

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

-----X
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, :

Civil Action No. 04cv1129 (JG)

Plaintiffs, :

v. :

NEW YORK STATE BOARD OF ELECTIONS; :
CAROL BERMAN, NEIL W. KELLEHER, :
HELENA MOSES DONOHUE, and EVELYN J. :
AQUILA, in their official capacities as :
Commissioners of the New York State Board of :
Elections :

Defendants. :

-----X

**LIMITED SURREPLY MEMORANDUM OF LAW
OF INTERVENOR DEFENDANT NEW YORK COUNTY
DEMOCRATIC COMMITTEE IN FURTHER OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

INTRODUCTION 1

ARGUMENT 4

I. NO CONSTITUTIONAL INJURY OCCURS WHEN REASONABLE
ALTERNATIVE MEANS OF BALLOT ACCESS EXIST 4

CONCLUSION..... 12

TABLE OF AUTHORITIES

American Party of Texas v. White, 415 U.S. 767 (1974)..... *Passim*

Bullock v. Carter, 405 U.S. 134 (1972)..... *Passim*

Burdick v. Takushi, 504 U.S. 428 (1992).....7, 11

Campbell v. Bysiewicz, 242 F. Supp. 2d 164 (D. Conn. 2003).....7, 8

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).....5

Jenness v. Fortess, 403 U.S. 431 (1971).....7, 8

Lubin v. Panish, 415 U.S. 709 (1974).....6

Molinari v. Powers, 82 F. Supp. 2d 57 (E.D.N.Y. 2000)7

Morse v. Republican Party, 517 U.S. 186 (1996).....2

Munro v. Socialist Workers Party, 479 U.S. 189 (1986).....10

Rockefeller v. Powers, 917 F. Supp. 155 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir. 1996)7

Storer v. Brown, 415 U.S. 724 (1974)9, 10

Williams v. Rhodes, 393 U.S. 23 (1968).....10

Defendant-intervenor New York County Democratic Committee (the “Democratic Committee”), through its undersigned counsel, Akin Gump Strauss Hauer & Feld LLP, respectfully submits this surreply memorandum of law in further opposition to Plaintiffs’ motion for preliminary injunction.

INTRODUCTION

Plaintiffs do not dispute that New York provides alternative, non-burdensome means of gaining access to the general election ballot for judicial elections. Instead, Plaintiffs contend that it is “well established that a candidate’s right to compete for his or her own party’s nomination without facing severe and unnecessary burdens is entirely distinct from and in no way satisfied by an independent candidate’s right to get onto the general election ballot.” (Reply Brief, at p. 8). In support of this claim, Plaintiffs rely principally on a Supreme Court case striking down on equal protection grounds exclusionary filing fees for accessing a primary ballot.

Here, there is no primary ballot. The only relevant ballot as to which the Constitution requires alternative means of access is the general election ballot. As the Supreme Court has repeatedly held, no constitutional injury occurs when reasonable alternative means of ballot access exist. Because Plaintiffs’ new leading case, *Bullock v. Carter*, 405 U.S. 134 (1972), has received scant attention in the parties’ prior briefing, we submit this brief surreply to address it.

Plaintiffs’ misplaced reliance on *Bullock* reveals that their true agenda is to engraft a primary election system onto New York’s delegate-based judicial convention system. Plaintiffs concede, as they must, what the Supreme Court established long ago in *American Party of Texas v. White*, namely, that there is no constitutional right to a primary election and that a convention is a constitutionally acceptable method for a party

to select its nominee. 415 U.S. 767 (1974). (*See, e.g.*, Reply Brief, at 10) (“Plaintiffs do not claim any right to a primary election”). However, Plaintiffs attempt to evade the implications of this point by arguing that the only constitutionally permissible convention-based systems are those that, in fact, are not true conventions but thinly-disguised primaries. Thus, Plaintiffs proffer as constitutional forms of conventions, systems in which voters themselves either “(a) attend and their votes are directly counted, (b) vote for delegates who are listed on the ballot with the name of a specific candidate to whom they are pledged, or (c) can petition their favored candidate onto a primary ballot if their party’s convention does not nominate their candidate of choice.” (Reply Brief, at 19). Each of these alternatives is the functional, if not precise, equivalent of a primary election system.

