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 OF FORMER NEW YORK STATE JUDGES AND THE AMERICAN JUDICATURE SOCIETY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The *amici curiae* are a select group of individual former New York State judges (trial, appellate, and administrative) who have extensive knowledge of the workings of the New York court system, as well as the American Judicature Society, a national organization of jurists, attorneys, and lay people committed to judicial excellence. The *amici* share a concern that New York's current selection system for selecting Supreme Court Justices threatens public confidence in the integrity and independence of the state judiciary. The background and experience of the *amici*, reflected in the brief summaries below, collectively demonstrate their broad knowledge of and interest in the issues implicated by this case.

Hon. Richard J. Bartlett served as a Justice of the New York State Supreme Court beginning in 1973. He was appointed as the first Chief Administrative Judge of the State of New York in 1974 and served until 1979. In addition, he served as the Dean of Albany Law School from 1979 to 1986. Prior to his judicial service, Judge Bartlett was elected to the State Assembly, where he led his party as Minority Whip. In 2003, Chief Judge Judith S. Kaye formed the New York State Commission to Promote Public Confidence in Judicial Elections (the Feerick Commission) and appointed Judge Bartlett as a member.

Hon. Joseph W. Bellacosa served as Chief Administrator and Chief Administrative Judge of the New York State

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Unified Court System from January 31, 1985 until he was appointed to the Court of Appeals in 1987, where he served as Associate Judge and Senior Associate Judge for 14 years. Judge Bellacosa was Dean and Professor of Law at St. John's University School of Law from 2000 to 2004. He served as Chairman of the American Bar Association Section on Legal Education, Accreditation, and Admission to the Bar in 1995.

Hon. E. Leo Milonas served on the New York judiciary for 26 years, as Justice of the Supreme Court, as Associate Justice of the Appellate Division, and as Chief Administrative Judge of the New York State Unified Court System from 1993 through 1995. Judge Milonas currently serves on the New York State Commission on Judicial Selection and on the Governor's Judicial Screening Committee for the First Judicial Department.

Hon. Richard Rosenbloom served as Justice of the New York State Supreme Court and as a Judge of the Family Court. He currently serves as a member of the Character & Fitness Committee for the Seventh Judicial District.

Hon. Robert E. Whelan served as Justice of the New York State Supreme Court for 14 years. He is very familiar with the New York elections process, having been elected to one term on the Supreme Court and four terms as comptroller of Buffalo, New York.

The American Judicature Society, founded in 1913, is a national, non-profit organization with members who are judges, lawyers, and lay people dedicated to improving the administration of justice. It is funded through members' dues, contributions, and grant funds for special projects. For 94 years, the Society has remained true to its mission "to secure and promote an independent and qualified judiciary and a fair system of justice."

The Society's interest as *amicus curiae* in this case arises from its national perspective on judicial selection, ethics, and independence. From its founding, the Society has been a consistent voice in favor of reform of the process of judicial selection to ensure a bench of the highest quality. Through its Elmo B. Hunter Citizens Center for Judicial Selection, the Society has compiled comprehensive information on state judicial selection and made it available on-line at http://www.ajs.org/js. This website is the leading resource about the methods of selecting and retaining judges and includes information about successful and failed reform efforts, the roles of parties, interest groups, and professional organizations in judicial selection, and the diversity of the state courts.

In 1997, the Society established the Center for Judicial Independence in response to an increase in unfair criticism and efforts to remove from the bench judges who have issued unpopular rulings. Finally, through its Center for Judicial Ethics, the Society provides a forum for the exchange of information and promotes the enforcement of judicial ethics standards designed to promote confidence in the judiciary.[2]

[2] As a matter of policy and procedure, no judicial member of the Society participated in the decision to file this brief or in its preparation. No inference should be drawn that any judge member of the Society's executive committee has participated in the adoption or endorsement of the positions of this brief.

SUMMARY OF ARGUMENT

> [T]he State has an overriding interest in the integrity and impartiality of the judiciary. There is hardly … a higher governmental interest than a State's interest in the quality of its judiciary. Charged with administering the law, Judges may not actually or appear to make the dispensation of justice turn on political concerns.

Nicholson v. State Comm'n on Judicial Conduct, 409 N.E.2d 818, 822 (N.Y. 1980).

The process by which individuals are selected to join the bench—along with the public perception of how that process works—has profound and direct implications for promoting and maintaining public confidence in the judiciary. *See Mistretta v. United States*, 488 U.S. 361, 407 (1989). While Petitioners acknowledge New York's interest in protecting both the fact and the appearance of judicial independence throughout the election process, they misconstrue how that interest can be appropriately served. As Section I explains, the current convention system undermines rather than enhances public confidence in the judiciary. Consequently, the State does not have a compelling interest in maintaining this system, but rather has an affirmative due process obligation to change it.

