

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----X
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.

Index No. CV 04-1129 (JG)

NEW YORK STATE BOARD OF ELECTIONS; NEIL W. KELLEHER,
CAROL BERMAN, HELENA MOSES DONOHUE, AND EVELYN J.
ACQUILA, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS
OF THE NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK
REPUBLICAN STATE COMMITTEE, ASSOCIATION OF JUSTICES OF THE
SUPREME COURT OF THE STATE OF NEW YORK, ASSOCIATION OF
JUSTICES OF THE SUPREME COURT OF THE CITY OF NEW YORK,
AND JUSTICE DAVID DEMAREST, INDIVIDUALLY, AND AS PRESIDENT
OF THE STATE ASSOCIATION,

Defendant-Intervenors,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory Intervenor.

-----X
**DEFENDANTS' PROPOSED CONCLUSIONS OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

AKIN GUMP STRAUSS
HAUER & FELD LLP
590 Madison Avenue
New York, NY 10022
*Counsel for the New York
County Democratic Committee*

ARTHUR W. GREIG, ESQ.
401 Broadway, Suite 1902
New York, NY 10013
*Counsel for the New York
County Democratic Committee*

ATTORNEY GENERAL OF THE
STATE OF NEW YORK
120 Broadway – 24th Floor
New York, NY 10271-0332
Statutory Intervenor

ROBERT ALAN MUIR
ASSOCIATES LLP
205 Montague Street, Suite 400
Brooklyn, NY 11201
*Counsel for New York State
Republican Committee*

SPECIAL COUNSEL TO
STATE BOARD OF
ELECTIONS
40 Steuben Street
Albany, NY 12223-1650
*Counsel for State Board of
Elections*

STROOCK & STROOCK
& LAVAN LLP
180 Maiden Lane
New York, NY 10038
*Counsel for Associations of New
York State Supreme Court Justices
in the City and State of New York,
Honorable David Demarest, J.S.C.*

October 26, 2004

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INTRODUCTION

1. This is a 42 U.S.C. Section 1983 action for declaratory and injunctive relief by individual voters and judicial candidates seeking to enjoin the New York Board of Elections' enforcement of three New York State Election Law statutes, N.Y. Elec. L. Sections 6-106, 6-124 and 6-158 (the "Judicial Nominating Provisions"), on the grounds that these statutes deny the equal protection of the law and violate the First and Fourteenth Amendments by imposing undue burdens on candidates for State Supreme Court justice seeking the nomination of the Democratic or Republican Party. Plaintiffs allege that they will suffer irreparable harm unless the Court: (i) declares the Election Law statutes governing nomination of Supreme Court Justices unconstitutional, both facially and as applied, (ii) directs the New York State Legislature to repeal these statutes and pass new legislation within 90 days of the Court's ruling and (iii) if the Legislature does not act, order that the 2005 election of justices of the Supreme Court be governed by a primary election.

I. THE HEIGHTENED STANDARD FOR GRANTING A PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTES

2. A preliminary injunction "is an extraordinary and drastic remedy which should not be routinely granted." *Medical Soc. of the State of N.Y. v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977). Where, as here, "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," a preliminary injunction should *not* be granted "unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." *Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *see also No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (under such circumstances, a preliminary injunction "should be granted only if the moving party meets the more rigorous likelihood-of-success standard"); *Eisberg v. Dutchess County Legis.*, 37 F. Supp.

2d 283, 285 (S.D.N.Y.), *aff'd*, 181 F.3d 82 (2d Cir. 1999) (applying heightened standard in upholding constitutionality of New York Election Law provision).

3. This heightened standard has been described as recognizing that “governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.” *Able*, 44 F.3d at 131; *see also Toia*, 560 F.2d at 538 (“where the grant of interim relief may adversely affect the public interest in a manner which cannot be compensated for by an injunction bond, plaintiffs undertake an even greater burden of persuasion”). Here, Plaintiffs seek to enjoin the most fundamental of all governmental action, legislative activity. The judicial convention system is the product of a statutory scheme that was authorized by the New York State Constitution, enacted by the New York State Legislature and signed into law by the Governor in 1921.

4. Where, as here, the injunction sought “will alter rather than maintain the status quo the movant must show ‘clear’ or ‘substantial’ likelihood of success.” *Rodriguez v. DeBuono*, 175 F.3d 227, 223 (2d Cir. 1999) (emphasis added).¹ “[L]ike a mandamus, [a mandatory injunction] is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion,” *Heckler v. Lopez*, 463 U.S. 1328, 1333-34 (1983) (quoting *Morrison v. Work*, 266 U.S. 481, 490 (1925)), and should “issue[] to remedy a wrong, not to promote one,” *Morrison*, 266 U.S. at 490. *See also Tom Doherty Assocs., Inc. v.*

¹ Other Circuits have suggested that even when a constitutional violation is established, courts must first grant the proper state authorities the opportunity to devise an appropriate remedy, and that “[f]ederal courts may impose their own remedy only if the responsible state authorities fail to take corrective action within a reasonable time.” *Faulkner v. Jones*, 10 F.3d 226, 240 (4th Cir. 1993) (citing *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988)).

Saban Entm't, Inc., 60 F.3d 27, 28 (2d Cir. 1995) (where “injunction will provide all the relief sought and that relief cannot be undone” motion for such relief is held to a higher standard).

5. The record demonstrates that Plaintiffs have failed to meet the minimum standards for a preliminary injunction, much less the heightened standards that apply under the circumstances of this case.

II. PLAINTIFFS CANNOT ESTABLISH THAT THEY WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION THEY SEEK IS DENIED

A. There Is No Irreparable Harm Because Plaintiffs Have Ballot Access

6. Plaintiffs claim that unless mandatory injunctive relief is granted, those Plaintiffs who want to run for Supreme Court justice and those who want to vote for such candidates will be precluded from doing so. This is simply not true. Plaintiffs have more than adequate ballot access through several means.

7. First, they have the opportunity to vie for nomination at the convention of a major political party. The requirements for winning the nomination of one of the major political parties are identical for all would-be candidates – they must garner a majority vote of judicial delegates.

8. For example, Plaintiff Lopez Torres sought the nomination of the Democratic Party in the Second Judicial District in 2002 and in 2003. Although she did not win, Plaintiff Lopez Torres had the same access to the Party’s judicial nominating convention as every other candidate. She had her name placed in nomination and her candidacy was voted upon. Thus, Lopez Torres had the convention equivalent of ballot access at the nominating phase.

9. Second, under New York law, even candidates who belong to a major political party are not precluded by reason of such party affiliation from seeking a place on the general election ballot as the nominee of another political party. *See* Election Law Sections 1-104 and 6-106. Thus, Plaintiff Lopez Torres received the Working Families Party nomination. Lopez

Torres' nomination by the Working Families Party, in fact, was governed by the very Judicial Nominating Provisions here being challenged. Plainly, the Judicial Nominating Provisions, in themselves, afford political opportunity for ballot position and do not operate to "freeze the political status quo," either facially or as applied. *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

10. Third, under New York Law, candidates who are not nominated by a political party will be not be foreclosed from consideration in the general election. Such candidates, regardless of whether they try to win a party nomination through the judicial convention, may still petition onto the general election ballot. See N.Y. Election Law Sections 6-138 and 6-142.2. To enable his or her name to appear on the general election ballot, a candidate for Supreme Court justice in New York City has the option of collecting 4,000 signatures and filing an independent nominating petition. *Id.* at Section 6-142.2(c). Candidates for Supreme Court justice in judicial districts outside New York City are required to collect only 3,500 signatures. *Id.* at Section 6-142.2.

11. Finally, Sections 7-104.7 and 7-108.8 of the New York Election Law provide a write-in alternative, enabling voters to associate with any candidate of their choosing by writing a candidate's name in the space provided on the general election ballot. See *Storer v. Brown*, 415 U.S. 724 (1974) (reviewing entire California electoral scheme, finding that independent candidates who failed to qualify for the ballot could "nevertheless resort to the write-in alternative provided by law," *id.* at 737 n.7, and thus holding the provisions did not make it "virtually impossible" for new candidates and parties to appear on the ballot, *id.* at 728); *Jenness*, 403 U.S. at 439 (stressing that Georgia ballot access statute freely provided for write-in votes, and concluding the restrictions were not unreasonable because "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life").

12. In determining whether constitutional rights have been violated, the United States Supreme Court has repeatedly looked to whether challenged electoral schemes provide alternative means for accessing the ballot. (*See* discussion *infra* at VI). This approach considers the burden imposed by a challenged statute in light of the *totality* of a state's election scheme. *See Jenness*, 403 U.S. at 441 (rejecting Equal Protection challenge based on existence of alternative methods of accessing general election ballot); *Storer*, 415 U.S. at 746 n.16 (recognizing that California law provided adequate alternative paths of ballot access, by primary or nominating petition, and that candidates simply failed to qualify for the general election ballot under either alternative); *Lubin v. Panish*, 415 U.S. 709 (1974) (determining that, in order to be constitutional, election law provisions requiring filing fees must necessarily provide indigent candidates with an alternative means, such as petition, of accessing the ballot); *Burdick v. Takushi*, 504 U.S. 428, 436 n.4-5 (1992) (reiterating *Jenness* Court's determination that alternative means to access ballot prevents "freeze [of] the status quo" and distinguishing *Anderson v. Celebrezze* on grounds that the election scheme before that Court effectively foreclosed independent candidates from accessing the general election ballot).

13. The Second Circuit, in following the "totality approach," has directed that "[t]he burden imposed by the challenged regulation is not [to be] evaluated in isolation, but within the context of the state's overall scheme of election regulations." *Lerman v. Board of Elections in the City of New York*, 232 F.3d 135, 145 (2d Cir. 2000), *cert denied*, 533 U.S. 915 (2001); *see also Larouche v. Kezer*, 990 F.2d 36, 39 (1993) (directing that "[u]nder the totality approach, if *either* alternative would be constitutional standing alone, the other must be viewed as broadening the opportunities for ballot access and is a fortiori constitutional") (emphasis added).

14. In light of the multiple alternatives paths to the general election ballot provided under New York Election Law, Plaintiffs will not be irreparably harmed by denial of the extraordinary and drastic relief they seek.

B. The Parties' Counterbalancing First Amendment Associational Rights Will Be Harmed By The Grant Of A Preliminary Injunction

15. In considering Plaintiffs' request to enjoin enforcement of New York's judicial convention system, the Court must weigh the countervailing constitutional rights of the Defendants and others which would be harmed by the issuance of an injunction.

