No. 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 FOR THE MID-MANHATTAN BRANCH OF THE NAACP AND THE METROPOLITAN BLACK BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *American Party of Texas* v. *White*, 415 U.S. 767 (1974), this Court held that the Constitution does not necessarily forbid party conventions "in preference to" party primaries as the means for political parties to choose their candidates for elective office. In the decision below, the Second Circuit affirmed a ruling requiring New York's political parties to nominate candidates for trial-court judge by party primaries rather than conventions. In so doing, the Second Circuit invalidated the statute governing judicial nominations *in its entirety*, even though only certain portions of the statute were deemed unconstitutional.

The question addressed by *amici*, which is subsumed within the question presented by petitioners, is this:

> May a federal court strike down an entire state statute absent a finding that the legislature's purpose in enacting the statute would be frustrated by removing only its constitutionally defective portions?

This question was addressed by the courts below and is "not foreign to the parties." *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (considering retroactivity argument raised only by *amici*).

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The severability analysis in the decision below warrants reversal even if the Court otherwise affirms that decision. The Second Circuit found that New York's statutory system for nominating party candidates for judicial elections imposed severe burdens on the First Amendment rights of voters and candidates, and struck down the nomination statute in its entirety. Before striking down the entire statute, however, the court was required by long-standing precedent to perform a severability analysis to determine whether the non-defective portions of the statute could be preserved. Had the Second Circuit performed that analysis, it would have concluded that the severe burdens it found were traceable to an isolated portion of the statute; that the Legislature's purpose in enacting the statute would not be frustrated without the burdensome provisions; and that a more limited remedy was required.

The Second Circuit's severability analysis, moreover, not only led to the wrong result in this case, it also has profound implications for future cases in that Circuit and elsewhere. The Second Circuit's approach signals an enormous expansion of judicial power of which this Court has repeatedly disapproved, and that approach should be rejected here as well.

The severability issue in this case is of particular concern to *amici curiae* Mid-Manhattan NAACP and Metropolitan Black Bar Association, which support equal protection for African-Americans and other minorities in New York City.[1] Both organizations, which are described in more detail in the Appendix, include sitting black Su-

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[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* and its counsel has made a monetary contribution to the preparation or submission of this brief.

preme Court Justices in their membership, and both have representatives on the judicial screening panel that evaluates candidates for Supreme Court Justice for the First Judicial District—a panel recognized by the district court as "the best in the state." *Lopez Torres* v. *New York State Bd. of Elections*, 411 F. Supp. 2d 212, 231 (E.D.N.Y. 2006).

As organizations with a long history of championing the equal access of blacks and other minorities to elective office in New York, *amici* are strong proponents of New York's judicial convention system. *Amici* are especially proud of the record of minority participation that convention system has produced in New York City. *Amici* believe, however, that the decisions below unnecessarily compromise the success of New York's judicial election procedures. Even if portions of the relevant statutes could not be upheld, wholesale rejection of the convention statute was inappropriate. *Amici* thus urge the Court to reverse the decision below and thereby ensure that the remedy in this case does not needlessly sacrifice the diversity benefits of the existing convention system.

STATEMENT

1. In 1921, the people of New York, acting through their duly elected legislators, expressed a clear preference for selecting nominees for the office of New York State Supreme Court Justice through a convention system, rather than direct primary elections.

In more recent years, this convention system has promoted the public welfare by enabling minority candidates to seek and obtain the office of Supreme Court Justice in proportion with the tremendous diversity in New York City. For example, as a result of the convention system, the Supreme Court bench in New York County is currently 44.7 percent minority.[2] Of the 38 Supreme Court

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[2] Defendants' Corrected Proposed Findings of Fact in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Lopez Tor-*

justices in New York County, 22 are women, nine are African-American, four are Hispanic, and two are Asian-American.[3] In 2002, the First Judicial District convention nominated:

- Rolando Acosta, a Dominican man;
- Carol Edmead, an African-American woman;
- Troy Webber, an African-American woman;
- Rosalyn Richter, a disabled woman;
- Doris Ling-Cohan, an Asian-American woman; and
- Richard Price, an Orthodox Jewish man.[4]

