

06-0635-cv

To Be Argued By:
FREDERICK A. O. SCHWARZ, JR.

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



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, COMMON CAUSE/NY,

—against— *Plaintiffs-Appellees,*

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

Defendants-Appellants,

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN
STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT
JUSTICES IN THE CITY AND STATE OF NEW YORK, and JUSTICE DAVID
DEMAREST, individually, and as President of the State Association,

Defendants-Intervenors-Appellants,

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory-Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellee Common Cause/NY discloses that it has no parent corporation and that no publicly-held company owns 10% or more of its stock.

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ISSUES

1. Is New York’s convention system for nominating candidates for election to the office of Supreme Court Justice immune from constitutional scrutiny?
2. Does New York’s convention system impose “severe burdens” on voters and prospective candidates, as that term has been applied under the First and Fourteenth Amendments?
3. Is New York’s convention system narrowly tailored to serve compelling state interests?
4. Is the District Court’s temporary remedy an abuse of discretion exceeding the Court’s equitable powers?

PRELIMINARY STATEMENT

On the facts, this is not a close case. After 13 days of hearings, 24 witnesses, and more than 10,000 pages of evidence, reality can no longer be denied: everywhere in the State, Justices of the New York Supreme Court are, in all but name, hand-picked by the leaders of the locally dominant political party. Rank-and-file party members—the voters whose rights are at stake in this case—have no effect on the nomination of Justices. This is not hyperbole, but a simple statement of the central fact in this case: among the hundreds of “elections” for seats on the Supreme Court throughout the state, “there is no evidence of a single successful challenge to candidates backed by the party leaders.” SPA-33.

The District Court found that a handful of party leaders enjoy virtually absolute power in selecting Supreme Court Justices. Appellants do not even try to show that this finding was clearly erroneous, instead mislabeling it a “mixed” finding of fact and law. But it does not matter what standard the Court applies.

The District Court's findings were more than not clearly erroneous; they were inescapable.

To see this, one need only consider Appellants' *best* case: the First Judicial District in Manhattan. The defense called numerous witnesses to testify to the virtues of the screening panel system used in that district. Judge Gleeson found that it had "resulted in a measure of quality control that is unmatched elsewhere in the state," and said that "the [Democratic Party] county leadership deserves praise for having created it many years ago." SPA-33, 47.

Yet whatever laudatory terms one might apply to the First District's system, one thing it cannot properly be called is an election. In Manhattan, as in the other eleven Judicial Districts, the county leader decides who will ascend to the Supreme Court bench (in this case, the relevant leader is Herman "Denny" Farrell, the Executive of Appellant New York County Democratic Committee). Defense witnesses had to admit that they could not recall a single person obtaining the party's nomination over Mr. Farrell's objection. Mr. Farrell himself described his role graphically: "I have the votes to be able to kill someone—in other words, I can't guarantee I can always make you, but I can surely block you." HE-6151. He testified that he "would keep the nominations" (rather than having a primary election) "because it gives me a better chance to control what goes on." HE-6083.

Out of the hundreds of Supreme Court Justices chosen in recent decades, Appellants identified six who purportedly show that "challenger" candidates can overcome the objection of the county leader. Yet all six received the blessing of

the county leaders; half were actually related by blood or marriage to county or district leaders. And these are Appellants' *best* cases.

It cannot credibly be denied that the party leaders control the outcome of the nomination process; a 100% success rate in every district in the state is hard to explain away as a lucky streak. The only remaining question, therefore, is whether the federal Constitution permits a state to give a handful of individuals such absolute power—over a purportedly elective office—that rank-and-file voters have literally never had the opportunity to overrule the leadership. To ask the question is to answer it: this cannot be how elections are run in a democratic polity. This common-sense instinct is also well-settled constitutional doctrine. Where laws burdening candidates and voters imposed by an election law are severe, they must be proven “necessary” to serve a compelling state interest. Under that standard, this Court has previously enjoined barriers to the ballot that entrench the power of local party leaders at voters' expense.¹ This case presents higher barriers than those cases. The preliminary injunction should be affirmed.

¹ See, e.g., *Lerman v. Bd. of Elections*, 232 F.3d 135, 145 (2d Cir. 2000) (invalidating New York requirement that witnesses to signatures on ballot petitions be residents of the district in which the office is being voted on because it constitutes severe burden on party's candidates and voters); *Rockefeller v. Powers*, 78 F.3d 44, 45-46 (2d Cir. 1996) (invalidating New York Republican Party requirement that each presidential candidate's delegate slate from a congressional district obtain signatures equal to the lesser of 5% or 1,250 of the district's registered Republicans to be placed on primary ballot).

STATEMENT OF THE CASE

Plaintiffs commenced this action in March 2004 against the State Board of Elections under 42 U.S.C. § 1983 for deprivation of voting and associational rights secured by the First and Fourteenth Amendments. With Plaintiffs' consent, two political parties intervened—the New York County Democratic Committee and the New York Republican State Committee. Their extremely active participation in the case is fitting, as they are beneficiaries of the *status quo*.

The District Court held a four-week evidentiary hearing in the fall of 2004 on Plaintiffs' motion for a preliminary injunction. Twenty-four witnesses testified, including six experts and ten sitting or former New York judges, and the Court received more than 10,000 pages of evidence. Afterwards, the parties filed nearly 500 pages of proposed findings of fact and conclusions of law. On the basis of that record, Judge Gleeson made extensive factual findings about the structure of the Supreme Court selection process in general and reviewed, district by district, how it has actually functioned across the state. He heard the testimony not only of several lower-court judges who wished to run for Supreme Court over the opposition of their parties' leadership, but also of Justices called by Defendants who had been nominated by that leadership.

After marshalling the facts from this extensive record, the District Court faithfully applied the precedents of this Court and the U.S. Supreme Court. The District Court found that New York's system imposes severe burdens on the rights of voters and candidates and also found Defendants unable to produce a sufficient justification for such burdens. The District Court concluded that Plaintiffs had

“made a compelling showing that the New York system is designed to freeze the political *status quo*,” SPA-75, had shown a clear and substantial likelihood of success on the merits, SPA-49, and had met the other requirements for a preliminary injunction. The District Court granted Plaintiffs’ motion in January 2006.

In fashioning its injunction, the District Court noted that “[t]he choice of a *permanent* remedy for this constitutional violation does not fall to me, but rather to the legislature of New York State.” SPA-75 (emphasis supplied). The Court therefore awarded a temporary remedy, lasting only until trial, or until the legislature enacts a constitutional method of nominating Supreme Court Justices. *Id.* The Court severed the unconstitutional convention system and left in place the default statutory framework that otherwise governs all judicial elections in New York. The Court determined that this approach, which would result in a direct primary election until the State enacts a constitutional statute, was “the least intrusive course.” *Id.* The Court stayed its injunction until after the 2006 election, JA-2106, in order to permit candidates time to plan for primary elections, to permit New York’s Legislature time to enact legislation, and to permit Appellants to pursue this expedited appeal.

After seeking supplemental briefing and factual submissions from the parties, the District Court adapted for the Supreme Court the petitioning requirements set forth in N.Y. Election Law § 6-142, which “provides the most reasonable guidance in fashioning the petitioning requirements for judicial-district-

wide primaries.” Order (Apr. 7, 2006) p. 2. Appellants have separately appealed that Order.

Appellants have never proposed to the District Court *any* alternate remedy.

FACTS

I. INTRODUCTION

Judge Gleeson received extensive evidence that New York’s convention system has successfully shut out candidates of whom the county leaders do not approve. For example, the Court received in evidence the June 2004 Report of the New York State Commission to Promote Public Confidence in Judicial Elections, chaired by Dean John Feerick of Fordham Law School. The Commission included ten sitting or former New York judges. Its report states: “The uncontested evidence before the Commission is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders.” HE-5047.²

Defendants’ own witnesses confirmed that fact. The following examples were among the more striking of defense witnesses’ many admissions and concessions.

² After the District Court issued its injunction, the Commission published its Final Report, making legislative and policy recommendations after reaffirming that “[a]s conducted today, conventions impose unnecessary burdens on qualified judicial candidates and foster a public perception that, once elected, delegates do not act thoughtfully or independently in nominating their party’s candidates, but simply reflect the decisions already reached by political party leaders.” Final Report p. 15 (February 2006).

First, Dr. Hechter, an expert called by Defendants, analyzed the byzantine multi-level process for electing Supreme Court Justices and reduced it to a simple reality: “The consequences of the New York judicial convention are well-appreciated. In politically unified districts it is difficult to attain the nomination without the support of the party leadership. This high barrier to entry significantly narrows the pool of candidates.” HE-4923.

Second, Mr. Kellner, another defense expert, admitted that “there are judicial districts in the State of New York that today operate precisely as you described the smoke-filled room in Manhattan before the reformers prevailed.” Tr. 1630-31. Mr. Kellner also testified that any attempt by a challenger candidate to urge her party’s voters to elect supportive convention delegates would “twist 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.” Tr. 1567. He added: “By definition, the convention system is designed that the political leadership of the party is going to designate the party’s candidates.” Tr. 1671.

Third, the defense called State Senator (and former Senate Minority Leader) Martin Connor. Senator Connor, who had chaired the Democratic Party convention in the Second District on five occasions, Tr. 2191, admitted that he thought the nominee selected by the party leaders in 2002 was “unqualified” and a “horrible choice.” Tr. 2208. Although Senator Connor had begun his political career as a “reformer” who “[spoke] truth to power,” *see* Tr. 2249-50, he said and did nothing to challenge the “horrible” candidate anointed by the County Leader. Tr. 2208. Rather, he simply withdrew as chairman of the convention and left,

knowing that the remaining delegates would (as always) rubber-stamp the County Leader's choice—which they did. Tr. 2209-10.

Finally, there was the testimony, quoted earlier, of participants in the supposedly exemplary First District. Mr. Farrell, the County party leader, acknowledged his power to stop any candidate whom he had not approved: “I can surely block you.” HE-6151. Arthur Schiff, a District Leader in Manhattan (and a witness for the defense), testified: “I think I would know about it” if someone were nominated for Supreme Court Justice over Mr. Farrell's objection, and “I can't remember it ever happening that way.” Tr. 1291-92. The New York County Democratic Committee intervened as a defendant in the case but deliberately chose *not* to call Mr. Farrell as a witness. Tr. 2403-06. The District Court admitted his testimony as a party admission under Federal Rule of Evidence 801(d)(2)(E), Tr. 1156-63, and found Defendants' decision not to call Mr. Farrell or any other county leader “striking.” SPA-35. The county leaders were within Defendants' control because the State Republican Committee intervened as a defendant and Mr. Farrell serves not only as Executive of the New York County Democratic Committee, but also of the statewide Democratic Committee.

The admissions of Defendants' fact and expert witnesses are borne out by overwhelming documentary evidence, statistics from throughout the State, and the District Court's weighing of testimony by many participants in the nominating process, including successful and unsuccessful aspirants to the Supreme Court bench. A summary of that evidence follows.

II. NEW YORK'S JUDICIAL CONVENTION SYSTEM IN CONTEXT

The convention system is unique to the office of Supreme Court Justice. Candidates for every other elective office in New York—judicial *and* non-judicial—run in open primary elections. N.Y. Elec. Law § 6-110; SPA-5-6. Candidates for Surrogates' Court, Civil Court (in New York City), Family Court (outside New York City), City Court, County Court, District Court, and Town and Village Courts all obtain a place on a primary ballot by gathering signatures directly from voters.³ All of New York's elected legislative and executive officers also may run in primaries.

Further, New York is the only state in the Union that uses a convention system to select trial court judges. SPA-6; JA-274. Thirty-three states use contestable elections to select some or all of their trial judges. In all of these states but New York, candidates obtain a place on a primary election ballot by filing a notice, gathering a reasonable number of signatures, paying a filing fee, or some combination of these. SPA-5-6; HE-40-191.⁴

It is no secret that New York's unique system vests virtually unchallengeable power in the hands of party leaders. Proponents of good

³ See N.Y. Const. art. VI, §§ 10(a), 12(b), 13(a), 15(a), 16(h), 17(d); N.Y. Elec. Law §§ 6-104, 6-108, 6-110. Many of the judges so elected go on to become Acting Supreme Court Justices, who exercise the full “powers, duties and jurisdiction” of an elected Supreme Court Justice. N.Y. Const. art. VI, § 26(k).

