

Canceling an Election During a Pandemic

Yang v. New York State Board of Elections (1:20-cv-3325)
and *Key v. Cuomo (1:20-cv-3533)* (Analisa Torres, S.D.N.Y.)

Because all but one candidate for a party's presidential nomination had announced suspension of their campaigns, and in light of a global infectious pandemic, election officials in New York canceled the party's 2020 presidential primary election, leaving in place primary elections for other offices in most of the state's counties. A district judge and the court of appeals concluded that it was unconstitutional to remove from the ballots candidates who had merely suspended their campaigns.

Subject: Election dates. *Topics:* Enjoining elections; Covid-19; primary election; getting on the ballot; intervention; absentee ballots; party procedures; class action.

At a time of widespread social distancing, both mandatory and voluntary, because of the global Covid-19 infectious pandemic, New York's governor announced on March 28, 2020, that the state's April 28 presidential primary election would be moved to June 23, the same day as primary elections for other offices.¹ On April 27, at a time when all major Democratic candidates but former Vice President Joe Biden had already left the race, the state's board of elections decided to remove from the state's Democratic primary election the presidential primary election.² Using newly enacted authority, election officials removed from the presidential primary ballot all candidates who had suspended their campaigns, leaving Biden as the only candidate and declaring him the winner.³ In twenty of the state's sixty-two counties, the office of President was the only office on the ballot, so voters in those counties would be spared a trip to the polls.⁴

On April 28, Andrew Yang, a Biden challenger earlier in the election season, and seven other voters filed an emergency class-action federal complaint in the Southern District of New York against the board of elections, seeking restoration of the election of delegates to the presidential nominating convention.⁵

1. *Yang v. Kosinski*, 960 F.3d 119, 125 (2d Cir. 2020); *Yang v. Kellner*, 458 F. Supp. 3d 199, 204 (S.D.N.Y. 2020); see *Presidential Primary*, N.Y. Times, Mar. 29, 2020, at 9; Stephen Williams, *Cuomo Delays Primary*, Schenectady Daily Gazette, Mar. 29, 2020, at 1.

2. *Yang*, 960 F.3d at 123, 125–26; see Stephanie Saul & Nick Corasaniti, *Sanders Camp Fumes as New York Cancels Primary*, N.Y. Times, Apr. 28, 2020, at A18; see also *Yang*, 960 F.3d at 123 (noting that candidates other than Biden had “chosen to ‘suspend,’ rather than formally terminate, their campaigns”).

3. *Yang*, 458 F. Supp. 3d at 204–05.

4. See Saul & Corasaniti, *supra* note 2.

5. Complaint, *Yang v. N.Y. State Bd. of Elections*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 28, 2020), D.E. 1; *Yang*, 960 F.3d at 126; *Yang*, 458 F. Supp. 3d at 202, 205; see Amended Complaint, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. May 1, 2020), D.E. 18.

The court assigned the case to Judge Analisa Torres on April 29;⁶ on that day, she set the case for a telephonic hearing on May 12.⁷ If not for Covid-19, Judge Torres would have conducted the hearing in person.⁸ Because the court had not yet established secure videoconference capabilities, the hearing was not conducted on video.⁹

The board of elections immediately requested that briefing and argument be completed no later than May 4,¹⁰ and Judge Torres reset the hearing for May 4.¹¹ On April 30, Judge Torres instructed the parties to address the court's jurisdiction over the case, including the effect of the Eleventh Amendment.¹² On May 1, the plaintiffs filed an amended complaint adding individual election officials as defendants.¹³

Also on April 30, supporters of Bernie Sanders, who had suspended his challenge to Biden but who would still be on the ballot, asked Judge Torres to delay the hearing one day to facilitate their intervention.¹⁴ Judge Torres declined to change the hearing date,¹⁵ but on May 3, she granted the intervention motion.¹⁶

Judge Torres began the May 4 telephonic hearing with instructions for members of the public dialing in:

Before the attorneys make their appearances, I would like you to know that this is an open proceeding and members of the public and the press are welcome. If you are not an attorney for a party, please mute your phone and refrain from speaking during the hearing. Also, recording of this proceeding is not permitted.¹⁷

On May 5, Judge Torres ruled that removing from the ballot presidential candidates who had publicly announced suspension of their campaigns but who had not sought removal from the ballot infringed associational rights protected by the Constitution's First and Fourteenth Amendments.¹⁸

6. Docket Sheet, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 28, 2020) [hereinafter *Yang* Docket Sheet].

Tim Reagan interviewed Judge Torres for this report by telephone on September 1, 2020.

