

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

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MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO,
JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C.
SEGAL, SUSAN LOEB, DAVID J. LANSNER, AND COMMON CAUSE/NY,

Plaintiffs,

v.

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.

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**DEFENDANTS' PROPOSED FINDINGS OF FACT
IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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in the City and State of New York,
Honorable David Demarest, J.S.C.*

October 26, 2004

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DEFENDANTS' PROPOSED FINDINGS OF FACT

I. INTRODUCTION

1. Plaintiffs claim that New York State's system for selecting Supreme Court Justices - an 83-year old system shaped by statute and party rules - violates the First and Fourteenth Amendments to the United States Constitution. Plaintiffs claim that the judicial convention system both deprives voters of a right to choose their parties' judicial candidates and imposes "insurmountable" burdens on so-called "challenger candidates" who, without major party support, seek a major party nomination against candidates supported by local Democratic or Republican leaders.

2. The relief sought, by means of a motion for preliminary injunction, is a declaration from this Court that New York's judicial convention system is unconstitutional and a mandatory injunction directing the state legislature to create a new system in only ninety days. Should the legislature fail to do so, then this Court is asked to displace the convention system itself and order that Supreme Court Justices be chosen through direct primary elections.

3. On September 13, 2004, this Court began a hearing on Plaintiffs' preliminary injunction motion. The hearing spanned thirteen days of testimony from twenty-four witnesses. Neither the testimony nor the documents admitted into evidence supports Plaintiffs' claims of: (1) an "insurmountable" and unconstitutional burden on "challenger candidates" seeking major party nomination; and, in what is really the flipside of the same claim, (2) an unconstitutional deprivation of the electorate's right to vote for "challenger candidates" on a major party line.

4. To the contrary, the evidence adduced during the hearing establishes that the judicial convention system is open, competitive, democratic and accountable to the public. As a

result, Plaintiffs' Proposed Findings of Fact and Proposed Conclusions of Law tread lightly over the testimony of twenty-four witnesses over thirteen days, instead relying heavily on a combination of declarations prepared before trial and hearsay, often many layers deep.

5. Plaintiffs' "challenger candidates" paradigm is problematic. First, just what a "challenger candidate" is remains somewhat unfixed. Is it a candidate who never had, at any stage, party support? A candidate who had and lost support? And what exactly constitutes "party support" – support of "leaders" only, if so which leaders? And when does rank and file support acquire enough mass to be considered "party support"?

6. Second, the "challenger candidate" paradigm asks this Court to weigh the Constitutionality of the convention system through a very peculiar set of circumstances, one which ignores how the system works for the vast majority of major party candidates who are not "challengers."

7. Third, the "challenger candidate" paradigm rests on a single path to party nomination: running one's own slate of delegates. There are at least two factual failings to this presumption.

8. The first failure of proof is that it ignores the fact that even "challenger candidates" need not run their own slates. "Challenger candidates," like traditional party candidates, are able to lobby delegates and alternate delegates for support. Plaintiffs have quite simply failed to prove that this cannot be done successfully. Plaintiffs can only point to the actual experience of two Plaintiffs who failed to get the Democratic Party nomination (Margarita Lopez-Torrez and Philip Segal) after making no effort to court delegates. By contrast, Defendants have submitted unrefuted testimony from a number of successful judicial candidates,

including Justices Abdus-Salaam, Freedman, Gangel-Jacob, Lunn, Schlesinger and Sise, that earnest efforts to solicit support among delegates can and do indeed succeed.

9. The second failure of proof is that Plaintiffs have also not shown that their chosen route to major party nomination, running one's own delegates, is bound to fail. Plaintiffs' other witnesses with direct experience (Thomas Keefe and John Regan) do not support such a finding. Not only were their efforts in this regard half-hearted and isolated, but the road they chose was not as steep, or "insurmountable," as the Plaintiffs' papers describe. An examination of Lopez Torres' own petitions in 2002 reveals that without even trying she was able to garner more than enough signatures to qualify sufficient delegates to constitute a majority at the convention.

10. In short, the evidence at best only establishes that Plaintiffs were not reasonably diligent in pursuing their candidacies and does not come close to establishing, let alone doing so clearly and substantially, that the burdens on presenting a challenger candidacy are severe and "insurmountable."

11. Plaintiffs argue that it is too difficult for a candidate with no support whatsoever within the Democratic or Republican party to gain the nomination of the party. Assuming for the sake of argument that there is a constitutionally cognizable right to run on a major party line, which there is not. See Accompanying Defendants Proposed Conclusions of Law. Plaintiffs have failed to show an unconstitutional burden on that right.

12. Plaintiffs cannot sidestep the incontrovertible conclusion that even "challenger candidates" have ample alternative access to the ballot, in satisfaction of their and their potential supporters' associational rights.

13. For these reasons, explained below, and for the reasons set forth in the accompanying Defendants' Proposed Conclusions of Law, Plaintiffs' motion for a preliminary injunction should be denied.

II. THE JUDICIAL CONVENTION SYSTEM UNDER NEW YORK LAW

14. The United States Constitution does not prescribe any particular method by which the States must choose their judges. Rather, the Constitution deliberately leaves to the States, as "laboratories of democracy," the right to provide for the selection of judges in the manner of their choosing. These laboratories of democracy have concocted a bewildering array of different methods for choosing judges including appointment, nonpartisan election, partisan election, convention, retention election and various amalgams of each.¹

15. Seventeen states dispense with elections entirely, instead choosing their judges by some form of appointment. While gubernatorial appointment, for example, may seem undemocratic, denying the enrolled voters any choice in the selection of judges, it is a perfectly constitutional method of judicial selection.² Of the 33 states that provide for some form of judicial election, 18 hold nonpartisan elections. In Ohio and Michigan, judicial elections are nonpartisan only in the voting booth itself, where the ballot lists candidate names without party affiliations. Outside the polling place, candidates and parties are free to campaign as they like. Thus, the major parties have unfettered discretion to endorse the candidate of their choice in these judicial elections and to broadcast that endorsement during the campaign without giving

¹ Tr. 741:3 – 742:11 (Schotland); Exh. S at 247-250 (Chart showing method of judicial selection in 50 states).

² Tr. 742:12 – 744:23 (Schotland).

rank and file party members any vote in the matter.³ Nine states hold partisan elections - in the sense that party labels are associated with the candidates on the ballot itself.

16. The New York State Constitution provides for the election of its general trial level judges known as Justices of the State Supreme Court.⁴ Supreme Court Justices are not elected statewide, but from each of twelve geographic Judicial Districts, which are comprised of one or more counties. Supreme Court Justices are elected for a 14-year term – a tenure that Plaintiffs’ expert Professor Roy Schotland testified is the best in the nation.⁵ 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 the office of Supreme Court Justice.⁶

17. The requirements of New York’s constitution are undisputedly met: on election day, all registered voters in New York State have an opportunity to vote for the office of Supreme Court Justice within their respective Judicial Districts.

18. Like many other states, New York’s system for electing Supreme Court Justices contemplates a partisan political process whereby enrolled voters within the Judicial Districts elect Justices from among candidates nominated by local political parties.

19. New York State Election Law defines political “party” as “any political organization which at the last preceding election for governor polled at least 50,000 votes for its candidate for governor.” In New York, there are currently five recognized parties: The

³ Tr. 752:4-9 (Schotland).

⁴ See New York State Constitution, Art. VI § 6; NY Elec. L. § 6-124; N.Y. Jud. L. § 140.

⁵ Tr. 746:9-14 (Schotland).

⁶ N.Y. Elec. L. § 1-104(3).

Democratic Party, the Republican Party, the Conservative Party, the Independence Party, and the Working Families Party.

20. But unlike most other states, New York's legislature did not choose direct primaries as the vehicle by which parties select their nominees for the office of Justice of Supreme Court. Instead, New York deliberately chose a convention system whereby the nominating function is delegated to elected representatives – judicial delegates and alternate delegates. New York State Election Law § 6-106 mandates that parties nominate their candidates for Supreme Court Justice at a Judicial District convention held in each district where there are one or more vacancies for Supreme Court.⁷ In this respect, Michigan is similar in that it provides that candidates for its Supreme Court will only be placed on the ballot if they are chosen at the Democratic state convention or the Republican state convention or, if running independently, have gathered petitions with between 30,000 and 60,000 signatures.⁸

21. The Election Law requires that the convention occur in the third week of September and the general election be held in November.

22. The delegates and alternate delegates who attend the convention are elected at a party primary in September from smaller geographic areas within each Judicial District, called Assembly Districts.⁹ Assembly Districts are the same political subdivisions by which New Yorkers elect their representatives to the New York State Assembly and the members of the State committees of their respective parties.

⁷ N.Y. Elec. L. § 6-106.

⁸ See Exhs. GGG and HHH; Tr.754:25 – 755:18 (Schotland).

⁹ See N.Y. Elec. L. § 6-124. If an Assembly District encompasses a part of two or more counties and if the party rules permit, the delegates from that Assembly District are elected from the part of the Assembly District contained with each such county.

23. Although the determination of the number of delegates and alternate 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.¹⁰

24. Once elected, delegates and alternate delegates convene at the district-wide judicial convention held on a date "not earlier than the Tuesday following the third Monday in September preceding the general election and not later than the fourth Monday in September preceding such election."¹¹

25. Unlike other conventions held in the state for other public offices, the judicial convention is not a designating convention, which is utilized to designate candidates to run in a primary election. The judicial convention is purely a nominating convention, which selects party nominees for Supreme Court *in lieu of* a primary election. Thus, at the convention, the sole function of delegates is to place names of candidates in nomination for each vacancy and vote for candidates on behalf of their constituents, the enrolled voters of the political parties residing in their respective Assembly Districts.

26. Plaintiffs, however, blur this important distinction when they invoke the Democratic Party's convention for statewide office.¹² The Democratic Party's statewide convention is a designating convention, which is used solely as an alternative means of obtaining a place on the primary ballot.¹³ Because a designating convention only takes the place of

¹⁰ N.Y. Elec. L. § 6-124.

¹¹ N.Y. Elec. L. § 6-158(6).

¹² Plaintiffs' Proposed Findings of Fact, ¶ 7.

¹³ Tr. 585:21-586:1 (Carroll).

gathering petition signatures, the loser has the right to petition onto the primary ballot.¹⁴ As such, it is easy to understand why the convention takes place in May, the month before petitioning starts under New York Election Law.

27. Unlike a designating convention, a nominating convention serves as the mechanism for actually selecting the party's candidates.¹⁵ Under New York's statutory scheme, designating conventions and nominating conventions serve two different functions.¹⁶ New York's nominating convention, like a primary, is winner-take-all. Whether a nominee is determined by primary or by nominating convention, there is no alternative access for the loser to seek access to the general election ballot as a party's nominee.¹⁷ Of course, the losing candidate is always free to utilize the other mechanisms under the election law to obtain access to the general election ballot – as Plaintiff Lopez Torres did when she failed to obtain the Democratic Party nomination in 2003.

28. New York's judicial convention is more similar to that most familiar of political conventions – the national party conventions used to select presidential candidates. The principal difference between the two is that delegates to the national conventions are voting to fill only one position with one candidate, while New York's judicial delegates are generally called upon to fill multiple vacancies from an even broader array of candidates. For that reason alone, judicial delegates in New York are typically not pledged to a particular candidate.

29. New York's method of selecting a party's candidate for Supreme Court has been in place since 1921 when the state legislature abandoned a nine year experiment with a primary

¹⁴ Tr. 586:7-8 (Carroll).

¹⁵ Tr. 586:18-20 (Carroll).

system for selecting party candidates for the bench – an experiment that raised concerns that direct primaries by secret ballot resulted in the election of party nominees who neither reflected the ideals of the party nor were qualified to serve as jurists.¹⁸ Professional and civic organizations and other critics also noted that affluent individuals could buy the nomination by mounting well-funded primary campaigns, thereby discouraging many highly qualified individuals from seeking election to the judiciary.¹⁹

30. Indeed, the Association of the Bar of the City of New York published an official report at the time, supporting the abolishment of primaries in favor of the restoration of the convention system because it was “unseemly” for judges to solicit money in primary campaigns.²⁰

31. Thus, in 1921, the legislature, in its wisdom, abolished the primary system and crafted a form of representative democracy that would allow an elected body of informed delegates to consult, deliberate, and choose Supreme Court nominees who best reflect the interests and values of the delegates’ constituents.²¹ Nonetheless, the convention system established in 1921 has remained essentially unchanged to this day.²² As Judge Regan testified, a proposal to replace the convention system with county primaries was considered and hotly debated at the 1967 New York State Constitutional Convention.²³

¹⁶ Tr. 586:21-24 (Carroll).

¹⁷ Tr. 586:25-587:10 (Carroll).

¹⁸ Tr. 1542:8-25 (Kellner).

¹⁹ Kellner Decl., ¶ 17-18.

²⁰ Kellner Decl., ¶ 17.

²¹ Tr. 1542:16-20 (Kellner); Kellner Decl., ¶ 19.

²² Tr. 1542:25 (Kellner).

²³ Tr. 344:1-12 (Regan).

32. Although the judicial convention is the exclusive means for obtaining a political party's nomination, individuals aspiring to become a Supreme Court Justice have the option under the Election Law to access the general ballot as an independent candidate by obtaining the requisite number of signatures on a nominating petition from voters within a Judicial District.²⁴

33. To petition onto the general election ballot, a candidate must obtain 4000 signatures if the candidate is running for Supreme Court in New York City or 3500 signatures if the candidate is seeking office elsewhere in the state.²⁵ Plaintiffs do not contend that it is overly burdensome to get on the general election ballot.

34. Supreme Court candidates who win a party's nomination or candidates who successfully petition onto the general ballot must face the voters in a general election within the Judicial District. So ultimately, the voters decide who is elected to the Supreme Court bench.

35. In addition to this statutory structure, many Judicial Districts use a screening panel to evaluate a candidate's qualifications for Supreme Court. Not required by statute, these panels are voluntary in nature.²⁶

36. For example, in certain upstate districts, such as the Seventh and Eighth Judicial District, various bar and professional associations screen candidates' qualifications.²⁷

37. The Second Judicial District also uses an independent screening committee. Under the Brooklyn Democratic Party rules, this committee publicly solicits candidates for

²⁴ N.Y. Elec. L. § 6-138.

²⁵ *Id.*

²⁶ Tr. 1698:14-18 (Kellner).

²⁷ Tr. 120:16 - 121:11 (Lunn).

Supreme Court, rather than relying on the party chairman to propose candidates.²⁸ A new screening panel was recently established so that the majority of the members represent bar associations, law schools, and government entities rather than political appointees.²⁹

38. In the First Judicial District (New York County), the Democratic party instituted a comprehensive screening mechanism in the 1980s, known as the Independent Screening Panel. The Panel was established as part of an effort by reformers to promote a merit-based system of judicial selection.³⁰ This panel is put together using a “double-blind” process designed to keep the panel independent and free from political influence.³¹

III. THE JUDICIAL DELEGATE PROCESS, FROM PETITIONING THROUGH THE CONVENTION, IS OPEN AND DEMOCRATIC

A. Delegate Are Not “Hand-Picked” By County Leaders

39. At the heart of Plaintiffs’ assault on New York’s judicial selection process is the claim that the method of electing delegates from local Assembly Districts is somehow a closed process that results in the selection of delegates who are: (1) “hand-picked” by county leaders rather than voted upon by the rank and file voters; and (2) pre-ordained to vote in accordance with those leaders’ wishes.³² Plaintiffs, however, have presented no credible evidence supporting these contentions. With the exception of Benjamin Ostrer, not a single live witness on either side testified based on personal knowledge that any delegate was hand-picked. Yet even Ostrer conceded that had he voted against the county leader’s preferred candidate he still would have been able to serve as delegate the following year. Similarly, not a single live witness testified

²⁸ Tr. 432:21-23; Tr. 535:6-19 (Carroll)

²⁹ *Id.*

³⁰ Tr. 1543:9-18 (Kellner)

³¹ Levinsohn Decl., ¶ 9; Tr. 1544:23-25 (Kellner)

³² Compl. at ¶ 30.

based on personal knowledge that any delegate was ever instructed how to vote. Indeed, Plaintiffs' own witnesses with delegate experience – Carroll, Berger and Ostrer – all testified that they had never been directed how to vote.

40. To the contrary, the evidence establishes that the delegate election system is an open and democratic process which affords enrolled voters the opportunity to participate and exercise their political franchise. As Emily Giske testified, with regard to her experience in the 66th Assembly District, delegate races are more often than not “unbelievabl[y] competitive,” with two-way and even three-way races.³³

41. Delegate and alternate delegate are party positions designated by enrolled voters.³⁴

42. The qualifications to become a delegate are minimal. Any New York State resident who is an enrolled member of a political party can run for judicial delegate or alternate within any Assembly District within the Judicial District.³⁵ The evidence shows that most candidates run for delegate within their home Assembly Districts.³⁶ Delegate and alternate candidates from the same Assembly District often run as a slate. Notably, one of Plaintiffs' experts, Henry Berger, testified that individuals and slates of individuals have ample opportunity to run for delegate in a primary.³⁷

³³ Tr. 1984:2-5; Tr. 2010:6-11 (Giske);

³⁴ Tr. 144:22 – 145:16; Tr. 151:16-19 (Berger).

