06-0635-CV

United States Court Of Appeals

for the

Second Circuit

MARGARITA LOPEZ TORRES, STEVE BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, COMMON CAUSE/NY,

Plaintiffs-Appellees,

v.

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections,

Defendants-Appellants,

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association,

Defendant-Intervenors-Appellants,

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory-Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* FUND FOR MODERN COURTS IN SUPPORT OF AFFIRMANCE

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May 15, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Fund for Modern Courts ("FMC") is a New York not-for-profit corporation. It does not have any corporate parents or any shares of stock that are owned by a publicly held company.

STATEMENT OF IDENTITY AND INTEREST

FMC is a private, nonprofit, nonpartisan statewide organization dedicated to improving the administration of justice in New York. FMC was founded in 1955 specifically to advocate changes in New York's judicial selection process, and although FMC's mission has broadened to include other issues of judicial administration, FMC has remained steadfast in its efforts to change New York's judicial selection processes to strengthen judicial independence and quality.

The Board of FMC includes concerned citizens of New York, faculty members at law schools in New York State and attorneys practicing in New York courts. As the only organization in New York State devoted exclusively to improving the state's judicial system, FMC has played a role in every significant judicial reform effort in New York State in the last fifty years, including the creation of New York's Judicial Conference, the 1961 amendment to the state Constitution that reorganized New York's court system, and the creation of New York's Commission on Judicial Conduct.

In the area of judicial selection, FMC has been particularly active. FMC has studied different judicial selection processes and, in connection with these studies, has issued reports on the effects of different judicial selection processes and voter participation in, and financing of, New York judicial elections. In the 1970s, FMC was instrumental in amending the New York Constitution to establish a commission-based appointive system for choosing the judges on New York's highest court, the Court of Appeals. FMC leaders have recently been called upon to provide testimony in legislative hearings on judicial selection and in connection with the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission") as it prepared its Final Report to the Chief Judge of the State of New York (the "Feerick Report").

With the written consent of the parties, FMC respectfully submits this brief as *amicus curiae* in support of the decision and order of the United States District Court for the Eastern District of New York (Gleeson, J.) entered January 27, 2006 (the "Order").

PRELIMINARY STATEMENT

More than 20 years ago, FMC summed up what it had learned in studying the election process for New York State Supreme Court Justices: "*[T]he selection of Supreme Court justices in New York is, by and large, a process controlled not by the voters but by political leaders, largely unaccountable to the*

citizens of New York." Fund for Modern Courts, Inc., *Judicial Elections in New York* at 86 (1984) (Ex. 110.)

Now in a meticulous, thoughtful and well-reasoned decision, the district court has reached essentially the same conclusion: *"[L]ocal major party leaders--not the voters or delegates to the judicial nominating conventions--control who becomes a Supreme Court Justice and when . . . The result is an opaque, undemocratic selection procedure that violates the rights of the voters and the rights of candidates who lack the backing of local party leaders."* (SPA at 3.)

Finding that New York's electoral process for the office of Supreme Court Justice violates the First Amendment rights of both voters and judicial candidates, the district court enjoined the enforcement of the statutory nomination process. Because constitutional infirmities permeated the *entire* selection process, enjoining the existing convention system was an appropriate way for the district court to remedy the violations.

Then, recognizing that "[t]he choice of a permanent remedy for this constitutional violation does not fall to me, but rather to the legislature of the New York State" (SPA at 75), the district court imposed a *temporary* remedy -- primary elections and a stay through the next election cycle. Primaries are the statutory default nomination method in New York and they are a lawful and constitutional way for the court to remedy the myriad constitutional violations in the electoral

process while the state legislature adopts a new statutory scheme for selecting Supreme Court Justices.

The legislature now has the opportunity to fix the constitutional infirmities in New York's selection process for the office of Supreme Court Justice. Ultimately, FMC believes that New York should amend its Constitution to adopt a commission-based appointive system for the selection of Supreme Court Justices, similar to the selection process already in place for New York's Court of Appeals. Should the legislature, however, decide to retain some sort of convention system, FMC will urge the adoption of legislation consistent with that which has been proposed by the City of New York. That proposed legislation would reduce the number of judicial delegates, reduce the number of signatures needed to become a delegate and give judicial candidates a right to address judicial delegates. Most significantly, the City's proposed legislation would also establish judicial qualification commissions, a step that has already been taken by a court rule adopted after the district court's decision, and one that deserves legislative enactment.

