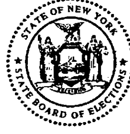

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February 8, 2006

Hon. John Gleeson
United States District Court
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

RE: *Lopez Torres v. State Board of Elections*
Index No. **04-CV-1129**

Dear Judge Gleeson:

I am writing on behalf of the defendants and defendant-intervenors in response to the February 3, 2006 letter of Jeremy M. Creelan, Esq., regarding plaintiffs' proposal for the appropriate petitioning requirements for primary elections for Supreme Court Justices. Plaintiffs ask this Court to adopt the signature requirements contained in Election Law 6-142 governing *independent* candidates for the *general* elections rather than the provisions under Election Law 6-136 governing *primary* elections.

Plaintiffs' proposal should be rejected. To the extent that Supreme Court Justices are nominated through a primary election, Election Law 6-136 must govern such election. The signature requirements set forth in Election Law 6-136 clearly govern all primary elections in New York State, including primaries for the office of Supreme Court Justice. Accordingly, unless Election Law 6-136 is viewed as unconstitutional, it must be followed here. Indeed, Election Law 6-136(2), which provides for the *lesser* of 5% of enrollment in a geographic subdivision or a fixed capped amount, has already survived constitutional scrutiny. *Prestia v. O'Connor*, 178 F.3d 86, 87 (2d Cir. 1990) ("the general rule that a ballot access requirement of signatures from five percent of the relevant voter group ordinarily does not violate constitutional rights.") That the percentage signature requirements for Democrats and Republicans are different is not based upon a statutory bias, but result from the fact that the political parties have differing enrollment totals in each judicial district. Constitutional arguments based upon disparate numbers of enrolled party members that do not exceed the 5% cap have been rejected as recently as this past election cycle. *Ulrich v. Mane*, 383 F. Supp. 2d 405 (E.D.N.Y. 2005) (Garaufis, J.) (rejecting challenge by Republican candidate for New York

City Mayor based upon 5:1 registration disparity that resulted in Republican candidates being required to obtain a higher percentage of signatures from enrolled members than Democratic candidates for the same office). Thus, the percentage of signatures required by candidates as a percentage of party enrollment totals for each judicial district are well within constitutional standards. *Id.*

Tellingly, Plaintiffs do not squarely argue that Election Law 6-136 is unconstitutional. Instead, they argue that the application of Election Law 6-136 would create "anomalous" and "unintended" results. But Plaintiffs have not cited to a single case or any legal authority that would permit a Federal court to invalidate the applicability of a statutory provision based, not upon its alleged unconstitutionality, but merely the bald allegation that the provision is other than what the legislature intended. Absent the suffering of any constitutional deprivation – which Plaintiffs do not allege, nor can they allege, as discussed above – there is simply no basis for adopting Plaintiffs' proposal.

Of course, we agree that EL 6-136 should be read to provide for the fewest signatures necessary under the statute for a candidate to gain access to the primary ballot. Accordingly, as noted in our February 3, 2006 letter, we believe that candidates in the Second Judicial District should only be required to obtain 7,500 signatures under EL 6-136(2)(b)&(k) rather than 8,000 signatures under EL 6-136(2)(a) &(j). As with any other application of Election Law 6-136, the ultimate determination of the requisite number of signatures needed to obtain a position on the primary ballot falls within in the province of the New York State Board of Elections to administratively determine based upon party enrollment. EL 5-604; 6-136.

Respectfully submitted,

Todd D. Valentine (TV 5304)
Special Counsel

TDV/mer

cc: **All Counsel of Record (via e-mail)**

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