No. 06-766

In The Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, and EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections, New York County Democratic Committee, New York Republican State Committee, Associations of the 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, ELIOT SPITZER, Attorney General of the State of New York,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, Common Cause/NY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST[1]

Amicus Curiae Asian American Bar Association of New York ("AABANY") is a membership organization which represents the interests of approximately 4,000 Asian American attorneys in New York. Since its incorporation in 1989, AABANY has taken an active role in advocating and promoting diversity in the judiciary and has taken positions on legal issues that affect the access of Asian Americans and other minorities to the electoral process.

AABANY filed a brief *amicus curiae* in the court of appeals seeking reversal of the district court decision on the grounds that the district court failed to narrowly tailor its injunctive relief to fit the purported constitutional infirmities set forth in its preliminary injunction decision. Because of the direct and negative impact that the lower courts' remedy of judicial district-wide primaries will have on Asian Americans, from both an ethnic diversity and an associational rights perspective, AABANY is in a unique position to aid this Court in understanding the issues presented by the petition, particularly with regard to the district court's improper remedy, which is a subsumed component of the first question presented by the petition for a writ of *certiorari*.

AABANY agrees with the petitioners that this appeal involves (1) an existing circuit split on the issue of the

[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, the *amicus curiae* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

constitutionality of New York's convention system and (2) important issues of Constitutional law, which firmly support granting of *certiorari*. S. Ct. Rules 10(a) & (c).

INTRODUCTION

This Court has previously held that it is "[i]t is too plain for argument . . . that the State may properly limit each political party to one candidate for each office on the ballot and may insist that intra party competition be settled before the general election by primary election or by party convention." *American Party of Texas v. White*, 415 U.S. 767 (1974), citing, *Storer v. Brown*, 415 U.S. 724, 733-736 (1974). New York State has chosen to have intra-party competition between candidates for its court of general jurisdiction, the New York State Supreme Court, settled in party conventions. Yet, by judicial fiat, the district court jettisoned New York's convention system in favor of the very system New York State intentionally chose *not* to adopt with regard to this office - open primaries. Assuming the existence of the purported constitutional infirmities found by the district court - too many delegates, too many petition signatures and too little time to lobby delegates - they each should have been addressed, as mandated by this Court's decision in *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320 (2006), while maintaining New York's 85-year-old convention system.

SUMMARY OF ARGUMENT

The court of appeals and district court refused to correctly apply *Ayotte* and directed open primaries as an "interim" remedy based upon a non-existent primary default provision supposedly contained in New York's election law.[2] Pet. App. 82 (discussing the purported default nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions "[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . ."). Yet, New York's election law contains no such "default" provision to open primaries for the office of New York State Supreme Court Justice. Rather, Election Law § 6-110 specifically states that a primary election be used "*except as provided herein*." Election Law § 6-106, in turn, expressly provides that nominations for Supreme Court Justice will be by party convention. Thus, rather than providing for an open primary "default," Election Law § 6-106 actually embodies the legislature's intention to have nominations for this elective office conducted by convention.

These erroneous readings of the New York State election law tainted the court of appeals' entire analysis of the propriety of the district court's directive mandating New York to use open primaries as a so-called interim remedy. If the court of appeals had considered the various *Ayotte* factors, it may have attempted to remedy the supposed constitutional infirmities by ordering reductions

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[2] The lower courts struck down Election Law § 6-106 and § 6-124 as unconstitutional. Election Law § 6-106 pertains to party nominations for justices of the New York State Supreme Court. Election Law § 6-124 contains the statutory procedures for judicial conventions. Pet. App. 186.

in the number of signatures required on designating petitions, reduction of the number of delegates at the nominating conventions and/or expansion of the time New York State Supreme Court judicial candidates have to lobby delegates.

Likewise, the court of appeals could have, and should have, taken into consideration the fact that a remedy of judicial district-wide partisan elections has the grave potential of leading to a "tyranny of the majority" to the detriment of Asian Americans, one of the least powerful and most underrepresented ethnic minorities in New York state. The existing nominating system, whatever its flaws, does not present Asian Americans with the same barriers that they may face in a partisan election process. The latter process is one in which voting along ethnic lines would most likely prevail to the detriment of small minority groups such as Asian Americans. Indeed, a partisan electoral process is one in which cash is king - again an insuperable barrier to the aspirations of many Asian Americans who generally lack the resources and the political clout to raise the hundreds of thousands of dollars, if not millions of dollars, needed for judicial races in New York.