⁴ For a description of the nominal requirements in these thirty-two states, see JA-1529, ¶ 5; see also JA-274-77, ¶¶ 9-16, notes 1-4 (Michigan uses a primary to select candidates for trial courts). Where helpful to the Court (as here), we include citations to the proposed findings, which marshal relevant evidence.

government have complained for generations that county party leaders, not the voters, select Supreme Court justices.⁵

III. THE MECHANICS OF NOMINATION BY JUDICIAL CONVENTION

A Supreme Court candidate must navigate a multi-tiered and arcane process. The evidence showed that there are numerous choke points in the process, any one of which would likely preclude a candidate lacking the party leadership's support from being nominated. Taken together, the following choke points have prevented even a single challenger candidate from reaching the Supreme Court:

- The county and district leaders decide who will stand for election as delegates to the nominating convention. A challenger, in contrast, must recruit delegates to run.
- Once the hand-picked delegates have officially been elected (or, roughly 90% of the time, once they have been awarded their posts without an election because there is no opposing

⁵ Examples from the record include:

- A 1944 Chamber of Commerce Report: “Judicial nominations today in the State of New York fall to the choice of boss-manipulated conventions.” HE-4984.
- A 1952 *New York Times* editorial: “The selection of judges is made not by the people but by the leaders of the predominant parties.” HE-4985.
- A 1954 letter to the *Times* editors from Citizens Union: “Supreme Court justices are nominated by large judicial conventions which lie as bulky buffers against possible insurgence.” HE-4986.
- A 1983 *Times* editorial: “New York elects its Supreme Court justices, but by a process that mocks choice. Most voters can never know the candidates and have to accept party slates. The real choice is thus left to political bosses...who control nominations.” HE-4987.

These exhibits met the requirements of Fed. R. Evid. 803(16). Tr. 835-37.

candidate), there is very little time before the convention in which a challenger could lobby them.

- Even if a challenger *could* lobby delegates, there would be no point in doing so, as there is not even a remote possibility that a majority would defy the leader who chose them.
- There is no debate at the convention itself, which often lasts for about a quarter of an hour.
- The locally dominant party’s nomination is tantamount to election; indeed, the vast majority of “races” are either not competitive or not even contested.

A. Selecting Convention Delegates

1. Recruiting Candidates for Delegate and Alternate

Parties nominate candidates for Supreme Court Justice by a vote of delegates to a convention held in September in each of the state’s twelve Judicial Districts. SPA-9; N.Y. Elec. Law § 6-106. Voters “elect” the delegates (almost all of whom appear on no ballot) in separate races held in each Assembly District (“AD”) in September, when the primary for every other elective office is held. SPA-10-11; *see* SPA-78 (map showing overlay of 150 ADs on the twelve Judicial Districts). “This odd feature of the judicial nominating convention process contributes significantly to the heavy burden it places on those who seek major party nominations for Supreme Court Justice without the support of the party’s district leaders and county leaders. Such challenger candidates face the prospect of as many delegate races as there are ADs in the judicial district—at least nine and as many as 24.” SPA-10-11. Further, state law empowers the political parties to determine the number of delegates and alternates to be elected in each AD, within

broad limits. N.Y. Elec. Law § 6-124. They have exercised that power by setting the number so high as to inhibit challengers.

Judicial District		Democratic		Republican		Number of ADs within the Judicial District	
		Total Number of Delegates	Total Number of Alternates	Total Number of Delegates	Total Number of Alternates		
	3	41	41	50	50	11	
	4	32	32	54	54	10	
	5	35	35	81	81	12	
	6	24	24	66	66	9	
	7	43	43	48	48	11	
	8	62	62	62	62	13	
	9	76	76	139	139	17	
	10	102	102	185	185	21	
	NYC	1	93	93	57	57	12
		2	124	124	98	98	24
11		87	87	77	77	18	
12		63	63	32	32	11	

SPA-12; JA-1536 ¶ 24; JA-294-95 ¶ 41.

Therefore, the first problem any challenger faces is recruiting enough candidates to contest scores of delegate and alternate races in each of the district’s many ADs. That problem is insuperable in practice, as all but one of the Appellants conceded. SPA-14-15. Indeed, Appellants’ position, or at least the position of Appellants’ witnesses, was that it was *improper* for a challenger to run an alternative slate, because “[t]he system is designed for candidates to be appealing to the judicial delegates and not to the electorate at large.” Tr. 1572-73.⁶

⁶ Mr. Kellner said: “[O]bviusly everybody who I am aware of who has gotten a nomination has gotten it without running a slate pledged to their candidacy, and that’s not how the system is designed.” *Id.* Defense witness Mr. Schiff said he had “never heard of a candidate for Supreme Court nomination putting together slates

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Rather, according to these witnesses, the proper way for a challenger candidate to run is to lobby the leadership-selected delegates after they have been “elected,” rather than appealing directly to the voters. Tr. 1572-73 (Kellner); Tr. 1297 (Schiff). As we explain below, the opportunity to “lobby” delegates during the two weeks between the delegate election and the September convention is illusory. But Appellants (or all but one of them) are right about one thing: a challenger cannot succeed by recruiting an alternative slate of delegates and alternates.

Judge Regan explained the nature of the barriers, based on his personal experience.

[A]lmost all committee persons had a relative, or were themselves, employed in a government job for which they owed loyalty to the Party Chairman. Even if nothing else were required, recruiting the necessary number of delegates and alternate candidates alone would have been an impossible task. To have any realistic opportunity to compete for the nomination at the convention, I would have had to recruit over 55 people to represent the 11 Assembly Districts that were within my Judicial District in whole or in part, each of whom would have had to be willing to contribute significant energy, time, and money to run as delegates and win a campaign against the county Republican Party’s leaders’ candidates for the elusive satisfaction, if successful, of voting for me at a single judicial convention, and thereby jeopardizing their political future.

JA-230 ¶ 14; *see also* Tr. 389-90.

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of delegates to be run in the various assembly districts around the county.”
Tr. 1267.

Judge Keefe faced similar difficulties in the Third Judicial District in 1991. Few people volunteered to run for an office that most people do not understand and whose only function is to nominate someone else for another office. He said: “Recruiting candidates for Congress, city council or dog catcher does not require the recruiter to explain the nature of the job or what the position is. Try recruiting someone to run for judicial delegate and one immediately realizes the difficulties in this step of the process.” JA-501 ¶ 11, as amended by testimony, Tr. 852-53. Judge Keefe exhausted an enormous amount of time even getting the delegate slots filled; he was unable to recruit candidates for the alternate delegate positions. Tr. 931-32; *see also* Tr. 198 (Berger), 2140-41 (Senator Connor), 1143 (Lipton).⁷

In contrast, party leaders easily tap party loyalists to run as delegates and alternates. “Most delegates have strong ties to the district leaders who select them, and sometimes work for them as well.” SPA-19. Again, Appellants’ own witnesses confirmed that party leaders appoint the holders of what are nominally elective offices (*i.e.*, delegate and alternate).

- Defense expert Dr. Hechter: “District leaders effectively select delegates to the judicial convention.” HE-4945 ¶ 60.

⁷ Appellants note that almost anyone can run for judicial delegate. Br. 11. But, as the District Court found, “the argument conflates the virtually impossible task of running slates of delegates and alternates across a judicial district with running for delegate in a particular AD.” SPA-17; *see also* JA-1608-35 ¶¶ 240-301. Appellants point to isolated cases in which gadflies have successfully run for delegate positions (Br. 20), but they do not—and cannot—point to any instance in which the number of successful gadflies was more than a tiny fraction of the delegates.

- Defense expert Mr. Kellner said that local politicians select judicial delegates “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?” which the district leader then approves. Tr. 1624.
- Manhattan Democratic Party County Leader Farrell admitted that district leaders “select them [*i.e.*, delegates]” and “[w]hen you put someone in there, the chances are they will listen to you.” HE-6027; *see* JA-1567-70 ¶¶ 110-11, 116.⁸

2. Gathering Signatures

Even if a challenger could recruit enough people willing to run for delegate and alternate, it would be practically impossible to put all those willing individuals on the ballot. For each prospective delegate or alternate candidate, the challenger would have to gather 500 valid signatures of party members—limited to party members residing in the specific AD. N.Y. Elec. Law § 6-136(2)(i), (3). As a result, the number of signatures required just to run a slate of delegates and alternates across a Judicial District is several times larger than the number of signatures required to get onto the primary ballot for other judicial offices covering the same territory, rivals the number required to run for Governor, and is considerably more than the number required to run for Mayor of New York City. Further, candidates for the other offices need not obtain a certain number of

⁸ *Accord* Tr. 344-45, 377-79 (Judge Regan: County leaders select “reliable people in the sense that they would adhere to the instructions of each county chairman.”); Tr. 848 (Judge Keefe: “[T]he chairman of each county party chooses the party slate of delegate candidates.”); JA-238 ¶¶ 7-9 (Ostrer); *see* JA-1574, 1594 ¶¶ 127, 185-86.

signatures from each AD within the relevant area, but will be on the primary ballot if they simply get the total required number from anywhere in the jurisdiction.

Signature Requirements for Various New York State Offices (N.Y. Elec. L. § 6-136)					
Statewide Office	NYC Mayor	NYC Civil Court (Countywide)	County Courts	Supreme Court (Cumulative Signature Requirements)	
15,000	7,500	4,000	2,000	12,000	2nd J.D. (Kings, Richmond)
				9,000	11th J.D. (Queens)
				10,500	10th J.D. (Suffolk, Nassau)

As a practical matter, in each AD, a challenger candidate would need to gather petitions with 1,000 to 1,500 signatures to protect against expected legal challenges. SPA-14; *see* JA-470 ¶ 12 (Lipton); Tr. 931-32 (Keefe), 461, 506-07 (Carroll); JA-208-09 ¶¶ 16-17 (Carroll); JA-231-32 ¶¶ 16-19 (Regan); JA-286-87 ¶¶ 17-18 (Berger); Tr. 203 (Berger). Thus, for example, a Supreme Court candidate in the Second Judicial District “would need to gather 24,000 to 36,000 signatures drawn equally from the 24 ADs in the district.” SPA-14. This places an enormous burden on a challenger candidate because of the substantial time and money needed to gather such large numbers of signatures. *See, e.g.*, Tr. 1294, 1475-76, 1782-84; JA-470-471 ¶¶ 12-15 (Lipton). For a challenger candidate, the task is hopeless.

Judge Keefe explained the unique difficulties in gathering signatures from voters who are not familiar with the office of delegate: “I petitioned in my own neighborhood, the exact same neighborhood I had petitioned in the year before and

found it very difficult to get people to sign because people didn't understand it." Tr. 932; *see* Tr. 930, 918; JA-503 ¶ 18 (Keefe); JA-231 ¶ 16 (Regan). If that was what happened with the judge's neighbors, imagine the difficulty of collecting the required signatures in every AD across a multi-county Judicial District.⁹

Party leaders have no such difficulty in putting their hand-picked delegates and alternates onto the ballot in every AD.

[T]he petitioning process is rather easy for the major party organizations. Slates of judicial delegates are included on omnibus petitions on which signatures are obtained for other candidates seeking other offices. The county and district leaders can easily mobilize the resources necessary to conduct the petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices.

SPA-15; *see, e.g.*, Tr. 848-49, 934-35, 344-45, 378-79. Thus, an insurmountable hurdle for a challenger is a *pro forma* exercise for the party machine.

3. Electing Delegates

If, as occurs roughly 90% of the time, the party leadership slates of delegates and alternates are the only ones filed with the Board of Elections, they are "deemed

⁹ Appellants make much of the 30,000 signatures supporting Judge López Torres' 2002 candidacy for Civil Court. Br. 27. But a closer look reveals that the petitions supporting Judge López Torres contained 500 or more signatures from only 8 of the 24 Assembly Districts in the Second Judicial District. JA-1629-30, ¶ 292. For Civil Court, candidates need not obtain signatures from each AD, so this was not a problem. But the signatures supporting Judge López Torres would have been grossly inadequate to qualify anywhere near the number of delegate and alternate candidates needed to challenge the party machine at the convention. *See* SPA-13. In addition, the petitions had Judge López Torres' name on them.

elected” and do not appear on the September ballot at all. N.Y. Elec. Law § 6-160(2).¹⁰ Appellants argue that voters can “vote out of office” judicial delegates whenever voters are “roused” to action. Br. 21-22. Not true. Delegates run for the sole purpose of attending a single judicial convention. The job is over a mere two weeks after the election.