³⁵ Tr. 1554:3-6 (Kellner); Tr. 1393:21 – 1394:6 (Ostrer).

³⁶ See, e.g., Giske Dec. ¶¶ 5-7; Ostrer Dec. ¶¶ 3, 7; Ward Dec. ¶¶ 3, 5; Tr. 1237:23-1238:8 (Schiff)

³⁷ Tr. 264:15 – 265:10 (Berger).

43. Aspiring judicial delegates, like candidates for most other public or party offices, get on the primary ballot by petition.³⁸ The Election Law requires a designating petition signed by 500 enrolled members of the party, or 5% of the enrolled voters, whichever is less,³⁹ within the 37-day petition period in the Spring.⁴⁰ Petitioning begins in late June.⁴¹

44. Thus, where there is a slate of candidates for judicial delegate or alternate, 500 valid signatures qualifies the entire slate.⁴² For example, in Assembly Districts where there are 10 delegates named on a slate, each delegate need gather only 50 signatures. Typically, delegate candidates also run on omnibus petitions, which include names of candidates for other public offices and/or party positions.⁴³

45. Any enrolled member of the party residing anywhere in the State can carry petitions on behalf of a delegate candidate or slate of candidates and obtain signatures from voters, and petitioning is typically carried out by volunteers supporting the candidate.⁴⁴ By signing a designating petition, enrolled voters indicate their desire to designate the individuals named on the petition as candidates for the primary election.⁴⁵

46. Obtaining 500 signatures is not an onerous task. As testified by Arthur Schiff, a judicial delegate and District leader from the 73rd Assembly District in Manhattan, it takes

³⁸ N.Y. Elec. L § 6-136(3); Tr. 143:10-25; Tr. 152:10-15 (Berger).

³⁹ N.Y. Elec. L § 6-136(3).

⁴⁰ N.Y. Elec. L. § 6-134(4); Tr. 1554:7-15 (Kellner).

⁴¹ Tr. 387:22 – 388:20 (Regan).

⁴² Tr. 153:8-11; 160:13-19 (Berger).

⁴³ Tr. 183:6 – 184:8 (Berger); Tr. 449:3-11; Tr. 450:2-17; Tr. 485:24 – 486:2 (Carroll).

⁴⁴ Tr. 194:4-11 (Berger).

⁴⁵ Tr. 1671:20-22 (Kellner).

approximately 20 to 25 hours for a reasonably diligent person to gather the requisite number of signatures.⁴⁶

47. Mr. Schiff testified that he would have sufficient time to gather all 500 signatures by himself.⁴⁷ Indeed, without any primaries this year, members of the Lexington Democratic Club located in the 73rd Assembly District gathered more than 3,000 signatures – more than six times the number necessary to be designated for the primary ballot.⁴⁸

48. Similarly, William Allen testified that, without any club support, he collected over 1,500 signatures each time he was on a slate for delegate.⁴⁹ Mr. Allen testified that he obtained his signatures primarily from buildings in the neighborhood.⁵⁰

49. Judge Keefe's experience as a politician and election lawyer illustrates a further weakness in Plaintiffs' claim regarding difficulties with the petitioning process. As he admitted, petitions are quite easy to create and can be completed in minutes.⁵¹ In 1990, Judge Keefe sponsored over 100 candidates for Albany County Democratic Committee. Almost all of them ran on their own individual petitions. Judge Keefe created petitions for each candidate (for each of 60 voting districts in the county) at the rate of two to five minutes per petition – or 20 districts in one afternoon.⁵²

⁴⁶ Tr. 1239:22 – 1240:11 (Schiff); *see also* Tr. 1256:12-20 (Schiff).

⁴⁷ Tr. 1256:16-20 (Schiff).

⁴⁸ Tr. 1240:14 – 1241:7 (Schiff).

⁴⁹ Tr. 2027:24 – 2028:5 (Allen).

⁵⁰ Tr. 2028:6-14; Tr. 2041:19-2042:11 (Allen)

⁵¹ Tr. 894:15 – 895:5 (Keefe).

⁵² Tr. 895:6 – 898:15 (Keefe).

50. Plaintiffs contend that a candidate must obtain three times the number of required signatures in order to survive a legal challenge. In reality, only 500 valid signatures are necessary to withstand a challenge.⁵³

51. In practice, candidates routinely obtain more than 500 signatures as a precaution against inadvertently invalid signatures.⁵⁴

52. Door-to-door signature gathering using a voter enrollment list tends to result in the highest percentage of valid signatures.⁵⁵

53. New York City Board of Elections Commissioner Douglas Kellner and State Senator Martin Connor both testified that because of changes in the Election Law liberalizing the petitioning requirements, a candidate today need only obtain roughly 1½ times the required number of signatures to ensure that the petition survives any legal challenge.⁵⁶ For example, Judge Regan, who ran his own delegates, testified that since he was careful in how he circulated his petitions he did not need 1,500 signatures, and instead had as his goal 800 signatures.⁵⁷

54. Simply put, delegate candidates who meet the petitioning requirements and file with the appropriate Board of Elections in a timely manner are designated as candidates for the primary election.⁵⁸

55. When there are multiple delegate candidates competing for the same seat, the candidates' names appear on the primary ballot for voters to decide who they wish to represent

⁵³ Tr. 1554:16-19 (Kellner).

⁵⁴ Tr. 351:19-22 (Regan).

⁵⁵ Tr. 462:22 – 464:22 (Carroll).

⁵⁶ Tr. 1554:16-24; Tr. 1702:23 – 1704:14 (Kellner); Tr. 164:21 – 165:24 (Berger).

⁵⁷ Tr. 351:15-22 (Regan).

their interests and act on their behalf at the judicial convention. But when delegate candidates are uncontested, they are “deemed elected” at the primary under the Election Law. Although no actual primary vote for that delegate seat is held, the rank and file members’ designation by petition of an uncontested candidate becomes a deemed election.⁵⁹ Thus, *all* delegates are elected, regardless of whether they were in a contested primary.⁶⁰ Plaintiffs’ expert Professor Schotland testified that such races were “contestable” even if no actual contest occurred.⁶¹

56. The “deemed elected” provision of the Election Law obviates the need for the local Board of Elections to incur unnecessarily the expense of holding a primary for an uncontested office. The provision applies to all elected offices in the state, including Governor.⁶²

57. All enrolled voters can either run for delegate themselves or carry petitions for the candidate of their choice.⁶³

58. In addition to filing a designating petition, any group of voters who chooses to run a write-in campaign for judicial delegates would have the opportunity under state law to petition for an opportunity to ballot.⁶⁴ If voters have been successful at filing an opportunity to ballot and someone else in that district has actually filed a designating petition, the slate of candidates appears on the ballot and anybody who wants to write in against them has the opportunity to

⁵⁸ N.Y. Elec.L. § 6-160.

⁵⁹ Tr. 166:24 – 167:3 (Berger); see also Levinsohn Decl. ¶ 18; N.Y. Elec. L. § 6-160(2).

⁶⁰ Tr. 1556:12-19 (Kellner); Tr. 165:21- 24 (Berger).

⁶¹ Tr. 790:9-12 (Schotland).

⁶² Tr. 166:6-23 (Berger); Tr. 1560:24 – 1561:3 (Kellner); Tr. 482:23-16 (Carroll).

⁶³ Tr. 1560:24 – 1561:3; Tr. 1696:1-18 (Kellner); Tr. 164:8-24 (Berger).

⁶⁴ Tr. 168:12-15. (Berger)

write in whatever name they would like to write in.⁶⁵ Under an opportunity to ballot, any name can be written in whatsoever.⁶⁶

59. The fact that delegate elections are infrequently contested does not mean that the delegate election process is undemocratic.⁶⁷ Delegates serve in what Professor Cain described as a “low visibility post.” Owing to their low profile, these offices are infrequently contested across the country.⁶⁸ Nevertheless, Professor Cain has observed, officers holding these posts tend to be responsive to the interests of voters.⁶⁹ He attributes that phenomenon to the ability of voters when aroused to action by unresponsive or poor performing officials to “pull the fire alarm” and vote them out of office.⁷⁰ There was substantial evidence presented at the hearing of voters being roused to pull the fire alarm and contest delegate elections when they wanted to do so. The alarm may be sounded in conjunction with an overall political movement, such as the reform movement in the 1970’s; an effort to overthrow a party leader, such as County Chairman Pigeon in 2000; a battle among rival political clubs, as happens nearly every year in Manhattan; or an effort to promote a particular constituency to the bench, such as Ms. Giske’s support for GLBT candidates. Clearly, it is the voters who hold sway over the election of delegates, as they can and do exercise their ability to vote for change.

60. Plaintiffs have offered no testimonial or documentary evidence that any Judicial District in the State deviates from this open system of electing delegates. In fact, Plaintiffs have failed to proffer any evidence of how judicial delegates and alternates are elected in the majority

⁶⁵ Tr. 167:20-25. (Berger)

⁶⁶ Tr. 168: 20-25. (Berger)

⁶⁷ Tr. 308:8-20 (Cain).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Tr. 309:3-8 (Cain).

of Judicial Districts throughout the State. Certainly, Plaintiffs have offered no credible evidence to support their assertion that any delegates are “hand-picked” by county party leaders, let alone all delegates. The evidence shows that Plaintiffs John Carroll, Susan Loeb and David Lanner have themselves run for delegate and won.

**B. Delegates Are Not “Rubber Stamps”
For The County Leader**

61. Like their allegation that judicial delegates are “hand-picked” by county party leaders, Plaintiffs’ claim that judicial delegates simply vote as instructed by county leaders rather than independently is also without support.⁷¹ In fact, Plaintiffs’ own witnesses testified to the contrary.⁷²

62. Plaintiffs suggest that it is patronage which secures unwavering delegate loyalty. But there is no evidence of patronage, either.⁷³

63. Delegates function not as proxies for county leaders, but rather as elected representatives of the rank and file who have, and who fully exercise, the legal right to nominate candidates from the floor of the convention and vote how they choose. The testimony of delegate witnesses confirms that delegates and alternates have the independence and ability to vote for the candidate of their choice. Evidence from many witnesses also shows that party leaders do not instruct delegates how to vote.⁷⁴

64. Plaintiff John Carroll testified that over the 30 years he has served as a judicial delegate in the Second Judicial District, no one has ever directed him how to vote at the

⁷¹ Tr. 228:20 – 229:3 (Berger); Tr. 521:3-22; Tr. 524:3 – 525:2 (Carroll); Tr. 2101:8 – 2103:17 (Connor).

⁷² Tr. 228:20 – 229:3 (Berger).

⁷³ Tr. 1263:2 – 1265:7 (Schiff).

convention. Nor has he ever been prevented from making a nomination or nominating speech from the floor of the convention. Mr. Carroll is not aware of any delegate in the Second Judicial District having been told to vote for a particular Supreme Court candidate.⁷⁵

65. Plaintiffs witness Benjamin Ostrer testified that when he has served as delegate in the Ninth Judicial District, he was never instructed on how to vote.⁷⁶ He was never told that he could not make a nomination from the floor of the convention.⁷⁷ Nor has he heard of anyone being prevented from making a nomination from the floor.⁷⁸

66. Arthur Schiff, of the First Judicial District, testified that he was able to vote for the candidate that he deemed best, and stated that if he had to follow someone else's direction, he would not have run for delegate.⁷⁹

67. Defendants' expert Douglas Kellner testified that in his experience as a delegate to the First Judicial District convention, he was always free to vote his conscience.⁸⁰ Mr. Kellner further testified that he had never been instructed by the County leader to vote for a particular candidate.⁸¹ In fact, Mr. Kellner has voted for a candidate who did not have the County leader's endorsement.⁸²

⁷⁴ Tr. 235:3-14 (Berger); Tr. 525:3-21 (Carroll); Tr. 2088:12-21 (Connor).

⁷⁵ Tr. 448:17; Tr. 540:13 – 541:7; Tr. 521:3-22 (Carroll)

⁷⁶ Tr. 1423:17 – 1424:7 (Ostrer).

⁷⁷ Tr. 1425:3-13 (Ostrer).

⁷⁸ Tr. 1425:14-18 (Oster).

⁷⁹ Tr. 1261:25 – 1262:6. (Schiff).

⁸⁰ Tr. 1583:18-20 (Kellner).

⁸¹ Tr. 1583:9-13 (Kellner).

⁸² Tr. 1583:21-25 (Kellner).

68. Robert Levinsohn, a veteran of judicial politics in the First Judicial District, testified that in over three decades of service he has never been instructed by any District or County leader to vote for a particular judicial candidate.⁸³

69. William Allen, who served as a delegate for the 70th Assembly District on a number of occasions, testified that he always had the ability to vote for the candidate of his choice and that he has never heard the County leader instruct any delegate how to vote. As a District leader, Mr. Allen never instructed any delegate how to vote at the convention.⁸⁴

70. Emily Giske, an alternate delegate from the 66th Assembly District in New York County, stated that she has never been instructed by the County leader on how to vote at the convention and that the delegates she shared a slate with were typically very independent-minded.⁸⁵

71. At the 2002 Judicial Convention, for example, Ms. Giske exercised her independence as a delegate by nominating Troy Webber. There was a vote between Ms. Webber and John Bradley, in which Ms. Webber prevailed. Ms. Giske testified that at the same convention she voted for Rosalyn Richter, then a Criminal Court Judge, without knowing whether or not she had the county leader's support because Ms. Giske was committed to supporting an openly lesbian candidate.⁸⁶

⁸³ Tr. 1947:11-19 (Levinsohn).

⁸⁴ Tr. 2036:15-21; Tr. 2036:10-14 (Allen).

⁸⁵ Tr. 1993:17-19; Tr. 1986:25 – 1987:2 (Giske).

⁸⁶ Tr. 1990:13-18; 1994: 18-19 (Giske).

72. The experiences of Justices who have worked hard to earn delegate support and gone on to win the nomination further confirm that delegates are free to vote for the candidate of their choice at the convention.⁸⁷

73. As discussed more fully below, Justices Freedman, Schlesinger, Gangel-Jacobs, Lunn, Sise and Abdus-Salaam all testified to the hard work entailed in courting delegate support. Although these Justices testified to attempting to reach out to all delegates and alternates, none reported ever being told in response to their request for support that a delegate was committed to voting the will of the county leader rather than his or her own mind. As Justice Freedman said of Manhattan delegates, “people tend to be independent.”⁸⁸

74. Apparently, even after her unsuccessful bid in 2002, Judge Lopez Torres continued to believe that delegates are independent, as proven by her own campaign literature, which she sent to delegates the following year.⁸⁹ As she wrote: “As a delegate, you have a right and obligation to use your judgment and to vote for the most qualified candidates who will best serve all the people of Kings and Richmond Counties.”⁹⁰

75. Delegate independence carries over from the campaign into the convention. For example, Justice Lunn testified that leading up to the vote at the convention, delegates were still asking him questions, specifically about whether he had published any decisions at the town court level.⁹¹ Justice Abdus-Salam told of being approached during the convention by another

⁸⁷ Tr. 1823:1 – 1824:22 (Gangel-Jacob).

⁸⁸ Tr. 1785: 16 (Freedman).

⁸⁹ Exh. K.

⁹⁰ *Id.* (emphasis added).

⁹¹ Dep. Tr. 94:5-12 (Lunn).

candidate's wife, who mistook her for a delegate and solicited her vote.⁹² Floor fights and logrolling would not ensue if the delegates did not wield real decision-making authority.

76. To the extent delegates from the same political club tend to vote together for judicial candidates, this does not show a lack of independence, as Plaintiffs claim. It is unremarkable that delegates who share club membership also share similar views on candidates. Plaintiffs have short-changed the process by ignoring the discussion, debate and consensus building that go into trying to forge a club consensus on different candidates. To advance their agenda, political clubs, like political parties, necessarily seek common ground.⁹³

77. The evidence shows that delegates pursue their duties seriously and conscientiously, taking affirmative steps to learn more about the candidates' qualification by hosting and attending face-to-face sessions with candidates, reviewing campaign literature, and caucusing with other delegates.⁹⁴

78. Plaintiffs' claim that "the delegate process is designed to ensure that county party leaders rather than the voters choose the judicial delegates and alternate delegates" and that, as a result, these "hand-picked delegates nominate . . . the party leadership's Supreme Court candidates," so central to their case, is contrary to the overwhelming weight of the evidence.⁹⁵ As even Plaintiffs' expert, Professor Cain, admitted: a "[d]elegate is free to do as he or she sees fit."⁹⁶

C. Political Clubs Are Highly Democratic Organizations

⁹² Tr. 1866:19-1867:2 (Abdus-Salaam).

⁹³ Tr. 1567:3-9 (Kellner); Tr. 1943:21 - 1944:1 (Levinsohn).

