06-0635-CV

United States Court of Appeals

for the

Second Circuit

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

PLAINTIFFS-APPELLEES,

- v. -

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

DEFENDANTS-APPELLANTS,

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

DEFENDANT-INTERVENORS-APPELLANTS,

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

STATUTORY-INTERVENOR-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS

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PRELIMINARY STATEMENT

On the law, this is not a close case. No prior case has ever found a constitutional right to a primary. No prior case has ever held that a candidate has a constitutional right to a meaningful opportunity to win a party's nomination. There is no legally cognizable class of "challenger candidates" who deserve protection from their own party. And there is a Supreme Court case directly on point that upholds the constitutionality of a party convention as "too plain for argument." *American Party of Texas v. White*, 415 U.S. 767 (1974). Given the complete absence of any supporting constitutional principles, the district court's sweeping mandatory injunction installing an entirely different election process amounts to a naked act of judicial legislation that warrants reversal.

As a starting point, the district court may be correct that if "the State of New York 'chooses to tap the energy and legitimizing power of the democratic process' in selecting its Supreme Court Justices, 'it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" SPA-53[1] (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)). But this statement simply begs the critical question presented in this case: *what are the roles accorded to the various participants?*

The plain answer provided by the New York state legislature in 1921 is that the role of voters is to elect delegates and the role of delegates is to select candidates. If the Court accepts this inherent design of a true delegate-based convention system as being consistent with the Constitution, then New York's judicial convention system is easily vindicated. Applying the flexible balancing test adopted by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), in light of the intended roles of voters and delegates respectively, it is clear that New York's statutory scheme for electing Justices of the State Supreme Court, viewed in its totality, does not impose a severe burden on the right to vote and is easily justified by the State's important regulatory interests.

Appellees and the district court reach a different answer only because they begin with the fundamentally flawed premise that rank-and-file voters should have a direct vote in the selection of a party's nominee for judicial office. Proceeding from the assumption that there is a constitutional right to direct democracy, it is an inescapable conclusion that any representative form of democracy – no matter how well-constructed – infringes upon that right. But no such direct right exists under

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Footnote continued from previous page

[1] Unless otherwise noted, defined terms have the same meaning set forth in Appellants' opening brief, which is cited as "D-__." Appellees' brief is cited as "P-__."

the First and Fourteenth Amendments, and Appellees cite no case to support such a right. Even the district court begrudgingly acknowledges that "[i]n a loose sense, then, the defendants are correct that '[n]othing in the United States Constitution requires that once a state decides to make an office elective, the electoral system must ratify the direct and unmediated preferences of a plurality of voters.'" SPA-60 (quoting Def. Proposed Conclusions of Law 31-32). That concession should have been the end of the inquiry, not the beginning. Nevertheless, by supplanting the convention with a primary, the district court made plain that it shares Appellees' view that nothing short of a direct opportunity for voters to cast primary ballots will satisfy its erroneous legal standard.

Undoubtedly cognizant of their shaky legal footing, Appellees present an argumentative and cherry-picked version of the facts designed to bathe the convention system in the worst light. But upon closer examination it becomes clear that the evidentiary support for their case is wafer thin and largely non-existent. For most districts and most parties, Appellees failed to offer any evidence. Their case primarily centers on the public feud between lead Plaintiff Lopez Torres and the leaders of the scandal-plagued Brooklyn Democratic Party – a cautionary tale if ever there was one. Yet even this saga reveals that challenger candidates can access the convention and compete for delegate support. Considering all the evidence, including the accounts of several sitting justices who

prevailed over county leader opposition, party leaders do not wield the near-absolute power that Appellees and the district court ascribe to them.

The district court's order warrants reversal for numerous reasons. *First*, while the convention system may be subject to constitutional scrutiny, it does not follow that voters have a right to express their preferences for candidates directly and the district court erred by finding the right to a primary or its equivalent. *Second*, the district court erroneously concluded that the convention system was unduly burdensome by concocting a "meaningful participation" standard and analyzing the convention from the flawed perspective of a "challenger candidate." *Third*, the district court's determinations, among other things, that party leaders control conventions and challenger candidates have no chance to succeed are legal conclusions or mixed findings subject to *de novo* review, and, in any event, are clearly erroneous when viewed from the proper perspective. *Fourth*, the district court disregarded the State's important regulatory interests in fostering, among other things, party associational rights, which amply satisfy any burdens imposed by the convention. *Finally*, the district court committed several procedural errors and its issuance of a mandatory injunction was an overbroad remedy.[2]

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[2] This brief does not respond to every point Appellees raise, many of which are amply addressed in Appellants' moving brief; accordingly, silence should not be mistaken for assent.

ARGUMENT

I. WHILE NEW YORK'S JUDICIAL NOMINATING CONVENTION IS SUBJECT TO CONSTITUTIONAL SCRUTINY, IT DOES NOT HAVE TO BE A PRIMARY OR ITS FUNCTIONAL EQUIVALENT TO PASS CONSTITUTIONAL MUSTER

Appellees falsely charge Appellants with seeking to "avoid[] constitutional scrutiny." P-34. That claim is nonsense. We agree that the Constitution applies to the judicial convention system, and respectfully submit that the system readily passes constitutional muster. The pages upon pages of their brief that Appellees devote to *Classic, Bullock* and the "white primary" cases merely establish a proposition that is not in dispute: the state action requirement for triggering constitutional protection is satisfied. P-40-42, 50, 56. But, unlike those cases that involve racial discrimination, exclusionary filing fees and ballot tampering, and were decided on Fourteenth Amendment equal protection and even Fifteenth Amendment grounds, this case involves none of these invidious practices and raises on appeal only voting and associational rights under the First Amendment.

In stretching *Classic*, *Bullock* and the "white primary" cases far beyond their limited applicability, Appellees and the district court also wrongly dismiss the significance of the general election ballot here. P-40-42; SPA-56-57. Appellees assert that the general ballot is irrelevant to this debate because it does not "immunize" the convention system from constitutional scrutiny. P-40. Far from being irrelevant, the general election is the only stage in this electoral process

where voters are given a direct opportunity to express their preferences for particular candidates. To the extent particular candidates have any intended right to appeal directly to voters, that right arises only at the general election stage and is fully provided by ready access of individual candidates to alternative paths to the general election ballot. Once again, reliance on *Bullock* and *Classic* is misplaced because those are "primary" cases where the intended role of voters in those electoral schemes is to express their preference for candidates directly at the nominating stage, unlike here where the nomination is a mediated process. P-35, 40-42; SPA-58-59.

There is no constitutional requirement under the First or Fourteenth Amendments that rank-and-file voters have a direct vote in the selection of a party's nominee, as discussed in Section I.A. While the district court may be correct that First Amendment rights attach to the nomination phase, SPA-53, those rights are coextensive with the roles of the respective participants. Thus, as discussed in Section I.B., the structure of a true party convention, which requires voters to vote for delegates and empowers delegates to select candidates, is perfectly constitutional.

