

20-1494-CV

United States Court of Appeals

for the

Second Circuit

ANDREW YANG, individually and on behalf of all others similarly situated,
JONATHAN HERZOG, individually and on behalf of all others similarly
situated, HELLEN SUH, individually and on behalf of all others similarly
situated, BRIAN VOGEL, individually and on behalf of all others similarly
situated, SHLOMO SMALL, individually and on behalf of all others similarly
situated, ALISON HWANG, individually and on behalf of all others similarly
situated, KRISTEN MEDEIROS, individually and on behalf of all others
similarly situated, ROGER GREEN, individually and on behalf of
all others similarly situated,

Plaintiffs-Appellees,

JAY BELLANCA, TRACI STRICKLAND, EMILY ADAMS, NESTOR
MEDINA, SIMRAN NANDA, KATHRYN LEVY, JOSHUA SAUBERMAN,
CARI GARDNER, STEPHEN CARPINETA, NANCY DEDELVA, TING
BARROW, PENNY MINTZ, GEORGE ALBRO,

Intervenors-Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICI CURIAE* SENATOR BERNIE SANDERS AND
BERNIE 2020 INC. IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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– v. –

PETER S. KOSINSKI, Co-Chair and Commissioner, individually and in his official capacities at the NYS BOE, TODD D. VALENTINE, Co-Executive Director, individually and in his official capacities at the NYS BOE, ROBERT A. BREHM, Co-Executive Director, individually and in his official capacities at the NYS BOE,

Defendants-Appellants,

ANDREW SPANO, Commissioner, individually
and in his official capacities at the NYS BOE,

Intervenor-Defendant-Appellant,

NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS A. KELLNER,
Co-Chair and Commissioner, individually and in his official
capacities at the NYS BOE,

ADR Providers-Intervenors-Defendants-Appellants,

ANDREW CUOMO, As Governor of the State of New York,

Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P 26.1(a) and 29(a)(4)(A), Bernie 2020 Inc. states that it is a Vermont corporation with no parent corporation. No publicly held company owns 10 percent or more of the stock in Bernie 2020 Inc.

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IDENTITIES AND INTERESTS OF AMICI CURIAE

1. Senator Bernie Sanders has served as United States Senator for the State of Vermont since 2007, and is a candidate for the Democratic nomination to the 2020 presidential election. Senator Sanders petitioned and duly qualified to appear on the ballot for New York’s 2020 Democratic presidential primary (the “Primary”), which is scheduled to take place on June 23, 2020. When announcing the suspension of his presidential campaign on April 8, 2020, Senator Sanders emphasized that he intended to remain on the ballot in upcoming primaries, for the purpose of building a larger and more influential delegation to the Democratic National Convention (the “Convention”). In the 2016 election cycle, Senator Sanders and his delegation actively participated in the Convention and its Committees, securing important reforms to the Democratic Party’s platform, rules and bylaws. Significantly, Senator Sanders succeeded in changing party rules that previously conferred disproportionate power on unelected “superdelegates,” most of whom are party leaders and elected officials.

On April 27, 2020, Defendants-Appellants at the New York State Board of Elections (the “Board”) invoked the newly enacted New York Election Law § 2-122-a (12) against Senator Sanders and his delegates, removing them from

the primary ballot (the “Ballot Removal”) and consequently canceling the election (the “Primary Cancellation”). The Ballot Removal frustrated Senator Sanders’ widely publicized efforts to accrue additional delegates for a stronger political position at the Convention. This deprivation, in turn, has interfered with the Senator’s efforts to rally his supporters behind the presumptive Democratic nominee, Vice President Joe Biden. Senator Sanders appears as *amicus curiae* with the consent of all parties.

2. Bernie 2020 Inc. (the “Campaign”) is the official campaign committee of Senator Sanders’ 2020 presidential candidacy. The Campaign devotes a substantial portion of its operations and resources to organizing and supporting Senator Sanders’ pledged delegate candidates, including assistance with ballot access. The Campaign facilitates delegate involvement at the Convention, has assisted in Senator Sanders’ party unification efforts, and has participated in dialogues with Vice President Biden’s campaign regarding delegate allocation. The Campaign submitted written objections on the morning of Defendants-Appellants’ vote to approve the Ballot Removal and the Primary Cancellation. The Campaign appears as *amicus curiae* with the consent of all parties.

ARGUMENT

Senator Sanders and his Campaign respectfully submit this brief of *amici curiae* in support of Plaintiffs-Appellees and Plaintiffs-Intervenors-Appellees, urging affirmance of the decision below.¹ The *amici* endeavor to minimize overlap with the arguments briefed by the parties, limiting themselves to matters uniquely suited to their knowledge, experience or perspective.