16. The Supreme Court has repeatedly held that there is a constitutionally protected right of association of political parties and their members, including the right to determine the process for selecting nominees, that must be respected. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986).

17. The Supreme Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs," *Tashjian*, 479 U.S. at 214-215, which "necessarily presupposes the freedom to identify the people who constitute the association and to limit the association to those people only," *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 108 (1981). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Id.* at 122 n. 22 (quoting L. Tribe, *American Constitutional Law* 791 (1978)); *see also Jones*, 530 U.S. at 574-575.

18. The Supreme Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political

party ‘select[s] a standard bearer who best represents the party’s ideologies and preferences.’” *Jones*, 530 U.S. at 575 (quoting *Eu*, 489 U.S. at 224 (internal quotations omitted)). Indeed, 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 in the community.’” *Jones*, 530 U.S. at 575 (quoting *Tashjian*, 479 U.S. at 216).

19. In *Jones*, 530 U.S. 567 (2000), the Supreme Court invalidated a state statute that conflicted with the rules of four political parties prohibiting individuals who were not party members from voting in the parties’ primaries. According to the Court, it is for the party, not the State, to determine whom it will permit to vote in its primaries because “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.” *Jones*, 530 U.S. at 575; *see also Tashjian*, 497 U.S. 208, 224 (1986) (“a State, or a court, may not constitutionally substitute its own judgment for that of the Party”); *Wisconsin*, 450 U.S. 107, 122-24 (States cannot constitutionally compel a political party to seat a delegation in a way that violates party rules); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1959) (“[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents”). Here, rank and file party members vote for judicial delegates directly, thus determining themselves who will serve as their representatives to vote for candidates for Supreme Court justice at the respective parties’ judicial district nominating conventions.

20. Plaintiffs’ purported aim of protecting party members from the influence of their own leadership is exactly the type of paternalistic rationale that the Supreme Court has rejected. In *Eu*, for example, the Court found that California could not justify its ban on party endorsements in primaries on the ground that the ban protected the party from “pursuing self-destructive acts.” 489 U.S. at 227. Indeed, the Supreme Court has drawn a clear distinction: “a

State may enact laws to ‘prevent disruption of political parties from without’ but not . . . laws ‘to prevent the parties from taking internal steps affecting their own process from the selection of candidates.’ *Id.* at 215 (quoting *Tashjian*, 479 U.S. at 224).

21. Election Law Sections 6-106 and 6-124, whose enforcement Plaintiffs seek to enjoin, are among the provisions of the Election Law which are directly governed by party rules. *See Balletta v. Secretary of State of the State of N.Y.*, 65 A.D.2d 583, 584 (2d Dep’t 1978) (an “examination of these provisions of the Election Law dealing specifically with judicial conventions specify particular areas which must be governed by party rules,” including Sections 6-106 and 6-124). Under these provisions, the process of selecting judicial nominees for Supreme Court indisputably implicates the associational freedoms of members of the Democratic and Republican parties. Clearly, the act of selecting judicial delegates, just as the act of voting for the relevant party’s nominee(s) at the judicial delegate convention, exemplifies the associational freedoms which the Supreme Court has vigorously protected under the First Amendment.

22. The relief sought on behalf of a so-called “challenger candidate,” which Plaintiffs have alternately defined as a candidate without support from party leaders or as a candidate without any party support, directly collides with a party’s First Amendment associational right to chose its nominee.

III. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF ANY OF THEIR CLAIMS BECAUSE THEY LACK STANDING AND BECAUSE THE COURT CANNOT AFFORD COMPLETE RELIEF

A. Plaintiffs Lack Standing

23. The constitutional minimum of standing, “an essential and unchanging part of the case-or-controversy requirement of Article III,” contains three elements: (1) “the plaintiff must have suffered an . . . invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent,” (2) “a causal connection between the injury and the conduct complained of” must exist and be “fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court” and (3) “it must be ‘likely’, as opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

24. Plaintiffs lack standing because there is no injury, either actual or imminent. The statutes which Plaintiffs seek to enjoin do not foreclose those Plaintiffs or, for that matter, other eligible persons who want to run for Supreme Court justice and those who want to vote for such candidates from doing so. The Judicial Nominating Provisions provide any minimally qualified candidate the opportunity to compete for their party’s nomination, to access judicial delegates, have their name placed in nomination and their candidacy voted upon at the judicial nominating convention. In addition to seeking the nomination of a major political party, New York Election Law affords any would-be judicial candidate the option of: (i) petitioning directly onto the general election ballot under New York Election Law Section 6-138; (ii) running as a minor party candidate under New York Election Law Sections 1-104 and 6-106; or (iii) having a vote cast for them as a write-in candidate under Sections 7-104.7 and 7-108.8.

25. Therefore, judicial conventions are not determinative of who may seek election as a New York Supreme Court justice. Voters across New York State ultimately choose their candidates for office during the general election. Because candidates have the ability to appear on the general election ballot, as Plaintiff Lopez Torres did, the judicial convention system does not infringe upon the First Amendment right to associate through the vote.

26. Neither of the proffered classifications on which Plaintiffs' Equal Protection claim depends, in fact, constitutes a suspect class. Neither a classification by elective office nor a classification based on a candidate's level of party support are suspect. Nor is the fundamental right to vote implicated in this case since Plaintiffs have adequate ballot access.

27. Because no actual or imminent harm has been shown, Plaintiffs lack standing.

B. The Court Cannot Accord Complete Relief To Plaintiffs

1. Plaintiffs Have Failed To Join Indispensable Parties

28. An essential element of the inquiry as to whether Plaintiff has made out a case or controversy within the meaning of Article III is whether the injury alleged is likely to be redressed by the requested relief. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). This same principle is embodied in Rule 19(a) and 12(b)(7) of the Federal Rules of Civil Procedure. Rule 19(a) states in relevant part: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter shall be joined as a party in the action if . . . in the person's absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a).

29. If the Plaintiff has failed to join a party or parties without whom complete relief cannot be granted among those already parties, the action is subject to dismissal pursuant to Rule 12(b)(7). *See Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70 (2d Cir. 1984).

30. Here, even if there were injury, such injury would not be adequately addressed by a favorable decision because Plaintiffs have failed to join indispensable parties. Among others, Plaintiffs have failed to join the New York State Democratic Party. The statutory provisions that Plaintiffs are challenging are contained not only in the statutes that Plaintiffs seek to enjoin, but also in the rules of the Democratic Party of The State of New York, which is not a party to this case.

31. Article II, Section 5 of the Rules of The Democratic Party of The State of New York, provides:

Delegates and Alternate Delegates to a State Convention and to the Judicial District Convention for the nomination of Party Candidates for the office of Justice of the State Supreme Court shall be chosen by the election of such Delegates and Alternate Delegates from each Assembly District in the State as follows: One Delegate and one Alternate Delegate from each Assembly District in the State, and one additional Delegate and one additional Alternate Delegate from each Assembly District in the State for each two thousand five hundred votes or fraction of two thousand five hundred votes cast on the Democratic line in such Assembly District for the Party candidate for Governor at the last preceding general State Election.

32. Party rules will still be operative even if the statutory provisions are struck down because, as the Supreme Court has made clear, a state cannot vitiate the rules by which a political party selects its nominee. *See, e.g., Jones*, 530 U.S. 567.

33. Given the recognition that political parties have associational rights and that it is the parties, not the states, that have the right to control the selection of their nominees, any ruling that fails to include the Democratic Party will be wholly ineffectual. This is because the parties could still lawfully conduct their conventions pursuant to the Party's rules for selection of delegates and alternate delegate to the Judicial District Convention. *See Wymbys v. Republican State Executive Committee of Florida*, 719 F.2d 1072, 1082 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (dismissing case as nonjusticiable where plaintiffs challenging rule of

Executive Committee of the Florida Republican Party for selecting delegates to Republican National Convention failed to name Republican National Committee as defendant, concluding: “to provide the relief Wymbs has requested would require [the] Court to engage in political party policy making beyond its role in society and beyond our ken as article III judges”).

2. The Legislature Cannot Repeal The Judicial Nominating Provisions Or Pass New Legislation Relating To Election Of Supreme Court Justices Without Preclearance Under The Voting Rights Act

34. Under the Voting Right Act “covered” jurisdictions are required to obtain preclearance of any changes in election laws or regulations that affect or impact voting. *See* Voting Right Act § 5. Based upon a statutory formula set forth in Section 4 of the Act, New York State is not covered as a whole, but three counties within New York are covered. *See* 22 U.S.C. Section 1973b. The three covered counties are New York County, Kings County and Bronx County. *See* 36 FR 5809, 40 FR 43746.

35. The statewide changes to New York’s election laws governing nomination of Supreme Court justices would impact these three county subdivisions of the state and, therefore, would require preclearance by the Civil Rights Division of the United States Justice Department. *See Lopez v. Monterey County*, 525 U.S. 266 (1999). Any change affecting voting in these three counties, even if it ostensibly expands voting rights, would have to be pre-cleared.

36. Plaintiffs’ requested relief, requiring the New York State Legislature to repeal the Judicial Nominating Provisions and to pass new legislation, therefore, could not be fulfilled without preclearance under the Voting Rights Act, which has not been sought.

IV. AS A THRESHOLD MATTER, PLAINTIFFS' FACIAL CHALLENGE TO THE STATUTES MUST FAIL

A. Standard For Raising A Facial Challenge

37. Plaintiffs purport to challenge the three New York State Election Law statutes, N.Y. Elec. L. Sections 6-106, 6-124 and 6-158, both facially and as-applied. By raising a facial challenge to the statutes, Plaintiffs confront “a heavy burden” in advancing their claim. *Rust v. Sullivan*, 500 U.S. 173, 183 (1991).

38. The Second Circuit has determined that “[i]n order to succeed on a facial challenge to a statute, the plaintiff, must . . . ‘establish that no set of circumstances exists under which the [challenged] Act would be valid.’” *Cranley v. Nat’l Life Ins.*, 318 F.3d 105, 110 (2d Cir. 2003) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). New York’s Court of Appeals has stated the standard as follows: “A party mounting a facial constitutional challenge bears a substantial burden of demonstrating ‘that in any degree and in every conceivable application,’ the law suffers wholesale constitutional impairment.” *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003).

39. “Facial challenges to legislation are generally disfavored.” *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990). The Supreme Court has traditionally required that challenges to the constitutionality of government action proceed on an “as-applied” basis. See *United States v. Raines*, 362 U.S. 17, 26 (1960); *Warth v. Seldin*, 422 U.S. 490 (1975).

