

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARGARET LOPEZ TORRES, et al., :

Plaintiffs, :

-against- :

NEW YORK STATE BOARD OF
ELECTIONS, et al., :

Defendants. :

Civil Action Number
04 Civ. 1129

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**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS’
MOTION FOR A PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Defendant-Intervenors, the Associations of Justices of the Supreme Court of the State of New York and of the City of New York and Justice David Demarest, individually, and as President of the State Association (collectively, “The Associations”), respectfully submit this Memorandum of Law in Opposition to Plaintiffs’ Motion For Preliminary Injunctive Relief.

BACKGROUND

Plaintiffs have brought this action challenging the manner in which Supreme Court Justices are elected in the State of New York. In that regard, Plaintiffs filed a Complaint before this Court on March 18, 2004 claiming that the judicial district convention system established under New York Election Law §§ 6-106 and 6-124, deprives Plaintiffs of their rights, privileges and immunities under the First and Fourteenth Amendments to the United States Constitution, as well as under the Civil Rights Act, 42 U.S.C. § 1983. Claiming that the current system – a system that has been in place since at least 1921 – is unconstitutional, plaintiffs seek to overhaul the entire state judicial election process by *inter alia*, compelling primary elections

for nominations to the Supreme Court.¹ We submit that such an outcome would severely damage the quality of New York State's judiciary system, would mandate a nomination system which has been rejected by the Legislature and which would have the effect of favoring the wealthy and telegenic candidate over highly qualified candidates that are more representative of the communities they serve. The direct primary system would adversely impact on diversity in the Courts, would deprive litigants of experienced judges, and would be especially unfair to sitting Justices who seek re-election.

STATEMENT OF FACTS

For the convenience of the Court, The Association incorporates by reference and adopts the statement of facts and arguments presented in the papers of the New York State Attorney General, and the New York County Democratic Committee, fellow intervenors, submitted concurrently herewith.

In a nutshell, New York law provides that "Party nominations for the office of Justice of the Supreme Court shall be made by the judicial district convention." New York Election Law § 6-106. Plaintiffs seek to hold that law unconstitutional. (Motion at 1). The judicial district convention is defined in section 6-124 of the New York Election Law. Plaintiffs also seek to hold that section unconstitutional. (Motion at 1). Basically, the judicial district convention is constituted of various delegates and alternate delegates as may be elected in a political party's primary election from each assembly district. A majority of these elected delegates ultimately choose the candidate who will run with a political party's designation. Thus, the Party nomination is made by representatives – the people who are registered as

¹ See Attorney General's brief for a full development of the legislative history of the statute and the judicial district convention system.

members of the Party may vote in a primary to select their judicial delegates, and their judicial delegates nominate the party's candidate to run in the general election.² The process is quite similar to that utilized by the major parties in designating their nominees for President of the United States. There, the voters in primaries or caucuses elect delegates to the parties' national conventions. Those delegates select the parties' nominees and those nominees, as here, run in the general election, often against a number of third-party candidates who get on the ballot by circulating independent or third-party petitions. Significantly, plaintiffs are not arguing that they are being denied the opportunity to run for Supreme Court Justice, only that they are unable to *win* such an election if they run as an independent or minor-party candidate.

In a direct primary, party members typically cast their votes simultaneously (on primary day) for a series of candidates for the different offices listed on a ballot. In this process, the party member has no means of influencing any other votes in the primary election, and presumably votes for whichever candidate(s) he or she most prefers. As in a general election, the participants in a primary election vote by secret ballot and the voters, accordingly, have no opportunity to interact and get to know one another. The primary preserves the anonymity of the voters, enabling them to vote for a candidate on the basis of their own values without concern for how other party members may view their vote. Due to the sheer number of registered party members, and the impossibility of meeting or discussing the candidates among themselves, under the direct primary system, the candidate is chosen in essentially a popularity contest, and subject to the most aggressive and expensive campaigns. It is virtually impossible to form coalitions that can influence the selection of candidates.

² The legislative history of the judicial district convention is fully set forth in the companion brief of the New York State Attorney General.

The result of a direct primary election is that the majority of the party members who came out to vote have spoken, and the majority's will prevails. One adverse consequence of majority rule is commonly referred to as the "tyranny of the majority." (See, e.g., The Federalist, more commonly known as the Federalist Papers, 1787-1788, by James Madison, Alexander Hamilton, and John Jay). It is axiomatic that majority rule means the minority loses, and the majority will always impose its will on the minority.

The judicial district convention system on the other hand is an open selection system. The delegates do not vote behind closed curtains, with their anonymity preserved. The delegates are thus unable to vote solely on the basis of their own personal preferences without concern for how other interested party members may view their vote – since their vote will be announced publicly. Because of the relatively small number of delegates (as compared to the number of voters in a direct primary model) meetings and discussions regarding candidates can take place, and coalitions can be formed which influence the selection of candidates.

