

**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' CORRECTED SURREPLY PROPOSED FINDINGS OF FACT IN FURTHER
OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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

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PRELIMINARY STATEMENT¹

Like their initial proposed findings, Plaintiffs' Reply Proposed Findings of Fact summon facts that fall far short of the clear and substantial burden of proof they must meet in order to obtain the extraordinary injunctive relief they seek: declaring state law unconstitutional and abolishing the system New York has used for nominating party candidates for Supreme Court for more than 80 years.

Plaintiffs theorize that a loosely defined category of candidates who seek their party's nomination but lack their party leader's support face burdens so severe as to violate the United States Constitution. From a factual standpoint, there are several gaping flaws in this theory.

First, it hinges on the proposition that the party leader has virtually absolute and "exclusive" control of the convention process. Compl. ¶ 100. This proposition – resting heavily on hearsay evidence from an unrelated 10-year-old case and ancient documents also embedded with hearsay – is far out of step with the record. Even Plaintiffs have implicitly acknowledged the weakness of the evidence by scaling back perhaps the central assertion of their case. Party leaders are no longer described as having unilateral "control" over the selection of both delegates and nominees, but rather as having the ability to "block" disfavored candidates. *Compare* Compl. ¶¶ 29, 38, 53, 60, 100 to P. R. F. at p. 3 and ¶ 49.

Second, Plaintiffs' insistence that "challengers" run their own slates of delegates ignores the principal, proven and more direct path to nomination: appealing for support directly to members of the elected delegation. Six current Supreme Court Justices testified to their success

¹ Defendants' Proposed Findings of Fact is referred to as "Def. F. ¶ ___"; Plaintiffs' Complaint is referred to as "Compl. ¶ ___"; Plaintiffs' Memorandum of Law in Support of a Preliminary Injunction is referred to as "Plf. Mem. at ___"; Plaintiffs' Proposed Findings of Fact is referred to as "Plf. F. ¶ ___"; Plaintiffs' Reply Proposed Findings of Fact is referred to as "Plf. R. F. ¶ ___"; Defendants' Proposed Conclusions of Law is referred to as "Def. C. ___"; Defendants' Surreply Conclusions of Law is referred to as "Def. S.C. ___".

in doing just that. None of these witnesses had the party leaders' support *before* they garnered significant delegate support themselves. Plaintiffs cannot prevail unless the testimony of all of these Justices is found to be unworthy of belief. Indeed, Plaintiffs act as if this proven path did not even exist. Plaintiffs turn the system on its head when they ask the Court to assess it exclusively through the prism of running one's own delegates.

Third, the evidence supports a conclusion that virtually *every* candidate, "challenger" or not, lacks party leader support *before* the convention. Party leader support is a function of delegate support. Candidates who earn adequate delegate support earn party leader support. In reality, as opposed to in Plaintiffs' backwards-looking theory, the concept of a candidate without leader support in fact shows the democratic nature of the convention system: support must be earned from the grass-roots up. If and when it comes, party leader support reflects a candidate's success at campaigning for that support among delegates.

Fourth, the supposed "insurmountable" obstacles complained of by Plaintiffs are not insurmountable at all. Because their Complaint *assumes* an absolute level of party leader control (now unsubstantiated), Plaintiffs wrongfully continue to insist that there is but one way for the so-called challenger to win the nomination: run her own delegates. Yet, as described below, the record shows that running one's own slates is simply not as difficult as Plaintiffs speculate. Plaintiffs' overstatement of the obstacles finally rings hollow because they failed to offer a single person who made a genuine effort to run his own judicial delegates. Confronted by this lack of proof for their Complaint, Plaintiffs respond predictably: no one has even tried because it cannot be successfully done. In other words, they proffer "challengers" who did not challenge.

Margarita Lopez Torres herself further demonstrates the holes in Plaintiffs' claim of "insurmountable" obstacles. On the one hand, she did have meaningful success with her one

attempt to circulate petitions; on the other, she never tried to campaign directly to the elected delegates to earn their support. Like Judge Lopez Torres, Judge Segal's total lack of effort and the half-hearted and/or self-destructing efforts of Judge Keefe and Mr. Regan fail to show that there is anything inherently "insurmountable" in the convention system.

In stretching to support their exaggerated claims of "insurmountable" obstacles and "exclusive" leader control, Plaintiffs in many instances distort the record. The distortions are pointed out below. For the record, Defendants dispute the claims set forth in the bullet points on pages 3-4 of Plaintiffs' Reply.

Plaintiffs claim to seek a "meaningful" opportunity for challenger candidates to compete for votes. Compl. ¶ 3. But they have it already. Anyone can run for delegate, individually or on a slate; anyone can vote for the delegates of their choosing. Any candidate can either run her own delegates or campaign to win the support of the elected delegates. Delegates are free to vote their mind at the convention, and the rank and file are free not to return delegates whose votes they disapprove. Moreover, any candidate is free to petition directly onto the general election ballot. Party leaders may influence, but do not control, the process. Plaintiffs dismiss such openness and accountability, just as they disregard the fact that county and district leaders themselves are elected, and can be unseated, by the rank and file.

Plaintiffs concede that there is nothing unconstitutional about a convention system *per se*. Plaintiffs concede that there is no constitutional right to a primary. Plaintiffs concede that influence is an appropriate part of the party system, and party leaders have a constitutional right to support and endorse whom they choose. Plf. Mem. at 4-5.

Hoping to bridge the chasm between the allegations in their Complaint and what the record actually shows, Plaintiffs selectively marshal facts around the false premise that they have

a constitutional right to win – which they do not. What they do have is a right to participate in the process. Viewed objectively, the facts show that the New York Legislature has indeed satisfied this right through legislation that provides candidates and voters ample opportunities for meaningful participation in the election of Supreme Court Justices.

I. NEW YORK’S DELEGATE-BASED JUDICIAL SELECTION PROCESS IS OPEN, DEMOCRATIC, AND ACCOUNTABLE TO THE STATE’S CITIZENS

A. The Current Process Is The Result Of The Legislature’s Deliberate Decision To Abolish Primaries In Favor Of A Delegate-Based Convention System

1. The New York State Legislature made a deliberate decision in 1921 to abolish a primary system for judicial nominations in favor of a delegate-based convention system. Def. F. ¶ 31. Put simply, the legislature decided that the people should elect delegates and that the delegates, as representatives of the people and unpledged to any candidate, would openly consult and deliberate about the candidates, discuss and debate party goals and objectives, and eventually nominate those candidates who best embodied the party’s aims and hopes for success. Def. F. ¶ 31. The legislature’s highly deliberated, open and bipartisan decision to restore the judicial convention system was made in response to the disadvantages of direct primary elections, which critics condemned as burdensome, expensive, and likely to lead to an unqualified bench. *Id.* ¶ 29; *see also* Memorandum of Law of Statutory Intervenor Attorney General of the State of New York in Opposition to Plaintiffs’ Motion for a Preliminary Injunction (“AG Memo of Law”) at 5-6 (discussing widespread support for restoration of convention system). Plaintiffs’ case is really an attempt to usurp decision-making best left to the Legislature. It is therefore not surprising that, in their quest to bring back a judicial primary, they treat legislative history with slight regard – ignoring or revising it as they see fit.

2. Douglas Kellner, who testified as an expert in the history of the judicial convention, stated at the hearing and in his declaration that after experimenting with the primary system for some nine years the Legislature decided that it was best to delegate the function of nominating party candidates for Supreme Court Justice. Kellner Decl. ¶ 17-19; Tr. 1541:24-1542:20 (Kellner). Mr. Kellner, who has studied the history behind the judicial convention process, further testified that the Legislature's decision was largely motivated by the Association of the Bar of the City of New York's ("City Bar Association") condemnation of the primary system and its position that if partisan elections of judges were to continue – as required by the State Constitution – then nomination by party convention was preferable to direct primaries. *Id.* Notably, Plaintiffs did not challenge Mr. Kellner's qualifications as an expert in the history of New York State's judicial convention system at the hearing.

3. Rather than look directly to the reports issued by the City Bar Association, Plaintiffs rely heavily on Albert Bard to support their revisionist history. Mr. Kellner cites Mr. Bard's presentation to the City Bar as an example of the widespread criticisms of primaries for selecting judicial candidates in the early 1900s and the ill effects of primaries – not as an example of the support for a return to the convention system. Kellner Decl. ¶ 17. While Plaintiffs are correct that Mr. Bard advocated less party control, the City Bar Association, considered Mr. Bard's thoughts and still chose the convention system as a way to minimize party leader dominance.

4. Indeed, contrary to what Plaintiffs assert, the City Bar's reports clearly come out in favor of a return to the judicial convention system. Specifically, the Association's Committee on the Judiciary reported that it had "approved the Walton-Fearon bill introduced in the Legislature, which provided among other things for the nomination of . . . Justices of the

Supreme Court by nominating conventions instead of by the direct primary system.” *Annual Report of the Committee on the Judiciary for 1919*, 23 ABCNY Reports #225 at 136 (1920) (Exh. 113).

5. Likewise, the City Bar Association’s Committee on the Amendment of the Law (the “Law Committee”) expressed disapproval for a bill calling for the use of primaries for party nominations: “Insofar as the bill continues the system of nominating Supreme Court Justices by direct primaries *instead of by Convention*, the Law Committee disapproves the bill.” 24 ABCNY Reports #228 at 294-95 (1921) (Exh. 114) (emphasis added).

6. Plaintiffs mischaracterize this report as being equally critical of judicial conventions and primaries. Plf. R. F. ¶ 3. The report does no such thing. The criticism cited by Plaintiffs dealt only with certain aspects of one particular kind of convention for statewide elected offices. *Id.* at 295. The Law Committee nevertheless indicated a clear overall preference for state conventions, stating: “Insofar as this bill continues the system of nominating officers to be voted for by all the voters of the State at direct primaries, *instead of by a State Convention*, the Committee disapproves of the bill.” *Id.* at 294 (emphasis added).

7. Another section of City Bar Report # 228 – a report addressed to the Governor and both houses of the Legislature #228 at 1 – confirms the Association’s support for State and judicial conventions, the latter explicitly favored over primaries, which had led to unseemly practices:

The Committee has likewise from time to time approved of bills providing for the restoration of the State convention, coupled with a provision that the members shall be elected to such convention at direct primaries and that the Secretary of State shall certify to the roll of delegates, thus precluding the exclusion of delegates by the action of partisan committees.

The Committee has likewise strongly approved all of the amendments proposing the restoration of conventions for the nomination of candidates

for judicial office, thus *obviating the undignified methods by which such candidates are now constrained to seek nomination and election.*

24 ABCNY Reports #228 at 7-8 (emphasis added).

8. In discussing the benefits of a convention, the Law Committee contrasted it with a primary system, which it found to be simply a means of confirming choices made by party leaders at closed meetings – ironically, the very complaint that Plaintiffs raise concerning judicial conventions. *Id.* at 290-91. The Law Committee saw restoration of the convention system as the remedy:

The selection of candidates for public office by conventions composed of delegates who meet publicly and are enabled to confer with one another as to the choice of candidates in its essence tends to the perpetuation of this fundamental [representative] principle of government . . .

The State Convention afforded an excellent example of a political representative institution in a democratic community. It constituted a sound application of the principle of authority delegated by the people. It operated to bind the various elements of a political organization firmly together by making it possible to determine their differences after public discussion. It afforded full opportunity for an interchange of views, for criticism and debate. It made it possible to bring together the members of a party dwelling in widely separated portions of the state to promote acquaintance and mutual understanding between the voters of Nassau and Chautauqua, of Warren and Erie counties; now absolutely impossible [under the primary system]. It inspired an enthusiastic party spirit and a study of political thought. It was one of the principal causes for the maintenance and perpetuation of party principles and policies and stimulated wholesome political sentiment and party faith and devotion.

Id. at 292-293.

9. It is for these reasons in addition to concerns about wealthy individuals “buying the bench” that the Legislature restored the judicial convention system. Tr. 1541:24-1542:20 (Kellner); Kellner Decl. ¶ 18; AG Mem. at 5-6. And contrary to what Plaintiffs continually – and wrongly – assert, the system was not designed to maintain the control of party leaders. Quite the opposite, as the history of the convention system shows, the system was intended to delegate the

nominating function to elected representatives who have the knowledge, time and interest to collectively select the party's standard-bearers.

10. Any doubts regarding the Legislature's intent are immediately dispelled by Dr. Hechter's analysis of the legislative history of the convention system. In his report, Dr. Hechter notes that the New York State legislators appreciated the open nature of the convention system as opposed to the closed nature of primaries. Specifically, Dr. Hechter, citing and quoting the Senate's Special Committee on Primary Law states:

The primary system "provides no method whereby . . . groups of voters may assemble to declare purposes to all the voters (Report No. 34:1)." The proposed convention, on the other hand, would permit parties to "make manifest, after consultation and deliberation, what its aims are, and at such meeting or convention, propose candidates in support of such aims (*Id.*:2)" Such consultation and deliberation on aims is impossible in a direct primary, which deprives parties of an opportunity to express their aims as a collective [body]: "Party aims and purposes cannot be articulated by candidates who may be nominated, because they, themselves, have no method of discovering what is the party will (*Id.*)."

Exh. 69 at 22.

B. If New York's Judicial Convention Process Is Unique, It Is Permissibly So

11. The result of the Legislature's decision in 1921 was the adoption of a unique system of electing party nominees for Supreme Court Justice. Plaintiffs harp on the fact that the system is decidedly unique as if somehow the system's distinctiveness makes it improper. It does not. As explained in Defendants' Proposed Findings, the United States Constitution leaves to the States, as "laboratories of democracy," the right to choose the manner in which judges are selected. Plaintiffs' own expert, Professor Schotland, acknowledged this during the evidentiary hearing and agreed that the mere fact that State A employs a different system for the same elected official than State B does not make either State's method unconstitutional. Tr. 740:21-741:23; 742:8-11 (Schotland). Thus, there is a wide array of different judicial selection systems across

the country, including pure appointments, partisan election, non-partisan elections, merit appointment with retention elections, and hybrid systems, none of which are unconstitutional *per se*. Tr. 742:12-21 (Schotland); *see also* Schotland Decl. ¶¶10-14.

12. Plaintiffs' gratuitous accusation that Defendants have distorted Professor Schotland's testimony is not only unexplained, but entirely unfounded. Defendants do *not* suggest, as Plaintiffs assert, that variations in how States select judges need not comply with the Constitution; of course they do. Indeed, Defendants explain at length in their Proposed Conclusions of Law and Sur-Reply Conclusions of Law how and why the delegate-based convention system is in fact constitutional.² *See generally* Def. C.; Def. S.C.

13. In its wisdom, New York has deliberately chosen to adopt an open and democratic process whereby the nominating function is delegated to locally *elected* representatives, who confer, consult, deliberate, and select their respective party's nominees for Supreme Court. These delegates represent local communities defined as Assembly Districts. Def. F. ¶ 42. Thus, while unique to judicial selection, New York's system is based on age old principles of representative democracy, which also underlie the system by which the country selects its President and Vice President.

