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 RESPONDENTS

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STATEMENT

When political party members join together to support a prospective nominee for elective office, they share a crucial moment in the democratic process, a point at which an "appeal to common principles may be translated into concerted action, and hence to political power in the community." *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (plurality opinion) (internal quotation marks and citations omitted); *see id*. at 599 (O'Connor, J., concurring); *id*. at 612 (Stevens, J., dissenting). New York holds out the promise of such a democratic moment in connection with the nomination of candidates for its supreme court trial bench. But the promise is illusory. As the lower courts found, and as the robust record demonstrates, the State imposes a nominating process that places unconstitutionally severe burdens on the ability of political party members to associate in support of a prospective judicial nominee.

In fact, New York's state-imposed nominating process creates a locked gate, to which those in control of the party machinery hold the only key. The Second Circuit accurately described New York's statutory nominating process as "beset with obstacles," with "restrictive regulations" and "overlapping and severe burdens." PA-17a, 45a, 53a.[1] As Petitioner (and expert witness) Douglas Kellner testified, "the convention system is designed [so] that the political leadership of the party is going to designate the party's candidates." *Id*. at 19a. As both lower courts found, the cumulative impact of New York's statutory nominating procedures is to vest power

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[1] "PA-___" refers to the Appendix to the Petition for Certiorari, which includes the opinions of the Second Circuit (PA-1a-92a) and district court (PA-93a-185a). "JA-___," "HE-___" and "Tr.___," refer to the Joint Appendix, Hearing Exhibits, and Transcript filed in the Second Circuit and in this Court. Relevant New York statutes appear in Appendix A to this Brief.

to select the nominee in the party's leadership, rendering it effectively impossible for rank-and-file party members to influence the choice of their party's nominee.

Petitioners mistakenly dismiss these incontrovertible findings as reflecting only the private choices of political parties. But as shown below, they are the direct and inevitable consequence of New York's statutory scheme. Whatever power a political party acting autonomously may have to invest the party's leadership with autocratic nominating power to the exclusion of rank-and-file members, two mutually reinforcing lines of First Amendment authority forbid New York from imposing such "democratic centralism" on its recognized political parties by statute.

First, this Court has repeatedly held that the state may not require political parties to adopt nominating procedures that abridge the associational rights of party members. *See Clingman*, 544 U.S. 581; *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. S.F. County Democratic Cent. Comm.,* 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.,* 479 U.S. 208 (1986).

Second, this Court has repeatedly held—and the Second Circuit emphasized below—that when the state undertakes to regulate any phase of the electoral process, it may not impose severe burdens on the ability of candidates and voters to gain access to the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).

This case does not call for a policy judgment about the relative merits of an elective or appointive judiciary. New York's system, viewed "in a realistic light," *Anderson*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143), is neither a legitimate exercise in democracy nor a delegation of appointive power to accountable state officials. Rather, New York vests *de facto* power to appoint supreme court judges in local party bosses, thereby creating a fertile source of corruption,

decreasing confidence in its courts, impeding the search for judicial excellence, and failing to achieve a genuinely representative judiciary. For these reasons, recognizing that New York's system is the worst of all worlds, an impressive array of organizations and individuals with differing perspectives appear as *amici* in support of affirmance.

1. The Operation of New York's Statutory System

New York's statutorily mandated nominating system erects an insurmountable series of obstacles to efforts by political party members to associate in support of a prospective supreme court nominee. The obstacles include: (i) geographically dispersed delegate contests in every one of the numerous Assembly Districts located in each Judicial District; (ii) large numbers of required delegates and alternates (often ranging into the hundreds) who must be recruited four months in advance of the delegate primary; (iii) cumulatively onerous petition signature requirements that must be satisfied within a 37-day window with signatures drawn from a shrinking pool of eligible party members who may sign only one petition; (iv) highly technical signature qualification standards leading to repeated legal challenges; (v) a large number of simultaneous delegate races in which delegates must appear on the ballot without signifying the supreme court candidates they support; and (vi) a mere two-week period between the delegate election and the nominating convention.

The district court found that all of these obstacles combine to create a burden on association so severe that "with very few exceptions, district leaders and county leaders select the delegates and alternate delegates, who, without consultation or deliberation, rubber stamp the county leaders' choices (or 'package' of choices) for Supreme Court Justice." PA-114a. Accordingly, the lower courts issued a preliminary injunction invalidating New York Election Law §§ 6-106 and 6-124.

The trial court made its factual findings after a four-week evidentiary hearing involving testimony from two dozen witnesses and the compilation of a 10,000-page record.[2] The district court concluded that the evidence "established overwhelmingly" that "local major party leaders—*not the voters or the delegates* to the judicial nominating conventions control who becomes a Supreme Court Justice and when." *Id.* at 95a, 136a (emphasis supplied). The Second Circuit agreed that the "evidence showed that a network of restrictive regulations effectively *excludes* qualified candidates and voters from participating in the [delegate] election and subsequent convention." *Id.* at 53a (emphasis in original).

Evidence from across the entire State supported these findings. For example, the lower courts relied on a report issued by the New York State Commission to Promote Public Confidence in Judicial Elections appointed by New York's Chief Judge (the "Feerick Commission"), which included ten sitting or former New York judges. The Feerick Commission found that: "'The uncontested evidence before the Commission is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders.'" *Id.* at 29a. The Second Circuit highlighted the impressive unanimity among those who had studied the nomination system:

> The Commission is hardly the only entity to reach this conclusion—it merely is the latest. Since 1944, New York's judicial nominating system has been described as exclusionary and boss-dominated; reports and newspaper editorials from that time for-

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[2] Only one group of Petitioners even acknowledges the record, and that group's description of the facts is contrary to the findings of the two lower courts. *Compare*, *e.g.*, Br. of N.Y. County Dem. Comm. *et al.* ("County Br.") at 28 n.14 *with* PA-68a-69a, 114a-15a, 122a-25a.

> ward have decried an electoral practice "that mocks choice," and criticized a system in which "voters can never know the candidates and have to accept party slates," while the "real choice is…left to political bosses…who control nominations." *Id.*

Considering evidence from every part of the State, the district court found that county party leaders (rather than voters or the delegates) control the nomination process across the State, including, for example, in the Judicial Districts that lie: just to the north of New York City, *id.* at 148a; around Schenectedy, *id.* at 143a-44a; around Albany, *id.* at 143a; around Rochester and Buffalo, *id.* at 146a-47a; and within New York City. In Manhattan, "[n]o one can get elected Supreme Court Justice in the First Department without [the county leader's] support." *Id.* at 135a, 65a-66a. In the Bronx, party officials disclosed the names of the judicial nominees "before the delegates—who purportedly select the nominees—were even elected." *Id.* at 19a. And in Brooklyn, "[f]rom the 1960s…through the time of the evidentiary hearing in this case…the county leader in Kings County has selected the Supreme Court Justices in the Second District." *Id.* at 136a.

For decades and all across the State, in both major parties, the same thing has always occurred. The reason is structural, not political. The statutory mechanism by which each party in each Judicial District *must* select convention delegates guarantees that local party leaders control the delegate-selection process and, thus, the nomination.

a. The Delegate-Selection Phase

(i) Structural Dispersion of Races. Although supreme court candidates run at large within one of New York's twelve Judicial Districts, N.Y. Jud. L. § 140, delegates to the nominating convention are *not* elected at large. Rather, New York requires that prospective delegates run "from each" of the (much smaller) Assembly Districts

("ADs") located within each Judicial District. N.Y. Elec. L. § 6-124; *see* PA-86a-92a (map showing overlay of 150 ADs on Judicial Districts). Moreover, the district court found that, in order to associate effectively in support of a prospective nominee, rank-and-file members must run slates of delegates in most or all of the ADs within a Judicial District. *Id*. at 11a, 107a-08a. Success in a single delegate race merely permits the winner to act as "a gadfly at a convention otherwise populated by delegates placed there by the party organization." *Id*. at 112a-13a.

As the district court explained, this geographical distribution requirement "contributes significantly to the heavy burden it places on those who seek major party nominations for Supreme Court Justice without the support of the party's district leaders and county leaders. Such challenger candidates face the prospect of as many [sets of] delegate races as there are ADs in the judicial district—at least nine and as many as 24." *Id*. at 104a. Further, the sheer number of delegates (determined by the parties pursuant to a formula imposed by law) must be burdensomely high in order for the parties to comply with the statutory mandate that the number of delegates in each AD be "substantially in accordance with the ratio" between (a) "the number of votes cast for the party candidate for the office of governor" in the AD at the last election and (b) "the total [statewide] vote cast at such election for such candidate." N.Y. Elec. L. § 6-124. In 2004, for example, the combined number of delegate and alternate positions in the twelve Judicial Districts ranged from a low of 48 to a high of 370, with a median of 187. *See* PA-105a-06a.

(ii) Recruiting Delegates. The entire slate of candidates for delegates and alternates in each AD must be identified and recruited nearly four months before the primary. *See* N.Y. Elec. L. §§ 6-134(4), 6-158(1). The slates must contain numerous registered party members for each AD, and, as noted, delegates are elected from each of the Judicial District's many ADs. PA-107a-08a. As one judge who un-

successfully sought the Republican party nomination observed, this large number of people had to be willing "to contribute significant energy, time, and money to run as delegates and win a campaign against the county Republican Party's leaders' candidates for the elusive satisfaction, if successful, of voting for me at a single judicial convention, and thereby jeopardizing their political future." JA-230 ¶ 14; *see* Tr. 389-90. Another judicial candidate observed that the nature of the job mystifies most party members. *See* JA-501 ¶ 11.

By contrast, as the lower courts found, local party leaders easily tap "reliable" party loyalists to qualify as delegates, who will "adhere to the instructions of each county chairman." PA at 21a; *see id.* at 109a-10a; *see generally Amicus* Br. of John R. Dunne; *id*. at 18. Petitioner Kellner admitted that local politicians select the judicial delegates "at a meeting where I'm reminded of the old song, politics and poker from Fiorello, where they're sitting around the table and say who do we run?" Tr. 1624.

(iii) Collecting Signatures. Each slate of delegates in each AD or part of an AD must file its *own* 500-plus signature petition. N.Y. Elec. Law §§ 6-136(2)(a), (3), 6-132(2). Moreover, delegate petitions may be signed only by registered party members actually residing in the particular AD. *Id.* In contrast, candidates for all other elected offices in the State—including the many other elected *judicial* offices—obtain signatures from party members residing anywhere in the political subdivision that the officer will serve. *Id*.

Each party member may sign only one petition. *Id.* § 6-134(3). Thus, "the number of available signatories shrinks each time a party member signs a designating petition." PA-12a. Further, petition circulators have a 37-day "window" to gather petitions. N.Y. Elec. L. § 6-134(4). The lower courts found that this "brief period" renders gathering so many sig-

natures in each AD a "difficult task." *See* PA-12a, 14a, 62a, 108a.

Rank-and-file members seeking to support delegates thus face a cumulative set of obstacles in gathering signatures. The number of signatures required to run a slate of delegates across a Judicial District is several times larger than the number required to qualify for the primary ballot for other judicial offices covering the same territory. For example, in Brooklyn (Kings County), supporters of candidates for other countywide judicial offices, such as civil court judge, must gather 4,000 valid signatures from anywhere in the county. N.Y. Elec. L. § 6-136(2)(b). In contrast, supporters of a candidate for supreme court in the Second Judicial District (covering Brooklyn and Staten Island) must amass a total of 12,000 valid signatures drawn equally from the 24 ADs in the Judicial District. PA-107a-09a. As the district court found, "these features of New York's electoral system render any effort by a challenger candidate to field slates of supportive delegates and alternates virtually impossible. Indeed, it is considerably easier for an aspiring Supreme Court Justice to petition herself onto the ballot for the office of Mayor of New York City." *Id*. at 108a-09a.