Even in the rare contested delegate and alternate races, the September ballot does not and cannot tell voters which Supreme Court candidate the nominees intend to support—as the ballot does with Presidential primaries, showing the voter both the delegate and the Presidential candidate together. As a result, a Supreme Court challenger would have to inform the voters of a particular delegate’s or slate’s allegiance through expensive campaign advertising or contacts with voters—with each AD requiring separate literature identifying the relevant delegate candidates and the Supreme Court candidate. Tr. 390 (Regan), 1433-35

¹⁰ In New York City, only 12.7% of the judicial delegate seats—or one in eight—were contested at the September elections in the years 1999-2003. HE-5959. Outside New York City, delegate contests are even rarer. *See* JA-1538-41 ¶¶ 28-40; Tr. 1529 (witness “not aware of contested primaries” in the Fourth Judicial District); JA-234 ¶ 23 (Judge Regan’s efforts were “the only contested delegate race within the 7th Judicial District of which I am aware in the many years I have been in Rochester.”); Tr. 396-97 (same); Tr. 1372-73 (no contested races in the Eighth except for two years in which party leaders battled for control of Erie County); JA-238 ¶ 9 (“there has never been a contested delegate or alternate race” in Ninth Judicial District); Tr. 1407 (same); *see also* Tr. 1912 (Levinsohn); Tr. 1783 (Freedman); 1622-23 (Kellner); 1277-78, 1298 (Schiff); Tr. 2245 (Connor), 43, 45-46, 80 (Berger), 849 (Keefe); HE-4945-48 ¶¶ 60-67 (Hechter); HE-5959 (summarizing extent of contested elections).

(Ostrer), 1576-77 (Lipton); JA-471-72 ¶ 16 (Lipton); JA-503 ¶¶ 19-20 (Keefe); JA-233 ¶ 20 (Regan); JA-285-86 ¶ 16 (Berger); JA-209 ¶ 18 (Carroll).¹¹

Even if a challenger candidate recruited enough nominees for all of the delegate and alternate seats in every AD (none ever has), and even if each of those nominees obtained the necessary number of signatures and survived legal challenges to their petitions (*a fortiori*, that has never happened either), there would still be the formidable obstacle of actually getting the insurgent slate elected. A challenger “would need to field delegates in all or virtually all the ADs to have a realistic chance of prevailing in enough races to obtain a majority of delegate support at the convention. This is true not only because a challenger candidate is not likely to win every delegate race under normal circumstances, but also because the prospect of competing against the party leaders elevates the degree of difficulty.” SPA-13; *see* JA-284-86 ¶¶ 14-16 (Berger); JA-207-08 ¶¶ 13-15 (Carroll); JA-231-33 ¶¶ 18-20 (Regan); Tr. 85-86 (Berger), 390 (Regan), 1431-32 (Ostrer), 1717 (defense expert Kellner); JA-470 ¶ 12 (Lipton).

¹¹ As if this were not sufficiently burdensome, any such voter education may be forbidden by the Rules of Judicial Conduct. In particular, Rule 100.5(A)(1)(c) and (d) of the Rules Governing Judicial Conduct (22 N.Y.C.R.R. § 100.5) preclude any candidate for judicial office from “publicly endorsing or publicly opposing” candidates for *other* political offices, from “soliciting funds” or “attending political gatherings” on behalf of such candidates, or “making speeches on behalf of or for another candidate.” *See* HE-5413-19; *see also* Tr. 1306.

B. “Lobbying” the Party Leaders’ Chosen Delegates and Contesting the Convention

1. The Situation Throughout the State

Once the delegates appointed by the party leaders have been duly installed in early September, New York law requires the nominating convention to be held within two weeks. N.Y. Elec. Law § 6-124. That is an impossibly short period in which to persuade scores of delegates to defy the leaders who gave them their positions. SPA-32, 63. But even if it were two months, or two years, party leaders’ control over the delegates and the convention would thwart any challenger candidate.

New York’s judicial nominating conventions are *pro forma* affairs at which the delegates rubber-stamp decisions made earlier. Appellants’ own expert, Dr. Hechter, explained:

Party leaders have great influence over the nomination process when their party is unified. Indeed, judicial conventions generally take little time. Decisions are often unanimous. Since insurgent candidates are only likely to be nominated when the party is internally divided, rates of incumbency are high.

HE-4923. The District Court also credited the admission by Mr. Kellner, another of Appellants’ experts, that conventions outside Manhattan operate in the manner of a proverbial “smoke-filled room.” SPA-47 n.36. Mr. Kellner continued:

A: Yes, there are places where the leadership of the party will hold a meeting and try to work things out before the convention.

Q: And tell the delegates what they’re to do when the meeting occurs.

A: Make recommendations to the delegates, yes.

Q: Which are always followed?

A: Generally, yes.

Tr. 1630-31.

Henry Berger, former Chairman of New York's Commission on Judicial Conduct, described the county leaders' control in similar terms:

[T]he district leaders almost always follow the wishes of the county party [leader] when it comes to voting for Supreme Court candidates at the convention. In turn, the delegates follow the wishes of the district leaders who have selected them and support the county party [leader's] chosen candidates.

JA-283 ¶ 11, as amended by testimony, Tr. 207. Mr. Berger also testified that the current convention system “inevitably rewards candidates more for their loyalty and service to their political party leaders than for their legal experience, integrity, or judicial temperament.” JA-295-96 ¶ 43. He added that “the pool of truly eligible candidates is severely limited and cannot include many talented lawyers who have spent their careers focusing on legal work rather than political party service.” *Id.* The District Court credited Mr. Berger's testimony “in its entirety.” SPA-22.

Political science expert Bruce Cain testified that “[t]he whole process lacks that democratic moment [in] which the voters get to say whether or not they believe the party's organization is doing the right thing. It is just not there in the process.” Tr. 329. Dr. Cain analyzed the extent of contested delegate elections across the entire state, searching for any examples of Supreme Court candidates

successfully challenging the party-backed candidates at the convention. The only example that even came close in the last 25 years occurred in 2000, at the Democratic Party's judicial convention in the Eighth Judicial District. There, candidates supported by a rival faction of party leaders won as a result of a split within the county party leadership, rather than an individual challenger candidate's efforts. JA-254 ¶ 15, 1591-92 ¶ 178, 1597 ¶ 194, 1610-11 ¶ 246, JA-1632-33 ¶ 299. The District Court credited Dr. Cain's conclusion, finding "no evidence of a single successful challenge to candidates backed by the party leaders." SPA-33 & n.27, SPA-46.¹²

Compelling documentary evidence confirms the experts' conclusions. Throughout the entire state, more than 96% of nominations have been uncontested at the convention. HE-1342-2403, 3045-4712. The Court also credited evidence of the compressed time devoted to the conventions (*see* SPA-28), and the high absentee rates for judicial delegates, which range from 25% for Democratic Party conventions in New York City; 32% for conventions outside New York City; and 69% for Republican Party conventions in New York City. SPA-11 n.8; JA-251-52 ¶ 10 (Cain); Tr. 312 (Cain) 2236 (Connor); JA-1534 ¶ 19. The Court explained

¹² Appellants contend that "several 'insurgent candidates' have been nominated and elected in the Second Judicial District." Br. 26, 62. Their only support for this counter-factual assertion is testimony agreeing that half-a-dozen judges "came out of the reform movement." Tr. 488-89. The witness did not suggest that these judges were "insurgents" or that they were opposed by the county party leader. Appellants did not think it was in their interest to call any of those supposed "insurgents" as witnesses, though they all worked within walking distance of the Federal Courthouse on Cadman Plaza.

that “[t]he extremely high absentee rate reflects, among other things, the fact that delegates to the conventions know their votes do not really matter.” SPA-28.

The high rates of absenteeism are especially striking considering that attending that single convention is the *only* duty of the office to which the delegates are “elected” less than two weeks earlier. If a similar fraction of Presidential Electors failed to show up for the Electoral College vote—when the result is (usually) *supposed* to be a foregone conclusion—it would be a scandal. In Supreme Court elections, however, it is simply business as usual.

The absentees are, if not admirable, correct: it makes no difference whether they turn up or not. Evidence from across the state confirmed that fact. For example:

- In the Third Judicial District, as Albany City Court Judge Thomas Keefe explained based on his many years as a Democratic Party leader in Ulster and Albany Counties, “it is the Albany County Democratic chairman, in tandem with the Rensselaer County Democratic chairman, who choose who the Democratic candidates will be.” Tr. 850-51.
- In the Fourth Judicial District, “the Republican Party county leaders in the Fourth District—not the judicial convention delegates or the voters—selected [Justice Sise] as the nominee for Supreme Court Justice in 1998.... Justice Sise already knew the county leader from Schenectady County—the second most populous county in the district—because he was his brother.... When Justice Sise received the nomination at the convention, he expressed his appreciation to the eleven county leaders.” SPA-43; *accord* JA-1588-99 ¶¶ 170-71; Tr. 1517-23.
- In the Seventh Judicial District, Judge Regan testified, Democratic Party chairpersons from each county in the district meet in April and May, at least four months before the delegate

rices, to determine who they will nominate for Supreme Court Justice, and the Republicans determine their nominee by the third or fourth Friday in May. Tr. 344-45, 377-79, 385.

- In the Eighth Judicial District, there was a significant power struggle within the Democratic Party when the 2000 convention was held, with the result that no strong county leader controlled the convention. Patricia K. Fogarty said: “This is the first time, and I’ve been coming to these things for many years, when the delegates’ votes counted for something.” HE-4981-83.
- In the Ninth Judicial District, the Court found on the basis of unrebutted testimony that “nominees for Supreme Court Justice ... are selected by the county leader in the county where the justice will sit. The only way to become nominated is to obtain the sponsorship of that county leader; if the vacancy happens to be in one of the four counties other than Westchester, the blessing of the leader in Westchester County is required as well. The conventions in Westchester are mere formalities, as they are throughout the state. There is no lobbying of delegates beforehand and no deliberation at the conventions themselves. Indeed, there is nothing to deliberate, as the delegates know their role is to ratify the party leaders’ choice of candidates.” SPA-47; JA-242-44 ¶¶ 20-28, 1592-94 ¶¶ 179-84.
- In the Eleventh and Twelfth Judicial Districts, according to Appellants’ own expert, “[t]here are ad hoc discussions between district leaders and the county leader, and some consensus seems to be worked out at these discussions.” HE-4946 ¶ 62. Many nominators at the conventions in the Eleventh District do not even know how to pronounce the nominees’ names. HE-4952-53 ¶ 77.
- In the Twelfth District, party officials have disclosed the names of the nominees before the delegate *primary* has even taken place. Tr. 246.

Finally, Appellants’ evidence that some delegates were not *expressly* told how to vote (Br. 22) is beside the point. First, delegates *have* been told how to

vote and followed those instructions. Tr. 620-21. Other delegates were “told who we were going to take direction from,” but did not receive explicit instructions because “[t]here has never been a contested vote.” Tr. 1422-23. Second, the District Court credited the extensive evidence that the delegates’ dependence on district and county leaders ensures that “[e]xplicit voting commands are not needed to keep the delegates in line.” SPA-20. Appellants claim that the District Court’s finding was an “unsubstantiated assumption.” Br. 62. That is wrong. For evidence supporting this finding, see JA-1553, 1557-58, 1561, 1565-95 ¶¶ 73, 88-89, 97, 106-89; HE-4945 ¶ 60 (defense expert Hechter); HE-20 (“ingrate” letter); HE-6027 (Farrell); Tr. 1263-64 (defense witness Schiff); JA-283-84 ¶¶ 11-12 (Berger); JA-203-05 ¶¶ 7-9, Tr. 523-24, 541 (Carroll); JA-238 ¶¶ 8-9 (Ostrer); JA-229-31 ¶¶ 13-15 (Regan); Tr. 621 (López Torres); Tr. 808-09, JA-219-20 ¶¶ 8-11 (Segal); *see also* evidence described *infra* pp. 29-33.

