No. 06-766

IN THE

Supreme Court of the United States

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

v.

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

On Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE CITY OF NEW YORK, NEW YORK STATE BAR ASSOCIATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, AND FUND FOR MODERN COURTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are the City of New York and three of the leading bar associations and institutions in New York State that for long have recognized and publicly reported upon the many severe shortcomings of the present judicial selection system for trial court judges in New York State.

The ***City of New York*** (the "City"), the largest city in the United States with more than 8 million residents, has more cases pending in the New York State court system than any other entity: More than 6,000 cases are commenced annually against the City in state supreme court, and more than 25,000 such cases are currently pending. The City is a party to more than 20% of all civil cases pending in the state courts located in the City. The Office of the Corporation Counsel represents the City in all of these litigations. As the most frequent litigant before the state supreme court, the City has a vital interest in the quality and independence of the state bench.

The City and its citizens have suffered as a result of the state's current judicial selection system, which, as the courts below found and the City believes, is unconstitutional. In the past several years, three Supreme Court justices in the City have been indicted, two convicted, at least four removed

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. The parties, with the exceptions of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Clerk of this Court giving blanket consent to the filing of all *amicus curiae* briefs in this case. Written letters of consent from the New York County Democratic Committee and the Attorney General of New York have been filed in the Court with this brief.

from the bench for improper conduct, and several others disciplined for improper behavior. At the same time, qualified judges in the City have been denied promotion for refusing to kowtow to political bosses, and judicial nominations have been made on the basis of friendships with district leaders rather than merit. All of this has eroded public confidence in the state judiciary, and affected litigants, including the City, before the state Supreme Court.

New York City Mayor Michael R. Bloomberg has made judicial selection reform one of his top priorities, and has repeatedly emphasized the importance of a fair and impartial judiciary. As the Mayor said last year about this case: "The federal court's . . . ruling validates what we have been saying for years: the backroom process for nominating judges is unconstitutional and it has to stop." Remarks of Michael R. Bloomberg, Citizen's Union Awards Dinner (Oct. 24, 2006).

As a policy matter, the City supports a state constitutional amendment mandating appointment rather than election of judges, and opposes open judicial primary elections. But because such a constitutional amendment could not take effect for several years, the City supports legislative reform of the convention in the short-term and has drafted legislation reflecting its proposed reforms. "The good solution, and in fact the best [legislative] solution today, is to reform the convention system, and to do it now. . . . *without* the need for open primaries." Michael A. Cardozo, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007).

The New York State Bar Association (the "NYSBA"), founded in 1876, is the oldest and largest voluntary state bar organization in the nation, with a membership of more than 70,000 lawyers representing every town, city and county in the state. Many notable Americans have contributed to the

NYSBA's 130-year history, including U.S. Presidents Grover Cleveland and Chester A. Arthur, as well as United States Supreme Court Chief Justice Charles Evan Hughes, who served as a president of the NYSBA.

Since its inception, the NYSBA has played a key role in supporting a state judicial selection system that requires judges to be selected because of their professional, not political, credentials. For more than 30 years, the NYSBA has maintained and reported that the current system, in which judicial candidates are nominated by delegates at political conventions, is undemocratic and that true reform is necessary. In 1993, the NYSBA approved a "Model Plan" setting forth the details of a proposed appointive selection system that is similar to the method used for selecting judges to the New York Court of Appeals. *See* New York State Bar Association, *A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges* (May 14, 1993). Again in January of this year, the NYSBA crafted a comprehensive package of legislation that would amend the state constitution to allow for an appointive selection process for selecting New York State judges, together with an interim bill that would reform the current party convention system until such time as a constitutional amendment would pass.

Long cognizant of the failures and infirmities of the current judicial selection system in New York, the NYSBA concluded in a report approved by the House of Delegates nearly 15 years ago: "The defects of New York's present system of 'electing' judges are well known. In reality, New York's electorate does not participate in the process. Nominees of the major political parties for the Supreme Court are at present chosen in conventions tightly controlled by party leaders. Party loyalty, not ability, is the primary prerequisite for nomination." *Id.* at 1.

At the same time, the NYSBA has warned against a system of direct party primaries in place of party conventions as a cure "worse than the disease" – a system that would lay bare the

> prospect of judicial candidates promising in advance how they will decide politically-charged cases, or at least being pressured to do so by special interest groups, and negative advertisements attacking judicial candidates for their real or imagined positions on hot-button issues. . . . Can you imagine the effect on our legal system if judges were thought to make rulings based on campaign promises, or for that matter, in violation of campaign promises? . . . A judge's actions must be guided by the rule of law, not by popular opinion or special interest groups.

Mark H. Alcott, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007).

