

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.

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

Defendants.
-----X

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTIVE RELIEF**

Index No. CV 04-1129 (JG)

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PRELIMINARY STATEMENT

New York purports to elect its Supreme Court justices. Yet, New York has erected complex statutory barriers that make the promise of elections a sham.

In all too many instances, this Court and the Second Circuit have had to enjoin barriers to the ballot devised by New York State that limit access for candidates who do not have their party leaders' backing.¹ This is that rare case where the rules being challenged do not simply burden

¹ See, e.g., *Lerman v. Bd. of Elections*, 232 F.3d 135, 145 (2d Cir. 2000) (invalidating New York State law requirement that witnesses to signatures on ballot petitions be residents of the district in which the office is being voted because it constitutes severe burden on party's candidates and voters); *Rockefeller v. Powers*, 78 F.3d 44, 45-46 (2d Cir. 1996) (invalidating New York Republican Party requirement that each presidential candidate's delegate slate from a congressional district obtain signatures equal to the lesser of 5% or 1250 of the district's registered Republicans to be placed on primary ballot); *Molinari v. Powers*, 82 F. Supp. 2d 57, 72-77 (E.D.N.Y. 2000) (invalidating requirement that presidential candidates obtain signatures from 5% of registered party members within

candidates or render their path to the ballot treacherous; they literally remove *any and all possibility* of competing for a party's nomination before the voters.

“[T]he right to vote is heavily burdened if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot.” *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (internal quotation marks omitted). Yet, unlike the selection rules for *every* other state elective office in New York – including *all* other judgeships – and for the trial courts of *all* of the 32 other states that elect such judges, there is no primary ballot for Supreme Court on which candidates could even “clamor” for a place. Voters are *never* allowed to choose from among their party's candidates. Candidates cannot get on any ballot by gathering signatures.

Instead, the county party leaders' hand-picked nominees for Supreme Court are ratified at a judicial convention by judicial delegates who have been selected by the same party leaders. Just to obtain the possibility of obtaining any delegates' votes at that convention, the statutory selection requirements force a challenger candidate who lacks the county's party leaders' backing to accomplish what only a countywide political party operation can: namely to recruit, run, petition onto the ballot, and elect scores of judicial delegates equally distributed across a judicial district that usually includes numerous counties.² Nor is there any way for a challenger to petition onto the general election ballot for Supreme Court as a major party candidate. For challenger candidates, history shows these hurdles to be wholly insurmountable.

Take Plaintiff Civil Court Judge Margarita López Torres, for example. On November 5, 2002, she was reelected to the Civil Court for a countywide seat covering all of Kings County

each congressional district).

² Throughout this memorandum, candidates who would seek to run without the party leaders' backing are referred to as “challenger” candidates to avoid confusion. This use of the term “challenger” is, of course, distinguished from its common usage to refer to a candidate who challenges an incumbent.

(Brooklyn). She received 200,710 votes – more votes in Brooklyn than any other judicial candidate running that day, including not only four other Civil Court candidates but also each of the six Democratic candidates for *Supreme Court* who won that day. Despite such widespread popular support among Democratic voters and her exemplary judicial career, however, the Democratic Party Chairman in Brooklyn chose not to allow her Supreme Court nomination because she had refused the party leaders' demands that she hire their cronies and even their relatives as her court attorney.

Without the county party chairman's support, a challenger candidate in her shoes would have to recruit approximately 300 residents of Brooklyn or Staten Island willing to run as candidates for delegate or alternate delegate to the judicial convention in opposition to their political party's chosen delegates. Then she would have to gather approximately 1,500 signatures in each of 24 Assembly Districts in those counties (*i.e.*, 36,000 in total) just to place those delegate candidates on the September ballot. If she somehow were to succeed in placing the challenger delegate candidates on the September ballot, voters would then be confronted at the polls with a mystifying list of convention delegate candidates with no indication on the ballot of which delegates support which Supreme Court candidates. Getting a majority of those delegate candidates elected across the judicial district is, therefore, virtually impossible.

Given these uniquely severe burdens on challengers' candidacies, it is no surprise that from 1994 through 2002, *none* of the Supreme Court candidates who were selected at Democratic or Republican conventions anywhere in the State were challengers without the party leaders' support. The fewer than a handful of instances across the state over the last 30 years in which there have been successful convention challenges to the leader-backed candidates have resulted from large factional splits within the local party leadership itself that produced a war for

control between each faction's delegates, rather than from any success by individual challenger candidates in overcoming the party leaders' choices.

Far from serving any compelling state interest, this undemocratic system directly contravenes the most relevant state interest, namely the New York State Constitution's command that Supreme Court justices "shall be chosen by the electors [*i.e.*, the voters] of the judicial district in which they are to serve." N.Y. Const. art. VI, § 6. In addition, New York State has determined with respect to all other judgeships, like the 32 other states that elect their trial judges, that its interests (and the voters' interests) are better served by competitive primary elections with reasonable ballot access requirements than by the tortuous selection requirements used for Supreme Court. In short, no state interest can justify the severe burdens imposed by those requirements on candidates and voters.

Plaintiffs are current and potential Supreme Court candidates who seek the opportunity to earn their party's nomination but have been stymied from doing so by the burdens of the current requirements, several voters from across the state who have been deprived of their right to choose their parties' candidates for Supreme Court, and Common Cause/NY, which represents over 20,000 members across the State who have similarly been injured as voters. Plaintiffs respectfully request that the Court declare the challenged selection requirements unconstitutional and enjoin their use for the 2005 elections, but permit the state's political process to fashion a remedy within a set time period. If the Legislature and Governor fail to remedy the constitutional violations in a timely fashion, the Court can and should fashion an appropriate mandatory injunction.

