No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,
Petitioners,

v.

MARGARITA LOPEZ TORRES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Republican National Committee ("RNC") is the national political organization of the Republican Party of the United States.[1] The RNC is involved in the full spectrum of party-building activities, ranging from endorsing candidates, to supporting candidates and party organizations, to sponsoring voter registration, education, and turnout programs.

The RNC promotes candidates in all fifty states for a myriad of state and local offices from the statehouse to the courthouse. The RNC is directly affected by a ruling, such as the ruling of the Court of Appeals for the Second Circuit in this case, that limits a political party's ability to form a strong leadership group, endorse and support candidates, and generally organize itself as it sees fit to advance the party's interests. The RNC also is directly and adversely affected by a rule of law, such as that announced by the Second Circuit, that ties the constitutionality of state election statutes to the independent actions of party officials. Simply put, the Second Circuit's ruling in this case has the potential to limit severely the ability of the RNC to engage in the kind of core political speech and association that is central to its purpose and that it routinely promotes in other states, including by endorsing candidates for public office.

The RNC has filed briefs *amicus curiae* with this Court in numerous ballot access and other voting rights cases in recent years. *See, e.g.*, *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002); *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000). Because of the direct impact of the Second Circuit's ruling on the speech and associational rights of political parties, and because of the RNC's experience in

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the RNC, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

supporting candidates for judicial office across the nation, the RNC is well positioned to assist this Court in its consideration of the issues presented for review.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). The requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

First Amendment associational rights in the electoral context are not limited to voters and candidates. On the contrary, political parties enjoy First Amendment rights to pick and promote candidates for office. Indeed, 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.' " *California Democratic Party* v. *Jones*, 530 U.S. 567, 575 (2000) (quoting *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). A political party also enjoys the right to organize as it sees fit to accomplish those tasks—in the Court's words, to determine "the boundaries of its own association, and * * * the structure which best allows it to pursue its political goals." *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 224 (1986).

The decision of the Court of Appeals for the Second Circuit in *Lopez Tórres* v. *New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006) (Pet. App. 1-85), encroached on these established rights of political parties in at least four ways. One of the encroachments—the court's erroneous application of strict scrutiny, in lieu of recognizing the countervailing rights of political parties and balancing them against the rights of candidates—has been the focus of argument by petitioners. *See, e.g.*, Reply Brief for Petitioners New York State Board of Elections *et al.* at 8. The RNC subscribes to their points but will not reiterate them here. Instead, this brief will focus on three other aspects of the Second Circuit's approach, all of which managed not only to give short shrift to the rights of political parties but also to

denigrate "the breadth of power enjoyed by the States in determining * * * the manner of elections[.]" *Bullock* v. *Carter*, 405 U.S. 134, 141 (1972).

First, the Second Circuit discerned "burdens" that do not, in fact, exist at the first stage of New York's judicial election scheme, during which party voters choose delegates for the subsequent nominating convention. The court found that it would be unduly difficult for a judicial candidate to assemble a full slate of committed delegates and inform voters which delegates to support. But New York's election law does not contemplate that a judicial candidate will do either of these things. Rather, the law calls for the selection of *unaffiliated* delegates: The rank-and-file voter does nothing more than choose a proxy, aligned to no judicial candidate, who later will attend the judicial convention and pick the nominees of his or her choosing. Judicial candidates have no contemplated role in this delegate-selection stage of the process. The Second Circuit, by overlooking this fact and proceeding as if New York had adopted a direct primary, effectively punished the state for *not* having adopted one. But New York, like any state, has the perfect right to adopt a mechanism other than the direct primary for the resolution of intraparty competition. *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974). The Second Circuit's decision, in short, curtailed the state's right to structure its elections. In so doing it diminished party rights by enshrining one approach to party decision-making to the exclusion of all others. The Court should not permit such judicial second-guessing in the very arena—nominee selection—where party associational rights are at their strongest.

Second, the court below discerned chimerical "burdens" at the second stage of New York's judicial election scheme, the nominating convention. The court noted that party leaders very often endorse slates of candidates for nomination at the convention, and that the elected delegates very often sign on to those recommendations from their party leaders. This decision-making process, the court concluded, constitutes an unwarranted burden on candidates who do not win party

leaders' favor. Here again, the court below erred. Such a supposed "burden" has nothing at all to do with the law under review, and is nothing more than party politics in action. The enshrinement into constitutional law of the Second Circuit's approach on this point would be both ahistorical and potentially destabilizing: If New York's election system is unduly burdensome because party leaders wield strong influence over party decision-makers, then presidential nominating conventions from the mid-19th century through at least 1968 were most likely unconstitutional—and more importantly, current election laws and practices in many states are potentially unconstitutional as well.

Third, the Second Circuit relied, as part of its justification for striking down New York's law, on the notion that many of New York's judicial districts have a single dominant party. But this Court has never said that one-party dominance is a factor in the burden analysis in ballot access cases. The Court should dispel this errant notion before it takes root. One-party dominance is demonstrably irrelevant to the burden analysis. It makes no difference to a candidate who unsuccessfully seeks his party's nomination, or to his supporters, if the *other* major political party is competitive come election day.