By way of example, if two minority groups are represented by delegates who can form a coalition sufficiently large enough to nominate a candidate who would otherwise lose acting alone, their voting power is enhanced and can influence how another block of delegates chooses to vote. Forming coalitions sufficient to block certain candidates or elect other candidates is one way that a minority can help defeat the "tyranny of the majority." Whether the minority is one of race, gender, sexual orientation or geographic location, or any combination of the above, the ability to form coalitions, which is fostered by the judicial district convention system, permits a minority group to influence the outcome of the nomination process in a manner which is simply not possible in the direct primary election system.

The judicial district convention thus permits consensus building so that the candidates chosen will better reflect their communities in race, gender, sexual preference, nationality and geography.³ This is especially true in the very large districts with multiple counties where the geographic diversity of Supreme Court Justices will benefit the people of the district. For example, the people in ten out of the eleven counties making up the Fourth Judicial District have a Supreme Court Justice who is resident in that county, and is available on a regular basis to preside in that county, and to handle any emergency applications that arise from that county. (Sifre. Ex. 1, Declaration of Hon. Joseph M. Sise at ¶ 11). Geographic diversity in places like the Fourth Judicial District would be impossible without the judicial convention system. This is because the Counties of Saratoga and Schenectady have such dense populations compared to the other counties of district, that if there were a direct primary, their candidates would dominate the elections for the state supreme court.(Id. at ¶¶ 7, 10). As a natural consequence of Montgomery County having less than one-fifth the registered Republicans of Saratoga County, if candidates were forced to run in a district wide primary election, candidates from Montgomery County would likely lose to candidates from Saratoga, leaving Montgomery County without a possibility of having a Supreme Court Justice who resides within the county. (Id. at ¶7).

Similarly, as set forth in the Declaration of Dennis E. Ward, submitted by the New York County Democratic Committee, the Judicial District Convention is necessary to ensure that the Supreme Court bench reflects the diversity of interests within the Eighth Judicial District, where the voting bloc for one county far outnumbered that of the other counties combined

³ For actual instances of coalition and consensus building, permitting diverse candidates to win their parties' nominations, the Court is respectfully directed to the Declarations of Emily Giske, Robert J. Levinsohn, and Dennis E. Ward, submitted by the New York County Democratic Committee.

and the overwhelming majority of Democratic voters are white. Under a direct primary system, a candidate from outside of Erie County or a minority candidate would likely face insurmountable obstacles to obtaining the Democratic nomination for Supreme Court in light of the Eighth Judicial District's demographics. As the 2000 judicial contest in the Eighth District shows (and as described in the Ward Declaration), a convention system permits such candidates an opportunity to capture the nomination through coalition and consensus building among both the candidates and the judicial delegates elected by the people.

The convention system also eliminates the expensive "popularity contest" of an open primary, in which the candidate with the most money (or with the support of wealthy special interest groups seeking to influence policy) stands a far better chance of nomination. .

ARGUMENT

POINT I

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED BECAUSE PLAINTIFFS DO NOT MEET THE ELEMENTS NECESSARY FOR PRELIMINARY RELIEF

It is well-settled that a "preliminary injunction is an extraordinary remedy that should not be granted as a routine matter." Firemen's Ins. Co. of Newark, New Jersey v. Keating, 753 F. Supp. 1146, 1149 (S.D.N.Y. 1990). One seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right based on undisputable facts. See Rosemont Enterp. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966). The plaintiffs here are essentially seeking a mandatory injunction, as the grant of the preliminary injunction will give them all the relief they seek. See West v. Keane, No. 93 Civ. 6680, 1995 WL 434306, at *1 (S.D.N.Y. July 24, 1995). Because of this the court must apply a higher standard and the movant must show a substantial likelihood of success on the merits. See Johnson v. Kay, 860 F.2d 529,

540 (2d. Cir. 1988); Line Comm. Corp. v. Reppert, 265 F.Supp.2d 353, 357 (S.D.N.Y. 2003). This rule takes on even greater importance when a party is seeking full relief through the preliminary injunction. Line Comm. Corp., 265 F.Supp.2d at 357. Plaintiffs concede that to obtain preliminary injunctive relief that will alter the status quo, they must show that they are likely to suffer irreparable harm absent such relief and must make a “clear” or “substantial” showing of a likelihood of success on the merits. (Br. at 32).

Furthermore, irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction.” Rodriguez v. DeBuono, 175 F.3d 227, 233 (2d Cir. 1999) (citations omitted). Thus, “the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.” Id. It is not sufficient for a movant to demonstrate merely the possibility of irreparable harm; rather “[a]n applicant for a preliminary injunction must show that it is likely to suffer irreparable harm if equitable relief is denied.” JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 80 (2d Cir. 1990); see also Lentjes Biscoff v. Joy Envtl. Tech., Inc., 986 F. Supp. 183, 187 (S.D.N.Y. 1997) (“To justify an injunction, the complained-of injury must be likely and imminent, not remote and speculative”) (citation omitted). In the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied. JSG Trading, 917 F.2d at 80.

