06-0635-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARGARITA LOPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, COMMON CAUSE/NY,

Plaintiffs-Appellees,

v.

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections,

Defendants-Appellants,

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association,

Defendants-Intervenors-Appellants,

and

ELIOT SPITZER, Attorney General of the State of New York,

Statutory-Intervenor-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF FORMER NEW YORK STATE JUDGES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND SUPPORTING AFFIRMANCE

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IDENTITY AND INTERESTS OF THE AMICI CURIAE

The amici curiae are a select group of individual former New York State judges (trial, appellate, and administrative) who have particularly extensive knowledge of the workings of the New York court system. The amici judges share a concern about the threat that New York's current selection system for Supreme Court Justices poses to public confidence in the integrity and independence of New York's judicial process. The background and experience of the amici, reflected in the brief summaries below, collectively demonstrates their broad knowledge of and interest in the issues implicated by this case:

- Hon. Richard J. Bartlett served as a Justice of the New York State Supreme Court beginning in 1973. He was appointed as the first Chief Administrative Judge of the State of New York in 1974 and served until 1979. Prior to his judicial service, he was elected to the State Assembly, where he led his party as Minority Whip. In 2003, Chief Judge Judith S. Kaye formed the New York State Commission to Promote Public Confidence in Judicial Elections (hereinafter "Feerick Commission") and appointed Judge Bartlett as a member.

- Hon. Joseph W. Bellacosa served as Chief Administrator and Chief Administrative Judge of the New York State Unified Court System from January 31, 1985 until he was appointed to the Court of Appeals in 1987, where he served as Associate Judge and Senior Associate Judge until September, 2000. Judge Bellacosa was Dean and Professor of Law at St. John's University School of Law from 2000 to 2004.

- Hon. E. Leo Milonas served on the New York judiciary for 26 years, as Justice of the Supreme Court, as Associate Justice of the Appellate Division, and as Chief Administrative Judge of the New York State Unified Court System from 1993 through 1995. Judge Milonas currently serves on the New York State Commission on Judicial Selection and on the Governor's Judicial Screening Committee for the First Judicial Department.

- Hon. Richard Rosenbloom served as Justice of the New York State Supreme Court and as a Judge of the Family Court. He currently serves as member of the Character & Fitness Committee for the Seventh Judicial District.

- Hon. Robert E. Whelan served as Justice of the New York State Supreme Court for 14 years. He is very familiar with the New York elections process, having been elected to one term on the Supreme Court and four terms as comptroller of Buffalo, New York.

The amici judges respectfully submit this brief in support of affirmance.

Counsel for all parties have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

> [T]he State has an overriding interest in the integrity and impartiality of the judiciary. There is hardly . . . a higher governmental interest than a State's interest in the quality of its judiciary. Charged with administering the law, Judges may not actually or appear to make the dispensation of justice turn on political concerns.

In re Nicholson, 50 N.Y.2d 597, 607-08 (1980).

Public confidence in the impartiality, quality, and integrity of the judiciary is one of New York's highest goals. The New York Court of Appeals has stated that without such public confidence the judicial branch of government could not function. Public respect and support, in turn, depend on the steadfast appearance of independence, competence, quality, and integrity. The State has a corresponding obligation to safeguard the reputation of its judiciary for each of those attributes.

The process by which individuals are selected to join the bench, along with the perception of how that process works, has profound implications for public confidence in the judiciary. New York's current system for selecting nominees for Supreme Court vacancies injures rather than enhances the reputation of the justices. This failure results primarily from two shortcomings of the system.

First, there is a public perception that county leaders of political parties handpick each party nominee. In many cases, the perception – and reality – is that, if a person desires to be Supreme Court nominee in a particular district, the *only* option is to win the favor of one particular party leader. While Defendants implausibly deny that the political party leaders have actual control, they at least

acknowledge that the perception exists. Indeed, the political parties seek to reinforce this perception.

Second, the current system lacks transparency. The party leaders and judicial convention delegates who make the ultimate determinations deliberate in nonpublic ways. They have no need – or desire – ever to explain their choices to the public. As a result, the public is left to wonder what criteria were used in selecting the nominees, whether any pressure was placed on the candidates, whether any promises were made, and whether any inappropriate financial factors played a part in the designations.