In short, the Second Circuit's decision skews the careful balance this Court has maintained between the rights of voters, candidates, and parties, and the interests of states in crafting election structures. In so doing the Second Circuit threw into serious question the rights of parties to organize in the way they believe best serves their interests. This Court should reverse the decision below and (1) reaffirm that states are not required to employ direct primaries or their equivalent for resolution of all intra-party contests, *American Party of Texas*, 415 U.S. at 781, and (2) clarify that the decision of party members to follow party leaders' recommendations in choosing a nominee cannot possibly constitute a severe burden for purposes of First Amendment ballot access analysis.

ARGUMENT

I. THE SECOND CIRCUIT PERCEIVED A "BURDEN" AT THE DELEGATE-SELECTION STAGE THAT DOES NOT EXIST.

A. New York Judicial Candidates Play No Role In Delegate Selection And Thus Can Suffer No Burden At This Stage Of The Process.

1. New York State is divided into 12 judicial districts. Pet. App. 11, 86. The election of Supreme Court justices take place in each of the 12 districts and consist of three phases. First, rank-and-file voters from each political party select unaffiliated judicial delegates to attend a subsequent nominating convention. Second, the chosen delegates attend the convention and select party nominees. Third, those judicial nominees compete in the general election against anyone else who has gained a spot on the ballot by collecting voter signatures. Pet. App. 10; *see also* N.Y. Elec. Law §§ 6-106, 6-124, 6-158, 7-116(1).

In the first phase, the convention delegates are selected by rank-and-file party voters in subdivisions of the 12 judicial districts, known as "assembly districts." *See* N.Y. Const. art. III, § 5. On delegate-selection day in early September, the voters in each assembly district choose several delegates and several alternates from among those citizens who are running for office—*i.e.*, those who have gathered signatures and been placed on the delegate ballot. Pet. App. 11-12. The top vote-getters win the delegate slots and earn the right to serve as delegates at the subsequent judicial nominating convention.[2]

2. Two crucial facts about this delegate-selection process are key in analyzing the Second Circuit's decision. First, just

[2] If the number of candidates for delegate from a given party in a given assembly district is less than or equal to the number of available delegate slots for that party in that district, then, as common sense would dictate, the candidates are all deemed elected—the assembly district does not bother to hold a vote in which all candidates will win. *See* N.Y. Elec. Law § 6-160(2).

about anyone who wants to do so can run to be a delegate. The requirements to be placed on the ballot are not onerous—indeed, the *only* relevant requirement of note is that the delegate candidate gather 500 valid signatures from party members residing in his or her district. *Id.* at 12 (citing N.Y. Elec. Law §§ 6-134(4), -136(2)(i), (3)).

Second, those interested in running for judge have *no role* in the delegate-selection stage, and state law contemplates no interaction between rank-and-file voters and judicial candidates at this stage. Such rank-and-file voters are simply entrusted to select unaffiliated delegates who later will pick nominees for their party. The delegate candidates, in other words, are not pledged to a particular judicial candidate. Pet. App. 107. Indeed, they cannot be, because the convention that the delegates will later attend is required to select multiple nominees, one for each of the judicial slots up for election. In short, this is not a direct primary, or even, to coin a phrase, a "quasi-direct" primary in the manner of most states' presidential primaries, where each voter chooses a presidential nominee and the national convention delegates are apportioned accordingly. Rank-and-file voters in the New York delegate elections are not weighing in on who the judicial nominees should be.

3. Properly analyzed, there are no burdens of constitutional significance in this system. The 500-signature requirement for convention delegate candidates is unobjectionable on its face. *See American Party of Texas*, 415 U.S. at 789 (stating that any argument that a 500-signature requirement is objectionable "approaches the frivolous"); *Jenness* v. *Fortson*, 403 U.S. 431, 438, 442 (1971) (approving requirement that minor-party candidates gather signatures from five percent of the number of registered voters at the last election). Nor do voters face barriers: They may cast their votes for any would-be delegate who fulfills the modest signature requirement. None of the sorts of structural barriers that have led this Court to strike down state ballot access laws are present here. *See*, *e.g.*, *Bullock*, 405 U.S. at 134 (striking down exorbitant filing fees required to run in primary elections for

local offices); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio law barring candidates from a spot on the ballot for President unless they registered more than seven months in advance). Indeed, this Court's primary concern has been with ballot access restrictions that tend to " 'limit the field of candidates from which voters might choose.' " *Celebrezze*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143). Here, there are no such restrictions. The candidates in question at this phase are the delegate candidates, and nothing blocks their participation.

B. The Second Circuit Found A Burden On Judicial Candidates At This Stage By Analyzing An Election System That Never Was.

The Second Circuit nonetheless deemed the delegate selection process to impose a severe burden on associational rights. But it did so by implicitly positing a type of election—a direct primary—that New York does not have and then measuring the *actual* New York system against that standard. Because nothing in constitutional law forces a state to adopt the direct primary for purposes of resolving its intraparty contests, *see American Party of Texas*, 415 U.S. at 781, the Second Circuit's approach should not be permitted to stand.