14. Delegates do not serve as proxies pledged to individual candidates, but rather are independent agents with the ability to vote as they wish. Notably, the City Bar Association's

² Nor do Defendants state anywhere that in States with non-partisan elections for judges, political parties can nominate candidates for those elected offices. Rather, in a brief overview of the various systems of judicial selection, Defendants point out that major parties have unfettered discretion to *endorse* the candidate of their choice in non-partisan judicial elections and broadcast that endorsement during the campaign without giving rank and file party members any vote in the matter. Def. F. ¶ 15. For example, as Professor Schotland acknowledged, in Ohio where all judges are selected by non-partisan elections, the Democratic and Republican parties actively endorse and campaign for candidates outside of the ballot box. Tr. 754:10-21 (Schotland). Plaintiffs' gripe about Defendants' comparison of New York's judicial selection system with Michigan's misses the point. The point is simply that candidates for Michigan's Supreme Court must also be nominated at Democratic or Republican conventions or, for

Law Committee applauded the fact that the proposed bill to restore the convention omitted a provision contained in previous bills permitting delegates to be pledged to specific candidates, confirming that the convention system was intended to be truly delegate-based. *See* 24 ABCNY Reports #228 at 293. And as set forth in Defendants' Proposed Findings of Fact, Plaintiffs have failed to proffer any evidence that the judicial delegates do not have the independence and free will to nominate candidates of their choosing. Nor have Plaintiffs proven that delegates are deprived of the opportunity to engage in the type of open dialogue and discussion envisioned by the Legislature. To the contrary, the overwhelming evidence presented at the hearing is that delegates have the ability to nominate whomever they wish, and do in fact engage in open discussion about judicial candidates. Def F. ¶¶ 61-78.

C. Plaintiffs Have Failed To Prove That Judicial Delegates Lack Independence

15. Delegate independence is at the heart of New York's judicial convention system. Under the Election Law, elected delegates and alternate delegates convene at the convention to determine the party nominees for Supreme Court on behalf of their constituents. While Plaintiffs complain of "insurmountable" systemic barriers in the judicial selection process, they have failed to point to a single provision under the Election Law or State Constitution that prohibits, prevents, burdens or otherwise curtails a delegate's right and ability to nominate and vote for the judicial candidate of his or her choice. And significantly, *none* of the witnesses at the hearing testified that they were denied the ability to exercise their choice in selecting their party's nominees for Supreme Court. To the contrary, the overwhelming testimony of both Plaintiffs' and Defendants' witnesses confirms that delegates are independent agents with the ability to

politically unaffiliated candidates, by petitioning onto the general ballot with 30,000 to 60,000 signatures. Exh. HHH.

exercise their discretion rather than “rubber stamps” under the will of party leaders. Def. F. ¶ 61-78; *see also* Tr. 881:6-11 (Keefe) (admitting that under the Election Law, delegates can vote for any candidate they want). Virtually every witness who served as a delegate testified that their party leaders never instructed them to vote for a particular judicial candidate and that they had the ability to nominate any candidate they wished. Def. F. ¶¶ 64-70.

16. While accusing Defendants of placing form over substance, Plaintiffs ignore the Election Law in order to make the system appear more consistent with their view of the “true dynamic” between leaders and delegates, namely complete control. Plf. R. F. ¶ 10. To do so, Plaintiffs manipulate and ignore testimony, and rely heavily on hearsay to tell a story based more on innuendo and implication than fact.

17. It is self-evident and unobjectionable that political leaders have influence within their own parties. In a partisan political system, such as New York’s judicial selection process, political leaders will naturally lead – as they were elected to do. Thus, it is no surprise that the evidence adduced at the hearing shows that political leaders have some influence in the judicial selection process. *See e.g.*, Tr. 1619:18-20 (Kellner). This would be the case in a convention system or a primary system. The mere fact that political leaders have influence does not render the system unconstitutional. Leader influence notwithstanding, delegates are independent and exercise their independence in choosing candidates, in accordance with their consciences. The record does not support Plaintiffs’ contention that, far beyond mere influence, all delegates and alternates are wholly controlled “rubber-stamps.” Indeed, Plaintiffs concede that there is nothing wrong with party leader influence *per se*, and that leaders are free to act as leaders and endorse and support candidates of their choice. Plf. Mem. at 4.

18. Notwithstanding, Plaintiffs persist in conflating, among other issues, “influence” and “control.” To illustrate, Plaintiffs completely mischaracterize Arthur Schiff’s testimony. Plf. R. F. ¶ 10 (citing Plf. F. ¶ 106-107). First, Plaintiffs selectively quote Mr. Schiff’s testimony at Tr. 1295:12-23 as evidence of the New York county leader’s “forceful influence” on delegates, who are routinely denied the opportunity to make a choice between the county leader’s preferred candidate and the candidate they wish to support. Plf. F. ¶ 106. This testimony is taken completely out of context. What Mr. Schiff actually said in response to the Court’s inquiry, was that judicial candidates who fail to garner sufficient delegate support to win the nomination often *voluntarily* withdraw their candidacies before a vote is taken, which obviates the need for delegates to choose between a candidate who has demonstrated majority delegate support – and thus earned the county leader’s support – and a candidate who they might have initially wanted to support but who had lacked enough delegates to win. *See* Tr. 1294:12-1295:23 (Schiff).

19. Thus, the discussion between the Court and Mr. Schiff during the hearing was not about delegate independence, but about how the final slate of judicial candidates is determined. As explained in detail in Defendants’ initial Proposed Findings of Fact and in this part of Mr. Schiff’s testimony, the final slate is determined through a dynamic and fluid process whereby judicial candidates actively lobby delegates and engage in logrolling in the two to three-week time period before the convention. Def. F. ¶¶ 124-148. As a result, as Mr. Schiff testified, delegates need not vote at the actual convention “when the process has *already demonstrated* that these three candidates or these four candidates are the ones that have the majority support.” Tr. 1295:20-23 (Schiff) (emphasis added).

20. Second, Plaintiffs likewise quote Mr. Schiff’s testimony at Tr. 1263:11-1264:7 out of context. In that passage, Mr. Schiff merely states that hypothetically, *if* he were asked by the

county leader to support a particular candidate, it would be a factor he would consider, as a matter of political reality. Tr. 1263:11-1265:7 (Schiff). In fact, as Mr. Schiff testified, the county leader has *never* asked him to support any particular candidate. *Id.* 1265:5-7. Moreover, Mr. Schiff testified that if he were ever in a position where, as a delegate, he had to vote in accordance with someone's direction, he would not run for delegate. *Id.* 1262:2-6.

21. With regard to their own witnesses, Henry Berger and John Carroll, Plaintiffs essentially dismiss as insignificant their testimony that they personally had not instructed or been instructed how to vote. Plf. R. F. ¶ 10. It is not insignificant. The testimony of these witnesses and other witnesses who have served as delegate (*i.e.*, Benjamin Ostrer, Douglas Kellner, Robert Levinsohn, Arthur Schiff, William Allen, Emily Giske, and Martin Connor) demonstrates that, at bottom, delegates have the freedom and ability to vote for whomever they wish. Def. F. ¶¶ 64-70. There simply is no testimony from any former delegates that party leaders exercise control over how delegates vote or that delegates are required to vote in any particular manner.

22. Plaintiffs' reliance on Douglas Kellner's testimony for the proposition that the system was "expressly designed to place the control of Supreme Court nominations in the hands of party leaders rather than voters" is equally unavailing. Plf. F. ¶ 11. Curiously, Plaintiffs focus their attention on Mr. Kellner's description of the judicial selection system as one designed for voters to select delegates who will perform the screening and nominating function. *Id.* at ¶ 240-41. But what Mr. Kellner describes is an example of representative democracy, not party leader control. And by "party leaders," Kellner means elected delegates, elected district leaders, and other party officials. Tr. 1671:7-22 (Kellner). By definition, the convention system was not intended for candidates vying for the nomination to campaign among voters, but among delegates. By ignoring basic principles of representative democracy, Plaintiffs' reasoning is

inherently flawed when they challenge the constitutionality of a convention system as if it were a direct primary system. *See* Plf. Mem. at 2 (“Voters are *never* allowed to choose from among their party’s candidates.”). And their attempts to manipulate the record to fit their reasoning is mere distortion. As discussed more fully below, Plaintiffs completely miss this point in arguing that running slates of delegates across an entire judicial district constitutes a severe burden on judicial candidates. *See infra* ¶¶ 50-54.

23. As for testimony about districts where leader influence may be stronger (Plf. R. F. ¶ 12; Plf. F. ¶ 72), Mr. Kellner’s point is that regardless of how the judicial selection system plays out in different districts, there is a system in place within which candidates have the opportunity to compete for and win the party nomination. Tr. 1721:17-1722:9 (Kellner). Simply put, Plaintiffs have offered no evidence that delegates lack the freedom to ignore their leaders’ recommendations and choose to support a different candidate. Plf. F. ¶ 73; Tr. 1630:8-1631:7 (Kellner).

24. In fact, the abundance of evidence, including testimony from Plaintiffs’ witnesses, shows that delegates both upstate and downstate are not pledged and have the ability to change their positions and realign their support throughout the period leading up to the convention and at the convention itself. Def. F. ¶ 108; *see also* Tr. 1349:3 – 1350:11 (Ward); Tr. 486:24 – Tr. 487:9 (Carroll) (delegates not pledged to particular candidates); Tr. 310:16-19 (Berger); Tr. 1412:2-8 (Ostrer); Tr. 1256:21-25 (Schiff); Tr. 2031:6-9 (Allen). For example, Plaintiffs’ own witness, Albany City Court Judge Thomas Keefe, along with others successfully lobbied enough delegates to vote for a particular Supreme Court candidate and prevent the nomination of two cross-endorsed candidates against the wishes of chairmen of two counties in the Third Judicial District. Tr. 872:13-876:8; 920:14-9 (Keefe).

25. Similarly, the experiences of the many sitting Supreme Court Justices who testified at the hearing show their success was the result of hard work and active campaigns to win delegate support. Def. F. ¶¶ 124-137. The testimony of the Justices also demonstrate that county party leaders do not dictate the outcome of the convention. *Id.* F. ¶¶ 165-173; 181.

26. Indeed, Defendants have demonstrated at length that the county leader, like most political leaders, publicly support candidates *after* determining which candidates have garnered the most delegate support. Def. F. ¶¶ 155-182; *see also* Tr. 1324:6-10 (Ward) (testifying that party chairperson’s support comes late in the process). Thus, it is no surprise that, when viewed by Plaintiffs from the outcome looking backwards, delegates appear to almost always vote for candidates who have won the county leader’s endorsement. Plaintiffs disregard this evidence of how this alignment was arrived at, as if the hearing never took place. By the end of a very dynamic and democratic process – characterized by open club politicking, hard campaigning, debate, discussion and logrolling – the delegates, elected representatives of the voters, and the party’s elected leaders, come together to agree on the party’s candidates. This is as it should be and is not in any way unconstitutional.

D. Plaintiffs Have Failed To Prove That Delegate Selection Compromises Voter Choice

27. As part of their attack on delegate independence, Plaintiffs contend that party leaders – *i.e.*, county chairpersons, county leaders, and district leaders – “handpick” judicial delegates. But just as they have failed to show that judicial delegates lack independence, Plaintiffs have failed to demonstrate that delegates across the State are “handpicked” by political leaders and that voters are deprived of input into selecting their representative delegates.

28. Judicial delegate is a party position. Def. F. ¶ 41. *Any* enrolled member of a recognized political party residing within the judicial district has the ability and opportunity to

run for delegate by satisfying the petitioning requirements set forth in the Election Law. *Id.* ¶ 42. Indeed, *any* group of enrolled party members within the judicial district that is organized around a cause, such as a union, can put forth candidates for judicial delegate. *Id.* ¶ 58. Under the Election Law, *all* delegates are elected at the primary, regardless of whether an actual primary is held. *Id.* ¶ 55. When enrolled party members residing in an Assembly District sign a petition for a slate of delegates, they are expressing their desire to designate the individuals on that petition as candidates for the delegate position. *Id.* ¶ 45.

29. In practice, because delegate and alternate delegate are party positions, it is natural that local, community-based organizations championing the party's values and interests are involved in endorsing and putting forth candidates for these offices. Thus, in the First and Second Judicial Districts, local political clubs – the kernels of community activism – put forth or sponsor slates of delegate candidates along with other candidates for public and party offices. Def. F. ¶¶ 88-93. Similarly, in upstate districts where the political club structure does not exist, county committees fulfill the role of putting forth slates of delegate candidates and other candidates who reflect the party's values. *Id.* ¶¶ 117, 119. There is no evidence that any rank and file party member or voter cannot participate in these organizations.

30. Plaintiffs, again failing to appreciate political realities, cite to the role of these political organizations, including their leaders, and the paucity of delegate primaries as evidence that delegates are “handpicked” automatons. Plf. R. F. 8; Plf. F. 71. But the evidence shows that despite the various ways that delegates are elected across the State, voters are not denied the opportunity to get involved in the process, and that by no means is delegate independence compromised.

31. The overwhelming evidence relating to the First and Second Judicial Districts shows that delegates are not handpicked by political leaders. Rather, delegates are elected through an open and highly competitive process that largely occurs at the grass roots club level and is frequently resolved at a primary. *Id.* ¶¶ 89-95. Plaintiffs brush this evidence aside and attack political clubs as being unrepresentative and ineffective in alleviating the purported absence of voter choice. Plf. R. F. ¶¶ 40-41. In doing so, Plaintiffs ignore all of the testimony regarding the low barriers of entry to these community-based clubs. Def. F. ¶¶ 84-86. As Senator Connor, Commissioner Kellner, and District Leader Schiff testified, club dues are minimal, and in the case of indigents, clubs will waive those dues. Tr. 2084:1-20 (Connor); Tr. 1552:11 – 1553:1 (Kellner); Tr. 1237:10-16; Tr. 1314:8-18 (Schiff); Tr. 1842:21 – 1843:11 (Gangel-Jacob).

32. Plaintiffs have proffered no evidence showing that political clubs exclude voters from joining their organizations and participating in the delegate selection process. To the contrary, the evidence shows that clubs are always seeking to recruit new members. Def. F. ¶ 84.

33. Moreover, Plaintiffs have not adduced any evidence that voters cannot themselves organize and run their own slates of delegates from their Assembly Districts. To the contrary, as the example of William Allen and Alan Flacks show, individuals can successfully run for delegate position without club or party support if they are motivated, interested, and have the will. *Id.* ¶¶ 102-107. That voters choose to remain apathetic does not mean that the delegate and judicial selection processes are systemically flawed.

34. And lastly, Plaintiffs have proffered no evidence showing that political clubs are controlled by the county or district leaders. In fact, the evidence demonstrates that the clubs are local community-based organizations, free of county and district leader control. *See* Tr. 1215:11-

18 (Schiff); Tr. 1843:2-11 (Gangel-Jacob) (describing clubs as kernels of community activism). For example, Plaintiffs' witness, John Carroll, testified that his district leaders have no say in how his political club chooses delegate candidates. Tr. 522:7-12 (Carroll).

35. Plaintiffs rely heavily on deposition testimony of County Leader Herman Farrell in the *France v. Pataki* case as evidence that party leaders control the delegate selection process. Plf. R. F. ¶ 8. That testimony, however, is more than ten years old and was given in an entirely unrelated case. Moreover, Mr. Farrell explained that by "control" he meant his ability to create the appearance that he selected the nominee by waiting to see which candidate had the most delegate support and then publicly endorsing that candidate. As Mr. Farrell stated, "it's almost like picking the winner of a horse race after the race is over." Tr. 1663:15-22 (Kellner). Thus, Mr. Farrell's testimony actually undermines Plaintiffs' contention that party leaders dictate the convention's outcome.