A. The District Court Erred By Finding A Right To A Direct Primary Or Its Functional Equivalent

Confronted with *White*, Appellees and the district court ostensibly acknowledge that a convention can be a permissible method for candidate

selection. SPA-59; P-45-46. Indeed, both Appellees and the district court even protest that they are not condemning all conventions, but that New York's convention is unconstitutional because it imposes a unique burden on voters. SPA-59 ("the New York system does not elude scrutiny by virtue of its falling under the broad rubric of 'party convention.'") (internal citation omitted); *see also* P-46. Yet what they find burdensome about the convention process is not unique to New York's judicial convention, but is true of any convention comprised of representatives with genuinely-delegated authority: there is a mediated nomination process rather than a direct pipeline between voters and candidates. Thus, the district court boils its complaint down to the following statement: "more open and effective participation by voters must be allowed at the nomination stage, and candidates must be permitted an effective means of appealing to the voters when it counts." SPA-61.

Appellees cite *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), for the proposition that "[t]o exclude the voter who cannot cast a vote for [a] candidate, it is all the same whether the party conducts its nomination by a primary or by a convention *open* to all party members except those kept out by the filing fee. Each is an 'an integral part of the election machinery.'" P-45 (emphasis added) (quoting *Morse*, 517 U.S. at 207) (quoting *U.S. v. Classic*, 313 U.S. 219, 318 (1941)). But Appellees' misplaced reliance on *Morse* lays bare their true

belief that only a convention that is the functional equivalent of a primary passes constitutional muster. P-45.

Morse involved a claim by voters that the Republican Party's imposition of a registration fee for participating in a convention "open" to all party members to nominate candidates for U.S. Senate violated the Voting Rights Act of 1965. 517 U.S. at 190. *Morse* stands for the unremarkable proposition that voters have the right to participate in the nomination process in a convention that "resemble[d] a primary about as closely as one could imagine," because it was open to any party member. *Morse*, 517 U.S. at 238 (Breyer, J., concurring). *Morse,* which decided no constitutional issues, did not hold that the only constitutional way to participate in a convention nomination process is for the convention to be "open" to every voter, or in other words, be "just like a primary." *Id.*

Appellees, again, pay lip service to the notion that a convention system is not unconstitutional *per se* when they assert that "[c]ourts have upheld conventions that – unlike this one – do not exclude voters from the nomination process." P-46. What Appellees hold out as purportedly constitutional alternatives to New York's convention system are the functional, if not precise, equivalents of direct primaries. Thus, Appellees proffer as constitutionally acceptable forms of nominating conventions systems where:

(a) any member of the party may attend and vote at the convention,

(b) rank-and-file party members vote for delegates who are listed on the ballot with the name of a candidate to whom they are pledged, or

(c) voters can petition their favored candidate onto a primary ballot for their party's nomination against candidates endorsed at the party's convention.

P-46 (citations omitted).

Appellees' first alternative is a convention open to all registered party members, such as the Republican party convention system in *Morse*. But, as the Supreme Court noted in *Morse*, that kind of convention "resembles a primary about as closely as one could imagine," as it was "open to any [Republican] voter . . . just like a primary." 517 U.S. at 238.

Appellees' second alternative in which voters elect delegates to act as proxies is no different than voting directly for a candidate in a primary. Appellees complain that New York's convention system prevents voters from having any input into the selection process because it does not identify the delegate with a particular candidate. P-46. But in *New York State Democratic Party v. Lomenzo*, 460 F.2d 250, 251-52 (2d Cir. 1972), this Court rejected the claim that the name of a candidate whom the delegate intended to support must be on the ballot, finding that it "does not raise a serious a constitutional question."

Appellees and the district court also have no answer to the fact that, unlike the pledged delegates in *Ripon*, who served as proxies for a single candidate, delegates in New York's convention are typically called upon to nominate several

candidates. Tr. 585:21 – 586:1; 586:18-24 (Carroll). For that reason alone, delegates cannot be expected to carry the flag for any particular candidate, but instead to advance the interests and values of voters within their respective ADs.

In Appellees' third alternative, a convention is but one of several means of accessing a primary ballot. Clearly, then, such a convention system is not an alternative to a primary but only a precursor to one. Nor does *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164 (D. Conn. 2003), shed light on the constitutionality of New York's convention system. P-47. *Campbell* only recognized that "*if a primary is provided as part of the process by which nominees are selected*, party rules cannot establish qualifications to appear on primary ballots which so unreasonably restrict such access." 242 F. Supp. 2d at 175 (emphasis added). *Campbell* does not address the constitutionality of a convention system where a primary ballot is not provided.

Under Appellees' theory, which the district court has adopted, there simply could never be a closed convention system that is constitutional as they make clear in the following:

> No case has ever upheld a system like New York's uniquely closed judicial convention system, where only delegates can vote, voters must select delegates without any indication of which candidates the delegates favor, and the convention's decision is the final word on the nomination.

P-46. Indeed, that nothing other than the installation of a direct primary will satisfy Appellees is made plain by numerous other references sprinkled throughout Appellees' brief. *See, e.g.*, P-49, 52.

While it may be that not all delegate-based convention systems are necessarily constitutional under *White*, P-45, it cannot be the case that *none* of them is. The Supreme Court's ruling in *White* that a convention is a constitutional alternative to a primary would be rendered meaningless if the convention must precisely resemble a primary, as Appellees contend. *See Shapiro v. Berger*, 328 F. Supp. 2d 496, 502 (S.D.N.Y. 2004) (confirming under *White* "the right of a State to provide for party conventions as an alternative to primaries as a means for selecting party candidates."); *see also Maldonado v. Pataki*, No. 05 CV 5158 (SLTVVP), 2005 WL 3454714, *5 (E.D.N.Y. Dec. 16, 2005) (citing *Berger*).

Therefore, it is the fact alone that New York State has a true delegate-based system – which *delegates* authority to choose the party's nominee(s) to duly elected delegates – that Appellees and the district court believe constitutes a severe burden on voters' right to vote and associate. The deeply mistaken view that the First and Fourteenth Amendments mandate direct voter participation in candidate selection infects their entire approach to assessing the constitutionality of the convention system and explains the district court's unprecedented decision to order a primary as an 'interim' remedy.

B. Voters Can Be Constitutionally Required To Have Their Preferences Mediated Through True Delegates

Courts have recognized that it is an appropriate and beneficial function of a convention within a party structure to mediate the direct preferences of its rank-and-file members through true delegates who represent their constituencies.

