C-3

SUPREME COURT: STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Petitioner-Appellants,

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

Index No. 6056/90

Order to
Show Cause
for a Preference
of Appeal pursuant
to Supreme Court
Rules, 3rd Dept.,
Section 800.16

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondent-Respondents,

for an Order declaring invalid the Certificates
purporting to designate Respondents Hon. FRANCIS A.
NICOLAI and HOWARD MILLER, Esq. as candidates for
the office of Justice of the Supreme Court of the
State of New York, Ninth Judicial District, and
the Petitions purporting to designate ALBERT J.
EMANUELLI, Esq.. a candidate for the office of
Surrogate of Westchester County to be held in
the general election of November 6, 1990.

Upon reading and filing the annexed Affirmation, affirmed October 21, 1990, of DORIS L. SASSOWER, Esq., of DORIS

L. SASSOWER, P.C., attorney for Petitioner-Appellants, the Exhibits annexed thereto, the Decision and Order of Hon. Lawrence E. Kahn of the Albany County Supreme Court, the Petition herein and other supporting papers referred to in the annexed Affirmation, incorporated by reference from the Record on Appeal heretofore filed with the Court, and the Appellant s' Brief in support thereof heretofore filed with this Court together with the Record on Appeal; and the prior papers and proceedings heretofore had herein;

LET Respondent-Respondents show Cause before this Court at the Courthouse, at the Justice Building, South Mall, Albany, New York 12223, , on the 29 day of October, 1990, at 9:30 a.m., or as soon thereafter as counsel can be heard, why an Order should not be made and entered herein:

1. Granting a preference to the instant appeal pursuant to Supreme Court Rules, Third Dept., Article 3, Part Section 800.16, Article 1, Sections 6, 9, and 11 of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States of America, for all the reasons set forth in the annexed moving papers and exhibits thereto, in that this is an Election Law case pertaining to the upcoming November 6, 1990 Election of Justices of the Supreme Court in the Ninth Judicial District and of the Surrogate's Court of Westchester County;

2. Calling a special session and/or term of the Court to hear and expeditiously determine this Appeal before the

aforesaid November 6, 1990 elections;

3. Granting Petitioner-Appellants such other, further, and different relief as this Court may deem just and proper, including that, in the event there is insufficient time for this Court to render such determination prior to Election Day, or having made such determination by granting the petitioned relief to invalidate the Certificates of Nomination and the Designation of the judicial nominees, there is insufficient time to reconvene the Judicial Nominating Conventions to consider and duly nominate judicial candidates to fill the vacancies in the aforesaid judicial offices prior to the date of the scheduled election, that a stay thereof be granted to enjoin, restrain, and prohibit Respondent New York State Board of Elections from permitting the names of the Respondent candidates for election, Hon. FRANCIS A. NICOLAI, HOWARD MILLER, Esq., and ALBERT J. EMANUELLI, Esq., to appear on the ballots for election of Justices of the Supreme Court for the Ninth Judicial District and Surrogate's Court of Westchester County, for such General Election to be held on November 6, 1990, and thereafter directing such further election proceedings as may be called for under the Election Law, including the reconvening of the Judicial Nominating Conventions and the calling of a Special Election, if required, to implement the decision of this Court; and, it is further

ORDERED, that sufficient cause appearing therefor, let service of a copy of this Order and annexed moving papers in

support thereof, made on or before October 23 1990 upon the attorneys for Respondents by telefax and mail to their respective offices, at the telefax numbers and addresses set forth on the annexed schedule, be deemed good and sufficient service; and it is further

ORDERED, that Answering Papers, if any, be served upon counsel for Petitioner-Appellants, DORIS L. SASSOWER, P.C. at its office at 283 Soundview Avenue, White Plains, New York 10606, by overnight mail and by telefaxing same to said counsel's fax number 914/684-6554 no later than ~~one (1) day after~~ ~~Thursday~~ October 25, 1990 ~~telefaxed~~ service upon Respondents of a copy of this Order To Show Cause and supporting papers. Reply Papers, if any, to be filed on the return date hereof.

Dated: Buffalo, New York
October 22, 1990

Ann T. Mikoll

HON. ANN T. MIKOLL
J. S. C
Appellate Division, 3rd Dept.

SUPREME COURT: STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Petitioner-Appellants,

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondent-Respondents,

Index No. 6056/90

Affirmation in Support of Preference of Appeal pursuant to Supreme Court Rules, 3rd Dept., Section 800.16

for an Order declaring invalid the Certificates purporting to designate Respondents Hon. FRANCIS A. NICOLAI and HOWARD MILLER, Esq. as candidates for the office of Justice of the Supreme Court of the State of New York, Ninth Judicial District, and the Petitions purporting to designate ALBERT J. EMANUELLI, Esq. a candidate for the office of Surrogate of Westchester County to be held in the general election of November 6, 1990.

