

**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.

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

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

November 9, 2004

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I. AS A THRESHOLD MATTER, ABILITY TO ACCESS THE GENERAL ELECTION BALLOT DEMONSTRATES THAT THE RIGHT TO VOTE AND ASSOCIATE IS NOT ABRIDGED AND THEREFORE PLAINTIFFS' FIRST AMENDMENT CLAIM FAILS¹

A. Neither *Bullock* Nor *Lubin* Supports Plaintiffs' Claim To A Separate And Independent Right To Participate In The Judicial Nominating Process

1. Plaintiffs contend that even where there are alternative means to access the general election ballot, there is a separate and independent right to participate meaningfully in the major parties' nomination process. (Reply Brief at ¶¶ 21-22). But there is no right to participate in a nominating process by accessing a ballot that does not exist.

2. Plaintiffs cannot deny that every single one of the cases on which they rely involves a primary ballot, including *Bullock*, *Lubin*, *Rockefeller*, *Molinari* and *Campbell*. As for Plaintiffs' Supreme Court cases, neither *Bullock* nor *Lubin* addresses the question of the constitutionality of a nomination process that does not involve a primary ballot. Rather, *Bullock* and *Lubin* stand for the proposition that there must be reasonable access to *the ballot at issue*. Thus, where there is no primary ballot, as is the case here, the only relevant issue is whether there are reasonable alternative means to access the general election ballot.

3. In the end, to accept Plaintiffs' argument would require this Court to disregard the constitutional significance of the fact that there are alternative, non-burdensome means of access to the general election ballot. Plaintiffs' argument effectively ignores the fact that access to the ballot in the general election means that any eligible candidate who wants to run for Supreme

¹ As an initial matter, it bears noting that Plaintiffs have all but conceded that the Judicial Nominating Provisions are in fact facially valid because they make absolutely no attempt to respond to a single argument advanced by Defendants for why the statutes are facially valid under the overbreadth doctrine, in the case of Plaintiffs' First Amendment claim, and under the *Salerno* standard, which applies to Plaintiffs' Fourteenth Amendment Equal Protection claim. (Compare Plaintiffs' Reply Conclusions of Law in Support of Motion For Preliminary Injunctive Relief ("Reply Brief") at ¶ 8 to Defendants' Proposed Conclusions of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Defendants' Proposed Conclusions of Law") at ¶¶ 37-51). Accordingly, the only issue is whether the Judicial Nominating Provisions are unconstitutional as applied.

Court justice, and any voter who wants to vote for that candidate, is able to do so. Plaintiffs' argument also ignores the fact that Lopez Torres gained access to the general election ballot on the Working Families Party's ticket. Plaintiffs' argument wholly disregards the fact that each and every voter in New York State whose right to vote was allegedly infringed had an opportunity to vote for Lopez Torres in the general election. Finally, Plaintiffs simply dismiss the fact that Lopez Torres had access to the judicial nominating convention, that her candidacy was voted upon, and that she received delegate support, though not enough to win. To grant Plaintiffs' requested relief, the Court would have to ignore the *constitutional significance of each of these facts*. This the Court cannot do.

B. Nor Do Plaintiffs' Lower Court Decisions Salvage Their Argument

4. None of the lower court decisions relied upon by Plaintiffs undermines the basic proposition that where a state has chosen to employ a delegate-based nominating convention in lieu of a primary, access to the general election ballot is constitutionally sufficient.

5. Plaintiffs do not dispute that *Rockefeller* has been limited by *Prestia* to the "special circumstances surrounding the presidential primary process." *Prestia v. O'Connor*, 178 F.3d 86, 89 (2d Cir. 1999); (see Reply Brief at ¶ 15). Nor have Plaintiffs disputed that *Rockefeller* is distinguishable because it involved a presidential primary, which the lower court itself recognized requires a "very different" campaign from a campaign for local office. (Defendants' Proposed Conclusions of Law at ¶ 74).

6. Indeed, the decision in *Rockefeller*, which was not on the merits and merely upheld the grant of a preliminary injunction, was based on the particular inequities Forbes suffered at the hands of the Republican Party. The Republican Party had made the decision to employ the more restrictive signature requirement of 1250 or 5% of enrollment, as opposed to the less restrictive .5% signature requirement that had been adopted by the Democratic Party.

917 F. Supp. at 164. Thus, the Republican Party elected to require 10 times the number of signatures New York State deemed necessary to establish a modicum of support. *Id.* In any event, *Rockefeller* overruled signature requirements previously upheld by the Second Circuit. Moreover, the opinion almost completely ignores Supreme Court precedent that defines what signature requirements constitute an undue burden on voters' rights under *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Although the decision quotes from a number of relevant Supreme Court decisions, it fails to compare ballot access laws that were found constitutional in those cases to the New York law except in the most perfunctory way. *See, e.g., Rockefeller v. Powers*, 917 F. Supp. 155, 159-65 (E.D.N.Y. 1995), *aff'd*, 78 F.3d 44 (2d Cir. 1996).

7. Recognizing the weakness of *Rockefeller*, Plaintiffs now attempt to rely on *Campbell*, a District of Connecticut case. (Reply Brief at ¶ 13). But Plaintiffs' reliance on *Campbell* is misplaced because, not only is *Campbell* not binding precedent on this Court, but it is inapposite. *Campbell* only recognized that “[i]f a primary is provided as part of the process by which nominees are selected, party rules cannot establish qualifications to appear on primary ballots which so unreasonably restrict such access.” *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 175 (D. Conn. 2003) (emphasis added). Thus, *Campbell* does not address the constitutionality of a convention system where a primary ballot is not provided. Further, the convention in that case was the only means to access a primary ballot for state-wide and multi-town offices, and no alternatives routes to that ballot existed. Here, by contrast, the ballot at issue is the general election ballot and, under New York's judicial electoral scheme, there are alternate paths to the ballot which are not burdensome. Finally, to the extent that *Campbell* collides with Supreme Court case law, the case is wrongly decided.