⁹⁴ Tr. 2031:25 - 2032:16; Tr. 2034:13-25 (Allen).

⁹⁵ Compl. ¶ 30.

⁹⁶ Tr. 310:19 (Cain).

79. Plaintiffs claim that political clubs render the convention process undemocratic and constitutionally offensive by excluding potential members with a de facto poll tax in the form of club dues.⁹⁷ But testimony proves the opposite. The City's political clubs are in fact open, inclusive and brimming with democracy.

80. Although political clubs exist throughout New York City, Plaintiffs have proffered evidence relating only to the Manhattan and Brooklyn. Plaintiffs essentially ignored Staten Island, Queens and the Bronx.

81. Far from the impenetrable, unrepresentative and exclusionary organizations painted by Plaintiffs, political clubs are "kernel[s] of community activism" and the grass-roots of the Democratic party.⁹⁸ As State Senator Marty Connor testified, clubs are "the quintessential [expression] of the First Amendment," offering like-minded citizens an opportunity to organize for political action.⁹⁹

82. In fact, clubs often organize around issues or ideals, giving rise to liberal and conservative clubs, to gay and lesbian activist clubs, to clubs centered around race and ethnicity – and to reform-minded clubs.¹⁰⁰ Indeed, political clubs played a major role in the Democratic reform movements in the New York and Kings Counties in the late 1970s and early 1980s.¹⁰¹

83. From their 18th Century origins as community organizations and benevolent orders, today's political clubs embrace and promote various party ideals through grass-roots voter education and old-fashioned hard work. Their efforts extend to the selection and election

⁹⁷ Tr. 119:1 – 120:4 (Berger).

⁹⁸ Tr. 1843:2-11 (Gangel-Jacob); *see also* Tr. 1552:11 – 1553:4 (Kellner); Tr. 1859:25 – 1860:8 (Abdus-Salaam).

⁹⁹ Tr. 2083:12-18 (Connor); *see also* Tr. 1315:11-18 (Schiff); Tr. 1551:8-10 (Kellner).

¹⁰⁰ Tr. 2083:2-12 (Connor); *see also* Tr. 56:5 – 57:23 (Levinsohn).

of candidates for public and party office, including the positions of delegate and alternate delegate to the judicial convention.¹⁰² Clubs also have social service functions, such as running housing and immigration clinics and advising individuals about welfare rights.¹⁰³

84. There are no meaningful barriers to entry for political clubs. Any enrolled party member can join a political club.¹⁰⁴ The annual dues are typically in the range of ten to twenty-five dollars, with lower rates for those who cannot afford standard dues.¹⁰⁵ If an individual wishing to join a club cannot afford even reduced rates, someone will typically cover dues for that person or the club may waive the dues.¹⁰⁶ Indeed, clubs are always seeking to get people in the community more involved with political process.¹⁰⁷ It is in the club's interest to attract new members.

85. Any group of individuals that wants to organize and run candidates can form a new political club. There are no restrictions on forming new clubs, which happens quite often.¹⁰⁸ In fact, new clubs often form to take over existing clubs. All clubs were new clubs at some point in time.¹⁰⁹

86. Contrary to Plaintiffs' arguments that political clubs are undemocratic, they are a centerpiece of democratic association. Mr. Schiff responded to the suggestion that clubs are undemocratic as follows:

¹⁰¹ Tr. 1904:6-10 (Levinsohn); Tr.1551:19-22 (Kellner); Tr. 2073:4-16 (Connor).

¹⁰² Tr. 1551:5-22; Tr. 1552:7-8 (Kellner).

¹⁰³ Tr. 1551:23 – 1552:4 (Kellner).

¹⁰⁴ Tr. 114:14-19 (Berger); Tr. 1313:14-22 (Schiff).

¹⁰⁵ Tr. 1552:4-24 (Kellner); Tr. 1237:15-16 (Schiff); Tr. 1998:19-21 (Giske).

¹⁰⁶ Tr. 1552:25 – 1553:1 (Kellner); Tr. 2084:1-20 (Connor); Tr. 1314:8-18 (Schiff); Tr. 1998:19-21 (Giske).

¹⁰⁷ Tr. 1843:5-11 (Gangel-Jacob); Tr. 1314:8-18 (Schiff).

¹⁰⁸ Tr. 1553:15 (Kellner); Tr. 2085:19 (Connor discussing the formation of LAMAPA); Tr. 2049:24 – 2050:17 (Allen, discussing his recent formation of a new political club); Tr. 2084:24 2085:19 (Connor).

¹⁰⁹ Tr. 1553:2-9 (Kellner).

The fact that people get together to form a club and then agree that by majority vote the club will select candidates to endorse and agree essentially that they won't oppose those candidates once the club endorses candidates, that to me is not undemocratic. It is democratic, in the sense that majority rules, involving people in the party getting them to coalesce in order to enhance their political will.¹¹⁰

87. New York County, the sole county of the First Judicial District, is divided into twelve Assembly Districts, drawn along neighborhood lines. There are multiple clubs in all of the Assembly Districts, with the exception of the 73rd Assembly District – encompassing primarily Manhattan's Upper East Side – which has only one political club.¹¹¹ On the other hand, clubs may transcend an Assembly District's boundaries, as in the case of GLID.¹¹²

88. In the Spring of each year, political clubs hold endorsement meetings where members vote on endorsements for public and party offices, including judicial delegate.¹¹³ A notice goes out to all club members, even those who are delinquent in paying their dues.¹¹⁴

89. In New York, choices for delegates and alternates are vigorously contested at club meetings, which are heavily attended.¹¹⁵ Robert Levinsohn and Douglas Kellner both testified that every single year they ran for judicial delegate they were contested by other club members.¹¹⁶ Mr. Levinsohn testified that he has lost to others seeking the delegate position in his club.¹¹⁷

¹¹⁰ Tr. 1215:11-18 (Schiff).

¹¹¹ Tr.1912:18-21 (Levinsohn); Exh. A (1st Judicial District Map).

¹¹² Tr. 1998:1-5 (Giske)

¹¹³ Tr. 1557:20-25 (Kellner); Levinsohn Decl., ¶ 16; *see also* Tr. 1984:6 – 1985:6 (Giske).

¹¹⁴ Tr. 1944:5-14 (Levinsohn); Tr. 1242:6 – 1243:5 (Schiff).

¹¹⁵ Levinsohn Decl., ¶ 16; Tr. 1551:2-4; Tr. 1556:20-22; Tr. 1557:20-25 (Kellner); Tr. 1984:6-22 (Giske).

¹¹⁶ Tr. 1448:22-24 (Kellner); Tr. 1942:13-17 (Levinsohn).

¹¹⁷ Tr. 1942:18-21 (Levinsohn).

90. Given the robust competition, aspiring delegates often lobby for support by making phone calls and disseminating literature to other club members.¹¹⁸ Ultimately, most clubs choose their delegate and alternate delegate candidates by secret ballot.¹¹⁹

91. Because there are multiple clubs in most Assembly Districts, clubs will either negotiate a joint slate of delegate candidates for the Assembly District or put forth rival slates that engage in local battles to win the delegate seats.¹²⁰

92. Primary contests in the First Judicial District are not uncommon. Commissioner Kellner estimated that over the last twenty years there have been primaries in roughly one-third of the twelve Assembly Districts in New York County.¹²¹ Plaintiffs' statistics show that number as 40%.¹²² In 2003, more than half of the Assembly Districts had contests, some with more than two rival slates.¹²³

93. In delegate state primaries, rival slates, with assistance from their respective clubs, launch grass-roots campaigns to win voter support. In the 66th Assembly District in Greenwich Village, for example, competing slates of delegate and alternate candidates engage in a spirited community-based efforts to print and disseminate literature on street corners, subways and buildings, and call friends and neighbors to win their support.¹²⁴

¹¹⁸ Tr. 1558:6-9 (Kellner); Tr. 1984:25 – 1985:6 (Giske); Exh. QQ (Alan Flacks flyer).

¹¹⁹ Tr. 1558:10-16 (Kellner).

¹²⁰ Tr. 165:10-20 (Berger); Tr. 2085:8-19 (Connor).

¹²¹ Tr. 1561:6-10 (Kellner); Kellner Decl. ¶ 26.

¹²² *Id.*

¹²³ Kellner Decl., ¶ 26; Tr. 1561:15-18 (Kellner).

¹²⁴ Tr. 1984:18 – 1985:6; Tr. 1988:21 – 1989:8 (Giske).

94. Not every delegate and alternate on a slate of candidates wins at the primary. Sometimes, partial slates are elected, with candidates from other slates –and by extension other clubs - sharing the victory.¹²⁵

95. The election of delegates is often competitive on many levels. As Emily Giske testified, the majority of delegate races in the 66th Assembly District are “unbelievabl[y] competitive,” with at least a two-way race most of the time, and occasionally three-way races.¹²⁶

96. Ms. Giske has a great deal of experience in such races. She has been actively involved in judicial politics for approximately eight years, has served as an alternate delegate approximately seven times, and has voted in judicial conventions two or three times.¹²⁷

97. In 2002, Giske was an alternate on a 66th Assembly District slate, from the Gay and Lesbian Independent Democrats, that was challenged by two other slates.¹²⁸ Julie Nadel ran as an individual on a competing slate against Ms. Giske’s slate that year, and won in the primary election.¹²⁹ Ms. Giske also testified she herself ran and lost in prior years.¹³⁰

98. District leaders are local party representatives who are normally club members themselves. They do not handpick delegate and alternate delegate candidates.¹³¹ By party rule and statute, district leaders are charged with leading the party’s activities within that district.

¹²⁵ Tr. 130:20 – 131:15 (Berger).

¹²⁶ Tr. 1984:2-5; Tr. 2010:6-11 (Giske).

¹²⁷ Giske Decl., ¶ 6.

¹²⁸ Giske Decl., ¶ 11.

¹²⁹ Tr. 1994:24 – 1995:14 (Giske).

¹³⁰ Tr. 1985:7-11 (Giske).

¹³¹ Tr. 1254:1-6 (Schiff); Tr. 1325:24 – 1326:2 (Ward).

Although they play a role as club leaders, it is really the club membership which chooses the club's candidates.¹³²

99. As the witnesses who have served as judicial delegates or alternates testified at the hearing, they ran in vigorous contests within their political clubs for their positions.¹³³

100. Moreover, district leaders are elected in a primary every two years by enrolled voters residing in the Assembly District.¹³⁴ Thus, while district leaders do have influence, as they should, they are regularly accountable to their constituents. If the rank and file party members are dissatisfied with district leader's performance, they can replace her. Indeed, as Mr. Allen testified, this happens all the time.¹³⁵

101. As for the New York County leader – the Chief Executive Officer of the Party – he plays no role in the delegate selection process at the Assembly District level except in his own Assembly District, where he is a district leader.¹³⁶

102. Although most delegate candidates in the First Judicial Districts are elected out of political clubs, neither club membership nor club endorsement is necessary to win a delegate seat.¹³⁷ Nor is club membership necessary to run for delegate or the Supreme Court bench.¹³⁸

103. William Allen – lifelong resident of the 70th Assembly District – is an example of an individual winning a delegate seat without any backing from a political club, much less a

¹³² Tr. 1563:3 – 1564:8 (Kellner); Tr. 2112:15 – 2113:7 (Connor).

¹³³ See, e.g., Tr. 253:10-13 (Berger); Tr. 1993:25-1984:5 (Giske); Tr. 1558:1-12; Tr. 1558:17-25 (Kellner); Tr. 1942:8-21 (Levinsohn); Tr. 445:20-23 (Carroll).

¹³⁴ Tr. 40:16 – 41:14 (Berger).

¹³⁵ Tr. 2037:23 – 2038:5 (Allen); Tr. 1671:23 – 1672:8 (Kellner).

¹³⁶ Tr. 1564:9-15 (Kellner); Tr. 1241:11-19 (Schiff).

¹³⁷ Tr. 150:20 – 151:15 (Berger); Tr. 1996:3-8 (Giske).

party leader. After a twenty year hiatus, Mr. Allen reentered judicial politics in 1999, in part as an example to younger members of the Harlem community who were angry over the well-publicized murder of Amadou Diallo, and that civic and political involvement with the management of the community was a more productive means for expressing their anger and effecting social change.¹³⁹

104. Enlisting the help of unpaid volunteers, including friends, community activists, and leaders of civic organizations such as block associations and tenant groups, Mr. Allen put together a slate of delegates and alternate delegate candidates, including himself, and obtained within two weeks more than enough signatures to withstand a legal challenge and get on the primary ballot.¹⁴⁰ Mr. Allen also ran and appeared on the petition as a candidate for District leader.¹⁴¹ Mr. Allen's story is an example of grass-roots community activism at work. As Mr. Allen testified:

Ordinary citizens if they are active in the community should run for office and make a difference and they don't have to necessarily be tied to a club to do that, all they have to do, know their neighbors and get their message out and that is what I did and was elected.¹⁴²

105. Indeed, Mr. Allen ran independently because he wanted to demonstrate that "one did not need the club to get elected."¹⁴³ Mr. Allen won both the delegate and District leader seats at the primary deliberately without seeking any endorsements from any political clubs or

¹³⁸ Tr. 1699:17-25 (Kellner); *see also* Tr. 1553:19 – 1554:2 (Kellner) (Kellner advises some candidates that club affiliation is not necessary).

¹³⁹ Tr. 2022:19-25; Tr. 2026:7 – 2027:11 (Allen).

¹⁴⁰ Tr. 2027:14 – 2028:24; Tr. 2029:6-8 (Allen).

¹⁴¹ Tr. 2029:11-17; Tr. 2020:1-2; Tr. 2021:23-25 (Allen).

¹⁴² Tr. 2023:6-10 (Allen).

¹⁴³ Tr. 2022:9-12 (Allen).

political leaders.¹⁴⁴ And since 1999, Mr. Allen has again successfully run for delegate and District leader without any club support.¹⁴⁵

106. Another example of a candidate who has successfully run without the backing of a political club is Alan Flacks. Mr. Flacks is full time community activist in the 69th Assembly District. Mr. Flacks had previously been a member of a club called Community Free Democrats, and in the late 1970s and 1980s would routinely receive its endorsement for delegate. For several consecutive years thereafter, the club refused to endorse him, and so, one year, Mr. Flacks prepared his own petitions made it to the primary, and won.¹⁴⁶

107. Since then, Mr. Flacks has joined a different club, the Three Parks Independent Democrats, where he has never had the support of most of the club leadership. Nonetheless, Mr. Flacks has won the delegate position without the club's endorsement, and in recent years has successfully recruited enough club members so that he now routinely finishes in first place for the endorsement to be on the Three Parks judicial slate.¹⁴⁷

108. In virtually all cases, delegates and alternates are not committed to voting for any particular judicial candidate for Supreme Court before or at the time they are elected to serve at the judicial convention.¹⁴⁸ Delegates, however, may be, and often are, committed to promoting certain ideals and voting for candidates that reflect those ideals. For example, Ms. Giske, of the 66th Assembly District in Greenwich Village, is committed to voting for candidates who are

¹⁴⁴ Tr. 2022:1-4, 15-18 (Allen).

¹⁴⁵ Tr. 2021:19-2022:4 (Allen).

¹⁴⁶ Tr. 1559:17-1560:11; Tr. 1564:1-8 (Kellner).

¹⁴⁷ Tr. 1560:12-18 (Kellner).

¹⁴⁸ Tr. 1568:1-5 (Kellner); Giske Decl., ¶¶ 13-14; Tr. 2031:2-9 (Allen).

openly gay, lesbian, bisexual, or transsexual.¹⁴⁹ Likewise, William Allen, of the 70th Assembly District in Harlem, is committed to promoting African-Americans to the bench.¹⁵⁰ Neither of these delegates was a “rubber stamp.” There is no evidence in the record of any delegate in any Judicial District in any year having been a “rubber stamp” of a party leader.

109. Brooklyn and Staten Island comprise the Second Judicial District. As in the First Judicial District, political clubs play a major role in Brooklyn party politics, including the selection of candidates for public and party offices such as judicial delegate and alternates.¹⁵¹ Clubs are at the heart of grass-roots politics and community-based efforts to effect governmental change. The constructive, democratic and open nature of the Brooklyn clubs is highlighted in testimony from Senator Connor and John Carroll.

110. Senator Connor’s first foray into politics, for example, was through involvement with a political club in the 1970s. Senator Connor started out in Brooklyn politics with a reform club in the mid 1970’s. He was also involved with KCDC (Kings County Democratic Coalition), the Brooklyn arm of the citywide New Democratic Coalition.¹⁵²

111. As a key member of the Brooklyn Reform Movement, he and the reform clubs ran delegate slates in 24 of what was then 26 Assembly District’s in Brooklyn.¹⁵³ His group won a significant number of delegates, nominated candidates at the convention, and engaged in floor fights.¹⁵⁴ In each year from 1972 to 1975, they ran contested races for judicial delegate.¹⁵⁵

¹⁴⁹ Tr. 1987:6-12 (Giske); Giske Decl., ¶ 13.