1. The court began by recognizing that "judicial candidates do not run in the [delegate] election themselves." Pet. App. 11. But instead of acknowledging that this is because the statutory scheme is designed to funnel the judicial candidates' campaigning energies to the subsequent convention—and that this is a perfectly legitimate way to structure internal party decision-making—the court created a role for judicial candidates at the delegate-selection stage. It wrote that they "have the option of assembling 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." *Id.*

This analytical move drove the rest of the court's opinion. The court seized on the idea that a judicial candidate should (1) assemble a slate of committed delegate candidates, one from every assembly district; (2) gather enough signatures to place all of those delegate candidates on the ballot; and (3) market himself to rank-and-file party voters in every assembly district, letting those voters know which delegate candidates were committed to support him. The court analyzed the difficulty of accomplishing such a feat and concluded that it would be severe. First, the judicial candidate would have to find a dedicated delegate candidate in each assembly district—between nine and 24 candidates in all. *Id.* Second, the judicial candidate would have to collect between 9,000 and 24,000 signatures to get all of those delegate candidates on the ballot; dozens of workers would be required for this task. *Id.* at 13-14.[3] Third, the judicial candidate would have to run an expensive public relations campaign in every assembly district. *Id*. The court concluded that all of this, taken together, would be too much for most candidates. It cited testimony from judges and judicial candidates to the effect that these "requirements of the process * * * effectively foreclosed their ability to access the [delegate] election phase." *Id.* at 14. And its finding on this point was at the heart of its conclusion that the state scheme as a whole severely burdens associational rights. *See id.* at 46 (stating that the delegate-selection stage "is of central importance to the entire electoral process because it effectively dictates the result of the convention").

2. The court's burden analysis was deeply flawed, in the main because it did not analyze New York's actual process for electing judges. What the court failed to appreciate was that under the New York system, a judicial candidate is not *supposed* to "access" the delegate election phase. On the contrary, the delegates are elected in their own stead, as

[3] The court reached this total by using a figure of 1,000 signatures per delegate candidate, on the assumption that the validity of signatures would be challenged and therefore the required 500 per candidate was actually insufficient. Pet. App. 13.

proxies unaffiliated to any one candidate, and the judicial candidate is supposed to address his campaigning to those unaffiliated delegates at the convention. As New York City Board of Elections Commissioner Douglas Kellner testified, " '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. 17.[4]

Thus, the Second Circuit's discussion of the "burden" on judicial candidates at the delegate-selection stage misses the point. Judicial candidates have no role at this stage and therefore can suffer no burden. The supposed burden of collecting 24,000 signatures is non-existent; the signature requirement is 500, and it falls on individual delegate candidates, not on judicial candidates. The same goes for the supposed burden of conducting a voter-education campaign across assembly districts and the supposed burden of recruiting sufficient committed delegates; state law does not contemplate that a judicial candidate would attempt either feat.

3. The Second Circuit's approach appears to stem from its notion that like some primaries, the delegate-selection stage of the New York Supreme Court election is designed to give rank-and-file voters a *direct* say in who the nominees of their party will be. *See* Pet. App. 17 (referring to the delegate-selection stage as an "open primary"); *id.* at 53 (stating that part of the basis for plaintiffs' claim is that "the regulations effectively *prevent a party member from voting for their preferred candidate*") (emphasis added). Proceeding from this premise, the court concluded that rank-and-file voters are not being given the direct say to which they are entitled, and that this is a constitutional infirmity, because once New York granted the rank-and-file voters an entitlement to choose nominees, it had to comport with First Amendment protec-

[4] Commissioner Kellner's testimony is supported by the findings of the District Court itself, which noted that with one exception, all defendants in this case agreed that "the system is not designed for challenger candidates to run their own slates of delegates." Pet. App. 168.

tions. *See id.* at 34-35 (citing *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 788 (2002)).

The problem with this analysis is that the premise is simply incorrect. The New York statutory scheme is not designed to give rank-and-file voters a direct say in choosing nominees. On the contrary, the plain text of the law, and the testimony of Commissioner Kellner, make clear that such voters are meant to have a say only in choosing unaffiliated delegates. Those delegates are the ones who get to pick the nominees. New York, in other words, chose to "insist that intraparty competition be settled before the general election" through a mixed scheme that arguably has more in common with the convention than with the primary. *American Party of Texas*, 415 U.S. at 781. "It is too plain for argument" that New York was entitled to do so. *Id.* The Second Circuit went too far in invalidating that choice—the oft-confirmed choice of a sovereign state[5]—and replacing it with another among the range of permissible election structures. Not only does such judicial overreaching intrude on the prerogatives of the states, but it has an unavoidable dilatory impact on political parties. If a state is sharply restricted in the types of nominee-selection processes it may permit, then parties by definition are identically restricted. The moment when a party chooses its standard-bearer is, after all, "the crucial juncture" at which the party's associational rights reach their zenith. *Tashjian*, 479 U.S. at 216.

4. The Second Circuit's analysis of the delegate selection stage is also faulty for another reason: The supposedly burdensome "requirements" it identifies do not appear in the text of New York's election law. This approach to ballot access questions has no support in this Court's jurisprudence. On the contrary, the cases have focused tightly on the terms of, and mechanisms created by, the challenged law. In

[5] As petitioners have noted, New York's Legislature adopted the current system in 1921 after a failed experiment with direct primaries, and has maintained the system for more than 85 years despite heated (and repeated) debate about whether it should be amended. *See* Pet. 6-8.

Bullock, for example, the Court struck down a Texas statute because the statute itself created the burden of paying exorbitant filing fees. 405 U.S. at 143. In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), the Court struck down an Ohio statute because the statute itself created the burden of obtaining many thousands of signatures in order to earn a ballot position in presidential elections. *Id.* at 24. And in *Celebrezze*, the Court struck down Ohio's statutory early filing deadline because the statute itself flatly and unnecessarily excluded candidates who made a late decision to run for President. 460 U.S. at 795.

In this case, unlike *Bullock*, *Williams*, and *Celebrezze*, the supposed burdens highlighted by the Second Circuit appear nowhere in the invalidated statutes. This is highly problematic as a mode of judicial review. It is the law itself—and not how political actors operate within that law—that is under review. If state laws may be struck down because of elusive situational "burdens" not rooted in the statutory text, it is difficult to see what is to stop a court from striking down election laws because of, say, the advantages of incumbency, or the disincentive to challengers posed by major-party financial warchests. The Court should disapprove such freewheeling negation of state legislation and reaffirm that state laws may be struck down under the ballot access jurisprudence only if the *laws themselves* create the burdens.

5. Similarly, it should be noted that a central underpinning of the Second Circuit's "burden" finding is the fact that, in many cases, the only people who run for delegate slots are those party members—often party activists or insiders—recruited by the parties to do so. *See* Pet. App. 16-18. This lack of candidates creates the situation, lamented by the court, that many of the convention delegates end up being party activists, or individuals with strong connections to party leaders. If other citizens took it upon themselves to run for delegate positions, the conventions presumably would feature a smaller percentage of delegates who are party insiders, and any incentive for disfavored judicial candidates to try to run slates of committed delegates would disappear.

Here, again, the dynamic to which the Second Circuit objects is not created by state law. There is nothing to stop rank-and-file party members from running to be convention delegates. From all that appears in the record, their failure to do so stems from a simple lack of interest. As a result, the candidates picked by party insiders often win without a fight. But lack of citizen participation is not an unconstitutional burden on First Amendment rights, and in any event it is unclear why state law should be struck down to solve a problem state law did not create. Judicial review is not such a blunt instrument.

II. THE SUPPOSED "BURDEN" AT THE CONVENTION STAGE HAS NOTHING TO DO WITH STATE LAW ITSELF AND IS SIMPLY PARTY POLITICS IN ACTION.

For the reasons enumerated above, the Second Circuit was wrong to hold that New York law severely burdens associational rights at the delegate-selection stage. That leaves only the court's second finding—that unwarranted burdens also exist at the convention stage. But this finding, like the first, has no grounding in law. Not only is it again untethered from the actual text of the challenged statute, but the "burdens" the court perceived are in fact nothing more than ordinary party dynamics. If they render New York's convention scheme unconstitutionally burdensome, then various election systems across the country could be accused of being similarly burdensome.

A. The Court Below Found A "Burden" At The Convention Stage Because Delegates Often Nominate The Candidates Endorsed By Party Leaders.

Under New York law, the political parties hold their judicial nominating conventions in late September, one to two weeks after the judicial delegates are elected. Pet. App. 18 (citing N.Y. Elec. Law §§ 6-124, -126, -158(5)). At the conventions, any delegate may propose the nomination of any judicial candidate. Once this process is complete, the

delegates choose as many nominees as there are open Supreme Court positions in that district.

The Second Circuit noted that, during the period between the delegate elections and the convention, "any Supreme Court Justice aspirant * * * theoretically may lobby the delegates for support." *Id.* It also recognized that any delegate may support, and propose for nomination, any candidate he or she likes. *See id.* at 18, 28. It nonetheless found a severe burden on candidates at the convention stage.

First, it found that "the time frame for lobbying delegates is unrealistically brief," because the approximately two-week period between the delegate election and the convention is insufficient time for a judicial candidate to reach all of the delegates and alternates. *Id.* at 18. It reached this conclusion despite the fact that most delegate elections are uncontested, and in those cases the identities of the delegates are known—and lobbying may begin—as soon as delegate signature petitions are due in July. *See id.* In other words, the Second Circuit relied on a two-week time frame, even though the more typical time frame for lobbying delegates is at least two months.

Second, and more importantly, the court found that for many candidates, lobbying is fruitless in any event because "delegates do not exercise their own judgment when deciding which candidate to support. Instead, they endorse the choice" of local party leaders. *Id.* at 19. The court cited testimony that in at least some districts, the party leadership meets before the convention to select favored candidates, those selections are passed on to the convention delegates as recommendations, and the delegates usually nominate the recommended candidates, even though the party leadership issues no explicit commands to that effect. *See id.* at 19-22. The Second Circuit found that this system constituted a "severe" burden on judicial candidates' associational rights, *id.* at 45, even though it recognized that delegates do not have to, and do not always, follow the party leaders' wishes as to whom they should support. For example, the court noted that when respondent Margarita López Torres ran for a

Supreme Court nomination, two delegates at the judicial convention attempted to nominate her even though she had fallen out of favor with the local Democratic Party leadership. *Id.* at 28. And at the 2002 convention, López Torres received 25 delegate votes to her adversary's 66, even though she had not received party leaders' backing. Tr. 827-828.