To be clear, Plaintiffs do not challenge the rights of party leaders to endorse or to support specific candidates for Supreme Court at a convention or otherwise. Nor are the political parties

even defendants in this matter. Rather, Plaintiffs challenge the *State's* statutory rules that unnecessarily preclude even the most diligent, able, and popular challenger candidates from satisfying the requirements just to be considered by their party's voters for their party's nomination. It is those structural, state-mandated barriers to the ballot, and not the party leaders' decisions not to support or endorse challenger candidacies, that run afoul of constitutional standards.

New York State need not have chosen by its own constitution to elect Supreme Court justices. Once it has done so, however, it must comply with the federal constitution.³

SUMMARY OF DECLARATIONS

The Statement of Facts details the statutory selection rules for Supreme Court, the severe burdens they place on challenger candidates and voters, and the unique nature of those burdens. That section is based on the declarations of 11 witnesses, whose testimony is briefly summarized here:

Lay Witnesses

- **Plaintiff Margarita López Torres** – A Civil Court Judge for Kings County elected in 1992 and re-elected in 2002 after garnering more votes than any other Democratic judicial candidate on the ballot in Brooklyn, she explains her efforts over several years to compete for her party's nomination for Supreme Court and the severe burdens and harm imposed by the current selection requirements;
- **Plaintiff John W. Carroll** – Based on his extensive experience as a judicial delegate and a voter, Mr. Carroll explains how the current selection requirements work and the severe burdens they place on challenger candidates and on voters;

³ See, e.g., *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (“If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”) (internal quotation marks omitted). While it was the First Amendment freedom of judicial candidates to address issues to voters which the Supreme Court vindicated in *White*, that case reaffirmed the established principle that state-mandated judicial election rules must fully comply with the First Amendment.

- **Plaintiff Philip C. Segal** – Based on his experience as a former candidate for Supreme Court and as a New York City Family Court judge, Mr. Segal explains his efforts to compete for the Democratic Party’s nomination and the severe burdens imposed by the current selection requirements;
- **Rachel Leon** – As Executive Director of Plaintiff Common Cause/NY, Ms. Leon explains that organization’s purpose in joining this lawsuit and the burdens placed by the current Supreme Court selection requirements on the more than 20,000 voters across New York State who are members of Common Cause/NY;
- **Former Rochester City Court Judge John Manning Regan, Sr.** – Judge Regan explains his efforts to obtain the Republican Party’s nomination for Supreme Court in the Seventh Judicial District in 1994 and the severe burdens placed by the current selection requirements on challenger candidates like himself;
- **Mary Geissman** – Based on her experience as the chair and member of the judiciary committee of the New York County Democratic County Committee for many years, Ms. Geissman explains how the Supreme Court selection requirements work in the First Judicial District and the severe burdens placed on challenger candidates;
- **Benjamin Ostrer** – Based on his experience as a judicial delegate or alternate delegate at every Republican Party convention since 1990 in the Ninth Judicial District, Mr. Ostrer explains how the judicial convention system works and the severe burdens imposed by the current system upon challenger candidates and voters;

Expert Witnesses

- **Dr. Bruce Cain** – Robson Professor of Political Science and Director of the Institute of Governmental Studies at the University of California at Berkeley and one of the nation’s foremost experts on elections, Dr. Cain analyzed judicial convention minutes and election results from each of the 12 judicial districts and other materials to assess the burdens placed on challenger candidates, the extent of competition for major party nominations, the conventions themselves, and role of voters in selecting Supreme Court Justices in New York State. After documenting the numerous barriers placed before challenger candidates and their lack of success in competing for their parties’ nomination, Dr. Cain concludes, in part, that “New York State’s Supreme Court nomination system falls well below the threshold of a minimally democratic selection system.”
- **Roy A. Schotland** – A professor of law at Georgetown University Law Center and among the nation’s foremost experts on judicial selection in the various states, Prof. Schotland analyzed the selection systems and ballot access rules used by the 50 states to select the judges of their trial courts of general jurisdiction. According to Prof. Schotland’s analysis, New York’s selection rules are unique both in allowing only one path onto the ballot (*i.e.*, the judicial convention) *and* in the draconian requirements that must be met to compete at the convention by placing delegate candidates on the ballot. As a result, he concludes, New York State’s Supreme Court selection requirements place

much more severe burdens on challenger candidates than those of any other state in the nation;

- **Henry T. Berger** – One of New York’s premier election lawyers and the former chair (for 13 years) of the New York State Commission on Judicial Conduct, Mr. Berger explains, based on over 30 years of experience advising candidates for Supreme Court and other offices, the nature of the severe burdens placed on challenger candidates by the current Supreme Court selection requirements, and his view that a direct primary election system with reasonable signature requirements to get on the ballot (whether combined with a party convention option to nominate certain primary candidates or not) would better serve the interests of candidates, voters, and New York State;
- **William Lipton** – The Political Director of the Working Families Party and an experienced campaign manager for candidates across the state, Mr. Lipton analyzed the specific costs that would be faced by a challenger Supreme Court candidate who is attempting to compete for his or her party’s nomination at the judicial convention. Based on his detailed analysis, he concludes that the costs of such a challenge would exceed \$1.3 million – and even that astronomical burden would in no way guarantee the challenger a place on any ballot to be considered by the voters.

The evidence that accompanies this motion, outlined in detail by these witnesses, supported by the documents appended to the Declaration of Jeremy Creelan, and summarized in the Statement of Facts, fully supports the following key conclusions:

- The statutory selection rules for Supreme Court impose severe burdens on challenger candidates who seek the opportunity to compete for their party’s nomination;
- The extreme severity of those burdens on challenger candidacies is unique to New York State when compared to the burdens imposed on candidates by the selection systems of the other states that elect general jurisdiction trial judges, and unique *within* New York State when compared to the burdens imposed for all other state elective offices, including other elected judgeships;
- *Not a single* challenger candidate has successfully overcome those severe burdens to obtain the nomination for Supreme Court from the Democratic or Republican Parties in any judicial district since at least 1994, and in all likelihood, for many years earlier; and
- The statutory selection rules for Supreme Court do not serve any compelling, or even important, state interests.