8. Plaintiffs attempt to salvage *Molinari* by arguing that *Campbell* is consistent with *Molinari*. (Reply Brief at ¶ 14). Their attempt fails because, not only do they ignore the fact that *Molinari* involved a presidential primary, but they cannot credibly discount the practical effect of the stipulation on the court's decision in that case. (*Id.* at ¶ 14). In any event, *Molinari* merely addressed the requirement to list town and village residency, in addition to mailing address, on delegate designating petitions, and the failure of the Board of Elections to give adequate notice of petition challenges. These impediments, which were eliminated by *Molinari*, are not at issue here.

II. PLAINTIFFS WRONGLY EQUATE A RIGHT TO PARTICIPATE IN THE NOMINATION PROCESS WITH A RIGHT TO UNMEDIATED ACCESS TO VOTERS

A. Even If Plaintiffs' Interpretation of *Bullock* And *Lubin* Were Correct, At Most, These Cases Would Stand For No More Than A Right Of Access At The Nominating Phase

9. Even if Plaintiffs' interpretation of *Bullock* and *Lubin* were correct to the extent that access to the general election ballot alone were insufficient, at most, Plaintiffs would still only have a limited right of access at the nominating phase. But Plaintiffs want these cases to mean even more, arguing that these cases require, more than access, an affirmative right to "participate meaningfully in the nomination process." (Reply Brief at ¶ 21; *see also id.* at ¶¶ 11, 16, 18). Even the most aggressive reading of these cases, however, fails to support this interpretation as both of these cases are nothing more than "access" cases. *Bullock* and *Lubin* each vindicates an indigent candidate's right to ballot access in the face of exclusionary filing fees, and does not confer, comment on, or otherwise consider any right beyond a right to access. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's *access* to the

ballot ‘does not of itself compel close scrutiny’”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (emphasis added)).

10. As a factual matter, what the candidates in *Bullock* and *Lubin* were clamoring to access was a primary ballot only because a direct primary election was the process the states had happened to choose for selecting nominees. The most that can be said of these cases is that candidates have a right to access whichever process the state adopts for selecting candidates. This interpretation is the only way to square *Bullock* and *Lubin* with cases like *White*, which clearly hold that there is no constitutional right to a primary. Where, as here, the state has adopted a convention as the means of selecting candidates, the only First Amendment right candidates have is to access the convention without undue burden. Where Plaintiffs’ constitutional analysis goes off the rails is where they argue that the right to access set out in *Bullock* and *Lubin* extends beyond the state’s chosen selection method to *require* that candidates have direct, unmediated access to voters at the nomination phase. Such an interpretation runs afoul of *White* because it would make unconstitutional a delegate-based convention system, or any other process for that matter that relies on true representative democracy, and would mandate direct primary balloting.

B. Plaintiffs’ True Agenda Is To Engraft A Primary Election System Onto New York’s True Delegate-Based Judicial Convention System

11. Plaintiffs’ misplaced reliance on *Bullock* and *Lubin* demonstrates, yet again, that their true agenda is to engraft a primary election or its functional equivalent onto New York’s delegate-based judicial convention system. Notwithstanding Plaintiffs’ repeated attempt to dismiss as “strawmen” Defendants’ efforts to point out that Plaintiffs seek to expunge the convention system and replace it with a primary-like system, (Reply Brief at ¶ 20), Plaintiffs’ own papers make it plain that this is precisely what they are doing, (*see id.* at ¶¶ 21-22). While

conceding that the right to participate in the nomination process free from severe burdens “does not extend as far a right to a direct primary,” (*id.* at ¶ 21), what Plaintiffs hold out as purportedly constitutional alternatives to New York’s convention system are the functional, if not precise, equivalents of direct primaries, (*see id.*). Plaintiffs proffer as constitutional forms of nominating systems the following:

[i] primary elections; [ii] systems . . . that feature a convention followed by a primary if a challenger candidate files a petition with sufficient signatures; [iii] conventions where delegates expressly pledged to support specific candidates at the convention run in primaries; and [iv] conventions or caucuses that are open to all registered party members.

(*Id.*).

12. Highlighting the circularity of Plaintiffs’ argument, each of these alternatives is tantamount to a primary electoral system. The first alternative *is* a primary. The second alternative, in which a convention is but one of several means of accessing a primary ballot, clearly is not a true alternative to a primary because, obviously, there is still a primary, just as in the first option. The third alternative, in which voters elect delegates to act as proxies for candidates, is the equivalent of voting directly for a candidate in a primary. And, finally, Plaintiffs’ fourth alternative, a convention open to all registered party members, as the Supreme Court noted, “resembles a primary about as clearly as one could imagine.” *Morse v. Republican Party*, 517 U.S. 186, 238 (1996) (a “convention . . . open to any [Republican] voter . . . [is] just like a primary”) *id.* *It is the fact alone that New York state has a true delegate-based system that, under Plaintiffs’ theory, constitutes a severe burden on a voter’s right to vote and associate.*

13. However, Plaintiffs’ argument that a convention must mimic a primary flies in the face of the Supreme Court’s unanimous ruling “that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled

before the general election by primary election *or by party convention.*” *American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (citing *Storer v. Brown*, 415 U.S. 724, 733-36 (1974)) (emphasis added); *see also Shapiro v. Berger*, 328 F. Supp. 2d 496, 502 (S.D.N.Y. 2004) (relying on *White* as “confirm[ing] the right of a State to provide for party conventions as an alternative to primaries as a means for selecting party candidates for public office”); (See Defendants’ Proposed Conclusions of Law at ¶¶ 85-86; *see also id.* at ¶¶ 87-89). The Supreme Court’s ruling that a convention is a constitutional alternative to a primary would be rendered hollow if the convention must precisely resemble a primary. The fact of the matter is that New York State has a true convention system which *delegates* authority to choose the party’s nominee(s) to duly elected judicial delegates.

