**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, AND COMMON CAUSE/NY,

Plaintiffs,

v.

Index No. CV 04-1129 (JG)

NEW YORK STATE BOARD OF ELECTIONS; NEIL W. KELLEHER, CAROL BERMAN, HELENA MOSES DONOHUE, AND EVELYN J. ACQUILA, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE CITY OF NEW YORK, AND JUSTICE DAVID DEMAREST, INDIVIDUALLY, AND AS PRESIDENT OF THE STATE ASSOCIATION,

Defendant-Intervenors,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory Intervenor.

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# DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY


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## PRELIMINARY STATEMENT

Defendants have appealed this Court's Memorandum and Order Including Preliminary Injunction entered on January 27, 2006 (the "Decision") granting Plaintiffs' motion and enjoining enforcement of New York Election Law § 6-106 and the use of the procedures set forth in § 6-124, and ordering that nomination of Supreme Court Justices shall be by primary election. It cannot be denied that this is a case of first impression that raises serious legal questions of great public importance which are worthy of appellate review. Defendants respectfully submit, therefore, that before dismantling a system that has operated continuously for nearly 85 years, the Court should stay enforcement of the injunction to provide Defendants with an opportunity to have the Second Circuit review this important decision. Accordingly, by this motion, Defendants request the Court to modify and stay enforcement of the mandatory injunction pursuant to Federal Rule of Civil Procedure 62(c) pending the determination of Defendants' appeal to the United States Court of Appeals for the Second Circuit. Defendants will ask the Second Circuit to expedite the appeal to shorten the period of any stay.

As detailed below, this Court should grant a stay pending appeal to the Second Circuit because:

1. ***The matters decided by this Court involve difficult and complex legal issues on which Defendants are likely to succeed, which the Second Circuit should be given an opportunity to review prior to enforcement of the Court's sweeping mandatory injunction***. These issues include, among others: (a) whether the Court failed to properly heed overwhelming Supreme Court authority establishing that no constitutional violation occurs where the electoral scheme provides alternative means of access to the relevant ballot; (b) whether there is a right to compete and win a major party nomination or merely a right to access whatever process a state has chosen for nominations; and (c) whether the court erred in applying strict scrutiny as opposed to rational basis review.

2. ***Defendants, along with candidates, voters and the political parties face irreparable harm absent a stay***, including, among others things, the following: (a) absent a stay, there will be no meaningful opportunity for appellate review prior to the 2006 election cycle; (b) incumbent Justices facing reelection, who have been isolated

from politics for over a decade, will face the daunting task of campaigning and running a primary that may result in permanent loss of judicial careers; and (c) political parties will be deprived of the use of a constitutionally permissive method of choosing their standard bearers for the office of Supreme Court Justice, and may suffer attempts by other parties to raid their ballot line.

3. ***Plaintiffs will suffer no harm as a result of a stay because a stay would merely preserve the status quo***. Indeed, Plaintiffs' own request for relief would have afforded the Legislature a period of time to act before a primary would be imposed. This Court's consideration of the preliminary injunction motion over fourteen months demonstrates that no constitutional crisis was ignited in 2005, the year Plaintiffs sought to obtain their relief.

4. ***The public interest favors a stay*** for the reasons stated above.

Accordingly, Defendants submit that principles of federalism counsel strongly that the Second Circuit have an opportunity to review the correctness of the Court's Decision before the convention system is swept aside. Rather than engage in lawmaking of its own, even on an interim basis, the Court should modify its order and enter a stay pending appeal to allow the Second Circuit to review the decision and, should the Second Circuit affirm, allow elected lawmakers an opportunity to respond in a deliberative fashion to the issues raised by the Court's Decision.

In the event that the Court denies the requested stay pending the determination of the appeal, Defendants request that the Court temporarily stay the enforcement of the injunction long enough for the Second Circuit to hear an application for a stay pursuant to Federal Rule of Appellate Procedure 8.

Alternatively, the Court also should modify its order for mandatory injunctive relief to more narrowly tailor the relief granted while staying enforcement of the modified order pending appeal. Indeed, as detailed in the final report of the Commission to Promote Public Confidence in Judicial Elections, issued shortly after this Court's Decision, there are numerous measures that

could be imposed to reduce the perceived burdens associated with the judicial nominating system while leaving a judicial nominating convention fully intact.

## FACTUAL BACKGROUND

On June 9, 2004, Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the New York State Board of Elections' enforcement of three New York State Election Law statutes, N.Y. Elec. L. §§ 6-106, 6-124 and 6-158, on the grounds that these statutes deny the equal protection of the law and violate the First and Fourteenth Amendments by imposing undue burdens on candidates for State Supreme Court Justice seeking the nomination of the Democratic or Republican Party.

