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BY ELECTRONIC FILING

Honorable John Gleeson
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

February 3, 2006

Re: Lopez Torres et al. v. New York State Board of Elections (CV04-1129 (JG))

Dear Judge Gleeson:

We write on behalf of plaintiffs in this matter as per your Memorandum & Order concerning the petitioning requirements that would apply to the judicial districts for primary elections. In this letter, we first answer the question the Court posed in footnote 44 of the opinion—namely, what would the petitioning requirements be if the Court were to apply N.Y. Elec. L. § 6-136(2)? We show that the application of section 6-136(2) would produce anomalous and unintended consequences, and that a better guide to the Legislature's intent for Supreme Court candidates is the equivalent petitioning requirements for independent candidates under Section 6-142. We therefore respectfully urge the Court to adopt the petitioning requirements in Section 6-142 as an interim measure pending legislation.

1. Application of § 6-136(2)(j) and (k) Produces Anomalous, Unintended Results. It is safe to say that, in drafting the current provisions of N.Y. Elec. L. § 6-136(2)(k) and (j), the Legislature did not contemplate that these provisions would be applied to petitioning requirements for major-party candidates in the state's judicial districts. As a result, if the Court were to apply Section 6-136(2) to determine the signature requirements for Supreme Court, we respectfully submit that the statute would create unintended and irrational results.

Set forth below is a summary chart showing the enrolled major-party voters in each judicial district, and the lowest signature requirement permitted by Section 6-136(2). (We attach a spreadsheet as Attachment A that shows how these figures were calculated.)

| District | Signatures under § 6-136(2) | Enrolled Republicans | Enrolled Democrats |
|----------|-----------------------------|----------------------|--------------------|
| 9 | 8,500 | 377,901 | 486,858 |
| 2 | 7,500 | 211,551 | 1,021,290 |
| 8 | 6,500 | 352,245 | 475,030 |
| 5 | 6,000 | 257,306 | 197,937 |
| 7 | 5,500 | 315,364 | 276,347 |
| 3 | 5,500 | 168,850 | 216,899 |
| 4 | 5,000 | 220,506 | 145,822 |
| 6 | 4,500 | 201,730 | 159,598 |
| 1 | 4,000 | 127,605 | 716,557 |
| 10 | 4,000 | 701,164 | 604,064 |
| 11 | 4,000 | 154,681 | 666,729 |
| 12 | 4,000 | 53,678 | 504,639 |

We calculated these figures with the understanding that § 6-136(2)(j) and (k) limit the number of signatures required in a particular jurisdiction so that the Section's blanket rule of 5% of enrolled voters does not become onerous when applied. The text states that the number of signatures "need not exceed the following limits." Accordingly, where the Section could be read to produce different possible limits on the requisite signatures, the statute appears to require the candidate to satisfy the computation that imposes the least burden on candidates and voters ("need not exceed"). For example, in the Second Judicial District, the statute could variously require 7,500 signatures (under subsection (j)), 8,000 signatures (applying subsection (k) to the two counties within the Judicial District), or 12,000 signatures (applying subsection (k) to the 24 Assembly Districts within the Judicial District). In some circumstances the figures are large enough that they suggest burdens of constitutional dimension, moreover, and the statute should be interpreted to avoid raising such questions. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr.*, 485 U.S. 568, 575 (1988).

The attached chart lists the relevant detail for each of the 12 judicial districts. The numerical requirements that would follow from the application of Section 6-136(2)(i) (via subsection (k)) are listed in the first set of columns; those that would follow from the application of Section 6-136(2)(d), (e), and (f) (via subsection (k)) are listed in the second set of columns; and, within the City of New York, those that would follow from the application of Section 6-136(2)(j) in the final column. The final column provides the signature requirements that we respectfully submit should be applied if the Court determines to use Section 6-136(2). In particular, these are:

- Outside New York City:** As the chart shows, the "aggregate of the signatures required for the [assembly districts] or parts of [assembly districts] so contained" within each judicial district outside of New York City (except the 10th) is lower than the aggregate of the signatures required for the counties within those judicial districts. In the 10th Judicial District, the aggregate of the signatures required for the two counties within that District is far lower than the aggregate of those required for the 21 assembly districts within the District. As noted, we respectfully submit that Section 6-136 requires that the lower limit be chosen in each case, whether that limit is drawn from subsection (2)(i) or from subsections (2)(d)-(f).