In the district court, petitioners presented voluminous testimony that a primary system could never achieve the kind of diversity that the convention system does, mainly because "[t]he best single determinant of success in a direct election is the size of the candidate's campaign chest," and minorities tend to have disproportionately smaller fundraising resources.[5] One of petitioners' experts testified that without the convention system "you would have a bunch of rich people [elected] to the bench and there would be no minorit[ies] sitting up there at all."[6] According to this expert, the existing convention system is "a little

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res v. *New York State Bd. of Elections*, No. 04-cv-1129-JG-SMG (E.D.N.Y. Jan. 26, 2005) (Docket No. 112) ("Defendants' Proposed Findings"), ¶ 241.

[3] *Ibid.*

[4] *Id.* ¶ 239.

[5] *Id.* ¶ 247.

[6] *Id.* ¶ 248.

fairer to ordinary people."[7] Another expert testified that primaries would result in "an entirely white bench."[8]

2. Although the convention system was democratically enacted and has done much to foster diversity on the bench, the courts below held that the statute enacting that system violates the First Amendment and cannot be applied in its current form. The district court ruled that the statute imposed severe burdens on the First Amendment rights of voters and candidates to have meaningful choice in the election of Supreme Court Justices, without the justification of sufficiently compelling state interests. 411 F. Supp. 2d at 243-255. The district court based this ruling primarily on anecdotal evidence of respondents' difficulties in obtaining the nomination of their parties without the support of party leadership. *Id.* at 231-239.

According to the district court, several features of the judicial election statute were responsible for respondents' alleged difficulties, including: (1) the number of assembly districts from which a candidate must field delegates to the conventions; (2) the number of delegates each candidate must run within each assembly district; (3) the number of signatures each candidate must obtain for each delegate within a 37-day period; (4) the prohibition of identifying the candidate each delegate supports on the ballot; and (5) the impracticality of lobbying delegates to change their votes prior to and at the conventions themselves. *Id.* at 217-230.

Based on its finding of a First Amendment violation, the district court enjoined the operation of the entire New York judicial convention system and ordered that direct primary elections be held unless the Legislature can implement a new system before the next election cycle. *Id.* at 255-56. The district court did not examine whether the

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[7] *Ibid.*

[8] *Id.* ¶ 249.

convention system could still function in the absence of the provisions it found too burdensome, instead concluding that a primary system was preferable because it "assure[s] that intraparty competition [will be] resolved in a democratic fashion." *Id.* at 256 (citation omitted).

The Second Circuit affirmed the district court's findings in their entirety. *Lopez Torres* v. *New York State Bd. of Elections*, 462 F.3d 161, 208 (2d Cir. 2006). The Second Circuit acknowledged the Legislature's preference for holding conventions rather than primaries, as well as the obligation of federal courts not to "nullify more of a legislature's work than is necessary." *Id.* at 171-172, 205. But the court failed to examine whether nullifying the entire convention statute was the least invasive way to remove its constitutional defects. Instead, the court conflated the required practice of striking defective provisions with the impermissible practice of "rewriting" or "modifying" them. *Id.* at 206.

In reviewing the district court's requirement that primaries be held in the next election cycle, the Second Circuit considered only two options—striking down the entire convention system and leaving a procedural void for selecting candidates, or striking down the entire convention system and ordering primaries. *Id.* at 206-207. This false dichotomy omitted the option of striking down only the defective portions of the convention system and leaving the remainder of that system in place.

SUMMARY OF ARGUMENT

Even if the Court affirms the Second Circuit's conclusion that New York's convention statute violates the First Amendment in some respects, the Court should reverse the decision below because it nullifies a greater portion of the statute than necessary to remedy those asserted constitutional defects. To prevent overreaching by the lower federal courts, this Court has provided strict rules for determining how to fashion equitable relief when striking

down defective statutes. Those rules were not followed in the decisions below.

The correct approach, following a finding that certain features of New York's judicial convention procedures were unconstitutional, would have been to examine whether the remainder of the statute could function in a manner consistent with the Legislature's intent with the defective portions removed. The Second Circuit did not perform that analysis.