In *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), the appellee challenged the constitutionality of his party's rule requiring him to allocate evenly on the basis of gender his votes for delegates to the party's closed national Presidential convention. In finding no violation of the appellee's First Amendment right to vote, the Fourth Circuit noted that it had been settled by the Supreme Court in *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975), that "a political party has a right of political association protected by the First and Fourteenth Amendments, and that right of association carries with it a right to determine the party's own criteria for selection of delegates to its national convention." *Bachur*, 836 F.2d at 841. Indeed, the court recognized that in exercising its right to associate, a party could choose to adopt a closed, delegate-based convention system, as has New York's legislature, in which voters have "no direct voice" and their preference may only be "partially translated into the actual nomination" as "popular" support may not be "wholly determinative of the outcome:"

> standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a . . . preference[,] and

> the selection of delegates[,] may be only partially translated into the actual nomination. A finding that . . . a right to participate in a popular primary election does not foreclose party limits on the effective weight of [that] participation, or mandate that the popular ballot is to be wholly determinative of the outcome of the nomination process. Indeed in many states, delegates to the national convention are selected by means other than a primary election, so that many . . . [voters] have *no direct voice* in the selection of delegates.

836 F.2d at 842 (emphasis added). Ultimately, the court concluded that "the limited restriction [placed] on Bachur's right to vote for delegates" did not unconstitutionally infringe upon his right to vote when "balanced" against the "broad, encompassing" First Amendment rights of parties. *Id.* at 842.

Bachur's analysis of the appropriate function of a true delegate-based convention is consistent with "how political parties operate in reality" as described in *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (*en banc*). In *Ripon*, registered Republicans in numerous states challenged the constitutionality of the delegate allocation formula adopted by the National Republican party for its 1976 convention as violating the principle of "one-man, one-vote." *Id.* at 570. In upholding the constitutionality of the formula, the court disposed of the case primarily on equal protection grounds. But the court also found that "[t]o the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did." *Id.* at 588. In balancing the First Amendment rights of voters and parties, the court recognized that "[t]here are a

number of respects, then, in which the parties conduct their affairs other than by giving equal attention to the preferences of all voters, or even all party adherents." *Id.* at 584 (citation omitted). The court further noted that "[t]he types of local leaders dominating the process vary from party to party and from locality to locality. . . . Candidate selection is not the business of the party rank and file. . . . Candidate selection is meant to be oligarchical." *Id.* at 585 (citing same). Ultimately, the court's guiding principle was that the "internal workings of a political party" deserve the protection of the First Amendment absent invidious discrimination. *Id.* at 588.

Indeed, the courts' analyses in *Bachur* and *Ripon* are consistent with this Court's observations in *Mrazek v. Suffolk County Board of Elections*, 630 F.2d 890, 898 n.11 (2d Cir. 1980), that a delegate to a convention "acting in a nominating capacity" may properly speak on behalf of his constituents in the broadest sense and mediate their preferences for individual candidates. *Mrazek* relied on *Ripon*, among other cases, and noted that "a delegate may speak for a group broader than simply party membership. . . . The parties are best situated to define the proper constituencies of their nominating delegates, and these determinations should not be invalidated unless such definitions are utilized to exclude or disadvantage discrete groups or minorities." *Id.* at 898 n.11 (citations omitted). Appellees attempt to consign *Mrazek* to a footnote, but it merits more

prominence. The Court's analysis of the expansive scope of delegates' authority to represent voters did not turn on any factual circumstances unique to that case. P-48 n.21.

II. THE DISTRICT COURT ERRONEOUSLY DETERMINED THAT THE BURDENS IMPOSED BY THE JUDICIAL CONVENTION SYSTEM ARE "SEVERE"

A. The District Court Erred By Imposing A Constitutional Right To A Meaningful Chance To Win

In its opinion, the district court failed to cite to a single case in support of its meaningful participation standard, and we are not aware of any. Apparently, Appellees are not either as they could only cite to the district court's own opinion. P-49 ("candidates must be permitted an effective means of appealing to voters when it counts.") (quoting SPA-61). Thus, it seems that meaningful participation is a standard of the district court's own creation. While the district court purportedly used *Classic* and *Bullock* as the raw material to fabricate this meaningful participation standard, SPA-59, even Appellees do not dispute that neither *Classic* nor *Bullock* supports such a standard, and that those cases require at most access to the judicial nominating convention. D-48-50; *see also* P-49.

Nevertheless, the district court determined that the convention system is unduly burdensome based upon its application of this meaningful participation standard and its conclusion that so-called challenger candidates do not have a "realistic" chance of winning their party's nomination. SPA-59. As Appellees

claim, the "ultimate proof of how severely voters' and candidates' right are burdened is . . . [that] none has actually made it to the Supreme Court over the dominant party leader's objection." P-52.

But even Appellees admit the Constitution does not "guarantee electoral success." P-49. Indeed, there can be no right to win where the Supreme Court in *Clements v. Fashing* has already recognized that a candidate has no right to run for office in the first place. 457 U.S. 957, 963 (1982). In *Clements*, public officials and voters challenged two sections of the Texas state constitution that prohibited or limited certain public officials currently holding office from becoming candidates for other offices. Even though appellees were categorically precluded from running for office and interested voters were barred from voting for them, the Court concluded that neither provision violated the First Amendment because the burdens imposed on them were "so insignificant [that] . . . [t]he State's interests in this regard are sufficient to warrant the *de minimis* interference with appellees' interests in candidacy." *Id.* at 971-72. The plurality reasoned that "[fa]r from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Id.* at 963 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

Appellees respond to *Clements* by noting that a majority of the Court rejected the plurality's "mode of equal protection analysis." P-49. But that is

beside the point. A majority of the Justices, including Justice Stevens, agreed with the plurality opinion on the First Amendment question. *Clements*, 457 U.S. at 973-74 (Stevens, J., concurring). And all nine Justices agreed "we have never defined candidacy as a fundamental right." *Id.* at 977 n.2 (Brennan, J., dissenting).

Therefore, even if this Court were to accept Appellees' assertion that a candidate without party leader has no realistic chance of winning the nomination, that alone does not establish a severe burden on voters' and candidates' First Amendment rights. D-55-57.

Without any support for their constitutional standard, Appellees can only offer the rhetoric that "access" to the convention is "meaningless" because it does not afford candidates with an effective means of appealing to voters. P-49. As they put it, "'access' to the closed convention [for a candidate] bears no resemblance to the opportunity to compete for support among the party's voters." *Id.* In other words, access is meaningless because it does not involve a direct primary. Like Appellees, the district court will be satisfied with nothing short of a primary. SPA-57 (concluding that Appellees have the right "to compete for their major party's nomination for Supreme Court Justice by garnering support among the rank-and-file members").