B. The Second Circuit's Conclusion Is Not Only Untethered From State Law, But Chills Perfectly Acceptable Party Activity.

In short, the Second Circuit deemed the convention stage severely burdensome because (a) in a minority of cases, judicial candidates have a relatively short period of time to lobby convention delegates for support, and (b) often, when party leaders tell the delegates whom the leaders think should be nominated, the delegates nominate that person. The first of these conclusions is peripheral: It does not even apply as a factual matter in most elections, given the number of uncontested delegate races, and the Second Circuit explicitly acknowledged that this point was not central to its decision. *See* Pet. App. 18-19. And the second conclusion—namely, that party-leader influence over convention delegates renders the state's election law severely burdensome to candidates who do not enjoy the party leaders' imprimatur—is doubly erroneous.

1. As an initial matter, the burdens identified by the Second Circuit, like those it identified at the delegate-selection stage, again have nothing whatsoever to do with the state law under review. The state election rules have nothing to say about whether party leaders should recommend preferred candidates, or about whether delegates should choose to follow those recommendations. On the contrary, under state law the delegates have the freedom to support whomever they like, and judicial candidates have the freedom to lobby those delegates for support. In short, the Second Circuit struck down the law not because of what it said, but as a response to what the court saw as objectionably strong party leadership.

As noted in Part I, *supra*, there is no precedent for this approach: In every ballot access case relied on by the Second Circuit, this Court focused on the effect of the state provisions themselves in deciding whether or not the law placed unacceptable burdens on associational rights. *See, e.g.*, *Bullock*, 405 U.S. at 143; *Williams*, 393 U.S. at 24. This is as it should be, both because it is the law itself that is being challenged and because a contrary rule would give courts entirely too much power to strike down state election law to remedy perceived (and potentially ephemeral) electoral ills. Indeed, if the mere fact of top-heavy party influence could render an otherwise innocuous state law unduly burdensome, then the law could become constitutional, unconstitutional, and then constitutional again as a state party leader's power waxed and waned, even without a change in the statute. Such a rule would create a constitutional morass for future courts, which would be called upon to judge the constitutionality of state laws based not on their text, but on the private, mutable behavior of party officials.

2. Second, even if a court could strike down a state law to correct behavior that the state law does not endorse or encourage, the Second Circuit singled out the wrong behavior here. The mere facts that party leaders recommend preferred candidates to the convention delegates, and that the delegates often accept these recommendations, cannot constitute a severe burden on the associational rights of non-favored candidates. It is an indispensable element of party politics that party leaders organize the rank-and-file, set goals, and endorse candidates who best advance those goals; indeed, these are recognized associational rights of parties. *See, e.g.*, *Eu*, 489 U.S. at 216; *Tashjian*, 479 U.S. at 224. The fact that these party leaders have, in some elections, more than an equal say in who receives a nomination does not in any coherent sense mean that candidates for that nomination have been " 'exclude[d] * * * from the electoral process.' " *Celebrezze*, 460 U.S. at 793 (citation omitted) (quoting *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982)).

Like its analysis of the election's first stage, this portion of the Second Circuit's holding appears driven by a certain conception of party decision-making—one in which every registered party member gets an equal say in choosing the nominee for every office. But this conception is not as a general matter a factually accurate description of political parties, nor is it constitutionally compelled. On the contrary, "[t]here are a number of respects * * * in which the parties conduct their affairs other than by giving equal attention to the preferences of * * * all party adherents." *Ripon Society* v. *National Republican Party*, 525 F.2d 567, 584 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). If a state, through its elected legislature, decides to endorse a system—be it a convention, a caucus, or the blended system at issue here—that gives party leaders and activists a special role in choosing party nominees for certain positions, that is the state's prerogative.

a. The ahistorical nature of the Second Circuit's approach is perhaps best illustrated by the fact that it appears to require the conclusion that the presidential nominating conventions from the mid-19th century up to at least 1972, when prepledged delegates became the norm, were unconstitutional. As one scholar has noted, "[n]ational party conventions prior to 1972 were generally under the control of state party leaders," who held "power * * * over delegates[.]" AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE 14 (Harvey L. Schantz ed., 1996) (hereinafter, "Schantz"). As recently as 1968, "when Hubert Humphrey won the Democratic Party nomination for president, his major strategy was the courtship of party leaders. He did not even enter a single primary." *Id.*

Indeed, the Court of Appeals for the District of Columbia Circuit has emphasized this very point. In *Ripon Society*, the court noted that "administrative decisions" such as "appointments of subcommittees and their chairmen, delegate seating and accommodations, [and] media coverage" played a "crucial role" in the outcome of the 1968 Democratic Convention. 525 F.2d at 583 n.51 (citing COMMISSION ON

THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE 40-43 (1968)). It further observed that in many states, as recently as 1968, the selection of delegates to the presidential nominating convention was "made not in a primary election but through a series of local, county, and state caucuses and conventions. * * * [O]ften voter participation [was] so slight as to make the selection process one virtually (or even officially) of appointment by party officials." *Id*. at 584. It is difficult to see how such a system would pass muster under the Second Circuit's approach.

b. The problems created by the opinion below are not limited to historical curiosity, however. Quite the contrary—election laws in a number of states would seem to be vulnerable to the same objections.