B. Standard For Facial Challenge Under The Overbreadth Doctrine Applicable To First Amendment Claims

40. An exception to the general standard for facial invalidation has been recognized in the context of First Amendment freedom of speech and associational rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The Supreme Court has consistently required plaintiffs to demonstrate “substantial overbreadth” before resorting to the “strong medicine” of facial

invalidation of a statute on First Amendment grounds. *Broadrick*, 413 U.S. at 613; *see Houston v. Hill*, 482 U.S. 451, 458 (1987) (“Only a statute that is substantially overbroad may be invalidated on its face”).

41. Under the overbreadth doctrine, Plaintiffs must demonstrate a “substantial risk” that application of the challenged provision will result in suppressing First Amendment rights. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Once raised, an overbreadth facial challenge may succeed if a “substantial number” of applications against third parties would be unconstitutional. *New York v. Ferber*, 458 U.S. 747, 769-70 (1982).

42. However, before applying the “strong medicine” of facial overbreadth invalidation, the Court has weighed the benefits of facial invalidation of a statute against the societal costs of blocking a statute in its numerous constitutional applications. *Broadrick*, 413 U.S. at 613. “Application of the overbreadth doctrine . . . has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.” *Id.*

43. Furthermore, “[p]artial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid.” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985).

C. The Statutes Are Facially Valid

44. The *Salerno* test for facial invalidation applies to Plaintiffs’ Fourteenth Amendment claim, while the overbreadth doctrine applies to Plaintiffs’ First Amendment claim.

1. Plaintiffs’ Fourteenth Amendment Facial Challenge Fails

45. With respect to Plaintiffs’ Fourteenth Amendment claim, Plaintiffs challenge the facial validity of N.Y. Elec. L. Sections 6-106, 6-124 and 6-158 on the grounds that the statutes

provide for a judicial delegate convention system for nomination of Supreme Court justices and that under such a system “candidates who are opposed by the party leadership can never win.” (Plaintiffs’ Proposed Conclusions of Law In Support of Motion for Preliminary Injunctive Relief (hereinafter, “Plaintiffs’ Conclusions of Law”) at ¶ 33). However, Plaintiffs fail the *Salerno* test for facial invalidation because *Salerno*’s “no set of circumstances” language requires a demonstration that each and every application of the statute is unconstitutional. *Salerno*, 481 U.S. at 745.

46. With respect to Sections 6-106 and 6-124, Plaintiffs’ facial challenge is based on the mere fact that these statutes provide for nomination by delegates at a judicial district convention. Section 6-106 provides that “[p]arty nominations for the office of justice of the supreme court shall be made by judicial district convention.” Section 6-124 provides for election of Supreme Court justices by delegates. But one need look no further than the Supreme Court’s decision in *American Party of Texas v. White*, 415 U.S. 767 (1974) to determine that Plaintiffs cannot meet their burden of demonstrating that each and every application of Section 6-106 and 6-124 of the Election Law is unconstitutional because, in that case, the Supreme Court squarely held that a convention, in and of itself, is a constitutionally acceptable method for a party to select its nominee.

47. Further, the Judicial Nominating Provisions, which govern judicial nominations for political parties, were the very provisions operative in the Working Families Party’s nomination of Plaintiff Lopez Torres in 2003. Plaintiffs have not claimed, nor could they claim, that the Judicial Nominating Provisions were unconstitutionally applied in that instance. Accordingly, Plaintiffs’ facial challenge to the Judicial Nominating Provisions fails for this additional reason.

48. With respect to nominations by the Democratic and Republican Party, the record demonstrates that all candidates have the opportunity to compete for their party's nomination and have done so. The record further demonstrates that candidates have won over the opposition of party leaders. In the case of Democratic judicial conventions, in particular, candidates have secured nominations even when opposed by the county leader, such as in the case of Justice Gangel Jacob. Plaintiffs fail the *Salerno* test for facial invalidation for these additional reasons, too.

49. It bears noting that Plaintiffs' other complaints regarding the constitutionality of N.Y. Elec. L. Sections 6-106 and 6-124 are not facial but rather as-applied constitutional challenges. Plaintiffs' constitutional attack on the requirement that delegates be elected from each assembly district, for instance, clearly amounts to an as-applied challenge. This attack relates to alleged burdens associated with signature requirements. However, Plaintiffs have not even challenged N.Y. Elec. L. Section 6-136 which provides the number of signatures required for delegate nominating petitions.

50. To the extent Plaintiffs complain that N.Y. Elec. L. Section 6-158 is facially invalid because it provides too compressed a period between the delegate primary and the judicial district convention, the facial attack is misplaced because Section 6-158 is completely silent concerning when the delegate primary is to be held.

2. Plaintiffs' First Amendment Facial Challenge Fails

51. For essentially the same reasons stated above, Plaintiffs have failed to demonstrate a clear or substantial likelihood of success on the merits of their First Amendment facial challenge to the Judicial Nominating Provisions. Plaintiffs simply cannot show that the Judicial Nominating Provisions were unconstitutionally applied to Plaintiff Lopez Torres, let alone that a substantial number of applications against third parties would be unconstitutional.

V. THE STANDARD FOR DECIDING WHEN A STATE LAW VIOLATES THE FIRST AMENDMENT OR FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

52. “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). “It does not follow, however, that the right to vote in any manner . . . through the ballot [is] absolute.” *Id.* Instead, the Constitution entrusts States with the regulation of the “‘Times, Places, and Manner of holding Elections’ . . . and the Court therefore has recognized that *States retain the power to regulate their own elections.*” *Burdick*, 504 U.S. at 433 (emphasis added); *see also Jones*, 530 U.S. at 572.

53. “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). “To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes, [e]ach provision of [which] . . . whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonably non-discriminatory restrictions.” *Anderson*, 460 U.S. at 788.

54. Given the practical necessity of regulating elections, coupled with the presumption of constitutionality that attaches to all duly enacted statutes, *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944), the Supreme Court has recognized that “[c]onstitutional challenges to specific provisions of a State’s election laws cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions.” *Anderson*, 460 U.S. at 789.

55. Instead, when deciding whether a State election law violates the First and Fourteenth Amendment, a court:

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate, [and] must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id.

56. "Under this standard, the rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), *aff'd*, *Twin Cities Area New Party v. McKenna*, 117 F.3d 1423 (8th Cir. 1997) (internal quotations and citations omitted). Nor does a court require "elaborate, empirical verifications of the weightiness of the State's asserted justifications." *Id.* at 364.

VI. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM BECAUSE PLAINTIFFS HAVE BALLOT ACCESS AND THEREFORE THEIR FUNDAMENTAL RIGHT TO VOTE IS NOT ABRIDGED

57. Only the denial of a candidate's *opportunity* for ballot position implicates an individual's fundamental right to vote. *See Williams v. Rhodes*, 393 U.S. 23, 25 (1968) (involving lawsuits brought by the Ohio American Independent Party and the Socialist Labor Party challenging the validity of Ohio election laws on the grounds that Ohio's electoral statutes

made “it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties” to choose electors pledged to particular candidates for the Presidency and Vice-Presidency of the United States); *Storer v. Brown*, 415 U.S. 724 (1974) (involving individuals in California who sought ballot position as independent candidates for members of Congress and the Presidency and Vice Presidency); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (involving a lawsuit brought by an independent candidate for Presidency of the United States and three voters challenging the constitutionality of Ohio’s early filing deadline for independent candidates); and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (involving a challenge to Illinois’ signature requirement as applied to independent candidates and new political parties).

A. No Constitutional Violation Occurs When There Are Reasonable Alternative Means Of Ballot Access

58. The Supreme Court has repeatedly determined that there is no constitutional violation where the electoral scheme provides for alternative means of access to the relevant ballot.

59. In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Supreme Court upheld a Georgia election law that required independent and minor-party candidates to file nomination petitions signed by at least 5% of the number of all voters registered in the previous election in order to be listed on the general election ballot. The Georgia statute also required parties to gather the signatures over a 180-day period ending in June. *Id.* at 432. In unanimously rejecting the constitutional challenges to the statute, the Supreme Court determined that other aspects of Georgia’s election laws served to ensure reasonably open access to the ballot:

The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, *alternate routes are available to getting his name printed on the ballot*. He may enter the primary of a political party, or he may circulate

nominating petitions either as an independent candidate or under the sponsorship of a political organization.

Id. at 440-41 (emphasis added); *see also Burdick*, 504 U.S. at 436 n. 4 (characterizing its decision in *Jenness* as “reject[ing] an equal protection challenge to a system that provided *alternative means of ballot access for members of established political parties and other candidates, concluding that the system was constitutional because it did not operate to freeze the political status quo*”) (emphasis added).

60. The Supreme Court also stressed that the Georgia statute freely provided for write-in votes. *Jenness*, 403 U.S. at 438. Thus, the Supreme Court concluded, the ballot access restrictions were not unreasonable because “Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.” *Id.* at 439. No less can be said of New York State.

61. In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court upheld a Texas ballot access statute that required political parties to have secured 2% of the vote in the previous general election, and to file nomination petitions signed by registered voters equaling at least 1% of the votes cast in the prior election. *Id.* at 776. Again, the Supreme Court pointed to the fact that the qualification requirements did not freeze the political status quo, noting that two of the plaintiffs had previously satisfied them and qualified for a place on the ballot. *Id.* at 787-88 (“[Texas] affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more.”).

62. The Supreme Court upheld an equally restrictive ballot access requirement in *Storer v. Brown*, 415 U.S. 724 (1974). There, the Supreme Court was asked to determine the reasonableness of a California statute that “absolutely denie[d] ballot position to independent

candidates who, at any time within 12 months prior to the immediately preceding primary election, were registered as affiliated with a qualified political party,” *id.* at 758, and required independent candidates to collect signatures from 5% of the total votes cast in California at the last general election within a 24-day period. *Id.* at 738-39. The Supreme Court approximated that this amounted to collecting 325,000 signatures in 24 days. *Id.* at 739.

63. After reviewing its earlier decisions upholding burdensome ballot access restrictions, the Supreme Court said it “ha[d] no hesitation in sustaining” the party-disaffiliation requirement. *Id.* at 733. The Supreme Court reviewed the entire California electoral scheme and found that independent candidates who failed to qualify for the ballot could “nevertheless resort to the write-in alternative provided by California law,” *id.* at 737 n.7, and thus held that the provisions did not make it “virtually impossible” for new candidates and parties to appear on the ballot. *Id.* at 728 (quoting *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)).