After conducting a preliminary injunction hearing, and after submission of post-hearing findings of fact and conclusions of law, the Court granted Plaintiffs' motion for a preliminary injunction in its Decision. The Court issued its Decision without having consolidated the hearing with a trial on the merits, or otherwise ordering a subsequent trial. On the basis of an incomplete record expressly based on evidence that would not be admissible at trial, the Court determined that Plaintiffs are likely to succeed on the merits of their claim that New York State's judicial convention system violates the First Amendment. As an interim remedy, the Court swept aside the judicial nominating convention system, enjoining enforcement of New York Election Law § 6-106 and use of the procedures set forth in § 6-124, and ordered that nomination of Supreme Court Justices shall be replaced by primary election.

## ARGUMENT

The Federal Rules of Civil Procedure provide that a district court may stay entry of a preliminary injunction when an appeal is taken from that order: "When an appeal is taken from an interlocutory or final judgment granting . . . an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such

terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Fed. R. Civ. P. 62(c). *See also Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance"). Here, Defendants seek a stay pending the appeal filed on February 7, 2006. This Court retains jurisdiction to take appropriate action under Rule 62 to preserve the *status quo* even after a notice of appeal has been filed. *See Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 564-65 (2d Cir. 1991).

It is well-recognized that the fundamental purpose of a stay is to preserve the *status quo* pending appellate review. *See, e.g., Carvel Corp. v. Eisenberg*, No. 87 Civ. 608 (CSH), *2 (S.D.N.Y. Oct. 31, 1988). A stay of the Court's ruling pending appeal is particularly appropriate here because the injunction alters, rather than maintains, the *status quo*. In addition to considering whether the preliminary injunction alters or maintains the *status quo*, a federal district court considering a motion to stay that injunction must consider the following factors:

(1) whether the movant will suffer irreparable injury absent a stay,

(2) whether a party will suffer substantial injury if a stay is issued,

(3) whether the movant has demonstrated "a substantial possibility, although less than a likelihood, of success" on appeal, and

(4) the public interests that may be affected.

*LaRouche v. Kezer*, 20 F. 3d 68, 72 (2d Cir. 1994) (citing *Hirschfeld v. Board of Elections*, 984 F. 2d 35, 39 (2d Cir. 1993)); *see also Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). The standard for granting a stay pending appeal is a flexible one: a lesser showing on some factors may be counterbalanced by a strong showing on others. *Mohammed*, 309 F.3d at 101; *see also*

*United States v. ASCAP*, No. 13-Civ-95 (WCC), 1991 WL 501864, *1 (S.D.N.Y. Oct. 3, 1991).

Each of these factors, taken independently and together as a whole, strongly favors entering a stay in this case.

## I. DEFENDANTS' APPEAL RAISES SERIOUS AND UNSETTLED QUESTIONS OF LAW UPON WHICH IT IS LIKELY TO PREVAIL ON THE MERITS

### A. Standard For Substantial Probability Of Success On The Merits

Read literally, showing a substantial probability of success on appeal would require a trial court to find that a moving party had a strong likelihood of obtaining reversal. In other words, the court would have to hold that it had just erred. That, of course, is not how this factor is applied. Rather, "[t]he likelihood-of-success standard does not mean that the trial court needs to change its mind or develop serious doubts concerning the correctness of its decision in order to grant a stay pending appeal." *Goldstein v. Miller*, 488 F. Supp. 156, 172 (D. Md. 1980), *aff'd* 649 F.2d 863 (4th Cir. 1981). Instead, courts analyzing this criterion "'may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the *status quo* should be maintained.'" *Barcia v. Stikin*, No. 79 Civ. 5381 (RLC), 2004 WL 691390, *2 (S.D.N.Y. Mar. 31, 2004) (quoting *Goldstein*, 488 F. Supp. at 172); *see Carvel Corp. v. Eisenberg*, No. 87 Civ. 608 at *2 ("the mere fact that defendants' view of the merits is one that I do not share does not foreclose the issue of whether a stay should issue . . . . The equities . . . clearly favor the maintenance of the *status quo* during the . . . appeal [as] this action does present 'difficult legal questions' worthy of consideration by the court of appeals . . .").

Moreover, "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors." *Mohammed v. Reno*, 309 F.3d at 101 (quoting *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C.

Cir. 1977)). Even if the court believes the likelihood of success on appeal is not high, a stay is justified when the balance of the equities favors the appellant. *Id.* Similarly, a persuasive showing of likelihood of success on appeal justifies a stay even where the movant/appellant has only shown "some injury." *Id.*

### B. Defendants Are Likely To Succeed On The Merits Of Their Appeal

Defendants respectfully submit that the Court made five principle legal errors in reaching its determination that Plaintiffs are likely to succeed on their claim that the New York State judicial convention system violates the First Amendment. Given that the standard of review on this appeal is *de novo*, there is a *substantial likelihood* that the Second Circuit will reverse this Court's judgment on one or more grounds. *See, e.g., India.com, Inc. v. Dalal*, 412 F.3d 315, 320 (2d Cir. 2005) (questions of law subject to *de novo* review on appeal).

