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COURT OF APPEALS  
STATE OF NEW YORK

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PENNY MINTZ,

Appellant,

-against-

NO. 127

BOARD OF ELECTIONS OF THE CITY OF NEW  
YORK,

Respondent.

RACHEL LAVINE,

Intervenor-Respondent.

-----

20 Eagle Street  
Albany, New York  
August 29, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

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1 CHIEF JUDGE DIFIORE: Good morning, everyone.  
2 This is appeal number 127, Matter of Mintz v. Board of  
3 Elections of the City of New York.

4 Counsel?

5 MR. SCHWARTZ: Thank you, Your Honor. Could I  
6 reserve two minutes at the end? I'm not sure of the proper  
7 procedure.

8 CHIEF JUDGE DIFIORE: Yes, of course you may.

9 MR. SCHWARTZ: Thank you very much. Your Honors,  
10 I first - - - you know, it was an expedited procedure in  
11 getting our briefs here, and - - - and I'm going to talk  
12 about two cases that - - - or one case, at least, that I  
13 didn't cite in my brief, and I handed it to the clerk. I  
14 have seven copies if the court wants.

15 I believe that it's important - - - I mean, you  
16 guys hear tons of election cases where - - - issues of  
17 content and form and whatever. And I - - - I spent the  
18 weekend looking to see whether this court had any decisions  
19 where it talked about the impact of the 1992 and 1996  
20 amendments to the Election Law on this strict compliance  
21 and what had to be strictly complied with or not. And I  
22 couldn't find - - - I couldn't find any.

23 The Bosco case, which the respondents rely on and  
24 which this court just affirmed based on the opinion below,  
25 said, "The Court of Appeals has repeatedly held that there



1 must be strict compliance with statutory commands as to  
2 matters of prescribed content." And that was in 1984.

3 Then I found a - - - a decision out of the Second  
4 Department - - - sorry, the Third Department, 190- - - -  
5 it's Hogan v. Goodspeed, 196 A.D. 2d 675, where the Third  
6 Department stated that the - - - that content - - - that  
7 the content rather than form rule - - - and then they cited  
8 a long line of Court of Appeals cases - - - has been  
9 "legislatively overruled by the new Election Law. No  
10 longer are the courts permitted to abort candidacies and  
11 disenfranchise voters as a result of an innocent violation  
12 of some technical requirement having no logical bearing  
13 upon the underlying purpose of preventing fraud."

14 This decision, which was in 1993, so nine years  
15 after Bosco, was unanimously affirmed by this court at 82  
16 N.Y. 2d 710.

17 This case is a perfect vehicle, we think, to  
18 emphasize what the court affirmed in 1993 and to apply the  
19 line of cases that we cite at page 17 of our brief, which  
20 allows a designate - - -

21 JUDGE RIVERA: Counsel, just for clarification,  
22 where is the requirement of the reference to "female"?

23 MR. SCHWARTZ: Where is the - - -

24 JUDGE RIVERA: Where is that requirement that it  
25 must include the word "female", a petition - - -



1 MR. SCHWARTZ: It isn't. There is no requirement  
2 that - - -

3 JUDGE RIVERA: So where is - - - where is that  
4 coming from that the - - -

5 MR. SCHWARTZ: Okay. The - - -

6 JUDGE RIVERA: - - - you have to identify as  
7 female - - - that word must be deployed?

8 MR. SCHWARTZ: Section 2-102 of the Election Law  
9 states that where a party has a rule that requires male and  
10 female, it says the petition "shall list candidates  
11 separately by sexes." That's the - - - that's - - - that's  
12 it.

13 Section 6-132, which talks about content, simply  
14 says you have to put the name of the position.

15 So what the dissent said here and what we argue  
16 is that the name of the - - - the position as per the  
17 Democratic Party rules, which are in the record, is "member  
18 of the state committee". Then in a separate line it says  
19 each assembly district shall elect a male and a female to  
20 such position. It doesn't say there shall be 200 male  
21 state committee members and 200 female state committee  
22 members.

