

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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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, and COMMON
CAUSE/NY,

Plaintiffs,

v.

NEW YORK STATE BOARD OF ELECTIONS;
NEIL W. KELLEHER, CAROL BERMAN,
HELENA MOSES DONOHUE, and EVELYN J.
AQUILA, in their official capacities as
Commissioners of the New York State Board of
Elections,

Defendants.
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**DECLARATION OF HENRY T.
BERGER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTIVE
RELIEF**

Index No. CV 04-1129 (JG)

HENRY T. BERGER declares as follows:

1. I am attorney admitted to practice in the courts of the State of New York, and have practiced election law in New York for the last 30 years. I submit this declaration in support of Plaintiffs' motion for a preliminary injunction.

Background

2. I have represented many candidates, including President Bill Clinton, Vice President Al Gore, Presidential candidate John McCain, Mayor David Dinkins, Public Advocate Mark Green, Congressman Charles Rangel, and numerous state and local legislative and judicial candidates, advising about and litigating issues concerning ballot access in New York State, including overseeing the legal work involved in petition drives and making and defending challenges to designating petitions.

I have chaired the Election Law and State Legislation Committees of the Association of the Bar of the City of New York, and in that capacity conducted reviews of the selection procedures for Supreme Court and other offices in New York State. In addition, I served as a member of the Association of the Bar's Judiciary Committee, which reviews and rates the qualifications of judicial candidates.

3. From 1990 to 2000, and again from 2001 through this year, I served as chairman of the New York State Commission on Judicial Conduct, which receives and reviews written complaints of misconduct against judges of the courts of the Unified Court System, including State Supreme, County, Municipal, Town and Village Courts. In that capacity, I have developed knowledge of who sits on the various courts across the State and the relative levels of experience and professionalism of the judges on each court.

4. From 1970 until 1977, I was a District Leader in Manhattan. In 1977, I was elected to the New York City Council. I have also served as a delegate to Democratic judicial and presidential conventions. In addition, I have served as an adjunct member of the judiciary committee of the New York County Democratic County Committee.

5. Based on my experience, I am very familiar with how judicial delegates and alternates are selected, with how the parties' judicial conventions are conducted, and with the significant barriers placed before any Supreme Court candidate who seeks their party's nomination without the support of county party chairpersons.

6. I graduated from New York University Law School in 1972. I am admitted to practice in the U.S. District Courts for the Southern and Eastern Districts of

New York, the U.S. Courts of Appeals for the Second, Third, and Fourth Circuits, and the U.S. Supreme Court.

7. I have been asked to serve as an expert witness for the plaintiffs in this matter. I am not receiving any compensation for my testimony.

8. In the last four years, I testified by affidavit in the following case concerning the laws of ballot access in New York State: *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000). I had been retained to represent Senator John McCain, a plaintiff in that case, to obtain a place on the ballot in the Republican presidential primary election in New York State. I testified by affidavit concerning the petitioning rules that governed access to the ballot.

9. The opinions expressed below are based upon my 30 years of experience as an election lawyer representing candidates in New York State and federal courts and advising them on how to obtain a position on the ballot, my personal involvement as a judicial delegate and advisor to Supreme Court candidates seeking the Democratic Party's nomination, my knowledge of the election laws of New York and their practical application and significance in Supreme Court races, and my 16 years of service on the Commission on Judicial Conduct.

10. This declaration explains that (a) New York's Supreme Court selection statutes impose severe burdens on candidates seeking their party's nomination – more severe than for *any* other office in New York State; (b) no legitimate justifications exist for the current system or the burdens imposed on candidates; and (c) a system of direct primaries with reasonable petitioning requirements would better serve the interests of candidates and voters, and would better allow and encourage the finest lawyers and

judges to run for and serve as Supreme Court justices and thereby improve the quality of the judiciary.

The Unique Burdens Placed on Challenger Candidates for Supreme Court

A. Party Leaders' Control Over Delegate Selection

11. The first step in the Supreme Court selection process is the selection of judicial delegates and alternate delegates in each Assembly District ("AD") pursuant to N.Y. Elec. L. § 6-124. Ostensibly, the voters elect judicial delegates in an election in September (the same Election Day on which primary elections are held for other offices). With few exceptions, however, the county party leaders and local district leaders rather than the voters control the selection of judicial delegates and alternate delegates. Most of these delegates have strong ties to the party's district leaders who select them, and many delegates actually work for or are related to those leaders. In my experience, the district leaders almost always follow the wishes of the county party chairperson when it comes to voting for Supreme Court candidates at the convention. In turn, the delegates follow the wishes of the district leaders who have selected them and support the county party chairperson's chosen candidates.

