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New York Inches Its Way Toward Easier Ballot Access

Government and Election Law

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As the U.S. Supreme Court grapples with the most fundamental issue facing American politics—whether "partisan gerrymandering" can be so egregiously one-sided as to be unconstitutional—New York courts routinely confront the less profound but equally far-reaching issue of ballot access. After all, decisions as to which candidates can actually appear on the ballot shape our elections, and, with the advantages that incumbents generally have, such rulings can have a lasting impact. Opponents routinely scrutinize whether a candidate has met residency and other requirements to run for office; and they also review—in great detail—a candidate's nominating petitions (to get on the ballot) and nominating certificates (issued by party committees) for hyper-technical errors. Some of these issues are disposed of by the Board of Elections. Often, however, they wind up being adjudicated in the courts.

In 2014, a Democratic Party primary opponent of Gov. Andrew Cuomo and an insurgent state Assembly candidate faced stiff challenges as to whether each met residency requirements. Although the evidence showed, at best, only a tangential relationship to New York while having significant contacts in other states, both the Brooklyn and Bronx trial courts, and the First and Second Departments of the Appellate Division, found that

the candidates could run. *Weiss v. Teachout,* 120 A.D.3d 701 (2d Dep't 2014); *Jones v. Blake,* 120 A.D.3d 415 (1st Dep't), *lv. to appeal den'd.* 23 N.Y.3d 908 (2014). Central to the outcome in both cases was the long-standing rule that under the election law a candidate (or voter) could have more than one residence. Last year, however, the Court of Appeals limited this rule by blocking a candidate with two residences on the ground that he had voted outside the district. Conflating voting with residency, the Court of Appeals made it more difficult for candidates with multiple residences to run for office. *Glickman v. Laffin,* 27 N.Y.3d 810 (2016).

On the other hand, just this past August, the Court of Appeals made it easier for potential candidates. In a case relating to Mayor Bill de Blasio's candidacy for re-election on the Working Families Party line, he was able to run on that line despite the party having failed to follow the statutory nomination procedure. *Morgan v. de Blasio,* 29 N.Y.3d 559 (2017). Focusing on the fact that the complaining petitioner failed to name the WFP State Executive Board as a "necessary party" in his lawsuit, the court sidestepped the law on nominations and elevated a procedural deficiency in the lawsuit—resulting in the case against the mayor being dismissed. Ironically, a week earlier, in *Marafito v. McDonough,* 153 A.D.3d 1123 (3d Dep't 2017), the Appellate Division, Third Department, took the opposite tack with a contrary result. In that case—a matter challenging a Rensselaer County Executive nomination by the Independence Party—the appellate court allowed the case to proceed even though the relevant party committee had not been named. The court found it was not necessary for the case to proceed. The party's candidate was removed from the ballot.

Aside from the *de Blasio* case*,* the court denied leave in all other cases this election season—letting stand several Appellate Division decisions that made it easier for candidates to run. For example, the First Department articulated a more relaxed approach when candidates challenge Board of Elections rulings that have invalidated their nominating petitions. Contrary to a previous Court of Appeals decision from 2013 that required an invalidated candidate to specify in his lawsuit each board ruling alleged to be erroneous, the appellate court in two companion cases this year held that an aggrieved candidate could present such challenges at the trial court's first hearing date. *Clark v. Ortega,* 153 A.D.3d 443 (1st Dep't) *lv. to appeal den'd*. 29 N.Y.3d 915 (2017); *Campusano v. Ortega,* 153 A.D.3d 443 (1st Dep't), *lv. to appeal den'd*. 29 N.Y.3d 915 (2017). This seemingly minor extension of time is actually a welcome revision of the law because it allows a candidate more time to gather its evidence to get back on the ballot. Similarly, the Court of Appeals denied leave in a Second Department case where the candidate's petition signers incorrectly identified their town address. Although they resided in the Town of Harrison, several signers misidentified the legal name of their town. No fraud was found, but the trial court struck these signatures—which resulted in the invalidation of the candidate's petition. The Appellate Division reversed, reflecting a growing liberalization in ballot access cases. *Giordano v. Westchester County Board of Elections,* 153 A.D.3d 821 (2d Dep't), *lv. to appeal den'd.* 29 N.Y.3d 915 (2017).

Despite decisions such as *Clark, Campusano* and *Giordano,* courts overall have a mixed record in dealing with errors that might not strictly comply with the Election Law's

requirements. In one case, a Nassau Supreme Court approved a Women's Equality Party nomination certificate that identified the district as the 17th, rather than the correct one, the 5th. *Spatz v. Mule,* Sup.Ct. Nassau County, Index No. 3138/17 (Aug. 11, 2017). Yet, in another, the Third Department affirmed the removal of Town of Bethlehem candidates for not having their nomination certificates signed properly. *Harder v. Kuhn,* 153 A.D.3d 1119 (3d Dep't 2017). Also reflecting a lenient approach to mistakes, the Appellate Division, Second Department, reversed a Nassau County trial judge's invalidation of a candidate whose nominating petition stated the office he sought was the "15th District County Nassau Legislature" instead of the correct nomenclature, "Legislator." *Fochtman v. Coll,* 2017 WL 3974931 (2d Dep't 2017). What made this case even more significant, though, was the fact that the appellate court restored the candidate to the ballot only one day before this year's primary election. In this respect, its decision was in stark contrast to a ruling it made just last year. In 2016, a challenged candidate was found eligible to run five days before an election, only to be told by a Nassau Country trial court that it was "too late" to add his name to the ballot; the Second Department affirmed. This year's more supple approach by the Appellate Division appears more in keeping with liberalized ballot access rules.

All told, New York's ballot access requirements are still a minefield, but seem to be slowly becoming easier to navigate.

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