the rule of necessity was found to be an apt exception to the recusal rule in cases such as this one, where a plaintiff indiscriminately names all the judges of a court as defendants to an action otherwise properly before that court.

Once the Ninth Circuit found the rule of necessity to be applicable, it then reached its decision on Ignacio's substantive claims. Not surprisingly, the court held that dismissal was proper, as the court lacked subject-matter jurisdiction to decide the case.

While this case may seem almost contrived with respect to Ignacio's determination in pursuing his claims and his paranoia regarding the way the judicial system treated them, cases like this do occur. Indeed, that the Ninth Circuit had contemporary precedent from sister circuit courts on which to rely demonstrates that suits like Ignacio's are not as uncommon as they otherwise may seem. It is precisely situations like the *Ignacio* case, where a litigious plaintiff indiscriminately names all the judges on a court as defendants, in which the rule of necessity is an appropriate exception to the rule of judicial ethics that judges recuse themselves when personally a party to a lawsuit. **jsj**

Judge Lopez Torres and New York's Trial Judge Nominating Process

MARK S. HURWITZ

As prescribed by its constitution, New York holds elections for judges to its supreme courts, the trial courts of general jurisdiction. In *Lopez Torres v. New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006), the Second Circuit held that the state's nominating process for these courts deprives potential judicial candidates and voters of their First Amendment rights. For a panel including circuit judges Sotomayor and Hall, Judge Chester Straub said, "New York's nominating process . . . does not merely deprive a candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether" (at 189). This decision may be the impetus for momentous change to the state's selection methods, and perhaps to its judicial system more generally. Much, however, will depend upon what is said by the U.S. Supreme Court, which granted certiorari in the case in February 2007.

The formal methods of judicial selection in New York are "unique" (at 171). Certainly, the state's rules are archaic. An 1846 amendment to its constitution compels election of judges to the state's supreme court. Interestingly, this constitutional provision provides no other details, so over the years the state legislature has filled in details. Initially, candidates were nominated in judicial conventions. In 1911 the state then employed primary elections. However, anxiety over the influence of money and parties in "bare-knuckled" primaries and over potential lack of judicial independence persuaded the state once again to alter its nominating process (at 171-

72). The result was the multifaceted nominating process enacted in 1921, which remains in place. As codified in New York's constitution and laws, the first phase includes a primary in which judicial delegates are elected. In the second phase, these delegates attend a nominating convention where judicial candidates are selected. Finally, the candidates' names are placed on a general election ballot, from which Supreme Court judges ultimately are elected by the public.

Judge Lopez Torres was a popular civil court judge in Brooklyn who had twice won election to this post by large margins. After her initial victory, local party officials attempted to persuade her to hire a particular party worker as her law secretary, an important substantive position within chambers. Based on her view of the potential employee's merits, Judge Lopez Torres decided instead to hire another lawyer for this position. Afterwards, she was severely chastised by party leaders, one of whom told the judge that she "did not understand the way it works . . . [that she] would want to become a Supreme Court Justice and the party leaders would not forget this" and that without party backing a place on the Supreme Court "will not happen" (at 179). Sure enough, when Judge Lopez Torres attempted to secure a nomination for the supreme court on subsequent occasions, party leaders ensured she would not gain ballot access. Facing these obstacles to the ballot without party support—in reality, the party actively opposed her candidacy—she removed her name from contention, but she has continued to serve as a judge and has served in Brooklyn's surrogate court since 2006.

Because of these events and matters involving other judicial candidates, in 2004 Judge Lopez Torres and others brought suit in federal district court against the New York Board of Elections, alleging the nominating system for the state's supreme court violated the First Amendment's freedom-of-association rights of both judicial candidates and their supporters in the voting public. Plaintiffs demanded the court declare the relevant provisions of New York's election law unconstitutional. They also sought an injunction to require the state legislature to enact a new method of selection and to require the state to conduct direct primary elections until a new system is in place. After an extensive hearing and on the basis of a voluminous record, in January 2006 Judge John Gleeson of the Eastern District of New York granted plaintiffs' motion, stating that they demonstrated a clear likelihood of success on the merits. Judge Gleeson then enjoined the state from enforcing its election law in relevant part, and ordered it to conduct direct primary elections, although he would not order the legislature to amend the state's election law. 411 F.Supp.2d 212 (E.D.N.Y. 2006).

After the district court stayed its order until after the November 2006 election and the New York Board of Elections appealed, the Court of Appeals for the Second Circuit heard the case on an expedited schedule. In August 2006, the court issued a unanimous decision, holding that the district court did not abuse its discretion—the appropriate standard of review in this case involving injunctive relief—in finding that the plaintiffs would likely succeed on the merits of their First Amendment claim.

The district court and court of appeals, relying on the former court's findings, found that the nominating system in practice sharply diverges from the formal con-

stitutional and statutory methods. They found the actual system of attaining ballot access in New York to be cumbersome and replete with politics, and strongly slanted in favor of candidates supported by the local party leadership. As the court of appeals put it, the "various delegate petitioning requirements created impossibly high entry barriers for candidates lacking institutional support—even for those who possessed significant public support" (462 F.3d at 174).

The Second Circuit panel portrayed the primary election phase as one where innumerable signatures must be obtained in a time period of just over a month. Even candidates experienced in electoral campaigns find it nearly impossible to secure sufficient signatures, at least not without the help of the local party. However, those candidates with party support "easily navigate the primary system with the benefit of the party's pre-existing apparatus" (at 175). The result of this stage is that few candidates outside of the local party even attempt to obtain access to the ballot.

Once the delegates have been selected in this primary controlled by the local parties, nominating conventions are convened. Judge Straub referred to them as "perfunctory affairs" that are "devoid of debate" and "fleeting." He also observed that "[i]n 1996, the Second Judicial District's convention lasted 11 minutes but yielded eight nominees" (at 178). Once someone was on the ballot, success in the general election was essentially guaranteed, as many elections were uncontested affairs. Where an opposition candidate appeared on the ballot, the one-party nature of politics in much of New York meant that the general election was "little more than ceremony" (at 178). The court said this process was similar for those seeking either the Democratic or Republican nomination.

Although Judge Straub referred to Judge Lopez Torres's experience as a "political mugging," he said it was not an anomaly (at 181). In fact, that experience comported with the findings of the Feerick Commission, created by New York's chief judge, Judith Kaye, which found that judicial elections across the state are dominated by local party leaders. Other commissions and groups had also found that New York's system is "only nominally one of election" (at 181).

In finding that the plaintiffs would likely prevail on the merits, Judge Straub said that the First Amendment guarantees a right of association to advance political beliefs, and a right to voters to cast votes effectively. These rights meant that candidates and voters must be granted a "realistic opportunity to participate in the nominating process . . . free from burdens that are both severe and unnecessary to further a compelling state interest" (at 187). Since the nominating process in New York effectively maintained "an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process," its nominating process would likely violate the First Amendment (at 188).

While a political party surely has a First Amendment right of association concerning the structure of its party, the court held such a right to be outweighed by the First Amendment rights of candidates and voters. Here, Judge Straub said that "it is difficult for us to conceive of any party interest that is weighty enough to justify

excluding qualified party members from competing for the position of delegate or judicial nominee, or from associating with party-member candidates seeking those offices" (at 193). The severe burdens imposed by New York's electoral scheme thus violated the First Amendment rights of both voters and candidates.

The appeals court panel also stated that New York's electoral provisions were not narrowly tailored to further a compelling state interest. While many of the interests the state claimed were compelling, such as promoting racial and geographic diversity and guarding against party raiding,[1] less-burdensome means were available to achieve those interests. For instance, the Board of Elections did not show how its electoral scheme was necessary to prevent party raiding. Similarly, it was unclear whether the current nominating process actually promoted or hindered racial and geographic diversity. Further, while the state argued that judicial independence was a compelling interest, the panel relied on *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), to provide that judicial independence is compelling only to the degree that it prevents bias against the litigants before the court. The *Lopez Torres* court thus held that New York's nominating process was not necessary to further a compelling state interest, and thus the plaintiffs had demonstrated a clear likelihood of success on the merits of the First Amendment claim. Finally, Judge Straub held that the district court did not exceed its discretion in crafting its remedy in this case. As the nominating process excluded not only these plaintiffs but any candidate lacking local party support, the relief granted by the district court was appropriate.

Those who have navigated New York's court system are well aware of its quirks and idiosyncracies, as well as vast differences in procedures across the state. Media coverage about the odd nature of the judicial system in New York, with the resultant implication for the administration of justice, appears frequently. The 2002 investigative reporting in the *Buffalo News* on how money and politics are involved in obtaining ballot access in western New York judicial races is but one recent example. Despite occasional impulses, institutional inertia hinders substantive change to New York's system. However, the *Lopez Torres* case has the potential to bring about vast transformation in a way that past efforts or opportunities to reform the New York system have failed. Though the U.S. Supreme Court's decision in the case is not expected until sometime in 2008, court watchers eagerly anticipate what could be a groundbreaking decision regarding the judicial system in New York. **jsj**

[1] Party raiding occurs when voters from one political party designate themselves as voters from the other party, hoping to influence the other's primary election.