36. Plaintiffs also rely upon the portion of Dr. Hechter's report indicating that district leaders select delegates. Plf. R. F. ¶ 8. But Dr. Hechter did not investigate the issue and was not concluding that this was factually accurate. Rather, the statement was an assumption that he made for purposes of his analysis. Tr.1219:8-23 (Hechter).

37. As for judicial districts outside of New York City, Plaintiffs have produced no credible evidence showing that county leaders dictate who the delegates will be. Instead, Plaintiffs rely on testimony that undermines their case, Plf. R. F. ¶8; Plf. F. ¶89, such as Mr. Kellner's testimony that district leaders do *not* select delegates to the judicial convention:

[I]n the competitive districts [where Democratic candidates can prevail in the general election], . . . it usually happens at a meeting where I'm reminded of the old song, politics and poker from Fiorello, where they're sitting around the table, say who do we run? We have to run judicial delegates. *Who wants to be a delegate*, and it will be done that way. Does the district leader

ultimately sign off on it? I guess that's what happens, *but it's done in a collective fashion rather than the district leader sitting at his desk saying who am I going to run for delegate.*

Tr. 1623:21-1624:14 (Kellner) (emphasis added).

38. Likewise, Dennis Ward, testified that the county leader does not select delegates in the Eighth Judicial District. Tr. 1325:24 – 1326:2 (Ward).

39. Plaintiffs' reliance on Judge Keefe's testimony is equally unavailing. Plf. R. F. ¶ 8. Judge Keefe has never served as a delegate or attended a convention. Tr. 919:4-15 (Keefe). He also admitted that new party leaders have been elected since he left politics, and he is ignorant of the role those leaders now play in the judicial selection process in the Third Judicial District. *Id.* 923:17-924:1. Significantly, Judge Keefe further testified that in his experience, party leaders do not prevent judicial delegates from discussing the candidacies of judicial delegates amongst themselves and with the actual candidates. *Id.* 928:6-13.

40. To be sure, there is testimony in the record that leaders upstate do solicit people to serve as delegates. But the fact that leaders solicit individuals to serve as delegates does not mean that those individuals are forced to serve and it certainly does not mean that they are forced to vote in accordance with party leaders' instructions. As Mr. Kellner testified, choices of who to run as delegates are made by consensus, not party leader mandate. Again, Plaintiffs conflate influence and control.

41. Moreover, there is no evidence that individual voters are barred from getting involved in the process, volunteering to serve, or running as delegates themselves, independent of the party organization. Nor is there any evidence that groups of voters cannot organize and run slates of delegates or even vote out their elected leaders. Def. F. ¶¶ 42, 58, 100, 285-286.

42. And most importantly, Plaintiffs do not, as they cannot, prove that any delegates lack the independence to vote for the judicial candidates whom they wish to nominate or that

voters cannot contact delegates to express their views about judicial candidates. In sum, delegates are free to vote for whomever they wish.

E. Plaintiffs' Belief That "Challenger" Candidates Must Run Pledged Delegates Fundamentally Misconstrues The Delegate-Based Convention System

43. Because the convention system is premised on the principle that independent delegates serve as representatives of their communities, Plaintiffs' myopic focus on the purported need for so-called challenger candidates to run delegates pledged to their candidacies is misguided. While there is nothing in the Election Law that would prohibit candidates from running their own delegates, Plaintiffs' contention that this method is the only viable means for challengers to meaningfully vie for the nomination fundamentally misconstrues the representative nature of the process. *See* Tr. 1700:1-15 (Kellner). As confirmed by the history behind the convention system and the bulk of the testimonial evidence, delegates are not agents or representatives of candidates. They are representatives of the enrolled voters residing in particular Assembly Districts and have been delegated the authority to act on behalf of the voters.

44. Indeed, delegates are often called upon to vote for multiple candidates for Supreme Court. Tr. 1257:14-24 (Schiff). Witness after witness testified that at the juncture at which delegates are elected, they are not pledged to any particular Supreme Court candidate. Def. F. ¶ 108. Thus, the notion that a Supreme Court candidate should recruit individuals and sponsor their effort to win delegate seats fundamentally turns the system on its head. As Mr. Kellner testified:

Q. Now, are you aware that one of the allegations in this lawsuit is that challenger candidates for Supreme Court who attempt to run their own slates of delegates must incur significant expense to educate voters about which delegates are pledged to them?

A. I understand that's the theory of this lawsuit, but it twists on its head the system that the Legislature set up.

The system isn't designed for individual candidates to be campaigning directly among the voters. The system is designed for the voters to select delegates who will perform that function of screening candidates and deciding who the party's candidate should be.

So the idea that an individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head.

Q. In your experience, at the point in which delegates are elected, are they committed to any particular Supreme Court candidate?

A. That's very rare, and generally the answer is no, they're not.

Tr. 1567:10 – 1568:5 (Kellner); *see also Id.* 1572:23 – 1573:7.

45. Mr. Schiff also confirmed that candidates do not run their own delegates, but seek support from locally elected delegates. Tr. 1266:14-1267:4 (Schiff). Mr. Schiff noted that Mr. Berger's statement that a judge would run his or her own delegates is contrary to the method that is employed by candidates for Supreme Court Justice. *Id.* 1267:17-19.

46. Tellingly, Plaintiffs have offered no evidence that so-called challengers cannot work within the system and court delegate support. Instead, Plaintiffs offer purported examples of challenger candidates who either ran half-hearted campaigns or did nothing at all to advance their candidacies. Def. F. ¶¶ 189-199. In stark contrast, Defendants have presented the testimony of numerous sitting Justices in both upstate and downstate districts showing how through hard work and perseverance, they were able to win delegate support, win the nomination, and win a Supreme Court seat. Def. F. ¶ 126-148; *see infra*, ¶¶ 75-100.

47. As discussed above, the evidence shows that far from depriving individual voters and delegates of the ability to affect their party's choice of Supreme Court candidates, the representative and community-based convention system empowers communities in a way that no other system can. Specifically, delegates from local Assembly Districts can act on behalf of their

constituent communities and advance their interests through the logrolling process whereby delegates from one community negotiate, debate and strike deals with delegates from another community. In this way, delegates can advance the interests of their constituents.

F. Even In The Case Of Judicial Candidates Who Choose To Run Their Own Delegates, Plaintiffs Have Not Proven That The Burdens Are “Severe” Or “Insurmountable”

1. The Convention System’s Purported Structural Flaws Are Based On A Misunderstanding Of The Role Of Delegates

48. Plaintiffs argue that the burdens to running one’s own slate of delegates in every Assembly District are “insurmountable,” based on their contention that no candidate has ever done it. Even if true, this contention does not prove Plaintiffs’ point. As discussed above, every potential candidate has free and open access to the judicial convention process and can successfully court the support of existing delegates, as attested to by each of the six Justices that Defendants called at the hearing. Given this relatively and comparatively easier path to competing for the nomination, it is unsurprising that few would bother to take the more challenging path of running one’s own slate of delegates.

49. Yet even if a challenger candidate attempts to travel down this more difficult and unconventional road, the evidence shows that the burdens are not insurmountable.

2. Running Delegates Across An Entire Judicial District Is Unnecessary

50. First, as both Senator Connor and Commissioner Kellner testified, so-called challenger candidates need not run delegates across an entire judicial district in order to win a majority of delegates at the convention. Tr. 2135:2-13 (Connor); Tr. 1574:10 – 1575:4 (Kellner). Plaintiffs, however, brush this evidence aside, and instead, rely on the testimony of William Lipton in support of their contention that challengers should take the most aggressive and expensive approach to secure the nomination. Plf. R. F. ¶ 27. Indeed, Plaintiffs rely heavily on

Mr. Lipton in their attempt to establish every purported burden that challengers allegedly face, and devote nearly two pages attempting to rehabilitate Mr. Lipton's credentials. At bottom, however, Mr. Lipton's credentials and experience pale in comparison to that of Senator Connor and Commissioner Kellner, both of whom are well-seasoned in judicial politics. Tr. 2054:16 – 2067:9 (Connor); Kellner Decl. ¶¶ 1-7.

51. Using the example of Plaintiff Lopez Torres, Senator Connor testified that he would have advised her to parlay the delegate support that she had in 2002 into a broader coalition to win the nomination. Def. F. ¶ 194; Tr. 2150:6 – 2151:20; 2155:17-25 (Connor). Lopez Torres, however, squandered that opportunity. Def. F. ¶ 194; *see also infra*, ¶¶ 120-122.

52. Addressing a hypothetical closely mirroring Lopez Torres' situation, Commissioner Kellner likewise opined that a candidate with an existing base of 24 delegates should build upon that base and garner broader delegate strength. Tr. 1664:5-18 (Kellner).³

53. Many witnesses acknowledged that candidates voluntarily can run their own delegates. No witness testified to the contrary. Further testimony shows that not only can it be done, but it can be done successfully and that whatever "burdens" are involved are by no means "insurmountable" or even "severe," as alleged.

54. Judge Regan, for example, was entirely successful at petitioning his slate of delegates. He obtained at least 800 signatures in sufficient districts to elect a majority of delegates to his convention. Tr. 351:20-22 (Regan). The slate he filed with the correct Board of

³ Plaintiffs suggest that Defendants erroneously base their conclusion that in 2002 Lopez Torres needed only 46 delegates to win on the incomplete attendance at the convention, and that *if* County Leader Norman had real concerns about Lopez Torres' ability to garner a majority, he *would have* ensured that all 137 delegates and alternates attended the convention. Plaintiffs thus conclude that Lopez Torres would have had to run at least 69 delegates to win a majority. Plaintiffs conclusion is based on rank speculation and ignores the ability to logroll Lopez Torres' base of 25 delegates into a majority. Further, it in no way proves that Lopez Torres would have to run delegates in every Assembly District.

Elections was qualified and his delegates were elected. *Id.* 395:13-18. However, his remaining slates were removed from the ballot because he failed to file that petition with the proper Board of Elections. *Id.* 395:19 – 366:7. It is indisputable that requiring filing of the petition with the Board of Elections does not create a substantial burden on the process. No witness testified that they were unsuccessful in an attempt at running their own judicial delegates. Mr. Regan’s experience demonstrates affirmatively that there are neither “insurmountable” nor “severe” obstacles to running one’s own delegate slate.

55. As for the number of signatures necessary to survive a legal challenge, while Plaintiffs insist on three times the requisite 500 signatures, the answer is that 500 valid signatures is all that is required per petition. Tr. 1554:16-19 (Kellner). As a precautionary measure, Mr. Kellner testified that in his experience hearing petition challenges, roughly 1½ times the 500 signatures is sufficient. *Id.* 1554:16-24; 1702:23 – 1704:14; Tr. 351:15-22 (Regan) (testifying that 800 signatures was sufficient); Tr. 2132:11 – 2133:2 (Connor) (testifying that although he typically advises twice the number of signatures, in his experience, petitions with fewer signatures have “survived nicely”). Thus, Plaintiffs contention that three times the requisite number of signature is necessary should be rejected.

56. The weight of the evidence also shows that petitioning is not as burdensome and expensive a process that Plaintiffs’ expert William Lipton claims it is. Def. F. ¶ 46; Tr. 1044:2-11 (Lipton). Indeed, Arthur Schiff, William Allen, Alan Flacks, and Emily Giske’s experiences show that petitioning is not an onerous task and is a community-based effort comprised of unpaid volunteers. Def. F. ¶¶ 46-49.

57. Mr. Schiff testified he routinely gathers signatures on a volunteer basis for candidates supported by his political club and that he alone is able to gather enough signatures to

designate delegate candidates in approximately 20-25 hours. Def. F. ¶47. In fact, this year, members of his political club in Manhattan gathered more than 3,000 signatures – more than six times the number of required signatures. *Id.*

58. William Allen testified that he successfully ran for delegate without any party support by engaging his community. Plaintiffs mischaracterize Mr. Allen's testimony in an effort to increase the difficulty of the petitioning process. Plaintiffs suggest that Mr. Allen reached out to 200 tenant and block associations to recruit petitioners. In fact, Mr. Allen testified that he *knew* 200 tenant and block associations and thus had a pool of people whom he could call for assistance in collecting signatures on certain blocks and in certain buildings. Mr. Allen did *not* testify that he called all 200 associations to recruit delegates. And indeed, Mr. Allen had the help of only ten volunteers in collecting signatures for his slate of delegates. Moreover, Mr. Allen's petitions for delegate were never challenged. Tr. 2038:21-22 (Allen).

59. Likewise, Mr. Kellner testified that Allan Flacks was able to single-handedly win a delegate seat year after year without any political support or backing. Tr. 1559:23 – 1560:11 (Kellner).

60. And finally, Emily Giske's testimony regarding her experience in a community-based, grass roots effort to get her slate of delegates on the ballot also confirms the volunteer nature of the petitioning process. Def. F. ¶¶ 70-71, 93-97.

61. Mr. Lipton's cost model fails to take into account the volunteer and local nature of these petitioning drives, instead envisioning an army of paid signature gatherers. Given the evidence, Mr. Lipton's assumption is unrealistic. Indeed, Plaintiffs have offered no proof that challengers cannot organize grass roots efforts in enough local Assembly Districts to obtain a majority of pledged delegates.

62. As Defendants' previously discussed in their first submission, Mr. Lipton's budget contemplates several other unrealistic cost items, which Plaintiffs fail to rebut. Such items include rental vans, phone banks, salaries for campaign staff, voter education costs, and legal costs for prophylactic law suits. Such costs are simply unheard of for delegate races. Again, Plaintiffs' grossly over-inflated budget is the result of a fundamental misunderstanding of how the system is supposed to work – *i.e.*, candidates courting delegate support; not candidates recruiting delegates.

63. Plaintiffs likewise erroneously build into their model, the assumption that a challenger would have to recruit an equal number of alternates as delegates. This assumption makes little sense, particularly since a challenger is recruiting *pledged* delegates. One would think that if the delegates are committed to supporting the challenger, that they would show up at the convention, obviating the need for, at the very least, a full complement of alternates.

64. Furthermore, Mr. Lipton built his belt-and-suspenders model exclusively for the Second Judicial District, which happens to be the largest in the entire State of New York, with the most (24) Assembly Districts. Assembly Districts, in the Lipton model, are the key multiplier of campaign costs. Thus, even if it were an accurate model for reasonable costs of campaigning in the Second Judicial District, which it is not, its already inflated figures have even less utility as a basis for assessing or projecting costs in the State's other eleven Judicial Districts.

65. In short, Plaintiffs have not proven that the challenger candidate, who decides to recruit pledged delegates faces burdens that are "severe" or "insurmountable."

66. Plaintiffs continue to point to the paucity of delegate primaries and the 1970s reform movement as evidence that the systemic burdens on challenger candidates are severe and

that only a large scale, multi-year effort can result in a challenger successfully running candidates across an entire Assembly District. Plf. R. F. ¶ 37.

67. But as discussed in Defendants' previous submission, the rarity of actual delegate primaries is not reflective of the competitive and contested delegate races that occur at the grass roots level. Def. F. ¶¶ 89-95. Plaintiffs have proffered no evidence that challenger "delegates cannot" successfully run in individual Assembly Districts across a judicial district. Indeed, the examples of William Allen and Alan Flacks prove otherwise. Def. F. ¶¶ 103-107.

68. Moreover, Plaintiffs confuse the efforts of a single challenger to win the nomination and an entire movement to takeover the party. The Democratic reform movements of the 1970s were grass roots efforts to overthrow the then-existing party establishment and reform the party. Reforming the judicial selection process was only one aspect of that movement. Tr. 1938:9 – 1939:4 (Levinsohn). Plaintiffs have failed to introduce any evidence suggesting that a challenger candidate would have to engage in such a movement to recruit and run a sufficient number of delegates to win a majority at the convention.