12. In addition to the significant personal ties many delegates have to the party's leaders, two other factors are at work in ensuring that delegates support only the chairperson's candidates. First, the county party chairperson is, in effect, the gatekeeper for the substantial patronage positions that flow from the mayor or other officials of the same party down to the district leaders. The district leaders thus have a strong incentive to support the chairperson in his choice of candidates. Second, the district leaders work with the county party chairperson over long periods of many years;

it makes no sense to alienate the chairperson over a choice of Supreme Court candidate in a given year because there could well be opportunities for a district leader to plead a candidate's virtues to the chairperson in future years. For these reasons, district leaders and their delegates from each AD virtually always support the Supreme Court candidates backed by the county party chairperson at the judicial convention.

13. Any candidate for Supreme Court who does not have the support of the county party chairman in the largest county (or counties) in the Judicial District faces insurmountable barriers to electing sufficient delegates to compete for their party's nomination. These barriers are inherent in the current statutory selection system.

14. First, while Supreme Court justices are selected at large from judicial districts, the judicial delegates and alternates are selected separately from each AD. *See* N.Y. Elec. L. § 6-124. As a result, in order to obtain a meaningful majority of delegates willing to support a Supreme Court candidate not supported by the county party chairman, that candidate would have to organize, petition, and run slates of delegate and alternate delegate candidates in every AD and elect a majority of delegates across the Judicial District. Without victory by a majority of delegates, there is little purpose in running individual delegates who are willing to support a judicial candidate not selected by the party chairman. As a general matter, only the party leadership for an entire county possesses the resources and political organization to overcome this fragmented system of judicial delegate selection by AD.

15. Second, the Election Law grants to the political parties substantial control over the number of the delegates and alternate delegates at the judicial convention. Section 6-124 provides that "the number of delegates and alternates, if any,

shall be determined by party rules”; the number of delegates from each AD must be “substantially” proportional to the number of votes cast from that AD for the party’s candidate for governor in the most recent gubernatorial election. N.Y. Elec. L. § 6-124. The Democratic Party currently allots each AD one delegate and one alternate delegate, plus an additional delegate and alternate for each 2,500 votes cast for the Democratic gubernatorial candidate at the most recent general election. The Republican Party uses the same formula for most Judicial Districts. This statute-based formula produces such a large number of delegate positions to fill, particularly in urban judicial districts, that any attempt by a challenger candidate to elect a majority of delegates – the amount necessary to challenge the county party leadership’s delegates – is effectively doomed to failure. In addition, the massive size of the Judicial Districts – even those that include only a single county such as Manhattan or Queens – renders it all but impossible for a challenger candidate to recruit, gather signatures for, and elect delegates across the entire Judicial District.

16. Third, the current system precludes voters from choosing delegates based upon an indication on the ballot of which Supreme Court candidates they intend to support at the convention. Unlike the presidential primary system, delegate selection occurs *before* any Supreme Court candidates are even identified, much less chosen by anyone. Even if the timing were different, moreover, the September ballot on which such delegate candidates appear still would not indicate their support for a particular Supreme Court candidate. As a result, a Supreme Court challenger attempting to run delegates to support his candidacy at the convention would be required to inform the voters of a particular delegate’s or slate’s allegiance through expensive campaign advertising or

contacts with voters. In addition, the challenger would have to duplicate this public education campaign in each AD across the judicial district and for different delegate candidates.

17. Fourth, the petitioning rules with which a challenger Supreme Court candidate would have to comply to run delegate candidates in each AD across a judicial district are prohibitive. For an individual to petition onto the ballot as a Democratic or Republican candidate for delegate or alternate delegate, in most districts 500 signatures must be gathered from members of the individual's political party who live within the AD. N.Y. Elec. L. § 6-136(2)(i), (3).¹ When considered in the context of the rules restricting who may sign a petition, who may witness it, the short period (37 days) in which petitions may circulate, candidates must collect far more than the number of signatures required by statute to avoid successful challenges to their petitions. As I regularly advise all candidates for other offices, I would advise any challenger delegate candidate – or the Supreme Court challenger who is attempting to run delegate candidates – to gather two-and-a-half to three times the number required by statute in each AD.