The lower courts found that party leaders "can easily mobilize the resources necessary to conduct the petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices." *Id*. at 109a; *see id.* at 16a-17a. Indeed, New York permits petitions to list the leaders' hand-picked candidates for judicial convention delegate along with candidates supported for high-profile offices such as governor, senator, or mayor. N.Y. Elec. L. § 6-134(1).

(iv) Defending Petitions. As the lower courts explained, in New York generally, "petition signatures are routinely and successfully challenged" on numerous technical grounds. PA-13a, 108a; *see* N.Y. Elec. L. § 6-154 (setting

forth process for objecting to petition signatures). History teaches, and the lower courts found, that to withstand such legal attacks, successful petitions must contain two to three times the legal minimum of signatures. PA-13a, 108a. This magnifies the already-overwhelming signature-gathering burden substantially. For example, the lower courts found that supporters of a supreme court candidate in the Second Judicial District "would need to gather 24,000 to 36,000 signatures drawn equally from the 24 ADs in the district." *Id.* at 108a.

(v) Electing Delegates. Even if it were possible for rank-and-file party members to assemble a slate of delegates and to place them on the ballot, New York makes it severely burdensome to wage an election campaign for delegate in support of a particular judicial candidate. Petitioners agree that, unlike delegates to more familiar nominating conventions, the prospective judicial delegates "cannot signify on the primary ballot an allegiance to a specific [supreme court] candidate." *Id.* at 107a. "[T]he rules," testified Petitioner Kellner, "are basically set up to discourage that." Tr. 1568. Because the names of prospective delegates are rarely well known, party members would be unable to distinguish one slate from another without expensive educational campaigns in each AD informing the party members "which delegates are pledged to [the candidate] in that specific locale." *Id.* at 13a. Not surprisingly, as a result of these cumulative statutory barriers to electing slates of delegates, challenges to those slates selected by the county party leaders almost never occur. Instead, the party leaders' chosen slates are deemed "elected" without ever appearing on a ballot. *Id.* at 18a, 130a; *see* N.Y. Elec. L. § 6-160(2).

(vi) Post-Election Period. The nominating convention must take place two weeks after the election of delegates. N.Y. Elec. L. § 6-158(5). The lower courts found that two weeks is an "unrealistically brief" time for supreme court candidates or their supporters to interact effectively with the

delegates. PA-18a, 116a. Indeed, such a short statutory timeframe makes clear that the Legislature did not envision that any meaningful deliberation by delegates would occur.

Moreover, delegates themselves have no incentive to deliberate and every incentive to obey the county party leader who hand-picked them. As the lower courts found, delegates simply "do not exercise their own judgment when deciding which candidate to support." *Id.* at 19a; *see id.* at 114a. As one of Petitioners' witnesses admitted, delegates avoid nomination contests because that would "force the delegates to make a choice between supporting a candidate that they might—that they might want to support and offending the county leader." Tr. 1295.

b. The Nominating Conventions

Given the lock-up of delegates caused by the statutory delegate selection process, the lower courts found that judicial nominating conventions are *pro forma* affairs at which delegates "rubber stamp" decisions made earlier by the party leadership. Historically, more than 96% of nominations have been uncontested at the convention. PA-22a. The lower courts credited evidence of the compressed time devoted to the conventions, which often take twenty minutes or less, *see id.* at 126a-29a, and the high absentee rates for judicial delegates, which range from 25% to 69%, *id.* at 23a, 104a n.8. "The extremely high absentee rate reflects, among other things, the fact that delegates to the conventions know their votes do not really matter." *Id.* at 125a.

Not surprisingly, delegates engage in no debate, and do not challenge the party leader's choice of nominees. *See, e.g.*, *id.* at 18a-22a, 114a, 125a.[3] This finding rested on

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[3] Petitioners argued below that the convention provides an opportunity for "'an elected body of informed delegates to consult, deliberate and choose Supreme Court nominees who best reflect the interests and values

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overwhelming evidence, including the expert testimony of Petitioner Kellner, who "conceded that at least in some judicial districts, the 'leadership of the party...hold[s] a meeting before the convention' to 'work things out,' and then makes nomination 'recommendations' to the delegates. Asked whether those 'recommendations' were 'always followed,' Kellner replied, 'Generally, yes.'" *Id.* at 21a. Kellner admitted that most nominating conventions operate in the manner of a proverbial "smoke-filled room." *Id.* at 149a n.36 (citing Tr. 1630-31). He also testified that (since the time he became privy to the party leader's decisions thirty years ago) "I have known what the result would be before every roll call that has happened." Tr. 1579.

Political scientist Bruce Cain, testifying for plaintiffs, analyzed the conventions across the entire State, searching for any examples of supreme court candidates successfully challenging the leadership's candidates at the convention. He found none. The district court credited Dr. Cain's analysis, finding "no evidence of a single successful challenge to candidates backed by the party leaders." PA-131a-32a.

c. General Elections

The supreme court nomination process is particularly important because the general election for supreme court is virtually always "little more than ceremony." *Id.* at 23a. Democrats always prevail in such elections within New York City, while Republican nominees almost always prevail elsewhere in the State. *Id.* at 129a. While the *pro forma* nature of supreme court elections does not impugn their integrity—local dominance by a political party usually reflects free electoral choice—it renders it particularly important to

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of the delegates' constituents.'" *Id.* at 113a-14a. The district court rejected this contention: "It does not describe how the system in fact works." *Id.* The Second Circuit agreed. *Id.* at 22a-23a, 64a-70a.

safeguard the associational rights of persons seeking to participate in the nominating process, because nomination is so often tantamount to election.

Moreover, lack of electoral competition is not limited to so-called one-party districts. "In districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Id.* at 130a. In some districts, more than half the candidates are cross-endorsed by the two major parties, and 62% of the entire State's voters in supreme court general elections have only one choice among major-party candidates. *Id.* at 23a, 130 & n.26.

d. Judge Margarita López Torres—An Example of the System in Action

As the district court observed, the experience of Judge López Torres "reveals most of the flaws in the process by which Supreme Court Justices are selected in New York." *Id.* at 136a. Judge López Torres was elected to Kings County civil court in 1992. She was "off to a great start in her judicial career." *Id.* at 137a. Shortly after she was elected, however, she "was told by [Clarence] Norman, the county leader, and Vito Lopez, her district leader, to hire a particular young attorney as her court attorney," the state-court analog to a federal judge's law clerk. As the district court explained, "the party leaders…felt entitled to place employees in her chambers." *Id.* at 137a-38a.

Judge López Torres interviewed the attorney, checked his references, but did not hire him because she concluded that he was unqualified and would spend his days attending to political work rather than to legal research and writing. Norman and Lopez were "extremely upset." They demanded that she fire her well-qualified law clerk and instead hire their (unqualified) candidate. She declined. "Some day, Norman warned her, she 'would want to become a Supreme Court Justice and…the party leaders would not forget this.' He told

her that 'without the "County's" support, her Supreme Court nomination 'will not happen.'" *Id.* at 25a; *see id.* at 138a.

Some years later, District Leader Lopez offered Judge López Torres "a chance to redeem herself: if she hired his daughter as her law secretary, he would secure her nomination as the Democratic Party's candidate for Supreme Court Justice." Again, Judge López Torres declined, "refusing to fire the qualified attorney she had initially hired to the position." *Id.* at 139a, 24a-25a.

Judge López Torres eventually did seek the Democratic supreme court nomination starting in 1997. But Norman told her that her earlier independence had been "a serious breach of protocol." *Id.* at 26a. Nonetheless, several elected officials asked if she would be willing to be considered for nomination. She agreed. JA-175. Norman demanded that she withdraw in writing, saying that her continued candidacy was an "affront" and that actually seeking the nomination in the convention "was not the way it works." PA-26a. The convention delegates fell into line with Norman: not one even proposed her nomination. *Id.*

In 2002, Judge López Torres sought reelection as a civil court judge (nominated in a primary election) and also sought the nomination for supreme court. She asked Norman to refer her name to a party "screening panel," which recommends qualified candidates for nomination to supreme court. (The panel considered *only* those candidates that Norman referred.) Norman refused, solely because she had been "disloyal." *Id.* at 27a, 140a.

The Kings County Democratic Party leaders then turned on Judge López Torres, supporting a candidate against her in the 2002 primary election for her civil court position. She prevailed in the civil court primary, and, in the 2002 general election, received more votes on the Democratic line in Brooklyn—over 200,000—than any of the Democratic candidates for supreme court.

But "indisputable qualifications for the job and immense popularity among the candidate's fellow party members are neither necessary nor sufficient to get the party's nomination" for supreme court justice. *Id.* at 131a. In contrast to the primary for civil court, County Leader Norman controlled the 2002 supreme court nominating convention. According to Petitioners' own witness (who had chaired the convention) Norman directed delegates to nominate "a horrible choice," who would be "bad for the bench." *Id.* at 114a-15a. Judge López Torres—the party's most popular judicial candidate ever in the Borough of Brooklyn—received only 25 votes out of the 137 possible delegates. JA-1582; HE-2268, 5903-04.

In 2003, Judge López Torres tried again. Norman continued to oppose her, saying she did not have sufficient "support" to gain the nomination. But, according to the district court,

> Since she had been the leading vote-getter among elected judges in Brooklyn just six months earlier, Norman was not referring to support in the electorate. Rather, he was referring to the only support that matters when it comes to Supreme Court Justice candidates in the Second District—his own and that of the district leaders. PA-142a.

Judge López Torres tried to appeal to the delegates directly. But her "efforts to identify and lobby the delegates…were frustrated by both the timing of the relevant events and the antipathy of the party leadership." *Id*. The leadership refused to tell her where or when the convention would be held, or who the delegates were. *Id.* at 121a.

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As the Second Circuit stated, "[y]ears of careful study by a number of groups whose reports were in evidence established that López Torres' experience was no anomalous po-

litical mugging." *Id.* at 29a. According to New York's Chief Judge,

> One thing now is perfectly clear: that given the extensive findings of the Feerick Commission and the extensive findings of the United States District Court, we are not dealing solely with a "Brooklyn problem," or a "New York City problem," as I have heard some say. The issues that have been identified are pervasive, both systemically and geographically. Judith S. Kaye, *State of the Judiciary* at 4 (2006).

2. Proceedings Below

On Plaintiffs' motion for a preliminary injunction, the district court issued a thorough decision, making extensive findings of fact and faithfully applying this Court's precedents protecting access to the ballot. The court concluded that Plaintiffs had "made a compelling showing that the New York system is designed to freeze the political status quo," PA-183a, had a substantial likelihood of success on the merits, *id.* at 185a, and met the other requirements for a preliminary injunction.

A unanimous panel of the Second Circuit affirmed, holding that New York's statutory scheme unconstitutionally denied challenger candidates and voters "a realistic opportunity to participate in the nominating process." *Id.* at 41a. The court had no doubt that the State's burdens on associational rights are "severe": the New York scheme "does not merely deprive a candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether." *Id.* at 45a. "[C]andidates lacking party leaders' support and the voters who wish to associate with them are practically, if not formally, excluded from the nomination process." *Id.* The court assessed these burdens in light of the extensive record developed below, including statistical, documentary, and testimonial evidence from two dozen witnesses, concluding that

the statutes blocked intra-party collective action by anyone without "either great wealth or a massive preexisting political apparatus." *Id.* at 59a.

The Second Circuit then considered and rejected as insufficient each of the State's proffered justifications for the burdens imposed by its election system, applying strict scrutiny. *Id.* at 70a-76a. Of most relevance here—given Petitioners' assault on the lower court's reasoning—the Second Circuit considered and rejected Petitioners' argument that the district court accorded "little respect" to the "constitutionally protected right of association of political parties and their members." (Br. of Appellants at 68-69.) In fact, the Second Circuit—focusing on cases advanced by Petitioners—distinguished New York's statutory micromanagement of the nominating process in this case from the national presidential conventions, which are governed by autonomous decisions by the parties and are, therefore, protected by "the party's right to govern its own internal affairs." PA-51a.