23 And that section, 2-102, that Judge Edmead relied  
24 on and the First Department simply - - - the majority  
25 simply said for the reasons that Judge Edmead stated, which

1 was Bosco - - -

2 JUDGE RIVERA: Um-hum.

3 MR. SCHWARTZ: - - - doesn't - - - it says they -  
4 - - it shall list candidates separately by sexes.

5 Now, the petition here had one candidate on it.  
6 There was no ability to list them separately by sexes. The  
7 letter filed by - - -

8 JUDGE FEINMAN: Now, there would have been an  
9 ability if you had listed it, that there is a male - - - I  
10 mean, the male and female are elected at the same time. So  
11 the fact that - - -

12 MR. SCHWARTZ: If it was on - - -

13 JUDGE FEINMAN: - - - she may not be running - -  
14 -

15 MR. SCHWARTZ: - - - the ballot.

16 JUDGE FEINMAN: - - - in a slate with a - - - a  
17 male - - -

18 MR. SCHWARTZ: Right, if - - - so - - -

19 JUDGE FEINMAN: - - - doesn't necessarily relieve  
20 her of the burden to identify herself as the female  
21 candidate.

22 MR. SCHWARTZ: I - - - I - - - so in a petition  
23 that has more than one candidate, which - - - which the  
24 intervenors attached a copy of one to their letter, where  
25 there was a male and a female running on the same petition,



1 it said "male" and "female".

2 In this petition, there was one - - - so it said  
3 "must be listed separately". It doesn't say must have the  
4 word "male" and "female". It says - - -

5 JUDGE STEIN: But how - - - how is it - - - how  
6 are you say - - - suggesting it's listed separately. You  
7 mean on the petition itself with only one candidate, that's  
8 a separate listing?

9 MR. SCHWARTZ: It has to identify - - - if  
10 there's two names, it has to identify one - - - who's a  
11 male and who's a female.

12 JUDGE STEIN: Well, but - - - but that's not what  
13 it says. It says that the petition shall list candidates  
14 separately by sex.

15 MR. SCHWARTZ: Right.

16 JUDGE STEIN: Right? Okay. So if there are two  
17 candidates who are running but they're - - - as they were  
18 here, but they run on separate petitions, you're saying  
19 that the - - - that each petition does not have to identify  
20 the sex or gender of the person who is seeking - - -

21 MR. SCHWARTZ: So this - - -

22 JUDGE STEIN: - - - a petition - - -

23 MR. SCHWARTZ: - - - is - - - this is why I think  
24 this is a good case to talk about whether we - - - whether  
25 we and this court continues - - - I mean there's - - - most



1 of the cases come up here are about whether we're going to  
2 strictly comply or substantially comply or liberal  
3 construction, strict construction. I assume - - - I do  
4 Election Law - - - that - - - that's what what they often -  
5 - - often the cases turn on.

6 Here, if one uses the liberal construction rule,  
7 then there's a whole line of cases that say look to the  
8 petition. It says a designated petition should stand if  
9 it, quote - - - this is a - - - all the cases on page 17 of  
10 our brief - - - sufficiently - - - if the petition is  
11 sufficiently informative so as to preclude any reasonable  
12 probability of confusing or deceiving the signers, the  
13 voters, or the Board of Elections.

14 Now, here, we say that a petition by someone  
15 named Penny was sufficiently informative to tell people  
16 that she was a female. The Board of Elections itself, when  
17 she filed, put her down as a female. They - - - they  
18 published a list for two weeks - - -

19 JUDGE FEINMAN: That's the - - - the clerk - - -  
20 the administrative clerk who takes it. It's not a ruling  
21 by the Board at that point.

22 MR. SCHWARTZ: I understand it's not a ruling by  
23 the Board. But the reaction of the clerical people in the  
24 Board of Elections was to say Penny, female, just like the  
25 voters. So the question - - - it's not reasonable





1 probability - - - it's not all probability, it's reasonable  
2 probability, that - - - that the voters will not be  
3 deceived by what they're reading on the petition.

4 JUDGE GARCIA: So in a case where there was a  
5 name that wasn't so readily identifiable, we would have a  
6 different outcome?

7 MR. SCHWARTZ: Yes, you would have a different  
8 outcome if the - - -

9 JUDGE GARCIA: So if the name - - -

10 MR. SCHWARTZ: - - - if the name was - - -

11 JUDGE GARCIA: - - - it's named based?

12 MR. SCHWARTZ: - - - my wife's name is Kelly.  
13 Kelly could be a male or female. There - - -

14 JUDGE GARCIA: So it would really depend on how  
15 you view your name. So if I feel that my name won't cause  
16 confusion, then I don't have to do that?