As a result of the demographic and fiscal challenges posed by a partisan election system, Asian Americans have been virtually shut out of judgeships in the states where such systems prevail. Eight states, encompassing approximately 25% of the nation's population, have partisan election systems similar to the system that the lower

courts have imposed.[3] From the point of view of Asian Americans, the experiences of these eight states are striking: out of nearly 2,500 judges in those eight states, only *seven judges* are of Asian American descent.[4] A majority of the states with partisan open primary election systems have *no Asian American judges* whatsoever.[5]

Finally, if the lower courts were not going to salvage the conventions statutes by applying *Ayotte*, they should not have judicially enacted new state action in the form of open primaries. While the court of appeals found that it would have been "irresponsible" for the district court to have "left such a gaping hole in the State's electoral scheme," Pet. App. 82, no such gap truly existed in the absence of the stricken statutes. As noted in the petition, Pet. 6, New York's political parties used conventions notwithstanding the absence of a statute mandating them between the years 1846 to 1911. Thus, in the absence of state law directing how political parties were to nominate their candidates for this office, the parties could have chosen through their own internal rules to use conventions or any other method of their choosing.

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[3] Peter D. Webster, *Selection and Retention of Judges: Is There One Best Method?*, 23 Fla. St. U. L. Rev. 1, n.80 (Summer 1995). The states with partisan election systems are Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia.

[4] American Bar Association, National Database on Diversity in the State Judiciary, http://www.abanet.org/judind/diversity/national.html#1. The ABA analyzed authorized judgeships in the states for the general jurisdiction appellate and trial court bench.

[5] Webster, *supra,* n.81. The states are Alabama, Arkansas, Mississippi, North Carolina, and West Virginia.

ARGUMENT

I. The Lower Courts Failed To Properly Apply *Ayotte* Because Of Their Misreading Of The New York State Election Law

The lower courts failed to heed this Court's direction that federal courts should not "nullify more of the legislature's work than is necessary." *Ayotte, supra,* at 326. Thus, "[i]njunctive relief should be narrowly tailored to fit legal violations." *Waldhill Pub. Corp. v. Landoll Inc,* 43 F.3d 775, 785 (2d Cir. 1994). Indeed, this Court has provided a clear admonition in the election law context that judicial remedies be narrowly tailored to avoid "reject[ing] state policy choices more than was necessary to meet the constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (U.S. 1982) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971)); *accord Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 n.5 (7th Cir. 1991) ("Any court remedy must be narrowly tailored to include only those measures necessary to cure the effect"). Thus, in cases such as *United States v. Booker*, 543 U.S. 220 (2005), the court took great pains to sever and excise only those portions of Title 18 of the United States Code that rendered the Sentencing Guidelines unconstitutional, while scrupulously leaving in place the applicability of the Guidelines to the federal sentencing scheme. Similarly, the lower courts should have used a like surgical technique by only excising any allegedly offending provision.

The lower courts, however, failed to follow this Court's direction to narrowly tailor its relief by, among other errors, misinterpreting New York's election law as having a so-called default remedy. Pet. App. 82 (discussing the purported default nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions

"[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . ."). Nothing could be further from the truth. New York election law, far from defaulting to an open primary, clearly and unequivocally mandates that party nominations for the office of New York State Supreme Court Justice shall be conducted by party convention. *See* Election Law § 6-106. The statutory provision relied upon by the lower courts, Election Law § 6-110, when read in conjunction with the remainder of the election law, clearly carves this office out of the provision calling for the use of open primaries for other offices.

While the court of appeals claimed that the application of *Ayotte* to salvage judicial conventions from the purported constitutional defects would have been "inviting the District Court to act as a one-person legislature superchamber," Pet. App. 80, this is exactly what the district court did when it directed open primaries. New York repealed the laws providing for open primaries for nomination for New York State Supreme Court Justices in 1921. In a naked act of judicial activism, the district court effectively supplanted the New York legislature's conclusion as to the best method for nominating candidates for this office by directing the return to primaries. The district court's mandate of open primaries is particularly offensive since the selection of manner and timing of the election of state officeholders is a core State's right. Indeed, the district court had no qualms in reducing the number of signatures required by Election Law § 6-136 which would apply to the open primaries the court has imposed as an interim remedy. *See López-Torres v. New York State Bd. of Elecs.*, 2006 WL 929363, No. 04 CV 1129 (JG) (E.D.N.Y. April 7, 2006). But the district court refused to reduce the

number of signatures required for delegate candidates to run which would have addressed one of the central constitutional defects identified by that court. In short, the lower courts should have correctly applied *Ayotte* to eliminate whatever constitutional infirmities they claimed to exist in the statute as its so-called interim remedy rather than directing New York to use open primaries - a selection system it expressly rejected.