2. Appellants’ Best Case: The First District

Appellants focus their case on the First District. Appellants’ own witnesses, however, confirmed that Mr. Farrell, the Democratic Party’s County Executive, controls the convention in the First District. Most tellingly, none of the defense witnesses could identify a single candidate for Supreme Court who had been nominated over the County Executive’s objection at a First District convention. Mr. Farrell himself defended the system this way:

I basically think I would keep the nominating conventions, because and I am now speaking *from a self-serving point of view*, as opposed to whether it is best in terms of electing minorities. *I take the position that it*

works best for me, because it gives me a better chance to control what goes on, and that, I think, is important in terms of doing some of the things we have done.

HE-6083 (emphasis supplied).

Mr. Farrell also commented on an unusual feature of the First District’s screening panel system—the screening panel recommends *only* sitting judges of the civil or criminal court. JA-1546 ¶ 56; Tr. 1304-05, 1602-04, 1731-33. Mr. Farrell explained, “We choose from both sides, but you tend to get more from the Civil Court because they are more politically related, having come out of the political system.” HE-6062-63. The screening panel waits until after Labor Day to report its findings, leaving only a few weeks at most for the approved candidates to “campaign.” Tr. 1672-73.

Speaking of his personal experience in advising candidates in the First District, Henry Berger said: “The district leaders could tell us what their delegates were going to do very easy and so as always, we just dealt directly with the district leaders and we still do that today.” Tr. 75. (Mr. Berger’s reference to “their” delegates nicely illustrates the relationship between party leaders and delegates.)

Alan Schiff, a Manhattan district leader called as a witness for the defense, expressly agreed with Mr. Berger’s testimony:

I certainly would—as I said earlier, if the county leader called me and asked me to support a candidate that he was supporting, I would certainly give that respect, and I would recognize that if I chose not to do it, that there might come a time a year, two years, three years down the line when we were seeking something from the county leader, some support for some—some change that we wanted to make in some way or another, he might

remember that I didn't support him at a different time. So I suppose, if the county leader asked me for support, that would be in my mind as I was considering who to support for judge.... [S]o I would say that Henry Berger's statement to that effect is simply pointing out political reality in a democratic process.

Tr. 1263-64. Mr. Schiff admitted that contested conventions are avoided because that would "force the delegates to make a choice between supporting a candidate that they might—that they might want to support and offending the county leader."

Tr. 1295. This system has led to the inevitable result, quoted earlier, that Mr. Schiff cannot remember any candidates' being nominated over the county leader's objection. Tr. 1291-92.

Given these admissions—and similar evidence from other defense witnesses—Appellants' narratives about six Supreme Court Justices' paths to the bench (Br. 30-34) do nothing to disprove the fact that the county leaders name the candidates. All six Justices received the blessing of county leaders. SPA-25-27.¹³ Two of the six hailed from outside the First District; neither one purported to have gained the nomination without the support of his local County leader. JA-1588-89 ¶¶ 170-71, JA-1764-65 ¶¶ 71-74. Three of them were related by blood or marriage to party leaders. SPA-25-26, 43. The District Court reasonably inferred from these facts that the testimony of these witnesses "supports the plaintiffs' contention

¹³ Tr. 1834-35 (Gangel-Jacob); Tr. 1975, 1980 (Schlesigner); Tr. 1768-69, 1779-80, 1795 (Freedman); 1865-67, 1880, 1894 (Abdus-Salaam); Tr. 1491-92, 1517-19 (Sise); JA-1764 ¶ 72 (Lunn).

that the district leaders (together with Farrell), not the delegates, select the Supreme Court Justice nominees.” SPA-25.

Appellants make much of two Manhattan phenomena: political clubs and screening panels. Neither gives the rank-and-file voters meaningful influence on the nomination for what is supposedly an elective office. Mr. Kellner testified that only 1.3 percent of registered Democrats in Manhattan belong to political clubs. Tr. 1624-25. The clubs charge annual membership dues, Tr. 113, 1237, 1274-75, 1552, which experts on both sides of the case agree limit the ability of poor voters to participate. Tr. 1208-09 (Hechter); Tr. 117-18 (Berger).

As for screening panels, they may weed out unqualified candidates, but they do not even purport to lessen the burdens on well-qualified candidates who do not have the county party leader’s support. And even the screening panel in the First District is subject to manipulation by the party leaders. Tr. 1723-25 (Kellner).

Finally, there is the telling fact that Appellants have tried, as much as possible, to make this a case about the First District alone: the improvements in that district, while not giving the voters any influence over the process, reveal just how bad things have been in the other eleven districts:

[T]he most important thing to be said about screening panels is why they are necessary. Robert Levinsohn, a defense witness who was instrumental in the creation of the First District panel, testified that screening panels are needed to counter the manipulation by county leaders of the process of judicial selection. In the First District, the panel was created in 1976 because of the closed nature of process, in which the judicial delegates simply followed the wishes of the party leaders, with no public input in

the selection of the judges. *Those characteristics of the process continue to exist today throughout the state.*

SPA-47 (emphasis supplied); JA-1555 ¶ 79; JA-1771 ¶ 88; Tr. 1921-22 (defense witness Levinsohn: by “manipulation...I am talking about the party leadership of the County”).

3. The System in Action: Judge López Torres and the Second District

Judge Margarita López Torres tried for eight years to gain a Democratic Party nomination for Supreme Court in the Second District. She could not do so, despite her immense popularity among her party’s voters. Her experience is a “microcosm” of an unconstitutional system. SPA-42. It reflects structural hurdles, such as recruiting delegate and alternate nominees to run an alternative slate in each of 24 ADs. It demonstrates the absolute power of the county leader, in this case Mr. Norman. And it shows that nepotism, cronyism, and personal pique trump qualifications and voter preference when the leader exercises that absolute power.

Judge López Torres was elected to Kings County Civil Court in 1992 and re-elected in 2002. In 2005, she was elected to the Kings County Surrogate’s Court. In both 2002 and 2005, she defeated machine-backed opponents in county-wide primaries. But she never was able to gain the nomination for Supreme Court. As the District Court explained,

López Torres was off to a great start in her judicial career.... Shortly after she was elected, however, López Torres lost her way. It began when she was told by [Clarence] Norman, the county leader, and Vito Lopez, her district leader, to hire a particular young attorney as

her court attorney.... When López Torres refused, Norman told her she would not become a Supreme Court Justice....

SPA-37-40; JA-1574-87 ¶¶ 127-66.

Judge López Torres incurred “personal antipathy to her on the part of Mr. Norman” (Tr. 2212-14 (Connor)) because of “her failure to hire the people sent to her by the party leadership and her refusal to withdraw her candidacy [for Supreme Court] in 1997.” SPA-40; *see* JA-1581 ¶ 149; JA-180 ¶¶ 34-35. She also incurred the political enmity of a “powerful district leader” in Assemblyman Vito Lopez for those actions and because, later, “she refused to take Vito’s recommendation for hiring someone,” namely his daughter. Tr. 2212-14; SPA-38-39; JA-174-75 ¶¶ 13-14.

During her quest for the Supreme Court bench, Judge López Torres met with nearly all of the 42 district leaders in Brooklyn to seek their support for her nomination. In declining her requests, none of the district leaders ever suggested that she lacked the necessary qualifications. Tr. 709; JA-186 ¶ 52 (López Torres). Rather, Judge López Torres testified:

[T]hey all indicated that the process and the way you became a Supreme Court judge is through the County Leaders essentially select[ing] them and the district leaders select[ing] them. And in my particular situation, everyone indicated that I would need the support and the approval of the County Leader and also of Assemblyman [Vito] Lopez.

Tr. 707-08.

Mr. Norman himself told Judge López Torres that “his concerns with her candidacy had nothing to do with her qualifications, but rather arose out of her disloyalty.” SPA-40; *see* JA-1581 ¶ 149; JA-180 ¶¶ 34-35. Mr. Norman also told Judge López Torres that she did not have sufficient “support” to gain the nomination. SPA-41; JA-1583-84 ¶ 155; JA-182 ¶ 42. As the District Court explained,

Since she had been the leading vote-getter among elected judges in Brooklyn just six months earlier, Norman was not referring to support in the electorate. Rather, he was referring to the only support that matters when it comes to Supreme Court Justice candidates in the Second District—his own and that of the district leaders. Norman summed up his position by telling López Torres that “County,” *i.e.*, the leadership of the Kings County Democratic County Committee, would only support candidates who support “County.”

SPA-41 (citing JA-182 ¶ 42).

The support of “County” was indispensable to competing for the nomination, as Judge López Torres discovered. The convention simply rubber-stamped “County’s” selections. The District Court highlighted, as an illustration of “the disparity between what may appear to happen at a convention and what actually happens,” the proceedings for the 2001 Second Judicial District nominating convention, chaired by State Senator Martin Connor. The delegates went through many formalities, including reciting the pledge of allegiance, reading aloud an eight-page letter, nominating and voting on temporary presiding officers, administering the oath of office to the temporary officers, nominating and voting

on permanent presiding officers, administering the oath of office to the permanent officers, making and seconding various other motions, and nominating and voting on the six candidates “recommended” by “County.” SPA-28-30; Tr. 2224-30. All this took only 20 minutes. Tr. 2230; HE-2151-63.

The defense called Senator Connor as a witness. He admitted that a “County” operative routinely told him in advance of the convention who the nominees were to be. Tr. 2204. Consistent with that routine, on the day before the 2002 convention, he learned that the party leaders had chosen a candidate he considered “unqualified” and expressed his strong disapproval: “I said you have Margarita López Torres, she might put her name in. You people are supporting...[a candidate who is] a horrible choice.” Tr. 2208-09; JA-1581-82 ¶ 150. In contrast, he regarded Judge López Torres as “well qualified.” Tr. 2209-10.

Despite his strong conviction that “what was about to be done was wrong, and bad for the bench,” Tr. 2262, Senator Connor kept quiet.

Senator Connor was outraged, convinced that the nomination [of the person Mr. Norman had chosen] was bad for the Supreme Court bench. But he said nothing. He dared not tell the delegates that the county leader’s choice would be a disaster. Instead, after he convened the nominating convention, he declined to continue as its chair and ducked out, saying nothing. The candidate he objected to was nominated and became a Supreme Court Justice. Why was he afraid to voice objection? Because he wanted the county leader to support his choice in a State Senate race.

SPA-19-20; *see* JA-1581-82 ¶ 150; JA-1633-35 ¶¶ 300-01; Tr. 2261-62.

After the convention, a district leader circulated a letter to all delegates telling them that he had voted against Judge López Torres because she was an “ingrate.” “She courted Vito Lopez to support her for Civil Court, but then decided she didn’t need him anymore and denied his daughter a job.” HE-20.

Senator Connor “had five offices and 150 staff members,” Tr. 2208, but even he was admittedly unable to “speak truth to power,” despite his outrage. Tr. 2263. If a powerful and respected politician feels obliged to keep quiet while “County” punishes an “ingrate,” “it is hardly likely that mere delegates will refuse to do the county leader’s bidding in the ordinary course of events.” SPA-20; *see* JA-1581-82 ¶ 150. The District Court recognized this as evidence of the “political dynamic [that] ensures that the district leaders and their delegates...virtually always support the candidates backed by the party leaders.” SPA-19; *see also* evidence cited *supra* p. 25.

IV. THE GENERAL ELECTION

The convention system is particularly important in New York because the general election for Supreme Court Justice is so often non-competitive or non-contested; therefore, the nomination of the locally dominant party is tantamount to being elected to the bench in most parts of the State. Appellants chide the District Court for “presuming” this fact (Br. 45), but the undisputed evidence shows it to be true. *See* JA-1602-08 ¶¶ 211-39.