As an initial matter, any “presumption of irreparable harm is inoperative if the plaintiff has delayed either in bringing suit or in moving for preliminary injunctive relief.” Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 968 (2d Cir. 1995). “Though such delay may not warrant the denial of ultimate relief, it may, standing alone, ... preclude the granting of preliminary injunctive relief, because the failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no

irreparable injury." *Id.* at 968 (quotation marks and citations omitted). Here, since the particular statute being challenged has been on the books since 1921, plaintiffs can hardly argue that there is any urgency to their application, which could just as easily have been made six months, six years, or sixty years earlier.

Moreover, here, plaintiffs' alleged harm is speculative at best. The ultimate issue in this case is whether the voters of New York State are unconstitutionally deprived of their right to vote for the elected office of Justice of the Supreme Court of New York. As the United States Supreme Court held in Anderson v. Celebrezze, 460 U.S. 780, 787 (1983), "voters can assert their preferences only through candidates or parties or both." (emphasis added). The United States Supreme Court has never held or suggested that voters must be able to assert their preferences through parties and candidates. After all, the question at issue is whether the candidate is reasonably able to present herself to the people as a candidate for election. If so, that should end the matter. In the instant case, the lead plaintiff herself, Margarita Lopez Torres, having failed to obtain the Democrat's nomination for Supreme Court in 2000, was able to present her candidacy to the public by running as the candidate of another party. (Torres Dec. at ¶ 49). Accordingly, no harm of a constitutional dimension has befallen her, and her own experience demonstrates beyond cavil that it is readily achievable for minority-party candidates for Supreme Court Justice to present their candidacy to the people of the State of New York, for a vote in the November elections. This applies with equal force to all the named plaintiffs who might wish to be candidates. As for those plaintiffs who are voters, they do have the opportunity to cast their ballot at the general election. Thus, because no actionable irreparable harm has been shown to be *possible* much less imminent, plaintiffs' motion for a preliminary injunction should be denied.

POINT II

PLAINTIFFS' MOTION PAPERS ARE DEFECTIVE INsofar AS THE RELIEF THEY SEEK CANNOT BE PROPERLY ORDERED

As an initial matter, plaintiffs do not identify what actions they wish to enjoin.

Specifically, the plaintiffs seek

an injunction allowing the New York State Legislature to establish ... a new system of Supreme Court Justice selection that is consistent with the Federal Constitution and this Court's findings, provides a real opportunity for candidates with public support to compete for their party's nomination, and consequently gives voters their constitutional right to vote effectively to choose their Supreme Court Justices. If the New York State Legislature fails to establish a new system of selection as outlined above, ordering as interim relief at least until such time as the Legislature acts to do so, that Supreme Court Justices be selected through a system that includes (a) direct primary election for Supreme Court, and (b) an avenue by which candidates may obtain a place on the primary election ballot of their party by gathering a reasonable number of signatures by petition.

(Motion at 2). The Legislature has been, and remains, free to establish a new system within the bounds of law. Since none of the defendants are alleged to be preventing the New York State Legislature from establishing a new system of Supreme Court Justice selection, there is no basis for the specific relief that plaintiffs seek. Indeed, at least one authority cited in plaintiffs' brief recognized that States have broad discretion in formulating election policies, and specifically pointed out that while the court would declare certain election practices unconstitutional, "[w]hat is done by the state when the decision here is promulgated is the decision of the state and its governing officers and bodies." Campbell v. Bysiowicz, 242 F.Supp.2d 164, 177 (D. Conn. 2003).

It is submitted that the injunctive relief here sought is entirely improper, and the motion should be denied in its entirety. To the extent that plaintiffs seek a declaration that certain sections of New York's Election Law are unconstitutional, then it is respectfully

submitted that plaintiffs should be required to litigate that issue as they would any other case seeking declaratory relief after full discovery, a greater opportunity to gather witnesses and experts, and a full trial. Because the system they seek to change has been around since at least 1921, there is no reason whatsoever that the extraordinary relief sought should be rushed through in the guise of a preliminary injunction hearing.

POINT III

THE STATE LEGISLATURE'S CHOICE OF A JUDICIAL CONVENTION TO SELECT PARTIES' NOMINEES FOR STATE SUPREME COURT, RATHER THAN A DIRECT PRIMARY, DOES NOT VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHTS

In evaluating the constitutionality of New York's election laws governing the election of Supreme Court Justices, it is important to recognize that the election of the judiciary poses unique issues, which should not be addressed in the same fashion as the elections of other government officials from the executive or legislative branches. Cf. New York State Assoc. of Trial Lawyers v. Rockefeller, 267 F.Supp. 148 (S.D.N.Y. 1967) (recognizing the "general policy of the federal judiciary of refusing to interfere with the internal administration by the states of their court systems" and holding that the "one person one vote" doctrine applicable to the legislative branch does not apply to the election of the judicial branch).

And, given the differences between judicial office and executive or legislative office, and the differences between the Supreme Court of the State of New York and State Courts of more limited jurisdiction, it was not irrational for the New York State Legislature to conclude that a convention system for nomination of candidates for Supreme Court was superior to an open primary system.