POINT ONE

Senator Sanders and His Campaign Have Supported and Invested in Delegates, Recognizing the Civic Importance of Delegate Selection and Participation at Party Conventions

The *amici* commend the District Court for appreciating the important role that presidential primaries play in selecting delegates, and that delegates play in the political process. Only by understanding these functions could the Board hope to weigh and balance of the Constitutional rights directly and adversely affected by its Ballot Removal and Primary Cancellation. Unfortunately, the Board's own statements – trivializing the election of delegates as a “beauty contest” (Joint Appendix (“J.A.”), 289, ¶ 57; J.A. 118, ¶ 38) – betray a frail grasp of the pivotal purpose delegates serve in party governance and, in turn, national political discourse.

¹ This brief was authored entirely by the undersigned counsel to the *amici curiae*, and not by any party or party's counsel. No party, party's counsel, or person other than the *amici curiae* contributed money to fund the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29(2), all parties have consented to the filing of this brief.

The election at issue, now to be held on June 23, 2020, is commonly portrayed as a “Presidential” primary election. But as the court below recognized, it has an equally important additional component – electing delegates to the Democratic Party’s National Convention (the “Convention”). Special Purpose Appendix (“S.P.A.”), 21. The Convention, in turn, has two facets. Most famously, it is the event at which the party’s Presidential and Vice-Presidential candidates are chosen by the delegates. Call for the 2020 Democratic National Convention (hereafter, “Call”), App. B.² But the delegates also debate, adopt and promulgate the party platform, which sets out the party’s policy priorities. *See* Call, Section VII.H (Platform Committee). Equally important to the direction of the party, the delegates debate, adopt and promulgate proposed rules on the Convention and its agenda, amendments to the Charter of the Democratic Party, and any other matter they choose. Call Section VII.I (Rules Committee).

The delegates’ role in party governance does not end at the quadrennial Convention. From 2020 through the selection of new delegates in 2024, the group of delegates chosen for this year’s Convention (a group itself denominated as the “National Convention”) collectively remain “the highest authority of the Democratic Party.” The Charter & The Bylaws of the Democratic Party of the United States,

² Available at <https://democrats.org/wp-content/uploads/sites/2/2019/07/2020-Call-for-Convention-WITH-Attachments-2.26.19.pdf> (last visited May 10, 2020).

Charter Article Two, Section 2 and Bylaws Article One, Section One (as amended August 25, 2018) (hereafter “Charter & Bylaws”).³ Accordingly, state party rules and state laws must be harmonized with “the resolutions or other actions of the National Convention.” Charter & Bylaws, Charter Article Two, Section 2. The actions of the Democratic National Committee (“DNC”) are subordinate to the National Convention’s decisions. Charter & Bylaws, Charter, Article Three, Section 1. Party officials, including the DNC’s Executive Committee and its National Chairperson, are to carry out “the programs and policies of the National Convention and the Democratic National Committee.” Charter & Bylaws, Charter, Article Four, Section 1; Article Five, Section 1. The delegates assembled at the Convention are thus the sovereign governing body of the Democratic Party.

This Court has recognized the freestanding importance of delegates to the electoral process, and has rejected the insinuation that New York’s delegate elections are a “straw poll” or “beauty contest”:

Although popular attention may well focus on the number of delegates pledged to each candidate at the convention, the delegates themselves will also cast votes on platform issues and issues of party governance. No doubt, the chief purpose of many voters will be to send a message on presidential candidates. But that does not mean that we must treat these thirty-one elections as if they were a straw poll. In short, registered Republicans in each district will be electing a slate of three people who are pledged to vote for a particular candidate, who may be

³ Available at <https://democrats.org/wp-content/uploads/2018/10/DNC-Charter-Bylaws-8.25.18-with-Amendments.pdf> (last visited May 10, 2020).

freed to vote for anyone, and who will vote at the convention on other issues as well.

Rockefeller v. Powers, 74 F.3d 1367, 1380 (2d Cir. 1995). The court below, in keeping with these decisions, correctly identified the harms engendered by the Board's actions:

[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.

S.P.A., 21.

One must also pause to consider the importance of the New York delegation. New York has been allotted 320 delegates to the Convention (inclusive of bonus delegates), out of a total of 4,533 – the second largest number of delegates of any State in the Nation. Call, App. B.⁴ The composition and membership of the New York delegation is key to the future direction of the Party.