Had it done so, the court below would have seen that the Legislature clearly preferred nominating judicial candidates by convention, and that the convention statute could still function robustly with the offending features removed. The result would have been to strike down only the offending features and to leave the rest of the convention statute intact.

Instead, the Second Circuit imposed upon New York a party-primary system that its Legislature expressly discarded in 1921 and that its voters still do not want today. Prominent among the reasons New York's voters want to preserve the convention system is its proven track record of promoting minority representation in the New York judiciary. But the decision below replaces that process with one preferred, as a matter of public policy or political theory, by unelected federal judges. That decision should be reversed.

ARGUMENT

As a preliminary matter, and contrary to the analysis performed below, the severability of a state statute is governed by state law. See *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996); *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). Thus, although the rule for determining whether a statute is severable is the same under both New York and federal law, compare *Hynes* v. *Tomei*, 706 N.E.2d 1201, 1207 (N.Y. 1998), with *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006), it is

appropriate to draw upon New York authority in assessing the severability of any provisions found to be constitutionally infirm here.

As we show in Section I, under New York law, non-defective portions of a statute must be preserved if the state legislature would prefer that result. And as we show in Section II, even if some portions of the New York convention statute violate the First Amendment, the New York legislature would clearly prefer to retain a convention system rather than switching to a primary system. That preference should be respected.

I. Under New York Law, Which Controls Here, Non-Defective Portions Of A Statute Must Be Preserved If The Legislature Would Prefer That Result.

For more than 80 years, New York law has been clear that a court finding specific provisions of a statute invalid must determine "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 129 N.E. 202, 207 (N.Y. 1920) (Cardozo, J.). To determine what the Legislature "would have wished," New York courts consider the legislative history of the statute, see *Matter of Westinghouse Elec. Corp.* v. *Tully*, 470 N.E.2d 853, 855 (N.Y. 1984), and ask whether, as a practical matter, the statute would still be capable of functioning "if the knife is laid to the branch instead of at the roots," *Alpha Portland Cement*, 129 N.E. at 207.[9]

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[9] A corollary of this functionality test is that, where a defective portion of a statute was added by later amendment, the pre-amendment version of the statute is functional enough to stand on its own. See *Skaneateles Waterworks Co.* v. *Village of Skaneateles*, 55 N.E. 562, 566-567 (N.Y. 1899) (where unconstitutional provision was not added to statute until 19 years after its passage, "the elimination of that feature of the statute will in no-

The obvious reason for this approach is to keep legislative power out of the hands of the judiciary by limiting a court's power to the minimum necessary to remedy the constitutional infirmity before it. As then-Judge Cardozo explained in *Alpha Portland Cement*, a court's "right to destroy [a statute] is bounded by the limits of necessity." 129 N.E. at 208. "Our duty is to save," he wrote, "unless in saving we pervert." *Ibid.*[10]

New York's highest court has applied these well-settled severability rules to provisions of the State's election apparatus on several occasions, with results that are instructive here.

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wise interfere with the just and proper working out of the general purposes of the act"); *Buckley* v. *Valeo*, 424 U.S. 1, 75-76 (1976) (upholding 1971 campaign spending disclosure statute while striking down 1974 amendment imposing campaign spending limits).

[10] The limits on the power of federal courts to issue broad injunctions were one of the few issues upon which both the Federalists and the Anti-Federalists agreed. When the Federalists sought to include the phrase "all cases, in law and equity" in describing the powers of the judiciary in Article III, the Anti-Federalists were concerned that "equity" powers could be abused to give judges unfettered discretion. See Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), in 1 *The Debate on the Constitution* 245, 273 (Bernard Bailyn ed., 1993). Alexander Hamilton's reply for the Federalists was not to defend broad equity powers, but rather to deny that judicial power was broad in the first instance. See Publius [Alexander Hamilton], *The Federalist* No. 78 (May 28, 1788), in 2 *The Debate on the Constitution* 467, 468 (Bernard Bailyn ed., 1993). Thus, the Anti-Federalists opposed the grant of equity powers to federal courts for fear of the unfettered discretion they would lend, and the Federalists considered the judiciary to be capable of "no active resolution whatever." *Ibid.* Between them, there is little support for the broad exercise of judicial power in issuing sweeping injunctions when a more limited remedy is available.