The Association of the Bar of the City of New York (the "City Bar"), has since its founding in 1870 played an important role in reform efforts relating to judicial selection methods in New York State. Comprised currently of more than 22,000 attorneys, the City Bar has long supported a system in which state judges would be appointed by an elected executive – who would select from among a limited number of nominees approved and presented by a diverse, representative and nonpartisan commission – rather than elected. Indeed, among the chief reasons for founding the City Bar was the steady decline in judicial integrity following the state constitutional convention of 1846, which instituted the election of state judges. Throughout its 137-year existence, the City Bar has advocated reforms to root out corrupt judges, reinstate the appointive method of

selecting judges and minimize the pernicious effects of overt political activity upon judicial independence or public perceptions thereof.

As far back as nearly 30 years ago, the City Bar concluded that "[u]nder the present judicial selection system, delegates to the judicial convention generally do as they are told by the political leaders who select them, and therefore play no constructive role in the judicial selection process. Because the judicial conventions are so large, there is no hope that they can function as a deliberative assembly, and there is no one to blame for improper nominations." Committee on State Courts of Superior Jurisdiction, *A Proposal to Restructure the Judicial District Nominating Convention*, 32 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ("THE RECORD") 615 (1977). The Committee concluded "that the convention system is a hindrance, as it is now constituted, to any meaningful role by the electorate." *Id.* at 616.

Similarly, less than four years ago and again last year, the City Bar concluded in comprehensive reports that a commission-based appointive system should be instituted whereby state judges would be selected by an appointing authority from among a limited number of candidates rated as "most qualified" by truly independent judicial screening commissions – and, until such time as a constitutional amendment can be passed to effectuate such a system, genuine legislative reform of the party convention system should be initiated to ensure more deliberative and democratic choices. *See* Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (December 2006) ("2006 Report"); Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (October 2003).

The City Bar also warned that "primary elections by themselves (i.e., without a convention system and without public financing) are far from the best constitutional solution for the shortcomings of the current convention system. To the contrary, primary elections engender a host of problems that render such elections undesirable as a means of providing to the electorate a diverse slate of the highest caliber candidates to fill the positions of Supreme Court justices" and raise a "substantial concern" relating to "the necessity for candidates without party backing to raise large sums of money to mount competitive campaigns." 2006 Report at 21.

The Fund for Modern Courts ("Modern Courts") is a private, nonprofit, nonpartisan organization dedicated to improving the administration of justice in New York State. Led by concerned citizens, prominent lawyers and leaders of the business community, Modern Courts is the only organization in New York State devoted exclusively to improving the judicial system. It was founded in 1955 specifically to advocate changes in New York State's judicial selection processes, and has remained steadfast in its efforts to change these processes to strengthen judicial independence and quality, even as its mission has broadened to include other critical issues of judicial administration.

Modern Courts has played a role in every significant judicial reform effort in New York State in the last fifty years, including the creation of New York's Judicial Conference, the 1961 amendment to the State Constitution that reorganized New York's court system, and the creation of New York's Commission on Judicial Conduct. In the area of judicial selection, Modern Courts has studied different selection processes and issued several key reports on the effects of such processes on voter participation in, and financing of, state judicial elections.

Modern Courts has long supported a state constitutional amendment that would establish a commission-based appointive system for judges in New York State in place of the current system of judicial elections. As an interim, alternative legislative reform until such constitutional change can be effectuated, Modern Courts favors, within a framework of an elective system for state judges, a modified party convention system that would allow state court judges to be nominated for the general election ballot by their parties pursuant to fair, deliberative and democratic procedures, following non-binding evaluations of judicial candidates by independent judicial qualification commissions.

More than twenty years ago, as it advocated for commission-based judicial appointments, Modern Courts summed up what it had learned in studying the election process for New York State trial court judges: "[T]he selection of Supreme Court justices in New York is, by and large, a process controlled not by the voters but by political leaders, largely unaccountable to the citizens of New York." Fund for Modern Courts, Inc., *Judicial Elections in New York* 86 (Oct. 1984).

Nevertheless, while decrying the current party convention system, Modern Courts also has warned consistently against direct party primary elections in place of party conventions. As Modern Courts testified earlier this year: "We deeply believe that direct nominations through party primaries threatens to undermine confidence in the administration of justice by the public, which overwhelming[ly] believes that campaign contributions have an effect on judicial decisions." Victor A. Kovner, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007).

* * *

All four *amici*, therefore, in their policy and advocacy work favor a constitutional amendment to institute a commission-based appointive system for state court judges in place of elections. Absent a state constitutional amendment, however, *amici* support a legislatively reformed party convention system to curb the abuses of the current party boss-driven judicial selection system. *Amici* oppose direct, contested primary elections for judicial candidates because of the deleterious effects that contested primary elections could have upon the administration of justice and upon the state judiciary – due in no small part to the resulting reality that the cost of judicial campaigns would increase dramatically and judicial candidates would have to raise substantial funds to become viable candidates.

