# 06-0635-CV

## United States Court of Appeals for the Second Circuit

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

**Plaintiffs-Appellees,**

**v.**

**NEW YORK STATE BOARD OF ELECTIONS; CAROL BERMAN, NEIL W. KELLEHER, HELENA MOSES DONOHUE, AND 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,**

**Defendant-Intervenors-Appellants,**

**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 AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES, SEEKING AFFIRMANCE OF THE ORDER OF THE DISTRICT COURT


**CHARLES J. HYNES**
**District Attorney**
**Kings County**
**350 Jay Street**
**Brooklyn, New York 11201**
**(718) 250-2492**

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .......... i

PRELIMINARY STATEMENT OF INTEREST OF THE AMICUS CURIAE, CHARLES J. HYNES, DISTRICT ATTORNEY OF KINGS COUNTY, NEW YORK .......... 2

ARGUMENT .......... 8

CONCLUSION .......... 23

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

## TABLE OF AUTHORITIES

Page

### CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) .......... 16

Bullock v. Carter, 405 U.S. 134 (1972) .......... 12

Lerman v. Bd. Of Elections, 232 F.3d 135 (2d Cir. 2000),
cert. denied, 533 U.S. 915 (2001) .......... 16

Lubin v. Panish, 415 U.S. 709 (1974) .......... 12

Margarita Lopez Torres, et al. v. N.Y. State Bd. Of Elec., et al.,
411 F. Supp.2d 212 (E.D.N.Y. 2006) .......... 7, *passim*

Molinari v. Powers, 82 F. Supp.2d 57 (E.D.N.Y. 2000) .......... 16

People ex rel. Coffey v. Democratic General Committee,
164 N.Y. 335 (N.Y. 1900) .......... 19

Schultz v. Williams, 44 F.3d 48 (2d Cir. 1994) .......... 16

United States v. Classic, 313 U.S. 299 (1941) .......... 11-12

### STATUTES and OTHER AUTHORITIES

N.Y. Elec. L. § 6-104 .......... 7

N.Y. Const., art. VI, § 6(c) .......... 9, 15

N.Y. Const., art. VI, § 7 .......... 15

N.Y. Const., art. 4, § 4 .......... 15

# United States Court of Appeals
# for the
# Second Circuit

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

**Plaintiffs-Appellees,**

**v.**

**NEW YORK STATE BOARD OF ELECTIONS; CAROL BERMAN, NEIL W. KELLEHER, HELENA MOSES DONOHUE, and 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,**

**Defendant-Intervenors-Appellants,**

**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 AMICUS CURIAE, CHARLES J. HYNES, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK, IN SUPPORT OF PLAINTIFFS-APPELLEES, SEEKING AFFIRMANCE OF THE ORDER OF THE DISTRICT COURT

## PRELIMINARY STATEMENT OF THE AMICUS CURIAE, CHARLES, J. HYNES, DISTRICT ATTORNEY OF KINGS COUNTY, NEW YORK

It is with a sense of urgency that I submit this brief as amicus curiae in support of the Plaintiffs-Appellees [hereafter referred to as "the Plaintiffs"] and the affirmance of the decision of the District Court.[1] The issuance by that court of an order enjoining the State of New York from continuing to utilize the judicial district convention system for the nomination of candidates for the Supreme Court bench was manifestly correct and critically necessary. I now urge this Court to affirm the decision and order of the District Court. So long as the judicial district convention system remains in place, only those candidates for the Supreme Court bench who are chosen by the leaders of the major political have ever and will ever attain the bench. So long as the district convention system remains in place, the party leaders and not the voters of this State determine who fills each seat on the bench of the Supreme Court, and the rights of legitimately qualified candidates to the bench will be frustrated.

Although counsel for the Plaintiffs will present these important issues to the Court in an exemplary manner, I believe that I have unique insight into the

---

[1] The parties to this appeal consented to the filing of amicus-curiae briefs, pursuant to Fed. Rule App. Proc. 29(a).

issues raised. As the District Attorney of Kings County, Brooklyn, New York, since 1990, I have overseen and I continue to oversee the investigation of allegations of the corrupt use of the power of the Kings County Democratic Party to control and influence the judiciary in Brooklyn. As a result, I know full well the evidence that was considered by the District Court, and I therefore can and do attest that the District Court correctly concluded that the powerful county leaders of the major political parties, through the mechanism of the judicial district nominating convention, have a stranglehold on the Supreme Court of the State of New York.