II. PLAINTIFFS' CLAIM THAT THE CONVENTION SYSTEM IS UNDEMOCRATIC RESTS ON A BACKWARD-LOOKING PERSPECTIVE THAT DISTORTS THE NATURE OF THE CONVENTION

69. Plaintiffs' insistence that the convention is no more than a group coronation orchestrated by county leaders bottoms on what they consider to be the relative brevity of the convention itself. This view is part and parcel of Plaintiffs' pattern of looking at results, rather than the steps leading to the results, to draw sweeping conclusions about the system. It also assumes, rather than proves, that county leaders have absolute control over delegate selection and, through the delegates, absolute control of nominations. As demonstrated, those assumptions are unfounded. The duration of the convention itself proves little. Much of the work, as amply demonstrated in the testimony of Justices Gangel-Jacob, Freedman, Schlesinger, Abdus-Salaam,

Sise and Lunn, is done before the convention formally begins. Candidates approach delegates many times and in many ways, and delegates, in turn, form and change their opinions of the candidates. As this process unfolds, stronger and weaker candidacies emerge. Club and district leaders also rally around their choices. And, quite rightly, county leaders weigh in. The trading and logrolling that follows when there are multiple new vacancies is therefore set in motion well before the opening bell, and the strongest candidates soon rise to the top – yielding a so-called “package” that the delegation can agree upon. The exception occurs when votes are in doubt and a floor fight ensues, producing an even more vivid example of the convention system’s inherently democratic nature.

70. The duration of the convention is no evidence either way of leader control. In discussing the role of party leaders at the convention, Plaintiffs attempt unsuccessfully to take the sting out of two witnesses who directly contradict their position. At ¶ 49 of their Reply Facts, Plaintiffs state, “To be sure, Mr. Kellner opined that County Leader Farrell could not block a candidate who has garnered a majority of the delegates.” Tr. 1583:3-9 (Kellner). At ¶ 50, Plaintiffs state, “Senator Connor opined that County Leader Norman could not block the nomination of a judicial candidate who has majority support among the delegates.” Tr. 2104:25 – 2105:4. Though Plaintiffs try, *this testimony cannot be sidestepped*. It is a forceful acknowledgement of the reality Plaintiffs ignore: the will of the delegates, the elected representatives of the voters, will make itself heard.

71. To counter Mr. Kellner, Plaintiffs offer only Mr. Farrell’s own unsubstantiated, hyperbolic self-assessment, taken out of context from a 10-year old unrelated case. To counter Mr. Connor, Plaintiffs correctly point out that in Judge Lopez Torres’ case there was more at play

than simply the will of the county leader: she had “incurred the political enmity” of Vito Lopez, whom Plaintiffs describe as “the most powerful ‘Latino’ district leader.” Plf. R. F. ¶ 58.

72. Looking elsewhere to make their point, Plaintiffs invoke Professors Hechter and Cain, though indiscriminately. For example, they say Hechter agrees “precisely” with Cain. *Id.* ¶ 42. On just what they supposedly agree, however, is less clear. Plaintiffs cite a paragraph from the Hechter report that discusses unified districts, where party leader control is greater, and divided districts, where insurgent candidates (like Judge Lopez Torres) are more likely and leader control is weaker. *Id.* In the very next paragraph of the report, Hechter goes on to note that:

Although the consequences of the judicial convention process are relatively straightforward, the *interpretation* of these consequences is debatable. The same system that can be faulted for its lack of competitiveness can be praised for its openness to candidates who cannot command the support of the majority of the electorate.

Plf. Exh. 69, ¶ 10.

73. Far from concluding “precisely” what Cain did, Hechter found that the convention system is entirely democratic.

[D]irect elections are but one of many different means of aggregating voters’ values democratically. Committee decisions (such as those used in the United States Congress) and political conventions are other kinds of democratic decision-making institutions. In and of themselves, decision-making institutions affect voters’ strategies; therefore they can also affect electoral outcomes.

Id. at ¶ 100.

74. Plaintiffs also make dubious use of testimony from Mr. Kellner, who they cite to support the proposition of “no voter involvement.” Plf. R. F. ¶ 46. That proposition is wrong at several levels, beginning with the fact that voters choose delegates. Plaintiffs, however, offer three lines of Kellner’s testimony, stopping before he finished his thought that the system

actually brings together leader, delegate and voter influence in a highly democratic mix known as a convention:

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.

Tr. 1671:20 – 1672:8 (Kellner).

A. Defendants’ Six Supreme Court Justice Witnesses Utterly Refute Plaintiffs’ Allegations That Party Leaders Dictate The Judicial Selection Process

75. Plaintiffs ignore the substance of the testimony of Defendants’ six sitting Supreme Court Justice witnesses, opting instead to quote snippets of testimony taken out of context. Plf. R. F. ¶¶ 63-67, 70-74. Alice Schlesinger, Phyllis Gangel-Jacob, Helen Freedman, Sheila Abdus-Salaam, Robert Lunn and Joseph Sise cumulatively have 76 years of experience as Supreme Court Justices, both acting and elected. Cumulatively, they have had 17 years of experience campaigning for Supreme Court. Their entirely harmonious testimony on how they ascended to the bench tells a uniform story of hard campaigning and honest effort. Their consistent and transparent efforts to win delegate and popular support starkly contradict Plaintiffs claims that delegates are hand-picked and nominees are pre-ordained. Plf. Mem. at 2, 19.

76. In fact, none of these six Justices had their county leader's support until they demonstrated that they had strong delegate support. Tr. 1806:1-17 (Gangel-Jacob); Tr. 1758:10-1759:10; Tr. 1767-16-1768:14 (Freedman); Tr. 1967:17-1968:8 (Schlesinger); Tr. 1865:3-10 (Abdus-Salaam); Tr. 1493:3-15 (Sise); Dep. Tr. 57:21-58:9 (Lunn).

77. Each Justice fought hard to win such support from the delegates, whether over the long-haul (*e.g.*, Justices Gangel-Jacob) or short-haul (*e.g.*, Justice Abdus-Salaam), downstate (Justice Schlesinger) or upstate (Justices Sise and Lunn), and each earned county leader support only *after* they had proven their mettle.

78. Plaintiffs' selective parsing of the testimony exposes the tenuousness of their claims. They have not stated, and indeed, cannot state a claim against county leader influence or county leader endorsement of candidates. Plf. Mem. at 4. Regardless of how individual leaders may hype their political prowess, the evidence shows that they respond to, rather than create, delegate support for Supreme Court candidates. Justice Gangel-Jacob's experience is a prime example of how party leaders cannot dictate the judicial selection process.

79. Like Plaintiff Margarita Lopez Torres, Justice Gangel-Jacob was opposed by the county leader. Unlike Judge Lopez Torres, however, Justice Gangel-Jacob persevered, pushed through the opposition and won a seat on the Supreme Court. She was able to do this not because County Leader Farrell had on his own a change of heart, but because Justice Gangel-Jacob, like all successful candidates, went directly to the delegates and built up substantial support. It was only *after* she had the votes that the county leader sought a rapprochement. 1818:3-6 (Gangel-Jacob).

80. Also unlike Judge Lopez Torres, Justice Gangel-Jacob was an Acting Supreme Court Justice, and had been for four years when she won her party's nomination. *Id.* 1803:21-24;

Gangel-Jacob Decl. ¶ 16. Plaintiffs ignore the importance of this qualification in favor of the disingenuous and sexist suggestion that the Justice's husband, and not her credentials and hard work and grass-roots support, got her elected. Plf. F. ¶ 100. The full testimony on this point shows that Mr. Jacob had no particular influence with Mr. Farrell and was not even able to deliver all the delegates from his own club. *Id.* 1809:4 – 1810:22.

81. To further divert attention from Justice Gangel-Jacob's successful campaign to court delegate support, Plaintiffs focus on select testimony about the 1992 convention. Plf. R. F. ¶ 63. Drawing from a string of aphorisms he used during her deposition, Plaintiffs' counsel took some time at the hearing to parse the primary and secondary reasons for Justice Gangel-Jacob's withdrawal from the convention that year. Tr. 1833-1840 (Gangel-Jacob). Plaintiffs now unfairly imply that Justice Gangel-Jacob was not honest on the stand. *Id.* Justice Gangel-Jacob clearly testified that she withdrew because she could not be assured of winning that year and, as she had by that time already served for several years as an Acting Justice, she valued professional harmony and did not want to risk yet another floor fight against one of her colleagues. *Id.* 1817-1821; Gangel-Jacob Dec. ¶ 15. Interestingly, Mr. Farrell did not even hold out that he would in turn support her the next year, only that he would not oppose her. Tr. 1818:7-19 (Gangel-Jacob).

82. Indeed, Justice Gangel-Jacob was such a strong campaigner, so undeterred by Mr. Farrell's opposition, that she campaigned in his own backyard in Harlem and won over delegates from his own Assembly District. *Id.* 1816:24 – 1817:21.

83. Plaintiffs use the same backwards-looking approach in a shameful effort to discredit Justice Schlesinger. Plf. R. F. ¶ 64. The faulty logic which follows posits that: Justice Schlesinger won; Mr. Farrell did not oppose; therefore, she won because he did not oppose. Of

course, this position attempts to obscure, again, what sets Justice Schlesinger apart from Judge Lopez Torres: her appreciation that successful campaigns are not anointments but are built from the ground up; and her willingness to take her campaign directly to the people, the delegates, and gain their support. Tr. 1963 – 1968 (Schlesinger); Schlesinger Dec. ¶¶ 4-8. In 1999, when she finally won the nomination, she came into the convention with more votes than any other candidate. Tr. 1979:2 – 1980:15 (Schlesinger).

84. As for Justice Freedman, Plaintiffs summarize their assessment of her success as follows: “In short, she was plainly not nominated over Mr. Farrell’s objection.” Plf. F. ¶ 103; Plf. R. F. ¶ 67. So be it. She also happened to be nominated as part of a “package” of candidates, which Plaintiffs imply is a taint on the candidate and the delegates. How? When there are multiple open seats and multiple candidates vying for those seats, “packaging” by the delegation is a perfectly democratic phenomenon of judicial conventions, made no less democratic by the participation of various party leaders in the deliberations and consensus-building that leads to a package. The evidence, which Plaintiffs studiously avoid, shows that Justice Freedman worked hard to obtain delegate support, which support led to her nomination (yes, without objection from Mr. Farrell).

85. As the testimony of Justice Abdus-Salaam makes clear, while the support of the county leader is preferable, it is by no means the *sine qua non* of a successful campaign.

86. Before reporting out of the Supreme Court screening panel in 1993, Justice Abdus-Salaam worked hard for the party’s nomination, attending club functions, fundraisers, meetings of community organizations and “non-traditional sorts of clubs.” Tr. 1859 – 1861 (Abdus-Salaam). She understood the importance of getting “my name out there” among the rank

and file. *Id.* 1860:19. She further understood that a campaign could, but often did not, reach fruition after one year, and therefore “I might as well get in line.” *Id.* 1858:18.

87. Though any candidate would prefer to have the party leader’s support, in Justice Abdus-Salaam’s case such support was changeable and predicated on multiple factors, and it did not dictate her efforts. The breakthrough for her was not an unprovoked change in heart in Mr. Farrell, but what the Justice called a “grass roots groundswell call for support for me.” *Id.* 1865:7-10. The groundswell came, of course, from the delegates, specifically “the delegates of color.” *Id.* Once again, it was popular support – from the ground up, from the delegates themselves, the elected representatives of the rank and file, from all over Manhattan, from the Upper West Side, to the Upper East Side, to Chelsea, to Greenwich Village (Tr. 1881:25 – 1885:3; 1897:23 – 1898:2 (Abdus-Salaam); Exh. TT) – that persuaded County Leader Farrell, an expert counter of votes and a political survivor, to change his tune and support an already well-supported candidate for Supreme Court.

88. It is worth noting that the “counter” assigned by the party to candidates like Justice Abdus-Salaam would be a superfluity if the delegates were not independent and gauging were immaterial. Tr. 1868:13-24 (Abdus-Salaam). Plaintiffs have built their case around the opposite (and unsupportable) conclusion that there is no such thing as an independent delegate, that they are all “hand-picked” by and “rubber stamps” of an all-controlling county leader. Plf. Mem. at 9; Compl. ¶¶ 29, 38, 60, 100. But as Justice Abdus-Salaam’s story shows, Plaintiffs’ case is based on a false assumption. In the two-week window between the panel’s report and the convention, Justice Abdus-Salaam’s counter reported a rise in delegate support directly attributable to her solicitation of their support.

89. Plaintiffs correctly note that Justice Sise would not have campaigned for the Republican Party's nomination had he not received the endorsement of the Montgomery County Republican Committee. Plf. R. F. ¶ 70. Defendants thus withdraw ¶ 180 of their Proposed Findings of Fact. In footnote 10 of their Reply Facts, however, Plaintiffs go too far when they state that Justice Sise's deposition testimony indicates that he and his opponent for the party's nomination "essentially agreed beforehand that they would abide by that Committee's endorsement and that the non-endorsed candidate would not pursue the nomination thereafter." Having mischaracterized testimony outside the record and inviting clarification, Plaintiffs cannot be said to be prejudiced if the misrepresentation is corrected. Therefore, we offer Justice Sise's deposition testimony as follows:

A. *** By implication the Surrogate Court judge and I agreed by implication that that candidate who was endorsed would move forward and then seek nomination at the judicial convention in the fall.

Q. When you say by implication, did you have a discussion with that other candidate?

A. The other candidate is a good friend of mine. He was the district attorney when I was assistant district attorney, and he and I both got elected to judgeships on the same day in 1995. It strained our friendship and relationship. Yet I would like to say both he and myself were very professional. That's why I say by implication. We were not discussing anything at the time. We were very cordial with each other, but I know it was very difficult for him, as it was for me, to face each other in this endorsement process that the chairwoman set up. I can speak for myself. If I can't get support from the people who I live with and serve as county judge, then I would stop my candidacy there and be happy as the county judge and not move on. By implication I assumed he would as well, but there was no agreement.

Sise Dep. Tr. at 31:19-34:6.

90. Plaintiffs rather disingenuously argue that Justice Sise did not reach out to delegates as part of his campaign and that not doing so "demonstrate[s] the control exercised by

county party leaders . . . rather than by voters or even delegates.” Plf. R. F. ¶ 70. Justice Sise, however, was the very model of efficiency and industry in seeking support district-wide from the grass roots on up. He traveled extensively to all corners of the sprawling district; mailed literature; used radio advertising; gave out magnets, buttons, balloons and other name recognition materials; used lawn signs (“[I]f you have your lawn sign on someone’s lawn, your neighbor will say, Bill Smith supports Sise. I’ll support Sise, because I think a lot of Bill Smith. That’s campaigning.” Tr. 1503:16-20 (Sise)); attended political and community events; and went to all nine of the Fourth Judicial District’s county fairs. *Id.* 1488-1500.

91. And the whole purpose of this concerted outreach, which swept up through the rank and file to the leadership of the District’s eleven counties, was to win delegate support. He took to heart the advice he was given after winning his county committee’s endorsement, namely “that you’re going to have to work hard in order to get the nomination, and that it’s a huge district, and that you will have to prove yourself throughout the summer and fall *so that you’re able to get the support from the delegates at the convention.*” *Id.* 1493:6-12 (emphasis added). Moreover, he remained motivated throughout the process to continue his outreach campaign *because he knew that the system was open* and “at any time another candidate could put forth his or her name and seek the nomination and receive it over me.” *Id.* 1501:11-13.