From the perspective of each participant in the process, the burdens on the right to vote imposed by the convention system are slight. Voters have the

unfettered right to vote for delegates of their choosing who share their interests and values, and will advance them in the convention process. Elected delegates, in turn, have the right to select judicial candidates of their choosing. If voters do not share the values and interests of the party leaders, then they are free to run a slate of independent-minded delegates of their own choosing provided they can gather a modest 500 signatures within their AD. If elected, such delegates are free to vote independently of party leaders. An individual voters' opportunity to cast a ballot for his preferred delegate fully vindicates that voter's First Amendment rights irrespective of whether there is any realistic chance that the delegate himself will be elected, let alone have his preferred judicial candidate nominated at the convention. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724 (1974) (concerning ballot access for independent candidate for President).

B. The District Court Erred By Analyzing The Convention System From The Flawed Perspective Of A "Challenger Candidate"

In an attempt to save the district court's elusive definition of "challenger candidate" as one who lacks the support of "party leadership," SPA-56, Appellees turn the kaleidoscope and focus on county leader support. P-54. But this narrower definition fares no better.

The district court and Appellees fail to recognize that county leaders only support a candidate at the end of the nomination process, not the beginning. D-61-62. As Farrell described it, "[i]t's like picking a winner of a horse race after the

race." D-61. Under a more logical definition of a true challenger candidate, such as those candidates who lack county leader support at the outset, numerous challengers have succeeded in obtaining the nomination including sitting justices who testified at trial. D-29-34, 62. From the district court's skewed perspective, each of these justices ceased to be "challenger candidates" upon obtaining party support. P-27 ("[a]ll six Justices received the blessing of county leaders."). Further, there are 62 counties in New York and only 12 Judicial Districts, meaning that most districts have several county leaders and are unlikely to be controlled by a single autocrat. *See* JA-1588-99 (¶¶ 170-171).

C. The District Court Erroneously Relied Upon *Rockefeller* In Determining That The Convention Was Overly Burdensome

The district court also erroneously relied upon the *Rockefeller* decision in finding the burdens imposed by the convention system to be severe because of the number of signatures that a candidate must gather across multiple ADs. D-64-65. Appellees have all but conceded that *Rockefeller* – the only case involving an intra-party challenger candidate to which they cite – is inapposite here. D-65; P-51-52.[3] Notwithstanding *Rockefeller's* inapplicability to this case, Appellees invoke it, contending that "New York's judicial system is far more burdensome" than the

[3] Appellees' other cases, such as *Storer*, do not involve intra-party contests, but instead efforts by indigents, independents or minor party candidates to gain ballot access. P-51-53.

presidential primary system in *Rockefeller*. But their reasoning for branding New York's convention as burdensome is simply that it is not a primary. The following passage is telling:

> [the convention system] ensures that even candidates with strong popular support can never be considered directly by the voters for nomination: *there is no primary ballot*, and no caucuses where voters could nominate a Supreme Court candidate. In nominating candidates for New York's Supreme Court, a party's voters do not have any choice at all, ever. This is not a burden; this is an impassable barrier between a party's voters and candidates. *Voters are entirely shut out of the nomination process by design.*

P-52 (emphasis added).

III. THE DISTRICT COURT ERRED IN DETERMINING THAT NO CHALLENGER CANDIDATES CAN SUCCEED

The district court's determinations that challenger candidates never succeed and party leaders control the convention process are mixed questions of fact and law involving fundamental constitutional issues that the Supreme Court has repeatedly reviewed *de novo*. D-59-60 (citing, among other cases, *Lilly v. Virginia*, 527 U.S. 116, 136 (1999); *Ornelas v. U.S.*, 517 U.S. 690 (1996); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984)). Appellees attempt to distinguish these cases, arguing that they sought to "protect the constitutional rights of *individuals*, not to give a *state* a lighter burden." P-38-39 (emphasis in original). But in none of those decisions does the standard for independent review depend on whether the appellant is an individual.

As for Appellees' cases applying the clear error standard, not one case addresses constitutional determinations involving mixed questions of fact and law. P-39 (citing, *inter alia*, *Thornburg v. Gingles*, 478 U.S. 30 (1986) (decided under Voting Rights Act), and *Goosby v. Town Bd. of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999) (same); *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (factual question of discriminatory purpose); *Nicholson v. Scoppetta*, 344 F.3d 154, 167 (2d Cir. 2003) (factual question of knowledge of policy for establishing failure-to-train liability); *Cornwell v. Robinson*, 23 F.3d 694, 706 (2d Cir. 1994) (factual question of discriminatory treatment)). Indeed, as this Court noted in *Green Party of New York v. New York State Board of Elections*, one of Appellees' *own* voting-rights cases, "where, as here, plaintiffs seek vindication of rights protected by the First Amendment, we are obliged to make an *independent* examination of the record as a whole." 389 F.3d 411, 418 (2d Cir. 2004) (emphasis added).

Contrary to Appellees' protestations, the district court's determinations concerning the success of challenger candidates and party leader control over the convention process simply do not constitute findings of historical fact. P-40. If anything, they are pure legal issues, which are inextricably bound up with the district court's erroneous definition of a "challenger candidate."

Even if this Court reviews these determinations as factual findings, the district court's sweeping conclusions based on paltry and frequently contradictory evidence were clearly erroneous.

Appellees point to several purported "choke points" in the process which they claim have barred any challenger candidate from gaining the nomination. P-10-11. In adopting wholesale Appellees' asserted conclusions, the district court dismissed the abundant evidence that challengers – those without county leader support at the *outset* – can access the convention, lobby delegates and win the nomination.

A. Challenger Candidates Have Been Successful

1. Appellants' Witnesses Prove That Challengers Can Succeed

The district court erroneously discounted the experience of sitting justices who were able to obtain the nomination despite lacking county leader support at the outset. D-30-33. Appellees do not credibly dispute the force of these experiences, arguing only that "[t]wo of the six hailed from outside the First District" and "[t]hree of them were related by blood or marriage." P-27.

The district court wrongly attributed the nominations of Justices Gangel-Jacob and Alice Schlesinger to their husbands' positions as Democratic district leaders. SPA-25-26. In doing so, the district court too readily dismissed their testimony about their diligent campaigning to garner sufficient delegate support to

win without Farrell's backing, causing him to relent from opposing them. D-30-32. That their husbands could become local district leaders and help their candidacies is an important reminder that the elected party leadership itself is subject to change.

In the cases of Justices Freedman and Abdus-Salaam, the district court disregarded their testimony about how delegate support was the critical factor in their victories. D-31-32. Citing Freedman's testimony that she also lobbied district leaders, the district court jumped to the conclusion that district and county leaders are the decision-makers. SPA-27. But her testimony simply suggests that district leaders, many of whom are themselves delegates, appropriately have influence on their delegations.

Although the district court found that Abdus-Salaam "truthfully testified to her belief" that a groundswell of delegate support caused Farrell to support her candidacy, SPA-27 n.22, it relegated its discussion about her to a footnote, asserting that there were insufficient facts to conclude that she was correct. *Id.* Incredibly, having credited mountains of hearsay evidence proffered by Appellees, the district court unduly dismissed Abdus-Salaam's testimony as "no substitute for evidence." *Id.*

Similarly, the district court ignored the unrebutted testimony of Justices Sise and Lunn regarding their widespread efforts to win delegate support. D-32-34.

