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

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PRELIMINARY STATEMENT

This is an appeal from the issuance of a preliminary injunction prohibiting the enforcement of New York's election law governing the nomination of major party candidates for the State's trial courts of general jurisdiction. In an order of breathtaking scope, United States District Judge John Gleeson declared unconstitutional New York's delegate-based convention system under the First Amendment and ordered that primary elections be held for major party candidates until the legislature adopts a new statutory scheme. The district court dismantled a carefully crafted electoral scheme that has operated effectively to select a highly regarded judiciary since it was enacted 84 years ago.

The district court's order suffers from several serious legal errors that warrant its reversal. *First*, the district court wrongly dismissed the general election ballot as legally irrelevant based solely on the court's conclusion that Judicial Districts generally are dominated by a single party. Not only is this factual premise flawed, but it fails to consider the totality of New York's election scheme, which provides a number of reasonable alternative paths to the ballot by which judicial candidates are elected.

Second, the district court erred by fashioning a federal constitutional right to "meaningful participation," *i.e.*, that "challenger candidates" have a reasonable chance of winning their party's nomination. But the Constitution is not a guarantor

of electoral success. The controlling Supreme Court cases, including *Classic* and *Bullock* on which the district court relied, do not remotely support a right to win or meaningfully participate, but simply require that all candidates have an unfettered right to enter the contest. Nor does the Constitution require that candidates be chosen by direct plebiscite. The role of the First Amendment in this context is very limited. If the Legislature chooses to hold primaries, as was the case in *Classic* and *Bullock*, then candidates have a right of access to the primary ballot. But, if a State chooses to select judges through general elections (as eighteen do), the First Amendment only guarantees access to the general ballot and will not mandate a primary. Here, where the New York Legislature chose an intermediate route of establishing a judicial convention, the proper role of the First Amendment is merely to ensure that candidates and voters have access to that nominating process. Given that the Supreme Court in *White* described the constitutionality of a party nominating convention as "too plain for argument," the district court went far beyond the bounds of the First Amendment in second guessing the choice of the State Legislature.

Third, the district court erroneously concluded that the burdens associated with the convention system are severe and applied strict scrutiny to invalidate the statutes. The crux of the district court's error is its construct of a "challenger candidate" who by definition has no chance of winning. Thus, the district court

made a mixed finding of fact and law that party leaders control each of the delegates. But the weight of the evidence showed that delegates are free to vote for candidates of their choice and many true challenger candidates not only compete but win in judicial conventions by appealing directly to delegates. Compelling examples are the sitting justices who testified at the hearing that they lacked party leader support initially but won the convention anyway. This opportunity is all the Constitution mandates.

Fourth, the district court erred by granting Plaintiffs the ultimate relief they sought in their complaint without holding a trial and adhering to the rules of evidence. By holding a preliminary injunction hearing without consolidating it with a trial on the merits, the district court based its ruling on an incomplete record, relied extensively on hearsay or otherwise inadmissible evidence and relaxed the burden of proof Plaintiffs had to meet.

Fifth, the district court's sweeping injunction is overly broad. Instead of carefully tailoring the relief to the constitutional defects that the district court identified (erroneously) in a way that would preserve as much of the Legislature's intent as possible, the district court simply eliminated the entire judicial convention scheme. This act of legislating from the bench was an abuse of discretion.

Ironically, the district court's order returns New York to the status quo in 1922, when the New York Legislature deliberately put an end to the "undignified

practices" of holding primaries for the office of Supreme Court Justice by replacing them with the convention system. The concern that judicial primaries in New York, like those in other large states, will be "noisy, nasty and costly" affairs that will undermine confidence in the judiciary, remains today. In addition, the State of New York has many other legitimate and indeed compelling interests in maintaining the convention system, including protecting the associational rights of parties and their members to choose candidates who will advance their collective goals and values, promoting diversity on the bench, and ensuring broad geographic representation. These state interests were more than enough to sustain the constitutionality of New York's judicial convention system. The district court's decision should be reversed and the State's judicial convention system should be restored.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action under 28 U.S.C. § 1331 because this case involves federal questions of constitutional law.

This Court has appellate jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1) because the district court's order granted preliminary injunctive relief to Plaintiffs-Appellees ("Plaintiffs" or "Appellees").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court fail to heed Supreme Court authority establishing that no First Amendment violation occurs where the electoral scheme provides alternative means of access to the relevant ballot?

2. Is there a right to "meaningful participation" in the nominating process for a major party, *i.e.*, a reasonable chance of winning, as the district court assumed, or merely at most a right to access whatever process a state has chosen for party nominations?

3. Did the district court err in concluding that New York's judicial convention process severely burdens the First Amendment rights of a theoretical "challenger candidate" who lacks any support within the party and in therefore applying strict scrutiny as opposed to rational basis review?

4. Did the district court err by effectively granting final relief on the merits to Plaintiffs based on a preliminary injunction hearing with a limited record and relaxed evidentiary standards without consolidating the preliminary hearing with a full trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2) and providing Defendants-Appellants ("Defendants" or "Appellants") with proper notice?

5. Did the district court abuse its discretion by issuing a mandatory injunction imposing a primary for judicial candidates, a remedy that is overbroad in relation to the purported constitutional defect?

STATEMENT OF THE CASE[1]

On March 14, 2004, Plaintiffs, individual voters and judicial candidates, brought this action against the New York State Board of Elections for declaratory and injunctive relief under 42 U.S.C. § 1983 challenging the constitutionality of New York State's convention system for the nomination of party candidates for State Supreme Court Justice and seeking permanent injunctive relief installing a primary system in its place.

On or about July 27, 2004, Eliot Spitzer, Attorney General of the State of New York, appeared as a statutory intervenor in defense of the challenged statutory provisions. Likewise, the New York County Democratic Committee, the New York Republican State Committee, the Association of Justices of the Supreme Court of the State of New York, the Association of Justices of the Supreme Court of the City of New York and Justice David Demarest, individually, and as President of the State Associations intervened as defendants.

On June 9, 2004, Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the New York State Board of Elections' enforcement of three

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[1] N.Y. Elec. L. §§ 6-106, 6-124 and 6-158 are reproduced in the Special Appendix and cited as "SPA-__." Documents in the Joint Appendix are cited as "JA-__." Volumes 1 through 9 of the Hearing Exhibits and Transcript Volumes are cited as "HE-__." The transcript is reproduced in Volume 10 of the Hearing Exhibits and Transcript Volumes and cited as "Tr. __."

New York State Election Law statutes, N.Y. Elec. L. §§ 6-106, 6-124 and 6-158,[2] on the grounds that these statutes deny citizens and candidates equal protection under the law, and violate the First and Fourteenth Amendments by imposing undue burdens on candidates seeking a political party's nomination for State

[2] Section 6-106 provides that "[p]arty nominations for the office of justice of the supreme court shall be made by the judicial district convention." SPA-80.

Section 6-124 provides, in relevant part:

> 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. . . . When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, . . . 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.

SPA-81. Section 6-158(5) provides:

> 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.

SPA-82.

Supreme Court Justice. As relief, Plaintiffs requested that the district court: (i) declare the New York Election Law statutes governing nomination of Supreme Court Justices unconstitutional, both facially and as applied; (ii) direct the New York State Legislature to repeal these statutes and pass new legislation within 90 days of the district court's ruling; and (iii) if the Legislature did not act, order that judicial candidates be nominated through a primary election.

Rather than direct a trial on the merits, the district court called for an evidentiary hearing on the motion for a preliminary injunction. The hearing began on September 13, 2004 and spanned 13 days, concluding on October 7, 2004. The court heard 14 witnesses and received more than 10,000 pages of documents into evidence. After the preliminary injunction hearing, the parties submitted four rounds of post-hearing findings of fact and conclusions of law. Summations were held on November 18, 2004, at which time, the motion was fully submitted.

Nearly fourteen months later, on January 27, 2006, the district court granted Plaintiffs' motion for a preliminary injunction in its Memorandum and Order Including Preliminary Injunction (the "Decision").[3] The district court determined that Plaintiffs were likely to succeed on the merits of their claim that New York State's judicial convention system violates the First Amendment. Specifically, it

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[3] The opinion of the district court is reported at 411 F. Supp. 2d 212 (E.D.N.Y. 2006) and has been reproduced in SPA-1-79.

concluded that major party leaders, not the delegates or voters, control who becomes a Supreme Court Justice. The district court further determined that the petitioning requirements for delegate, the sheer number of delegates, as well as the fact that the delegates are elected from local Assembly Districts create insurmountable barriers that preclude a candidate without any party support from successfully running a sufficient number of delegates pledged to his candidacy to prevail at the convention.

As an interim remedy, the court swept aside the judicial nominating convention system, enjoining enforcement of N.Y. Elec. L. § 6-106 and use of the procedures set forth in N.Y. Elec. L. § 6-124, and ordered that nomination of Supreme Court Justices shall be replaced by primary election.

Appellants filed their notice of appeal on February 7, 2006.

On March 3, 2006, the district court granted Appellants' motion for a stay pending appeal, ordering that its Decision would not take effect until after the 2006 general election.

On March 14, 2006, this Court entered an order expediting the appeal.

STATEMENT OF FACTS

I. OVERVIEW AND HISTORY OF NEW YORK'S DELEGATE-BASED JUDICIAL CONVENTION

A. New York's Selection Process Is Permissibly Unique

Overview Of Convention

The United States Constitution does not prescribe any particular method by which the states must choose their judges. Rather, the Constitution deliberately leaves to the states, as "laboratories of democracy," the right to provide for the selection of judges in the manner of their choosing. *See* Tr. 740:21 - 741:23 (Schotland). Thus, there exists a wide array of different judicial selection systems across the country, including pure appointments, partisan elections, non-partisan elections and hybrid systems, none of which is unconstitutional *per se*. Tr. 742:12 - 744:23; JA-275-76 (Schotland Decl. ¶¶ 10-14).

Like many other states, New York's judicial selection system contemplates a partisan political process whereby enrolled voters within the Judicial Districts elect Justices from among candidates nominated by local political parties.[4] In New

[4] New York State Election Law defines political "party" as "any political organization which at the last preceding election for governor polled at least 50,000 votes for its candidate for governor." N.Y. Elec. L. § 1-104(3). In New York, there are currently five recognized parties: (i) the Democratic Party; (ii) the Republican Party; (iii) the Conservative Party; (iv) the Independence Party; and (v) the Working Families Party.

York, the State Constitution provides for the election of its general trial level judges known as Justices of the State Supreme Court. *See* New York State Constitution, Art. VI § 6; SPA-81 (NY Elec. L. § 6-124); N.Y. Jud. L. § 140. Any New York State resident, who has been licensed to practice law in the State of New York for ten or more years, is eligible to run for Supreme Court Justice. N.Y. Elec. L. § 1-104(3).

But unlike most states, New York did not choose direct primaries as the vehicle by which parties select their standard bearers for this office. Instead, the Legislature chose to adopt a process whereby the nominating function is delegated to a locally elected body of representatives called delegates, who gather at a convention to select the Supreme Court nominees for their party. *See* JA-365 (Kellner Decl. ¶ 19). New York Election Law § 6-106, codifying this form of representative democracy, mandates that all parties nominate their candidates for Supreme Court Justice at a judicial convention held in each district where there are one or more vacancies for Supreme Court, and requires that it convenes in the third week of September. *See* SPA-82 (NY Elec. L. § 6-158(6)).

Function Of Judicial Delegates

A judicial delegate serves a specific function within a political party structure – to nominate candidates for Supreme Court Justice to run on the party's

ticket. Tr. 151:16-19 (Berger).[5] The delegates are elected at a party primary in September from smaller geographic areas within each Judicial District, called Assembly Districts ("ADs") – the same political subdivisions by which New Yorkers elect their representatives to the State Assembly. *See* N.Y. Elec. L. § 6-160(2); Tr. 1556:12-19 (Kellner); JA-347 (Levinsohn Decl. ¶ 19); SPA-81 (N.Y. Elec. L. § 6-124). Although the determination of the number of delegates for each AD is governed by each party's internal rules, New York Election Law requires that the allotted number be substantially proportional to the percentage of total votes cast statewide for the party's gubernatorial candidate in the last election. *Id.*

There are no significant barriers to running for judicial delegate. Any enrolled member of a recognized political party residing within the Judicial District may run for delegate. The only requirement necessary to get on the primary ballot is to gather 500 valid signatures from enrolled party members in the AD within the petitioning period in the spring. *See* N.Y. Elec. L § 1-334(4); Tr. 1554:3-12 (Kellner).[6] In practice, because delegate is a party position, local community-based organizations, which actively participate in the party, such as political clubs

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[5] An alternate delegate serves the delegate function when a delegate is absent from the convention. *See* SPA-81 (N.Y. Elec. L. §6-124).

[6] Any enrolled member of the party residing anywhere in the State can carry petitions on behalf of a delegate candidate or slate of candidates. Tr. 194:4-11 (Berger).

or party committees, are involved in endorsing and putting forth candidates for these offices. Tr. 1557:20-25 (Kellner); Tr. 1984:6 – 1985:6 (Giske); JA-346 (Levinsohn Decl. ¶ 16). But any rank-and-file party member or group of members that is organized around a cause can participate in these organizations or run for the office of delegate independently. Tr. 1554:3-6 (Kellner); Tr. 168:12-18 (Berger).