Amici do not agree that affirmance of the decision below would mean that all party conventions are unconstitutional. Petitioners have set up and repudiated a straw man argument – that, according to the decision below, party nominating conventions to select candidates for judicial (or any other) office are necessarily unconstitutional if their outcomes do not replicate the unmediated preferences of rank-and-file party voters. Indeed, as noted, *amici* as a policy matter prefer party conventions, properly constituted, over direct primary elections for state judges. Nevertheless, *amici* believe that the court below correctly analyzed the present system for judicial nominations in New York State and concluded that it unconstitutionally burdens the rights of voters and candidates. *Amici* also believe that the courts below acted within their equitable discretion in enforcing the statutory default mechanism of direct primaries as provisional relief until the legislature enacts a permanent remedy to address the constitutional defects of the current statutory scheme for electing state supreme court justices.

SUMMARY OF ARGUMENT

As a legal matter, the current statutory scheme fails to meet basic federal constitutional requirements because it severely burdens the rights of voters and candidates for state judicial office. As a policy matter, the current system results in the worst of all worlds: New York State effectively has an appointive system in the guise of an electoral system, but an appointive system of the worst kind – a system in which judges are appointed by party leaders who are unaccountable to the public and who base their choices on political loyalty and party credentials, rather than on professional judicial qualifications.

1. The district court was correctly led by an extensive factual record and statutory analysis to conclude that New York State's current system of nominating state supreme court justices – viewed in totality and in light of the practical effects of the scheme as a whole – operates to restrict meaningful voter choice, and that the system overall imposes severe burdens on voters', party members' and candidates' rights. Petitioners do not challenge the district court's detailed factual findings in this Court. Instead, they seek to granulize the elements and the operation of the state statutory scheme to a point of abstraction. They argue that New York has mandated a two-step primary election system for judicial candidates – a primary election for delegates, followed by a delegate-based party convention which selects the party's judicial candidate – neither step of which, they argue, when viewed in isolation violates or burdens constitutional rights. By seeking to decouple the two-step party selection process and the web of associated statutory provisions into a "network of facially innocent provisions," Brief for Petitioners New York County Democratic Committee, *et al.* ("NYCDC Pet. Br.") 23 (quoting Pet. App. 44), Petitioners disregard the great body of this Court's precedents.

First, in its long line of election law cases, this Court has made clear that it must not, in assessing the potential burdens of election laws on voters or candidates, engage in formalism, but instead must consider the cumulative, practical effect of the totality of statutory provisions and electoral stages. The constitutional deprivations found by the courts below are the result of many overlapping aspects of the existing delegate primary and nominating convention system – each of which stage was found by the district court to operate in practice as a sham. The combined effect of all aspects of the existing selection system is that "party leaders, rather than the voters, select the Justices of the Supreme Court." Pet. App. 183a. Petitioners' formalistic approach to constitutional analysis in this area, which would require the Court to disaggregate and view in isolation the various interrelated components of the judicial selection system in New York, has long been rejected.

Second, in emphasizing the associational rights of political parties to choose candidates without interference from courts, Petitioners disregard that the delegate-based party convention at issue here burdens rank-and-file party members' associational rights. Such burdens are not the product of private, internal party rules and procedures, but instead are the product of state statute. It is state law that defines in detail and facilitates the burdensome methods for electing delegates to the party conventions, and that governs the timing of the party conventions relative to the delegate elections (and thus the time available for judicial candidates to seek to influence delegates). State law *mandates* a delegate election followed by a delegate convention, and the procedures for both, thereby *precluding* party members from setting forth their own mechanisms for selecting party nominees. The court below properly supported the associational rights of rank-and-file party members by invalidating the state election law provisions governing party nominations of state supreme court justices.

2. In light of the substantial burden on voters', party members' and candidates' rights placed by New York's statutory procedures for judicial selection, the district court properly enjoined operation of the judicial nominating convention system. Although *amici curiae* as a policy matter oppose primary elections for state supreme court justices as an interim or permanent remedy, the district court acted within its equitable discretion in ordering this form of provisional relief. Recognizing correctly that the choice of a permanent remedy falls in the first instance to the state legislature and not the courts, the district court acted well within its broad discretion when it ordered that the existing statutory mechanism in place governing party nominations of other state judges and public officers – direct primary elections – should govern nominations for state supreme court justices until such time as the legislature can act, and then stayed this temporary remedy until the election cycle beginning in 2007. (The district court then stayed imposition of the provisional remedy again through 2007 following grant of certiorari by this Court.)