18. Generally, a challenger Supreme Court candidate thus would need to gather at least 1,250 to 1,500 signatures per AD from registered party members in order to resist successful legal challenges. Moreover, the candidates must gather an equal proportion of those signatures from each of the many ADs within each judicial district. A prohibition against any party member signing more than one petition for a slate of

¹ The statute requires 500 signatures or five percent of the voters enrolled in the party in the AD, whichever is less. As of March 1, 2004, Democratic candidates must collect 500 signatures in every AD in the state because there are more than 10,000 enrolled Democratic voters in all of the 150 ADs across the state. Republicans must collect 500 signatures in all but 48 of the 150 ADs; 47 of those 48 ADs are within New York City, and the remaining district is the 87th AD, which lies directly north of the Bronx. See Exhibit A. Because Democratic candidates for Supreme Court prevail with few exceptions in New York City, for all intents and purposes any challenger candidate in either party who would have a real chance to prevail at the general election if nominated by their party must gather at least 500 signatures.

delegates makes it even more difficult to perform this geographical and organizational challenge; for the eligible pool of eligible signatories shrinks with each signature gathered. Gathering signatures and communicating with voters can be even harder in rural counties where significant distances separate communities.

19. The petitioning requirements for other offices in New York State are much less burdensome not just proportionately but even, in several cases, in absolute terms. For instance, the signature requirement for *statewide* office is only 15,000 signatures. N.Y. Elec. § 6-136. To obtain a ballot line as a major party candidate for mayor in New York City, a candidate must gather a statutory minimum of only 7,500 signatures. *Id.* Moreover, a mayoral candidate need not gather those signatures from any particular geographic areas within New York City. To obtain a ballot line as a major party candidate for *countywide* Civil Court judgeships in New York City, a candidate must gather a statutory minimum of only 4,000 signatures, again without geographic distributional requirements. N.Y. Elec. § 6-136. In Queens, for example, a countywide Civil Court candidate must gather only 4,000 signatures while a Supreme Court challenger candidate would have to gather 9,000 signatures *despite the fact that the 11th Judicial District and Queens are entirely coterminous jurisdictions.*

20. By contrast, the combined statutory minimums required to run delegate candidates just in the four Judicial Districts that cover New York City is 32,500 signatures – *i.e.*, more than four times the requirement for mayoral candidates, more than eight times the requirement for countywide judgeships in New York City, and more than twice the requirement for *statewide* office.² To run delegates in the Second Judicial District alone (covering only Brooklyn and Staten Island) would require a statutory

²There are 65 ADs within New York City. 65 x 500 signatures/AD = 32,500.

minimum of 12,000 signatures – and a practical minimum of 30,000-36,000 signatures -- drawn equally from each of the 24 ADs within the two counties.

21. In Nassau County, with a population of over 1.3 million, the signature requirement for county court is only 2,000 signatures gathered anywhere in the county. *See Elec. Law § 6-136(2)(d)*. In fact, the same requirement applies to all county court seats outside New York City with over 250,000 residents. By contrast, to run delegates in the 10th Judicial District that covers Nassau and Suffolk Counties would require a statutory minimum of 10,500 signatures gathered in equal parts from each of 21 ADs.

22. Similarly, the signature requirement for a Congressional District, which is approximately 40% of the size of an average Judicial District, is, in most cases, only 1,250. *N.Y. Elec. L. § 6-136(2)(g)*.

23. These are just a few of the many comparisons one could cite to demonstrate that the cumulative petitioning requirements faced by challenger Supreme Court candidates (to put delegate/alternate candidates on the ballot) are severely and irrationally burdensome. No other office within New York State, moreover, requires candidates to complete this kind of two-step gauntlet just to compete for a place on a ballot. All other state elective offices provide a primary election for voters to choose among candidates from their party, and no other office provides just a single route other than petitioning to get on the ballot as a major party candidate. There is simply no legitimate rationale for the excessive burdens placed on Supreme Court candidates, particularly where New York State has established in statute much less burdensome petitioning requirements and a primary election for candidates for other offices – even for

offices that cover the same or much larger jurisdictions.

24. In addition to the costs of petitioning, moreover, the Supreme Court challenger candidate would also be required to expend substantial funds to hire election lawyers to review the petitions from each of the ADs for accuracy before submitting them to the board of elections and to defend those petitions against challenges in court.

25. The challenge process is extremely byzantine and costly, particularly where multiple jurisdictions are involved as they would be under the Supreme Court convention system.