The judicial convention is similar to the national party conventions that are used to select presidential candidates. The principal difference between the two is that delegates to the national conventions fill only one position with one candidate, while New York's judicial delegates are generally called upon to fill multiple vacancies from a broad array of candidates. For that reason alone, judicial delegates in New York are, by design, typically not pledged to a particular candidate. Tr. 585:21 – 586:1; 586:18-24 (Carroll).

Alternative Means Of Access To The Ballot

Although the judicial convention is the exclusive means for obtaining a major political party's nomination, individuals aspiring to become a Supreme Court Justice have alternative means of accessing the ballot.[7] In this case, as even

[7] In addition to this statutory structure, many Judicial Districts use a screening panel to evaluate a candidate's qualifications for Supreme Court. Not required by statute, these panels are voluntary in nature. Tr. 1698:14-18 (Kellner). Political parties in some Judicial Districts also use bar associations to screen their

Footnote continued on next page

the district court acknowledged, Plaintiffs have more than adequate access to the general election ballot through several means. The challenged statutory scheme provides any minimally qualified candidate with the opportunity to compete for their party's nomination, access judicial delegates, and have their name placed in nomination and their candidacy voted upon at the judicial nominating convention. In addition to seeking the nomination of a major political party, New York Election Law affords any would-be judicial candidate the option of: (1) petitioning directly onto the general election ballot under N.Y. Elec. L. § 6-138 by gathering 4,000 signatures (or 3500 outside of New York City); (2) running as a minor party candidate under N.Y. Elec. L. § 1-104 and 6-106; or (3) having a vote cast for them as a write-in candidate under N.Y. Elec. L. §§ 7-104.7 and 7-108.8.

The General Election

The last step of the selection process for Supreme Court Justice is the general election in November. On election day, all registered voters in New York State have an opportunity to vote for the office of Supreme Court Justice within their respective Judicial Districts. The district court presumed that a single party dominates each Judicial District, and therefore, races for Supreme Court are uncompetitive. In fact, as the evidence showed, more than 50% of the general

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candidates. *See* HE-6806 (Court Ex. ZZ1 – Deposition Transcript of Justice
Footnote continued on next page

elections for the Supreme Court are contested. *See* JA-254 (Cain Decl. ¶ 16). The competitive landscape can also shift over time. For example, Nassau County, not long ago a Republican bastion, is today Democratically controlled. Tr. 1690:21 – 1691:14 (Kellner); Tr. 2177:22 – 2178:1 (Connor). Even in a district dominated by one party, contests can and do arise, such as the 1993 race in the First District where the Republican party fielded judicial candidates in the hopes of capitalizing on the mayoral race which seated Rudolph Giuliani. Tr. 1880:20 – 1881:7; 1881:18-24 (Abdus-Salaam).

Most recently, in the 2005 general election in the Ninth Judicial District – a district in which Plaintiffs' witness Ostrer claimed no Democrat had won since 1996 and that the district court concluded was under Republican control – two Democrats won Supreme Court seats in contested races. *Compare* JA 240 (Ostrer Decl. ¶ 13) *and* SPA 46 *with* 2005 Election Results for Supreme Court Justice Races in the Ninth Judicial District.[8]

B. The Legislature Deliberately Adopted The Judicial Convention System After A Failed Nine-Year Experiment With Primaries

Conventions have a long and rich history dating back to the 19th century. In 1846, New York amended its Constitution to provide for popular election of

Footnote continued from previous page
Robert Lunn ("Lunn Dep.Tr.") at 120:16 – 121:11).

[8] Available at http://www.elections.state.ny.us/elections/2005/9thjus05.pdf.

Supreme Court Justices. N.Y. const. of 1846, art. VI, § 12. Without statutes providing otherwise, a party's judicial candidates were chosen by the same method as other candidates for State office, which, at the time, was by party convention.

In 1911, the Legislature suspended the convention process for nominating judicial candidates in order to experiment with a primary system. JA-364 (Kellner Decl. ¶ 15). Primaries, however, came under fire for creating the risk of party control and influence over judicial selection, as well as conditions for wealthy individuals to buy the bench. *See The State Convention*, New York Times (May 1, 1917) (editorial urging restoration of nominating conventions for candidates for State officers and judges); *Miller Declares Primary a Fraud*, New York Times (Oct. 23, 1920) (candidate for governor calls for restoration of nominating conventions for State officers and judges); Tr. 1541:24 - 1542:20 (Kellner); JA-365 (Kellner Decl. ¶ 18); 24 ABCNY Reports #228 at 7-8.

As Appellants' expert in the history of judicial conventions and a current Commissioner of the New York State Board of Elections, Douglas Kellner, testified, after nearly a decade of debate and consideration of various proposals, in 1921 the Legislature restored the use of conventions for the nomination of candidates for Supreme Court Justice.[9] Tr. 1542:16-20 (Kellner); JA-365 (Kellner

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[9] The Legislature's decision was largely motivated by New York's bar associations, such as the Association of the Bar of the City of New York ("City

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Decl. ¶ 19); *see also* Laws of 1922, ch. 588. Thus, the New York Legislature made a deliberate and reasoned choice to employ nominating conventions instead of primaries to select candidates for the office of Supreme Court Justice.

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

Most recently, on February 2006, the New York State Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"),

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Bar"), which held the position that if partisan elections of judges were to continue – as required by the State Constitution – then nomination by party convention was preferable to direct primaries. *See* Tr. 1541:24 – 1542:20 (Kellner); JA-365 (Kellner Decl. ¶ 19); HE-6701 (Ex. 113 *Annual Report of the Committee on the Judiciary for 1919*, 23 ABCNY Reports #225 at 136 (1920)); HE-6704-05 (Ex. 114, 4 ABCNY Reports #228 at 294-95 (1921)); 24 ABCNY Reports #228 at 7-8; *see also* 24 ABCNY Report #228 at 290-91 (noting that primaries were simply a means of confirming the choices of party leaders at closed meetings).

issued its final report, concluding, as the Legislature did in 1921, that conventions are preferable to primaries for nominating candidates for the office of Supreme Court Justice. *See* Commission to Promote Public Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York at 3 (February 6, 2006) (the "Feerick Report").[10] As the Feerick Commission noted, "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary." *Id.* Nominating conventions, on the other hand, "facilitate access to a place on the ballot for non-majority candidates . . ., allow members of geographic and other minority factions to build coalitions to win a spot on the ballot[,] . . . and allow candidates to avoid the high cost of conducting primary campaigns in judicial districts." *Id.* at 30. Accordingly, the report concluded, "without public financing of judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections." *Id.* at 11; *see also* Judith S. Kaye, Chief Judge of the State of New York, *The State of the Judiciary* 6 (2006) (noting that "[n]othing is more destructive of public confidence in the impartiality of judges than the need to raise

[10] Available at http://www.nycourts. gov/reports/FerrickJudicialElection.pdf.

large amounts of money");[11] John Caher, *Cardozo: Fix Party Conventions to Fight Voter Non-Participation*, New York Law Journal (Mar. 27, 2006) (reporting that the New York City Mayor and Corporation Counsel support reformation of the judicial nominating convention system for the selection of Supreme Court Justices).

II. NEW YORK'S DELEGATE-BASED CONVENTION SYSTEM IS OPEN, DEMOCRATIC AND ACCOUNTABLE TO THE STATE'S CITIZENS

The district court's conclusion that the judicial convention is unconstitutional rests largely on its mixed finding of fact and law that, across the entire State, "party leaders" control the judicial selection process by handpicking judicial delegates who lack independence, and dictate how they vote at the convention. *See* SPA-3.[12] In fact, the evidence adduced at the hearing shows that candidates and voters alike can freely participate in the convention system.

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[11] Available at http://www.nycourts.gov/admin/ stateofjudiciary/soj2006.pdf.

[12] Because the district court did not define the term "party leaders," its conclusion that "party leaders" control the process is elusive. The district court's definition of "party leader" apparently refers primarily to county leaders and district leaders. The court defines county leaders as the officials who exercise the executive authority over their political party in the relevant county. District leaders, who are elected every two years in their local AD, are their party's local representatives charged with leading their party's activities within their AD. Tr. 1235:18 – 1236:8 (Schiff).

A. Delegates Are Elected At The Grass Roots Level Rather Than Handpicked By Party Leaders

Although the evidence on the election of judicial delegates was limited to a handful of Judicial Districts, it showed that the process for selecting delegates typically begins at the grass roots level within each party, which is embodied by political clubs in New York City and County Committees elsewhere in the State.[13] Tr. 1552:11-13 (Kellner); Tr. 1843:2-11 (Gangel-Jacob) (describing clubs as kernels of community activism); Tr. 522:7-12 (Carroll) (testifying that his district leaders have no say in how his political club chooses delegate candidates). Competition for delegates frequently occurs within these grass roots political organizations, and hotly-contested delegate races are resolved at the ballot box on primary day, albeit less frequently. Tr. 1551:2-4; 1556:20-22; 1557:20-25; 1558:6-16; 1558:22-25 (Kellner); Tr. 1984:6-22; 1984:25 – 1985:6 (Giske); Tr. 1942:13-21 (Levinsohn); JA-346 (Levinsohn Decl. ¶ 16); HE-7466 (Ex. QQ, Campaign literature for Alan Flacks). Club or party support is not essential for interested candidates to run and win seats as delegates, as evidenced, for example, by the repeated successes of Alan Flacks and William Allen in running for delegate without the support of political leaders. Tr. 1559:17 – 1560:11; 1564:1-8 (Kellner);

[13] The evidence showed that clubs have low or no barriers of entry. Tr. 2084:1-20 (Connor); Tr. 1552:11 – 1553:1 (Kellner); Tr. 1237:10-16; 1314:8-18 (Schiff); Tr. 1842:21 – 1843:11 (Gangel-Jacob).

Tr. 2021:19 – 1022:4; 2022:15-18 (Allen). Notably, with perhaps the exception of one witness, no one testified based upon personal knowledge that any delegate was handpicked by party leaders. Tr. 235:3-14 (Berger); Tr. 521:3-22; 540:13 – 541:7 (Carroll); Tr. 1261:25 – 1262:6 (Schiff); Tr. 1325:24 – 1326:2 (Ward); Tr. 1583: 10-13; 1583: 18-20 (Kellner); Tr. 1986:25 – 1987:2; 1993:17-19 (Giske); Tr. 1947:11-20 (Levinsohn); Tr. 2036:10-21 (Allen); Tr. 2088:12-22 (Connor). In fact, three Appellees – John Carroll, Susan Loeb, and David Lansner, have themselves run for delegate and won. Tr. 445:9-19; 515:1-25 (Carroll); HE-7559 (Ex. III Deposition Designations of David Lansner at 4: 13-25).

While candidates for delegate often run unopposed, the infrequency of contested delegate races does not mean that the process is undemocratic. Tr. 308:13-20 (Cain). For example, the Fund for Modern Courts in its study entitled the "The Illusion of Democracy" observed that intraparty contests for civil court are infrequent, occurring only 28 percent of the time, despite the existence of open primaries. HE-6572 (Ex. 111 at 2). As Plaintiffs' expert, Professor Bruce Cain, explained, "low visibility" posts, such as judicial delegate, are infrequently contested because of their low profile. Tr. 307:6-10 (Cain). Nevertheless, as Professor Cain has observed, officers holding these posts tend to be responsive to the interests of voters because voters can vote out of office underperforming officials when they are roused to do so. Tr. 307:17 – 308:12 (Cain). There was

substantial evidence that voters contested delegate elections for a variety of reasons, including: (i) the political reform movement in the 1970's in Manhattan; (ii) an effort to overthrow a party leader, such as Erie County Chairman Pigeon in the Eighth Judicial District in 2000; (iii) a battle among rival political clubs, as happens nearly every year in Manhattan; and (iv) an effort to promote a particular constituency to the bench. Tr. 1551:8-22 (Kellner); Tr. 1904:6-10 (Levinsohn); Tr. 2073:4-16 (Connor); Tr. 1333:11 – 1335:9 (Ward); Tr. 2085:8-19 (Connor); Tr. 1561:6-10; 1561:15-18 (Kellner); JA-367 (Kellner Decl. ¶ 26); Tr. 1567:3-9 (Kellner); Tr. 1943:21 – 1944:1 (Levinsohn); Tr. 1315:1-18 (Schiff). The evidence demonstrated that delegate elections are contested when rank-and-file party members are roused to action.

B. Judicial Delegates Are Independent Representatives Of Enrolled Party Voters

Delegates are independent agents with the ability to exercise their own discretion. Tr. 881:6-11 (Keefe) (admitting that under New York Election Law, delegates can vote for any candidate they want). All of the witnesses who served as delegates, including Plaintiffs' own witnesses, testified that no party leader ever instructed, much less coerced, them to vote for a particular judicial candidate and they always could nominate the candidate of their choice. Tr. 235:3-14 (Berger); Tr. 521:3-22; 540:13 – 541:7 (Carroll); Tr. 1261:25 – 1262:6 (Schiff); Tr. 1325:24 – 1326:2 (Ward); Tr. 1583: 10-13; 1583: 18-20 (Kellner); Tr. 1986:25 – 1987:2;

1993:17-19 (Giske); Tr. 1947:11-20 Levinsohn); Tr. 2036:10-21 (Allen); Tr. 2088:12-22 (Connor). Indeed, a number of these witnesses, testified that they had voted against the county leader's preferred candidate. *See, e.g.*, Tr. 1583:21-25 (Kellner); 1333:11 – 1335:4 (Ward). Plaintiffs' expert, Dr. Cain, also acknowledged that a "[d]elegate is free to do as he or she sees fit." Tr. 310:19 (Cain).