First, the Court did not properly apply to its burden analysis the overwhelming Supreme Court precedent establishing that no constitutional violation occurs where the electoral scheme provides for reasonable alternative means of access to the relevant ballot. In analyzing the burdens associated with a challenged electoral scheme, the Supreme Court has consistently examined whether there are reasonable alternative means of access to the relevant ballot. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 441 (1971) (rejecting Equal Protection challenge based on existence of alternative methods of accessing general election ballot); *Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974) (recognizing that California law provided adequate alternative paths of ballot access, by primary or nominating petition, and that candidates simply failed to qualify for the general election ballot under either alternative); *Lubin v. Panish*, 415 U.S. 709 (1974) (determining that, in order to be constitutional, election law provisions requiring filing fees must necessarily provide indigent candidates with an alternative means, such as petition, of accessing the ballot). The Second Circuit, in following the "totality approach," has directed that "[t]he

burden imposed by the challenged regulation is not [to be] evaluated in isolation, but within the context of the state's overall scheme of election regulations." *Lerman v. Board of Elections*, 232 F.3d 135, 145 (2d Cir. 2000); *see also Larouche v. Kezer*, 990 F.2d 36, 39 (1993) (directing that "[u]nder the totality approach, if *either* alternative would be constitutional standing alone, the other must be viewed as broadening the opportunities for ballot access and is a fortiori constitutional") (emphasis added).

Defendants respectfully submit that the Court's analysis failed to weigh the alleged burdens associated with New York State's judicial nominating system in the context of the State's overall election scheme. New York Election Law clearly provides reasonable alternative means of access to the general election ballot as any would-be judicial candidate has the option of (i) seeking the nomination of one (or more) political party, (ii) petitioning directly onto the general election ballot, (iii) running as a minor party candidate, or (iv) having a vote cast for them as a write-in candidate. Indeed, Plaintiff Lopez Torres is a case-in-point as she sought the nomination of the Democratic Party and, though she did not win, the same challenged provisions governed her successful bid to become the nominee of the Working Families Party through the judicial convention process.

Second, while the Court references the Supreme Court's decision in *Lubin v. Panish*, it effectively disregarded the holding of this case. In *Lubin*, the Supreme Court addressed a mandatory filing fee statute that "operate[d] to exclude some potentially serious candidates from the [primary] ballot without providing them with *any alternative means* of coming before the voters." *Lubin*, 415 U.S. at 718 (emphasis added). *Lubin* vindicates an indigent candidate's right to ballot access in the face of exclusionary filing fees and does not confer, comment on, or

otherwise consider any right *beyond a right of access*. Under *Lubin*, the only First Amendment right candidates could possibly have is to access the convention without undue burden.

Third, in overlooking that the constitutional inquiry concerns the issue of access, the Court also erred in finding that the First Amendment guarantees a right to compete for a major parties' nomination. (Dec. at 57). In particular, the Court determined that voters and candidates "have a right to participate meaningfully in the nomination process, which includes a realistic opportunity to challenge the selections of party leadership." (Dec. at 59). In this respect, the Court appears to equate a right to participate meaningfully with the right to win. (Dec. at 57).

The Court relies on *United States v. Classic*, 313 U.S. 299 (1941) and *Bullock v. Carter*, 405 U.S. 134 (1972) in reaching its decision. (Dec. at 58-59). However, even if, as the Court has determined, *Classic* and *Bullock* are not limited to primary elections, these cases could stand for no more than the proposition that candidates have a right to access, whatever process the state adopts for selecting candidates – in this case, a convention system. This interpretation is the only way to square *Bullock* and *Lubin* with cases like *American Party of Texas v. White*, 415 U.S. 767 (1974), which clearly hold that there is no constitutional right to a primary.

The Court's constitutional analysis further errs in extending *Classic* and *Bullock* beyond the state's chosen selection method to *require* that voters have direct, unmediated access to candidates at the nomination phase. Such an interpretation runs afoul of *White* and other Supreme Court case law because it would make unconstitutional a delegate-based convention system, or any other process for that matter that relies on representative democracy, and would mandate direct primary balloting.

Fourth, in reaching its determination that the system is unconstitutional, the Court erred in applying the wrong standard of scrutiny. The Court determined that the judicial convention

system imposes severe burdens on candidates and voters, and therefore applied strict scrutiny as opposed to rational basis review. Specifically, the Court found that "[r]easonably diligent candidates who lack the support of entrenched party leaders stand virtually no chance of obtaining [*i.e.*, winning] a major party nomination." (Dec. at 63-64). Again, however, the determination respecting the severity of the burdens is predicated on a constitutional analysis that assumes there is a right to obtain or win a major party nomination, as opposed to a right to access to the nomination phase.