- **Within New York City:** As the Court noted in the opinion, Judicial Districts 1, 11, and 12 would fall within Section 6-136(2)(b), and require no more than 4,000 signatures. Pursuant to Section 6-136(2)(j), however, the 2nd Judicial District would fall within the “larger [political] subdivision” that is New York City. As citywide offices within New York City require no more than 7,500 signatures (*see* § 6-136(2)(a)), we respectfully submit that the 2nd Judicial District should require no more than 7,500 signatures, rather than the 8,000 signatures that would be reached by simply aggregating the requirements for Richmond and Kings Counties. *See* § 6-136(2)(j).

Still, the application of these figures produces anomalous results. Aside from the Second, in no judicial district outside of New York City is the required number of signatures lower than for a district within New York City, even though many of the “upstate” districts have substantially smaller populations spread over vastly larger geographic areas.

In the 10th Judicial District, the most populous of the judicial districts outside New York City, with nearly two million registered voters in only two counties, a candidate need only obtain 4,000 signatures, which is less than two-thirds of one percent of the enrolled voters of either major party. The 9th Judicial District, also adjacent to New York City, has approximately 1.2 million registered voters—including roughly 377,000 Republicans and 486,000 Democrats. If Section 6-136 were applied, a candidate in that district would need to obtain 8,500 signatures, approximately 1.75% of the enrolled Democratic voters and 2.25% of the enrolled Republican voters, many of whom are spread through the district’s northern counties.

Comparisons with the signature requirements of other offices also raises equal protection concerns about application of section 6-136(2)(k). For example, the statutory signature limit for congressional districts is 1,250. N.Y. Elec. L. § 6-136(2)(g). Congressional District 18, which contains parts of Rockland and Westchester Counties, contains 183,317 enrolled Democratic voters.¹ A candidate for that office would need to secure the signatures of two-thirds of one percent (0.66%) of the enrolled Democrats, as compared to the 1.75% needed for a candidate for Supreme Court hailing from the same locality.

In short, if Section 6-136(k) is used to set the signature requirements for Supreme Court, in certain cases the signature requirements could be so onerous as to raise constitutional concerns not only as burdens on a candidate’s First Amendment rights but also as irrationally high when compared under the Equal Protection Clause with those for comparable offices within the State. *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979).

They would also be irrationally high when compared with the limits set out in section 6-142, to which we now turn.

2. Application of § 6-142. We respectfully submit that a better source for determining the necessary “modicum of support” that candidates must demonstrate through petitioning can be found in Section 6-142, which sets forth the signature requirements for independent candidates for Supreme Court and other offices.

In Section 6-142(b-1), the Legislature established that the signature requirement for the 2nd Judicial District is 4,000 signatures—the same as for other judicial districts within New York City, and substantially lower than the “catch all” figure of 7,500 called for by section 6-

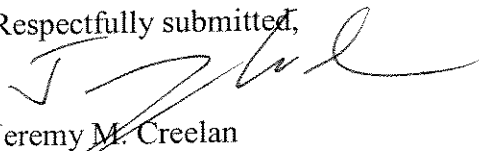
¹ *See* http://www.elections.state.ny.us/enrollment/congress/congress_nov05.htm.

136(2)(j).² This provides the most direct evidence of the Legislature's intent for the signature requirements for the office of Supreme Court Justice. In the same vein, Section 6-142 limits all of its signature requirements for political units outside New York City to a maximum of 3,500 signatures—far below the requirements that would be imposed by application of 6-136(2)(k)'s “catch all” provision. It should also be noted that the signature requirements for independent candidates, in all but one instance, equal or exceed those for major party candidates, as shown in the attached chart. *See* Attachment B.

