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* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF AFFIRMANCE

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May 17, 2006

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CORPORATE DISCLOSURE STATEMENT

The Association of the Bar of the City of New York is a not-for-profit association incorporated under the laws of the State of New York. It has no corporate parents, and has no shares of stock that are owned by a publicly held company.

The Association of the Bar of the City of New York (the "City Bar") respectfully submits, with the consent of all the parties, this brief as *amicus curiae* in support of affirmance.

STATEMENT OF INTEREST

The City Bar has a deep and longstanding interest in sustaining and promoting the independence, integrity, diversity and quality of New York State judges. Since its founding in 1870, the City Bar has been dedicated to maintaining the high ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. The City Bar's members include over 22,000 attorneys practicing in the New York State courts who share a profound commitment to ensuring that the judges before whom they appear are empowered and supported to uphold the highest standards of the profession.

As an institution, the City Bar has played an important role in reform efforts relating to judicial selection methods in New York State, and has long supported a system in which state judges are appointed by an elected executive – who selects from among a limited number of nominees approved and presented by a diverse and representative, independent nonpartisan commission – rather than elected. Indeed, a steady decline in the public's perception of the legal community and of judicial integrity following the state constitutional convention of 1846 (which instituted the election of state judges and removed restrictions on the right

to practice law), "and the necessity for reversing the trend [in declining public esteem] had been among the chief reasons for founding the [City Bar]." George Martin, CAUSES AND CONFLICTS – THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970, at 104 (1970); *see also* Jeffrey B. Morris, MAKING SURE WE ARE TRUE TO OUR FOUNDERS – THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1970-1995, at x (1997) (Foreword by Michael A. Cardozo) ("The Association was founded in 1870 to confront a crisis of confidence in the judiciary and to seek the removal of corrupt judges.").

As Samuel Tilden said during the City Bar's initial organizational meeting in February 1870: "[I]t is impossible for New York to remain the centre of commerce and capital for this continent, unless it has an independent Bar and an honest judiciary." Martin, *supra*, at 38. [1]

The City Bar's efforts with regard to promoting judicial independence and integrity began immediately upon its formation in 1870, and have continued

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[1] The City Bar was founded during the era of Boss Tweed and Tammany Hall, during which loss of public confidence in the elected state judiciary reached a zenith following highly publicized scandals involving the state's legal system from 1865 to 1872. "Political leaders who wanted to control the patronage of the court system had nominated and elected some judges who could be controlled." Martin, *supra*, at 85. The *New York Times* published an editorial on June 20, 1869 calling for "a permanent, strong and influential association of lawyers for mutual protection and benefit" to maintain professional standards and to guard against abuses within the judiciary and legal profession. *Id.* at 11-12. Lawyers thereafter began circulating a letter calling for the organization of a bar association that would "sustain the profession in its proper position in the community, and thereby enable it, in many ways, to promote the interests of the public." *Id.* at 15.

through the organization's 136-year existence. The City Bar joined the Committee of Seventy in opposing Boss Tweed's candidates for the Supreme Court in the November 1871 judicial elections. *Id.* at 69. In its first official act to reform the New York State judiciary, the City Bar approved a report drafted by its Judiciary Committee, one of its three original committees, *id.* at 46, to be sent to the legislature. The report included a full description of the corruption that had plagued the judiciary in New York and led to an investigation of four judges by the New York State Assembly's Judiciary Committee. *Id.* at 72-73.

In 1873, the City Bar supported a referendum on the ballot to reinstate the appointive method of selecting judges, which was ultimately defeated. *Id.* at 104, 107-09. It organized a successful statewide campaign in 1893 to defeat the election of a judge who had been given an interim appointment earlier, and who the City Bar concluded had tampered with the election of a state senator. *Id.* at 158-59. In 1932, the City Bar helped create an independent political party with its own candidates for two judgeships. *Id.* at 239-40. The report of the party stated that "large numbers of the public have individually become conscious of the evils of political domination of the bench, and of the insolence with which political leaders barter and control judicial office." *Id.* at 241.