In affirming the injunction and temporary remedy, the court below specifically asked the legislature's leaders for their anticipated timeframe for enacting a permanent remedy to the system for nominating trial court judges in New York, and received assurances that the legislature would be acting promptly. Reversal of the decision below would impede voters' ability to effectuate legislative reform of the current system. As long as the principle of elections is in place without meaningful rank-and-file party and voter participation, the shortcomings of a judicial election system are insulated from review and blocked from appropriate voter scrutiny. Because the current statutory scheme disguises a system of party-controlled appointments as an electoral system, some of the most pernicious aspects of any system of judicial elections – the injection of pure politics into the judicial process – are hidden from the electorate

because the give-and-take and horse-trading of politics occurs behind closed convention doors among or on behalf of party faithful, rather than through more transparent and deliberative public exchanges. While political excesses of the elective judicial system continue, the public is insulated and less energized to press for reform of judicial elections overall, thus leaving the "principle of elections in place while preventing" meaningful voter participation. *Republican Party v. White*, 536 U.S. 765, 788 (2002). As a result, voters are burdened in their ability to seek democratic reform of the system through ordinary legislative and political channels. As the City Bar stated in its 1977 report: "The principal evil perceived by the Committee with the judicial convention system is a lack of accountability and responsiveness. . . . There is, therefore, no hope that an improper nomination will lead to a reaction that will have a direct future impact on judicial selection." 32 THE RECORD at 616.

Amici curiae submit that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the [constitutional] rights that attach to their roles." *Republican Party*, 536 U.S. at 788 (internal quotation marks omitted) (alteration in original). Central to this principle is the notion of accountability. If a state chooses to require elections for a particular office, then it may not impair the constitutional rights of voters in the name of insulating candidates from the effects of the elective process. Otherwise, as this Court noted in a different context involving federalism concerns, the state could "avoid being held accountable to the voters for the choice" of the system, impeding democratically enacted reform of that choice. *New York v. United States*, 505 U.S. 144, 182 (1992).

ARGUMENT

I. NEW YORK'S JUDICIAL NOMINATING SYSTEM IS UNCONSTITUTIONAL.

A. Petitioners Improperly Seek To Apply A Bright-Line Formalistic Analysis To An Area Of Law Where There Can Be No "Litmus-Paper" Test.

Under this Court's precedents, the courts below properly looked to the operation and practical effect of the statutorily mandated judicial selection system to conclude that it is unconstitutional. As the district court found, the cumulative impact of manifold state law provisions ensures that none of the three steps in the election process for state supreme court justices is meaningful: neither of the two steps of the primary process (delegate elections or the delegate conventions), and not the general elections.

With respect to the first step – the primary election for delegates to the judicial nominating convention – the courts below found that approximately 90% of the time there is no primary election at all because the party leader's slates of delegates and alternates are the only ones filed and so are "deemed elected" without appearing on the primary ballot. Pet. App. 18a; N.Y. Elec. Law § 6-160(2). Similarly, the next step, the nominating convention, was found to be *pro forma* rather than the theoretical construct of deliberative democracy among elected delegates so rhapsodically portrayed by Petitioners. More than 96% of judicial nominations have been uncontested at the party nominating convention, Pet. App. 22a, and the convention itself frequently has a duration of no more than twenty minutes, Pet. App. 129a & n.25. From 25% to 70% of judicial delegates are absent from the convention, Pet. App. 23a, 104a n.8, which is remarkable given that the only role for which delegates stand "election" in the party primaries is to

attend that one convention. Finally, there rarely are contested general elections for state supreme court judges, the final step of the statutory election scheme for state supreme court justices. Pet. App. 23a, 129a-130a. "[B]ecause one-party rule is the norm in most judicial districts" according to "empirical evidence," "the general election is little more than ceremony." Pet. App. 23a.

In the face of the uncontested, extensive factual findings by the district court, Petitioners ask this Court to view the judicial selection system in New York pursuant to its constituent statutory components, and to analyze each step to determine whether each provision viewed in isolation substantially and unconstitutionally burdens the rights of voters and candidates. In particular, Petitioners argue that the district court and court of appeals improperly considered the combination of the New York statutory provisions governing primary elections of delegates, together with the provisions applicable to party convention for elected delegates, to conclude that a challenger judicial candidate lacking the support of party leadership would be severely burdened in her ability to run her own committed delegates in district primaries or to obtain the party nomination by influencing the votes of elected delegates at the convention.

Instead, Petitioners argue that each stage of the two-step nominating process – the primary election of delegates by rank-and-file party members, followed by the party nominating convention of judicial candidates by elected delegates – should be analyzed separately. Because, they contend, the primary election does not itself severely burden potential delegate candidates in their access to the primary ballot, there is no constitutional infirmity. Similarly, because any judicial candidate has access (and the theoretical ability) to influence delegates to the convention once freely elected, the candidate's and voters' rights are not violated if the state

chooses to channel voter preferences through duly elected delegates.