2. Appellees' Two Challenger Accounts Do Not Establish That Challengers Always Fail

Even the district court conceded that "there is not a rich tradition of challenger candidates." SPA-23. For all their talk of "13 days of hearings, 24 witnesses and more than 10,000 pages of evidence," Appellees could only muster two *sui generis* challengers – Lopez Torres and Regan. This statistically insignificant sample does not remotely support the conclusion that no challenger can ever succeed. P-52-53.

While Lopez Torres's experience is the centerpiece of the district court's opinion and Appellees' entire case, she is but a cautionary tale of a single candidate within a troubled judicial district, who poked her finger in the eye of a notorious county leader and a powerful assemblyman, yet still expected to win their support for the nomination. In truth, Lopez Torres ran a half-hearted campaign, yet still gained substantial delegate support. D-26-27.[4]

As for the testimony of Judge Regan regarding a standing agreement among county leaders on how to nominate justices, it was unreliable as a legal matter. Tr.

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[4] Both the district court and Appellees claim that Lopez Torres had popular support based on her success as a civil court candidate and her recent election as surrogate in Kings County. SPA-41-42; P-29. But these victories do not provide useful insight here. Due to the publicity of this case, she has become a "cause célèbre" with exceptional name recognition. Tr. 517 (Carroll). Further, she was elected for those offices from a smaller geographic region with very different demographics than the office of Supreme Court Justice.

355:17 – 356:7 (Regan). The district court received Regan's testimony about the alleged agreement solely for the non-hearsay purpose of its effect on him, including his "understanding of why he didn't get the nomination." Tr. 356:1-357:5 (Regan). Yet the district court credited as *fact* Regan's pure speculation about the existence of such agreement, and his belief that he was popular among voters and lost the nomination because he angered county leaders. SPA-45. Moreover, as discussed below, Regan's experience in successfully running his own delegates undermines the conclusion that the burdens to running delegates are insurmountable.

3. The District Court Ignored Evidence Of Delegate Independence And Accountability

The district court failed to address – and Appellees did not refute – the testimony of *both* Appellants' and Appellees' witnesses that, as delegates, they were never directed to vote for the county leader's candidate. D-22-23. In fact, a number of them testified that they actually voted *against* his wishes. D-23; Tr. 1583:18-25 (Kellner); Tr. 2088:12-18 (Connor); Tr. 1333:11 – 1335:4 (Ward). Yet the district court ignored this evidence and reached the sweeping conclusion that delegates throughout the state always ratify the county leader's choices, relying on exceedingly shoddy hearsay and anecdotal evidence. D-23-24.

The district court cited no evidence for its conclusion that district leaders, together with county leaders, select delegates, who purportedly have strong ties to,

or work for, them. SPA-19; *see also* SPA-15, 18-20. Nor did it cite any evidence showing that county leaders control district leaders. SPA-19. In an *ex post facto* effort to justify this groundless conclusion, Appellees proffer truly feeble evidence consisting of:

- Selective and misleading quotations of County Leader Farrell's deposition transcript in the 10-year old and unrelated case of *France v. Pataki*;
- Passages in sociology professor Dr. Michael Hechter's report, which are based not on personal knowledge but on the transcripts of the same 10-year old case; and
- An out-of-context quote of Kellner, the full passage of which contrasts running delegates upstate with competitive districts, describing the latter as "not that simple" and being "done in a collective fashion" rather than district leader-controlled. Tr. 1623:21 - 1624:14 (Kellner).

In contrast, Appellees and the district court ignore *unrebutted* first-hand evidence showing that party leaders do *not* select delegates:

- John Carroll's testimony that district leaders have no say in how his political club chooses delegates. Tr. 522:7-12 (Carroll).
- Dennis Ward's testimony that in the Eighth District, slates of delegates are typically run by local democratic committee members, not county leaders. Tr. 1325:23-1326:2.
- Doug Kellner's, Robert Levinsohn's, and Emily Giske's testimony that in their personal experiences, delegates are elected through an open and vigorously contested process at the political club level in the First District. Tr. 1551:2-4; 1556:20-22; 1557:20-25; 1558:6-16; 1558:22-25 (Kellner); Tr. 1942:13-21 (Levinsohn); JA-346 (Levinsohn Decl. ¶ 16); Tr. 1984:6-22; 1984:25 – 1985:6 (Giske).

4. The District Court Disregarded Evidence That County Leaders Respond To The Will Of The Delegates

Hoping to conjure images of Boss Tweed and Tammany Hall, Appellees declare that it is "no secret that the party leaders control the process." P-9.[5] Appellees offer, and the district court relied on, spotty evidence limited primarily to the First and Second districts, in determining that county leaders have near-absolute power.

Appellees and the district court primarily relied upon cherry-picked excerpts from the decade-old deposition testimony of Denny Farrell in *France v. Pataki.* SPA-24-35. But the district court wholly disregarded several passages of Farrell's testimony clarifying that he predicts rather than dictates the convention. As Farrell testified:

> The day I lose, I have to leave. But the definition of "win" is my determination, and as they said in the Korean War or the Vietnam War, we should declare a victory, throw a parade, and leave. . . . As long as I know the outcome, then I consider it a victory.

HE-6024 (Ex. 98 at 65:13-22).

Thus, Farrell gauges where the delegate support is converging – commonly known as vote-counting – and adjusts his preferences accordingly to "pick" the winner:

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[5] Some of their amicus support is less subtle in this respect. Koch Amicus Br. at 3 n.4.

> That means I've never . . . nominated a candidate, and lost a candidate on the floor. But . . . I don't always win, though I never lose, as in the Judge Ramos [example] . . . I have to control. Whatever occurs, I must never lose control, so in not losing control, I have to pick X instead of Y. I must always pick the winner.

HE-6153 (Ex. 98 at 195:14-22). In reality, the delegates do not ratify the county leader's choices; the county leader ratifies the *delegates'* choices. Thus, every Supreme Court nominee in the First District has Farrell's support at the *end* of the process.

Appellants elicited testimony at the hearing firmly corroborating Farrell's testimony in these passages. Kellner's testimony generally confirmed that Farrell responds to delegate votes and specifically that he could not generate enough delegate votes for Ramos to win. Tr. 1711:11-17; 1712:17-20 (Kellner); JA-367-68 (Kellner Decl. ¶¶ 28, 30). Moreover, the experiences of the four Justices in the First District, who testified at the hearing, fully corroborated Farrell's practices, as discussed above.

