No. 06-766

IN THE

Supreme Court of the United States

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

v.

MARGARITA LÓPEZ TORES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

ANDREW CUOMO, Attorney General
of the State of New York
BARBARA D. UNDERWOOD
RICHARD DEARING
JOEL GRABER
120 Broadway - 25th Floor
New York, New York 10271-0332
Statutory Intervenor

CARTER G. PHILLIPS
ERIC A. SHUMSKY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Counsel for the New York Republican State Committee

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS HAUER
& FELD, LLP
1333 New Hanpshire Avenue, N.W.
Washington, D.C. 20036
Counsel for the New York County Democratic Committee

STEVEN M. PESNER
ANDREW J. ROSSMAN *
JAMES P. CHOU
JAMES E. D'AUGUSTE
VINCENZO A. DELEO
JAMISON A. DIEHL
AKIN GUMP STRAUSS HAUER
& FELD LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1081
Counsel for the New York County Democratic Committee

EDWARD P. LAZARUS
AKIN GUMP STRAUSS HAUER
& FELD LLP
2029 Century Park East
Los Angeles, CA 90067
Counsel for the New York County Democratic Committee

* Counsel of Record

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

ARTHUR W. GREIG
401 Broadway, Suite 1902
New York, New York 10013
Counsel for The New York County Democratic Committee

JOSEPH L. FORSTADT
ERNST H. ROSENBERGER
KEVIN J. CURNIN
DAVID SIFRE
MARY A. GORMAN
STROOCK & STROOCK & LAVAN
180 Maiden Lane
New York, New York 10038
Counsel for Associations of New York State Supreme Court Justices in the City and State of New York, Honorable David Demarest, J.S.C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

REPLY BRIEF FOR PETITIONERS

The Second Circuit in this case has bestowed a new constitutional right upon disappointed office seekers to challenge the outcome of their political party's candidate selection process. Finding that "challenger candidates" competing within their own political party have a First Amendment right to a "realistic opportunity to participate in the nominating process," the Second Circuit deviated wildly from the law governing intraparty contests – whether by convention, primary or other means. The decision below thus presents questions of national importance warranting this Court's review.

I. FAR FROM BEING FACT-BOUND AND UNIQUE, THE SECOND CIRCUIT'S OPINION SWEEPS BROADLY TO APPLY TO ALL NOMINATING SYSTEMS WHERE PARTY LEADERS INFLUENCE THE OUTCOME

Putting aside the enormous public impact of a decision that demolished an 84-year old statutory framework for picking trial judges throughout the third largest state in the nation – which is reason enough for Supreme Court review – this case is certworthy because of its nationwide impact on all candidate nominating systems.

First, this case directly applies to any electoral system involving a representative form of democracy, including party conventions. While Respondents would paint New York's convention system as "unique" and this case as "fact bound" (Resp. Br. 16), party conventions have been a feature of American politics for two centuries. In fact, this Court itself has on more than one occasion reviewed cases involving the national party conventions and protected the constitutional rights of political parties. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107,

124 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution."); *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (a political party's "right of association carries with it a right to determine the party's own criteria for selection of delegates to its national convention"). This Court has also blessed the use of nominating conventions at the state level, holding in *American Party of Texas v. White*, 415 U.S. 767, 781 (1974) that "[i]t is too plain for argument that the State . . . may insist that intraparty competition be settled . . . by primary election or by party convention." Yet, the Second Circuit would deprive parties of that choice by mandating that all nominations proceed by primary or its functional equivalent.

Second, the broad and novel constitutional principles pronounced by the Second Circuit, including the gross departure from this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), apply to any nomination process, misguidedly inviting federal courts to once again "peer inside . . . political clubhouses" (App. 5) to determine whether party leaders had such sway over candidate selection that disfavored candidates had no "realistic opportunity to participate." Likewise, the Second Circuit's determination to subordinate the political parties' First Amendment associational rights to those of challenger candidates and voters puts all nominating schemes at risk. Indeed, aspects of the New York system that the Second Circuit deemed so constitutionally repugnant have been common features of political parties' organizations and operations for over 200 years, including their core function of selecting nominees for office. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) (characterizing the "candidate-selection process" as "the basic function of a political party") (internal quotation marks and citation omitted). As *amicus curiae* Republican National Committee

("RNC") stated, "[a]bsent review by this Court, the decision below will cast into doubt the constitutionality of myriad state election laws and the bedrock associational freedoms of political parties." RNC at 3.