This Court has rejected such formalism, however, and repeatedly has held that statutory electoral laws are invalid that, in their "combined effects," have the practical effect of severely burdening voters' or a candidate's rights absent narrow tailoring to serve compelling governmental interests. *Storer v. Brown*, 415 U.S. 724, 726-727 (1974) (striking down various provisions of California ballot access laws for independent candidates). There is "no litmus-paper test for separating those [election law] restrictions that are valid from those that are invidious" under the Constitution. *Id.* at 730. Instead, decision in this area "is very much a matter of degree, very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Id.* (quotations omitted). *See also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213 (1986) (quoting *Storer*). The Court makes "pragmatic or functional assessment[s]" of the actual and realistic burdens of an electoral scheme on voters, rather than focusing on theoretical constructs. *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring).

Thus, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (striking down candidate filing fee as a condition to having name placed on primary election ballot); *see Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) (looking to the "realities of the electoral process" in noting that "access" via write-in votes "falls far short of access in terms of having the name of the candidate on the ballot"); *Jenness v. Fortson*, 403 U.S. 437, 438-439 (1971) (noting practical effect of challenged election law provision, as opposed to the "merely theoretical"); *accord Amer. Party of Tex. v. White*, 415 U.S.

767, 783 (1974) ("access to the electorate [must] be real, not 'merely theoretical'") (citation omitted).

In one of its earliest pronouncements in this area, *United States v. Classic*, 313 U.S. 299 (1941), the Court considered whether the right of qualified voters to vote in a primary and to have their ballots counted is a right secured by the Constitution so as to fall within the scope of a Louisiana criminal provision. Rejecting formalism, the Court looked to the "practical operation of the primary law," *id.* at 313, and noted that interference with the right to vote in the Democratic congressional primary was "as a matter of law *and in fact* an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result," *id.* at 314 (emphasis added).

Similarly, as the Court earlier had invalidated a party rule requiring the exclusion of black voters in party primaries, *see Smith v. Allwright*, 321 U.S. 649 (1944), the Court subsequently, in *Terry v. Adams*, 345 U.S. 461 (1953), refused to focus on formalities when it invalidated a "three-step" election process (consisting of a "two-step" primary process, together with general elections) that was designed to exclude black voters. The three steps consisted of a party's entirely private and exclusionary primary election, followed by an official state primary election, and then a general election. The Court rejected the "attempted distinction between the 'two-step' exclusion process . . . and the 'three-step' exclusion process" as too "slight a change in form" to have constitutional significance in light of the practical impact of the scheme as a whole. *Id.* at 465 n.1.

Likewise, here, New York has a "two-step" primary process – a primary election for delegates and then a party nominating convention comprised of delegates – combined

with a third step of general elections. The constitutional deprivations found by the district court are the result of many restrictions permeating the existing statutory nominating convention system as a whole, including the large number of Assembly Districts in each judicial district (at least nine and as many as 24), the large number of signatures required for delegate designating petitions in each judicial district (as many as 36,000), the brief time period (37 days) in which delegate designating petitions may circulate, the rules regarding who may sign and witness delegate petitions, the prohibition on party members' signing more than one delegate designating petition, the brief statutory time period (less than three weeks) between the election of delegates and the judicial conventions, the absence of any right by candidates to address delegates, the lack of a mechanism for delegates to signify on the ballot their allegiance to candidates, and the high percentage of general elections that are uncontested or uncompetitive.

It is through the cumulative effect of all of these aspects of the existing convention system that rights of voters and candidates are burdened such that the "party leaders, rather than the voters, select the Justices of the Supreme Court." Pet. App. 183a. The party leaders' control of the "opaque, undemocratic selection procedure" is infused into each step of this process – from the "uniquely burdensome" method of electing delegates, through the "insurmountable . . . structural and practical impediments" that prevent lobbying of delegates once they are elected, through the nominating conventions that are "brief, rote, formal stamps of approval given to decisions made elsewhere" and finally to the general elections that "play almost as minor a role in the selection of Supreme Court Justices as do the conventions." Pet. App. 95a, 100a.

The result, as noted above, *supra* at 13-14, is that none of the three steps in the election process is meaningful. Thus,

after a 13-day preliminary injunction hearing in which 24 witnesses testified and more than 10,000 pages were received into evidence, and following submission by the parties of hundreds of pages of extensive proposed findings of fact and conclusions of law as well as oral argument, the district court determined that "local major party leaders – not the voters or the delegates to the judicial nominating conventions – control who becomes a Supreme Court Justice and when." Pet. App. 95a. Under the statutory scheme, there is virtually no opportunity for a non-party-backed candidate who cannot field her own delegates to lobby or persuade fielded delegates. Pet. App. 113a-117a, 169a. "As a result, almost all Supreme Court Justice nominations in New York State are uncontested. There is no evidence of a single successful challenge to candidates backed by the party leaders." Pet. App. 131a-132a.

