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 PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

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QUESTIONS PRESENTED

1. Whether "insurgent candidates" (Br. in Opp. 1; Pet. App. 64)—i.e., candidates not favored by their party's leadership—have a First Amendment right to a "realistic opportunity to participate" in the candidate-selection process of the party of their choice.

2. Whether Sections 6-106 and 6-124 of the New York Election Law, which establish the basic framework of New York's 85-year-old system of using party conventions to nominate candidates for the position of New York Supreme Court Justice, are facially invalid because they impose severe burdens on insurgent candidates' opportunities to participate in the candidate-selection process of the party of their choice.

3. Whether the Second Circuit erred when, after invalidating New York's 85-year-old party convention system, it imposed in its place virtually the same system of party primaries that the New York Legislature rejected when it created the convention system in 1921.

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections, Douglas Kellner, Neil W. Kelleher, Helena Moses Donohue, Evelyn J. Aquila, the New York County Democratic Committee, the New York Republican State Committee, the Associations of New York State Supreme Court Justices in the City and State of New York, Justice David Demarest, individually and as President of the State Association, and Andrew Cuomo, Attorney General of the State of New York.

Respondents are Margarita López Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Lili Ann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-92) is reported at 462 F.3d 161. The opinion of the district court (Pet. App. 93-191) is reported at 411 F. Supp. 2d 212.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2006. The petition for a writ of certiorari was filed on November 28, 2006, and was granted on February 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States provides:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 6-106 of the New York Election Law provides:

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

Section 6-124 of the New York Election Law provides:

A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from

the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate; substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

STATEMENT

This case concerns respondents' facial challenge to the State of New York's 85-year-old system of requiring political parties to use conventions attended by delegates to select their nominees for the office of New York Supreme Court Justice. The basic framework of that system is established by Sections 6-106 and 6-124 of the New York Election Law. Respondents include disappointed "insurgent candidates"

who failed to obtain the nomination of their respective parties, several voters who claim to have supported their candidacies, and the New York branch of Common Cause. They contend—and the courts below held—that both provisions of New York law are unconstitutional on their face because they violate the associational rights of "insurgent candidates" and the voters who support them.

Petitioners New York State Board of Elections and its commissioners (collectively, the "Board") were the defendants named in respondents' complaint. The Board is responsible for the administration and enforcement of the New York Election Law. N.Y. Election Law §§ 3-102, 3-104. The terms of the district court's injunction prohibit the Board "from enforcing New York Election Law § 6-106, and from using the procedures set forth in § 6-124," and require the Board to establish and administer a system of "primary election[s] until the legislature of the State of New York enacts a new statutory scheme." Pet. App. 185.

1. In 1846, New York amended its state constitution to require the popular election of Justices of the New York Supreme Court, the State's trial court of general jurisdiction. *See* Pet. App. 9. Lacking specific statutory guidance, political parties selected their candidates for Supreme Court Justice by the same method employed to nominate candidates for other state offices at the time: party convention. *See id.*

Reflecting a rise in progressive political sentiment, in 1911 the New York State Legislature changed the law to provide for Supreme Court nominations through direct primary elections. Pet. App. 9. But the subsequent decade proved that "bare-knuckled primary elections" are a poor means of selecting qualified individuals for the bench, as the political contests dissuaded qualified jurists from seeking election. *See id.* Moreover, the primary system required candidates for Supreme Court Justice to raise large sums of money, creating at least the appearance of partiality toward their donors. *See id.*

Responding to these concerns, by 1921 the New York State Legislature had implemented a new convention-based system that eliminated direct primaries but, through a system of representative democracy, still provided the parties' rank-and-file members with a say in the selection of their parties' nominees. Pet. App. 10. Under this system, each September, the parties hold so-called "delegate primaries" in each of New York's 12 judicial districts. Each judicial district is divided into geographical sub-units called assembly districts, and in the delegate primaries, the party members of each assembly district elect uncommitted delegates to represent the assembly district at the party's judicial district convention. It is the delegates to the judicial district convention who nominate the party's candidates for the position of Supreme Court Justice for the judicial district. The contest among the nominees of the various parties is then ultimately settled at the November general election. *See id.* This system is codified, in part, in the two New York statutory provisions here at issue: Sections 6-106 and 6-124 of the New York Election Law.

New York Election Law § 6-106 simply reads: "Party nominations for the office of justice of the supreme court shall be made by the judicial district convention." A separate provision of the New York Election Law defines a "party" as any political organization whose candidate for governor of New York received 50,000 or more votes in the most recent gubernatorial election. N.Y. Election Law § 1-104(3). In 2006 and 2002, five political parties qualified under this provision: the Conservative Party, the Democratic Party, the Independence Party, the Republican Party, and the Working Families Party. Currently only these five parties are obligated to select their nominees for Supreme Court Justice

through the judicial district convention system specified by Section 6-106.[1]

Section 6-124 directs that each party's judicial district convention shall be comprised of delegates elected from the assembly districts in the September delegate primary. N.Y. Election Law § 6-124. Judicial districts contain as few as 9 assembly districts, and as many as 24. Pet. App. 104. Section 6-124 grants each political party substantial authority to determine the number of delegates allocated to each assembly district. *Id.* at 11-12. The number of delegates elected from each judicial district accordingly varies, ranging from the 24 delegates elected to attend the Democratic Party's Fourth Judicial District convention, to the 185 delegates elected to attend the Republican Party's Tenth Judicial District convention. *See id.* at 105-06.

To run for judicial district convention delegate—that is, to be placed on the delegate primary ballot—a party member must submit to the Board a nominating petition with valid signatures of 500 party members residing in the same assembly district, all gathered during a 37-day period. *See* N.Y. Election Law §§ 6-134(4), 6-136(2)(i), 6-136(3); Pet. App. 12.

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[1] The two most recent gubernatorial election returns for New York State are available at http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_gov.pdf and http://www.elections.state.ny.us/NYSBOE/elections/2002/general/2002_gov.pdf, respectively; *see also* Pet. App. 97 n.2. In recent elections, the Green Party and the Right to Life Party have both come within several thousand votes of the 50,000-vote threshold. Political organizations failing to meet the 50,000 vote threshold are considered, under Election Law, "independent bodies." N.Y. Election Law § 1-104(12). An independent body may nominate candidates and place its name and that of its candidates on the general election ballot by submitting a petition with the requisite number of valid signatures (ranging from 500 to 15,000, depending on the office). *Id.* § 6-142.

One to two weeks after the delegate primary, each party's delegates are summoned to their respective party's judicial district convention. N.Y. Election Law § 6-158(5); Pet. App. 18, 116. At those conventions, delegates select the party's candidates for Supreme Court Justice in the November general election. *See* N.Y. Election Law § 6-126(2). Those nominated by the judicial district conventions appear as the parties' nominees on the general election ballot. Pet. App. 10. They are joined on the general election ballot by any independent candidate who submitted to the Board a timely nominating petition with (depending on the judicial district) 3,500 or 4,000 valid signatures. *See* N.Y. Election Law §§ 6-138–6-142.