Defendants respectfully submit that the Court also inappropriately relies on *Rockefeller v. Powers*, 917 F. Supp. 155 (E.D.N.Y. 1996), *aff'd* 78 F.3d 44 (2d Cir. 1996), *cert. denied*, 517 U.S. 1203 (1996), in support of its position. Not only does the Court disregard the Second Circuit's limitation of the holding in *Rockefeller* to "special circumstances surrounding the presidential primary process," *Prestia v. O'Connor*, 178 F.3d 86, 89 (2d Cir. 1999), but the Court compounds the error by ignoring the critical distinction between the facts in *Rockefeller* and those present here. *Rockefeller* involved a primary, not a convention.

Moreover, in light of the fact that numerous witnesses testified to delegates exercising independent judgment in casting their votes for judicial candidates, the Court's conclusion that delegates somehow are not independent rests upon a legal conclusion concerning the meaning of "independent."

Finally, the Court erred by failing to place Defendants on notice that it would effectively grant final relief to Plaintiffs without ordering that the preliminary injunction hearing be consolidated with a full trial on the merits. *See* Fed. R. Civ. P. 65(2) ("the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the [preliminary injunction] application"); *Woe by Woe v. Cuomo*, 801 F.2d 627 (2d Cir. 1986)

(where record clearly indicates appellants' counsel functioned throughout hearing under the belief that only a motion for temporary relief and not the merits of the claim was at issue, neither the district court's oblique references during the hearing to the dispositive nature of the proceedings, nor the request for permanent relief in appellees' post-hearing memorandum constitute timely, "clear and unambiguous notice," which is required); *see also aaiPharma Incorporated v. Thompson*, 296 F.3d 227 (4th Cir. 2002) (district court erred in entering final judgment after hearing on patent holder's motion for preliminary relief, without giving notice that the court was considering a final disposition on the merits). Here, although the Court could have consolidated the hearing, it chose not to do so, but failed to provide notice of its decision to the parties. Indeed, the lack of notice was highly prejudicial as the Court relied on an incomplete record that, among its many infirmities, fails to demonstrate how the judicial convention system operates in a majority of Judicial Districts, or to establish how the challenged statutes are used by the Independence, Working Families and Conservative Parties, respectively. Indeed, the Court suspended the rules of evidence, substantially relying on hearsay and other inadmissible evidence in granting sweeping mandatory final relief that, in fact, exceeds the relief requested by the Plaintiffs.

It also bears noting that had the Court ordered a full trial in order to determine whether Plaintiffs are entitled to the final relief which effectively has been awarded here, Plaintiffs would have been required to prove "*beyond a reasonable doubt*" that the challenged statutes are unconstitutional. *See New Alliance Party v. N.Y. State Bd. of Elec.*, 861 F. Supp. 282, 292 (S.D.N.Y. 1994) ("New York's election statutes, as with other state legislative enactments, have been afforded a strong presumption of constitutionality . . . Although the presumption is rebuttable, 'invalidity must be demonstrated beyond a reasonable doubt.'" *Id.* (quoting *McGee v.*

*Korman*, 70 N.Y.2d 225 (1987)). Application of the rules of evidence and this standard would have been accorded appropriate weight had the hearing been consolidated.

For all of the reasons discussed above, Defendants have a substantial likelihood of prevailing on the merits of their appeal. Moreover, at a minimum, there is no question that Plaintiffs' motion for preliminary injunction raised difficult and complex legal questions that are worthy of consideration by the Second Circuit.

First, whether this Court erred in imposing a primary where the United States Supreme Court has held that a convention is a constitutional *alternative* to a primary raises a serious question going to the merits. *American Party of Texas v. White*, 415 U.S. at 781 ("it is too plain for argument . . . that the State may . . . insist that intraparty competition be settled before the general election by primary election or by party convention"). More specifically, the fundamental question is: what is a constitutionally acceptable form of convention? Even if, as this Court contends, *White* cannot be read as establishing a *per se* rule that all conventions are constitutional, *White* also cannot be read to require conventions to be just like primaries. While this Court attempts to limit *White*, another district court in the Second Circuit declined to do so. *See Shapiro v. Berger*, 328 F. Supp. 2d 496, 502 (S.D.N.Y. 2004) (holding that *White* "confirm[s] the right of a State to provide for party conventions as an alternative to primaries as a means for selecting party candidates for public office"). A stay pending appeal is particularly appropriate under these circumstances. *See, e.g., In re Klein Sleep Prods., Inc. v. Costich*, No. 93 Civ. 7599, 1994 WL 652459, *1 (S.D.N.Y. Nov. 18, 1994) (noting that because "the issue on appeal is a question never before ruled upon by the Second Circuit" and "[t]he few district and bankruptcy court decisions addressing the issue are split, . . . it is entirely possible that the Second Circuit

could see fit to disagree with this Court" and is thus "a quintessential circumstance presenting both substantial questions going to the merits and a substantial possibility of success on appeal").