17 MR. SCHWARTZ: Well, I don't think it's - - -  
18 it's whether your name - - - if you think your name won't  
19 cause confusion. It's whether a reasonable person - - -

20 JUDGE GARCIA: So we would be passing on that.  
21 So a name that might be closer, we would have to say, well,  
22 that name a reasonable person would - - - don't you see  
23 that it would be a problem with that?

24 MR. SCHWARTZ: But I think that that's true on  
25 every one of these issues where someone describes a



1 position wrong. They say it's - - -

2 JUDGE GARCIA: This is a gender description. So  
3 you're asking us to assume a name as associated with a  
4 particular gender. That's what we would have to do.

5 MR. SCHWARTZ: Yes, I'm - - - I'm saying that if  
6 you look at the petition as a whole, that the name Penny  
7 suggests a female.

8 JUDGE FAHEY: It seems we'd be trapped by - - -

9 JUDGE FEINMAN: So if somebody - - - I'm sorry.

10 JUDGE FAHEY: No, go ahead, Judge. No, you're  
11 fine. Finish your thought.

12 JUDGE FEINMAN: So what if it's a foreign name -  
13 - - when I say foreign, I mean one that is not common to  
14 traditional speakers of English. Then what? I mean - - -

15 MR. SCHWARTZ: Uh - - -

16 JUDGE FEINMAN: - - - do you understand the  
17 danger of the rule you're proposing?

18 MR. SCHWARTZ: But it's not a dangerous rule.  
19 Most of what judges do, just like the Board of Elections  
20 has to do, is they look at facts and they make decisions  
21 based on what's - - - what's in front of them.

22 JUDGE GARCIA: But as a policy matter, would we  
23 want to put judges in that position, rather than put what  
24 seems to be a not significant burden on someone going out  
25 and getting 1,900 signatures to list their gender?



1 MR. SCHWARTZ: But - - - but here - - - so again,  
2 this is - - - if we're going to do the strict compliance,  
3 which is like, hey, you didn't put female, or you're going  
4 to - - - or are you going to apply a reasonable standard -  
5 - -

6 JUDGE GARCIA: I think you're confusing a little  
7 bit there the standard with - - - whatever standard we're  
8 using, let's say it's a looser standard than strict  
9 compliance, to me, if you don't use the name, and you have  
10 two slots open, a male and a female slot, and you go out  
11 with a petition, and you get people to sign it, and they  
12 don't know which of those gender slots you're running for -  
13 - - and put the name aside - - - they could be supporting a  
14 candidate for the female slot; you're not identifying which  
15 of those two slots - - - so I'll sign your petition.

16 Maybe it - - - it's a different slot. It's just  
17 member of the committee. So you're causing confusion there  
18 under any standard if you don't look at the name.

19 MR. SCHWARTZ: But the - - - if you - - - if you  
20 - - - but who - - - people look at - - - you know, this is  
21 a one-person petition. It's not like a list, and somewhere  
22 down the list there was a name that you couldn't identify.  
23 This was a one-person petition, Penny Mintz was as the top,  
24 Penny Mintz did most of the petitioning, she herself  
25 collected 500 signatures. And the circumstances have to -



1 - - the facts of the petition - - -

2 JUDGE RIVERA: Let - - -

3 MR. SCHWARTZ: - - - and that 1,900 people signed  
4 it is - - - is particularly important. I don't want to  
5 lose - - -

6 JUDGE RIVERA: Let me ask - - - let me ask you  
7 this. Let's say that Penny Mintz, she identifies as a  
8 female, but on the petition it says "male", what - - - what  
9 happens then?

10 MR. SCHWARTZ: If she identifies as female but -  
11 - -

12 JUDGE RIVERA: She herself identi - - - that's  
13 how she recognizes herself.

14 MR. SCHWARTZ: Right.

15 JUDGE RIVERA: That's how she lives in the world  
16 as a female. The petition says "male" on it. What happens  
17 then?

18 MR. SCHWARTZ: Well, that - - - that, I think,  
19 shows some underlying problems. Judge Edmead talked about  
20 it, not in her decision, but when she was talking about it  
21 with the - - - with the rule, because the rule doesn't  
22 recognize exact - - - some stuff that's going on in society  
23 and in American society today.