14. Plaintiffs cannot credibly dispute that delegate-based nominations are constitutional. As the Second Circuit has observed, a delegate to a convention “acting in a nominating capacity” may properly speak on behalf of his constituents in the broadest sense. *Mrazek v. Suffolk County Board of Elecs.*, 630 F.2d 890, 898 (2d Cir. 1980) (citing cases) (“[t]he parties are best situated to define the proper constituencies of their nominating delegates, and these determinations should not be invalidated unless such definitions are utilized to exclude or disadvantage discrete groups or minorities”) *id.*; *see also Bachur v. Democratic Nat’l Party*, 836 F.2d 837, 842 (4th Cir. 1987) (“[i]ndeed, in many states, delegates to the national convention are selected by means other than a primary election, so that many . . . [voters] have no direct voice in the selection of delegates”); *Ripon Soc., Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (equal protection clause does not require representation in presidential nominating conventions of some defined constituency on a one-person, one-vote basis). (See Defendants’ Proposed Conclusions of Law at ¶¶ 89).

15. To the extent that Plaintiffs' argument that voters must be afforded a right to vote directly for a candidate of their choosing at the nominating phase is based on the principle of one-person, one-vote, it is ill-founded. It is well-settled that election of state court judges need not conform to a one-person, one-vote standard. *See, e.g., New York State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (holding the "one person one vote" doctrine inapplicable to the election of the judicial branch); *Cox v. Katz*, 22 N.Y.2d 903, 905 (1968) (explaining that the "one person one vote" doctrine was "never intended to regulate the election of judges whose functions are solely judicial"; and stating "[t]he function of judges, it is manifest, is to apply the law, not to represent or champion the cause of a particular constituency"); *Gilday v. Board of Elecs.*, 472 F.2d 214, 217 (6th Cir. 1972) (one-person, one-vote principle not applicable to state judiciary); *Holshouser v. Scott*, 335 F. Supp. 928, 930-32, 934 (M.D.N.C. 1971) (republican form of government does not require election of state court judges; these elections need not conform to one-person, one-vote standard), *aff'd*, 409 U.S. 807 (1972); and *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (state judiciary not responsible for achieving representative government).

16. Therefore, in the final analysis, even if there is a right to access the nominating phase, there is no support for the proposition that such access must take the form of direct, unmediated access to voters in order to be constitutional.

III. New York's Judicial Convention System Does Not Unduly Burden The Rights Of Voters and Candidates Because It Provides Them Access To The Judicial Nominating Convention

A. Candidates And Voters Have Access To The Convention And The First Amendment Requires No More

17. Plaintiffs complain that the judicial convention system imposes severe burdens on candidates and voters by depriving them of an opportunity to participate meaningfully in the

judicial nominating convention. Plaintiffs are wrong because, as a threshold matter, to the extent that Plaintiffs have any right to participate in the nominating convention, Plaintiffs' right to participate entitles them, at most, to access meaningfully the judicial nominating convention as candidates and as voters.

18. Plaintiffs fail to address a single factual argument regarding convention access other than to dismiss all of Defendants' arguments as "primarily rhetoric without citation." (Reply Brief at ¶ 35; *compare* Defendants' Proposed Conclusions of Law at ¶¶ 102-105 to Reply Brief at ¶¶ 35-50).

19. As for candidates' access to the system, Plaintiffs simply ignore and, indeed, cannot dispute, the evidence adduced at the hearing which demonstrates:

- a. Any New York State resident, who has been licensed to practice law in the State of New York for ten or more years, is eligible to run for Supreme Court.
- b. The requirements for winning a political party's nomination are the same for all would-be candidates, namely, a candidate must win a majority of delegate votes at the judicial district nominating convention.
- c. Judicial candidates have ready access to and can garner support from prospective and then elected judicial delegates throughout the year.
- d. The Judicial Nominating Provisions do not preclude candidates who are not endorsed by the "party leadership" from presenting their candidacies at or before the convention.
- e. There are no barriers to accessing the convention, such as exclusionary filing fees. In fact, under New York's convention system, a candidate need not gather a single petition signature to seek the nomination and need only convince a single delegate to nominate her in order to obtain a vote on the convention floor.

20. That access to the judicial nominating convention is not a "hollow right," as Plaintiffs baselessly assert, is demonstrated by Plaintiff Lopez Torres, herself. As a so-called "challenger candidate," Lopez Torres achieved meaningful access to the judicial nominating

convention in 2002 and 2003, each year having her name placed in nomination and voted upon by the judicial delegates at those conventions.

21. As for voters' ability to access the system, New York's judicial nominating process affords voters the opportunity to exercise their right to vote upon and associate with delegates and judicial candidates. The evidence adduced at the hearing demonstrates:

- a. Voters are afforded the opportunity to associate with judicial delegates by signing and/or circulating nominating petitions.
- b. Voters may then vote in the delegate primary for judicial delegates who, in turn, nominate judicial candidates.
- c. Voters may even run for judicial delegate themselves.
- d. Ultimately, judicial candidates are voted upon by voters in the general election. In this regard, signing delegate nominating petitions, voting for judicial delegates, and running, indeed, even being elected as delegate for a particular political party, do not preclude a voter from voting for *any* judicial candidate in the general election.

B. In Any Event, Plaintiffs Also Have A Meaningful Opportunity To Participate In The Nomination Process

1. Party Leaders Do Not Control The Structure And Outcome Of Nominating Conventions

22. Plaintiffs allege that challenger candidates face a severe burden because party leaders control the structure and outcome of the party nominating process and that a vote for a candidate not backed by the party leaders, at most, is a "protest vote" given party leaders' purported ability to "almost always block challenger candidates from winning in a convention system." (Reply Brief at ¶ 30). As a threshold matter, it is worth reiterating, as Plaintiffs admit, that "candidates do not have a right to win their party's nomination." (Reply Brief at ¶ 20). More fundamentally, not only is there no right to win a nomination, but, as the Supreme Court has recognized, there is no right even to be a candidate in the first place. *See, e.g., Burdick v. Takushi*, 504 U.S. 428 (1992); *cf. Clements*, 457 U.S. at 963 ("Far from recognizing candidacy as

a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny’”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

23. Moreover, Plaintiffs simply fail to respond in any way to the overwhelming evidence adduced at the hearing that the method of electing delegates from local Assembly Districts and the manner in which those delegates carry out their responsibilities demonstrate an open and quintessentially democratic process. More specifically, Plaintiffs have failed to respond to evidence that the delegate election system is an open and democratic process:

- a. Not a single witness on either side testified that any delegate had ever been instructed as to how to vote.
- b. Indeed, Plaintiffs’ own witnesses with any delegate experience – Carroll, Berger and Ostrer – uniformly testified that they had never been instructed how to vote.
- c. Plaintiff Lopez Torres’ 2003 campaign literature also demonstrates that she, herself, believed that delegates are independent.