Indeed, if a convention is a constitutional alternative to a primary, the serious legal issue presented by this case concerns the degree to which delegates may properly speak on behalf of voters, or, stated differently, the permissible degree of a delegate's mediation of voter preferences. In this regard, this Court does not even discuss *Mrazek v. Suffolk County Board of Elecs.*, 630 F.2d 890, 898 (2d Cir. 1980), in which the Second Circuit observed that a delegate, "acting in a nominating capacity[,] . . . may speak for a group broader than simple party membership: rather, the constituency may properly be defined as a mix of the district's total population, unenrolled party sympathizers, affiliated party members . . . ."

Second, the Court's decision raises another important legal issue of whether the concept of one-person, one-vote has been improperly applied to the judiciary in this case. The Court's imposition of a primary suggests that the concept of one-person, one-vote should apply to the election of Supreme Court Justices, but the United States Supreme Court has held that the principle of one-person, one-vote does not apply to the judiciary. *See Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904 (1973) (affirming voting rights decision that the "one-man, one-vote" concept does not apply to the judiciary); *Dennis v. United States*, 341 U.S. 494, 525, 71 S.Ct. 857, 95 L.Ed. 1137, 1160-61 (1951) (Frankfurter, J., concurring in the judgment) ("Courts are not representative bodies. They are not designed to be a good reflex of a democratic society"). The lower federal courts have also held that judges are not representatives. *See, e.g., Gilday v. Board of Elections*, 472 F.2d 214, 217 (6th Cir. 1972) (rejecting application of one-man, one-vote to judicial selection in Ohio); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (distinguishing judicial candidates from legislative and executive candidates

because judges administer the law rather than espouse the cause of a particular constituency); *Fahey v. Darigan*, 405 F. Supp. 1386, 1391 n. 6 (D.R.I. 1975) (holding one-man, one-vote precepts inapplicable to "the selection of officials not intended to serve in a representative role, such as judges"); *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (rejecting application of one-man, one-vote to Ohio judiciary because "[t]he state judiciary is not responsible for achieving representative government"); *Romiti v. Kerner*, 256 F. Supp. 35, 46 (N.D. Ill. 1966) (three judge court) (expressing "little doubt" that "there is a valid distinction between applying the 'one man, one vote' rule in a legislative apportionment case to the election of a state supreme court judiciary"). Indeed, in two New York cases, where plaintiffs sought judicial reapportionment on the basis of population, the courts emphasized the unique role of the judiciary. *See New York State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153-54 (S.D.N.Y. 1967) ("The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government"); *Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (same).

It follows from these decisions that the principle that this Court has established concerning candidates' and voters' rights to access the nominating phase, particularly in areas where one political party dominates at a given time, may not have taken into account the unique role played by the judiciary. Accordingly, the Court's decision raises a serious question relating to the role of the judiciary and the effect of that role, if any, in determining the constitutionality of judicial nominating conventions.

Fourth, the Court's determination that New York's judicial nominating convention as structured is not a constitutional alternative to a primary in areas of one-party rule poses yet another difficult legal question, particularly given that not all Judicial Districts are dominated by

single parties. In reaching its Decision, this Court has determined that "in areas of one-party rule, voters' and candidates' rights of access to the nomination stage of the electoral process take on greater importance." (Dec. at 60). The Court apparently has determined that the Judicial Districts are dominated by one party and, therefore, "nominations, not general elections, are the critical determinant in electing Supreme Court Justices in New York." (Dec. at 61). Accordingly, the serious legal question raised is whether it is appropriate to apply the principle that in areas of so-called one-party rule, rights of voters and candidates to access the nomination stage of the electoral process take on greater importance.

These are all serious legal questions worthy of additional scrutiny by the Second Circuit. And for the reasons set forth in their initial motion papers and proposed conclusions of law to this Court, and as discussed above, Defendants respectfully submit that they are likely to succeed on the merits of their appeal.

## II. DEFENDANTS WOULD BE IRREPARABLY HARMED ABSENT A STAY

### A. A Stay Is Necessary To Prevent The Irrevocable Effects Of The Court's Order On The 2006 Election Cycle

Absent a stay, the Court's Order, which entirely dismantles the State's judicial selection scheme, will have an irrevocable effect on the upcoming 2006 election cycle – which is exactly the type of irreparable harm that a stay is intended to prevent. *See Rell v. Rumsfeld*, 423 F.3d 164, 165 (2d Cir. 2005).

New York's 2006 primary election will be held on September 12, 2006. Election Law § 8-100(1)(a). Pursuant to the Election Law, state and county party chairs must file a statement of all party positions to be filled in the primary elections no later than May 23, 2006. Election Law § 2-120(1). On June 6, 2006, candidates may start obtaining signatures on their designating petitions, as required for a candidate's inclusion on the primary ballot, *id.* § 6-134(4), and those

designating petitions must then be filed between July 10-13, 2006, *id.* § 6-158(1). Thus, absent a stay or the conclusion of appellate review by mid-May – a highly unlikely event – there will be *no opportunity* for any meaningful appellate review of this Court's exceedingly broad relief in time to have any effect on the 2006 election cycle.