In Virginia, for example, state law provides for primaries for nomination as to certain offices, but as to many others, it permits "[t]he duly constituted authorities" of the state or local party to decide "the method by which a party nomination for that office shall be made." Va. Code Ann. § 24.2-509. The major parties take advantage of this provision to nominate candidates by convention. In Loudoun County, the County's Republican Party holds a convention at which delegates nominate the party's candidates for "Chairman, Board of Supervisors; Sheriff; Commissioner of the Revenue; Treasurer; Clerk of the Circuit Court; and Commonwealth's Attorney."[6] One does not even have to be elected to serve as a delegate to this convention; instead, the delegates are simply those people who register to serve in the capacity.

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[6] *See Call for a 2007 Convention of the Loudoun County Republican Party*, *available at* http://www.loudoungop.com/library/2007convention-call-draft.pdf. The county party's 2007 call has been challenged by the state party as violative of party rules, but the alleged violations are unrelated to the issues presented here. *See* Michael Laris, *County GOP Accedes to Ruling*, Washington Post (Apr. 15, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041302589.html.

If more people register than there are slots, elections are held, but the delegates appear in any event to be uncommitted to candidates.[7] This system is used in other Virginia counties as well.[8]

Similar convention mechanisms are in place in other states. In Indiana, state law obliges certain political parties—those whose nominee received at least two percent but less than 10 percent of the votes cast for secretary of state in the most recent election—to "nominate the party's candidate for a local office at a county convention of the party." *See* Ind. Code Ann. § 3-10-2-15. Indeed, the convention system is used in Indiana not just for local elections, but also for statewide elections for lieutenant governor, secretary of state, attorney general, and other positions. *Id.* § 3-8-4-2. The delegates to the statewide convention apparently are not affiliated with particular candidates, and the parties have at times had trouble finding enough delegates to fill all the convention slots.[9] In South Carolina, likewise, state law permits parties to nominate candidates for county offices *via* a county convention; the delegates to that convention, who again appear to be unaffiliated to candidates, are elected by county political "clubs." S.C. Code Ann. § 7-9-70. And these laws are hardly outliers. Other states have similar convention provisions applicable to local, and in some cases state, elections. Additional states still employ the caucus system for certain nominations, including that of the party's candidate for President of the United States. *See, e.g.*, Scott R. Meinke *et al.*, "State Delegate Selection Rules for Presidential Nominations, 1972-2000," 68 JOURNAL OF POLITICS 180, 182 (Feb. 2006) (noting that "despite the well-

[7] *See Call for a 2007 Convention*, *supra* note 6.

[8] *See, e.g.*, Web Site of the Buchanan County Democratic Committee, *available at* http://buchanandemocrats.com (noting that "Buchanan County Democrats traditionally select candidates by convention for local office," including the offices named above in connection with Loudoun County).

[9] *See* Niki Kelly, *Minus Decisions, GOP convention to be uneventful*, Fort Wayne Journal-Gazette (June 18, 2006).

documented trend toward primaries, nearly 25% of the states ran caucuses during the 2000 election season").

It is true, of course, that there is no record evidence that party leaders dominate, or strongly influence, the nomination processes at any or all of these conventions or caucuses. It would be difficult to believe, however, that such is not the case in at least some states and localities. After all, scholars and political observers long have recognized that caucus and convention attendees at every level "are stronger party identifiers * * * than primary voters," making them "precisely the individuals whom we might expect would be receptive to the party leadership's appeals to support one candidate or another and to advance the ideological goals of the party." *Id.*; *see also* Schantz, *supra*, at 15 (noting that "power and control over delegates [to the national conventions] were historically held by state party leaders"). To the extent this is so, the Second Circuit's approach would call into question the constitutionality of other state election mechanisms.

The Second Circuit, in sum, was led astray by its unrealistic, and unnecessarily cramped, view of political parties. In one fell swoop, the court's analysis of the convention stage of New York's judicial election managed to give impermissibly short shrift both to the state's power to structure elections, *see Bullock*, 405 U.S. at 141, and to parties' rights to endorse candidates and structure their internal association as they see fit, *see Eu*, 489 U.S. at 216.

III. THE SECOND CIRCUIT ERRED IN BASING ITS "SEVERE BURDEN" FINDING IN PART ON ONE-PARTY DOMINANCE.

The Second Circuit erred yet again when it based its "severe burden" finding in part on the fact that in certain of New York's judicial districts, one of the two major parties is currently dominant. *See* Pet. App. 70. This Court should clarify that the dominance *vel non* of a party in a given electoral district has nothing to do with the ballot-access burden analysis. Not only is there no support for the Second Circuit's approach in this Court's cases, but such a rule would invite further litigation the aim of which would be to strike down democratically-crafted election laws based on such "burdens."