As a result, it is no surprise that candidates (including Senator Sanders and his Campaign) have expended substantial effort directed at the New York election in general, and specifically at identifying, promoting, and encouraging delegates

⁴ Available at <https://democrats.org/wp-content/uploads/sites/2/2019/07/2020-Call-for-Convention-WITH-Attachments-2.26.19.pdf> (last visited May 10, 2020).

pledged to Senator Sanders. *Amici* took those steps based on provisions of New York law that specifically required election of delegates at a Primary. The resources marshaled by the Campaign to organize New York delegates included substantial sums on salaries, supplies, travel and lodging, and hundreds if not thousands of volunteers assisting in efforts directed at the New York election.⁵ The campaign also had six paid organizers and a paid supervisor between December 16, 2019 and January 18, 2020, who organized meetings and collected signatures; three organizers and a supervisor in state to finalize signature collection from January 18, 2020 through February 3, 2020, when signatures were submitted; roughly one full-time-equivalent staff person dedicated to New York; and other supervisory personnel devoting at least half their time to the State. In the end, Campaign staff and volunteers collected roughly 32,000 signatures for Sanders delegates.

This importance of the Primary is also reflected by the substantial campaign contributions to Senator Sanders originating from New York. New Yorkers have contributed over \$8.5 million to the Campaign, an amount again only second to one other State in the Nation.⁶

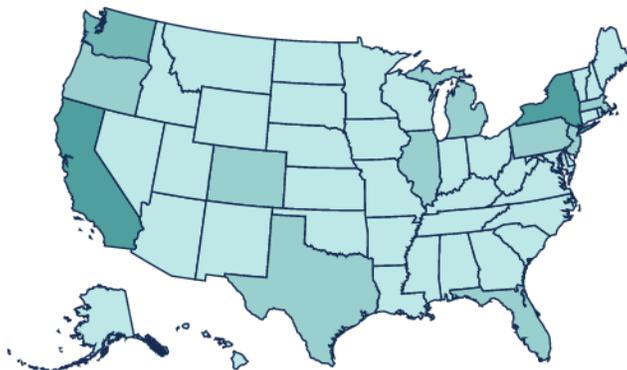
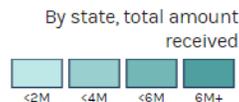
⁵ Because of the compressed time period in the court below, the parties and *amici* were not able to present evidence on these points before the District Judge. However, *amici* are prepared to provide such evidence to this Court and/or to the parties, when and if it is requested.

⁶ <https://www.fec.gov/data/candidates/president/presidential-map/>.

Nationwide: All 2020 candidates » Nationwide: SANDERS, BERNARD

SANDERS, BERNARD
[DEM]

Candidate for President
ID: P60007168



Naturally, the Sanders campaign concentrated a substantial amount of its operating expenses (which presently exceed \$195 million) on the New York election, an essential part of which is the election of Sanders delegates.

The *amici* care not only about their delegates, but also about the manner in which those delegates are chosen. The method by which delegates are selected to the Convention is, and has been, a matter of intense national debate over many years. Some delegates are selected by voters, who vote in primary elections; some are selected via a statewide caucus system; and some are automatically granted delegate status due to their elected or party positions (so-called “superdelegates”). The balance among these groups is incredibly important not only because delegates select candidates, but because delegates establish party platforms, which affect the

direction of the party (and the Nation) for the following four years, if not longer. As an example, specific policies advanced by Senator Sanders in his 2016 presidential campaign and at the 2016 Convention⁷ later became part of the national political conversation in the 2018 elections, Congress, and state and local legislative bodies. By the time of the 2020 presidential elections, many of these ideas had gained such mainstream acceptance that they were espoused by a majority of the Democratic Primary candidates. Thus, the selection of like-minded delegates to the Convention is not just about presidential candidates; it is about having the right advocates present at the Convention to advance ideas and principles that can be implemented at all levels of government.

For years, Senator Sanders has objected that our political system, including the role of superdelegates and the manner in which delegates are selected, is unfairly weighted toward party insiders, at the expense of voters themselves. The *amici* have expended substantial energy and effort over the last three years convincing the Democratic Party to move away from insider control over the critical process of delegate selection for the 2020 Convention. Appellants now recommend jettisoning direct democratic elections of New York delegates for an as-yet unidentified process in which party insiders (either at the state or national level) will substitute their

⁷ These include policies such as Medicare for All, expanded Social Security, free college tuition, and a \$15 minimum wage.

judgments and values for those of the voters. They blithely assure this Court that this behind-closed-doors sausage-making will vindicate the Constitutional rights of the delegates themselves; the voters; and the candidates. But this is a predictive judgment which is by no means self-evident.