The party boss-dominated convention system is not essential, or even particularly well suited, to the promotion of the state interests identified by Defendants. While we respect the Legislature's unique authority regarding the precise judicial selection system that would best serve New York's interest, we note that the Legislature can implement alternatives that would preserve judicial independence, integrity, and quality. In Section III below, we discuss some of these alternatives.

Because New York's convention system for selecting nominees to the Supreme Court unnecessarily and unconstitutionally undermines public confidence in the State's judiciary, and because alternatives exist, we urge this Court to uphold the District Court's ruling.

ARGUMENT

I. PUBLIC CONFIDENCE IN THE JUDICIARY IS A CORNERSTONE OF OUR GOVERNMENTAL FRAMEWORK

A. The Legal System Depends on Public Confidence in the Judiciary

Public confidence in the integrity, impartiality, and quality of the judiciary is essential to the administration of the legal system. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

Not only must judges be impartial, competent, independent, and non-partisan, they must, in order to maintain public confidence in the legal system, *appear* to be so. Even if the public merely perceives that a judge favors one party, or is beholden to one set of interests, the system suffers, just as surely as if the judge actually is biased. *See In re Duckman,* 92 N.Y.2d 141, 153 (1998) ("the perception of impartiality is as important as actual impartiality"); *Nicholson*, 50 N.Y.2d at 608 ("The State's interest is not limited solely to preventing actual corruption through contributor-candidate arrangements. Of equal import is the prevention of the appearance of corruption stemming from public awareness of the opportunities for abuse") (internal quotation marks and omitted). Accordingly, "the State's interest in ensuring that judgeships are not – and do not appear to be – 'for sale' is beyond compelling. The public would justifiably lose confidence in

the court system were it otherwise and, without public confidence, the judicial branch could not function." *In re Raab*, 100 N.Y.2d 305, 315-16 (2003).

B. The State Has the Obligation to Safeguard the Independence of the Judiciary

An impartial judiciary is much more than a self-evident best practice. It is a right guaranteed by the Due Process Clause of the United States Constitution. *See In re Raab*, 100 N.Y.2d at 313. ("[L]itigants have a right guaranteed under the Due Process clause to a fair and impartial magistrate . . . ."). The State has the corresponding "obligation to create such a forum and prevent corruption and the *appearance* of corruption, including political bias or favoritism." *Id.* at 217 (emphasis added).

The State can safeguard the reputation of its judiciary by creating a system that minimizes the appearance of outside influence on judicial candidates. In the context of judicial elections, the State must be particularly diligent in monitoring and legislating the process, because "there is a heightened risk that the public, including litigants and the bar, might perceive judges are beholden to a *particular political leader or party* after they assume judicial duties." *Id.* at 316 (emphasis added); s*ee also Hurowitz v. N.Y. State Bd. of Elections*, 53 N.Y.2d 531, 535 (1981) (identifying the particularly dangerous "risk of the appearance of impropriety that may be perceived by the public in a Judge's injection of himself into the political process for the sole purpose of extending his tenure.").

II. NEW YORK'S CONVENTION-BASED SYSTEM FOR SELECTING SUPREME COURT JUSTICES UNDERMINES PUBLIC CONFIDENCE IN THE JUDICIARY

A. The Public Perception Is That Political Party Leaders, Rather Than Voters, Really Determine Judicial Nominees

All parties to this litigation agree that there is a widely-held belief that the political parties' county leaders control the selection of nominees to the Supreme Court. Plaintiffs argued below that the power to make or break candidates for the Supreme Court rests solely in the hands of relatively few individuals – the county leaders of the two major political parties. Judge Gleeson concurred, concluding that "[t]he path to the office of Supreme Court Justice runs through the county leader of the major party that dominates in that part of New York State. Without his or her support, neither superior qualifications nor widespread support among the party's registered voters matters." *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 236-37 (E.D.N.Y. 2006).[1]

Although Defendants dispute Judge Gleeson's conclusion of actual control, Defendants acknowledge that the county party leaders successfully maintain the

[1] We have reason to believe that Judge Gleeson's conclusion that party leaders control the process is correct. In this regard, we note that the Feerick Commission recently reported testimony from witnesses across the state – corroborated by Commission representatives who attended judicial conventions in two districts – that convention delegates "do not act thoughtfully or independently in nominating their party's candidates" but rather are "reduced to merely rubber stamping decisions already reached by political party insiders." Feerick Commission, Final Report to the Chief Judge of the State of New York at 15, 19 & n.9 (Feb. 6, 2006) [hereinafter "Feerick Commission Final Report"].