¹⁵⁰ Tr. 2044:13-15 (Allen).

¹⁵¹ Tr. 2093:22 – 2094:9 (Connor).

¹⁵² Tr. 2075:17 – 2076:7 (Connor).

¹⁵³ Tr. 2079:6-15 (Connor).

¹⁵⁴ Tr. 2081:3-14 (Connor).

112. Mr. Carroll, active in Brooklyn politics for 30 years, similarly used club activity as a platform to build his career that in large part has been dedicated to party reform efforts.¹⁵⁶

Mr. Carroll also testified that he lost a primary election for delegate.¹⁵⁷

113. Both witnesses confirm that district leaders do not dictate the selection of delegates in the Second Judicial District, where there were a contested delegate primaries in 2004.¹⁵⁸ Recent Board of Elections records reveal that there were also contested delegate primaries in the Second Judicial District in 2000, 2001, 2002 and 2003.¹⁵⁹

114. Plaintiffs otherwise have offered no evidence showing that the delegate selection process in Brooklyn is any less open, democratic and competitive than in New York County. There is also no evidence that district leaders or County Chairman Norman exercise total control by “hand-picking” delegates who “rubber-stamp” their preferences at the judicial convention.

115. As noted earlier, Plaintiffs, despite bearing the burden of proof in this action, have offered no evidence about the operation of political clubs in the remaining counties in New York City. The record is silent on political clubs in Queens (Eleventh Judicial District) and Staten Island. There is only limited testimony on political clubs in the Bronx, much of which is dated.

¹⁵⁵ Tr. 2076:11-2081:20 (Connor).

¹⁵⁶ Tr. 442(16)-443(8) (Carroll)

¹⁵⁷ Tr. 445:20-23 (Carroll).

¹⁵⁸ Tr. 467:25 – 468:4 (Carroll); Exh. E (ballot showing two competing slates of delegates and attendees).

¹⁵⁹ Exhs. 19-22.

116. Except in limited circumstances, outside of New York City there is no political club system.¹⁶⁰ Instead, County Committees serve the function of running candidates for public office and party positions, including delegates and alternates.¹⁶¹

117. Outside of New York City there are no clubs. There are town, village and city committees whose members are elected every two years as members of the county committee after they circulate petitions.¹⁶²

118. With the limited exception of Mr. Ostrer's testimony, Plaintiffs have presented no direct evidence that county party leaders dictate who will run for delegate.¹⁶³ But Mr. Ostrer's testimony stands in contrast to the weight of the evidence, as discussed below. For example, Dennis Ward testified that no county leader chooses who runs for delegate in the 8th Judicial District.¹⁶⁴

119. County Committees also promote party's agenda and candidates. The Committee is typically comprised of two to four members from every election district, depending upon the size of the gubernatorial vote in that election district. Any enrolled member of a particular political party can circulate petitions and seek designation and election as a County Committee member from any election district within the county in which they reside.¹⁶⁵ Committees are

¹⁶⁰ Tr. 2082:21 – 2083:18 (Connor); *see also* Tr. 1329:10-14 (Ward).

¹⁶¹ Tr. 2083:2-11; Tr. 2099:16-24 (Connor).

¹⁶² Tr. 381:10-382:7; Tr. 382:22-383:9 (Regan)

¹⁶³ Tr. 1404(13-21) (Ostrer).

¹⁶⁴ Tr. 1325:24 – 1326:2 (Ward).

¹⁶⁵ Tr. 147:1; Tr. 148:24 (Berger).

comprised of members and leaders elected at the primary every two years by enrolled voters of the party residing within the county.¹⁶⁶

120. In the Seventh Judicial District, the identity of the county committee - supported candidates for Supreme Court are known by the 3rd Friday in May. Petitioning for judicial delegates begins in late June.¹⁶⁷ After he learned he would not be the county committee choice, Regan had one month to organize his own delegates. He ran them in 5 districts because that would be enough to control the convention and nomination. He was able to obtain sufficient signatures to control the convention.¹⁶⁸ But because they are elected, County Committee members and leaders are accountable to the voters. If the party rank and file are dissatisfied with their elected Committee leaders' choices, including choices for delegate and alternate delegate candidates, they can vote those leaders from office.

121. Further, there is nothing to prevent enrolled voters who want to be more active in the judicial selection process from organizing and getting involved in the county political organizations, or organizing and running their own slates of delegates to the convention.

122. Thus, Mr. Ward testified that 500 signatures is all it takes to contest a delegate position when there is voter dissatisfaction.¹⁶⁹ When there are not such challenges, or other voter-based reaction to the Committee's role in the conventions, the proper conclusion is not that Committee leaders dictate results, but that the process is working and enrolled party voters approve.

¹⁶⁶ N.Y. Elec. L. § 2-106; Tr. 146:14 – 147:8; Tr. 147:20 – 148:25; Tr. 175:1-7 (Berger); Tr. 381:10 – 382:7; Tr. 382:22 – 383:9 (Regan).

¹⁶⁷ Tr. 387:22-388:20. (Regan)

¹⁶⁸ Tr. 387:7-392:5; Tr. 402:21-403:13. (Regan)

¹⁶⁹ Tr. 1326:3-8 (Ward).

123. Mr. Kellner's testimony on the point is instructive:

A. By definition, the convention system is designed that the political leadership of the party is going to designate the party's candidates. Specifically, judicial delegates are part of the party leadership and responsive to it and make it up, you know, constitute the party leadership.

Q. So it is the voters that elect the delegates to actually make the selection on their behalf?

A. Yes. And the voters elect the other party leaders as well. The voters elect the district leaders. The voters elect the county committee members, and the county leader is elected by the district leaders, but the party leadership is accountable to the party members through the primary challenge process.

Q. So if the voters [are] not happy with what the district leader is doing with respect to judicial elections or the county leader, for that matter, do they have the ability to throw them out?

A. Not only the ability, but they do throw them out.¹⁷⁰

IV. JUDICIAL CANDIDATES COMPETE OPENLY FOR SUPPORT FROM DELEGATES WHO EXERCISE THEIR DISCRETION AS TO WHOM TO SUPPORT, WHEN AND TO WHAT DEGREE

A. The Nine-Month Campaign Window

124. Plaintiffs assert that the time-frame between the primary and the convention – or, in districts that have screening panels, between the panel report and the convention - is too short for candidates to campaign meaningfully and win delegate support. This assertion misperceives the process.

125. Once the petitions are filed with the local Board of Elections in July, the names of candidates running for delegate and alternate delegate, contested or uncontested, are publicly available and easily accessible. According to Mr. Carroll, it would take only about an hour to

¹⁷⁰ Tr. 1671:15 – 1672:8 (Kellner); *see also* Tr. 2037:10-12; Tr. 2019:18-23 (Allen).

obtain this information from the Board of Elections.¹⁷¹ Judicial candidates routinely requisition petitions to assist their campaign.¹⁷²

126. But the evidence also shows that the campaigning occurs throughout the year, over a long nine-month period, with judicial candidates appearing at community events and political functions attended by club members, party leaders, and potential delegates and alternates, meeting with the people who are likely to be involved in the judicial selection process, and generally planning and promoting their candidacy.¹⁷³ Indeed, because many delegates run year after year, judicial candidates often know who to contact even before petitions are filed. The abbreviated time period pushed by Plaintiffs is a red herring.¹⁷⁴

127. 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.¹⁷⁵ Candidates who are judges typically notify the Office of Court Administration in January that they intend to run.¹⁷⁶

128. Candidates, including sitting Civil Court judges and Acting Supreme Court Justices, typically take advantage of this nine-month “window” to promote their candidacy even before being reporting out of the screening panel in early September, particularly by: making their name and intentions known within the Judicial District; attending events sponsored by political clubs; speaking with party leaders, club members and potential delegates; creating their

¹⁷¹ Tr. 507:15 – 509:16 (Carroll).

¹⁷² Tr. 1785:23 – 1786:17 (Freedman); Tr. 1572:4-8 (Kellner); Tr. 1326:9 – 1327:12 (Ward); Tr. 210:19 – 212:8 (Berger); Tr. 2115:13 – 2117:10 (Connor).

¹⁷³ Tr. 1308:22 – 1309:6; Tr. 1309:18 – 1310:6 (Schiff); Tr. 1362:11 – 1329:24 (Ward).

¹⁷⁴ Tr. 2115:13 – 2117:10 (Connor).

¹⁷⁵ *Code of Judicial Conduct*, 22 NYCRR Part 100, at § 100.Q. Tr. 1572:12-18 (Kellner); Dep. Tr. 83:14-24 (Lunn); 1773:12-20.

election committees; hosting a breakfast or reception for delegates and alternates; and otherwise attempting to gather and measure support for their candidacy by getting to know people in the district and people getting to know them.¹⁷⁷

129. A timeline is illustrative. In 1988, Justice Freedman began campaigning about nine months before the general election, at the New York County Committee dinner.¹⁷⁸ She used that opportunity to get her name out officially, so that the political clubs would be aware of her candidacy and invite her to their fundraisers, where she could talk to party leaders and potential delegates.¹⁷⁹ After the County Dinner, beginning in the Spring and continuing through the Summer, Justice Freedman attended the various club dinners and fundraisers.¹⁸⁰ By July, lists of delegates and alternates became available, and Justice Freedman attempted to contact all of the delegates and alternates, even in instances of competing slates.¹⁸¹ By August 24th she sent out her first mailing; a second mailing followed on September 9th.¹⁸² From September through the convention, she and her campaign committee continued to work hard for delegate support. Her success at the convention in November was a direct result of nine-month effort, which yielded substantial delegate support that allowed her to enter the convention as a strong candidate and emerge as a winner in the logrolling that followed.

130. It is important to note, moreover, that the measure of a candidate's efforts to be elected to the Supreme Court and the openness of the system need not be considered in static, one-year increments only. Many successful efforts occur over multiple years, with candidates

¹⁷⁶ Tr. 1309:15-21 (Schiff).

¹⁷⁷ Tr. 1754:5 – 1755:19; Tr. 1760:23 – 1763:25 (Freedman); *see also* Tr. 1572:12-18 (Kellner).

¹⁷⁸ Tr. 1760:23 – 1761:2 (Freedman).

¹⁷⁹ Tr. 1761:3-16 (Freedman).

¹⁸⁰ Tr. 1756:4-10 (Freedman).

¹⁸¹ Tr. 1756:13-22 (Freedman).

learning from and build on the prior year's experience to refocus their efforts and strengthen their candidacy.¹⁸³

131. Indeed, as the campaigns described by Justices Schlesinger and Freedman demonstrate, the current system allows for and often rewards this kind of sustained effort from candidates who are committed to attaining this important office. Justice Freedman, for example, campaigned over a five or six-year period, entering four panels and emerging from two, before being elected in 1988.¹⁸⁴ She candidly stated that prior experience made her a better candidate in 1988 and explained how.¹⁸⁵

132. Justice Schlesinger went to several panels before first reporting out in 1995,¹⁸⁶ when she was nominated, but realized she lacked sufficient support and withdrew.¹⁸⁷ In 1997, she was again nominated at the convention, but lost in a floor fight.¹⁸⁸ In 1998, she was nominated and prevailed.¹⁸⁹

133. Contrary to plaintiffs' contentions, a person does not have to be "politically connected" to get the party nomination, but rather must – like any office – demonstrate zeal and determination to win. An example of such a person is Paula Feraletto, an attorney from Buffalo, that won the Democratic Party nomination for the Eighth Judicial District in 2003 by campaigning across all of the eight counties of the eighth Judicial District.¹⁹⁰ Ms. Feraletto was

¹⁸² Tr. 1763:20-22 (Freedman).

¹⁸³ Tr. 1964:16-24 (Schlesinger); Tr. 1764:1-16 (Freedman).

¹⁸⁴ Tr. 1750:13 – 1752:15 (Freedman).

¹⁸⁵ Tr. 1764:1-16 (Freedman).

¹⁸⁶ Tr. 1963:21-23 (Schlesinger).

¹⁸⁷ Tr. 1964:12-15. (Schlesinger).

¹⁸⁸ Tr. 1965:21 – 1966:23 (Schlesinger).

¹⁸⁹ Tr. 1968:6-8 (Schlesinger).

¹⁹⁰ Tr. 1329:25 – 1330:12 (Ward).

not politically connected, nor was her spouse or other members of her family, but rather was “a candidate off the street.”¹⁹¹ Ms. Feraletto’s efforts can easily be compared to the efforts of Lopez Torres where, by her own admission, did nothing to court delegates the first year she sought the nomination for the Democratic Party for the Second Judicial District and sent a single letter to the delegates the second year she sought the nomination for the Democratic Party for the Second Judicial District.

134. Professor Schotland, testified that if the candidates know who the delegates are, the candidate has a greater opportunity to reach those delegates and gain their support.¹⁹² Senator Connor testified that serious judicial candidates are out seeking support months before the judicial convention.¹⁹³ Schotland also conceded that his concerns that the candidates have only two weeks to reach the delegates would be modified if he knew that the candidate had months to court delegates.¹⁹⁴

135. Like Justices Schlesinger and Freedman, Justice Lunn described the many efforts he made to gain the support of his party and the delegates who would nominate him at the convention, as well as the support of the broader electorate who would ultimately elect him to the Supreme Court.¹⁹⁵ He, too, adhered to the nine-month window, which was enough time for him to successfully to earn support.¹⁹⁶

¹⁹¹ Tr. 1330:13-19 (Ward).

¹⁹² Tr. 781:4-21 (Schotland).

¹⁹³ Tr. 2115:24-2116:14 (Connor).

¹⁹⁴ Tr. 782:18 – 783:1 (Schotland).

¹⁹⁵ Dep. Tr. 31:21 – 46:14; Dep. Tr. 49:22 – 50:14; Dep. Tr. 53:21 – 56:15; Dep. Tr. 72:24 – 73:13; Dep. Tr. 106:5 – 109:25; Dep. Tr. 115:14 – 116:11 (Lunn).

¹⁹⁶ Dep. Tr. 83:14-24 (Lunn).

136. Justice Sise also testified that he campaigned diligently throughout Montgomery County, where he resides, for the endorsement of the Republican County Committee.¹⁹⁷ Thereafter, Justice Sise worked extremely hard, covering thousands of miles, to gain enough support to receive the nomination of his party at the Judicial District Convention. Once he received the nomination, Justice Sise campaigned diligently against the Democratic candidate for Supreme Court Justice and ultimately won the election to become Supreme Court Justice.¹⁹⁸

137. In the Eighth Judicial District, which does not have the First Judicial District's formal screening panel, candidates for Supreme Court campaign all year long.¹⁹⁹ The process is one that "could go on beginning perhaps in January of the year."²⁰⁰ During this time period, even the delegates are "weighing their options" as to which candidate for Supreme Court Justice they are going to support.²⁰¹

B. The Two or Three-Week Campaign Window

138. As the convention approaches, campaign activity naturally intensifies.²⁰² But the campaign period is clearly not restricted to the period between the primary, or the panel report, and the convention.

139. Even if candidates were restricted to this shortened time-frame, which they are not, it is a sufficient amount of time to run a reasonable campaign for delegate support.

¹⁹⁷ Sise Decl., ¶ 8.

¹⁹⁸ Sise Decl., ¶ 9; Tr. 1487:3 – 1488:8; Tr. 1498:15 – 1499:16; Tr. 1500:1 – 1501:1; Tr. 1502:25 – 1503:8; Tr. 1503:21 – 1504:4; Tr. 1493:3-15 (Sise).

¹⁹⁹ Tr. 1362:11-15 (Ward).

²⁰⁰ Tr. 1325:3-4 (Ward); *see also* Tr. 1326:9 – 1329:24 (Ward).

²⁰¹ Tr. 1325:13-15 (Ward).

²⁰² Tr. 2093:22 – 2094:8 (Connor).

140. As a matter of perspective, Senator Connor testified that abbreviated time frames are common in politics. The Election Law typically contemplates short time periods for parties to convene and nominate candidates. For example, when a legislator vacates a seat, and the governor calls a special election, parties have ten days to call a meeting of the party committee, get a quorum, and legally nominate a candidate.²⁰³ There is no petition route available within the party structure under these circumstances.

141. Indeed, the evidence shows that not only is this timeframe sufficient, but that former candidates now sitting as Supreme Court Justices are quite comfortable operating within it and even prefer working within it. The road to the nomination entails hard work, focused and intense campaigning, and getting known by the judicial delegates and those who might influence their opinions.²⁰⁴ And as Justice Gangel-Jacob testified, she would prefer not to engage in that process for much longer than the shorter time period.²⁰⁵ Justice Abdus-Salaam testified that the shorter period was sufficient for her to present her candidacy to the delegates. In that period, she wrote to and met with almost all of the delegates.²⁰⁶

142. Douglas Kellner testified that the Judiciary Committee of the Democratic Committee discussed campaign timing at length in the 1980's and determined by clear consensus that the first week after Labor Day for the panel report was ideal for all interested parties, including the candidates.²⁰⁷

I think that especially the judicial candidates themselves appreciate that length of time, that they don't want a campaign that goes on

²⁰³ Tr. 2118:18 – 2119:21 (Connor).