First, it is not unreasonable to treat the judicial office differently from the executive or legislative office. For example, in some systems, Judges are appointed to office

rather than elected by the people they serve. Judges do not “represent” their constituents in the way that legislators or executive officers do. Rockefeller, 267 F.Supp. at 152 (“The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government.”). Therefore, it should not be required, as a matter of constitutional mandate, that party nominees for judicial office be selected in the same manner – direct primary election – as other nominees, for other offices, are selected.

Second, it is not unreasonable to choose a different method for selection of Supreme Court nominees than for other Courts. The New York Supreme Court is the State’s highest Court of original jurisdiction. Justices of that Court deal with the most complex and important cases. Although there are exceptions, a candidate for Justice of the Supreme Court usually has judicial experience in one of the Courts of more limited jurisdiction. Further, the Legislature was not irrational or acting unconstitutionally in determining that the popularity contest of an open primary was not the best method for selecting Justices of this Court, and in opting, instead, for indirect democracy, in which delegates are elected, and those delegates, assembled at a convention, assess the abilities and records of the prospective candidates in order to choose the party’s standard bearer for judicial office.

Finally, it is not unreasonable or unconstitutional for the Legislature to determine that the enormous expense of a primary election, and the limitations the law places upon the ability of an incumbent Judge to “campaign,” makes the convention method of nomination superior to the open primary method.

A. Plaintiffs Are Incorrect In Characterizing The Judicial Convention System As Making It Impossible For Challenger Candidates To Win An Election

As a factual matter, plaintiffs’ allegations that candidates who lack their party leader’s backing are doomed to fail to obtain the party’s nomination are grossly exaggerated. In

the first place, there is a “chicken and egg” question which plaintiffs’ papers studiously ignore – logically, one cannot infer that merely because a party leader backs the winning candidate, that it is the party leader’s backing which causes the candidate to win the nomination. In other words, plaintiffs fail to recognize the possibility and reality that a candidate who musters sufficient delegate support, is able to convince the party leader to back that candidate. Thus, it is not that “whoever the party leader favors, wins the nomination” but that “whoever looks likely to win the nomination, wins the party leader’s support.” Plaintiffs also ignore the fact that a successful candidate for Supreme Court Justice is able to build a coalition of support so that even if a party leader stands against her, she can win the nomination, and ultimately, the election.

By way of example, the declaration of the Honorable Phyllis B. Gangel-Jacob, submitted herewith, reveals that she initially ran for the Supreme Court Justice Nomination and was told by Denny Farrell, the New York County Democratic Chairman, that she would never receive support for her nomination as she had challenged and defeated the Party Leader’s candidate for Civil Court in a direct primary. However, through hard work, dedication and coalition building, she ultimately prevailed in winning her Supreme Court Judgeship. Significantly, through the judicial convention process, Justice Gangel-Jacob was able to win her position as Supreme Court Justice at total cost of approximately \$20,000.00, spread over four years. (Sifre. Ex. 2, Gangel-Jacob Dec. at ¶ 17). This is in stark contrast to the more than \$100,000 spent on her single campaign for her Civil Court judgeship in 1984. (*Id.* at ¶ 9). There can be no doubt but that the judicial convention system permits “campaigns” to be conducted at substantially less cost than the primary system urged by plaintiffs.

Indeed, by way of another example, the Honorable Alice Schlesinger has indicated that the total cost of her Supreme Court candidacy was approximately \$2,000. (Sifre.

Ex. 4, Proposed Schlesinger Dec. at ¶ 10).⁴ Moreover, Justice Schlesinger managed to win her party's nomination without incurring the cost of running her own slate of delegates. Instead, like Justice Gangel-Jacob, she chose to contact the potential delegates and to seek their support for the nomination. (Id. at ¶¶ 6-7). Only after it became clear that she had considerable support from the delegates, did the county leader support her candidacy. (Id. at ¶ 9).

Well-funded candidates have a substantial advantage in a 'primary' system as they are able to obtain their victories at substantial cost without the necessity of prior judicial experience. Will such candidates make better judges than those who are able to build the coalitions necessary to achieve victory in the judicial convention system? Indeed, Plaintiffs' own witness, Mary Geissman, testified that during her twenty years as a judicial delegate, all of the eventual nominees chosen by her party were qualified notwithstanding the judicial district convention system that plaintiffs seek to invalidate. (Sifre. Ex. 5, Geissman, Dep. at 150-151). She also recognized that, in a primary, a well-funded candidate for Supreme Court Justice could win the election regardless of whether the candidate made it through a judicial screening panel (Id. at 157). Under the current system, a sitting Supreme Court Justice's costs in seeking re-election are minimal. (Id. at 158-159). Indeed, sitting Supreme Court Justices are normally re-nominated without opposition, unless guilty of some egregious conduct. (Id. at 159). Thus, under the judicial district convention system, as opposed to the direct primary, money does not buy a Supreme Court Justice seat. This is particularly so when a sitting Supreme Court Justice is running for re-election and the costs of such a campaign are de minimis.

⁴ As set forth in the declaration of Ernst H. Rosenberger (Sifre Ex. 3), Justice Schlesinger is unable to sign her declaration as she is out of the United States, returning August 23, 2004. As the Court has directed that all opposition papers be submitted by August 13, 2004, the draft declaration submitted on Judge Schlesinger's behalf, is based on an interview with Mr. Rosenberger. We will endeavor to provide a signed declaration upon her return.

