

SECOND CIRCUIT REVIEW

Expert Analysis

COVID-19 and the New York Democratic Primary

Earlier this month, the U.S. Court of Appeals for the Second Circuit issued its opinion in *Yang v. Kosinski*, —F.3d.—, No. 20-cv-1494, 2020 WL 2820179 (2d Cir. June 1, 2020), affirming the preliminary injunction issued by Judge Analisa Torres of the U.S. District Court for the Southern District of New York, reinstating the New York Democratic presidential primary following the New York Board of Elections' (the board) decision to effectively cancel it in light of the COVID-19 pandemic. The opinion was written by Circuit Judge José Cabranes and joined by Circuit Judges Amalya L. Kearse and Dennis Jacobs. The court ruled that the fundamental First Amendment rights of speech and association took precedence over the public safety and financial concerns cited by the board.



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The Democratic Primary And Election Law Section 2-122-a(13)

The New York Democratic Party presidential primary is an opportunity for candidates not only to seek the presidential nomination, but also compete for pledged delegates who attend the Democratic National Convention. In addition to participating in the selection of the presidential nominee, delegates vote on the procedural rules of the convention, help develop the Democratic Party platform,

weigh in on issues of party governance, and participate in the selection of the vice presidential nominee. Their responsibilities extend beyond the National Convention as they remain in place until new delegates are selected at the next convention. In New York, the only way for a delegate to attend the Democratic National Convention is if the name of the delegate's presidential candidate appears on the ballot.

Prior to 2020, longstanding rules permitted the names of candidates who had either suspended their campaigns, or publicly announced that they no longer sought the nomination, to appear on the ballot and compete for delegates. On April 3, however, Gov. Andrew Cuomo signed an omnibus bill that altered those rules. That statute, New York Election Law Section 2-122-a(13), enacted while the state battled the COVID-19 pandemic, authorized the board to omit presidential candidates from the primary ballot if they publicly announced that they were no longer seeking the nomination or announced that

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they were suspending or terminating their campaigns.

District Court Proceedings

That change to the New York Election Law proved to be significant. By April 2020, every candidate except former Vice President Joseph Biden publicly announced that they were no longer seeking the Democratic presidential nomination or that they were terminating or suspending their campaign. Around the same time, the COVID-19 pandemic prompted Cuomo to postpone the Democratic primary from April to June. Despite vigorous opposition from former Democratic presidential candidates, on April 27, the Democratic commissioners on the board adopted a resolution (the April 27 Resolution) that invoked the recently enacted Section 2-122-a(13) and removed 11 qualified candidates and their pledged delegates from the ballot, leaving only Biden and his pledged delegates. Pursuant to a longstanding New York statute providing that uncontested elections may be resolved without balloting, the Board effectively canceled the presidential primary.

Within days, former presidential candidate Andrew Yang and several of his pledged delegates, along with intervening delegates of former candidate Sen. Bernie Sanders, challenged the resolution as unconstitutional and sought a preliminary injunction reversing the board's decision. U.S. District

Court Judge Torres held a telephonic argument and granted the preliminary injunction on May 5. In granting the injunction, the district court found that the plaintiffs satisfied the more rigorous standard applicable to mandatory preliminary injunctions, by establishing a strong showing of irreparable harm absent injunctive relief; a clear or substantial likelihood of

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success on the merits; and that the public interest weighed in favor of granting the injunction.

The Second Circuit's Decision

On appeal, the board argued that the plaintiffs' and Sanders' delegates were not likely to succeed on the merits of their claims and that the balance of equities and public interest did not support the preliminary injunction. The Second Circuit rejected both arguments.

In determining the likelihood of success on the merits, the court explained that it was required to consider the constitutionality of Section 2-122-a(13), as applied by the board to the plaintiffs' and Sanders' delegates, through the

adoption of the April 27 Resolution. That analysis required a two-step inquiry. First, the court considered the extent to which the challenged restriction burdens the exercise of the speech and associational rights. The extent of that burden would then determine whether the more flexible standard for "reasonable and nondiscriminatory" restrictions or the more rigorous standard for "severe" restrictions applied.

Although "it may be hard to imagine a more 'severe' election-related restriction than the removal of 10 out of 11 qualified candidates from a ballot," the court applied the more flexible and less-exacting standard, because, even under that standard, the plaintiffs' and Sanders' delegates were "clearly or substantially likely to prevail on the merits of their claim." *Yang*, 2020 WL 2820179, at *6. The court first considered the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments, and second, identified and evaluated the precise interests put forward by the state as justifications for the burden imposed by its rule.

The magnitude of the asserted injury to the plaintiffs' and the Sanders delegates' First and Fourteenth Amendment rights was clearly evident. The court explained that the plaintiffs' and Sanders' delegates intended to both appear on the ballot and

vote in the primary election. The April 27 Resolution, however, burdened their ability to vote, compete for delegates, and compete for an opportunity to attend the Democratic National Convention, thereby eliminating their ability to influence and participate in party business. Consequently, the April 27 Resolution affected their interests to “engage in association for the advancement of beliefs and ideas” and “to cast their votes effectively”—interests that fall squarely within the ambit of the First Amendment. This, the court found, was a substantial burden on the rights of free speech and association.

The court was equally unpersuaded by the board’s justifications for the April 27 Resolution. The Board argued that the April 27 Resolution was justified to further the State’s compelling interest in protecting the public from the effects of the COVID-19 pandemic. Specifically, the board alleged that many New York counties and subdivisions would not need to conduct any election at all absent the Democratic presidential primary. The board argued that not holding elections in those places would significantly reduce human contact and decrease the risk of spreading COVID-19. This justification, however, was “overstated” for two reasons. First, Cuomo authorized every voter in New York to request an absentee ballot, likely significantly decreasing in-person turnout, allowing

the state to safely accommodate those voters who need to vote in person. Second, the court explained that approximately 90% of New York’s Democratic Party electorate would be voting in other primaries on the same day. Further, many of those voters reside in counties that have populations exceeding one million people, which stands in stark contrast to those counties where no election would need to be conducted absent the Democratic presidential primary, which are located in sparsely populated areas. The board also argued that the April 27 Resolution was justified because it allowed them to use the board’s limited resources to ensure that other contested elections can be conducted safely and efficiently.

The court characterized these arguments as “too conclusory and vague to support the cancellation of the presidential primary.” Indeed, the court explained that, even assuming the factual accuracy of those contentions, the possibility of future increases in the cost of administering the election system is not a sufficient basis for infringing on the plaintiffs’ and Sanders’ delegates’ First Amendment rights. That was especially true in this case, where the costs were only necessary because the Board effectively canceled the primary in the first instance.

Finally, the court explained that the competing interests demonstrated that the balance of equities tipped in favor of the

plaintiffs’ and Sanders’ delegates. Under the current Democratic Party Rules and New York delegate-selection plan, a presidential primary must take place in order for the Yang and Sanders delegates to be able to participate in the deliberations of the convention. Citing the “importance of the right to political participation in a primary election and the pivotal role that delegates play within the structure of the Democratic Party,” the plaintiffs’ and Sanders’ delegates showed that, absent injunctive relief, their First Amendment rights “likely would be forever extinguished.”

Conclusion

In this closely watched case of national significance, the Second Circuit reaffirmed the manifest importance of First Amendment speech and associational rights, even in the face of a global pandemic. As the pandemic continues to spread throughout the nation, and fears of a second wave in the fall escalate, courts across the country may confront similar questions that require the balancing of fundamental rights and public safety. The Second Circuit’s ruling in *Yang v. Kosinski* may be a barometer that fundamental First Amendment rights take precedence over public safety concerns.