Petitioners' attempt to have this Court view each aspect of the scheme separately or through formalistic lenses should be rejected in light of the overwhelming factual findings concerning the practical, combined burdensome effects of New York's statutory scheme.

B. The Severe Burdens On Voters' And Candidates' Rights Result From Operation Of State Election Law, Not Internal Party Rules, And Thus The Associational Rights Of Party Members Are Supported By Invalidation Of The State Election Law Provisions.

Petitioners rely heavily upon the associational rights of parties in arguing that the courts below improperly interfered with state parties' ability to select their own party nominees for judicial office. But unlike cases in which this Court has declined to enforce state laws or actions that would contravene or interfere with internal party rules for selecting

delegates or nominees, *see, e.g., Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (rejecting operation of Wisconsin open primary law where Democratic party rule required voters for delegates to national convention to be members of the party); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (party rule in conflict with state court injunction), it is state laws and procedures – not internal party rules – that have the effect of severely burdening voters' and candidates' rights.

Judicial nominating conventions in New York State are not internal party matters. Their exclusionary and burdensome aspects are the direct products of state law. Section 6-106 of the Election Law mandates judicial nominations by party conventions, providing that "[p]arty nominations for the office of justice of the supreme court shall be made by the judicial district convention." N.Y. Elec. L. § 6-106. Moreover, virtually every significant and burdensome feature of party judicial nominating conventions is regulated by state law. Delegates to the party conventions must be elected in party primaries. *Id.* § 6-124. Delegates must be elected from within each assembly district, and the total number of delegates from each district must be in accord with a statutory formula. *Id.* Before an individual may appear on the primary ballot as a candidate for delegate to a party judicial nominating convention, he or she must submit to the State Board of Elections a petition containing the signatures of at least five percent of the party's registered voters within the assembly district he or she wishes to represent. *Id.* § 6-136(2). This process is complicated by a restriction that does not allow a party member to sign petitions designating or covering more than one slate of candidates. *Id.* § 6-134(3). Prospective delegates are given 37 days to collect the required signatures. *Id.* § 6-134(4). In a contested primary election, delegates have to campaign for primary votes, but state law does not allow a delegate's

preferred judicial candidate to be set forth on the official primary ballot. Pet. App. 107a.

Once elected, delegates attend the judicial nominating convention, the critical timing of which is governed by state law. By statute, judicial delegates are elected in primary elections taking place in the first two weeks of September, the judicial convention occurs in the third week of September, *see* N.Y. Elec. L. § 6-158(5), and the general election is in early November. Judicial candidates are therefore given a very small window of time during which they can attempt to persuade elected delegates to support their nominations. The statutorily-required timing of judicial conventions is relative to the general election (and thus the primary election for delegates): "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." *Id.*

This is not a case where a party adopts a private internal rule independently of the state that is the subject of judicial scrutiny. This is a case where a party is *mandated* by the state to hold a convention, with delegates selected according to certain statutorily mandated procedures, and at a certain statutorily mandated time – all of which combine to severely burden voters' and candidates' choices.[2]

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[2] Moreover, the parties' private internal procedures within the statutory framework also are subject to constitutional scrutiny. The parties' practices with respect to their nominating conventions may be viewed as a delegated public function by virtue of the party's automatic placement of its nominees on the general election ballot, *see, e.g.*, *Morse v. Republican Party*, 517 U.S. 186, 197-198 (1996) (opinion by Stevens, J.), or as state action by virtue of the fact that the party's convention is a heavily state law-regulated process, *see id.*

(cont'd)

The associational freedom of rank-and-file party members to select party nominees of their choosing is therefore *impeded* under the current statutory scheme. The decision below, by invalidating the state law restrictions that burden voters' choices, supports the associational rights of rank-and-file party members.

II. THE PROVISIONAL REMEDY OF DIRECT PRIMARY JUDICIAL ELECTIONS FELL WELL WITHIN THE REASONABLE DISCRETION OF THE DISTRICT COURT.

Although as a policy matter *amici curiae* do not support direct primary elections for judicial candidates, the district court's order of provisional relief – direct primary elections – is a legally appropriate and judicially restrained preliminary remedy. The district court ordered that, effective in 2007 and "until the legislature enacts a new method of electing Supreme Court Justices," Pet. App. 183a-184a, the nomination of New York State supreme court justices shall be by direct primary elections – the default party nomination mechanism that currently is in place for public officers and elective state judicial posts, unless otherwise specified. The court of appeals affirmed this provisional remedy, concluding that it was legally appropriate and that, "as a practical matter," the legislature might well act to reform the current system before primary elections might be held. Pet. App. 84a.

(cont'd from previous page)

at 267-278 (Thomas, J., dissenting), or as state action because the party conventions for state supreme court justice nominees "in practice produce the uncontested choice of public officials," *id.* at 267 (Thomas, J., dissenting) (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) (Rehnquist, J., for the Court) (internal quotation omitted)).