The district court relied upon the testimony of three witnesses – Margarita Lopez Torres, Henry Berger and State Senator Martin Connor – for its conclusion that delegates lack independence. Margarita Lopez Torres testified that she overheard an assembly member – who was not identified as a district leader – tell some delegates at the 2003 judicial convention in the Second District that they should vote for a particular candidate. SPA-19 n.13; Tr. 620:25 – 621:25 (Lopez Torres). Nothing in the record corroborated this self-serving hearsay statement. Even assuming its truth, there is no reason to conclude that the single assembly-member's statement was anything more than a recommendation. More tellingly are Lopez Torres' own actions in writing campaign letters to delegates soliciting their support which demonstrate that even she believed delegates are capable of being persuaded. *See* HE-6860-61 (Ex. K, Lopez Torres campaign literature); Tr. 616:17 – 618:2 (Lopez Torres).

Plaintiffs' expert, Henry Berger, claimed that, as a district leader over *twenty years ago*, he "instructed" delegates in his political club to vote for a Bronx judicial candidate that they did not particularly like. SPA-19 n.13; Tr. 233:22 – 235:8 (Berger). The evidence showed, however, that Berger and the delegates from his political club voted for the Bronx candidate so that the candidate that he and his fellow club members supported, Martin Stetcher, would receive the Bronx delegates' backing. Berger's account is simply an example of logrolling, and it appears that the delegates participated in this effort to gain mutual advantage.

Senator Connor testified that at a judicial convention in 2002, which he convened, he refrained from voicing his objection to the nomination of a judicial candidate that he personally did not believe the party should support. SPA-20. He did not publicly object because his chief aim and responsibility as State Senate Minority Leader that year was to unify the Democratic ticket because the Republicans were mounting a serious challenge against a State Senator from Brooklyn. Tr. 2263:12-24 (Connor). But most importantly – as Connor explained – the reason that the party leadership chose the candidate that he opposed was because she was the second choice of all the delegates – *i.e.*, the compromise candidate. Tr. 2208:7-22 (Connor).

C. County Leaders Do Not Dictate The Outcomes Of Conventions

County leaders do not dictate the outcome of conventions. Like many shrewd political leaders, they publicly support candidates only after it is clear they are likely to win based on who is amassing the most delegate support. Tr. 1580:20 – 1581:21 (Kellner); *see also* Tr. 1245:2-12; 1292:10-21 (Schiff); Tr. 1324:6-10 (Ward) (testifying that party chairperson's support comes late in the process).

New York County Democratic Leader Herman Farrell's deposition testimony in *France v. Pataki* ten years ago showed that he adjusts his preferences based on where the delegate support is converging. HE-6149-154 (Ex. 98 at 191:2 – 196:8). Farrell then tries to present a "package" of candidates with the most support, taking into account diversity and fairness to all parts of the county. Tr. 1663:15-22 (Kellner); *see also* Tr. 1286:20 - 1287:11; 1292:22-1293:7 (Schiff). But he testified he cannot dictate the outcome of the convention. As Farrell described it over a decade ago, "[i]t's almost like picking a winner of a horse race after the race." Tr. 1663:15-22 (Kellner). For example, Farrell personally supported but could not get nominated, Justices Charles Ramos, Herman Cahn, and Rolando Acosta, when they first sought the Democratic nomination for Supreme Court Justice. Tr. 1581:9 – 1582:9; 1659:4-20; 1661:17 – 1662:7 (Kellner). Farrell had to withdraw his support for these candidates because they did not have sufficient delegate support. *Id.; see also* HE-6152-6153 (Ex. 98 at 194:8-17; 195:14-22).

Further, as discussed below, Justices Phyllis Gangel-Jacob, Alice Schlesinger and Sheila Abdus-Salaam each lacked the support of Farrell. Yet, through hard work, each one garnered sufficient support to cause Farrell to change his position.

As with Farrell, former Democratic county leader of the Kings County Democratic Committee, Clarence Norman, had to respond to the will of the delegates. Senator Connor testified that Norman could not block the nomination of a judicial candidate who had majority support among the delegates. Tr. 2104:25 – 2105:4 (Connor). The evidence at the hearing showed that candidates can succeed in winning the nomination without the party's imprimatur. For example, Plaintiffs' own witness, John Carroll, testified that several "insurgent candidates" have been nominated and elected in the Second Judicial District, including Justices Michael Pesce, Joseph Bruno, Al Tomei, Lawrence Knipel and Frank Barbaro. *See* Tr. 488:6 – 489:12 (Carroll).

While lead Plaintiff Lopez Torres claimed that Norman and other party leaders blocked her efforts to obtain the nomination, the evidence showed that Lopez Torres made a minimal effort to build delegate support for her candidacy. *See* Tr. 609:13 – 610:3 (Lopez Torres); Tr. 527:6-9; 527:23 – 528:2 (Carroll). She failed even to attend the convention in 2002, where her name was put in nomination for Supreme Court Justice and she received 25 delegate votes. Tr. 612:9 – 615:23 (Lopez Torres); *see also* Tr. 512:4-6 (Carroll) (testifying that Lopez

Torres had the support of all the delegates in the 44th AD in Brooklyn). Senator Connor and Commissioner Kellner opined that she could have parlayed that support into a wider base of delegate support in her bid for the nomination. Tr. 1664:5-18 (Kellner); Tr. 2150:6 – 2151:20; 2155:17-25 (Connor).

Further, as a candidate for civil court in 2002 and simultaneously for Supreme Court, Judge Lopez Torres collected 30,000 signatures across Kings County, considerably more than the 10,500 signatures needed to place delegates on the ballot in 21 of the 24 ADs in the Second Judicial District. HE-7675-85 (Ex. R-S, chart describing petitions).

There was virtually no evidence about the role that county leaders play today in judicial conventions outside of the Democratic Party in the First and Second Districts. The only other evidence concerned the Republican races in the Fourth, Seventh and Ninth Districts and Democratic races in the Eighth District. *See* Tr. 1323:15-23; 1333:11 – 1335:4 (Ward); Tr. 1490:6 – 1492:2 (Sise); JA 240-44 (Ostrer Decl. ¶¶ 13-27); HE-6801-02 (Lunn Dep. Tr. 101:25 - 102:12). But this evidence does not support the district court's conclusions. For example, Dennis Ward testified that in the Eighth District, county leaders do not direct delegates how to vote. Tr. 1325:24 – 1326:2 (Ward). And as discussed below, Justices Sise and Lunn campaigned hard to gain the support of delegates necessary to win the nomination. JA-128-29 (Sise Decl. ¶ 9); Tr. 1487:3 – 1488:8; 1493:3-15; 1498:15

– 1499:16; 1500:1 – 1501:1; 1502:25 – 1503:8; 1503:21 – 1504:4 (Sise); *see also* HE-6784-6790, 6794, 6803, 6805 (Lunn Dep. Tr. 31:21 – 46:14; 49:22 – 50:14; 53:21 – 56:15; 72:24 – 73:13; 106:5 – 109:25; 115:14 – 116:11).

D. Logrolling Is A Highly Democratic Process

When there are multiple vacancies for Supreme Court and more candidates than there are vacancies, delegates or blocs of delegates engage in logrolling or coalition-building to arrive at a slate of candidates with enough support to win the party's nomination. There was ample evidence at the hearing of this dynamic process. Tr. 1868:22 - 1869:8 (Abdus-Salaam); Tr. 1757:18 - 1758:3; 1766:2-11 (Freedman); Tr. 235:3-8 (Berger).

E. The Judicial Convention Is The Culmination Of A Dynamic Democratic Process

The fact that conventions themselves are relatively brief and frequently non-dramatic does not mean that the process is undemocratic. Tr. 314:19 - 315:1 (Cain). The fierce contests among candidates for the nomination are often waged in the pre-convention period and are often resolved before the convention opens, much like national party conventions for presidential candidates. Tr. 1566:10-14 (Kellner). As a result, the conventions themselves are typically uneventful and the minutes record the nominations as unopposed or affirmed by unanimous voice vote. JA-344 (Levinsohn Decl. ¶ 12); JA-387 (Giske Decl ¶ 12); Tr. 1577:13-20 (Kellner); Tr. 2092:10 – 2093:21 (Connor). Nonetheless, there have been a number

of floor fights at conventions, including the 2000 Democratic convention in the Eighth District, the 2002, 2003 and 2004 Democratic conventions in the Second District, and the 1993 Democratic convention in the First District. HE-6832-41 (Ex. G Minutes for 2002 Democratic Judicial Convention for the Second Judicial District); Tr. 2113:22 - 2114:5 (Connor); *see also* Tr. 1880:20 - 1881:7 (Abdus-Salaam); Tr. 1758:4-9 (Freedman); Tr. 1578:8-10 (Kellner).

III. CANDIDATES HAVE FULL ACCESS TO THE CONVENTION

A. Candidates Have The Ability To Successfully Lobby Delegates

A candidate has the ability to campaign for the nomination well beyond the two to three week window between the primary and the convention in September. The evidence showed that candidates campaign, over a long nine-month period during which they appear at community events, breakfasts, and political functions attended by rank-and-file members of the party, party leaders and potential delegates. Tr. 1308:22 – 1309:6; 1309:18 - 1310:6 (Schiff); Tr. 1362:11-15 (Ward); *Code of Judicial Conduct*, 22 NYCRR Part 100 at § 100 Q; Tr. 1572:12-18 (Kellner); HE-6797 (Lunn Dep. Tr. 83:14-24); Tr. 1773:12-24; 1754:5 – 1755:13; 1760:23 – 1763:25 (Freedman). The names of candidates running for delegate and alternate delegate are publicly available and easily accessible by July, and candidates access those lists in order to contact delegates. Tr. 1785:23-1786:17 (Freedman); Tr. 1572:4-8 (Kellner); s*ee also* Tr. 507:15 - 509:16 (Carroll). In any

event, successful candidates uniformly testified that they are not only comfortable operating within the time frame, but actually prefer it to an extended campaign period. Tr. 1814:21 – 1815:13 (Gangel-Jacob); Tr. 1879:4 – 1880:6 (Abdus-Salaam); *see also* Tr. 1672:20 – 1673:13 (Kellner).

Candidates also have the ability to successfully lobby delegates. The six sitting Justices in both upstate and downstate districts who testified demonstrate how through hard work and perseverance, they were able to gain delegate support, win the nomination, and then win a Supreme Court seat.[14] The testimony of the Justices on how they ascended to the bench tells a uniform story of earnest campaigning to win delegate and popular support.

Justice Phyllis Gangel-Jacob: Before ascending to the Supreme Court, Justice Gangel-Jacob challenged and defeated the party organization's candidate in a race for Civil Court Judge, thus incurring the enmity of County Leader Farrell, who publicly announced that he would never support her bid for Supreme Court. Tr. 1807:3-10 (Gangel-Jacob). Yet, despite being Farrell's sworn enemy, Justice

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[14] *See* HE-6784-90; 6794; 6803; 6805 (Lunn Dep. Tr. 31:21 – 46:14; 49:22 – 50:14; 53:21 – 56:15; 72:24 – 73:13; 106:5 – 109:25; 115:14 – 116:11); JA-128-29 (Sise Decl. ¶ 9); Tr. 1487:3 – 1488:8; 1498:15 – 1499:16; 1500:1 – 1501:1; 1502:25 – 1503:8; 1503:21 – 1504:4; 1493:3-15 (Sise); Tr. 1754:20 – 1756:22; 1760:23 – 1763:25; 1767:3-11 (Freedman); Tr. 1963:22 – 1964:25; 1967:1-16 (Schlesinger); Tr. 1812:16 – 1814:17; 1814:21 – 1815:13; 1816:16-20; 1823:7 – 1824:10 (Gangel-Jacob); Tr. 1858:22 – 1859:17; 1867:18 – 1869:8 (Abdus-Salaam).

Gangel-Jacob persevered, campaigned hard and won a seat on the Supreme Court. Undeterred by Farrell's opposition, she campaigned in his stronghold in Harlem and even won over delegates from his own AD. Tr. 1816:24-1817:21 (Gangel-Jacob).

Justice Alice Schlesinger: Justice Schlesinger made a bid for the nomination for Supreme Court Justice in 1995, 1997 and 1999. Each time, Farrell advised her to secure delegate support, and she worked diligently to do so. Tr. 1963:22 – 1968:8 (Schlesinger). Although she did not garner enough support to prevail at the 1995 and 1997 conventions, by the eve of the convention in 1999, she had garnered the support of a considerable bloc of delegates. Tr. 1963:22 – 1968:8 (Schlesinger). Because Farrell had independently concluded that she had more delegates than any other candidate, he indicated that he would not oppose her candidacy. Tr. 1967:17 - 1968:5 (Schlesinger). As Justice Schlesinger testified, she believed – as did Farrell – that she would have won the nomination with or without his support. Tr. 1980:10-15 (Schlesinger).

Justice Helen Freedman: Justice Freedman began campaigning about nine months before the general election and used that opportunity to enhance her name recognition, so that political clubs would be aware of her candidacy and invite her to their fundraisers. She attended various events where she appealed to party leaders and potential delegates. Tr. 1760:23 - 1761:16 (Freedman). By July, when

lists of potential delegates and alternates became available at the Board of Elections, she attempted to contact all of them, including candidates in contested delegate races. Tr. 1756:13-22 (Freedman). From September through the convention, she and her campaign committee labored for delegate support, and at the convention, she secured the nomination. Tr. 1750:13 – 1752:15 (Freedman).