92. Plaintiffs insinuate that Justice Sise was a shoo-in for the party’s nomination because his brother was a leader in Schenectady County. Pl. R. F. ¶ 70. Were that true, of course, one must wonder why Justice Sise would have expended the time, expense and effort he did. Plaintiffs would portray him as “hand-picked,” when, to accept such an indictment by implication, this Court would have to conclude that Justice Sise’s testimony about his campaign efforts was unworthy of belief. Indeed, Plaintiffs’ key propositions – “hand-picked” candidates

and “rubber stamp” delegates, Pl. F. ¶¶ 113-114, Plf. R. F. ¶ 8; Plf. Mem. at 2; Compl. ¶ 35 – begs the same question and again hinges on rejecting the testimony of all six of the sitting Supreme Court Justices who testified for Defendants. Respectfully, such a finding would be unthinkable.

93. Plaintiffs’ misuse of Justice Lunn’s testimony is particularly acute. Plaintiffs poach deposition testimony to create a portrait of a candidate who focused only on county leaders, neglecting the electorate generally and delegates specifically. Plf. R. F. ¶¶ 71-73. This is flat out wrong.

94. Justice Lunn repeatedly testified of his efforts to reach delegates and the electorate. Indeed, even before he ran for Supreme Court, he was aware, as a member of the Town of Pennfield Committee, that Supreme Court candidates went to town committees “to try to secure delegates.” Lunn Dep. Tr. 22:3-7. The lesson was not lost on him, and Justice Lunn sought his own delegate support when he campaigned in the Seventh Judicial District in 1994. Plaintiffs, for example, chastise Justice Lunn for, of all things, spending money on his campaign. Plf. R. F. ¶ 74. But Justice Lunn was clear that his campaign paid to reach leaders and delegates alike. Lunn Dep. Tr. 46:6-11. Certainly, no one would conclude that thousands of palm cards, thousands of writing pads, balloons, a highway billboard, a mobile billboard, t-shirts, attendance at 22 parades throughout the district’s eight counties, radio and TV advertising were directed only at county leaders and not at delegates themselves and the general electorate. *Id.* 54:6-23. Indeed, when asked at his deposition by Plaintiffs’ counsel whether all this sustained effort was to reach out to the delegates or to the electorate, Justice Lunn testified “Both.” *Id.* 86:16-23; *and see* 88:7-9 (“It was my belief that much of what I described I was doing was reaching potential delegates.”).

95. In addition to campaigning to delegates generally, Justice Lunn reached out to “probably more than 20” specific delegates. *Id.* 56:3-10. He would scan lists of delegates and if he recognized a name, he would make contact. *Id.* 88:5-7. And he spoke with delegates seeking their support not only before, but at the Republican and Conservative party conventions. *Id.* 49:25 – 50:11.

96. Disregarding all this, Plaintiffs point out only that Justice Lunn did not set up a phone bank and did not do a direct mailing. Plf. R. F. ¶ 73.

97. Plaintiffs fault Justice Lunn for considering how to win the general election even as he campaigned for the party nomination. *Id.* But his success in achieving both goals is thoroughly democratic, both in theory and in execution.

That feeling actually originated in January, not necessarily, and continued. I think anybody running for public office has to have some belief that they are going to prevail or they would not dedicate resources financially and otherwise. It was just the general belief that I was the best qualified candidate if I had an opportunity to get my credentials before the delegates. If I had an opportunity to get my credentials ultimately before the general electorate, that I was going to be successful.

Lunn Dep. Tr. 93:5-15.

98. It was just this belief in himself and in the democratic process, *and not any assurance given by county leaders*, that gave Justice Lunn confidence that he would prevail at the convention. Plaintiffs oddly cite lines 3 to 8 on page 119 of his deposition transcript as showing that Justice Lunn “begrudgingly admitted” that he could not have won without county leaders’ support. He did no such thing. Surely, he preferred their support, but he simply says “I have no way of knowing” if he could have prevailed – even if they were *against* him. *Id.* 119:3-18.

99. In fact, Justice Lunn nowhere states that he had county leader support prior to the convention. Plaintiffs say otherwise – relying on the one hand, not on Justice Lunn but on testimony from the man he defeated, Judge Regan; and, on the other, on grossly mischaracterized testimony. Plf. R. F. ¶ 72. Plaintiffs’ overreaching notwithstanding, Justice Lunn was never told and never “knew” he had any county leader support – at best, he “believed” that he did, but he just kept on campaigning for delegate support. And throughout the late winter, spring, summer and fall of that year, the entire basis for obtaining county leader support, Republican or Conservative, was simple: winning delegate support.

Q. Do you know if you had the support of your county leader, the Monroe County leader and other county leaders by July of 1994 or were you still campaigning for that support at that time?

A. Yes, and yes. I believe I had their support, but I continued to campaign and campaigned hard.

Q. Was it your understanding that the only way to win the Republican party’s nomination was to have a majority of the judicial delegates vote in your favor?

A. Correct.

Q. Was it also your understanding that the only way to win the conservative party’s nomination was to have the majority of the judicial delegates for the conservative party vote in your favor?

A. Yes.

Id. 57:15 – 58:6.

100. Indeed, Plaintiffs miss the entire point. Like Justices Gangel-Jacob, Schlesinger, Freedman, Abdus-Salaam and Sise, Justice Lunn makes it quite clear that his broad, varied and sustained efforts were targeted to delegate support and that only by succeeding there, and proving one’s mettle and viability as a candidate, could one hope in turn to gain leader support.

Id. 107:9 – 109:25.

**B. Testimony From Plaintiffs' Witnesses
With Judicial Experience Failed To
Advance Their Claims, And Often Hurt Them**

101. The point seems lost, too, on Judge Keefe and John Regan, Plaintiffs' only examples other than Judge Lopez Torres of how it is impossible for a "challenger" to get a party nomination. The campaign experiences of Judge Keefe and Mr. Regan are not proof of insurmountable systemic barriers, Plf. R. F. ¶ 32. Indeed, neither was a successful Supreme Court candidate – but Plaintiffs cannot claim there is a constitutional right to win. If they "foundered," one place to look for an explanation is their peculiar campaigns. For example, the kind and magnitude of effort mustered by Mr. Regan, who opposed Justice Lunn, hardly rose to that of a bona fide challenge, and thus hardly provides a basis to say a real challenge cannot succeed. Justice Lunn's testimony, again, shows the large gap between Plaintiffs' claims and Plaintiffs' proof.

Q. Do you believe that in order for a judge to be the best judge that he or she can be, that they would need to read and at least make an attempt to understand what the appellate courts have to say regarding his or her decisions and opinions?

A. Yes.

Q. When you were out parading and campaigning, as it were, prior to the judicial delegate convention, did you believe that the efforts you made would be known by the local political committees and by the judicial delegates?

A. Yes.

Q. Did you believe that the effort you made helped establish that you were a serious and viable candidate?

A. Yes.

Q. Did you believe that the efforts you made helped establish that you would take the time and spend the resources required to win the general election?

A. I did, although as I testified earlier, I believe there was a two-phase benefit to that. It was widely known and is widely known that the local political parties do not commit funds generally to judicial campaigns. I knew that anybody who is typically aware of that seeing billboards, signs, note pads, key cards, parades, balloons. I mean, we did quite a bit. Knew that that was either money I raised or money that I spent out of my own pocket. Generally the latter.

Q. And did you feel that enhanced your candidacy for your party's nomination by showing them that you were willing to spend both time and resources to put your name out there?

A. Yes. It was told to the committees. And in fairness to my opponents during that committee process, they likewise represented to the committees that they would commit resources and energy to a campaign if they were successful at the convention or successful in getting the nomination.

Q. Did anybody commit to devoting energy and resources prior to receiving the nomination?

A. Yes. But not to the extent that I did.

Q. Did you actually make a commitment to the parties that you would be doing this or --

A. Yes. I stood before the Brighton committee. My first one, I remember it because there was an allusion to the weather here earlier. We trudged through snow with resumes in hand to get to the town hall. And that's exactly what I told them. I said, I'm here. And I'll continue to be here and I'm somebody who will work hard and devote financial resources and a lot of energy if I'm successful in getting the nomination.

Q. Did you also commit to vote -- I'm sorry. Do you also commit to devote energy and resources to getting the nomination?

A. Yes.

Q. And based on what you saw of your competitors and the efforts that they undertook to -- the public efforts, at least, that they undertook to seek the Republican party's nomination, how would you compare their efforts to yours?

A. I thought I campaigned much harder.

Q. And what was that based on?

A. Just my personal observations. Their lack of presence at parades and community functions. In addition to what I have testified to, there were a number of church functions that sponsored potential candidate nights. I went to every single one of those I could. Rarely if ever saw either Mr. Mastrella or Judge Regan.

Lunn Dep. Tr. 107:5 - 109:25.

102. The circumstances leading up to Mr. Regan's attempt to run his own slate of delegates to the 1994 Republican judicial convention are revealing. For 26 years, from 1959 to 1985, Judge Regan was a registered Democrat, and "extremely active in Democratic politics." Tr. 361:12-20 (Regan). In 1971 and 1972, he ran as the Democrats' choice for Rochester City Court Judge, losing each time to a Republican. *Id.* 362:6-25. In 1981, he was finally elected to the City Court bench, against the leadership of the Democratic and Conservative parties, but with Republican Party support. Midway through that term, he left the Democratic Party and enrolled as a Republican. *Id.* 364:2-5. But since he was a sitting judge, he did not participate in party politics. As a Republican, he ran unsuccessfully for Supreme Court in 1990, 1993 and 1994. *Id.* 341:1-6. He attempted to run his own delegates in 1994.

103. Mr. Regan knew he needed to run delegates in only six of the Seventh Judicial District's Assembly Districts to be positioned to control the convention. *Id.* 352:5-14. He does *not* testify that it would be impossible to go into the convention with *less than a majority* of delegates and, by persuading other delegates at the convention to support him, *still* win the nomination. In assessing how to run his slate, Mr. Regan aimed to obtain only 800 signatures per district, and, to guarantee majority control before the convention even began, would need a total of only 5,400 to 6,000 signatures. *Id.* 351:15-22; 352:5-14.

104. Mr. Regan claims that he had a lot of support from voters within the Republican Party but was blocked from accessing it by party leadership, and therefore had no choice but to run his own delegates in 1994. Regan Decl. ¶¶ 11-13. These assertions lack factual support.

105. According to Mr. Regan, the Conservative and Republican parties had a standing agreement on how Republican Supreme Court candidates would be nominated. *Id.* ¶ 11. Yet because Plaintiffs offered no actual proof of the agreement, Mr. Regan's testimony was received only for the non-hearsay purpose of showing the effect on him of being told by a non-testifying third party that there was such an agreement, including the effect of "the witness' understanding of why he didn't get the nomination." Tr. 356:21 – 357:5 (Regan). The other half Mr. Regan's thesis, that there was real support for his candidacy, is on equally shaky footing. He based his assumption of party support on feedback from Republican committees in the Seventh Judicial District. But Mr. Regan was forced to admit that he had no idea if those same committees gave the same pledge of support to his opponents, including Justice Lunn. *Id.* 374:12-21.

106. As for Plaintiffs' claim that it is impossible to successfully run one's own slate of delegates, nothing is proven by the failure of Mr. Regan – who was also involved around this time in a feud with the Conservative Party chairman involving ethical charges and allegations of fraud, *Id.* 368-69 – to actually obtain his party's nomination. In five of the six Assembly Districts in which he ran slates, Mr. Regan's petitions were not accepted. This had nothing to do with purported barriers to "challenger" candidates – it was caused by his campaign's failure to file properly. *Id.* 395:19 – 396:11. The one slate he was left with was in fact elected. *See, supra*, ¶ 54.

107. An unguarded piece of testimony from Mr. Regan is particularly revealing. Mr. Regan himself does not subscribe to the theory that the party system dictates the outcome, but

rather that candidates control their own destinies: “I think that the question of whether he will be the strong candidate transcends party affiliation in judicial races frequently.” *Id.* 367:12-14.

Notably, this admission comes from a former Supreme Court candidate who did not know that one could petition directly onto the general election ballot as an independent. *Id.* 380:4-23.

108. Judge Keefe’s limited experience in 1991 also inadequately supports the notion that it is impossible to succeed in running one’s own delegates. According to Plaintiffs, Judge Keefe is a good example of the “unique difficulties” of recruiting delegates. Plf. F. ¶ 266. The record shows, however, that these difficulties were not “unique” to the convention system so much as to Judge Keefe himself. The judge had difficulty explaining to voters, even in his own neighborhood, what delegates did. Tr. 932:3-14 (Keefe). He limited his attempt to two of the Third Judicial District’s eleven Assembly Districts. *Id.* 887:9-19. One of those petitions was found to be facially invalid. He ran not to get on the bench, not to win the nomination, and not to support any other candidate – but for the novel purpose of being “a thorn in the side of the county leader.” *Id.* 859:15-18; 910:16-20. Indeed, by Plaintiffs’ own definition and use of the term throughout this litigation, *Judge Keefe is not even a “challenger” candidate*. He was not really a candidate at all.

109. Far from showing the futility of running one’s own slate, Judge Keefe’s experience shows the very real success that can attend to lobbying elected delegates. In 1992, he was part of an effort to petition elected delegates to the judicial convention, not to support a cross-endorsement. Though opposed by the county leaders from Albany and Rensselaer, the effort succeeded. *Id.* 876:6 – 877:8.

110. As for his present day knowledge, Judge Keefe admitted to having been out of politics for a while and “as a result of that I don’t know what’s going on today.” *Id.* 923:17 – 924:1.

111. Though his declaration claims that a “challenger” would need 36,000 signatures, Keefe Decl. ¶ 17, Judge Keefe admitted on cross-examination that the minimum number of valid signatures needed was 5,500. Tr. 880:4-13 (Keefe). In 2002, Judge Keefe gained 3,800 signatures for his successful City Court campaign. *Id.* 890:12-14.

112. As for the issue of party leader control of the process, Judge Keefe gave the following testimony.

Q. Party leaders don’t direct voters how to vote in [the] general election, do they?

A. Party leaders have no ability to ensure that people are going to vote the way their told to vote by the party leaders. People are free to vote however they want to vote.

Q. Is it your position that the voters in the State of New York are not competent?

A. It is not my position.

Q. Is it your position the voters in the State of New York, if provided with the credentials for two candidates for Supreme Court Justice, that they are unable to vote according to their conscience for Supreme Court Justice of th[eir] choice?

A. That would not be my position.

Q. Party leaders do not preclude individuals from running as independent candidates, do they?

A. I think – I’m not sure I understand your question. The – I’m not sure I understand your question.

Q. Do party leaders, to your knowledge, preclude candidates from running as independents for Supreme Court Justice?

A. Any registered voter is free to circulate petitions and run as an independent if they can get on the ballot for any position that they're qualified for. Party leaders can't stop them from doing that.

Q. The party leaders don't prevent the candidate for Supreme Court from educating the judicial candidates – I'm sorry – the judicial delegates as to what their qualifications are, do they?

A. No.

Q. And the party leaders don't prevent judicial delegates from discussing the candidates for Supreme Court Justice among themselves, do they?