appearance of control over the choice of nominees. *See* Def. Proposed Findings of Fact ¶ 158 [hereinafter "Def. F."] (Party leaders "always end up supporting the winner, and create the appearance that they are in control of the process."). Defendants assert, for instance, that New York County leader Herman Farrell intentionally cultivates the widespread belief that he controls the selection of party judicial nominees, in order to "achieve[] one of his most significant objectives as a political leader – the perception of winning and 'running the show.' As Mr. Kellner testified: '[f]or Farrell . . . an important part of being an effective leader is the perception that you're leading; that people are doing what you want.'" *Id.* ¶ 163 (emphasis omitted).

B. The Convention Selection Process is Not Transparent and Provides No Meaningful Assurance of Electoral Participation

Another consequence of the current convention system is that the public has no real insight into the selection process. Even Defendants agree that "the 'real voting process at a judicial convention does not occur at the convention, it occurs . . . over the telephone and in the meetings that people have leading up to the convention in one or two weeks immediately before the convention.'" Def. F. ¶ 150 (citation omitted). As Judge Gleeson explained, it is "clear that the decisions of who becomes a Supreme Court Justice are only ratified at conventions. They are made elsewhere. Not even the defendants contend otherwise." *López Torres*, 411 F. Supp. 2d at 230.

Because the convention nomination system appears to funnel the key decision-making through a relatively small group of powerful "insiders" who communicate in non-public ways and whose job it is to be overtly partisan and political, members of the public are left to speculate as to what criteria were used to make the judicial nominee choices, what pressures were applied to the nominees – some of whom are sitting lower court judges, some of whom are incumbent Supreme Court Justices, and all of whom are prospective Supreme Court Justices – what promises were made, and what financial arrangements or considerations entered into the process.

Further, because the public believes that party leaders control nominee selection and because individuals have the right to make donations to political groups up to the date they become candidates for judicial office,[2] the current system creates the perception that the party leaders are selecting nominees for the wrong reasons. Judge Gleeson honed in on this problem in his opinion:

> The record of financial contributions by candidates for Supreme Court Justice to political groups controlled by [Second District leader Clarence] Norman has fostered not only the (accurate) perception that he, rather than the voters or delegates, controlled the selection of the justices, but the further perception that he used the wrong criteria in making his decisions.

Id. at 233.

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[2] Judicial candidates and sitting judges may not make donations to political organizations or political candidates, except that they may pay ordinary dues to political organizations of which they are members. *See* 22 N.Y.C.R.R. § 100.5

The lack of transparency is especially problematic given that it occurs within a system that is supposed to guarantee and promote the New York State constitutional mandate that the "justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve." N.Y. Const. art. VI, § 6(c). New York has fostered and tolerated a system in which voters not only are deprived of their right to choose, but in which they are left to question whether they have been denied that right in order for others to use objectionable criteria to determine who will become judges. The current convention system fails – at the crucial juncture when the judgeship is being bestowed – to provide constitutionally-required assurances to the public of the nominees' integrity, competence, impartiality, and quality.

III. THE CONVENTION SYSTEM IS NOT NARROWLY TAILORED TO ACHIEVE STATE INTERESTS, AND ALTERNATIVES EXIST THAT WOULD PRESERVE DEFENDANTS' IDENTIFIED INTERESTS WITHOUT UNDERMINING CONFIDENCE IN THE JUDICIARY

Defendants claim that the party leader-dominated convention system is "properly tailored" to advance New York's interests in (1) protecting the association rights of political parties; (2) promoting racial and ethnic diversity; and (3) promoting geographic diversity.[3] Defendants' Br. at 68. Given that numerous

[3] Earlier briefs by the Defendants identified the additional interests of ensuring high quality judicial candidates and insulation of incumbents from costly campaigns. *See* Def. F. ¶¶ 227-29, 259-281.

judges, executive branch members, and legislators are elected throughout New York and the rest of the United States without a party-leader dominated convention system, it is obvious that there are alternatives, and it is equally obvious that the current system is not "properly," much less "narrowly" tailored to achieve Defendants' identified state interests.