SUMMARY OF ARGUMENT

The principal issue raised by this case is whether New York State may mandate a nominating process that imposes insuperable burdens on the ability of members of a recognized political party to participate in the choice of their party's nominees. Both lower courts found that at each of the two possible moments for collective action—the election of delegates and the convention itself—New York's statutes preclude effective political mobilization except by those in control of the party machinery. Such a state-imposed burden on political association by rank-and-file party members violates the First Amendment.

1. The First Amendment protects members of political parties against state abridgement of "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters…to cast their votes effectively. Both of

these rights, of course, rank among our most precious freedoms.'" *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

These mutually reinforcing rights have given rise to two lines of cases germane here. The State laws at issue are invalid under both.

a. The First Amendment protects a political party's nomination process from statutes that dilute or abridge the ability of party members to associate with one another in selecting the nominee. *E.g.*, *Jones*, 530 U.S. 567; *Eu*, 489 U.S. 214. This Court has held that party members' First Amendment associational rights are unconstitutionally diluted when the state mandates the inclusion of non-members in the process of selecting a party's nominee. *Jones*, 530 U.S. 567. It has also held that party members' associational rights are unconstitutionally abridged when the state forbids party leaders from communicating a preference for a given candidate for the party's nomination. *Eu*, 489 U.S. 214. And it has held that party members' associational rights are unconstitutionally truncated when the state forbids the inclusion of independent voters in the process of selecting party nominees. *Tashjian*, 479 U.S. 208. If the First Amendment forbids the state from diluting party members' associational rights by including outsiders as in *Jones,* abridging them by silencing party leaders as in *Eu*, or truncating them by forbidding inclusion of independents as in *Tashjian,* then surely New York may not completely *eliminate* the members' ability to influence the party's choice of nominee by the onerous statutory procedures mandated in this case.

b. The First Amendment also forbids a state from imposing unduly severe burdens on party members' and candidates' access to the ballot at both the nomination phase and the general election. *See Bullock*, 405 U.S. at 146-47; *Lubin*, 415 U.S. at 716. Where, as here, the state burdens eligible candidates' access to a state-mandated element of the elec-

tion, including the nomination process, the state "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson*, 460 U.S. at 787-88.

c. Under both lines of First Amendment cases, in order to satisfy strict scrutiny, New York must show that its extremely burdensome method of selecting nominees is a narrowly tailored means of advancing a compelling state interest.

2. Petitioners place great weight on this country's historic use of conventions and this Court's statement in *American Party of Texas v. White,* 415 U.S. 767, 781 (1974), that conventions are a permissible forum for resolving intra-party competition. But the question in this case is not whether nominating conventions are *always* constitutional or *never* constitutional. Any state-mandated nominating convention must be evaluated on its own merits. The sole question before this Court is whether the statutes mandating this *particular* convention system, viewed in a realistic light, impose severe burdens on the associational and voting rights of party members and, if so, whether such burdens are narrowly tailored to serve a compelling state interest.

3. New York may not avoid strict scrutiny of its statutory scheme by pretending that this case involves protection of the autonomy of political parties. The statutorily mandated nomination process at issue in this case is imposed on all recognized political parties in New York, whether they like it or not. This case simply does not raise the question of the extent to which the Constitution limits—or protects—truly autonomous choices made by political parties concerning their nomination processes.

4. Petitioners have failed to demonstrate that the severe burdens on the associational and voting rights of party members imposed by New York are narrowly tailored to

serve compelling state interests. The State argues that the statutory scheme relieves candidates for judicial office of the burden of educating party members during the nomination process. In the teeth of *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the State contends that it has a compelling interest in *preventing* prospective candidates for judicial office from communicating with party members in connection with delegate selection. But the State has no legitimate interest in foreclosing speech between candidates and prospective voters during any stage of the electoral process, including the nomination phase. The State's "greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance." *Id*. at 788. If New York wants party members entirely out of the business of nominating judges, it may adopt an appointive system.

The State's other proffered interests—protection of judicial independence and advancement of judicial diversity—fare no better. Given the statutes' notoriously deleterious effect on both judicial independence and judicial diversity, New York's system can hardly be defended as a narrowly tailored means of advancing either interest.

Certain Petitioners offer additional "State interests" not suggested by the State itself. They claim that the statutes promote strong party leadership, enhance parties' chances of winning, and help avoid factionalism. But the State has no legitimate interest in entrenching party leaders and privileging their choice of nominees at the nomination stage by fencing out the parties' own members. *See Jones*, 530 U.S. at 584; *Eu*, 489 U.S. at 227-28. Indeed, this case is the obverse of *Eu*. Just as the State may not silence party leaders, it may not silence the rank and file. Similarly, the State lacks a legitimate interest in seeking to alter the electoral chances of political parties. Finally, excluding party members from a fair opportunity to resolve intra-party disputes is hardly a

narrowly tailored means of avoiding factionalism. Rather, it is a recipe for party-splitting.

5. Petitioners warn that a parade of horribles, including a ban on nominating conventions, will befall political parties if the Second Circuit's decision is upheld. But this case does not concern the ability of political parties to act autonomously, and will not affect the overwhelming majority of nominating conventions. Most obviously, the national party presidential nominating conventions are not implicated by this case: they do not operate pursuant to a government-imposed structure, but rather in accordance with rules set by the parties autonomously. Nor will affirmance affect the vast bulk of statutorily regulated conventions cited by Petitioners, which arise in different circumstances and which do not severely burden the associational rights of party members.

ARGUMENT

I. NEW YORK'S STATUTORY SCHEME IMPOSES SEVERE BURDENS ON THE ASSOCIATIONAL AND VOTING RIGHTS OF PARTY MEMBERS

The nomination process is "the 'crucial juncture' at which party members traditionally find their collective voice and select their spokesman." *Jones*, 530 U.S. at 586 (citations omitted). Accordingly, the First Amendment grants special protection to "the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'" *Id.* at 575 (quoting *Eu*, 409 U.S. at 224).

This Court evaluates state-imposed burdens on the freedom to associate in support of candidates during all phases of the electoral process—including the nomination phase—by examining such burdens "in a realistic light" to determine their "impact on voters." *Anderson*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143); *see Clingman*, 544 U.S. at 607-08 (O'Connor, J., concurring); *Tashjian*, 479 U.S. at 234

(Scalia, J., dissenting); *Storer v. Brown*, 415 U.S. 724, 740 (1974); *cf. Vieth v. Jubelirer*, 541 U.S. 267, 315-16 (2004) (Kennedy, J., concurring); *Lane v. Wilson*, 307 U.S. 268, 275-76 (1939). Such examination here leaves no doubt that New York's statutory scheme imposes extremely severe burdens on party members' rights to associate with each other and with the candidates of their choice. As the Second Circuit observed, challengers and their supporters have no "right to win." PA-45a. But candidates and their supporters within a party do have a right to be free from a state-mandated process guaranteeing that they will lose.

A. The Statutes Severely Burden Party Members' Rights to Associate with One Another

"A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice" in the nomination process. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). Sections 6-106 and 6-124 are admittedly designed to prevent the party members from performing this "basic function." *Id.*

The associational rights of rank-and-file members are of independent significance and warrant constitutional protection, separate and apart from the interests of party leaders. Indeed, leaders' views often "diverge[] significantly from the views of the Party's rank and file." *Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting). Thus, in *Eu*, this Court rejected California's argument that its restriction on primary campaign endorsements was constitutional because the parties had "consented to it": "[T]he State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights." *Eu*, 489 U.S. at 225 n.15. And in *Jones*, this Court reiterated that: "The ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the

party leadership, but do not want the party's choice decided by outsiders." *Jones*, 530 U.S. at 581; *see also FEC v. Colo. Republican Campaign Comm*., 533 U.S. 431, 448 n.10 (2001) ("We have repeatedly held that political parties and other associations derive rights from their members.").

In associating with one another for the purposes of advocating for their preferred nominee, party members' associational rights reach their zenith. *See Tashjian*, 479 U.S. at 216. The "associational rights at stake are much stronger" when "party members do not seek to associate with nonparty members, but only with one another…." *Eu*, 489 U.S. at 230-31 (footnote omitted). "[A] State may enact laws to 'prevent the disruption of the political parties from without' but not…laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Id*. at 227 (quoting *Tashjian*, 479 U.S. at 224).

Here, by statute, the State "prevent[s]…parties from taking internal steps affecting their own process for the selection of candidates," *id*., by effectively requiring political parties to fence out their rank-and-file members, leaving them with no voice in the parties' nomination processes. As a result, New York provides candidates with the imprimatur of a party nomination, while depriving the rank and file of a voice in selecting those who ostensibly speak in their name. Thus, New York's statutes are unconstitutional for reasons akin to those invoked by this Court in *Jones*, where the state mandated a nomination process that created a risk that rank-and-file members would be forced "to give their official designation to a candidate who is not preferred by a majority or even plurality of party members." *Jones*, 530 U.S. at 579 (quotations omitted). As in *Jones*, "[t]he true purpose of this law... is to force a political party to accept a candidate it may not want." *Id*. at 587 (Kennedy, J., concurring).

Petitioner Board of Elections concedes that "the First Amendment does not permit a State to favor the speech ac-

tivities of one class of candidates over another." BOE Br. 28. But, just as it runs afoul of the First Amendment to "silence party leaders," *id*., it is equally impermissible for the State to adopt a structure that operates to silence the rank and file.

Even more dramatically, New York vests local party leaders with power, when it serves their parochial interests, to cross-endorse candidates of rival political parties without the members' participation or consent. *See Jones*, 530 U.S. at 579; *compare Clingman*, 544 U.S. at 589 (plurality) (describing attenuated interest of party members in associating with members of other parties at nomination stage).[4] To take one example, the statutorily rigged Democratic Party convention in the Second Judicial District nominated a member of the Republican Party who had been found unqualified by the Democratic Party's own "screening panel." Tr. 1742-43. As this Court has held, the party's rank-and-file members suffer a significant First Amendment harm when they are thus "saddled with an unwanted, and possibly antithetical, nominee." *Jones*, 530 U.S. at 579.[5]

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[4] New York law ordinarily bars non-members of a party from obtaining a party's nomination without the consent of the party's committee for the relevant jurisdiction. N.Y. Elec. L. § 6-120. But the statute makes an exception for judicial nominations, *i.e*., no such consent is needed. *Id.* § 6-120(4).

[5] Petitioners are wrong to suggest that the "option" of disaffiliating from the party will alleviate the burdens New York imposes. In order to avoid associating with the antithetical judicial nominee, a rank-and-file member would have to leave the party and thus sacrifice the ability to participate in its primary elections for all other offices. *See Kusper*, 414 U.S. at 57 (invalidating state registration law that forced the voter "to forgo participation in any primary elections occurring within the statutory 23-month hiatus"). Petitioners also err in suggesting that disaffected party members may simply put in new leadership. First, county leaders are not elected by party members. Second, the statutes ensure that rank-and-file party members will be fenced out of their own party's nomination process regardless of who is elected party leader. Finally, as the district court ob-

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Because the Court is here confronted with a statutory scheme imposed upon all parties, the case presents no occasion to decide whether a political party could, acting on its own without the command of state law, invest nominating authority in "the party's executive committee in a smoke-filled room." *Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting). In effect, New York has mandated "the smoke-filled room" as the method for all parties to nominate candidates for the supreme court bench. Usually, states regulate elections for precisely the opposite purpose: "*to protect* the general party membership against this sort of minority control." *Id*. (citations omitted) (emphasis added). That the Constitution permits. But it is far different for a state to require that every party must use a procedure that operates to deny rank-and-file members any meaningful role in the nomination process. The First Amendment simply does not permit such extensive government interference with the associational rights of party members.