The first alternative, as the Supreme Court remarked, “resembles a primary about as clearly as one could imagine.” *Morse v. Republican Party*, 517 U.S. 186, 238 (1996) (“[t]he convention . . . was open to any [Republican] voter . . . just like a primary”) *id.* The second alternative in which voters elect delegates as proxies for candidates is the functional equivalent of voting directly for the candidate, as in a primary. The third alternative in which a convention is but one of several means of accessing a *primary ballot* again highlights the circularity of Plaintiffs’ argument. Indeed, to the extent Plaintiffs argue that a convention must be “just like a primary” in order to be constitutional, they fail to properly heed the Supreme Court’s unanimous ruling “that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary

election *or by party convention.*” 415 U.S. at 781 (citing *Storer v. Brown*, 415 U.S. 724, 733-36 (1974)) (emphasis added).

The Supreme Court’s ruling that a convention is a constitutional alternative to a primary would be meaningless if the convention must precisely resemble a primary. The fact of the matter is that New York State has a true convention system which *delegates* authority to choose the party’s nominee to duly elected judicial delegates. Plaintiffs simply do not like it.

Plaintiffs falsely attribute to the Democratic Committee the argument that, because the Supreme Court has determined that there is no constitutional right to a primary election, *any* convention system must therefore be constitutional. (*See, e.g.,* Reply Brief, at 11-15). This is not an argument that Defendants have advanced. Rather, Defendants argue that New York State’s judicial convention system passes constitutional muster because, *inter alia*, it (i) imposes requirements on candidates for the Democratic and Republican Party’s nomination that are identical for all would-be candidates, (ii) does not preclude candidates who are not back by party leaders from gaining enough delegate support to win their party’s nomination and (iii) does not unreasonably interfere with an individual’s right to vote and associate as the judicial convention system is but one means to gain access to the general election ballot. (*See* Memorandum of Law of Intervenor-Defendant New York County Democratic Committee in Opposition to Plaintiffs’ Motion for Preliminary Injunction (the “Opposition Brief”), at pp. 27 et seq.).

For these reasons, under New York State’s judicial electoral scheme, a “reasonably diligent” candidate suffers absolutely no injury as she will not be denied access to the general election ballot. Because there are meaningful alternative paths to

the general election ballot, New York's judicial convention system does not *unreasonably interfere* with an individual's right to vote and associate. Evaluated in the context of the entirety of New York's election scheme, and not standing alone, the appropriate inquiry is whether the Contested Statutes pose a burden so undue as to offend the Constitution. When viewed in this light, it is clear that the New York electoral scheme is reasonable.

ARGUMENT

I. NO CONSTITUTIONAL INJURY OCCURS WHEN REASONABLE ALTERNATIVE MEANS OF BALLOT ACCESS EXIST

Relying principally on *Bullock v. Carter*, 405 U.S. 134 (1972), Plaintiffs contend that the Supreme Court has rejected Defendants' argument that no constitutional injury occurs when reasonable alternative means of ballot access exist. Plaintiffs' reliance on *Bullock* not only is badly misplaced, but is a misguided attempt to avoid the phalanx of Supreme Court cases which have repeatedly determined that *no* constitutional rights are violated when a challenged electoral scheme provides alternative paths to the relevant ballot. Indeed, *Bullock* itself made this explicit in its holding:

By requiring candidates to shoulder the costs of conducting primary elections through filing fees *and by providing no reasonable alternative means of access to the ballot*, the State of Texas has erected a system that utilizes criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice.

Id. at 149.