Justice Sheila Abdus-Salaam: Before being reported out of the Supreme Court screening panel in 1993, Justice Abdus-Salaam worked hard for the party's nomination, attending club functions, fundraisers, meetings of community organizations and "non-traditional sorts of clubs." Tr. 1859:1 – 1861:17 (Abdus-Salaam). While she did not initially enjoy the backing of County Leader Farrell, a "grass roots groundswell" of delegate support – specifically from delegates of color – persuaded Farrell to change his mind. Tr. 1865:5-10 (Abdus-Salaam). Once again, it was popular support from the representative delegates that made the difference, allowing her to win a floor fight at the convention. Tr. 1881:25 – 1885:3; 1897:23 – 1898:2 (Abdus-Salaam). The tally of delegate votes at that convention demonstrates a number of split slates within individual ADs, strongly suggesting that delegates voted independently. HE-7488-89 (Ex. TT).

Justice Joseph Sise: Although Justice Sise had won the endorsement of the Republican Committee in Montgomery County – only one of eleven counties comprising the Fourth District – he nonetheless had to engage in a hard fought

campaign for the nomination because he was not running unopposed for the nomination. Indeed, the committee advised Sise that "you're going to have to work hard in order to get the nomination, and that it's a huge district, and that you will have to prove yourself throughout the summer and fall so that you're able to get the support from the *delegates at the convention*." Tr. 1493:6-12 (emphasis added) (Sise). Sise heeded this admonition and, throughout his campaign, when he met delegates, he presented his qualifications and asked for their consideration. Tr. 1503:1-4 (Sise). Sise also heavily campaigned among the general electorate, as he fully expected to face opposition in the general election in November. Tr. 1502:11-21 (Sise). Thus, Justice Sise's campaign across the vast Fourth District, and his efforts to reach the general populace through attendance at county fairs, distribution of literature, radio advertising, lawn signs, magnets, buttons and other campaign trappings were geared toward both phases of the judicial selection process. There was no evidence at the hearing that Republican county leaders dictate how delegates vote in the Fourth Judicial District.

Justice Robert Lunn: Like Justice Sise, Justice Lunn engaged in a full blown campaign in anticipation of the general election. *See* HE-6799 (Lunn Dep. Tr. 93:5-15). Thus, Justice Lunn tried to reach delegates and the electorate. HE-6782; 6788; 6790; 6798 (Lunn Dep. Tr. 22:3-7; 46:6-11; 54:6-23; 86:16-23); *and see* HE-6788 (Lunn Dep. Tr. 88:7-9) ("It was my belief that much of what I described I

was doing was reaching potential delegates."). In addition to campaigning to delegates generally, Justice Lunn reached out to "probably more than 20" specific delegates. HE-6790 (Lunn Dep. Tr. 56:3-10). He would review lists of delegates and if he recognized a name, he would make contact. HE-6788-89; 6798 (Lunn Dep. Tr 49:25 – 50:11; 88:5-7). While he "believed" that he had county leader support, he diligently continued to campaign for delegate support. HE-6790-91 (Lunn Dep. Tr. 57:15 – 58:6).

B. A Candidate Can Run His Own Delegates

New York Election Law does not prohibit candidates from running their own slates of delegates. But as Appellants' expert, Commissioner Kellner, testified, the notion that an individual candidate should recruit pledged delegates "twists the design of the system on its head." Tr. 1567:10 – 1568:5; 1572:23 – 1573:7 (Kellner); *see also* Tr. 1266:14 - 1267:4; 1267:17-19 (Schiff). In fact, delegates are often called upon to vote for multiple candidates for Supreme Court, making unworkable the notion of pledged delegates. Tr. 1257:14-24 (Schiff). Instead, every potential candidate has access to the judicial convention process and can court the support of existing delegates, as attested by each of the six Justices who testified.

Yet, should candidates wish to pursue the unconventional path of running their own delegates, the evidence showed that the burdens to placing their names

on the delegate ballot are not insurmountable, requiring only 500 valid signatures in each AD. And to compete effectively, there is no need to run delegates in every AD, as the district court concluded. Logically, the evidence showed that a candidate only needs to run enough delegates to win a majority at the convention. Tr. 1574:10 – 1575:4 (Kellner); Tr. 2135: 2-13 (Connor). Further, using whatever delegates he or she can win, a challenger can then parlay that support into a wider base of delegate support by forming coalitions with other candidates. Tr. 2150:6 - 2151:20; 2155:17-25 (Connor); Tr. 1664:5-18 (Kellner); Tr. 1963:24 – 1968:8 (Schlesinger).

Not only was there evidence at the hearing that candidates could run their own delegates, there was testimony that it could be done successfully. Plaintiffs' own witness, Judge Regan, for example, succeeded in petitioning his own slate of delegates. He obtained 800 signatures in sufficient districts to elect a majority of delegates to his convention. Tr. 351:20-22 (Regan). The slate he filed with the correct Board of Elections was qualified and his delegates were elected on primary day. Tr. 395:13-18 (Regan). His remaining slates were removed from the ballot only because he failed to file the petitions with the proper Board of Elections. Tr. 395:19 – 396:7 (Regan).

SUMMARY OF ARGUMENT

1. The district court erred in failing to evaluate the alleged burdens associated with the judicial convention system within the totality of New York's electoral scheme. In determining whether constitutional rights have been violated, the United States Supreme Court requires that courts examine whether challenged electoral schemes provide alternative means for candidates to access the ballot. Because New York's electoral scheme provides alternative means of access to the general election ballot, the only ballot on which any judicial candidate's name appears, the judicial nominating convention is constitutional.

2. The district court further erred by determining that candidates have an independent right "to participate meaningfully in the nomination process" of the major political parties, which must include "a realistic opportunity to challenge the selection of party leadership." Neither this Court nor the Supreme Court has ever endorsed a "meaningful participation" standard. Rather, the Supreme Court has focused exclusively on whether the challenged electoral scheme provides an opportunity for *access* to the relevant ballot. In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court held that there is no constitutional requirement that the electoral scheme include a primary as "[i]t is *too plain for argument* . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election *or by party convention*." *Id.* at 781

(citation omitted) (emphases added). Here, where the nominating process adopted by the Legislature takes the form of a delegate-based convention rather than a primary, at most, all the Constitution requires is that candidates have a right to *access* that process. They do.

3. The district court also erred in determining that the alleged burdens associated with the convention system were "severe," and in thus applying strict scrutiny as opposed to rational basis review. The root of the district court's error is the adoption of Plaintiffs' "challenger candidate" paradigm and acceptance of the view that delegates lack independence and do the bidding of "party leaders." These mixed questions of fact and law are subject to *de novo* review, and should be reversed as they depart severely from the requirements of the First Amendment and the weight of the competent evidence. Viewed from the proper perspective of whether a delegate candidate can access the delegate ballot by garnering 500 signatures or whether a judicial candidate can access the convention by appealing to delegates, the burdens are minimal and easily justified by the State's legitimate and compelling interests in regulating elections. The district court's reliance upon the *sui generis* case of *Rockefeller v. Powers* to support its conclusion that the signature requirements are unduly burdensome is inappropriate.

4. The district court further erred by failing to place Defendants on notice that it would effectively grant final relief to Plaintiffs without ordering that

the preliminary injunction hearing be consolidated with a full trial on the merits as required by Fed. R. Civ. P. 65(a)(2). Consequently, Defendants were prejudiced as the district court's decision was made on the basis of an incomplete record, and rested heavily on evidence that would have been inadmissible at trial.

5. In entering its sweeping injunction which installed a primary system and dismantled New York's convention system in its entirety, the district court failed to narrowly tailor its remedy to the perceived constitutional infirmities. Thus, the district court abused its discretion by entering an injunction that is overly broad.

STANDARD OF REVIEW

This appeal raises (1) questions of law and (2) mixed questions of fact and law involving constitutional issues, which are subject to *de novo* review. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 136 (1999) ("we have assumed, as with other fact-intensive, mixed questions of constitutional law, that independent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights") (citations and internal quotations omitted).

The standards for granting preliminary injunctive relief are well-established. A preliminary injunction "is an extraordinary and drastic remedy which should not be routinely granted." *Medical Soc. of the State of N.Y. v. Toia*, 560 F.2d 535, 538

(2d Cir. 1977). Where, as here, "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," a preliminary injunction should *not* be granted "unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." *Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Eisberg v. Dutchess County Legis.*, 37 F. Supp. 2d 283, 285 (S.D.N.Y.), *aff'd*, 181 F.3d 82 (2d Cir. 1999) (applying heightened standard in upholding constitutionality of New York Election Law provision). This heightened standard has been described as recognizing that "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able*, 44 F.3d at 131. Further, where, as is also the case here, the injunction sought "will alter rather than maintain the status quo, movant must show '*clear*' or '*substantial*' likelihood of success." *Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir. 1999) (emphasis added).

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO ASSESS THE ALLEGED BURDENS ASSOCIATED WITH NEW YORK'S JUDICIAL NOMINATING CONVENTION SYSTEM WITHIN THE TOTALITY OF NEW YORK'S ELECTORAL SCHEME, WHICH PROVIDES REASONABLE ALTERNATIVE MEANS OF ACCESS TO THE GENERAL ELECTION BALLOT

A. The Standard For Deciding When A State Law Violates The First Amendment To The United States Constitution

The Constitution entrusts states with the regulation of the "'Times, Places, and Manner of holding Elections' . . . and the Court therefore has recognized that *States retain the power to regulate their own elections*." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (emphasis added); *see also California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). Thus, when deciding whether a state election law violates the First and Fourteenth Amendment, a court:

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate, [and] must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule.

*Anderson v. Celebrezze,*460 U.S. 780, 789 (1983). "Under this standard, the rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review,

and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal quotations and citations omitted). Nor does a court require "elaborate, empirical verifications of the weightiness of the State's asserted justifications." *Id.* at 364.

It is well-settled that only the denial of a candidate's opportunity for ballot position implicates an individual's fundamental right to vote. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 25 (1968). While "laws that affect candidates always have . . . [a] correlative effect on voters," *Bullock v. Carter*, 405 U.S. 134, 143 (1972), candidacy by itself is not a "fundamental right," *Clements v. Fashing*, 457 U.S. 957, 963 (1982). Thus, alleged barriers to candidates must be considered in light of their impact on voters. *Bullock*, 405 U.S. at 143.

B. The District Court Erred By Dismissing The Significance Of The Fact That New York's Electoral Scheme Provides Alternative Means Of Access To The Ballot

The district court noted, but dismissed the significance of the fact, that New York's electoral scheme provides alternative means of access to the general election ballot. *See* SPA-57. However, in determining whether constitutional rights have been violated, the United States Supreme Court has repeatedly looked to whether challenged electoral schemes provide alternative means for accessing the ballot. This approach considers the burden imposed by a challenged statute in

light of the "totality" of a state's election scheme. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 441 (1971); *Storer v. Brown*, 415 U.S. 724, 746 (1974); *Lubin v. Panish*, 415 U.S. 709 (1974); *Burdick*, 504 U.S. at 437 (1992); *see also Lerman v. Bd. of Elections in the City of N.Y.*, 232 F.3d 135, 145 (2d Cir. 2000).

In *Jenness v. Fortson*, the Supreme Court upheld a Georgia election law that required independent and minor-party candidates to file nomination petitions signed by at least 5% of registered voters in the previous election in order to be listed on the general election ballot. *See* 403 U.S. at 431-32. The Supreme Court determined that Georgia's election laws served to ensure reasonably open access to the ballot because "alternative routes are available to getting his name printed on the ballot," including entering a party primary or circulating nominating petitions as an independent candidate. *Id.* at 440-41. Thus, the ballot access restrictions were not unreasonable because "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Id.* at 439.

In *Storer v. Brown*, the Supreme Court was asked to determine the reasonableness of a California statute that "absolutely denie[d] ballot position" to independent candidates who were registered as affiliated with a qualified political party within one year of the immediately preceding primary election. 415 U.S. at 757. The challenged provision also required independent candidates to collect signatures from 5% of the total votes cast in California at the last general election

within a 24-day period, or approximately 325,000 signatures. *Id.* at 738-39. The Supreme Court "ha[d] no hesitation in sustaining" the party-disaffiliation requirement, *id.* at 733, as independent candidates who failed to qualify for the ballot could "nevertheless resort to the write-in alternative provided by California law," *id.* at 737 n.7.

In *Burdick v. Takushi*, the Supreme Court upheld Hawaii's ban on write-in voting against a claim that the ban unreasonably infringed on voters' First and Fourteenth Amendment rights. 504 U.S. at 438-49. Analyzing the requirement within the totality of the electoral scheme, the Court concluded that the provision imposed only a "limited burden" on voters because adequate alternative ballot access existed. *Id.* at 439.

In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Supreme Court upheld a Washington election statute that required minor-party candidates for statewide offices to receive 1% of the total vote in an open primary in order to be placed on the general election ballot. *Id.* at 190. Although minor parties were effectively eliminated from the general election ballot, the Supreme Court did not consider the scheme burdensome because it provided an opportunity for access to a statewide primary ballot. *See id.* at 199. The Court stated, "[i]t can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the

general election." *Id.* If an opportunity for a primary ballot position is constitutionally sufficient, as the Supreme Court held, *a fortiori*, a general ballot position must be constitutionally sufficient, as here, it is the very means by which the ultimate vote for the particular office is cast.