24 JUDGE FEINMAN: That's - - -

25 JUDGE RIVERA: But how to answer my - - - please



1 - - -

2 JUDGE FEINMAN: - - - for the party to work out.

3 JUDGE RIVERA: - - - answer my question. What -  
4 - - what would happen in that kind of case?

5 MR. SCHWARTZ: But again, we still have to go  
6 back to the facts. Is there a reasonable probability that  
7 people were being deceived when they signed her petition  
8 and she was running for female.

9 I want to - - - I want to address one other issue  
10 before I lose my time.

11 JUDGE STEIN: Before you do that, do - - - this  
12 standard of potential confusion, reasonable possibility of  
13 confusion have - - - have we ever applied that standard to  
14 a - - - a case where the legislature has said that certain  
15 information must be on a petition?

16 MR. SCHWARTZ: Well, I - - - I don't think this  
17 court has issued a decision where it talked about the  
18 standard to apply since the 19 - - - I couldn't find one -  
19 - - since 1992.

20 I want to just raise one other issue: the timing  
21 of this. The Board - - - the Board acted three weeks after  
22 the petition was filed, not two days like almost every  
23 other case that you have here. Three days (sic). No  
24 objection was filed. They acted three weeks later.  
25 There's a New York City only rule where they give



1 themselves the power - - - that doesn't derive anywhere  
2 from the Election Law, and we talk about it in our brief -  
3 - -

4 JUDGE RIVERA: Did you preserve this argument?

5 MR. SCHWARTZ: Yes. I - - -

6 JUDGE RIVERA: When did - - -

7 MR. SCHWARTZ: - - - I argued it - - -

8 JUDGE RIVERA: - - - when did you assert this  
9 argument?

10 MR. SCHWARTZ: Excuse me?

11 JUDGE RIVERA: When did you assert this argument?

12 MR. SCHWARTZ: I asserted this argument in the -  
13 - - in the lower court. I asserted it in my brief, which  
14 the court has copies of, in the Appellate Division. The  
15 Appellate Division didn't talk about it, and I reasserted  
16 it here.

17 The - - - the - - - the Board acted - - - what  
18 they call the prima facie defect. Now there's a stat - - -  
19 there's a state rule, the State Board Rules, that says they  
20 have to do it within two days, anything apparent on its  
21 face. Prima facie, apparent on its face, similar words.

22 The New York City Board created this Rule E that  
23 lets them - - - no time limit. So here it was three weeks  
24 later, after the opportunity-to-ballot date had passed,  
25 where they decided oh, we found - - - we found this issue,



1 and we're going to disqualify.

2 If they had done it in the two days, then at  
3 least - - - there's no way that she could have fixed the  
4 petition, but they - - - she could have petitioned for an  
5 opportunity to ballot. And this court does have case law  
6 that - - - that we - - - we cite in our - - - in our brief  
7 that - - - that the Hunt - - - the Henley - - - the Hemley  
8 (sic) case, 20 N.Y. 2d - - -

9 JUDGE STEIN: Doesn't that - - - doesn't that  
10 two-day rule just apply to compliance with the cover sheet  
11 and binding requirements of the regulations?

12 MR. SCHWARTZ: But that's - - - the cover sheet  
13 and binding requirements - - - this - - - the - - - it's  
14 about - - - and it also says matters apparent on their  
15 face. There's nothing that gives a local board - - -  
16 there's no rule that gives the local board anywhere the  
17 power to just three weeks later, after all the petition  
18 deadlines have passed, after all the opportunity-to-ballot  
19 petition deadlines have passed, to all of a sudden discover  
20 a problem, where there's been no objection.

21 They do have the - - - the power to - - - to  
22 create rules to implement how to deal with objections, but  
23 here there was no objection. In fact, the opponent didn't  
24 think she wasn't a female.

25 CHIEF JUDGE DIFIORE: Thank you, Mr. Schwartz.



1 MR. SCHWARTZ: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel?

3 MS. GORDON: Good morning, Your Honors. May it  
4 please the court, my name is Jane Gordon.

5 Many of the questions that the court posed just  
6 now arise because the dissent inappropriately relied on  
7 Election Law 6-132 to resolve this matter. That provision  
8 must be read in harmony with Election Law 2-102.