For example, in *In re Orans*, 206 N.E.2d 854 (N.Y. 1965), the Court of Appeals examined which portions of the New York State Constitution governing legislative district size could withstand the recently-announced "one man, one vote" apportionment rule of *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Article III of the New York State Constitution contained numerous mechanisms that combined to give sparsely populated areas of the state greater representation per capita in the Legislature than more densely populated areas. This Court invalidated these mechanisms on Fourteenth Amendment grounds in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964). The state courts in *Orans* were left to sort out which other portions of Article III could be preserved in light of *WMCA*.

Citing Judge Cardozo's instructions in *Alpha Portland Cement*, the Court of Appeals in *Orans* carefully examined each remaining portion of Article III, "saving as much as possible" in order to "carry[ ] out the will of the people of this State." 206 N.E.2d at 858, 860. The court concluded that only the provisions making election district boundaries "co-terminal" with county borders needed removal, leaving intact other clauses capping the assembly size at 150 members, requiring assembly districts to be "compact * * * convenient and contiguous," allowing the number of senate districts to increase with population growth, and preserving "the historic and traditional significance of counties in the districting process * * * where and as far as possible." *Id.* at 859.

Similarly, in *Schieffelin* v. *Goldsmith*, 170 N.E. 905 (N.Y. 1930), the New York Court of Appeals considered a state statute providing for the appointment of temporary municipal court justices in the event that a sitting justice became unable to perform his duties. The statute gave the mayor authority to appoint temporary replacement justices, but with the proviso that the mayor could choose those replacements only from the membership of the same political party as the justice being replaced. *Id.* at 906. This party affiliation limitation was challenged under Ar-

ticle 13, § 1 of the New York State Constitution, which prohibits any "oath, declaration or other test" (other than the oath of office) as a qualification for holding public office. *Id.* at 908.

The Court of Appeals found that the party affiliation provision could be pruned at the branch without harming the rest of the statute: "It is a complete harmonious statute with that sentence deleted. It affords a complete and definite system for appointing temporary justices. The sentence in question adds nothing to and detracts nothing from the purpose of the act. The provisions of the act are not so interdependent that the act cannot operate without the sentence in question. It is not so related to the other provisions that it can be supposed that the Legislature would not have passed the act without it." *Ibid.*

In so holding, the Court of Appeals distinguished the party affiliation provision in *Schieffelin* from one that tainted the entire statute in *Rathbone* v. *Wirth,* 45 N.E. 15 (N.Y. 1896). There, the Court of Appeals had considered a state statute requiring that the four-member Albany police board be composed of two members from each of the two dominant political parties on the city council. *Id.* at 16-17. The statute thus precluded voters from electing a majority from one of the two major parties, and precluded third-party candidates from running at all. *Id.* The Court of Appeals found these provisions to violate the sections of the New York State Constitution guaranteeing local voters the right to elect local officers of their choosing. *Id.* at 17. It then considered whether the defective provisions concerning the composition of the police board could be severed and the rest of the statute concerning the procedural mechanisms for choosing the police board preserved. *Id.* at 20.

The Court of Appeals performed the familiar severance analysis, asking whether the legislature would have enacted the remainder of the statute had it known the offending provisions were constitutionally defective. The

answer was clearly "No": "This statute was intended to amend the existing law upon the subject of a police commission, and it is perfectly plain, upon its reading, that what was aimed at was to remove from office the present four commissioners and all of their subordinates, * * * and to compel the substitution, as commissioners, of four persons, who would be representatives of two certain political organizations. If we eliminate the prescribed methods for the accomplishment of this purpose, we emasculate the legislative act, and it cannot seriously be contended that then there would remain any such law as was intended to be enacted by the legislature." *Id.* at 21. According to the court in *Schieffelin*, "the statute [in *Rathbone*], read as a whole, made it apparent that its purpose was to change the political construction of the police department, and to strike out that provision would nullify the purpose of the Legislature. The decision is not in conflict with the holding in this case." 170 N.E. at 908.