The current system's failure results primarily from two shortcomings, as we discuss in Section II. First, there is a public perception that the political parties' county leaders handpick each party nominee. In many cases, the perception—and reality—is that, if a person desires to be a Supreme Court nominee in a particular district, the *only* option is to win the favor of one particular party leader. Petitioners forthrightly acknowledge that this perception exists—indeed, they concede that the political parties seek to reinforce this perception—but implausibly deny that the

political party leaders have actual control over the selection process.

Second, the current system lacks transparency. The party leaders and judicial-convention delegates who make the ultimate nominations or selections operate in nonpublic ways. They have no need—or desire—ever to explain their choices to the public. As a result, the public is left to wonder what criteria were used in selecting the nominees, whether any pressure was placed on the candidates, whether any promises were made, and whether any inappropriate financial factors played a part in the designations.

Petitioners and some *amici* (the Republican Party and the Cato Institute) argue that the State may not regulate the parties' internal candidate-selection processes. In making these arguments, Petitioners and *amici* fail to consider the unique nature of judicial elections and the State's duty to protect judicial independence. While a legislative or executive candidate or office-holder may publicly or privately promise to follow the dictates of a party boss, or to elevate the interests of party members over others, a judicial candidate or judge may not do so—because of the State's unique due process interest in an independent judiciary. *See* Section III. More importantly, this is not a case that pits political parties' associational rights against those of judicial candidates and their supporters. Here, the State of New York has imposed a process that deprives the political parties, their individual members, and judicial candidates ("insurgent" or not) of their respective associational rights, all the while denigrating the due process interest in an independent judiciary.

Rather than defending the current system, Petitioners, for the most part, attack the District Court's remedy. *See* Section IV.A. The necessity of fundraising for a primary election, they argue, *could* undermine the independence of judicial candidates *vis-à-vis* their donors. As a result,

Petitioners argue, the State has a compelling interest in avoiding primary elections. While we agree that there *can* be serious potential problems with unregulated primaries, such problems are not fatal to the District Court's decision. As the Second Circuit found, the State has numerous options at its disposal that would allow it to counteract any potential negative effects of such elections with less burden than the current system imposes on other constitutional interests. In any event, Petitioners' critique of primaries goes only to the appropriate remedy, and the fact remains that the current selection system unnecessarily undermines judicial independence.

Finally, the party-boss-dominated convention system is not essential, or even particularly well-suited, to the promotion of the other state interests Petitioners have identified. While we respect the New York Legislature's unique authority regarding the precise judicial-selection system that would best serve the State's interest, we note that the Legislature can implement alternatives to the current system that would preserve judicial independence, integrity, and quality, and still meet the State's other goals, such as increased racial and geographic diversity in the judiciary. In Section IV.B below, we discuss some of these alternatives.

Because New York's convention system for selecting nominees to the Supreme Court unconstitutionally and unnecessarily undermines public confidence in the State's judiciary, we urge this Court to uphold the Second Circuit's affirmance of the District Court's prudent judgment. We agree with the Respondents' brief in its entirety, and add the instant discussion, from the perspective of our experience with judicial independence, to supplement and bolster the arguments presented therein.

ARGUMENT

I. PUBLIC CONFIDENCE IN THE JUDICIARY IS A CORNERSTONE OF OUR GOVERNMENTAL FRAMEWORK.

Public confidence in the integrity, impartiality, and quality of the judiciary is essential to the administration of the legal system. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407. As discussed below, and as set forth in the Respondents' brief, New York's current system for selecting nominees for Supreme Court vacancies injures rather than enhances the reputation of the justices.

An impartial judiciary is much more than a self-evident best practice. It is a right guaranteed by the Due Process Clause of the United States Constitution. *See Republican Party v. White*, 536 U.S. 765, 775-76 (2002) (citing cases in which judges' lack of impartiality as to the parties violated due process); *see also In re Raab*, 793 N.E.2d 1287, 1290 (N.Y. 2003) ("[L]itigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate ….").

The New York Court of Appeals has found that the State must meet certain requirements in order to satisfy its due process obligation to maintain an independent judiciary. The Court of Appeals has identified two requirements that are of particular importance to this case.

