06-0635-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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,

Plaintiffs-Appellees,

—against—

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,

Defendants-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* NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEES

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INTRODUCTION AND INTEREST OF AMICUS

This case involves a constitutional challenge to an elaborate electoral regime governing the election of justices who seek to serve on the New York State Supreme Court. Plaintiffs contend, and the District Court below found, that this electoral regime, commonly known as the "judicial convention system"[1] is so complex and erects barriers to the ballot that are so formidable as to be navigable only by the party leadership that controls the apparatuses of the major parties. Accordingly, the District Court found that this system for electing Supreme Court justices provides the leadership of the major parties with virtually insurmountable control over the choice of justices and that insurgent candidates and their supporters are unconstitutionally denied a fair opportunity to contest those choices.

The judicial convention system requires candidates seeking nomination as State Supreme Court justices from the major parties to induce supporters to serve as delegates to a convention to be held for the Judicial District in which they seek office. To serve as delegates the supporters must, in turn, be elected from one of the Assembly Districts within the Judicial District. And, as a precondition to election, the would-be delegates must circulate nominating petitions to run for the position of delegate to the judicial convention (Republican

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[1] Section 6-106 of the New York Election law reads as follows: "Party nominations for the office of Justice of the Supreme Court shall be made by the judicial district convention."

and Democratic candidates seeking nomination as delegates must secure 500 valid signatures over a 37 day period[2]). New York law further allows the political parties to determine the number of delegates and alternate delegates from each Assembly District. Thus, the leadership of each political party can create a large number of delegate seats in order to make it difficult for insurgents to run against the candidates that are handpicked by the party leadership. According to the District Court, "frequently as many as six or seven delegates are elected from each AD to attend the nominating convention for Supreme Court candidates." Lopez Torres v. New York State Board of Elections, 411 F. Supp. 2d. 212, 220 (E.D.N.Y. 2006). And, as the District Court further noted by way of example, "a challenger candidate for the Supreme Court in Brooklyn or Staten Island would need to gather 24,000 to 36,000 signatures drawn equally from the 24 ADs in the [judicial] district." Id. at 221.

The District Court, therefore, concluded that "[t]hese features of New York's electoral system render any effort by a challenger candidate to fund slates of supportive delegates and alternates virtually impossible." Id. By way of an aside, the District Court observed that "it is considerably easier for an aspiring

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[2] As noted by the District Court, "[a]s a practical matter, in light of the brief period of time in which petitions may circulate (37 days) and of the rules regarding who may sign them and who may witness the signatures, 1000 to 1500 signatures per Assembly District (A.D.) are necessary to ensure that legal challenges will be fended off." Id.

Supreme Court Justice to petition herself onto the ballot for the office of Mayor of New York City (7,500 signatures -- 15,000 to 22,500 as a practical matter -- from anywhere in the city [citations omitted]) than it is to petition onto the ballot slates of delegates to a judicial nominating convention." Id.

These burdensome requirements are compounded by the fact that, according to the District Court,

> unlike presidential delegates, New York's judicial delegates cannot signify on the primary ballot an allegiance to a specific candidate. As a result, even if a Supreme Court challenger candidate were to petition successfully to plant supportive delegate candidates on the ballot in each AD within the judicial district, he or she would then be required to inform the voters through campaign literature or advertising of those delegates' allegiance. And because there would not be just one race but at least nine and up to 24 [because each Judicial District contains between 9 and 24 ADs], the challenger would have to replicate that public education campaign for each distinct slate of delegates in each AD throughout the judicial district.
> Id. at 220.

The District Court further compared these burdens with the impact of this regime upon the leadership of the major parties. "By contrast" the Court noted,

> the petitioning process is rather easy for the major party organizations. Slates of judicial delegates are included on omnibus petitions on which signatures are obtained for other candidates seeking other offices. The county and district leaders can easily mobilize the resources necessary to conduct petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices. Thus, when deciding who to run for the array of offices set for election, the party leaders also decide who to run as judicial delegates and alternates.
> Id. at 221.