While these portions of Farrell's testimony were unrebutted, the district court ignored them effectively, making a credibility determination on a paper record. Even more egregious, the district court scolded *Appellants* for not calling

any county leaders at the hearing, even though the burden of proof fell squarely on Appellees, who failed to even notice any county leaders for deposition.[6]

As for the other districts across the State, apart from the First, Second, Fourth and Seventh, which are discussed elsewhere, Appellees failed to introduce competent and convincing evidence:

- Third District: Although the district court cites no evidence, SPA-42, Appellees invoke Judge Thomas Keefe. P-23. In fact, Keefe helped persuade delegates to block a cross-endorsement supported by two county chairmen. Tr. 876:6 - 87:8 (Keefe).

- Eighth District. Appellees rely on double hearsay by citing a newspaper article quoting a delegate. By contrast, Appellants elicited Dennis Ward's unrebutted testimony that Democratic county leaders tend to wait until the end of a "winnowing process" before supporting a candidate. Tr. 1324:1-17 (Ward).

- Ninth District: Appellees' sole witness, Benjamin Ostrer, testified that, as a delegate, he could always vote his conscience. Tr. 1423:17 – 1424:3 (Ostrer).

- Eleventh – Appellees failed to produce a single witness regarding the Eleventh District, relying instead on snippets from Dr. Hechter's report summarizing and quoting 10 year old deposition testimony. P-24.

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[6] Aside from failing to acknowledge that Appellants made this point at summation, Tr. 2402:20 – 2403:13; 2404:14-23 (Appellants' summation), the district court rejected "as no explanation at all" Appellants' statement that they may call the county leaders at trial. SPA-36. Of course, if the district court were so concerned that it did not hear from any of the 62 county leaders, instead of racing the parties through expedited discovery and a preliminary injunction hearing only to wait 14 months before issuing its Decision, it could have used that time period to conduct full discovery and hold a trial on the merits.

- Twelfth – Appellees similarly failed to proffer a single witness with first-hand knowledge about the Twelfth District. Appellees instead rely on a short anecdote from Henry Berger from over a decade ago. P-24.

As for the Fifth, Sixth and Tenth Judicial Districts, Appellees proffered no evidence whatsoever. And with regard to virtually every district, Appellees presented evidence for only one major party.

5. The District Court Ignored Evidence Of Coalition-Building

The evidence shows that support coalesces around candidates in the weeks leading up to the convention so that when the convention arrives, the likely nominees are known, just as with the national Democratic and Republican conventions. Tr. 1577:8-18 (Kellner). That explains why the conventions are relatively short affairs, even when they are contested, as all that is left to do is count the votes on the floor. Tr. 314:19 -315:1; 317:3 – 320:15 (Cain).

While the district court rejected Dr. Hechter's thesis about logrolling, there was undisputed evidence that this well-known political phenomenon does occur:

- Berger's account of building a coalition with the delegation in Bronx county. D-24.

- Ward's testimony about the successful effort to nominate a slate of candidates at the 2000 Democratic convention in the Eighth District. JA-380-81 (Ward Decl. ¶¶ 13-17).

- Giske's account about the grass roots effort to parlay the support of 10 delegates supporting Rosalyn Richter into a broader coalition that resulted in the nomination of a very diverse slate at the 2002

Democratic convention in the First District, including one female African American nominee – Troy Webber – who was able to win a floor fight. Tr. 1989:18 - 1993:16 (Giske).

- Justice Freedman's observation that in the First District, delegates form coalitions. Tr. 1757:18-25 (Freedman).

- Connor's testimony that, at the 2002 convention in the Second Judicial District, the county leader threw his support behind the delegates' consensus candidate. Tr. 2208:7-22 (Connor).

- Kellner's description of the coalition-building process that occurs between the screening panel reports and the convention. Tr. 1570:18 - 1571:1; Tr. 1574:14 - 1575:12; Tr. 1577:8 - 1578:7 (Kellner).

B. Challenger Candidates Can Run Delegates If They So Choose

Contrary to the district court's conclusion, Appellants have never conceded that running delegates in every district is impossible. SPA-18. Rather, Appellants have contended that a significantly easier path to the nomination exists – lobbying delegates, as the Legislature intended. Given this far simpler route, it is no wonder that few have attempted to run delegates.

But should a challenger take the road less traveled, the challenger would not need to run and win delegates across an entire judicial district, just enough to gain a majority. Tr. 1574:10 - 1575:4 (Kellner). And as Judge Regan showed by successfully petitioning enough slates of delegates to control the convention, a reasonably diligent candidate can succeed at this alternative approach. D-35.

IV. THE STATE'S IMPORTANT REGULATORY INTERESTS ARE SUFFICIENT TO SATISFY ANY BURDENS IMPOSED BY JUDICIAL NOMINATING CONVENTIONS

New York State's judicial convention system does not impose undue burdens on the right to vote and associate and is rationally related to achieving several compelling and/or legitimate state interests, including: (i) protecting the associational rights of political parties; (ii) promoting diversity, (iii) ensuring broad geographic representation; and (iv) protecting incumbents and otherwise ameliorating the ill effects of political campaigning on the judiciary. *See France v. Pataki*, 71 F. Supp. 2d 317, 333 (S.D.N.Y. 1999) (holding that New York State has "a substantial interest in maintaining the structure of judicial elections").

A. The District Court Disregarded The States' Compelling Interest In Preserving A Political Party's First Amendment Associational Rights

Neither the district court nor Appellees can deny that the State has a compelling interest in protecting the First Amendment rights of political parties and their members to band together to choose their standard bearers. P-56-57; SPA-66. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000) (the Supreme Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'") (quoting *Eu v. San Francisco County Democratic Cent. Comm.*,

489 U.S. 214, 224 (1989) (internal quotations omitted)); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986) (choosing the party's nominee is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.") (footnote omitted); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981).

The compelling interest in party associational rights must be factored into the flexible balancing test to assess whether the relative burdens of the New York's convention system are outweighed by the benefits of having parties choose their standard bearers. *See Bachur*, 836 F.2d at 842 ("[w]hen we balance the broad, encompassing [First Amendment] protection enjoyed by the [party] against the limited restriction on Bachur's right to vote for delegates, we can only conclude that [the party rule] does not unconstitutionally infringe on Bachur's right to vote."); *see also Burdick*, 504 U.S. at 433-34 ("the mere fact that a State's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.") (citation omitted).

Appellees argue that none of the Supreme Court safeguarding party's associational rights applies here because they "do not find or imply a right of party leaders to exclude the party's own members from the nomination process." P-56. Again, Appellees disingenuously invoke the "white primary" cases.

In *Jones*, the Supreme Court upheld a party's right to *exclude* non-members from its primary, while it upheld a party's right to choose to *include* non-members in its primary in *Tashjian*. The consistent strand in both cases is that the Court determined that the party's right to decide its own internal processes for selecting a nominee by adopting non-discriminatory rules outweighed the state's interests in having all of its citizens participate in that party's primary. While the "white primary" cases prohibit parties from discriminating against their members on the basis of race or other invidious criteria, these cases do not otherwise restrict a party's First Amendment interest in choosing its own nominee. *See Jones*, 530 U.S. at 573.