Mere recognition by the District Court of this problem would have been an empty exercise had the District Court not then granted the motion for an injunction. I have, just as others have over the course of decades, highlighted the glaring infirmities of the judicial district convention system and strongly urged reform. We have traced the roots of this system back to the corruption in the era of Tammany Hall, establishing that it is a vestige of the back-room power that party leaders used to be able to wield over the nominating process for *all* elected offices. We have repeatedly called upon the State either to amend the Constitution and provide for the merit-based appointment of the justices in order insulate those critical jurists from participation in partisan campaign fundraising and electioneering or, in the alternative, to repeal the

infirm provisions of the Election Law and enact a publicly-funded, direct primary nominating system that would give to the voters the power to nominate and elect the justices of the Supreme Court that the State Constitution intends.

The New York State Legislature has instead allowed this untenable abrogation of the First Amendment rights of the voters and of challenger candidates to become an entrenched part of not only the political power structure but also of the judiciary, negatively but understandably impacting the public's perception of the system of justice in New York. The District Court, cognizant of the fact that many if not all members of the legislature are themselves among the leaders of their political parties who wield the power to anoint the justices of the Supreme Court, eschewed naiveté and properly wielded its injunctive power, barring the further use of the judicial district convention system, and calling upon the Legislature to amend the Election Law so as to reflect the State Constitution within a circumscribed period of time.

The voluminous evidence heard and considered by the District Court left it with no option but to conclude that the harm that has resulted from the judicial district nominating convention system and legislative inaction can no longer be tolerated where even many of those in the legal community have

come frighteningly close to passive acquiescence to it. In fact, none of the results of the investigations that I have overseen into allegations of corruption in and relating to the judiciary – including the prosecution for bribe receiving of two sitting Justices of the Supreme Court -- has been as disturbing to me as evidence that even those honorable and learned members of the legal profession who rightly aspire to the Supreme Court are largely reconciled to the fact that, in order to achieve their goal, they must cater to, and inevitably advance the interests of, the corrupt system that has the absolute power to ensure them success by virtue of the judicial district convention system.

In one unsettling situation uncovered by the investigation, a sitting Civil Court judge, who had been formally endorsed for re-election by the Democratic Party in Brooklyn, saw her bid for nomination for a second term in that office personally sabotaged by Clarence Norman, Jr., who was then the leader of the Democratic Party in Brooklyn, because she refused to accede to Norman's demands, which included the financing of primary campaign operations for other candidates in Brooklyn. Nevertheless, even while knowing that she had lost the race because Norman had made good on his threat to abandon the judge's campaign, the judge ultimately felt compelled to comply with Norman's financial demands. The judge explained that she believed that by doing so would she preserve some chance that Norman, as the

county leader, would make her a justice of the Supreme Court, which was her ultimate professional goal.

Norman, who has already been convicted following two trials of felonies directly involving his abuse of the power that was inherent in his position as the chairman and boss of the Democratic Party in Brooklyn and a member of the State Legislature, will soon stand trial along with Jeffrey Feldman, who remains as the Executive Director of the Democratic Party organization in Brooklyn, on charges of conspiracy, grand larceny by extortion, and coercion relating to the demands they placed on this and another judge during judicial campaigns. However, that trial will not address and cannot remedy the fundamental threat to the system of justice in New York that is exemplified by the complacent acceptance by a sitting judge and legitimate potential candidate for the Supreme Court that the only means to attain that bench was to curry the personal favor of a corrupt party boss.

As confirmed by the evidence heard by the District Court, the mere removal of an individual party leader cannot and will not cure the fundamentally flawed judicial district convention system. The flaws in the system and the abuses and corruption it both enables and fosters permeates the State and has never been limited to one county or region. Absent judicial intervention, the entrenched unwillingness on the part of the State to act means

that the current and future leaders of the major parties in counties across the state will, just as did Clarence Norman, Jr., and his predecessors, determine who sits on the Supreme Court bench, thereby violating the First Amendment rights of the voters and of the potential candidates who aspire to achieve that office legitimately. Accordingly, and for the reasons set forth herein and in the brief of the Plaintiffs, I ask this Court to affirm the decision and order of the District Court enjoining the State from utilizing the judicial district nominating convention system.