The Second Circuit in *Larouche v. Kezer*, 990 F.2d 36 (2d Cir. 1993) directed that a district court must utilize the "totality approach" in analyzing the challenged election provision unless it would render a potential candidate "per se ineligible" to access the ballot. In *Larouche*, the Court upheld a media recognition requirement without considering its propriety, concluding that "[b]ecause we hold the petition alternative, standing alone, to be constitutional, we also uphold the media recognition statute . . . ." *Id.* at 41. Thus, "[u]nder the totality approach, if *either* alternative would be constitutional standing alone, *the other must be viewed as broadening the opportunities for ballot access and is a fortiori constitutional.*" *Id.* at 39 (emphasis added).

Therefore, because candidates have the ability to appear on the general election ballot, as Plaintiff Lopez Torres did, the judicial convention system does not infringe upon the First Amendment right to associate through the vote. *See supra* at 13-14. On the contrary, because there are alternative means of ballot access as an independent, minor party, or write-in candidate, the statutory provisions governing judicial conventions "must be viewed as broadening

opportunities for ballot access and [are] *a fortiori* constitutional." *Larouche*, 990 F.2d at 39.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THERE IS A RIGHT TO PARTICIPATE MEANINGFULLY IN THE NOMINATION PROCESS, RATHER THAN – AT MOST – A RIGHT TO ACCESS, AND BY REQUIRING THAT THE NOMINATION PHASE RATIFY VOTERS' DIRECT, UNMEDIATED PREFERENCES THROUGH A PRIMARY BALLOT

The district court determined that the nomination phase is the critical determinant in electing Supreme Court Justices in the State of New York rather than the general election based on its presumption – which Appellants dispute – of one-party rule within each Judicial District. Accordingly, the district court concluded that even where there are alternative means to access the general election ballot, under the Supreme Court's holdings in *United States v. Classic*, 313 U.S. 299 (1941) and *Bullock v. Carter*, 405 U.S. 134 (1972), there is a separate and independent right of voters and candidates "to participate meaningfully in the nomination process" of the major parties. SPA-59. The district court's attempt to fashion this new constitutional standard is unprecedented and should be rejected.

In assessing whether judicial candidates have an opportunity to "participate meaningfully" in New York's judicial nominating system, the district court purported to base its inquiry on the standard set forth in *Storer*. In *Storer*, the relevant inquiry was whether "a reasonably diligent independent candidate [can] be expected to satisfy the signature requirements, or will it be only rarely that the

unaffiliated candidate will succeed in getting on the ballot?" SPA-61 (quoting *Storer*, 415 U.S. at 742)). The district court, however, reformulated the *Storer* test to ask:

> Could a reasonably diligent challenger candidate for Supreme Court Justice succeed in getting her own delegates and alternates on the ballot in each Assembly District? If not, could she *succeed* in lobbying the delegates installed by the party leaders?

SPA-62 (emphasis added).

By "participate meaningfully," the district court meant the ability to win a major political party's nomination. Certainly, if a "reasonably diligent challenger candidate . . . *succeed[ed] in lobbying the delegates*," that candidate not only would have had a chance to compete but, by definition, would have *won* the party's nomination. As for running one's own slate of judicial delegates, the district court's analysis was similarly infected by a standard based on ability to win, as "meaningful participation," according to the court, must "include[] a realistic opportunity to challenge the selections of party leadership." SPA-59. Indeed, this is why the district court ultimately found the convention system unconstitutional on the grounds that "[r]easonably diligent candidates . . . stand virtually *no chance of obtaining* [*i.e.*, winning] a major party nomination." *Id* at 63-64. (emphasis added); *see also id.* at 57 ("I recognize that at least in form, petitioning onto the general election ballot as an independent and *winning a major*

party's nomination gain a candidate the same thing: a line on the ballot and an opportunity to appeal to the voters") (emphasis added).

But the Supreme Court has never followed a standard based on "meaningful participation." Indeed, there is no authority for the proposition that an individual has a fundamental right to be a candidate, let alone, as the district court found, a fundamental right to vie meaningfully for his party's nomination. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("Far 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'") (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). If there is no fundamental right to be a candidate, clearly there is no constitutional right to win an election or, in the case of a convention, a nomination. Instead, the Supreme Court has consistently focused only on whether the challenged electoral scheme provides an opportunity for *access*.

The district court further determined that meaningful participation requires "more open and effective participation by voters . . . at the nomination stage." SPA-61. On that basis, the district court imposed a primary in lieu of the convention system. The district court's decision, however, runs afoul of *White* and other Supreme Court precedent because it would make unconstitutional a delegate-based convention system and would mandate direct primary balloting.

A. The District Court Erred In Relying On *Classic* And *Bullock* To Find A Constitutional Right To Meaningfully Participate And Thereby Win A Major Party's Nomination

The district court's reliance on *Classic* and *Bullock* is badly misplaced as neither case supports a standard based on "meaningful participation." In expressly disregarding the Supreme Court's long line of ballot access cases, the district court incorrectly relied on *Classic* and *Bullock* for the proposition that in areas of one-party rule, the nomination phase takes on greater importance and candidates and voters must have a realistic opportunity to challenge the selections of party leadership – in other words, to win. *See* SPA-59. But neither one of these cases supports this proposition. *Classic* and *Bullock* are clearly limited to cases where the state has already instituted a direct primary. But even if they applied, these cases could stand for nothing more than the proposition that candidates have a right to access whatever process the state adopts for selecting candidates – in this case, a convention system.

It stretches *Classic* beyond recognition to apply its simple holding that tampering with a primary election is a federal crime because a primary involves state action to conclude that challenger candidates must have a meaningful chance to win a primary. In *Classic*, the appellees, Commissioners of Elections for Louisiana, were indicted for willfully altering and falsely counting and certifying the ballots of voters cast in the primary election for a Congressional candidate. In

finding that voters have a constitutional right to have their primary ballots counted, the Supreme Court determined that the right to vote was implicated in the primary election because "[t]he primary in Louisiana is an integral part of the procedure for the popular choice of Congressman," *Classic*, 313 U.S. at 314, operating as a constitutive "step in the exercise by the people of their choice of representatives in Congress," *id.* at 317. In other words, state law had converted "the mode of [constitutionally protected] choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election." *Id.* at 316-17. *Classic* thus merely stands for the principle that where a state chooses to adopt a primary system of nomination, party nomination activities form an integral part of the election machinery and implicate the right to vote; *i.e.* state action is present.

The district court's reading of *Bullock v. Carter* is equally flawed. In *Bullock*, the Supreme Court struck down under the Fourteenth Amendment a statute in Texas which required prospective candidates to pay an exorbitant filing fee to participate in primary elections. The Supreme Court found that the statutory scheme was discriminatory because it tended "to deny some voters the opportunity to vote for a candidate of their choosing," while simultaneously giving affluent voters "the power to place on the ballot their own names or the names of persons

they favor." *Bullock*, 405 U.S. at 144. The Supreme Court found the requirement unconstitutional on the grounds that the inability to pay the filing fee resulted, as a practical matter, in absolute "barriers to candidate *access* to the primary ballot." *Id.* at 143 (emphasis added).

Bullock therefore is a case about an indigent candidates' right, in the face of exclusionary filing fees, to access the nominating phase, which in that case happened to be a primary election. *See id.* at 142. As in *Classic*, the Court in *Bullock* determined that "the mechanism of such elections is the creature of state legislative choice and hence is 'state action.'" *Bullock,* 405 U.S. at 140. The district court erred in applying *Bullock* to support its meaningful participation standard which the district court determined without support can only be satisfied through a primary. The most that can be said of the holding of *Bullock* is that candidates have a right to *access* whichever process the state adopts for selecting candidates, not a reasonable chance of prevailing in that process. The district court's reliance on *Bullock* to announce a new constitutional standard under the First Amendment is particularly unjustifiable given that *Bullock* was decided under the Fourteenth Amendment.

B. The District Court Further Erred By Running Afoul Of The Supreme Court's Decision in *American Party of Texas v. White*, Upholding A Political Party's Right To Choose Its Nominee By Convention

The district court's constitutional analysis further erred in extending *Classic* and *Bullock* beyond the facts of those cases to *require* that voters have direct, unmediated access to candidates at the nomination phase even where the state has chosen a delegate-based convention system of nomination which, by definition, does not involve direct appeal to voters at the nomination phase. In this respect, the district court runs afoul of *American Party of Texas v. White*, 415 U.S. 767 (1974), which holds that there is no constitutional right to a primary electoral system.

In *White*, the Supreme Court rejected a challenge to a Texas ballot qualification system under which the major political parties were required to nominate candidates by primary elections, smaller parties could use either primaries or nominating conventions, and new and even smaller parties had to use precinct nominating conventions. *Id.* Justice White, writing for seven other Justices, stated:

> *[i]t is too plain for argument* . . . that the State may properly limit each political party to one candidate for each office on the ballot and may insist that *intraparty competition be settled before the general election by primary election or by party convention.*

Id. at 781 (citing *Storer v. Brown*, 415 U.S. at 733-736) (emphasis added); *Trinsey v. Commonwealth of Pa.*, 941 F.2d 224, 234 (3d Cir. 1991) (according to "available precedent . . . the Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states") (quoting *White*, 415 U.S. 767).

Nothing 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. For example, while the court below has attempted to limit *White*, the district court in *Shapiro v. Berger*, declined to do so. 328 F. Supp. 2d 496, 502 (S.D.N.Y. 2004). In *Shapiro v. Berger*, the court addressed a constitutional challenge to New York election statutes providing that vacancies for town offices may be filled by appointment if they arise too late for a primary. Plaintiff claimed that the statutes in question deprived Democratic voters of the ability to cast a primary ballot for their preferred candidate. In rejecting the challenge, the court noted that the Constitution "does not specify how state or local offices are to be selected, and the Supreme Court has made clear that states need not hold democratic elections to fill those positions." *Id.* Accordingly, the court relied on *White* as "confirm[ing] the right of a State to provide for party conventions as an alternative to primaries as a means for selecting party candidates for public office." *Id.*

As the Second Circuit has observed in *Mrazek v. Suffolk County Board of Elecs.*, a delegate to a convention properly has the responsibility for speaking on behalf of his constituents in the broadest sense:

> [a]cting in a nominating capacity, a delegate may speak for a group broader than simple party membership: rather, the constituency may properly be defined as a mix of the district's total population, unenrolled party sympathizers, affiliated party members and certain other factors such as the importance of the district to the party and the past or foreseeable success of the party in the locale . . . 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.

630 F.2d 890, 898 (2d Cir. 1980) (internal citations omitted); *see also Montano v. Lefkowitz*, 78 Civ. 17 (JMC) 1978 U.S. Dist. LEXIS 20201, at *13 (S.D.N.Y. Jan. 12, 1978) (Haight, D.J.) ("a political party's delegation of nominating authority to a committee is a familiar device") *rev'd on other grds.*, 575 F.2d 378 (2d Cir. 1978); *Moritt v. Rockefeller*, 346 F. Supp. 34, 38 (S.D.N.Y. 1972) (three-judge court) (holding that challenge to State conventions under N.Y. Elec. Law § 6-104 failed to present "substantial constitutional question"), *aff'd*, 409 U.S. 1020 (1972). In contrast, under the logic of the district court's decision, a delegate-based convention could never be constitutional insofar as it does not provide voters direct access to candidates.

In light of the Supreme Court's decision in *White*, one cannot read *Classic* and *Bullock* to require a primary where the state has chosen instead to adopt a

convention. Even if, as the district court contended, *White* does not establish a *per se* rule that all conventions are constitutional, *White* also does not require that conventions resemble primaries. Where a state has made a delegate-based convention system as the first "step in the exercise by the people of their choice," *Classic*, 313 U.S. at 316-17, all that *Classic* and *Bullock* require is *access to that system* without undue burden. In other words, that voters have the right to vote for delegates of their choosing and elected delegates have the right to select judicial candidates of their choosing.[15]

C. The District Court Failed To Recognize That The Constitutional Issue Concerns At Most Whether There Was Access To The Nominating Phase

The district court's meaningful participation standard requiring a realistic chance to win departs from the long line of Supreme Court ballot access cases that, as discussed above and as applied here, establish that the constitutional inquiry

[15] The district court's determination that "more open and effective participation by voters *must be allowed* at the nomination stage," SPA-61 (emphasis added), also fails to take into account the unique role played by the judiciary. Unlike other elective offices, the judiciary does not serve a representative function. In this regard, it is well-established that the principle of one-person, one-vote does not apply to the judiciary. *See Wells v. Edwards*, 409 U.S. 1095, 93 S. Ct. 904 (1973) (affirming voting rights decision that the "one-man, one-vote" concept does not apply to the judiciary); *Dennis v. United States*, 341 U.S. 494, 525, 71 S. Ct. 857, 95 L. Ed. 1137, 1160-61 (1951) (Frankfurter, J., concurring in the judgment) ("Courts are not representative bodies. They are not designed to be a good reflex of a democratic society"); *New York State Ass'n of Trial Lawyers v. Rockefeller*, 267

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does not extend beyond the question of whether there is access to the nominating process adopted by the state – here the judicial nominating convention. While the Supreme Court's ballot access cases involve non-establishment candidates or independent parties with no realistic opportunity to challenge the major party candidates, not a single one of these decisions weighs whether there is a realistic opportunity to actually win the election. Rather, in each case, the constitutional inquiry concerns solely the issue of access.

