No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, et al.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

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The court of appeals held that a political party violates the First Amendment rights of those seeking its nomination for elected office whenever the party burdens the potential candidate's ability to compete for the party's nomination. That holding grants a new federal constitutional cause of action to virtually every disappointed would-be party nominee for federal, state, and local office to challenge the outcome of the political party's nominating process, and thereby portends to cast party politics across the nation into turmoil. The decision below presents questions of undeniably wide practical importance and conflicts with decisions of this Court and two other circuits. It accordingly warrants this Court's review. The nominally interlocutory posture of this case should not be an impediment to that review. The Second Circuit's decision makes clear that there will be no trial; the district court ordered the New York State Legislature to change the law, and, in the interim, installed precisely the direct primary that the Legislature, in 1921, was at pain to reject.

I. The Second Circuit's Decision Raises Questions Of Exceptional Importance For The Future Of Party Nominating Contests

The Second Circuit has pronounced a new constitutional rule that grants frustrated would-be party nominees unprecedented access to the federal courts. Distilling what it identified as the "animating principle" of this Court's ballot access decisions of *United States v. Classic*, 313 U.S. 299 (1941), and *Terry v. Adams*, 345 U.S. 461 (1953), the Second Circuit held that the constitutional protections afforded candidates' participation in public elections should be extended to safeguard prospective candidates' participation in any political party nominating contest that qualifies as an "integral part[] of [a] State's election machinery." Pet. App. 41. "[T]he First Amendment affords candidates and voters," the Second Circuit concluded, "a realistic opportunity to participate in the nominating process, and to do so free from burdens that

are both severe and unnecessary to further a compelling state interest." *Id.* at 41-42; *see also id.* at 45 (affirming a "'right to . . . *compete* for their major party's nomination' free from burdens that are both severe and unnecessary" (quoting *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 245 (E.D.N.Y. 2006) (emphasis in original)). That such a right would attach to a public primary is unsurprising; that the Second Circuit extended it to party conventions is extraordinary and radically alters the law governing party nomination contests.

In the instant matter, the Second Circuit found that the New York convention system for selecting Supreme Court Justices "burdens the associational rights of candidates" by "preclud[ing] all but candidates favored by party leadership 'from seeking the nomination of their chosen party . . . .'" *Id.* at 70 (quoting *Bullock v. Carter*, 405 U.S. 134, 143-44 (1972)). That is, a party may not "exclude its own members from the nominating phase." *Id.* at 71. The Second Circuit found such "exclu[sion]" here based on the district court's completely unsurprising determination that "judicial delegates" regularly "endorse the choices of party leadership." *Id.* at 69. It typically was those same party leaders, after all, who drafted the delegates to run. *See id.* at 16.

The Second Circuit never expressly delineated the contours of would-be candidates' First Amendment associational rights at party conventions, choosing instead only to tear down the system before it. Presumably, party nominating conventions must include a "realistic opportunity" for all electoral hopefuls to convince delegates to nominate them. And it appears that party leaders may not exert too much influence on the process, lest the leadership render the "realistic opportunity" unrealistic and thereby deny a prospective candidate his or her "right to compete" for the party's nomination.

Respondents attempt to downplay the significance of the decision below by characterizing the electoral scheme at issue in New York as an "arcane system [that] has no analog in

the current statutory nomination systems in other states." Opp. 16. While the intricacies of New York's delegate allocation formulae may be unusual, delegate nominating conventions are commonplace in American politics. And the broad, novel constitutional principles pronounced by the Second Circuit would apply to any situation in which a political party is authorized by law to stage a convention for the purpose of selecting a candidate to run for public office. Indeed, the niceties of the New York system are irrelevant, because the legal rule articulated by the Second Circuit applies to every "nominating phase" sanctioned by law.

By focusing on the details of the New York process, respondents seek to draw this Court's attention away from the devastating impact that the Second Circuit's ruling could have on political parties nation-wide. The decision below offers judicial review to any disappointed candidate who attributes his or her political defeat to nebulous (and obviously nefarious) "party bosses." But some of the aspects of New York's system that the Second Circuit found so constitutionally repugnant have been common features of U.S. political parties' organizations and operations for over 200 years. That the rank-and-file members enjoy a constitutional right to wrest control of the party nomination process from party leaders could strike fatally at the core purpose of a political party. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 634 (1996) (Thomas, J., concurring in judgment and dissenting in part) ("[O]f course, one of the main purposes of a political party is to support its candidates in elections.").

For generations, party leaders have exercised disproportionate influence over party nominations. As the amicus brief of the Republican National Committee ably highlights, until the last half-century presidential nominating conventions were structured so that state party leaders essentially controlled the outcome. *See* Rep. Nat'l Comm. Amicus Br. 17. In fact, in *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976), the D.C. Circuit remarked that the Republican

National Committee "makes numerous important political decisions" and that "[t]he fortunes of presidential hopefuls rise and fall with such decisions." 525 F.2d at 583. Similarly, the Fourth Circuit acknowledged in *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), that "standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a presidential preference and the selection of delegates may be only partially translated into the actual nomination." 836 F.2d at 842.