The District Court went on to observe that burdens imposed upon an insurgent candidate by the delegate selection process would not be cured by having the insurgent candidate seek support from the delegates at the convention itself. The Court noted that there were several factors that would suggest the futility of such a strategy. First, "[m]ost delegates have strong ties to the district leaders who select them, and sometimes work for them as well." Id. at 223. Second, the compressed time period between the "Tuesday following the third Monday in September preceding the general election and ... the fourth Monday in September preceding such election." (N.Y. Election law § 6-158(5)) "leaves virtually no time for lobbying dozens, if not hundreds, of delegates and alternates." Id. at 223. Third, "[t]he judicial nominating conventions themselves are perfunctory, superficial events." Id. at 229. In this regard, the District Court noted, again by way of example, that in 2001 the Democratic Party Convention in the Second District "lasted only 20 minutes." Id.

For these reasons, the Court below properly concluded that the judicial convention system burdens severely the constitutional rights of insurgent candidates to seek judicial office as State Supreme Court justices and that it correspondingly burdens the rights of voters to associate in support of these insurgent candidacies. The Court below also properly concluded that the burdens

erected by the statutory regime are unwarranted and that, therefore, the judicial convention system is unconstitutional.

The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union. As such, the NYCLU is devoted to the protection and enhancement of fundamental constitutional rights. The rights of electoral participation are among the most fundamental of liberties. They are "preservative of other basic civil and political rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964). The fundamental rights of electoral participation embrace the right to have a meaningful opportunity to run for office as well as the right of voters to associate in support of candidates. As discussed above and as further elaborated in the Argument set forth below, those rights are deeply implicated in this case. The NYCLU, therefore, respectfully submits this brief with the consent of the parties to address, as *amicus curiae*, the constitutional rights of electoral participation raised in this case.

ARGUMENT

I. The District Court Properly Ruled New York's Judicial Convention Nomination System Violates the First and Fourteenth Amendments

A. The Standard for Determining Whether The Judicial Convention Nomination System Violates the First and Fourteenth Amendments

In evaluating whether a state election law violates the First and

Fourteenth Amendments, courts must consider the character and magnitude of the asserted injury to these rights, and then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411, 419 (2d Cir. 2004).

Under this test, the rigor of a court's inquiry into the constitutionality of an election law depends on the extent to which it burdens candidates' and voters' First and Fourteenth Amendment rights. Green Party of New York State, 389 F.3d at 419. Laws that erect an absolute bar to the franchise will be measured against the requirements of "strict judicial scrutiny" unless shown to advance "compelling" interests and to do so in a "narrowly tailored" fashion. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Carrington v. Rash, 380 U.S. 89 (1965). But even in circumstances where an absolute bar is not erected, laws or regulations imposing severe burdens on electoral rights must be narrowly tailored and advance a compelling state interest. Anderson, 460 U.S. at 788. Regulations imposing less onerous burdens trigger less exacting review, and a state's important regulatory interests will generally justify such restrictions. Id.

B. Appellants Fail to Give Sufficient and Due Weight to the District Court's Findings of Fact

Before handing down its decision, the District Court held an evidentiary hearing that spanned 13 days, during which Judge Gleeson heard the

testimony of 24 witnesses and received into evidence more than 10,000 pages of documents. After this hearing, the parties submitted four rounds of proposed findings of fact and conclusions of law to the District Court.

After evaluating the record and the proposed findings of fact and law, the District Court handed down a well-reasoned, 77 page decision, which first set forth findings of fact, and then analyzed the constitutionality of the judicial convention nomination system under the framework articulated in Anderson.

The District Court was uniquely situated to evaluate the entire record and make credibility determinations and its findings of fact can be overturned only if "clearly erroneous." See, e.g., Green Party of New York, 389 F.3d at 418 (affirming issuance of preliminary injunction invalidating a voter enrollment scheme because it impinged on the First and Fourteenth Amendments); Bronx Household of Faith v. Bd. of Educ. of City of New York, 331 F.3d 342, 348 (2d Cir. 2003) (affirming issuance of preliminary injunction preventing school board from denying rental agreements of public buildings for purposes of religious worship).