First, not only must judges *be* impartial, competent, independent, and non-partisan, they must, in order to maintain public confidence in the legal system, *appear* to be so. Even if the public merely perceives that a judge favors one party, or is beholden to one set of interests, the system suffers, just as surely as if the judge actually were biased. *See In re Duckman*, 699 N.E.2d 872, 878 (N.Y. 1998)

("[T]he perception of impartiality is as important as actual impartiality …."); *Nicholson*, 409 N.E.2d at 822 ("The State's interest is not limited solely to preventing actual corruption through contributor-candidate arrangements. Of equal import is the prevention of the 'appearance of corruption stemming from public awareness of the opportunities for abuse.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976))); *Raab*, 793 N.E.2d at 1290-91 ("[T]he State, as the steward of the judicial system, has the obligation to create [an impartial] forum and prevent corruption and the *appearance* of corruption, including political bias or favoritism." (emphasis added)). Accordingly, "the State's interest in ensuring that judgeships are not—and do not appear to be—'for sale' is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function." *Raab*, 793 N.E.2d at 1292.

Second, the State must enforce the fact and the appearance of judicial independence throughout the election process, not just once judges are on the bench. *Id.* at 1292-93. Absent such measures during elections, "there is a heightened risk that the public, including litigants and the bar, might perceive judges as beholden to a *particular political leader or party* after they assume judicial duties." *Id.* (emphasis added); *see also Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("Just as a State may take steps to ensure that its governing political institutions and officials … maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself."); *Hurowitz v. Bd. of Elections*, 426 N.E.2d 746, 748 (N.Y. 1981) (identifying the particularly dangerous "risk of the appearance of impropriety that may be perceived by the public in a Judge's injection of himself into the political process for the sole purpose of extending his tenure"); *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003) (explaining that New

York's Rules Governing Judicial Conduct forbid statements by judicial candidates "that single out a party or class of litigants for special treatment … or [that] convey" that idea).

II. NEW YORK'S CONVENTION-BASED SYSTEM FOR SELECTING SUPREME COURT JUSTICES UNDERMINES PUBLIC CONFIDENCE IN THE JUDICIARY.

A. The Public Perception Is that Political Party Leaders, Rather than Voters, Actually Choose Judicial Nominees.

All parties to this suit agree that there is a widely held belief that the political parties' county leaders control the selection of Supreme Court nominees in New York. Respondents argued below that the power to make or break candidates for the Supreme Court rests solely in the hands of relatively few individuals: the county leaders of the two major political parties. The District Court collected an indisputable mountain of evidence to support its conclusion that "[t]he path to the office of Supreme Court Justice runs through the county leader of the major party that dominates in that part of New York State. Without his or her support, neither superior qualifications nor widespread support among the party's registered voters matters." Pet. App. 143a. The Second Circuit discerned ample support for the District Court's decision in the District Court record—and the public record.

New York's Commission to Promote Public Confidence in Judicial Elections (of which *amicus* Judge Bartlett was a member)—more commonly referred to as the "Feerick Commission"—reached the same conclusion. As quoted in the Second Circuit's opinion: "the uncontested evidence … is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders. … And in many parts of the State,

being on the dominant party's slate is tantamount to winning the election." Pet. App. 29a; *see also id.* at 29a-30a ("The Commission is hardly the only entity to reach this conclusion—it merely is the latest." (collecting sources)).

Even Petitioners acknowledge that the county party leaders successfully promote the appearance of control over the choice of nominees, though they dispute the District Court's conclusion of actual control. *See* Pet. App. 134a ("Defendants acknowledge that [New York County Democratic Committee Chairman Herman] Farrell appears to control the process, and claimed to do so under oath …, but contend that he really does not."). Petitioners assert, for instance, that Farrell intentionally cultivates the widespread belief that he controls the selection of party judicial nominees, in order to "achieve[] one of his most significant objectives as a political leader—the perception of winning and 'running the show.' As [defense expert (and Petitioner) Douglas] Kellner testified: '[f]or Farrell … an important part of being an effective leader is the perception that you're leading; that people are doing what you want.'" 2d Cir. J.A. 2017 (emphasis omitted). Thus, it is uncontested that, at a minimum, there is a public *perception* that county leaders—and not the electorate—control the selection of Supreme Court nominees.

B. The Convention Selection Process Is Not Transparent and Provides No Meaningful Assurance of Electoral Participation.

Another consequence of the current convention system is that the public has no real insight into the selection process. Even Petitioners agree that "the real voting process at a judicial convention does not occur at the convention, it occurs … over the telephone and in the meetings that people have leading up to the convention in one or two weeks immediately before the convention." 2d Cir. J.A. 2013 (internal quotation marks omitted). As the District Court

explained, it is "clear that the decisions of who becomes a Supreme Court Justice are only ratified at conventions. They are made elsewhere. Not even the defendants contend otherwise." Pet. App. 129a.

The convention nomination system manifestly funnels the key decision-making through a relatively small group of powerful "insiders" who communicate in non-public ways and whose job it is to be overtly partisan and political. Thus, members of the public are left to speculate as to what criteria were used to make the judicial nominee choices, what pressures were applied to the nominees—some of whom are sitting lower-court judges, some of whom are incumbent Supreme Court Justices, and all of whom are prospective Supreme Court Justices—what promises were made, and what financial arrangements or considerations entered into the process.