POINT TWO

The Amici's Discussions of a Negotiated Delegate Allocation Are Preliminary, Tentative, and No Substitute for an Actual Primary

The *amici* wish to comment further on Defendants-Appellants' argument that the possibility of a negotiated delegate allocation, agreed upon by the Sanders and Biden campaigns (a "Delegate Allocation"), negates the damage done by the Ballot Removal and Primary Cancellation. (Appellants' Brief ("App. Br."), 34; Joint Appendix ("J.A."), 121-22). While Senator Sanders and his Campaign are grateful to Vice President Biden's campaign for its collegiality in considering a Delegate Allocation, the two groups have at most reached a preliminary agreement that is vague as to substance and uncertain as to enforceability.

The campaigns' exploratory efforts to formulate a Delegate Allocation do not remedy or excuse the Constitutional injuries caused by the Primary Cancellation. The First Amendment is not a contract for the sale of goods that requires a party aggrieved of its civil liberties to mitigate damages. There is no "cover" for the deprivation of core political rights. And the First Amendment does not afford lesser redress to those who take voluntary steps to mitigate Constitutional injuries. Even if

a Delegate Allocation had been consummated, which it hasn't, it would not moot the Appellants' claims. In any event, to the *amici*'s knowledge, Senator Sanders is the only one of ten candidates purged from the ballot for whom any Delegate Allocation has been considered.

Senator Sanders was harmed by the Ballot Removal, among other reasons, because it made his accrual of delegates dependent on the largesse of a former rival and a party establishment that he has long sought to reform. Senator Sanders has campaigned on a platform of party transformation, calling for more transparent and responsive governance structures within the Democratic Party. Acceptance of a Delegate Allocation could well compromise his advancement of these positions. Senator Sanders would prefer to stand on the strength and legitimacy of a delegation he has earned himself, through the electoral process.

And even if it were inclusive of all candidates, mathematically fair and final – none of which may be said with certainty at this point – a Delegate Allocation would still deprive voters and candidates of the intrinsic benefits of an actual election. A Delegate Allocation would be, at best, an ersatz substitute for a real Primary. Elections have civic and democratic purpose beyond the determination of winners and losers.

Win or lose, elections are a source of legitimacy. The “consent of the governed,” as expressed through elections, is the root of the government’s moral

authority in our democracy. Declaration of Independence, Preamble (U.S. 1776). So too are elections the primary mechanism by which candidates seek to legitimate and prove viable their ideas, by showing that those ideas enjoy a measure of public acceptance. Without the benefit of an election to confirm the strength of Senator Sanders' support in New York, the delegates awarded to Senator Sanders through a Delegate Allocation would inevitably be marginalized.

Few candidates know this better than Senator Sanders, who started his career as an unconventional figure in Vermont, gained popularity through early electoral losses,⁸ and decades later had amassed enough support to win election to mayoral

⁸ Senator Sanders' began his political career with 1972 runs in the Vermont gubernatorial election (receiving 1.1% of the general election vote as a minor party candidate) and Senate election (receiving 2.2% of the vote). In 1974, he competed and lost in another Senate election, receiving 4.1% of the vote. In 1976, he competed and lost in another gubernatorial election, receiving 6.1% of the vote. In 1981, he won his first election as an independent candidate for mayor of Burlington, Vermont, receiving 43.4% of the vote, edging out his Democratic competitor by one tenth of one percent. Two years later, he was reelected over a new Democratic rival by a margin of more than 21%. By the time of his 1985 reelection, that margin had widened to more than 25%. In 1986, he attempted another gubernatorial run and received 14.4% of the vote, more than double his previous total. In 1988, he ran for Congress as an independent, receiving 37.5% of the vote in the general election, but losing to his Republican competitor by less than four points. In 1990, he won election for the first time to the House of Representatives, collecting 57.8% of the vote as an independent candidate (nearly 27% more than his Democratic rival). There is a clear arc to this story: Senator Sanders lost by increasingly narrower margins, until eventually he won.

office, the House of Representatives and eventually the U.S. Senate.⁹

Federal courts have recognized, even for candidates with little or no chance of winning an election, that such contests still provide a Constitutionally significant “opportunity to capitalize on the disaffected group of voters created . . . after the major parties’ . . . candidates are known.” *Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687, 701 (8th Cir. 2011). Applying this principle, these courts have frequently invalidated, on First and Fourteenth Amendment grounds, ballot access measures that could prevent minor parties from competing in (and losing) elections:

The States’ interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. . . Overbroad restrictions on ballot access jeopardize this form of political expression.