²⁰⁴ Tr. 1812:6 – 1814:17 (Gangel-Jacob); Tr. 2156:3-5 (Connor).

²⁰⁵ Tr. 1814:21 – 1815:13 (Gangel-Jacob).

²⁰⁶ Tr. 1879:4 – 1880:6 (Abdus-Salaam).

²⁰⁷ Tr. 1673:12 – 1673:13 (Kellner).

for many months, that the idea that it's all done in a two or three week period, which is intense for them, but it's over. It has a clear starting time and a clear ending time. Everybody gets ready for it and then they know that they are in for two or three weeks of nonstop campaigning and then it is over.²⁰⁸

C. Logrolling Is a Highly Democratic Component of the Process from Initial Campaigning Through Final Nominations

143. In a year when there are multiple judicial vacancies and more candidates come out of the panel than there are vacancies, a phenomenon known as “logrolling” occurs. Because each delegate will get to vote for as many candidates as there are vacancies, each delegate or coalition of delegates has the opportunity to barter votes. At the end of that process, a group of candidates can emerge with enough support to win the party’s nomination.

144. Logrolling is defined as “combination for mutual assistance in political or other action.”²⁰⁹ In the context of judicial selection, it is the process in which delegates and leaders involved in the convention process bargain and negotiate deals to support one another’s preferred candidates. This process starts to take shape during the campaign, as those most closely involved – *i.e.*, the candidates, their campaign managers, delegates, alternates, and district leaders – engage in vote-counting and coalition-building.²¹⁰ Logrolling culminates at the convention, where successful candidates emerge by leveraging the support they earned in the preceding weeks and months.

145. Like campaigning itself, logrolling is a fluid process, and delegate support is not absolute.²¹¹ Delegates weigh the field, and rank and trade their support for different candidates

²⁰⁸ Tr. 1673:14-21 (Kellner).

²⁰⁹ Hechter Report at ¶ 37, citing, Oxford English Dictionary.

²¹⁰ Levinsohn Decl. ¶ 7.

²¹¹ Tr. 1868:22 – 1869:8 (Adbus-Salaam).

from the time they come out of panel, and even before, until the night of the convention. During this time, the candidates' support can wax and wane, with viable packages emerging as delegates pledge and shift their support.

146. Justice Freedman provided an apt description of the logrolling process based on her own experience:

Q: You mentioned that you had a few delegates who were giving you their sole support.

A: Right.

Q. Tell the court, if you would, is there a distinction between different levels of support from delegates that you reached out to?

A. People will say I'll support you together with somebody else, support you if so and so drops out or I'll do this or I'll do that, but there were a few people who I knew who were very close friends who said I will support you to my dying day, probably two delegates who said that, maybe three.²¹²

147. The coalition and consensus-building among the delegates supporting Rosalyn Richter as their first choice and the delegates supporting other candidates occurred during the time period after the independent screening panel process and leading up to the Judicial Convention. At the beginning of the process, Justice Richter's support was not even close to the majority necessary to win outright a nomination for one of the open seats. But by the time the Judicial Convention was held, she had earned such a significant bloc of delegate support that the convention was almost pro forma with respect to her nomination.

²¹² Tr. 1757:21 – 1758:3 (Freedman); *see also* Tr. 1766:2-11 (Freedman).

148. And there are other examples of judicial candidates who after having lost their bid for the nomination on one or more occasions, were able, through hard work and perseverance, to secure the nomination.²¹³

V. THE JUDICIAL CONVENTION IS THE CULMINATION OF A DYNAMIC DEMOCRATIC PROCESS

149. The campaign for delegate support culminates at the judicial convention in mid-September. The fact that conventions are relatively brief and frequently nondramatic events does not mean the process is undemocratic.²¹⁴

150. Because the fierce contests among candidates for the nomination are often waged in the pre-convention period, the contests are most often resolved before the convention formally opens, by which time it becomes fairly obvious which candidates have sufficient support among delegates to win the nomination. As Mr. Kellner testified, the “real voting process at a judicial convention does not occur at the convention, it occurs . . . over the telephone and in the meetings that people have leading up to the convention in one or two weeks immediately before the convention.”²¹⁵

151. As a result, the conventions themselves are typically uneventful as reflected in the minutes which dryly record the ultimate nominations as unopposed or affirmed by unanimous voice vote.²¹⁶ In this respect, the judicial conventions are very similar to the national party conventions at which the presidential candidates are blithely nominated even though they may have undergone a bloody primary battle in the preceding months.

²¹³ Giske Decl., ¶¶ 15-18.

²¹⁴ Tr. 314(19) – 315:1 (Cain).

²¹⁵ Tr. 1566:10-14 (Kellner).

²¹⁶ Levinsohn Decl., ¶ 24; Giske Decl., ¶ 16; Tr. 1577:13-20(Kellner); Tr. 2092:10 – 2093:21 (Connor).

152. In relying on the convention minutes, Plaintiffs fail to consider what occurs in the period of time leading up to the convention. That the minutes reflect virtually no deliberations, debate or contests is in and of itself insignificant. For example, the minutes of the 2000 Democratic Convention in the First Judicial District do not record a floor vote on nominees.²¹⁷ But they do record several candidates declining nominations. While Professor Cain did not take this phenomenon into account in his analysis, he concedes that he would not be surprised if these were candidates who seriously contested the Democratic nomination, but graciously bowed out after realizing they had no hope of winning.²¹⁸

153. Neither of Plaintiffs' experts, Professor Cain and Professor Schotland, examined the pre-convention process in any Judicial District. Accordingly, their conclusions are completely unreliable, particularly Professor Cain's opinion that the convention process is undemocratic because the conventions themselves are short formulaic affairs.

154. Even still, there have been a number of instances where the conventions themselves were contested in a floor fight,²¹⁹ including recently the 2000 Democratic convention in the Eighth Judicial District, and the 2002, 2003 and 2004 Democratic conventions in the Second Judicial District.²²⁰ There was also a floor fight at the 2002 convention in the First Judicial District.²²¹ Justice Abdus-Salaam's description of the roll call vote at the 1993

²¹⁷ Exh. H.

²¹⁸ Tr. 322:23-324:9 (Cain).

²¹⁹ Tr. 1880:20 – 1881:7 (Abdus-Salaam); *see also* Tr. 1758:4-9 (Freedman); Tr. 1578:8-10 (Kellner).

²²⁰ Exhs. F, G; Tr. 2113:22-2114:5 (Connor).

²²¹ Tr. 1991:23-24 (Giske).

Democratic Convention in the First Judicial District between her and the tenacious Justice Tompkins is a memorable example of a contested convention.²²²

A. The County Leader's Role Is Appropriately Influential, Not Dictatorial

155. Each county party organization has a chairperson – or leader in the case of the First Judicial District – who acts as the chief executive officer of the party.²²³

156. Defendants do not dispute that these party leaders play a role in the judicial selection process. As leaders of the party, they are elected to lead. Indeed, the evidence shows that the county party leader may help shape and facilitate the consensus-building and logrolling process, which results in a slate of nominees for the Supreme Court that the party can agree upon and endorse.²²⁴ And as Plaintiffs' own expert, Professor Schotland, testified, he is not opposed to a party endorsing candidates. In fact, according to Schotland, party endorsements can lead to high quality judges.²²⁵

157. Plaintiffs contend, however, that the county chairperson *dictates* the outcome of the convention. In reaching this conclusion, Plaintiffs rely heavily on testimony that no Supreme Court candidate has won the nomination or the general election without the support and endorsement of the county chair or leader. This purported evidence is misleading.

158. The overwhelming evidence adduced at the hearing shows that rather than dictating the outcome, astute party leaders publicly throw their support behind a candidate when

²²² Tr. 1881:11-1885:9 (Abdus-Salaam); Exhs. TT, UU.

²²³ Tr. 1580:6-7 (Kellner).

²²⁴ Tr. 1580:14-19 (Kellner); Tr. 2096:11 – 2097:2 (Connor).

²²⁵ Tr. 789:5-19 (Schotland).

it becomes clear that the candidate has achieved widespread support. In this way, they always end up supporting the winner, and create the appearance that they are in control of the process.

159. Mr. Farrell – the New York County leader - is a prime example of this phenomenon. As Douglas Kellner – a former associate of Mr. Farrell – testified, while Mr. Farrell may have his own preferred Supreme Court candidate, he does not publicly endorse any candidate until very late in the process, often the day of the convention or even at the convention itself.²²⁶

160. Instead, Mr. Farrell sits on the sidelines and gauges where most of the delegate support is converging. Indeed, Mr. Farrell has long had a reputation of being an excellent vote counter with an uncanny ability to predict the outcome of a vote at the convention. In fact, his talent as a counter is, in part, what catapulted him to success in politics.²²⁷

161. Mr. Farrell adjusts his preferences depending on how the counts develop.²²⁸ Once Mr. Farrell determines how the delegate votes are lining up, he steps in and throws his support behind the leading candidates. Then within the context of diversity and fairness to all parts of the county, Mr. Farrell, acting as a facilitator, tries to put together a slate or “package” of candidates that have the most support.²²⁹

²²⁶ Tr. 1580:20 – 1581:1 (Kellner); *see also* Tr. 1245:2-12; 1292:10-21 (Schiff).

²²⁷ Tr. 1581:9-18 (Kellner).

²²⁸ Tr. 1581:19-21 (Kellner).

²²⁹ Tr. 1286:20 – 1287:11; 1292:22 – 1293:7 (Schiff).

162. As Mr. Farrell testified in his deposition in the France v. Pataki case, “it’s almost like picking the winner of a horse race after the race is over.” Mr. Kellner confirmed that this was an accurate characterization.²³⁰

163. In this way, Mr. Farrell achieves one of his most significant objectives as a political leader—the *perception* of winning and “running the show.”²³¹ As Mr. Kellner testified: “[f]or Farrell . . . an important part of being an effective leader is the perception that you’re leading; that people are doing what you want.”²³²

164. Thus, Plaintiffs’ isolated references to Mr. Farrell’s testimony regarding the importance of maintaining “control” are taken out of context. As Mr. Kellner explained, when Mr. Farrell uses the word, “control,” he does not mean the actual ability to dictate the outcome of the convention but rather the ability to create the *perception* that “he is running the show.”²³³

165. Ultimately, the collective will of the independent delegates dictates the outcome of the convention. Justices in the First District who called or met with Mr. Farrell before the convention, testified that doing so was neither necessary nor sufficient to getting elected. Rather it was delegate support that was crucial to a candidate’s success, which is why the County leader encouraged the candidates to go out and get support from the delegates.²³⁴

²³⁰ Tr. 1663:15-22 (Kellner); *see also* Tr. 1814:21-13 (Gangel-Jacob).

²³¹ Tr. 1662:8-1663:14 (Kellner).

²³² Tr. 1662:20-22 (Kellner).

²³³ Tr. 1662:11-20 (Kellner).

²³⁴ Tr. 1963:24 – 1964:9 (Schlesinger); Tr. 1758:10 – 1759:10 (Freedman).

166. Justice Abdus-Salaam's experience running for Supreme Court confirms that it is the vote of the delegates that controls the outcome of the convention and the County Leader's support is attainable once it is clear that there is broad support among delegates.²³⁵

167. As Justice Gangel-Jacob testified, Mr. Farrell always told candidates, "bring the votes and we'll see what happens."²³⁶

168. And as Justice Freedman similarly testified, Mr. Farrell told her that although he was aware that she had a base of support, he was going to "wait and see" how things played out with respect to the delegate votes.²³⁷ Ms. Freedman further testified that she never sensed at any point in time that the County leader was controlling the selection process or dictating who would win the nomination as Supreme Court Justice.²³⁸

169. Indeed, the evidence shows that Mr. Farrell's support of a judicial candidate cannot ensure a favorable outcome for that aspiring Supreme Court Justice. In 1992, for example, Mr. Farrell's preferred candidate was Judge Ramos, who simply did not have enough votes to win the nomination. As a result, Mr. Farrell withdrew his support for Ramos and publicly endorsed a different candidate in order to maintain the appearance of control over the process. Justices Herman Cahn and Rolando Acosta are also examples of how Mr. Farrell's support can be insufficient to win the nomination.²³⁹

170. Further, while Plaintiffs repeatedly quote Mr. Farrell's testimony from over ten years ago that he can "kill" a nomination, the reality is that if a candidate appears to be winning

²³⁵ Tr. 1897:10 – 1898:2 (Abdus-Salaam).

²³⁶ Tr. 1806:16-17 (Gangel-Jacob).

²³⁷ Tr. 1768:4-14 (Freedman).

²³⁸ Tr. 1770:9-12 (Freedman).

widespread delegate support, Mr. Farrell alone cannot block the candidate from prevailing at the convention.²⁴⁰ Phyllis Gangel Jacob's candidacies both for Civil Court and for Supreme Court are such an example.

171. Justice Gangel-Jacob challenged and defeated the party organization's candidate, Antonio Brandveen, for Civil Court Judge, and nonetheless, over the opposition of the County leader, was subsequently successful in obtaining the nomination for Supreme Court.²⁴¹

172. Plaintiffs point to the fact that Justice Gangel-Jacob withdrew at the request of County leader Farrell the year before she won the nomination to secure the nomination the following year. But as Justice Gangel-Jacob testified, she was certain she had the votes to defeat Farrell that year, and that she withdrew primarily to maintain harmony.

173. Alice Schlesinger's experience also confirms that Mr. Farrell cannot block a nomination if there is a convergence of votes for that nomination:

Q. . . . Having read your statement in the context it was given, is it correct to say that the basis of your belief that Mr. Farrell was going to support you was that Mr. Farrell had come to accept with him or without him you were to be a Supreme Court Justice?

A. I think that is a fair statement.²⁴²

174. In the same way that Mr. Farrell cannot dictate the outcome of the convention, the County Chairman in Brooklyn, Clarence Norman, cannot impose his will and dictate the outcome in the Second Judicial District. As Senator Connor testified, like Mr. Farrell, Mr. Norman has to gauge a candidate's support and act as a facilitator between competing interests::

²³⁹ Tr. 1581:22 – 1582:9; Tr. 1659:4-20; Tr. 1661:17 – 1662:7 (Kellner).

²⁴⁰ Tr. 1583:3-9 (Kellner).

Q Let's focus on Mr. Norman who is chairman of the executive committee or function committee leader in Kings County. Is Mr. Norman able to hand pick his own judicial candidates?

A The delegates are supported by clubs or district leader, other groups that come together. As I explained before, [Norman] takes the pulse, of the different districts to see who is getting the votes together and he also acts as conduit the other way. There are other groups, as I said before, labor unions, bar associations, I know instances where the women's bar associations weighed in heavily, we need a woman, it should be our president, where ethnic or where a bar association, or the Colombians, we want a Italian American. . . . Does he dictate, no, [if]the weight of everybody's opinion was against him, he wouldn't be county leader for very long.²⁴³

175. As Senator Connor also testified, Mr. Norman cannot block the nomination of a candidate with strong support among the delegates:

Q As county leader in the process that you just described, performing the function that you described, can Mr. Norman block the nomination of a judicial candidate who has strong support among the delegates?

A No . . .²⁴⁴

176. Defendants, on the other hand, have offered evidence that county chairs in upstate districts do not dictate the convention process and that the outcome is delegate-driven.

177. For example, Dennis Ward, who has been active in Democratic judicial politics in the Eighth Judicial District for over twenty years, testified that the Erie County (the largest county) chairman's preferred candidate does not always win.²⁴⁵ Nor do the preferred candidates

²⁴¹ Tr. 1801:7-18; Tr. 1807:3-12 (Gangel-Jacob); Tr. 1583:3-9; Tr. 1659:21 – 1660:5 (Kellner).

²⁴² Tr. 1980:10-15 (Schlesinger).

²⁴³ Tr. 2101:8 – 2103:17 (Connor).

²⁴⁴ Tr. 2104:25 – 2105:4 (Connor).

²⁴⁵ Tr. 1323:15-23 (Ward).

of the county chairpersons of the other 8 counties within the Eighth Judicial District always win.²⁴⁶

178. As demonstrated by the race in 2000, in which Mr. Ward was elected as the convention's presiding officer, there were various splits in the delegations from the various counties within the Eighth Judicial District.²⁴⁷ While Plaintiffs have attempted to characterize the 2000 election as a "faction fight" within Erie County, Mr. Ward testified that delegates from two *other* counties voted against their respective county chairpersons' preferred candidate.²⁴⁸ Indeed, the individual whom Plaintiffs contend cast the deciding vote at the 2000 judicial convention was an alternate delegate, Patricia Fogarty from Allegheny County, who refused to support the Allegheny County chairwoman's endorsed candidate.²⁴⁹

179. Likewise, in 1992, rather than run slates of delegates, Plaintiffs' witness, Judge Keefe, a city court judge in the Third Judicial District, participated in an effort to change the outcome of the judicial convention by lobbying elected delegates not to support a cross-endorsement. The effort, though opposed by Albany County and Rensselaer County Democratic leaders, was successful.²⁵⁰

180. Justice Sise, a Supreme Court Justice in the Fourth Judicial District also testified that although he campaigned for the endorsement of the Montgomery County Republican County

²⁴⁶ Tr. 1333:11-14 (Ward).