64. The *Storer* majority reasoned, “[t]he general election ballot is reserved for major struggles; it is not a forum for continuing intra party feuds.” *Id.* at 735 (the function of the election process is “to winnow out and finally reject all but the chosen candidates, . . . not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]”) (*id.*)).

65. In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Supreme Court upheld a Washington election statute that required minor-party candidates for statewide offices to receive 1% of the total vote in an open primary in order to be placed on the general election ballot. *Id.* at 190. Although the statute effectively eliminated minor parties from the general election ballot, the Supreme Court did not consider the scheme burdensome because the system provided at least some access to a statewide ballot, even if it was not in the general election. *See*

id. at 206. The Supreme Court rejected the notion that states were required to provide preferential treatment to candidates in order to level the playing field of the election process. *Id.* at 198 (noting that states are not “burdened with a constitutional imperative . . . to ‘handicap,’ an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot”). If an opportunity for a *primary* ballot position is constitutionally sufficient, as the Supreme Court held, *a fortiori*, a general ballot position *must be constitutionally sufficient* where, indeed, it is the very means by which the ultimate vote for the particular office is cast.

66. In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court upheld Hawaii’s ban on write-in voting against a claim that the ban unreasonably infringed on voters’ First and Fourteenth Amendment rights. *Id.* at 438-49. Because only one candidate appeared on the ballot for the race in question, the voter had a choice between voting for a candidate he did not support, or not voting at all. *Id.* at 442 (Kennedy, J., dissenting) (noting that this was not an isolated occurrence because Democratic candidates often ran unopposed in Hawaii’s state legislative races).

67. The Supreme Court indicated that the requirement should not be analyzed in a vacuum; instead a court must consider the totality of the electoral scheme, and determine whether the total electoral scheme provides constitutionally sufficient ballot access. *Id.* at 441. Examining Hawaii’s statute in this light, the Court concluded that the ban on write-in voting imposed only a “limited burden” on voters because Hawaii’s election code offered adequate access, *id.* at 439; namely, parties could file a petition signed by 1% of the registered voters 150 days before the primary, or an independent candidate could file a nominating petition with between 15 to 25 signatures, depending on the office sought, 60 days before the primary. *Id.* at 435. Given what the majority found to be a reasonable, nondiscriminatory restriction, the

Supreme Court found the state's interests in "avoiding the possibility of unrestrained factionalism," and guarding against "party raiding," sufficient to justify the limited burden. *Id.* at 429.

B. Plaintiffs' Cases Are Distinguishable Because The Relevant Inquiry Is Whether There Is Alternative Means Of Access To The Ballot At Issue

68. Unable to dispute that New York Election Law provides alternative means to access the general election ballot, Plaintiffs attempt to argue that an individual has a fundamental right to their party's nomination. However, the principle cases on which Plaintiffs attempt to rely – *Bullock* and *Lubin* – do not stand for that proposition. Rather, these cases merely stand for the proposition that there must be reasonable access to the ballot at issue. In *Bullock* and *Lubin*, the ballot at issue in each case happened to be a primary ballot. Here, *there is no primary ballot*. There is but one ballot at issue, the general election ballot for Supreme Court justice. Accordingly, applying the principle of *Bullock* and *Lubin*, the relevant question remains whether there are reasonable alternative means of access to the general election ballot under New York Election Law.

69. In *Bullock*, the main case on which Plaintiffs rely, the Supreme Court struck down a Texas statute which required candidates in the major party primaries to help finance the cost of the primary through filing fees that in 1972 ran as high as \$8,900. Certain would-be candidates failed to pay the filing fee and consequently were denied a place on the ballot. Invoking the landmark case of *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), striking down a poll tax on equal protection grounds, the Supreme Court found that the statutory scheme at issue tended "to deny some voters the opportunity to vote for a candidate of their choosing," while simultaneously giving affluent voters "the power to place on the ballot their own names or the names of persons they favor." *Bullock v. Carter*, 405 U.S. 134, 144 (1972). To the extent that

the system required the candidate to rely on contributions to pay the filing fees, the Supreme Court recognized that the challenged filing fee structure fell “with unequal weight on voters, as well as candidates, according to their economic status.” *Id.* The discriminatory nature of the filing fee requirement led the Supreme Court to scrutinize the statutes closely. The Supreme Court determined that inability to pay the filing fee resulted in an absolute denial of a primary ballot position:

By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice.

Id. at 149 (emphasis added).

70. The ballot in question in *Bullock* was a primary election ballot. Accordingly, the Court examined whether there were alternative means to access *that ballot*. The Court found that the filing fee in question was “an absolute prerequisite to a candidate’s participation in a primary election” and that “[t]here is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot.” *Id.* at 137. In this regard, the fact that candidates could petition onto the general election ballot did not address the issue of access to the ballot in the primary election.²

² Further, as the Court noted, the statutory scheme in question in *Bullock* contained a disaffiliation provision, the political equivalent of a poison pill, which disqualified voters who had voted in the primary from signing an independent nominating petition. Thus, the option of appearing on the general election ballot not only failed to address the issue of alternative means of access to the primary ballot, but actually required voters to abandon their own party affiliation in order to sign a would-be independent candidate’s petition. Here, of course, no disaffiliation or other similar provision exists under New York Election Law. Thus, Plaintiff Lopez Torres and her supporters were free to retain their affiliation with the Democratic Party and, in fact, she ran for election as the nominee of the Working Families Party *after* participating in the Democratic Party’s judicial convention and attempting to win the Democratic Party’s nomination. Accordingly, New York’s Election Law, unlike the Texas statute struck

71. Plaintiffs' attempt to rely on *Lubin v. Panish*, 415 U.S. 709, 716 (1974), is similarly unavailing. In *Lubin*, the Supreme Court addressed a mandatory filing fee statute that "operate[d] to exclude some potentially serious candidates from the [primary] ballot without providing them with any *alternative means* of coming before the voters." *Id.* at 718 (emphasis added). Again, the relevant ballot at issue was a primary ballot, and the Court held that, "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Id.* (emphasis added). Thus, Plaintiffs' main Supreme Court cases help to demonstrate that alternative means to access the relevant ballot has been a central focus of Supreme Court ballot access jurisprudence.

72. Neither *Bullock* nor *Lubin* held that a court may introduce a primary ballot as a constitutional requirement into an election statute that did not otherwise provide for one.³

73. Plaintiffs also attempt to rely on lower court decisions including *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000). However, *Molinari* dealt with a Presidential primary election system and sheds no light on a convention system where (i) there is no primary ballot on which any judicial candidates, including those allegedly favored by party leaders, may affix their names, (ii) delegates are not pledged, and (iii) delegates vote to fill multiple vacancies,

down in *Bullock*, does not present a Hobson's choice between gaining access to the ballot and renouncing one's party of preference.

³ The exclusionary filing fees faced by the plaintiff-appellees in *Bullock* and *Lubin* are also a far cry from the situation faced by so-called challenger candidates seeking the Democratic or Republican Party's nomination for Supreme Court Justice under New York's election scheme. The Judicial Nominating Provisions do not require filing fees a candidate cannot pay. Plaintiffs and other persons seeking a place on the ballot as a major party's nominee, indeed, *may freely do so*, and the requirements for winning the nomination are the same for everyone, regardless of whether a candidate enjoys party leaders' support. Further, there is no dispute, New York's Election Law provides for alternative means by which a candidate's name can appear on the general election ballot, if not as a major party's nominee, then as an independent candidate, minor party candidate or even as a write-in vote.

not a single office. *Id.* at 58-59. In any event, it bears noting that the Court's decision was rendered in the context of a stipulated settlement. *Id.* at 68-69. Indeed, Mr. Keyes, whom Judge Korman acknowledged "arguably was not entitled to the relief as it applies to him because he made no attempt to gather petitions . . . [and who] sought to intervene only after the petitioning period had ended," nevertheless, had his delegate candidates placed on the ballot pursuant to the stipulation. *Id.* at 78.

74. Similarly, *Rockefeller v. Powers*, 917 F. Supp. 155 (E.D.N.Y 1996), *aff'd*, 78 F.3d 44 (2d Cir. 1996), *cert. denied*, 517 U.S. 1203 (1996) is distinguishable as it too involved a presidential primary which, as the court noted, "requires a kind of campaign that is very different from an ordinary campaign for local office." *Id.* at 160; *see also Anderson*, 460 U.S. at 795 ("the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries"). Further, the Second Circuit has previously upheld a number of the technical provisions similar to those found objectionable by the District Court in *Rockefeller*. For instance, in *Schulz v. Williams*, 44 F.3d 48, 57 (2d Cir. 1994), the Court upheld New York's requirement that each independent nominating petition indicate the signer's election district, assembly district or ward even though the candidate needed to gather 30,000 signatures to obtain the 15,000 signatures statutorily required to safely survive challenges. Without any attempt to distinguish this and other cases upholding New York's ballot access laws, the Second Circuit has cautioned that its holding in *Rockefeller v. Powers* was based on "special circumstances," including the "time constraints (the New York primary was scheduled to be held in eight days after the *Powers* appeal was argued) [which resulted in a] 'decision . . . rendered with

considerably less elaboration than is found in a typical opinion.” *Prestia v. O’Connor*, 178 F.3d 86, 89 (2d Cir. 1999) (citing *Rockefeller*, 78 F.3d at 45).

75. *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164 (D. Conn. 2003) is wholly inapposite and besides the point. In that case, the court held that a Connecticut statute providing that petitions to be on a primary ballot could only be circulated by “an enrolled party member of a municipality in this state who is entitled to vote in a primary for which such candidacy is being filed,” impermissibly burdened First Amendment speech and association rights without advancing a legitimate state interest and was thus unconstitutional. *Id.* at 170. *Campbell*, thus, sheds no light on a convention system in which the only petitions are for judicial delegates, and there is no limitation concerning who may circulate such petitions.

76. Applying the *Molinari*, *Rockefeller* and *Campbell* to a convention system is not only putting a square peg in a round hole; it also threatens a party’s First Amendment associational rights to select its own standard bearer as it sees fit, and would be completely unprecedented.

C. The Statutes Must Be Evaluated In The Context Of The Entirety Of New York’s Election Scheme

77. The Judicial Nominating Provisions must be evaluated in the context of the entirety of New York’s electoral scheme for electing Supreme Court justices, and not standing alone. *See, e.g., Burdick v. Takushi*, 504 U.S. 428 (1992) (burdens of ban on write-in votes assessed in light of the state’s comprehensive election code); *Storer v. Brown*, 415 U.S. 724 (1974) (constitutionality of state petition requirement determined by interaction with other election statutes); *American Party of Texas v. White*, 415 U.S. 767, 786-87 (1974) (constitutionality of statute limiting petition time determined in conjunction with statute specifying total number of signatures required).