Seeking to minimize the potentially pernicious effects of overt political activity upon judicial independence or public perceptions thereof, the City

Bar proposed an appointive system for state judges to the state constitutional convention of 1967, which voted not to endorse it. *Id.* at 311-13. In a formal report in 1973, *The Selection of Judges*, the City Bar outlined a similar appointive selection plan, concluding that "[t]his state should have a judiciary of the highest quality at all levels, one that is uniformly respected by lawyers and laymen alike. The present elective method has in too many instances failed." 28 THE RECORD 372, 376 (1973).

The City Bar's longstanding efforts aimed to minimize the harmful effects of political activity on judicial integrity achieved fruition in 1975, when Governor Carey issued an executive order – upon the recommendation of a task force on the state court system headed by Cyrus Vance, then-President of the City Bar – to institute an appointive process for New York Court of Appeals judges. The order provided that Court of Appeals judges would be appointed by the Governor from a list of lawyers recommended by a nonpartisan commission. The executive order was submitted by the legislature to the voters of New York as a constitutional amendment in 1977, and the electorate approved it. *See* Morris, *supra*, at 54-55.

The City Bar continues to publish reports, offer testimony, hold events and promote public discussion about improved judicial election and selection methods for New York State judges, for purposes of maintaining and promoting

the highest standards of quality, diversity, independence and integrity for the bench and bar.

PRELIMINARY STATEMENT/SUMMARY OF ARGUMENT

The district court's decision in this case is an exercise in judicial restraint and statesmanship. The district court was led by an extensive factual record to conclude that New York State's system of nominating state Supreme Court justices is unconstitutional because it severely burdens the rights of voters and candidates. After a 13-day hearing in which 24 witnesses testified and more than 10,000 pages were received into evidence, and following submission by the parties of extensive proposed findings of fact and conclusions of law as well as oral argument, the district court determined that "local major party leaders – not the voters or the delegates to the judicial nominating conventions – control who becomes a Supreme Court Justice and when." *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 213 (E.D.N.Y. 2006) (SPA 3). That factual determination is neither surprising nor anomalous, and indeed accords with the reported findings of virtually every bar association that has reviewed the issue, including the City Bar and the State's Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission").

Based on the extensive factual record, the district court properly enjoined operation of the judicial nominating convention system. But recognizing

correctly that the choice of a permanent remedy falls in the first instance to the legislature and not the courts, the district court acted well within its broad discretion when it ordered, as an interim remedy, that the existing statutory mechanism in place governing party nominations of other state judges and public officers – direct primary elections – should govern nominations for state Supreme Court justices as well until such time as the legislature can act, and then stayed this interim remedy until the election cycle beginning in 2007. Although the City Bar does not favor primary elections for state Supreme Court justices as a permanent remedy or as a policy matter, the district court did not abuse its broad equitable discretion, and indeed exercised judicial restraint, in ordering this form of provisional and interim relief.

Following trial on the merits, it will be appropriate for the district court to consider thoroughly all available relief options, including additional remedial proposals submitted by the parties and *amici curiae*, and to adopt a permanent remedy. In addition, the state legislature will receive a wide range of views, testimony and proposals prior to any legislative enactment. The City Bar has long favored an appointive system for state Supreme Court justices. If, however, the legislature fails to act or refuses to replace the current judicial nominating convention system, the City Bar may submit views to the district court concerning additional appropriate permanent remedial options.

Until such time as the legislature acts, the district court's preliminary injunction order should be affirmed, and the district court should proceed toward a trial on the merits and final judgment.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Enjoining New York's Unconstitutional Judicial Nomination Convention System And Ordering Direct Primary Elections As A Temporary Remedy

A. Enjoining The Convention System Was Not An Abuse Of Discretion

This Court should affirm the district court's conclusion that the current system for party nominations of candidates seeking to be justices of the New York State Supreme Court, as described in the district court's opinion, must be preliminarily enjoined. The current judicial nominating convention system violates the United States Constitution by severely burdening the rights of voters and candidates who lack the backing of the local party leaders.[2]