2. In March 2004, respondents—disappointed judicial office-seekers, several New York voters, and Common Cause/NY—brought this Section 1983 action to challenge the constitutionality of New York's system for selecting party nominees for the office of Supreme Court Justice. *See* C.A. JA 1-36. Respondents alleged that New York's judicial district convention system was a "sham 'election' process" that "plac[ed] severe and unjustified burdens on candidates seeking to challenge candidates . . . backed by local Democratic or Republican party leaders," and thereby deprived "candidates . . . access to the ballot," "rank-and-file party members of their rights to associate to choose their party's candidates," and "all New York State voters their right to vote effectively." *Id.* at 1, 2-3. Respondents further alleged that this system denied voters and candidates "equal protection of the laws by imposing . . . a virtually insurmountable burden upon any challenger candidates for Supreme Court, while imposing a lesser burden on candidacies for . . . other elective offices." *Id.* at 3.

Respondents claimed that Sections 6-106 and 6-124 of the New York Election Law, which "established and defined" "[t]he judicial convention process," violated the First and Fourteenth Amendments and sought a declaration that

both provisions were unconstitutional "both facially and as applied to Plaintiffs." C.A. JA 9-10, 35. In addition to the declaration of invalidity, respondents also claimed entitlement to affirmative injunctive relief mandating the establishment of "a direct primary election" to select party nominees for Supreme Court Justice. *Id.* at 35.

After an evidentiary hearing, the district court found that Sections 6-106 and 6-124 violated the First Amendment and issued an injunction barring the Board "from enforcing New York Election Law § 6-106, and from using the procedures set forth in § 6-124." Pet. App. 185. The district court further mandated that "the nomination of Supreme Court Justices shall be by primary election until the legislature of the State of New York enacts a new statutory scheme." *Id.* Having concluded that the First Amendment alone "fully support[ed] the relief" respondents requested, the district court declined to consider respondents' Fourteenth Amendment equal protection claim. *Id.*

3. The Second Circuit affirmed, concluding that respondents had "demonstrated a clear likelihood of success on the merits of their First Amendment claim." Pet. App. 34. The court of appeals found in the First Amendment a right, belonging to "voters and candidates," to "a realistic opportunity to participate in [a political party's] nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." *Id.* at 41-42. This right, the Second Circuit argued, "derive[d] directly from a line of cases limiting a State's power to structure its elections and regulate access to its ballot," including *Williams v. Rhodes*, 393 U.S. 23 (1968), *Bullock v. Carter*, 405 U.S. 134 (1972), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Pet. App. 42-43.

The Second Circuit divined from those decisions an "animating principle" of compulsory access that extends not only to general elections, but also "to each State-created or State-endorsed 'integral part of the election machinery.'"

Pet. App. 39 (quoting *United States v. Classic*, 313 U.S. 299, 318 (1941)). The State's provision of ready access to the general election ballot, the court held, was not itself sufficient to meet the State's First Amendment obligations: The court found that "one-party rule" prevails to such an extent within the State of New York that the ruling party's nominating phase must be viewed as "the 'crucial' stage of the electoral process," one that "'effectively controls the choice' at the general election." *Id.* at 52 (quoting *Classic*, 313 U.S. at 318), 55. Moreover, in the Second Circuit's view, the right conferred by the First Amendment is not merely to associate in the political arena at large, but rather the right to associate within the framework of the party of one's choice. *Id.* at 55 (rejecting suggestion that election procedure that compelled candidate to "abandon his political affiliation for a general election ballot position" could satisfy First Amendment). The Second Circuit found no great tension between granting a "challenger candidate" a right to associate within the political party of his choice and the "political party's [First Amendment right] to determine the structure and content of its own association." *Id.* at 51. Indeed, the Second Circuit could conceive of no "party interest that is weighty enough to justify excluding qualified party members from competing" for the party's nomination "or from associating with party-member candidates seeking those offices." *Id.* at 53.

Having determined that candidates and voters have a First Amendment right to participate meaningfully in the nominating process of the party of their choice, the Second Circuit proceeded to analyze the burdens on associational rights imposed by Sections 6-106 and 6-124 of the New York Election Law. Pet. App. 44. Notwithstanding the fact that it was reviewing the district court's conclusion that these provisions were *facially* invalid, the Second Circuit, following the district court's lead, adopted the point of view of a so-called "challenger candidate"—"a reasonably diligent candidate who, although possessing public support, lacks the resources

provided by a supportive political party"—and inquired whether Sections 6-106 and 6-124 imposed severe burdens on this particular class of individuals. *Id.* at 59, 60.

Without ever examining the text of the challenged statutes, the court of appeals concluded that "New York's [j]udicial [e]lection [p]rocess"—"the structure of the [delegate] primary election, its petitioning requirements, and the delegate lobbying process[—]severely burden First Amendment associational rights" of challenger candidates. Pet. App. 61. The court focused first on "the petition signature requirements for running a slate of delegates." *Id.* The court found that "[i]n order to participate in the primary election by running a slate of delegates, a judicial candidate must gather at least 9,000 signatures and as many as 24,000 within a 37-day period." *Id.* at 62. (A "surplus of signatures" over and above that required by another (unchallenged) provision of the Election Law was necessary, the court concluded, "to beat back challenges" to the petition.) An insurgent candidate also would need to recruit "between 32 and 124 individuals to run as delegates." *Id.* at 63. This, in the Second Circuit's view, was too much to ask of an insurgent candidate given the "large disparity in resources when competing against those favored by the party leadership." *Id.*

The court of appeals also noted the strong influence of party leaders in the ultimate selection of nominees at the judicial district convention. Indeed, the Second Circuit expressly endorsed the district court's factual findings that, although the elected delegates are uncommitted when they arrive at the judicial district conventions, "(1) county leaders select their party's nominees; (2) delegates merely endorse those choices; and (3) delegates do not require express commands to do so." Pet. App. 64. The court of appeals concluded that, notwithstanding their unpledged status, judicial delegates—even when vigorously lobbied by insurgent candidates—routinely end up simply rubber-stamping those anointed by party leaders. *See id.* at 66-69.

For the Second Circuit, the influence of party leaders over delegates typically recruited by those leaders, when coupled with the burdens associated with a challenger candidate running his or her own slate of delegates, "reduced to this bottom line: through a byzantine and onerous network of regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment," and thereby "preclude[d] all but candidates favored by party leadership from seeking the nomination of their chosen party." Pet. App. 70 (internal quotation marks omitted). "It is virtually impossible—and perhaps absolutely impossible—for a candidate to satisfy this series of election laws." *Id.* at 63 (internal quotation marks omitted). The court of appeals therefore affirmed the district court's finding that "New York's judicial nominating process severely burdens the associational rights of candidates and voters alike." *Id.* at 70.