9 And the only way to read them in harmony is that  
10 2-102 governs when it's a mandatory legislative command,  
11 and 6-132 applies when it's a technical, a non-substantive  
12 issue. That is the only way to harmonize those two  
13 provisions. And under that harmony, it is clear that this  
14 is a mandatory substantive command, as provided by the  
15 Democratic Party Call, which at least Packer v. Board of  
16 Elections, the Second Department case ruled, is where you  
17 find the name of the position and the Party Call requires  
18 that it either be male state committee member or female  
19 state committee member.

20 There was no compliance whatsoever here. So we  
21 never get to whether or not the petition was sufficiently  
22 informative, because the candidate made no effort to  
23 comply.

24 It would have been different if she had put the  
25 initial "F" up there. Then we might get into Section 6-132





1 territory about whether or not that would be substantial  
2 compliance. But there was no compliance here.

3 JUDGE RIVERA: If - - - if there's something else  
4 on it, though, that would lead one to believe that the  
5 individual is of one particular gender, does that resolve  
6 it? Does it boil down to this: you've got to have the "F"  
7 or you've got to have the "M" or have to have the whole  
8 word or part of the word?

9 MS. GORDON: Your Honor, anything less than  
10 something that says "female" or "male" is going to devolve  
11 into a subjective view of what a clerk deems is  
12 sufficiently feminine or masculine.

13 JUDGE RIVERA: What if it said "woman"? What if  
14 it said "woman" instead of "female"?

15 MS. GORDON: I think that gets into 6-132  
16 territory: is that substantial compliance? But we don't  
17 have any gender - - -

18 JUDGE FEINMAN: What - - - what about the  
19 symbols, you know, the circle with the cross or - - -

20 MS. GORDON: You know, that's a question of  
21 substantial compliance. I'm - - - I'm not going to rule on  
22 that here, but at least an effort has been made - - -

23 JUDGE FEINMAN: That's another case, another day.

24 MS. GORDON: - - - an effort has been made - - -

25 JUDGE RIVERA: But what about - - -



1 MS. GORDON: - - - to comply.

2 JUDGE RIVERA: - - - a name that generally is  
3 associated with a female?

4 MS. GORDON: Well - - -

5 JUDGE RIVERA: Why doesn't that work?

6 MS. GORDON: - - - actually, I would say most of  
7 you may or may not know Penny Hardaway. You know, a male.  
8 There are other men named Penny.

9 JUDGE RIVERA: Okay.

10 MS. GORDON: I don't think that works. I think  
11 that's an unworkable solution, because it's - - -

12 JUDGE RIVERA: You think there's absolutely no  
13 name? No name at all that is strictly on one side of the  
14 ledger than the other?

15 MS. GORDON: Not today, Your Honor.

16 JUDGE RIVERA: Not today.

17 MS. GORDON: Not today - - - in today's world,  
18 where there are people who are nonbinary. It's a - - -  
19 it's a - - - it's - - -

20 JUDGE RIVERA: What if you - - -

21 MS. GORDON: - - - treacherous territory to go  
22 there.

23 JUDGE RIVERA: - - - what if you write "trans  
24 woman"?

25 MS. GORDON: I'm sorry?



1 JUDGE RIVERA: What if you write "trans woman" in  
2 the petition?

3 MS. GORDON: That's an interesting question. But  
4 at least an effort has been made to identify by gender.  
5 You know, that's actually a problem with the original  
6 statute.

7 JUDGE RIVERA: But you think relying on a name  
8 that - - - yes, there may be some people who fit the other  
9 way - - - relying on a name that usually is associated with  
10 - - -

11 MS. GORDON: That's a very Western - - -

12 JUDGE RIVERA: - - - with females or women - - -

13 MS. GORDON: - - - that's a very Western way - -  
14 -

15 JUDGE RIVERA: Okay.

16 MS. GORDON: - - - of looking at things in a  
17 culture that is no longer Western dominated, Your Honor.

18 JUDGE WILSON: What about the argument that  
19 2-102(4) doesn't say "identify the sex of" but says "lists  
20 separately by sex"?

21 MS. GORDON: Um - - -

22 JUDGE WILSON: So for example, if I asked you,  
23 could you list the presidents of the United States  
24 separately by sex, and you gave me a list of all the  
25 presidents, and didn't say "male" on it, would you have



1 complied with that?

2 MS. GORDON: For looking at the petition from the  
3 public's point of view, which is what we have to do here,  
4 because - - -

5 JUDGE WILSON: Well, don't we have to look at the  
6 statute from the perspective of the legislature's point of  
7 view?