Given that the Legislature has not generally imposed greater petitioning burdens on major party candidates than on independent candidates, Section 6-142 strongly suggests that the requirements for Supreme Court should be no greater than 3,500 per judicial district outside New York City and 4,000 per judicial district within New York City. This figure would, we submit, best comport with the directly expressed intent of the Legislature on petitioning for the office of Supreme Court Justice, would avoid imposing onerous burdens on candidates in certain districts, and would avoid anomalous results.

We also respectfully seek the Court's ruling or guidance on plaintiffs' request to amend their complaint to add a prayer for nominal damages, submitted by letter dated November 16, 2005. If possible, we wish to ensure that, if there is an appeal of this Court's preliminary injunction order, that request has been resolved in advance of consideration by the Court of Appeals.

Respectfully submitted,



Jeremy M. Creelan

cc: All Counsel of Record (via email)

² Although the judicial district is not named, there are no other offices “to be filled by all the voters of any two counties in [New York City].” N.Y. Elec. L. § 142(b-1).

Attachment A
Lopez Torres et al. v. New York State Board of Elections (CV04-1129 (JG))

| JD | County | ADs* | Population | Enrolled Voters | | 6-136(2) 5% Blanket Rule | | 6-136(2)(i) Method | | 6-136(2)(b)/(d)(e)(f) Method | | 6-136(2)(i) Method | Lowest Requirement under 6-136(2) | | |
|-----|-------------|----------|------------|-----------------|------------|--------------------------|------------|--------------------|---------|------------------------------|--------|--------------------|-----------------------------------|-------|-------|
| | | | | Republican | Democratic | Republican | Democratic | Method | Method | Method | Method | | | | |
| 1st | New York | 12 | 1,537,195 | Total | 1,083,330 | 127,605 | 716,557 | 6,380 | 35,828 | 6,000 | 4,000 | 4,000 | 4,000 | | |
| | | | | 24 | 2,909,054 | 211,551 | 1,021,290 | 10,578 | 51,065 | 12,000 | 8,000 | 7,500 | 7,500 | 7,500 | |
| | | | | | 2,465,326 | 131,209 | 904,075 | | | | 4,000 | | | | |
| 2nd | Richmond | | 443,728 | 262,249 | 80,342 | 117,215 | | | | | | | | | |
| | | | | 11th | Queens | 18 | 2,229,379 | 1,059,371 | 154,681 | 666,729 | 7,734 | 33,336 | 9,000 | 4,000 | 4,000 |
| | | | | 12th | Bronx | 11 | 1,332,650 | 680,661 | 53,678 | 504,639 | 2,684 | 25,232 | 5,500 | 4,000 | 4,000 |
| 3rd | Albany | 11 | 841,689 | 592,242 | 168,850 | 216,899 | 8,443 | 10,845 | 5,500 | 8,000 | 2,000 | 5,500 | | | |
| | Columbia | | 294,565 | 213,321 | 50,169 | 101,888 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Greene | | 63,094 | 43,815 | 14,466 | 12,840 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Rensselaer | | 48,195 | 32,658 | 14,314 | 7,366 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Schoharie | | 152,538 | 102,637 | 29,369 | 27,971 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Sullivan | | 31,582 | 18,659 | 7,908 | 5,023 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Ulster | | 73,966 | 59,958 | 17,800 | 23,315 | | | | 1,000 | 1,000 | 1,000 | | | |