78. *Larouche v. Kezer*, 990 F.2d 36 (2d Cir. 1993) directs that if a challenged election provision does not render a would-be candidate “per se ineligible” to access the ballot, a district court must utilize the “totality approach” in analyzing the challenged provision. “Under the totality approach, if *either* alternative would be constitutional standing alone, the other must be viewed as broadening opportunities for ballot access and is *a fortiori* constitutional.” *Id.* at 39 (emphasis added); *see also Lerman*, 232 F.3d at 145 (“[t]he burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state’s overall scheme of election regulations”).

79. It is instructive to consider that in *Larouche* the main statute at issue was a media recognition statute directing Connecticut’s Secretary of State to place on its state’s presidential primary election ballot those candidates who are “generally and seriously recognized according to reports in the national or state news media.” *Id.* at 37. An alternative ballot access statute enabled candidates who failed the media recognition test to petition onto the ballot by collecting signatures from one percent of their party’s registered voters within the next fourteen days. *Id.* The Court determined the constitutionality of the media recognition statute not by analyzing the media recognition statute, but by analyzing the petition alternative. The Court concluded on this basis that “[b]ecause we hold the petition alternative, standing alone, to be constitutional, we also uphold the media recognition statute.” *Id.* at 41.

80. Accordingly, a totality approach proceeds, first, by determining whether an alternative ballot access statute is constitutional. If the alternative is constitutional, “standing alone, the other must be viewed as broadening opportunities for ballot access and is *a fortiori* constitutional.” *Larouche*, 990 F.2d at 39.

D. New York's Electoral Scheme Provides Reasonable Alternative Means Of Ballot Access And Passes Constitutional Muster Under The Totality Approach

81. Here, there is no allegation that the Judicial Nominating Provisions render a candidate "per se ineligible" to seek the nomination of a political party. Under the contested provision, Plaintiff Lopez Torres sought the nomination of the Democratic Party. The statutes did not render her ineligible to seek the nomination. She simply did not win. Further, as discussed, the challenged provisions apply equally to all candidates and governed Plaintiff Lopez Torres' successful bid to become the nominee of the Working Families Party through the judicial convention process, again illustrating that Lopez Torres was not "declared per se ineligible" by the contested provisions. Therefore, the totality approach, which is consonant with the Supreme Court's ballot access jurisprudence, applies.

82. New York Election Law provides alternative means of access to the ballot. New York Election Law affords any would-be judicial candidate the option of seeking the nomination of a political party, petitioning directly onto the general election ballot, running as a minor party candidate, or having a vote cast for them as a write-in candidate.

83. There is no claim that the requirements or procedures for petitioning onto the ballot as an independent candidate are constitutionally burdensome, and New York's independent nominating procedures have been repeatedly sustained. *See, e.g., Kuntz v. New York State Board of Elecs.*, 113 F.3d 326, 327-29 (2d Cir. 1997) (signature requirements for New York's independent congressional candidates – amounting to lesser of five percent of the number of votes cast for governor from congressional district in the last gubernatorial election or 3,500 signatures from that same group of voters – "cannot be said to be so burdensome as to freeze the status quo unconstitutionally") (citations omitted); *Van Allen v. Pataki*, 00-CV-1061 DNH/RWS, 2000 U.S. Dist. LEXIS 20144 (N.D.N.Y. Aug. 21 2000) (dismissing constitutional challenges to

Sections 6-138 and 6-140 governing independent nominations), *aff'd mem.*, 9 Fed Appx. 41, 00-9068, 2001 U.S. App. LEXIS 8434 (2d Cir. May 3, 2001); *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994) (upholding certain requirements applicable to contents of independent nominating petitions); *Herschaft v. New York Board of Elecs*, 99 F. Supp. 2d 258, 261 (E.D.N.Y.) (independent nomination requirements “do not unduly burden the rights to vote, to run as a candidate, or to assemble”), *aff'd in part and rev'd in part on other grounds*, 234 F.3d 1262 (2d Cir. 2000), *cert denied*, 531 U.S. 1078 (2001); *Johnson v. Cuomo*, 595 F. Supp. 1126 (N.D.N.Y. 1984).

84. In light of the adequate ballot access afforded under New York’s election code, the provisions governing selection of political party nominees do not burden Plaintiffs’ right to make free choices and to associate politically through their chosen candidates and their votes. On the contrary, because there are alternative means of ballot access, the Judicial Nominating Provisions “must be viewed as broadening opportunities for ballot access and [are] *a fortiori* constitutional.” *Larouche*, 990 F.2d at 39. Under New York State’s judicial electoral system, a “reasonably diligent” candidate suffers absolutely no injury as she will not be denied access to the general election ballot.

VII. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM BECAUSE THERE IS NO CONSTITUTIONAL RIGHT TO A PRIMARY ELECTION AND THEREFORE NO FUNDAMENTAL RIGHT TO VOTE IS IMPLICATED

A. Under *White*, There Is No Constitutional Right To A Primary Electoral System

85. There is no constitutional right to a primary electoral system. The Supreme Court has squarely held that states may utilize conventions rather than primaries as a means for selecting party candidates for elective office. *See American Party of Tex. v. White*, 415 U.S. 767 (1974).

86. In *White*, the Supreme Court rejected a challenge to a Texas ballot qualification system under which the major political parties were required to nominate candidates by primary elections, smaller parties could use either primaries or nominating conventions, and new and even smaller parties had to use precinct nominating conventions in the first instance. *Id.* Justice White, writing for seven other Justices, stated:

[i]t is too plain for argument . . . that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election *or* by party convention.

Id. at 781 (citing *Storer v. Brown*, 415 U.S. at 733-736) (emphasis added); *see also Storer*, 415 U.S. at 735 (the State is within its rights to reserve “[t]he general election ballot . . . for major struggles . . . [and] not a forum for continuing intraparty feuds”); *Trinsey v. Commonwealth of Pa.*, 941 F.2d 224, 234 (3d Cir. 1991) (according to “available precedent . . . the Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states”) (quoting *White*, 415 U.S. 767).

87. In *Shapiro v. Berger*, 328 F. Supp. 2d 496 (S.D.N.Y. 2004), United States District Judge McMahon in the Southern District of New York addressed a constitutional challenge to New York election statutes providing for vacancies for town offices to be filled by appointment if the vacancies arise too late for a primary. Plaintiff claimed that the statutes in question deprived voters and rank-and-file members of the Democratic party rights to ballot access and to vote, as guaranteed by the First and Fourteenth Amendments. In rejecting the challenge, the court relied on *White* as “confirm[ing] the right of a State to provide for party conventions as an alternative to primaries as a means for selecting party candidates for public office.” *Id.* at 502.

88. Nothing in the United States Constitution requires that once a state decides to make an office elective, the electoral system must ratify the direct and unmediated preferences of

a plurality of voters. The Constitution “does not specify how state or local offices are to be selected, and the Supreme Court has made clear that states need not hold democratic elections to fill those positions.” *Shapiro*, 328 F. Supp. 2d at 502 (citing *Fortson v. Morris*, 385 U.S. 231, 234 (1966) (holding “[t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor”); *Sailor v. Board of Ed. of Kent County*, 387 U.S. 105, 108 (permitting appointment of school board members); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (permitting appointment of state legislatures to fill vacancies).

89. The Second Circuit has observed that a delegate to a convention properly has the responsibility for speaking on behalf of his constituents in the broadest sense:

acting in a nominating capacity, a delegate may speak for a group broader than simple party membership: rather, the constituency may properly be defined as a mix of the district’s total population, unenrolled party sympathizers, affiliated party members and certain other factors such as the importance of the district to the party and the past or foreseeable success of the party in the locale.

Mrazek v. Suffolk County Board of Elecs., 630 F.2d 890, 898 (2d Cir. 1980) (citing cases) (“[t]he parties are best situated to define the proper constituencies of their nominating delegates, and these determinations should not be invalidated unless such definitions are utilized to exclude or disadvantage discrete groups or minorities”) *id.*; *see also Montano v. Lefkowitz*, 78 Civ. 17 (JMC) 1978 U.S. Dist. LEXIS 20201, at *13 (S.D.N.Y. Jan. 12, 1978) (Haight, D.J.) (“a political party’s delegation of nominating authority to a committee is a familiar device”) *rev’d on other grds.*, 575 F.2d 378 (2d Cir. 1978); *Moritt v. Rockefeller*, 346 F.Supp. 34, 38 (S.D.N.Y.) (three-judge court) (holding that challenge to State conventions under N.Y. Elec. Law § 6-104 failed to present “substantial constitutional question”), *aff’d*, 409 U.S. 1020 (1972).

B. Plaintiffs' Reliance On *Morse* Is Misplaced

90. Plaintiffs' misplaced reliance on *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) is an attempt to evade the implications of *White* by arguing that the only constitutionally permissible convention-based systems are those that, in fact, are not true conventions but thinly disguised primaries.

91. In *Morse*, voters brought suit in the Western District of Virginia against the Republican Party alleging that the imposition of a registration fee as a prerequisite to delegates participating in a convention to nominate candidates for the Senate violated the Voting Rights Act. Any voter could be certified as a delegate to the convention by a local political committee by payment of a registration fee which would entitle the voter to attend the convention and vote for his or her Party's nominee. *Id.* at 190. Applying the holding in *United States v. Classic*, 313 U.S. 299, 318 (1941), that the right to vote in a primary is protected where the state had made the primary an "integral part of the election machinery," the Court reasoned that by limiting the chance of voters to participate in the convention, the fee undercut their influence on which candidates appeared on the ballot and thus affected their voting rights in the general election. *Morse*, 517 U.S. at 205.

92. Plaintiffs confuse the facts of *Morse* with its holding. *Morse* stands for the simple and unremarkable proposition that voters have the right to participate in the nomination process in a convention that "resemble[d] a primary about as clearly as one could imagine." *Morse v. Republican Party*, 517 U.S. at 238 ("[t]he convention . . . was open to any [Republican] voter . . . just like a primary") *id.* *Morse*, which was decided under the Voting Rights Act and which decided no constitutional issues, does not hold that the only constitutional way to participate in a convention nomination process is for the convention to be "just like a primary," *id.*, open to

every voter to cast a vote at the convention. Put differently, *Morse* does not require an open convention system.