DORIS L. SASSOWER, an attorney duly licensed to practice law in the Courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am the attorney for Petitioner-Appellants in the

above-entitled special proceeding under Article 16 of the New York State Election Law, and submit this application for a preference of the appeal herein, denial of which would frustrate, if not nullify, the very meaning and purpose of said law and of proceedings brought thereunder.

2. It is respectfully submitted that Petitioners are further entitled to such preference as a matter of right pursuant to Section 800.16 of the published Rules of this Court, as well as under applicable provisions of the Federal and State Constitutions, as detailed in the Order to Show Cause annexed hereto.

3. It must be stressed at the outset that the Legislature gives an extremely limited time period to enforce rights granted under the Election Law. Election Law, Sec. 16-158, specifically mandates that Judicial Nominating Conventions be held in the third week of September. A Petition seeking judicial review under Section 16-102(2), claiming that fraud or irregularity occurred at the judicial nominating conventions, must be initiated by Order to Show Cause obtained within ten (10) days of the Conventions. Objections and Specifications to the Certificates of Nominations filed with the New York State Board of Elections must also be filed within severely-limited time parameters. Petitioners scrupulously adhered to <u>all</u> such required time limitations, and now seek appellate review of a Lower Court Decision entered, after oral argument, on October 17, 1990.

4. For the summary judicial relief provided under Article 16 to be meaningful, it must be afforded within the six weeks prior to Election Day, since the prime purpose of the Election Law is to protect the constitutionally guaranteed rights of the voters, not to defeat them. Otherwise, candidates would claim that their illegally or fraudulently gained "rights" had vested by virtue of their election.

5. The legislative timetable clearly necessitates the mandatory preference granted to Election Law cases by this Court when it adopted Rule, Sec. 800.16, since the Court is cognizant that absent the granting of the omnibus relief, hereinafter described, the Decision-Order of Special Term would not only be the first word, but the last word. This would then lead to the legislatively-proscribed and unintended consequence that illegally and fraudulently nominated candidates would be elected, without any appellate review, and without Petitioners having had their "day in Court"--all in violation of the Constitutions of the State of New York and the Constitution of the United States.

6. A chronology of the pertinent background events is essential for the Court's proper consideration of this compelling preference application, as well as the most meritorious underlying appeal.

7. This special proceeding, under the Election Law, to enforce constitutionally-guaranteed voting rights, was commenced by Order to Show Cause, dated September 26, 1990, and supporting Petition. Argument was heard thereon before Hon. Lawrence E.

Kahn of the Supreme Court, Albany County on Monday, October 15, 1990. A copy of the Order to Show Cause, Petition, Exhibits, and Affidavits in Support appears at pages 8-75 of the Record on Appeal, on file with the Court and incorporated herein by reference. By So-Ordered Decision, dated October 16, 1990, entered the following day, Judge Kahn granted the motion of Guy T. Parisi, Esq., on behalf of Respondent Colavita, heard on October 15, 1990, to dismiss "upon the ground that the Petition fails to state a cause of action". Judge Kahn's Decision and Order, appearing at pages 3-7 of the aforesaid Record on Appeal, is likewise incorporated herein by reference.

8. It is imperative that this Court grant the critical relief requested in the instant Order to Show Cause so that the public interest can be protected by proper enforcement of the Election Law. This Court's denial of a preference will otherwise be put before the public by Respondents as representing this Court's apparent approval of the dangerous precedent represented by Justice Kahn's erroneous Decision. Moreover, after the election, Respondents will doubtless argue that the issues raised in this appeal are moot. Indeed, if the appeal is thereafter dismissed on such ground, the huge investment of legal time and money expended on Petitioners' behalf, in the public interest, will have been entirely in vain.

9. The Petition herein and Petitioner-Appellants' Brief, (likewise incorporated herein by reference, particularly pp. 1-22 thereof) clearly demonstrate that the Lower Court's

Decision and Order is grievously in error both as to its unsupported factual findings and legal conclusion based thereon that the Petition does not state a cause of action.

10. The Petition alleges that the 1990 judicial nominations of the Ninth Judicial District, incorporated in the Certificates of Nomination, filed with the New York State Board of Elections, were not only the result of an illegal contract between the two major political party leaders and their hand-picked judicial candidates, but were the end-product of Judicial Nominating Conventions which violated mandatory Election Law safeguards.