| | | | | 177,749 | 121,194 | 34,824 | 38,496 | | | | 1,000 | 1,000 | 1,000 | | |
| | 4th | Clinton | 10 | 716,950 | 529,693 | 220,506 | 145,822 | 11,025 | 7,291 | 5,000 | 9,500 | 1,000 | 5,000 | | |
| | | Essex | | 79,894 | 49,351 | 17,496 | 17,779 | | | | 1,000 | 1,000 | 1,000 | | |
| | Franklin | | 38,851 | 27,816 | 14,277 | 6,744 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Fulton | | 51,134 | 29,293 | 11,489 | 10,453 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Hamilton | | 55,073 | 32,524 | 18,181 | 7,618 | | | | 1,000 | 500 | 500 | | | |
| | Montgomery | | 5,379 | 5,218 | 3,375 | 1,044 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Saratoga | | 49,708 | 32,682 | 12,585 | 11,587 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Schenectady | | 111,931 | 149,071 | 69,246 | 35,203 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Warren | | 200,635 | 98,289 | 31,878 | 35,562 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Washington | | 63,303 | 44,407 | 22,971 | 10,186 | | | | 1,000 | 1,000 | 1,000 | | | |
| | | | 61,042 | 61,042 | 19,008 | 9,646 | | | | 1,000 | 1,000 | 1,000 | | | |
| 5th | Herkimer | 12 | 1,019,291 | 636,078 | 257,306 | 197,937 | 12,865 | 9,897 | 6,000 | 7,000 | 1,000 | 6,000 | | | |
| | Jefferson | | 64,427 | 41,950 | 21,476 | 11,269 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Lewis | | 111,738 | 64,233 | 28,780 | 18,043 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Oneida | | 26,944 | 18,704 | 10,179 | 4,823 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Onondaga | | 235,469 | 124,334 | 51,986 | 42,843 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Oswego | | 458,336 | 297,650 | 102,476 | 99,253 | | | | 2,000 | 2,000 | 2,000 | | | |
| | | | | 122,377 | 89,207 | 42,409 | | | | | 1,000 | 1,000 | 1,000 | | |
| | 6th | Broome | 9 | 771,629 | 493,421 | 201,730 | 159,598 | 10,087 | 7,980 | 4,500 | 10,500 | 1,000 | 4,500 | | |
| | | Chemung | | 200,536 | 131,078 | 52,369 | 46,814 | | | | 1,000 | 1,000 | 1,000 | | |
| | | Chenango | | 91,070 | 56,228 | 24,467 | 17,656 | | | | 1,000 | 1,000 | 1,000 | | |
| | Cortland | | 51,401 | 31,812 | 14,863 | 8,189 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Delaware | | 48,599 | 30,632 | 12,070 | 9,433 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Madison | | 48,055 | 32,795 | 15,600 | 8,792 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Otsego | | 69,441 | 44,739 | 19,478 | 11,795 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Schuyler | | 61,676 | 35,104 | 14,829 | 10,674 | | | | 1,000 | 500 | 500 | | | |
| | Seneca | | 19,224 | 13,993 | 5,922 | 3,939 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Tioga | | 33,342 | 21,198 | 9,098 | 6,568 | | | | 1,000 | 1,000 | 1,000 | | | |
| | Tompkins | | 51,784 | 33,636 | 16,228 | 8,961 | | | | 1,000 | 1,000 | 1,000 | | | |
| | | | 96,501 | 62,206 | 16,806 | 26,777 | | | | 1,000 | 1,000 | 1,000 | | | |

Attachment A
Lopez Torres et al. v. New York State Board of Elections (CV04-1129 (JG))