Granting *certiorari* is thus warranted to correct the Second Circuit's impermissible expansion of First Amendment protections into intraparty affairs and to enable this Court to explain for the first time how to resolve challenges to state laws and/or party rules dealing with party members' access to the nomination stage of an electoral process where invidious discrimination is not at issue.

II. THE DECISIONS BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *STORER* AND *WHITE* AND CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUITS

1. Respondents' brief in opposition entirely skips the threshold question of whether the ballot access test formulated in this Court's *Storer* decision even applies to determining the scope of First Amendment rights in the context of intraparty competition. The handful of cited primary ballot access cases stand for a proposition that is not in dispute: namely, the state action requirement for triggering constitutional protection against invidious discrimination is satisfied at the nomination stage. (*See* Pet. Br. 19 n.2) (discussing *Bullock v. Carter*, 405 U.S. 134 (1972), *Lubin v. Panish*, 415 U.S. 709 (1974), *U.S. v. Classic*, 313 U.S. 299 (1941) and *Terry v. Adams*, 345 U.S. 461 (1953), all of which concern Fourteenth or Fifteenth Amendment rights and *invidious discrimination*). The "white primary" cases (*Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry*) and the poll tax case (*Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) they cite involve discrimination by race or wealth. The other line of cases from which the *Storer* ballot access test emerged concerns exclusions of minor or

non-party, independent candidates from the general election ballot – *i.e.* this Court's "freeze out" line of ballot access cases of which *Moore v. Oglivie*, 394 U.S. 814 (1969) is an example. Respondents do not, because they cannot, dispute that these cases do not address *intraparty* competition. *Storer's* "reasonable diligent independent candidate" test *has never been applied to the nomination phase* and this Court should grant the petition to set the applicable test. *Kusper v. Pontikes*, 414 U.S. 51 (1973), *Clingman v. Beaver*, 544 U.S. 581 (2005) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), which address party disaffiliation requirements within the primary setting, are not relevant here.

To the extent *Storer* has any application here, the Second Circuit distorted the Court's ruling by crudely and improperly retrofitting the *Storer* test to apply to the arena of intraparty competition. While purporting to disclaim the admittedly improper "right to win" standard (Resp. Br. at 22), the Second Circuit in fact relied on the outcome of nomination contests to measure whether its "challenger candidates" are afforded a "realistic opportunity to participate." (Pet. Br. 22-23; Resp. Br. 22).

Respondents attempt to rescue the "realistic opportunity" standard by arguing that *Classic* and *Bullock* support "the Second Circuit's insistence on actual, rather than theoretical, voter participation at the nomination phase." (Resp. Br. at 23). But *Classic* and *Bullock* are primary cases where state legislatures specifically granted voters the right of expressing their preferences directly for candidates, unlike here where voters' intended role is to select delegates who representatively choose nominees.

By assuming its own conclusion that there is a First Amendment right to vote directly for judicial candidates, the Second Circuit reached the inevitable result that New York's representative system is unconstitutional. But when the

scope of the right is viewed from the appropriate perspective of the roles that the Legislature accorded to the various participants in the process – *i.e.* (i) rank-and-file members vote for delegates of their choosing, and (ii) delegates select candidates of their choosing – the convention system passes constitutional scrutiny with ease.

2. Despite the efforts of Respondents to distinguish *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) and *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) on the facts (Resp. Br. at 28), there is a genuine conflict between those courts of appeal and the Second Circuit on the appropriate legal test when the First Amendment rights of voters collide with the co-equal First Amendment rights of political parties.

Respondents do not dispute that *Bachur* and *Ripon* applied a different legal test than the Second Circuit – a flexible balancing test weighing the competing First Amendment rights of political parties versus those of voters and candidates, rather than a strict scrutiny analysis, which unjustifiably favors the First Amendment rights of voters and candidates over the rights of political parties. Nor do they address the D.C. Circuit's holding in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), that the strict scrutiny review applied by this Court in its ballot access decisions does not apply where, as here, a political party asserts First Amendment rights in its own nominating process.