(See Defendants’ Proposed Findings of Fact in Opposition to Plaintiffs’ Motion for Preliminary Injunction (“Defendants’ Proposed Findings of Fact”) at ¶¶ 39, 40, 61, 63-78). In sum, Plaintiffs’ allegation that delegates are hand picked by party leaders or preordained to vote in accordance with those leaders’ wishes has been roundly disproved.

24. Unable to refute the evidence of the openness of the process and delegate independence, Plaintiffs instead resort to repeating Mr. Farrell’s testimony from ten years ago that he can “kill” a nomination to support the claim that “county party leaders are not nearly as passive as Defendants would suggest.” (Reply Brief at ¶ 40). But the experiences of Phyllis Gangel-Jacob and Alice Schlesinger put an end to this argument as their experiences demonstrate that, braggadocio aside, Mr. Farrell alone cannot block a determined candidate from prevailing at the convention in the First Judicial District. (Defendants’ Proposed Findings of Fact at ¶¶ 170-

173). As for the other eleven judicial districts, Plaintiffs utterly have failed to put in any evidence that the county party leaders throughout these districts can block nominations. To the contrary, the evidence at the hearing demonstrates that county leaders or their equivalents in the Second, Third, Fourth, Seventh and Eighth Judicial Districts cannot block determined nominees. (*Id.* at ¶¶ 174-182).

25. The evidence of delegate independence, which has gone unanswered, also fundamentally refutes Plaintiffs' unfounded claim that "only a small handful of party leaders . . . [can] block an insurgent candidate from competing in any meaningful respect for the party's nomination" (Reply Brief at ¶ 41; *see also id.* at ¶ 40). The independence of delegates, which is irrefutable, cannot be reconciled with Plaintiffs' claim that a small group of party leaders control the outcome of judicial nominating conventions. Certainly, party leaders play a role in the judicial selection process, and Defendants do not dispute that this is the case. (*See* Defendants' Proposed Findings of Facts at ¶ 156). But while party leaders may be influential, the evidence shows that they do not control judicial conventions.

26. Lastly, Plaintiffs ask this Court to draw an inference of party leader control from the "paucity of contested nominations at the judicial conventions." (Reply Brief at ¶ 40). As an initial matter, Plaintiffs attempt to found this claim almost exclusively on convention minutes. The evidence adduced at the hearing demonstrates that convention minutes fail to record or reflect the most critical events of all – those that occur in the period of time leading up to the convention. (*See* Defendants' Proposed Findings of Fact at ¶ 152). That the minutes reflect virtually no deliberations, debate or contests is in and of itself quite besides the point. (*Id.*). The evidence amply shows that there are often fierce contests among candidates for the nomination that are waged prior to the convention and that such contests are most often resolved before the

convention formally opens. (*See* Defendants' Proposed Findings of Fact at ¶¶ 149-153). The fact that conventions themselves are uneventful affairs, therefore, is not probative of whether judicial nominations involve contests among candidates for delegate support. Moreover, Plaintiffs make no effort to dispute that there have been numerous instances where the conventions themselves were contested in floor fights, including without limitation, the 2000 Democratic convention in the Eighth Judicial District, the 2002, 2003 and 2004 convention in the Second Judicial District, and the 1993 and 2002 conventions in the First Judicial District. (*Id.* at 154). During the reform movement in the 1970s, hotly disputed conventions were an annual event in the only two districts where we have testimony on this subject – the First and the Second Judicial Districts. (*See, e.g.*, Tr. 1543:1-25 (Kellner); Tr. 2244:8-13 (Connor)).

27. Accordingly, Plaintiffs are left with the argument that the Judicial Nominating Provisions are severely burdensome because no “insurgent candidates” have prevailed in a vote at a convention “over the county leader’s objection without being the beneficiary of an internal fight for party control.” (Reply Brief at ¶ 40; *see also id.* at ¶ 36). First of all, Plaintiffs’ own witness, John Carroll, testified that “insurgent candidates” have been nominated and elected in the Second Judicial District, including Michael Pesce, Joseph Bruno, Al Tomei, Lawrence Knipel and Frank Barbaro. (Tr. 488:2-489:12; 491:4-17 (Carroll)). In any event, the fact that so-called insurgent candidates have been successful in the context of internal fights for party control demonstrates that party leaders can and do lose whatever control is claimed for them, and also that insurgent candidates have been successful.

28. Second, Plaintiffs’ argument runs afoul of the well-settled principle that there is no constitutional right to win an election or, as Plaintiffs admit, a party’s nomination. Plaintiffs cannot, on the one hand, admit that there is no right to win a nomination and, on the other hand,

ground a claim for a constitutional violation in the purported failure of candidates to win. In this regard, having already blurred the true constitutional issue, which concerns ballot access, Plaintiffs confuse “meaningful participation” with actually winning.