| JD | County | ADs* | Population | Enrolled Voters | | 6-136(2) 5% Blanket Rule | | 6-136(2)(f) Method | 6-136(2)(b)/(d)(e)(f) Method | 6-136(2)(i) Method | Lowest Requirement under 6-136(2) |
|-------------|--------------|---------|------------|-----------------|------------|--------------------------|------------|--------------------|------------------------------|--------------------|-----------------------------------|
| | | | | Republican | Democratic | Republican | Democratic | | | | |
| | | | Total | Republican | Democratic | Republican | Democratic | | | | |
| 7th | Cayuga | 11 | 1,232,312 | 828,967 | 315,364 | 276,347 | 13,817 | 5,500 | 8,500 | | 5,500 |
| | Livingston | | 81,963 | 51,708 | 20,486 | 17,040 | | | 1,000 | | |
| | Monroe | | 64,328 | 41,485 | 18,757 | 11,107 | | | 1,000 | | |
| | Ontario | | 735,343 | 463,522 | 154,245 | 170,935 | | | 2,000 | | |
| | St. Lawrence | | 100,224 | 70,861 | 29,852 | 20,197 | | | 1,000 | | |
| | Steuben | | 33,342 | 65,642 | 25,429 | 23,556 | | | 1,000 | | |
| | Wayne | | 98,726 | 60,429 | 32,375 | 15,110 | | | 1,000 | | |
| | Yates | | 93,765 | 60,189 | 26,265 | 14,692 | | | 1,000 | | |
| | | | | 24,621 | 15,131 | 7,955 | 3,710 | | | 500 | |
| 8th | | 13 | 1,591,708 | 1,091,144 | 362,245 | 475,030 | 17,612 | 6,500 | 9,000 | | 6,500 |
| | Allegany | | 49,927 | 28,097 | 14,767 | 7,101 | | | 1,000 | | |
| | Cattaraugus | | 83,955 | 53,717 | 21,531 | 18,315 | | | 1,000 | | |
| | Chautauqua | | 139,750 | 90,217 | 31,036 | 31,360 | | | 1,000 | | |
| | Erie | | 950,265 | 682,309 | 191,247 | 333,881 | | | 2,000 | | |
| | Genesee | | 60,370 | 37,790 | 17,206 | 10,104 | | | 1,000 | | |
| | Niagara | | 219,846 | 145,575 | 51,052 | 60,810 | | | 1,000 | | |
| | Orleans | | 44,171 | 27,406 | 12,977 | 6,727 | | | 1,000 | | |
| | Wyoming | | 43,424 | 26,033 | 12,429 | 6,732 | | | 1,000 | | |
| | | | 17 | 1,927,474 | 1,242,052 | 377,901 | 486,858 | 24,343 | 8,500 | 9,000 | |
| Dutchess | | 280,150 | 174,716 | 59,185 | 53,885 | | | 2,000 | | | |
| Orange | | 341,367 | 210,238 | 80,158 | 69,744 | | | 2,000 | | | |
| Putnam | | 95,745 | 66,780 | 24,726 | 18,584 | | | 1,000 | | | |
| Rockland | | 286,753 | 179,281 | 45,534 | 81,346 | | | 2,000 | | | |
| Westchester | | 923,459 | 611,037 | 168,298 | 263,299 | | | 2,000 | | | |
| 10th | | 21 | 2,753,913 | 1,842,884 | 701,164 | 604,064 | 35,058 | 10,500 | 4,000 | | 4,000 |
| | Nassau | | 1,334,544 | 917,849 | 358,848 | 324,406 | | | 2,000 | | |
| | Suffolk | | 1,419,369 | 925,035 | 342,316 | 279,658 | | | 2,000 | | |

* Includes Portions of ADs
 Sources: Enrolled Voters by County: http://www.elections.state.ny.us/enrollment/county/county_nov05.htm
 Population by County: <http://quickfacts.census.gov/qfd/states/36000.html>
 ADs or Portions of ADs: Memorandum & Order, p. 12

Attachment B

| Office | § 6-136 | § 6-142 |
|------------------------------------|----------------|----------------|
| Statewide | 15,000 | 15,000 |
| NYC Citywide | 7,500 | 7,500 |
| NYC Countywide | 4,000 | 4,000 |
| County outside NYC (over 250,000) | 2,000 | 1,500 |
| County outside NYC (up to 250,000) | 1,000 | 1,500 |
| County outside NYC (up to 25,000) | 500 | 1,500 |
| Municipal Court District | 1,500 | 3,000 |
| City Council District | 900 | 2,700 |
| Congressional District | 1,250 | 3,500 |
| State Senatorial District | 1,000 | 3,000 |
| Assembly District | 500 | 1,500 |