Nearly thirty years ago, the City Bar concluded:

> The judicial district nominating conventions by which political parties nominate Supreme Court justices in each judicial district accomplish no proper purpose. Under the present system, delegates to the judicial convention generally do as they are told by the political leaders who select them, and therefore play no constructive role in the judicial

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[2] The district court appears to have suggested that the judicial nominating convention system is facially unconstitutional, *see Lopez Torres*, 411 F. Supp. 2d at 241 n.37 (SPA 50), but the major thrust of the opinion and the reason for which the City Bar supports affirmance is that on an "as applied basis," a candidate without the support of the party leader(s) cannot obtain access to the primary ballot.

> selection process. Because the judicial conventions are so large, there is no hope that they can function as a deliberative assembly, and there is no one to blame for improper nominations.

Committee on State Courts of Superior Jurisdiction, "A Proposal to Restructure the Judicial District Nominating Convention," 32 THE RECORD 615 (Nov. 1977). The Committee concluded "that the convention system is a hindrance, as it is now constituted, to any meaningful role by the electorate." *Id.* at 616.

Now, three decades later, both the district court and the Feerick Commission have concluded that legislative reform of the judicial nominating convention system is required. As the final report of the Feerick Commission noted: "As conducted today, conventions impose unnecessary burdens on qualified judicial candidates and foster a public perception that, once elected, delegates do not act thoughtfully or independently in nominating their party's candidates, but simply reflect the decisions already reached by political party leaders." Commission to Promote Public Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York 15 (Feb. 6, 2006) ("Final Feerick Commission Report"), *available at* http://www.nycourts.gov/reports/FerrickJudicialElection.pdf.

Similarly, the district court concluded that "[r]easonably diligent candidates who lack the support of entrenched party leaders stand virtually no chance of obtaining a major party nomination, no matter how qualified they are

and no matter how much support they enjoy among the registered voters of the party." *Lopez Torres*, 411 F. Supp. 2d at 249 (SPA 63-64).

Both the district court and the Feerick Commission reached their conclusions based on extensive factfinding and analysis detailing that nearly every provision within the current statutory scheme of judicial nominating conventions operates to restrict meaningful voter choice, and that the system overall imposes severe burdens on voters' and candidates' rights. The district court found that the process of placing supportive delegates at the convention is difficult, given the large number of petition signatures required in numerous assembly districts, *see id.* at 218-221 (SPA 8-14); that only party organizations can place delegates because they "use the massive apparatus of their respective major party to file the necessary petitions across the judicial district," *id.* at 221 (SPA 15); that the party leaders accordingly place delegates "who do their bidding," *id.* at 249 (SPA 63); and that the time frame in which delegates are able to interact with judicial candidates is "deliberately kept short" and thus there is virtually no opportunity for a non-party-backed candidate who can't field her own delegates to lobby or persuade fielded delegates, *id.* "As a result, almost all Supreme Court Justice nominations in New York State are uncontested. There is no evidence of a single successful challenge to candidates backed by the party leaders." *Id.* at 231 (SPA 33).

Although appellant challenges these factual findings and conclusions of the district court on appeal, other reports, including the final report of the Feerick Commission, confirm the district court's analysis. The Feerick Commission found onerous petitioning requirements such that "qualified judicial candidates without institutional party support cannot realistically hope to seat enough delegates to affect the outcome of the election," Final Feerick Commission Report 25; insufficiently lengthy terms of service and inadequate available resources for delegates such that they lack the ability to gain experience, interview judicial candidates or perform any effective role, *id.*; and the large numbers of delegates that "all but guarantee that deliberate, thoughtful action will be foreclosed," *id.* at 26. As New York State's Chief Judge, Judith S. Kaye, noted in her most recent "The State of the Judiciary" address:

> One thing now is perfectly clear: that given the extensive findings of the Feerick Commission and the extensive findings of the United States District Court, we are not dealing solely with a "Brooklyn problem," or a "New York City problem," as I have heard some say. The issues that have been identified are pervasive, both systematically and geographically. They must be dealt with by our Legislature not just as a matter of obligation but as a matter of opportunity. It is no understatement that public confidence in the Judicial Branch is at stake.