## ARGUMENT

The record before this Court fully supports the findings and conclusions of the District Court that the judicial district system for the nomination of the justices of the New York Supreme Court, as implemented in section 6-106 of the New York Election Law, violates the New York Constitution and abridges the rights of the citizens of this State under the First and Fourteenth Amendments of the United States Constitution. Margarita Lopez Torres, et al. v. N.Y. State Bd. Of Elec., et al., 411 F. Supp.2d 212 (E.D.N.Y. 2006) [hereafter referred to and cited as "Decision and Order"]. The exercise by the District Court of its power to order injunctive relief was appropriate and necessary. The district convention system has insidiously resulted in a dangerous resignation on the part of the voters, as well as of potential candidates, for the office of justice of the Supreme Court to the usurpation of their rights by the leaders of the major political parties. Accordingly, recognizing that the rights of the electorate must be protected and nurtured or risk being surrendered, the District Court acted with requisite urgency to protect and uphold the constitutional rights of the citizens of the State of New York.

New York has both the power and the right to provide that a judicial office shall be filled by the vote of the electorate for qualified candidates. Indeed, Article VI, section 4 of the New York Constitution specifies that the justices of

the New York Supreme Court shall be chosen by the vote of the electorate. However, having placed such power in the hands of the voters, New York may not then -- without violating the First and Fourteenth Amendments of the United States Constitution -- implement an electoral process that effectively transfers to the leaders of the major political parties the power of the electorate to choose the justices. Nevertheless, and as correctly found by the District Court, that is precisely what New York did through the legislatively enacted judicial district convention system for nominating party candidates for the office of justice of the New York Supreme Court.

The District Court weighed and considered the testimony of twenty-four witnesses and in excess of 10,000 pages of documentary evidence during a comprehensive hearing conducted over the course of thirteen days. This hearing, along with submissions by the parties, afforded the District Court extraordinary insight into the process, resulting in its conclusion that the plaintiffs had demonstrated convincingly that the judicial district convention system invests in the major party leaders and power brokers – not the voters or the delegates to the judicial nominating conventions – control over who becomes a Supreme Court Justice, in direct contravention of Article VI, § 6(c) of the New York Constitution and in violation of the First and Fourteenth amendments of the United States Constitution. The conclusion of the District Court that injunctive

relief was both appropriate and necessary in order to enforce and protect the constitutional rights of the voters of the State of New York is fully supported by the law and by the record that is before this Court.

The successful challenge by the Plaintiffs to the constitutionality of the judicial district nominating system came more than 80 years after the system was first legislatively enacted. During those decades, any demand for reform of the Election Law went largely unheard -- and always unheeded -- by those branches of the State government with the power to effect change. Under these circumstances, the District Court determined that it was necessary to enjoin the continued implementation of the judicial district convention system unless and until the Legislature acted to remedy the constitutional infirmities of that system or implement an alternative system through an amendment of the constitution. There was no realistic option available to the District Court. In light of the decades of complacent inaction by the Legislature that has persisted, notwithstanding pervasive evidence of the corruption that is and always has been an inherent part, and result, of the district convention scheme, failure to act by the District Court would have been akin to sanctioning the continued implementation of the patently unconstitutional system which derogates the fundamental right of the citizen in this State to vote for the candidate of their choice.

The District Court found that the New York State Constitution expressly vests in the voters the power and right to elect the justices of the Supreme Court. However, the District Court correctly concluded that New York had statutorily implemented a judicial district convention system for the nomination of candidates for that office, which:

> is designed to freeze the political status quo, in which party leaders, rather than the voters, select the Justices of the Supreme Court. By preventing competition among candidate and deterring voter participation, the system is successful in fact at achieving that goal.

Decision and Order, 411 F. Supp.2d at 255. Therefore, the District Court found, the district convention system does not merely defy the New York Constitution, it also severely burdens and irreparably harms citizens' rights as candidates and voters under the First and Fourteenth Amendments.