Further, because the public believes that party leaders control nominee selection and because individuals have the right to make donations to political groups up to the date they become candidates for judicial office,[3] the current system fosters the perception that the party leaders might be selecting nominees for inappropriate reasons. The District Court honed in on this problem in its opinion:

> The record of financial contributions by candidates for Supreme Court Justice to political groups controlled by [Kings County Democratic Party Leader Clarence] Norman has fostered not only the (accurate) perception that he, rather than the voters or delegates, controlled the selection of the justices, but

[3] Judicial candidates and sitting judges may not make donations to political organizations or political candidates, except that they may pay ordinary dues to political organizations of which they are members. *See* N.Y. COMP. CODES R. & REGS., tit. 22, § 100.5.

> the further perception that he used the wrong criteria in making his decisions.

Pet. App. 136a.[4]

The lack of transparency is especially problematic given that it occurs within a system that is supposed to guarantee and promote New York's constitutional mandate that the "justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve." N.Y. CONST. art. VI, § 6(c). New York has fostered and tolerated a system in which voters are not only deprived of *their* right to choose, but further are left to question whether they have been denied that right in order to allow others to use objectionable criteria to determine who will become judges. The current convention system thus fails—at the crucial juncture when the nomination is being bestowed—to provide constitutionally required assurances to the public of the nominees' integrity, competence, impartiality, and quality, and of the integrity of the selection process itself.

III. THE STATE MAY NOT CREATE AND ENFORCE A JUDICIAL-SELECTION SYSTEM THAT UNDERMINES THE FACT AND THE APPEARANCE OF AN INDEPENDENT AND IMPARTIAL JUDICIARY.

A candidate for state assembly or governor may proclaim publicly during an election campaign that she will always vote in line with the position of the Republican Party, that she will always favor the interests of tenants over landlords,

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[4] Indeed, Mr. Norman was recently convicted for extortion in a Brooklyn Supreme Court for "shak[ing] down judicial candidates in exchange for party support," or as Brooklyn District Attorney Charles J. Hynes put it, "'manipulat[ing] the judicial selection system and pervert[ing] the way judges are elected in this county.'" Michael Brick, *Former Democratic Leader Is Sentenced*, N.Y. TIMES, Apr. 17, 2007, at B2.

or—to take an example closer to the facts of this case—she may freely indicate that she will make decisions pursuant to the (lawful) dictates and interests of a particular party leader. In the context of legislative and executive elections, candidates have a First Amendment right to make such promises, and the voters have a First Amendment right to vote to enable such favoritism. *See Brown*, 456 U.S. at 55-58 (legislative or executive candidates have a First Amendment right to promise during an election that they will systematically favor one group of voters over another).

A candidate for a New York judgeship, conversely, may not favor, or appear to favor, the interests of any party, individual, or group of individuals. *See supra* Section I; *see also Watson*, 794 N.E.2d at 7 (New York's Rules Governing Judicial Conduct forbid candidates from making statements "that single out a party or class of litigants for special treatment … or [that] convey" that idea); *White*, 536 U.S. at 775-76 (identifying maintenance of judicial impartiality as to parties as a legitimate state interest that might support constraints on speech rights); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."). As a result, a judicial candidate may not promise, for instance, to follow the dictates of a particular party leader, and an elected judge may not follow through with such a promise, even if the majority of voters or the majority of members of the local party were to support the idea.

Because of its unique obligation to maintain judicial independence, the State may, and sometimes must, regulate judicial elections in ways that would be unnecessary for other types of elections. In some instances, these steps require that due process take precedence over electoral participants' First Amendment interests. *See Raab*, 793

N.E.2d at 1292 (In a judicial election, "a number of competing interests are at stake, almost all of a constitutional magnitude. Not only must the State respect the First Amendment rights of judicial candidates and voters but also it must simultaneously ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption."); *Republican Party v. White*, 416 F.3d 738, 784 (8th Cir. 2005) (en banc) (Gibson, J., dissenting) (weighing First Amendment interests against "due process and separation of powers interests" relating to judicial independence), *cert. denied sub nom. Dimick v. Republican Party*, 126 S. Ct. 1165 (2006); *In re Bybee*, 716 N.E.2d 957, 960 (Ind. 1999) (acknowledging that some cases require balancing First Amendment rights against due process interests in preserving the impartiality of the judiciary); *see also Buckley*, 997 F.2d at 227 (two principles are in conflict when regulating judicial elections, and "[j]ustice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted").