II. A Partisan Open Primary Election System Will Likely Disadvantage Asian Americans Because Voting Will Tend To Take Place Along Ethnic Lines

In considering the proper remedy, the lower courts should have considered the impact of their remedy on the diversity of the bench and the associational rights of ethnic minorities, such as Asian Americans. In this regard, the experience of Asian Americans in states with partisan election systems provides strong support for several of the opinions expressed by the petitioners' expert, Dr. Michael Hechter, Emeritus Professor of Political Sociology at the University of Washington. As Dr. Hechter testified, voting in judicial elections tends to take place along ethnic lines:

> [T]he tyranny of the [majority] is always a problem in direct election. There can be persistent underrepresented minorities who can never win the election because there aren't enough of them. . . . There are not enough registered voters ever to prevail in that unit. They will always be consistently out voted.

(Tr. 1223:8-21). Dr. Hechter's conclusions are supported by court decisions concluding that New York politics is characterized by bloc voting and racial polarization. *See, e.g.,*

Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt, 796 F. Supp. 681, 693 (E.D.N.Y. 1992) (African American and Latino voters in the state of New York had established the existence of racial bloc voting); *Butts v. City of New York,* 614 F. Supp. 1527, 1547 (E.D.N.Y. 1985) ("racial and ethnic polarization and bloc voting exists in New York City to a significant degree").

New York State Senator Martin Connor also attested to the strength of bloc voting in New York, testifying that, in an open primary in the Second Judicial District, "you could not elect an Italian American, an Irish American, maybe have a hard time with a Latino." (Tr. 2124:4-2125:4). *See also* Testimony of Dennis Ward (Tr. 343:23-344:1) (stating that, in the Eighth Judicial District, no ethnic minorities would ever win a party nomination in an open primary system).

For Asian Americans, the picture may be even bleaker. As one of the few Asian Americans to win election to the judiciary in Illinois, Judge Sandra Otaka, has stated:

> [I]f African Americans cannot [elect their candidates] at 22% how in the Sam Heck are we going to do it at 4% when you have the name Fujimoto or Svrapi Punja [on the ballot] in Illinois? I was told to put an apostrophe after my O because if I did that, I would have a greater chance at winning county-wide. The bottom line is in Cook County and I imagine other places. . . . if it isn't O'Brien or O'Malley or it isn't Smith or it isn't a name that they have a level of comfort with, then it's going to be a lot more difficult for them to get elected. *Let me tell you, having an Asian name*

does not facilitate access to election through the political process [emphasis added].[6]

The extent of the uphill battle that Asian Americans may face in seeking elective office is further demonstrated by the fact that recent polls show that as many as 30% of Americans believe that Chinese Americans are more loyal to China than they are to the United States, and that 25% of those polled are unsure.[7] As one commentator suggested: "I ask you whether the electorate voting for a candidate who is Chinese American running for judicial office is likely to vote for that candidate if they hold those kind of suspicions?"[8] Thus, by throwing the baby out with the bath water, the lower courts may very well have placed Asian Americans in a worse position than the baby.

The district court recognized that, at a minimum, diversity in the judicial selection process is "a legitimate state interest." Pet. App. 174. Asian Americans are, of course, a significant part of that diversity. The district court, however, did not adequately consider, and failed to protect, that interest in diversity when it imposed its remedy. The district court also failed to take into account the associational rights of minorities, such as Asian Americans, to organize and participate within the political party of their choosing and within that party's chosen

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[6] Judge Otaka was quoted in Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, at 17.

[7] These figures are presented by Professor Sherrilyn Ifill and appear in Lawyers' Comm. For Civil Rights Under Law, *id.* at 18.

[8] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, *supra.*

method of nominating judicial candidates – in this case, a process that Dr. Hechter described as logrolling. These associational rights are, themselves, a compelling state interest, which was sufficient to uphold the convention system. Simply put, the district court did not, as it claimed, impose "the least intrusive course" when it directed open primaries. *Id.* at 183-84.

III. District-Wide Judicial Elections In New York State Would Be Prohibitively Expensive

The expense of a partisan open primary system may also adversely affect the prospect of a diverse judiciary. There is every reason to believe that, as stated in the Final Report to the Chief Judge of the State of New York of the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research shows, would serve to further undermine confidence in the judiciary."[9] The negative impact of prohibitively expensive district-wide judicial primaries would affect Asian Americans as their population concentration is within the New York City metropolitan area – the most expensive media market in the country.[10]

Indeed, as the plaintiffs themselves have conceded, New York is one of the most expensive states in which to

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[9] Commission to Promote Public Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York at 3 (Feb. 6, 2006).