The statistics are stark and beyond dispute: more than 40% of candidates across the state receive cross-endorsement by the two major parties; 62% of the State’s voters in Supreme Court general elections have only one “choice” among

major party candidates on Election Day; and 76% of the Supreme Court elections across the state are either uncontested or non-competitive (meaning that the second-place candidate gets less than 80% of the winner’s total). SPA-31; JA-254-55 ¶¶ 16-17 (Cain); JA-1602 ¶¶ 209, 211; HE-4717-4908. Even Appellants’ expert admitted that “there are relatively few judicial districts where there are contested general elections.” Tr. 1601. Within New York City, Democrats always prevail in Supreme Court general elections. Tr. 1601 (defense expert Kellner); HE-5261. Appellants’ witnesses admitted that Republican nominees almost always prevail in general elections elsewhere in the state. Tr. 1601-02 (Kellner), 1524-25 (defense witness Sise); *accord* JA-240 ¶ 13 (Ostrer); JA-228 ¶ 10 (Regan); HE-4717-4908.

* * *

Therefore, the overwhelming evidence that county leaders control the dominant party’s nomination means that those leaders also control who ultimately sits on the Supreme Court bench. What is supposedly an elective office is actually in the hands of party leaders unknown to most voters.

SUMMARY OF ARGUMENT

1. The Convention System Is Subject to Scrutiny. Appellants’ core arguments go to *avoiding* constitutional scrutiny rather than satisfying the relevant standard. Appellants argue that “the District Court erred in determining that there is a right [for voters and candidates] to participate meaningfully in the nomination process.” Br. 45. Appellants evidently contend that meaningless participation is enough.

Formalistic “access” to a convention dominated by one or a handful of party insiders does not relieve the burdens on challengers to the party machine or to voters who would support those challengers. Nor does “access” to the general election ballot as an independent or minor-party candidate cure the severe burden on the nomination. That has never been the law. *See Bullock v. Carter*, 405 U.S. 134, 149 (1972); *United States v. Classic*, 313 U.S. 299, 318-19 (1941).

The key question is not, as Appellants insist, whether a candidate for elective office has *de jure* “access” to a nomination process that is in reality closed to the voters. Rather the relevant questions under the case law are (a) whether the burden imposed by the convention on rank-and-file voters who would support a challenger candidate is “severe,” and (b) if so, whether the statute is “necessary” to serve a compelling state interest.

2. The Burdens Are Severe. The burdens on voting rights in this case are more severe than in many previous cases in which this Court or the Supreme Court has struck down election laws. Earlier cases have considered burdens to be “severe” when challenger candidates have had only a small chance of beating the party leaders. *See Storer v. Brown*, 415 U.S. 724, 742 (1974). Here, the evidence demonstrated conclusively that such candidates have virtually *no* chance of prevailing over the objection of county leaders. Few challenger candidates have come close to getting past *any* of the choke points in the system. None has obtained the nomination over the party leader’s opposition.

3. The Convention System Is Not Narrowly Tailored To Serve a Compelling State Interest. Far from serving any compelling state interest, the

convention system contravenes the most relevant state interest, namely the New York Constitution's command that Supreme Court justices "shall be chosen by the electors of the judicial district in which they are to serve." N.Y. Const. art. VI, § 6(c). Appellants failed to prove that the convention system serves any of their other three asserted interests. Moreover, Appellants cannot deny that in each case less burdensome tools would serve the interests equally well, if not better.

Appellants assert that political parties have an associational right to employ the convention system, and the state has a compelling interest in not violating that right. But the Supreme Court has held over and over again that parties' associational rights do not permit the leadership to exclude members of their own parties from the nomination process. That was the lesson of the "white primary" cases and their more recent progeny.

With respect to the remaining interests asserted, the current system is not designed to serve them at all. For example, one aspect of the asserted associational rights of the parties is the prevention of cross-party raiding. Far from preventing such raiding, however, the convention system promotes it: in many parts of the state, the parties routinely cross-nominate each others' Supreme Court candidates. And, in any event, the state has a narrower tool at hand to prevent cross-party raiding: extending the Wilson-Pakula law, which (in non-judicial elections) simply forbids members of one party from entering the primary of another party without permission of that party's leaders.

The convention system also disserves the interests of racial, ethnic, and geographic diversity. Appellants' own expert admitted that less populous counties

are underrepresented on the Supreme Court bench. As for racial diversity, in five of the twelve Judicial Districts, there is not a single minority Supreme Court Justice. Three other districts have a combined total of five minority justices. And, once again, the State has much narrower tools to promote its interest in these worthy goals, including smaller judicial districts.

4. The District Court’s Remedy Was Proper. The District Court did what courts generally do when presented with an unconstitutional statute: it enjoined enforcement of the provision that led to the harm and severed it from the rest of the law. The District Court adopted that ordinary remedy on a temporary basis. It also stayed the injunction until after the next election so that the State will have an opportunity to create a constitutionally permissible system if it chooses. The District Court acted well within its discretion.

Appellants never suggested another remedy to the District Court. But they now treat the District Court as if it were a state legislature, contending that the District Court abused its discretion by failing to order detailed and extensive revisions to the Election Law and the political parties’ rules. Appellants’ proposal would be far more intrusive than the remedy adopted by the District Court. And it would fail, in any event, to address the fundamental constitutional infirmity—the exclusion of voters and challenger candidates from the nominating process. Appellants would keep the convention system, tinker with its particulars around the edges, but leave in place the county leaders’ veto power over nominations.

STANDARD OF REVIEW

This Court reviews a grant of a preliminary injunction for abuse of discretion, overturning the District Court’s decision “only if it rested on an error of law or on a clearly erroneous factual finding.” *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004).

Appellants’ brief reads as though the District Court’s findings of fact should be ignored, rather than reviewed. Appellants’ 25-page statement of the facts cites the District Court’s findings only 5 times but mentions nearly a dozen citations that are *dehors* the record. Appellants claim that *all* of the District Court’s findings should be reviewed *de novo*, on the theory that *all* of them were mixed findings of fact and law. Br. 38, 59-60. The evidence overwhelmingly supports the District Court’s findings under *any* standard of review. But Appellants’ claim is simply untrue. Federal Rule of Civil Procedure 52 provides: “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” As the Supreme Court has noted, Rule 52 “does not make exceptions or purport to exclude certain categories of factual findings.” *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982).

Appellants point to a handful of cases in which appellate courts have subjected certain “mixed” questions to *de novo* review in order to protect particular individual rights. *See, e.g., Ornelas v. U.S.*, 517 U.S. 690, 699 (1996). Appellants’ cases applied stricter review to “ultimate findings” in order to protect the constitutional rights of *individuals*, not to give the *state* a lighter burden in

challenging findings against it.¹⁴ This case does not fall into that narrow category. Moreover, this Court has consistently applied the clear error standard even to ultimate findings of fact—here, that the burdens are “severe” and that the statute is not “narrowly tailored” to serve a compelling state interest—in cases concerning ballot access,¹⁵ voting rights,¹⁶ and § 1983 claims.¹⁷

Even if, contrary to *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), this case were subject to an exceptional standard of review, the Court would still apply the clear error standard to findings of historical fact (*e.g.* party leaders control the nomination). On “ultimate questions,” the Court would construe all record inferences in favor of the District Court’s decision. *See Washington v. Schriver*, 255 F.3d 45, 55 (2d Cir. 2001) (citing *Maggio v. Fulford*, 462 U.S. 111, 113 (1983)). Among the findings that Appellants focus on specifically, nearly all are undeniably questions of historical fact with no legal element at all—for example,

¹⁴ *See Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (four-member plurality) (confrontation clause); *United States v. Kliti*, 156 F.3d 150, 152-53 (2d Cir. 1998) (ineffective assistance of counsel); *Oyague v. Artuz*, 393 F.3d 99, 104 (2d Cir. 2004) (same); *Ornelas*, 517 U.S. at 699 (reasonable suspicion and probable cause); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984) (actual malice in liable case).

¹⁵ *E.g.*, *Green Party*, 389 F.3d at 418; *Rockefeller*, 78 F.3d at 46.

¹⁶ *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 492 (2d Cir. 1999) (“we are constrained to apply a clearly erroneous standard of review to the district court’s ultimate findings of vote dilution”) (citing *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)).

¹⁷ *E.g.*, *Nicholson v. Scopetta*, 344 F.3d 154, 165 (2d Cir. 2003); *Anobile v. Pelligrino*, 303 F.3d 107, 115 (2d Cir. 2002); *Carlos v. Santos*, 123 F.3d 61, 67 (2d Cir. 1997); *Cornwell v. Robinson*, 23 F.3d 694, 706 (2d Cir. 1994).

whether party leaders have determined who has been nominated in past elections, and which elements of the convention system supply party leaders with the control they have exercised for all these years. The core finding that a candidate lacking the party leader's imprimatur cannot be nominated is not only itself a question of fact, but is supported by antecedent factual findings such as the impossibility of persuading delegates to defy party leaders at the convention and the practical futility of challenging the dominant party's slates of delegates in multiple ADs at the primary.

ARGUMENT

I. THE CONVENTION SYSTEM IS SUBJECT TO CONSTITUTIONAL SCRUTINY.

If the facts demonstrate that a state "subject[s] speech, association, or the right to vote to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Lerman*, 232 F.3d at 145 (internal quotation marks omitted); see *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Appellants pay lip service to this standard, but argue principally that the Court should *ignore* the severe burdens imposed by New York's convention system. Appellants cite three bases for this remarkable claim; none is persuasive.

A. Access to the General Election Ballot Does Not Cure Severe Burdens at the Nomination Stage.

Appellants first contend that the convention system is immune from constitutional scrutiny because there is an alternative path to the Supreme Court bench: petitioning onto the general election ballot as an independent or gaining a

minor-party nomination. But voters' right to decide whom their party will nominate cannot be satisfied by a candidate's access to the general election ballot as an independent or as the candidate of *another* party. It simply makes no sense to require a candidate who has demonstrated a modicum of support to leave her party in order to make an appeal to the voters of that party. Moreover, the Supreme Court rejected Appellants' theory more than three decades ago:

Instead of arguing for the reasonableness of the exclusion of some candidates, appellants rely on the fact that the filing-fee requirement is applicable only to party primaries, and point out that a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition. Apart from the fact that the primary election may be more crucial than the general election in certain parts of Texas, we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law.

Bullock, 405 U.S. at 146-47 (footnotes omitted).

Indeed, *Bullock's* holding that voters need not "abandon their party affiliations in order to avoid the burdens" of state laws shutting them out of the nomination process goes back far longer than three decades. In *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927), the first of the "white primary" cases, the Court struck down a statute providing that "in no event shall a negro be eligible to participate in a Democratic party primary election." Justice Holmes wrote for a unanimous Court that "the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election

that may determine the final result.” *Id*; see also *Nixon v. Condon*, 286 U.S. 73, 89 (1932).

In *Classic*, the Court reasoned that “[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected.” *Classic*, 313 U.S. at 318-19. Appellants dismiss *Classic* as a criminal prosecution about ballot tampering. But in *Smith v. Allwright*, 321 U.S. 649, 653, 663-64 (1944), the Court applied *Classic* to strike down Democratic Party rules excluding black voters from Texas primary elections—even though Texas law allowed independent and write-in candidates to appear in the general election. And in *Terry v. Adams*, 345 U.S. 461, 463, 469-70 (1953), the Court, again applying *Classic*, struck down a pre-primary conducted by an *entirely private club* that excluded black voters.

By the time the Court decided *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969), it was settled law that “[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.” This Court’s precedents reflect that well-established principle. See *Lerman*, 232 F.3d at 145 (invalidating rule for primary ballot petitions notwithstanding availability of access to general election ballot as independent); *Rockefeller*, 78 F.3d at 45-46 (striking down statutory rules used to keep insurgent Republican candidates off the primary ballot, even though such candidates could petition onto the general election ballot as independents). It is far too late now to claim that the Constitution permits courts to ignore severe burdens

imposed upon voters and candidates at the nomination stage simply because there is a formal right to vote for (or to appear as) an independent, minor party, or write-in candidate in the general election.

Moreover, the District Court found as a matter of historical fact that—as in *Bullock, Classic*, and the “white primary” cases—the dominant party’s nomination determines who will hold the office. In such a system, “a vote in the nominating process is the only effective vote that can be cast.” *Ripon Soc’y, Inc. v. Nat’l Republican Party*, 525 F.2d 567, 589 (D.C. Cir. 1975) (*en banc*).

