

Originally published in

New York Law Journal

Election and Political Law Column

July 30, 2024

NY Court of Appeals Weighs Mail-In and Non-Citizen Voting

By [Jerry H. Goldfeder](#)

The dog days of summer have not halted an onslaught of election-related issues. The presidential election has reached warp speed, and several salient issues have already been raised.

Each state has a statute that places the names of the Democratic and Republican party presidential and vice presidential nominees on their general election ballot (or, to be more precise, presidential electors pledged to those candidates). The Republican convention ran smoothly, nominating its candidates with no opposition, suspense, or legal issues. And they did so in time to meet all the statutory deadlines for the November ballot. On the other hand, the Democratic Party's convention is in the third week of August this year (by tradition, the incumbent party goes second), which appeared to be too late for [Ohio's statutory deadline](#) of August 7. After some back-and-forth, [Ohio changed its law to accommodate the late August nomination](#). This change is not unprecedented. Faced with an early September Republican convention in 2004, a number of states changed their laws to ensure President George W. Bush would be on their general election ballots. However, this election occurs in a much more partisan atmosphere. As a result, despite Ohio's accommodation, Democrats are nominating Vice President Kamala Harris during a virtual roll call in time for Ohio's original law—just in case the Buckeye state revises its law once again. [So there shouldn't be any legitimate legal issue](#).

Of course, this is not the only drama regarding the Democrats. With the withdrawal of President Joe Biden and the nomination of Harris, there are those [who question whether delegates originally pledged to Biden can vote for other candidates](#) at the upcoming Democratic convention. The answer is yes. Each political party has its own set of rules and procedures for nominating its presidential and vice presidential candidates. Delegates to the Democratic convention are chosen by state party conventions and primaries, mostly from state congressional districts and some representing their state as “at-large” delegates. Here in New York, there are 307 delegates in total, most of whom had pledged their vote to Biden. But the national Democratic Party rules make it clear that “pledged” does not mean “bound,” and delegates can vote “in good conscience” for the candidate of their choice. Thus, there is no legal reason, these

delegates (which includes yours truly) cannot now vote for Harris (as a majority has already indicated they would).

Another issue is whether the monies raised for the Biden/Harris campaign committee can be used by Harris, and apart from various partisan election lawyers, disparate views, [pro](#) and [con](#), have been expressed by several current and former members of the Federal Election Commission. I think the better view is that Harris, as a principal of the existing campaign committee, is essentially a beneficiary of those funds and, therefore, can use them in her campaign.

[Nevertheless, the Trump campaign just filed a complaint with the FEC to halt the transfer of Biden/Harris monies to the Harris campaign.](#) Even if the FEC ultimately weighs in on this—which is doubtful, in that there are three Democrats and three Republicans on the FEC—it will not happen until long after the election.

Here in New York, the Court of Appeals has before it one case that impacts the presidential election, and another that affects next year's mayoral vote (as I have [previously written about](#)): early mail-in voting, argued on July 30, 2024, and non-citizen voting in New York City, for which the city of New York has just filed its appeal. (I am a counsel in the latter case for the Board of Elections in the city of New York, which has taken no position on the issues.)

The [early mail-in voting](#) case relates to a statute that permits anyone to vote by mail for any reason; it is distinguished from absentee ballot voting, which requires a voter to be away or ill. The law's constitutionality was challenged and [Supreme Court, Albany County](#), held that the law was a proper exercise of the legislature's plenary power and its specific authority pursuant to Article II, Section 7 of the New York constitution to establish "the method of elections for all voters." On appeal, the Appellate Division, Third Department, affirmed, writing a very detailed historical exegesis and concluding that "upholding the act comports with the N.Y. Constitution's embrace of broad voting rights for the state electorate, the history and language of Article II, and the fundamental right to vote." Indeed, the court went so far as to refer to Pennsylvania's universal mail-in voting law, where that state's highest court rejected the very same arguments made by the challengers to the New York law. *Stefanik v. Hochul*, 211 N.Y.S.3d 574 (3d Dep't. 2024). The Court of Appeals will no doubt issue its ruling expeditiously, [in time for this year's election](#).

On the other hand, the case relating to [New York City's non-citizen voting law](#) will not be decided any time soon. Enacted by the New York City Council in December 2021, it was challenged immediately. On June 27, 2022, [Supreme Court, Richmond County](#), held the law unconstitutional and invalid on various grounds. On Feb. 21, 2024, the [Appellate Division, Second Department, in a 3-1 decision, affirmed](#), holding that the law ran afoul of the state constitution's provisions that only U.S. citizens could vote, and that a voter referendum was required under the Municipal Home Rule Law. (It rejected Supreme Court's view that the New York Election Law barred the law.)

The court reasoned that "Article IX [of the New York constitution] provides that the elected officials of 'local governments shall be elected by 'the people,' which incorporates by reference the eligibility requirements for voting under Article II, Section 1, applying exclusively to

‘citizens.’” It further held that the law required a voter referendum because it “‘change[d] the method of nominating, electing, or removing an elective officer.’”

On July 10, 2024, the City Council filed its appellate brief—so it remains to be seen whether a final decision will be rendered in time for New York City’s municipal elections next year.

Jerry H. Goldfeder *is senior counsel at Cozen O’Connor and director of the Fordham Law School Voting Rights and Democracy Project.*