The District Court further concluded that this constitutionally infirm system cannot be upheld because it is not narrowly drawn to advance *any* state interest of compelling importance. Therefore, because irreparable harm is manifest and because the Plaintiffs had made a substantial showing of a likelihood of success on the merits of their claim, the District Court properly enjoined implementation of the convention system until such time as the Legislature enacts another statutory scheme. Decision and Order, 411 F. Supp.2d at 256.

The District Court's findings with regard to the usurpation by party leaders of the right and power to vote for the justices of the Supreme Court are fully supported by the record. Indeed, there is simply no merit to the Appellants' claims that the District Court erroneously found that New York's Election Law ensures that the district conventions are "perfunctory, superficial events. They do not determine candidates, but formally endorse determinations made elsewhere." Decision and Order, 411 F. Supp.2d at 229. The evidence now before this Court establishes that the principal function of the district conventions is, as the District Court found, not to implement the Constitutional mandate that the voters shall select the justices, but to give the deceptive appearance of legitimacy to the unilateral prior determinations of Party leaders concerning who will fill an open seat on the bench of the Supreme Court. Id.

Furthermore, far from failing, as the Appellants' claim, to "evaluate the alleged burdens associated with the judicial conventions system within the totality of New York's electoral scheme" (Appellants' Brief at 36), the District Court concluded that New York, having chosen to make the party primary nominating system an integral part of the election procedure, has failed to ensure that "the nomination process does not 'operate to deprive the voter of his constitutional right of choice.'" Decision and Order, 411 F. Supp.2d at 246, quoting United States v. Classic, 313 U.S. 299, 318 (1941). As explained

by the Supreme Court in Classic, courts cannot ignore "that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right to vote. Classic, 313 U.S. at 318; see Lubin v. Panish, 415 U.S. 709, 715-16 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

Indeed, although the district conventions are sham exercises in representative democracy, the general elections serve, if possible, an even more insignificant role than do the district conventions. As found by the District Court, the result of a general election race for an opening on the Supreme Court is a formality, having been dictated long before the first voter enters the polling place on election day. Decision and Order, 411 F. Supp.2d at 230.

The District Court analyzed data pertaining both to those districts in which a single party controls and those districts in which the two major parties shared control, before finding that "[i]n most places, the nominees of a single party (either Democratic or Republican) win all or virtually all of the time, [while] in others cross-nominations by those parties deprive the general election of any contest. Contested elections for Justice of the Supreme Court

are the exception and not the rule." Decision and Order, 411 F. Supp.2d at 217. The District Court's detailed review of the evidence led it to conclude that, even in judicial districts outside New York City that are not dominated by a single party, "the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements," and even the "relatively few contested [general] elections are not competitive, [because] without either the Democratic or Republican nomination have no chance of being elected anywhere." Decision and Order, 411 F. Supp.2d at 230-31. Contrary to the Appellants' claim, isolated instances of deviations from the norm cannot and do not remedy constitutional infirmities of the norm.

Therefore, although the Election Law provides *mechanisms* for challenger candidates to seek a party's nomination and to gain a position on the general election ballot, the mechanisms are entirely unrealistic, amounting in practice to little more than an opportunity to tilt at windmills, at great cost to those few idealistic candidates who actually attempt to undertake the challenge. In contrast, the choice of the Party leaders is handed both the nomination and a victory in the general election, with the Party itself assuming many of the costs and expenses.

The reasons *why* the voters have been denied their right in this manner is inescapable, because the influence and control that the political parties wield

by removing from the voters the power to elect the Supreme Court judiciary cannot be underestimated, encompassing as it does not only the power to dictate patronage appointments but also to influence the very exercise of judicial authority by those placed on the Supreme Court trial and appellate benches. The Supreme Court has original trial jurisdiction both in law and equity, exclusive original jurisdiction over all crimes prosecuted by indictment in New York City, and original jurisdiction over all new classes and actions created by the legislature. N.Y. Const. Art. VI, § 7(a), (b). Justices of the Supreme Court, although locally elected, have statewide jurisdiction, and they constitute the exclusive pool of candidates for both temporary and permanent appointment by the governor to the Appellate Division of the Supreme Court. N.Y. Const. Art. VI, § 4. The jurisdiction of the justices of the Appellate Division in many cases exceeds that of the New York Court of Appeals, and notably includes the key power to review Election Law matters during critical campaign periods.