Having concluded that New York's "judicial nominating process" was not narrowly tailored to any compelling state interest, the court of appeals affirmed the district court's finding that Sections 6-106 and 6-124 were "unconstitutional on their face." Pet. App. 80. While acknowledging that "facial invalidation is strong medicine," the Second Circuit concluded that insofar as "New York's judicial nominating process excludes not just these plaintiffs, but all candidates lacking party support," "facial invalidation is proper." *Id.* (citing *Lerman v. Bd. of Elections*, 232 F.3d 135, 153 (2d Cir. 2000)). The court of appeals accordingly affirmed the district court's "enjoining the whole of sections 6-106 [and] 6-124." *Id.*

Finally, the court of appeals sustained the district court's affirmative relief: the installation of direct primary elections for party nominations for the office of New York Supreme Court Justice. *See* Pet. App. 82-83. Citing Section 6-110 of the New York Election Law, which provides for direct primary elections for judicial positions "except as provided for

herein," the Second Circuit reasoned that the equitable relief awarded was merely that which would have come into being by operation of law. *Id.* at 79. In any event, the district court concluded, it would have been "irresponsible" for the district court not to fill the "gaping hole in the State's electoral scheme" left by facial invalidation. *Id*. at 82.

SUMMARY OF ARGUMENT

The decision of the court of appeals is deeply flawed, in at least three respects:

I. The Second Circuit held that the First Amendment grants to "insurgent candidates" and the voters that support them "a realistic opportunity to participate in the nomination process" of the party of their choice—here, the parties' judicial district conventions. Pet. App. 41. Neither the courts below nor the respondents cite any authority that supports the proposition that the First Amendment grants to candidates and voters a right of compulsory access to party nominating conventions. And indeed, there is none; the First Amendment does not compel the State to intrude so deeply into political parties' decisions as to who will be their standard-bearers. To be sure, this Court has held that, because "an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), the First Amendment grants to candidates a right to a reasonable "opportunity . . . to wage a ballot-connected campaign," *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986). Accordingly, state laws that interpose "an absolute bar to candidacy" *may* violate the First Amendment. *Storer v. Brown*, 415 U.S. 724, 737 (1974) (finding no violation). Conversely, though, when state law leaves open to candidates a reasonable "opportunity to wage a ballot connected campaign," such as access to the general election ballot—as New York law indisputably does here—the Court has found that associational rights are not

burdened. *Munro*, 479 U.S. at 199. State laws that require a candidate to "channel [his] expressive activity" into a general election campaign, rather than a primary process, do not violate the First Amendment. *Id.*

Moreover, it is not clear that the First Amendment even *permits* the state-enforced access that the courts below held the First Amendment *requires*. This Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). This Court accordingly has viewed skeptically any effort by the State to "adulterate [political parties'] candidate selection process." *Jones*, 530 U.S. at 581. But it was precisely this type of "adulteration" of the parties' judicial district conventions that the courts below commanded the New York Legislature to undertake.

II. Even positing, for purposes of argument, that candidates and voters have a First Amendment right of meaningful access to party nomination processes, the Second Circuit failed utterly to demonstrate that Section 6-106 and Section 6-124 "severely burden" that right. The court of appeals never looked to the language of the statutes respondents alleged to be unconstitutional. Instead, it looked to the "realities" of the "electoral scheme," Pet. App. 60, 61, and identified two severe burdens: the expense and effort involved in "running a slate of delegates" in the delegate primary, and the outsized influence party leaders have over the delegates' votes at the judicial district convention. *Id.* at 62; *see also id.* at 64-69. It is absolutely clear, however, that neither of those "burdens" is imposed by Section 6-106 or Section 6-124. Nothing in those statutes requires a candidate for New York Supreme Court Justice to "run a slate of delegates." *Id.* at 58. Nor do they grant to unidentified "party leaders" special

powers of persuasion over duly-elected delegates or otherwise compel those delegates to follow those leaders' commands. The "burdens" identified by the court of appeals are imposed not by state law, but by the private acts of persons competing for party nominations and those who support them. The First Amendment grants no right against private action.

The court of appeals compounded its error by holding that respondents had demonstrated Sections 6-106 and 6-124 to be facially invalid. Even under the relaxed standard applied to facial challenges brought under the First Amendment, the plaintiff must demonstrate at least that the challenged statutes are invalid in a substantial proportion of their applications. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Here, the court of appeals found that test was satisfied based on its conclusion that Section 6-106 and Section 6-124 burden the associational rights of "all candidates lacking party support." Pet. App. 80. But the court of appeals never examined whether these "candidates lacking party support" constituted a substantial proportion of all candidates seeking party nominations for New York Supreme Court Justice. In the absence of such an analysis, the court of appeals should have restrained itself to the more measured response of an as-applied invalidation.

III. There was no basis for the district court's injunction mandating the installation of a system of direct primaries. *See* Pet. App. 184. Injunctive relief must be tailored to the injury it seeks to remedy. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996). If, in fact, it was Section 6-106 and Section 6-124 that imposed the severe burdens that the court of appeals supposed, then an injunction against enforcement of those statutes would have sufficed to alleviate those burdens. The Second Circuit's *post hoc* rationale for this extraordinary affirmative relief—that it merely mandated the outcome already required by Section 6-110 of the New York Election Law—is insufficient. It was the Board's job—not the federal

courts'—to fill the "gaping hole in the State's electoral scheme" opened by the courts' invalidation of Sections 6-106 and 6-124. Pet. App. 82. Because the New York Legislature specifically provided in 1921 that nominees for New York Supreme Court Justice should *not* be selected by direct primary, Section 6-110, which provides for primaries to select nominees for offices "except as provided" elsewhere in the Election Law, would not apply.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT COMPEL A STATE TO GRANT "INSURGENT CANDIDATES" ACCESS TO THE NOMINATION PROCESSES OF THE POLITICAL PARTY OF THEIR CHOICE

The court of appeals held that the First Amendment right of association guarantees to "insurgent candidates" and voters that support them "a realistic opportunity to participate in the nominating process" of the party of their choosing. Pet. App. 41. This Court's decisions, however, make clear that candidates' and voters' associational rights—and the State's corresponding obligation—are fulfilled when the State provides a reasonable avenue of access to the general election ballot to candidates (insurgent or not) who have demonstrated a modicum of public support. While the Fourteenth and Fifteenth Amendments mandate that state-sanctioned party nomination processes be untainted by invidious discrimination, this Court has never held that the *First Amendment* grants to candidates a right of unfettered access to those contests—contests which this Court has recognized often enough to be central to a political party's own associational interests. *See*, *e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). And with good reason: a political party is not a traditional public forum. Treating a political party as such—as respondents urged and the courts below did—is to destroy it. Respondents have no First Amendment entitlement to state action that interjects them into the midst of a

party's decision as to who will (and who will not) be the party's standard-bearer in the general election.