The resulting harm is especially egregious as the courts have repeatedly and strongly indicated that elections are the primary responsibility of the state legislature; it is not now, and could not – consistent with the United States Constitution – ever be the primary job of federal courts. *See, e.g.*, *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) (acknowledging the broad powers states may exercise in prescribing the times, places, and manner of holding such elections not only for federal legislators, but also for state officers).[1] Therefore, the Court should enter a stay pending appeal to allow the Second Circuit to review the Decision and, in the event the Second Circuit affirms, the Legislature should be afforded a meaningful opportunity to address the issues raised by the Court's decision in the first instance, rather than proceeding with an election system that has been unilaterally selected by a single federal judge.

Indeed, alternatives to the current system exist. For example, the Commission to Promote Public Confidence in Judicial Elections recently issued a report analyzing New York's judicial election process and recommended certain reforms. *See* Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* (Feb. 6, 2006) (the "Feerick Report"). The Legislature should have a reasonable opportunity to choose among those alternatives, and in any event, this Court should decline from insisting on the

[1] Article I, section 4, clause 1 of the United States Constitution states, in part, that "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof . . . ."

implementation of a new election regime prior to appellate review. To do otherwise will irreparably injure the citizens of New York.

**B. The Court's Order Endangers Incumbent Justices' Judicial Careers**

The individuals who will perhaps be most directly impacted by this Court's mandatory injunction are incumbent Justices of the State Supreme Court. This Court's order mandating the use of a primary system has abruptly thrust those up for re-election in 2006 into a daunting political campaign at an extreme disadvantage to non-judge competitors. The Court's order thus ultimately jeopardizes the incumbents' hard-earned careers, which if lost under a primary election in 2006, cannot be recovered even if the Second Circuit reverses this Court on appeal.

As the highly-regarded incumbent Justice Mazzarelli of the Appellate Division, First Department has asked, "[s]hould anyone of us not prevail in a primary . . . who could repair the damage to the careers and lives of we incumbent judges? Who could repair our shattered judicial careers and return to us the opportunity to continue serving the state of New York?" (Mazzarelli ¶ 2).[2] These questions reflect the following realities that this Court should not ignore:

- *First*, running in a primary campaign is all-consuming and entails, among other things, assembling a committee of supporters to raise considerable sums of money, creating and distributing campaign materials, appearing at scores of public events, all of which require months of planning, funding and actual campaigning. Given these demands, incumbent Justices simply will not be able to devote their full time to their judicial function, as they rightly should. (Mazzarelli ¶¶ 4, 10, 12, 13; Kohm ¶¶ 4,6; Gangel-Jacob ¶ 5; Lobis ¶¶ 8, 13).

- *Second*, a primary campaign requires incumbents to enter into a political arena in which they have not operated for years, and, indeed, have been prohibited from participating in because of court rules barring judges from engaging in political activity except for a limited nine-month window prior to the primary, two weeks of which had already elapsed when the Court's Decision was issued. (Mazzarelli ¶¶ 6-8; Lobis ¶¶ 2, 8-9; Kohm ¶¶ 2-4).

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[2] The Declarations and Affidavit referenced herein are attached to the Notice of Motion.

- *Third*, incumbent Justices, who are generally individuals of modest means, would be required to raise several hundreds of thousand of dollars to run effectively for office – a task which they are ill-equipped to undertake, given the short time frame leading to the primary in September 2006 and their long absence from political activity. Incumbents thus face a significant competitive disadvantage against wealthy, politically active candidates who have war chests to fund their campaigns and to effectively buy a judicial office – one of the very concerns that caused the Legislature to abandon judicial conventions in favor of primaries in 1921. (Gangel-Jacob ¶ 5; Mazzarelli ¶¶ 8, 11; Lobis ¶ 10; Kohm ¶ 5). Further, campaigning and fundraising activities will inevitably place Justices in uncomfortable ethical positions – something that the Legislature also expressly sought to avoid. (Lobis ¶ 11; Mazzarelli ¶ 13; *see also* Dec. at 71) (recognizing protection of judicial independence from conflicts inherent in solicitation of political contributions as a compelling state interest advanced by the convention system).

- *Fourth*, these burdens are exacerbated both by the timing of this Court's Decision, which comes a mere six and a half months away from the primary election in September, and the Decision's silence regarding details of the ordered primary. (Mazzarelli ¶¶ 7, 11; Kohm ¶ 4; *see also* Gangel-Jacob ¶ 5). As Justice Mazzarelli states, had she known a year ago that she would be required to run in a primary election, she would have spent at least the last six months personally preparing and planning the steps to organize a primary campaign. (Mazzarelli ¶ 9).

The net effect of these harsh realities is that incumbent Justices, who have now been placed in an untenable situation economically, ethically and politically, now face the serious threat that they will lose their judicial offices. Thus, even if the Second Circuit reverses the Decision, there will be no mechanism to restore any defeated Justices to his or her judicial office. That harm and the injury to the citizens of New York State arising from loss of incumbent judges and the experience they bring to the administration of justice are, indeed, irreparable.