Respondents' proffered distinction that *Ripon* and *Bachur* involved challenges to internal party rules as opposed to challenges to state laws is factually inaccurate. The number of delegates to New York's judicial convention – crucial to the Second Circuit's decision – is established by party rule, not by statute. (App. 104). Further, as discussed *supra*, the nominating convention does not "block entry" of candidates when considering that the true convention analog

to ballot access is merely the opportunity of a candidate to have his name considered by the delegates.

At its heart, the Second Circuit's decision reveals a deep hostility toward the First Amendment associational freedoms of political parties. To suppress the undeniable rights of political parties to choose their own nominees, to avoid party-raiding and to engage in ticket-balancing, the Second Circuit deviated from the flexible basis balancing test of *Ripon*, *Bachur* and *LaRouche*, creating a genuine circuit split, which this Court should resolve by granting this petition.

3. Faced with this Court's holding in *White* that a convention can be a constitutional alternative to a primary, Respondents resort to attacking a straw man argument they wrongly attribute to Petitioners, *i.e.*, that all conventions are *per se* constitutional. (Resp. Br. at 25). But petitioners make a different point. *White* would be meaningless if a convention must be equivalent to a primary to pass constitutional muster, yet this is what the Second Circuit has wrongly concluded.

Respondents prove our point by proffering as an example of a constitutional convention a system involving voters petitioning their favored candidate onto a primary ballot for their party's nomination against candidates endorsed at the party's convention. (Resp. Br. at 26). In this variation, a convention is simply a precursor to a primary, not an alternative to one, as it provides one means of accessing the primary ballot.

Finally, Respondents claim that the lower courts did not dismantle or otherwise prohibit the convention by replacing it with a primary, but merely deferred to the statutory default provision of a primary and left open the possibility for the enactment of a convention. (Resp. Br. at 26). Not only does the statute not have a primary default,

but Respondents ignored this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), that the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent to replace New York's failed experiment with judicial primaries with judicial conventions.

The deeply mistaken view of the Second Circuit that the First and Fourteenth Amendments mandate *direct* voter participation in candidate selection clashes with *White*, and, thus, serves as another basis for granting this petition.

III. THIS CASE IS RIPE FOR REVIEW

Opposing the Petition, Respondents raise two contradictory procedural arguments. Respondents first argue that *certiorari* is unwarranted because the lower court decisions are interlocutory and based upon a factual record that may change during a trial on the merits. In the same breath, Respondents then argue that the Legislature is poised to alter the statutory scheme at issue, thereby avoiding a full trial on the merits and rendering this appeal moot. Neither argument counsels against review by this Court.

1. Although technically interlocutory in nature, the district court's mandatory injunction, which the Second Circuit affirmed, is effectively a final order granting the ultimate relief sought in this case. The lower court decisions will have an immediate and irrevocable effect on current and future election cycles. The results of these elections will be permanent notwithstanding the outcome of a trial on the merits. For instance, fourteen incumbents of the New York State Supreme Court who have been absent from politics during their fourteen year terms immediately would be forced to run in primary campaigns that Respondents' expert below called "nasty, noisy and expensive." If these incumbents were to lose, or choose not to run for the same

reasons that motivated New York to reject primaries in 1921, their injury would be irreparable.

In any event, it is well-established that "the interlocutory status of the case may be no impediment to *certiorari* where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Robert L. Stern *et al., Supreme Court Practice* § 4.18, at 260 (8th ed. 2002); *see also* 28 U.S.C. § 1254(1).[1]

Here, a trial on the merits would be pointless because the legal framework articulated by the lower courts will inevitably lead to the same conclusion. In their view, the question of whether the judicial convention system poses a severe burden on First Amendment rights must be measured by whether so-called "challenger candidates" can *succeed* in either (i) attracting enough delegates to run on their behalf and enough signatures to place those delegates on the primary ballot (App. 62-63), or (ii) lobbying the support of delegates supposedly selected by party leaders. Certainly, as to the former, a trial would add nothing of value to the factual record as the signature and delegate requirements are not in dispute. As for the latter, a trial would be to no avail because the circular definition of a challenger candidate as one who "lacks the support of party leadership" (App. 61) predetermines the result. Invariably, candidates who attract