In *Lubin v. Panish*, the Supreme Court addressed a mandatory filing fee statute that "operate[d] to exclude some potentially serious candidates from the [primary] ballot without providing them with any alternative means of coming before the voters." 415 U.S. at 718. Thus, *Lubin* merely vindicates an indigent candidate's right to ballot access in the face of exclusionary filing fees and does not recognize a right *beyond a right of access*.

In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court's analysis focused on whether a candidate could "[get] his name printed on the ballot." *Id.* at 440; *see also id.* at 434. Certainly, the Court's decision did not remotely touch upon a right to win, as petitioner candidates were members of "new" or "small" parties with no hope of defeating the majority party in the general election. *See id.* at 438.

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F. Supp. 148, 153-54 (S.D.N.Y. 1967) ("The state judiciary, unlike the legislature,
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Similarly, *Storer v. Brown*, 415 U.S. 724 (1974) involved independent candidates with no realistic chance of winning. Two of the petitioner candidates were seeking ballot position as independent candidates for members of Congress, while the other two petitioner candidates were members of the Communist Party who wanted to run for President and Vice-President. *Id.* at 1278. Critical to the Court's decision was its finding that the availability of a write-in alternative did not make it "virtually impossible" for new candidates and parties to achieve ballot access. *Id.* at 728 (quoting *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)).

Munro v. Socialist Workers Party, 479 U.S. 189 (1986), which involved the Socialist Workers Party candidate for the United States Senate reaffirms that the constitutional inquiry concerns ballot *access*. As the Court stated, "the State can properly reserve the general election ballot 'for major struggles' [] by conditioning *access* to that ballot on a showing of a modicum of voter support." *Id.* at 196 (internal citation omitted) (emphasis added). The Court noted with approval that the access restrictions were established, in the first place, out of "concern about minor parties having such easy access" to the general election ballot. *Id.* While the challenged provision made it more difficult to access the ballot, the Court stated that the state "was not required to afford . . . *automatic access* and would

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is not the organ responsible for achieving representative government").

have been entitled to insist on a more substantial showing of voter support" before a candidate's name appeared on the ballot. *Id.* at 197 (emphasis added). Indeed, the dissent in *Munro* expressly criticized the majority opinion, finding that the decision "permits a State to pre-empt *meaningful participation* by minor parties in the political process by requiring them to demonstrate their support in a crowded primary election." *Id.* at 207 (Marshall, J., dissenting) (emphasis added).

Nor does the issue change in areas of one-party rule as demonstrated by the Supreme Court's decision in *Burdick*, 504 U.S. 428, where, as discussed above, the Supreme Court upheld Hawaii's ban on write-in voting. *Id.* at 438-39. In *Burdick*, the Court was presented with a situation where, "Democratic candidates often run unopposed especially in state legislative races." *Id.* at 442 (Kennedy, J., dissenting). As a result, the voter had a choice between voting for a candidate he did not support, or not voting. *Id.* at 442 (Kennedy, J., dissenting). The dissent complained that the majority's decision left the petitioner voter with "no way to cast a *meaningful* vote . . . because of the State's ballot access rules and the circumstance that one party, the Democratic Party, is predominant." *Id.* at 442 (Kennedy, J., dissenting) (emphasis added). The majority did not accept the view, and the controlling law remains that candidates need only have a right to access, not a right to win. *Id.* at 437-38.

The district court clearly erred by misconstruing the Supreme Court's ballot access cases to require that challenger candidates have a reasonable chance of gaining access to the general election ballot on a major party ticket by *winning* their party's nominating phase. Even if reasonable alternative means of access to the general election ballot were not sufficient to cure any purported constitutional infirmities with the nominating phase, the constitutional inquiry in this case would still only be whether there is *access* to that phase, *i.e.*, a chance to enter the judicial convention.

III. THE DISTRICT COURT ERRED IN FINDING THE ALLEGED BURDENS ASSOCIATED WITH THE JUDICIAL CONVENTION SYSTEM "SEVERE," AND THUS IN APPLYING STRICT SCRUTINY RATHER THAN RATIONAL BASIS REVIEW

New York Election Law passes constitutional muster because it provides any minimally qualified candidate the opportunity to compete for his party's nomination, to access judicial delegates, and have his name placed in nomination and his candidacy voted upon at the judicial nominating convention. The district court erroneously concluded that the burdens imposed by Election Law §§ 6-106 and 6-124 are severe and thus applied strict scrutiny rather than rational basis review based on its determination that: (1) challenger candidates are never successful; (2) delegates lack independence and are controlled by party leaders; and (3) the petitioning requirements are unduly burdensome.

Each of these determinations is subject to *de novo* review as mixed questions of fact and law borne out of the district court's legal conclusion regarding the appropriate constitutional standard, and should be reversed. As this Court has recognized, whether a litigant has been deprived of a right guaranteed by the Constitution is a mixed question of law and fact subject to *de novo* review. *See, e.g., United States v. Kliti*, 156 F.3d 150, 152-53 (2d Cir. 1998) (whether "a defendant's representation violated the Sixth Amendment right to effective assistance of counsel" because of actual or potential conflicts of interest "is a mixed question of law and fact requiring *de novo* review"); *see also Oyague v. Artuz*, 393 F.3d 99, 104 (2d Cir. 2004) (reviewing *de novo* denial of *habeas* petition involving mixed questions of involuntariness of plea and ineffectiveness of counsel). Indeed, the Supreme Court has reviewed *de novo* mixed questions of fact and law issues involving fundamental constitutional rights. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 136 (1999) ("we have assumed, as with other fact-intensive, mixed questions of constitutional law, that 'independent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.") (quoting *Ornelas v. United States*, 517 U.S. 690, 699 (1996)); *Ornelas*, 517 U.S. at 699 (holding that "as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal"); *Bose Corp.*

v. Consumers Union, 466 U.S. 485, 502 (1984) (holding that determination of actual malice in defamation cases must be reviewed *de novo* because they implicate fundamental First Amendment rights). In any event, even if the Court were to review the district court's determinations as factual findings, the district court's conclusions were clearly erroneous.

A. The District Court's "Challenger Candidate" Paradigm Is Deeply Flawed

As a threshold matter, the district court conducted its constitutional analysis from the inherently flawed perspective of the so-called "challenger candidate." The court relies on *Rhodes*, *Storer* and *Jenness* to support the proposition that the First Amendment prohibits anticompetitive conduct that freezes the political status quo, and that the burdens of a statutory scheme restricting ballot access must be "judged from the viewpoint" of a reasonably diligent challenger candidate who "lacks the support of a 'massive apparatus' controlled by party leadership." SPA-56 (citations omitted). But these cases do not apply here because they deal with freezing out minor political parties from competing with the two dominant parties, not individual candidates within a party.

In framing its inquiry, the district court adopted Plaintiffs' circular definition of "challenger candidate" as a candidate with no support from *anyone* in the party establishment at any stage in the process. SPA-56; Tr. 305:5-16 (Cain). Under the district court's definition, no "challenger candidate" could ever capture the party

nomination for any elected office because upon attaining support he would lose his "challenger" status. Tr. 305:5-21 (Cain). At the outset, *all* candidates start out on the same square and inevitably some candidates win party support, while others do not. To criticize the convention system for favoring candidates who ultimately garner more party support is tantamount to criticizing the rules of baseball for favoring teams that score more runs.

The district court's conclusion that "challenger candidates are *never* successful in winning the nomination" is based on its circular definition of challengers as those entirely lacking in any party support at any stage in the process, including the end. SPA-65 (emphasis in original). Substituting a more sensible definition, such as those who lack the support of county party leaders at the outset, the factual underpinnings of the district court's opinion fall away as numerous challengers succeed in obtaining the nomination.

The overwhelming evidence showed that party leaders throw their support behind a candidate only *after* it becomes clear that the candidate has achieved widespread support among delegates. *See* Tr. 1580:20 – 1581:1; 1581:19-21; 1663:15-22 (Kellner); Tr. 1292:10-21 (Schiff); Tr. 1768:4-14 (Freedman). As Farrell described it over a decade ago, "[i]t's almost like picking a winner of a horse race after the race." Tr. 1663:15-22 (Kellner); *see also* Tr. 1286:20 -

1287:11; 1292:22 - 1293:7 (Schiff). The fact that elected party leaders successfully predict and frequently shape the party's support is not unconstitutional.

Plaintiffs' own witness, John Carroll, testified that several "insurgent candidates" have been nominated and elected in the Second Judicial District, including Michael Pesce, Joseph Bruno, Al Tomei, Lawrence Knipel and Frank Barbaro. *See* Tr. 488:6 – 489:12 (Carroll). Appellants also presented the testimony of six sitting Justices in both upstate and downstate districts who were able to win delegate support and win the nomination, including in instances where they initially faced the opposition of party leaders. *See supra* at 29-34.

B. The District Court Erred In Concluding That Delegates Lack Independence And Party Leaders Control The Outcome Of Nominating Conventions

The district court further erred in concluding that the two paths for obtaining a major political party's nomination for Supreme Court Justice – running ones' own slate of delegates and lobbying delegates for their support – are overly burdensome. Critical to the district court's analysis with respect to candidates' perceived inability to lobby delegates is its unsubstantiated assumption that judicial delegates lack independence and simply do the bidding of party leaders. *See* SPA-63. This determination was clearly erroneous.

The overwhelming weight of the evidence elicited at the hearing was that judicial delegates are independent. None of Plaintiffs' witnesses with any delegate

experience testified that they had ever been instructed how to vote. *See supra* 22-23. The evidence, in fact, showed that candidates and party leaders engage "counters" to measure support among the delegates in the pre-convention period. *See* Tr. 1868:13 – 1869:8 (Abdus-Salaam). If delegates simply followed the will of party leaders, there would be nothing to count. Moreover, the district court completely overlooked the evidence of candidates that Farrell personally supported but could not at the time get nominated, such as Justices Ramos, Cahn and Acosta. *See* Tr. 1581:22 – 1582:9 (Kellner). Thus, the county party leader cannot simply impose his will on delegates. The fact that so-called challengers, or "insurgent candidates," have been successful in the context of internal fights for party control further underscores the fact that party leaders can and do lose whatever control is claimed for them. Finally, Lopez Torres' own actions in writing campaign letters to delegates soliciting their support demonstrates that even she believed that delegates were capable of being persuaded to go against the county leader. *See* HE-6860-61 (Ex. K Lopez Torres campaign literature).

For its conclusion that delegates lack independence, the district court also relied on Farrell's testimony from ten years ago that he can "kill" a nomination. *See* SPA-34. But the experiences of Justices Gangel-Jacob and Schlesinger put an end to this argument by demonstrating that, braggadocio aside, Farrell alone cannot block a determined candidate from prevailing at the convention in the First Judicial

District. *See* Tr. 1801:7-18 (Gangel-Jacob); Tr. 1980:10-15 (Schlesinger); Tr. 1583:3-9; 1659:21 – 1660:5 (Kellner). As for the other *eleven* Judicial Districts, there was no evidence presented that the county party leaders in the 61 counties throughout these districts can block nominations, and substantial evidence that they cannot do so in the Second, Third, Fourth, Seventh and Eighth Judicial Districts. *See* Tr. 2104:25 – 2105:4 (Connor); Tr. 1323:15-23; 1333:11 – 1335:4 (Ward); Tr. 876:6 – 877:8 (Keefe); Tr. 1490:6 – 1492:2 (Sise); HE-6801-02 (Lunn Dep. Tr. 101:25 – 102:12).

Finally, that delegates do not merely do the bidding of party leaders is established by the fact that Lopez Torres garnered a vote of 25 delegates at the 2002 judicial nominating convention – a year in which she did not even attend the convention. *See* Tr. 614:17; 615:3-4 (Lopez Torres). A vote of 25 delegates is a significant bloc of delegate support. Judicial candidates with less delegate support, such as Rosalyn Richter, have been successful in obtaining their party's nomination by logrolling to build coalitions with other successful candidates. *See* Tr. 1687:10 – 1689:4 (Kellner).

C. *Rockefeller*, Limited To The Presidential Primary, Does Not Justify The District Court's Determination That The Signature Requirements Are Overly Burdensome

With respect to the alleged burdens associated with a judicial candidate running his own slates of delegates, the district court found the burdens imposed

by the judicial nominating system severe, among other reasons, because of the number of signatures that a candidate must gather across multiple ADs in order to successfully run his own slate of candidates for judicial delegate. In analyzing the severity of the burdens associated with signature requirements, the Court inappropriately relies on *Rockefeller*. *See* SPA-64-66.

As a general matter, the decision in *Rockefeller v. Powers*, which was not on the merits and merely upheld the grant of a preliminary injunction, was based on the particular inequities Steve Forbes suffered in the Republican presidential primary. 917 F. Supp. 155 (E.D.N.Y. 1996), *aff'd* 78 F.3d 44 (2d Cir. 1996), *cert. denied*, 517 U.S. 1203 (1996). The Republican Party had made the decision to employ the more restrictive signature requirement of 1250 or 5% of enrollment, rather than the 0.5% signature requirement that had been adopted by the Democratic Party. 917 F. Supp. at 164. Thus, the Republican Party elected to require ten times the number of signatures New York State deemed necessary to establish a modicum of support. *Id.*

Despite the Second Circuit's limitation of the holding in *Rockefeller* to "special circumstances surrounding the presidential primary process," *Prestia v. O'Connor*, 178 F.3d 86, 89 (2d Cir. 1999), the district court relied heavily on *Rockefeller*. As the *Rockefeller* court noted, the presidential primary "requires a kind of campaign that is very different from an ordinary campaign for local

office." 917 F. Supp. at 160. The Supreme Court recognized that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S. at 795.