Among the findings of fact set forth in the District Court's opinion are the following:

- The selection of delegates and alternates to the judicial district nominating conventions is dominated by party leadership, and the unique features of the judicial convention process virtually guarantee that result. Lopez Torres, 411 F.Supp.2d at 216.

- Judicial nominating conventions are not the places where important decisions get made. Rather, judicial nominating conventions are brief, rote, stamps of approval given to decisions that were made elsewhere. Id. at 217.

- With very few exceptions, delegates, without consultation or deliberation, rubber stamp the county leaders' choices (or "package" of choices) for Supreme Court Justice. Most delegates have strong ties to the district leaders who select them, and sometimes work for them as well. Id. at 223.

- New York State's judicial convention system is unique, both inside New York and throughout the nation, in not providing a way for candidates to petition directly onto primary ballots by collecting valid signatures. Id. at 215-16.

- Running one's own slate of delegates is not a viable alternative: the petitioning requirements faced by an insurgent candidate, including the number of signatures that must be gathered, the number of Assembly Districts, the numbers of delegates and alternatives, and the need for voter education, make running a slate of supportive delegates infeasible. Id. at 216.

- The general elections, the culmination of this ostensibly "democratic" process, play almost as minor a role in the selection of Supreme Court Justices as do the conventions. Therefore, nomination at the judicial convention, based on party leader support, is tantamount to election in most cases. Id. at 217.

The conclusions of the District Court are supported by those of a State Commission appointed by the Chief Judge of the State of New York. The Commission, entitled the Commission to Promote Public Confidence in Judicial Elections, was chaired by John Feerick and it issued its Final Report (the "Feerick Report") in February 2006. The Feerick Report found that "[t]he delegates' term of office—roughly one week—is too short to allow delegates to develop the

information or skills they need; the law permits political parties to set the number of delegates so high and to conduct the business of the conventions in such a perfunctory manner that delegates do not have an adequate platform to exercise their role effectively; and petitioning requirements are so onerous that qualified judicial candidates without institutional party support cannot realistically hope to seat enough delegates to affect the outcome of the convention." Id. at 24-25.

C. The District Court Properly Found That New York's Judicial Convention Nomination System "Severely" Burdens Candidates' and Voters' First and Fourteen Amendment Rights

The factual findings of the District Court, as highlighted in the preceding section, and as reinforced by the Feerick Commission Report, strongly support the conclusion that the statutory regime under review in this case imposes "severe" burdens upon the rights of candidates to run for judicial office and upon the rights of voters to support those candidates. In evaluating laws that limit candidate access to the ballot, the Supreme Court has explained that a decisive question is whether "a reasonably diligent independent candidate can be expected to satisfy the signature requirements, or will it only rarely be that the unaffiliated candidate will succeed in getting on the ballot?" Storer v. Brown, 415 U.S. 724, 742 (1974).

Asking the Supreme Court's question in this case invites two additional questions: (1) Could a reasonably diligent challenger candidate for

Supreme Court succeed in getting his or her own delegates and alternatives on the ballot in each Assembly District? (2) If not, could he or she succeed in lobbying the delegates installed by the party leader? Lopez Torres, 411 F.Supp.2d at 248.

The answer to both questions is clear from the District Court's findings of fact.[3] Structural barriers inherent to New York's current judicial nomination convention system make a challenger candidate's odds of successfully running his or her own slate of delegates practically nil. Similarly, the compressed timeframe between the election of delegates and alternates and the judicial nomination convention—less than three weeks—and the dynamic between party leaders and judicial delegates, makes lobbying delegates infeasible.

Accordingly, the burdens on the First and Fourteenth Amendment are severe, and an application of strict scrutiny is warranted.[4] See, e.g., Rockefeller v.