11. Petitioners set forth that the Judicial Nominating Conventions of both parties suffered from fundamental fatal defects, inter alia, that at the Democratic Judicial Nominating Convention (a) there was no Roll Call of the Delegates to ascertain the presence of a quorum; (b) that, in fact, no quorum was present; (c) that the Convention meeting room did not have seating capacity to accommodate the number of elected Delegates and Alternate Delegates, all, inter alia, in violation of Election Law 6-126; (d) that at the Republican Judicial Nominating Convention, the Convenor, Respondent Colavita, continued to preside as Permanent Chairman after the Convention was organized, in contravention of the legislative mandate contained in Election Law 6-126, designed to avoid coercion of or chilling effect on the free expression of the assembled judicial Delegates.

12. All said violations were not only alleged in the Verified Petition, but supported by sworn affidavits of witnesses at the 1989 and 1990 Conventions. Obviously, then, the determination of Justice Kahn that "there is no proof that the judicial conventions at issue were not legally organized, with a quorum present, and that a majority of that quorum duly voted for the candidates named as respondents thereto" (Record on Appeal, p. 7) ignores and flies in the face of the pleaded allegations to the contrary in the Petition, detailed more particularly in the Objections and Specifications annexed to the Petition, sworn to by Petitioners, as well as in Supporting Affidavits, which were submitted to the Lower Court and are included in the Record on Appeal.

13. The Lower Court's aforesaid determination is plainly unfounded and erroneous as a matter of law, and must be reversed. Moreover, apart from the fact that "proof" is irrelevant on a motion addressed to the sufficiency of a pleading, the Lower Court failed to afford Petitioners any opportunity to present further proof at an evidentiary hearing, notwithstanding that I had apprised the Court at oral argument on October 15, 1990 that I had witnesses who could testify as to the foregoing fatal Convention deficiencies.

14. In addition, the Petition alleges that the judicial nominations in question are the result of an illegal contract, violative of penal provisions of the Election Law, Sec. 17-158, expressing a public policy of the State of New York

prohibiting practices corruptive of the democratic process and which impair constitutionally-guaranteed voting rights. It is further alleged that this illegal contract between two major political party leaders, involving a series of judicial cross-endorsements over a three-year period, was thereafter incorporated into a written Resolution, later ratified and implemented by the respective Judicial Nominating Conventions, which the leaders conducted in violation of mandatory Election Law safeguards.

15. Clearly, without the requested preference and decision on this appeal by this Court before the November 6, 1990 election, the election of Respondent judicial candidates will proceed. In view of their cross-endorsement, the candidates are guaranteed seats on the bench. As aforementioned, Respondents will undoubtedly thereafter argue that this appeal has been rendered moot.

16. The Decision of Justice Kahn explicitly acknowledged the need for expedition and the fact that his Decision was not going to be the last word. Indeed, His Honor stated that since "this decision must be rendered in an exceedingly expeditious manner, the court shall address the merits of the petition itself, in order that the inevitable appeal process may be commenced in a timely fashion." (Record on Appeal, at p. 6, emphasis added). Such statement by His Honor accorded with the wishes expressed by counsel for all parties, to permit maximum time for review, ultimately, by the Court of

Appeals.

17. This case having been argued on Monday, October 15, 1990, His Honor expedited "the inevitable appeal process" by rendering a decision the very next day (Tuesday, October 16, 1990) and then dispensing with necessity of a Judgment, (and the time loss consequent thereto) by entering a "So-Ordered" Decision at 9:46 a.m. the following morning, i.e., on Wednesday, October 17, 1990.

18. As will be shown hereinafter, I have done all in my power to ensure that this appeal would be heard and determined in a timely fashion before the election. Prior to leaving Albany after argument on Monday, October 15, 1990, I personally checked with the Clerk's Office of the Appellate Division as to the applicable procedure in the Third Department once an appealable order was obtained from Judge Kahn.

19. I was informed by the Deputy Clerk that if I could get my Briefs and Record on Appeal served and filed by Wednesday, October 17, 1990, the case would be calendared and heard on Friday morning, October 19, 1990, and we might have a decision as early as that Friday afternoon. Indeed, it was precisely because the Deputy Clerk also told me that Friday was the last day of the term and that the Court would not be reconvening until <u>after</u> the election, that I immediately notified Justice Kahn that I was requesting his immediate decision, and that he need not wait for the further submission he had authorized me to make in response to Respondents' papers,

belatedly and improperly served on me.