²⁴⁷ Tr. 1333:11 – 1335:9; Tr. 1332:5-18 (Ward).

²⁴⁸ Tr. 1333:11 – 1335:4 (Ward).

²⁴⁹ Tr. 1334:17 – 1335:4 (Ward).

²⁵⁰ Tr. 876:6 – 877:8 (Keefe).

Committee, had they chosen to endorse his opponent, he would have continued to campaign for the nomination.²⁵¹

181. Justice Lunn from the Seventh Judicial District testified that in his experience, the judicial nominating process is not in the hands of local party leaders.²⁵²

182. Furthermore, as Mr. Kellner testified, most if not all leaders are successful at the “smoke and mirrors game” where the reality of their power does not match what their public relations staff has been able to generate.²⁵³ Ultimately, all leaders no matter how powerful have to be responsive to their district leaders and constituents.²⁵⁴

B. The Convention Is Open Even To Plaintiffs’ “Challenger Candidate”

183. As the facts discussed above show, the judicial selection system in New York is designed so that candidates can win the support of delegates at the convention. It is up to the candidate to engage the political process and build a base of support among those who are involved in the process.²⁵⁵

184. Plaintiffs claim, however, that so-called “challenger candidates” have no meaningful opportunity to win a major party nomination for Supreme Court.

185. Plaintiffs offer multiple definitions of “challenger candidate.” On the one hand, Plaintiffs’ expert, Professor Cain, defines a “challenger” as a candidate who has no support

²⁵¹ Tr. 1490:6 – 1492:2 (Sise).

²⁵² Dep. Tr. 101:25 – 102:12 (Lunn).

²⁵³ Tr. 1712:17-25 (Kellner).

²⁵⁴ Tr. 1734:12-24 (Kellner); Tr. 2114:6 – 2115:8 (Connor).

²⁵⁵ See *Supra*, Ns. 183-199.

whatsoever from anyone in the party establishment at any stage of the process.²⁵⁶ Once the challenger candidate obtains the support of even of one delegate, that candidate is no longer a challenger under Cain's definition.²⁵⁷ Thus, under this definition, even lead Plaintiff Margarita Lopez Torres, who had support from 25 delegates at the 2002 convention in the Second Judicial District, is not a challenger.

186. Professor Cain's definition is problematic, as it automatically excludes challenger candidates who participate within the party structure in any fashion. No challenger candidate except perhaps one with extraordinary name recognition or wealth could capture the party nomination for any office, whether it be local, statewide, or national under these circumstances. Professor Cain's definition also collides with a party's First Amendment right to associate and determine how candidates obtain the party's nomination.

187. On the other hand, Plaintiffs point to Margarita Lopez Torres as an example of a challenger candidate who they claimed had no opportunity to win the nomination without the blessing of the party leadership.

188. Plaintiffs contend that Lopez Torres could not win her party's nomination because she had earned the enmity of Brooklyn's Democratic leaders, Clarence Norman and Vito Lopez.

189. But it appears that Judge Lopez Torres did not consider the possibility that her failure to obtain the nomination for Supreme Court was on the merits. Indeed, the evidence shows that even though Judge Lopez Torres has been on the Civil Court bench for twelve years, she has never been appointed to serve as an acting Supreme Court Justice despite several

²⁵⁶ Tr. 305:5-16.

attempts to get appointed through the Office of Court Administration overseen by the State's Chief Judge Judith Kaye.²⁵⁸ In fact, over the years, Judge Lopez Torres was reassigned to various courts from criminal court to landlord tenant court to family court.²⁵⁹ The evidence also suggests that Judge Lopez Torres had a poor temperament on the bench.²⁶⁰

190. Indeed, the evidence shows that Lopez Torres never won the nomination any of the times she ran for Supreme Court because she did nothing to build delegate support for her candidacy. She undertook no effort to contact judicial delegates either in person or through promotional literature, or even to have her friends and supporters do so.²⁶¹ Indeed, Mr. Carroll, a supporter of Ms. Lopez Torres, admitted that he spent no time at all on and made no effort to advance Mr. Lopez Torres candidacy in 2002.^{262, 263}

191. And even though Ms. Lopez Torres had access to the judicial convention at all times, she failed even to attend the convention in 2002, where her name was put in nomination for Supreme Court Justice and she received 25 delegate votes without having done any work whatsoever to obtain the support of those 25 delegates.²⁶⁴

192. As a candidate for civil court in 2002 and simultaneously a "challenger candidate" for Supreme Court, Plaintiff Lopez Torres was able to gather nearly 30,000 signatures on omnibus petitions that bore her name.²⁶⁵ Thus, she gathered far more than the 12,000

²⁵⁷ Tr. 305:22 – 306:4.

²⁵⁸ Tr. 603:12-25, 646:19-647:13 (Lopez Torres).

²⁵⁹ Tr. 644:24 – 645:4 (Lopez Torres)

²⁶⁰ Tr. 638:12 – 639:17 (Lopez Torres)

²⁶¹ Tr. 609:13 – 610:3 (Lopez Torres); Tr. 575:12-22 (Carroll).

²⁶² Tr. 527:6-9; Tr. 527:23 – 528:2 (Carroll).

²⁶³ Tr. 512:7-25 (Carroll).

²⁶⁴ Tr. 612:9 – 615:23 (Lopez Torres); *see also* Tr. 512:4-6 (Carroll) (testifying that Lopez Torres had the support of all the delegates in the 44th Assembly District in Brooklyn).

²⁶⁵ Exh. R (chart describing petitions); *see also* Exh. 126 (Plaintiffs' summary chart).

signatures actually needed to place delegates on the ballot in every one of the 24 Assembly Districts that comprises the Second Judicial District. Indeed, over 40 delegates and 40 alternates ran on her petitions. She gathered over 1500 signatures, or three times the required 500, in each of the following Assembly Districts: 43, 44, 46, 52, 54, 55, 57 and 58. Had she run the full complement of delegates in each of these districts, she would have easily qualified 57 delegates for the 2002 Judicial convention.²⁶⁶ If these delegates were elected on primary day and voted for her at the convention, she would have easily commanded a majority of the 96 delegates present in 2002.²⁶⁷

193. While Plaintiffs rely on the supposed expert opinion of Mr. Lipton that it would cost approximately \$175,000 to obtain sufficient petition signatures to qualify a challenger's delegates in the Second Judicial District, there is no testimony that Lopez Torres paid anything in order to gather her signatures. Lipton Decl., Exh. A. As can be readily inferred from the face of the omnibus petitions, she was able to join forces with the campaigns of a number of other elected officials, including even Senator Connor, in order to complete her petition drive for free.

194. Senator Connor – an experienced politician and election lawyer – testified that if he were counseling Lopez Torres, he would have advised her to parlay her base of 25 votes into a wider coalition of support.²⁶⁸ Lopez Torres, however, squandered her opportunity to leverage her 25 votes into a broader delegate base.²⁶⁹

195. Plaintiffs also cite to former Brooklyn Family Court Judge Philip Segal's experience as an example of how challengers have no opportunity to win the nomination. But

²⁶⁶ Exh. 92 E (party call).

²⁶⁷ Exh. G at 4 (convention minutes).

the evidence shows, that like Margarita Lopez Torres, Mr. Segal did nothing to win delegate support or otherwise participate in the judicial selection system.

196. In 1994, then-Judge Segal expressed wrote to officials of the Brooklyn Democratic Party expressing an interest in becoming a Supreme Court Justice.²⁷⁰ Mr. Segal testified that at the time, he knew virtually nothing about the judicial selection process.²⁷¹ And after learning that the process was political in nature, he took no steps to get involved with process; he made no efforts to educate himself on the judicial selection system.²⁷² In fact, Mr. Segal admitted that he did absolutely nothing to advance his candidacy. He did not court delegates, send out any literature, or contact any bar associations, and he never attempted to run for Supreme Court again.²⁷³

197. Additionally, the evidence suggests that like Margarita Lopez Torres, Phillip Segal's candidacy failed on the merits. As Mr. Segal testified, approximately one-third of his decisions that have been appealed have been reversed, and in fact more of his decisions were appealed than any other judge he knew. Indeed, as Mr. Segal testified, he was not reappointed to the Family Court.²⁷⁴

198. At bottom, neither Judge Lopez Torres nor Phillip Segal did any work to advance their candidacies. It is no wonder that their attempts to become Supreme Court Justices were futile. As the overwhelming testimony of the Defendants' witnesses shows, as discussed above,

²⁶⁸ Tr. 2150:6 – 2151:20; Tr. 2155:17-25 (Connor).

²⁶⁹ Tr. 2156:3-5 (Connor).

²⁷⁰ Segal Decl., ¶ 8.

²⁷¹ Tr. 816:18-818:3 (Segal).

²⁷² Tr. 817:23-25 (Segal).

²⁷³ Tr. 818:14 – 819:3; Tr. 820:17-22 (Segal).

participating in the coalition-building process and becoming a Supreme Court Justice takes hard work. As Senator Connor testified:

look, you don't put together coalitions and majorities without effort, you don't do it without some degree of political sophistication either – I recognize a lot of people run for judgeships are not sophisticated politically, they get a friend to advise them and be their counter and manager, you put together the votes you win. If you do nothing and sit back and say read my resume, you are not likely to win any office; just I deserve it, read my resume, I went to a better school, whatever. It does not work that way, you have to make an effort.²⁷⁵

199. But as the stories of the many Justices, such as Justice Gangel Jacob, who testified at the hearing show, in the end, the hard work eventually pays off. As Douglas Kellner testified, “given time and qualifications, some luck, they have a good shot at [winning].”

C. Challengers Also Have Alternative Paths to the Ballot

200. Apart from the typical path of campaigning and winning delegate and district leader support, Supreme Court candidates have alternative paths to the nomination and general ballot.

a. Running Delegates

201. Supreme Court candidates can run their own slates of delegates.²⁷⁶ Plaintiffs present this method as the only potentially viable means for a challenger candidate without support from the party leadership to winning a Supreme Court nomination. Under this approach, a Supreme Court candidate would recruit delegates and alternate delegates pledged to his or her candidacy. The candidate would then launch a petition drive to get their delegates and, if they

²⁷⁴ Tr. 811:16 – 812:3; Tr. 813:22 – 814:2 (Segal); Segal Decl., ¶ 7.

²⁷⁵ Tr. 2105:7-16 (Connor).

chose, alternates on the primary ballot, and campaign among voters for those delegates and alternates.

202. There is nothing in the Election Law that would prohibit candidates from engaging in this approach.

203. In the 1970's individuals not affiliated with the party leadership were able to circulate petitions, qualify and elect delegates to the convention and ultimately take control of that convention.²⁷⁷ Candidate or candidates could organize and successfully elect delegates and take control of the convention.²⁷⁸

204. Regan testified that in the Seventh Judicial District the identity of the county committee supported candidates for Supreme Court are known by the third Friday in May. Petitioning for judicial delegates begins in late June.²⁷⁹ After he learned he would not be county committee choice, Regan had one month to organize his own delegates. He ran them in five districts because that would be enough to control the convention and nomination. He was able to obtain sufficient signatures to control the convention.²⁸⁰

205. Plaintiff's claim that no candidate has ever attempted to run delegates in every Assembly District, even if true, is readily explained by the fact that the traditional method is far

²⁷⁶ Tr. 263:22 - 264:14 (Berger); Tr. 1405:12-14 (Ostrer); Tr. 1710:8-16 (Kellner).

²⁷⁷ Tr. 1709:12-25 (Kellner).

²⁷⁸ Tr. 1710:8-16 (Kellner).

²⁷⁹ Tr. 387:22-388:20 (Regan).

²⁸⁰ Tr. 387:7-392:5 (Regan); see also Tr. 402:21-403:13 (Regan).

easier. As Mr. Kellner explained there is already a system in place, and given time, qualifications and a little luck, a candidate has a good shot at winning.²⁸¹

206. Admittedly, running delegates is more difficult than the typical path of courting delegate support.²⁸² But if a candidate chooses this alternative route, the burdens are not severe.

207. First, a candidate does not need to run delegates in every Assembly District in the Judicial District. Since candidates only need a majority of the delegates to win, they only need to target enough Assembly Districts where they believe their delegate and alternate candidates can win in the primary election. As Mr. Kellner explained:

[F]irst of all, they only need to win a majority of the delegates in order to get the nomination. So they don't need to run in every district. They only need to win a majority of the delegates.

Secondly, most candidates are able to win the nomination without a majority of the delegates. What they do, for example, in Manhattan, where the process is certainly fairly open and it's well-known, if you have multiple candidates to be nominated, then you need to build a collation in order to get a majority of delegates. The way people will do that is by getting delegates to indicate that their primary candidate is Jane Doe and those delegates will say, my main goal at this convention is to get Jane Doe nominated.

And then another group of delegates will say well, our goal is to get Rick Smith nominated, and together those two groups can come together and form what we c[a]ll a "slate, and even though no particular candidate has a majority of the delegates, by pooling their delegate votes, they can put together a majority slate.²⁸³

208. Senator Connor likewise disagreed with the premise that a challenger candidate would have to run delegates in every Assembly District:

²⁸¹ Tr. 1719:17 – 1720:6 (Kellner).

²⁸² Tr. 1293:25 – 1294:17 (Schiff)

²⁸³ Tr. 1574:10 – 1575:4 (Kellner).

I disagree with the premise, you don't need to recruit delegates, each and every Assembly District, you do what politicians do, targeting, you don't see President Bush campaigning in New York and John Kerry campaigning in Texas. You go where you can get votes, where you have a reasonable possibility of winning. You start where you have local organizations like IND or CBID, where you will get 20 or 25 delegates without trying. You got your 25 delegates where you don't have to try, spend a dollar and then you make alliances or get your volunteers and apply whatever resources you have to five or six other districts where you think you can prevail.²⁸⁴

209. In addition to targeting, Senator Connor testified that a candidate should make coalitions with other candidates rather than run delegates in every Assembly District.²⁸⁵

210. Second, Plaintiffs contend that because candidates are not affiliated with delegates on the ballot itself, a challenger candidate bears the burden of having to educate voters in each Assembly District as to which delegates to support. However, the evidence in this case is that candidates and political clubs routinely educate voters as to which slates of delegates to elect by simply distributing palm cards and other literature.²⁸⁶ It hardly imposes an undue burden to ask judicial candidates to perform something routine.

211. Third, a candidate need not run a full slate of alternate delegates. There is no requirement under the Election Law that there be alternate delegates at the convention. Alternates serve to replace delegates who do not attend the convention. As Plaintiff's witness, Mr. Carroll testified, "[a]n alternate delegate is the fifth wheel on the car. Unless one of the four primary wheels falls off, he has no function whatsoever . . ."²⁸⁷

²⁸⁴ Tr. 2135: 2-13 (Connor)

²⁸⁵ Tr. 2135:14 – 2136:3 (Connor).

²⁸⁶ Exhs. B, CCC

²⁸⁷ Tr. 473:1-3 (Carroll); *see also* Tr. 446:7-25 (Carroll).

212. Thus, if a candidate's pledged delegates commit to being at the convention, there is no need to recruit an alternate for every delegate.²⁸⁸

213. Plaintiffs rely on their purported expert, William Lipton, for an estimate of what it would cost for a challenger candidate to run delegates in every Assembly District. Mr. Lipton's testimony and declaration should be given no weight.

214. Mr. Lipton, a full-time employee of the Working Families Party, has worked in only three Democratic primaries –two in Manhattan and one in the Bronx. He has never been involved in an election for delegate to any judicial convention or otherwise participated in the nomination of Supreme Court candidates, except on one occasion within the Working Families Party. He has never served as a judicial delegate in the Democratic party, nor has he participated in any primary election for judicial delegate or alternates. Furthermore, he has *never* been involved in any Democratic petitioning process for any public office or party position.²⁸⁹ Thus, his cost analysis was developed in a vacuum. Mr. Lipton did not even analyze the actual costs of Judge Lopez Torres' campaign for the countywide judicial primary for the Civil Court nomination in 2002.²⁹⁰

215. Mr. Lipton's lack of experience is reflected in his unrealistic and grossly inflated \$1.4 million estimate for the cost of running delegates across the Second Judicial District. As Mr. Kellner – an experienced election lawyer and Board of Elections Commissioner – testified, Mr. Lipton's budget contemplates a full-scale effort in all 24 Assembly Districts in the largest

²⁸⁸ Tr. 1575:23 – 1576:4; Tr. 1707:6-13 (Kellner).

²⁸⁹ Tr. 1013:14-25 (Lipton).

²⁹⁰ Tr. 1082:18-1083:3 (Lipton).