B. The Statutes Severely Burden Party Members' Rights to Associate with Candidates for Their Party's Nomination

"[T]he rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock*, 405 U.S. at 143. When statutes deprive candidates of "the availability of political opportunity," they directly impact the voters, who "can assert their preferences only through candidates or parties or both." *Lubin*, 415 U.S. at 716; *see Ill. Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences."). The

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served, "voters cannot be expected to provide any check on party leaders' judicial selections by voting those leaders out of office for exercising poorly a discretion with which they are not vested." PA-183a.

record in this case leaves no doubt that the statutory burdens imposed on candidates for their parties' nomination are severe.

The findings below "establish that candidates lacking party leaders' support and the voters who wish to associate with them are practically, if not formally, excluded from the nomination process." PA-45a. The statutory nominating process "does not merely deprive a candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether. The exclusion of candidates, in turn, severely and unnecessarily 'limit[s] the field of candidates from which voters might choose….'" *Id.* at 45a-46a (quoting *Anderson*, 460 U.S. at 786). The statute thus burdens voters and candidates alike—it locks both out of the crucial moment of intra-party political competition.

Petitioners concede that the State *wishes* to block access by candidates to voters during the nomination stage.[6] Recognizing that the severe statutory burdens render it impossible for challenger candidates to assemble and run a slate of delegates, Petitioners criticize the lower courts for even considering the possibility of candidates seeking to campaign for the nomination by running slates of delegates or otherwise.[7]

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[6] The office, they tell us, should "seek the man [*sic*]." County Br. at 2; AG Br. at 11; *see* BOE Br. 32 ("Section 6-124 does not envision the judicial candidate's participation at all."). In reality, however, candidates for supreme court often "campaign" by making cash contributions to political committees controlled by the county leaders. PA-136a.

[7] In fact, one Petitioner, the New York State Republican Committee, tried the case on the theory that the statutes were constitutional *because* candidates were able to run their own slates. Its counsel explained: "There is some difference of opinion at defense table in terms of the ability of John Doe, citizen, to run for a judge of the Supreme Court. I think the statute is very clear. This statute permits any candidate for Supreme Court to go and identify and run their own candidates for judicial convention.... You may run your own delegates." Tr. 2434 (Muir Summation).

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Candidates for a judicial nomination, argue Petitioners, may be prevented by the State from engaging in such undignified political behavior. But, as this Court recognized in *Republican Party of Minnesota*, this cannot be the way a true election system works. If New York believes that such a fundamental exercise in democracy adversely affects the judiciary, the answer is to opt for an appointive bench. The one option not open to New York is to pretend that its supreme court judges are freely elected, while rigging the process to vest *de facto* appointive power in one or two county party leaders.

Moreover, *voters* who belong to political parties have a constitutional right to join together with like-minded members of their parties in order to influence the selection of the parties' nominees. Petitioners argue that such political behavior is possible under New York's system because a single party member may run for delegate. But Petitioners' myopic focus on the burdens faced by a *single* delegate candidate (running as a lone gadfly) is misplaced. As the lower courts found, a single delegate acting alone cannot influence the actual choice of a nominee. Given the statutory system, only slates of delegates elected from each of many ADs despite insuperable burdens could act as a counter-weight to the hand-picked delegate slates chosen by the county party leader. As the lower courts found, this never happens. *See* PA-53a.

Thus, New York's statutory scheme erects barriers ensuring that "potential office seekers…are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter

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The Republican State Committee's position in the lower courts undercuts Petitioners' and the Republican National Committee's contention in this Court that "[j]udicial candidates have no contemplated role in this delegate-selection stage of the process," and that the lower courts erred "by overlooking this fact." RNC Br. 3.

how broad or enthusiastic their popular support." *Bullock*, 405 U.S. at 143. At the same time, the statutory scheme gives the county party leaders, who are the only ones capable of assembling and electing slates of delegates, "the power to place on the ballot their own names or the names of persons they favor." *Id.* at 144.

New York is the only State that uses such a restrictive system to nominate judges. PA-97a. Even within New York, the supreme court nominating system stands in contrast to that for every other elective office—judicial[8] and non-judicial.[9] This, too, is evidence of burden. *See*, *e.g., Norman v. Reed*, 502 U.S. 279, 294 (1992) (burden severe where state "adduced no justification for the disparity"); *Storer*, 415 U.S. at 739 (comparing statute to "most state election codes").

Finally, conditions at the general election highlight the lack of an opportunity for competition at the nomination stage. In most supreme court elections, one of the two major parties is locally dominant, assuring the election of the party's nominee.[10] While local party dominance is not inconsistent with free elections, its presence in this case under-

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[8] The State requires parties to employ primaries to nominate candidates for election to all of the State's many other elected courts, including Surrogates Court, Family Court, County Court, Civil Court, City Court, and District Court. N.Y. Elec. L. § 6-110; *see* PA-98a.

[9] New York's legislators run in direct party primaries. N.Y. Elec. L. § 6-110. Candidates for statewide offices are designated at conventions, with post-convention primaries if a substantial group within the party is dissatisfied with the convention's designee for a particular office. N.Y. Elec. L. §§ 6-104(1), 6-104(5), 6-160.

[10] Notwithstanding the Board of Elections' suggestions to the contrary in this Court, the lower courts' findings were well documented, amply supported by the evidence and admitted below by the Petitioners. *See* Tr. 1601-02 (Petitioner Kellner); PA 129a-30a; JA-254-55 ¶¶ 16-17 (Cain); JA-1602 ¶¶ 209, 211; HE-4717-4908, HE-5261; Tr. 1524-25.

scores the importance of protecting freedom of association at the crucial nomination stage. Since one-party domination of supreme court general election races persists in much of the State, and since the major parties routinely cross-endorse candidates elsewhere, access at the nomination stage is particularly important. *See Bullock*, 405 U.S. at 147; *Burdick v. Takushi*, 504 U.S. 428, 442-45 (1992) (Kennedy, J., dissenting).

No doubt exists that the burdens imposed by New York on candidates for the nomination (and their supporters) are "severe" as that term has been used by this Court. In evaluating whether burdens on candidates (and thus voters) are severe, this Court has considered whether challenger candidates have "only rarely" succeeded in being considered by the voters. *See Storer*, 415 U.S. at 742. The lower courts properly considered the historical record as part of the evidence of the severity of the statutory burdens, showing the extraordinary degree to which the statutes lock out rank-and-file members and their candidates. Here, "to say that challenger candidates for the Supreme Court 'only rarely' succeed…gives euphemism a bad name. It never happens." PA-167a (citation and quotation omitted).[11]

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[11] Similarly, in the campaign contribution context, this Court has analyzed state interference with the opportunity for electoral competition by evaluating whether government regulations "put challengers to a significant disadvantage" and "prevent[] challengers from mounting effective campaigns." *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (Breyer, J., for a plurality). "[T]he critical question concerns…the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*." *Id.* at 2496 (emphasis in original); *see Buckley v. Valeo*, 424 U.S. 1, 31 & n.33 (1976) (evaluating whether contribution limits evidence "invidious discrimination against challengers as a class," such as where "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge"). New York's state-imposed burden on challengers to candidates anointed by party leaders warrants similar scrutiny.

In the face of this evidence, Petitioners contend that the State's uniform exclusion of challengers at the nomination stage is not of constitutional dimension. County Br. 25-26. But this Court has never suggested that state-mandated burdens on the ability of a party member to associate with other members to seek the party's nomination receive lesser scrutiny than burdens on competition at the general election. To the contrary, this Court's precedents apply the same level of scrutiny to state-imposed burdens at both the nomination stage and at the general election. This Court considered the very argument Petitioners make here and rejected it in *Bullock*: "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens...imposed by state law." 405 U.S. at 146-47.[12]

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[12] *Bullock* followed earlier cases to the same effect. *See Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) ("All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."); *United States v. Classic*, 313 U.S. 299, 318 (1941) (where state law makes the primary "an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected.").

The Board argues that a State can require party members "'to channel their expressive activity into a campaign at the [general election] as opposed to the [primary].'" BOE Br. 23 (misquoting *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)). But *Munro* does not stand for that proposition. It held that a minor party's interests were satisfied by access to voters in a state-wide blanket primary, even though the candidate did not make a sufficient showing at the primary to access the general election ballot. The party made no claim that its members' intra-party associational rights were burdened. Because it was a blanket primary, moreover, the candidate in question had the opportunity to be supported by his own party's members in any event. Finally, the 1% threshold was justified by the state's interest in ensuring that the ballot was not confusingly filled with candidates without sufficient support among voters.

And, in *Lubin*, this Court expressly extended the logic of earlier ballot-access cases to intra-party competition:

> "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." This must also mean that the right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot. *Lubin*, 415 U.S. at 716 (quoting *Williams*, 393 U.S. at 31 (1968)).

The Board of Elections argues that *Bullock* and *Lubin* rested solely on the Equal Protection Clause and that there is "no pertinent authority whatsoever" for the "revolutionary conclusion" that members of political parties "have a First Amendment right to associate in the context of a political party's candidate-selection process." BOE Br. 16-17. But the Board confuses judicial review of a party's autonomous decisions with judicial review of statutes mandating a particular nominating procedure. This Court has consistently held that *all* state-imposed severe burdens on ballot access and associational rights at any stage of the electoral process must survive strict scrutiny. As recently as 2005, this Court relied on *Bullock* for the proposition that a severe state-imposed burden "between voter and party" at the nomination stage requires strict scrutiny under the First Amendment. *Clingman*, 544 U.S. at 593; *accord Jones*, 530 U.S. at 582. In *Anderson*, moreover, this Court made explicit that the analysis developed in *Bullock*, *Lubin*, and other cases derives from *both* the First and the Fourteenth Amendment. *Anderson*, 460 U.S. at 786-87 & n.7. Even in *American Party*, the Court used heightened scrutiny to analyze severe burdens on

the "right to association" at nominating conventions. *Am. Party*, 416 U.S. at 780.[13]

Petitioners also contend that the burdens on candidates are not severe because the statutes "grant a reasonably diligent candidate the opportunity to access the nominating convention, *i.e.*, having a chance to put his or her name up for consideration by the delegates." County Br. 27. That contention, however, is contradicted by the record. As the courts below found, "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates," PA-18a, and the conventions merely "rubber stamp" the will of the party leaders, *id.* at 45a, 125a-26a. Once the delegates are selected, the two-week interval between delegate selection and the convention hardly provides time for a candidate to seek the support of hundreds of delegates, even if the delegates selected under this statutory scheme were open to persuasion.

The universal lack of competition at the conventions stands as powerful evidence that the statutory delegate-selection process imposes severe burdens on voters and challenger candidates. For a challenger candidate, "access" to a convention whose composition has been rigged by statute imposes severe burdens on any attempt to compete for the party's nomination. For the party's rank-and-file members, such "access" not only never occurs, but would, as admitted by Petitioner Kellner, "twist the design of the system on its head." *Id*. at 17a.

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[13] For this reason, Petitioners' reliance (County Br. 16, 32) on a plurality opinion in *Clements v. Fashing*, 457 U.S. 957, 964 (1982), is unpersuasive. Later cases make clear that the rights of candidates and voters derive from the First Amendment. *See, e.g.*, *Anderson*, 460 U.S. at 786.

II. THE COURT SHOULD APPLY STRICT SCRUTINY

"Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest." *Clingman*, 544 U.S. at 587; *see Jones*, 530 U.S. at 582; *Eu,* 489 U.S. at 222; *Burdick*, 504 U.S. at 434. Petitioners avoid even stating this standard. They argue that, even if the burdens that the statutes impose on associational and voting rights are severe, this Court should abandon strict scrutiny in favor of an undefined "balancing test." *See* County Br. 32-34 (relying on cases outside the election context). The Attorney General does not even contend that the statute would survive strict scrutiny, limiting his defense to "legitimate" interests. AG Br. 24-27.