93. Indeed, in the context of primaries to elect delegates, who, in turn, determine the party's nominee, courts have even recognized 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 . . . preference[,] and the selection of delegates[,] may be only partially translated into the actual nomination. A finding that . . . a right to participate in a popular primary election does not foreclose party limits on the effective weight of [that] participation, or mandate that the popular ballot is to be wholly determinative of the outcome of the nomination process. Indeed, in many states, delegates to the national convention are selected by means other than a primary election, so that many . . . [voters] have no direct voice in the selection of delegates.

Bachur v. Democratic Nat'l. Party, 836 F.2d 837, 842 (4th Cir. 1987).

94. Finally, to the extent Plaintiffs argue that a convention must be just like a primary in order to be constitutional, they fail to properly heed the Supreme Court's unanimous ruling in *White*. The fact of the matter is that New York State has a true convention system which delegates authority to choose the party's nominee to duly elected judicial delegates. There is no constitutional requirement in *Morse* or any other Supreme Court case that all conventions must be the equivalent of open primaries.

C. New York's Judicial Nominating Process Affords Voters An Opportunity to Vote Upon And Associate Themselves With Delegates And Judicial Candidates

95. New York's judicial nominating process affords voters an opportunity to exercise their right to vote upon and associate with delegates and judicial candidates. In the first instance, voters are afforded the opportunity to associate with judicial delegates by signing and/or circulating nominating petitions. Voters then vote for judicial delegates in the delegate primary and may even run for judicial delegate themselves. Duly elected delegates, in turn, nominate

judicial candidates who are ultimately voted upon by rank and file party members in the general election. In addition to the nominees of the major political parties, voters also may have a choice among other party-affiliated candidates running on the Working Families Party, the Independence Party and/or the Conservative Party ballot lines. In addition, voters have a potentially unlimited number of choices among candidates who have qualified for ballot position as independent candidates or, finally, by electing any qualified write-in candidate of their choosing.

96. The degree of voter participation evidenced by New York's electoral system for electing Supreme Court justices stands in contrast to restrictive ballot access schemes upheld by the Supreme Court in which voters did not have the right to participate in selection of the nominee but only the right to choose among already nominated candidates. In *Burdick v. Takushi*, for instance, the voter wished to write-in a candidate's name because only one candidate qualified for the ballot in his district. 504 U.S. at 433. The voter had a choice of voting for a candidate he did not support, or not voting at all. Rejecting his claim, the Supreme Court's decision stressed that the burden the state's overall ballot access system imposed on voters' choices, not the write-in ban itself, determined whether the ban violated the right to vote. If the state's ballot access system was constitutionally acceptable, the write-in ban imposed only a "limited burden" on voters. *See id.* at 438-40.

VIII. IN ANY EVENT, PLAINTIFFS' FIRST AMENDMENT CLAIM FAILS ON THE MERITS BECAUSE THE NEW YORK ELECTORAL SYSTEM DOES NOT VIOLATE THE RIGHT TO VOTE AND ASSOCIATE

A. Standard For First Amendment Analysis

97. The first step of a First Amendment analysis requires consideration of the "character and magnitude of the asserted injury to the rights protected by the First . . . Amendment[]." *Anderson*, 460 U.S. at 780. The Supreme Court has consistently held that where

a challenged law imposes “reasonable, nondiscriminatory restrictions” on voters’ protected rights, then it need only be reasonably related to a legitimate state interest.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). In such cases, “the State’s important regulatory interests are generally sufficient to justify the restriction.” *Id.* (quoting *Anderson*, 460 U.S. at 788).

98. The Supreme Court has upheld a wide range of election laws that imposed limited and even severe burdens on the right of association. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding a law prohibiting an individual from appearing on the ballot as a candidate for more than one party); *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding a law prohibiting “write-in” voting on primary and general election ballots); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding requirement that voter enroll in party at least 30 days before the general election in order to vote in party primary); *Storer v. Brown*, 415 U.S. 724 (1974) (upholding law denying independent candidate a ballot position in the general election if they were affiliated with a political party during the year prior to the primary); *Clements v. Fashing*, 457 U.S. 957 (1982) (upholding State constitutional provision prohibiting public officials from running for legislative offices before their terms expired); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding statute restricting general election ballot to candidates receiving at least 1% of total vote in primary).

B. New York State’s Judicial Electoral Scheme Is Not Unduly Burdensome

1. A Reasonably Diligent Candidate Has An Opportunity To Compete For Their Party’s Nomination

99. Plaintiffs contend that “the operative question is whether candidates have a real opportunity to compete for their party’s nomination despite the opposition of the party leadership,” (Plaintiffs’ Conclusions of Law at ¶ 31), and “present their case to the voters of the

party” (*id.* at ¶ 32). In *Storer v. Brown*, the Supreme Court analyzed the severity of burdens imposed by an electoral scheme by asking the question, “[c]ould a reasonably diligent independent candidate . . . succeed in getting on the ballot?” 415 U.S. at 742.

100. Plaintiffs literally fail the *Storer* test because, among other reasons, Plaintiff Lopez Torres *did* gain access to the general election ballot in 2003. The Judicial Nominating Provisions, in fact, were the very provisions governing the judicial district nominating process through which Lopez Torres won the Working Families Party’s nomination. Further, as discussed above, nomination by a political party is but one of several paths to the general election ballot.

101. There is no authority for the proposition that, in addition to a fundamental right to have the opportunity for ballot access (or the convention equivalent of ballot access), an individual has a fundamental right to her party’s nomination. *Cf. Clements v. Fashing*, 457 U.S. 957, 963 (1982) (“Far from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny’”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). If there is no fundamental right to be a candidate, clearly there is no constitutional right to win an election or, in the case of a convention, a nomination.⁴

⁴ Plaintiffs also complain that political party endorsements further hinder an independent candidate’s ability to win in the general election. However, endorsements by political parties are constitutional. Indeed, the Supreme Court has explicitly protected the right of political party organizations to campaign actively for some party candidates at the expense of other party candidates. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (“Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association”). Nor is there a constitutional question raised by cross-endorsements of candidates as such endorsements do not interfere with voters’ right to associate with and vote for candidates of their choice in the general election.

102. In any event, with respect to New York's judicial district nominating convention, the relevant question is whether a reasonably diligent judicial candidate has an opportunity to have their candidacy voted upon by the judicial delegates at the nominating convention. After all, the "voters of the party" to whom candidates "present their case" at the nominating phase of the judicial selection process are the duly elected judicial delegates. In this regard, as a threshold matter, the Judicial Nominating Provisions do not preclude candidates who are not endorsed by the "party leadership" from presenting their candidates at the convention. Indeed, the evidence is that candidates who are not favored by the party leadership have gained enough delegate support to win their party's nomination through the judicial convention process. Any New York State resident, who has been licensed to practice law in the State of New York for ten or more years is eligible to run for Supreme Court. The requirements for winning a political party's nomination are the same for all would-be candidates: a candidate must win a majority of delegate votes at the judicial district nominating convention.⁵ Once again, Plaintiff Lopez Torres, herself, demonstrates that even so-called "challenger candidates" can achieve access to the judicial district nominating convention. Lopez Torres did so in 2002 and 2003, each year having her name placed in nomination and voted upon by judicial delegates at those conventions.

103. Plaintiffs' claim that no candidate has ever won the nomination without the support of the county party leader is misleading. Plaintiffs fundamentally misunderstand the nature of the judicial nominating process in two important respects. First, as the evidence shows, party leaders throw their support behind a candidate only *after* it becomes clear that the candidate has achieved widespread support among delegates. Because the judicial selection

⁵ Although the determination of the number of delegates for each Assembly District is determined by each party's internal rules, the Election Law requires that the allotted number be substantially proportional to the percentage of total votes cast statewide for the party's gubernatorial candidate in the last election. See N.Y. Election Law Section 6-124

process is a consensus building exercise, the county party leader cannot simply impose his will even if he wants to, particularly where there is overwhelming support for a particular candidate.

104. Second, delegates do not serve as proxies, but are rather elected representatives who are given the legal right to vote any way they wish and nominate any candidate from the floor of the convention. The testimony of delegate witnesses at the hearing confirms that delegates and alternate delegates believe they have the independence and ability to vote for the candidate of their choice. The evidence also shows that district leaders and party leaders do not instruct delegates how to vote. The experience of justices who have successfully garnered delegate support and gone on to win the nomination confirm that every delegate is free to vote for the candidate of her choice at the convention.

105. The independence of delegates is underscored by the fact that “challenger candidates,” in fact, have overcome opposition of party leaders to win their party’s nomination. The record also demonstrates that there is not only a right to unseat party leaders by voting them out of office, but a history of rank and file members doing so.

2. New York’s Judicial Nominating Provisions Are Not Unduly Burdensome Compared To Requirements For Other Offices Within And Outside Of New York

a. Plaintiffs Fail To Heed The Supreme Court’s Holding In *White* That There Is No Constitutional Right To A Primary Election

106. Plaintiffs’ claim that their fundamental right to vote is violated, which is predicated on burdens purportedly associated with New York’s Judicial Nominating Provisions, amounts to the argument that these laws are unconstitutional because they do not provide an opportunity for a primary election.

107. More specifically, Plaintiffs allege that New York’s judicial election provisions impose heavier burdens on the First Amendment rights of candidates and voters than the trial

court selection requirements of any other state because, among the states that elect their judges, New York is the only state that does not utilize a primary election. (Plaintiffs' Proposed Conclusions of Law, ¶ 21). Plaintiffs also allege that the statutes governing judicial selection for Supreme Court justice impose more severe burdens than ballot access rules for any other elective office within New York as the Supreme Court is the only elective office without a primary election. (*Id.* at ¶ 22). Thus, at bottom, Plaintiffs are attacking the fact that New York does not provide a primary election for nomination of Supreme Court justices.

108. Plaintiffs also attempt to rely on *Campbell, Molinari and Rockefeller* "for the proposition that candidates who lack the support of the party leadership must be allowed a reasonable opportunity to seek their party's nomination through *popular support of the party's enrolled members.*" (Plaintiffs' Conclusions of Law at ¶ 31) (emphasis added). Here again, Plaintiffs are attacking the fact that New York does not provide a primary election for nomination of Supreme Court justices.