Appellants rely on cases that involved general elections, not party nominations. Br. 42-44 (discussing *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party of Texas v. White*, 415 U.S. 767 (1974), *Storer*, 415 U.S. 724, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Burdick*, 504 U.S. 428). Those cases all addressed access to the general election ballot by minor party, independent, or write-in candidates. None confronted a situation in which the state had erected machinery fencing out voters from determining who their own party’s nominee would be. None overruled the Court’s repeated holdings that access to the general election ballot is not a “reasonable alternative” to the right to compete for a party’s nomination. *Bullock*, 405 U.S. at 146-47.

In its most recent case addressing the nomination process, the U.S. Supreme Court was unanimous in reaffirming that the party’s nomination plays a central role in the overall election process and implicates core rights of voters and candidates. See *Clingman v. Beaver*, 544 U.S. 581, 125 S. Ct. 2029, 2037 (2005) (“The moment of choosing the party’s nominee’ . . . is ‘the crucial juncture at

which the appeal to common principles may be translated into concerted action, and hence to political power in the community.’”) (Thomas, J., for a plurality) (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (quoting, in turn, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986)); *id.* at 2043 (O’Connor, J., concurring) (“To have a meaningful voice in this process, the individual voter must join together with likeminded others at the polls. And the choice of who will participate in selecting a party’s candidate obviously plays a critical role in determining both the party’s message and its prospects of success in the electoral contest.”); *id.* at 2049 (Stevens, J., dissenting) (agreeing with the majority: “If the so-called ‘white primary’ cases make anything clear, it is that the denial of the right to vote cannot be cured by the ability to participate in a subsequent or different election.”).

Finally, the case of *LaRouche v. Kezer*, 990 F.2d 36 (2d Cir. 1993), does not sweep as broadly as Appellants claim (Br. 44). In *LaRouche*, candidates could gain a place on the primary ballot either by submitting a petition or by showing that they were generally recognized as a serious candidate by the media. *Id.* 37-38. This Court concluded that the media-recognition route onto the primary ballot did not render the statute unconstitutional, because candidates could still qualify for the primary ballot through petitioning. *Id.* 39-41. Either option produced the same result: a spot on the primary ballot. In no way does *LaRouche* suggest that precluding a candidate from competing for the *nomination* can be cured by providing that candidate an opportunity to obtain a place on the *general* election ballot as an independent or minor party candidate.

B. Using a Convention Does Not Insulate the State from Constitutional Scrutiny.

Just as some nomination systems using primary elections are permissible and others are not, the fact that some convention systems are constitutional does not mean that all of them are. “To the excluded voter who cannot cast a vote for his or her candidate, it is all the same whether the party conducts its nomination by a primary or by a convention open to all party members except those kept out by the filing fee. Each is an ‘integral part of the election machinery.’” *Morse v. Republican Party of Va.*, 517 U.S. 186, 207 (1996) (internal citations omitted) (Stevens, J., announcing the opinion of the Court) (quoting *Classic*, 313 U.S. at 318). Appellants concede that “barriers to candidates must be considered in light of their impact on voters,” Br. 41, and that the Constitution requires access to the state’s nomination system “without undue burden.” Br. 54.

Appellants rely on *American Party of Texas v. White*, 415 U.S. at 781, and argue that a state may “insist that intraparty competition be settled before the general election by primary election or by party convention.” Br. 51. Appellants’ argument proves too much: if *White* insulated any primary or convention system as they contend, then every primary election process a state might adopt would automatically be constitutional, a proposition flatly contradicted by later cases. *See, e.g., California Democratic Party*, 530 U.S. at 586 (striking down California’s primary law); *Lerman*, 232 F.3d at 149 (striking down primary ballot access rule).

In essence, Appellants accuse the District Court of holding *all* conventions unconstitutional (Br. 51). They overlook the Court’s actual holding: “The

constitutional analysis is not categorical; just as some primary systems fail to pass constitutional muster, the New York system does not elude scrutiny by virtue of its falling under the broad rubric of ‘party convention.’” SPA-59 (citation omitted).

Courts have upheld conventions that—unlike this one—do not exclude voters from the nomination process, including systems in which (a) any member of the party may attend and vote at the convention,¹⁸ (b) rank-and-file party members vote for delegates who are listed on the ballot with the name of a candidate to whom they are pledged,¹⁹ or (c) voters can petition their favored candidate onto a primary ballot for their party’s nomination against candidates endorsed at the party’s convention.²⁰ In none of these cases did the party leaders hold exclusive control over the nomination; rank-and-file voters had *some* opportunity to choose a candidate not endorsed by the party leaders. Appellants rely on these cases, but cannot explain how New York’s judicial nominating convention provides any means for the rank-and-file voter to support a challenger candidate, as each of these conventions does. No case has ever upheld a system like New York’s uniquely closed judicial convention system, where only delegates can vote, voters must select delegates without any indication of which candidate the delegates favor, and the convention’s decision is the final word on the nomination.

¹⁸ *E.g., Morse*, 517 U.S. at 190, 238.

¹⁹ *E.g., Ripon Soc’y*, 525 F.2d at 575.

²⁰ *E.g., Moritt v. Rockefeller*, 346 F. Supp. 34, 36-38 (S.D.N.Y.), *aff’d*, 409 U.S. 1020 (1972).

Conversely, the District Court in *Campbell v. Bysiewicz* struck down Connecticut's burdensome convention system. 242 F. Supp. 2d 164 (D. Conn. 2003). In *Cambpell*, a convention determined the party's presumptive nominee; candidates could force an intra-party primary only by gaining 15% of the votes at the convention. *Id.* at 167. The dearth of actual success in forcing such primaries led the Court to conclude that Connecticut's convention system imposed a severe and unconstitutional burden. *Id.* at 172-73.

Finally, evaluating the specific contours and the particular burdens that the convention system places on voters and candidates year in and year out explains why Appellants' cases (Br. 52-53) approving selection of candidates by party committees in special elections or during emergencies are inapposite. Those cases do not apply to a convention system that is the state's routine nomination process, rather than an emergency measure. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 11-12 (1982) (impact on voters' rights is minimal where vacancies only arise under unusual circumstances); *Montano v. Lefkowitz*, 575 F.2d 378, 386 (2d Cir. 1978) ("exigencies of special elections for the House of Representatives do not afford time for a primary"); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 500 (S.D.N.Y. 2004) (state has compelling interest in ensuring timely nomination when inadequate time remains for the standard nomination process); *Trinsey v. Penn.*,

941 F.2d 224 (3d Cir. 1991) (special demands of time justified giving state discretion in filling vacancy).²¹

C. Access to a Convention Dominated by a Party Leader Does Not Cure Severe Burdens.

Appellants argue that the First and Fourteenth Amendments require nothing more than a formalistic “chance to enter the judicial convention.” Br. 58.

Appellants equate the opportunity to beg party insiders for the nomination with the opportunity to appeal to the voters of one’s party. As Judge López Torres herself experienced, the two “opportunities” are worlds apart. Voters supported her overwhelmingly in the Kings County Civil Court primary against a party-backed opponent. SPA-41. In contrast, she did not have adequate “support” from the County leader—the only person whose support mattered—when it came to the office of Supreme Court. SPA-37-42.

Appellants offer the Court a vision of the convention as a “representative” form of democracy. But, as the District Court found, this theory is “grounded on a faulty factual premise.” SPA-63. The Court found:

Specifically, New York’s judicial convention does not actually work, and was not designed to work, in the manner described by these defendants. The process of placing delegates at the convention is so difficult, except in isolated instances in a single AD, that only the party

²¹ Appellants rely heavily on *dicta* from a footnote in the “proceedings below” section of this Court’s decision in *Mrazek v. Suffolk Cty. Bd. of Elections*, 630 F.2d 890, 898 n.11 (2d Cir. 1980). Br. 53. But in the “discussion” portion of the opinion, the Court applied ordinary constitutional scrutiny to the convention at issue.

organization can accomplish it. The party leaders select delegates who do their bidding.

SPA-63.

The evidence overwhelmingly supported the District Court’s findings that New York’s judicial nominating conventions uniformly rubber-stamp the county leaders’ choices, irrespective of a candidate’s popular support among voters within the party as a whole. For a candidate, “access” to the closed convention bears no resemblance to the opportunity to compete for support among the party’s voters. For the party’s voters, even indirect “access” to the convention would “twist[] on its head the system that the Legislature set up.” Tr. 1567-68 (defense expert Kellner).

While the Constitution does not entitle candidates to obtain a “guarantee of electoral success” (Br. 1-2)—no democratic system could or should—“candidates must be permitted an effective means of appealing to voters when it counts.” SPA-61. The District Court’s findings show that the structure of New York’s judicial nominating convention ensures that no amount of popular support can overcome the opposition of a few party leaders. This burdens voters and candidates, rendering meaningless their “participation” in the nominating process. Appellants argue that “there is no authority for the proposition that an individual has a fundamental right...to vie meaningfully for his party’s nomination.” Br. 47. In support of this proposition, they cite only the plurality opinion in *Clements v. Fashing*, 457 U.S. 957, 963 (1982). But in *Clements*, “a majority of the Court...[rejected] the plurality’s mode of equal protection analysis.” *Id.* at 977 n.1

(Brennan, J., dissenting). Indeed, four members of the Court observed, “[a]lthough we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters.” *Id.* at 977 n.2 (citing *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Lubin v. Panish*, 415 U.S. 709 (1974); *American Party of Texas*, 415 U.S. 767; *Bullock*, 405 U.S. 134 and *Storer*, 415 U.S. 724 among others). More recent cases also confirm that the nominating process implicates core rights of voters and candidates. *Clingman*, 544 U.S. 581 (2004), quoted *supra* at p. 44; *California Democratic Party*, 530 U.S. 567 (2000); *Morse*, 517 U.S. 186 (1996).

If Appellants were correct that candidates need only be allowed to ask a convention to nominate them, then none of the primary cases would make any sense. In *Lubin*, *Bullock*, and the “white primary” cases, to take but a few examples, states could have maintained their exclusionary systems by eliminating even the pretense of an election and giving a few party leaders the express power to nominate candidates. That cannot be right. The burdens must be assessed in light of the actual facts. If they severely shut out voters, they must be necessary to serve a compelling state interest. Here, as found by the trier of fact, those burdens are structural, intentional, and insurmountable.

II. THE BURDENS IMPOSED BY NEW YORK’S SUPREME COURT NOMINATION REQUIREMENTS ARE SEVERE.

The District Court considered New York’s judicial nominating conventions from the perspective of a reasonably diligent candidate not favored by the party

leadership. The U.S. Supreme Court and this Court have held that if such a candidate can “only rarely” succeed in being considered by the party’s voters, the election barriers impose a severe burden. *Storer*, 415 U.S. at 742; *Rockefeller*, 78 F.3d at 45.

New York’s Supreme Court convention system burdens the right to vote far more severely—and shuts out challenger candidates far more conclusively—than nomination systems that this and other courts have found to impose severe burdens on constitutional rights. The procedures in those cases made it difficult, not all-but-impossible, to be considered by their parties’ voters at the nomination stage. *See, e.g., Lubin*, 415 U.S. at 716-19 (filing fees for primary elections); *Bullock*, 405 U.S. at 146-47 (same); *Lerman*, 232 F.3d at 145 (requirement that witnesses to signatures on primary ballot petitions be residents of the district in which the candidate is running); *Morse*, 517 U.S. at 190 (\$35 registration fee to convention operated to exclude voters); *Rockefeller*, 78 F.3d at 45-47 (signature and filing requirements for access to primary ballot); *Campbell*, 242 F. Supp. 2d at 172-73.

Like the presidential candidates in *Rockefeller*, Supreme Court candidates face the burden to recruit, gather signatures for, and elect delegates in each of numerous jurisdictions (ADs) within the larger judicial district. 78 F.3d at 89. Just as in *Rockefeller*, the State’s far lower signature requirements and lack of geographic distribution requirements for other offices show that the burdens on

Supreme Court candidates and voters cannot be justified by a state interest in requiring a “modicum of support.” *Id.*²²

New York’s judicial convention system is far more burdensome. It ensures that even candidates with strong popular support can never be considered directly by the voters for nomination: there is no primary ballot, and no caucuses where voters could nominate a Supreme Court candidate. In nominating candidates for New York’s Supreme Court, a party’s voters do not have any choice at all, ever. This is not just a burden; this is an impassable barrier between a party’s voters and candidates. Voters are entirely shut out of the nomination process by design.