The Board of Elections argues for doctrinal "flexibility" in applying the First Amendment to elections, but misunderstands the relationship between the First Amendment and the electoral process. A candidate participating in an election is not, as the Board suggests, relegated to diminished First Amendment protection as though the candidate were "in a public prison." BOE Br. 20. To the contrary, First Amendment rights are at their *apex* during elections. *Cf. Eu*, 489 U.S. at 223 ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. Free discussion about candidates for public office is no less critical before a primary than before a general election.") (citations and quotation omitted); *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405 (2000) (Kennedy, J., dissenting) ("[P]olitical speech in elections [is] the speech upon which democracy depends.")

A. The State Imposes Its Convention System on All Parties

Petitioners argue that two sets of First Amendment rights are in tension—the right of party members to participate in the nominating process and the right of a political party to

adopt rules limiting rank-and-file participation. But this case does not implicate the private organizational choices of a political party. Petitioners' briefs often omit the fundamental fact that the State itself has made a choice that eliminates rank-and-file members from the political parties' nomination process and has imposed that choice on every recognized political party. Petitioners clothe what is clearly a statutory mandate in the garb of private choice.[14]

Petitioners cite no case that has applied their standardless balancing test to a severely burdensome mandatory election law. Rather, they rely on three court of appeals cases that assessed challenges to the autonomously adopted internal rules of the national parties. *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc); *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987); *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir 1998).[15]

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[14] *See* County Br. 21 ("[A] party can choose to adopt a closed, delegate-based convention system in which voters have 'no direct voice.'"); *id.* at 38 ("[A] party exercises its constitutionally protected right of association through both the structure and conduct of the delegate primary and nominating conventions."); BOE Br. 11 ("[T]he First Amendment does not compel the state to intrude so deeply into political parties' decisions."); *id.* at 27 ("[T]he States may not act 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" (quoting *Eu*)); *id.* at 29 ("This Court has historically been very solicitous of the right of political parties to control their internal candidate selection processes.").

[15] In fact, those cases presented no severe burdens, state-imposed or otherwise. In *Bachur*, "there existed no entry barriers to candidates. Nor did the regulations effectively prevent a party member from voting for their preferred candidate…." PA-53a. In *Ripon*, the lack of a severe burden was obvious. Indeed, the plaintiff could not even "identify with any confidence the set of people whose preferences are to be given equal and accurate expression." 525 F.2d at 585 n.58. And in *LaRouche*, it was "not necessarily clear that the restrictions on plaintiffs were 'severe.'" 152 F.3d at 993.

Indeed, Petitioners' cases explicitly highlighted the fundamental distinction between a system voluntarily adopted by the national political parties and one imposed by state law, as in *Gray v. Sanders*, 372 U.S. 368 (1963). *See Ripon*, 525 F.2d at 589 n.65 (plurality) (In *Gray*, the burden "was mandated by a state statute, applicable to all parties and passed some forty-five years earlier."); *id*. at 607 (Wilkey, J., concurring) (The allocation formula in *Ripon* "was purely the product of party deliberations and actions and was neither compelled, restricted, modified, devised, or encouraged by any state statute or ordinance."); *id.* at 594 (Danaher, J., concurring) ("Were Congress to have acted and to have regulated the composition of the national convention of a major political party, we would have before us a totally different problem."); *id.* at 598-99 (Tamm, J., concurring); *Bachur*, 836 F.2d at 842 ("[E]fforts of the states to regulate delegate selection have been repeatedly rebuffed."); *LaRouche*, 152 F.3d at 990 n.24 (distinguishing autonomous actions of political party from state-mandated candidate-selection statutes).

Petitioners suggest that because one state or local political party might itself determine that some form of convention would further its interests, New York can further those interests by imposing a highly exclusionary convention structure on all parties. That is simply a non-sequitur. The fact that a single party, acting autonomously, might opt for a more or less restrictive system does not give the State license to impose that structure on the membership of all parties by statute. *See Tashjian*, 479 U.S. at 215-25 (striking down state statute forbidding parties to invite independent voters to participate in nomination primary); *Jones*, 530 U.S. at 577 (striking down statute requiring inclusion of non-members).

There may or may not exist a political party in New York whose members want their party's nomination process to function as a rubber stamp for a party leader. But New York's statutes require that, when it comes to selecting su-

preme court nominees, *every* party is *required* to function as the Rubber Stamp Party.

B. A Convention System Is Neither Constitutional Nor Unconstitutional *Per Se*

Petitioners rely on the statement in *American Party* that a state may "insist that intra-party competition be settled before the general election by primary election or by party convention." *Am. Party*, 415 U.S. at 781. But this Court's unremarkable recognition that a party convention may serve as a constitutional method of resolving intra-party disputes does not give a state *carte blanche* to impose a nominating process that effectively excludes a party's members from the nomination process.

The associational rights of party members and challenger candidates attach whether the State structures the nomination contest as a convention or a primary. "If the state chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn.*, 536 U.S. at 788 (quotations and citations omitted). Petitioners acknowledge this, but contend the State can "assign" statutory "roles" to party members that create insuperable obstacles to collective action and bar any meaningful opportunity for them to influence the nomination of their parties' candidates.[16] But the "greater power to dispense" with elections altogether does not include the lesser power to assign "roles" to party members that exclude them

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[16] *See, e.g.*, County Br. 19 ("New York's legislature only gave voters the limited role of voting for delegates and gave delegates the role of choosing candidates."); *id.* ("[T]he critical threshold question becomes what are the roles that have been granted by the states?"); *see also* RNC Br. 9 ("Judicial candidates have no role at this stage and therefore can suffer no burden."). *But see* position at trial of New York Republican *State* Committee, *supra* n.7.

from their own party's nomination process. *See id.*; *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988) (rejecting state's argument that "because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right").

Each type of state-imposed nominating process (whether a convention, a primary, or (as here) a hybrid) must stand or fall on whether it imposes unjustifiably severe burdens on the ability of party members to associate in support of common values. Indeed, numerous examples exist of nominating conventions that fully comply with the First Amendment.

Moreover, First Amendment protection of associational rights cannot be bypassed pursuant to a fiction that the statutes further the rights of "parties" (whatever that word can mean when divorced from the membership of the party) in some nebulous way, or that "indirect" democracy is always acceptable without regard to the burdens the particular form of indirect democracy imposes on associational rights. In fact, as the lower courts found, the intent and effect of New York's unique convention scheme is not to resolve intra-party disputes through a form of "indirect" democracy; it is to eliminate democracy altogether by rigging the system to prevent ordinary party members from associating in support of their chosen candidates.

C. The Severe Burdens Found by the Lower Courts Flow from New York's Statutory Scheme, Not from Private Conduct

Petitioners argue that the severe burdens imposed by New York's convention system stem not from statutory provisions themselves, but from the private conduct of party leaders and delegates. BOE Br. 26-29; *see also* RNC Br. 14. But the severe burdens arise here from the way that New York's statutes burden collective action by ordinary party members. Where, as here, "the mechanism of such elections

is the creature of state legislative choice," it must be assessed as state action. *Bullock*, 405 U.S. at 140.[17]

New York's statutory scheme micromanages every aspect of the nomination procedures. The statutes, for example, mandate the widely dispersed set of races to be organized and won simultaneously; demand that a large number of geographically allocated signatures be collected in a short time from a widely dispersed set of shrinking pools of party members; provide no mechanism for delegates to signify on the ballot which candidates they intend to support; and impose the short time between the election and the convention.[18] The evidence established overwhelmingly—and the lower courts found as facts—that because only the party leadership has the resources to navigate those statutory obstacles, those leaders predictably pick "reliable" delegates who are not challenged. PA-19a-23a, 109a-10a; *see also Amicus* Br. of John R. Dunne. The convention is necessarily a "rubber stamp" not because New Yorkers are unassertive by nature, but because the statutory structure fences out those

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[17] *See id.* at 140 n.16. ("[W]e are here concerned with the constitutionality of a state law rather than action by a political party and thus have no occasion to consider the scope of the holding in [the White Primary Cases]."); *Republican Party of Va. v. Morse*, 517 U.S. 186, 252 (1996) (Kennedy, J., dissenting) (distinguishing between private acts and statute facilitating "unlawful discrimination in the nominating process"); *Eu*, 489 U.S. at 232 n.22 ("[I]t is state law, not a political party's charter, that places the state central committees at a party's helm, and in particular, assigns the statutorily mandated committee responsibility for conducting the party's campaigns.").

[18] Petitioners observe that one aspect of the statute grants the parties a modicum of discretion to determine the precise number of delegates and alternates elected from each assembly district. But such discretion is severely limited, because the statute provides that the number of delegates must "be substantially in accordance with" a ratio that bounds the parties' discretion. N.Y. Elec. L. § 6-124. The parties *must* choose a number high enough to allow them to satisfy this ratio, and they have historically complied with that requirement. PA-105a-106a.

who do not hold the key to the locked gate imposed by the delegate selection process. The constitutional offense is not the fact that party leaders act as one would expect them to do by choosing nominees, but instead that the state-mandated nominating process prevents any challenges by party members to those leaders' choices.[19]

Petitioners analogize this universal lock-up to "party line" voting in Congress. But the lower courts' findings here reveal an institution of a wholly different character. In Congress, members face reelection and must either respond to the will of their constituents or face the prospect of being voted out of office. Here, by contrast, the voters have no electoral check. The delegates' sole task once in office is to attend a single convention and nominate others to run as candidates for election to public office. Their terms of service are over two weeks after the election and twenty minutes after they have been sworn in. Party members have no way to throw any of them out of "office."

Moreover, the more relaxed level of scrutiny that might apply to a nomination process autonomously chosen by a political party with the consent of its members is simply not applicable here, where State statutes control virtually every action the parties take to carry out the nomination process. Indeed, the statutory scheme actually *precludes* parties from structuring their nomination processes in a more democratic fashion, either in response to the will of their members or to

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[19] Petitioners contend that passing on the merits of this case would draw the courts into a nonjusticiable "political thicket" of evaluating party action. County Br. 41. But this case does not involve autonomous party action. Rather, it tests the constitutionality of state statutes. This Court has squarely held that the constitutionality of such statutes raises a justiciable controversy and their validity "cannot be relegated to the political arena." *Williams*, 393 U.S. at 28. This Court has not experienced difficulty in developing manageable judicial standards to measure governmental interference with associational rights.

attract new members disaffected by non-participatory processes adopted by rival parties. By erecting mandatory barriers, the State insulates the choices of party leaders from challenge, prevents any party from offering a more democratic system, and snuffs out electoral competition at the nomination stage.

III. NEW YORK'S STATUTES ARE NOT NARROWLY TAILORED TO ADVANCE COMPELLING—OR EVEN LEGITIMATE—STATE INTERESTS

A. The State's Asserted Interests Do Not Justify the Burdens Imposed by New York's Statutory Scheme

New York's Attorney General asserts three State interests allegedly served by the statutory convention system: dispensing with the need to inform the electorate prior to the nomination; enhancing judicial independence; and promoting racial and geographic diversity by creating "balanced slates." AG Br. 24-27. The State must demonstrate it is "necessary to burden the plaintiff[s'] rights" with the statutory scheme in order to serve those interests. *Anderson*, 460 U.S. at 789; *see Ill. Elections Bd.,* 440 U.S. at 185 ("This requirement is particularly important where restrictions on access to the ballot are involved."). The lower courts correctly found that the asserted State interests are poorly served by New York's nominating system and that the State has tools at hand to promote each State interest by less burdensome means. PA-70a-76a, 172a-82a.