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[3] Appellants seek *de novo* review of the District Court's findings of fact. However, *de novo* review applies only to mixed questions of law and fact, such as whether to characterize burdens on the First and Fourteenth Amendment as severe or reasonable—not to pure findings of fact, such as the District Court's findings regarding the uniqueness of New York's judicial convention nomination system, party leaders' control of that system, and the inability of challenger candidates to access the ballot without party leader support. Courts routinely give such findings of fact deference, even in the context of the First Amendment. See, e.g., Green Party of New York, 389 F.3d at 418; Bronx Household of Faith, 331 F.3d at 348.

[4] Appellants' claim that Rockefeller limits constitutional scrutiny of petitioning requirements to presidential elections is baseless. As the District Court found, the petitioning requirements that insurgent candidates for Supreme Court Justice must overcome, including the number of signatures that must be gathered, the number of Assembly Districts, the numbers of delegates and alternatives, and the need for

Powers, 917 F.Supp. 155 (E.D.N.Y.), aff'd, 78 F.3d 44 (2d Cir. 1996) (affirming the invalidation of petitioning requirements for accessing the Republican Party's primary ballot in the race for President because the requirements were more onerous than those in any other state and history suggested that no candidates lacking the support of the party organization, other than those with vast personal wealth, could access the ballot).

D. New York's Judicial Convention Nomination System Fails Strict Scrutiny Because it is Not Narrowly Tailored To Serve Compelling State Interests

Appellants argue that the judicial convention system is uniquely designed to protect the major parties' rights to freedom of association and to promote racial and geographic diversity on the bench. However, these purported interests are all either illusory or insufficient to justify severe burdens on First and Fourteenth Amendment rights, or could be served through far less burdensome means.

Appellants' claim that the judicial convention nomination system is necessary to protect parties' associational rights. This claim, however, ignores the fact that in ballot access controversies of the sort at issue here there are countervailing rights of association. The associational interests that Appellants

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voter education, are uniquely and inordinately burdensome. Indeed, the petitioning requirements at issue in this case are even more egregious than the 5,000 signature requirement in Rockefeller.

seek to defend are those held by the current leadership of the political parties. But there are insurgents within the party who are also possessed of association rights. These insurgents seek to associate with the political parties to support the candidates of their choice. Their associational rights are equally deserving of constitutional protection. As the District Court observed, in the context of mechanisms for choosing candidates, the major parties' "generalized interest in [party] autonomy" is outweighed by voters' rights to participate in the process. See Lopez Torres, 411 F.Supp.2d at 250 (citing Cal. Democratic Party v. Jones, 530 U.S. 567, 572 (2000)).

Furthermore, Appellants' argument that the judicial convention nomination system is necessary to prevent "party raiding" is also meritless because this purported interest is entirely implausible. Indeed, a judicial convention nomination system is not used to elect any other judges in New York, nor to elect judges for courts of general jurisdiction in any other state, and Appellants can offer no credible reason why it is uniquely necessary to use the judicial convention nomination system as currently structured to prevent party raiding with regard to the office of Supreme Court Justice in New York and not with regard to any other judicial office.

Appellants' further assert that the judicial nomination convention system is necessary to promote diversity on the bench. This interest may, indeed,

be substantial. But, however, important the interest, there are less burdensome means of promoting diversity on the bench. With respect to racial diversity, the District Court noted that a less burdensome means would be permitting cumulative voting in primary elections involving multiple judgeships, or a districting scheme that allows geographically compact minority populations to elect their candidate of choice. Id. at 252. Similarly, with respect to geographic diversity, the District Court explained that the most "direct and democratic way" to accomplish this objective is to define the geographical areas from which representation is desired, draw lines around them, and have voters within them select their nominees. Id. at 251. Thus, the current judicial convention system cannot be found "narrowly tailored" in the pursuit of interests in diversity among judges.