The district conceded that the convention system protects parties by preventing party-raiding, but determined that the convention is "by no means narrowly tailored to do so." SPA-67. But there is no support in the record for the district court's belief that a primary open only to registered voters of the party "would protect against raiding just as well." D-71-72; P-57; SPA-67.

Appellees contend that the state has a "narrower tool" at hand to prevent party raiding: namely, extending the Wilson-Pakula law to judicial elections. P-36. But Wilson-Pakula has not been effective in precluding raiding in higher visibility races. For example, one court found the Working Families Party was involved in unseating the Albany County District Attorney. *In re: Avella*, Index No. 5945/04

(S. Ct. Albany County Oct. 14, 2004) (Malone, J.). Allegations of party raiding were also reported in other recent cases. *See The Meddling Parties*, N.Y. Times, Oct. 2, 2005 at 13.

Appellees misleadingly argue that "[f]ar from preventing such raiding," the convention system promotes it, citing instances of cross-nominations. P-36; *see also id.* at 57. Cross-endorsements are the *voluntary* nomination of a member of another political party, while party raiding refers to the subversive efforts of a member of one party to interfere with another party's primary. Tr. 1335:25-1336:12 (Ward). The voluntary nature of the party's conduct was the crux of the Supreme Court's rulings in *Jones* and *Tashjian*.

B. New York's Convention Promotes Diversity On The Bench

Appellees have acknowledged that New York has an interest in promoting racial and ethnic diversity on the bench. P-58. Nevertheless, Appellees argue that conventions have "hindered efforts to produce a diverse bench" and contend that "[t]he overwhelming majority (92%) of minority justices statewide come from New York City, where ethnic and racial minority voters make up at least 50% of the voting-age population." P-59. Appellees rely, however, on a misleading statistical comparison. The appropriate pool of comparison should be eligible minority attorneys (*i.e.*, those admitted more than ten years), not all minorities of

voting age in the judicial district. *See e.g., Mallory v. Harkness*, 895 F. Supp. 1556, 1560 (S.D. Fla. 1995).

The appropriate statistics make clear not only that the judicial convention system promotes diversity in New York City, D-74-75, but also that it cannot be blamed for the lack of diversity upstate:

Judicial District	Total Number of Minority Lawyers	Total Lawyers	Percentage of Lawyer Population that is a Minority
3	81	2634	3.07%
4	9	1538	0.58%
6	19	1220	1.56%
7	40	2869	1.39%

HE-7667. These stark numbers should quiet Appellees' charge that it is "insulting" to assume that the pool of eligible minority candidates is too small to allow elections to reflect minority preferences. P-61. Factoring in that these districts are predominantly Republican, and minorities are disproportionately Democrats, Tr. 1177:8 - 1178:20 (Hechter); Tr. 2124:12-22 (Connor), it is hardly surprising that these districts do not have Supreme Court Justices of color.

Since 2001, the year that Appellees use for their statistical comparison, diversity has only increased. For instance, in the First Judicial District Convention of 2002, delegates renominated all incumbents, which included two female and

two minority Supreme Court Justices, then filled the remaining six seats with two Caucasians, two African-Americans, one Latino and one Asian-American, including four women. HE-2248.

In 2004, in the Ninth Judicial District where Appellees claim that "the convention system's failure to elect a single minority justice . . . refutes any argument that the convention system promotes diversity," the Democrats nominated Justice Bruce Tolbert, an African American jurist, who won the general election.[7]

Delegates do not "elect" justices, they nominate them. Appellees use of general election statistics then obscures the minority candidates that were nominated but lost in the general election, such as the three minorities who were nominated in the Eighth Judicial District but lost. JA-380 at ¶ 13; Tr. 1345:5-13 (Ward); HE-2678.[8]

C. New York's Convention Promotes The State's Interest In Ensuring A Geographically Diverse Bench

Appellees do not deny New York's legitimate interest in promoting geographical diversity on its bench. *See Pataki*, 71 F. Supp. 2d. at 333. Rather, Appellees contend that in judicial districts dominated by one county, that county

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[7] *See* http://hosted.ap.org/dynamic/files/elections/2004/general/by_state/ballot_other/NY.html?SITE=NYUTI&SECTION=POLITICS.

[8] *See also* http://www.elections.state.ny.us/elections/2005/8thjus05.pdf.

will have a grossly disproportionate share of its justices. P-63. Appellees assert that Erie County "has only 61% of the population, but 89% if the justices," *id.*, but fail to consider that under a primary, *no* justices would be elected from counties outside of Erie because Erie's majority would dictate the election outcome. Tr. 1340:14 – 1343:14 (Ward); JA-381-82 (Ward Decl. ¶ 19); JA-2045; *see also* Richmond County Bar Association *Amicus* Br. at 5; St. Lawrence County Bar Association *Amicus* Br. at 2.

D. New York's Convention Promotes Judicial Independence

As the testimony of the sitting Justices established, a primary for re-election poses a genuine threat to judicial independence by forcing judicial candidates to focus on fundraising and subjecting their rulings to political scrutiny. Tr. 1773:8-11; Tr. 1775:17 – 1776:23 (Freedman); Tr. 1495:5-12 (Sise); Tr. 1828:18 – 1829:10 (Gangel-Jacob); Tr. 1887:19 – 1888:6 (Abdus-Salaam); Dep. Tr. 116:22 (Lunn).

As the Feerick Commission noted, "primaries pose a great risk of attracting substantial increases in partisan spending on New York Judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary." D-18; *see also* Tr. 1542:16-20 (Kellner); Tr. 788:5-14 (Schotland). As one amicus has observed, the injection of money into judicial elections has a

corrupting influence that will further erode the public's confidence in the judiciary. Charles J. Hynes, District Attorney Kings County *Amicus* Br. at 5-6.

A primary would also pressure incumbents to render politically popular decisions – chilling a judge's willingness to make tough decisions. Tr. 1828:18 – 1829:10 (Gangel-Jacob). Even Appellees' expert admitted that he is "very concerned" that candidates would run on campaign platforms. Tr. 779:9-12 (Schotland).

E. In Any Event, New York's Judicial Convention Is Narrowly Tailored To Achieve All Of The State's Interests

As discussed above, New York's judicial convention system serves several compelling and legitimate state interests. Even if the convention were not viewed as narrowly tailored to preserve the state's compelling interest in protecting a party's associational rights, it should still withstand strict scrutiny because it alone is narrowly tailored to promote *all* of the above-identified state interests *in the aggregate*. *See United States v. Gomes*, 289 F.3d 71, 87 (2d Cir. 2002) ("narrow tailoring in strict scrutiny analysis does not contemplate a perfect correspondence between means chosen to accomplish a compelling governmental interest") (citation and internal quotations omitted).