Read together, *Orans*, *Schieffelin*, and *Rathbone* provide a three-step process for determining severability. Courts must (1) identify the purpose of the statute in which the defective provision is found; (2) strike out only the minimum language needed to remove the constitutional defect; and (3) determine whether the remainder can still function in a manner consistent with the previously identified purpose.

II. The Courts Below Failed To Conduct The Required Severability Analysis, And In So Doing Erred In Eliminating New York's Entire Convention Statute.

The analysis below departs sharply from this well-established framework.

1. To be sure, the Second Circuit correctly recognized that the purpose of the convention statute was to end a ten-year experiment with primaries that the Legislature had deemed a failure. From the first judicial elections in New York in 1846 until 1911, the political parties em-

ployed conventions to designate their Supreme Court nominees. 462 F.3d at 171. In 1911, the Legislature, "buoyed by a wave of progressive politics," switched to a primary system. *Ibid.* The new system soon proved to be problematic: "[O]ver the next decade, concern grew that bare-knuckled primary elections dissuaded qualified candidates from seeking these significant judicial positions. As to those brave enough to enter the contest, observers worried that the need to raise large sums of money might compromise their independence, or at least appear to do so, and lodge effective control of the nominating process in the hands of the political bosses who directed their party's large election apparatus. As a result of these concerns, in 1921 New York recast the electoral process for Supreme Court justices [by enacting the current statute]." *Id.* at 171-172.

In other words, for 150 of the 160 years that New York has elected its Supreme Court Justices, party candidates were chosen by nominating conventions. For the remaining ten years, the State experimented with a primary system much like the one crafted by the district court as a remedy here, but it was deemed to jeopardize the independence of judges due to the large sums of money it required them to raise, and was scrapped.[11] It may be inferred from this legislative history that the purpose of the statute at issue in this case was to create a nomination process that shelters candidates from the need to raise money to finance "bare-knuckled" primary elections.

2. According to the decisions below, the principal defect in the convention statute is the burden created by party rules requiring candidates to field unreasonably large slates of convention delegates. See 462 F.3d at 192; 411 F. Supp. 2d at 220. Under the existing statute, a candidate seeking the office of Supreme Court Justice must

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[11] These concerns were repeated 85 years later in the testimony presented in the district court. See *supra* at 3-4.

field a slate of convention delegates and alternate convention delegates from each assembly district ("AD") within the judicial district he or she seeks to represent. See N.Y. Election Law § 6-124. But the statute leaves to the political parties the task of determining how many delegates must be elected from each AD. *Ibid.*

Using this authority, the political parties have devised delegate-allocation formulas yielding what the courts below found to be unreasonably high numbers of delegates per judicial district. For example, a Democratic candidate running for Supreme Court Justice in the Second Judicial District must field a slate of 124 delegates plus 124 alternate delegates—248 total—across the 24 ADs in that judicial district. Even worse, a Republican candidate running in the Tenth Judicial District must field 185 delegates plus 185 alternate delegates—370 total—across that judicial district's 21 ADs. See 411 F. Supp. 2d at 219.

According to the district court, the statute "make[s] a challenger candidate's effort to elect a majority of delegates more difficult" by "delegating to the major parties the right to determine the number of delegates and alternate delegates" required for nomination. *Id.* at 220. "In the Second Judicial District in 2004, for example, such a challenge would require running approximately 250 candidates across 24 ADs and two counties. The sheer number of people a challenger must recruit to run for the office of delegate and alternate delegate is a significant burden in itself." *Ibid.*

The Second Circuit agreed, concluding that "the evidence showed that the political parties' delegate-allocation formulae do much more than merely dilute the proportional efficacy of votes *vis-a-vis* assembly districts within a judicial district. Rather, the evidence showed that a network of restrictive regulations effectively *excludes* qualified candidates and voters from participating in the primary election and subsequent convention, and thus se-

verely limits voter choice at the general election." 462 F.3d at 192.