II. The Preliminary Injunction Is Necessary to Remedy Temporarily the Current System's Constitutional Infirmities Pending Legislative Action

Recognizing that the current New York statutory system for electing Supreme Court Justices is constitutionally infirm and that federal courts lack authority to command the New York State Legislature to amend the system, the District Court appropriately issued the only remedy within its power that could afford the voters and potential judicial candidates of New York complete relief: a preliminary injunction. After 13 days of hearings involving testimony from 24 witnesses and receipt of over 10,000 pages of documentary exhibits into evidence,

the District Court was compelled to enjoin enforcement of a statutory scheme that resulted in "an opaque, undemocratic selection procedure that violates the rights of the voters and the rights of candidates who lack the backing of the local party leaders." Lopez Torres, 411 F. Supp. 2d at 214. Moreover, by issuing a preliminary injunction, the District Court merely announced a temporary remedy that concomitantly protects New York State voters and judicial candidates' First Amendment rights while respecting the New York Legislature's intrinsic authority to enact an electoral scheme consistent with constitutional mandates. Indeed, the District Court chose "the least intrusive" remedy by requiring New York's political parties to nominate their candidates for Supreme Court Justice through direct primary elections—the same electoral system used by the same parties to elect all other elected judges in New York State—while the state legislature deliberates an electoral scheme—judicial nomination convention or otherwise—that respects the voters and candidates' First Amendment rights.

In an effort to maintain the status quo or, at a minimum, the status quo with a twist,[5] Appellants make hyperbolic and overreaching arguments that

[5] While Appellants decry any attempt by the court to rewrite state law, their brief recommends numerous, piecemeal injunctions to amend the statutory scheme. See, e.g., Appellants' Brief at 85 ("[T]he District Court thus could have directed the Democratic and Republican parties to adopt rules that maintain the requisite statutory ration but decrease significantly the absolute number of delegates and alternates." Moreover, Appellants offer the drastic suggestion that the District

mischaracterize the scope of the District Court's order and misstate its legal obligations when fashioning injunctive relief to remedy constitutionally infirm statutes. Significantly, Appellants accuse the District Court of circumventing the will of the New York Legislature by "rewriting state law to conform it to constitutional requirements," Appellants' Brief at 80-81, when in fact the court specifically issued a preliminary injunction to avoid such interference by "legislating from the bench." See Lopez Torres, 411 F. Supp. 2d at 255 (explaining that the temporary remedy of a preliminary injunction is appropriate because "[t]he choice of a permanent remedy for this constitutional violation does not fall to [the District Court], but rather to the legislature of New York State.").

Moreover, Appellants' analysis of the District Court's obligation to respect the will of the legislature when invalidating a statute is incomplete. While it is true that courts should sever only those provisions of a statute that "reach[] too far", Appellants' Brief at 82, the "more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent" with the Legislature's intent. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis in original). The District Court concluded that the New York statutory scheme for judicial nomination conventions was "designed to freeze the political status quo, in

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Court should have extended the term of delegates by "enjoining the upcoming delegate election.").

which party leaders, rather than the voters, select the Justices of the Supreme Court." Lopez Torres, 411 F. Supp. 2d at 255. Where a system was designed to function in a manner rife with constitutional infirmities,[6] severance of offending provisions will leave little more than a confusing smattering of words on a page, providing little guidance on how to conduct New York's unique system of judicial nomination conventions in accordance with the First Amendment.

A. The District Court's Issuance Of A Temporary Remedy Should Be Affirmed As The Least Intrusive Course To Remedy The Statutory Scheme's Constitutional Infirmities.

Through hyperbole and overstatement, Appellants elevate the District Court's well-reasoned, well-researched and—most importantly—temporary remedy into an assault on the principles of federalism. See, e.g., Appellants' Brief at 81 (stating that the District Court resorted to the "bluntest of remedies" without "any consideration of the New York Legislature's intent in designing a system for electing Supreme Court Justices" and complaining that "[t]he judgment about the best way to nominate judicial candidates is a choice best made by a legislature answerable to the electorate, rather than a single federal District Court judge."). In reality, the District Court's decision is appropriately respectful of the New York Legislature's inherent authority to craft laws governing the election of Supreme

[6] See supra section I. B. (describing the District Court's findings of fact regarding the manner in which the statutory scheme functions in practice).