Judith S. Kaye, *The State of the Judiciary 2006*, at 4, *available at* http://nycourts.gov/admin/stateofjudiciary/soj2006.pdf.

Among the many evils of the current judicial nominating convention system, in the view of the City Bar, is not only that voters and candidates are denied their electoral rights. In addition to this grave constitutional violation, it is of great concern that meaningful reform of the electoral system for state judges – about which the City Bar has expressed grave reservations since its founding – is virtually precluded. Some of the most pernicious aspects that emerge from injecting pure politics into the judicial process through a system of judicial elections may be hidden from the public when the give-and-take and horse-trading of politics occurs behind closed convention doors among or on behalf of party faithful, rather than through more transparent and deliberative public exchanges. As a result, while excesses of the political system continue, the public is insulated and less energized to press for reform overall, thus leaving the "principle of elections in place while preventing" meaningful voter participation. *Republican Party of Minn. v. White*, 536 U.S. 765, 766 (2002). As the City Bar stated in its 1977 report: "The principal evil perceived by the Committee with the judicial convention system is a lack of accountability and responsiveness. . . . There is, therefore, no hope that an improper nomination will lead to a reaction that will have a direct future impact on judicial selection." 32 THE RECORD at 616.

The City Bar submits that "'[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the

participants in that process . . . the [constitutional] rights that attach to their roles.'" *Republican Party of Minnesota*, 536 U.S. at 788 (citation omitted). Central to this principle is the notion of accountability. If a state has the choice of elections with respect to a particular office, and chooses to adopt a system of elections, then it may not impair the constitutional rights of voters in the name of insulating candidates from the effects of the elective process. Otherwise, as the Supreme Court noted in another context involving federalism concerns, the state could "avoid being held accountable to the voters for the choice" of the system, impeding reform of that choice. *New York v. United States*, 505 U.S. 144, 182 (1992).[3]

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[3] Appellant argues that the legislature's decision to restore the use of nominating conventions in 1921 for the nomination of candidates for Supreme Court justice, after a "failed" nine-year experiment with primaries, "was largely motivated by New York's bar associations, such as the [City Bar]." (Brief for Appellant at 16-17 n.9.) Although the City Bar did support the return to nominating conventions at that time, it was based on the reality that under the then-existing

> system of direct primaries, the party's leaders deliberate privately and prepare what is familiarly known as a slate. They inform their lieutenants of their conclusions and the latter then proceed to secure the required number of signatures to the prescribed petitions, to the end that the decisions of the party leaders may be confirmed at the primaries and those slated for nomination may be formally designated as nominees. It is a truism that in the vast majority of nominations, the direct primary election merely consists of an adoption and confirmation of the slate prepared by the leaders.

24 ABCNY Reports # 228, at 290 (1921). The City Bar's contemporaneous reports also reflect the anticipation that nominating conventions would be more open and deliberative, in contrast to mass primaries:

> It has never been suggested that the State Convention (though far from perfect) did not afford unusual opportunities for inquiry and discussion concerning the character and qualifications of the various candidates for public office. . . . The restoration of a representative State Convention would be a long step

(cont'd)

B. The District Court's Interim Remedy Of Direct Primaries Should Be Affirmed

Although the City Bar does not support direct primary elections for judicial candidates as a policy matter, the district court's order of provisional interim relief – direct primary elections – is a legally appropriate and judicially restrained preliminary remedy. The district court ordered that, effective in 2007 and "until the legislature enacts a new method of electing Supreme Court Justices," *Lopez Torres*, 411 F. Supp. 2d at 255-56 (SPA 75), the nomination of New York State Supreme Court justices shall be by direct primary elections – the default party nomination mechanism that currently is in place for public offices and elective state judicial posts, unless otherwise specified.

In fashioning preliminary relief, the district court acted in a manner that the United States Supreme Court in similar circumstances found to be "most proper and commendable," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), because the district court: (1) recognized that the choice of a permanent remedy for the constitutional violation falls to the legislature of New York State, and not the court;

(cont'd from previous page)

> toward the selection of worthy candidates and of making political parties genuine exponents of public opinion.