[10] *See* SRDS Service Reports (Standard Rate and Data Service).

run a campaign.[11] For example, general election legislative candidates (who run in districts that are often less populous than the areas in which a State Supreme Court Justice would be forced to run) raised a total of more than $50 million in New York State in 2004.[12] Some New York State Senate races have generated spending of more than $3 million per candidate, in one case amounting to more than $51 per vote.[13] Even non-New York City races can cost millions of dollars: the 2005 race for Westchester County Executive cost a total of almost $4 million and the race for Westchester County Clerk cost a total of $673,931.[14]

The expense of campaigning for judicial office may impose disproportionate burdens upon Asian Americans and other members of minority groups. As Geri Palast, Executive Director of Justice at Stake Campaign,[15] has stated, "The high cost of campaigns poses a threat to minority candidates who may not be able to raise as sufficient a war chest to be competitive in these elections."[16] Professor Spencer Overton, a Professor of Journalism at George Washington University School of Law, has

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[11] *See* Declaration of William Lipton in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, dated June 1, 2004 (JA300).

[12] Common Cause, *The $2100 Club: What New York State Political Campaigns Cost, How Much Those Costs are Rising and Who's Footing the Bill* (March 2006) at 5.

[13] *Id.* at 9.

[14] *Id* at 10.

[15] Justice at Stake Campaign is a "nationwide, nonpartisan partnership of more than thirty judicial, legal and citizen organizations" seeking to "campaign for fair and impartial courts." http://www.faircourts.org/contentviewer.asp?breadcrumb=8,284.

[16] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, *supra,* at 15.

also noted that, although minority group members make up almost 30% of the nation's population, they make up less than 1% of the contributors to federal campaigns.[17]

In fact, over 55% of the contributions by candidates in New York State campaigns during 2002, 2004, and 2005 have come via checks written for more than $2,100 (the federal contribution limit) and, thus, would have been illegal in a federal election.[18] As a result, a comprehensive study of nationwide legislative elections found that "white candidates for contested seats typically spent more than minorities in similar states."[19] As Professor Ira Rohter, an Associate Professor of Political Science at the University of Hawaii at Manoa, said, "People in minority groups typically are lower-income, and they don't have access to the kinds of corporate funding that white people normally would." *Id.*

For this reason, the American Bar Association has supported public financing of judicial elections "to create more opportunities for attorneys of all racial and ethnic backgrounds who do not have . . . the personal or political connectedness to raise large sums of money for elections."[20] However, the remedy imposed by the lower courts does not – and cannot – provide for public financing, and there is no reason to believe that such financing is politically or fiscally feasible in an era of soaring budget deficits.

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[17] *Id.*

[18] Common Cause Report, *supra,* at 3.

[19] *See* Mark Niesse, *Study: Minority Candidates for State Office Often Raise Less Money,* Associated Press, March 29, 2006.

[20] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity,* June 2005, *supra,* at 15 & n.51.

Professor John D. Feerick of Fordham University was quoted saying: "[t]here was no enthusiasm for a primary without public financing and there is no political reality for a vast public financing system." Jennifer Medina, *Albany Is Split Over a Plan to Pick Judges,* New York Times, February 28, 2006. As stated in the Feerick Commission Report at Page11, "without public financing of judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections."

Thus, for the foreseeable future, if the remedy imposed by the lower courts is not reversed, it will inflict crushing financial burdens upon minority candidates seeking judicial office.

IV. The Lower Courts Erred By Permitting The Enactment Of New State Action In The Form Of Open Primaries After Striking New York's Judicial Convention Statutes In Their Entirety

Assuming that it was proper for the district court to refrain from following *Ayotte* and *Booker* and thereby striking the entire convention statutes, it was improper for the lower courts to impose *new* state action in the form of open primaries. The district court foisted open primaries by baldly stating that it would have been "irresponsible" for it to have "left such a gaping hole in the State's electoral scheme," Pet. App. 82. Its conclusion, however, rests on the flawed assumption that party nominations require state regulation. New York's political parties used nominating conventions between the years 1846 to 1911, notwithstanding the absence of any statute mandating their use. Pet. 6. In the absence of state law directing

parties to nominate their candidates for this office in a specific way, it was the prerogative of parties to create internal rules, which ethnic minorities could have assisted in shaping, to determine the process of nominating candidates for New York State Supreme Court Justice rather than – as we have here – a judicially-imposed method of open primaries.

CONCLUSION

For the foregoing reason, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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