In fashioning preliminary relief, the district court acted in a manner that the United States Supreme Court in similar circumstances found to be "most proper and commendable," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), because the district court: (1) recognized that the choice of a permanent remedy for the constitutional violation falls to the legislature of New York State, and not the court; (2) ordered "a temporary remedy, lasting only until the legislature enacts a new method of electing Supreme Court Justices" in recognition that the court lacks "authority to direct the legislature to take up the matter immediately," Pet. App. 183a-184a; (3) selected as its temporary remedy the least intrusive relief by utilizing an existing, applicable default judicial nomination mechanism contained within the Election Law; and (4) stayed the preliminary injunction until after the 2006 general election (and then again until after the 2007 election, following the grant of certiorari by this Court), thereby allowing the parties time for an expedited appeal, the affected candidates opportunity to prepare for an altered electoral party nomination method, and the legislature time to enact a permanent remedy.

The court below properly affirmed the provisional remedy imposed by the district court. Indeed, prior to argument of the appeal, the court of appeals solicited the views of the state legislature to ascertain how promptly it might enact legislation to address the constitutional flaws of the current nominating system, thereby potentially avoiding the provisional relief from ever having to take effect. The legislature responded that it would "move as expeditiously as necessary to devise a workable solution," and the court of appeals, affirming the temporary remedy, noted that "[w]e take it at its word." Pet. App. 84. Indeed, prior to the grant of certiorari in this case, the state Assembly and Senate already had held hearings to move promptly toward enactment of legislation, at which each of the present *amici* testified.

Although as a policy matter *amici* do not support direct primary elections for judicial candidates as a permanent remedy, the preliminary remedy of direct primaries ordered by the district court is a proper exercise of discretion until such time as new legislation can be enacted.

A. The Federal Courts Have Broad Discretion To Shape Equitable Remedies In Election Law Matters.

It is established law that "[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Indeed, "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Id.* (footnote omitted).

The courts of appeals have recognized the district courts' broad power and discretion to fashion appropriate affirmative equitable relief, particularly in time-sensitive election-related cases. In *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 357 F.3d 260 (2d Cir. 2004), the Second Circuit vacated the conclusion of the district court that it lacked affirmative power to order a special election under a new redistricting plan. The court held that the district court had broad equitable power to do so, and that when submission and approval of the new redistricting plan came too late to conduct the regular November election under the new plan, the district court should have taken the additional affirmative step of ordering a special election. *Id.* at 262-63.

The appeals court wrote: "When the court has determined that there has been a [Voting Rights Act] violation, it has the power to, and normally should, order that remedial steps be taken." *Id.* at 262 (noting further that the "federal courts' power to remedy apportionment violations [under the Voting

Rights Act] is defined by principles of equity"); *see Brown v. Chote*, 411 U.S. 452, 456 (1973) ("In the exigent [election] circumstances, the grant of extraordinary interim relief was a permissible choice."); *Goosby v. Town Bd. of Hempstead, N.Y.*, 180 F.3d 476, 483, 498 (2d Cir. 1999) (affirming remedy that ordered Town Board to adopt a proposed redistricting plan for violations of constitutional rights and the Voting Rights Act and a special election in accordance with the new plan); *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) (upholding portion of preliminary injunction that enjoined the apparent electoral victor from exercising the authority of office even where the district would remain "without representation in the Pennsylvania Senate during the pendency of this litigation" and noting that "[i]nterim periods during which the voters of an area are without representation are inevitable" and "regrettable" in such election situations); *Griffin v. Burns*, 570 F.2d 1065, 1074-80 (1st Cir. 1978) (affirming preliminary injunction order that a new primary be held and postponing the general election); *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) ("In this vital area of vindication of precious constitutional rights [involving voting], we are unfettered by the negative or affirmative character of the words used or the negative or affirmative form in which the coercive order is cast. If affirmative relief is essential, the Court has the power and should employ it.").

Even in situations where a court of appeals has been confronted in election matters with extraordinarily sweeping preliminary orders and noted "serious doubt whether, if any of us had been sitting as the district judge, . . . would have entered the orders here under review," the court has deferred to the district court's wide discretion in crafting preliminary relief to remedy constitutional violations. *Coalition for Educ. in Dist. One v. Bd. of Elections of N.Y.*, 495 F.2d 1090, 1093-94 (2d Cir. 1974) (affirming preliminary injunction directing that a school board election be declared invalid and the

position of the elected members be declared vacant, that a new election be held, and that the Chancellor of the City School District should in the interim exercise the powers of the previously elected board, despite concluding that an alternative remedy would have afforded "ample relief"). Such deference is "not too high a price to pay for the benefit of the greater time which a trial judge can give to a particular case and his advantage in having seen and heard the witnesses." *Id.* at 1093.

