BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

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June 23, 2006

Honorable Chester J. Straub
Honorable Sonia Sotomayor
Honorable Peter W. Hall
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, New York 10007

Re: *López Torres et al. v. New York State Board of Elections* (06-0635-cv)

Your Honors:

We respectfully submit that a new stay through June 30, 2007 is not warranted at this time, for three reasons. *First*, the request is premature. The need for a new stay cannot be evaluated in the abstract—any application for new stay will have to be considered in the context of the timing of this Court's decision in relation to the election cycle. *Second*, no new stay should be entered without consideration of why the party seeking the new stay cannot apply in the first instance to the District Court, as required by Rule 8. *Third*, a stay at this time would be unwarranted by the law governing stay applications.

1. Timing. The District Court's stay expires with the close of the 2006 election cycle. In one sense, the 2007 election cycle will begin in early December 2006, when candidates for election to judicial office become free to engage in political activity during the nine-month pre-primary "window period" permitted by New York's Commission on Judicial Conduct. *See* 22 NYCRR §§ 100.5(A)(2), 100.0(Q). In early June 2007, candidates begin collecting petition signatures for qualification onto the primary ballot. N.Y. Elec. L. §§ 6-134(4), 6-158(1), 8-100(2). Candidates must file such petitions in early July to qualify for the primary ballot. *Id.*

Within this statutory and regulatory context, the timing of this Court's decision will bear on the propriety of a new stay. If this Court issues its decision in advance of the 2007 election cycle, then granting the application for a stay until June 30, 2007 would do what the Attorney General urges the Court not to do—establish a "judicially-imposed change in the middle of an election cycle." A June 30, 2007 expiration date would also create practical questions. Would the Board of Elections be required to accept petitions in early July and hold a primary in early September 2007? If not, how long would the courts permit an unconstitutional system to linger after defendants had exhausted their appellate rights?

To be sure, when this Court issues its decision, the defendants will be free to seek a new stay from the District Court, which can weigh the relevant factors at that time.

2. Procedure. Defendants sought a stay from the District Court "pending appeal." We objected to an open-ended stay that could have served as an incentive for delay and observed that a limited stay for a single election cycle would, *inter alia*, give the Legislature sufficient time to consider enacting legislation comporting with constitutional norms. (Even before the District Court ruled on the application for a stay, the Senate passed S-55A.) The District Court entered a limited stay, not the open-ended one defendants sought. Defendants did not appeal from that order. In this respect, the Attorney General's current application for a stay is untimely.

In addition, the District Court retains plenary jurisdiction over the case, with full power and authority to enter a new stay should the need arise at the appropriate time. Nothing would prevent any party from seeking such a stay from the District Court. For that reason, the current application for a stay from this Court runs afoul of Rule 8(a)(1)(A), which provides that "[a] party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal." If a party does not make such a motion in the district court, it must "show that moving first in the district court would be impracticable." *Id.* This is "[t]he cardinal principle of stay applications." 16A Wright & Miller's *Federal Practice & Procedure*, § 3954 (3d ed. 1999)); *Hirschfeld v. Board of Elections*, 984 F.2d 35, 38 (2d Cir. 1993) (denying stay where "[n]o showing of impracticability of bringing such a motion in the district court").

3. Substance. No stay should be entered unless justified by the four relevant factors, described by this Court in *Hirschfled*, 984 F.2d at 39, and discussed below.

a. Whether the movant will suffer irreparable injury absent the stay. No irreparable injury will befall the State of New York if the Board of Elections administers the 2007 elections for Supreme Court Justice under N.Y. Elec. L. § 6-110. The Board will administer many other elections under that statute in 2007, including many other judicial elections. Similarly, no injury will befall the Legislature absent a new stay, for that body has committed to this Court that "the Legislature will move as expeditiously as necessary to devise a workable solution." *Amicus* Br. of the New York State Legislature at 12.

b. Whether a party will suffer substantial injury if the stay is issued. Extending the stay would infringe the rights of rank-and-file voters to participate in the nomination process free of severe and unnecessary burdens on their ability to express a preference for the candidates they support. Extending the stay would also infringe the concomitant rights of candidates to compete for the nomination free of severe and unnecessary burdens on their opportunity to appeal to the voters of their parties. *See Lubin v. Panish*, 415 U.S. 709, 716 (1974) (candidate's rights are "intertwined with the rights of voters"). Indeed, extending the stay would not merely burden rank-and-file voters, but would continue to exclude them entirely.

Continued exclusion of rank-and-file voters imposes injury of constitutional dimension, because the "moment of choosing the party's nominee" is "the crucial juncture at which the appeal to common principles may be translated into concerted action and hence to political power for a community." *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (plurality opinion, quotations omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord*

Green Party v. N.Y. State Bd. of Elections, 389 F.3d 411, 418 (2d Cir. 2004).

c. Whether the movant has demonstrated a substantial possibility of success on appeal. The Attorney General's application is premised on the assumption that this Court will *affirm* the decision of the District Court. This renders a stay particularly problematic, reducing the question at hand to whether the District Court exceeded the bounds of allowable discretion in selecting the *timing* of the preliminary injunction's effective date. "In 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 (1972). The District Court's timing cannot be considered an abuse of discretion. The Court took into account the desires of candidates to have a full "window period" in which to plan to run in a primary if the Legislature does not act and provided the Legislature a year to enact constitutional legislation.

The Attorney General suggests that the District Court should also conduct a further hearing to reconsider the imposition of a proper remedy in the event that the Legislature fails to act. But the District Court already considered the possibility of legislative inaction, and its back-stop remedy is well within the Court's discretion. It is the mechanism for filling every other elected judicial office in New York; the State's default provision governing all elected party nominations; and indeed was the method for nominating candidates for the office of Supreme Court Justice until the state engrafted the convention system onto the Election Law.

d. The public interests that may be affected. The public interest does not favor the continuation of elections in which voters have no realistic opportunity to participate. "[T]he public interest clearly favors the protection of constitutional rights, including the voting and associational rights of . . . political parties, their candidates, and their potential supporters." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997); *Family Trust Found. of Ky. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 228 (6th Cir. 2004) (public interest weighs in favor of informed electorate in judicial elections); *see Lopez v. Monterey County*, 519 U.S. 9, 20-25 (1996) (error to permit judicial elections that violate Voting Rights Act).

Further, "[t]he process by which individuals are selected to join the bench, along with the perception of how that process works, has profound implications for public confidence in the judiciary. New York's current system for selecting nominees for Supreme Court vacancies injures rather than enhances the reputation of the justices." Br. of *Amici*, Former New York State Judges Bartlett, Bellacosa, Milonas, *et al.*, at 3.

Granting the current application is not in the public interest.

Respectfully submitted,

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cc: Counsel of Record