The ultimate proof of how severely voters’ and candidates’ rights are burdened is the fact that virtually no challenger has gotten past any of the choke points in the system, and none has actually made it to the Supreme Court over the dominant party leader’s objection. *See Storer*, 415 U.S. at 742 (finding severe burden based on limited number of contested primary elections); *Green v. Mortham*, 155 F.3d 1332, 1337 (11th Cir. 1998) (reviewing the number of candidates who obtained ballot status); *Gjersten v. Bd. of Election Comm’rs*, 791 F.2d 472, 477 (7th Cir. 1986) (weighing statute’s effect in past elections); *Molinari*

²² These characteristics also highlight the inapplicability of *Prestia v. O’Connor*, 178 F.3d 86, 87 (2d Cir. 1999). In *Prestia*, the Court distinguished *Rockefeller* by focusing on “special circumstances” in the earlier case, especially the requirement that candidates expend substantial resources gathering signatures in many localities and the relative rarity with which challengers had achieved ballot access. 178 F.3d at 89. Those circumstances also arise in this case, but with even greater severity, as the District Court found. SPA-65.

v. Powers, 82 F. Supp. 2d 57, 70-71 (E.D.N.Y. 2000) (paucity of candidates who had even attempted to compete demonstrated severe burden); *Campbell*, 242 F. Supp. 2d at 173 (same). “[T]o say that challenger candidates for the Supreme Court ‘only rarely’ succeed in getting their own slates of delegates on the ballot across the judicial district ‘gives euphemism a bad name.’ It never happens.” SPA-62 (citation omitted).

It is also relevant that the judicial nominating convention is more burdensome than the nomination process for any comparable office in New York or any other state. *See, e.g., Norman v. Reed*, 502 U.S. 279, 294 (1992) (finding burden where the state “adduced no justification for the disparity”); *Storer*, 415 U.S. at 739 (comparing provision unfavorably to “most state election codes”); *Rockefeller*, 78 F.3d at 45 (“With regard to justification for the substantial burdens on candidates, the district court noted that New York ballot access rules are far more burdensome than those adopted by virtually every other state.”); *Campbell*, 242 F. Supp. 2d at 170 (“it is relevant that 44 states and the District of Columbia” have lesser restrictions); HE-40-45 (comparing nomination requirements of all states).

Appellants assert that the District Court erred in assessing the burdens on candidates from the perspective of a “challenger candidate.” Br. 60-61. Appellants incorrectly claim that the Court defined “challenger candidate” in “circular” fashion, as “a candidate with no support from *anyone* in the party establishment at any stage in the process.” Br. 60 (emphasis in original). The District Court did not use that definition, and indeed Plaintiffs and witnesses in this

very case do not meet that definition. Judge López Torres had the public support of many elected officials from the Democratic Party. She also had undeniable popularity among Democratic voters. When she ran for Civil Court in 2002, she was the only judicial candidate in Brooklyn to receive more than 200,000 votes—more than any Democratic candidate for *Supreme* Court that year. JA-1582-83 at ¶ 152; JA-181 at 37. In her bid for Supreme Court that year, she sought the support of many Democratic district leaders, but they told her that she “would need the support and the approval of the County Leader and also of Assemblyman Lopez.” Tr. 707-08. Similarly, Judge Regan had significant support among Republican Party officials in the 7th Judicial District, but such support was irrelevant to seeking a Supreme Court nomination; the County Leader told Judge Regan that he alone controlled the convention delegates and “that’s all that matters.” JA-229 at ¶ 12. Far from assessing the relevant burdens from the perspective of a candidate with *no* party support, the District Court cited overwhelming evidence that such support is irrelevant if the county leader decides to block the candidate.

The District Court based its finding of severe burden—and its antecedent findings supporting that ultimate finding—on admissible expert testimony that the Court credited, on state-wide statistics and admissible state-commissioned reports, on the party-admissions of Defendants and the concessions of Defendants’ own witnesses (both fact and expert), on Defendants’ “striking” decision not to call parties within their control, and on the Court’s deliberative weighing of the various (and sometimes conflicting) narrative accounts offered by two dozen live

witnesses. Appellants attempt to challenge the Court’s finding by ignoring most of this evidence, by citing (and often mischaracterizing) snippets of testimony that the Court did not find worthy of the weight Appellants now place on them, and by offering new evidence *dehors* the record. They offer the Court no means to weigh the evidence *de novo*. And they offer no reason why this Court should even try to do so. They have not come close to showing that the District Court’s finding of severe burden was wrong.

III. THE CONVENTION SYSTEM IS NOT NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST.

Appellants set forth three state interests allegedly served by the current judicial convention system: associational rights; racial diversity; and geographic diversity. (They have abandoned a fourth, no longer contending that the convention system promotes judicial independence.) Appellants must demonstrate that it is “necessary to burden the plaintiff[s’] rights” with New York’s Supreme Court selection requirements in order to serve those interests. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Illinois State Bd. of Elections*, 440 U.S. at 185 (“We have required that states adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved.”).

The District Court correctly found that (a) the asserted state interests are poorly served by the convention system, and (b) the state has tools at hand to promote each state interest by less burdensome means. In addition, the most compelling state interest—ensuring that voters are actually able to elect their

Supreme Court justices—has been perverted by the statutory scheme. N.Y. Const. art. VI, § 6(c). Because “the State of New York ‘chooses to tap the energy and legitimizing power of the democratic process’ in selecting its Supreme Court Justices, ‘it must accord the participants in that process...the First Amendment rights that attach to their roles.’” SPA-53 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)).

A. The Convention System Does Not Serve Legitimate Associational Rights of Political Parties.

Appellants assert as their principal state interest the associational freedom of political parties to select judicial delegates. (Br. 69). Since the “white primary” cases, courts have refused to permit political parties to exclude their own members from the nomination phase. *See, e.g., Smith*, 321 U.S. 649. The Supreme Court has “considered it ‘too plain for argument,’ for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion.” *California Democratic Party*, 530 U.S. at 572 (quoting *American Party of Texas*, 415 U.S. 767). To be sure, the party has a right to exclude *non-members* from its nominating processes. *California Democratic Party*, 530 U.S. at 576-77. Similarly, the party has a right to *endorse* members in intra-party competition. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989). But Appellants’ cases do not find or imply a right of party leaders to exclude the party’s own members from the nomination process. If such a right existed, the

State would not only be permitted to establish closed conventions, it would be required to do so at the political parties' request.

To the extent that Appellants rely on the prevention of party raiding—the only associational right Appellants identified to the District Court—the judicial nominating convention does not further the interest, and the State has narrower tools at hand to achieve the goal. The Wilson-Pakula law prevents party raiding in the context of non-judicial elections in New York by forbidding a member of one party to enter another party's primary without permission of that party's leaders. N.Y. Elec. Law § 6-120(4). The State could extend that statute to Supreme Court elections. Because a narrower solution exists if the State wishes to address this problem, fears of party raiding cannot justify a severe burden on the rights of party members to support challenger candidates.

Appellants rely on testimony from one witness to suggest that the Wilson-Pakula law would not prevent party raiding. Br. 71. That witness testified that the law has not been effective against party raiding in primaries for judicial offices in the Eighth Judicial District. Tr. 1337-38. But the Wilson-Pakula law does not reach judicial primaries. N.Y. Elec. Law § 6-120(4). Moreover, conventions do not prevent party raiding. In that very same Eighth Judicial District, 20 out of the 34 Supreme Court candidates elected between 1990 and 2002 received cross-endorsements by both major parties. JA-1606 ¶ 232.

Finally, Appellants' invocation of slate balancing (Br. 72) does not justify the severe burdens imposed by the current convention system. Unlike the core associational rights implicated in *California Democratic Party* and *Eu*, the State's

interest in permitting party leaders to hand-pick “balanced” slates is not supported by any case law. Br. 72. Moreover, vanishingly little evidence supports Appellants’ assertion that the convention system actually produces balanced slates.

Appellants rely exclusively on Senator Connor’s testimony about the Second Judicial District to conclude that the convention system produces slates balanced “across geography, race, ethnicity and gender.” Br. 72. In reality, the evidence shows that slates of Supreme Court justices are overwhelmingly from the most populous county in the district (JA-1788-89 ¶ 123), overwhelmingly white except in districts that approach or exceed majority-minority demographics (JA-1775 ¶ 98), and overwhelmingly male (HE-5723). Surely if the State were genuinely concerned with “balanced slates,” it could choose narrower tools, such as smaller districts, allowing cumulative voting or tickets of judges running together, in order to allow robust slate-balancing without imposing severe burdens on candidates or voters.

B. The Convention System Is Not Narrowly Tailored To Promote Racial Diversity.

New York has a real interest in promoting racial and ethnic diversity on the bench. But the District Court correctly found that that the facts contradicted Appellants’ “flawed contentions regarding diversity.” SPA-70; *see also* JA-1774-88 ¶¶ 94-121. And, again, the state has narrower tools to promote diversity, most obviously smaller judicial districts and cumulative voting.

1. The Convention System Does Not Promote Racial Diversity.

Appellants argue that the convention system promotes racial diversity.

Br. 73-74. They reason from an analysis by Dr. Hechter, who assumed that, in a hypothetical Supreme Court primary, New York City voters would vote only on the basis of a candidate's race. Tr. 1171-72; HE-4925-26 ¶¶ 15-16, HE-4933 ¶ 32 n.11. Based on this assumption, Dr. Hechter concluded that in Manhattan, Brooklyn and Queens, no minority judges could ever be elected in a direct primary election. Tr. 1172; HE-4926 ¶ 18. Dr. Hechter admitted that his assumptions were "likely to be falsified in certain cases." Tr. 1189-91. His theory, for example, predicted that Judge López Torres could never win a contested county-wide primary in Brooklyn, though she has won two—against the party machine—since 2002. The District Court found Dr. Hechter's testimony "unpersuasive," "flatly incorrect," and "flawed." SPA-68, 69, 70. Appellants present no reason to question the Court's rejection of Dr. Hechter's testimony, which was extensively discredited. JA-1774-82 ¶¶ 95-105.

The convention system has, in fact, hindered efforts to produce a diverse bench. The overwhelming majority (92%) of minority justices statewide come from New York City, where ethnic and racial minority voters make up at least 50% of the voting-age population. JA-1776 ¶ 99, HE-6769. Outside New York City, the convention system has produced a staggeringly non-diverse bench. Five of New York's twelve districts have *no* Supreme Court justices of color despite a combined total of 81 authorized seats. HE-6769.

District	Authorized Justices	Minority Justices	Percentage of Minorities in Voting Age Population
Third	15	0	12.9%
Fourth	13	0	7.4%
Sixth	10	0	7.4%
Seventh	18	0	12%
Ninth	25	0	27%

Zero out of 81 is not diversity, regardless of jurisdiction. The convention system's failure to elect a single minority justice in the Ninth Judicial District, where more than a quarter of the voting age population consists of minorities and the district elects a total of 25 justices, refutes any argument that the convention system promotes diversity.

Three other districts have a *combined* total of five minority justices. *Id.*

District	Authorized Justices	Minority Justices	Percentage of Minority Justices	Percentage of Minorities in Voting Age Population
Fifth	17	1	5.9%	10.3%
Eighth	26	2	7.7%	13.1%
Tenth	47	2	4.3%	21.8%

The only districts with more than two minority justices are districts in which people of color represent at least half of the voting-age population. HE-6769. That figure suggests that minority candidates could win Supreme Court seats in a democratic system. In two districts, they could do so at potentially higher rates than they do under the convention system.