The Feerick Commission has put forward one potential alternative – a convention system that is thoroughly revamped to minimize the fact and appearance of party leader control.[4] The parties and District Court focused on another – a direct primary system – which removes party leaders from direct involvement. *See López Torres*, 411 F. Supp. 2d at 256. It is up to the legislature to determine which of these systems to use, provided that it builds sufficient safeguards into the process to meet the State's constitutional duty to ensure an independent, qualified judiciary. Below, we note some potential reforms, among

[4] The Commission concluded that, in order to prevent party leader control, the convention system should be modified in at least the following ways: (1) reduce the number of delegates at each convention, (2) ensure at least two delegates from each assembly district, (3) weight the delegates' votes based on the population they represent, (4) reduce the number of signatures required to run as delegate, (5) increase the delegates' term of service from one year to three, (6) improve the variety, quality, and timing of information provided to delegates, and (7) give candidates the right to address delegates at the convention. *See* Feerick Commission Final Report, 17-18. In fact, the Feerick Commission put forward a full slate of additional reforms – including many of those discussed below – which it recommended that the legislature adopt in order to enhance the State's judiciary.

the wide variety available, that are well suited – whichever basic system the State uses – to achieving the various state interests that have been identified, while also fulfilling the State's obligation to ensure public confidence in the judiciary.

A. Within the Framework of the New York Constitution, There Are Reforms Available to the Legislature to Ensure Judicial Independence While Addressing the Other Concerns That Have Been Raised

1. Public Financing of Judicial Elections Would Preserve Judicial Independence and Public Confidence

All parties agree that the need to raise campaign contributions could compromise the appearance of judicial independence. *See* Def. F. ¶ 259**;** *López Torres*, 411 F. Supp. 2d at 253. Indeed, "from the perspective of the public, the media, and many court reform organizations, the old adage that 'money talks' is accepted wisdom when it comes to assessing whether judges are likely to be influenced by the campaign contributions they receive." ABA Standing Comm. on Judicial Independence, Report of the Commission on Public Financing of Judicial Campaigns*,* 20 (Feb. 2002) [hereinafter "ABA Report"].

On the other hand, "[s]ubstituting public money for private money removes any concern that there is a connection between campaign contributions and judicial decision-making. Instead, a judge depends on exactly the people he or she serves – all the citizens of New York – for campaign financing." Feerick Commission, Second Report to the Chief Judge of the State of New York, 24 (June 29, 2004)

[hereinafter Feerick Commission Second Report]; *see also* ABA Report at 30. Consequently, particularly if the legislature chooses direct primary elections of Supreme Court candidates, it will be critical that the State adopts public financing for these elections.[5] Public financing has worked to promising effect in other jurisdictions. Arizona, Illinois, Idaho, North Carolina, Texas, and Wisconsin have public financing programs for judicial elections employing multiple sources. *See* Feerick Commission Second Report at 30.

In addition to preserving judicial integrity, publicly financed elections would allow a wider group of candidates to run for judicial office and reduce the public perception that only wealthy or politically-motivated people can become judges. *See* concern expressed in Defendants' Brief at 16; Def. F. ¶¶ 260-61. Accordingly, public financing would address the concerns raised in the amicus brief filed by the Women's Bar Association of the State of New York.

2. Retention Elections Would Preserve Judicial Independence for Incumbent Justices

Plaintiffs and Judge Gleeson have noted that the perception of an

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[5] We note that the Feerick Commission concluded that absent public financing, the legislature should choose a significantly modified convention system over a direct primary system. *See* Feerick Commission Final Report at 16. ("Given that the introduction of primary races would draw major financial contributions into judicial elections, the Commission recommends retaining judicial district nominating conventions, subject to significant reforms, at least until New York adopts public campaign financing of judicial elections.").

independent judiciary is particularly strained whenever a sitting justice is running for reelection, seeking contributions for his or her campaign, and soliciting votes from either political party leaders or the public at large. *See* Def. F. ¶ 259; *López Torres*, 411 F. Supp. 2d at 253. Defendants agree with respect to direct elections, but assert that their current system somehow protects justices facing reelection from the pressure to render politically favorable decisions. *See* Def. F. ¶ 278. Defendants, however, have provided no rationale why – let alone evidence that – political party leaders or judicial convention delegates are less likely than the public to punish a justice for the judicial decisions the justice has made. To the contrary, the current system subjects sitting Supreme Court Justices to the risk that they must curry favor with political bosses in order to secure renomination.

Retention elections – in which incumbent justices are subject to non-competitive, non-partisan elections in the year before their terms expire – would insulate sitting Supreme Court Justices from political leader pressure while also mitigating potential pressure from the public. For this and related reasons, the Feerick Commission specifically recommended implementation of retention elections. *See* Feerick Commission Second Report at 35.