26. The process begins with the preparation and binding of petitions. If one assumes for the sake of argument that the Supreme Court challenger candidate possessed the organizational capacity to run slates of delegates in each AD – an entirely counterfactual assumption in my view – then he or she would have to retain lawyers to prepare, review, and bind separate petitions in each of the ADs across the Judicial District. Once completed, the attorneys would then file these petitions with the New York City Board of Elections.

27. Anyone wishing to object to petitions must file “general” and then “specific” objections to identified signatures. The staff of the board of elections reviews such objections and the commissioners of the board of elections then consider the validity of the petition.

28. But a challenger candidate would be reckless in awaiting the results of these administrative proceedings. Indeed, to preserve the right to argue for the validity of the maximum number of signatures, a candidate needs to file a prophylactic

lawsuit in Supreme Court before such administrative proceedings have been completed. Such a lawsuit must be filed and served within 14 days after the last date to file petitions, N.Y. Elec L. § 16-102(2), just four days after the last day to file objections and long before the board of elections has completed its administrative review. The following hypothetical explains the rationale for this approach:

- § Assume that Candidate A needed 500 signatures in the X AD, and that he filed 600 signatures;
- § After timely filing his general objection, Candidate B then filed specific objections to 175 signatures;
- § The Board of Election invalidates 75 of the 175 challenged signatures, but rejects B' s challenge to the remaining 100 challenged signatures;
- § At the end of the administrative phase, then, A has 525 valid signatures – more than enough to achieve ballot status;
- § B presses his claim in Supreme Court, arguing that the Board erroneously failed to invalidate 100 challenged signatures;
- § Here is the counterintuitive part: In B' s suit, A is *prohibited* from arguing that the Court should reinstate *any of* the 75 signatures struck by the Board; New York law is settled that A lacks standing to seek this relief *unless A has timely commenced his own suit*. *Suarez v. Sadowski*, 48 N.Y.2d 620, 421 N.Y.S.2d 50 (1979); *Krueger v. Richards*, 59 N.Y.2d 680, 463 N.Y.S.2d 413 (1983).
- § Because A plainly cannot afford to forfeit the right to argue for the validity of the maximum number of signatures (here 600, rather than the 525 he would be limited to in defending the challenger's lawsuit), the prudent course is to file his own prophylactic lawsuit.

29. A challenger Supreme Court candidate would thus need to be prepared with a legal team to file such prophylactic suits for every slate of delegate candidates against whom the county party leaders have filed general objections, *i.e.*, in all or substantially all of the ADs in the Judicial District. Moreover, such litigation almost

always involves appeals to the Appellate Division of the Supreme Court and, at times, to the New York Court of Appeals. In other words, in my view, a serious Supreme Court challenger would be required to recruit and pay for a large legal team to handle, on a few hours' notice, a series of separate administrative and court proceedings for each of the many slates of delegate candidates across a Judicial District.

30. Preparing, reviewing, and defending the necessary petitions from challenges, and commencing and defending the inevitable spate of state court litigation that follows, could easily cost the challenger Supreme Court candidate \$200,000 or more in legal fees and related costs. Indeed, based on my experience, in my opinion the cost could far exceed this estimate.

31. By contrast, such legal representation is generally provided free of charge to those Supreme Court candidates who are backed by the county party leadership which also, through its district leaders, provides the resources to mount challenges on an AD-by-AD basis.

32. Litigation under the Election Law consumes more than money. It is also extremely labor intensive. Based on my experience, a challenger's campaign would have to devote 4 to 6 of its best staff members *in each AD* to review the accuracy of the board of elections Clerk's determinations as to the validity of signatures.

33. Significantly, none of the burdens outlined above include any of the substantial costs to run separate delegate campaigns in each of the ADs if a challenger succeeds in getting them onto the ballot in each AD.

34. Moreover, on Election Day a challenger Supreme Court candidate would have to devote significant resources to get-out-the-vote ("GOTV") efforts as well

as monitoring of polling places by both volunteer and paid attorneys. In my experience, a challenger who is not the beneficiary of the volunteer attorneys provided by the county's party leaders must instead rely on paid attorneys and workers for a substantial portion of his Election Day monitoring team. This would add even more legal costs to the burdens faced by such a candidate.

35. In sum, the barriers to Supreme Court challenger candidates at this stage in the process – both financial and organizational – severely burden their efforts to obtain their party's nomination and party members' rights to choose among candidates even if they have significant voter support.

36. For all of these reasons, most judicial delegates and alternates never even appear on any ballot because they are not opposed by other candidates. In my career in New York politics, delegate races have been extremely rare and, when they have occurred, they have only been the result of localized battles for control between two factions within the Democratic Party rather than the product of a challenger Supreme Court candidate's efforts to be considered by party members.