In any event, as the Supreme Court held in Anderson v. Celebrezze, 460 U.S. at 787, “voters can assert their preferences only through candidates or parties or both.” (emphasis added). It is sufficient that the voters are able to assert their preference through a particular candidate, whether or not that candidate is running as the official nominee of a particular party. And while the Supreme Court held that the right to vote is ‘heavily burdened’ if that vote may be cast only for major-party candidates at a time when other parties or other candidates are ‘clamoring for a place on the ballot’ (Id.), plaintiffs do not assert that this is the case in New York, but rather complain “that minor party candidates stand no chance of winning.” (Cain Dec. ¶ 6).⁵ Again, neither the Constitution nor democracy requires that candidates “stand a chance of winning,” only that they have the ability to be placed before the voters for election. The Constitution does not require that parties select their nominees by primary vote, and neither democracy nor the Constitution prohibit rules that favor judicial conventions at which nominees are selected through a coalition-building process. While a majority vote made by secret ballot in a primary is certainly one way to select a candidate, it is not the sole way for the democratic process to unfold. New York’s Legislature has elected to use the judicial convention system, which requires the votes of the delegates to be made in public, which enables coalitions to be formed with the result that candidates who might never otherwise get nominated (because they

⁵ Mr. Cain also asserts that “contests for delegate positions are rare, and as a result, party leaders’ delegate candidates rarely even appear on the September Ballot.” (Cain Dec. at ¶ 9). Current events say otherwise. In fact, as reported in the New York Law Journal’s An Unruly Year for Primaries in Brooklyn Judicial Contests, Brooklyn lawyer Alan Rocoff is a lawyer or political advisor in the party’s nominating convention in 17 of the Assembly Districts in Brooklyn. (NYLJ, 8/10/04, page 1 and 4).

come from sparsely populated areas, or because of their race, gender, sexual preference, nationality or physical handicap) are able to win their party's nomination.⁶

Accordingly, there is no constitutional requirement that New York adopt a primary system for selecting a party's candidate. And while there may be a legitimate debate concerning which method of electing Supreme Court Justices is the "better" method, this is not a question that reaches Constitutional dimensions. Moreover, neither Mr. Cain's nor any of the other declarations provided in support of the preliminary injunction, offer any authority or empirical evidence that potential candidates with public support lack the real opportunity to receive their party's nomination.

1. Benjamin Ostrer

Benjamin Ostrer submits a declaration in support of plaintiffs' motion, which takes umbrage at the fact that there has never been a challenger candidate for Supreme Court considered for the Republican Party's nomination at the 9th Judicial District's Republican Convention. (Ostrer Dec. at ¶ 18). Mr. Ostrer inconsistently argues in his sworn declaration, that "no county would dare mount a contest or support a candidate other than one who has been deemed acceptable by the Westchester Committee" only to contradict himself in the very next sentence, when he states that such a challenge was made in 2003. (*Id.* at ¶ 16).

Mr. Ostrer suffers from what is akin to "juror's remorse," blaming the system for unanimous judgments that he himself has participated in. Mr. Ostrer served as judicial delegate in *fourteen* conventions at which the candidates selected by the party chairpersons were approved by unanimous acclamation by the delegates (*Id.* at ¶¶ 19-20). Yet, Mr. Ostrer

⁶ The Court is directed to the companion brief being submitted on behalf of New York County Democratic Committee for a more detailed discussion of the enhanced diversity brought about by the judicial district convention system.

essentially complains that he and his fellow delegates were “forced” to vote the way they voted in order to curry favor with Chairmen, claiming that “the failure to support the candidate enjoying the favor of the Chairmen would likely produce an end to future invitations to serve as a delegate, at the very least.” (*Id.* at ¶ 29). One is left to wonder why Mr. Ostrer is concerned about not being invited to serve as a delegate, when he declares that “[t]he judicial conventions are a mere formality” and “actually functions as a social gathering” for which one third of the delegates purportedly do not even bother attending. (*Id.* at ¶¶ 20, 22).

2. **Mary J. Geissman**

Ms. Geissman submitted a declaration, swearing to things that she had no personal knowledge of. Thus, while paragraph 8 of her declaration covers the judicial screening panel that is used in New York County to select potential candidates for nomination, she asserts, “[s]ome organizations, such as the Columbian Lawyers, were selected [to serve on the screening panel] because of their close ties to the County Chairman.” However, at her deposition, Ms. Geissman admitted under cross-examination that she had no personal knowledge of this purported “fact,” and indeed, she testified that it was possible that the Columbian Lawyers did not have a close relationship with the County Chairman, but instead, had a close relationship with one Bill Fugazy. (Sifre Ex. 5, Geissman Dep. at 73-75). Ms. Geissman’s swearing to facts about which she has no personal knowledge is wholly improper, and calls into question the veracity of all of her factual allegations.