8 MS. GORDON: Yes, but the - - - the - - - the - -  
9 - that - - - your proposition presupposes that everybody  
10 knows that there's not been a female president. I wish I  
11 could say that that's something that we can assume for  
12 people who are voters. I'm not - - -

13 JUDGE WILSON: Well, suppose - - - suppose - - -

14 MS. GORDON: - - - sure we can all - - -

15 JUDGE RIVERA: Take an office where you have  
16 both.

17 MS. GORDON: I'm sorry?

18 JUDGE RIVERA: Where you had a male and a female,  
19 and just replace that title for the Judge Wilson suggested  
20 in his hypothetical.

21 MS. GORDON: Again, we have to go to what the  
22 Democratic Party Call describes the position as here. And  
23 it is binding. And it says it has to be male state  
24 committee member - - - that is the title for which he is  
25 running, the position for which she is running.



1 She is running for male state committee member  
2 and female state committee member. She's running for  
3 female - - -

4 CHIEF JUDGE DIFIORE: Counsel, what about the  
5 argument that the candidate missed the opportunity to  
6 ballot?

7 MS. GORDON: Well, I would argue that that is  
8 effectively an estoppel argument. That was not preserved  
9 below. But even then, you can't estop the government from  
10 executing its lawful responsibility here.

11 But as an initial matter, it's unpreserved.

12 JUDGE RIVERA: But doesn't that, though, beg the  
13 question whether or not the Board of Elections process and  
14 rule is lawful?

15 MS. GORDON: Um - - -

16 JUDGE RIVERA: Maybe it's not, if it - - - as he  
17 argues - - - now makes it impossible for them to try and  
18 get a write-in candidate or get on the ballot some other  
19 way.

20 MS. GORDON: It was their own mistake that put  
21 them in this position, Your Honor.

22 JUDGE RIVERA: You're back to the preservation.

23 JUDGE FEINMAN: So could they have - - - I'm  
24 sorry.

25 JUDGE RIVERA: No, no. That's fine.



1 JUDGE FEINMAN: Could they have, you know, in an  
2 excess of caution, brought a petition to validate upon  
3 discovery of the error, you know, before the Board actually  
4 had its final determination? And in fact, this proceeding  
5 was commenced before the Board actually issued its final  
6 determination; was it not?

7 MS. GORDON: Yes, it was.

8 JUDGE FEINMAN: So could they have done it even  
9 sooner or - - - to - - - in order to preserve that  
10 opportunity to ballot?

11 MS. GORDON: I - - - I don't have the answer to  
12 that, Your Honor. I apologize. I don't know the answer to  
13 that.

14 JUDGE FEINMAN: Okay.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.  
16 Counsel?

17 MS. KAPLAN: Good morning, Your Honors. Roberta  
18 Kaplan for intervenor, Rachel Lavine. May it please the  
19 court.

20 We actually did some research over the weekend  
21 too, Your Honors, and I've been kind of - - - ever since  
22 I've got involved in this case, I've been fascinated by  
23 this question of how long this provision has lasted - - -  
24 how long it has been in the law. It's actually remarkably  
25 old. We think it goes back to the '20s. We talked to the



1 reference law librarians in Albany, and there was  
2 apparently a fire, and a lot of legislative bill jackets  
3 were burned, so they can't conclusively determine it.

4 But we - - - but the - - - the understanding is  
5 that it actually originates with Eleanor Roosevelt, who  
6 required, in the Democratic Party initially in the state -  
7 - - and now it's the Republican Party as well, that there  
8 be equal representation for women, and that the view would  
9 be that if you have equal representation for women in the  
10 state party, a female state committee member and a male  
11 state committee member, that will increase representation  
12 of women in politics and in polity. That's for another day  
13 whether or not that actually succeeded, Your Honors.

14 But it's an incredibly old statute. This  
15 language has existed in Election Law 2-102 since at least  
16 the '30s, and we found a case that I handed to my - - - my  
17 friend Mr. Schwartz, that's actually from a judge in Queens  
18 - - - I'll give you the cite - - - Alexander v. Cohen, 169  
19 Misc. 151 (1938). This is a Queens trial judge actually  
20 first saying that he disagrees with this idea that there  
21 should be male and female slots for state committee, but  
22 putting that aside, this is what he wrote.