STATEMENT OF FACTS

I. The Supreme Court Selection System

A. Overview

Nothing epitomizes the Alice-in-Wonderland quality of Supreme Court “elections” so well as the fact that they are best understood when looked at backwards. Our overview of the process therefore starts at the end: the general election. Consider the process from the perspective of an aspiring judge who does not have the backing of her party’s county chairman.

Supreme Court seats are “contested” in partisan elections. Partisan because candidates appear on the general election ballot as nominees of political parties; “contested” in quotation marks because so many races offer voters only one candidate to choose from, and so many others are predictable landslides for the dominant major party in the region. So our would-be judge *must* become her party’s nominee and that party must be one of the two major parties. *See infra* at 23-24.

She can accomplish this if a majority of the delegates (and alternate delegates who fill in for absent delegates) at the party’s judicial nominating convention vote for her. In practice, the conventions are *pro forma*, lasting only long enough for a pre-selected delegate to nominate a pre-selected candidate for each seat and for the other delegates to record a unanimous voice vote in favor. As discussed below, challenges at the convention are extremely rare and, unless there is a true power struggle between factions within the party’s leadership for control over the party, never successful. *See infra* at 17-23.

Lobbying delegates for their support would be logistically impossible in most cases even if the delegates were not firmly under the control of party leaders. State law requires conventions to be held less than two weeks after delegates are chosen in the September election (this election is generally referred to as the “primary” because voters directly select their parties’

nominees for every elective office *other* than Supreme Court justice in primary elections on the same day). There simply is not enough time between the delegate primary and the convention to persuade a majority of the delegates to support a particular candidate. Even more to the point, the delegates are not open to persuasion. They are there to rubber-stamp the candidates selected by party leaders; hence the fact that challengers never succeed at the convention stage. Our judge-to-be thus must convince voters to select delegates who will support her, or who will at least be open-minded enough to consider her. *See id.*

This objective, however, is a merely theoretical possibility. Delegates are selected not by judicial district, nor even by county, but by Assembly District (“AD”). This means that a candidate who is independent of the party’s machinery must collect signatures in every AD within her (usually multi-county) judicial district to nominate delegates for that district, then get her group of delegate nominees elected through separate campaigns in each of many ADs. Because the Supreme Court candidate’s name does not appear on the September ballot, moreover, it is impossible for voters to tell which delegate candidates support her. Thus, the candidate must not only persuade voters to support *her*, she must explain to them which names they should choose in the delegate election—a list that will be different in every AD, making district-wide communications useless. Considering the futility of any concerted challenge to the party leadership’s nominated delegates, it should not be surprising that voters are rarely called upon even to vote for delegates: a small minority of delegate positions are contested, and the rest—more than 85% in New York City and even more in other parts of the state —never even appear on the ballot. *See infra* at 10-19.

What is our challenger candidate to do? Only one of two things: either do whatever the party leaders ask of her, no matter what that might be, or abandon her challenge. *See López*

Torres Decl. ¶¶ 8-30. If she gets the dominant county party leaders to support her, the party will recruit delegate candidates, collect signatures to nominate delegates to the convention, and have the delegates rubber-stamp her nomination without asking her to do much of anything. In many parts of the state, the other major party will cross-endorse her or simply fail to nominate anyone for the seat. In the majority of cases, her election in November will be a foregone conclusion. But if she does not have the leaders' support, the voters will never see her name on any ballot, and she will have literally no chance of being elected.

B. Convention Delegates Selected by Party Leaders

Having painted a picture of the entire process in broad strokes, we now start more prosaically at the beginning, with the selection of delegates to the parties' nominating conventions.⁴

The bottom line is that challengers have no chance of filling a majority of the seats at the judicial nominating convention with sympathetic delegates. As the numerous declarations submitted with this application explain, the hurdles to trying to run alternative slates of delegate candidates are virtually insurmountable. *See* López Torres Decl. ¶¶ 25-30; Carroll Decl. ¶¶ 10-21; Segal Decl. ¶¶ 12-13; Regan Decl. ¶¶ 14-20; Ostrer Decl. ¶¶ 10-12; Cain Expert Decl. ¶¶ 8-9; Lipton Expert Decl. ¶¶ 13-18; Schotland Expert Decl. ¶ 8; Berger Expert Decl. ¶¶ 11-18. What makes this burden so severe? The following section summarizes the current selection requirements, each of which alone would likely preclude challenger candidates from competing for their party's nomination, but which together impose overwhelmingly severe burdens on challenger candidates.

⁴ An appendix to this memorandum provides the relevant statutory provisions addressed herein and in the declarations of Messrs. Berger, Lipton, and Carroll.

1. Fragmented Delegate Selection by Assembly District

Supreme Court justices are selected from each of New York State's 12 judicial districts, but delegates are selected by the voters of each AD within the judicial district. N.Y. Elec. L. § 6-124; N.Y. Jud. L. § 140. The state is divided into 150 ADs, and many of those ADs are further split between different judicial districts. As a result, each judicial district includes many ADs. The Second Judicial District, for example, covers Brooklyn and Staten Island and includes 24 ADs. *See generally* Creelan Decl. ¶¶ 3-5, Ex. 2-4.⁵ Outside New York City, every judicial district contains more than one county, and all but one contain at least five counties.