The other features of the judicial convention system cited below as contributing to an undue burden have previously been found constitutionally benign when standing alone. For example, this Court has repeatedly upheld more demanding signature requirements for ballot access than those at issue here—between 9,000 and 24,000 signatures over a 37-day period. See *Norman* v. *Reed*, 502 U.S. 279, 295 (1992) ("our precedents foreclose the argument" that collecting 25,000 signatures from one suburban district is unduly burdensome); *Storer* v. *Brown*, 415 U.S. 724, 740 (1974) ("[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden"); *White*, 415 U.S. at 783 (22,000 signatures in 55 days "does not appear either impossible or impractical").

Similarly, although this Court has not considered New York's practice of not including on the primary ballot the names of the candidate to whom a convention delegate has pledged his support, that practice has been sustained by a New York State court. See *Fallon* v. *State Bd. of Elections*, 380 N.Y.S.2d 355 (N.Y. App. Div. 1976).

None of the other features of the convention statute was even claimed to be unconstitutional, much less found to be so. The requirement of a convention in the first instance is clearly permissible under *White*. The election of delegates in a primary and their distribution across all ADs are both features of candidate selection for other offices in New York that were cited with approval by the district court. 411 F. Supp. 2d at 220.

Without the cumulative effect of the delegate-allocation formulas discussed above, it is unlikely that the courts below would have found that the other features of

the convention system significantly burden First Amendment rights.[12]

3. Once the court below concluded that the delegate-allocation formulas could not stand, it was required to strike from the statute the *minimum* language necessary to remove those formulas, and then to ask "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *Alpha Portland Cement*, 129 N.E. at 207.

Striking the defective formulas from the statute here would have been remarkably easy because the formulas are not in the statute to begin with. The statute contains only a grant of authority to the political parties to create those formulas, not the formulas themselves.[13]

If the Legislature did not insist upon *any* particular delegate-allocation formulas in the text of the statute, it follows that the Legislature's intent would not be thwarted by invalidating only the particular allocation formulas chosen by the parties. Furthermore, the fact that the specific formulas were put in place *after* the statute was enacted is compelling evidence of the statute's adequate

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[12] The other factual findings below, detailing the anecdotal difficulties of respondents in seeking office, are more accurately described as symptoms, not causes, of the severe burden discussed above. It is hardly surprising that the political bosses respondent Lopez Torres encountered—one of whom, Clarence Norman, has since been convicted on numerous felony corruption charges—were able to freeze her out of the convention process when her only alternative was to attempt to field a slate of 248 of her own delegates and alternates.

[13] See N.Y. Election Law § 6-124 ("The number of delegates and alternates, if any, shall be determined by party rules"). The creation of the delegate-allocation formulas by the parties is nonetheless "state action" for constitutional purposes. See *Terry* v. *Adams*, 345 U.S. 461, 481-482 (1953); *Smith* v. *Allwright*, 321 U.S. 649, 663-664 (1944).

functionality in the absence of those formulas. Cf. *Skaneateles Waterworks*, 55 N.E. at 566-567. Like the party affiliation requirement in *Schieffelin*, the delegate-allocation formulas "add[ ] nothing to and detract[ ] nothing from the purpose of the act." 170 N.E. at 908.[14]

To extend Judge Cardozo's analogy from *Alpha Portland Cement*, the knife in this case need not have been laid at the branch or at the root, but rather at the poisonous fruit grafted on by the political parties. It was error for the court below to enjoin more than was necessary to cure the constitutional defects it found.

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[14] Even without these logical inferences, the Second Circuit knew what the Legislature "would have wished" because the Legislature told it so in the *amicus* brief it submitted in this case. See Brief of the New York State Legislature as *Amicus Curiae*, *Lopez Torres* v. *New York State Bd. of Elections*, No. 06-0635 (2d Cir. June 2, 2006). The Legislature wanted the federal courts to keep out of crafting state legislation.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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APPENDIX

The Mid-Manhattan Branch of the NAACP:

Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization. Its members throughout the United States and the world are the premiere advocates for civil rights in their communities, conducting voter mobilization and monitoring equal opportunity in the public and private sectors. The Mid-Manhattan Branch was founded in 1966.