Id. at 291. The current method for a nominating convention system, however, hardly encourages deliberation, and so by at least 1977 the City Bar had expressed serious concerns about the convention system, as it was then implemented, and had proposed reforms of it. *See supra* at 7-8. Moreover, the City Bar does not now favor, as a permanent remedy or as a legislative solution, a return to the system of direct primary elections that previously had been tried and proven problematic. *See supra* at 6, *infra* at 22-23.

(2) ordered "a temporary remedy, lasting only until the legislature enacts a new method of electing Supreme Court Justices" in recognition that the court lacks "authority to direct the legislature to take up the matter immediately," *Lopez Torres*, 411 F. Supp. 2d at 255-56 (SPA 75); (3) selected as its temporary remedy the least intrusive relief by utilizing an existing, applicable default judicial nomination mechanism contained within the Election Law; and (4) stayed the preliminary injunction until after the 2006 general election (JA 2106), thereby allowing the parties time for an expedited appeal, the affected candidates opportunity to prepare for an altered electoral party nomination method, and the legislature time to enact a permanent remedy.

The preliminary injunction accordingly should be affirmed pending a trial (perhaps expedited) and final judgment, or pending enactment by the legislature of a new method of selecting state Supreme Court justices.

1. The District Court has Broad Discretion To Shape Equitable Remedies In Election Law Matters

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

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

This Court wrote: "When the court has determined that there has been a [Voting Rights Act] violation, it has the power to, and normally should, order that remedial steps be taken." *Id.* at 262 (noting further that the "federal courts' power to remedy apportionment violations [under the Voting Rights Act] is defined by principles of equity"); *see also Brown v. Chote*, 411 U.S. 452, 456 (1973) (in the "exigent [election] circumstances, the grant of extraordinary interim relief was a permissible choice"); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 483, 498 (2d Cir. 1999) (affirming remedy that ordered Town Board to adopt a proposed redistricting plan for violations of constitutional rights and the Voting

Rights Act and a special election in accordance with the new plan); *Marks v. Stinson*, 19 F.3d 873, 889-90 (3d Cir. 1994) (upholding portion of preliminary injunction that enjoined the apparent electoral victor from exercising the authority of office even where the district would remain "without representation in the Pennsylvania Senate during the pendency of this litigation" and noting that "[i]nterim periods during which the voters of an area are without representation are inevitable" and "regrettable" in such election situations); *Griffin v. Burns*, 570 F.2d 1065, 1074-80 (1st Cir. 1978) (affirming preliminary injunction order that a new primary be held and postponing the general election); *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) ("In this vital area of vindication of precious constitutional rights [involving voting], we are unfettered by the negative or affirmative character of the words used or the negative or affirmative form in which the coercive order is cast. If affirmative relief is essential, the Court has the power and should employ it.").

Even in situations where this Court has been confronted in election matters with extraordinarily sweeping preliminary orders and noted "serious doubt whether, if any of us had been sitting as the district judge, we would have entered the orders here under review," the Court has deferred to the district court's wide discretion in crafting preliminary relief to remedy constitutional violations. *Coalition for Educ. in Dist. One v. Board of Elections of City of N.Y.*, 495 F.2d

1090, 1093-94 (2d Cir. 1974) (affirming preliminary injunction directing that a school board election be declared invalid and the position of the elected members be declared vacant, that a new election be held, and that the Chancellor of the City School District should in the interim exercise the powers of the previously elected board, despite concluding that an alternative remedy would have afforded "ample relief"). The Court has noted that such deference is "not too high a price to pay for the benefit of the greater time which a trial judge can give to a particular case and his advantage in having seen and heard the witnesses." *Id.* at 1093.