In *Bullock*, the Supreme Court struck down a Texas statute which required candidates in the major-party primaries to help finance the cost of the primary through filing fees that in 1972 ran as high as \$8,900. Certain would-be candidates failed to pay

the filing fee and consequently were denied a place on the ballot. Invoking the landmark case of *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), striking down a poll tax on equal protection grounds, the Supreme Court found that the statutory scheme at issue tended “to deny some voters the opportunity to vote for a candidate of their choosing,” while simultaneously giving affluent voters “the power to place on the ballot their own names or the names of persons they favor.” *Id.* at 144. To the extent that the system required the candidate to rely on contributions to pay the filing fees, the Supreme Court recognized that the challenged filing fee structure fell “with unequal weight on voters, as well as candidates, according to their economic status.” *Id.* The discriminatory nature of the filing fee requirement led the Supreme Court to scrutinize the statutes closely. The Supreme Court determined that, as the law in question provided “no reasonable alternative means of access to the ballot,” *id.* at 149, inability to pay the filing fee resulted in an absolute denial of a primary ballot position.

The ballot in question in *Bullock* was a primary election ballot. Accordingly, the Court examined whether there were alternative means to access that ballot. The Court found that the filing fee in question was “an absolute prerequisite to a candidate’s participation in a primary election” and that “[t]here is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot.” *Id.* at 136. In this regard, the fact that candidates could petition onto the general election ballot did not address the issue of access to the ballot in the primary election. Here, of course, there is no primary ballot. There is but one ballot at issue, the general election ballot for Supreme Court Justice, and *each* of the alternative means of access under New York Election Law directly relates to accessing *that* ballot.

Further, as the Court noted, the statutory scheme in question in *Bullock* contained a disaffiliation provision, the political equivalent of a poison pill, which disqualified voters who had voted in the primary from signing an independent nominating petition. Thus, the option of appearing on the general election ballot not only failed to address the issue of alternative means of access to the primary ballot, but actually required voters to abandon their own party affiliation in order to sign a would-be independent candidate's petition. Here, of course, no disaffiliation or other similar provision exists under New York Election Law. Thus, Plaintiff Lopez Torres and her supporters were free to retain their affiliation with the Democratic Party and, in fact, she ran for election as the nominee of the Working Families Party *after* participating in the Democratic Party's judicial convention and attempting to win the Democratic Party's nomination. Accordingly, New York's Election Law, unlike the Texas statute struck down in *Bullock*, does not present a Hobson's choice between gaining access to the ballot and renouncing one's party of preference.

When the Supreme Court next addressed the mandatory filing fee issue in *Lubin v. Panish*, 415 U.S. 709 (1974), the Court held that the fee statute at issue "operate[d] to exclude some potentially serious candidates from the [primary] ballot *without providing them with any alternative means of coming before the voters.*" *Id.* at 718 (emphasis added). Again, the Court held that, "*in the absence of reasonable alternative means of ballot access*, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Id.* (emphasis added).

The exclusionary filing fees faced by the plaintiff-appellees in *Bullock* and *Lubin* are a far cry from the situation faced by so-called challenger candidates seeking the

Democratic or Republican Party's nomination for Supreme Court Justice under New York's election scheme. The Contested Statutes, of course, do not require filing fees a candidate cannot pay. Plaintiffs and other persons seeking a place on the ballot as a major party's nominee, indeed, *may freely do so*, and the requirements for winning the nomination are the same for everyone, regardless of whether a candidate enjoys party leaders' support. Further, there is no dispute, New York's Election Law provides for alternative means by which a candidate's name can appear on the general election ballot, if not as a major party's nominee, then as an independent candidate, minor party candidate or even as a write-in vote.

As Plaintiffs' main case helps to demonstrate, alternative means to access the relevant ballot has been a central focus of Supreme Court ballot access jurisprudence. Just 8 months before the Court's decision in *Bullock*, the Court in *Jenness v. Fortess*, 403 U.S. 431 (1971), set forth the test which it applied in *Bullock*. The Supreme Court has characterized its own decision in *Jenness* as "reject[ing] an equal protection challenge to a system that provided *alternative means of ballot access for members of established political parties and other candidates, concluding that the system was constitutional because it did not operate to freeze the political status quo.*" *Burdick v. Takushi*, 504 U.S. 428, 436 n. 4 (1992) (emphasis added). When Plaintiffs state that the Supreme Court long ago rejected Defendants' arguments, it is clear that Plaintiffs' revisionist history does not begin early enough.¹

¹ For a discussion of why the circuit and district court cases cited by Plaintiffs are inapposite, including *Rockefeller v. Powers*, 917 F. Supp. 155 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir. 1996), *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) and *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164 (D. Conn. 2003), the Court is respectfully referred to the Democratic Committee's Opposition Brief, at pp. 26-27.