37. In the mid-1970s, as a District Leader I was involved in just such a battle within the Democratic Party in Manhattan. In my 30-year involvement in politics and election law, this is the only example I am aware of in which challenger Supreme Court candidates were able to compete for and obtain their party's nomination, and it was only possible because of a large-scale split within the party itself. I was in the leadership of a reform faction within the party, known then as the New Democratic Coalition, which was attempting to get progressive, well-qualified candidates elected to offices in New York City. In 1976, we managed to recruit several slates of delegate and alternate

candidates in Manhattan for the judicial convention. (At that time, Manhattan and the Bronx were included within a single Judicial District; now they are separate Districts unto themselves.) Because political organizations affiliated with the New Democratic Coalition existed in many districts within the Judicial District, we were able to recruit slates in most of the ADs within the Judicial District. We recruited a slate of extremely well-qualified Supreme Court candidates – Richard Wallach, Israel Rubin, Fritz Alexander, John Carro, and Ernst Rosenberger – all of whom ultimately became judges of the Appellate Division and one of whom served on the Court of Appeals.

38. To prevail at the convention, we needed at least 100 votes for a majority of delegates. As in all judicial conventions, the delegates who were not elected as challengers through our efforts followed the wishes of their District Leaders and, ultimately, of their County Party Chairman. The best example of that loyalty is that the Latino judicial delegates from the Bronx were prevented by the Bronx County Chairman from voting for the only Latino candidate in contention, John Carro. Instead they were required to vote for the Chairman's slate of Supreme Court candidates. Still, because of the Democratic Party's factional split, our coalition succeeded in electing enough delegates and alternates to win the vote at the convention against the two counties' party leadership. Without such an internal power struggle, no such insurgency could prevail under the current statutory selection system because the burdens on candidates are simply too severe.

B. The Judicial Convention

39. In my experience, as a result of the barriers I described above, the

judicial conventions have almost always served to rubber stamp the county party chairman's choice of Supreme Court candidates for the party's nomination. Judicial candidates who do not have such backing have virtually no realistic opportunity to earn a place on the ballot at the convention.

40. The convention itself is designed to ensure that the county party leadership controls which candidates are nominated. As a contrast, at the statewide nominating conventions held by the Democratic Party in June to select the nominees for the primary election in September, candidates for statewide office can obtain a place on that ballot by gaining 25 percent of the state committee members' votes. If a candidate does not obtain 25 percent, he or she can still get on the ballot by petition. A Supreme Court candidate, however, must receive at least a majority of the delegates' votes to obtain the party's nomination at a judicial convention. Absent a majority, there is no opportunity to petition or otherwise get on the ballot. Because judicial delegates are virtually always loyal to the county party leaders in their votes because of both the many personal and professional connections between those leaders and the delegates and the pressure those leaders can bring to bear on delegates to ensure that they vote in accordance with the leaders' wishes, challenger Supreme Court candidates have no realistic opportunity to compete at the convention.

41. Significantly, the other New York races that involve conventions (in those cases, to select primary candidates) do not require the election of nearly as many delegates as do the Supreme Court selection requirements. Congressional districts are typically more than three times larger than ADs, yet only five to six delegates are selected per congressional district for Democratic presidential primaries and three per

congressional district for Republican primaries. Similarly, typically only two state committee members are elected from each AD in part to serve as delegates to the parties' nominating conventions in June for statewide candidates. By contrast, the current Supreme Court selection system requires an average of over six delegates per AD in the Second Judicial District and more in specific ADs – or more than 150 delegates from the entire Judicial District. In short, the massive number of judicial delegates required for the judicial conventions renders it that much more difficult for challenger Supreme Court candidates to recruit, run, and elect their own supportive delegates.

No Legitimate Justification for the Burdens on Candidates

42. In my opinion, no legitimate justifications exist for the current Supreme Court selection system or the severe burdens it imposes on challenger candidates. In *all* of the other elected judicial and non-judicial offices in New York State, the State has established that direct primary elections with more reasonable petitioning requirements satisfy any state interests, and avoid any potential concerns, that may be involved in nominating candidates for elective office. Thus, there is no conceivable rationale – except the illegitimate desire to preserve the stranglehold on Supreme Court nominations held by county party chairmen – for the unique burdens placed on Supreme Court candidates.