A. No.

Q. Do the party leaders prevent the judicial delegates from discussing the candidacies for Supreme Court with the candidates themselves?

A. No, not to my knowledge.

Id. 928:3 – 929:13.

113. Plaintiffs hold up Mr. Segal as evidence of how the judicial convention system deters potential candidates, those who might have sought their party's nomination, but who instead end up unwilling to "consider even trying to overcome the barriers." Pif. R. F. ¶ 62.

While meant to dovetail with their selective use of Dr. Hechter's testimony, *see* ¶¶ 74-75, *supra*, Plaintiffs' reliance on Mr. Segal as actual proof demonstrates the ultimate softness of their claims.

114. Mr. Segal's deterrence originates from an interview with a screening committee at which he was allegedly laughed at for not knowing who his district leaders were. Segal Decl. ¶ 9. After the disappointing interview, he had no further contact with the committee, and he did not get their "endorsement." *Id.* ¶ 11. Essentially, his candidacy was over then.

115. Though a self-professed political naïf who did not know who his district leaders were, Mr. Segal's declaration states that he chose not to pursue his goal of becoming a Supreme

Court Justice because he did know: what it meant to run one's own delegates; that doing so would require "a tremendous amount of effort and money"; that he would necessarily be "unsuccessful in electing a sufficient number of delegates" from across one and possibly two counties and scores of Assembly Districts; and, moreover, he knew enough about campaigning and the convention to believe that actually trying to persuade delegates directly would be "futile." *Id.* ¶ 12.

116. Mr. Segal, who does not give the date of his interview, apparently did not consider contacting delegates until two weeks prior to the convention. *Id.* ¶ 12. He admits that he did not know how to contact or even identify delegates. *Id.* He thus did not try. He knew there were conventions, but "I didn't know how they worked." Tr. 816:18-25 (Segal). In fact, Mr. Segal's live testimony indicates that, at the time in 1994, he knew almost nothing about the process and made little effort to educate himself. *Id.* 815-820.

117. It is impossible to conclude from the record that a man with virtually no knowledge of the system could have been deterred by the system. And yet from this extremely brief and limited experience (1994 was the extent of it – there were not subsequent efforts of any kind), Mr. Segal also claims that he did not have "an opportunity to earn his party's nomination." Segal Decl. ¶ 13.

118. Mr. Segal is silent on just what it meant to other candidates in 1994 to have in fact been endorsed by a screening panel, and whether and how that spared them the effort that deterred him so, and how those candidates fared at the convention.

C. The Center Of Plaintiffs' Case Cannot Hold

119. Plaintiffs spend pages of their Reply Findings of Fact resuscitating lead Plaintiff Margarita Lopez Torres' stature as the centerpiece of this litigation: the "challenger" candidate. Plf. R. F. ¶¶ 53-61. Passing for the moment on whether Plaintiffs ever adequately defined that

concept, whether there is a single “challenger” type, and whether Judge Lopez Torres fits it, the end result is that she cannot save this case.

120. When a contestant loses a race, and blames the course for the loss, it is certain and fair that the contestant’s own effort and qualifications will enter the debate. With regard to Judge Lopez Torres’ experience on the bench, and the different roles she has filled in different courtrooms, the record speaks for itself. Defendants do note, however, that Plaintiffs’ willingness to invoke in her defense a somewhat off-handed and certainly unsubstantiated comment by Mr. Kellner raises serious questions. *Id.* ¶ 57. Plaintiffs argue that the reason for Judge Lopez Torres’ failure to be promoted to Acting Supreme Court Justice after so many years in Civil Court is something that Mr. Kellner “suggests might be quite common, namely that Administrative Judges who decide such matters are ‘not fully independent of the county leaders who certainly give them their input.’” *Id.* As discussed more below in paragraph 183, Plaintiffs’ adoption of this remark impugns the entire Office of Court Administration, whose role it was to review (and in each case deny) Judge Lopez Torres’ requests to be appointed to the Supreme Court, and whose performance of its duties, overseen by Chief Administrative Judge Jonathan Lippman and Chief Judge Judith Kaye, is beyond reproach on this record.

121. Plaintiffs state that Judge Lopez Torres “worked over a period of approximately eight years” courting support from delegates and leaders. Plf. R. F. ¶ 58. There are two problems here. First, she sought the nomination in only three years. Second, she did very little to court the delegates for their support. This is, of course, a gross oversight when seeking the nomination at a judicial delegate convention. Plaintiffs attempt to explain away the continuous slight of her constituency by blaming Vito Lopez and Clarence Norman – the very two people whom she claims thwarted her every attempt to become an (elected) Supreme Court Justice. It is

not explained how it is that Judge Lopez Torres, by then an experienced judge, came to rely for campaign advice on the very persons she thought were obstructing her campaign.

122. To the extent that Judge Lopez Torres claims that there were district leaders who also asked “[Is] the County Leader supporting you, are you being supported by Assemblyman Lopez?” Plf. R. F. ¶ 58; Tr. 716:9-11 (Lopez Torres), that question is not surprising, given that the enmity between Assemblyman Lopez (“the most powerful ‘Latino’ district leader,” Plf. R. F. ¶ 58), and Judge Lopez Torres (the City’s first Latina Civil Court Judge, Lopez Torres Decl. ¶ 7), was well known in Brooklyn.

123. Defendants have shown that despite allegedly “insurmountable” obstacles, not the least of which was the enmity of her own Assemblyman, Judge Lopez Torres petitioned for delegates in 2002 and made a strong showing. Def. F. ¶¶ 190-91. Plaintiffs’ ironic response is to minimize her efforts. That is, she did not *really* try hard enough to merit the full opposition that the Democratic Party *would have* offered “if [her delegates] were actually part of a campaign for Supreme Court.” Plf. R. F. ¶ 61. But, of course, she *was* part of a campaign for Supreme Court. Furthermore, say Plaintiffs, *if* she had run her own slates instead of running on petitions with other officials, *then* she would have been stymied by those same “insurmountable” obstacles. *Id.* Again, this is just Plaintiffs’ conjecture. And moreover, since there is absolutely no requirement that a candidate petition on her own rather than with candidates for other offices, why require that of “challenger” candidates as a test of the system’s openness?

III. PLAINTIFFS HAVE FAILED TO REFUTE STRONG EVIDENCE THAT THE CONVENTION SERVES SEVERAL LEGITIMATE AND COMPELLING STATE INTERESTS

124. The judicial convention system has served New York State well by serving several compelling State interests. Plaintiffs have attempted to disprove this by addressing each compelling interest separately, and offering various unproven proposals that they claim could

meet those interests just as well. Taken separately, these various alternatives do not disprove the convention system's service of compelling interests. Moreover, Plaintiffs' seriatim reply and menu of unproven alternatives ignores the fact that the convention system on its own effectively serves all these interests cumulatively. Plaintiffs' aspersions and alternatives not only fail individually, they fail to offer a single, coherent system that will, within New York's entrenched party system, maintain the judiciary's same high-quality, independence, diversity and accountability.

A. The Convention System Has Created A High-Quality Bench

125. Plaintiffs' effort to cast doubt on the highly qualified Supreme Court bench created in New York over the past 80 years by the convention system is wide of the mark. For starters, there was not one allegation, nor one shred of evidence to support the proposition that the Supreme Court for the State of New York is anything less than a top-quality bench. On the contrary, testimony elicited on the subject confirmed the high regard for our State's Justices, six of whom appeared and testified at the hearing. Tr. 1963:22-33 (Schlesinger); 1245:22-1246:2; 1258:13-19 (Schiff); 433:12-21 (Carroll); 1548:7-14 (Kellner); 1862:11-13 (Abdus-Salaam).

126. Second, the method of Plaintiffs' rebuttal is unsound. On the one hand, they do not credit the benefits of screening panels to the convention system because the panels are not statutorily created. Plf. R. F. ¶ 88. On the other, they fault the system for allegedly tolerating uninformed delegates, when any given delegate's knowledge of the candidates is hardly legislated, either. *Id.* ¶ 86. In addition, and to the contrary, the present system is statutorily structured to encourage candidates to lobby delegates and educate them on their candidacies and for delegates in turn to debate and discuss the candidates amongst themselves, thus giving rise to

the dynamic and informed delegations that we have in this State. Tr. 2031:25 – 2032:10, 2034:13-25, 2045:23 – 2046:17 (Allen).

127. Plaintiffs seem to think that a primary system will create a bench of equal or greater quality – but that is mostly a guess. At the very least, the expected massive influx of money and special interest influence that will infuse primaries weighs against purely merit-based success.

128. As cited by Plaintiffs, Henry Berger subscribes to the theory that a convention system has barriers to entry that discourage certain types of candidates from running. Plf. R. F. ¶ 83. Plaintiffs’ sole example to support Mr. Berger’s opinion regarding potential candidates who are deterred from even seeking nomination is Philip Segal. Mr. Segal’s extremely limited experience is an inadequate basis from which to draw conclusions about purported systemic flaws. More troubling still is the fact that through Mr. Berger, Plaintiffs advocate a system that would replace one set of barriers – which have not over 80 years caused our State’s Supreme Court to be viewed as anything other than a high-quality bench – with another set of untested, uncertain and unpredictable barriers that are equally sure to discourage another set of potential candidates. Furthermore, given the undisputedly high-quality of the Supreme Court, Mr. Berger’s opinions that the “pool of truly eligible candidates is severely limited” and the “quality of the Supreme Court bench as a whole thus suffers” are without merit. Plf. R. F. ¶ 83.

129. At the hearing and in their proposed findings, Plaintiffs have frequently invoked the Feerick Commission Report. Perhaps this is a fitting place to state that the Feerick Commission did not recommend a primary system. Defendants’ position on the ultimate utility of the Report for any purpose in this litigation has been made known to Your Honor. *See* Letter

of Kevin J. Curnin to the Court, dated October 8, 2004 and memo-endorsed by the Court on October 18, 2004.

130. In addition, the importance of incumbency to a high-quality bench cannot be overestimated. *See, infra*, ¶¶ 179-184. And yet driving sitting judges into the free-for-all fray of a primary after years in the courtroom risks a potential death knell for many incumbents. For example, the eminently qualified Justice Helen Freedman testified quite candidly that she would not have sought reelection at all had she been confronted with a primary contest. Tr. 1776:22-23 (Freedman).

B. Replacing Conventions With Primaries Would Impinge Defendants' Party Associational Rights

131. Plaintiffs have failed to refute the basic proposition that the judicial convention system for nominating candidates for Supreme Court Justice protects the associational rights of members of political parties to organize themselves, forge coalitions and select their standard bearers as they see fit. In what is more of an attack on political parties than on judicial conventions, Plaintiffs seek to supplant the current method of nominating candidates with their preferred method.

132. Plaintiffs' complaints about political clubs and local party committees banding together to support a slate of candidates for delegate fail to take into consideration that these groups are exercising *their* First Amendment rights. Likewise, when party leaders endorse and support candidates, they are exercising *their* First Amendment rights.

133. In addition to fostering the associational rights of parties and their members to express support for their preferred candidates in general, the convention system secures their First Amendment rights in two specific and critical ways: (1) by preventing party-raiding, and (2) by permitting ticket balancing.

134. Plaintiffs do not dispute that party raiding *cannot* occur in a convention. *See* Plf. R. F. 90-93; Plf. R. C. 53-55. By contrast, party raiding *can and does* occur in a primary. *Id.* This was exactly the point made by several defense witnesses and set out in Defendants' initial Findings of Fact. Def. F. ¶¶ 230-34. Thus, Defendants have demonstrated that conventions very effectively achieve the compelling state interest of protecting party associational rights insofar as they prohibit party raiding.

1. **Party Raiding Prevented**

135. In their reply, Plaintiffs offer two responses to Defendants' party raiding argument. First, Plaintiffs obfuscate the difference between cross-endorsements at political conventions and party raiding. Plf. R. F. ¶ 91. As Mr. Ward testified, cross-endorsements are the *voluntary* nomination of a member of another political party, while party raiding refers to the subversive efforts of a member of one party to interfere with another party's primary. Tr. 1335:25-1336:12 (Ward). Though attempting to equate the two, Plaintiffs can cite no evidence or legal authority for the unfounded proposition that when duly elected delegates at a party convention cross-endorse a member of another political party, they abridge the associational rights of rank and file members of their own party. Instead, the testimony suggests that there are many important benefits to the party and to all voters that can be achieved through voluntary cross-endorsements by judicial delegates at the convention. For example, protecting incumbent Supreme Court Justices from having to run divisive and expensive re-election campaigns (Tr. 1932-33 (Levinsohn)), deal-making between opposing parties to guarantee each political party some success in the general election (Tr. 874 (Keefe)), or allowing a minor party to act as a fusion party and throw its support behind a major party candidate (Tr. 1107 (Lipton)).

136. Second, Plaintiffs claim that Defendants acknowledge that the "only reason" party raiding would be possible in judicial elections is that New York has "made a determination that

its interests in avoiding party raiding is, in fact, not sufficiently important in judicial elections to apply [the Wilson-Pakula Law] to those elections”. Pif. R. F. ¶ 92. Plaintiffs simply assume this problem away by speculating that the law could be amended. But as they cannot guarantee that result, their requested relief would thereby leave political parties with the daunting prospect of having candidates who are active members of other parties crashing their primaries. In addition, even if such an amendment were enacted, it would only limit the damage that would be caused to political party association rights, not eliminate them because primaries are still subject to various types of party raiding even with the Wilson-Pakula Law.

137. For example, the Working Families Party was determined this year to have illegally interfered in the Democratic Party’s primary for Albany County District Attorney – an office that does come within the purview of Wilson-Pakula. *In re: Avella*, Index No. 5945/04 (S. Ct. Albany County October 14, 2004) (Malone, J.). Plaintiffs’ expert, William Lipton testified that as an employee of the Working Families Party he spent substantial time working on that very race on behalf of his preferred candidate, David Soares. In his decision, Judge Bernard J.

Malone Jr. states:

The documentary evidence before the Court established that the WFP did violate Election Law section 2-126 by spending money to promote the candidacy of David Soares in the Democratic Primary for the Office of Albany County District Attorney. That fact is established by the primary election filings of the WFP itself with the Board of Elections and also by the content of the four mailings. . . . The only primary in Albany County in September 2004 for the Office of Albany County District Attorney was the Democratic Primary. If the WFP was not making expenditures in support of a candidate in the Democratic Primary it had no reason to file primary election expenditure disclosure reports with the Board of Elections. Yet, it did so The language of the four mailings received as exhibits in this proceeding makes it explicitly clear to a reasonable person that the WFP was encouraging democrats to vote for Mr. Soares rather than Mr. Clyne. The financial primary election filings of the WFP indicate that it spent \$121,776.91 on

behalf of the promoting Mr. Soares prior to the Democratic Primary. The petitioners are granted an order declaring that these expenditures violated section 2-126 of the Election Law.

In re: Avella, supra, at 12-13.

If primaries replaced judicial conventions in the Second Judicial District, nothing would prevent the Working Families Party from spending their money in the same illegal fashion for Plaintiff Lopez Torres.

2. Ticket Balance Promoted

138. Political parties also have associational rights relating to the ability to field a diverse slate of candidates. Senator Connor described this important goal as “balanc[ing] the ticket.”

When you have multiple vacancies for the same office, that’s your opportunity, you want to balance that ticket. You want to represent diverse constituencies. Long before Hispanics had any real vote in Brooklyn, as I had said before, they were able to elect a Hispanic Supreme Court Judge. It’s in the parties’ interest.