Judicial District	Total Authorized Justices	Minority Justices	Percentage of Minority Justices	Percentage of Minorities in the Voting Age Population
Eleventh	38	12	31.6%	64%
Twelfth	24	10	41.7%	82.3%

These statistics show that, under the convention system, communities of color do not have a voice in the nomination process coextensive with their numbers in the voting age population. Appellants try to explain this disparity by pointing to the percentage of minority *lawyers* in 1990.²³ Br. 74-75; HE-7646-49, 7667-70. Their reliance on these statistics suggests that they believe the pool of eligible minority candidates to be too small to allow the results of the elections to reflect the actual preferences of voters from minority communities. That assumption is insulting. The State of New York granted a license to an African-American lawyer as early as 1848.²⁴ By now, there are large numbers of qualified lawyers of color in every district, and significant numbers of minority judges regularly win seats in open primaries. Minority judges regularly win elections in mid-sized cities including Rochester, Buffalo, and Albany, even as they have failed to gain the bench in proportional numbers on the Supreme Court in those regions. JA-1784

²³ For discussion of the methodological impropriety of using 1990 census data, see JA-1780-82, ¶¶ 106-09.

²⁴ See Paul Finkleman, *Review Essay: Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 Stan. L. Rev. 161, 172 n.83 (1994).

¶ 111.²⁵ Senator Connor testified that a direct primary election system would actually elect more African-Americans at the expense of white Irish or Italian American candidates. Tr. 2124-25. In essence, Senator Connor testified, “promoting diversity” today with judicial conventions means affirmative action for white candidates who already dominate the Supreme Court bench statewide. JA-1776 ¶ 100, Tr. 2124-25.

2. Less Burdensome Alternatives Would Serve Racial Diversity.

Smaller districts would better serve racial diversity than districts of the current size. Witnesses presented by both parties agreed that this is true. *See* Tr. 222-23 (Berger); Tr. 1656 (Kellner); HE-6073 (Farrell).

In addition, “allowing cumulative voting in primary elections involving multiple judgeships would permit minority groups of any kind—racial, geographic, ideological, or otherwise—to concentrate their support behind the candidate most to their liking.” SPA-69 (citing Richard H. Pildes, *Gimme Five: Non-gerrymandering Racial Justice*, *The New Republic* (March 1, 1993)).

²⁵ The evidence was undisputed that the convention system has also undermined efforts to promote gender diversity on the Supreme Court. *See* HE-6758 (task force concluding that progress was virtually non-existent with respect to Supreme Court as against other elected courts in New York); HE-5755 (Supreme Court had a lower percentage of women on the bench than any other court in New York State except for the upstate county courts and the Court of Claims). In this Court, neither the Appellants nor the Women’s Bar Association of the State of New York (appearing as *amicus*) disputes that evidence.

C. The Convention System Does Not Promote Geographic Diversity.

Appellants do not contend that State has a compelling interest in geographic diversity, and the convention system could hardly be considered even clumsily tailored to serve that interest. Readily available alternatives—reducing the size of the judicial districts or imposing residence requirements—would more effectively promote geographic diversity.

The evidence before the District Court proved that the convention system deprives voters in less populous counties of their proportionate share of justices. Even in the judicial districts identified by Appellants’ expert, Dr. Hechter, as the “most geographically diverse,” the current system selects a disproportionate share of justices from the county with the greatest voting-age population. *See* JA-1788-89 ¶ 123; HE-4959 ¶ 94. Richmond County (Staten Island) has approximately 17% of the population of the Second Judicial District, but Dr. Hechter found that only seven of the 83 justices in the district (8.4%) reside there. JA-1789 ¶ 123; HE-4980. According to the *amicus* brief of the Richmond County Bar Association, that figure is now down to five. (The rest of the justices live in Brooklyn.)

In the Seventh Judicial District, Monroe County has only 59% of the voting population, but it has 86% of the justices. *Id.* In the Eighth Judicial District, Erie County has only 61% of the population, but 89% of the justices. *See* JA-1789; HE-4980. In the Ninth Judicial District, Westchester County has only 48% of the voting population, but roughly two thirds of the justices. JA-241-42 ¶¶ 15-17; JA-246, as amended by testimony, Tr. 1389-90, JA-1789.

While the convention system does a very poor job of promoting geographic diversity, simple remedies are available and more narrowly tailored. One is reducing the size of judicial districts. If Richmond County were its own district, its voters could consistently elect justices of their choice—as they do for Surrogate Court and Civil Court—instead of begging for scraps offered by the Kings County Democratic Party. Without altering the current judicial district lines, the State could also reserve judicial seats for the residents of specific counties or even smaller subdivisions, even if they are elected at large. *See, e.g., Dallas Cty. v. Reese*, 421 U.S. 477 (1975). Similarly, the State could establish county residence requirements. *See, e.g., Weidman v. Starkweather*, 80 N.Y.2d 955, 956 (1992); N.Y. Pub. Off. Law § 3(1).

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN SELECTING A TEMPORARY REMEDY.

With nominations under §§ 6-106 and 6-124 unconstitutional, the District Court required that nominations for Supreme Court Justice proceed for now under the default provision of New York law that governs public offices including all other elected judicial positions. *See* N.Y. Elec. L. § 6-110 (“All other party nominations of candidates for offices to be filled at a general election, except as provided herein, shall be made at the primary election.”).

Appellants attack the District Court’s temporary injunction on two contradictory grounds. They assert that the Court “improperly usurp[ed] legislative authority.” Br. 81-82. Then they argue that the Court should have enjoined the upcoming delegate election and line-edited the convention statute to

bring it into conformity with recommendations published by the Feerick Commission after the Court entered its injunction. Br. 84-87. Neither objection is sound.²⁶

The District Court did not usurp legislative authority. Rather, it applied the ordinary and common-sense remedy of enjoining enforcement of an unconstitutional provision, where the provision can be severed from the valid portions of the law. *E.g., Green Party*, 389 F.3d at 417-18. By leaving in place the State’s default provisions to govern nominations, the District Court showed respect for existing state policies. The Court’s remedy respects the State’s decision to use primary elections for all other judicial nominations, preserves an official role in the nominating process for the major parties, and permits party leaders and their organizations to work to support candidates of their choosing, while ““assur[ing] that intra-party competition [will be] resolved in a democratic fashion.”” SPA-76 (quoting *California Democratic Party v. Jones*, 530 U.S. at 572).

Other courts, “[c]ognizant of [their] role as a federal court,” have gone so far as to order a legislature to “render[] constitutional its election code.” *Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1301 (8th Cir. 1995). The District

²⁶ “In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.” *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1972); *see also Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004) (same); *Republic of Philippines v. N.Y. Land Co.*, 852 F.2d 33, 36 (2d Cir. 1988) (“flexibility rather than rigidity has distinguished equitable remedies”) (internal quotation omitted). “Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.” *Lemon*, 411 U.S. at 200.

Court here was more modest. It invited New York’s Legislature to enact constitutional legislation, but in the meantime, it left the State’s default nomination processes in place. Much more drastic injunctions are within the Court’s discretion. *See Hellebust v. Brownback*, 42 F.3d 1331, 1332 (10th Cir. 1994) (affirming injunction against holding any elections until legislature remedied an unconstitutional election scheme); *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 501 (7th Cir. 1991) (“the court can permit or even order the legislature to submit a proposed remedy” for Voting Rights Act violation).

Appellants argue that the District Court should have begun by enjoining an upcoming election and editing the Election Law and the party rules (Br. 85). Appellants’ proposal—which they never made to the District Court—would thrust the District Court into a quasi-legislative role: imposing a new geographic distribution formula for the allocation and election of delegates, setting new time frames, changing the numbers of delegates and their terms of service, altering the petitioning requirement, and devising new rules to govern the conventions themselves.

In support of their argument, Appellants rely on *Ayotte v. Planned Parenthood*, 126 S. Ct. 961, 968 (2006). But the Court in that case held that federal courts should “restrain ourselves from ‘rewrit[ing] state law to conform it to constitutional requirements’” and avoid the “serious invasion of the legislative domain” that comes with trying to re-write state laws. *Ayotte*, 126 S. Ct. at 968 (citation omitted). In *Ayotte*, the Court never contemplated a judicial line-edit of state-law; it remanded for the courts to consider only whether they should

invalidate the entire statute or sever the unconstitutional provision. *Ayotte*, 126 S. Ct. at 968-69.

Appellants' suggestion suffers from a deeper flaw. It simply would not address the profound constitutional violation inherent in the current system. Even under the Feerick Commission's recommendations to adjust the convention system, voters would remain entirely frozen out of the nomination process, and qualified candidates with unquestionable popular support would remain utterly without any mechanism to appeal to voters. Appellants' demand that the District Court begin by tinkering with the convention system would not address this most basic of that system's constitutional infirmities. *See Abrams v. Johnson*, 521 U.S. 74, 86-88 (1997) (using infirm starting point "as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting").

V. THE DISTRICT COURT MADE NO PROCEDURAL ERRORS.

Appellants claim that the District Court made three procedural errors. *First*, Appellants claim that the District Court erred in granting Plaintiffs full relief without consolidating the preliminary injunction hearing with the full trial on the merits. Br. 76. A District Court may grant a preliminary injunction that "provide[s] the movant with substantially all the relief sought," even if granting such relief would "render a trial on the merits largely or partly meaningless." *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 33-35 (2d Cir. 1995); *see also Johnson v. Kay*, 860 F.2d 529, 540 (2d Cir. 1988). To be sure, the movant must

demonstrate a “clear” or “substantial” likelihood of success on the merits. *Id.*²⁷

The District Court applied that standard here. SPA-49.

In any case, the District Court neither consolidated the preliminary injunction hearing with the trial nor granted final relief. The District Court’s opinion specifically contemplates a future trial. SPA-49-50 (“Assuming the plaintiffs’ claims have merit, the harm alleged...is properly remedied *pending trial on the merits* by a preliminary injunction.”) (emphasis supplied); SPA-4, 36, 49-50, 76. The District Court expressly acknowledged that the “choice of a permanent remedy” falls to the New York State Legislature, and characterized its order as a “temporary remedy.” SPA-75. The District Court even stayed its order for the 2006 election cycle, giving the legislature a whole year to enact legislation complying with the Constitution. JA-2106.

Second, appellants contend that the District Court based its decision on inadmissible hearsay. Br. 78. In fact, the District Court’s findings of fact rested principally on extensive admissible evidence, including party admissions, statistics, live testimony from witnesses with personal knowledge (including many of appellants’ own witnesses), expert testimony, reliable reports and documents

²⁷ Appellants’ brief suggests that Plaintiffs should have proved their case “beyond a reasonable doubt.” Br. 79 (citing a solo district court case). Appellants made a related argument to the District Court, which properly rejected it. SPA-50 n.37 (quoting *Lerman*, 232 F.3d at 144 (“Because ‘the plaintiffs challenge a [statutory scheme] regulating the ability to engage in interactive political speech and association activity,’ the overbreadth doctrine applies, under which ‘the plaintiffs need only demonstrate a substantial risk that application of the provision will lead’ to a deprivation of First Amendment right.”)).

admissible under hearsay exceptions, and even Defendants' strategic decision not to call witnesses under their control. But even if Appellants were right about the District Court's reliance on hearsay, it would not matter: a district court may consider hearsay evidence at a preliminary injunction hearing. *See Communication Workers of Am. v. NYNEX Corp.*, 898 F.2d 887, 891-92 (2d Cir. 1990) (affirming grant of preliminary injunction based on record containing hearsay evidence that was corroborated by non-hearsay evidence).

Third, Appellants argue that the Court relied on an "incomplete record." Br. 77. The evidentiary hearing spanned 13 days; 24 live witnesses testified; the District Court received more than 10,000 pages of documentary evidence; and the parties presented almost 500 pages of proposed findings and several hours of summations. SPA-3. If the Appellants consider the record incomplete, the fault lies with them. SPA-36 ("defendants' failure to call Farrell or any other county leader as a witness is striking"). Appellants make no assertion that the District Court improperly excluded any evidence. Appellants understood the stakes. If they believed more evidence should have been put before the Court, they had ample opportunity to do so.

CONCLUSION

The District Court's preliminary injunction should be affirmed.

May 9, 2006

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CERTIFICATE OF COMPLIANCE WITH RULE 31(a)(7)

I, Kent A. Yalowitz, hereby certify that the foregoing Brief for the Appellees, excluding the corporate disclosure statement, table of contents, table of authorities, signature block, and this certificate, contains 18,239 words, according to the Word Count feature in Microsoft Word.

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ANTI-VIRUS CERTIFICATION

Case Name: Margarita López Torres, et al. v. NYS Board of Elections, et al.

Docket Number: 06-0635-cv

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 5/9/2006) and found to be VIRUS FREE.

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