In so holding, this Court has reaffirmed that "the shaping of a remedy is largely for the district courts," and that "within the bounds of rationality, 'the framing of decrees should take place in the District rather than in Appellate Courts.'" *Id.* at 1094 (citation omitted); *see also California Prolife Council Political Action Comm. v. Scully*, 164 F.3d 1189 (9th Cir. 1999) (affirming grant of preliminary injunction and interim remedy, and noting that appellate review of equitable remedy is "narrow").

2. The District Court's Interim Remedy Was An Exercise In Judicial Restraint, Not An Abuse Of Discretion

Against this backdrop of broad deference to the district courts' discretion to fashion far more sweeping interim equitable remedies than the one at issue here, the district court's interim order in this case is an example of "proper judicial restraint," *Reynolds v. Sims*, 377 U.S. at 586, well within the court's sound

discretion, and should be affirmed. *See id.* at 586-87 (upholding district court's order of a provisional and temporary reapportionment for general election that combined features of two plans enacted by the legislature, enjoined future elections under any of the invalid plans, and deferred hearing on a permanent injunction but maintained jurisdiction until the legislature, as provisionally reapportioned, would have the opportunity to enact a constitutionally permissible reapportionment plan).

Appellants argue that the district court abused its discretion with an "indefensible," "astonishing," "sweeping" and "overly broad" injunction that "wholly disregards" the New York State Legislature's prerogatives. (Brief for Appellants at 79-80.) But four aspects of the district court's interim relief and remedial analysis underscore that, to the contrary, the district court crafted a limited interim remedy, and with great judicial restraint.

First, the district court correctly understood that the state legislature should decide the appropriate permanent remedy to address the constitutional infirmities of the State's judicial election system. *See Lopez Torres*, 411 F. Supp. 2d at 255 (SPA 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"). Thus, the court "correctly recognized" that the appropriate permanent remedy "is primarily a matter for legislative consideration and determination, and that judicial [permanent] relief becomes appropriate only when a legislature fails to reapportion

according to federal constitutional requisites in a timely fashion." *Reynolds v. Sims*, 377 U.S. at 586.

Second, the district court properly ordered only an interim remedy, "prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for [a permanent remedy] which rests with the legislature." *Id.*; *see Lopez Torres*, 411 F. Supp. 2d at 214 (SPA 4) ("Until the New York legislature enacts another electoral scheme, such nominations shall be made by primary election."). Indeed, once an electoral system has been found likely to be unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan," subject to "equitable considerations [that] might justify a court in withholding the granting of immediately effective relief." *Reynolds v. Sims*, 377 U.S. at 585.

Third, the district court's interim remedy was the least intrusive available option. The district court properly concluded that the existing judicial nominating convention system is constitutionally deficient as a result of several separate but interrelated provisions within the statutory scheme, including as a result of the combination of provisions operating together. The district court noted, for example, the large number of Assembly Districts in each judicial district, *Lopez Torres*, 411 F. Supp. 2d at 218-19 (SPA 8-9), the large number of judicial

delegates from each Assembly District, *id.* at 219-20 (SPA 10-12), the large number of signatures necessary for delegate petitions in each judicial district, *id.* at 220-21 (SPA 14), the brief time delegates have to circulate petitions, *id.*, the burdensome rules regarding eligible signatories and witnesses to delegate petitions, *id.*, and so forth. *Cf. Rockefeller v. Powers*, 78 F.3d 44, 45 (2d Cir. 1996) (agreeing that the "combination of New York requirements severely hampers candidates" in obtaining sufficient petition signatures).

Rather than making a quasi-legislative determination concerning which of these many statutory provisions it should selectively enjoin, the district court instead enjoined the judicial nominating convention system altogether. It then ordered nominations for Supreme Court justices to proceed under the default system under the state Election Law requiring direct primaries, applicable to the party nominations of elected public officials and judges unless otherwise specified: "All other party nominations of candidates for offices to be filled at a general election, except as provided herein, shall be made at the primary election." N.Y. Elec. Law § 6-110 (McKinney 1998). This reliance upon an existing statutory alternative was an appropriate and restrained exercise of equitable discretion. *See, e.g.*, *Rockefeller v. Powers*, 78 F.3d at 46 (affirming order that enjoined onerous petition signature requirements, and fashioned a remedy based on an existing

mechanism in New York law that "provides an option to political parties" to reduce the number of necessary signatures to a specified alternative).