1. The idea that one-party dominance has some relevance to the burden analysis first crops up in the opinion of the District Court. That court noted that "nearly all Supreme Court Justice 'races' in New York State are overwhelmingly controlled by one party—the Democrats in New York City and the Republicans in most of the rest of the state." Pet. App. 161. It went on to state that "[p]articularly where, as here, there are established areas of one-party rule, voters and candidates have a right to participate meaningfully in the nomination process, which includes a realistic opportunity to challenge the selections of party leadership." *Id.* at 163.

The Second Circuit picked up this thread. It first recounted "evidence * * * that because one-party rule is the norm in most [New York] judicial districts, the general election is little more than ceremony. Over a 12-year period between 1990 and 2002, almost half of the State's elections for Supreme Court Justice were entirely uncontested * * *." Pet. App. 23. The court made repeated subsequent reference to this fact, *see, e.g.*, *id.* at 32, 40, 46, and finally made quite clear that this perceived one-party dominance was a key cog in its "severe burden" holding:

> All of the evidence presented, and accepted by the District Court, reduces to this bottom line: through a byzantine and onerous network of nominating phase regulations *employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment. * * * Under these circumstances,* the District Court properly concluded that New York's judicial nominating process severely burdens the associational rights of candidates and voters alike. [Pet. App. 69-70 (emphases added).]

Respondents, in turn, latched onto this theme in their brief opposing the petition for certiorari. Respondents emphasized in their opening paragraph that "because most parts of the State are dominated by a single party, these undemocratic nominations dictate the outcome of the general election in all but a few instances." Brief in Opposition at 1. They went on to reiterate the Second Circuit's one-party rule thesis throughout their argument. *See id.* at 11, 24.

2. Notably absent from all of this argumentation is any explanation of *why* a party's dominance in certain electoral districts is, or should be, relevant to the question whether a state's laws burden candidates' right to seek *their party's nomination* (or the concomitant right of voters to associate with the candidate of their choice). This, no doubt, is because the idea does not stand up to examination. Indeed, it is a *non sequitur*: Since the right at issue is that of "candidate access to the primary ballot," *Bullock*, 405 U.S. at 143, by definition, any burden on that right must operate at a time when the candidate could still be nominated—that is, prior to the selection of the party's nominee. Otherwise, it has nothing to do with the candidate's ability to seek the nomination free of excessive burdens.

Indeed, the notion that a competitive general election—*i.e.*, one in which the two major parties both stand a fair *ex ante* chance of winning—has anything to do with burdens on

associational rights betrays a failure to define the nature of the rights involved. If those rights have any definable content, they must be tied to specific candidates, and the voters who desire to vote for those candidates. And it is easy to see that it could not make any difference to a specific candidate—say, for example, a Democrat from New York City—whether or not the opposing party is competitive in her district. It would change nothing for *that candidate*, or for the voters who desired to support her, if the Republican Party had a fighting chance in the general election. After all, the Democratic candidate could hardly be expected to compete for the Republican nomination—indeed, it is difficult to see how the candidate could do so even if she wanted to, given that the conventions for both parties occur at the same time. In short, reliance on one-party dominance in the burden analysis untethers that analysis from the actual rights of actual people.

To the extent the notion posited by the Second Circuit (and by respondents) makes any sense at all, it would have to be as part of a broader argument, unarticulated below—that the general election matters because a would-be nominee who fails to win the nomination nonetheless may participate by seeking a spot, any spot, on the general election ballot. But this argument also cannot bear weight, for two reasons. First, this Court explicitly has stated that the availability of access to the general election ballot is irrelevant to the calculus of whether a candidate's right to access the *nomination* phase is burdened. *See Bullock*, 205 U.S. at 146-147 (rejecting the notion that the power to petition on to the ballot as an independent may save a burdensome primary scheme because "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations * * *."). And second, even if ability to participate in the general election *were* relevant to the analysis of nomination-stage burdens, that would not cut in favor of a "severe burden" finding on these facts: Judicial candidates in New

York indeed have the option of participating in the general election as independent or write-in candidates, as the Second Circuit itself emphasized. Pet. App. 54. Such a chance to participate is what the Constitution requires. *See Celebrezze*, 460 U.S. at 793 ("[B]allot access cases * * * focus on the degree to which the challenged restrictions operate as a mechanism to *exclude certain classes of candidates from the electoral process*.") (emphasis added). If the Second Circuit believes something more is required, then it is attempting to enshrine either a right to be a major party nominee or a right to win, despite its protestations to the contrary. *See* Pet. App. 45. Such is not the rule.