Until the legislature acts, however, the interim primary elections ordered by the district court are New York's legislatively-mandated judicial selection process in the absence of any other process, and as such, the district court's imposition of primaries was correct and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ENJOINING NEW YORK'S UNCONSTITUTIONAL CONVENTION NOMINATING SYSTEM AND IMPOSING AS A TEMPORARY REMEDY THE NOMINATION MECHANISM PROVIDED FOR BY THE CURRENT LEGISLATIVE SCHEME

In granting injunctive relief, "[a] district court is expected to use the flexibility traditionally associated with equitable remedies and its broad discretion means [that the appellate court's] review is correspondingly narrow". *Rep. of Philippines v. New York Land Co.*, 852 F.2d 33, 36 (2d Cir. 1988) (holding that injunctions requiring court approval for *all* disbursements was not an abuse of discretion) (internal citations omitted). "[A district court] abuses its discretion only if it applies an incorrect legal standard, bases the preliminary injunction on a clearly erroneous finding of fact, or issues an injunction that contains an error in its form or substance." *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 999 (2d Cir. 1997) (affirming grant of an injunction).

This Court routinely affirms injunctions when the record includes evidence from which a district court could conclude that an injunction was appropriate. *See Drywall Tapers v. Local 530 of Operative Plasterers & Cement Masons Int'l Assoc.*, 954 F.2d 69, 78 (2d Cir. 1992) (holding that an injunction was a "proper exercise of the district court's broad discretion" when "the district court devised a sensible solution" based on "legitimate extrapolation" and "evidence in

the record"); *Charles of the Ritz Group Ltd v. Quality King Distribs., Inc.*, 832 F.2d 1317, 1323 (2d Cir. 1987) (no abuse of discretion in a grant of injunctive relief when the district court's decision was "grounded in solid factual support").

Appellants argue that even if there are constitutional infirmities in the nomination system, the district court abused its discretion with a "sweeping" and "overly broad" injunction that "wholly disregards" the New York legislature's prerogative. (Brief for the Appellants ("Appellants' Br.") at 79-80.) Appellants are wrong. *First*, the district court made findings of fact based on evidence in the record that showed that virtually every step of the existing nomination process is riddled with constitutional violations. Thus, the injunction was a "sensible solution" to the problem. *See infra* I.A. *Second*, the district court took care to impose only an interim remedy -- primaries -- that the New York legislature itself enacted as a default method for nominating electoral candidates. *See infra* I.B.

A. Enjoining The Nomination System Was Not An Abuse of Discretion.

The district court's decision to enjoin the judicial nomination process was reached after a 13-day hearing in which 24 witnesses testified and more than 10,000 pages of documentary evidence was received in evidence. (SPA at 3.) Oral argument was held and extensive proposed findings of fact and conclusions of law were submitted. (*Id. See also* JA1636; JA1653; JA1725; JA1799; JA1849; JA1883; JA1968.)

That New York's judicial selection process violates the Constitution is plain from the district court's painstaking itemization of all the ways the process fails. Although New York's Constitution provides that "The justices of the supreme court shall be chosen by the electors" (N.Y. Const. art. VI, § 6(c)), they are not. The judicial elections that the district court enjoined are, in practice, not elections at all, and as Judge Gleeson correctly found, a state "may not say one thing . . . and do quite another . . . ". (SPA 73.)[1]

The constitutional deprivations found by the district court are the result of many overlapping aspects of the existing nominating convention system, including the large number of Assembly Districts in each judicial district (at least nine and as many as 24) (*id.* at 10-11), the large number of judicial delegates from each Assembly District (as many as seven) (*id.* at 11-13), the large number of signatures required for delegate designating petitions in each judicial district (as many as 36,000) (*id.* at 14), the brief time period (37 days) in which delegate designating petitions may circulate (*id.* at 14), the rules regarding who may sign and witness delegate petitions (*id.* at 14), the prohibition on party members signing more than one delegate designating petition (*id.*), the brief time period (less than