Judicial District by a complete outsider with absolutely no support to buy a Supreme Court seat.²⁹¹

216. Mr. Lipton's budget contemplates unnecessary costs, such as \$65,000 of van rentals, phone banks and preemptive lawsuits – extravagant expenses for running delegates. More importantly, he fails to take into consideration that campaigns for delegates are usually grass-roots volunteer efforts.²⁹²

217. For example, William Allen – a community activist who has successfully run for delegate and district leader against the county organization – collected three times the minimum number of signatures over the course of two weeks using unpaid volunteers.²⁹³ In Mr. Allen's view, paying people to gather signatures for a community-based position such as delegate "would defeat the whole purpose" of running for the office.²⁹⁴ Mr. Allen noted that he had no more than ten volunteers gathering petition signatures.²⁹⁵ Mr. Allen also received voluntary assistance from civic leaders and tenant committees.²⁹⁶ Contrary to Plaintiffs assertion that challenger delegates are always challenged resulting in the need to expend resources on legal fees, Mr. Allen testified that he never had his petitions for delegate challenged.²⁹⁷

218. Another option for aspiring Supreme Court Justices is to run on a different party line.²⁹⁸ The Election Law has no restrictions on candidates belonging to one party from running

²⁹¹ Tr. 1576:5-22 (Kellner); Tr. 1080:16-1081:16-24 (Lipton).

²⁹² Corrected Lipton Decl. ¶ 12-15; *see also* Tr. 1576:8 – 1577:4 (Kellner); Tr. 2165:24 – 2167:3 (Connor).

²⁹³ Tr. 2027:22 – 2028:5; Tr. 2028:23-24; Tr. 2040:6-8 (Allen)

²⁹⁴ Tr. 2028:20-22. (Allen).

²⁹⁵ Tr. 2040:13-20 (Allen).

²⁹⁶ Tr. 2040:14-16 (Allen).

²⁹⁷ Tr. 2043:2-7 (Allen).

²⁹⁸ Tr. 1585:6-14 (Kellner); Tr. 583:20-25 (Carroll).

as another party's candidate. Indeed, this is exactly what Plaintiff Lopez Torres – a Democrat – did when she sought and won the Working Families Party nomination in 2003.²⁹⁹

219. Lopez Torres' name thus appeared on the general ballot in the 2003 general election, giving all registered voters in her Judicial District the opportunity to vote in support of her candidacy.³⁰⁰ Despite receiving allegedly widespread support from voters in her 2002 re-election to the Civil Court, those same voters refused to elect her to the Supreme Court bench in 2003.³⁰¹

220. Candidates also have the option of petitioning onto the general ballot.³⁰² The Election Law provides that a candidate may petition onto the ballot by obtaining 4,000 signatures in the First, Second, Eleventh, and Twelfth Judicial Districts, and 3,500 signatures in every other Judicial District.³⁰³

221. A well-organized, disciplined campaign can satisfy the petitioning requirements.³⁰⁴ Plaintiffs do not challenge this.

222. Plaintiffs allege that neither of these alternatives presents a meaningful opportunity to win the general election because only major party nominees get elected. But that phenomenon is a result of demographics and party dominance.

²⁹⁹ Tr. 658:21-22 (Lopez Torres).

³⁰⁰ Exh. E (2003 ballot)

³⁰¹ Tr. 661:20 (Lopez Torres).

³⁰² Tr. 1585:13-21 (Kellner).

³⁰³ N.Y. Elec. L. § 6-136; Plaintiffs' witness, Judge Regan, fundamentally misunderstood that a candidate could petition onto the ballot as an independent. He incorrectly believed that there had to be a convention to get onto the general ballot. Tr. 380:12-14 (Regan).

³⁰⁴ Tr. 1585:22 – 1586:9 (Kellner).

223. Plaintiffs have presented no evidence that adopting a primary system for selecting party nominees for Supreme Court would change this voting pattern.

224. As the example of Nassau County shows, a party's strength in a geographic region can shift if the party does maintain the confidence of its rank and file members.³⁰⁵ Nassau County was once a Republican stronghold, but today it no longer is.

225. At bottom, Plaintiffs' contention appears to be premised on the flawed assumption that there is a constitutional right to win. There is no such right.³⁰⁶

VI. A PRIMARY SYSTEM WOULD ONLY EXACERBATE SOME OF THE ELEMENTS PLAINTIFFS COMPLAIN OF, TO DETRIMENT OF THE CANDIDATES AND THE ELECTORATE

A. Benefits of the Convention System

226. New York's convention system serves a number of compelling state interests.

1. A High-Quality Bench

227. The system and collaborative process helps to ensure that parties will select high quality judicial candidates by concentrating the power to select Supreme Court justices in the hands of elected delegates, who have the interest and opportunity to become more informed about the strengths and weaknesses of judicial candidates than the public at large.³⁰⁷

³⁰⁵ Tr. 1691:2-14 (Kellner).

³⁰⁶ Tr. 1721:17-19 (Kellner).

³⁰⁷ Tr. 773:22-25 (Schotland); Tr. 777:5 – 778:11 (Schotland).

228. Further, the system enables parties to establish meaningful screening panels such as the one used in New York County, where the panel is chosen using a “double-blind” process, which is meant to insulate the panel from politics.³⁰⁸

229. Screening panels typically reach out to a broad and diverse cross-section of the community for their membership, and is consistent with the open and democratic nature of the process.³⁰⁹

2. Protection of Party Associational Rights

230. The convention system protects the associational rights of party members of each major political party to organize themselves, forge coalitions and select their standard bearers as they see fit.

231. For example, the convention system effectively prevents party raiding, also known as cross-filing, a phenomenon where members of one political party cross-files in another party’s primary and wins the ballot line.³¹⁰ Unlike cross-endorsements where a party voluntarily provides its ballot line to another party’s candidate, raiding occurs when chameleon candidates deceive enrolled voters from another party into supporting them at a primary.

232. Mr. Ward described the dangers and deceptive nature of party raiding:

In a cross-filing situation, a candidate for a judicial office, for example, a county wide judgeship, would be permitted to simply file a petition with the requisite number of signatures of registered – of enrolled democrats and would simply be placed on the ballot within the [D]emocratic primary, for example, even if they were not a member of that party.

³⁰⁸ Levinsohn Decl., ¶ 9; Tr. 1544:23-25 (Kellner).

³⁰⁹ Levinsohn Decl., ¶ 9.

³¹⁰ Tr. 1335:17-24 (Ward).

The difference would be that they would then pitch their candidacy to the electorate at large in an open primary, without any need for party identification or to indicate that they are a member of this party or that party, and with the distance between the voter and the voting booth and the candidate on the ballot, most of the people, or a good number of the people that are voting for that party primary election would not necessarily know that that person is a member of another party.³¹¹

233. Mr. Ward noted that this phenomenon has occurred in his judicial district – the Eighth Judicial District. For instance, in Erie County, 60% of the elected Family Court judges are Republicans who won their seats by covertly running in Democratic party primaries.³¹² This infringes on Mr. Ward’s associational rights as a Democrat.³¹³

234. A convention, Mr. Ward explained, prevents party raiding because it involves a smaller group of delegates who are more intimately familiar with the judicial candidates seeking the party’s nomination.³¹⁴

3. A Diverse Bench

a. Ethnic And Racial Diversity

235. The convention process enhances diversity of judicial candidates on the bases of race, ethnicity, gender, religion and sexual orientation because minorities and other members of historically disadvantaged groups benefit greatly from a system that rewards coalition-building and logrolling.³¹⁵

³¹¹ Tr. 1336:6-21 (Ward).

³¹² Tr. 1337:17 – 1338:23 (Ward).

³¹³ Tr. 1338:24 – 1339:4 (Ward).

³¹⁴ Tr. 1339:17-24 (Ward).

³¹⁵ Levinsohn Decl., ¶ 23; Tr. 1992:3 – 1993:16; Tr. 2011:5 – 2012:8 (Giske); Giske Decl., ¶ 19; Tr. 1687:10 – 1689:4 (Kellner).

236. Dr. Hechter explained in his report that logrolling enables voters to sever their preferences from their values. By doing so, voters are freed to act strategically, and this can enable them to realize socially-preferred outcomes that would remain beyond their grasp in direct elections.³¹⁶

237. As Dr. Hechter testified at the hearing:

Well, if there are two minority groups . . . let[s] say one has 25 percent of the electorate and another has 26 percent of the electorate, . . . a judicial convention could enable the log-rolling that would enable them to form a binding, enforceable commitment to support one another's candidate. And therefore, both could end up being elected in that scenario.³¹⁷

238. Thus the convention affords minorities meaningful opportunities for participation that otherwise would simply not exist.³¹⁸ The testimony of witnesses who have participated in the convention process powerfully demonstrates how the current system allows minorities to bring their interests to the table. For example:

a) As a Harlem resident, one of William Allen's priorities in serving as a delegate is to ensure that the African-American community is represented on the bench.³¹⁹ Mr. Allen testified that the convention system gives his community a voice.³²⁰

b) Similarly, Greenwich Village resident, Emily Giske, testified that her objective as an alternate delegate is to vote for openly gay, lesbian, bisexual or transgender Supreme Court candidates. Ms. Giske testified that since she has been involved in the system, New York County has elected very diverse Justices to the Supreme Court.³²¹

³¹⁶ Exh. 69 at 18-19.

³¹⁷ Tr. 1224:1-7 (Hechter).

³¹⁸ Exh. 69 at 48-49.

³¹⁹ Tr. 2031:10-15 (Allen).

³²⁰ Tr. 2032:10-16; Tr. 2045:4-14 (Allen).

³²¹ Tr. 1988:11-14 (Giske).

c) Justice Sheila Abdus-Salaam, an African-American woman, testified that the convention system gave her the opportunity to present herself and her credentials to delegates and offset unfair stereotyping based on her Muslim name.³²² The convention system is thus particularly important in the post-September 11th era when a surname of a candidate will likely have an impact on voter decisions.³²³ As Justice Abdus-Salaam testified, she was informed after the 1993 general election that a voter had indicated in an exit interview that she voted for everyone “except that one with the Muslim name.”³²⁴

239. The 2002 First Judicial District convention poignantly illustrates how the convention system and the logrolling process can result in a very diverse slate of candidates, representing various interests and neighborhoods. In 2002, the convention nominated:

- Rolando Acosta, a Dominican male.
- Carol Edmead, an African-American female.
- Troy Webber, an African-American female.
- Rosalyn Richter, an openly gay, disabled female.
- Doris Ling-Cohan, an Asian-American female.
- Richard Price, an Orthodox Jewish male.³²⁵

240. As Mr. Kellner explained, a primary system could never achieve the type of diverse slate that the 2002 First Judicial Convention nominated.³²⁶

241. Today, the Supreme Court bench in New York County, is 44.7% minority and 57.9% female. Of the thirty-eight Supreme Court justices in New York County, twenty-two are

³²² Tr. 1889:4 – 1890:4 (Abdus-Salaam).

³²³ *Id.*

³²⁴ Tr. 1889:4-16 (Abdus-Salaam).

³²⁵ Tr. 1687:10 – 1688:12 (Kellner); Tr. 1992:3 – 1993:16 (Giske); Exh. I (2002 First Judicial District Convention Minutes).

³²⁶ Tr. 1688:21 – 1699:4 (Kellner); Tr. 1668:13-18 (Kellner).

women, nine are African-American, four are Hispanic, two are Asian-American, and three are openly gay.³²⁷

242. Plaintiffs contend that the logrolling process in judicial conventions does not lead to greater diversity on the bench by comparing the percentage of minority Supreme Court justices to the percentage of minorities in the voting age population. This comparison is fundamentally flawed, however, as it ignores the New York State Constitutional requirement that a Supreme Court justice must be an attorney admitted to the bar for 10 years.³²⁸ Using a more apt comparison between percentage of minority Supreme Court Justices and percentage of minority attorneys that were admitted to the bar for 10 years, the results clearly demonstrate that conventions have promoted diversity on the bench.

243. On a statewide basis, 19.2% of the Supreme Court Justices as of 2001, were minorities from a candidate pool where there were only 8.6% minority attorneys admitted to practice in 1990.³²⁹ The following table illustrates the percentage of minority justices compared to the percentage of minority attorneys who were admitted to practice a decade before:³³⁰

Judicial District	Total % Minority Justices (2001)	Total % Minority Attorneys (1990)
1	44.7 %	6.81 %
2	34.6 %	14.8 %
3	0.0 %	3.07 %
4	0.0 %	0.58 %
5	5.9 %	2.6 %
6	0.0 %	1.56 %
7	0.0 %	1.39 %

³²⁷ Levinsohn Decl., ¶ 23.

³²⁸ N.Y. Const. Art. 6 § 20(a).

³²⁹ Exh. NNN.

³³⁰ Exh. NNN.

8	7.7 %	3.03%
9	0.0 %	4.62 %
10	4.3 %	4.25 %
11	31.6 %	16.62 %
12	41.7 %	27.20 %
Statewide	19.2 %	8.67 %

244. Next, Plaintiffs claim that the Civil Court is a more diverse bench than the Supreme Court, and argue that conventions are not the most suitable mechanism for ensuring diversity in the twelve judicial districts. But this claim is based on a selective and misleading reading of Professor Hechter's Report. As Hechter made clear in his report, a comparison between Civil Court and Supreme Court is not proper because the offices encompass electoral districts of different sizes and different demographic compositions.³³¹

245. While minorities have been able to prevail in Civil Court races, many of these seats have been from smaller electoral units – such as Harlem or Washington Heights – where minorities actually constitute a majority of the voting age population. When using countywide electoral units, minorities have not been nearly as successful in winning Civil Court seats. For example, out of the 16 elected countywide Civil Court seats in Manhattan, only 5 or 31.2% are occupied by ethnic minorities.³³² By contrast 44.7% of the Supreme Court Justices in Manhattan are held by minorities.³³³

246. Outside of New York City, minorities have an even more abysmal election rate in countywide races. For instance, as of 2001, only 2 of the 128 County Court judges were African-

³³¹ Exh. 69 at ¶ 86.

³³² Exhs. 89A-N (New York City Civil Court Elections: Statement and Return of Votes for the Office of Civil Court Judge, 1990-2003); Exh. 83 (Excerpt from the Directory of Minority Judges of the United States); Exh. 84 (Excerpt from The New York Red Book 2001-2002).

³³³ Exh. NNN, Exh OOO.

American in all 57 non-New York City counties combined. No Hispanics or Asian-Americans were on the county court bench. A mere 11 County Court judges in 2001 or 8.59% were women. The breakdown of the comparison between County Court and Supreme Court was set forth in a table attached to Professor Hechter's Report which shows.³³⁴

	Appellate Division Supreme Court	Supreme Court	County Court
Number of judgeships	55	346	128
Number of women judges	12	64	11
Number of African American (Black) judges	7	40	2
Number of Hispanic judges	0	13	0
Number of Native American judges	0	0	0
Number of Asian/Pacific Island judges	1	2	0

247. Plaintiffs ignore the disparate impact that the costs associated with primaries will have on minorities. As Dr. Hechter testified, there are opportunity costs associated with a primary election, which impact poor voters more significantly than wealthy voters.³³⁵ Hechter reported that “[t]he best single determinant of success in a direct election is the size of the candidate’s campaign chest (and the role of campaign finance is greater in the least visible races,

³³⁴ Hechter Report at Table 3

³³⁵ Tr. 1232:13-16, 19-1233:7 (Hechter).

like those for state Supreme Court).”³³⁶ Because removing the convention system will eliminate the opportunity for logrolling, a primary system will negatively impact minorities and women, particularly since minorities tend to be disproportionately poorer.³³⁷ As such, a primary system is more likely to result in a homogeneous bench of wealthy individuals and adversely impact minorities.³³⁸

248. Mr. Allen testified that without the convention system “you would have a bunch of rich people [elected] to the bench and there would be no minorit[ies] sitting up there at all. Money will rule, and I think right now you have a process by which the process is a little fairer to ordinary people.”³³⁹

249. In addition to the inability of minority candidates to bear the massive costs associated with primaries, primaries would eliminate minority populations’ ability to logroll their votes so as to obtain adequate representation on the bench – a process which has been very successful in those judicial districts with any statistically significant minority population. As Mr. Ward testified:

Q. Would changing the current convention system in your opinion, and based upon your experience within the 8th judicial district, to an open primary dispar[ately] impact minorities by forcing them to face two direct votes cast by voters the majority of which are Caucasian?

A. Yes, there is no question about that.

³³⁶ Hechter Report at ¶ 28, *citing*, “State Supreme Court Races: Ten Out of Eleven Candidates with the Most TV Advertising Support also Received the Most Votes,” *Brennan Center for Justice at New York University School of Law*, Nov. 20, 2002.

³³⁷ Tr. 1678:14-18 (Kellner); Tr. 1343:19 – 1344:10 (Ward); Exh. 111 (Fund for Modern Courts).

³³⁸ Tr. 1586:20 – 1587:3 (Kellner).

³³⁹ Tr. 2046:13-17 (Allen).

Q. What do you believe the results in racial makeup would be if judicial district conventions were replaced with judicial district primaries?