Thus, there is no merit to the contentions of the Plaintiffs and the amici curiae that neither the political parties nor the members of the legislature have a vested interest in maintaining a system in which the political party leaders withhold from the voters the power to determine who sits on the bench of the Supreme Court, and then wield the power of influence over those who attain

the bench upon receiving the imprimatur of the party leaders. If, as claimed, political and legislative leaders were indeed concerned with the quality and integrity of the judiciary, and fearful of the corruptive affects of electioneering, obvious solutions have always been available: The State could amend the Constitution to provide for the merit appointment of the justices of the Supreme Court. Decision and Order, 411 F. Supp.2d at 253. In the alternative, the State could effectuate the intent of the Constitution by amending the Election Law to implement a system of non-partisan conventions in single-county judicial districts, while concomitantly providing for the public funding of all judicial campaigns and the screening of all judicial candidates by a qualified, neutral body of experts who are neither affiliated with nor controlled by any political party..

The fact that the Legislature – the membership of which includes individuals who, like former Kings County Democratic Party boss Clarence Norman, Jr., are also the very party leaders who determine who sits on the Supreme Court bench – has sustained the judicial district convention system is demonstrable evidence that that injunctive relief ordered by the District Court is absolutely necessary. Indeed, the District Court understandably dismissed out of hand the Appellants' argument that -- notwithstanding that the State Constitution directs that the justices of the Supreme Court shall be chosen by

the electors -- the State has justifiably given that power to party leaders because they are *better qualified* than the voters to assume the responsibility of nominating candidates for the Supreme Court bench.

In reaching this conclusion, the District Court took into account that in New York, as in any state, "the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in state legislatures." Anderson v. Celebrezze, 460 U.S. 780, 803, n.30 (1983). Thus, a reviewing court must not assume that every provision of the Election Law was motivated by a "legitimate state interest." Id. To the contrary, "the manner in which election laws are enacted *requires* that courts 'pass judgment' on the 'legitimacy and strength' of the state's proffered interests." Molinari, et al. v. Powers, 82 F. Supp. 2d 57, 77 (E.D.N.Y. 2000) (quoting Schultz v. Williams, 44 F.3d 48, 58 [2d Cir. 1994]; Anderson v. Celebrezze, 460 U.S. at 789). The District Court undertook that analysis and concluded that the judicial district convention system abridges the constitutional rights of the electorate and is not narrowly tailored to advance *any* legitimate and compelling State interest.

Indeed, the district convention system is not narrowly drawn to advance a compelling state interest, see Lerman v. Bd. of Elections, 232 F.3d 135, 145 (2d Cir. 2000), cert. denied, 533 U.S. 915 (2001), including those proposed by

the Appellants, such as the promotion of geographic and racial diversity in the judiciary. Decision and Order, 411 F. Supp.2d at 250-56. The State certainly has an interest in ensuring a diverse and qualified Supreme Court bench. However, the Appellants' purported belief that a system cannot be put into place that would allow the voters an opportunity to fulfill that interest is startling for what it implicitly concedes, because it presupposes that the Legislature believes that largely anonymous political party leaders, who operate in secrecy and in furtherance of self-serving agendas known only to themselves, are in the best position to determine the diversity and qualifications of the individuals who preside over arguably the most important courts in the State. Even assuming the legitimacy of the claimed goal of the current statutory scheme, the judicial district convention is far from a reasonable or appropriate means of achieving it when the State Constitution expressly provides for the direct election of the justices.

Moreover, if the Legislature concluded early in the Twentieth Century that the electorate cannot be trusted to select qualified candidates for the Supreme Court, why has not the Legislature at some point since then acted to amend the Constitution to provide for the merit-based appointment rather than the quasi-election of Supreme Court justices? Instead, although the Legislature has twice enacted major revisions of the Election Law (in 1949 and

1976), the provisions governing the nomination process for Supreme Court judges have not been substantively modified since 1922. Indeed, the Legislature has on more than one occasion chosen to ignore express calls for reform.[2]

The Legislature could choose to retain the convention system, while modifying it to cure the constitutional failings that the current law has institutionalized, while including much-needed reduction in the sizes of the judicial districts and instituting a non-partisan system for screening of judicial candidates that is not controlled by the Party leaders. The Legislature could enact a system of either partisan or non-partisan primary elections, augmented by the much-needed public financing of judicial campaigns. Finally, the