Because of this unique selection system, candidates who do not have party leaders' backing would have to run and elect a group of delegate and alternate candidates for each of many ADs spread across a judicial district. Otherwise, there is simply no chance of competing for their party's nomination at the judicial convention. For obvious reasons, however, only the party leadership *for an entire county* possesses the resources and political organization needed to overcome the atomized nature of judicial delegate selection by AD. This burden alone is prohibitive. *See* López Torres Decl. ¶¶ 25-26; Carroll Decl. ¶¶ 13-19; Segal Decl. ¶¶ 12-13; Regan Decl. ¶¶ 14-20; Ostrer Decl. ¶¶ 10-12; Cain Expert Decl. ¶¶ 8-9; Lipton Expert Decl. ¶¶ 13-18; Schotland Expert Decl. ¶ 15; Berger Expert Decl. ¶¶ 13-18.

⁵ The 12 districts, with the counties that are included in each district listed in parentheses, are as follows: 1st Judicial District (New York); 2nd Judicial District (Kings, Richmond); 3rd Judicial District (Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan, Ulster); 4th Judicial District (Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren, Washington); 5th Judicial District (Herkimer, Jefferson, Lewis, Oneida, Onondaga (including Syracuse), Oswego); 6th Judicial District (Broome, Chemung, Chanango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga, Tompkins); 7th Judicial District (Cayuga, Livingston, Monroe (including Rochester), Ontario, Seneca, Steuben, Wayne, Yates); 8th Judicial District (Allegany, Cattaraugus, Chautauqua, Erie (including Buffalo), Genesee, Niagara, Orleans, Wyoming); 9th Judicial District (Dutchess, Orange, Putnam, Rockland, Westchester); 10th Judicial District (Nassau, Suffolk); 11th Judicial District (Queens); and 12th Judicial District (Bronx).

2. The Uniquely Large Number of Delegates and Alternate Delegates

New York law requires that the number of delegates from each AD be proportional to the AD's percentage of the total votes received statewide by the party's gubernatorial candidate in the last election. *See* N.Y. Elec. L. § 6-124. This requirement, implemented with rules adopted by the major parties, means that, depending upon the judicial district and the party, approximately 30 to 150 delegate candidates and an equal number of alternate delegate candidates are selected in each judicial district.⁶ For a challenger candidate to have any chance to elect a majority of delegates and alternates, therefore, she would have to run that number of delegate and alternate candidates. In 2002, for example, Judge López Torres would have had to recruit and run 304 delegate and alternate candidates across the Second Judicial District just to have had a realistic opportunity to elect a majority against the county party leadership. López Torres Decl. ¶¶ 25-30; Creelan Decl. ¶ 11, Ex. 9 (2002) (Board of Elections certification lists showing 304 delegates and alternates selected for Brooklyn (Kings County) and Staten Island (Richmond County)). In 2001, former Judge Regan would have had to run 135 delegate and alternate candidates across 11 ADs in eight counties in the Seventh Judicial District. Regan Decl. ¶ 14; Creelan Decl. ¶ 12, Ex. 10 (2001) (certification lists for Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne, and Yates Counties). A Republican challenger in the Tenth Judicial District in 2001 would have had to run 394 delegate and alternate candidates. Creelan

⁶ Section 6-124 of the Election Law provides that the number of delegates and alternate delegates at the judicial conventions must be proportional to the number of votes in the most recent gubernatorial election in each AD, but delegates to the political parties the determination of their precise numbers. *See* Appendix. The Democratic Party currently allots each AD one delegate and one alternate delegate, plus an additional delegate and alternate for each 2,500 votes cast for the party's gubernatorial candidate at the most recent general election. *See* Creelan Decl. ¶ 6, Ex. 5. The Republican Party follows the same formula for eight of the 12 judicial districts, but uses 4,000 votes (rather than 2,500) as the multiplier in the Third and Fourth Judicial Districts, and 5,000 in the Seventh and Eighth Judicial Districts. *Id.* at ¶ 7, Ex. 6. The relevant portions of the Democratic and Republican Parties' rules, and a chart setting forth the number of delegates and alternates in each Judicial District, are set forth at Creelan Decl. ¶¶ 6, 7, and 16.

Decl. ¶ 12, Ex. 10 (2001) (certification lists for Nassau and Suffolk Counties). As detailed by numerous former Supreme Court candidates, delegates, and experts in election law, the burden of recruiting individuals willing to run for delegate or alternate is insurmountable even standing alone. *See* López Torres Decl. ¶¶ 25-26; Carroll Decl. ¶¶ 13; Segal Decl. ¶ 12; Regan Decl. ¶¶ 13-15; Ostrer Decl ¶ 10; Cain Expert Decl. ¶¶ 8-9; Lipton Expert Decl. ¶¶ 12-15; Berger Expert Decl. ¶¶ 14-18.

3. Severely Burdensome Cumulative Petitioning Requirements

Even if delegate and alternate delegate candidates could be recruited, the Supreme Court challenger candidate would still have to ensure that her recruits get on the ballot. In almost every AD, delegate and alternate delegate candidates must collect valid signatures from at least 500 voters enrolled in the relevant party to appear on the September ballot.⁷ As courts in this circuit have found, moreover, challengers typically must obtain many more signatures than the law nominally requires in order to withstand a virtually inevitable legal challenge to such petitions from the party leadership. *Molinari v. Powers*, 82 F. Supp. 2d 57, 60-61 (E.D.N.Y. 2000) (recognizing that candidates must seek as many as six times the number of signatures required by statute); *Rockefeller v. Powers*, 78 F.3d 44, 45 (2d Cir. 1996) (at least 140% of the number required by statute). According to Plaintiffs' expert William Lipton, an experienced campaign worker for Democratic Party candidates, as well as former candidates and experienced campaign advisers, a challenger delegate candidate would need to gather at least three times the statutory minimum required—*i.e.*, 1500 signatures—in order to deter and defeat court challenges by the

⁷ The statutory requirement is whichever is less: 500 or five percent of the voters enrolled in the party in the AD. N.Y. Elec. L. § 6-136(2)(i), (3). As of March 1, 2004, Democratic candidates must collect 500 signatures in every AD in the state. Republicans must collect 500 signatures in all but 48 of the 150 ADs; 47 of those 48 ADs are within New York City, and the remaining district is the 87th AD, which lies directly north of the Bronx. *See* Creelan Decl. Ex. 8.