[1] FMC supports arguments of the Brennan Center and New York Common Cause ("Appellees") for affirmance of the district court's findings of constitutional violations in the current judicial selection process. *See* Brief for the Appellees.

three weeks) between the election of delegates and the judicial conventions (*id.* at 20-21), the absence of any right by candidates to address delegates (*id.* at 24), the lack of a mechanism for delegates to signify on the ballot their allegiance to candidates (*id.* at 13), the absence of any way other than nomination by the convention to reach the general election ballot as a major party nominee (*id.* at 5-7) and the high percentage of general elections that are uncontested or uncompetitive (*id.* at 31-32).

It is through the combined effect of all of these aspects of the existing convention system that the "party leaders, rather than the voters, select the Justices of the Supreme Court". (*Id.* at 75.) The party leaders' control of the "opaque, undemocratic selection procedure" is infused into each step of this process from the "uniquely burdensome" method of selecting delegates, through the "insurmountable . . . structural and practical impediments" that prevent lobbying of delegates, through the nominating conventions that are "brief, rote, formal stamps of approval given to decisions made elsewhere" and finally to the general elections that "play almost as minor a role in the selection of Supreme Court Justices as do the conventions". (*Id.* at 3, 7-8.) *See Molinari v. Powers*, 82 F. Supp. 2d 57, 71, 78 (E.D.N.Y. 2000) (holding that ballot access scheme for the New York Republican primary "invoke[d] the application of the principle that a number of facially valid provisions may operate in tandem to produce impermissible barriers

to constitutional rights" and issuing an injunction requiring delegates to be listed on ballot regardless of whether petition requirements had been met (internal citation omitted)).

Because the constitutional deprivations at issue are the result of the combined effect of numerous aspects of the existing convention system, a piecemeal remedy of the type Appellants argue should have been imposed here would have been inappropriate. (Appellants' Br. at 83-86.) Remedying only one or two of the defects in this system would have been more intrusive on the part of the federal court, requiring line-editing of numerous provisions of New York's Election Law.[2] Moreover, changing only one aspect of the convention system would not have remedied the underlying violations that operate "in tandem" to produce an unconstitutional process as a whole. For example, Appellants suggest

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[2] Contrary to the argument advanced by Appellants and by some of the *amici* who have written in support of Appellants, this case is not analogous to *Ayotte v. Planned Parenthood*, ___ U.S. ___, 126 S. Ct. 961 (2006). (*See* Appellants' Br. at 80-82; Brief for Amicus Curiae Women's Bar Assoc. of the State of New York ("Women's Bar Assoc. Br.") at 5-6; Brief for Amicus Curiae Asian American Bar Assoc. of New York ("Asian American Bar Assoc. Br.") at 12.) In *Ayotte*, "[o]nly a few applications" of the relevant statute "present[ed] a constitutional problem" and the statute itself included a "severability clause", thus making possible and appropriate a narrow injunction that did not require re-writing state law. 126 S. Ct. at 969. The Supreme Court expressly stated that courts must be "mindful that our constitutional mandate and institutional competence are limited [and] *restrain ourselves from rewriting state law* to conform it to constitutional requirements even as we strive to salvage it". *Id.* at 968 (internal citation omitted and emphasis added). Here, until there has been a full trial, it was appropriate for the district court to impose a less intrusive remedy on an interim basis, giving the state legislature an opportunity to consider alternative measures.

that the district court "could have extended the time for candidates to lobby delegates" or "directed the Democratic and Republican parties to adopt rules . . . [t]o decrease significantly the absolute number of delegates and alternatives". (*Id.* at 85.) But, merely extending the time period for delegate lobbying and reducing the number of delegates would not alter the "political dynamic" whereby "district leaders and county leaders select the delegates . . . [m]ost [of whom] have strong ties to the district leaders who select them, and sometimes work for them as well" and then those delegates "without consultation or deliberation, rubber stamp the county leaders' choices (or 'package' of choices) for Supreme Court Justice". (SPA at 18-19.) Indeed, the district court found that the "political dynamic" operated to such a degree that there was "no need for an express directive" to the delegates of how to vote. (*Id.* at 19.) While more time for lobbying and fewer delegates would be positive reforms, standing alone, they are insufficient to remedy the unconstitutional system by which "(1) neither the voters nor the delegates play a significant role in the nomination of Supreme Court Justices; and (2) an aspiring candidate cannot obtain a major party nomination without the backing of the party leaders". (*Id.* at 27.)[3]