It merits emphasis that the interim remedy of open primaries ordered by the district court is the default system applicable to the majority of state elected judgeships. By enjoining the judicial nomination convention system but relying on a default party nomination system applicable to other state *judges*, the district court's approach does not implicate the concerns expressed by the *dissenting* Justices in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), who noted that striking down certain restrictions on judicial elections might improperly conflate the roles of elected political actors with those appropriate to judges, including elected judges. *See, e.g.*, 536 U.S. at 805 (Ginsburg, J., dissenting) ("I would differentiate elections for political offices . . . from elections designed to select those whose office it is to administer justice without respect to persons."); *id.* at 799-800 (Stevens, J., dissenting) ("recognizing a conflict between the demands of electoral politics and the distinct characteristics of the judiciary"). Instead, the district court simply ordered that state Supreme Court justices be elected pursuant to the same procedures that the state legislature has determined is appropriate for the election of the majority of state judges.

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

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

Under these circumstances, the preliminary relief ordered by the district court – although not favored by the City Bar as a permanent remedy for the constitutional violation – is a legally permissible and appropriately restrained interim remedy in light of the identified constitutional violations, well within the district court's equitable powers, and not an abuse of discretion.[4]

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[4] Because it contemplates nomination of state Supreme Court justices by convention, the state Election Law does not specify the number of signatures that would be needed on a primary election ballot to qualify candidates for the state Supreme Court. If a primary election is to be held in 2007, and if the legislature has not specified the number of signatures needed to obtain access to the primary ballot, then the district court should have broad equitable authority to specify the number of signatures on a primary ballot needed to qualify candidates for justice of the Supreme Court, including those specified in Election Law § 6-142 or other appropriate requirements, in order to effectuate its ordered interim relief of primary elections.

II. The City Bar Will Urge The District Court And The State Legislature To Consider Thoroughly All Available Relief Options, Including Additional Remedial Proposals, At The Permanent Injunction Or Legislative Action Stage

Following trial on the merits, it will be perfectly appropriate for the district court to consider thoroughly all available relief options, including additional remedial proposals submitted by the parties and *amici curiae*, and to adopt a different permanent remedy. *See, e.g.*, *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 497 F.2d 1113, 1115 (2d Cir. 1974) (affirming injunctive remedy that was modified from the original form of awarded relief). In fashioning equitable relief, the trial court has "broad discretionary power" to fashion remedies that are "a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. at 200 (footnote omitted).

Although the City Bar has long favored an appointive system for state Supreme Court justices, should the legislature fail to act or refuse to replace the judicial nominating convention system, the City Bar may submit additional views to the district court concerning appropriate permanent remedial options, ranging from enhancing the existing judicial nominating convention system to accommodating the importance of the values of merit-based appointments.

A. Improving the Convention System

Less than three years ago, the Judicial Selection Task Force of the City Bar released a comprehensive report on improving the state judicial selection process. *See Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (October 2003) ("2003 Report"), *available at* http://www.abcny.org/pdf/Judicial%20selection%20task%20force.pdf. The Task Force concluded that an appointive selection system – through which the appointing authority selects from among a limited number of nominees approved and presented by a diverse and representative, independent nonpartisan commission – "is vital to the independence and integrity of the New York judiciary," whereas "the current elective process provides the illusion of voter participation." 2003 Report at 29. Nevertheless, the Task Force recognized that "the process of constitutional amendment . . . could take several years to effectuate" whereas "the need for reform is urgent." *Id.* at 30. It accordingly recommended several principles to be followed in reforming the nominating convention system in order to refine the current process. *Id.* at 31.