Democratic or Republican Party leaders. Lipton Expert Decl. ¶ 12; Carroll Decl. ¶¶ 16-17; Regan Decl. ¶¶ 16-19; *see also* Berger Expert Decl. ¶¶ 17-18 (2.5 to 3 times).

As a result, the cumulative numbers of petition signatures that must be gathered in each judicial district across the state to place delegate or alternate candidates on the ballot in every AD are staggering: the *lowest* number of signatures required by law in any judicial district is 4,000 in the North Country's Sixth Judicial District (12,000 to resist legal challenges), while in eight of the state's 12 judicial districts a challenger candidate would face cumulative statutory minimum requirements of between 6,000 and 12,000 signatures – *i.e.*, 18,000 to 36,000 signatures in reality.⁸ (These numerical requirements are exacerbated by the statutory prohibition against any party member signing more than one petition for a slate of delegates, for the pool of eligible signatories shrinks with each signature gathered. Berger Expert Decl. ¶ 18.) These signatures must all be gathered within a 37-day petitioning period. N.Y. Elec. L. § 6-134(4).

As detailed in Mr. Berger's declaration, based on his lengthy career as an election lawyer representing Democratic candidates in New York City, the challenger delegate candidate would also have to expend substantial funds to hire an election lawyer to review his or her petitions for accuracy before submission to the county board of elections and to defend those petitions against challenges in court. Berger Expert Decl. ¶¶ 29-31; Lipton Expert Decl. ¶ 15. The challenge process is extremely costly, particularly where multiple jurisdictions are involved. Berger Expert Decl. ¶¶ 24-32. Additional legal fees must be incurred if one hopes to challenge those petitions filed by party-backed delegate candidates.

Mr. Berger estimates that these legal costs could be as much or more than \$200,000 for a challenger Supreme Court candidate. While the party-backed candidates can call upon the party

⁸ For a chart of the signature requirements for each of the 12 judicial districts, see Creelan Decl. ¶ 10. The information in that chart is drawn from Creelan Decl. ¶ 9, Ex. 8 and ¶¶ 3-5, Ex. 2-4.

to provide such legal representation in many cases, the challenger would have to pay these costs out of her own campaign funds. Berger Expert Decl. ¶¶ 30-31.

In all, the costs of mounting such a challenge just to place delegate and alternate candidates on the ballot (not to speak of the subsequent effort to try to get them elected, *see infra* at 17-19) would include, among other things:

- Identifying, contacting, and recruiting suitable and supportive delegate candidates in each of the many ADs within the judicial district who agree to run, campaign, and defy their local party leaders by voting for a challenger Supreme Court candidate at the convention;
- Running a complete petitioning operation in every AD;
- Running a fundraising operation;
- Printing petitions for each of the delegate candidate slates in each AD; and
- Reviewing and defending petitions against legal challenges.

Lipton Expert Decl. ¶¶ 12-17; Berger Expert Decl. ¶¶ 14-34; Carroll Decl. ¶¶ 16-17; Regan Decl. ¶¶ 14-16.

Plaintiffs' expert William Lipton has estimated the costs of each of the foregoing burdens based in part upon his extensive campaign experience in New York State. Just to get delegate and alternate candidates on ballots in the 24 ADs of the Second Judicial District, including fending off legal challenges, would cost as much or more than \$665,000. *See* Lipton Expert Decl. ¶ 18, Ex. A; *see also* Berger Expert Decl. ¶ 30; Carroll Decl. ¶ 20; Regan Decl. ¶¶ 16-19.

For delegate candidates selected by the leaders of the Democratic or Republican Parties, the selection process involves little or no cost to the individual delegate candidates or to the party-backed Supreme Court candidates. Berger Expert Decl. ¶ 31; Carroll Decl. ¶ 8. Rather, party-backed delegate candidates are simply included on the petitions of the party's candidates for higher offices within the AD. *Id.* In this manner, moreover, the county party leadership

gathers signatures for a slate of delegate candidates on a single petition in each AD, rather than for individual candidates on separate petitions. *Id.* The county party leaders and local party clubs under their control provide volunteers to gather signatures without cost to the delegate or Supreme Court candidates. *Id.* For these reasons, the Supreme Court candidates who are selected by the county party chairmen for nomination at the convention are essentially relieved of any campaign obligations or expenses connected with obtaining the support of judicial delegates.

By contrast, a Supreme Court challenger candidate does not have the benefit of these economies of scale or party organization. Not surprisingly, Supreme Court candidates who fail to obtain their local party chairman's backing inevitably realize that any effort by their campaign or supporters to run challenger delegate slates in their judicial district is futile. They are either forced, as former Rochester City Court Judge Regan was, to develop last-ditch strategies that are inevitably doomed to failure, or they must simply abandon any hope of competing for their party's nomination. *See* Regan Decl. ¶ 18; Segal Decl. ¶ 12; López Torres Decl. ¶ 30.