1. Eliminating Voter Education. The State's initial defense is the remarkable theory that the statutes relieve candidates of the need to educate voters at the nomination stage. AG Br. 24. But the State does not have a legitimate interest in foreclosing speech between candidates and voters. The district court correctly characterized this position as a justification for "eliminating elections as a method for selecting judicial officers, not for depriving the voters of their rights

where elections are required." PA-178a. As this Court has held, the State does not have an interest in conducting elections "under conditions of state-imposed voter ignorance." *Republican Party of Minn.*, 536 U.S. at 788; *see id.* at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work, compels the abridgment of speech."). In any event, the State itself does not seem to take this interest seriously: it provides for the nomination of all of its other elected judges in primaries. *See* PA-98a, 178a.

2. Judicial Independence. The State next contends that the convention system enhances "the candidates' actual and perceived independence." AG Br. 25; *see* County Br. 40. As several prominent former New York State judges and the American Judicature Society explain, however, "the current convention system undermines rather than enhances public confidence in the judiciary." *Amicus* Br. of Former NY Judges & Am. Judicature Society; *see also Amicus* Br. of Campaign Legal Center, *et al*., Part I. Even organizations historically opposed to *any* judicial elections find New York's system to be the "worst of all worlds." *See Amicus* Br. of New York State Bar Ass'n *et al.*; *Amicus* Br. of New York County Lawyers' Ass'n. In fact, the system promotes judicial *dependence* on political party leaders, often with shameful consequences. *See Amicus* Brs. of Charles J. Hynes, Edward I. Koch.

3. Diversity. The State next contends the convention system permits "a coordinated slate of candidates" from diverse constituencies, and thereby promotes geographic and ethnic "diversity." AG Br. 25-26. But the record evidence shows New York's supreme court nomination system has disserved diversity of all kinds for decades. PA-74a-75a, 174a; HE-6758 (task force concluding that progress in achieving racial, ethnic and gender diversity was virtually non-existent with respect to supreme court as against other elected courts in New York); HE-5755 (supreme court had a

lower percentage of women on the bench than nearly all other courts in New York); *see Amicus* Br. of AALDEF *et al.*

B. The Interests Asserted by Other Petitioners Do Not Justify the Burdens Imposed by New York's Statutory Scheme

Other Petitioners—but not the State—assert three additional "State" interests: promoting strong party leadership; enhancing a party's "chances of winning"; and avoiding "factionalism." County Br. at 38-39. Petitioners did not assert these interests in the lower courts. In any event, they are not legitimate here, much less compelling.

1. Strong Party Leadership. Some Petitioners contend that New York's unique version of a nominating convention system promotes strong party leadership. *Id*. at 37-38. Whatever the State's interest in promoting party discipline, however, this Court has never held, nor even suggested, that the State has a legitimate interest in fencing out rank-and-file party members from a core moment of choice in order to increase the power of party leaders.

The Board of Elections argues that "[e]fforts to diminish the influence of party leaders are highly problematic." BOE Br. 28. But surely, a state-mandated system that eviscerates *member* influence on the party is even more "problematic."[20] Tilting the balance of power within a political party in the crucial area of nominations is not a legitimate interest. *See Eu*, 489 U.S. at 233 (stating that "a State cannot substitute its

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[20] Lower courts confronting similar questions have explained that the state has no legitimate interest in intervening in intra-party nomination contests in favor of the party leadership against the rank and file. *See Riddell v. Nat'l Democratic Party*, 508 F.2d 770, 776 (5th Cir. 1975); *Duke v. Cleland*, 5 F.3d 1399, 1404 n.4 (11th Cir. 1993); *Duke v. Connell*, 790 F. Supp. 50, 54 (D.R.I. 1992). *But see Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996).

judgment for that of the party as to the desirability of a particular internal party structure").

2. Enhancing Parties' Chances of Winning. Some Petitioners suggest that the State's nominating convention system strengthens a party's chance of winning. County Br. 39. To the contrary, even where a party is "pursuing self-destructive acts," the State has no legitimate reason for intruding on associational rights in a paternalistic effort to save the party. *Eu*, 489 U.S. at 227-28; *see also Morse*, 517 U.S. at 274 (Thomas, J., dissenting) ("[T]he selection of a party nominee forms no part of the *government's* responsibility in regulating an election." (internal quotation marks and citations omitted)). It is, moreover, curious to argue that a political party can enhance its chances to "win" by preventing its own members from having an opportunity to participate in determining the party's nominee.

3. Avoiding Factionalism. Finally, some Petitioners argue that the statutes help parties avoid factionalism. County Br. 39. But avoiding factionalism at the nomination stage by smothering dissent is not a legitimate state interest. It is true that a state "may insist that intra-party competition be settled before the general election by primary election or by party convention." *Am. Party*, 415 U.S. at 781; *see Storer*, 415 U.S. at 735 ("The general election ballot is reserved for major struggles; it is not a forum for continuing intra-party feuds."). But the State's legitimate interest is in ensuring that intra-party disputes are settled *before the general election*—not in stifling intra-party disputes *at the nomination stage*. *See Eu*, 489 U.S. at 227 (*Storer* "does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism"). *Eu* held unequivocally that "preserving party unity during a primary is not a compelling state interest." *Id.* at 228. And, in *Timmons*, the Court reiterated that the State's interest in political stability is not a "paternalistic license for States to protect political parties from the consequences of their own internal disagreements."

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997); *see Riddell*, 508 F.2d at 778 ("[T]he solution is not to try to ignore that factionalism in the state exists, but rather for the two factions to have the opportunity to pursue their own political objectives without undue hindrance by the state.").

If anything, the statutes at issue actually *promote* factionalism. Petitioners argue that an immensely popular candidate who was not anointed by the party leader must leave her party in order to participate in the election as an independent, or as the nominee of another party. But a scheme that forces the most popular judicial candidate to run against her party on the general election ballot serves both to fragment the party and "to confuse or mislead the general voting population to the extent it relies on party labels as representative of certain ideologies." *Clingman*, 544 U.S. at 594 (internal quotation marks and citations omitted).

IV. THE SECOND CIRCUIT'S DECISION DOES NOT CAST DOUBT ON THE HISTORICAL OR CURRENT USE OF NOMINATING CONVENTIONS

Petitioners contend that the Second Circuit's decision casts doubt on the national parties' presidential nominating conventions; that it casts doubt on the convention systems of 34 states; and that the legislative history of N.Y. Elec. L. §§ 6-106 and 6-124 supports their defense of the statutes. None of these arguments withstands analysis. The question is not "conventions or no conventions." Each convention system, like each primary, must be judged on its own merits.

First, the national party conventions are not germane. They are created by the parties' own rules, not by state statutes. Moreover, this Court has repeatedly held that national party conventions implicate important national interests as well as associational rights that warrant special protection when *states* attempt to interfere with the national parties' autonomous decisions. *See, e.g.*, *Democratic Party of U.S. v.*

Wisconsin ex rel. La Follette, 450 U.S. 107, 123-24 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 488-91 (1975) (relying on uniquely national role of the national party conventions and the correspondingly weak role for state regulation); *Gray v. Sanders*, 372 U.S. at 378-79; *see supra* p.33 (discussing *Ripon*).

Second, of the 43 conventions in 34 states cited by Petitioners, not one shares the mandatory statutory burdens imposed by New York's system. Seven do not even relate to the nomination of candidates for public office. (*See* Appendix B hereto, ¶ 1.) Seven more operate only to fill vacancies caused by emergencies or by the failure of any candidate to obtain a majority at a primary election (*id.* ¶ 2), a setting where the state has a compelling interest in ensuring that the unexpected vacancy is filled in time for the general election. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982). Seventeen apply only to minor parties or unaffiliated assemblages of voters (Appendix B ¶ 3), where conventions may be a more practical way to demonstrate "the required measure of support" among the electorate. *See Am. Party*, 415 U.S. at 783. Six are not mandatory on parties at all, and four of those six leave the delegate selection process and the extent of voter participation entirely to the parties to determine. (Appendix B ¶ 4.) Two simply allow parties to designate or endorse candidates before a primary election. (Appendix B ¶ 5.) The four remaining statutory conventions are distinct from New York's in that they give parties significant autonomy in determining for themselves the structure of the delegate selection process, including whether to permit any party member to vote for nominees in the convention itself.[21]

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[21] Indiana allows each party to determine the procedure for nominating candidates for lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction. *See* Ind. Code Ann. §§ 3-8-4-1 to 7. Michigan allows parties to determine who votes at conventions to nominate candidates for lieutenant governor,

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Many of these conventions cited by Petitioners are structured to enhance the ability of rank-and-file party members to express their nomination preferences.[22] Similarly, caucus systems like those used in Iowa (and in New York's towns and villages) allow *any* resident party member to attend an open caucus to nominate candidates for local offices and thus impose none of the burdens on party members at issue here.

Third, the actual legislative history of §§ 6-106 and 6-124 rebuts Petitioners' truncated rendition of the statutes' development. In 1890, New York began allowing political parties to nominate candidates by convention. JA-363. Twenty-one years later, New York adopted primary elections for party nominations, but "a candidate could obtain a place on the primary ballot by designation of a party committee or convention, or the candidate could submit designating petitions with the requisite number of valid signatures." *Id*. at 364 (citing N.Y. L. 1911, c. 891). In other words, the State permitted both primaries *and* conventions. In 1913, the State eliminated designation by party committee or convention,

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attorney general, secretary of state, and state board of education, and to set other critical details of the delegate selection process, if there is one. Mich. Const. art. 5, § 21, art. 8, § 3; Mich. Comp. Laws §§ 168.72-74; Mich. Democratic Party Rules, Art. 11; Mich. Republican Party Rules, Art. X. South Dakota, too, leaves the structure and manner of selecting delegates and other critical details regarding the nomination process to the parties themselves to determine in nominating candidates for lieutenant governor, attorney general, secretary of state, state auditor, state treasurer, and certain other offices. S.D. Codified Laws §§ 12-5-21 to 22. And Iowa requires the use of a statewide convention to nominate candidates only for the office of lieutenant governor, and only *after* the gubernatorial primary election takes place. Iowa Code § 43.123.

[22] For example, all members of Michigan's Democratic Party can vote at its state convention. Mich. Democratic Party Rules, Art. 4B. Alabama's statutes provide for primaries as the default nominating mechanism but allow parties to select candidates by "mass meeting, beat meeting, or other voters of the party." *See* Ala. Code § 17-13-50(a).

leaving the primary as the only method of party nomination. *Id.* (citing N.Y. L. 1913, c. 800).

Critics focused on the "distinctly onerous" signature requirements, which created "a special handicap for all but the designees of the party machine." Albert S. Bard, "Some Observations on the Primary and Election Laws of the State of New York With Special Reference to the Nomination and Election of Judges," 15 ABCNY Reports No. 169 at 8 (March 10, 1914). Some critics began promoting a return to a convention system as a means of enhancing rank-and-file participation.

Of course, restoring conventions did not *require* eliminating the role of party members in nominating candidates for elective office. To the contrary, proposals to restore conventions repeatedly *embraced* rank-and-file participation. The 1918 proposal touted by Petitioners (County Br. 2, AG Br. 11) actually would have provided that "proposed delegates may be pledged to the nomination of a certain candidate for a State office… Thus the enrolled voters are given every opportunity to express their will for candidates…." N.Y. Sen. Doc. No. 84 at 3 (March 1, 1918). New York's former Governor, Charles Evans Hughes, urged selection of candidates by convention, with the proviso that "[t]he action of such a body should not be final…. [I]f the candidates, or any of them, which it selected were unworthy, then there should be opportunity for the party members, immediately and without difficulty, to express themselves in opposition and on primary day…." *New York Times* (Nov. 19, 1920).