109. Plaintiffs' arguments are fatally flawed because, as noted above, there is no constitutional right to a primary electoral system. *See American Party of Tex. v. White*, 415 U.S. 767 (1974). And the Supreme Court has held that a convention is a constitutionally acceptable alternative to a primary electoral system. *Id.*

b. Signature Requirements For Delegate Candidates Are Not Unduly Burdensome

110. Plaintiffs allege that New York's signature requirements for delegate candidates are much more burdensome than the signature requirements for judicial candidates in other states that require petitions. (Plaintiffs' Conclusions of Law, ¶ 21). Plaintiffs also complain that the signature requirements for other offices in New York State are less burdensome. (*Id.* at ¶ 22). And Plaintiffs point to the signature requirements in *Molinari and Rockefeller* as examples of

signature requirements struck down that were purportedly less burdensome than those required for judicial delegates under New York's judicial election scheme. (*Id.* at ¶¶ 25, 27).

111. As an initial matter, Plaintiffs fundamentally misunderstand the nature of New York's delegate convention system for nominating Supreme Court justices. A candidate for Supreme Court justice – unlike candidates for other offices in other states or other offices in New York State, or presidential delegate candidates in *Molinari* and *Rockefeller* – is not required to collect a single signature. This requirement is only applicable to judicial *delegates*, not judicial candidates. For the delegate, the burden of collecting 500 valid signatures is not great. Indeed, Plaintiffs have not even challenged New York Election Law Section 6-136 which provides the number of signatures required for delegate nominating petitions.

112. Further, under Plaintiffs' theory of the case, a challenger candidate must run her own slate of judicial delegates in each Assembly District in order to win their party's nomination. However, a judicial candidate requires no more than a majority of delegate votes in order to win a party nomination. Therefore, it hardly would be necessary to run delegate slates in each and every Assembly District, but merely in enough Assembly Districts to achieve majority support for a particular judicial candidate's nomination. Plaintiffs' characterization of the burden associated with seeking a party's nomination as a so-called "challenger candidate," thus, not only misunderstands the nature of New York State's judicial selection system, but hinges on the false premise that a candidate, like the pledged delegates in *Rockefeller*, must "target all or almost all" Assembly Districts in order to succeed. (*Id.* at ¶ 27).

113. In any event, the signature requirements under New York Election Law in absolute terms are less burdensome than other signature requirements that have been upheld by the Supreme Court. For most Assembly Districts, delegate and alternate delegate candidates

must collect valid signatures from at least 500 voters enrolled in the relevant party to appear on the September ballot. Assuming *arguendo* that it was necessary to collect signatures in all Assembly District within a particular Judicial District – which it is not – on a cumulative basis, this would mean that 4,000 to 12,000 valid signatures would have to be collected in each judicial district (or 12,000 to 36,000 indulging Plaintiffs’ inflated contention that candidates must amass triple the number of signatures required to resist legal challenges).

114. The Supreme Court has upheld signature requirements comparable to and, in some cases, far in excess of the number of signatures required for judicial delegates for New York’s judicial convention. For example, in *American Party v. White*, 415 U.S. 767 (1974), the Court upheld a Texas ballot access statute that required political parties to have secured 2% of the vote in the previous general election, and to file nomination petitions signed by registered voters equaling at least 1% of the votes cast in the prior election. *Id.* at 776. The Court pointed to the fact that the qualification requirements did not freeze the political status quo, noting that two of the plaintiffs had previously satisfied them and qualified for a place on the ballot. *Id.* at 787-88 (“[Texas] affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more”). The Court found that the 1% signature requirement amounted to approximately 22,000 statutorily-required signatures, *id.* at 776, but said it was “neither unreasonable nor unduly burdensome,” to require potential candidates to obtain 22,000 actual signatures within 55 days. *Id.* at 787 n.18. The Court was

“wholly unpersuaded” that the convention process is “invidiously more burdensome than the primary election.”⁶ *Id.* at 768.

115. Similarly, in *Storer v. Brown*, 415 U.S. 724 (1974), the Court was asked to determine the reasonableness of a California statute that “absolutely denie[d] ballot position to independent candidates who, at any time within 12 months prior to the immediately preceding primary election, were registered as affiliated with a qualified political party,” *id.* at 757 (Brennan, J., dissenting), and required independent candidates to collect signatures from 5% of the total votes cast in California at the last general election within a 24-day period. *Id.* at 738-39. The Court approximated that this amounted to gathering 325,000 signatures in 24 days. *Id.* at 739. While the Court remanded to determine whether the available pool of signers might render the signature requirement unduly burdensome, nevertheless, the Court stated that “[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden.” *Id.* at 740. The Court reasoned that an independent candidate should be able to attract 1,000 volunteers who would gather fourteen signatures per day for twenty-four days in order to fulfill a state signature requirement of 325,000 signatures. *Id.*

c. There Is No Constitutional Requirement Under A Convention System That Delegates Must Be Pledged

116. Plaintiffs also argue that including the names of delegates without identifying the delegate with a particular candidate for Supreme Court justice is unconstitutional because it causes voter confusion. However, unlike the pledged presidential delegates in *Rockefeller* and *Molinari*, who serve as proxies for a single presidential candidate, judicial delegates often must

⁶ Plaintiffs assume that if there were a primary as part of the system for electing Supreme Court justices in the State of New York, that such a primary would necessarily provide an opportunity for multiple candidates to win a spot on the general election ballot as the relevant party’s nominees. This assumption is groundless, as a primary as easily could provide only for a single primary winner.

exercise their judgment to vote for several judicial nominees. Judicial delegates are elected from each Assembly District not to represent a judicial candidate, therefore, but to represent the interest of the registered voters of the particular Assembly District.

117. In *New York State Democratic Party v. Lomenzo*, 460 F.2d 250 (2d Cir. 1972), the Second Circuit rejected the argument that voter confusion constitutionally required placing, alongside the names of candidates for delegate and alternate delegate, the name of the candidate whom the delegate and alternate delegate ultimately intended to support for nomination at the party convention. *Id.* at 251. In that case, the court went on to state:

[t]he determination of what should be included [on a ballot] is a state function. Given the wide latitude which the state has in deciding the manner of conducting elections, and, therefore, both the form and content of the ballot, appellee's prohibition against this type of information or designation appearing on the ballot does not raise a substantial constitutional question.

Id. at 251-52.

d. The New York Judicial Nominating Convention System Does Not Impose Undue Costs On Candidates

118. Plaintiffs acknowledge there are no filing fees required to seek a judicial nomination, yet disingenuously contrast the filing fees considered in *Bullock* to the "costs of running a *successful* insurgent campaign for Supreme Court." (Plaintiffs' Proposed Conclusions of Law at ¶ 13) (emphasis added). First, the only constitutional concern is what are the burdens to *accessing* the ballot or in this case, the convention, not what are the costs of waging a *victorious* campaign. Second, it is not necessary for challenger judicial candidate to run their own slates of delegates to compete. In any event, the record demonstrates that competing in a judicial convention is far less burdensome than running an expensive primary campaign.

e. The Time Period For Judicial Campaigns Does Not Impose An Undue Burden On Candidates

119. Plaintiffs complain that the time frame between the judicial delegate primary and the judicial nominating convention is too short for judicial candidates to campaign meaningfully and win delegate support. This assertion truncates and misperceives the process.

120. New York ethical rules governing judicial campaigns explicitly allow for candidates to launch their campaigns nine months before the general election and remain politically active three months after the election.⁷ As the evidence demonstrates, campaigning occurs throughout the year. Judicial delegate candidates are required to file their nomination petitions with the local Board of Elections no later than in July, at which point the names of candidates running for delegate and alternate delegate in either contested or uncontested elections are publicly available and easily accessible. Thus, the campaign period is not restricted to the two to three week period between the primary and the convention.

121. Even if candidates were restricted to the two to three week period, evidence at the hearing shows that period to be sufficient to run a reasonable campaign and garner delegate support the nominating convention as Justice Abdus-Salaam testified.

3. A Limited Burden Associated With New York's Judicial Election System Need Be Justified Only By A Legitimate State Interest And Here Numerous Compelling State Interests Are At Stake

122. Assuming there is injury – and none has been shown here – the next step of a First Amendment analysis is for the Court to determine the legitimacy and strength of the state's interest in burdening these freedoms.

123. The Supreme Court has consistently held that where a challenged law imposes “reasonable, nondiscriminatory restrictions” on voters' protected rights, then it need only be

⁷ *Code of Judicial Conduct*, 22 NYCRR Part 100, at § 100.Q.

reasonably related to a legitimate state interest. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). In such cases, “the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* (quoting *Anderson*, 460 U.S. at 788).

124. Here, the judicial convention process is not the only way for a judicial candidate to appear on the ballot, and therefore the election laws which govern this process do not unreasonably interfere with the right of voters to associate with and have candidates of their choice appear on the ballot. Thus, the judicial convention system need only be justified by legitimate state interests.

125. Nevertheless, the State of New York has not only legitimate but compelling interests in enforcing New York’s judicial election provisions. First and foremost, the State has a compelling interest in protecting the constitutional right of association of the New York Democratic and Republican parties. The United States Supreme Court has repeatedly made clear that the constitutionally protected right of association of political parties and their members, including the right to determine the process of selecting their party nominees, must be respected by the States. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986). Indeed, courts have staunchly protected States’ rights to prevent a party from being subject to the baleful influence of party raiding, “a process in which dedicated members of one party formally switch to another party to alter the outcome of that party’s primary.” *Jones*, 530 U.S. at 572. *See also Anderson*, 460 U.S. at 788 n. 9 (“[t]he State . . . has the right to prevent distortion of the electoral process by the device of ‘party raiding’”). The judiciary in the State of New York is unique in that it is not subject to proscriptions against party raiding under the Wilson Pecula statutes, which apply to all other elective offices.

Accordingly, depriving parties of the convention system and forcing them to be subject to an open primary would expose parties to the serious danger of party raiding.

126. Second, the State has a legitimate interest in preserving the convention system because it promotes the nomination of candidates who reflect the geographic diversity of localities within a judicial district.

127. Third, the convention system ensures that minorities have the opportunity to win the nomination and a seat on the Supreme Court because by its nature, the convention process is a representative system that fosters coalition-building. Delegates are elected to represent the interests and values of their constituencies and to vote for the most qualified judicial candidates who reflect those interests and values. In doing so, they are permitted to form coalitions with other delegates to ensure that their candidates are successful in winning the nominations for Supreme Court. Surely, the State has a legitimate interest in ensuring that the bench remains diverse.