Rockefeller is further distinguishable from this case because the principal barriers observed by the *Rockefeller* court – New York's then arcane signature requirements and the dearth of enrolled Republicans eligible to sign petitions in certain Congressional Districts – are not present here. The technical requirements for validating petition signatures have been greatly relaxed over the last decade. *See* Tr. 197:7 – 198:2 (Berger); Tr. 461:21 – 462:21 (Carroll); Tr. 2108:18 – 2112:5 (Connor). And, Plaintiffs, such as Lopez Torres, ran in heavily Democratic Judicial Districts. Judge Lopez Torres easily amassed 30,000 signatures across Kings County, far more than the 10,500 signatures needed to place delegates on the ballot in 21 of the 24 ADs in the Second Judicial District. HE-7675-85 (Ex. R-S, chart describing petitions). There was no testimony that any judicial candidate ever tried and failed to gather enough signatures to qualify their chosen delegates.

The district court's attempt to apply *Rockefeller* to the instant case also reflects a misunderstanding of the judicial convention system. The court assumes that to win delegate votes, a challenger candidate must run his own slates of delegates by sponsoring their efforts to gather signatures. However, the delegate-

based convention system is based on the principle that independent delegates serve as representatives of their respective communities, and are often called upon to vote for multiple candidates for Supreme Court. Tr. 1257:14-24 (Schiff). As Appellants' expert, Commissioner Kellner, testified, the notion that an individual candidate should recruit pledged delegates "twists the design of the system on its head." Tr. 1567:10 – 1568:5; 1572:23 – 1573:7 (Kellner); *see also* Tr. 1266:14 - 1267:4; 1267:17-19. (Schiff).

Nonetheless, if a particular candidate insists on fielding slates of delegates, unlike in *Rockefeller*, the barriers to placing the names of such candidates on the delegate ballot are reasonably achievable. Notwithstanding the district court's attempt to increase the purported burdens associated with fielding one's own delegates, the only requirement, as discussed above, is obtaining 500 valid signatures per AD. Not only was there evidence at the hearing that challenger candidates could run their own delegates, there was testimony that it could be done successfully. Indeed, the experience of Plaintiffs' own witness, Judge Regan, demonstrates that there are neither "insurmountable" nor "severe" obstacles to running one's own delegate slate, as he succeeded at petitioning his slate of delegates. *See* Tr. 396:8-11 (Regan).

D. In Any Event, The State's Interests In Judicial Nominating Conventions Are Sufficient To Satisfy Any Burdens Imposed On Voters And Candidates

Where a challenged law imposes "reasonable, nondiscriminatory restrictions" on voters or "challenger candidates," as is the case here, "the State's important regulatory interests are generally sufficient to justify the restrictions." *See Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788) (internal quotations omitted). New York Election Law §§ 6-106 and 6-124 pass constitutional muster under either strict scrutiny or rational basis review because these provisions are properly tailored to advance New York's compelling, as well as legitimate State's interests in, among other things: (1) protecting the associational rights of political parties; (2) promoting racial and ethnic diversity; and (3) promoting geographic diversity. Indeed, New York has "a substantial interest in maintaining the structure of judicial elections." *See France v. Pataki*, 71 F. Supp. 2d 317, 333 (S.D.N.Y. 1999).

1. The District Court's Decision Failed To Accord Due Respect To The Political Parties' Compelling First Amendment Associational Rights

While the district court admitted that the First Amendment right of a party to choose its nominee is a compelling interest, its decision accorded this fundamental right little respect. *See* SPA-66-67. The Supreme Court has repeatedly held that there is a constitutionally protected right of association of political parties and their

members, including the right to determine the process for selecting nominees. *See, e.g.*, *Jones*, 530 U.S. 567; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986). 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.'" *Jones*, 530 U.S. at 575 (quoting *Eu*, 489 U.S. at 224 (internal quotations omitted)). Indeed, the "moment of 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.'" *Jones*, 530 U.S. at 575 (quoting *Tashjian*, 479 U.S. at 216).

Nevertheless, the district court enjoined N.Y. Elec. L. §§ 6-106 and 6-124, which govern the process of selecting judicial nominees based on party rules. *See Balletta v. Secretary of State of N.Y.*, 65 A.D.2d 583, 584 (2d Dep't 1978) (an "examination of those provisions of the Election Law dealing specifically with judicial conventions specify particular areas which must be governed by party rules," including Sections 6-106 and 6-124). Clearly, the act of selecting judicial delegates by party members under these provisions, just as the act of voting for the relevant party's nominee(s) at the judicial delegate convention, exemplifies the associational freedoms protected under the First Amendment.

The district court justified its decision based on its purported desire to protect rank-and-file party members from the influence of their own leadership. *See* SPA-66. This, however, is exactly the type of paternalistic rationale that the Supreme Court has rejected. In *Eu*, for example, the Court found that California could not justify its ban on party endorsements in primaries on the ground that the ban protected the party from "pursuing self-destructive acts." 489 U.S. at 227. Indeed, the Supreme Court has drawn a clear distinction: "a State may enact laws to 'prevent disruption of political parties from without' but not . . . laws 'to prevent the parties from taking internal steps affecting their own process from the selection of candidates." *Id.* at 215 (quoting *Tashjian*, 479 U.S. at 224).

Moreover, the district court acknowledged that the challenged provisions specifically "advance" the "legitimate" State interest of preventing party raiding. SPA-66-67. Party raiding is "a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary." *Jones*, 530 U.S. at 572; *see also Anderson*, 460 U.S. at 788 n.9 ("[t]he State . . . has the right to prevent distortion of the electoral process by the device of 'party raiding'"). The convention system thwarts party raiding by funneling the nominating process through smaller groups of delegates who are intimately familiar with the qualifications of judicial candidates seeking the party's nomination. Tr. 1339:17-24 (Ward).

Yet the district court erroneously determined that the convention process is not tailored narrowly enough to promote that State's interest, as a primary election open only to registered members of the party "would protect against raiding just as well." SPA-67. But as this Court has noted in other contexts, "'even narrow tailoring in strict scrutiny analysis does not contemplate a perfect correspondence between the means chosen to accomplish a compelling governmental interest.'" *United States v. Gomes*, 289 F.3d 71, 87 (2d Cir. 2002) (quoting *United States v. Weston*, 255 F.3d 873, 883 (D.C. Cir. 2001)), *vacated on other grounds*, 539 U.S. 939 (2003); *see also Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1186 (10th Cir. 2000), *cert. dismissed as improvidently granted*, 534 U.S. 103 (2001) (narrow tailoring does not require an inordinate "degree of precise fit"). Thus, even if party raiding could equally be avoided through another electoral scheme, this fact alone would not make New York's chosen convention system unconstitutional.

Nor is the district court's assertion that a primary election open only to enrolled party members "would protect against raiding just as well" supported by the record. Several witnesses testified that party raiding has occurred in primaries for various offices, including offices for which only enrolled members of the political party can seek election. *See, e.g.,* Tr. 1337:17 – 1338:13 (Ward). The

record, thus, demonstrated unequivocally that while party raiding cannot occur in a convention, it can and does occur in a primary.

The district court also failed to address that the convention system furthers the associational right of major political parties to "balance" its slates of candidates. Senator Connor attested that when you have multiple vacancies for the same office, "[i]t's in the parties' interest" to promote the important goal of "balanc[ing] that ticket" in order to represent diverse constituencies. Tr. 2121:9-13 (Connor). The ability to balance an entire party slate across geography, race, ethnicity and gender has broad ramifications for a major political party beyond any particular judicial election. In the Second Judicial District, for instance, Senator Connor noted that a judicial candidate from Staten Island would never win a primary because the voters are too heavily populated in Brooklyn. Tr. 2124:4-22 (Connor). Yet a failure to include candidates from Staten Island on the ticket would hurt the Democratic Party's ability to win Assembly races because of political fallout in Staten Island. Tr. 2103:2-17 (Connor). Similarly, Senator Connor testified that promoting ethnic diversity assists the party's other candidates whose names appear on the same ticket, Tr. 2103:25 – 2104:24 (Connor), as the Senatorial and Assembly candidates appear below the Supreme Court candidates on the ballot. Tr. 2103:22-23 (Connor).

2. New York's Judicial Convention System Promotes Racial And Ethnic Participation And Diversity On The Supreme Court Bench

The district court agreed that New York has a "legitimate" interest in maximizing minority participation in the judicial nominating process and in promoting racial and ethnic diversity on the bench. SPA-68. Nor did the district court deny that the existing statutory framework is sufficiently narrowly drawn to meet those aims.

The convention system ensures that minority candidates have the opportunity to compete for judicial nominations because it is a representative system that fosters cooperative decision-making. *See* Feerick Report at 30 ("In contrast to primaries, which are able to grant victory only to majority vote getters, conventions allow members of geographic and other minority factions to build coalitions to win a spot on the ballot."). Judicial delegates are elected to represent their constituents' interests and to vote for the most qualified judicial candidates who reflect those interests. At the same time, however, logrolling enables voters to achieve greater diversity than they would otherwise be able to achieve through direct elections. HE-4934-35 (Ex. 69, Report of Expert Witness Michael Hechter, at 18-19). Defendants' expert witness, Sociology Professor Michael Hechter, described the phenomenon:

> . . . *Well*, if there are two minority groups . . . let['s] say one has 25 percent of the electorate and another has 26 percent of the electorate, .

> . . a judicial convention could enable the log-rolling that would enable them to form a binding, enforceable commitment to support one another's candidate. And therefore, both could end up being elected in that scenario.

Tr. 1224:1-7 (Hechter); *see also* Tr. 1889:4 – 1890:4 (Abdus-Salaam); Tr. 2031:10-15 (Allen). In contrast, under a primary system, where voters cannot engage in coordinated bargaining, minority candidates for judicial office are deprived of the opportunity to build coalitions, and are subject to the "tyranny of the majority." Tr. 1222:18 – 1224:15 (Hechter).

Indeed, the record demonstrated the success of the convention process in promoting diversity. For instance, in the Eighth Judicial District, while African-Americans reside primarily in one AD, Tr. 1343:23 – 1344:1 (Ward), two African Americans sit on the bench. As Dennis Ward testified, without a convention system, no minorities would ever win a party nomination in the Eighth Judicial District, and the bench would become again entirely white and male. Tr. 1345:24 – 1346:2 (Ward); JA-381-82 (Ward Decl. ¶¶ 19-20).

The statistical evidence further confirmed that the convention system maximizes minority representation. As of 2001, on a statewide basis, 19.2% of Supreme Court Justices were racial or ethnical minorities from an eligible candidate pool (attorneys in practice for ten years) comprised of only 8.6% minorities. HE-7667-70 (Ex. NNN); HE-7646-49 (Ex. LLL). The same is true at the Judicial District level. In the First Judicial District, for example, 44.7% of

Supreme Court Justices were minorities from a pool of 6.81% minority attorneys. HE-7667-70 (Ex. NNN). Moreover, the only Judicial Districts that lacked minority representation in 2001 were districts with a total percentage of minority attorneys between 0.58% and 4.62% of the total number of such eligible attorneys. HE-7667-70 (Ex. NNN).

3. New York's Judicial Convention System Promotes The State's Interest In Ensuring That The Bench Is Geographically Diverse

Similarly, the district court could not deny that New York has a legitimate – if not compelling – interest in the convention system because it promotes geographic diversity, which supports "judicial accountability" and the "fair administration of justice." *See* SPA-67; *see also France*, 71 F. Supp. 2d at 333 ("[I]t is well settled that a State's citizens have a substantial and legitimate interest in maintaining the link between an elected judge's territorial jurisdiction and those courts' electoral districts.")

The convention system fosters geographic diversity by enabling delegates from local ADs to act on behalf of their constituent communities through the logrolling process to advance collective interests more effectively than through casting an individual ballot. *See* Feerick Report at 30 (acknowledging that conventions "allow members of geographic . . . factions to build coalitions to win a spot on the ballot")). Candidates from smaller, less populated counties use the

coalition building process to their advantage and win nominations that would otherwise be unattainable. In the most geographically diverse Judicial Districts, virtually all rural counties are represented on the Supreme Court bench. HE-4942; 4953-56; 4964-65 (Ex. 69, Report of Expert Witness Michael Hechter, at 37-40; 48-49); Tr. 1224:1-7 (Hechter).

The sprawling Fourth Judicial District, with eleven counties occupying 26% of the State's land mass, illustrates how the convention system is tailored to promote geographic diversity. As Justice Sise attested, with the exception of Hamilton County which has a miniscule population, every county has one Justice who sits in that county. JA-126-27; 129-30 (Sise Decl. ¶ 4-5, 10-12); Tr. 1495:25 –1498:3, 1514:14 – 1515:4 (Sise). Similarly, Staten Island residents comprise a substantial number of justices in the Second Judicial District even though Brooklyn is far more populous. HE-4980 (Ex. 69, Report of Expert Witness Michael Hechter, Table 9, at 64).

IV. THE DISTRICT COURT ERRED BY FAILING TO PROVIDE DEFENDANTS NOTICE THAT IT WOULD GRANT FINAL RELIEF WITHOUT CONSOLIDATING THE HEARING WITH A TRIAL ON THE MERITS UNDER FEDERAL RULE OF CIVIL PROCEDURE 65(a)(2)

The district court erred by failing to place Defendants on notice that it would effectively grant final relief to Plaintiffs without ordering that the preliminary injunction hearing be consolidated with a full trial on the merits. Under Fed. R.