A. Respondents' First Amendment Rights Are Satisfied By Reasonable Access To The General Election Ballot

1. No provision of federal law requires that the States select their judges—or, for that matter, any of their officers—through popular elections. *See Republican Party v. White*, 536 U.S. 765, 788 (2002) (acknowledging the "power to dispense with elections [of judges] altogether"); *Fortson v. Morris*, 385 U.S. 231, 233-36 (1966) (federal law does not "compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly"). To the extent that they choose to select their officers through elections, "States have a major role to play in structuring and monitoring the election process." *Jones*, 530 U.S. at 572; *see also Bullock v. Carter*, 405 U.S. 134, 140-41 (1972) ("we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections"). States may "require parties to use the primary format for selecting their nominees," *Jones*, 530 U.S. at 572, or "may insist that intraparty competition be settled before the general election . . . by party convention." *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974).

In exercising their authority to structure state election processes, the States, of course, must "act within limits imposed by the Constitution," including the First Amendment's guarantee of freedom of association. *Jones*, 530 U.S. at 573. This Court has long held that "'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S.

609, 622 (1984)); *accord*, *e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). "[T]he freedom of political association," including "partisan political organization," "is an integral part of this basic constitutional freedom." *Tashjian v. Republican Party*, 479 U.S. 208, 214, 217 (1986). Indeed, this Court has held that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Jones*, 530 U.S. at 574.

Recognizing that "an election campaign is an effective platform for the expression of views on the issues of the day," and that a "candidate serves as a rallying point for like-minded citizens," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), this Court has invalidated on First Amendment grounds unreasonable restrictions on access to a general election ballot, concluding that such restrictions "burden[ed] . . . the right of individuals to associate for the advancement of political beliefs." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). "The right to form a party for the advancement of political goals," the Court reasoned, "means little if a party can be kept off the election ballot." *Id.* at 31.

This is not to say that all—or even many—state regulations limiting access to a general election ballot will violate the associational rights of candidates and those who would vote for them. This Court has recognized that "'there must be a substantial regulation of elections if they are to be fair and honest,'" and that, accordingly, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). But when a "restriction . . . limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," it risks transgressing constitutional limits on state power. *Id.* at 793.

Thus in *Williams*, the Court set aside "a series of election laws [that] made it virtually impossible for a new political party . . . to be placed on the state ballot" for the presidential elections. 393 U.S. at 24. This regime, the Court concluded, "g[a]ve the two old, established parties a decided advantage over any new parties struggling for existence and thus place[d] substantially unequal burdens on . . . the right to associate." *Id.* at 31. The Court found the handover of "a complete monopoly" on power to "two particular parties—the Republicans and the Democrats"—to be antithetical to "the core of our electoral process and of the First Amendment freedoms." *Id.* at 32.

Similarly, in *Anderson*, the Court struck down another Ohio law that required independent candidates—but not those nominated by the Democratic or Republican parties—to file petitions to be placed on the ballot many months before the general election. 460 U.S. at 806. The Court concluded that Ohio's early deadline "places a particular burden on an identifiable segment of Ohio's independent-minded voters" and reinstated the district court's conclusion that the Ohio statute "imposed an impermissible burden on the First Amendment rights of [independent candidate] Anderson and his supporters." *Id.* at 783, 792.

2. While this Court previously has struck down restrictions on access to a general election ballot on First Amendment grounds, it *never* has held that candidates—insurgent, or otherwise—have a First Amendment right of untrammeled access to a political party's nomination processes. To the contrary, this Court's decisions make clear that reasonable access to a general election ballot—as New York law indisputably provides here—is all that the First Amendment requires the State to provide.

a. The Second Circuit cites no pertinent authority whatsoever for its revolutionary conclusion that insurgent candidates and voters who support them have a First Amendment right to associate in the context of a political party's candi-

date-selection processes—to wit, "a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 41-42. The decisions on which the court of appeals relied establish either a right only to reasonable access to the general election ballot, or an entirely different right under the Fourteenth and Fifteenth Amendments to be free from invidious discrimination in the exercise of the franchise. Neither of those rights is implicated here.

The Second Circuit suggested that its new constitutional entitlement "derive[s] directly from a line of Supreme Court cases limiting a State's power to structure its elections and regulate access to its ballot": *Williams*, *Anderson*, and *Bullock*. Pet. App. 42. The court of appeals concluded that "[t]hese cases establish that the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." *Id.* at 44. But, as noted above, *Williams* and *Anderson* concerned challenges only to Ohio laws restricting access to the ballot for the *general election*. *See Anderson*, 460 U.S. at 786 (recounting that, under the challenged statute, "no independent candidate may . . . seek to place his name on the *general election ballot*" (emphasis added)); *Williams*, 393 U.S. at 24 (same). Neither *Williams* nor *Anderson* even remotely suggests that one seeking a political party's nomination and his and her rank-and-file supporters have a First Amendment right to participate in that party's candidate-selection processes.

Bullock v. Carter similarly fails to offer support for the Second Circuit's novel constitutional right. Though that case (unlike *Williams* and *Anderson*) did involve a challenge to a restriction on access to a party nomination process—specifically, a filing fee for the Texas Democratic Party's primary ballot—as the Second Circuit itself recognized, that case was decided not under the First Amendment, but rather

"pursuant to the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 43 (citing *Bullock*, 405 U.S. at 144, 145-49). This reading is confirmed by this Court's own view of the case as "resting on the Equal Protection Clause of the Fourteenth Amendment." *Anderson*, 460 U.S. at 786-87 n.7; *see also id.* at 793 n.15 ("the filing fees were unconstitutional because of the 'obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community" (quoting *Bullock*, 405 U.S. at 144)). Thus, *Williams*, *Anderson*, and *Bullock* offer no support whatsoever for the Second Circuit's conclusion that the *First Amendment* compelled the Board of Elections to grant respondents access to the political parties' nomination processes.

b. Unable to find a case in which this Court has found a *First Amendment* right to participate in a political party's candidate-selection process, the Second Circuit instead divined from this Court's decisions in *United States v. Classic*, 313 U.S. 299 (1941), and *Terry v. Adams*, 345 U.S. 461 (1953), an "animating principle" that "constitutional protection extends" not just to the general election, and indeed, not just to elections, but rather "to each State-created or State-endorsed 'integral part of the election machinery.'" Pet. App. 39 (quoting *Classic*, 313 U.S. at 318). Therefore, the court reasoned, the First Amendment right of association that applies at the general election stage applies with equal force to party nomination processes. Pet. App. 41; *see also* Br. in Opp. at 19-20. *Classic* and *Terry*, however, do not sweep so broadly.