But this case does not require such balancing, as Respondents' Brief sets forth clearly. *See* Br. for Respondents at 35-37. Despite Petitioners' (and their *amici*'s) arguments to the contrary, this is not a case pitting political parties' constitutional rights of association against those of certain judicial candidates and their supporters. Rather, here, New York has created and enforces a system that *interferes* with the associational rights of political parties, judicial candidates, and their supporters, and with the State's own interest in promoting judicial independence. The political parties have not created the current convention system, and are not free to deviate from it (irrespective of whether their current leadership would choose to do so). Thus, Petitioners' arguments based on the political parties' associational rights are inapposite.

In this respect, this is a much easier case than the speech restrictions evaluated by this Court in *Republican Party v. White*. There, a judicial candidate's right to speak his mind and associate with potential supporters had to be balanced against the state's interest in an impartial judiciary. 536 U.S. at 774-75. Here, the constitutional interests of the political parties (no matter how unwilling they may be to assert them in this litigation) and judicial candidates, as well as the State's interest in judicial impartiality, all lead to the inescapable conclusion that the current system must be abolished.

IV. THE CONVENTION SYSTEM IS NOT NARROWLY TAILORED TO ACHIEVE STATE INTERESTS; ALTERNATIVES EXIST THAT WOULD NOT BURDEN CONSTITUTIONAL RIGHTS OR UNDERMINE CONFIDENCE IN THE JUDICIARY.

Petitioners have identified several state interests which they assert justify any burden on constitutional rights: judicial independence, racial and ethnic diversity, and geographic diversity. *See* Br. for Pet'rs N.Y. County Dem. Cmte. *et al.* at 46-47. But their arguments provide little support for how the current system advances these laudable goals. Instead, Petitioners mostly argue why they believe primary elections for judges would advance these interests less than the current system. Below, we explain that even if Petitioners were correct, such arguments are insufficient to justify the continued existence of the current system. Then, we discuss several judicial-selection mechanisms that could be applied in conjunction with, or instead of, a primary system. Any one of these would both advance Petitioners' goals, and do so in a manner consistent with constitutional principles.

A. Petitioners' Criticisms of Judicial Primaries Do Not Bolster the Current System.

Petitioners do not attempt, except in the most oblique way, to refute the obvious conclusion from the above—namely, that the State's interest in judicial independence counsels against a party-boss-dominated system that creates the appearance of improper influence over the judiciary. Instead, Petitioners merely criticize the District Court's proposed remedy. *See, e.g.*, *id.* at 47-49. They assert that a primary system would put severe financial burdens on judicial candidates, and that those burdens would, in turn, undermine judicial independence because candidates would need to seek contributions from donors to whom they could feel indebted.

We agree that placing severe financial burdens on judicial candidates is highly inadvisable for a number of reasons, including the potential effects of large donations on the appearance and fact of judicial independence. Nevertheless, Petitioners' legal argument is flawed. As the Second Circuit concluded, Petitioners' apparent suggestion—a complete ban on judicial primaries—is not narrowly tailored to address the asserted goal of removing political donor influence over judges:

> [L]ess burdensome means exist to serve that end. To the extent that fundraising may implicate bias, New York could provide for public campaign financing. New York also could require that judges be disqualified from cases in which one party has contributed substantially to the judge's campaign. Further, New York could pass a narrowly tailored law preventing a judicial candidate from campaigning based on her views for or against particular parties [to litigation].

Pet. App. 76a (citation omitted); *see infra* Section IV.B.1.

Petitioners' assertion is also inconsistent with New York's use of open primaries to select candidates for numerous judicial positions other than Supreme Court Justices. *See* Pet. App. 98a ("All other elected judges in New York State are nominated in a direct primary election, rather than in a judicial convention."). Moreover, these other lower-court judges, elected in open primaries, may all "be appointed to serve as 'Acting Supreme Court Justices,' exercising the full powers, duties and jurisdiction of a Supreme Court Justice" in New York. *Id.*; *see, e.g.*, N.Y. ELEC. LAW § 6-168 (primary elections for Civil Court judges).

Petitioners' argument appears to rest, at least in part, on the notion of legislative deference. In particular, Petitioners ask this Court to accord such deference to the determinations made by the New York Legislature during its brief experience with Supreme Court primary elections nearly a century ago. *See* Br. of Pet'rs N.Y. County Dem. Cmte. *et al.* at 44 (asking this Court to "give due deference to the careful policy choice of New York's legislature" in adopting judicial nominating conventions "[a]fter a failed nine-year experiment with direct primaries in the early twentieth century"). It goes without saying that the considerations and circumstances used to justify nominating conventions in 1922 may no longer be relevant today. The District Court's opinion—like the Feerick Commission's reports, and the steady stream of criticism of the New York system that has amassed over the decades—speaks directly to this disconnect.[5]

[5] As former New York City Mayor Edward Koch put it: "New York's convention system for electing Supreme Court Justices has gone largely unchanged for the forty-plus years that I have been familiar with it. The undemocratic, boss-run system that I observed in the 1960s appears to operate no differently today than it did back then." Br. of Edward I. Koch as *Amicus Curiae* at 6.