Currently, twelve states use retention elections for some of their trial court judges, and twenty states have implemented retention elections for the judges and justices of appellate courts. Hon. B. Michael Dann & Randall M. Hansen, *Judicial*

Retention Elections, 34 LOY. L.A. L. REV. 1429, 1429 (2001). In the first thirty years of using retention elections, only 52 of 4,588 judges were not retained. Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 Judicature 79, 79 (1999).

3. Education and Screening Would Address Fears That the Electorate Would Elect Unqualified Justices

Defendants argued below that the convention system was implemented, in part, out of concern that the primary system would not ensure qualified candidates are seated on the judiciary. *See* Def. F. ¶ 29. Because of advances in transparency of government and because of advances in communications, now primaries need not raise the same concern, provided there are appropriate safeguards. In fact, there are various mechanisms (such as candidate screening, voter education, and public financing) that can be used in conjunction with primaries to address Defendants' concerns.

For example, a nonpartisan screening program would help to ensure the quality of the bench, and dissemination of the results would assist in ensuring confidence in the judiciary. *See*, *e.g.*, Chief Administrative Judge Jonathan Lippman, *The Public Policy Forum: Court Reform in New York State*, 8 (May 17, 2005). Currently, six other states have evaluation programs for retention elections. *See* Seth S. Andersen, *Judicial Retention Evaluation*, 34 LOY. L.A. L. REV. 1375, 1375, 1379 (2001).

There is already precedent for and growing use of screening committees in New York. For instance, New York uses a screening commission to identify qualified candidates for vacancies at the Court of Appeals. N.Y. Const. art. VI, § 2(c)-(e). The Governor is required by the Constitution to appoint a candidate who has been recommended by the Commission. *Id.* at 2c. Further, although not statutorily required, the First and Second Judicial Districts both use screening committees to evaluate the qualifications of Supreme Court candidates. *López Torres*, 411 F. Supp. 2d at 239.

Based on the proven benefits of nonpartisan screening, on February 14, 2006, the New York Unified Court System instituted a rule requiring the creation of judicial screening commissions in each judicial district. *See* Rules of the N.Y. Chief Administrative Judge, Part 150. These commissions will evaluate candidates for most courts, including Supreme Court. *Id*. at 150.1. Although Chief Administrative Judge Lippman's rules do not have the force of law, the legislature could choose to give these screening commissions an official role in the elections or appointment process.

Voter guides would similarly help the electorate make informed decisions. *See* Feerick Commission Second Report, Appendix G-8 at 3. In addition to describing the candidates, voter guides can describe the process of election and any information that may have surfaced through the screening process. By including

all of this information, voter guides enhance the transparency of the election process. Moreover, the Feerick Commission's research showed a strong nexus between voter education and public confidence in judicial elections. *Id.* at 38. Currently, thirteen states distribute voters' guides and numerous studies have found that the public values this information. *See*, *e.g.* Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voter Guides,* 64 OHIO ST. L.J. 84, 87-90 (2003).

4. Limits on Campaign Contributions Further Enhance Judicial Independence and Public Confidence

Limitations on large campaign contributions tend to preserve confidence in elected officials. *Cf. Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (large individual financial contributions can create the appearance of corruption). New York already has a system of campaign contribution limits based on formulas involving the number of enrolled voters in a candidate's political party. *See* N.Y. CLS Elec. § 14-114 (2006). The contribution limits could be further modified for judicial elections if deemed necessary.

B. Over the Longer Term, the State Has Additional Options Available to Ensure Judicial Independence While Addressing the Other Concerns That Have Been Raised

The legislature could make the foregoing changes to enhance the judicial selection process in the short term. Given New York's Constitution, certain other changes would involve more time and possibly require amendments to the State Constitution.

1. Smaller Judicial Districts Would Achieve Geographic, Racial and Ethnic Diversity, and Would Reduce the Cost of Campaigns

The judicial districts from which Supreme Court Justices are elected are created by Article VI, Sections 6(a)-(c) of the New York Constitution. Pursuant to Article VI, Section 6(b), once every ten years, the legislature may increase the number of judicial districts (and thereby make the resulting districts smaller). The Constitution does not limit the number of districts, but it does mandate that each district be no smaller than one county. Consequently, if the State chooses to create judicial districts that are smaller than one county, or to otherwise redefine the districts in any year except the tenth year, the State must amend Article VI, Sections 6(a) and (b) of the State Constitution.