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[3] The piecemeal measures proposed by the Appellants as alternative *judicial* remedies are distinct from more comprehensive measures such as those proposed by the City of New York as a *legislative* solution. *See infra* II.A.

B. Imposing Primaries As an Interim Remedy is Not An Abuse of Discretion As New York's Statutory Scheme Provides For Primaries in the Absence of Other Nomination Methods.

The district court clearly understood that the State legislature must act to remedy the constitutional infirmities in New York's judicial election system. (*See* SPA at 75 ("[t]he choice of a permanent remedy for this constitutional violation does not fall to me, but rather to the legislature of New York State"); *See also* SPA at 4 ("Until the New York legislature enacts another electoral scheme, such nominations shall be by primary election.").)

The district court's remedy was an appropriate way for a court to provide an *interim* remedy. After enjoining New York Election Law § 6-106 and § 6-124, the two sections that provide for the unconstitutional convention system for nominations of Supreme Court Justices, the district court simply turned to New York's Election Law § 6-110, which provides that: "All other party nominations of candidates for offices to be filled at a general election, except as provided for herein, shall be made at the primary election." (SPA at 75-76.) With the judicial convention provisions of the Election Law enjoined, the district court correctly fell

back on New York's own statutory scheme to impose the default mechanism for nominations.[4]

Significantly, the interim primary system ordered by the district court will be strengthened by an amendment to the Office of Court Administration rules adopted since the district court's decision that provides for one of the alternative remedies proposed by the Appellants, judicial qualification commissions. On February 14, 2006, the Chief Administrative Judge of the New York State Unified Court System, with the approval of the Administrative Board of the Courts, added Part 150 to the Rules of the Chief Administrative Judge.[5] Part 150 provides for the establishment of an Independent Judicial Election Qualification Commission in each judicial district and provides that these commissions will review the qualification of candidates for election to, *inter alia*, the Supreme Court.

Qualifications commissions are by no means a complete solution to the constitutional infirmities in New York's judicial selection process. As the

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[4] Some of the *amici* who have written in support of the Appellants have incorrectly suggested that the district court "created a constitutional right to have a primary". (Brief for *Amicus Curiae* Metropolitan Black Bar Assoc., Dominican Bar Assoc., Korean American Lawyers Assoc. of Greater New York et al. at 4.) As shown above, the district court did nothing more than impose *on an interim basis* the statutory default nomination method already provided for by the legislature. Indeed, not only are primaries the default mechanism set by New York law, they are also the nomination method used for all other elected judges in New York. (SPA at 6.)

[5] Part 150 is available at http://www.courts.state.ny.us/rules/chiefadmin/.

district court correctly observed "[t]he issue in this case is whether the *voters* are accorded their rightful role in the selection of Supreme Court Justices [and i]f they are not, that constitutional defect cannot be remedied by a screening panel". (SPA at 48.) But while Part 150 will not remedy the constitutional violations identified by the district court, it does provide a study in contrast with the unconstitutional judicial selection method that the district court enjoined.

Pursuant to Part 150, each district's qualification commission will be comprised of members appointed by the Chief Judge of the State of New York, by the Presiding Justice of the Appellate Division and by local bar associations.[6] This will allow authorities other than the party leaders to have input on the judicial selection process. In contrast, in the unconstitutional system enjoined by the district court the only parties that had meaningful input in judicial selection were the county and district leaders. (*See* SPA at 35 (finding that county leaders "wield[ed] enormous and dispositive power in the process by which Justices of the Supreme Court are selected").)