The City Bar Task Force's central recommendation for improving the existing convention system involved adding screening committees that would review the qualifications of candidates to be voted upon by delegates at the judicial nominating convention. *Id.* at 32. The members of the screening committees

would be selected from a broad range of bar groups, law school faculties and civic organizations and include both lawyers and nonlawyers. *Id.* The organizations themselves, and not the party leadership, would identify the particular individual members who would serve to represent the organizations' perspectives on the screening committees. *Id.* The screening committees would be provided with adequate resources to hire an independent staff counsel and to conduct background checks on potential candidates. Members would be selected for fixed renewable terms, and would operate publicly and transparently according to published rules. The screening committees would have an active outreach function to encourage the highest quality and diversity of potential judicial candidates. *Id.* at 32-33.

Most critically, under the Task Force's proposal, the screening committees would forward only the three most highly qualified candidates for consideration by the judicial district convention for each vacancy, and the delegates of the convention would agree to be bound to choose from only among those three candidates found most highly qualified for each vacancy. *Id.* at 33. The Task Force also suggested that a mechanism be adopted whereby existing judges approaching reelection or reappointment might be subject to retention elections, or presumed reappointment. *Id.* at 37-40.

The City Bar's earlier report (from 1977) also suggested ways to improve the nominating convention system. It suggested that the convention

should be reformed into a smaller deliberative body (through fewer delegates from each assembly district), that delegates should serve for at least two years, that the convention should have a permanent staff to investigate the background of prospective nominees and to report to the convention, and that a qualifications screening committee should work within a smaller convention.

B. Appointment-Based Selection System

Despite the City Bar's interest in improving the existing judicial nominating conventions, ultimately it remains committed to promoting an appointive, rather than elective, selection system for state judges including Supreme Court justices. The basic contours of the City Bar's proposed system have not changed for more than four decades. The City Bar's Committee on Judicial Selection and Tenure, formed in 1962 to study and make recommendations on improving the selection of judges, *see* George Martin, CAUSES AND CONFLICTS, *supra*, at 309, proposed an appointive system for the selection of judges in New York City, with three key components: (1) that all judges be selected by a politically accountable (elected) executive appointing authority, (2) exclusively from a list consisting of no more than 3-5 names recommended by

a judicial selection commission, (3) the members of which would be nonpartisan and truly representative of the community, the courts and the bar. *See id.* at 310.[5]

That basic framework remains the heart of the City Bar's proposal for an appointive judicial selection system. Yet just as the City Bar's commitment to such a selection method has not wavered for more than 135 years, three aspects related to its view of an appointive judicial selection system deserve emphasis. *First*, the City Bar has sought to minimize the direct political activity of state judges by recommending movement away from an elective system, but it has not sought to insulate judges from the political world entirely. To the contrary, the City Bar has emphasized that the authority appointing judges should be a single, visible elected executive with political accountability to voters for his or her decisions and judicial appointments. *See* 2003 Report at 36.

Second, the City Bar has emphasized that membership on selection screening panels should be diverse and representative of the community, as should the judiciary itself. To that end, it has engaged in active outreach efforts in order to seek to attract members of minority communities to judicial service, *see, e.g.*, Special Committee to Encourage Judicial Service, *How to Become a Judge* (2002), *available at* http://www.abcny.org/pdf/report/become_a_judge.pdf, as well as to

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[5] The 2003 Report specified that selection commissions should be bipartisan in composition and not dominated by the appointing authority. *See id.* at 35-36.

join the City Bar itself, *see* Morris, *supra*, at xiv, 14-15. The City Bar's commitment to a highly qualified judiciary relies for its success upon achievement of a diverse judiciary responsive to the community's and State's needs.

Third, the City Bar recognizes that many elected judges in New York are of the highest quality and integrity. Indeed, New York's system of judicial elections has produced some of the country's finest jurists. Unfortunately, even a few corrupt or incompetent judges can taint a public's perception of the quality of justice. In recognition of the outstanding abilities of state judges under our elective system, the City Bar's proposals for a permanent remedy in this matter may include suggestion of retention elections or presumed reappointment of current justices.

Until such time as a permanent remedy for the current, flawed judicial convention system can be enacted or ordered, the preliminary injunction should be affirmed.

CONCLUSION

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

Dated: May 17, 2006
New York, New York

Respectfully submitted,

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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6768 words and complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 29(d).

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