3. Not only does it make little sense to consider one-party dominance in the burden analysis, but the approach has no basis in Supreme Court precedent. The courts below cited two cases—*United States* v. *Classic*, 313 U.S. 299 (1941), and *Bullock*, 405 U.S. 134—in defense of their approach. *See, e.g.*, Pet. App. 40-41. But neither of those cases supports the proposition. *Classic* discussed one-party dominance only in considering whether a primary constituted state action; it concluded that the primary *was* state action, in part because exclusionary nominating-phase regulations in a one-party state may well "operate to deprive the voter of his constitutional right of choice." 313 U.S. at 319. The RNC certainly does not contest that well-established state-action principle; it simply has nothing to do with this case. *Cf. Georgia* v. *National Democratic Party*, 447 F.2d 1271, 1276 (D.C. Cir.) ("Of course, state action is not in itself a sufficient basis on which to premise the grant of affirmative relief sought by appellants."), *cert. denied*, 404 U.S. 858 (1971). It makes perfect sense to say that a primary in a one-party state—one in which the party itself *is* in some sense the state and can make the rules—constitutes state action. But it is a very long and illogical step, and one never taken by the Court, to go from reliance on one-party dominance to find state action (and thus bring the case within the reach of the

Fourteenth Amendment) to reliance on one-party dominance to find a burden on a candidate's associational right at the nomination stage.[10]

Likewise, *Bullock* did not purport to hold, or even suggest, that one-party dominance could somehow burden a candidate's rights at the nomination stage. The *Bullock* Court mentioned one-party dominance only in passing, and only to reject a litigant's argument that burdens at the primary stage were rendered *less* severe because they could be avoided by bypassing the primary. 405 U.S. at 146-147. It is a compound logical error to suggest, as the Second Circuit did, that the converse of a proposition this Court rejected is somehow the law.

4. But the idea that one-party dominance of an electoral unit can burden a candidate's, or a voter's, associational rights is not just illogical and unsupported by precedent—it also threatens democratically-enacted election laws. If lack of political competitiveness in a given electoral unit constitutes a burden for purposes of the ballot access analysis, or makes it substantially easier to conclude that other obstacles add up to a "severe" burden, then the deck is stacked against election laws in the substantial swaths of the country where one major party or another dominates at a given time.

There are hundreds, if not thousands, of electoral districts in the country where one party holds or has held sway for some stretch of time, be it years or decades. Democrats, of course, dominated nearly all of the South for well over half a century after Reconstruction; in 1958, the high point of the "Solid South," Democrats held 95 percent of the seats in

[10] This is especially so where the supposed one-party dominance is not even statewide. Here, since Republicans hold sway in some New York electoral districts and Democrats in others, there is no reason to think one party is pulling all the strings in the state legislature. *Cf. Burdick* v. *Takushi*, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting).

Southern state legislatures.[11] Today, while no entire region votes in a bloc to that extent, there are untold numbers of districts where the nominee of one party or another has no realistic chance to win. Indeed, if one adopts the Second Circuit's approach and deems unopposed elections a telltale sign of partisan dominance, *see* Pet. App. 23, the issue is even quantifiable: In 2004, 38.7 percent of state legislative races in the United States were not contested by one of the two major parties, and in at least three states—Arkansas, Florida, and South Carolina—the percentage of uncontested races exceeded 70.[12] And while not all of those unopposed races are a function of one-party dominance, there is no dispute that many are.

In Texas, to take just one example, Democrats dominated the state until 1980, and during that period judicial elections "tended to be uncontested, low-key affairs."[13] Between 1980 and 1996, as the Republican Party rose, far fewer seats were uncontested because the "viable political alternative encouraged vigorous party competition for all offices, including seats on the state bench."[14] In recent years, as Republicans have achieved dominance, a decrease in contested races again has followed: In 2004, two of every three judicial seats were uncontested.[15]

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[11] National Conference of State Legislatures, *Democratic Blip in the South*, Nov. 8, 2006 (*available at* http://ncsl.typepad.com/the_thicket/2006/11/rare_democratic.html).

[12] The Center for Voting and Democracy, *Uncontested State Legislative Races 2002-2004*, *available at* http://www.fairvote.org/?page=717.

[13] G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1454 (2003).

[14] Tarr, *supra* note 13, at 1454-55.

[15] Kyle Cheek, *Reconciling Normative and Empirical Approaches to Judicial Selection Reform: Lessons From a Bellwether State*, 68 ALBANY L. REV. 577, 583 (2005).

Accepting the Second Circuit's approach, nomination-stage ballot access rules in all such states and localities are subject to potential invalidation. Indeed, under the court's approach ballot access rules in State A, where one party currently dominates, may be held to "severely burden" associational rights, while identical rules in State B, where the parties are more closely balanced, are deemed acceptable. This cannot be, not just because it would be an administrative nightmare but because it creates an all-too-convenient lever for judicial discretion. The Court should not endorse a rule that enhances to such an extent the power of courts to prevent states, and their elected legislators, from organizing elections as they see fit.

5. Furthermore, the burden the court below saw as a result of one-party domination is, once again, mutable and subject to the vagaries and shifting sands of political fortune. This flaw runs through the court's opinion. *See supra* at 12, 15. Instead of focusing on state law itself and the mechanisms that law creates, the court vents its disapprobation on political and social factors—one-party dominance, powerful local political leaders, citizen disinclination to run for delegate slots—that are not enshrined in law and that could change with time, as they have in so many states. This approach to judicial review can only mean increased, unnecessary, and inconsistent judicial oversight of state election law, and a concomitant abridgement of the long-held freedoms of America's political parties to organize as they see fit, within the bounds of law.

CONCLUSION

For the foregoing reasons, and those in petitioners' briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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