A. My opinion is that it would be an entirely white bench.³⁴⁰

250. Only a single Assembly District out of the thirteen Assembly Districts in the Eighth Judicial District have a majority African American population.³⁴¹ There are two African American Supreme Court Justices in the Eighth Judicial District – higher than the percentage of African-American lawyers in the Judicial District.³⁴²

251. Approximately 8 percent of the Supreme Court Justices in the Eighth Judicial District are African-American, and using 1990 census data (because of the Constitutional requirement that Supreme Court candidates be admitted to the bar for 10 years), approximately 3 percent of the attorneys in the Eighth Judicial District are African American as shown by the following chart.³⁴³

Judicial District	Total % African American Justices (2001)	Total % African American Attorneys (1990)
1	31.6	2.27%
2	26.9	10.04%
3	0.0	0.56%
4	0.0	0.26%
5	5.9	2.10%

³⁴⁰ Tr. 1345:18 – 1346:2 (Ward).

³⁴¹ Tr. 1343:23 – 1344:1 (Ward).

³⁴² *Id.*; see also Defendants Exhibit NNN (chart relating to percentages of African American Justices/African American Lawyers).

³⁴³ Exh. NNN.

6	0.0	0.57%
7	0.0	5.68%
8	7.7	2.63%
9	0.0	2.30%
10	4.3	2.53%
11	26.3	10.15%
12	25.0	17.55%
Statewide	14.6	4.07%

b. Geographic Diversity

252. Professor Hechter found that logrolling is equally applicable to geography.³⁴⁴ In the same way the convention system promotes minority representation, it enhances geographic representation. Candidates from smaller, less populated counties can use the coalition-building process to their advantage and win nominations that would otherwise be out of their reach. Indeed, in the most geographically diverse judicial districts, virtually all rural counties are represented on the Supreme Court bench.³⁴⁵

253. For example, the Fourth Judicial District illustrates how the convention system promotes geographic diversity. The Fourth Judicial District is very large, comprised of eleven counties, and constituting 26% of New York State's land mass. Supreme Court Justice Sise testified that with the exception of Hamilton County, which has a population of 5,379, every other county in the Fourth Judicial District has one Supreme Court Justice who sits in that county

³⁴⁴ Hechter Report at ¶ 26.

³⁴⁵ Exhs. 69 at 43, Table 9.

and who resides in that county.³⁴⁶ The only reason Hamilton County does not have a Supreme Court Justice residing there is because there are only about five lawyers in Hamilton County.³⁴⁷ Therefore, there is a Supreme Court Justice that can handle “on a moments notice” an application and be within his or her courtroom within 30 minutes.³⁴⁸

254. Likewise, in the Eighth Judicial District, Erie County has the overwhelming majority of the population. But, as Dennis Ward testified, because of the convention system, other smaller counties have been represented on the Supreme Court bench.³⁴⁹ As discussed more fully below, this representation is far less likely to exist under a direct election scheme.

255. A primary system would effectively undermine the benefits of geographic diversity that the convention system promotes. Professor Hechter found that it “is child’s play” to determine the results in a direct primary election across Judicial Districts – i.e. the counties with the largest populations would always win.³⁵⁰ This would result in “[v]oters in the smaller rural counties [having] have no nominees at all – and hence no representation – on the [Supreme Court].”³⁵¹

256. Justice Sise testified that if a district-wide primary were required for nomination of Supreme Court Justice, would be unlikely that any Supreme Court Justice in the district could be nominated unless the candidate resided in Saratoga or Schenectady – the two largest counties

³⁴⁶ Sise Decl., ¶¶ 4 – 5; ¶¶ 10 – 12; Tr. 1495:25 – 1498:3; Tr. 1514:15 – 1515:4 (Sise).

³⁴⁷ Tr. 1532:16 – 1533:4 (Sise).

³⁴⁸ Tr. 1496:24-1497:1 (Sise).

³⁴⁹ Tr. 1340:14-1343:14 (Ward); Ward Decl., ¶ 19.

³⁵⁰ *Id.*

³⁵¹ *Id.*

in the Fourth Judicial District.³⁵² With all of the Supreme Court Justices heralding from Saratoga and Schenectady, Supreme Court Justices would have to preside over cases from areas as much as three hours away.³⁵³

257. In the Eighth Judicial District, the race between an Erie County candidate and a non-Erie County candidate ended in an electoral blowout where the Erie County candidate obtained between eighty and a hundred thousand votes.³⁵⁴ Under a primary system, a non-Erie County candidate would be forced to run this electoral gauntlet twice against Erie County candidates.³⁵⁵ The likely result would be that *all* of the candidates would come from Erie County “just given the weight of the vote from Erie County.”³⁵⁶

258. Similarly, in the Second Judicial District, a primary would result in a near certainty that Staten Island will never again have a Supreme Court Justice elected from its population as 3 of the 24 Assembly Districts in the Second Judicial District are located in Staten Island.³⁵⁷ As Senator Connor testified, in “Staten Island, you know, if you had a direct primary, nobody from Staten Island would win.”³⁵⁸ Senator Connor went on to testify that “Staten Island would have no voice if it was merged together with Brooklyn for all intents and purposes.”³⁵⁹ But because of the convention system, Staten Island residents comprise a substantial number of the Supreme Court Justices in the Second Judicial District.³⁶⁰

³⁵² Sise Decl., ¶¶ 7, 10; Tr. 1495:5-12 (Sise).

³⁵³ Tr. 1497:17-25 (Sise).

³⁵⁴ Tr. 1340:14 – 1341:8 (Ward).

³⁵⁵ Tr. 1341:9-20 (Ward).

³⁵⁶ Tr. 1343:12-14 (Ward).

³⁵⁷ Tr. 2042:17 (Allen)

³⁵⁸ Tr. 2102:23-24 (Connor).

³⁵⁹ Tr. 2134:1-4 (Connor).

³⁶⁰ Exh. 69 at 64 (Hechter Report Table 7).

4. Insulation of Incumbents From Costly, Political Primary Races

259. The judicial convention avoids the need for incumbent Justices to bear the enormous expense and burden of public primary campaigns. As [all of] the sitting Justices who testified stated, a primary system for re-election threatens judicial independence, both in terms of concerns about where and how fundraising occurred and in terms of scrutiny of one's decisions from the bench.³⁶¹

260. Wealthy non-judge candidates have a huge advantage over sitting Justices in at least two respects: fundraising and the freedom to express opinions on legal issues, including by criticizing an incumbent's decisions.³⁶²

261. The overwhelming evidence adduced at the hearing is that primaries are extremely expensive.³⁶³ The position of Supreme Court Justice is a prestigious position so there is a lot of competition. The cost of running primaries for Supreme Court races would far exceed the already high costs of Civil Court campaigns.³⁶⁴

262. Based on his 32 years of experience as an election lawyer, politician, and campaign manager, Senator Connor, the former Senate Minority Leader who has raised and spent millions of dollars on contested state senate races around New York State, estimates that a single

³⁶¹ Tr. 1773:8-11; Tr. 1775:17 – 1776:23 (Freedman); see also Tr. 1495:5-12 (Sise); Tr. 1828:18 - 1829:10 (Gangel-Jacob); Tr. 1887:19-1888:6 (Abdus-Salaam); Dep. Tr. 116(22)-118(9) (Lunn).

³⁶² Tr. 1774:15 – 1775:21 (Freedman).

³⁶³ Tr. 2013:16 – 2014:5 (Giske); Tr. 1587(4-12) (Kellner); Tr. 2141:10-2142:12. (Connor)

³⁶⁴ Tr. 2015:19 – 2016:1 (Giske); Tr. 2143:5 – 2144:7 (Connor)

contested open primary for a Supreme Court seat in the 2nd Judicial District could cost at least \$300,000 - \$500,000, and easily up to \$1,000,000.³⁶⁵

263. Dr. Hechter agreed that barriers to a primary system were high:

Q. So it would not be inconsistent with your analysis that, in fact, the barriers to entry in a convention system could be considerably lower than the barriers to entry in a direct primary?

A. There are very significant barriers to entry in a direct primary system, as we can see a lot of political races that are going on in this [polity]. In the Congress, for instance, it seems [that] millionaires seem to be elected these days. And for president, I think it may be billionaires now. That is [a] significant barrier[] to entry, it seems to me, in the direct election situation.³⁶⁶

264. In fact, according to Douglas Kellner, in his experience as an election lawyer and as a commissioner of the Board of Elections, the consensus is that a candidate cannot run a decent primary campaign for under half a million dollars.³⁶⁷ Mr. Kellner further testified that he has seen candidates spend well over a hundred thousand dollars even in small municipal court districts.³⁶⁸

265. Professor Schotland provides added insight on the rising costs of primary campaigns.

266. According to Professor Schotland, states that hold primary elections for their trial-level judges have seen costs of such campaigns skyrocket. For instance, as Professor Schotland

³⁶⁵ Tr. 2141:5-20 (Connor).

³⁶⁶ Tr. 1228:20-20 (Hechter).

³⁶⁷ Tr. 1587:4-10 (Kellner).

³⁶⁸ Tr. 1587:11-12 (Kellner).

testified that Texas has seen campaigns for judicial office reach five million dollars.³⁶⁹ He testified that the average cost is \$996,000.³⁷⁰

267. Additionally, in Florida where primary elections are also held, judges there spent \$8.6 million for 17 contested seats, or about half a million dollars per contested seat, at the trial court level. Professor Schotland explained that much of the expense comes from the cost of hiring election consultants.³⁷¹

268. In response to the exorbitant cost of primary campaigns, Plaintiffs suggest that there be public financing. However, Professor Schotland testified that in Wisconsin one of only two states that provide public payment of judicial elections, the public contribution represents approximately three or four percent of the campaign expenditures candidates make.³⁷²

269. Professor Schotland described elections within the general jurisdiction trial parts as “noisier, and nastier, and costlier.”³⁷³

270. For example, there was a very expensive surrogate court race in New York County that used a lot of media.³⁷⁴

271. There is no restriction on how much trial lawyers can spend on a campaign for Supreme Court Judge with a platform favorable to the trial lawyers on issues of tort law. In turn,

³⁶⁹ Tr. 759:1-13. (Schotland).

³⁷⁰ Tr. 761:1-4 (Schotland); Tr. 2167:4-20 (Connor).

³⁷¹ Tr. 761:17 – 762:18 (Schotland).

³⁷² Tr. 768:3-11 (Schotland).

³⁷³ Tr. 778:17 – 779:8 (Schotland).

³⁷⁴ Tr. 787:2-6 (Schotland).

there is no restriction on insurance companies spending unlimited amounts of money on judges who are favorable to them.³⁷⁵

272. In addition to Professor Schotland, Dennis Ward testified that in the Eighth Judicial District, a change to a primary system would double the cost of running for office.³⁷⁶ These additional primary costs are even more acute in the Eighth Judicial District where candidates typically seek more than one party's endorsement for the general election "because of the very close competitive nature of the Democratic versus Republican vote, the minor parties are very important."³⁷⁷ As demonstrated by the general elections in the Eighth Judicial District, primaries will be expensive. Ward testified that because the elections in the Eighth Judicial District are competitive, candidates for Supreme Court generally run a media campaign consisting television, radio and direct mailings.³⁷⁸ The media is largest component of the expenses.³⁷⁹

273. If New York adopted a primary system for the nomination of Supreme Court Justices, it would closely mirror Mr. Lipton's inflated budget.³⁸⁰

274. Testimony from the Justices shows that the cost of running for Supreme Court is comparatively low. Justice Freedman testified that the cost of her 2002 campaign for reelection to the Supreme Court cost about \$1,800.³⁸¹

³⁷⁵ Tr. 788:5-14 (Schotland).

³⁷⁶ Tr. 1347:17 - 1348:2 (Ward).

³⁷⁷ Tr. 1348:3-8 (Ward).

³⁷⁸ Tr. 1346:3 - 1348:2 (Ward).

³⁷⁹ Tr. 1346:11 - 1347:1 (Ward).

³⁸⁰ Tr. 1692:15-17 (Kellner).

³⁸¹ Tr. 1771:16-18 (Freedman).

275. Justice Gangel-Jacob testified that the cost of running in a primary for Civil Court in 1984 dollars was four times greater than the cost of obtaining the Supreme Court nomination.³⁸²

276. Justice Abdus-Salaam testified that she spent less than \$2,000 for her campaign for the Supreme Court nomination and that she is certain that under a primary system, she would have had to spend more.³⁸³ In fact, when she was first thinking about becoming a judge on the Civil Court bench, she was told that she would have to raise between \$35,000 to \$50,000.³⁸⁴

277. She further testified that it would be difficult to raise the \$150,000 to \$200,000 to run in a primary campaign for the Supreme Court nomination, in part because she did not have wealthy relatives, and because she has been on the bench so long.³⁸⁵

278. In addition to cost, a primary system imposes pressure on incumbents to render politically favorable decisions. Primary or retention election for sitting judges will have a chilling effect on a judge's willingness to take on or make tough decisions and will affect their impartiality as to decisions that may affect the judges' personal interest.³⁸⁶

279. The convention system avoids the incentives that a primary system creates for politicizing decisions, and maintains an independent judiciary. Politicizing judicial campaigns is dangerous. It is especially dangerous for incumbent judges who have been out of politics for 14 years, and are likely unable to raise sufficient funds.³⁸⁷ Justice Freedman provides a good

³⁸² Tr. 1803:11-20 (Gangel-Jacob).

³⁸³ Tr. 1887:10-24 (Abdus-Salaam).

³⁸⁴ Tr. 1888:2-6 (Abdus-Salaam).

³⁸⁵ Tr. 1888:10-22 (Abdus-Salaam).

³⁸⁶ Tr. 1828:18 – 1829:10 (Gangel-Jacob).

³⁸⁷ Tr. 2012:15-19 (Giske); Giske Decl., ¶¶20-21.

example of this danger. Though a highly experienced and highly regarded Justice, she testified that had she been faced with a contested primary rather than the current system when she was re-elected in 2002, she simply would not have run.

280. Incumbent candidates for judicial office are often challenged.³⁸⁸ Thus, incumbents have an incentive to politicize their decisions.

281. Professor Schotland testified that he is "very concerned" that judicial candidates will run for election on campaign platforms.³⁸⁹ Furthermore, he testified that he is very concerned about judicial independence and neutrality.³⁹⁰

5. Public Accountability

282. The convention system is accountable to the citizens of the state and more open and democratic than a primary or appointment system.³⁹¹ That delegate races or Supreme Court nominations are not contested does not mean that the process is undemocratic.

283. Even Professor Schotland believes that voters are not deprived of their right to vote when a candidate runs unopposed.³⁹²

284. Justice Lunn testified that based on his experience participating in both primaries and the convention system, the convention system is open to anybody. Justice Lunn stated:

I think my experience shows that it's open to anybody. I was not politically astute. I was not "politically wired" by in any reasonable interpretation of that term. And I'm sitting here today

³⁸⁸ Tr. 772:10-19 (Schotland).

³⁸⁹ Tr. 779:9-12 (Schotland).

³⁹⁰ Tr. 780:4-5; Tr. 789:1-4 (Schotland).

³⁹¹ Tr. 1588:8-11; Tr. 1588:18 – 1589:3 (Kellner).

³⁹² Tr. 790:5-8 (Schotland).

as a Supreme Court judge. And I attribute that to my work ethic and my credentials.³⁹³

285. Mr. Kellner explained that political leaders involved in the judicial selection process are elected by the voters, and dissatisfied voters can replace them with new leaders. And as Mr. Kellner testified, this happens actually.³⁹⁴ There is nothing preventing enrolled voters from getting involved in the political process, including the judicial selection process. It is up to the voters to pay attention to what their elected leaders are doing and exercise their democratic rights if they are not happy.³⁹⁵

286. Doug Kellner's advice to those who complain about the system is that:

what they really need to do is stop complaining and start organizing, and that if they would take a greater level of interest and get others to take a greater level of interest in the judicial selection process within the party, that they might find it a lot easier than they think.³⁹⁶

³⁹³ Dep. Tr. 118:4-9 (Lunn).

³⁹⁴ Tr. 1588:8 – 1589:3; Tr. 1671:23 – 1672:8; Tr. 1674:18-22 (Kellner).

³⁹⁵ Tr. 1696:7-18 (Kellner).

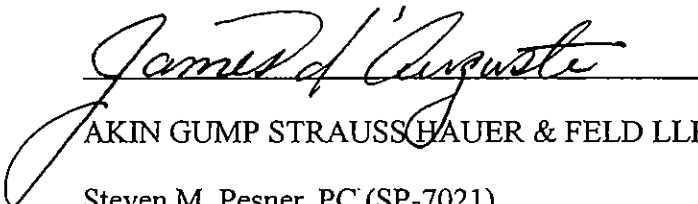
³⁹⁶ Tr. 1674:23 – 1675:4 (Kellner).

CONCLUSION

For the foregoing reasons, Plaintiffs motion for preliminary injunction should be denied.

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Respectfully submitted,


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