In *Jenness*, the Supreme Court upheld a Georgia election law that required independent and minor-party candidates to file nomination petitions signed by at least 5% of the number of all voters registered in the previous election in order to be listed on the general election ballot. The Georgia statute also required parties to gather the signatures over a 180-day period ending in June. *Id.* at 432. In unanimously rejecting the constitutional challenges to the statute, the Supreme Court demonstrated that other aspects of Georgia's election laws served to ensure reasonably open access to the ballot:

The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, *alternate routes are available to getting his name printed on the ballot*. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization.

Id. at 440-41 (emphasis added). The Supreme Court also stressed that the Georgia statute freely provided for write-in votes (which is also the case in New York State). *Id.* at 438. Thus, the Supreme Court concluded, the ballot access restrictions were not unreasonable because "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Id.* at 439. No less can be said of New York State.

Plaintiffs avoid any discussion of the several other Supreme Court cases which have determined that no constitutional injury occurs when the challenged electoral scheme provides for reasonable alternative means to access the ballot. For instance, in *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court upheld a Texas ballot access statute that required political parties to have secured 2% of the vote in the previous general election, and to file nomination petitions signed by registered voters equaling at least 1% of the votes cast in the prior election. *Id.* at 776. Again, the Supreme Court pointed to the fact that the qualification requirements did not freeze the

political status quo, noting that two of the plaintiffs had previously satisfied them and qualified for a place on the ballot. *Id.* at 787-88 (“[Texas] affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more.”).²

The Supreme Court upheld an equally restrictive ballot access requirement in *Storer v. Brown*, 415 U.S. 724 (1974). There, the Supreme Court was asked to determine the reasonableness of a California statute that “absolutely denie[d] ballot position to independent candidates who, at any time within 12 months prior to the immediately preceding primary election, were registered as affiliated with a qualified political party,” *id.* at 757, and required independent candidates to collect signatures from 5% of the total votes cast in California at the last general election within a 24-day period. *Id.* at 738-39. The Supreme Court approximated that this amounted to collecting 325,000 signatures in 24 days. *Id.* at 739.³ After reviewing its earlier decisions upholding severely restrictive ballot access restrictions, the Supreme Court said it “ha[d] no hesitation in sustaining” the party-disaffiliation requirement. *Id.* at 733. The Supreme Court reviewed the entire California electoral scheme and found that independent candidates who failed to qualify for the ballot could “nevertheless resort to the write-in alternative provided by California

² It is significant to note that the Court found that the 1% signature requirement amounted to approximately 22,000 signatures, *id.* at 776, but said it was “neither unreasonable nor unduly burdensome,” to require potential candidates to obtain 22,000 signatures within 55 days. *Id.* at 787 n. 18. In that amount of time, signatures would have to be obtained at the rate of 400 per day to secure the entire 22,000. *Id.* at 786. Nor did the Court consider it unreasonable to require potential candidates to file their petitions 120 days before the general election. *Id.* at 787 n. 18.

³ While the Court remanded to determine whether the available pool of signers might render the signature requirement unduly burdensome, nevertheless, the Supreme Court stated that “[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden.” *Id.* at 740.

law,” *id.* at 737 n.7, and thus held that the provisions did not make it “virtually impossible” for new candidates and parties to appear on the ballot. *Id.* at 728 (quoting *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)). The *Storer* majority reasoned, “[t]he general election ballot is reserved for major struggles; it is not a forum for continuing intra-party feuds.” *Id.* at 735 (the function of the election process is “to winnow out and finally reject all but the chosen candidates, . . . not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]”) (*id.*)).