4. Delegates' Allegiances Not on the Ballot to Educate Voters

The challenge of persuading voters to support an insurgent judicial candidate is even more daunting because, unlike Presidential primary elections, where the name of the Presidential candidate appears with the names of the delegate candidates, only the names of individual delegates—not the names of the Supreme Court candidate whom they would support at the convention—appear on the ballot. Berger Expert Decl. ¶ 16; Regan Decl. ¶ 20. As a result, even if a Supreme Court challenger candidate were ever to petition successfully to place a supportive delegate candidate on the ballot, he or she would have to inform the voters through costly campaign literature or advertising of that delegate's allegiance. *Id.* Further, a challenger would

have to repeat that costly and unprecedented public education campaign in each AD for scores of different delegate candidates. *Id.*

5. Delegate “Elections”

a. The Burdens

The burden of getting slates of delegate and alternate candidates on ballots in each AD is just the first of the barriers to ballot access for the Supreme Court candidate. The challenger would then have to expend even greater resources getting at least a majority of those candidates elected across the entire judicial district. Through a careful assessment of all the relevant costs, Mr. Lipton estimates that mounting such delegate election campaigns in each AD would, in the aggregate, cost over \$667,000. If one adds the costs of getting the delegate and alternate candidates on the ballot, the costs of having just a reasonable chance to elect a majority of delegates and alternates are conservatively estimated to be over \$1.3 million. Lipton Expert Decl. ¶ 18.

Moreover, even if a challenger Supreme Court candidate were able to meet this astronomical price tag and the unimaginable operational challenges involved, he or she still would not have replicated the experienced, countywide campaign and get-out-the-vote operations controlled by the county party leaders across the state. Carroll Decl. ¶ 19; Berger Expert Decl. ¶ 34; Regan Decl. ¶ 20; Ostrer Decl. ¶ 12. Such barriers can be even greater in rural counties where gathering signatures, communicating with voters, and getting them to vote on Election Day require overcoming significant distances and barriers to mass communication. Berger Expert Decl. ¶ 18.

b. The Results

As a result of these severe burdens on efforts to run and elect challenger delegates, most delegates and alternates are simply selected by local party leaders without being challenged. As

a result, only a small percentage of delegates and alternate delegates even appear on any ballot at all. In New York City, for example, from 1999 through 2002 only 14.5% of the 4,825 judicial delegates selected by the two major parties ever appeared on a ballot. Cain Expert Decl. ¶ 9. The Republican Party placed only one percent of its delegates on the ballot in New York City during this period. The Democratic Party selected 80% of its judicial delegates without placing them on the ballot. Outside New York City, delegates are rarely placed on the ballot. For example, the counties of Albany, Nassau, Suffolk, and Tompkins have all selected judicial delegates without placing a single candidate, Republican or Democratic, on a ballot since at least 1999. Cain Expert Decl. ¶ 9; Creelan Decl. ¶ 15, Ex. 13. The same lack of contested delegate elections is found across the state. *See* Ostrer Decl. ¶ 9 (9th Judicial District); Regan Decl. ¶ 23 (7th Judicial District).

As described by witnesses from across the state who have experienced the Democratic and Republican Parties' delegate selection process firsthand, moreover, county party leaders and the district leaders who select the delegates and alternates choose individuals who, for one reason or another, will support the Supreme Court candidates endorsed by those party leaders. The party leaders routinely select themselves, their own employees, or relatives of their own employees as judicial delegates. *See* Carroll Decl. ¶¶ 8-9; Berger Expert Decl. ¶ 11; Ostrer Decl. ¶ 8; Regan Decl. ¶ 14. The overwhelming majority of delegates and alternates selected by local party leaders, and rarely opposed by other candidates, owe some form of allegiance to those leaders and are thus unlikely to support any challenger candidates for their party's convention nomination. *Id.* Not only do many of those delegates and alternates have personal connections to the leaders, but also the patronage jobs and other benefits that flow from a mayor or other official of the same party are often distributed through the county party chairman down to the

district leaders. *Id.* Judicial delegates and alternates often have little connection to the ADs they purport to represent; they need only live within the judicial district (rather than the AD) and they often “represent” one AD in one year and another AD in the following year. *Id.*

C. Supreme Court Nominees Selected by Party Leaders Before the Convention

In each judicial district the dominant county party leaders have developed a procedure for selecting Supreme Court candidates to be approved at the judicial convention. While these procedures vary in their details, they uniformly deprive voters and rank-and-file party members of meaningful input in the selection process and prevent challenger candidates from obtaining their party’s nomination. In the Second Judicial District, the County Chairman of the Democratic Party County Committee has traditionally appointed a screening committee that has, in turn, considered and approved those candidates referred by the County Chairman himself. Carroll Decl. ¶¶ 25-27. While the Chairman recently chose to permit the screening committee to consider other applicants, there is no sign that the Chairman will fail to control the delegates’ vote at the convention to nominate his preferred candidates. *Id.* In New York County, the Chairman uses a screening committee to approve three Supreme Court candidates for every available position whose names are then added to those candidates who were previously approved by the committee, but not nominated, at least twice within the last four years. Geissman Decl. ¶¶ 11, 14. The Chairman then meets with the candidates individually and selects those candidates who will be nominated at the convention. *Id.* ¶ 13. In other judicial districts, the dominant county party chairperson simply chooses the nominees without the assistance of any kind of screening committee. Regan Decl. ¶ 12.

Regardless of how candidates are chosen for nomination by the county party leadership, challenger candidates who do not receive such support remain unable to compete for their party's nomination among their party's voters.

D. County Party Leaders' Nominees Always Approved at the Convention

With such severe barriers to electing delegates and alternates to support a challenger Supreme Court candidate, it is not surprising that Plaintiffs and their experts have found no instances in which a Democratic or Republican judicial convention in any judicial district nominated a candidate not endorsed by the dominant county party chairperson, except one occasion in 2000 in the Eighth Judicial District where the judicial convention became the battlefield for rival party leaders and their loyal delegates. Cain Expert Decl. ¶¶ 13-15; Creelan Decl. ¶¶ 13-14, Ex. 11 and 12.