Beyond national elections, the Second Circuit's decision will also reverberate across the country in nominating conventions for state and local office. In fact, the first party nominating convention was in a contest for state office, when Democrats in Pennsylvania nominated William Findlay for governor in 1820. *See* http://www.legis.state.pa.us/WU01/VC/visitor_info/creating/executive.htm. And today, political parties in states ranging from Massachusetts to Oregon use nominating conventions to select gubernatorial candidates. Temptation will be strong among failed candidates to wield the Second Circuit's decision as a weapon to revisit their convention defeats. Inquires will be made into whether party officials unfairly influenced the outcome, or whether party rules put "insurgent candidates" at a disadvantage vis-à-vis establishment candidates. In short, political parties on all levels will either have to regulate closely their nominating conventions to comply with the Second Circuit's rigid openness and nonintervention requirements, or face, as New York does now, the installation of open primaries.

But even assuming for the sake of argument that the Second Circuit's decision could be cabined to only affect New York Supreme Court Justices, the ruling would still have a profound impact. There are over 400 New York Supreme Court Justices—14 of whom are expected to run for reelection this year. Overnight, the decision below has transformed these jurists, who have not run for office in 14 years, into politicians who must raise in the next few months

enough money to fund contested primary campaigns in the nation's most expensive media market. *See* Asian Am. Bar Ass'n Amicus Br. 11. Suddenly, the high-profile trials conducted by the New York Supreme Courts will acquire a political element, as a Justice's rulings could be scrutinized in light of the Justice's electoral future. This is the very sort of politicization of the judiciary that the New York State Legislature rejected in 1921. *See* Pet. App. 9-10. And with the rise in popular animosity toward the judiciary in recent years, the infusion of politics into the New York judicial system at this time could prove particularly toxic.

Left undisturbed, the Second Circuit's decision will tear asunder New York's carefully crafted system for electing its judges of general jurisdiction, significantly impact the state's judiciary, and potentially disrupt the workings of political parties on all levels. The broad practical impact of the Second Circuit's enlargement of candidates' First Amendment rights warrants this Court's review.

II. The Decision Below Cannot Be Justified By This Court's Ballot Access Decisions And Conflicts With The Decisions Of Other Courts of Appeals

The Second Circuit held that aspiring politicians have a right under the First Amendment to "a realistic opportunity to participate" in a political party's "nominating process," free from burdens "severe and unnecessary to further a compelling state interest." Pet. App. 41-42. This new First Amendment right guarantees to "insurgent candidates" the opportunity to "'*compete* for their major party's nomination.'" *Id.* at 45 (quoting *López Torres*, 411 F. Supp. 2d at 245) (emphasis in original)). In the Second Circuit's view, any "nomination phase" that "'effectively foreclose[s]'" competition from so-called insurgent candidates is constitutionally suspect. *Id.* at 42 (quoting *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (Douglas, J., concurring)). By holding that a candidate's First Amendment right to access extends not just to *general election ballots*, but instead to *all* state-sanctioned nomination processes—primary, caucus, delegate convention, what-

ever—the Second Circuit greatly enlarged the First Amendment rights of aspiring candidates, and transcended completely the decisions of this Court on which it purported to rely.

1. *All* of the cases on which the Second Circuit relied are *ballot access* cases. *See, e.g., Bullock v. Carter*, 405 U.S. 134 (1972) (holding that large filing fee to have name placed on primary ballot violated Equal Protection Clause of Fourteenth Amendment). For at least two reasons, these ballot access decisions cannot justify the Second Circuit's radical reworking of New York's convention nomination system.

First, this Court has *never* held that candidates have a First Amendment right of access to a party *primary* ballot. This Court has found such a First Amendment right of access only to *general election* ballots. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974). To the extent that the federal Constitution curtails the authority of states to limit access to political primaries, it does so only under the Equal Protection Clause. *See* Pet. 19 n.2 (discussing this Court's opinions in *Bullock*, *Lubin*, *Classic* and *Terry*—cases concerning Fourteenth or Fifteenth Amendment rights and invidious discrimination).[1] That the First Amendment does not significantly restrict political parties' ability to regulate their primary elections is unsurprising. As long as there is a reasonably open and meaningful *general* election, limitations on access to a political party's primary election will not significantly impact voters' oppor-

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[1] Respondents' claim that *Bullock* and *Lubin v. Panish*, 415 U.S. 709 (1974), rested on associational rights under the First and Fourteenth Amendments (*see* Opp. 21 n.4) is plainly incorrect. *See Bullock*, 405 U.S. at 141 ("power [to regulate elections] must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment"); *Lubin*, 415 U.S. at 713 (grounding decision on "gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights"). Thus, respondents' reliance on a "unitary standard" of strict scrutiny that applies "in any context" in which the right to vote is burdened is badly misplaced. *See* Opp. 20.

tunity "to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Moreover, any restriction on the party's ability to regulate its primary election necessarily impinges on the political party's co-equal right under the First Amendment to select its candidates for office. *Id.* at 581 (characterizing the "candidate-selection process" as "the basic function of a political party" (internal quotation marks and citation omitted)); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (First Amendment protects a political party's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals").