Also, the Part 150 qualification commissions are required to operate with an openness that is a marked departure from the closed nature of the existing

[6] FMC believes the rule should be strengthened by involving representatives from other branches of the government and non-governmental groups in addition to local bar associations in the designation of commission members.

convention system that is dominated by party leaders. As Judge Gleeson noted, many delegates to the existing nomination conventions (themselves handpicked by party leaders (SPA 15)) do not even bother to attend the conventions because they "know their votes do not really matter". (SPA 28.) In contrast, Part 150 calls for wide dissemination of notice wherever an open judicial position is to be filled by elections, a personal interview with each applicant and a process for re-hearing upon request of an applicant. In addition, Part 150 has a clearly defined criteria for evaluating judicial candidates, including "professional ability; character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience".

Thus, as interim measures, primaries along with Part 150 qualification committees improve the judicial selection procedure until the legislature acts.

II. FUND FOR MODERN COURTS WILL URGE THE STATE LEGISLATURE TO IMPROVE JUDICIAL ELECTIONS BY ADOPTING THE REFORMS PROPOSED BY NEW YORK CITY AND, IN THE LONG TERM, FMC WILL SEEK A CONSTITUTIONAL AMENDMENT TO ADOPT A COMMISSION-BASED APPOINTIVE SYSTEM

The district court's interim remedy was a lawful and appropriate way for a federal district court to remedy the constitutional infirmities in New York's judicial convention system. The onus is now on the state legislature to adopt a permanent judicial selection method. To the extent that it may be useful for this Court to have before it alternative or additional measures that are or should be

under legislative discussion, FMC respectfully provides the following suggestions and information.

In the short term, should the legislature retain some sort of convention system for selecting candidates for the office of New York Supreme Court Justice, legislation consistent with the proposals by the City of New York should be adopted. Reflecting many of the recommendations of the Feerick Commission, that legislation would reduce the number of judicial delegates, reduce the number of signatures needed to become a delegate, give judicial candidates a right to address judicial delegates and create statutory judicial qualification commissions (similar to those already created by court rule). *See infra* II.A. In addition, although not a part of the City's proposed legislation, if the legislature retains any sort of elections for Supreme Court Justices, it should separately enact public financing for those elections.

In the long term, FMC suggests a commission-based appointive system -- rather than elections -- as the best way for New York to select Supreme Court Justices. The commission-based appointive system that FMC helped to create more than thirty years ago for New York's Court of Appeals has provided the state with one of the most respected high courts in the country. That system could provide a model for a comparable commission-based appointive system for the selection of New York Supreme Court Justices. Adoption of a commission-

based appointive system for Supreme Court Justices would require amending New York's Constitution, and the district court's clear finding that New York's nominating convention system violates the Constitution, coupled with this Court's affirmance of that finding, provides a singular opportunity for New York to begin that process. *See infra* II.B.

A. To the Extent the Legislature Retains a Convention System, It Should Adopt Legislation Consistent With Proposals by New York City

The district court's decision was a clarion call for the state legislature to enact a lawful selection process for Supreme Court Justices. To the extent that the legislature decides to retain any type of convention system, the City of New York has proposed measures that would improve such a system. None of the measures proposed by the City, taken alone, would remedy all the constitutional defects identified by the district court. Moreover, any newly-adopted judicial selection process would, in its application, be subject to constitutional scrutiny. If adopted in whole and followed diligently in practice, however, the City's reforms will address many of the constitutional infirmities in, and significantly strengthen, New York's judicial selection process.

First, New York City's proposed legislation would reduce the number of delegates to the judicial conventions. In the existing convention system, political parties have discretion to determine the number of delegates in each

judicial district. (SPA at 11 citing N.Y. Election Law § 6-124.) Under the formulas developed by the parties, currently some judicial districts have more than 100 delegates, and each district has as many alternative delegates as it has delegates. (SPA at 11-12.) The large number of delegates and alternative delegates to the convention in each district not only prevents a challenger candidate from effectively running and electing his/her own slate of delegates. (*Id.* at 13-14.) It also makes it difficult, if not impossible, for a candidate not supported by the party leadership to lobby delegates, as there are simply too many delegates to effectively lobby. This is especially true considering the short period of time between the election of the delegates and the convention (less than three weeks), the fact that delegates can be identified only by going to the Board of Elections and the short duration of the conventions (as little as 11 minutes) (*Id.* at 18-21, 28-30, 69-70.)