The State could create smaller judicial districts in order to enhance racial, ethnic and geographic diversity within the judiciary. Defendants themselves identified diversity in all of these realms as important interests in selecting nominees for the Supreme Court. *See* Defendants' Br. at 68, 73-76.[6] We acknowledge those goals and note further that in addition to its other desiderata,

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[6] Judge Gleeson noted that under the current system, "[d]elegates elected from ADs in which they need not even reside select justices who need not even be residents of the districts in which they are later elected." *López Torres,* 411 F. Supp. 2d at 251. These elements of the current system, along with the reality that justices can be assigned to sit anywhere in the state, are inconsistent with Defendants' argument that the current system protects geographic diversity.

diversity bolsters public confidence in the judiciary. As New York State Chief Judge Judith S. Kaye has said, "a diverse bench gives the public a feeling of inclusion in the justice system, willing to place its trust and faith in it, not alienated from it." *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 ALB. L. REV. 961, 975 (1994).

It is axiomatic that geographic diversity can be achieved through smaller, appropriately tailored, judicial districts. Judge Gleeson's logic is irrefutable: "[t]he more direct and democratic way to serve geographical diversity is to define the geographic areas from which representation is desired, draw lines around them, and have the voters within them select the nominees." *López Torres*, 411 F. Supp. 2d at 251. Smaller judicial districts would address the concerns raised in the amici briefs filed by the Richmond County and St. Lawrence County Bar Associations.

Likewise, with respect to racial and ethnic diversity, even Defendants' own witnesses admit that creating smaller judicial districts would "very likely" achieve the goal of a diverse bench. Defendants' expert witness, Dr. Hechter, stated that "with respect to minority representation, if the judicial districts were very much smaller and were either ethnically or geographically homogenous, it is very likely that there would be greater representation of those particular groups." Pl. Reply Findings of Fact ¶ 120, *citing* Hechter Tr. 1204:15-25. Moreover, Defendants themselves acknowledge the empirical reality that minorities tend to do well in

Civil Court races because the Civil Court districts are "smaller electoral units – such as Harlem or Washington Heights." Def. F. ¶¶ 244-45.

Finally, smaller judicial districts would likely reduce concerns about financing of campaigns. Many of the upstate districts span multiple counties, which can place a daunting burden on judicial candidates campaigning in those areas. A smaller district would allow candidates to campaign without the necessity of generating sufficient funds to advertise to multiple audiences, in multiple newspapers and multiple television markets. *See also* sections III.A.1 and III.A.4 above (outlining other methods of addressing campaign finance issues).

2. An Appointment System with Sufficient Safeguards Could Be Used to Promote Judicial Independence and Quality

Finally, the State could meet its duty to ensure public confidence in the judiciary by replacing the current selection system with an appropriately-tailored appointment system. In order to do so, the State would have to amend Article VI, Section 6(c), which currently requires that the judges be elected from the electors of the judicial district. Though it would require a constitutional change, the appointment system is not without precedent in the New York court system.

When considering this type of change, it is important to note that merely switching over to an appointment system is not sufficient to ensure public confidence. After all, as Judge Gleeson noted, the current system amounts to a de facto appointment system. *See López Torres*, 411 F. Supp. 2d at 255. In order to

meet the State's burden to ensure public confidence in the judiciary, any appointment process it creates must be thoroughly transparent. The process could also include other protections, such as the screening panels discussed above, sufficient to ensure a qualified and independent Supreme Court judiciary.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court affirm the judgment of the United States District Court for the Eastern District of New York.

Dated: May 18, 2006
New York, New York

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 4,851 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the type-style requirements of Fed. R. App. p. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 for Windows in 14-point Times New Roman.

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CERTIFICATIONS PURSUANT TO LOCAL RULE 32(a)(1)

I, Sonjia Richards, hereby certify that: a converted PDF version of the foregoing amici curiae brief was created and compared to the paper original and found to be a true and complete copy thereof. Said PDF version of the foregoing amici cruiae brief was also scanned for viruses using Symantec AntiVirus Full Version 10.0.0.359. No viruses were detected. Said PDF version was also submitted to the Court attached to an e-mail addressed to "briefs@ca2.uscourts.gov." Said PDF version was e-mailed to the adverse party.

_____

Sonjia Richards