

## Section 5 Preclearance and Holding a Special Election on the Same Day as a General Election

*Barron v. New York City Board of Elections*  
(*Raymond J. Dearie, E.D.N.Y. 1:08-cv-3839*)

A federal complaint sought a court-ordered special election at the time of the general election to fill out the last two months of a vacancy in the state’s assembly. The complaint included a claim that failure to fill the final two months had not been precleared pursuant to section 5 of the Voting Rights Act. The district judge denied the plaintiffs immediate relief because the candidate that the plaintiffs supported was running unopposed for the seat, so omission from absentee ballots would not be injurious. A three-judge district court found that section 5 preclearance was not required for the unusual circumstances.

*Subject:* Election dates. *Topics:* Getting on the ballot; section 5 preclearance; three-judge court; laches; matters for state courts.

Five voters supporting the Democratic nominee for a seat in New York’s assembly that became vacant in April 2008 because of the incumbent’s felony convictions filed a federal complaint in the Eastern District of New York on September 19 seeking an injunction for a special election on the day of the November 4 general election to fill out the last two months of the vacant term.<sup>1</sup>

On September 4, New York’s court of appeals resolved the candidate’s state-court suit by determining that state law contemplated that a vacancy arising after April 1 would remain vacant until the next legislative session.<sup>2</sup> The federal complaint alleged that not including on the November 4 ballot a special election for the remainder of the term was a change in practice that had not received preclearance pursuant to section 5 of the Voting Rights Act,<sup>3</sup> which applied to Kings County (Brooklyn).<sup>4</sup>

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1. Complaint, *Barron v. N.Y. City Bd. of Elections*, No. 1:08-cv-3839 (E.D.N.Y. Sept. 19, 2008), D.E. 1; Opinion, *id.* (Nov. 4, 2008), D.E. 39 [hereinafter Section 5 Opinion], 2008 WL 4809450; *see Amended Complaint, id.* (Oct. 6, 2008), D.E. 18.

2. *Barron v. Bd. of Elections*, 11 N.Y.3d 745, 896 N.E.2d 658, 867 N.Y.S.2d 23 (2008).

3. Complaint, *supra* note 1, at 15–16; *see Voting Rights Act of 1965*, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

4. U.S. Dep’t of Justice, *Jurisdictions Previously Covered by Section 5*, [justice.gov/crt/jurisdictions-previously-covered-section-5](http://justice.gov/crt/jurisdictions-previously-covered-section-5).

The plaintiffs filed a motion for a temporary restraining order and a preliminary injunction on September 22.<sup>5</sup> Judge Raymond J. Dearie met with the parties that day and ordered expedited briefing.<sup>6</sup> Following a September 29 telephone conference, Judge Dearie denied the plaintiffs immediate relief on October 1.<sup>7</sup>

The Court has been advised by counsel that while the printing of absentee, military, and special ballots for the November 4, 2008 election will commence in short order, changes to the regular ballots can be made for at least several more weeks. In light of the fact that Ms. Barron is the only candidate to have filed a valid petition for the term expiring on December 31, 2008, and would therefore run unopposed if the relief plaintiffs seek is ultimately granted, plaintiffs will not suffer irreparable harm if Ms. Barron's name does not appear on the military, absentee, and special ballots for the expiring term.<sup>8</sup>

Moreover, the span of fifteen days between the court of appeals' decision and the filing of the federal complaint "does call into question the emergent nature of the request for equitable intervention."<sup>9</sup>

Judge Dearie requested from the circuit's chief judge a three-judge district court to hear the section 5 claim.<sup>10</sup> Circuit Judge Reena Raggi, Judge Dearie, and Eastern District of New York District Judge Frederic Block heard the case on October 8 and denied the section 5 claim on November 3.<sup>11</sup> Lamenting "the factually wanting submissions of both parties,"<sup>12</sup> the court determined that a special election held in 2000 according to the plaintiffs' desired scheme may have been an anomaly, so failure to follow that pattern would not be a change requiring section 5 preclearance.<sup>13</sup>

Noting the candidate's general-election success, Judge Dearie dismissed the case as moot on July 29, 2009.<sup>14</sup>

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5. Motion, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. Sept. 21, 2008), D.E. 4, 7; Section 5 Opinion, *supra* note 1, at 3.

6. Order at 1, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. Oct. 1, 2008), D.E. 16 [hereinafter Oct. 1, 2008, Order]; Section 5 Opinion, *supra* note 1, at 3.

7. Oct. 1, 2008, Order, *supra* note 6; Section 5 Opinion, *supra* note 1, at 3.

8. Oct. 1, 2008, Order, *supra* note 6, at 3.

9. *Id.* at 3–4.

10. *Id.* at 3.

11. Section 5 Opinion, *supra* note 1; Minutes, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. Oct. 8, 2008), D.E. 29.

12. Section 5 Opinion, *supra* note 1, at 6.

13. *Id.* at 6–8.

14. Order, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. July 30, 2009), D.E. 40.