Court Judges. The court explicitly stated that the "choice of a permanent remedy for this constitutional violation"—as opposed to the temporary remedy issued by the court—"does not fall to [the District Court], but rather to the legislature of New York State." Lopez Torres, 411 F. Supp. 2d at 255. Indeed, the mandated temporary remedy, namely, the nomination of party candidates through direct primary elections, is one highly familiar to political parties in New York. Direct primary election is the mechanism currently in place for all other elective judicial offices in the state. See N.Y. Elec. Law § 6-110 ("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."). Moreover, the District Court later stayed the preliminary injunction for the 2006 election cycle at the parties' request. See Lopez Torres v. New York State Board of Elections, No. 04 CV 1129 (JG), 2006 WL 929363, at *1 (E.D.N.Y. Apr. 7, 2006).

B. Severance Of The Invalid Sections Of The Statutory Scheme Would Create A Statute That Is Confusing and Unworkable

Appellants' analysis of a court's obligations when deciding whether to invalidate a statute as a whole or in part is incomplete at best. While it is true that courts should "try not to nullify more of a legislature's work than necessary," a court's duties do not end there. See Appellants' Brief at 82 (citing Ayotte v. Planned Parenthood of Northern New England, __ U.S. __, 126 S. Ct. 961, 967 (2006). When determining whether to sever offending provisions of a statutory

scheme selectively or to enjoin preliminarily enforcement of the scheme as a whole, a court should also determine whether the retained provisions are coherent and workable and whether the retained scheme is consistent with the Legislature's intent when enacting the original statutes. See National Adver. Co. v. Town of Niagara, 942 F. 2d 145, 148 (2d Cir. 1991) (choosing to enjoin a regulatory scheme in its entirety for violations of the First Amendment).

The Supreme Court recently held that when invalidating an act of Congress, courts "must retain those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objective in enacting the statute." U.S. v. Booker, 543 U.S. 220, 223 (2005) (internal citations omitted) (emphasis added). Here, "severability is a question of state law." Nat'l Adver. Co., 942 F. 2d at 148. Like the Supreme Court, the New York Court of Appeals held that the Legislature's intent is critical to this analysis, holding that severance is inappropriate where the retained portions are incapable of functioning independently or where severance leaves a regulatory scheme that the legislature never intended. New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl. Conservation, 550 N.Y.S.2d 879, 881 (N.Y. 1989). Thus, the "principle of division" or severance, "is a principal of function" and courts should consider whether severance of the invalid sections would create

a statute that is confusing and unworkable. People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 60 (N.Y. 1920) cert. denied, 256 U.S. 702 (1921).

The statutes governing judicial nomination conventions, as currently designed, do not establish a comprehensive regime, but instead place a preponderant share of the responsibility for conducting conventions in the hands of the political parties and their county leaders. As the District Court noted, although the electoral process for Supreme Court Justice may have merely three simple, official steps—(1) the election of judicial district convention delegates and alternates; (2) the judicial district convention; and (3) the general election— "the true nature of the process is far more complex than a list of its formal phases suggests." Lopez Torres, 411 F. Supp. 2d at 216; see N.Y. Elec. Law §§ 6-106, 6-124. Indeed, the Feerick Commission concluded that there are a "number of [statutory] provisions that effectively limit independent action by convention delegates." Feerick Commission Report at 24. The Feerick Commission found that the system formed under § 6-124 has resulted in election of delegates with a term of "about a week" who then "do not have time to interview judicial candidates, to investigate the reports of bar association screening panels or to learn the skills required to perform their duties." Id. at 25. Moreover, by combining their power under § 6-124 to name large numbers of delegates in each district with their power to control the agenda of the nomination conventions, the political

parties have "all but guarantee[d] that deliberate, thoughtful action will be foreclosed." Feerick Report at 26.