Civ. P. 65(a)(2), a court "may order the trial of the action on the merits to be advanced and consolidated with the hearing of the [preliminary injunction] application." In the context of a request for a preliminary injunction, where a court intends to determine the full merits of a claim, the parties must be provided with clear and unambiguous notice of such decision. *See, e.g.*, *Woe v. Cuomo*, 801 F.2d 627 (2d Cir. 1986) (where record clearly indicates appellants' counsel functioned throughout hearing under the belief that only a motion for temporary relief and not the merits of the claim was at issue, neither the district court's oblique references during the hearing to the dispositive nature of the proceedings, nor the request for permanent relief in appellees' post-hearing memorandum constitute timely, "clear and unambiguous notice," which is required); *see also aaiPharma Inc. v. Thompson*, 296 F.3d 227 (4th Cir. 2002) (district court erred in entering final judgment after hearing on patent holder's motion for preliminary relief, without giving notice that the court was considering a final disposition on the merits).

Here, the district court effectively consolidated the hearing under Fed. R. Civ. P. 65(a)(2) without giving the parties notice of its intention to do so. The result was highly prejudicial as the district court relied on an incomplete record that, among its many infirmities, fails to demonstrate how the judicial convention system operates in a majority of Judicial Districts, or to establish how the challenged statutes are used by the Independence, Working Families and

Conservative Parties, respectively. Indeed, the district court suspended the rules of evidence, substantially relying on hearsay and other inadmissible evidence in granting sweeping mandatory relief that, in fact, exceeds the final relief requested by the Plaintiffs.

Given the gravity of this case and the sweeping nature of the ultimate relief that the district court granted on a preliminary injunction motion, it should not have relied on evidence that would have been inadmissible in a trial on the merits, such as the 10 year-old transcript of Farrell in *France v. Pataki*, Berger's reliance on Farrell's testimony in *France*, Judge Lopez Torres' account of what she allegedly overheard, and decades old news articles.[16]

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[16] The mountain of hearsay that the district court admitted into evidence is staggering. Such hearsay included: (1) news articles, many of which were opinion pieces and over a decade old (HE-4981-87 (Exs. 70-74); (2) documents with embedded hearsay, such as reports containing anonymous conclusions regarding conventions (HE-4988-5419, 5685-762 (Exs. 77-79, 90)); (3) the ten year-old transcript of Farrell's testimony from another case, from which the district court apparently made credibility determinations (SPA 33-35; HE-5960-6421 (Ex. 98); *see* Tr. 123-124; 1151; 1156-1163); and (4) impermissible opinion testimony (Tr. 30:8-19, 38: 23-24; SPA 21-22). Although this evidence was inadmissible, *e.g.*, *Tasini v. New York Times Co.*, 184 F. Supp. 2d 350, 357 (S.D.N.Y. 2002) ("Newspaper articles are simply not evidence of anything"), and Appellants objected vigorously to its admission (*see, e.g.*, JA-1464-69, JA-1518-20), the district court decided that all hearsay was admissible in a preliminary injunction hearing. Respectfully, it was improper for the district court to have relied on such evidence to ground the issuance of final relief in the case.

Had the district court ordered a full trial in order to determine whether Plaintiffs are entitled to the final relief which effectively has been awarded here, Plaintiffs would have been required to prove "*beyond a reasonable doubt*" that the challenged statutes are unconstitutional. *See New Alliance Party v. N.Y. State Bd. of Elec.*, 861 F. Supp. 282, 292 (S.D.N.Y. 1994) ("New York's election statutes, as with other state legislative enactments, have been afforded a strong presumption of constitutionality . . . Although the presumption is rebuttable, 'invalidity must be demonstrated beyond a reasonable doubt.'" *Id.* (quoting *McGee v. Korman*, 70 N.Y.2d 225 (1987)). The district court erred by failing to apply this standard.

V. THE PRELIMINARY INJUNCTION IMPOSED BY THE DISTRICT COURT IS OVERLY BROAD

Even if Plaintiffs could demonstrate an entitlement to some form of a preliminary injunction, the order entered by the district court is indefensible in light of its astonishing and unwarranted breadth. While the district court was not explicit about whether it purported to set aside New York's system for electing Supreme Court Justices on a facial or as-applied basis, it enjoined the Defendants "from enforcing New York Election Law § 6-106, and from using the procedures set forth in § 6-124" and ordered that "the nomination of Supreme Court Justices shall be by primary election until the legislature of the State of New York enacts a new statutory scheme." SPA-76-77. It thus effectively invalidated the statutes entirely, restrained the State from sanctioning any form of judicial nominating

convention for the office of Supreme Court Justice, and rewrote State law to impose a primary system for the election of candidates to that office.

This sweeping remedy was unjustified by the evidence before the court, and contradicts a key rule of constitutional interpretation, reiterated by the U.S. Supreme Court just a few months ago: "when confronting a constitutional flaw in a statute, [courts should] limit the solution to the problem." *Ayotte v. Planned Parenthood of Northern New England*, __ U.S. __, 126 S. Ct. 961, 967 (2006) (internal citations omitted). Accordingly, the district court's injunction was an abuse of discretion, and should be vacated by this Court.

A. The District Court Abused Its Discretion By Dictating A Sweeping Remedy That Wholly Disregards The Legislature's Decision To Use Nominating Conventions As Part Of The Judicial Election Process

The Supreme Court has cautioned that in remedying a constitutional flaw in a statute, courts should avoid "'rewriting state law to conform it to constitutional requirements.'" *Ayotte*, 126 S. Ct. at 968 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J. concurring in part and dissenting in part)). Even if the district court had been correct in finding some constitutional infirmity in New York's existing system for electing Supreme Court Justices – which it was not – ,

its remedy flouts these principles. The preliminary injunction entered below eviscerates, not just circumvents, the Legislature's intent in choosing a convention process for selecting party candidates.

The State properly exercised its authority to control the electoral process in 1922 in enacting legislation governing the judicial nominating convention process. That deliberate and reasoned choice has gone unchanged for more than eighty years. Instead of considering that legislative judgment and tailoring a remedy that would do the least amount of damage to the existing system, the court imposed the bluntest of remedies – a wholesale injunction of N.Y. Elec. §§ 6-106 and 6-124 – without, as *Ayotte* requires, any consideration of the New York Legislature's intent in designing a system for electing Supreme Court Justices. *See* 126 S. Ct. at 968. This error is all the more egregious given the strong interests that states, as sovereigns, have in crafting their own election procedures. *See Burdick*, 504 U.S. at 433. The judgment about the best way to nominate judicial candidates is a choice best made by a legislature answerable to the electorate, rather than a single federal district court judge. *See id.*

Moreover, the "ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly [courts] have already articulated the background constitutional rules at issue and how easily [the court] can articulate the remedy." *Ayotte*, 126 S.Ct. at 968. Where, as here,

neither the constitutional rule nor the appropriate remedy are easily defined by prior case law, there is a significant risk that the remedy will improperly usurp legislative authority. *See id.* ("making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than [courts] ought to undertake"). The district court abused its discretion by crossing that line.

B. The Injunction Is In No Way Tailored To Address The Constitutional Violations Identified By The Court

The district court's injunction should also be set aside because the court utterly failed to limit the scope of the injunction to the constitutional infirmities it identified. Courts should seek "not to nullify more of a legislature's work than is necessary." *Ayotte*, 126 S.Ct. at 967. "[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 968; *see also Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209, 220 (2d Cir. 2003) ("'Injunctive relief should be narrowly tailored to fit specific legal violations.'") (quoting *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994)). The district court's injunction far exceeds any reasonable bounds, in at least two respects.

First, the district court enjoined application of the challenged statutory provisions and ordered a primary election on a statewide basis, even though

Plaintiffs had not shown, and the court did not suggest, that the challenged provisions might be impermissible in a substantial number of districts. The evidence presented by Plaintiffs at the preliminary injunction hearing was limited to a small number of the twelve Judicial Districts in the State. As the district court itself noted, "[t]he evidence at the hearing did not focus equally on all 12 Judicial Districts. The most dominant subject by far was the First District, followed by the Second District. To a much lesser extent, conditions in *some* of the upstate . . . districts were addressed." SPA-33 (emphasis added). From this evidence pertaining to a handful of districts, the court improperly extrapolated a statewide constitutional infirmity. The district court compounded that error by invalidating the statutes based only on evidence pertaining to the Democratic and Republican Parties, when in fact there are – as the district court recognized, *see* SPA-5 n.2 – five political parties that presently enjoy "major party" status under New York law. *See* SPA-11-13; SPA-28-30; SPA-33-47. To the extent that the district court concluded that N.Y. Elec. L. §§ 6-106 and 6-124 are unconstitutional as applied in certain Judicial Districts or by certain political parties, it should have fashioned a remedy more properly tailored to those constitutional infirmities.

Second, the district court's opinion rested largely on its conclusion that several specific statutory requirements in the New York Election Law made the process overly burdensome for challenger candidates, namely, that: (1) separate

delegate races are required for each AD, *see* SPA-81 (N.Y. Elec. L. § 6-124); (2) the number of delegates and alternate delegates at the Democratic and Republican conventions purportedly is too high, *id.*; (3) delegates cannot signify on the primary ballot an allegiance to a specific candidate; and (4) the petitioning requirements for delegates are supposedly too onerous, *id.* § 6-136.[17] The court further found that the short time frame imposed by N.Y. Elec. L. § 6-158 makes any delegate deliberation impossible. SPA-82 (N.Y. Elec. L. § 6-158(5)) (judicial nominating conventions must 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").

None of these perceived flaws, however, justifies invalidating the judicial nominating convention system in its entirety. Instead, the district court should have simply set aside any provisions of the statutory scheme that it found problematic and allowed the Legislature to remedy those constitutional flaws. Even if the district court believed that more specific instruction to the Legislature

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[17] Nowhere in their Complaint have Plaintiffs alleged that the petitioning requirements in N.Y. Elec. L. § 6-136 are unconstitutional. The district court's review and invalidation of this provision thus exceeded the scope of its jurisdiction. *See, e.g., Liverpool, N.Y. & Philadelphia S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (a federal court "has no jurisdiction to pronounce any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies").

was appropriate, those directives should have been confined to any identified infirmities as well. *See Patsy's Brand*, 317 F.3d at 220; *Waldman Pub. Corp.*, 43 F.3d at 785. For instance, the district court was troubled by the large number of judicial delegates and alternates that the Democratic and Republican Parties presently require. SPA-11-13. New York Election Law § 6-124 does not specify a particular number of delegates and alternates; it merely provides that the number of delegates and alternates "shall be determined by party rules" based on the ratio of votes for that party's candidate for governor to the total vote cast for governor in the preceding election. SPA-81 (N.Y. Elec. L. § 6-124). Consistent with that statute, the district court thus could have directed the Democratic and Republican parties to adopt rules that maintain the requisite statutory ratio but decrease significantly the absolute number of delegates and alternates.

Similarly, the district court could have extended the time for candidates to lobby delegates by enjoining the upcoming delegate election. New York Election Law § 6-124 provides that "[a] judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates," but the statute does not specify when the preceding delegate primary must occur. Therefore, if the upcoming delegate election were enjoined, current delegates would continue to serve, thus affording all judicial candidates more time to lobby delegates, and delegates more time for deliberation.

There are other ways, too, in which the district court could have tailored the preliminary injunction to address perceived problems with access to judicial nominating conventions. For example, the Feerick Commission recommended requiring that the State Board of Elections provide delegates and the general public with general information about judicial elections and specific information about judicial candidates. Feerick Report at 34. That Commission also recommended giving candidates the right to address the delegates at the convention. *Id.* And, an earlier report issued by The Judicial Selection Task Force of The Association of the Bar of the City of New York concluded that all nominating conventions should establish screening committees to review the qualifications of candidates. *See* The Judicial Selection Task Force of The Association of the Bar of the City of New York, *Recommendations on the Selection of Judges and the Improvements of the Judicial System in New York* at 32-33 (Oct. 2003).[18]

Rather than consider any of these or other alternatives – remedies that would be consonant with the existing statutory framework – the district court concluded that imposing a primary was "the least intrusive course." SPA-75. As shown above, that determination was both misguided and unsupported. At a minimum, the district court should have heard from the parties on the question of remedy

[18] Available at http://www.abcny.org/pdf/Judicial%20selection %20task%20force.pdf.

before it invalidated the convention system and imposed a primary. Even if this Court were to conclude that N.Y. Elec. L. §§ 6-106 and 6-124 are constitutionally infirm, it should carefully craft a narrowly-tailored remedy that, consistent with the Legislature's intent, retains the essential features of the judicial nominating convention, or vacate the Decision and order the court below to fashion more appropriate relief on remand.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's Decision ordering that New York State's judicial nominating convention system shall be replaced by primary election, or, in the alternative, vacate the district court's order and order the court below to fashion more appropriate relief on remand, and grant any other relief that this Court deems just and proper.

Dated: April 11, 2006

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[19] It is with sadness that we note that Robert Alan Muir, former counsel for the New York State Republican Committee, passed away on March 14, 2006.

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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 20,433 words and complies with the type-volume limitations set forth in the Order of this Court dated April 7, 2006 and in Federal Rule of Appellate Procedure 32(a)(7)(B).

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