Dr. Cain analyzed the available convention minutes and election results for Supreme Court across the state from 1990 through 2002. As detailed in his declaration, those minutes showed a complete absence of successful challenges to candidates supported by county party leaders. Specifically:

- In the four judicial districts within New York City from 1994 through 2002, 137 Democratic candidates were selected during this nine-year period without a single successful challenge at any of the 32 conventions in the four judicial districts in the city. In the Republican Party, there was not a single convention challenge, even unsuccessful, to any of the party's 133 Supreme Court nominees. Cain Expert Decl. ¶ 14.
- Outside New York City, from 1990 through 2002, with the exception of a single convention in the 8th Judicial District in 2000 referred to above, no candidate selected by either of the two major parties' conventions in any judicial district was a challenger without the dominant county party leader's support. *Id.*

The timing and nature of the conventions reflect this absence of any real challenges to the county party chairpersons' selection of candidates.

1. Burdensome Timetable and High Absenteeism

The unique timetable for Supreme Court selection in New York State exacerbates an already insurmountable burden on challenger candidates. Judicial delegates are selected “on the first Tuesday after the second Monday in September,” the judicial conventions must occur in the third week of September, and the general election is held annually on the “Tuesday next succeeding the first Monday in November.” *See* N.Y. Elec. L. §§ 8-100, 6-158(5). In other words, Supreme Court candidates learn who has been selected as a judicial delegate one week or less before the convention. Even if open-minded delegates were selected at the September election, therefore, judicial candidates without the party leadership’s backing would still lack sufficient time to identify, contact, and convince the many selected delegates to vote for them at the convention. Carroll Decl. ¶¶ 23-24.

High absentee rates for judicial delegates reflect both the short notice afforded delegates and the extent to which delegates serve as no more than rubber stamps. In 1999 and 2000, for example, the absentee rate for Democratic Party judicial conventions in New York City was 24.5%. For the three Republican Party conventions between 1999 and 2002 for which data are available, the average absentee rate was 69.1%. Outside New York City, the conventions for which attendance information is available from 1995 through 2002 show an average absentee rate of 32.3%. Cain Expert Decl. ¶ 10; Creelan Decl. ¶ 14, Ex. 12(1995) – 12(2002). This absenteeism is particularly telling because attending the convention is the only duty for which the delegates have been selected.

2. Scripted Format

Because the county party leaders control delegate selection, the conventions are, with extremely rare exceptions, virtually all scripted procedure, with no substantive debate or decision-making by the delegates, and thus are usually concluded very quickly.

At the appointed hour, the convenor appointed by the state party's chairperson calls the convention to order and ascertains whether a quorum of delegates is present.⁹ Next, the convention delegates elect a temporary chairperson and then a temporary secretary, whose only function is to oversee the subsequent election of a permanent chairperson and secretary. In most cases, the chairperson who presides over the convention performs this function year after year and, in some cases, is the county party chairperson himself. Ostrer Decl. ¶ 24; Carroll Decl. ¶ 32. As shown by the minutes of the conventions, there have been no successful challenges to the anointed chairperson at any of the judicial conventions across the state since at least as early as 1994 and, in all likelihood, even before that time. Cain Expert Decl. ¶ 11; Creelan Decl. ¶¶ 13-14, Ex. 11 and 12.

After several insubstantial formalities, the chairperson calls for nominations for Supreme Court. Technically, all nominations are "from the floor," but there is virtually never a nomination that is not known and supported by the county party leaders before the convention begins. The chairperson calls upon a pre-selected delegate to nominate a specific nominee. Then another pre-selected delegate seconds the nomination. Ostrer Decl. ¶¶ 25-26; Carroll Decl. ¶ 33. At all but a few conventions, the chairperson then invites a motion to close nominations for that position, the motion passes by unanimous voice vote, and the candidate is announced as the party's nominee. The convention then repeats this process for each remaining open position.

⁹ If neither a delegate nor an alternate from an AD is present to fill a delegate seat at the judicial convention, delegates from the same district (often overseen by county party leaders) "shall elect a person to fill the vacancy." N.Y. Elec. L. § 6-124. Such replacements are thus appointed without submitting their names (much less signed petitions) to the relevant county board of elections, and they are appointed by delegates who themselves have been selected by party leaders for their unquestioning loyalty. Carroll Decl. ¶ 29.

In a minority of conventions, the delegates' vote is postponed until the entire slate has been announced.¹⁰

3. Brevity

The brevity of the conventions reflects the absence of real debate or deliberations. In the Second Judicial District, for example, the average length of the Democratic Party judicial conventions from 1994 through 2002 for which data are available was 28 minutes, during which time six candidates were nominated on average.¹¹ The longest Democratic Party convention in Brooklyn during this period ran 45 minutes, while the shortest took only 11 minutes—during which time (including the counting of the quorum and election of temporary and permanent convention officers) eight Supreme Court candidates were nominated and approved. Across the rest of New York State, the average duration of judicial conventions is less than one hour. Cain Expert Decl. ¶ 12; Creelan Decl. ¶¶ 13-14, Ex. 11-12.

E. Supreme Court Justices “Elected” in November

Once nominated, the Supreme Court candidates chosen by the leaders of the dominant major party in the judicial district become Supreme Court justices, the formality of the general election notwithstanding. Most voters in New York State face general elections for Supreme Court that are, more often than not, literally uncontested by the two major parties. As a result, the convention nomination process described above determines who will become a Supreme Court justice.