29. Finally, insofar as Plaintiffs’ argument ultimately boils down to a purported right of an insurgent candidate to participate meaningfully in the judicial nominating convention, Plaintiffs choice of Lopez Torres as their lead plaintiff is puzzling because Lopez Torres, herself, had such an opportunity. Plaintiffs simply cannot dispute that Lopez Torres gained meaningful access to Democratic judicial conventions each year she sought the nomination, garnering a vote of 25 delegates at the 2002 judicial nominating convention – a year in which she did not even attend. (Defendants’ Proposed Findings of Facts at ¶ 102). Far from representing a “token” or “hollow” showing, a vote of 25 delegates is a significant block of delegate support. Indeed, judicial candidates with less delegate support, such as Rosalyn Richter, have been successful in obtaining their party’s nomination by log rolling to build coalitions with other successful candidates. (*Id.* at ¶ 147; *see also id.* at ¶¶ 143-148).

2. Petitioning Requirements Do Not Prevent Candidates From Meaningfully Participating In The Judicial Nominating Process

30. Plaintiffs argue that cumulative signature requirements for running slates of judicial delegates are unduly burdensome because of the geographic distribution requirements. (*See Reply Brief at ¶¶ 42-43*). As an initial matter, the evidence demonstrates that it is not necessary for a judicial candidate for Supreme Court to run a single delegate in order to participate meaningfully in the judicial nominating process. (Defendants’ Proposed Findings of Facts at ¶ 8). Instead, judicial candidates, including so-called challenger candidates, need only solicit support among prospective and then elected judicial delegates in order to garner enough support to win a vote of the majority of duly elected delegates at the judicial nominating

convention. (*Id.*). The unrefuted testimony of successful judicial candidates, including Justices Abdus-Salaam, Freedman, Gangel-Jacob, Lunn, Schlesinger and Sise demonstrates that efforts to solicit support among delegates can and do succeed. (*Id.*). Thus, Plaintiffs' insistence on running independent slates of delegates ignores the principal path to nomination: appealing directly to members of the elected delegation for support.

31. Second, under Plaintiffs' theory of the case, a so-called challenger candidate must run her own slate of delegates in each Assembly District in order to win her party's nomination. (Plaintiffs' Proposed Statement of Facts at ¶ 258). Plaintiffs, however, do not dispute that a judicial candidate requires no more than a majority of delegate votes in order to win a party nomination. (*Compare* Defendants' Proposed Conclusions of Law at ¶ 112 to Plaintiffs' Reply Brief at ¶¶ 42-44). Therefore, it is not necessary to run delegates in each Assembly District to achieve majority support for a judicial candidate's nomination. Thus, Plaintiffs own theory of the case exaggerates the burdens purportedly faced by so-called insurgent candidates. (*See* Defendants' Proposed Conclusions of Law at ¶ 112).

32. In any event, in light of Lopez Torres's own experience, Plaintiffs cannot credibly maintain that the signature requirements for running delegate slates in each and every Assembly District are overly burdensome. Lopez Torres gathered nearly 30,000 signatures on petitions that bore her name in 2002, a number far in excess of the 12,000 signatures required to run slates of delegates in each of the 24 Assembly Districts in the Second Judicial District. (Defendants' Proposed Statements of Fact at ¶ 191).

3. The Other Purported Burdens Identified By Plaintiffs Are Not Severe

a. The Absence Of Ballot Cues Does Not Impose A Severe Burden

33. As a threshold matter, Plaintiffs have now conceded that the fact that delegates are not identified with the Supreme Court candidates on the delegate primary ballot does not

raise an issue of voter confusion. (*See* Reply Brief at ¶ 46). And Plaintiffs utterly fail to respond to *New York State Democratic Party v. Lomenzo*, 460 F.2d 250 (2d Cir. 1972), where the Second Circuit put to rest this issue, concluding that the name of the candidate whom the delegate and alternate delegate ultimately intended to support for nomination need not be on the ballot.

34. Instead, Plaintiffs now contend that including the name of a delegate without identifying the delegate with a particular candidate for Supreme Court “prevents voters from having any input into the selection of their party’s Supreme Court nominees.” (Reply Brief at ¶ 46). Once again, Plaintiffs’ complaint is that New York State’s judicial convention system does not provide direct, unmediated access to voters, but is a true delegate-based system. Further, Plaintiffs have no answer to the fact that delegates are often called to vote to nominate several candidates for Supreme Court justice. In this respect, again, Plaintiffs’ argument fundamentally misunderstands the nature of the judicial delegate convention system. Finally, that delegates are not pledged to any particular judicial candidate underscores the fact that delegates are elected to represent the interests of voters within their respective assembly district and that the process for Supreme Court candidates seeking delegate support is open and democratic.

b. Campaigns Are Not Unduly Expensive

35. Plaintiffs allege that “the costs faced by an insurgent candidate seeking to run their own slates of judicial delegates and alternates would be – and have been – prohibitive for most candidates,” and that such “costs would significantly exceed those required to run a countywide primary election.” (*See* Reply Brief at ¶ 47). Plaintiffs’ argument fails for three simple reasons. First, Plaintiffs continue to assume that an insurgent candidate must run slates of delegates in every assembly district, which simply is not the case, as discussed above. Plaintiffs also continue to overlook the fact that the relevant issue here is not the cost of winning an

election, but, at most, the cost of accessing the nomination phase. Plaintiffs compare the lowest figure estimated by Defendants witnesses for waging a primary campaign to the costs estimated by their witnesses for running a convention campaign. Furthermore, in relying solely upon exaggerated estimates of the average cost of participating in the convention system, Plaintiffs simply ignore the abundance of evidence of candidates who have mounted successful campaigns such as Justices Freedman, Gangel-Jacob and Abdus-Salaam, and their testimony that campaigning for a Supreme Court nomination is less costly under the existing convention system than it would be under a primary system. (*See* Defendants' Proposed Findings of Facts at ¶¶ 274-277).

c. The Judicial Convention System Does Not Impose Unduly Burdensome Time Constraints

36. Plaintiffs claim that the time frame for campaigning for Supreme Court justice is too compressed. (Reply Brief at ¶ 48). Plaintiffs first focus on the fact that Supreme Court candidates cannot learn of the candidates for delegate and alternate delegate until July, when delegate nominating petitions are filed with the Board of Elections. (*Id.*) Plaintiffs contend that this time frame is not prejudicial to candidates who "have the support of county party leaders." (*Id.*) However, the evidence adduced at the hearing demonstrates that county leaders do not, in any event, tend to support judicial candidates, if at all, until very late in the process, and on the basis of counting delegate support for different judicial candidates. Therefore, Plaintiffs' complaint regarding the compressed time frame misses the mark.