Second, even assuming that the First Amendment does limit political parties' rights to regulate their primary elections—and it does not—this Court has *never* found that those party members' First Amendment rights guarantee access to other nominating processes employed by political parties, such as the delegate conventions enjoined by the decisions below. Taken together, the cases on which the Second Circuit relied establish, at most, that a state, having set up an election, may not erect onerous barriers to candidates placing their names on the ballot, absent a compelling state interest. *See, e.g.*, *Bullock*, 405 U.S. at 147. But this Court has *never* held that candidates' First Amendment rights compel access to other nomination processes. Respondents complain that such "cannot be the law"—that it cannot make a constitutional difference whether a political party selects its nominees via primary, or delegate convention, or "smoke-filled room." Opp. 25. But as the Second Circuit itself recognized, it is only when a state "'chooses to tap the energy and legitimizing power of the democratic process,'" that "'it must accord the participants in that process the First Amendment rights that attach to their roles.'" Pet. App. 34 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)). If the First Amendment grants to candidates access to party nomination processes at all, it does so only when the party chooses to hold a primary election. As this Court recognized

though, "[i]t is too plain for argument" that "the State ... may insist that intraparty competition be settled before the general election by primary election *or by party convention.*" *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added).

2. The Second Circuit's application of strict scrutiny to New York's delegate convention system—without regard to political parties' First Amendment interests—conflicts starkly with the D.C. Circuit's and Fourth Circuit's balancing approach to substantially similar First Amendment claims.

Respondents nowhere dispute that *Ripon* and *Bachur*, when faced with competing First Amendment interests of candidates and parties, applied a balancing test that differs widely from the Second Circuit's brand of strict scrutiny. Nor do they dispute that, in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the D.C. Circuit held that this Court's ballot-access strict scrutiny has no application where, as in this instance, a party asserts its First Amendment rights with regard to its own nominating process—even when the party completely excluded delegates supporting an "insurgent candidate" from a nominating convention.

Respondents contend only that these cases are factually distinguishable. They involved, according to respondents, challenges to internal party rules as opposed to challenges to state laws, and did not concern restrictions that blocked candidates from appealing to voters of their party. *See* Opp. 28. But this distinction between state law and internal rules cannot possibly make a difference here, where what the Second Circuit found to be the principal insuperable obstacle to insurgent candidates' participation in the nominating conventions—the delegate allocation formulae—are established by party rule, not by statute. *See* Pet. App. 11-12. This conflict among the circuits over the applicable standard of review is substantial and warrants this Court's review.

III. This Case Is Not Only Suitable For Review, But Urgently Calls For It

Respondents argue that Supreme Court review of the Second Circuit's decision would be "premature" for two reasons. Neither is substantial.

First, respondents note that the ruling below is interlocutory. *See* Opp. 17. But it is certainly within this Court's power to review preliminary injunctions, and it has done so often enough. *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). Such review is particularly warranted where, as here, further proceedings necessarily will not alter the legal standard to which error is assigned.

Second, respondents suggest that the New York State Legislature may soon enact legislation that could moot this case. *See* Opp. 17. This rather cynically exploits the district court's preliminary injunction that, rather than severing those aspects of state law causing the supposed infirmity, struck down the relevant legal regime *in toto* and left the State with the Hobson's choice of enacting "corrective legislation" or accepting the federal courts' correction of open primaries—a procedure that New York has tried in the past and the Legislature has rejected. *See* Pet. 3. With the fall election season rapidly approaching, and fourteen judges up for reelection, the State is following the only responsible course of action.

Even assuming that all of respondents' speculation comes to fruition and the legislation they predict comes to pass, such an enactment would not moot petitioners' appeal in any event. Compliance with a court order renders a case moot only if it is "absolutely clear" that, even in the absence of the injunction, "the allegedly wrongful behavior could not reasonably be expected to recur." *Vitek v. Jones*, 445 U.S. 480, 487 (1980). Here, vacatur of the injunction would free the Legislature to repeal the court-mandated "reforms" and to restore the state's convention system to the form it had held for 84 years before the district court's incursion into politics.

Indeed, if the Legislature's recent activity suggests anything at all, it suggests the final nature of the district court's "temporary remedy."

CONCLUSION

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

Respectfully submitted.

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