In any event, Petitioners' judicial-independence argument is merely a challenge to the District Court's chosen remedy; it does not affirmatively support the current system. Petitioners raise the specter of judicial-independence issues that conceivably could arise if the District Court's injunction went into effect, and if the State took no further action. Hypothetical problems with a temporary replacement system, however likely to develop, cannot substitute for proof that the *current* system accords with due process. Petitioners' attempt to divert focus to the District Court's selected remedy should not obscure the obvious need to enjoin New York's current judicial-selection system.

B. Within the Framework of the New York Constitution, There Are Reforms Available to the Legislature to Ensure Judicial Independence, While Addressing the Other Concerns That Have Been Raised.

Given that numerous judges, executive officials, and legislators are elected throughout New York and the rest of the United States without a party-boss-dominated convention system, it is obvious that there are alternative permissible election systems, and it is equally obvious that the current system is not narrowly tailored to achieve Petitioners' identified state interests.

The Feerick Commission has suggested one potential alternative—a thoroughly revamped convention system that minimizes the fact and the appearance of party-leader control.[6] The parties and District Court focused on another

[6] The Commission concluded that, in order to prevent party-leader control, the convention system should be modified in at least the following ways: (1) reduce the number of delegates at each convention, (2) ensure at least two delegates from each assembly district, (3) weight the delegates' votes based on the populations they represent, (4) reduce the number of signatures required to run as delegate, (5) increase the delegates' terms of service from one year to three, (6) improve the

—a direct primary election system—which removes party leaders from direct involvement. *See* Pet. App. 184a. It is up to the New York Legislature to determine which of these systems to adopt, provided that it builds sufficient safeguards into the process to satisfy the State's constitutional duty to ensure an independent, qualified judiciary. Below, we list some potential reforms, among the wide variety available, that are well suited—whichever basic framework the State uses—to achieving the various state interests that have been identified, while also fulfilling the State's constitutional obligation to ensure public confidence in the judiciary.

1. *Public Financing of Judicial Elections Would Preserve Judicial Independence and Public Confidence.*

All parties agree that the need to raise campaign contributions could compromise the appearance of judicial independence. *See* Pet. App. 178a; 2d Cir. J.A. 2047. Indeed, "from the perspective of the public, the media, and many court reform organizations, the old adage that 'money talks' is accepted wisdom when it comes to assessing whether judges are likely to be influenced by the campaign contributions they receive." Am. Bar Ass'n Standing Cmte. on Judicial Indep., *Report of the Commission on Public Financing of Judicial Campaigns* 20 (Feb. 2002) [hereinafter "ABA Report"], *available at* http://www.abanet.org/judind.

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variety, quality, and timing of information provided to delegates, and (7) give candidates the right to address delegates at the convention. *See* Comm'n to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* 17-18 (Feb. 6, 2006) [hereinafter "Feerick Commission Final Report"], *available at* http://law.fordham.edu/commission/judicialelections. In fact, the Feerick Commission suggested a panoply of additional reforms—including many of those discussed below—which it recommended that the Legislature adopt in order to enhance the State's judiciary.

On the other hand, "[s]ubstituting public money for private money removes any concern that there is a connection between campaign contributions and judicial decision-making. Instead, a judge depends on exactly the people he or she serves—all the citizens of New York—for campaign financing." Comm'n to Promote Public Confidence in Judicial Elections, *Second Report to the Chief Judge of the State of New York* 24 (June 29, 2004) [hereinafter "Feerick Commission Second Report"], *available at* http://law.fordham.edu/commission/judicial-elections; *see also* ABA Report at 30. Consequently, particularly if the Legislature chooses to implement direct primary elections of Supreme Court candidates, the State could adopt public financing for these elections.[7] Public financing has worked to promising effect in other jurisdictions, including Arizona, Illinois, Idaho, North Carolina, Texas, and Wisconsin. *See* Feerick Commission Second Report at 30.

In addition to preserving judicial integrity, publicly financed elections would allow a wider group of candidates to run for judicial office and reduce the public perception that only wealthy or politically motivated people can become judges. This would obviate concerns along these lines raised by Petitioners. *See* Br. for Pet'rs N.Y. County Dem. Cmte. *et al.* at 44; 2d Cir. J.A. 2047-52.

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[7] We note that the Feerick Commission recommended that absent public financing, the Legislature should choose a significantly modified convention system over a direct primary system. *See* Feerick Commission Final Report at 16 ("Given the likelihood that the introduction of judicial primary races would draw major financial contributions into judicial elections, the Commission recommends retaining judicial district nominating conventions, subject to significant reforms, at least until New York adopts public campaign financing of judicial elections.").