37. Plaintiffs also argue that the time frame is too short in light of the fact that candidates for statewide office have longer periods of time to campaign for support from delegates to statewide designating conventions. (*Id.*) Just because the campaign period for

other statewide offices may be longer than the amount of time for Supreme Court justice does not mean that the shorter period of time is more burdensome; indeed, it may be less so.

38. Finally, Plaintiffs have not disputed that candidates for Supreme Court justice campaign throughout the year, and do not respond to the evidence adduced at the hearing that the time for campaigning is sufficient, indeed, even if candidates were restricted to the two to three week period between the delegate primary and the judicial nominating convention. (Defendants' Proposed Findings of Facts at ¶¶ 120-121).

IV. BECAUSE NEW YORK'S JUDICIAL CONVENTION SYSTEM DOES NOT IMPOSE SEVERE BURDENS ON THE RIGHT TO VOTE AND ASSOCIATE, THE LEGITIMATE AND COMPELLING STATE INTERESTS IT SERVES AMPLY JUSTIFY THE CONVENTION SYSTEM

A. Contrary To Plaintiffs' Claim, Rational Basis, Not Strict Scrutiny, Is The Proper Standard Because The Judicial Convention System Does Not Unduly Burden The Right To Vote And Associate

39. Plaintiffs claim that the Supreme Court selection requirements must be subjected to strict scrutiny for imposing purported burdens that are "plainly severe on both an absolute and a comparative basis" and, accordingly, must be narrowly tailored. (Reply Brief at ¶ 50).

However, the Supreme Court has consistently held that where a challenged law imposes "reasonable, nondiscriminatory restrictions" on voters' protected rights, then it need only be reasonably related to a legitimate state interest. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). In such cases, "the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

40. Assuming that injury has been shown, and none has been shown here, at most the Judicial Nominating Provisions would be subject to rational basis review because, at worst, New York's judicial convention system for nominating Supreme Court justices could be viewed as imposing "reasonable, nondiscriminatory restrictions" on voters' First Amendment rights. *Id.*

Thus, New York's judicial nominating system would easily pass constitutional muster as long as it can be demonstrated that the system in fact is rationally related to achieving any compelling and/or legitimate state interest(s).

B. Under The Rational Basis Test, New York State's Judicial Convention System Is Rationally Related To Achieving Several Compelling And/Or Legitimate State Interests

41. New York State's judicial convention system for nominating Supreme Court justices does not impose undue burdens on the right to vote and associate and is rationally related to achieving several compelling and/or legitimate state interests, including: (i) protecting the associational rights of political parties; (ii) promoting diversity, including along racial and ethnic lines; (iii) promoting geographic diversity, including community representation; and (iv) protecting incumbents and otherwise mediating the ill effects of political campaigning on the judiciary.

42. In examining New York's interest in maintaining its current system of nominating and electing Supreme Court Justices, *France v. Pataki*, 71 F. Supp. 2d 317, 333 (S.D.N.Y. 1999) held that New York State has "a substantial interest in maintaining the structure of judicial elections." *Pataki* and other courts have recognized the very interests served by New York's judicial convention system as both substantial and legitimate. For example, in *Pataki* the Court specifically recognized that the judicial convention system promotes geographical diversity. *See id.* ("[i]t is well settled that a State's citizens have a substantial and legitimate interest in maintaining the link between an elected judge's territorial jurisdiction and those courts' electoral districts") (citing cases). Geographic diversity, in turn, as the Court recognized, supports "judicial accountability and the fair administration of justice." *Id.* With respect to geographical, as well as racial diversity, the representative and community-based convention system empowers communities in a way that no other system can. Delegates from local assembly districts can act

on behalf of their constituent communities through the logrolling process to advance communitarian interests far more effectively than is possible based on the non-concerted action of casting an individual ballot.

43. Moreover, Plaintiffs themselves have acknowledged that the associational rights of political parties would be a compelling state interest, (Reply Brief at ¶ 53), and that promoting racial diversity, (*id.* at ¶ 56), and geographic diversity, (*id.* at ¶ 62), would be legitimate state interests.

1. New York’s Judicial Convention System Protects The Right of Association of Political Parties

44. Having no choice but to acknowledge that the associational rights of political parties are a compelling state interest, Plaintiffs have resorted to the untenable claim that such rights are not implicated here because “whether the State chooses to require political parties to use judicial nominating conventions, a primary, or a different convention system does not implicate those associational rights.” (Reply Brief at ¶ 53). This argument is not plausible. Indeed, Plaintiffs do not dispute that the statutory provisions that they are challenging are contained not only in the Judicial Nominating Provisions, but also in party rules, such as those of the Democratic Party of the State of New York. Nor do Plaintiffs dispute that Election Law Sections 6-106 and 6-124 are directly governed by party rules. *See Balletta v. Secretary of State of N.Y.*, 65 A.D.2d 583 (2d Dep’t 1978). Thus, the Judicial Nominating Provisions clearly *implicate* the associational rights of political parties. Plaintiffs, in any event, are wrong that political parties do not have a right to determine the process of selecting their party nominees, and Plaintiffs have cited no authority to the contrary. In contrast, the Supreme Court has repeatedly recognized the rights of political parties and their members to band together and choose their standard bearers. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567

(2000); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986).

45. Plaintiffs also argue that the First Amendment associational rights of political parties are not implicated here because “[p]olitical parties do not have any right to exclude their own members from the nomination processes.” (Reply Brief at ¶ 53). Here, as discussed above, there is no evidence of exclusion of candidates or voters from the nomination process. On the contrary, voters and their duly elected judicial delegates and judicial candidates have meaningful access at every stage of the judicial convention process.