23 He said that "the point of the law was to clearly  
24 define which of the candidates are women and which are men.  
25 That is particularly so where as in this instance, the

1 voter may vote for two or more candidates to be elected at  
2 the election for the same office or party position. This  
3 only gives the voter information to which he or she is  
4 entitled, vis the sex of the candidate.

5 "Section 11 of the Election Law, insofar as it  
6 authorizes the separation of designees and candidates by  
7 sexes, is a proper exercise of legislative power, not  
8 inconsistent with constitutional provisions treating  
9 suffrage and the right to hold office, especially when it  
10 is considered that given names of men and women are not  
11 always clearly indicative of sex."

12 That was in 1938, Your Honors. That was a very  
13 different world. And I would argue that in 1938 things  
14 were much more indicative of sex by name than they are  
15 today.

16 All the issues that you've identified with  
17 respect to names not being clear and - - - and having a sua  
18 sponte kind of case-by-case rule, is exactly why Election  
19 Law - - - the Election Law section that we're talking about  
20 says what it says, it's exactly why this court in Bosco  
21 held what it held. After all, in Bosco, the names were  
22 pretty obvious. It was Imogene Mayer. I think everyone  
23 knew that was a woman by name. And an F - - - I forget - -  
24 - F. Wilson for the man. You could look at that petition  
25 and - - - and pretty much assume that one was a woman and





1 one was a man, and that was not enough. That's because  
2 there are two separate pro - - - titles, there are two  
3 separate jobs: female state committee member, male state  
4 committee member.

5 And I would say - - - I - - - I understand the  
6 argument in the dissent that this isn't confusing because  
7 there's only one candidate. I actually think it's more  
8 confusing because there's one candidate.

9 And here's what I would say to that, Your Honors.  
10 In the interest of full disclosure, the intervenor in this  
11 case is my wife, the female state committee member for the  
12 Sixty-Sixth Assembly District. Before I met my wife, I had  
13 no idea that there was a state female committee member and  
14 a male state committee member for every assembly district.

15 I would bet that most of the people who sign the  
16 petition didn't know that. And so when they saw the  
17 petition submitted by the other side here, they naturally  
18 probably assumed it was one job, state committee member for  
19 the Sixty-Sixth Assembly District, and that's what they  
20 signed. And that's why it was ipso facto confusing. You  
21 don't even have to go to a reasonable probability standard.  
22 That would have been confusing. They wouldn't even have  
23 known that they were petitioning for one person for two  
24 jobs, rather than one person for one job.

25 JUDGE GARCIA: Counsel, there seems to be a



1 little disagreement over whether there was one or two  
2 positions open in this district. Is the male position also  
3 open in this - - -

4 MS. KAPLAN: Yes. There was no opponent for the  
5 male position, but yes, it was open. There's only an  
6 opponent for my wife's position.

7 JUDGE RIVERA: Let me go back to your point,  
8 because I'm not really understanding it. You're - - -  
9 you're trying to say that if they knew she was female,  
10 they'd say well, I don't want her to run for that, even  
11 though they want her to run - - - they're - - - they're  
12 signing off and they're happy to have her be a candidate -  
13 - -

14 MS. KAPLAN: What I'm saying, Your Honor - - -

15 JUDGE RIVERA: - - - if they knew she was fe - -  
16 - if specifically it said "female" on it. And if they  
17 didn't know - - -

18 MS. KAPLAN: I think what I'm - - -

19 JUDGE RIVERA: - - - that they would not want  
20 her?

21 MS. KAPLAN: I think what I'm saying, Judge  
22 Rivera, is that the way this petition was done, where it  
23 just said "member of the state committee" - - -

24 JUDGE RIVERA: Um-hum.

25 MS. KAPLAN: - - - most of the people who signed



1 this petition reasonably would have assumed that there's  
2 one position.

3 JUDGE RIVERA: Um-hum.

4 MS. KAPLAN: For the Sixty-Sixth Assembly  
5 District, there's one state committee member. It doesn't  
6 matter whether - - - what the gender.