Tr. 2121:8-13 (Connor).

139. While Plaintiffs have attempted to impugn these interests by characterizing the ticket as a “package” assembled by political leaders, they cannot deny that the composition of an entire party slate going into the general election has ramifications to the party beyond that particular judicial election. In the Second Judicial District, which comprises Brooklyn and Staten Island, Senator Connor noted that a candidate for Supreme Court Justice would never win a primary because the voting population is too heavily weighted to Brooklyn. *Id.* 2124:4-22. Yet, a failure to have Staten Island candidates on the ticket will negatively impact the Democratic Party’s ability to win Assembly races because the Staten Island Advance, the dominant local daily newspaper, would hold the Democrats accountable and the Republicans would gain an advantage in the legislative race. *Id.* 2103:2-17. Senator Connor further testified that ethnic

diversity on the judicial slate is also important in assisting other candidates for office to win. *Id.* 2103:25 – 2104:24. The importance of the diversity described by Senator Connor is heightened by the fact that the names of the Senatorial and Assembly candidates appear below those of the Supreme Court candidates on the ballot. *Id.* 2103:22-23. In sum, for a variety of compelling reasons, the associational rights tied to a balanced ticket of candidates for Supreme Court Justice would not be served by replacing conventions with primaries.

C. Plaintiffs Have Failed To Refute That The Convention Promotes Diversity

1. Racial and Ethnic Diversity

140. Defendants have demonstrated that the judicial nominating convention serves both legitimate and compelling state interests by (1) maximizing minority participation in the Supreme Court nominating process and (2) promoting diversity on the bench.

141. As the record evidence shows, judicial conventions maximize the ability of minority groups to cooperate and form cohesive coalitions in an open environment, which promote the interest of their respective communities. In contrast, under a primary system, where voters cannot engage in coordinated bargaining, minority candidates are deprived of the opportunity to build coalitions and are subject to the “tyranny of the majority.” Tr. 1222:18 – 1224:15 (Hechter).

142. Indeed, the testimony adduced at the hearing, including Dr. Hechter’s expert opinions, confirms that logrolling routinely occurs at judicial conventions and that this group decision-making dynamic enhances the vote and power of discrete minority groups and allows all groups to improve their social welfare through mutually beneficial bargaining. Ex. 69 ¶ 37-39 (Hechter report). For example, Defendants fail to refute the testimony of judicial delegates such as William Allen and Emily Giske about the role that judicial conventions, including the logrolling process, have played in providing their minority communities a voice in the

nomination process. Tr. 2032:10-16 (Allen); Tr. 1988:11-14 (Giske). *See* Tr. 1246:18-1247:11; 1258:23-1260:15 (Schiff). Because the convention system enhances the strength of minority groups in a way that other systems cannot, the elimination of the conventions will effectively dilute the voting power of minority communities.

143. Dr. Hechter testified as follows about the harmful effect of primaries on minorities:

[I]n a direct election, if we assume that cultural groups or ethnic groups vote for . . . their own members, if there is a majority of whites in the district, it is quite likely that minorities will never be elected. Because the majority will always be a white majority. So the tyranny of the [majority] is always a problem in direct election. There can be persistent unrepresented minorities who can never win the election, because there aren't enough of them. . . . There are not enough registered voters ever to prevail in that unit. They will always be consistently out voted.

Tr. 1223:8-21 (Hechter).

144. Plaintiffs contend that the convention system fails to promote diversity, but their arguments are flawed as they are based on misleading statistics, disingenuous use of the evidence, reliance on multiple levels of hearsay, and rank speculation.

145. Plaintiffs erroneously accuse Defendants of using an improper standard to measure diversity on the bench. Plf. R. F. ¶¶ 106-109. At the hearing and in their prior submissions, however, Defendants clearly showed that the convention system results in a bench that is diverse in comparison to the pool of minority attorneys eligible to run for Supreme Court. For example, in 2001, 19.2% of the Supreme Court Justices across the State were ethnic minorities, while 8.6% of the total number of attorneys eligible to run for Supreme Court were ethnic minorities. Exhs. NNN, LLL.

146. The same analysis and conclusion holds true at the judicial district level. In the First Judicial District, for example 44.7% of the Supreme Court Justices were ethnic minorities,

while 6.81% of the pool of eligible attorneys were ethnic minority attorneys. Def. F. ¶ 243. *See* Exh. NNN for statistics in other judicial districts.

147. Plaintiffs maintain that the appropriate measure is not the pool of minority attorneys within a judicial district eligible to run for Supreme Court, but the pool of *voting age* minorities within the district. Plf. R. F. ¶¶ 106. Plaintiffs use this measure to conclude that the convention system does a poor job at enhancing diversity, arguing that the percentage of minorities on the bench in a given district is lower than the percentage of voting age minorities in the district. *Id.* ¶¶ 106-108.

148. Plaintiffs' use of this pool is nonsensical and misleading. Moreover, courts have rejected the use of general population statistics where the discriminatory exclusion at issue relates to a position requiring special skills, such as the office of Supreme Court Justice. *See e.g., Mallory v. Harkness*, 895 F. Supp. 1556, 1560 (S.D. Fla. 1995) (rejecting the applicability of statistics comparing the percentage of minorities in the general population to the percentage of minority judges because when special skills are required in a particular job, the relevant statistical pool "for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task").

149. The pool of eligible minority attorneys is the only reasonable basis to measure bench diversity, since only eligible attorneys can serve as Supreme Court Justices. If there were no eligible minority attorneys residing in a given judicial district, then no minorities could be elected to the Supreme Court bench, regardless of the number of non-attorney minorities living in the district. As a concrete example, there were no Asian American attorneys eligible to run for Supreme Court in the Fifth Judicial District in 2001, despite the fact that Asian Americans comprised 1.4% of the voting age population. Exh. NNN. It should come as no surprise that

there were no Asian American Supreme Court Justices in the Fifth Judicial District that year. *Id.* Indeed, the only judicial districts lacking 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.

150. Nonetheless, Plaintiffs insist that use of the voting age population is necessary in order to make a comparison between the effect of the convention and the primary system on nominating minority candidates for Supreme Court. This contention rests on the flawed presumption that over time, under a primary system, the diversity of the Supreme Court bench in a given judicial district will mirror the minority voting age population within that judicial district. Again, Plaintiffs' conclusion is highly suspect.

151. As Dr. Hechter testified, primary elections, which are winner take all, will result in what he calls the "tyranny of the majority." In other words, just as the Republican judicial candidates nearly always lose general elections in the First Judicial District because Democrats represent the majority of voters, so too would minority judicial candidates nearly always lose in a primary in districts where the minority voting age population is insufficient to overcome the majority group's voting strength.

152. Thus, it is patently disingenuous to point to what Plaintiffs claim to be low percentages of minority Justices on the bench as evidence that the convention system fails to enhance diversity, when a direct primary system would likely result in no minority Justices whatsoever at least in eleven of the twelve judicial districts. For example, in the Eighth Judicial District, the minority voting age population totaled only 13.1% in 2000. Exh. NNN. Under a primary system, as Dr. Hechter would conclude and as Mr. Ward confirmed, there would likely be no minorities on the Supreme Court bench, as this percentage is clearly insufficient to ever

win a direct election. Tr. 1345:24:1346:2 (Ward) (testimony that percentages could be zero). But in 2001, the percentage of minority Supreme Court Justices in the Eighth Judicial District was 7.7%, demonstrating how the convention system facilitates the election of qualified minority Justices to the bench.⁴ Exh. NNN.

153. Plaintiffs seek to undermine Dr. Hechter's analysis by attacking his assumption regarding voting patterns. Plaintiffs incorrectly assert, without citation, that Dr. Hechter "admitted" that his assumption that people vote solely along ethnic and racial lines was "deeply flawed." Plf. R. F. ¶ 106. Dr. Hechter *never* made any such a concession. Rather, Dr. Hechter stated that as with any social scientific model, a macro analysis of social conduct is based upon several assumptions that may not be entirely true in every single circumstance. Tr. 1194:8-14 (Hechter). For instance, there may be idiosyncrasies pertaining to a particular election that would not conform to the results of Dr. Hechter's analysis, but this would not undermine his conclusions as a whole. *Id.* Certainly, it is not unrealistic to assume that, "all things being equal," people tend to vote along racial and ethnic lines. *Id.* 1172:2-7.

154. Dennis Ward's testimony echoes Dr. Hechter's conclusions regarding voting patterns. Mr. Ward testified that disastrous consequences would befall minorities in the Eighth Judicial District, if judicial conventions were eliminated in favor of primaries. In the Eighth Judicial District, minorities – specifically African Americans – reside primarily in one of the thirteen Assembly Districts within the judicial district. Tr. 343:23 – 344:1 (Ward). Mr. Ward concluded that if conventions were eliminated, no ethnic minorities would ever win a party nomination, and the Supreme Court would eventually become an entirely white male bench. Tr.

⁴ Notably, the percentages understate the beneficial impact of the convention system because they do not take into account the fact that minorities nominated at the convention can nonetheless lose the general election. In fact, as

1345:24-1346:2 (Ward); Ward Decl. ¶¶ 19-20. In contrast, the convention system has resulted in two African Americans on the Supreme Court bench in the Eighth Judicial District. This number represents a higher percentage of African Americans on the Supreme Court bench than the percentage of African American attorneys (in relation to the pool of all attorneys) in the Eighth Judicial District eligible to run for Supreme Court. Def. F. ¶ 251.

155. Plaintiffs' focus on the minority voting age population also disregards minority party affiliations. As Plaintiffs themselves appeared to concede at the hearing when cross-examining Dr. Hechter, ethnic minorities, such as African Americans, tend to be Democrats. Tr. 1177:17-1178:11 (Hechter); Tr. 2124:9-22 (Connor). To the extent this is true, general election results – *i.e.* the total number of Justices – are a poor measure of the ability of Democratic conventions in Republican-dominated areas in upstate New York to enhance diversity on the bench.⁵

156. Plaintiffs suggest that the 2000 census data should be used in place of the 1990 data to account for the fact that non-minority lawyers are likely to retire or pass away in the intervening 11 years. While it seems doubtful that this effect would outweigh the corresponding influence in the same period of new minority lawyers ineligible to serve on the Supreme Court bench, even Plaintiffs' preferred set of data makes Defendants' case quite convincingly. As Plaintiffs' own chart shows, the percentage of minority Justices statewide, 19.20%, exceeds the total percentage of minority lawyers in 2000, 12.07%, by a wide margin. Plf. R. F. ¶ 108. While

Dennis Ward testified, there was an African-American nominee who lost the general election in the Eighth Judicial District two years in a row. Tr. 1345:12 (Ward).

⁵ Using voter age population is also flawed because it does not consider the number of voter-age minorities that are not enrolled voters.

there are positive and negative variances in each judicial district, these are the normal product of small numbers.

157. Curiously, in attempting to bolster their case that the minority voting age pool is the proper standard for analyzing diversity on the bench, Plaintiffs cite Senator Connor's testimony regarding demographic shifts in the Second Judicial District, arguing that increasing minority voting pools – specifically African Americans – will result in more minorities on the Supreme Court bench under a primary system at the expense of white Italian or Irish Americans. Plf. R. F. ¶ 100. And in a further attack on the convention system, Plaintiffs conclude that “[p]reserving access for these white candidates can hardly be said to serve any legitimate, much less a compelling state interest.” *Id.* Plaintiffs' contention is inconsistent with their attack on Dr. Hechter and misses the point of Senator Connor's testimony.

158. First, Plaintiffs' contention that an increasing minority voter pool will allow minorities to perform better in a primary confirms the very point that they seek to discredit, namely Dr. Hechter's point that voters tend to vote along ethnic and racial lines, to the detriment of minority representation.

159. Second, Plaintiffs fail to understand that the legitimate and compelling interest that the convention serves is providing *all* communities a voice, thus enhancing a diverse bench. Senator Connor's point is that as demographics shift, historically privileged groups in effect become minorities who will be disadvantaged under an open primary system. Tr. 2084:24 – 2085:19 (Connor). Though whites have not historically been recognized as a racial minority group for civil rights purposes, changing demographics in some districts could nonetheless deny whites representation on the Supreme Court bench in a particular district if direct primaries are employed.

160. In any event, Plaintiffs fail to demonstrate that minority Supreme Court candidates would have an equal or better chance of winning judicial district-wide primaries than they would under the current convention system. Instead, Plaintiffs resort to what Dr. Hechter characterized as “cherry picking” examples, which are either outliers or are otherwise completely inapplicable. Tr. 1188:12-1189:3 (Hechter). For example, Plaintiffs rely upon the fact that minorities have occupied high visibility posts such as Manhattan borough president, and New York City Mayor, which, as Dr. Hechter testified, are irrelevant to determining the outcome of a contested lower visibility judicial race. *Id.* 1180:7-1181:11. Plaintiffs also rely on contests in which minorities succeeded only when the white vote split. *Id.* 1218:18-1219:7.

161. In Dr. Hechter’s view, this type of statistic does not impact the overall analysis because single cases are determined by idiosyncratic factors that cancel out in the aggregate. The type of analysis that Dr. Hechter engaged in was a macro analysis, examining a large number of cases and free from skewing idiosyncrasies. *Id.* 1192:12-25.

162. With regard to the disputed example involving two Asian American candidates who occupied county-wide Civil Court seats, regardless of whether those two judges won contested or uncontested primaries for their Civil Court seats, their surnames are not typically identifiable Asian surnames – *i.e.*, Tom and Brandt. Under Dr. Hechter’s theory, even if these two judges ran in contested primaries, they would not have necessarily been disadvantaged in light of their non-Asian sounding surnames.

163. Plaintiffs’ final attempt to show that primaries will promote diversity better than conventions is to compare the number of minority judges on lower court benches with the Supreme Court bench. Plf. R. F. ¶¶ 109-111. Plaintiffs again miss the point. Lower court statistics and Supreme Court statistics are apples and oranges. For example, the New York City

Civil Court bench is comprised of both county-wide seats and seats that were elected from much smaller geographical areas, which may have a higher concentration of minorities. Plaintiffs contend that Defendants have not proven that the smaller districts in fact are populated by more minorities. Plaintiffs have not proven the opposite. In any event, Plaintiffs have not refuted that conventions produce far greater diversity when comparing the results of Supreme Court races in geographically equivalent regions. For example, out of the sixteen elected countywide Civil Court seats in Manhattan, 31.2% are occupied by ethnic minorities. Def. F. ¶ 244.

164. On the subject of small numbers, Plaintiffs make the counterintuitive argument that the convention system does not foster diversity outside of New York City because it produced *more* minority judges on the Supreme Court bench (5/171 or 2.92398%) than a direct primary did on the county court bench (2/128 or 1.5625%) Plf. R. F. ¶ 109. The best that may be said as far as Plaintiffs are concerned is that these numbers are too small to support any meaningful conclusions, but if any are to be drawn they are quite favorable to the convention system. On a percentage-wide basis (without rounding as Plaintiffs do to their benefit), the convention system yields 187% of the minority representation on the bench as compared to the direct primary system.

2. Gender Diversity

165. In attempting to show that the convention system fails to effectively promote gender diversity, Plaintiffs selectively rely on the double hearsay in the May 1996 and April 11, 2002 reports of the New York State Judicial Committee on Women in the Courts (“1996 NYJWC Report” and “2002 NYJWC Report,” respectively). Plf. R. F. ¶¶ 114-115.