46. Lastly, Plaintiffs do not disagree that preventing party raiding is a compelling state interest. (*See id.* at ¶ 55; *see also* Defendants’ Proposed Conclusions of Law at ¶ 125). Nor do Plaintiffs take issue with the fact that New York State’s judicial convention system avoids the baleful effects of party raiding. (*See id.*). Plaintiffs’ only point is that the system is not narrowly tailored to prevent party raiding. (Reply Brief at ¶ 55). Whether this is true or not is irrelevant because, under the rational basis standard of review, the convention system need only be rationally related, not narrowly tailored, to achieve this interest.

2. New York’s Judicial Convention System Promotes Diversity On The Supreme Court Bench

47. Plaintiffs first argue that even though racial and ethnic diversity is a legitimate state interest, the judicial convention system does not promote it. (Reply Brief at ¶ 56). Plaintiffs’ first argument is that “[t]he evidence shows that almost all of the diversity on the Supreme Court bench is in New York City, where the population of voters is sufficiently diverse that minority candidates can and do perform very well in primaries.” (*Id.* at ¶ 57). Plaintiffs’ claim is wrong for two reasons.

48. Plaintiffs rely on an erroneous statistical comparison. Plaintiffs compare the percentage of Supreme Court justices to the percentage of minorities in the voting age population to support their argument that the judicial convention system does not lead to greater diversity outside New York City, such as in the Third, Seventh and Ninth Judicial Districts. (*Id.*). But in doing so, Plaintiffs ignore the fact that under the New York State Constitution, a Supreme Court justice must be an attorney admitted to the bar for 10 years. Accordingly, the appropriate pool of comparison should be eligible minority attorneys, not the number of voting age minorities in the judicial district. (*See* Defendants' Proposed Statement of Facts at ¶ 243).

49. Using the appropriate comparison, Plaintiffs cannot refute that New York State's judicial convention system promotes diversity. For example, as of 2001, on a statewide basis, 19.2 percent of Supreme Court justices were minorities out of a candidate pool consisting of only 8.6 percent of an eligible minority attorney population. (*See id.*). Indeed, the only judicial districts that lacked ethnic minority Supreme Court justices in 2001 were districts where the total percentage of ethnic minority attorneys fell between 0.58% and 4.62% of the total number of eligible attorneys. (*See id.*).

50. Plaintiffs' argument also ignores the self-evident fact that minority representation in judicial districts outside New York City would be comparatively lower to reflect the fact that the population outside of New York City is not as diverse. (Reply Brief at ¶ 57). This fact does not evidence a shortcoming of the system to promote diversity. Rather, an appropriate comparison of minority justices to the eligible population of potential Supreme Court candidates in such judicial districts demonstrates that the system promotes diversity on the bench. (Defendants' Proposed Findings of Facts at ¶ 243).

51. Plaintiffs' second argument for why the convention system does not promote diversity is similarly unavailing. Plaintiffs contend that "[t]he Supreme Court selection system has done a particularly poor job of promoting diversity beyond African Americans" as "Hispanics and Asian Americans are much less well represented on the bench than African Americans." (Reply Brief at ¶ 59). As an initial matter, Plaintiffs do not deny that the Supreme Court selection system has promoted African American diversity on the Supreme Court bench. Thus, it is hard to understand how Plaintiffs can credibly argue that the system does not promote diversity. As for promoting diversity beyond African Americans, Plaintiffs' argument again is fundamentally flawed because it is not based on the appropriate pool of eligible minority attorneys.

52. Unable to deny credibly that the empirical evidence analyzed under the appropriate statistical measure demonstrates that New York's judicial convention system promotes diversity, Plaintiffs resort to *ad hominem* attacks on Defendants' expert, Dr. Hechter, which distort his straightforward analysis of the manner in which conventions advance minority interests through coalition-building. (*See* Reply Brief at ¶ 58). As discussed in Defendants' Reply Findings of Facts, Dr. Hechter never suggested that his analysis was "deeply flawed."

3. New York's Judicial Convention System Promotes The State's Interest In Ensuring That The Bench Is Geographically Diverse

53. Plaintiffs argue that even though geographic diversity is a legitimate state interest, the judicial convention system does a poor job of promoting it because in judicial districts that are dominated by one county, the largest county will have a grossly disproportionate share of the justices. (Reply Brief at ¶ 63). To support their argument, Plaintiffs point to the example of Erie County, which "contains 61% of the registered voters of the Eighth Judicial District, but 89% of the justices in the district, and only two of the eight counties in the district have any resident

justices.” (*Id.*). In absolute terms, it is true that the majority of justices come from Erie County. Plaintiffs, however, do not sufficiently address the likelihood that under a primary system, no justices would be elected from counties outside of Erie County because of the fact that Erie County’s majority could always determine the outcome of a primary election. (Defendants Proposed Findings of Fact at ¶ 254). Further, Plaintiffs completely ignore evidence showing how the judicial convention system promotes geographic diversity in the Fourth Judicial District. (*Id.* at ¶ 253).

4. **The Convention System Ensures That Qualified Incumbent Supreme Court Justices Remain On The Bench**

54. As an initial matter, Plaintiffs claim that Defendants’ failure to address the state’s interest in maintaining the high quality of its Supreme Court bench reflects that this is not a legitimate state interest. (Reply Brief at ¶ 51). However, Plaintiffs overlook that Defendants identify that “a system designed to ensure that qualified incumbent justices have a fair opportunity to remain on the bench serves a legitimate state interest.” (Defendants’ Proposed Conclusions of Law at ¶ 128). In insulating incumbent justices from costly political primary campaigns, the judicial convention ensures that the bench maintains independence without the appearance of any compromise. (*See* Defendants’ Proposed Statement of Facts at ¶ 259). Maintaining the integrity of the bench certainly counts as a substantial interest.

55. Lastly, Plaintiffs’ claim that New York’s Constitution does not recognize the importance of incumbency because “during the constitutional convention of 1867, New York State rejected a proposal that judges serve to age 70 without needing to stand for re-election.” (Reply Brief at ¶ 67). The fact that a shorter term of incumbency is provided does not amount to a concession relating to the importance, or lack thereof, of incumbency.