Classic concerned the interpretation of two federal criminal laws that prohibited the willful violation of rights secured by the Constitution. *See* 313 U.S. at 321 n.4, 325 n.9. The question for the Court was whether ballot fraud perpetrated by election officials in the course of a Louisiana primary election to nominate a candidate of the Democratic Party for representative in Congress was encompassed by those criminal statutes. The Court concluded that, inasmuch

as the right of the people to vote for their representatives in Congress is established by Article I, Section 2 of the Constitution, ballot fraud in a primary election was covered by the statutes. *Id.* at 324-25. The fact that the fraud had occurred in a primary election was immaterial; because the State had made the primary election "an integral part of the procedure of choice," "the right of the elector to have his ballot counted at the primary is . . . included in the right protected by Article I, § 2." *Id.* at 318.

For its part, *Terry* concerned whether "the Fifteenth Amendment's prohibition on race-based voting exclusions applied . . . to a primary election run by a private club called the Jaybird Democratic Association." Pet. App. 39. And as this Court recently observed, *Terry* held "only that, when a State prescribes an election process that gives a special role to political parties . . . the parties' discriminatory action becomes state action under the Fifteenth Amendment." *Jones*, 530 U.S. at 573.

But the fact that rights secured by the Fourteenth and Fifteenth Amendments apply with equal force to both general and primary elections does not nearly establish that *First Amendment* associational rights in the general and party nomination phases are similarly coterminous. While the dimensions of the substantive right secured by the Fourteenth and Fifteenth Amendments—the right to be free from state acts of invidious discrimination in the exercise of the franchise—are not dependent on the context in which the state action occurs, the First Amendment is not so one-dimensional. Whether one has a First Amendment right to speak or associate depends very much on the context in which that right is asserted. An insurgent candidate's First Amendment speech and associational rights are very strong when she is in a public park, but much less so when she is in a public prison. *Compare Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), *with Jones v. N.C. Prisoners' Union*, 433 U.S. 119 (1977). Her Fourteenth

Amendment right to be free from state acts of invidious discrimination, however, applies with equal force in both contexts. *See Johnson v. California*, 543 U.S. 499 (2005) (applying strict scrutiny in review of California prisons' racial segregation of inmates).

It is therefore unsurprising that, in *Jones*, the Court rejected precisely the interpretation of *Terry* advanced here by respondents—i.e., as establishing in voters a "First Amendment associational interest" to be included in "a state-required, state-financed primary election." *Jones*, 530 U.S. at 573 n.5. *Terry*, the Court recognized, "simply prevent[s] exclusion" of voters where that exclusion "violates some independent constitutional proscription." *Id.* *Classic* and *Terry* thus shed no light at all on whether exclusion of an insurgent candidate from a political party's candidate-selection process would violate the candidate's First Amendment rights.[2]

c. The First Amendment concern at the core of this Court's decisions in *Anderson* and the other ballot access cases—that "election campaigns [ ] not [be] monopolized by

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[2] Nor do the additional cases cited by respondents in their brief in opposition. *See* Br. in Opp. at 19-20. *Moore v. Ogilvie*, 394 U.S. 814 (1969), concerned restrictions on access to a general election ballot that were held to discriminate against rural voters in violation of the Equal Protection Clause. *Id.* at 819. While *Lubin v. Panish*, 415 U.S. 709 (1974), did concern a restriction on access (a filing fee) to a primary ballot, the decision was grounded on the equal protection rationale set forth in *Bullock*. *Id.* at 718. Moreover, in *Lubin*, the Court relied explicitly on the facts that the State provided no "alternative means of gaining access to the ballot" and that failure to pay the filing fee amounted to a "disqualification from running for office." *Id.* *Kusper v. Pontikes*, 414 U.S. 51 (1973), is completely inapposite. That case did not involve a restriction on access to any ballot, but rather an Illinois statute prohibiting a person "from voting in the primary election of a political party if he ha[d] voted in the primary of any other party within the preceding 23 months." *Id.* at 52. Respondents here allege no restriction on their ability to vote in the delegate primaries held in their respective assembly districts.

the existing political parties" at the expense of minor parties and independents (460 U.S. at 794) is not remotely implicated by the *intra-party* nominating process at issue in this case. Unlike the petitioners in *Anderson* and *Williams*, under New York law, the respondent would-be candidates each easily could have placed their names on the general election ballot, *see* N.Y. Election Law § 6-138, but they made no effort to do so. As even the district court recognized, *see* Pet. App. 160-61, this Court's decisions make clear that providing candidates with the opportunity to access and associate with the relevant electorate—an opportunity of which no respondent here availed herself—is all that the First Amendment requires.

In cases where the Court has struck down restrictions on access to the ballot, it has consistently emphasized that the state restriction, if not satisfied, constituted an absolute bar to candidacy. For instance, in *Lubin*, the Court held a candidate filing fee to violate principles of equal protection, but only in "[t]he absence of reasonable alternative means of ballot access." 415 U.S. at 718. Similarly, in *Anderson*, the Court noted that "the challenged Ohio statute totally exclude[s] any candidate" who failed to comply with an absurdly early filing deadline. 460 U.S. at 792. And in *Williams*, where the Court addressed a challenge to "various restrictive provisions [that] ma[de] it virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties," the Court found noteworthy the fact that "Ohio laws make no provision for ballot position for independent candidates." 393 U.S. at 24. In tandem, these restrictions amounted to the grant of "a complete" and "permanent monopoly" to the established parties. *Lubin*, *Anderson*, and *Williams* thus all strongly suggest that ballot access restrictions will not violate the First Amendment where the State leaves in place a reasonable alternative means of accessing the general election ballot; to violate the First Amendment the ballot restriction must present "an absolute bar to candidacy." *Storer v.*

Brown, 415 U.S. 724, 737 (1974) (upholding state one-year disaffiliation requirement for ballot access for independent candidates).