166. Plaintiffs ignore, however, that the overwhelming sentiment expressed in the 2002 NYJWC Report was that women were making remarkable strides in the legal profession, including on the bench:

The increase in the number of women practicing law over the past 15 years is striking, and many respondents from various parts of the state and varying kinds of practices remarked on the growing and visible presence of women at the bar and on the bench as well as the effects of critical mass of women in the profession.

Exh. 90 at 33.

167. Plaintiffs also ignore the material in the 2002 NYJWC Report that discusses the lack of women attorneys upstate until recently – a particularly relevant fact in view of the 10-year admission requirement to run for Supreme Court Justice. As a participant in the NYJWC’s survey stated:

When I graduated with a class of 125 from Albany Law School, the group included three women. Today, I am informed the number of women students is greater than the number of men. When I first began practicing law in [Warren] County, there were one woman partner and two associates in practice here. Today there are approximately 100 male attorneys . . . and approximately 25 female attorneys.

Id. As noted above, with respect to African-American candidates, to the extent that women are disproportionately members of the Democratic Party, general election results in Republican-dominated areas such as those in upstate New York will understate the effect of the convention system’s enhancement of gender diversity.

168. Statewide female Supreme Court Justices in 2001 comprised approximately 17% of the total. When properly compared with the total percentage of female attorneys eligible to run for Supreme Court, this statistic shows that the convention has been effectively promoting gender diversity on the Supreme Court bench. This is also true on a district by district basis:

JUDICIAL DISTRICT	PERCENTAGE OF FEMALE ATTORNEYS (1990)	PERCENTAGE OF WOMEN ON THE NEW YORK SUPREME COURT (2001)
1	34.5%	42%
2	35.14%	21%

3	28.2%	7%
4	21.4%	0%
5	16.2%	5%
6	18.6%	8%
7	18.7%	15%
8	17.9%	16%
9	18.9%	9%
10	20.4%	14%
11	29.9%	16%
12	39.6%	27%
TOTAL FOR STATE	27.3%	18%

169. As for Plaintiffs' attack on Emily Giske's credibility, Ms. Giske's failure to know diversity statistics in no way discredits her testimony about her personal experience participating in the nomination of very diverse slates of Supreme Court candidates at the judicial convention – slates that included an increasing number of women. Tr. 1988:6-14 (Giske).

3. Economic Diversity

170. Plaintiffs also argue that Defendants have not shown that the convention system does a better job of promoting economic diversity than other systems. In doing so, Plaintiffs note that Defendants have not provided any statistical basis to establish that Supreme Court candidates nominated through primaries are inevitably wealthier. But no such statistical evidence exists, since for the last 80 years, Supreme Court Justices have been nominated by convention. And using statistics relating to other offices, such as Civil Court, would not be a fair

comparison, as the office of Supreme Court Justice is a distinct and more prestigious post. Tr. 2031:16-2014:5; 2015:19-2016:1 (Giske).

171. Notwithstanding the absence of statistics, the abundance of evidence clearly shows that a convention system affords opportunities for individuals who are not wealthy, including incumbents, to compete for the Supreme Court nomination. Tr. 2013:23-2014:5 (Giske). A primary system would deter Supreme Court candidates, including incumbents, from running. Tr. 1776:22-23 (Freedman); Tr. 1828:18-1829:10 (Gangel-Jacob).

172. Indeed, the overwhelming evidence, including testimony from individuals with extensive political experience, demonstrates that a primary campaign would be extremely costly. Tr. 2141:10-2142:12 (Connor); Tr. 1587:4-12 (Kellner); Tr. 1347:17-1348:2 (Ward).

173. Given the enormous costs, it is safe to conclude that a primary system would have the unfortunate effect of encouraging attorneys to make campaign contributions to incumbents before whom they appear. Notably, the Feerick Commission, which Plaintiffs heavily rely upon in this litigation, determined that this was the chief concern among the public. Exh. 78 at 23. The convention system alleviates this concern.

4. Geographic Diversity Is Promoted

174. Plaintiffs' arguments regarding geographic diversity fare no better. Just as Plaintiffs fail to appreciate the tyranny of the majority with respect to racial diversity, they fail to understand how this principle applies to geographic diversity. Plaintiffs point to the statistics in certain judicial districts showing smaller percentages of Justices who hail from less populated counties. Plf. R. F. ¶123. What Plaintiffs fail to grasp is that under the tyranny of the majority principle, there would be *no* Supreme Court Justices from smaller counties in judicial districts where one or two counties have the overwhelming population if Supreme Court nominees were

selected through a primary system. As Dr. Hechter stated in his report, it is “child’s play” to determine the results in a direct primary election across judicial districts. The counties with the largest populations would always win, depriving “voters in the smaller rural counties [with] no nominees at all – and hence no representation – on the Supreme Court.” Exh. 69 ¶ 26.

175. Only the logrolling process, which Dr. Hechter describes in detail, can offset the effect of the tyranny of the majority by allowing representative delegates to bring their interests to the table at the convention. Exh. 69 ¶¶ 37-40; 48-49; Tr. 1224:1-7 (Hechter). The testimony of those directly involved in judicial politics confirms this conclusion.

176. Dennis Ward, from the Eighth Judicial District, testified that the convention system offsets the dominant size of Erie County. Def. F. ¶¶ 254-257. While Plaintiffs argue that the number of non-Erie County Justices is miniscule, Plf. R. F. ¶ 123, Mr. Ward testified that without the convention system, the number of non-Erie County Justices would be zero. Ward Decl. ¶ 21. Plaintiffs’ use of the statistics is misleading in another respect. Since the convention system affords the opportunity for these smaller areas to participate only in the nominating process, Supreme Court nominees must still face a general election, and there is no guarantee that a non-Erie County nominee will prevail at the general election.

177. Likewise, Senator Connor testified that under a primary system, Staten Island would be denied a voice on the Supreme Court bench in the Second Judicial District, given its small population in relation to the rest of the district. Def. F. ¶ 258. The convention system, however, has allowed the Supreme Court to include a number of Justices from Staten Island. Def. F. ¶ 258.

178. In the case of the First Judicial District, the convention system provides geographic diversity along neighborhood lines. As the testimony of William Allen and Emily

Giske aptly demonstrate, the convention provides their respective communities a voice in the nominating process. Def. F. ¶ 238. For example, the 2002 convention resulted in a slate of incredibly diverse nominees hailing from neighborhoods spanning across New York County. Exh. 39B (Certificate of Nomination of the Republican Party Judicial District Convention for the First Judicial District, showing cross-nominations of the Democratic slate).

D. The Convention System Provides For Public Accountability, Incumbency and Judicial Independence

179. Plaintiffs' decry the indisputable fact that the convention system ultimately turns on the decisions of the rank and file members of the party as to who shall be their representatives in choosing the nominees at the convention. The statute preserves to the enrolled voters through a primary, the right to elect their delegates. When the voters are dissatisfied, they have the right to cast out their delegates. Def. F. ¶¶ 100, 285; Tr. 1588:8-1589:3, Tr. 1671:23-1672:8, Tr. 1674:18-22 (Kellner); Tr. 2037:23-2038:5 (Allen). That there are few such challenges does not affect the contestability of the choice of delegates. Tr. 790:5-8 (Schotland). Plaintiffs' case turns in part on this legally insupportable point. At best, Plaintiffs want a better mousetrap; they cannot support the legal conclusion that the system deprives party members of their say.

180. At the end of the day, Plaintiffs' complaints of being disenfranchised fall flat. Stephen Banks, C. Alfred Santillo, Lili Ann Motta, John Carroll, Susan Loeb and David Lansner all complain that they have been deprived of their "constitutional right to choose [their] party's candidates." Compl. ¶¶ 11-18. What they mean of course, is not the right to choose the winning candidate, but the right to participate in the selection process. Contrary to these Plaintiffs' assertions, the evidence adduced at the hearing shows that they have ample opportunity to participate meaningfully in the delegate convention process. Each of these Plaintiffs, for example, can vote for their delegates, club leaders, district leaders and party leaders. Each can

vote in the general election. These Plaintiffs can also run for delegates, join clubs, and become leaders themselves. They can participate within the party's traditional guard or as reformers. The system, in other words, is open and accountable. It is up to individual party members whether and how they avail themselves of that openness and accountability. If these Plaintiffs' preferred candidates do not prevail, that does not mean that the system is unaccountable or the voters disenfranchised.

181. In their quest to change the system, Plaintiffs inject into it new and different issues: the effect of money in primary campaigns, the problems confronting sitting judges having to appeal for money, and, ultimately, they place at risk the very fabric of judicial independence as every judge in a direct primary system would be forced to consider the effect of his or her decisions on their electability. For any judge faced with a decision that may have wide public impact – *e.g.*, ruling on housing or property rights; sentencing a criminal defendant viewed in the community as wrongly convicted; enjoining a parade or protest; indeed, any public issue – the deliberation can become dangerously personal. Plaintiffs' attempt to turn the judiciary into the peoples' elected representatives tears at the fabric of judicial independence.

182. Given the well-known scrutiny of the tabloid press in New York City, in particular, every judicial decision becomes fodder for the press to explore, expose and denigrate. Judges seeking election to a higher court or re-election are put on public trial, not for their judicial temperament or the quality of their judicial skills in managing a trial or the writing of erudite opinions, but for the outcome of their decisions. One need only remember in recent times the demand for the impeachment of Judge Harold Baer in the Southern District of New York, which this Court may take judicial notice of, as an example of what will be wrought by a judiciary that is to be judged by the press and the political establishment as grist for

demagoguery. Can any judge or Justice engage in decision-making without looking over their shoulders at the personal consequences of their actions? Tr. 1828:18-1829:10 (Gangel-Jacob); Tr. 1772:11-1773:11 (Freedman).

183. Plaintiffs spend a number of pages of their reply extolling the virtues of the lead Plaintiff, Judge Lopez Torres. Plf. R. F. ¶¶ 53-61. Remarkably, they attribute the fact that OCA rejected her several applications to become an Acting Supreme Court Justice to politics, *i.e.*, court administrators are not unaware of the county leaders. *Id.* ¶ 57. This casual indictment of the State Office of Court Administration cannot go unanswered. A passing response by Mr. Kellner, purely hearsay and speculation, is resurrected to question OCA's refusal, on the merits, to elevate Judge Lopez Torres. Plaintiffs thus have implied that the Court system – Chief Judge Judith Kaye, Chief Administrative Judge Jonathan Lippman and their Administration – acted solely to avoid some perceived political disadvantage that would follow from her elevation. (How then can they explain the elevation of then Judge Gangel-Jacob to Acting Supreme Court Justice after she had directly challenged the candidate of the New York County Democratic Leader in a Civil Court primary, a leader who is indeed formidable as Chairman of the Assembly Ways and Means Committee and who publicly stated (allegedly) that Judge Gangel-Jacob would never go to the Supreme Court?) Def. F. ¶ 171; Tr. 1801:7-18, 1807:3-12 (Gangel-Jacob). Plaintiffs' insinuation was reckless. OCA was in the best position to assess fairly and objectively whether Judge Lopez Torres merited appointment to the Supreme Court and when asked by her on several occasions to do so, they declined. Def. F. ¶ 189; Tr. 603:12-25; 646:19-647:13 (Lopez-Torres).

184. Plaintiffs' solution to their perceived injury is to create a system that will reward the candidate with wealth or access to it. As the principal source of financial support for judicial

campaigns will inevitably be from those who wish to influence the outcome of judicial decision – making – *e.g.*, attorneys, insurance companies and special interest groups – the public perception of corruption in the judicial system will worsen. Plaintiffs’ answer is public financing – a proposal with a price tag which will not be welcomed by the electorate and restrictions that will be eschewed by candidates who can afford their own financing. Plaintiffs’ plan compares unfavorably to the testimony of Justice Gangel-Jacob, who spent just \$25,000 over four years to win the nomination, and Justices Abdus-Salaam, Freedman, Schlesinger, and Lunn, who also spent comparably modest sums. Tr. 1826:7-16 (Gangel-Jacob); Tr. 1887:10 – 1888:6 (Abdus-Salaam); Tr. 1765:20-23; Tr. 1770:17 – 1771:18 (Freedman); Schlesinger Decl. ¶ 11; Dep. Tr. 59: 17-21 (Lunn).

E. There Is No Proof That Plaintiffs’ Alternative Methods For Serving State Interests Would Be Effective

185. In an effort to discredit the benefits of the convention system, Plaintiffs recite an array of very general, unspecific alternatives that they claim would more effectively address the interests that the convention system serves. Plf. R. F. ¶¶ 119-121, 127. Plaintiffs, however, have offered no empirical evidence to show that any of these measures would be more effective and efficient in addressing all of the interests served by the convention system. Indeed, each proposal appears to address only a limited goal, whereas the convention system addresses at once a variety of interests. Further, because these sweeping proposals require Legislative action, Plaintiffs do not and cannot know whether the Legislature would pass, or even consider such sweeping measures. Moreover, Plaintiffs fail to consider whether such enactments would have broader ramifications beyond their stated purpose, including unintended consequences. To illustrate the point more clearly:

- Plaintiffs, citing Dr. Hechter, contend that a proportional representation model that has been adopted in other counties or a cumulative voting model that has

been adopted to run corporations would better serve diversity. Plf. R. F. ¶ 121. While Dr. Hechter discussed these concepts in the abstract, Plaintiffs do not point to a single State that uses this method of voting to nominate candidates for an office such as Supreme Court Justice. Plaintiffs have also offered no evidence that they would stand any realistic chance of being enacted into law. Thus, the Court is left with only one real question relating to diversity: does it better serve minority voter and candidate interests to have twelve judicial district conventions or twelve judicial district primaries? The competent evidence conclusively supports the continuation of judicial district conventions.

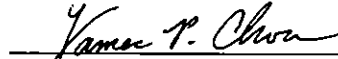
- Plaintiffs also suggest that redrawing the judicial districts so that they are smaller would enhance diversity on the bench. Plf. R. F. ¶¶ 119-120. Again, Plaintiffs have no cognizance of whether such a measure would or could pass in the State Legislature. Plaintiffs also fail to propose how the districts would be redrawn (e.g., along racial lines, Assembly District lines, neighborhood lines, etc.). Further, Plaintiffs fail to consider what broader ramifications redistricting might have, including triggering scrutiny under the Voting Right Act and the need for pre-clearance from the Department of Justice.
- To address geographic diversity, Plaintiffs propose that the State require specific judicial seats be elected from among the residents of specific counties. Plf. R. F. ¶ 127. Or, Plaintiffs assert, if residence during a Justice's term is the goal, the State could enact a county residence requirement. *Id.* Plaintiffs also claim that the State could ensure that each and every county could elect one of its own or keep a Justice in residence by making each county a separate judicial district. *Id.* Again, there is no way of knowing whether the Legislature would pass these measures. Further, these proposals, which in effect are a new residency barrier, would limit the pool of Supreme Court candidates, and would collide with the current Individual Assignment System (IAS) under which judges can be assigned anywhere within their local regional area.
- As for the interest of protecting incumbents and otherwise mediating the ill effects of political campaigning on the judiciary, Plaintiffs loosely propose public campaign financing without offering any specifics, and assume that the Legislature can enact a public financing system within the 90 days demanded in Plaintiffs' prayer for relief.

CONCLUSION

For the foregoing reasons and the reasons set forth in Defendants' Sur-Reply Conclusions of Law, the Court should deny Plaintiffs' Motion for a Preliminary Injunction.

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Respectfully submitted,



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