B. The District Court's Temporary Remedy Was Not An Abuse Of Discretion.

Against this backdrop of broad deference to the district courts' discretion to fashion far more sweeping interim equitable remedies than the one at issue here, the district court's provisional remedy in this case is an example of "proper judicial restraint," *Reynolds*, 377 U.S. at 586, well within the court's sound discretion, and should be upheld. *See id.* at 586-87 (upholding district court's order of a provisional and temporary reapportionment for general election that combined features of two plans enacted by the legislature, enjoined future elections under any of the invalid plans, and deferred hearing on a permanent injunction but maintained jurisdiction until the legislature, as provisionally reapportioned, would have the opportunity to enact a constitutionally permissible reapportionment plan).

Four aspects of the district court's interim relief and remedial analysis underscore its propriety.

First, the district court correctly understood that the state legislature should decide the appropriate permanent remedy to address the constitutional infirmities of the State's judicial election system. *See* Pet. App. 183a ("The choice of a permanent remedy for this constitutional violation does not fall to me, but rather to the legislature of New York State."). Thus, the court "correctly recognized" that the appropriate

permanent remedy "is primarily a matter for legislative consideration and determination, and that judicial [permanent] relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion." *Reynolds*, 377 U.S. at 586.

Second, the district court properly ordered only a temporary remedy, "prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for [a permanent remedy] which rests with the legislature." *Id.*; *see* Pet. App. at 95a ("Until the New York legislature enacts another electoral scheme, such nominations shall be made by primary election."). Indeed, once an electoral system has been found likely to be unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan," subject to "equitable considerations [that] might justify a court in withholding the granting of immediately effective relief." *Reynolds*, 377 U.S. at 585.

Third, the district court's provisional remedy was the least intrusive available option. The district court properly concluded that the existing judicial nominating convention system is constitutionally deficient as a result of several separate but interrelated provisions within the statutory scheme, including as a result of the combination of provisions operating together. The district court noted, for example, the large number of Assembly Districts in each judicial district, Pet. App. 101a, 104a, the large number of judicial delegates from each Assembly District, Pet. App. 104a-107a, the large number of signatures necessary for delegate petitions in each judicial district, Pet App. 108a, the brief time delegates have to circulate petitions, *id.*, the burdensome rules regarding eligible signatories and witnesses to delegate petitions, *id.*, and so forth.

The district court declined to make a quasi-legislative determination about how to rewrite the many provisions of this statutory scheme so that the convention system might pass constitutional muster. Instead, it enjoined the judicial nominating convention system and then ordered nominations for supreme court justices to proceed under the default system under the state Election Law requiring direct primaries, applicable to the party nominations of elected public officials and judges unless otherwise specified: "All other party nominations of candidates for offices to be filled at a general election, except as provided for herein, shall be made at the primary election." N.Y. Elec. Law § 6-110 (McKinney 1998). This reliance upon an existing statutory alternative was an appropriate and restrained exercise of equitable discretion. *See, e.g.*, *Rockefeller v. Powers*, 78 F.3d 44, 46 (2d Cir. 1996) (affirming order that enjoined onerous petition signature requirements, and fashioned a remedy based on an existing mechanism in New York law that "provides an option to political parties" to reduce the number of necessary signatures to a specified alternative).[3]

Fourth, and finally, the district court exercised judicial restraint with respect to the exercise of its remedial powers

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[3] Contrary to the argument advanced by Petitioners (NYCDC Pet. Br. 47), this case is not analogous to *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006). In *Ayotte*, "[o]nly a few applications" of the relevant statute "present[ed] a constitutional problem" and the statute itself included a "severability clause," thus making possible and appropriate a narrow injunction that did not require rewriting state law. *Id.* at 969. This Court expressly stated that courts must be "mindful that our constitutional mandate and institutional competence are limited, . . . [and] restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it." *Id.* at 968 (internal quotation marks omitted). Here, it was appropriate for the district court to impose a less intrusive remedy on a provisional basis, giving the state legislature an opportunity to consider alternative measures.

by staying the effective date of the interim remedy until after the 2006 general election, and then later until after the 2007 election. This allows time for the legislature to enact legislation before any provisional judicial remedy takes effect, and allows the judges and candidates subject to upcoming elections additional time to plan for and adjust to new electoral methods. *See Reynolds*, 377 U.S. at 585 ("With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.").

Under these circumstances, the preliminary relief ordered by the district court – while disfavored by *amici curiae* as a permanent remedy for the constitutional violation – is a legally permissible and appropriately restrained provisional remedy in light of the identified constitutional violations, well within the district court's equitable powers, and not an abuse of discretion.

CONCLUSION

The City of New York, the New York State Bar Association, the Association of the Bar of the City of New York and the Fund for Modern Courts as *amici curiae* respectfully request that this Court affirm the decision of the court below.

Respectfully submitted,

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