Second, the City's proposed legislation would reduce the number of signatures required on delegate designating petitions. Currently, New York's election law requires that a delegate designating petition include valid signatures from 500 party members in each assembly district. (*See Id.* at 14 citing New York Election L. § 6-136.) In the Second Judicial District, in light of likely legal challenges to signatures, a challenger candidate would need to gather 24,000 to 36,000 signatures drawn equally from party members in the 24 assembly

districts -- a task that is complicated by the fact that each party member can sign only *one* designating petition. (SPA at 14.) Like the large number of delegates to each judicial convention, the signature requirement for delegate petitions effectively deprives candidates not supported by party leaders of the ability to elect delegates.

Third, New York City's proposed legislation would give judicial candidates the right to address judicial conventions. Among the district court's most striking findings was its discussion of how challenger candidates in the existing convention system, such as Appellee Margarita López Torres, were denied the opportunity to even present their candidacy to the judicial delegates who were supposedly evaluating judicial candidates. (*Id.* at 23-24.)

Fourth, New York City has proposed the creation of a judicial qualification commission in each judicial district. As discussed above, qualification commissions have already been created by Part 150 of the Rules of the Chief Administrative Judge. The City's proposal would go a step further by giving the operation of the qualification commissions the force of law.[7] In

[7] In 2005, the New York State Assembly passed a bill (A0007) that would have created qualification commissions for certain judicial offices, including the office of Supreme Court justice. That legislation was not acted upon by the state Senate. It is being considered again by the legislature this year as Assembly bill A0007B.

addition, the City's proposed qualification commissions would be constituted based on input from a variety of governmental officials and non-governmental organizations, as compared to the Part 150 commissions, whose members are largely chosen by the judicial branch.

The City's proposed legislation does not provide for public financing of judicial campaigns. While this should not stand in the way of the legislature enacting the City's reforms, FMC believes that if the legislature retains any sort of elections for Supreme Court Justices, it should separately put into place a system of public financing for those elections. In such a system, candidates opting for public financing could be subject to contribution limits, campaign expenditure limits and more extensive financial disclosure requirements.[8] Public financing of judicial elections should assuage the concerns raised by some *amici* regarding the cost of judicial elections and the possible effects that those costs have on the important goal of achieving a diverse judiciary. (*See* Women's Bar Assoc. Br. at 10-12; Asian American Bar Assoc. Br. at 7-11; Brief of St. Lawrence Bar Assoc. ("St. Lawrence Br.").)

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[8] In 2005, the Assembly passed a bill (A0008) that would have provided public financing for judicial elections. That bill was not acted upon by the state Senate. It is being considered again by the Assembly as Assembly Bill A0008A.

This discussion is not intended as a comprehensive recitation of the only measures that the legislature should consider. There have been other proposed reforms that deserve the serious legislative considerations. For example, creating smaller judicial districts, a possible legislative action that was specifically mentioned by the district court (SPA at 67-69) but not proposed by the City, could serve several important goals by facilitating racial and geographic diversity, reducing the cost of judicial elections and increasing voter awareness. Legislation requiring that voters be provided with voting guides for judicial candidates would also promote informed voting decisions. The Feerick Commission's recommendations of increasing the term of delegates and increasing the amount of time between the election of delegates and the convention could increase opportunities for transparency, accountability and lobbying of delegates. *See* Feerick Report at 30-35.[9] None of these measures would be inconsistent with the City's proposed reforms. In the first instance, however, the legislature should enact legislation consistent with the City's proposals. The City's proposed reforms will, in the short term, strengthen the selection process for Supreme Court Justices,

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

until New York amends its Constitution to adopt a commission-based appointive system.

B. In the Long Term, The Best Selection Method For New York Supreme Court Justices Is A Commission-Based Appointive System.