If there were any doubt about that proposition, this Court's decision in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), would resolve it. *Munro* upheld against a First Amendment challenge Washington State's requirement that, to gain access to the general election ballot, a candidate must receive at least one percent of all votes cast in the State's multi-party "blanket primary" election. 479 U.S. at 191-93 (describing Washington's blanket primary system). Analyzing the Socialist candidate's claim of right of access to the general election ballot against the backdrop of the rejection of similar claims in *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party of Texas*, and *Storer*, the Court found dispositive the fact that "Washington virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought—candidate access to a statewide ballot." *Munro*, 479 U.S. at 199. "This," the Court stated, "is a significant difference." *Id.* Given that the State permitted ready access to the entire relevant electorate in the blanket primary, "there are no state-imposed obstacles impairing voters in the exercise of their choice." *Id.* That the State provided the opportunity to associate only in the blanket primary, and not in the general election, was irrelevant to the First Amendment analysis: "It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election." *Id.*

A fortiori, New York can hardly be said to have infringed respondents' "freedom of association because [respondents] must channel their expressive activity into a campaign at the [general election] as opposed to the [primary]." *Munro*, 479 U.S. at 199. *Munro* establishes beyond cavil that, so long as the State provides reasonable access to the entire relevant electorate—whether in a blanket primary or a

general election—it meets its obligation under the First Amendment to provide voters an opportunity "to band together in promoting among the electorate candidates who espouse their political views." *Jones*, 530 U.S. at 574.

Respondents will doubtless contend—as the courts below suggested—that the opportunity to run on the general election ballot does not constitute a "real" opportunity because (1) it would require them to abandon their party affiliation, and (2) "one-party rule" is so entrenched in the State of New York that the outcome of the general election is predetermined. Pet. App. 40, 52, 161. Neither rationale can support the conclusion that the general election ballot presents an inadequate opportunity to associate with voters. As to first rationale, it is bottomed only on a stray statement in this Court's decision in *Bullock*, *see* 405 U.S. at 145-46, which this Court has recognized turns on principles of equal protection. *See Anderson*, 406 U.S. at 486-87 n.7. The *Bullock* Court may have been correct to conclude that it violated the *Equal Protection Clause* to compel impecunious candidates to run as independents, while wealthy candidates could run under the banner of their choice. But that does not demonstrate that a requirement of disaffiliation substantially burdens associational rights. To the contrary, just two Terms ago, this Court held that a requirement that one disaffiliate from his current party "prior to participating in [another] party's primary minimally burdens voters' associational rights." *Clingman v. Beaver*, 544 U.S. 581, 592 (2005). Indeed, some 20 States (New York not among them) elect judges in nonpartisan elections—elections in which the candidates' party affiliations (if any) are not listed on the ballot, *see Republican Party of Minn. v. White*, 416 F.3d 738, 779 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006)—and the constitutionality of such elections is unquestioned. *Storer*, 415 U.S. at 741 (endorsing in principle a nonpartisan judicial primary); *see also Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch

ultimately depends on its reputation for impartiality and nonpartisanship."). The fact that respondents would not be listed on the general election ballot as members of the party of their choice would not prohibit them from announcing their party affiliation to the electorate and would not otherwise limit the candidates' ability to associate with like-minded voters.

Respondents' second rationale for spurning the general election ballot—that New York, like pre-World War II Louisiana or Baathist Iraq, is dominated by "one-party rule," Pet. App. 61—cannot be taken seriously. The fact that the current Mayor of the City of New York and his predecessor in office are both Republicans, and that, in the 2006 elections, two Republican incumbents from upstate districts lost their congressional seats to Democratic challengers ought to be evidence enough that the grip of the "one party" has loosened enough to permit competitive general elections. *See* New York State Board of Elections, 2006 Elections Results for Representative in Congress, http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_cong.pdf. In any event, respondents' second rationale presupposes that they have a First Amendment right not just to associate with voters, but to do so on terms deemed to be competitive. *Munro*, however, is quite clear that in the absence of a state restriction that poses an absolute bar to ballot access, there is no First Amendment violation.[3]

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[3] Even assuming that the First Amendment does guarantee insurgent candidates an independent right of access to party primary ballots along the lines suggested by the separate concurrence in *Clingman v. Beaver*, 544 U.S. 581, 599-600 (2006) (O'Connor, J., concurring in part and concurring in judgment) and the dissenting opinion in *Burdick v. Takushi*, 504 U.S. 428, 442-50 (1991) (Kennedy, J., dissenting)—and as *Munro* establishes, it does not—respondents suggest no reason why *that* right would extend to other nominating processes employed by political parties, such as the judicial district conventions enjoined by the decisions below. As the Second Circuit itself recognized, it is only when a State "'chooses to tap the energy and legitimizing power of the democratic

B. Respondents' Supposed Right Of State-Enforced Access To Political Parties' Candidate-Nomination Processes Trenches Upon The Parties' Associational Rights To Determine Their Standard-Bearers

1. The Second Circuit held that "the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." Pet. App. 44. At least as applied to party nomination processes, this is plainly incorrect. It was long ago established that the freedom of partisan political association itself "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981); *accord Tashjian*, 479 U.S. at 214. A political party thus enjoys not just the right to associate with citizens, but also "the right *not* to associate." *Jones* 530 U.S. at 574 (emphasis added). Moreover, this Court has observed that a political party's "right to exclude" is at its apogee when the

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[Footnote continued from previous page]

process'" that "'it must accord the participants in that process the First Amendment rights that attach to their roles.'" Pet. App. 34 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)). If the First Amendment granted candidates access to party nomination processes at all, it would do so only in cases like *Clingman* where the State dictates that political parties choose their candidates by primary election. The Constitution, however, does not require that parties select their candidates by primary election. Indeed, "[i]t is too plain for argument" that "the State . . . may insist that intraparty competition be settled before the general election by primary election *or by party convention*." *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 n.5 (2000) ("If the 'fundamental right' to cast a meaningful vote were really at issue in this context, [a blanket primary] would not only be constitutionally permissible but constitutionally required, which no one believes.").

party is engaged "in the process of selecting its nominee." *Id.* at 575. "Under our political system," the "select[ion of] the candidates for public office to be offered to the voters at the general elections" is among the party's most "basic function[s]." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). The outcome of the nomination contest "often determines the party's positions on the . . . issues of the day," and a party's candidates are charged with carrying the party's political message to the electorate. *Jones*, 530 U.S. at 575. The party, in turn, becomes identified to no small extent—and in some cases completely—with the messages espoused by its candidates. *See id.*

Because the candidate-selection process is so central in determining both the content and, ultimately, the currency of a party's political message, this Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Jones*, 530 U.S. at 575 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). While the States have wide latitude in determining the structure of party nomination processes, *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992), and indeed have the authority to mandate that political parties select their candidates through primary elections, *see Am. Party of Tex.*, 415 U.S. at 781, the States may not act "'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Eu*, 489 U.S. at 227 (quoting *Tashjian*, 479 U.S. at 224); *see also Eu*, 489 U.S. at 229 ("[A] political party's 'determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution.'" (quoting *Tashjian*, 479 U.S. at 224)). The First Amendment reserves a "special place" for the parties' internal candidate selection processes and, ac-

cordingly, protects it from improper "adulterat[ion]" at the hands of external regulation. *Jones*, 530 U.S. at 575, 581.[4]

2. The courts below determined that the First Amendment entitled respondents to state action that would enable insurgent candidates "to compete" in the State's chosen nomination process "by garnering support among rank-and-file members," and would thereby place a "check" on, and diminish the influence of, "party leaders." Pet. App. 45, 161, 183. Short of establishing a system of primaries—which, indisputably, the First Amendment does not *require*, *see Am. Party of Tex.*, 415 U.S. at 781—it is not clear that the First Amendment would *permit* the State to moderate the party nomination process in a way that satisfies respondents' demands.