20. To meet the aforesaid 24-hour deadline, an emergency session was called of the Ninth Judicial Committee, comprised of dedicated, civic-minded residents of the Ninth Judicial District, who have spearheaded the issues involved herein. They voted to undertake this Appeal, to commit themselves and their resources, and to work through the night to compile the Record on Appeal and the Appellants' Brief. Indeed, by the following day, 6,000 pages had been replicated and personal service of Appellants' Record on Appeal and Brief was effected on eight separate attorneys in New York City, Westchester, Rockland, and Albany Counties.

21. The required eight copies of my Briefs and Records on Appeal were filed with the Clerk's Office of the Appellate Division, Third Department by 4:30 p.m. on Wednesday, October 17, 1990 and the requisite fees were paid.

22. The Clerk of the Court, Michael Novack, Esq. reviewed my papers and informed me that everything was in order. I then confirmed my oral application for a preference for this election case and was told to call him the next morning at 9:30 a.m. to verify the precise time we would be scheduled for argument, which he believed would be at 9:00 a.m.

23. The next morning, however, in my telephone conversation with Mr. Novack, I was informed that the Justices of the Appellate Division, Third Department, had declined to calendar this appeal for argument on Friday, October 19, 1990.

Annexed hereto and made part hereof is my October 19, 1990 letter to Mr. Novack faxed to him that day (Exhibit "A"). Pursuant to Mr. Novack's faxed response to me, dated October 19, 1990, (Exhibit "B"), I am, accordingly, making this written motion for a preference for this appeal to be heard and decided before the upcoming November 6, 1990 election, in which the names of the Respondent candidates appear on the ballot.

24. As hereinabove described, this application accords with the mandate of the Election Law and this Court's own published Rules, which must be liberally construed to effectuate the legislative intent that election law cases shall be heard and decided in time to be meaningful, i.e. prior to the election.

Petitioners are entitled to the preference requested herein, as a matter of right, pursuant to Supreme Court Rules, Third Dept., Sec. 800.16, which provides that appeals in election cases "...shall be given preference..."

25. In view of the reverberating effect of the ultimate decision herein, it is respectfully requested that this application for preference be granted forthwith. Based upon our efforts to date to secure prompt appellate review, it is not an undue burden on Respondents to require them to serve their opposing briefs within one (1) day after service granting the preference herein. Respondents have had my Appellants' Brief and Record on Appeal since Wednesday, October 17, 1990 and were given notice by faxed communications from me, as well as the Court, on Friday, October 19, 1990 that a formal motion for a

preference would be made. This application is certainly no surprise to them.

Inasmuch as Petitioners' counsel did everything humanly possible to have this motion and appeal brought before this Court for decision at the earliest possible time, Respondents should be required to do likewise.

26. The importance of this case transcends this one election. A decision reversing the Lower Court is essential. Otherwise, the Lower Court decision will be cited as authority for future illegal cross-endorsement contracts between party bosses pre-ordaining our judges under Three-Year Plans, Five-Year Plans or longer, and "rigged" Judicial Nominating Conventions, acting as rubber stamps will be the rule. Voters will thus continue to be deprived of their constitutional right to "elect" between judicial candidates of opposing parties. Moreover, absent a preference and reversal of Justice Kahn's Decision, this Court will be deemed to have given its approval to the advance agreement by judicial nominees that their judicial appointments, such as those of conservators, guardians and the like, will be based on political patronage, not merit, in plain violation of the Code of Judicial Conduct and the Rules of the Chief Administrator of the Courts. (See Exhibit "G" to original Petition, pp. 53-54 of Record on Appeal and Appellant's Brief, pp. 17-19 therein)

27. Following the telephone conversation with Mr. Novack, advising me that this appeal would not be heard on the

calendar of Friday, October 19, as hereinabove mentioned, I was referred by Mr. Novack to the general judges number to discuss arrangements to submit an Order to Show Cause for a preference. Both Judge Casey and Judge Mikoll returned my call. Judge Casey opined that no Order to Show Cause was necessary in light of the statement by the Clerk of the Court that same could be presented by letter, which I promptly faxed to him (Exhibit "A"). However, as shown by the copy of Mr. Novack's faxed response (Exhibit "B") received at approximately 4:00 p.m. Friday, by which time all the judges had already left Albany, a letter application was not acceptable. From her Chambers in Buffalo, Hon. Ann T. Mikoll agreed to sign an Order to Show Cause, presented by me in compliance with the aforesaid requirement of the Court that I proceed by formal motion. Accordingly, I do so herewith.

WHEREFORE, it is respectfully prayed that this appeal be granted an immediate preference in the public interest and as a matter of right under the Election Law and the Rules of this Court, together with such other, further, and additional interim relief as the Court may deem just and proper.

Dated: White Plains, New York
October 21, 1990.

S/
DORIS L. SASSOWER