In 1921, New York restored conventions for statewide offices and supreme court judges, but left in place direct primaries for all other elected judges. The Committee that drafted the legislation at issue here proposed and promoted the Hughes system, with the possibility of rank-and-file participation following the convention. According to the Committee Report, "The nomination by convention, as provided

in the bill, is not absolute. Opportunity is given for calling an additional primary upon the filing of a designating petition…. If such petition be duly filed, the nomination by convention becomes itself a designation, and the party nomination is determined at the extra primary." Report of the Joint Legislative Committee on Election Law, N.Y. Legis. Doc. No. 60 at 6-7 (1921). But the final bill—passed late at night in the rush of the legislative session's final moments and without public scrutiny—omitted this provision. N.Y. L. 1921, c. 479. Given the duopoly power that the statutes bestow on the leaders of the two major political parties, the statutes have proved impervious to change.[23]

V. PETITIONERS' NEW ARGUMENTS ABOUT FACIAL INVALIDITY AND REMEDY ARE UNPERSUASIVE

In their merits briefs, Petitioners raise two arguments concerning remedy. These arguments are unpersuasive.

First, the Board of Elections complains that the lower courts "presented a glaringly insufficient factual basis for facial invalidation." BOE Br. 33.[24] The Board's new accusa-

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[23] That statutes are old is not a sufficient basis to uphold them. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 472 (Thomas, J., dissenting) ("[W]e have never before upheld a limitation on speech simply because speakers have coped with the limitation for 30 years.") (citing *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001) (striking down 67-year old restriction under First Amendment)).

[24] This argument is inappropriate. At the Petition stage, the Board advised the Court that Petitioners' "factual disputes" with the lower courts were "immaterial to this petition." Petition 9; *see* BOE Reply in Support of Cert. at 3 ("the niceties of the New York system are irrelevant"); *accord* County Reply in Support of Cert. at 8 ("a trial on the merits would be pointless"). Yet now Petitioners ask this Court to review the factual findings in detail to determine the validity of a facial challenge. As a general rule, in order to protect its institutional interest in determining which cases to review, this Court does not allow "the able counsel who argue before us to alter these questions or to devise additional questions

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tion cannot be squared with the 10,000-page record of the four-week hearing containing evidence from across the state, nor with the extensive findings of fact marshaled by the district court and affirmed by the court of appeals. No reference to that record appears in the Board's merits brief. In truth, the robust record shows that across New York State, the statutes impose severe burdens on party members and candidates. Facial invalidation is proper where, as here, "any application of the legislation 'would create an unacceptable risk of the suppression of ideas.'" *Sec'y of State v. J.H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 794 (1984)). The record leaves no doubt that the "statute in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling state interest." *J.H. Munson*, 467 U.S. at 967 n.13.

Second, Petitioners complain about the form of the district court's preliminary injunction. The district court did not usurp legislative authority, as Petitioners argue. Rather, the court properly severed §§ 6-106 and 6-124 from the remainder of the Election Law which requires supreme court nominations to proceed, for now, under the default provision that governs nomination for all other public offices. N.Y. Elec. L. § 6-110. The district court did not, as Petitioners contend, "mandate" a primary election as a judicial creation out of whole cloth. As the Second Circuit explained, "[i]f the District Court had merely enjoined the current nominating scheme, the default nature of section 6-110 would have resulted in a primary election by operation of law." PA-82a.

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at the last minute." *Taylor v. Freedland & Kronz*, 503 U.S. 638, 645-46 (1992); *Glover v. United States*, 531 U.S. 198, 205 (2001). The Board suggests no reason to depart from that rule here.

Petitioners never proposed any alternate remedy to the district court. Their argument here—that the court should have, in effect, edited §§ 6-106 and 6-124—would have thrust the court into a quasi-legislative role. The court appropriately left that task, in the first instance, to New York's elected representatives. *See Randall*, 126 S. Ct. at 2500 (Breyer, J., for plurality) (declining to "write words into the statute…or to leave gaping loopholes…or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found").

Contrary to Petitioners' suggestion that the lower courts failed to give the Legislature an opportunity to craft a new nomination scheme, the district court *and* the Second Circuit each expressly *invited* the Legislature to craft a new statute, PA-84a, 183a, and the district court has stayed its preliminary injunction for two years. The Legislature has an opportunity to enact a constitutional nominating system if it so desires.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be affirmed.

Respectfully submitted,

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APPENDIX A
NEW YORK CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Article VI of New York's Constitution provides in part:

§ 6. a. The state shall be divided into eleven judicial districts....[25]

b. Once every ten years the legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.

c. The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of justices of the supreme court shall be fourteen years from and including the first day of January next after their election.

d. The supreme court is continued. It shall consist of the number of justices of the supreme court including the justices designated to the appellate divisions of the supreme court, judges of the county court of the counties of Bronx, Kings, Queens and Richmond and judges of the court of general sessions of the county of New York authorized by law on the thirty-first day of August next after the approval and ratification of this amendment by the people, all of whom shall be justices of the supreme court for the remainder of their terms. The legislature may increase the number of justices of the supreme court in any judicial district, except that the number in any district shall not be increased to exceed one justice for

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25 Acting under authority granted in Art. VI, § 6(b), the Legislature has superceded this provision in part. *See* Judiciary Law § 140, reprinted *infra*.

fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The legislature may decrease the number of justices of the supreme court in any judicial district, except that the number in any district shall not be less than the number of justices of the supreme court authorized by law on the effective date of this article. * * *

§7. a. The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment and to the family court in the city of New York jurisdiction over crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household.

b. If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.

B. New York's Judiciary Law provides in part:

§ 140. Division of state into judicial districts.

The state is hereby divided into twelve judicial districts, pursuant to the provisions of the first section of the sixth article of the constitution, which districts shall be arranged as follows:

The first judicial district shall consist of the county of New York;

The second judicial district shall consist of the counties of Richmond and Kings;

The third judicial district shall consist of the counties of Columbia, Sullivan, Ulster, Greene, Albany, Schoharie and Rensselaer;

The fourth judicial district shall consist of the counties of Warren, Saratoga, Washington, Essex, Franklin, Saint Lawrence, Clinton, Montgomery, Hamilton, Fulton and Schenectady;

The fifth judicial district shall consist of the counties of Onondaga, Oneida, Oswego, Herkimer, Jefferson and Lewis;

The sixth judicial district shall consist of the counties of Otsego, Delaware, Madison, Chenango, Broome, Tioga, Chemung, Tompkins, Cortland and Schuyler;

The seventh judicial district shall consist of the counties of Livingston, Wayne, Seneca, Yates, Ontario, Steuben, Monroe and Cayuga;

The eighth judicial district shall consist of the counties of Erie, Chautauqua, Cattaraugus, Orleans, Niagara, Genesee, Allegany and Wyoming;

The ninth judicial district shall consist of the counties of Westchester, Putnam, Dutchess, Orange and Rockland;

The tenth judicial district shall consist of the counties of Nassau and Suffolk.

The eleventh judicial district shall consist of the county of Queens….

The twelfth judicial district shall consist of the county of Bronx….

C. New York's Election Law provides in part:

§ 6-106. Party nominations; justice of the supreme court

Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

§ 6-110. Party nominations; public office

All other party nominations of candidates for offices to be filled at a general election, except as provided for herein, shall be made at the primary election.

§ 6-118. Designation and nomination by petition

Except as otherwise provided by this article, the designation of a candidate for party nomination at a primary election and the nomination of a candidate for election to a party position to be elected at a primary election shall be by designating petition.

§ 6-120. Designation and nomination; restrictions

1. A petition, except as otherwise herein provided, for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid only if the person so designated is an enrolled member of the party referred to in said designating petition at the time of the filing of the petition.

2. Except as provided in subdivisions three and four of this section, no party designation or nomination shall be valid unless the person so designated or nominated shall be an enrolled member of the political party referred to in the certificate of designation or nomination at the time of filing of such certificate.

3. The members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, unless the rules of the party provide for another committee, in which case the members of such other committee, and except as hereinafter in this subdivision provided with respect to certain offices in the city of New York, may, by a majority vote of those present at such meeting provided a quorum is present, authorize the designation or nomination of a person as candidate for any office who is not enrolled as a member of such party as provided in this section. In the event that such designation or nomination is for an office to be filled by all the voters of the city of New

York, such authorization must be by a majority vote of those present at a joint meeting of the executive committees of each of the county committees of the party within the city of New York, provided a quorum is present at such meeting. The certificate of authorization shall be filed not later than four days after the last day to file the designating petition, certificate of nomination or certificate of substitution to which such authorization relates. The certificate of authorization shall be signed and acknowledged by the presiding officer and the secretary of the meeting at which such authorization was given.

4. This section shall not apply to a political party designating or nominating candidates for the first time, to candidates nominated by party caucus, nor to candidates for judicial offices.

§ 6-124. Conventions; judicial

A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by

one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates; the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate, substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

§ 6-126. Conventions; rules for holding

1. The time and place of meeting of a convention shall be fixed, within the times prescribed herein, by a committee appointed pursuant to the rules of the state committee. The room designated for the meeting place of a convention shall have ample seating capacity for all delegates and alternates. Every convention shall be called to order by the chairman of the committee from which the call originates or by a person designated in writing for that purpose by such chairman, or, if he fails to make such designation, then, by a person designated in such manner as the rules of the party shall prescribe. Such chairman or person designated shall have the custody of the roll of the convention until it shall have been organized. No such convention shall proceed to the election of a temporary chairman or transact any business until the time fixed for the opening thereof nor until a majority of the delegates or respective alternates named in the official roll shall be present. The roll call upon the election of a temporary chairman shall not be delayed more than one hour after the time specified in the call for the opening of the convention, provided a majority of delegates, including alternates sufficient to make up such majority by substitution, are present. The person who calls the convention to order shall exercise no other function than that of calling the official roll of the delegates

upon the vote for temporary chairman and declaring the result thereof.

2. The temporary chairman shall be chosen upon a call of the official roll. The committees of the convention shall be appointed by the convention, or by the temporary chairman, as the convention may order. Where only one candidate is placed in nomination for any office, the vote may be taken viva voce. When more than one candidate is placed in nomination for an office the roll of the delegates shall be called and each delegate when his name is called shall arise in his place and announce his choice, except that the chairman of a delegation from any unit of representation provided for by party rules, unless a member of such delegation objects, may announce the vote of such delegation. The convention may appoint a committee to nominate candidates to fill vacancies in nominations made by the convention and caused by the death, declination or disqualification of a candidate. The permanent officer shall keep the records of the convention.

§ 6-130. Designating petition; signer information

The sheets of a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed.

§ 6-132. Designating petition; form

1. Each sheet of a designating petition shall be signed in ink and shall contain the following information and shall be in substantially the following form:

I, the undersigned, do hereby state that I am a duly enrolled voter of the _____ party and entitled to vote at the next primary election of such party, to be held on _____, 20__; that my place of residence is truly stated opposite my signature hereto, and I do hereby designate the following named person (or persons) as a candidate (or candidates) for the nomination of such party for public office or for election

to a party position of such party.

Names of candidates	Public Office or party position	Place of Residence (also post office address, if not identical)
_____	_____	_____
_____	_____	_____

I do hereby appoint _____ (insert the names and addresses of at least three persons, all of whom shall be enrolled voters of said party) as a committee to fill vacancies in accordance with the provisions of the election law.

In witness whereof, I have hereunto set my hand, the day and year placed opposite my signature.

Date	Name of Signer	Residence
_____	_____	_____
_____	_____	_____
		Town or city (except in the city of New York, the County)
		_____
		_____

2. There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the political subdivision in which the office or position is to be voted for. However, in the case of a petition for election to the party position of member of the county committee, residence in the same county shall be sufficient. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false

statement, shall subject the person signing it to the same penalties as if he or she had been duly sworn. The form of such statement shall be substantially as follows:

STATEMENT OF WITNESS

I, _____ (name of witness) state: I am a duly qualified voter of the State of New York and am an enrolled voter of the _____ party. I now reside at _____ (residence address).