---

[2] For example, in 1973, the Joint Legislative Committee on Court Reorganization recommended a constitutional amendment to provide for the appointment rather than the election of Court of Appeals Judges. In its report to the Legislature, the Joint Committee also took note of the manner in which candidates for the office of Supreme Court judge were nominated, commenting that "city voters say that even for the local judgeships . . . the candidates are in most cases unknown to them. . . . They convey the sense that as a part of the selection process they are ciphers: they are ignored when party leaders pick candidates and their power of choice is non-existent because the leaders so frequently agree on cross-endorsements, effectively disenfranchising the voters from any choice on those candidates." Then, in 1988, Governor Mario Cuomo (backed by Chief Judge Sol Wachtler and the State Commission on Government Integrity) proposed to amend the Constitution to eliminate the elective system for judges of the Supreme Court, Civil Court, and Surrogate's Court, and to replace it with an appointive system based on the method for appointment of Court of Appeals judges enacted in 1976. Once again, in 1993, the New York State Bar Association proposed the merit selection of Supreme Court judges.

Legislature may – indeed, should -- amend the constitution and implement a merit-appointment system, which would best serve to protect the interests of the citizens of this State in a highly qualified and independent judiciary of the Supreme Court and the Appellate Divisions.

It must be concluded, as did the District Court, that the Legislature's implementation and steadfast retention of the judicial district convention nominating system furthers only the illegitimate goal of allowing party leaders to hand pick the justices of the Supreme Court in derogation of the rights of the voters. Decision and Order, 411 F. Supp.2d at 255. That this system may have, in some parts of the State, produced a statistically diverse bench is fortunate but irrelevant to the issues that are now before this Court. Although New York once was in the vanguard of states that adopted the expansive view that the individual's right to vote effectively included the right to participate substantively in the party nomination process through state regulation of political parties and the nominating process, see People ex rel. Coffey v. Democratic General Committee, 164 N.Y. 335 (1900), the State has long since denied its citizens for far too long both the right to vote effectively for the justices of the Supreme Court, and the right to have an independent Supreme Court judiciary that is above reproach.

In conclusion, while the New York Constitution provides that the electorate shall vote for the justices of the Supreme Court, through the judicial district convention nominating procedure, political party leaders have maintained their Nineteenth Century control of the nominating process and the general election throughout the Twentieth Century and now six years into the Twenty-first Century. These so-called "conventions" are charades orchestrated by the party leaders and designed to put a legitimate face on back room political maneuvering. No legitimate state interest has ever been established justifying the retention by the political party leaders of control of this critical judicial office. The resulting burdens imposed upon the citizens of New York by this system are overwhelming, because the system not only undermines the fundamental right to vote for the office of justice of the New York State Supreme Court, it fosters the appearance and the omnipresent threat that the justices of the Supreme Court are not independent of outside influence.

The District Court correctly concluded that the State's steadfast retention of the judicial district convention nominating system severely burdens the First and Fourteenth Amendment rights of the citizens of New York, while furthering *only* the illegitimate goal of allowing party leaders to hand pick the justices of the Supreme Court in derogation of the rights of the voters. Accordingly, the District Court's order enjoining implementation of

the judicial district convention system was properly issued and should be upheld by this Court on appeal.

# CONCLUSION

**THE DECISION AND ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.**

Dated: Brooklyn, New York
May 17, 2006

Respectfully Submitted,

CHARLES J. HYNES
District Attorney
Kings County, New York
350 Jay Street
Brooklyn, New York 11201
(718) 250-2100

Monique Ferrell
Assistant District Attorney
Of Counsel to the
District Attorney

**CERTIFICATE OF COMPLIANCE**
**WITH FED. RULE APP. PROC. 32(a)(7)(B)**

1. This brief complies with the type-volume limitations of Fed. Rules App. Proc. 32(a)(7)(B) because this brief contains 4,712 words, excluding the parts of the brief exempted by Fed. Rules App. Proc. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. Rules App. Proc. 32(a)(5), and the type style requirements of Fed. Rules App. Proc. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in Times New Roman 14.

Dated: Brooklyn, New York
May 17, 2006

__________________________________

Monique Ferrell
Assistant District Attorney
Of Counsel to
Charles J. Hynes
District Attorney
Kings County