V. THE DISTRICT COURT'S PROCEDURAL ERRORS WARRANT REVERSAL

Appellees try to excuse the district court's grave procedural errors, but they fall well shy of the mark. Labeling the court's stunning injunction a "temporary remedy" does not make it so. The damage would surely be permanent for any incumbent who lost his seat in a primary, to take one example.

Given the paucity of Appellees' evidence, the district court erred by granting injunctive relief across the State. Ironically, while it was Appellees' burden to prove that the system operated in an unconstitutional fashion statewide, Appellees simply cite the "size" of the record, and assert that if the record is incomplete, the fault lies with Appellants. P-69. Appellees presented an enormous body of hearsay and other inadmissible evidence, D-78, at a *preliminary* injunction hearing, and the district court took the unprecedented step of granting what amounts to *permanent* relief without giving notice that it intended to do so, and without holding a hearing on the appropriate remedy. Neither *Tom Doherty Associates v. Saban Entertainment, Inc.*, 60 F.3d 27, 33-35 (2d Cir. 1995), nor *Communication Workers of Am. v. NYNEX Corp.*, 898 F.2d, 887, 891-82 (2d Cir. 1990), stand for the proposition that where, as here, the district court grants what is essentially permanent relief altering the *status quo*, the court may do so without giving notice to the parties, based upon a hearing at which the rules of evidence do not apply.

VI. THE PRELIMINARY INJUNCTION IS OVERLY BROAD

The district court's remedy does not "respect existing state policies." P-65. After substantial public debate, the Legislature decided that party nominations for Supreme Court Justice should be made not by primaries, but by judicial district conventions. The district court thwarted that choice by invalidating the convention system in its entirety and ordering that nominations shall be by primary.

Appellees incredibly characterize this remedy as "modest." (P-66). Yet Appellees do not cite a single case in which a court has ordered the State to implement a specific election scheme. Indeed, in each of the cases relied upon by Appellees, the court left it to the *legislature* to remedy any constitutional flaws. *See Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1301 (8th Cir. 1995) ("Cognizant of our role as a federal court, we do not purport to advise Arkansas on the best means of rendering constitutional its election code: that decision rests with the sound judgment of the Arkansas Legislature."); *Hellebust v. Brownback*, 42 F.3d 1331, 1336 (10th Cir. 1994); *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 (7th Cir. 1991). While some of the remedies imposed in these cases may have been designed to encourage legislative action, these courts recognized that it is the legislature's prerogative – not a court's – to revise a statutory scheme in light of a court's decision. *See Califano v. Westcott*, 443 U.S. 76, 95 (1979) (Powell, J. concurring in part and dissenting in part) ("Now that we have held that

this statute constitutes impermissible gender-based discrimination, it is the duty and function of the Legislative Branch to review its . . . program in light of our decision and make such changes therein as it deems appropriate."). In arrogating that authority to itself, the district court intruded into the affairs of the state legislature. *See Association of Surrogates v. State of New York*, 966 F.2d 75, 79 (2d Cir. 1992). This intrusion is especially egregious because the regulation of local elections is a fundamental state power. *Tashjian,* 479 U.S. at 216 ("the Constitution grants to the States a broad power" to regulate elections); *see also* D-40 (citing cases).

In these circumstances, the courts owe particular deference to the State "lest the imposition by the court of its own broad changes designed to cure a constitutional infirmity not only offend the state's entitlement to respect but amount to an unnecessary overkill." *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986). As this Court has said, "[w]e have repeatedly been cautioned (1) not to use a sledgehammer where a more delicate instrument will suffice, (2) not to move too quickly where it appears that the state . . . will in its own way adopt reforms bringing its system into compliance with the Constitution, and (3) to give the state a reasonable opportunity to remedy a constitutional deficiency, imposing upon it a court-devised solution only if the state plan proves to be unfeasible or inadequate for the purpose." *Id.* (citations omitted).

The district court ignored these principles by ordering the most sweeping remedy available without giving the State any opportunity to remedy the problem. Rather than mandating a primary — or any other relief intended to "fix" the system — the court should have set aside any provisions of the statutory scheme that it found problematic and allowed the Legislature to consider the options available to remedy those flaws.

Even if the district court were permitted to disregard legislative authority and order its own remedy, the court's analysis was flawed because it ignored legislative intent — "the touchstone of any decision about remedy." *Ayotte v. Planned Parenthood*, __ U.S. __, 126 S. Ct. 961, 968 (2006). Appellees are correct that *Ayotte* directs a court to develop a remedy that is as unobtrusive as possible. Unobtrusiveness, however, can be determined only by evaluating remedial options in light of legislative intent. *Id.* at 969.

In this case, the Legislature intended for Supreme Court nominations for Supreme Court Justice to be made by convention, and several remedial options exist that would have done less violence to that central choice than the remedy ordered by the district court. Among other things, the court could have considered: (1) directing the Democratic and Republican parties to adopt rules that decrease the number of delegates; (2) enjoining the upcoming delegate election so that current delegates could continue to serve, thereby giving more time for candidates to lobby

and delegates to deliberate; and (3) ordering the political parties to allow candidates to address the convention. Feerick Report at 30-36. The district court also failed to consider whether a remedy could be tailored to address only those applications that it found unconstitutional. As discussed in Appellants' brief, the district court's findings were based on evidence pertaining to two political parties in a handful of districts. D-83. But, rather than determining whether it should craft an injunction that would be confined only to those unconstitutional applications, the court invalidated the convention system in its entirety, thus imposing the "strong medicine" of facial invalidation without properly considering whether the statutes "reach[] a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 769-70 (1982); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). At a minimum, the district court should have heard from the parties about these and any other alternatives before it imposed a primary.[9] By failing to do so, the court entered an injunction that

[9] Several *amici* agree. *See, e.g.*, Brief for *Amicus Curiae* Citizens Union of the City of New York at 7; Brief for *Amicus Curiae* Women's Bar Association of the State of New York at 2; Brief for *Amicus Curiae* Asian American Bar Association of New York at 2; Brief of *Amici Curiae* Boards of the Metropolitan Black Bar Association, Dominican Bar Association, Korean American Lawyers Association of Greater New York, and (in their individual capacity) James F. Castro-Blanco, Eliezer Rodriguez, and Fiordaliza A. Rodriguez, at 2-3.

improperly and unnecessarily intrudes on State legislative authority and abrogates legislative intent.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's Decision, or, in the alternative, vacate it and order the district court to fashion more appropriate relief on remand, and grant any other relief that this Court deems just and proper.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that according to the word count feature of the word processing program used to prepare this brief, the brief contains 10,493 words and complies with the type-volume limitations set in the Order of this Court dated April 7, 2006 and in Federal Rule of Appellate Procedure 32(1)(7)(B).

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