Each of the individuals whose names are subscribed to this petition sheet containing _____ (fill in number) signatures, subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Date: _____ _____
Signature of Witness

Witness identification information: The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid.

Town or City County

_____ _____

3. In lieu of the signed statement of a witness who is a duly qualified voter of the state qualified to sign the petition, the following statement signed by a notary public or commissioner of deeds shall be accepted:

On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing _____ (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself or herself, said that the foregoing

statement made and subscribed by him or her, was true.

Date: _____

_____
(Signature and official title of officer administering oath)

4. The state board of elections shall prepare a sample form of a designating petition which meets the requirements of this section and shall distribute or cause such forms to be distributed to each board of elections. Such forms shall be made available to the public, upon request, by the state board of elections and each such board. Any petition that is a copy of such a sample shall be deemed to meet the requirements of form imposed by this section.

§ 6-134. Designating petition; rules

1. A designating petition may designate candidates for nomination for one or more public offices or for nomination for election to one or more party positions or both, but designations or nominations for which the petitions are required to be filed in different offices may not be combined in the same petition. If two or more offices having the same title are to be filled for different terms, the terms of office shall be included as part of the title of the office.

2. Sheets of a designating petition shall be delivered to the board of elections in the manner prescribed by regulations that shall be promulgated by the state board of elections, provided, however, that the sheets of any volume of a petition shall be numbered. Such regulations shall be no more restrictive than is reasonably necessary for the processing of such petitions by the board of elections. Such regulations shall be binding on the boards of election in each county and in the city of New York. When a determination is made that a designating petition does not comply with such regulations, the candidate shall have three business days from the date of such determination to cure the violation.

3. If a voter shall sign any petition or petitions designating a greater number of candidates for public office or party position than the number of persons to be elected thereto his signatures, if they bear the same date, shall not be counted upon any petition, and if they bear different dates shall be counted in the order of their priority of date, for only so many designees as there are persons to be elected.

4. A signature made earlier than thirty-seven days before the last day to file designating petitions for the primary election shall not be counted.

5. The use of titles, initials or customary abbreviations of given names by the signers of, or witnesses to, designating petitions or the use of customary abbreviations of addresses of such signers or witnesses, shall not invalidate such signatures or witness statement provided that the identity of the signer or witness as a registered voter can be established by reference to the signature on the petition and that of a person whose name appears in the registration poll ledgers.

6. An alteration or correction of information appearing on a signature line, other than the signature itself and the date, shall not invalidate such signature.

7. A signer need only place his signature upon the petition, and need not himself fill in the other required information.

8. Notwithstanding any other provision of this chapter, the failure to list a committee to fill vacancies or the failure to list at least three eligible voters as a committee to fill vacancies shall not invalidate the petition unless a vacancy occurs which, under law, may be filled only by such a committee.

9. A person other than the subscribing witness may insert the information required by the subscribing witness statement, provided that all subscribing witness information required above the subscribing witness' signature is inserted

either before such subscribing witness signs the statement or in the presence of such subscribing witness.

10. The provisions of this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud.

11. If the number of signatures on any petition sheet is understated in the witness statement, such petition sheet shall not be invalid solely because of such understatement, but such petition sheet will be deemed to contain the number of signatures indicated on such witness statement and the signatures at the end of such petition sheet that are in excess of the number so indicated shall be deemed not to have been filed.

12. A signature on a petition sheet shall not be deemed invalid solely because the address provided is the post office address of the signer provided that proof that such address is the accepted address of such signer is provided to the board of elections no later than three days following the receipt of specific objections to such signature.

13. In addition to the requirement for the signature, the printed name of the signer may be added, provided that the failure to provide a place to print the name or failure to print a name if a space is provided shall not invalidate the signature or petition.

§ 6-136. Designating petitions; number of signatures

1. Petitions for any office to be filled by the voters of the entire state must be signed by not less than fifteen thousand or five per centum, whichever is less, of the then enrolled voters of the party in the state (excluding voters in inactive status), of whom not less than one hundred or five per centum, whichever is less, of such enrolled voters shall reside in each of one-half of the congressional districts of the state.

2. All other petitions must be signed by not less than five per centum, as determined by the preceding enrollment, of the then enrolled voters of the party residing within the po-

litical unit in which the office or position is to be voted for (excluding voters in inactive status), provided, however, that for the following public offices the number of signatures need not exceed the following limits:

(a) For any office to be filled by all voters of the city of New York, seven thousand five hundred signatures;

(b) For any office to be filled by all the voters of any county or borough within the city of New York, four thousand signatures;

(c) For any office to be filled in the city of New York by all the voters of any municipal court district, one thousand five hundred signatures;

(c-1) For any office to be filled in the city of New York by all the voters of any city council district, nine hundred signatures;

(d) For any office to be filled by all the voters of cities or counties, except the city of New York and counties therein, containing more than two hundred fifty thousand inhabitants according to the last preceding federal enumeration, two thousand signatures;

(e) For any office to be filled by all the voters of cities or counties containing more than twenty-five thousand and not more than two hundred fifty thousand inhabitants, according to the last preceding federal enumeration, one thousand signatures;

(f) For any office to be filled by all the voters of any other city or county, or of a councilmanic district in any city other than the city of New York, five hundred signatures;

(g) For any office to be filled by all the voters of any congressional district, twelve hundred fifty signatures;

(h) For any office to be filled by all the voters of any state senatorial district, one thousand signatures;

(i) For any office to be filled by all voters of any assem-

bly district, five hundred signatures;

(j) For any office to be filled by all the voters of any political subdivision, except as herein otherwise provided, contained within another political subdivision, not to exceed the number of signatures required for the larger subdivision;

(k) For any other office to be filled by the voters of a political subdivision containing more than one assembly district, county or other political subdivision, not to exceed the aggregate of the signatures required for the subdivisions or parts of subdivisions so contained; and

(l) For any county legislative district, five hundred signatures.

3. The number of signatures on a petition to designate a candidate or candidates for the position of delegate or alternate to a state or judicial district convention or member of the state committee or assembly district leader or associate assembly district leader need not exceed the number required for member of assembly, and to designate a candidate for the position of district delegate to a national party convention need not exceed the number required for a petition for representative in congress.

6-154. Nominations and designations; objections to

1. Any petition filed with the officer or board charged with the duty of receiving it shall be presumptively valid if it is in proper form and appears to bear the requisite number of signatures, authenticated in a manner prescribed by this chapter.

2. Written objections to any certificate of designation or nomination or to a nominating or designating petition or a petition for opportunity to ballot for public office or to a certificate of acceptance, a certificate of authorization, a certificate of declination or a certificate of substitution relating thereto may be filed by any voter registered to vote for such public office and to a designating petition or a petition for

opportunity to ballot for party position or a certificate of substitution, a certificate of acceptance or a certificate of declination relating thereto by any voter enrolled to vote for such party position. Such objections shall be filed with the officer or board with whom the original petition or certificate is filed within three days after the filing of the petition or certificate to which objection is made, or within three days after the last day to file such a certificate, if no such certificate is filed except that if any person nominated by an independent nominating petition, is nominated as a party candidate for the same office by a party certificate filed, or a party nomination made after the filing of such petition, the written objection to such petition may be filed within three days after the filing of such party certificate or the making of such party nomination. When such an objection is filed, specifications of the grounds of the objections shall be filed within six days thereafter with the same officer or board and if specifications are not timely filed, the objection shall be null and void. Each such officer or board is hereby empowered to make rules in reference to the filing and disposition of such petition, certificate, objections and specifications.

3. When a determination is made that a certificate or petition is insufficient, such officer or board shall give notice of the determination forthwith by mail to each candidate named in the petition or certificate, and, if the determination is made upon specified objections, the objector shall be notified.

§ 6-158. Nominating and designating petitions and certificates, conventions; times for filing and holding

1. A designating petition shall be filed not earlier than the tenth Monday before, and not later than the ninth Thursday preceding the primary election. * * *

5. A judicial district convention shall be held not earlier than the Tuesday following the third Monday in September preceding the general election and not later than the fourth Monday in September preceding such election.

6. A certificate of a party nomination made other than at the primary election for an office to be filled at the time of a general election shall be filed not later than seven days after the fall primary election, except that… a certificate of party nomination made at a judicial district convention shall be filed not later than the day after the last day to hold such convention and the minutes of such convention, duly certified by the chairman and secretary, shall be filed within seventy-two hours after adjournment of the convention. * * *

§ 6-160. Primaries

1. If more candidates are designated for the nomination of a party for an office to be filled by the voters of the entire state than there are vacancies, the nomination or nominations of the party shall be made at the primary election at which other candidates for public office are nominated and the candidate or candidates receiving the most votes shall be the nominees of the party.

2. All persons designated for uncontested offices or positions at a primary election shall be deemed nominated or elected thereto, as the case may be, without balloting.

APPENDIX B

STATUTORY PROVISIONS RELATING TO CONVENTIONS OUTSIDE NEW YORK STATE

1. Statutes pertaining to conventions that do not relate to the nomination of candidates for public office:

a. Del. Code. tit. 15, § 3113;

b. Idaho Code § 34-707;

c. 10 Ill. Comp. Stat. 5/7-9;

d. Me. Rev. Stat. tit. 21-A, § 321;

e. N.H. Rev. Stat. Ann. § 667:21;

f. Ohio Rev. Code Ann. § 3513.11;

g. R.I. Gen. Laws § 17-12-13.

2. Statutes pertaining to conventions that operate only to fill vacancies caused by emergencies or by the failure of any candidate to obtain a majority at a primary election:

a. Ariz. Rev. Stat. § 16-342;

b. Ark. Code Ann. § 7-7-104;

c. Colo. Rev. Stat. §§ 1-4-103, 402, 701;

d. Iowa Code § 43.65;

e. Iowa Code § 43.78;

f. Ky. Rev. Stat. § 118.105;

g. N.D. Cent. Code §16.1-13-14.

3. Statutes pertaining to conventions that apply only to minor parties or unaffiliated assemblages of voters:

a. Colo. Rev. Stat. § 1-4-1304;

b. Conn. Gen. Stat. § 9-451;

c. Del. Code. tit. 15, §§ 3101A, 3301;

d. Fla. Stat. § 99.0965;

e. Ga. Code Ann. §§ 21-2-170, 172, 180;

f. Iowa Code § 44.1;

g. Kan. Stat. Ann. §§ 25-202, 25-301, 302;

h. Ky. Rev. Stat. § 118.325;

i. Md. Code. Ann., Elec. §§ 5-701, 703.1;

j. N.C. Gen. Stat. §§ 163-96, 163-98;

k. N.M. Stat. Ann. § 1-8-2;

l. Or. Rev. Stat. § 248.009;

m. Or. Rev. Stat. §§ 249.735-.737;

n. Tex. Elec. Code §§ 172.001-.002, 181.001 - 005;

o. Wash. Rev. Code § 29A.20.111, 121;

p. W. Va. Code § 3-5-22;

q. Wyo. Stat. § 22-4-303.

4. **Statutes pertaining to conventions that are not mandatory on parties:**

    a. Ala. Code § 17-13-2, 50;

    b. Neb. Rev. Stat. § 32-616; § 32-710;

    c. S.C. Code Ann. §§ 7-9-70, 100; §§ 7-11-10, 30;

    d. Tenn. Code Ann. § 2-13-203;

    e. Utah Code Ann. § 20A-9-404;

    f. Va. Code Ann. §§ 24.2-508-509.

5. **Statutes pertaining to conventions that allow parties to designate or endorse candidates before a primary election:**

    a. Conn. Gen. Stat. § 9-382-390;

    b. N.D. Cent. Code § 16.1-11-06 to -11.