C. In Any Event, New York’s Judicial Convention System Would Survive Strict Scrutiny Because It Is Narrowly Tailored To Achieve All Of New York State’s Legitimate And Compelling Interests

56. As discussed above, New York’s judicial convention system serves a number of compelling and legitimate state interests. Even if the judicial convention system were not viewed as narrowly tailored to preserve the state’s compelling interest in protecting associational rights of political parties, the convention system should still withstand strict scrutiny because it alone is narrowly tailored to promote *all* of the above identified compelling and legitimate state interests *as a whole*.

57. The fact that Plaintiffs can identify alternative means for achieving any particular individual compelling or legitimate state interest does not mean that New York’s convention system is not narrowly tailored to achieve all of New York State’s interests in the aggregate. On the contrary, the fact that the many alternatives identified by Plaintiffs serve, at best, a single state interest, illustrates the opposite, namely, that the judicial convention system alone is uniquely tailored to achieve all of New York’s interests. (*See, e.g.*, Reply Brief at ¶ 55 (extending Wilson-Pakula to cover judicial election to “prevent party raiding”); *id.* at ¶ 61 (identifying alternative election structures such as cumulative voting, limited voting or proportional representation as a means to “promote diversity”); *id.* at ¶¶ 64-66 (advocating residence requirements or limiting judicial districts geographically to better serve state interest in “geographic diversity”); *id.* at ¶¶ 68-71 (employing retention elections or adopting campaign finance measures, such as public financing of judicial elections, to protect incumbent justices)).

58. Moreover, Plaintiffs’ alternatives are merely offered as brute alternatives to particular state interests, and are not narrowly tailored toward achieving the collective interests served by the judicial convention system as a whole. Rather, they would have a sweeping

adverse impact upon such interests, thus demonstrating that New York State's interests are protected and better served in the aggregate by the existing convention system.

V. PLAINTIFFS' FEEBLE EQUAL PROTECTION CLAIM HAS ALL BUT BEEN ABANDONED

A. Plaintiffs' Equal Protection Claim Appears To Be Completely Duplicative Of Their First Amendment Claim And, Accordingly, Fails For the Same Reasons

59. Plaintiffs contend that strict scrutiny applies to what is left of their equal protection claim. Plaintiffs, however, have abandoned any equal protection claim grounded on the existence of a suspect class which, Plaintiffs previously argued, could be based either on status as a so-called "challenger" candidate or some novel theory of vote devaluation. (*Compare* Reply Brief at ¶¶ 72-77 to Defendants' Reply Proposed Conclusions of Law at ¶¶ 141-144). Further, it appears that Plaintiffs have also abandoned any equal protection claim based on the existence of a suspect class based on treating Supreme Court judgeships differently than other elective offices. (*Compare* Reply Brief at ¶¶ 72-77 to Defendants' Reply Proposed Conclusions of Law at ¶¶ 136-140).

60. Accordingly, while Plaintiffs' arguments are far from clear, it appears that Plaintiffs' argument now is based solely on the claim that Plaintiffs' fundamental right to vote has been abridged. To the extent that Plaintiffs' argument is in fact no longer based on the existence of a suspect class, but instead grounded exclusively on a purported violation of the fundamental right to vote, Plaintiffs' equal protection argument is purely duplicative of their First Amendment claim and must, therefore, go the same way as that claim.

B. In Any Event, Plaintiffs Fail To Identify Any Suspect Class And Therefore Their Equal Protection Claim Must Fail Under The Rational Basis Test

61. In any event, to the extent that a residual of Plaintiffs' claim of the existence of a suspect class based on difference in classification by office can still be found, it falls woefully

short. In this regard, unable to refute that the Supreme Court, in its decision in *Illinois State Board of Elections*, never found the existence of a suspect class, (*see* Defendants' Reply Proposed Conclusions of Law at ¶ 140), Plaintiffs for the first time introduce *Bullock v. Carter* to attempt to salvage that case. *Bullock*, however, is plainly inapplicable. The Supreme Court has declared that, as a strict matter, *Bullock* is wholly inapplicable to equal protection challenges of provisions, as is the case here, that "involve neither filing fees nor restrictions that invidiously burden those of lower economic status." *Clements*, 457 U.S. at 964.

62. The difficulties of identifying Plaintiffs' arguments regarding a suspect class based on classification by elective office are compounded by Plaintiffs' failure to respond to any of Defendants' arguments for why a suspect class does not exist here. Plaintiffs do not fully respond to Defendants' argument that treating Supreme Court judgeships differently from other elective offices is neither arbitrary nor suspect. (*See* Defendants' Proposed Conclusions of Law at ¶ 136). Nor have Plaintiffs made any attempt to answer the fact that candidates for Supreme Court are not excluded from the electoral process on the basis of any classification because candidates do have ready access to the judicial nominating process. (*Id.* at ¶ 137). Thus, Plaintiffs have simply ignored Defendants' argument that there is no burden on the "availability of political opportunity" for either the candidates themselves or the voters who wish to support them. (*Id.*)

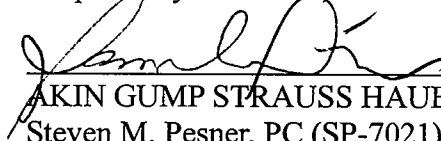
63. Accordingly, because there is no suspect class burdened in this case, rational basis review, not strict scrutiny, would be the appropriate standard. Under traditional equal protection principles, distinctions must only "bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the

pursuit of the State's goals and only if no ground can be conceived to justify them." *Clements*, 457 U.S. at 963 (citing cases).

64. Here, the challenged statutes are clearly related to numerous legitimate, not to mention compelling, state interests, as discussed above. Because Plaintiffs have not disputed that the judicial nominating process is supported by at least several legitimate state interests, Plaintiffs' Equal Protection Claim must fail.

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Respectfully submitted,



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