In paragraph 14 of her declaration, Ms. Geissman attests to the fact that the current system “allows the Chairman to choose from a larger group of candidates and to negotiate deals that involve, for example, promising nominations to candidates in future years if they withdraw in the current year.” At deposition, she clarified that she has no knowledge that this has in fact occurred, and that her declaration does not state that it has in fact happened.

(Sifre Ex. 5, Geissman Dep. at 140-141). Moreover, Ms. Geissman concedes that in her 20 years of experience as a judicial delegate, all of the candidates nominated by her party were qualified for the job. (Id. at 150-151).

3. Roy A. Schotland

Plaintiffs' expert, Mr. Schotland, asserts that "New York is the only state that limits potential major party candidates to a single route onto the ballot, without a 'safety valve' for candidates who may be unable or unwilling to use that route" and that "only New York uses a convention system, rather than a direct primary election, to select the candidates who will appear on the ballot." (Schotland Dec. at ¶ 8). These two factors, Mr. Schotland asserts, "impose uniquely severe burdens on challenger candidates who wish to be considered by the voters and, therefore, uniquely constrain voters." Id.

Mr. Schotland's assertion is wholly incorrect. There *is* a safety valve in New York, and that safety valve is to permit individuals to petition onto the ballot. And while individuals may not petition onto the Democratic or Republican ballot without their party's endorsement at the convention, if they are unable to obtain such endorsement, they are free to run as independents or as third-party candidates. See New York Election Law Elec. Law §§ 6-138-144. In so running, a challenger can present her qualifications and leave it to the voters to decide whether they wish to have that person sitting as a Supreme Court Justice in the State of New York. As plaintiff C. Alfred Santillo testified at deposition:

Q. By definition, you have majority parties and minority parties, correct?

A. Yes.

MR. CREELAN: Objection.

Q. And in a democracy when majority rules, in general, it's easier for a majority party to win than a minority party, right?

MR. CREELAN: Objection.

A. I believe what we are saying is we want to see a minority have an equal opportunity to be considered, not necessarily to be elected, but at least to be in equal view.

Q. To be considered for the position of Supreme Court justice or to be considered for a party's nomination for Supreme Court justice?

A. Well, to be considered for Supreme Court justice.

(Sifre Ex. 6, Santillo Dep. at 70-71). Ironically, the current system provides for exactly what Mr. Santillo was led to believe his lawsuit would correct.

Again, no authority is cited for the proposition that the selection of party candidates must be done by primary. The United States Supreme Court does not require that the voters be given the opportunity to assert their preferences through parties, so long as such preferences can be asserted through the candidates. Anderson, at 787 (“voters can assert their preferences only through candidates or parties or both.”).

4. Henry T. Berger

Another of Plaintiffs’ experts, Mr. Berger, recognizes as he must, that it is the voters who elect the judicial delegates. (Berger Dec at ¶ 11). Mr. Berger opines that “the county party leaders and local district leaders rather than the voters controls the selection of judicial delegates and alternate delegates”. Id. Mr. Berger also opines that the delegates follow the wishes of the district leaders, who follow the wishes of the county party chairperson. Id. Apparently, the Court is expected to draw the inference that the county party chairperson is therefore “pulling the strings” of hundreds of judicial delegates, and rigging the election. A much less sinister and more plausible scenario exists, to wit, the Democratic and Republican judicial conventions reach a consensus, through a long and deliberative process that starts with individual candidates seeking to win the approval of their local party leaders, continues

throughout the election process with the local party leaders seeking to build a consensus, culminating in the judicial convention at which time the consensus is formally recognized.

In contrast to the other declarations provided in support of plaintiffs' motion, and some of his own assertions, Mr. Berger also recognizes that the entire process is not simply a "rubber stamping" of the county party chairperson, and in fact he confirms that "the district leaders work with the county party chairperson over long periods of many years; it makes no sense to alienate the chairperson over a choice of a Supreme Court candidate in a given year because there could well be opportunities for a district leader to plead a candidate's virtues to the chairperson in future years." *Id.* at ¶ 12. In other words, Mr. Berger recognizes that the process does not begin and end with the judicial convention, but instead culminates in a judicial convention only after the process of coalition and consensus building is completed, a process which includes the district leaders' ability to persuade the chairperson of any given candidate's virtues. Nothing in the Constitution or the United States Supreme Court decisions mandates the elimination of this political system merely because some frustrated candidates are unable to immediately attain such a consensus.

Plaintiffs look at the process "backwards" which in and of itself demonstrates the unsound nature of their arguments.⁷ Of course it is difficult to challenge the chairperson's position if one looks to challenge that position only after a consensus is reached. There is nothing inherently undemocratic or unconstitutional in requiring candidates for judicial office to work within their party to build a consensus for their nomination, and nothing in the law that

⁷ Plaintiffs assert that the election process is "best understood when looked at backwards" (Br. at 8). However, it is precisely this backwards-looking "Mad-Hatter" logic that enables plaintiffs to characterize the system as having an "Alice-in-Wonderland quality." (Br. at 8).

prohibits such a practice. Just because other states do it differently, does not mean that New York's methodology is unconstitutional.