7. Order, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 29, 2020), D.E. 3.

8. Interview with Hon. Analisa Torres, Sept. 1, 2020.

9. *Id.*

10. Letter Motion, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 29, 2020), D.E. 4.

11. Order, *id.* (Apr. 29, 2020), D.E. 5; *Yang v. Kosinski*, 960 F.3d 119, 126 (2d Cir. 2020).

12. Order, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 30, 2020), D.E. 9.

13. Second Amended Complaint, *Yang v. Kellner*, *id.* (May 1, 2020), D.E. 20; *see Yang*, 960 F.3d at 124–26.

14. Letter Motion, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 30, 2020), D.E. 12; *see* Intervention Complaint, *id.* (May 5, 2020), D.E. 42; Intervention Complaint, *id.* (May 3, 2020), D.E. 37; Letter Intervention Motion, *id.* (May 1, 2020), D.E. 29.

15. *Yang* Docket Sheet, *supra* note 6 (D.E. 14).

16. Order, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. May 3, 2020), D.E. 38; *Yang v. Kellner*, 458 F. Supp. 3d 199, 205 (S.D.N.Y. 2020).

17. Transcript at 3, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. May 4, 2020, filed May 12, 2020), D.E. 45.

18. *Yang*, 458 F. Supp. 3d at 210–11, *aff'd*, 960 F.3d 119; *see* Matt Stevens & Nick Corasanti, *New York Must Hold Primary, Judge Rules*, N.Y. Times, May 6, 2020, at A12.

[T]he removal of presidential contenders from the primary ballot not only deprived those candidates of the chance to garner votes for the Democratic Party’s nomination, but also deprived their pledged delegates of the opportunity to run for a position where they could influence the party platform, vote on party governance issues, pressure the eventual nominee on matters of personnel or policy, and react to unexpected developments at the Convention. And it deprived Democratic voters of the opportunity to elect delegates who could push their point of view in that forum. Delegate Plaintiffs, who had planned to compete in the primary, express a strong continuing interest in doing so if given the chance, and affirm that they have made significant personal sacrifices for the opportunity.

...

Protecting the public from the spread of COVID-19 is an important state interest. But the Court is not convinced that canceling the presidential primary would meaningfully advance that interest—at least not to the degree as would justify the burdensome impingement on Plaintiffs’ and Plaintiff-Intervenors’ rights. As Plaintiffs and Plaintiff-Intervenors point out, Governor Cuomo has already issued executive orders allowing every voter statewide to request an absentee ballot and providing absentee ballot request forms. Even if not every voter can vote by mail—because they fail to request or do not receive an absentee ballot, because they need assistance voting, or because they are ineligible to cast an ordinary ballot but may cast a ballot with an affidavit—there is no doubt that many voters will avail themselves of the opportunity to do so.

This, in turn, will make it substantially easier for voters and poll workers to practice social distancing at voting sites. . . .

Moreover, in large portions of the state, including the most populous counties, elections besides the presidential primary are scheduled for June 23. Primaries are still taking place in 42 out of 62 counties in New York¹⁹

Following a May 15 hearing,²⁰ the court of appeals affirmed, on May 19, Judge Torres’s ruling “for substantially the reasons given by the District Court in its thorough May 5, 2020 Opinion and Order.”²¹ The appellate court issued its opinion on June 1.²²

Meanwhile, Judge Torres issued an order on May 11 staying a May 6 class action by eight voters seeking reinstatement of the presidential primary election on behalf of voters, because she had already granted the relief requested and the matter was on appeal.²³

19. *Yang*, 458 F. Supp. 3d at 213–16.

20. Telephonic Oral Argument, *Yang v. N.Y. State Bd. of Elections*, No. 20-1494 (2d Cir. May 15, 2020), D.E. 140, ww3.ca2.uscourts.gov/decisions/isysquery/b9ef4dde-9d45-4db6-b365-85284935953a/1/doc/20-1494.mp3 (audio recording).

21. *Yang v. Kosinski*, 805 F. App’x 63 (2d Cir. 2020).

22. *Yang*, 960 F.3d 119.

23. Order, *Key v. Cuomo*, No. 1:20-cv-3533 (S.D.N.Y. May 11, 2020), D.E. 11, 2020 WL 6554934; *see* Complaint, *id.* (May 6, 2020), D.E. 1, 4; Related Case Statement, *id.* (May 8, 2020), D.E. 9.

On September 1, Judge Torres approved an attorney-fee settlement in the main case of \$220,000.²⁴

24. Approved Settlement, *Yang v. N.Y. State Bd. of Elections*, No. 1:20-cv-3325 (S.D.N.Y. Sept. 1, 2020), D.E. 58.