Efforts to diminish the influence of party leaders are highly problematic. It is axiomatic that the First Amendment does not permit a State to favor the speech activities of one class of candidates over another. *See Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 190 (1999) (holding government could not restrict advertising of private casinos while allowing advertising by tribal casinos); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker."). Moreover, any state effort to silence party leaders would appear to be foreclosed by this Court's decision in *Eu*,

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[4] *See also Jones*, 530 U.S. at 587 (Kennedy, J., concurring) ("It may be that organized parties, controlled—in fact or perception—by activists seeking to promote their self-interest rather than enhance the party's long-term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State.").

which invalidated a state law that prohibited the party leadership from endorsing particular candidates. *See* 489 U.S. at 216.

But even content-neutral restrictions on the parties' conduct of their judicial district conventions would, under this Court's precedents, raise serious constitutional questions. This Court has historically been very solicitous of the right of political parties to control their internal candidate selection processes. In *La Follette*, for example, the Court upheld the National Democratic Party's refusal to seat Wisconsin's slate of delegates to the Democratic National Convention for failure to conform to party delegate-selection rules, holding that the party's "choice among the various ways of determining the makeup of a State's delegation to the party's national convention" was protected by the First Amendment. *See* 450 U.S. at 121-24. And in *Tashjian* and *Jones*, the Court held that political parties had the First Amendment right to opt out of, respectively, closed primaries and blanket primaries. *Tashjian*, 479 U.S. at 215-16; *see also Jones*, 530 U.S. at 574-75. *But see Clingman*, 544 U.S. at 591-97 (upholding semi-closed primaries against First Amendment challenge). The State violated the First Amendment in those cases by "plac[ing] limits upon" the party's decision as to whom it would "invite to participate" in its candidate selection processes. *Tashjian*, 479 U.S. at 215-16; *see also Jones*, 530 U.S. at 581 (State violated First Amendment when it forced political parties to "adulterate their candidate selection process").

The district court's injunction here requires the New York State Legislature to undertake precisely the type of "adulterat[ion]" of the "candidate selection process" that *Jones* prohibited. *See* Pet. App. 183. If there is any daylight between this Court's constitutional proscription of state interference in parties' candidate selection processes, and the Second Circuit's prescription of the same, it is a narrow band, indeed.

II. THE NEW YORK STATUTES ARE NOT FACIALLY INVALID

Even if one assumes the existence of a First Amendment right on the part of insurgent candidates to participate meaningfully in a political party's nominating processes, neither Section 6-106 nor Section 6-124 imposes any substantial burden on that "right," let alone the "severe burden" necessary to justify the application of strict scrutiny. *See Clingman*, 544 U.S. at 593 ("minor barriers between voter and party do not compel strict scrutiny"). The "burdens" on associational activity the Second Circuit identified are imposed not by Sections 6-106 or 6-124, but rather are the result of purely private action. There is no First Amendment remedy for purely private restrictions on speech. *See Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."). But even if respondents could identify some burden imposed by the state laws here at issue—and they cannot—they have not remotely demonstrated that those statutes burden speech in such a substantial proportion of their potential applications that the law must be deemed invalid on its face.

A. The New York Statutes Impose No Significant Burden On Respondents' Associational Interests

The Second Circuit examined "the reality of Supreme Court elections in present-day New York," Pet. App. 10, and located "severe burdens" in (1) the expense and effort required to run "a slate of delegates" who have allegiance only to the candidate "running" them, and (2) the overwhelming influence that party leaders wield over the votes the delegates ultimately cast at the judicial district convention. *Id.* at 57, 61; *see also id.* at 62-70. Neither purported burden on respondents' supposed right to participate in party nomination processes is affixed by state law.

As to the first "burden," the court of appeals envisioned a scenario in which those who wish to serve as a New York Supreme Court Justice recruit "a slate of delegates to run on their behalf, with an eye toward placing those delegates at the judicial nominating convention so that they can cast their votes in favor of the candidate with whom they are affiliated." Pet. App. 11. To run such a "slate," the court determined, an insurgent candidate would have to (1) recruit dozens of individuals to run as delegates; (2) "gather at least 9,000 signatures and as many as 24,000 within a 37-day petition circulating period" to place those recruits on the ballot; and (3) because candidates for delegate "may not indicate on the ballot the judicial candidate with whom they are affiliated," "educate voters in each assembly district as to the delegates with whom [she is] affiliated." *Id.* at 13, 62-63. Taken together, the court held, the requirements for running a slate of delegates "severely burden a judicial candidate's ability to access the primary election stage of the electoral process." *Id.* at 61.[5]

Neither Section 6-106 nor Section 6-124, however, makes any mention of running a slate of delegates. Section 6-106 says simply that "[p]arty nominations . . . shall be made by the judicial district convention." N.Y. Election Law § 6-106. Section 6-124 specifies that the convention shall be comprised of delegates elected from each assembly district in

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[5] It is obvious enough that, though it might be helpful to winning the party's nomination, a "slate of delegates" is not required merely "to participate" in the judicial district convention. Thus it seems that the court of appeals posited not simply a right "to participate in the nominating process," Pet. App. 41, or even "the right . . . to compete for their major party's nomination," *id.* at 161, but rather a right to a reasonable chance of winning the party's nomination at the convention. The First Amendment's right of political association—the right of "citizens to band together in promoting among the electorate candidates who espouse their political views," *Jones*, 530 U.S. at 574—of course does not encompass a right to prevail in an electoral contest.

the delegate primary, but imposes nothing resembling a requirement that a judicial candidate run a slate of delegates. *See id.* § 6-124. Indeed, Section 6-124 does not envision the judicial candidate's participation at all; the judicial district convention system was crafted in 1921 specifically to remove candidates from "bare-knuckled primary elections."[6] Pet. App. 9. The requirement that an insurgent candidate run a slate of delegates is practical rather than legal; it describes what an insurgent candidate might need to do to upset at the judicial district convention a candidate supported by a highly organized and effective political party. Neither Section 6-106 nor Section 6-124 requires that candidates run a slate of delegates in order to participate in party nomination processes, and it was thus manifest error for the Second Circuit to conclude that those statutes imposed this "Procrustean requirement" on insurgent candidates. *Id.* at 63.