2. *Retention Elections Would Preserve Independence for Incumbent Justices.*

Respondents and the District Court have noted that the perception of an independent judiciary is particularly strained whenever a sitting Justice is running for reelection, seeking contributions for his or her campaign, and soliciting votes from either political party leaders or the public at large. *See* 2d Cir. J.A. 2047; Pet. App. 178a. Petitioners agree that this is the case with respect to direct elections, but argue that the current convention system protects Justices facing reelection from the pressure to render politically favorable decisions. *See* 2d Cir. J.A. 2051. But Petitioners provide no rationale why—let alone evidence that—political-party leaders or judicial-convention delegates are less likely than the public to punish a sitting Justice for the decisions he or she has rendered. To the contrary, the current system subjects sitting Supreme Court Justices to the risk that they must curry favor with—or at least not antagonize—political bosses in order to secure renomination.

On the other hand, retention elections—in which incumbent Justices are subject to non-competitive, non-partisan elections in the year before their terms expire—would insulate sitting Justices from political-leader pressure while also mitigating potential pressure from the public. For this and related reasons, the Feerick Commission specifically recommended adoption of retention elections. *See* Feerick Commission Second Report at 35. Such elections are currently used in twelve states for trial court judges, and in twenty states for appellate judges and justices. Hon. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1429 (2001).

3. *Education and Screening Would Address Fears that Voters Would Elect Unqualified Justices.*

Petitioners argued before the District Court that the convention system was implemented, in part, out of concern that the primary system would not ensure that qualified candidates are seated on the judiciary. 2d Cir. J.A. 1977-78. But advances in government transparency and communications—such as candidate screening, voter education, and public financing—can be used alongside primary elections to improve voters' knowledge and understanding, and consequently the quality of those they elect.[8]

For example, a nonpartisan screening program would help ensure the quality of the bench, and dissemination of the results would assist in ensuring confidence in the judiciary. *See, e.g.*, Hon. Jonathan Lippman, *The Public Policy Forum: Court Reform in New York State* 8 (May 17, 2005), *available at* http://www.rockinst.org. As of 2001, six other states had evaluation programs for retention elections. *See* Seth S. Andersen, *Judicial Retention Evaluation*, 34 LOY. L.A. L. REV. 1375, 1379 (2001).

There is precedent for, and growing use of, screening committees in New York. The State already uses a screening commission to identify qualified candidates for vacancies on

[8] Moreover, the current system is considered by some (such as New York City Corporation Counsel Michael Cardozo) to favor politically connected, rather than particularly qualified judges: "There is a judicial selection crisis in this state. The system has not only been found unconstitutional, but it is producing candidates who clearly are not the most highly qualified." Michael Cardozo, *Mending a Broken Bench*, JUDICIAL REPORTS (Sept. 2006) ("The decision on who will become a judge has been left solely in the hands of a small group of people: county political leaders. As one Supreme Court justice … [has] said, 'You don't have to know something to be a judge, you have to know somebody.'"), *available at* http://www.judicialreports.com.

the Court of Appeals. N.Y. CONST. art. VI, § 2(c)-(e). The governor may only appoint a candidate who has been recommended by the commission. *Id.* § 2(c). Further, although not statutorily mandated, two of New York's twelve judicial districts use screening commissions to evaluate the qualifications of Supreme Court candidates. *See* Pet. App. 148a-150a.

Based on the proven benefits of nonpartisan screening, in February 2006, the New York Unified Court System promulgated a rule requiring the creation of judicial screening commissions in the remaining judicial districts. *See* N.Y. COMP. CODES R. & REGS., tit. 22, § 150.0 *et seq.* These commissions will evaluate candidates for most courts, including the Supreme Court. *Id*. § 150.1. Although these rules do not have the force of law, the Legislature could choose to give these screening commissions an official role in the elections or appointment process.

Voter guides would similarly help the electorate make informed decisions. *See* Feerick Commission Second Report, app. G-8, at 3. In addition to describing the candidates, voter guides can explain the election process and provide any information that may have emerged through the screening process. By including all of this information, voter guides can enhance the transparency of the election process. Moreover, the Feerick Commission's research showed a strong nexus between voter education and public confidence in judicial elections. *Id.* at 38. Currently, thirteen states distribute voters guides and numerous studies have found that the public values this information. *See, e.g.*, Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voter Guides*, 64 OHIO ST. L.J. 84, 87-90 (2003).

C. Over the Longer Term, the State Has Additional Options to Ensure Judicial Independence While Addressing Other Concerns.