For over 40 years, the Mid-Manhattan NAACP has been an advocate for all its citizens in the struggle for civil rights and equality. Today, Mid-Manhattan NAACP plays an active role in confronting the gaps and disparities in health care, economics, education funding, criminal justice, and diversity in the courts and the judiciary.

Its efforts continue in voter education, registration and mobilization, as well as youth development and enrichment programs. Today, Mid-Manhattan NAACP has over 600 members, with seven working Committees (Education, Health, Fundraising, Legal Redress, Membership, Political Action and Youth Council).

Mid-Manhattan NAACP's past and present participation on the Supreme and Civil Court Judicial Screening Panels has contributed to greater diversity and minority participation on the Bench. The Branch has five sitting Supreme Court Justices (Hon. Carol L. Edmead, Hon. Milton A. Tingling, Hon. Doris Ling Cohen, Hon. Debra James, and Hon. Paul Fineman) and four sitting Civil Court Judges (Hon. George Silver, Hon. Tanya Kennedy, Hon. Margaret Chan, and Hon. Shari Michels) among its active members. These Judges all reported out of the Judicial Screening Panel process as highly qualified and are representative of the great diversity of New York County.

The Metropolitan Black Bar Association ("MBBA") was created on July 5, 1984 upon the merger of two of the nation's oldest Black bar organizations, the Harlem Lawyers Association and the Bedford Stuyvesant Lawyers Association. For over sixty years, the Harlem Lawyers Association (founded 1921) and the Bedford Stuyvesant Lawyers Association (founded 1933) provided a voice for Black legal professionals and their communities. The MBBA proudly continues the rich legacy of these constituent organizations.

Today, the MBBA is comprised of Black attorneys in both the public and private sectors, as well as judges and other public officials. The MBBA is an affiliate of the National Bar Association and is governed by a 22-member Board of Directors. Its daily operations are managed by its President and six additional elected officers. The purpose of the MBBA is to aid the progress of attorneys of color, and to assist the progress of the legal profession generally. The MBBA serves all of the counties of the Greater New York metropolitan area.

Throughout its 23-year history, MBBA has advocated equal justice and diversity contributing to increasing numbers of minorities in the judiciary. Its founding members include Hon. George Bundy Smith, former Associate Judge on the NYS Court of Appeals; Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York; Hon. L. Priscilla Hall, NYS Supreme Court, Kings County; and Hon. Cheryl Chambers, NYS Supreme Court, Kings County.

The MBBA works to expand the breadth and scope of diverse social and legal issues programs for the benefit of the bar and bench as well as the community at large. MBBA has partnered with a number of other organizations to provide such programs, including the Mid-Manhattan Branch of the NAACP, the Asian American Bar Association, the Puerto Rican Bar Association, the Dominican Bar Association, the Jewish Lawyers Guild,

Nigerian Lawyers' Association, New York County Lawyers Association, the Association of the Bar of the City of New York, the American Bar Association, the New York State Bar Association, NAACP Legal Defense Fund, law schools, and other institutions.

The MBBA sponsors lectures and seminars on Tax Amnesty, Haywood Burns Memorial, Affirmative Action, Immigration Law, Attorney Disciplinary Procedures, Criminal Justice, Jury Selection, Entertainment Law, Guardian/Receivership Training, Surrogate Court Practice and Procedure, Labor Law, Estate Planning and other matters. Members may also qualify for scholarships for continuing legal education courses.

Recently, the MBBA called for minority bar associations to jointly screen and interview judicial candidates to increase the strength of diversity. Other initiatives include: In December 2006, the Hon. George Bundy Lecture Series was established to be held annually in conjunction with the Association of the Bar of the City of New York and the Ida B. Wells Barnett Awards is held annually in conjunction with the New York County Lawyers Association and MBBA's expansive CLE program is held in partnership with the ABA and other minority bar groups.

Other activities include programs geared to potential and current law students and mentoring high school students. The Metropolitan Black Bar Association Scholarship Fund, Inc., an independent non-profit corporation, raises funds and grants scholarships to minority law students.