stipulated a continuance until August 4, 2006.[26] On August 10, Judge Korman converted the plaintiffs' motion for a preliminary injunction to a motion for summary judgment.[27] After the action was filed, it turned out that the two judicial candidates had enough signatures even with the party-membership requirement and the assembly candidate did not have enough signatures even without the party-membership requirement.[28]

The court reassigned the case to Judge Nicholas G. Garaufis on September 11,[29] and the plaintiffs filed an amended complaint on October 25.[30] On May 23, 2008, Judge Garaufis granted the defendants summary judgment.[31]

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18. Defendants' Brief at 11–12, *id.* (Aug. 31, 2004), D.E. 5.

19. Transcript at 12, *id.* (Sept. 1, 2004, filed Sept. 28, 2004), D.E. 10.

20. *Id.* at 39.

21. Order, *id.* (Sept. 1, 2004), D.E. 8; Minutes, *id.* (Sept. 1, 2004), D.E. 11.

22. Complaint, Maslow v. Wilson, No. 1:06-cv-3683 (E.D.N.Y. July 27, 2006), D.E. 1.

23. *Id.*

24. *Id.* at 11 (citing Molinari v. Powers, 82 F. Supp. 2d 57, 69 (E.D.N.Y. 2000) (holding unconstitutional a requirement that petition signers list their towns of residence according to the board of elections' list for which address is in which town regardless of the signers' understanding of their towns of residence and a residence requirement for witnesses)).

25. Notice, *id.* (July 27, 2006), D.E. 2; *see* Docket Sheet, Molinari v. Powers, No. 1:99-cv-8447 (Dec. 22, 1999).

26. Transcript, *Maslow*, No. 1:06-cv-3683 (E.D.N.Y. July 27, 2006, filed July 28, 2006), D.E. 6; Minutes, *id.* (July 27, 2006), D.E. 8; *see* Order to Show Cause, *id.* (July 31, 2006), D.E. 5.

27. Order, *id.* (Aug. 10, 2006), D.E. 10.

28. Opinion at 3, *id.* (May 23, 2008), D.E. 69 [hereinafter E.D.N.Y. *Maslow* Opinion], 2008 WL 2185370; *see* Letter, *id.* (Aug. 3, 2006), D.E. 7 (informing Judge Korman that the judicial candidates qualified for the ballot).

29. Docket Sheet, *id.* (July 27, 2006).

30. Amended Complaint, *id.* (Oct. 25, 2006), D.E. 14.

31. E.D.N.Y. *Maslow* Opinion, *supra* note 28; Maslow v. Bd. of Elections, 658 F.3d 291, 294–95 (2d Cir. 2011).

The Supreme Court had held, on January 16, 2008, that selecting partisan nominees for judicial offices in New York by a primary-election-informed party convention rather than a direct primary election did not violate the constitutional rights of potential candidates disfavored by party leaders.[32] Judge Garaufis relied on this opinion: "Simply put, the Court has granted New York State enormous latitude to exclude non-members from participating in the selection of and 'determinin[ing] the candidate bearing the party's standard in the general election.'"[33] "Because Plaintiffs are without a right to have non-party members participate in a political party's nomination process," the court of appeals, on September 30, 2011, affirmed Judge Garaufis's ruling.[34]

32. N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196 (2008).
33. E.D.N.Y. *Maslow* Opinion, *supra* note 28, at 15 (quoting *López Torres*, 552 U.S. at 203).
34. *Maslow*, 658 F.3d at 294, *cert. denied*, 565 U.S. 1275 (2012).