In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Supreme Court upheld a Washington election statute that required minor-party candidates for statewide offices to receive 1% of the total vote in an open primary in order to be placed on the general election ballot. *Id.* at 190. Although the statute effectively eliminated minor parties from the general election ballot, the Supreme Court did not consider the scheme burdensome because the system provided at least some access to a statewide ballot, even if it was not in the general election. *See id.* at 206. The Supreme Court flatly rejected the notion that states were required to provide preferential treatment to candidates in order to level the playing field of the election process. *Id.* at 198 (noting that states are not “burdened with a constitutional imperative . . . to ‘handicap,’ an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot”). If, as the Supreme Court held, an opportunity for a primary ballot position is constitutionally sufficient, *a fortiori*, a general ballot position has to be constitutionally sufficient where, indeed, it is the means by which the ultimate vote for the particular office is cast.

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court upheld Hawaii's ban on write-in voting against a claim that the ban unreasonably infringed on voters' First and Fourteenth Amendment rights. *Id.* at 438-49. Because only one candidate appeared on the ballot for the race in question, the voter had a choice between voting for a candidate he did not support, or not voting at all. *Id.* at 442 (Kennedy, J., dissenting) (noting that this was not an isolated occurrence because Democratic candidates often ran unopposed in Hawaii's state legislative races).

The Supreme Court indicated that the requirement should not be analyzed in a vacuum; instead a court must consider the totality of the electoral scheme, and determine whether the total electoral scheme provides constitutionally sufficient ballot access. *Id.* at 441. Examining Hawaii's statute in this light, the Court concluded that the ban on write-in voting imposed only a "limited burden" on voters because Hawaii's election code offered adequate access, *id.* at 439; namely, parties could file a petition signed by 1% of the registered voters 150 days before the primary, or an independent could file a nominating petition with between 15 to 25 signatures, depending on the office sought, 60 days before the primary. *Id.* at 435. Given what the majority found to be a reasonable, nondiscriminatory restriction, the Supreme Court found the state's interests in "avoiding the possibility of unrestrained factionalism," and guarding against "party raiding," sufficient to justify the limited burden. *Id.* at 429.

Thus, notwithstanding Plaintiffs' empty assertion to the contrary, the above cases make clear that in determining whether constitutional rights have been violated, the Supreme Court *has repeatedly looked to whether the challenged electoral schemes provide alternative means for accessing the relevant ballot.* Here, the only relevant

ballot is the general election ballot. Plaintiffs can cite to no other case that holds that a candidate has a right to a court-imposed primary ballot where none exists.

Of course, Plaintiffs have not disputed, and cannot dispute, that such alternative means of ballot access exist under New York's election code. Instead, they simply ignore or dissemble an appropriate reading of the relevant case law. Thus, on the basis of a selective, and in some cases, wholly revisionist reading of Supreme Court ballot access jurisprudence, Plaintiffs claim that they will suffer irreparable harm unless the Court declares the New York statutes governing election of Supreme Court Justices unconstitutional and provides other extraordinary and drastic mandatory relief. Plaintiffs argue that unless mandatory injunctive relief is granted, those Plaintiffs who want to run for Supreme Court Justice and those who want to vote for such candidates will be precluded from doing so. This is simply *not true*. Such candidates, regardless of whether they try to win their party's nomination through the judicial convention process, have numerous alternatives under New York Election Law.

In light of the adequate ballot access afforded under New York's election code, the provisions governing selection of major-party's nominees do not burden Plaintiffs' right to make free choices and to associate politically through their chosen candidates and their votes.


CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Democratic Committee's Opposition Brief, the Court should deny Plaintiffs the extraordinary and drastic relief they seek.

Dated: September 9, 2004

Respectfully submitted,

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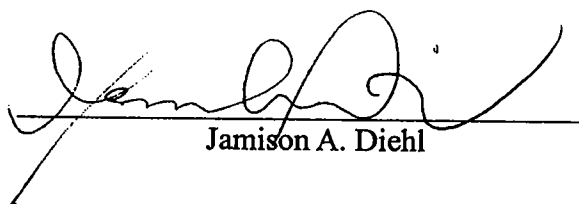
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Limited Surreply Memorandum of Law of Intervenor Defendant New York County Democratic Committee in Further Opposition to Plaintiffs' Motion for Preliminary Injunction was served by hand c/o Frederick A.O. Schwarz, Jr., Brennan Center for Justice at NYU School of Law and Kent Yalowitz, Arnold & Porter LLP, on this 13th day of September, 2004.


Jamison A. Diehl