While it is not disputed that the statutory formula for selecting delegates creates a number of delegate positions to fill, it is not required that any individual seeking the position of Supreme Court Justice fill all those positions. If they are unable to obtain unanimous support, they may succeed in obtaining enough delegate support to demonstrate their viability to the party (See Sifre Ex. 4, Proposed Declaration of Alice Schlesinger) or, at the least, remain free to run as an independent or under a minority-party's nomination. This "safety valve" ensures that the voters at large consider all serious contenders for the position of Supreme Court Justice.

Mr. Berger also takes exception to the fact that in order to petition onto the ballot as either a Democratic or Republican candidate for delegate, 500 signatures must be gathered from members of the individual's political party who live within the Assembly District. This number is not so large. And while Mr. Berger points out that the signature requirements for Civil Court judgeships in Queens requires only 4,000 signatures while a Supreme Court challenger candidate would require 9,000 signatures to cover delegate seats, this is only true if he or she wished to contest every delegate seat. As demonstrated by Justices Gangel-Jacob and Schlesinger, a candidate does not even have to run a single delegate in order to win the party nomination. He also fails to recognize that the higher number of signatures is commensurate with the importance of the position. The Supreme Court of New York State is a court of general (i.e., unlimited) jurisdiction, and hence, is charged with a great deal more responsibility than that of a Civil Court Judge of limited jurisdiction, warranting broader public support before a candidate should be permitted on the ballot. As for the 32,500 signatures Mr. Berger claims is "required" to run delegate candidates in the four Judicial Districts covering New York City, this

is wholly disingenuous as no candidate need run in all four Judicial Districts when a candidate can only be nominated and elected in one.

New York State is widely recognized as having a sophisticated legal system and its decisions are persuasive throughout the country. Indeed, Mr. Berger acknowledges that there are many talented Supreme Court Justices. He argues, however, that the system “inevitably rewards candidates more for their loyalty and service to their political party leaders than for their legal experience, integrity, or judicial temperament.” *Id.* at ¶ 43. Mr. Berger, however, offers no empirical evidence, studies or even an opinion on whether the direct primaries would result in *better* judges. Moreover, while Plaintiffs’ Mr. Berger believes that the quality of the Supreme Court bench suffers as a result of the current system, (he is contradicted by Plaintiffs’ witness Ms. Geissman, at Sifre Ex. 5, at 150-151), it is not for this Court to determine whether the current system produces better judges than an alternative system – that is a question for the people of the State of New York, to be addressed by the Legislature.

Finally, Mr. Berger states that the New York State Constitution requires that Supreme Court Justices be chosen by the voters. (Berger Dec. ¶ 43). Indeed, that is precisely how Supreme Court Justices are, in fact, elected. However, whether the current system violates the New York State Constitution is a question of State law, and should not be addressed by a Federal Court. In any event, the pleadings do not assert that the current system is in violation of the New York State Constitution, so Mr. Berger’s reference to the New York State Constitution is irrelevant.

B. Incumbent Supreme Court Justices Should Not Be Required To Engage In Intense Political Campaigning For Re-Election

The position of Supreme Court Justice is *not* a political one. Indeed, as the New York Court of Appeals ruled in In re Watson, 100 N.Y.2d 290 (2003), litigants have a right

guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption. Similarly, the New York Court of Appeals has determined that:

the State has an overriding interest in the integrity and impartiality of the judiciary. There is hardly ... a higher governmental interest than a State's interest in the quality of its judiciary. Charged with administering the law, Judges may not actually or appear to make the dispensation of justice turn on political concerns. The State's interest is not limited solely to preventing actual corruption through contributor-candidate arrangements. Of equal import is the prevention of the appearance of corruption stemming from public awareness of the opportunities for abuse.

Matter of Nicholson v State Commn. on Jud. Conduct, 50 N.Y.2d 597, 607-608 (1980) (internal quotation marks deleted). Opening the selection of Supreme Court Justices to a full-blown contested primary system, however, is bound to have negative repercussions. As found in The Case for Judicial Appointments, 33 U. Tol. L. Rev. 353, 368 (Winter 2002):

Contested judicial elections have appeared to degenerate in a growing number of states into an auction for control of the civil justice system. In Texas, Louisiana, Alabama, North Carolina, and Pennsylvania, states using contested partisan elections, millions of dollars are raised and spent each election cycle, with the principal contributions coming from the plaintiffs' personal injury bar on the one hand and the insurance defense bar on the other. In 1988, candidates for the six open seats on the Texas Supreme Court raised over \$10 million; candidates for the Chief Justice position alone raised almost \$4 million. Two years earlier in California, three sitting justices spent nearly \$4.5 million in an unsuccessful effort to retain their seats on the state Supreme Court; individuals and groups working against their retention spent another \$7 million. Also in 1986, the two candidates for Chief Justice of the Ohio Supreme Court spent over \$3 million.

(Footnotes omitted).