---

[1] This rule is borne out by the actual practice of this Court. In recent terms, this Court has reviewed numerous such interlocutory cases, including cases arising in a posture similar to the case at bar. *See e.g., Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (involving appeal of preliminary injunction); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (same); *Gonzales v. Raich*, 545 U.S. 1 (2005) (same); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (same); *S.E.C. v. Edwards*, 540 U.S. 389 (2004) (same).

substantial support during a campaign, whether a primary or convention, will likewise attract the support of party leadership and cease to be regarded as a challenger. Based on this flawed paradigm, the lower courts concluded there were no successful challengers and no additional evidence of hard-won victories by insurgent candidates could be expected to change the result at trial.

2. Respondents' conjecture that review is unsuitable because the Legislature may be forced to adopt a new nomination scheme at the sword point of an injunction is disingenuous. The Legislature's compliance with a federal court order should not frustrate review by this Court, lest *certiorari* be denied in all cases where an important statute is invalidated on Constitutional grounds. Of course, the law is to the contrary. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.").

In any event, there are widely divergent views among New York lawmakers on how the Legislature should respond to the lower court decisions and the outcome of any future legislative effort is far from clear. Both chambers of the Legislature (despite being controlled by different parties) have expressed the view that the convention system should be retained, arguing in its *amicus* brief submitted at the invitation of the court of appeals, that the preliminary injunction should be vacated because it trespassed on the core power of New York to regulate its own elections. New York State Legislature *Amicus* Br. at 5, citing, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citations omitted). While the judicial nominating convention has been the subject of

serious public and legislative debate in the past, the Legislature's decision to restore the convention in 1921 has – until the district court's decision – survived the test of time. *See, e.g., Report of the Joint Legislative Comm. on Court Reorganization*, Legis. Doc. 24 at 12 (1973) (recommending that Court of Appeals judges be appointed by the Governor but concluding it was "undesirable" to change the method by which judges for other courts are elected); Tr. 344: 1-12 (Regan) (describing the 1967 New York constitutional convention at which changes to the judicial nominating convention process were considered and rejected).

Even after the district court issued its preliminary injunction, the New York State Commission to Promote Public Confidence in Judicial Elections issued its final report, concluding that conventions are preferable to primaries for nominating candidates for the office of Supreme Court Justice. *See* Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* at 3 (February 6, 2006). Yet, counsel for Respondents threatened further litigation if the Legislature were to adopt that recommendation. As for recently-elected Governor Eliot Spitzer, who signed the petition as New York's Attorney General, he announced his support for amending New York's Constitution to establish an appointive system – a process that would take several years and faces strong opposition in the State Senate. Unless this Court resolves the legal issues in this case, there will be no clear constitutional guidance for the Legislature to follow and future judicial elections will remain clouded.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP
Steven M. Pesner
Andrew J. Rossman*
James P. Chou
James E. d'Auguste
Vincenzo A. DeLeo
Jamison A. Diehl
590 Madison Avenue
New York, New York 10022
(212) 872-1081

Edward P. Lazarus
2029 Century Park East
Los Angeles, CA 90067

Tomas C. Goldstein
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Counsel for The New York
County Democratic Committee

ARTHUR W. GREIG
401 Broadway, Suite 1902
New York, New York 10013

Counsel for The New York
County Democratic Committee

* counsel of record

ANDREW CUOMO, Attorney General
of the State of New York
Barbara D. Underwood
Richard Dearing
Joel Graber
120 Broadway - 25th Floor
New York, New York 10271-0332

Statutory Intervenor

SIDLEY AUSTIN LLP
Carter G. Phillips
Eric A. Shumsky
1501 K Street, N.W.
Washington, D.C. 20005

*Counsel for New York
Republican State Committee*

STROOCK & STROOCK & LAVAN
Joseph L. Forstadt
Ernst H. Rosenberger
Kevin J. Curnin
David Sifre
Mary A. Gorman
180 Maiden Lane
New York, New York 10038

*Counsel for Associations of New York State
Supreme Court Justices in the City and
State of New York, Honorable David
Demarest, J.S.C.*