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How New York Suppresses the Vote



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The midterm election cycle revealed in gory detail the various problems states have administering elections. Georgia was in the news for a number of controversies: requiring an “exact match” between the names on the registration lists and other state databases, database insecurities, and charges of voter suppression.

Here in New York, we like to think we do better. But we still do not allow early voting (as 37 states do), no-excuse absentee ballots (allowed in 26 states and Washington D.C.), automatic registration (as permitted by 15 states and DC) or an easy path to change enrollment from one political party to another (our closed primary system requires an 11-month waiting period to vote in most party primaries). The Governor and the legislature’s majority party have pledged to reform these and related laws.

While Albany is at it, however, there is an underside to our election laws that does not receive the attention it deserves—our restrictive ballot access laws that often deprive voters an opportunity to have a choice when they vote. To demonstrate how this works, we survey a variety of rulings from 2018 to demonstrate how hyper-technical provisions litter the law, and

prevent otherwise eligible candidates from being on the ballot—thus narrowing, and often eliminating, choices for the voters.

Let's start with a recent Court of Appeals decision, which very rarely grants leave to appeal in an election case but heard this one as of right pursuant to CPLR §5601(a). It concerned a challenge to a designating petition for Democratic Party Female State Committee Member from Greenwich Village. This unpaid position is usually a stepping stone to local office, and, even if not, is an important member of the state party's policy and nominating process. The alleged defect on the petition, submitted by one Penny Mintz, was that it did not explicitly state that the position sought was Female Committee Member. (Never mind that Penny is obviously a woman's name.) The Court of Appeals ruled that this "error" was a fatal defect as a matter of law, and thus the candidate was disqualified from appearing on the ballot. *Mintz v. Board of Elections*, 32 N.Y.3d 1054 (2018). As a result, voters were left with only one other candidate, and thus no choice.

The *Mintz* case did not affect very many voters, and concerned a relatively minor office. Nevertheless, for the highest court in the state to knock someone off the ballot for such a harmless error is troubling. However, it is not inconsistent with other decisions concerning equivalent innocuous mistakes. This year, for example, several Supreme Court justice candidacies were invalidated for an equally meaningless irregularity. In Staten Island, voters could not vote for Justices on the Democratic Party line because their certificates of nomination were filed without duly certified minutes of the judicial convention proceedings that nominated them as the statute requires—even though an undisputed transcript of the proceedings had been filed and signed by the stenographer. The Appellate Division, Second Department felt constrained to nullify these nominations because no explanation was provided at trial for the lapse and no cure was attempted. Thus, the Democrats were left with no candidates for the Supreme Court. *Fuentes v. Catalano*, 165 A.D.3d 1010 (2d Dept. 2018).

Similarly, candidacies for various offices are routinely invalidated in New York City by the Board of Elections if their paperwork is not perfect. In addition to submitting petitions to get on the ballot (usually in several volumes), Board regulations require a "cover sheet" which must accurately state the number of volumes submitted and the specified identification number on each volume. If the candidate makes a mistake on this cover sheet, she is permitted to amend it. But only once. If the amended cover sheet is not 100 percent perfect, the Board will knock the candidate off the ballot—even though this ministerial requirement does not reflect the validity of the petition signatures submitted. Thus, for example, this year, the Board invalidated over two dozen candidates for party positions in Queens for defective amended cover sheets (*Mandell v. Board of Elections*, 164 A.D.3d 719 (2d Dept. 2018)), and a candidate for Female State Committee member in Brooklyn for failing to sign her amended cover sheet authorizing

its submission (*Minter v. Board of Elections*, Index No. 700015 (Kings Co. Sup. Ct. Aug. 10, 2018)). Sometimes a court will restore a candidate to the ballot despite the Board's rejection of cover sheets for such minor mistakes, but aggrieved candidates must navigate statutes of limitations and a host of procedural issues to obtain a hearing. In these two cases, for example, the invalidated candidates did not seek judicial relief timely.

What makes New York's election laws even more exasperating is that court rulings are often inconsistent. For example, in a matter similar to the Staten Island judicial case cited above, the Appellate Division, Third Department ruled that violation of the law in the nominating process did not require invalidation of the candidacies. In *Marzullo v. DelConte*, 165 A.D.3d 1466 (3d Dept. 2018), the court held that the unlawful procedures followed at a Conservative Party judicial convention with respect to the election of its officers "in no way impaired the integrity or results of the nomination process." And in *Limpert v. Brandt*, 165 A.D.3d 1469 (3d Dept. 2018), the court ruled that voting procedures for the candidates were unlawful but "the intention of the delegates was fully and accurately expressed." It is hard to reconcile these decisions with that of the Staten Island decision in *Fuentes*. Indeed, such inconsistency only incentivizes litigation over the smallest of details regarding whether the law was followed in the ballot access process.

Therefore, in addition to expanding voting opportunities through early voting and the like, the legislature should also take a fresh look at the Election Law. It requires simplification and an explicit provision that substantial compliance with the law should be sufficient to provide candidates with easier access to the ballot, and thus greater choice for the voters.

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