The Legislature could make the changes described above to enhance the judicial selection process over the short term. Given provisions in New York's Constitution, certain other changes would involve more time and possibly require amendments to the State Constitution.

1. *Smaller Judicial Districts Would Achieve Geographic, Racial, and Ethnic Diversity, and Would Reduce the Cost of Campaigns.*

The judicial districts from which Supreme Court Justices are elected are created by Article VI, Sections 6(a)-(c) of the New York Constitution. Pursuant to Section 6(b), once every decade, the Legislature may increase the number of judicial districts (and thereby make the resulting districts smaller). The Constitution does not limit the number of districts, but it does mandate that each district be no smaller than one county. Consequently, if the State chooses to create judicial districts that are smaller than one county, or to otherwise redefine the districts in any year except the tenth year, Article VI of the State Constitution must be amended.

The State could create smaller judicial districts in order to enhance racial, ethnic, and geographic diversity within the judiciary. Petitioners themselves identified diversity in all of these forms as important interests in selecting nominees for the Supreme Court. Pet. App. 70a.[9] We acknowledge those goals and note further that in addition to its other benefits, diversity bolsters public confidence in the judiciary. As New

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[9] The Second Circuit and District Court further noted how poorly the current system effectuates these goals. *See* Pet. App. 74a-75a; *e.g.*, *id.* at 174a (under the current system, "[d]elegates elected from ADs in which they need not even reside select justices who need not even be residents of the districts in which they are later elected").

York Court of Appeals Chief Judge Judith Kaye has written, "a diverse bench gives the public a feeling of inclusion in the justice system, willing to place its trust and faith in it, not alienated from it." Judith S. Kaye, *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 ALB. L. REV. 961, 975 (1994).

It is axiomatic that geographic diversity can be achieved through smaller, appropriately tailored, judicial districts. The District Court's logic is irrefutable: "[t]he more direct and democratic way to serve geographical diversity is to define the geographic areas from which representation is desired, draw lines around them, and have the voters within them select the nominees." Pet. App. 174a.

Likewise, with respect to racial and ethnic diversity, even Petitioners' own witnesses admit that creating smaller judicial districts would "very likely" promote the goal of a diverse bench. Petitioners' expert witness, Dr. Michael Hechter, testified that "with respect to minority representation, if the judicial districts were very much smaller and were either ethnically or geographically homogenous, it is very likely that there would be greater representation of those particular groups." 2d Cir. J.A. 1787-88. Moreover, Petitioners themselves acknowledged the empirical reality that minorities tend to do well in Civil Court races because the Civil Court districts are "smaller electoral units—such as Harlem or Washington Heights." *Id.* at 2040.[10]

[10] Moreover, it is arguable that the current system, even if it manages to place a certain number of minorities into the New York judiciary, does those candidates, and all other qualified minority candidates, a disservice. As several minority legal groups have put it: "Minorities seeking to become supreme court justices in New York are not served by a closed, back-door system built on cronyism and political favors. No diverse, fair system can be built by such means." Br. of *Amici Curiae* Asian Am. Legal Defense & Educ. Fund *et al.*, at 4.

Finally, smaller judicial districts would likely reduce concerns about financing of electoral campaigns. Currently, many of the upstate districts span multiple large counties, which could place a significant burden on campaigning judicial candidates. Smaller districts would allow candidates to campaign without the necessity of generating sufficient funds to advertise to multiple audiences. *See also* Sections III.A.1 and III.A.4 above (outlining other methods of addressing campaign finance issues).

2. *An Appointment System with Sufficient Safeguards Could Be Used to Promote Judicial Independence and Quality.*

Finally, the State could meet its duty to ensure public confidence in the judiciary by replacing the current selection system in its entirety with an appropriately tailored appointment system. In order to do so, the State would have to amend Article VI, Section 6(c), which currently requires that Supreme Court Justices be elected. Though it would require a constitutional change, the appointment system is not without precedent in the New York court system, and is notably used for judges of the Court of Appeals (a change implemented in New York's 1977 constitutional reform).

When considering this type of change, it is important to note that switching to an appointment system, in and of itself, is not sufficient to ensure public confidence in the judiciary. After all, as the Second Circuit noted, the current system amounts to a "de facto appointment" system. Pet. App. 70a.[11] In order to comply with its constitutional obligations, any appointment process the State creates must be transparent. The process should thus also include other

[11] *See also* Testimony of Mark H. Alcott, President, N.Y. State Bar Ass'n Before the N.Y. State Assembly, Judiciary Cmte. (Nov. 15, 2006) ("What New York has now is an appointive system. It purports to be an elective system, but in reality it is an appointive system."), *available at* http://www.nysba.org.

protections, such as the screening panels discussed above, in order to ensure a qualified and independent Supreme Court judiciary.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Second Circuit.

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