7 JUDGE RIVERA: Yeah, but I don't understand your  
8 point. So what?

9 MS. KAPLAN: That's confusing. That's exactly  
10 why Election Law - - - the Election Law section that we  
11 cited here says - - -

12 JUDGE WILSON: Are you saying they're less - - -

13 JUDGE RIVERA: But isn't the point that they're  
14 interested in having her on the ballot? That's the point.

15 MS. KAPLAN: But - - -

16 JUDGE RIVERA: I don't see your point saying  
17 well, if everyone knew that there's also a male seat, that  
18 they wouldn't have signed off on this petition. I don't  
19 understand it.

20 MS. KAPLAN: But what they could have said is  
21 there's a female here. Is there someone running against  
22 her for female? Is there someone running against - - - is  
23 there someone running for male?

24 JUDGE RIVERA: But they know that - - - wouldn't  
25 they - - -



1 MS. KAPLAN: Is it - - -

2 JUDGE RIVERA: - - - wouldn't they wonder that  
3 whether it said "female" or not?

4 MS. KAPLAN: As to matters - - -

5 JUDGE RIVERA: Is there - - - is this contested?

6 MS. KAPLAN: As to matters of prescribed content,  
7 the Election Law is very clear, which is that the nature of  
8 the position - - - the law is very clear that the petitions  
9 have to specifically say what the position here (sic).

10 By having only "member of state committee", it  
11 misstated, fundamentally, the position, because the  
12 position is two positions.

13 JUDGE RIVERA: Well, no, there - - - there is  
14 only one position. The question is who fits the criteria  
15 to sit in that seat.

16 MS. KAPLAN: No, the - - -

17 JUDGE RIVERA: And the argument here is, she  
18 didn't clarify the criteria that allows her to sit in a  
19 particular seat.

20 MS. KAPLAN: With respect, Judge Rivera, I  
21 disagree. There are two positions. There's fe - - -

22 JUDGE RIVERA: Oh, because you've got two  
23 different petitions?

24 MS. KAPLAN: - - - female state committee member  
25 and male state committee member for each assembly district



1 in the State of New York.

2 JUDGE RIVERA: Okay.

3 MS. KAPLAN: I think my time is up. If there are  
4 any questions?

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 Mr. Schwartz?

7 MR. SCHWARTZ: Just a couple of brief points.

8 First of all, the Party Call, which is on page  
9 152 of the record, which I know that because I wrote it,  
10 says "member of the state committee". It doesn't - - - and  
11 it says each district shall elect - - - there's a heading,  
12 "member of the state committee", and each shall elect one -  
13 - - shall elect one female and one male. It doesn't say  
14 what has to be on petitions and what the title is other  
15 than "member of the state committee".

16 With respect to the opportunity to ballot, the -  
17 - - the case I was referring to was Hunting, which is 20  
18 N.Y. 2d 680. It was a remedy created by this court like in  
19 1940s, where there was sufficient showing of a technical  
20 violation, sufficient - - - adequate support for a  
21 candidate to run, and the - - - and the timing of when the  
22 petition was invalidated made it impossible for the person  
23 to do an opportunity to ballot, and the court said, let's  
24 have a write-in.

25 With all due respect to Judge Feinman, the notice



1 that came from a clerk at the Board of Elections, was dated  
2 July 24th, and the date to do the opportunity to ballot  
3 ended on July 23rd. So even if the notice had prompted  
4 some quick action, there was no possibility to do a  
5 validating petition.

6 There was no reason to believe - - - we were  
7 following the Board of Elections postings every day to see  
8 if there was an objection, and it said: female, female,  
9 female, female. When the letter came in, it was like - - -  
10 in fact it just said - - -

11 JUDGE FEINMAN: So how would the opportunity to  
12 ballot operate at this point?

13 MR. SCHWARTZ: The Board would have to put a line  
14 put - - - to allow a write-in, and then there could be a  
15 write-in for Ms. Mintz.

16 So it would be - - - so it's not an equitable  
17 estoppel, it's an equitable remedy. It's not an equitable  
18 estoppel argument; it's an equitable remedy. We're saying  
19 the Board shouldn't have been allowed to act that late, but  
20 if - - -

21 JUDGE FEINMAN: You don't - - - you don't put  
22 that line automatically?

23 MR. SCHWARTZ: No, I don't think so, because  
24 that's what opportunity to ballot is like. I think in the  
25 general election there's a line. But in the primary



1 election, you don't get that line unless you do an  
2 opportunity to ballot, and then you get - - - you get the -  
3 - - the write-in line.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Penny Mintz v. Board of Elections of the City of New York, No. 127 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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