As to the second "burden," the court of appeals observed that "county leaders select their party's nominees" and then party-sponsored delegates elected to the judicial district convention "merely endorse those choices." Pet. App. 64. The court of appeals also noted that party leaders sometimes prohibited insurgent candidates from lobbying delegates at the judicial district convention, further solidifying the influence of party leaders over the delegates. *Id.* at 69. The pervasive influence of party leaders, the court concluded, had permitted party leaders to arrogate to themselves the nomination power and "transformed a de jure decision into a de facto appointment." *Id.* at 70.

The key word in the Second Circuit's foregoing analysis is "facto," for it is absolutely clear that neither Section 6-106

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[6] It is for this reason—not because running a slate of delegates is burdensome—that petitioner Kellner testified that "'the idea that an individual candidate would go out and recruit delegate[] candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head.'" Pet. App. 63.

nor Section 6-124—the relevant *jure*—grants to "party leaders" special powers of persuasion over delegates. To the contrary, as the court of appeals observed, state law actually prohibits a delegate from formally pledging herself to a candidate prior to the election. Pet. App. 63. As amply demonstrated by the fact that respondent López Torres received 25 votes at a 2002 judicial district convention, *see id.* at 69, delegates are free to vote for the candidate of their choice. Neither Section 6-106 nor Section 6-124 even the least bit interferes with, let alone influences, the delegates' nomination decisions. The Second Circuit erred when it attributed to Sections 6-106 and 6-124 the unsurprising influence party leaders hold over the delegates they sponsor.[7]

B. Respondents Have Failed To Proffer A Sufficient Basis For Facial Invalidation Of The New York Statutes

Based on "record evidence . . . that New York's judicial nominating process excludes not just [respondents], but all candidates lacking party support," the court of appeals affirmed the "facial invalidation" of Sections 6-106 and 6-124. Even under the somewhat relaxed standard applied to facial challenges in the First Amendment context, *see Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003), the courts below presented a glaringly insufficient factual basis for facial invalidation of a statute—a remedy this Court has cautioned should be "employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

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[7] To the extent that respondents contend that the timing of the delegate convention imposes another "severe" burden by limiting insurgent candidates to an "unrealistically brief" period of time in which to lobby delegates, Pet. App. 18, that contention is answered by the fact that the timing of the judicial district conventions is set not by Section 6-106 or Section 6-124, but rather Section 6-158(5), a provision the constitutionality of which neither court below addressed.

Assuming that respondents could demonstrate that either Section 6-106 or Section 6-124 somehow excluded them from the party nomination processes, facial invalidation of those statutes would be appropriate only upon a showing that the laws restrict "a 'substantial' amount of protected free speech 'judged in relation to the statute's plainly legitimate sweep.'" *Hicks*, 539 U.S. at 118-19 (quoting *Broadrick*, 413 U.S. at 615); *see also New York v. Ferber*, 458 U.S. 747, 771 (1982) (approving facial invalidation when a statute "reaches a substantial number of impermissible applications"). Here respondents adduced no evidence whatsoever to support the proposition that the number of "candidates lacking party support" who were purportedly excluded from the nomination process by Sections 6-106 and 6-124 is "substantial" when compared to "the statute's plainly legitimate sweep," i.e., the number of candidates for whom Sections 6-106 and 6-124 posed no impediment to participation in the nomination process. Perhaps there are dozens upon dozens of would-be justices like respondent López Torres who would have pursued a party nomination in the absence of the "severe burdens" identified by the courts below. Perhaps not. In any event, before uncorking the "strong medicine" of facial invalidation, the courts below were obligated at least to perform the analysis. And in the absence of such an analysis, it was error for the courts below to move past the more measured response of holding the challenged statutes to be invalid as applied to respondents.

III. THE COURTS BELOW LACKED AUTHORITY TO MANDATE THE HOLDING OF PRIMARY ELECTIONS

Even if Sections 6-106 and 6-124 were facially invalid, there still would be no conceivable justification for the district court's extraordinary decision to mandate as a "temporary remedy" the implementation of primary elections to choose party nominees for New York Supreme Court Justice.

The scope of a court's award of prospective relief always must be bounded by the scope of the proven threatened injury. *Lewis*, 518 U.S. at 357 (that "a plaintiff demonstrated harm from one particular inadequacy in government administration" does not authorize a court "to remedy *all* inadequacies in that administration" (emphasis in original)); *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation" (citation and internal quotation marks omitted)). Accordingly, when a statute is determined to be facially invalid, an injunction against its enforcement generally will suffice to cure any injury the statute might threaten. *See*, *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (affirming lower courts' enjoinment of public school policy as facially violative of the First Amendment); *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997) (affirming the district court's preliminary enjoinment of portion of the Communications Decency Act of 1996 as facially invalid).

Notwithstanding this Court's clear limitations on inferior courts' exercise of their remedial powers, the district court concluded that an injunction against all enforcement of Sections 6-106 and 6-124 was inadequate to "afford the plaintiffs relief." Pet. App. 183. The "least intrusive" "temporary remedy," the district court concluded, was "to require a direct primary election." *Id.* at 183-84.

Reviewing this affirmative relief, the court of appeals made no effort to connect the district court's remedy to respondents' alleged injury. Nor could it: If respondents were correct that Sections 6-106 and 6-124, by operation of law, imposed severe burdens on their associational rights, an injunction against the enforcement of those statutes, without more, would have sufficed to alleviate those state-imposed burdens.

The court of appeals instead sustained the court-ordered primaries principally on the ground that the district court had

mandated merely the same result as that dictated by the so-called catch-all provision of the New York Election Law. *See* N.Y. Election Law § 6-110 ("All other party nominations of candidates for offices . . . , except as provided herein, shall be made at the primary election."). The Second Circuit reasoned that, in the absence of Sections 6-106 and 6-124, Section 6-110 required the State to hold primary elections even in the absence of the district court's award of affirmative relief. Pet. App. 82. "[T]he default nature of section 6-110 would have resulted in a primary election by operation of law." *Id.*

Whether the court of appeals accurately construed Section 6-110 is debatable. It would be a strange result if Section 6-110 compelled precisely the primaries that the New York Legislature, in 1921, had so clearly rejected. The court of appeals, however, short-circuited any such debate, arrogating to itself the power to interpret Section 6-110 in the first instance—a power that, under New York law, rests with the Board. *See* N.Y. Election Law §§ 3-102, 3-104. Even if the Second Circuit's interpretation of Section 6-110 is completely correct, it is the Board's mistake to make in the first instance, and the court of appeals had no authority to correct that "error" before it had been made. The mandate of direct primaries is precisely the sort of "judicial legislation" this Court has instructed inferior courts to avoid, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 (2006) (*per curiam*), and, accordingly, should be vacated.

CONCLUSION

The decision of the court of appeals should be reversed and the injunction of the district court should be vacated.

Respectfully submitted.

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