Against this backdrop of extensive disenfranchisement of voters' and candidates constitutional rights through the judicial nomination convention system, Appellants argue that the District Court's preliminary injunction was an "abuse of discretion" and suggest that the District Court should only have "set aside any provisions of the statutory scheme that it found problematic." Appellants' Brief at 84. They also suggest that the District Court should have issued a series of injunctions that, in effect, would constitute nothing more than "legislating from the bench." For instance, Appellants state that the District Court should have ordered the Democratic and Republican parties to decrease the number of delegates and alternates to be elected in each district. See Appellants' Brief at 85. But the New York Legislature assigned to political parties the power to decide the number of delegates and alternates to attend each convention. Furthermore, Appellants suggest that, in order to allow candidates more time for lobbying delegates, the District Court should have enjoined the upcoming delegate elections. Id. In effect and contrary to their own arguments, the Appellants suggest that the District Court should rewrite New York law by setting the term of office for judicial nomination convention delegates.

At bottom, the District Court could not have selectively severed portions from the scant statutory text without leaving a confusing and unworkable scheme that would be incapable of functioning in a manner consistent with the Legislature's intent. Indeed, as stated by Appellants' expert, Mr. Kellner, the Legislature designed the judicial nomination convention system with the intent to bypass the voters by placing nomination power solely in the hands of the party leadership. See Tr. 1671 ("By definition, the convention system is designed that the political leadership of the party is going to designate the party's candidates."). Nor is it the role of the District Court to erect a new judicial nomination convention statutory scheme that is compatible with voters' and candidates' First Amendment rights. As the District Court stated, "the choice of a permanent remedy for this constitutional violation [falls] to the legislature of New York State." Lopez Torres, 411 F. Supp. 2d at 255.

Appellants also argue that the District Court erred by not fashioning a remedy that applied solely to "certain Judicial districts," Appellants' Brief at 83, because the District Court stated in its opinion that "[t]he evidence at the hearing did not focus equally on all 12 Judicial Districts" but instead centered on the First and Second Districts. Lopez Torres, 411 F. Supp. 2d at 231.[7] Again, Appellants

[7] See Brown v. Thomson, 462 U.S. 835, 857-58 (1983) (J. Brennan dissenting) (arguing that in the voting rights context, courts must "consider the challenged scheme as a whole in determining whether the particular State's apportionment

argument overreaches. While the District Court may have been presented with a greater quantity of evidence regarding constitutional infirmities in the First and Second Districts, there was ample evidence of constitutional infirmities in the other districts to support the District Court's decision. For example, the court found that in the Third District "the dominant county leaders, particularly those in Albany and Rensselaer Counties, choose the convention delegates and nominees for Supreme Court Justice." Id. at 236. In addition, the District Court heard testimony from former Rochester City Court Judge John Regan whose efforts to compete for the Republican nomination in the Seventh District were eviscerated because of he angered party leaders. See id. at 238. As the District Court observed, "[d]espite significant popularity among the voters and the Republican Party county committee members across the district, Regan was told by the Republican county leader that he controlled the judicial convention delegates, and 'that's all that matters.'" Id. The District Court's opinion reports similar acts in violation of New York voters and candidates' First Amendment rights in the Fourth, Eighth, and Ninth Districts. See id. at 236-239. The record before the District Court demonstrates that serious violations of New York voters' and candidates' constitutional rights occurred in other judicial districts.

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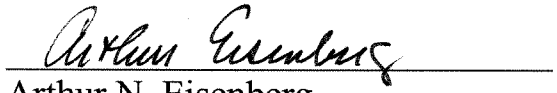
plan, in its entirety, meets federal constitutional requisites" and that problematic districts cannot be "legally sever[ed] from the rest of the plan.") (internal citations omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,



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May 16, 2006

CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7).

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,989 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word XP in Times New Roman font size 14.

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ANTI-VIRUS CERTIFICATION

Case Name: Margarita Lopez Torres, et al. v. NYS Board of Elections, et al.
Docket Number: 06-0635-cv

I, David R. Singh, hereby certify that this Amicus Curiae Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 5/16/2006) and found to be VIRUS FREE.

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Dated: May 16, 2006

CERTIFICATE OF SERVICE

I, David R. Singh, certify that on May 16, 2006, I sent the *Amicus* Brief of New York Civil Liberties Union by FedEx overnight service for filing with the Court and that two copies of the brief were served in the same manner on all counsel of record:

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