128. Fourth, the convention system ensures that qualified incumbent Supreme Court justices remain on the bench without having to (a) expend significant sums of money for a primary campaign, (b) re-engage in politics after being politically inactive for fourteen years, and (c) fear adverse consequences of making politically unpopular but correct decisions. The current system insulates sitting justices, who have been prohibited from engaging in a wide range of political activity during most of their tenure, from campaigning at least on the primary level. Given the huge docket that sitting justices have, it would be unfair to require them to engage in a primary campaign, which would entail raising significant funds and extensive politicking. Thus, the convention system safeguards sitting justices from being defeated for re-nomination in a direct primary by insurgent candidates who are willing to expend large sums of money. The

system also safeguards sitting justices from feeling pressured to make politically expedient decisions in order to garner support for a primary campaign. Certainly, a system designed to ensure that qualified incumbent justices have a fair opportunity to remain on the bench serves a legitimate state interest. Indeed, Plaintiffs appear to concede the constitutionality of retention elections, even though they prohibit anyone from accessing the ballot other than the incumbent.

129. New York State's judicial nominating system is the only system designed to effectuate all of these legitimate and compelling state interests and, therefore, serves a compelling state interest.

IX. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM

130. Under the Supreme Court's equal protection jurisprudence, a heightened level of scrutiny is only applicable where the statutes in question burden a "fundamental" right or "suspect class" of persons, neither of which is implicated here. *See, e.g., Clements v. Fashing*, 457 U.S. 957, 963 (1982).

131. There is no fundamental right that is unduly burdened in this case. The issue, therefore, concerns whether either of the classifications on which Plaintiffs' equal protection claims depend, in fact, constitutes a suspect category.

132. However, neither a classification by elective office nor a purported classification based on a candidate's level of party support are suspect. Because there is no suspect class burdened in this case, rational basis review is the appropriate standard. The challenged statutes clearly are rationally related to numerous compelling and legitimate state interests.

A. The Standard For Rational Basis Review

133. It is well settled that States are allowed “considerable leeway” under the Equal Protection Clause to enact legislation that appears to affect similarly situated people differently. *Clements*, 457 U.S. at 962-63. “Legislatures are ordinarily assumed to have acted constitutionally.” *Id.* at 963. Under traditional equal protection principles, distinctions must only “bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State’s goals and only if no ground can be conceived to justify them.” *Id.* at 963 (citing cases).

134. In evaluating the constitutionality of a challenged statute under equal protection, the Supreme Court has departed from traditional rational basis review and applied strict scrutiny “only when the challenged statute places burdens upon ‘suspect classes’ of persons or on a constitutional right that is deemed ‘fundamental.’” *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)) (emphasis added). Thus, where, as here, there is no fundamental right implicated, strict scrutiny could only apply if a suspect class exists.

135. “Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution.” *Clements*, 457 U.S. at 967 (citation omitted). In the context of cases involving ballot access restrictions, courts “focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the ‘availability of political opportunity.’” *Id.* at 964 (citing *Lubin v. Panish*, 415 U.S. 709, 716 (1974)).

B. The Challenged Statutes Are Subject To Rational Basis Review, Not Strict Scrutiny, Because There Is No Suspect Classification At Issue Here

1. Classification By Office Is Not A Suspect Class

136. Treating Supreme Court judgeships differently from other elective offices is neither arbitrary nor suspect. *See, e.g., Anderson v. Quinn*, 495 F. Supp. 730, 733 (D. Me. 1980) (“[p]lainly, the burdens imposed on independent Presidential candidates must be compared with those imposed on other candidates for the same office, not with candidates for other offices who are elected through an entirely different process”).

137. The purported classification does not exclude candidates for Supreme Court from the electoral process because, first, candidates aspiring to win their party’s nomination do have ready access to the judicial nominating process of political parties, and, in any event, all candidates for Supreme Court justice have unfettered access to the ballot in the general election as independent candidates. Therefore, there is no burden on the “availability of political opportunity” for either the candidates themselves or the voters who wish to support them. Accordingly, there is no suspect class.

138. Courts have recognized that the election of the judiciary poses unique issues, which are not required to be addressed in the same fashion as the elections of other government officials from the executive or legislative branches. *See, e.g., New York State Ass’n. of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 151 (S.D.N.Y. 1967) (recognizing the “general policy of the federal judiciary of refusing to interfere with the internal administration by the states of their court systems” and holding that the “one person one vote” doctrine applicable to the legislative branch does not apply to the election of the judicial branch).

139. New York’s convention system promotes several compelling interests in treating New York Supreme Court judgeships differently from other elective offices and from other

judgeships. For example, it is not unreasonable for the Legislature to determine that the enormous expense of a primary election, and the limitations the law places upon the ability of an incumbent Judge to “campaign,” make the convention method of nomination superior to the open primary method. Nor is it unreasonable to choose a different method for selection of Supreme Court nominees than for other Courts as the New York Supreme Court is the State’s highest Court of original jurisdiction, which hears the most complex and important state cases. In fact, as Professor Schotland’s nationwide survey reveals, 30 out of 50 states employ different means for selecting judges to courts of different levels.

140. Plaintiffs’ sole source of authority for its equal protection argument is *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), where Plaintiffs point out that there were different signature requirements for candidates in citywide elections as compared to statewide elections. While the Court took into account that discrepancy and ultimately found an equal protection violation, the fundamental right to vote was at stake as the signature requirements precluded independent and minority party candidates from gaining access to the ballot. *See Illinois State Bd.*, 440 U.S. at 184-86. In applying strict scrutiny to analyzing the signature requirements, the Court considered the requirements of other elective offices solely for the purpose of determining whether the requirement at issue was the “least restrictive means” to achieve the State’s interest. *Id.* at 186. The Court, in its decision, never found the existence of a suspect class. Because our case does not involve the implication of a fundamental right to vote as there is no denial of ballot access, *Illinois Board* is clearly inapposite.⁸

⁸ It also bears noting that while the Supreme Court “has departed from traditional equal protection analysis in recent years in two essentially separate, although similar, lines of ballot access cases,” *Clements*, 457 U.S. at 964, neither of these situations applies here. The first involves classifications based on wealth, while the second “involves classification schemes that impose burdens on

2. Candidates Who Ultimately Are Not Endorsed By Their Party Are Not A Suspect Class, And Plaintiffs' Claim Of Vote Dilution Or "Devaluation" Also Fails

141. Plaintiffs argue that New York's Judicial Nominating Provisions have the effect of devaluing the "political support of challenger candidates by raising higher burdens for challenger candidates than for candidates backed by the party organization." (Plaintiffs' Proposed Conclusions of Law at ¶ 36).

142. However, as an initial matter, there is no classification here, let alone the existence of a suspect class. There is no *a priori* determination of who is a "challenger" candidate and which candidate ultimately wins party support. At the outset, any candidate can win support. There is no discrimination or arbitrary classification which prevents this. The fact that a convention system favors those candidates who can win party support does not create a colorable equal protection claim.

143. In any event, the requirements for candidacy are the same for all candidates regardless of whether they have party-backing. *See Jackson v. Ogilvie*, 325 F. Supp. 864, 869 (D.C. Ill.), *summarily aff'd*, 403 U.S. 925 (1971) (holding that there is no Equal Protection violation where "different logistics are involved in an independent's attempt to run for office as compared with a member of a political party" because the requirements for candidacy for the party-backed candidate and the independent are the same) (emphasis added).

144. While Plaintiffs' argument here is far from clear, to the extent that Plaintiffs are trying to assert a traditional vote-dilution claim, it inevitably must fail under *Wells v. Edwards*, 409 U.S. 1095 (1973). There, the Supreme Court affirmed a district court opinion that held that

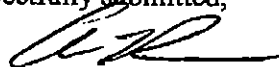
new or small political parties or independent candidates." *Id.* (citing *Illinois State Bd. of Elections, Storer, American Party of Tex., Jenness, and Williams v. Rhodes*).

the principle of one-man, one-vote is not applicable in electing state court judges.⁹ Alternatively, if Plaintiffs are attempting to advance a novel theory of vote “devaluation,” this argument also falls short for much the same reason. As courts have recognized, “[i]t is the dilution of power in the vote of citizens situated in districts suffering from inadequate representation which brings into play the Equal Protection Clause.” *New York Ass’n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153 (S.D.N.Y 1967). Here, Plaintiffs cannot credibly claim that any of the voters in any of the Assembly Districts suffer from inadequate representation. Quite to the contrary, as delegates are elected from each Assembly District to represent the voters of their particular district at the convention, voters clearly have adequate representation.

145. Therefore, because it is clear that the challenged laws are neither “invidious, arbitrary, [n]or irrational,” *Clements*, 457 U.S. at 967, Plaintiffs cannot demonstrate a likelihood of success on the merits of their equal protection claim.

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Respectfully submitted,



AKIN GUMP STRAUSS HAUER & FELD LLP
Steven M. Pesner, PC (SP-7021)
Andrew J. Rossman, Esq. (AR-0569)
James P. Chou, Esq. (JC-2629)
James E. d’Auguste, Esq. (JD-7373)
Vincenzo A. DeLeo, Esq. (VD-0092)
Jamison A. Diehl, Esq. (JD-1972)
590 Madison Avenue
New York, New York 10022

*Counsel for The New York County Democratic
Committee*

⁹ Lower courts had so held prior to the *Wells* decision. See e.g., *Holshouser v. Scott*, 335 F. Supp. 928 (D.C. Cir 1971), *aff’d*, 409 U.S. 807 (1972); *New York Ass’n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y 1967); *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964); *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Oh. 1960), *cert. denied*, 393 U.S. 839 (1968).

ARTHUR W. GREIG, ESQ. (AG-2755)
401 Broadway, Suite 1902
New York, New York 10013

*Counsel for The New York County Democratic
Committee*

ELLIOT SPITZER, ATTORNEY GENERAL
FOR STATE OF NEW YORK

Joel Graber, Esq. (JG-3337)
Clem Colucci, Esq.
120 Broadway – 24th Floor
New York, New York 10271-0332

Statutory Intervenor

ROBERT ALLEN MUIR ASSOCIATES LLP

Robert A. Muir, Esq. (BM-8003)
205 Montague Street, Suite 400
Brooklyn, New York 11201

Counsel for New York State Republican Committee

SPECIAL COUNSEL TO STATE BOARD
OF ELECTIONS

Todd D. Valentine, Esq. (TV-5304)
40 Steuben Street
Albany, New York 12223-1650

*Counsel for the State Board of Elections, Carol
Berman, Neil W. Kelleher, Helena Moses Donohue and
Evelyn J. Aquila*

STROOCK & STROOCK & LAVAN

Joseph L. Forstadt, Esq. (JF-0398)
Kevin J. Curnin, Esq.
David Sifre, Esq.
Mary A. Gorman, Esq.
180 Maiden Lane
New York, New York 10038

*Counsel for Associations of New York State Supreme
Court Justices in the City and State of New York,
Honorable David Demarest, J.S.C.*