43. To the contrary, the current system contravenes four significant interests, including what must be considered the most compelling state interest in this context:

- First, as I have already noted, the current statutory rules governing delegate selection for a judicial convention without any primary election rob well-qualified

candidates of any realistic opportunity to compete for their party's nomination without the support of their county's party chairman.

- Second, the parties' members are deprived of any input into their party's selection of nominees.
- Third, while many talented Supreme Court justices have been and continue to be selected, the current system inevitably rewards candidates more for their loyalty and service to their political party leaders than for their legal experience, integrity, or judicial temperament. While the election of judges inherently creates a tension between judicial independence and political campaign success, New York's closed system without a primary election not only lacks any kind of transparency to voters or party members but also ensures that only candidates who have obtained the party leaders' backing will get on the ballot. As a result, the pool of truly eligible candidates is severely limited and cannot include many talented lawyers who have spent their careers focusing on legal work rather than political party service. The quality of the Supreme Court bench as a whole thus suffers.
- Finally, the New York State Constitution expressly requires that Supreme Court justices "shall be chosen by the electors [*i.e.*, the voters] of the judicial district in which they are to serve." N.Y. Const. art. VI, § 6. In my view, no state interest could be more compelling than a constitutional command of this kind. Yet the current system does not allow the voters any meaningful choice of Supreme Court candidates.

A Direct Primary System With Reasonable Petitioning Requirements Would Better Serve Candidates, Voters, and the State

44. Based on my many years of experience representing candidates for

judicial and other offices in New York and my service on the Commission on Judicial Conduct, I believe that a direct primary election system with reasonable petitioning requirements would not only remedy the severe burdens imposed by the current selection system on candidates and voters, but also better serve the principal interests that should be served by any judicial selection system.

45. First, a direct primary system with reasonable petitioning requirements would remove the truly severe burdens now faced by challenger candidates. It would allow well-qualified lawyers and judges who would not be able to obtain the backing of their party's leaders to earn the opportunity to compete for their party's nomination by demonstrating a modicum of support by gathering signatures among voters in their communities. Local bar associations and other organizations would be able to review and rate their qualifications and, where appropriate, to endorse specific candidates before the primary election. Such information, along with that disseminated by the candidates themselves, could then be used by the party's voters and leaders to choose on Election Day. In addition, if they chose to do so, the major political parties could even hold judicial conventions at some point prior to the September primary election as they do for statewide offices to provide additional paths onto the ballot based on support among state committee members. Such a system would provide much broader access to the ballot for candidates, and would thus provide much greater choice for voters. Direct party primaries will also enhance the transparency of the candidate selection process, with all party members ultimately able to make an independent judgment on who is best qualified among qualified candidates.

46. A system of direct primaries would also likely enhance the quality

of candidates and, in turn, the judiciary itself. This is true not only because the potential pool of candidates who could obtain access to the ballot would be expanded, but also because the criteria used to select the parties' nominees could expand to include important qualifications – such as legal experience and judicial temperament – that too often matter less than political service in the closed convention system. Moreover, the diversity of the candidates for Supreme Court would likely be enhanced by a direct primary system that did not rely, as the current system does, on the commitment of a handful of county party leaders to back a diverse set of candidates for nomination.

47. In addition, the direct party primary would help build public understanding of the judicial election process as well as public confidence in New York State's judiciary. In 2003, Chief Judge Judith S. Kaye of the New York Court of Appeals appointed a Commission to Promote Public Confidence in Judicial Elections chaired by John Feerick. For its Interim Report issued in December of that year, the Commission funded a public opinion survey conducted by the Marist Institute. According to the survey, 66% of New York State's voters either believe that Supreme Court justices in New York are appointed or are unsure whether they are elected or appointed. By contrast, New York's voters are considerably more aware of their right to vote for County and Civil Court judges – offices where nominees are chosen through direct primary elections rather than judicial conventions – despite the fact that these courts have a more limited jurisdiction. According to the survey, 60% of New York's voters correctly believe that county and civil court judges are elected, while only 19% erroneously believe that such judges are appointed. In other words, voters' awareness of their right to elect corresponds directly to whether they are, in practice, allowed to vote effectively in the

selection system provided by New York State's Election Law. I believe that voters' understanding of and participation in the election of Supreme Court justices would increase significantly if a direct primary election system replaced the current system.

48. For all of these reasons, I believe that a direct primary election system with reasonable petitioning requirements would not only redress the severe and unjustified burdens placed on candidates and voters by the current system, but also better serve all of the relevant interests that must be served by any sound judicial selection system.

I swear under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
June 3, 2004


HENRY T. BERGER