Illinois State Bd. Of Elections v. Socialist Workers Party, 440 U.S. 173, 185-86 (1979). These principles apply with equal force to underdog candidates in major party primaries, especially those for whom candidacy is a vehicle for political expression, the spread of ideas, and in the case of Senator Sanders, the expansion of a progressive movement built up through decades of successes, setbacks and

⁹ Senator Sanders made his third bid for Senate in 2006, 32 years after his second failed attempt in 1974. He won the Democratic primary with a landslide vote share of 94.2%. He ran as an independent in the general election, obtaining 65.4% of the vote, more than double the showing of his closest competitor.

incremental gains. A Delegate Allocation would be no substitute for a Primary because it would deny Senator Sanders and other candidates an expressive platform and the legitimizing stature of votes won through a real election.

A Delegate Allocation would divest Senator Sanders of another benefit unique to a Primary: the ability to attract votes to ideologically aligned down-ballot candidates by increasing voter turnout at their elections. Senator Sanders supports kindred candidates because it is the right thing to do. But entrenching ideological allies in state and local offices also strengthens, legitimizes and normalizes the progressive movement of which Senator Sanders is a part. In a two-party landscape where outsider candidates like Senator Sanders gain political access by consolidating incremental gains over the course of decades, the importance of tying his candidacy to a broader political movement, which will continue beyond the sunset of his Campaign, cannot be overstated. A Delegate Allocation might give Senator Sanders more seats at the Convention, but it would do nothing to address the loss of voter turnout for Senator Sanders' down-ballot allies.

In explaining his decision to support the Ballot Removal and Primary Cancellation, Defendant-Appellant Kellner belittled the Primary as a “frivolous . . . beauty contest.” (J.A. 289, ¶ 57; J.A. 118, ¶ 38). These are remarkable statements coming from one of the state's top election officials. Would the Board consider a minor party candidacy “frivolous” if the candidate was running to raise issue

awareness with no expectation of winning? Decades of First Amendment jurisprudence stand for the opposite view.

It is equally remarkable that the Board measures the benefit of a Primary Cancellation by the number of votes it would eliminate. (App. Br. 14; J.A. 119). Something is amiss when the agency responsible for “enhancement in voter participation in elections”¹⁰ seeks praise for what amounts to wide-scale vote suppression. The Board seems oblivious to the immediate irony of its argument: it gauges the worth of the Primary Cancellation by the number of votes that would not be cast on June 23; but each of these is a vote suppressed, a quantum of Constitutional harm, and an indicator of the public’s disagreement with the Board’s view that the Primary does not matter. The severity of the Constitutional injury caused by the Primary Cancellation grows in direct proportion to the number of votes it eliminates. Each vote eliminated represents a citizen who, knowing that her or his vote is unlikely to impact the candidates to be nominated to the presidential election, still wants that vote to be counted. The belief of these voters in the importance of the Primary is self-fulfilling: it imbues the votes the Board considers “frivolous” with First Amendment significance.

¹⁰ Mission Statement of the New York State Board of Elections, *available at* <https://www.elections.ny.gov/AboutSBOE.html> (last visited May 10, 2020).

The *amici* presume the Board acted in good faith and with good intentions. But it is evident from Defendants-Appellants' own statements that the Board failed to grasp the full Constitutional dimensions of its decision. The Board seeks refuge and deference on grounds that it acted within its "institutional expertise . . . in the field of election regulation." App. Br. 23-24. That expertise should include knowledge of the Constitutional and jurisprudential backdrop against which its decisions are made. It appears that the Board suffered a momentary lapse of expertise when dismissing the Primary as a "beauty contest," when the decisions of this Court emphatically reject that characterization.

The Board overlooked the significance of delegates to Democratic Party governance, a quintessential exercise of associational rights. The Board overlooked the significance of how delegates are chosen, itself a politicized issue on which different factions of the Democratic Party hold different viewpoints. The Board overlooked the ripple effect that the Primary Cancellation would have on voter turnout for down-ballot candidates. And the Board overlooked the essential importance of elections as rites of legitimacy for both delegates and ideas.

The *amici* respectfully urge this Court to affirm the decision below, and thank the Court for this opportunity to be heard.

DATED this 11th day of May, 2020.

Respectfully submitted,

/s/ Malcolm Seymour

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**CERTIFICATE OF COMPLIANCE WITH FED R. APP. P. 32(a)
AND LOCAL RULE 32.1(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4). It contains 3,704 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-Point Times New Roman.

Dated: May 11, 2020

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CERTIFICATE OF SERVICE

I certify that on May 11, 2020, I electronically filed the foregoing Brief of *Amici Curiae* Senator Bernie Sanders and Bernie 2020 Inc. in Support of Plaintiffs-Appellees and Plaintiffs-Intervenors-Appellees, Urging Affirmance, with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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