06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

—v.—

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

In 1908, the New York County Lawyers' Association ("NYCLA") was founded on two fundamental principles: the inclusion of all who wish to join and the reform of New York State's legal system. Over the last century, by remaining faithful to these principles, NYCLA has grown into a diverse, not-for-profit, public service association comprising thousands of lawyers, judges and law students.[1]

NYCLA's mission statement articulates, *inter alia*, the following key institutional purposes: promoting the administration of justice and reforms in the law to advance the public interest; advocating for a strong and independent judiciary; encouraging inclusion throughout the legal profession; and maintaining high ethical standards for the bench and bar.

One of the fundamental principles of NYCLA's founding was to ensure that competent, independent jurists sat on New York's bench, without regard to party affiliation. NYCLA's founders were a mix of democrats and republicans who opposed many of the individuals whom Tammany Hall attempted to seat as judges. Since its inception, NYCLA has continuously led the effort to strengthen and maintain the independence of New York State's judiciary.

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all amicus briefs. Written consent from the remaining parties has been filed with the Court along with this brief. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

Toward that end, throughout its history, NYCLA has directed significant attention to the nomination process for New York State Supreme Court Justices, which is the subject of this appeal. NYCLA is dedicated to creating the best judicial selection system possible and has consistently urged the reform of the existing convention system. In September 2003, NYCLA empanelled a special Judicial Selection Task Force to evaluate all aspects of the judicial selection process. The Task Force, which issued a report in May 2006, continues its work today. NYCLA remains committed to the realization of a transparent and democratic judicial selection process.

While NYCLA prefers a merit-based appointment system for selecting New York Supreme Court Justices, it is imperative that the current, unconstitutional convention system for selecting Supreme Court Justices not be permitted to continue. The convention system is neither democratic, nor transparent. NYCLA therefore urges this Court to affirm the judgment of the United States Court of Appeals for the Second Circuit so that public confidence in the judiciary, which is a cornerstone of a free society, can be restored.

SUMMARY OF ARGUMENT

By decision dated January 27, 2006, the United States District Court for the Eastern District of New York (Gleeson, J.) found that respondents had demonstrated a clear likelihood of successfully proving that the existing convention system for nominating candidates for election to the New York State Supreme Court violates the First Amendment. *López Torres* v. *N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212 (S.D.N.Y. 2006). Accordingly, the district court preliminarily enjoined implementation of provisions governing the convention system, codified as

Sections 6-106 and 6-124 of the New York Election Law. Pet. App. 185[2]; N.Y. Election Law §§ 6-106, 6-124.

The Second Circuit affirmed. *López Torres* v. *N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006). This brief focuses on three key, and correctly decided, aspects of that decision.

1. The Second Circuit found that the "District Court correctly adopted the perspective of a candidate who has at least some measure of popular support but lacks the support of party leadership, and has no other means of overcoming the burdens imposed by the electoral scheme." Pet. App. 61. Petitioners' criticism of this "challenger candidate" viewpoint is unfounded. As the Second Circuit noted, this perspective "derives directly from applicable case law" of this Court, in particular, *Storer* v. *Brown*, 415 U.S. 724, 742 (1974). Pet. App. 60. Indeed, the Court's recent decision in *Randall* v. *Sorrell* struck down Vermont's contribution limits on First Amendment grounds based in part on their harmful effects on challengers. 126 S. Ct. 2479, 2496 (2006) (plurality opinion) ("[T]he critical question concerns . . . the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*."). The Second Circuit appropriately considered the burdens imposed by New York's judicial nominating convention system from the perspective of a challenger candidate.

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[2] We refer to the Appendix to the Petition for Certiorari as "Pet. App." We refer to the brief of the New York County Democratic Committee *et al.* as the "County Br."; and that of the New York State Board of Elections as the "BOE Br."

2. Based on its finding that "because one-party rule is the norm in most judicial districts, the general election is little more than ceremony," Pet. App. 23, the Second Circuit correctly focused its scrutiny on the convention system for nominating Supreme Court Justices. This Court has instructed that where the nominating phase of an electoral system is outcome determinative, the nominating phase itself – rather than the general election – is the proper focus of scrutiny. *Terry* v. *Adams*, 345 U.S. 461, 469 (1953) (Black, J., announcing judgment of the Court, joined by Douglas and Burton, J.J.) (striking down primary system after finding it was "the only effective part[] of the elective process"). In such cases, the availability of alternate means of access to the general election ballot will not save an unconstitutional primary scheme. *Bullock* v. *Carter*, 405 U.S. 134, 146-147 (1972) (striking down primary election filing fee where "the primary election may be more crucial than the general election," and an alternative candidacy in the general election "requires candidates and voters to abandon their party affiliations").

3. Focusing on the nominating phase of the Supreme Court elections, the Second Circuit found that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 41-42. Petitioners criticize this standard as unsupported by this Court's decisions and as granting a "right to *win* a party nomination outright or the right to have direct access to voters." County Br. at 25, 28. These complaints do not withstand scrutiny. The right to a "realistic opportunity to participate" is well-grounded in this Court's decisions holding that First Amendment "access to the electorate" must "be real, not 'merely theoretical.'" *Am. Party of Tex.* v.

White, 415 U.S. 767, 783 (1974) (quoting *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971)). And as these decisions demonstrate, a "realistic" right to participate is not a right to win, nor does it grant candidates a right to direct voter access.

The Second Circuit's judgment therefore should be affirmed.

ARGUMENT

I. THE LOWER COURTS CORRECTLY ADOPTED THE PERSPECTIVE OF A "CHALLENGER CANDIDATE."

In evaluating the severity of the burdens imposed on voters' and candidates' First Amendment associational rights, the district court and the Second Circuit adopted the perspective of "a reasonably diligent candidate who lacks the support of a massive apparatus controlled by party leadership." Pet. App. 160 (internal quotation marks and alteration omitted); Pet App. 61. The district court then asked whether such a reasonably diligent challenger could either (1) get her own delegates and alternates on the ballot in each Assembly District; or (2) lobby the delegates installed by the party leaders. Pet. App. 167. It found that neither avenue was open to challenger candidates and that, therefore, "the burdens on candidates and voters under New York's convention system are severe." Pet. App. 169. The Second Circuit agreed. Pet. App. 45-46, 61-70.

As the Second Circuit recognized, the district court's definition of a challenger candidate "derives directly from applicable case law." Pet. App. 60 (citing *Storer* v. *Brown*, 415 U.S. 724, 742 (1974)). In *Storer*, this Court assessed the burdens imposed by signature requirements from the perspective of a "reasonably diligent independent

candidate," asking whether such a candidate could "be expected to satisfy the signature requirements." 415 U.S. at 742. Applying that inquiry to this case resulted in the two questions identified above – whether a reasonably diligent challenger had an opportunity to run slates of pledged delegates or could lobby party-appointed delegates. Pet. App. 167.

Petitioners incorrectly suggest that *Storer* and other "ballot access cases" mean that First Amendment rights are implicated only when "the election schemes at issue were designed to '*freeze out*' minor party candidates and non-party, independent candidates from the political process." County Br. 25. Yet this Court's First Amendment jurisprudence is not so narrowly confined. In *Buckley* v. *Valeo*, 424 U.S. 1, 32 (1976), for example, this Court evaluated the effect of campaign contribution limits on "major-party challengers to incumbents." The Court upheld these limits in part on the ground that there was "no . . . evidence to support the claim that the contribution limits in themselves discriminate against" such challenger candidates. *Id*.

Moreover, since the Second Circuit rendered its decision in this case, this Court again has recognized that restrictions on candidates' First Amendment rights should be viewed through the lens of the challenger candidate. In *Randall* v. *Sorrell*, 126 S. Ct. 2479 (2006), the Court struck down contribution limits applicable to candidates for Vermont state office on First Amendment grounds. In doing so, the plurality opinion focused on the effects of the contribution limits on *challengers* seeking to unseat *incumbents*. It found that the evidence suggested that contribution limits would "significantly restrict the amount of funding available for challengers to run competitive

campaigns," *id.* at 2495, and concluded that the limits were unconstitutional in part because "the Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers." *Id.* at 2499.

With its focus placed squarely on the challenger candidate, the *Randall* plurality considered evidence about the *average* effect of contribution limits to be beside the point. The plurality opinion states that "the critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*." *Id.* at 2496. Justice Souter's dissenting opinion also recognized the relevance of the challenger perspective, noting that the constitutionality of the contribution limits should be evaluated in part based on "evidence that these low limits are fair to challengers." *Id.* at 2514 (Souter, J., dissenting, joined by Ginsburg and Stevens, JJ.).

To be sure, the analogy between a challenger candidate seeking to displace a party-supported candidate in an intra-party contest and a challenger seeking to defeat an elected incumbent is not perfect. But there are important similarities. The *Randall* plurality opinion makes clear that electoral requirements that "prevent[] challengers from mounting effective campaigns against incumbent officeholders" can "harm the electoral process" and "reduce[] democratic accountability." 126 S. Ct. at 2492. These same harms can result where, as here, the evidence demonstrates that challengers have no chance of mounting effective campaigns against party-backed candidates.

II. THE LOWER COURTS PROPERLY FOCUSED THEIR SCRUTINY ON THE CONVENTION SYSTEM FOR NOMINATING SUPREME COURT JUSTICES.

Apart from the convention system, independent candidates can gain a spot on the general election ballot for Supreme Court Justice, *inter alia*, by submitting a petition with 3,500 or 4,000 valid signatures. BOE Br. at 6; County Br. at 7. Petitioners argue that this other route to the *general election ballot* renders New York's nominating convention system constitutional, because "reasonable access to a general election ballot . . . is all that the First Amendment requires the State to provide." BOE Br. at 17. This is not correct. Given the substantial – indeed determinative – effect that the convention system has on the ultimate outcome of elections for Supreme Court Justice in New York, the lower courts properly subjected the convention system itself to First Amendment scrutiny.

A. Where, As Here, the Nomination Phase of an Electoral Process Effectively Determines the Outcome of the General Election, a Court Properly Subjects That Phase to Scrutiny.

Courts apply a careful balancing test when evaluating the constitutionality of an electoral system. As this Court has instructed, in "pass[ing] on constitutional challenges to specific provisions of election laws . . . no litmus-paper test . . . separat[es] those restrictions that are valid from those that are invidious . . . . The rule is not self-executing and is no substitute for the hard judgments that must be made." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974); *see also Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986) (setting forth balancing test).

In New York State, the system for electing Supreme Court Justices has two phases: a nominating convention for major parties, followed by a general election. The lower courts correctly found that, of these two phases, the convention always or almost always determines who ultimately will be elected a Supreme Court Justice. Pet. App. 129-132; Pet. App. 40-41, 45. In particular, the district court found that (i) in four out of twelve judicial districts "the Democratic Party nominees are always elected," (ii) in four other judicial districts "the Republican nominees are always elected" or "they usually are," and (iii) "[i]n districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." Pet. App. 129-30. It also concluded that "candidates without either the Democratic or Republican nomination" – *i.e.*, candidates other than those selected by nominating convention – "have no chance of being elected anywhere." Pet. App. 130-31. Likewise, the Second Circuit found that "New York's nominating process . . . deprives a candidate of access altogether," and that "because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." Pet. App. 45, 23; *see also* Pet. App. at 69-70 ("[T]hrough a byzantine and onerous network of nominating phase regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment.").

Petitioners' only response to these factual findings concerning one-party rule is that they "cannot be taken seriously" because the two most recent mayors of New York City have been Republicans and because two upstate New York Republicans lost congressional seats to Democrats in the 2006 elections. BOE Br. at 25. These arguments do not address the district court's finding that the parties "divvy up"

judgeships in competitive areas. Pet. App. 130. And of course, neither New York City mayoral candidates nor congressional candidates are subjected to New York's judicial nominating conventions. In any event, such non-record evidence provides no basis for finding clear error in the factual findings made below.

Where, as here, the nominating phase of an electoral system is outcome determinative, this Court has instructed that the nominating phase – rather than the general election – is the proper focus of scrutiny. In *Terry* v. *Adams*, the last of the so-called "White Primary" cases,[3] this Court struck down a primary system (known as the "Jaybird primary") after finding that it was always determinative of the general election. The Court explained its reasoning as follows:

> The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds . . . . The Democratic primary and the general election have become no more than perfunctory ratifiers of the choice that has already been made in Jaybird elections . . . . The Jaybird primary has become an integral part, indeed

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[3] There are four "White Primary" cases in which this Court struck down election restrictions that excluded non-white voters: *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); and *Terry* v. *Adams*, 345 U.S. 461 (1953). Although this Court found that these restrictions violated the Fifteenth Amendment, the holdings are relevant here because in each case the Court focused on the *nominating phase* (as opposed to the general election) to find that the entire election process was unconstitutional. That is precisely what the lower courts did in this case.

> the only effective part, of the elective process that determines who shall rule and govern in the county.

Terry v. *Adams*, 345 U.S. 461, 469 (1953) (Black, J., announcing judgment of the Court, joined by Douglas and Burton, J.J.).[4]

As Justice Stevens summarized more recently (dissenting in *Clingman* v. *Beaver*):

> If the so-called "white primary" cases make anything clear, it is that the denial of the right to vote cannot be cured by the ability to participate in a subsequent or different election. Just as the "only election that has counted" in *Terry*, 345 U.S. at 469, was the Jaybird primary, since it was there that the public official was selected in any meaningful sense, the only primary that counts here is the one in which the candidate respondents want to vote for is actually running.

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[4] Petitioners argue that *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000), rejected the idea that *Terry* created a "'First Amendment associational interest' to be included in 'a state-required, state-financed primary election.'" BOE Br. at 21 (quoting *Jones*, 530 U.S. at 573 n.5). In fact, the footnote cited by petitioners held that under *Terry*, parties retain the right to exclude individuals from voting in their primary elections, so long as these exclusions do not "violate[] some independent constitutional proscription." *Jones*, 530 U.S. at 573 n.5. Here, New York's judicial nominating convention system is unconstitutional under *Terry* because it excludes and burdens candidates and voters in violation of the First Amendment.

Clingman v. *Beaver*, 544 U.S. 581, 611 (2005) (Stevens, J., dissenting, joined by Ginsburg and Souter, J.J.) (parallel citations omitted).

Like the Jaybird primary in *Terry*, the convention system used to select Supreme Court Justices in New York is "the only election that . . . count[s]." 345 U.S. at 469. The lower courts thus properly focused their scrutiny on the convention system, as opposed to the general election.

B. The Lower Courts Correctly Held That the Availability of Alternate Means To Appear on the General Election Ballot Does Not Save the Convention System.

In an effort to deflect attention from the constitutional infirmities of the convention system, petitioners argue that the district court erred by failing to account for the fact that there are alternative means of "reasonable access" to the general election ballot in New York. BOE Br. at 17. In support of this argument, petitioners rely on a series of decisions by this Court that addressed laws limiting the ability of independent and minor-party candidates to appear on general election ballots. BOE Br. at 22-24. These cases do not provide any basis for overturning the Second Circuit's decision.

First, as the district court found, this case is not about the rights of a candidate seeking "to access the general election ballot as an independent." Pet. App. 161. Rather, it concerns the ability of candidates "to compete for their major party's nomination for Supreme Court Justice by garnering support among the rank-and-file members," Pet. App. 161 – an impossibility for challenger candidates who must disaffiliate from their parties and compete only in the general election in order to seek judicial office.

Second, the cases on which petitioners rely do not support the proposition that access to the general election ballot immunizes other stages of the electoral process from scrutiny. These cases address the constitutionality of limitations on candidate access to the primary or general election ballot. But none of them involved convention systems or primaries that were found to be outcome determinative, and in the one case where a ballot restriction was upheld, no candidate was required to disaffiliate from his or her party in order to participate in the general election. By contrast, the Second Circuit noted here that "the general election is little more than ceremony," Pet. App. 23, and the district court observed that "nominations, not general elections, are the critical determinant in electing Supreme Court Justices in New York." Pet. App. at 166. And, in this case, in order to be listed on the general election ballot, a challenger candidate would have to give up his or her party affiliation. Pet. App. 55. These striking factual differences significantly undercut petitioners' reliance on the cited Supreme Court cases.

Petitioners cite three cases in which this Court struck down limitations on ballot access. BOE Br. at 22 (citing *Lubin* v. *Panish*, 415 U.S. 709 (1974); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); and *Williams* v. *Rhodes*, 393 U.S. 23 (1968)). In each of them, the Court remarked that the electoral scheme at issue provided no alternate means of access to the general election ballot. In *Lubin*, the Court struck down a California filing fee requirement applicable to both the primary and general election that afforded no "reasonable alternative means of ballot access" to indigent candidates. 415 U.S. at 718. In *Anderson*, the Court found an early filing deadline unconstitutional, where the deadline would "totally exclude" from the general election ballot certain independent candidates. *Anderson*,

460 U.S. at 792. And in *Williams*, the Court struck down restrictions that made it "virtually impossible" for any but the two major parties to appear on Ohio's presidential ballot. *Williams*, 393 U.S. at 25.

These cases hold that an electoral scheme is unconstitutional if a state imposes burdensome limitations on general election ballot access and does not offer reasonable alternate means of access. The converse does not logically follow, however, that if reasonable alternative means to access a general election ballot exist, then access restrictions upon the party nomination process are *per se* constitutional. Indeed, in *Anderson* and *Williams*, only general election restrictions were at issue, and the Court therefore had no occasion to consider whether the existence of an exclusive, outcome-determinative phase of the electoral process prior to the general election would have equally rendered their schemes unconstitutional. In contrast, in *Lubin*, where indigent candidates were unable to pay the filing fee and the primary was an exclusive and outcome-determinative phase as to them, the Court found the scheme unconstitutional. 415 U.S. at 718.

Moreover, reasonable alternative means of access to the general election ballot are not available in this case. New York's system affords a challenger candidate no practical access to the judicial election process. New York's nominating conventions are much more outcome-determinative than the filing fees at issue in *Lubin*. Not only do they determine whether a challenger candidate will have any access to the election at all; they also decide the final winners. As the district court found, the Democratic and Republican parties appoint their respective justices in safe Assembly Districts and "divvy up the judgeships" in mixed ones, so that the candidate that is selected by a particular

party's convention is assured of victory at the general election. Pet. App. at 130. And as the Second Circuit found, "through the use of overlapping and severe burdens, [the convention system] deprives a candidate of access altogether." Pet. App. 45. Like the filing fee in *Lubin*, the deadline in *Anderson*, and the restrictions in *Williams*, New York's system completely excludes challenger candidates from the nominating convention phase of the elective process – and therefore the entire elective process – without providing "reasonable alternative means" of access. *Lubin*, 415 U.S. at 718. Indeed, as in *Williams*, where the major parties had a "permanent monopoly" on the general election ballot, 393 U.S. at 32, the district court here found that "candidates without either the Democratic or Republican nomination have no chance of being elected anywhere." Pet. App. 130-31. The lower courts thus properly found that the alternative means of appearing on the general election ballot in New York did not excuse the flaws in the convention system.

Furthermore, it is not reasonable access to require challenger candidates to disaffiliate from their parties in order to participate in the judicial election process. In *Bullock* v. *Carter*, in considering a primary election filing fee, this Court held that access to the general election that required candidates to disaffiliate from their parties offered no "reasonable alternative means of access to the ballot." 405 U.S. 134, 149 (1972); *id.* at 146-47 ("[W]e can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations.").

Citing *Clingman* v. *Beaver*, 544 U.S. 581 (2005), petitioners argue that such a disaffiliation requirement does not substantially burden associational rights. BOE Br. at 24. *Clingman* is inapposite. There, the Court considered

whether requiring voters to register as Libertarians or Independents in order to vote in the Libertarian primary violated voters' (and the Libertarian Party's) associational rights. *Clingman*, 544 U.S. at 584-85. The Court held that the statute minimally burdened voters' rights to associate with the Libertarian party – without addressing whether it burdened voters' right to associate with their original political party. *Id.* at 590-91 (plurality opinion).[5] The latter issue was apparently not raised and was not before the Court. The other cases cited by petitioners address nonpartisan primaries, which do not require a candidate to disaffiliate from his or her party and are thus irrelevant to evaluating the burdensomeness of disaffiliation. BOE Br. at 24 (citing *Republican Party of Minn.* v. *White*, 416 F.3d 738, 779 (8th Cir. 2005) (Gibson, J., dissenting), *cert. denied sub nom. Dimick* v. *Republican Party of Minn.*, 546 U.S. 1157 (2006); *Storer*, 415 U.S. at 741).

Petitioners also cite *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986) (cited in BOE Br. at 23), in which this Court upheld a Washington law conditioning access to the general election ballot on receiving one percent of the vote in an easily accessible multi-party "blanket

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[5] Petitioners mischaracterize *Clingman* in this regard, stating that it "held that a requirement that one disaffiliate from his current party 'prior to participating in [another] party's primary minimally burdens voters' associational rights.'" BOE Br. at 24. In fact, *Clingman* held that "requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights." 544 U.S. at 592. Read in context, *Clingman* clearly referred to the burden on a voter's right to associate with the party holding the primary, rather than on a voter's right to associate with his or her current party, if any.

primary." 479 U.S. at 191-92. Petitioners point to the Court's finding that Washington guaranteed "candidate access to a statewide ballot" at the primary stage, *id.* at 199, arguing that statewide access at any stage of an election should preserve it from First Amendment challenge. BOE Br. at 23-24. As the Second Circuit noted, however, this Court found *Munro's* ballot access provision constitutional not because of the existence of alternate means of access, but under the principle "that States may condition access to the general election ballot . . . upon a showing of a modicum of support." 479 U.S. at 193. Moreover, as discussed above, access afforded after the outcome-determinative phase of an election – in this case, access to the general election after the nominating conventions have already picked the winners – is no access at all. In *Munro*, candidates had "easy access to the primary election ballot" itself; there was no outcome-determinative phase of the election prior to the blanket primary. *Id.* at 199.

The lower courts properly considered the burdens imposed on those who seek a major party nomination to be a Supreme Court Justice in New York. The Second Circuit concluded that "through a byzantine and onerous network of nominating phase regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment." Pet. App. 69-70. The district court found that the only way to become a Supreme Court Justice in New York is through the convention system established by statute. Pet. App. 130-31. The lower courts did not ignore the supposed alternative means by which a candidate can access the general election ballot in New York – they instead found that these alternative means have absolutely no effect on the outcome of the general election. Under these circumstances, the Second Circuit did not err in subjecting the convention system to scrutiny, notwithstanding the

availability of alternative means by which a candidate can appear on the general election ballot.

III. THE SECOND CIRCUIT CORRECTLY APPLIED A "REALISTIC OPPORTUNITY TO PARTICIPATE" STANDARD.

In evaluating the constitutionality of the convention system used to select New York Supreme Court Justices, the Second Circuit found that "candidates and voters" have a First Amendment right to "a realistic opportunity to participate in the nominating process." Pet. App. 41. Petitioners argue that this was a "revolutionary conclusion" supported by "no pertinent authority whatsoever," BOE Br. at 17, and it created a "right to *win* a party nomination outright or the right to have direct access to voters." County Br. at 28. As explained below, the Second Circuit did not err in applying a standard based on a "realistic opportunity to participate." Nor did it create a "right to *win*" or to "direct access."

A. First Amendment Principles Require That Candidates Have a "Realistic Opportunity To Participate" In the Dispositive Stage of the Electoral Process.

The Second Circuit correctly found that New York State's judicial districts are subject to "one-party rule" and a series of regulations that "has transformed a de jure election" for Supreme Court Justices "into a de facto appointment." Pet. App. 69-70. This *de facto* appointment system violates candidates' and voters' First Amendment right to "a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 41-42. In other words, "the First Amendment prohibits a state from

maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process, unless the exclusionary regulations are necessary to further a compelling state interest." Pet. App. 44.

This right to a "realistic" opportunity to participate is well-grounded in this Court's jurisprudence. The First Amendment unquestionably protects the associational rights of voters and candidates, which include the right of voters to have "candidates of their choice placed on the ballot," *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992), as well as the correlative right of candidates "to a place on a ballot," *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974); *see also id.* (recognizing an "individual candidate's . . . important interest in the continued availability of political opportunity"); *Anderson* v. *Celebrezze*, 460 U.S. 780, 786 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."). Petitioners concede that candidates have "the right to access the electoral system instituted by the state" but assert that this right is fully satisfied if a candidate has "*convention access*, *i.e.*, . . . a chance to put one's name up for consideration at the convention." County Br. at 31. There are several problems with petitioners' position.

First, by asserting that the right to access is satisfied if a candidate can be considered at a convention, petitioners seem to suggest that unrealistic participation is enough to satisfy the First Amendment. The Second Circuit found that "regulations effectively prohibit candidates who lack the support of the party leadership from putting their slates of delegates on the primary election ballot," and "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates." Pet. App. 16, 18. In other

words, New York's judicial nominating convention system effectively "preclude[s]" a candidate without party support from seeking his or her party's nomination. Pet. App. 70. If this system violates candidates' and voters' First Amendment rights, the ability to engage in a pointless exercise by "put[ting] one's name up for consideration at the convention," County Br. at 31, without any chance of success, cannot cure that violation. A right to unrealistic access cannot be the law. Indeed, this Court has held that "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972).

Second, petitioners incorrectly assert that there is "no pertinent authority whatsoever" for the "realistic opportunity to participate" standard. BOE Br. at 17. In fact, the "opportunity to participate" standard is a staple of voting rights law. In *Hadley* v. *Junior College Dist. of Metropolitan Kansas City*, this Court held that the Constitution "requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U.S. 50, 56 (1970). In *Reynolds* v. *Sims*, the Court held that "each and every citizen has an inalienable right to full and effective participation in the political processes" of his or her state. 377 U.S. 533, 565 (1964); *id.* at 566 ("[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."). And there can be no question that courts are well versed in interpreting the "opportunity to participate" standard. Besides being enshrined in the law of this Court, it is set forth in Section 2 of the Voting Rights Act, which guarantees minority groups an equal "opportunity . . . to participate in the political process." 42 U.S.C. § 1973(b);

League of United Latin Am. Citizens v. *Perry*, 126 S. Ct. 2594, 2619 (2006) (applying Section 2).

Other voting cases have applied standards substantively similar to the "realistic opportunity to participate" standard. In *Terry* v. *Adams*, Justice Frankfurter condemned the exclusion of minority voters "from meaningful participation in the only primary scheme set up by the State." 345 U.S. 461, 476 (1953) (Frankfurter, J., concurring). In *Anderson* v. *Celebrezze*, this Court evaluated "ballot access restrictions" in light of the burdens that they place on the rights of voters "'to cast their votes effectively.'" 460 U.S. at 787 (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968)). And in *Regents of the University of California* v. *Bakke*, the Court stated that the "relevant opportunity" at issue in its prior election cases encompassed the opportunity for "meaningful participation in the electoral process." 438 U.S. 265, 305 (1978) (Powell, J., announcing judgment of the Court); *see also Rogers* v. *Lodge*, 458 U.S. 613, 640 n.21 (1982) (Stevens, J. dissenting) (stating that "meaningful participation" in the electoral process is a hallmark of representative democracy); *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 573 n.5 (2000) ("If the 'fundamental right' to cast a meaningful vote were really at issue," the challenged statute "would be not only constitutionally permissible but constitutionally required.").

That this Court has embraced the concept of realistic participation is not surprising given that it has long recognized that First Amendment "access to the electorate" must "be real, not 'merely theoretical.'" *Am. Party of Tex.* v.

White, 415 U.S. 767, 783 (1974) (citing *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971)).[6] The Second Circuit's application of a realistic participation standard is thus well supported by this Court's precedents.

B. The Second Circuit Did Not Interpret a "Realistic Opportunity To Participate" As the Ability To Win the Nomination of a Major Party or To Have Direct Access to Voters.

The Second Circuit found that the burdens imposed on respondents were severe because (i) at the delegate selection stage, candidates lacking party support can "never" satisfy the requirements for running their own slates of delegates; and (ii) at the convention stage, such candidates have a "non-existent" chance to lobby delegates. Pet. App. 45. Petitioners argue that by requiring them to alleviate one of these two burdens (each of which incorporates a combination of multiple burdens), the Second Circuit granted candidates a "right to *win* a party nomination outright or the right to have direct access to voters." County Br. at 28. According to petitioners, "*successful* lobbying of delegates at the convention stage[] amounts to winning the nomination, not merely competing for it." County Br. at 30.

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[6] This Court has also endorsed the concept of an opportunity to participate in other contexts. *See, e.g.*, *J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 145 (1994) (holding gender-based peremptory challenges unconstitutional and remarking that "[e]qual opportunity to participate in the fair administration of justice is fundamental to our democratic system"); *Powers* v. *Ohio*, 499 U.S. 400, 409 (1991) (holding race-based petit jury peremptory challenges unconstitutional because they foreclose "a significant opportunity to participate in civic life").

And "finding that candidates must have a right to run pledged delegates amounts to a judicial declaration that the only nomination method that satisfies the First Amendment is a primary or its functional equivalent." County Br. at 29.

The Second Circuit never held that a right to "successful" lobbying exists.[7] Instead, it found that respondents' rights were severely burdened because, among other reasons, challenger candidates have "no actual opportunity to lobby delegates." Pet. App. 18; Pet. App. 122 ("[L]obbying judicial convention delegates and alternates is not a realistic route to a nomination even for diligent candidates if they lack the support of party leaders."). As the district court found, the less than three-week time period for lobbying was "deliberately kept short," thereby making it impossible for challenger candidates to lobby delegates. Pet. App. 169. All that is required to alleviate the specific burden imposed by candidates' inability to lobby delegates is a system in which there is time to lobby delegates, and

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[7] Petitioners' claim that the courts guaranteed a right to "successful lobbying" comes from an out-of-context phrase in the district court opinion. Applying the *Storer* test, the district court evaluated the burdensomeness of the judicial nominating convention system by asking whether a challenger candidate could "succeed in getting her own delegates and alternates on the ballot in each Assembly District" or could "succeed in lobbying the delegates installed by the party leaders." Pet. App. 167. The second question clearly was intended to ask whether a challenger candidate had any practical chance to lobby delegates; the district court struck down the convention system after concluding that it gave challenger candidates "virtually no chance of obtaining a major party nomination." Pet. App. 169. In any event, the Second Circuit did not adopt this aspect of the district court's formulation of the burdens imposed by the judicial nominating convention system.

delegates are not beholden to party leaders. This is not a right to win.

Nor did the Second Circuit hold that all convention systems are unconstitutional and must be replaced by systems affording direct candidate access to voters. County Br. at 29. Rather, the Second Circuit held that *this* convention system unconstitutionally burdens the First Amendment rights of candidates and voters because it "preclude[s] all but candidates favored by party leadership" from seeking a party's nomination. Pet. App. 70.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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