In States that continue to hold partisan primaries for judicial nominations, costs for running these campaigns are increasing significantly. For example, in Illinois, spending on judicial primaries grew by 132% between 1990 and 2000. (See Judicial Election in the States;

Illinois, American Judicature Society, available at http://www.ajs.org/js/IL_elections.htm). In 2000, three candidates for Illinois Supreme Court spent \$1 million dollars in their primaries, with the fourth spending nearly that much. (See Aaron Chambers, *Judicious Spending*, Illinois Periodicals Online (October 2000) available at <http://www.lib.niu.edu/ipo/ii001021.html>). In states like Texas, Alabama, and West Virginia, where judicial elections are vigorously partisan, it's not uncommon for judges to collect hundreds of thousands or even millions of dollars in campaign contributions. (See Alexander Tabarrok and Eric Helland, *Partisan Judicial Elections and Home Court Advantage*, CORPORATE LEGAL TIMES, The Independent Institute (March 2002) available at <http://www.independent.org/tii/news/020300Tabarrok.html>). In fact, the nine justices of the Texas Supreme Court raised a total of \$11 million dollars in their campaigns between 1994 and 1998. (See Texans for Public Justice, *Supreme Court Fundraising Tops \$11 Million* (April 11, 2000) available at http://www.tpj.org/press_releases/checks.html)

Striking New York's election law, and requiring a primary system for the selection of Supreme Court Justices will increase the likelihood that judicial elections will degenerate into an expensive, time-consuming auction for control of the civil justice system.

Moreover, the rules governing the conduct of judges prohibit *any* political activity except as enumerated therein. Among the conduct that is specifically prohibited:

- (a) acting as a leader or holding an office in a political organization;
- (b) being a member of a political organization (other than enrollment and membership in a political party);
- (c) engaging in any partisan political activity (permitting participation in his or her own campaign for elective judicial office)
- (d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization.
- (e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office.

(f) making speeches on behalf of a political organization or on behalf of another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

See 22 NYCRR § 100.5.

Judicial candidates may participate in and contribute to their own campaigns during the "window period," beginning nine months before the primary election or nominating convention. See 22 NYCRR §100.0 (Q). Such participation may include attending political gatherings and speaking in support of their own campaigns, appearing in media advertisements and distributing promotional campaign materials supporting their campaign, and purchasing two tickets to and attending politically sponsored dinners and functions during the window period.

See 22 NYCRR 100.5 (A) (2) (i)-(v).

Although there are similar restrictions on non-judge candidates running for election to judicial office, the window period only applies once the "non-judge is an announced candidate" *Id.* at 100.0(O). A person becomes a candidate for judicial office "as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions" for that office. 22 NYCRR § 100.0 (A). Thus, there are no restrictions on the conduct of non-judges who have yet to announce their candidacy for Supreme Court Justice, and such persons remain free to engage in all manner of political activity, including participating in other candidates' campaigns, publicly endorsing other candidates or publicly opposing any candidate, making speeches on behalf of political organizations or other candidates, or making contributions to political organizations that support other candidates or general party objectives.

Indeed, no law prohibits non-judges from raising money for non-judicial positions and subsequently announcing that they are running for Supreme Court Justice, and using the funds previously raised to finance their judicial candidacies. Finally, whereas judges are prohibited from making any public comment about a pending or impending proceeding in any court within the United States (22 NYCRR § 100.3(B)(8)), non-judge candidates for Supreme Court are not so limited. It is not difficult to imagine the advantage that a challenger has in a primary, when that challenger is able to comment upon a sitting Supreme Court Justice's pending cases.

As a result, the election "playing field," if based on a primary system, distinctly disfavors sitting Supreme Court Justices. As it cannot be disputed that the State of New York has a compelling interest in maintaining a strong and competent judiciary, it is important not to create a system that disfavors the re-election of a sitting Supreme Court Justice, who has had *thirteen* years of experience as a Supreme Court Justice at the time he or she is up for re-election.

CONCLUSION

The judicial convention system, as opposed to the primary system favored by the plaintiffs, strengthens New York's judiciary by reducing the need to campaign and by permitting sitting Supreme Court Justices to focus on fulfilling their judicial functions.

The judicial convention system discourages aggressive and expensive political campaigning among the Republican and Democratic parties, while encouraging consensus building, thereby permitting the parties to craft their nominations to the State's judiciary to better reflect New York's population, including matters race, religion, nationality, gender, sexual preferences and geography. The system works. If a candidate is unable to form the consensus needed to receive her party's nomination at the judicial convention, that candidate can petition to have her name placed onto the ballot and still allow the voters to decide her fate. That is precisely what the lead plaintiff, Margarita Lopez Torres did when she failed to obtain the Democrat's nomination, and ran as the candidate of another party. (Torres Dec at ¶ 49). Ms. Torres does not, and cannot argue that the process of presenting herself for candidacy as a nominee of a minority-party is unconstitutional. And, it is wholly unreasonable for Ms. Torres to argue that the election system is unconstitutional because she is unable to win an election as a minority-party candidate.

As the Supreme Court held in Anderson v. Celebrezze, 460 U.S. 780, 787 (1983), "voters can assert their preferences only through candidates or parties or both." (emphasis added). And because the voters are able to express their preferences by voting for or against a minority-party candidate such as Ms. Torres, there is no constitutional infirmity in New York's election laws.