### C. Political Parties Will Be Deprived Of Their Associational Rights

Political parties will likewise suffer irreparable harm if the Court does not grant a stay. The Court's injunction requires *all* political parties across the state to select their nominees for Supreme Court Justice through a primary election. But the Supreme Court has repeatedly recognized the rights of political parties and their members not only to choose their standard

bearers, but also their *process* for selecting those individuals. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian*, 479 U.S. at 224. Thus, absent a stay of this Court's Decision, political parties in New York State will be stripped of these rights – which the Court's Decision recognized as compelling – with respect to their choice of candidates for the office of Supreme Court Justice.

Further, by imposing a primary, the Court has deprived the other three recognized parties in New York State of the use of the judicial nominating system. Indeed, Plaintiffs failed to adduce any evidence whatsoever that the convention system has been employed in an unconstitutional manner by Working Families Party, the Conservative Party, or the Independence Party. Unless a stay is granted, the deprivation of these parties' rights for this election cycle will be irrevocable.

As for the two major parties – Democratic and Republican – they too will be deprived of these same rights. In particular, these parties will not have the ability to balance a ticket along racial, gender and geographic lines – goals which directly serve a political party's interest in ensuring fair representation on the party's ballot and in the state's political offices. Further, the inability to use the convention as a ticket balancing tool will adversely affect the ability of candidates to win races for a variety of other offices on that party's ballot line. Significantly, the Court's findings with respect to the two major parties were based on evidence that was limited to only certain judicial districts and further limited to only one or the other party's use of the convention system in those districts. Clearly, the major parties in the remainder of the judicial districts for which no evidence was submitted will face irreparable injury because they too have been summarily deprived of their associational rights.

Finally, by imposing a primary, the Court has created the real risk that members of political parties will impermissibly raid another party's ballot. Indeed, Defendants submitted evidence of party raiding in primaries for lower court races. As the press has recently reported, a prominent Republican attorney in the Second Judicial District is seriously considering running in the Democratic primary in 2006 as a direct result of this Court's Order. Should such a party raider prevail, the result would be irrevocable and the Democratic Party would be left with an unwanted nominee from another party who, according to the Court's own analysis, will likely go on to win the general election. That harm is clearly irreparable. Accordingly, in light of the vast irreparable harm that this Court's injunction will cause, the Court should grant a stay pending appeal.

## III. VOTERS AND CANDIDATES WOULD NOT BE INJURED IF A STAY IS ISSUED

In stark contrast to the severe and irreparable harm facing Defendants and citizens of the State of New York, a stay will cause no harm to Plaintiffs. As mentioned earlier, the convention system for electing Supreme Court Justices has been in place since 1921, and despite reconsideration of the system on more than one occasion, has operated continuously since then. For nearly 85 years, numerous highly qualified and well-respected Justices have been elected to the Supreme Court through the convention system. A stay will simply preserve the *status quo*, causing no harm to Plaintiffs or the state's citizens.

Indeed, even the broad relief that Plaintiffs sought was not as sweeping as the relief issued by this Court. Even Plaintiffs contemplated some period of time – albeit 90 days is too short a period – for the Legislature to respond appropriately to a decision by this Court. Plaintiffs' requested relief only envisioned imposition of a primary election for the 2005 election

*if* the Legislature failed act. Plaintiffs thus implicitly acknowledged that they would suffer no irreparable harm under the *status quo.*

Finally, this Court's consideration of the preliminary injunction motion over the course of 14 months demonstrates that no constitutional crisis was ignited in 2005, the year Plaintiffs sought to obtain their relief.

## IV. THE PUBLIC INTEREST FAVORS A STAY

Because the Court's Decision will irreparably harm the state's citizens, incumbent Justices and political parties by imposing a primary election, the results of which will be irrevocable, it is in the public interest that the Court issue a stay pending appellate review. Only maintaining the *status quo* can safeguard against the harms described above and ensure that the public continues to enjoy both an orderly electoral process that will not lead to unintended results, and the undisrupted, efficient and effective administration of justice by incumbent Justices. The stay will also have the benefit of settling the confusion that the Court's Decision has created in the electoral process and among incumbent judges and party members.

## V. AT A MINIMUM, THE COURT SHOULD GRANT A TEMPORARY STAY TO ALLOW DEFENDANTS TO SEEK A STAY FROM THE SECOND CIRCUIT

In the event the Court declines the requested stay pending appeal, the Court nonetheless should enter a stay temporarily, long enough for the Second Circuit to hear an application for a stay pursuant to Federal Rule of Appellate Procedure 8. "Such brief stays for a matter of days are frequently issued when a district court denies an open-ended stay pending appeal. They give the appellate court an opportunity to decide whether an additional stay and an expedited appeal should be granted." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235-36 (2d Cir. 1999).

## VI. IN THE ALTERNATIVE, THE COURT SHOULD MODIFY THE INJUNCTION

Under Rule 62(c), the court in its discretion may suspend *or modify* its injunction pending appeal. Fed. R. Civ. P. 62(c). Here, it is respectfully submitted that the Court should both (i) modify its expansive order for mandatory injunctive relief to tailor more narrowly the relief granted, and (ii) suspend enforcement of the modified order pending appeal. In the alternative, the Court should, at a minimum, modify its order by tailoring it more narrowly.

Although the federal courts have great power in remedying violations of the law, that power is not absolute. As the Supreme Court has observed, the "remedial powers of an equity court must be adequate to the task . . . [but] they are not unlimited." *Anderson v. Dunn*, 19 U.S. 204, 231 (1821). Indeed, the principle of judicial restraint in granting injunctive relief has been relied on in a number of cases in limiting the scope of injunctions and relief designed to remedy constitutional infirmities. *See Califano v. Yamasaki,* 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of the violation established"); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) ("a federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy'") (quoting *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 16 (1971)); *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (instead of tailoring injunctive remedy commensurate with specific constitutional violations, court improperly imposed system-wide remedy); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 213 (1973) (only if there has been a system-wide impact may there be a system-wide remedy); *see also Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994) ("[i]njunctive relief should be narrowly tailored to fit specific legal violations. Accordingly, an injunction should not impose unnecessary burdens on lawful activity.").

More specifically, when the injunction at issue restricts conduct and speech protected by the First Amendment, courts must determine if the restrictions imposed by the injunction are content-based or content-neutral, and then must apply an appropriate level of scrutiny to determine if the restriction is justified. When the restrictions imposed by the injunction are content-neutral, as is the case here, the court must ask "whether the challenged provisions of the injunction burden no more speech [or conduct] than necessary to serve a significant government interest." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

Here, it is respectfully submitted that the Court's mandatory injunction exceeds the Court's remedial authority as it violates the fundamental principle that equitable remedies must be narrowly tailored to address specific constitutional violations. The Court states that the remedy of imposing a primary is "the least intrusive course" by which to alleviate the perceived constitutional violation. (Dec. at 75). The Court's decision, however, is devoid of any analysis to show why the convention system could not be left intact and the relief tailored to enjoin certain aspects of the system that were judged to impose severe burdens. (*See, e.g.*, Dec. at 10-14, 63). In fact, a review of the Court's decision reveals multiple options for how the relief could have been, and certainly still could be, narrowly tailored to remedy the alleged constitutional harm.

For example, the Court could have simply reduced the number of delegates. New York Elec. Law § 6-124 provides that "the number of delegates and alternate delegates, if any, shall be determined by party rules," as the Court notes, so long as they are allocated among the assembly districts in proportion to the votes cast in that assembly district for the party's candidate (and on the party's ballot line) in the previous gubernatorial election. Clearly, then, as long as the proportion remains the same, the number of delegates (and alternates) could, if necessary, be

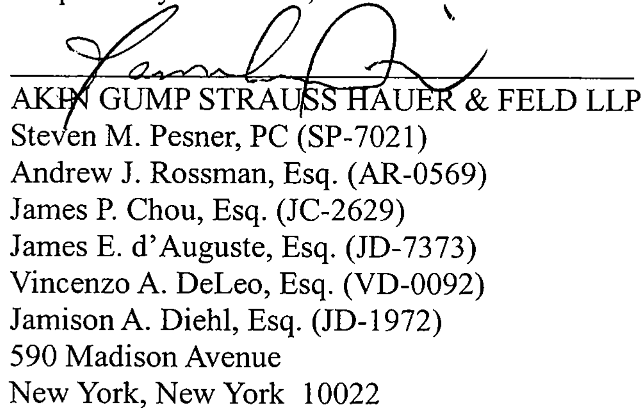
dramatically reduced. Far fewer delegates, alone, certainly would have gone some way towards alleviating significant aspects of the perceived burdens of the convention system as structured. The Court also could enjoin the upcoming delegate election, allowing the existing delegates to continue to serve, thus extending the time considerably for judicial candidates to lobby delegates. While New York Elec. Law § 6-124 provides that "[a] judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates," it does not specify when the preceding delegate primary must occur. Further, as the Feerick Commission specifically recommends, the Court could order the New York State Board of Elections to provide information to judicial candidates about delegates (and/or delegate candidates), and to supply information to delegates about judicial candidates. Certainly, ordering screening panels to complete their work and report out candidates much sooner would further tailor interim relief to the issues raised by the Court's Decision. Indeed, each of these interim measures would tailor the injunctive remedy commensurate with the specific constitutional violation and/or infirmities that the Court has identified while leaving the convention system intact.

## CONCLUSION

For these reasons, Defendants' motion to preserve the *status quo* pending Defendants' appeal from this Court's Decision by temporarily staying the mandatory injunction granted by this Court, or, in the alternative, to modify and stay the injunction pending appellate review, should be granted, along with any other relief that this Court deems just and proper.

Dated: February 24, 2006

Respectfully submitted,



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