In their brief and below, Appellants advance interests that they claim are served by the current nominating system: (1) the associational rights of political parties; (2) racial and ethnic diversity; and (3) geographic diversity. (Appellants' Br. at 68.) A fourth interest, which Appellants raised below but notably did not re-assert in their brief is an interest in judicial independence and impartiality. (SPA at 71-74.) While each of these is a legitimate interest, the district court correctly found that current nominating system is not narrowly drawn to serve these interests. (*Id.* at 66-74.) Indeed, Judge Gleeson noted that Appellants' concerns were actually "justifications for *eliminating* elections as a method for selecting judicial officers . . . ". (*Id.* at 70 (emphasis in original).) And, with respect to judicial independence, the district court quoted Justice Sandra Day O'Connor's dismissal of Minnesota's asserted interest in judicial independence in her concurrence in *Republican Party v. White*, 536 U.S. 765, 792 (2002):

> "If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."

FMC agrees that it would be preferable if judges were not elected. FMC supports selection by a commission-based appointive system for selecting Supreme Court Justices, because it represents the best method of limiting external pressures on judicial selection and diminishing the role of money and politics on the judicial selection process.

In the first step of a commission-based appointive system, a nonpartisan broadly-based nominating commission similar to the ones established pursuant to Part 150 (*see supra* at 12-14), would evaluate candidates for an open judicial position for such qualities as intelligence, fairness, impartial judgment, integrity, tolerance of criticism and resistance to intimidation. The commission would identify as "well-qualified" a prescribed number (or range) of candidates, and submit that list of candidates to the governor. Giving a cross-section of individuals and entities a say in the composition of the nominating commission will further the important goals of racial and geographic diversity on the bench. The Commission on Judicial Nominations currently serves in this way for New York's highest court, the Court of Appeals, nominating candidates for appointment by the governor.

In the second step, the governor would choose nominees from among the list of candidates found by the nominating commission to be "well qualified" from the relevant judicial district. One or both or the state's legislative branches may be given an opportunity to confirm the choice made by the governor.[10] The involvement of elected officials in a commission-based appointive system provides another opportunity to advance the goals of racial and geographic diversity in judicial selection: minority racial and geographic groups, when aggregated across judicial districts may be sufficiently numerous to exert political pressure on the governor and/or legislators to take account of racial and geographic diversity in judicial appointments.[11]

Appellants' argument that the existing nominating convention system advances political parties' associational interest in "balance" (Appellants' Br. at 72) simply highlights New York's need for a commission-based judicial appointive system for Supreme Court Justices. Appellants claim that the political parties

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[10] If this procedure were extended to lower courts, the appointing authorities could be mayors or county executives, and local legislative bodies could confirm the appointments.

[11] Thus, to take the example provided in the *amicus* letter brief submitted by the St. Lawrence Bar Association, if the residents of northern-most counties felt that there were not enough judges being appointed from their area, they could join forces with other underrepresented areas to lobby for greater geographic diversity in judicial selection. (St. Lawrence Br. at 2.)

attempt to achieve balance not among a slate of judicial candidates, but rather among a slate of *all* candidates running on the party line, including candidates for non-judicial offices, such as for legislative seats. (*Id.*) Appellants acknowledge that under the current system, judicial candidates are sometimes selected based on their ability to "assist[] the party's other candidates whose names appear on the same ticket . . . as the Senatorial and Assembly candidates appear below the Supreme Court candidates on the ballot". (*Id.*)

Appellants thus concede that under the current system, judicial candidates are selected not only based on their qualifications for the office of judge, and not only because of considerations of racial and geographic diversity on the bench (all appropriate considerations), but also based on whether they, as candidates, can assist the party's candidates for non-judicial offices. New Yorkers deserve a judicial selection process that takes account only of legitimate interests such as judicial ability, independence and racial and geographic diversity, rather than a system that, even its proponents concede, chooses judicial candidates based upon how they will affect other partisan non-judicial elections. And the Appellants do more than simply acknowledge this "balancing" -- they argue that it is one of the principal *merits* of the convention nominating system and one of the reasons why the convention system should be affirmed. (*Id.*) When the most that can be

said about a judicial selection process is that it allows for judges to be chosen based on political expediency, it is clearly time for a new system.

CONCLUSION

For the foregoing reasons, FMC urges that this Court affirm the decision and order of the district court.

Dated: May 15, 2006
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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