¹⁰ A Supreme Court candidate must receive a majority of the delegates' votes to obtain the party's nomination. This stands in stark contrast with the party conventions used for statewide offices in New York to select candidates for the primary election; such conventions allow a candidate to earn a place on the ballot as a candidate of her party by obtaining only 25% of the delegates at the convention, so that it is possible (and quite common) for different factions at a convention to place several candidates for an office on the primary ballot, leaving the party's enrolled voters to elect a nominee at the September primary election. *See infra* at 28-29.

¹¹ Only the minutes of the 1998 judicial convention are not publicly available.

As detailed by Dr. Cain, uncontested elections occur either because only one party decides it is worthwhile to run a candidate or because of cross-endorsement, whereby one party endorses the other party's candidate rather than place its own candidate on the ballot. From 1990 through 2002, 47% of the general elections in New York State for Supreme Court were uncontested with respect to major party candidates (*i.e.*, only one Democratic or Republican candidate appeared on the ballot for each open seat). Moreover, more than 62% of New York State voters live in judicial districts where the two major parties contest less than half the Supreme Court elections.¹² Cain Expert Decl. ¶ 16; Creelan Decl. ¶ 17, Ex. 14.

Even when both major parties place candidates who are not the same person on the general election ballot, the overwhelming majority of elections cannot be considered competitive. Political scientists commonly conclude that an election is not "competitive" if the losing candidate garners less than 80% of the winning candidate's vote total (equivalent to a 55%-45% margin). In New York City, for example, from 1990 through 2002, only five out of 221 Supreme Court elections (*i.e.*, 2%) could be considered "competitive" by this measure. Cain Expert Decl. ¶ 17.

In all, since 1990 New York State's voters have faced Supreme Court elections that were either uncontested or non-competitive 76% of the time. Cain Expert Decl. ¶¶ 16-17; Creelan Decl. ¶ 17, Ex. 14.

¹² No candidate has won a Supreme Court election since at least 1990, and in all likelihood much longer, without the nomination of either the Democratic or the Republican Party. Since 1990, 96% of general-election candidates without a major-party nomination from either of those two parties received fewer than one-fifth as many votes as the winner. A Supreme Court election without distinct Democratic and Republican candidates is thus not meaningfully contested. Cain Expert Decl. ¶ 17; Creelan Decl. ¶ 17, Ex. 14.

II. New York State's Supreme Court Selection Requirements More Burdensome Than Ballot Access Rules For Judges Of Any Other State

As explained by Professor Roy Schotland, one of the country's most knowledgeable experts on judicial selection, New York State's Supreme Court selection rules place much more severe burdens on challenger candidates than any other state in the nation that elects its trial court judges. New York is uniquely burdensome in two significant ways.

First, in all of the 33 states that elect general jurisdiction trial court judges – but not in New York – challenger candidates who do not have the party leaders' backing can nevertheless earn a place on a primary election ballot to compete for votes against the party-backed candidate(s). New York is the only state among those 33 that does not use a direct primary election to determine whether a major party candidate is placed on the general election ballot. In New York, there are *no* alternative paths onto the ballot as a major party candidate if one fails to obtain the party's nomination at the judicial convention. Schotland Expert Decl. ¶ 15.

Second, New York's insurmountable gauntlet of ballot access requirements for *delegate* candidates are much more severe than the ballot access rules of *all* of those 32 other states for *judicial* candidates. The rules of those states are summarized in a chart attached as Exhibit 1 to the Creelan Declaration. In four states, a judicial candidate need only file a declaration of her candidacy to get on the ballot; in five, a judicial candidate need only file such a declaration *and* pay a small fee; in ten more, a judicial candidate need only declare her candidacy and either pay a small fee *or* gather a reasonable number of signatures. In other words, in 19 out of the 32 states (outside New York) that hold contestable judicial elections, judicial candidates can get on the ballot *themselves* directly and do so without gathering any signatures at all. Creelan Decl. ¶ 2, Ex. 1.

New York's cumulative petitioning requirements for *delegate* candidates are, moreover, much more burdensome than the petitioning requirements for *judicial* candidates in those states that require petitions. In the 13 states that require signatures to be gathered to get on the ballot, the signature requirements are, with rare exceptions, nominal. In 10 of those 13 states, no judicial candidate is required as of 2004 to gather more than 2,000 signatures, and most of those 10 states require fewer than 500 signatures. The highest signature requirement in any of the 13 states is in Michigan (6,200), and even there the Secretary of State indicates that only four *out of* 42 circuit court positions open for non-incumbents in 2004 require 6,200 signatures, four require 4,000 signatures, and the remaining 34 positions (*i.e.*, 81%) require 2,000 or fewer. Creelan Decl. ¶ 2, Ex. 1.

III. New York's Supreme Court Selection Requirements More Burdensome Than Ballot Access Rules For Any Other Elective Office Within New York State, Including Other Judgeships

The Supreme Court selection requirements challenged here are not only uniquely burdensome when compared with other states, but also when compared with any other state elective office *within* New York State, including judgeships.

A. Petitioning Requirements

A challenger Supreme Court candidate in New York State must satisfy cumulative petitioning requirements for delegate and alternate candidates that are significantly more burdensome in both kind and degree than the petitioning requirements for the actual candidates for *any* other elective state office. Unlike *all* other offices in New York, satisfying petition requirements does not earn the Supreme Court candidate *herself* a place on any ballot. Rather, to get her name before voters, the challenger candidate must do what no challenger candidate has done in recent history (or, as far as we know, ever): get a majority of her slates of delegates

elected from across the judicial district so that they can nominate her for the November ballot. No other office within New York State requires candidates to complete such a two-step gauntlet just to compete for a place on the ballot. Berger Expert Decl. ¶ 23.

The cumulative signature requirements for Supreme Court candidates are uniquely burdensome as well. The following comparisons demonstrate the truly irrational discrepancies between Supreme Court and other state offices: