

Signature Requirements for Various New York State Offices					
Statewide Offices (Governor, Attorney General, Comptroller, U.S. Senator)	NYC Mayor	NYC Civil Court (Countywide)	County Courts (Outside NYC)	Supreme Court (Cumulative Signature Requirements for Delegate/Alternate Candidates)	
15,000	7,500	4,000	2,000	12,000	2 <sup>nd</sup> J.D. (Kings, Richmond)
				9,000	11 <sup>th</sup> J.D. (Queens)
				10,500	10 <sup>th</sup> J.D. (Suffolk, Nassau)
				8,500	9 <sup>th</sup> J.D. (Dutchess, Orange, Putnam, Rockland, Westchester)

As this chart and Mr. Berger's declaration explain, the signature requirements for Supreme Court judicial delegates are much greater than for other offices with coterminous or even much larger geographic jurisdictions.<sup>13</sup> In addition, unlike most other offices where no

<sup>13</sup> See Berger Expert Decl. ¶ 19. For example, candidates for *statewide* office need gather only 15,000 signatures. N.Y. Elec. § 6-136. Yet a Supreme Court challenger candidate in the Second Judicial District (covering only Brooklyn and Staten Island) must gather at least 12,000 signatures; in the Eleventh Judicial District (covering only Queens), 9,000 signatures; and in the Tenth Judicial District (covering only Suffolk and Nassau Counties), 10,500 signatures.

To obtain a ballot line as a major party candidate for *countywide* Civil Court judgeships in New York City, a candidate must gather a statutory minimum of only 4,000 signatures, without geographic distributional requirements. N.Y. Elec. § 6-136(2)(b). In Queens, for example, a countywide Civil Court candidate must gather only 4,000 signatures while a Supreme Court challenger candidate would have to gather 9,000 signatures with geographical distribution requirements, *despite the fact that the 11<sup>th</sup> Judicial District and Queens are entirely coterminous jurisdictions.*

To obtain a ballot line as a major party candidate for mayor in New York City, a candidate must gather a statutory minimum of only 7,500 signatures. N.Y. Elec. § 6-136(2)(a). Moreover, a mayoral candidate need not gather those signatures from any particular geographic areas within New York City. By contrast, the combined statutory minimums required to run delegate candidates just in the four judicial districts that cover New York City is 32,500 signatures – *i.e.*, more than four times the requirement for mayoral candidates and more than twice the requirement for *statewide* office.

geographical distribution requirements apply, the signatures for delegate candidates must be gathered in equal amounts in each of many ADs across a sometimes massive judicial district.

Not surprisingly, potential Supreme Court candidates have all found these arbitrarily severe signature requirements impossible to overcome, particularly when combined with the additional burdens of recruiting delegate candidates and convincing voters in each AD to vote for their specific slates of challenger delegate candidates. *See* Regan Decl. ¶ 16; Segal Decl. ¶ 12; López Torres Decl. ¶ 27; Ostrer Decl. ¶ 11.

### **B. The Absence of Alternate Routes to Major Party Ballot Lines**

For *all* elective offices except Supreme Court justice, New York State allows candidates to petition onto a primary ballot by gathering signatures among the voters.<sup>14</sup> In all of these elective state offices, the voters' choice among candidates at a primary election becomes the party's nominee in the general election.

By contrast, N.Y. Elec. L. 6-106 requires that the major parties select their Supreme Court candidates exclusively at a judicial convention in order to appear on the ballot. The absence of any alternate routes onto a ballot as a major party candidate, and of primary elections decided by voters, are unique among New York State's elective offices. Berger Expert Decl. ¶ 19; Schotland Expert Decl. ¶ 8.

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In Nassau County, with a population of over 1.3 million, the signature requirement for county court is only 2,000 signatures gathered anywhere in the county. *See* N.Y. Elec. L. § 6-136(2)(d). The same requirement applies to county court seats in neighboring Suffolk County. In fact, the same requirement applies to all county court seats outside New York City with over 250,000 residents. By contrast, to run delegates in the 10<sup>th</sup> Judicial District that covers Nassau and Suffolk Counties would require a statutory minimum of 10,500 signatures gathered in equal parts from each of 21 ADs across Long Island.

<sup>14</sup> New York State's Assembly and Senate candidates, as well as candidates for Civil Court (in New York City), city courts (in upstate cities like Rochester and Albany), and county courts (outside New York City), all obtain a place on the primary ballot by gathering signatures directly from voters. *See* N.Y. Elec. L. §§ 6-104, 6-106, 6-108, 6-110, 6-136, 6-168. Similarly, in statewide elections for U.S. Senator, governor, lieutenant governor, attorney general, and state comptroller, candidates can obtain a place on the Democratic or Republican Party primary election ballot by petitioning directly among voters, as well as by obtaining votes at a convention. *Id.*

In addition, for statewide offices in New York, the major parties select *additional* candidates for the primary election at a party convention in June. Whichever candidates obtain at least 25% of the convention delegates' votes are automatically placed on the primary ballot. The 25% threshold ensures that even if one candidate has the support of a majority of state committee members (in essence, the delegates) and of party leaders, voters can still choose among several candidates from their party at the primary election. Of course, even a statewide candidate who fails to obtain at least 25% of the convention votes can still earn a place on the primary ballot through direct petitioning after the June convention. Berger Expert Decl. ¶ 40.

In sum, potential candidates for *all other elective state offices* not only have access to a primary ballot but, in many cases, have several paths onto that ballot – each much less onerous than the exclusive path that Supreme Court candidates must take to obtain even the possibility of being selected at a judicial convention.

### **C. The Number of Convention Delegates**

Significantly, those New York races that involve party conventions to nominate additional candidates for primary elections do not require election of nearly as many convention delegates as do the Supreme Court selection requirements. Congressional districts are typically more than three times larger than ADs, yet only five to six delegates are selected per congressional district for Democratic presidential primaries, and three per congressional district for Republican. Similarly, typically only two state committee members are elected from each AD as delegates to the parties' June nominating conventions for statewide candidates. By contrast, the current Supreme Court selection system requires an average of over six delegates per AD in the Second Judicial District – or more than 150 delegates from the entire Judicial District. In short, the massive number of judicial delegates required for the judicial conventions

renders it uniquely difficult for challenger Supreme Court candidates to recruit, run, and elect their own supportive delegates. Berger Expert Decl. ¶¶ 14-15.

**D. The Abbreviated Timetable to Prevent Insurgent Candidacies**

The severely compressed statutory timetable for judicial conventions, discussed already (*supra* at 20-21), is also unique in New York State. The party conventions to nominate candidates for statewide offices are held in June in election years, a primary election for the candidates for those offices (rather than for convention delegates) is held in September, and the general election is held in November. In addition, the state committee members who serve as delegates to their parties' June primary conventions are elected at least six months and usually one year prior to the convention; challenger candidates for statewide office thus can contact them and seek their support many months before they must vote in June. By contrast, Supreme Court candidates generally have about one week between the "election" of delegates and the convention itself. *See* N.Y. Elec. L. § 6-158(5); Carroll Decl. ¶ 23.

**ARGUMENT**

Courts in this circuit have firmly established that ballot access requirements that severely burden candidates' access to their party's primary ballot and voters' right to choose such candidates cannot survive scrutiny unless the challenged restrictions are both necessary and narrowly tailored to serve a compelling state interest.<sup>15</sup> New York's Supreme Court selection statutes burden voting rights far more severely than any of the restrictions struck down in the past. The laws and practices previously invalidated merely limited the number of candidates by

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<sup>15</sup> *See, e.g., Lerman*, 232 F.3d at 145 (invalidating requirement that witnesses to signatures on primary ballot petitions be residents of the district in which the candidate is running); *Rockefeller*, 78 F.3d at 45-47 (striking down signature and technical filing requirements for access to primary ballot); *Molinari*, 82 F. Supp. 2d at 73-77 (invalidating requirement that candidates obtain minimum number of signatures from each congressional district in New York for access to presidential primary ballot); *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 171-77 (D. Conn. 2003) (striking down requirement that candidates obtain support of 15% of convention delegates to earn place on primary ballot).

erecting burdensome barriers to the primary ballot. The challenged Supreme Court system flatly precludes *any* path to a primary ballot for any candidates, and deprives voters of *any* choice among candidates for their party's Supreme Court nomination. These prohibitive burdens on candidates and voters are uniquely severe, moreover, both within New York State and within this nation. The evidence demonstrates that challengers simply cannot overcome these burdens to earn a chance to compete for their party's nomination and a place on the general election ballot. No "reasonably diligent independent candidate" could satisfy the requirements to get on the ballot, *Storer v. Brown*, 415 U.S. 724, 742 (1974). New York's statutory rules governing Supreme Court selection indisputably burden candidates and voters severely and unreasonably, and serve no important – much less compelling – state interest. Those rules are, therefore, plainly unconstitutional.

To obtain preliminary injunctive relief that will alter, rather than maintain, the status quo, Plaintiffs must show 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. *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 744 (2d Cir. 2000) (internal citation omitted).

**I. Plaintiffs' First Amendment And Equal Protection Claims Are Substantially Likely To Succeed On Their Merits**

New York's Supreme Court selection requirements have two constitutional flaws: first, they impose an undue burden on candidates' and party members' First Amendment rights by severely burdening access to the ballot for challenger candidates without any legitimate rationale, much less the requisite compelling interest, for imposing such a burden; second, they deny candidates and voters across the state equal protection of the laws by imposing, without legitimate justification, a virtually insurmountable burden upon challenger candidates for Supreme Court, while imposing a much lesser burden on candidates for all other state elective

offices, including judgeships. These constitutional flaws are fatal to the current requirements.

Plaintiffs are substantially likely to succeed on the merits of both claims.

**A. New York's Uniquely Burdensome Selection Requirements for Supreme Court Violate Candidates' and Voters' First and Fourteenth Amendment Rights by Excluding Challenger Candidates from the Ballot**

The First and Fourteenth Amendments protect the right to vote as a fundamental right. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (citation omitted); *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 118 (2d Cir. 1998) ("The power to vote is respected as a 'fundamental right' under the Fourteenth Amendment.").

That right to vote encompasses two sets of intertwined rights. First, party members have the right to have a meaningful choice among candidates for their party's nomination, and potential nominees have a commensurate right to put their names before party members. *See Lubin v. Panish*, 415 U.S. 709, 716 (1974); *cf. Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation."). Second, voters have rights to choose among potential candidates at the general election, and potential candidates have the commensurate right to put their names before voters for the general election. *See Storer*, 415 U.S. at 728-29.

To determine whether New York's Supreme Court selection requirements violate Plaintiffs' First Amendment rights, this Court

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff[s] seek[] to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden plaintiff[s'] rights.

*Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Where “state election laws subject speech, association, or the right to vote to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Lerman*, 232 F.3d at 145 (internal quotation marks omitted). Where a state law or practice “imposes only reasonable, nondiscriminatory restrictions” upon those rights, then “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (internal quotation marks omitted).

A voter’s First Amendment “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*, 415 U.S. at 716 (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)); *see also Anderson*, 460 U.S. at 787-88 (“The exclusion of candidates also burdens voters’ freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.”); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (“By limiting the choices available to voters, the State impairs the voters’ ability to express their political preferences.”).

Courts have boiled down their analysis of the severity of the burdens on challenger (also referred to as “independent”) candidates and voters by answering one “inevitable question for judgment: could a reasonably diligent independent candidate be expected to satisfy the . . . requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?” *Storer*, 415 U.S. at 742; *see also Molinari*, 82 F. Supp. 2d at 70-71 (quoting *Storer* and explaining that “independent” and “unaffiliated” mean independent of party leadership).

**1. The Statutory Requirements for Supreme Court Selection  
Impose a Severe Burden upon Plaintiffs' Right to Vote**

New York's statutory requirements for Supreme Court selection impose a severe burden upon Plaintiffs' right to associate and to express political preferences by competing as candidates for their party's nomination and by voting – *i.e.*, their First Amendment right to vote effectively. First, indisputable evidence demonstrates that because of the ballot access barriers imposed by the current requirements, even the most diligent major party candidates have no reasonable opportunity to earn their party's nomination through support among party members, unless they have the full support of the county party leadership. These burdensome requirements have prevented even a *single* challenger candidate from getting onto the ballot as a major party candidate at least since 1994 and, in all likelihood, long before that time. Second, New York State stands alone among the 33 states that hold contestable elections to select their trial judges in placing such severe burdens on candidates. Third, while Supreme Court candidates face such insurmountable burdens, New York State itself has chosen to use a direct partisan primary election with reasonable signature requirements to select major party nominees for *every other elective office within the state*, including all other judgeships. New York's statutory selection requirements for Supreme Court thus impose an unconstitutionally severe burden on candidates and voters and must be strictly scrutinized by this Court to determine whether they are narrowly tailored to serve a compelling state interest – a test that the current rules cannot pass.

**a. The Burdensome and Convoluted Judicial Convention  
Process for Supreme Court Ballot Access Severely  
Burdens Candidates' and Voters' First Amendment  
Rights.**

Could a “reasonably diligent independent candidate” get on the ballot? For New York Supreme Court, the plain answer to that question is: absolutely not. They don't. They can't. As demonstrated by Dr. Cain's analysis, not even a single challenger successfully obtained a place

on the ballot as a major party candidate for Supreme Court justice in any of the 62 counties of New York State from 1994 through 2002 and, as far as we know, long before then. The absence of successful challenger candidates at a convention is confirmed in the testimony of former delegates, candidates, and party officials from judicial districts across the state. *See supra* at 20-22; *see also* Carroll Decl. ¶ 35; Geissman Decl. ¶¶ 12-16; López Torres Decl. ¶¶ 36, 46-48; Ostrer Decl. ¶¶ 25-29; Regan ¶¶ 10-12.

Courts have frequently found evidence that independent candidates have only rarely succeeded or even attempted to navigate challenged rules to be a sign of unconstitutionally severe burdens. *See, e.g., Storer*, 415 U.S. at 742 (finding severe burden based on limited number of contested primary elections); *Molinari*, 82 F. Supp. 2d at 70-71 (noting that the paucity of candidates who had even attempted to compete in New York's Republican primary demonstrated severe burden); *Rockefeller*, 917 F. Supp. at 157-59, 163 (same); *Campbell v. Bysiewicz*, 242 F. Supp. 2d, 164, 173 (D. Conn. 2003) ("The lack of actual primaries substantiates finding substantial impairment of the ability of prospective candidates to place themselves and their ideas before the voters for consideration."); *see also Green v. Mortham*, 155 F.3d 1332, 1337 (11th Cir. 1998) (reviewing the number of candidates who obtained ballot status when assessing burden of challenged law); *Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 477 (7th Cir. 1986) (weighing statute's effect in past elections in assessing constitutionality); *Smith v. Bd. of Election Comm'rs*, 587 F. Supp. 1136, 1148 (N.D. Ill. 1984) (dearth of candidates on primary ballot demonstrates injury to voters' rights). *Storer* held it would be unconstitutional if independent candidates could overcome ballot access hurdles "only rarely"; *a fortiori*, a system that completely shuts out such candidates must be invalid.

Indeed, New York's Supreme Court selection requirements burden the right to vote far more severely, and shut out challenger candidates far more conclusively, than requirements that this and other courts have struck down. In those cases, the plaintiff candidates and voters faced requirements that made it unconstitutionally difficult, though not impossible, to gather sufficient signatures from voters to earn a place on their party's primary ballot. *See, e.g., Lerman*, 232 F.3d at 145 (witness residency requirement for signatures on primary ballot petitions); *Rockefeller*, 78 F.3d at 45-47 (New York Republican Party presidential primary signature requirements); *Molinari*, 82 F. Supp. 2d at 73-77 (same). As burdensome as the requirements struck down in those cases were, candidates could still earn a place on a primary ballot to be considered by their party's voters if they somehow met the challenged requirements.

By contrast, New York's Supreme Court selection requirements offer literally no way for a major party challenger candidate to get on a ballot to be considered by voters for his or her party's nomination. Instead, such challenger candidates would have to overcome the truly insurmountable burdens outlined in this submission not to place *themselves* directly onto a primary ballot, but instead just to place *slates of delegate candidates* onto the ballot. Even if successful in satisfying those burdensome requirements – as no known challenger candidate has been – they would still have to ensure that their delegate candidates prevail in scores of delegate races in dozens of ADs across numerous counties without any indication on the ballot whom a given delegate will support for Supreme Court. Then, even if successful in those elections, challenger Supreme Court candidates must then ensure that party leaders do not successfully pressure and convince those elected challenger delegates to support party-backed Supreme Court candidates at the convention. In short, the ballot access rules for Supreme Court do not allow

any candidate to be considered by her party's voters for the party's nomination *and* make it virtually impossible to compete for that nomination even at the judicial convention.

Even the cumulative signature requirements for Supreme Court delegates are far more burdensome than for candidates for other offices – a comparison that ignores that satisfying such requirements wouldn't even place a Supreme Court candidate herself on the ballot. *See supra* at 26-30. As with the Republican presidential primary signature requirements struck down in *Rockefeller*, moreover, those requirements are exacerbated by the fact that voters are prohibited from signing petitions for more than one candidate. 78 F.3d at 45.

In sum, unlike the burdensome requirements struck down in the numerous cases cited above, the requirements challenged here involve not simply a threshold barrier to earn a place on a primary ballot, but an unparalleled gauntlet that imposes upon challenger candidates much more severe and multi-layered burdens. The only court in the nation to have considered similar, though even less burdensome, barriers to the ballot struck them down without hesitation. *See Campbell*, 242 F. Supp. 2d at 171-77 (striking down requirement that party candidates obtain support of 15% of convention delegates to earn place on party primary ballot). Electoral history and experience demonstrate that New York's Supreme Court selection requirements severely burden the First Amendment rights of candidates and voters.

**b. New York State's Selection Requirements Impose More Severe Burdens on Candidates and Voters Than Those of Any Other State in the Country and Any Other Office Within New York State.**

An additional guidepost to assess the severity of ballot access laws is the relative burdens imposed in other states, and upon candidates for other offices within the state. *See, e.g., Norman v. Reed*, 502 U.S. 279, 294 (1992); *Storer*, 415 U.S. at 739; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Campbell*, 242 F. Supp. 2d at 170 (in assessing Connecticut's burdensome ballot

access rules involving an indirect convention process, “it is relevant that 44 states and the District of Columbia provide a semblance of control and order by using direct primaries for which a small percentage of petitioning voters, usually 5%, plus filing fees, qualifies”); *Rockefeller*, 917 F. Supp. at 161; *see also Rockefeller*, 78 F.3d at 45 (“With regard to justification for the substantial burdens on candidates, the district court noted that New York ballot access rules are far more burdensome than those adopted by virtually every other state.”)

As shown already, New York’s Supreme Court selection requirements impose heavier burdens on the First Amendment rights of candidates and voters than the trial court selection requirements of any other state:

- ***No Primary Election.*** New York is the only state in the country that uses a judicial convention system to determine whether a major party candidate is placed on the ballot. In all of the 32 other states that elect some or all of their general jurisdiction trial court judges in contestable elections, challenger candidates who do not have the party leaders’ backing can nevertheless get on a primary election ballot to compete directly for votes against the party-backed candidate(s). *See supra* at 24-26.
- ***No Alternative Paths to the Ballot.*** In New York, unlike all the other states that elect trial judges, 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. *See supra* at 24-25.
- ***Incomparably Severe Petitioning Requirements.*** The ballot access rules in *all* of those 32 states are much less burdensome on challenger *judicial* candidates than New York’s insurmountable series of rules governing ballot access for *delegate* candidates. While the majority of those states require only either a declaration of candidacy alone *or* a filing fee *or* a nominal number of signatures, New York’s rules require that Supreme Court candidates gather large numbers of signatures distributed across an entire judicial district just to place delegate candidate slates on ballots in each AD. *See supra* at 25-26.

Similarly, a comparison with ballot access rules for other offices *within* New York State demonstrates the uniquely burdensome design of the Supreme Court selection requirements:

- ***No Primary Election.*** Unlike candidates for *all* other New York State elective offices, Supreme Court candidates cannot appear on the general election ballot as a member of one of the two major parties without being chosen by the party leadership and approved at the judicial convention. Supreme Court is the *only* elective office without the

opportunity for a primary election in which candidates may compete before voters. *See supra* at 28-29.

- ***No Alternative Paths to the Ballot.*** Unlike *all* other New York State elective offices, Supreme Court candidates who fail to obtain their party's nomination at the judicial convention have no alternative route onto the ballot as a candidate from their party. *See supra* at 28-29.
- ***Uniquely Burdensome Petitioning Requirements.*** The cumulative signature requirements for Supreme Court candidates are significantly more burdensome than for other state elective offices both proportionately and, in most cases, even in absolute terms. *See supra* at 26-28.
- ***Restrictive Nomination Rules.*** In *all* statewide elections, candidates get on the primary ballot as a candidate of their party by obtaining just 25% of the convention delegates' votes. By contrast, candidates for Supreme Court must obtain at least 50% of the judicial delegates to obtain their party's nomination and a place on the general election ballot. *See supra* at 28-29.
- ***Higher Number of Convention Delegates.*** The massive number of judicial delegates required imposes a much greater burden on challenger candidates to meet the already-insurmountable barriers to nomination at the judicial convention. By contrast, the numbers of presidential delegates and state committee members for the statewide nominating conventions in June are much lower on both proportional and absolute bases. *See supra* at 29-30.
- ***Compressed Timetable.*** The unique timetable for Supreme Court selection in New York State exacerbates an already insurmountable burden on potential candidates. *See supra* at 30.

In sum, within both the United States and New York State, the Supreme Court selection requirements are unique in the number and the strength of the barriers placed before challenger candidates who wish to be considered by voters and before voters who wish to choose among different candidates. Indeed, while the "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*, 415 U.S. at 716 (internal quotation omitted), in the case of New York's Supreme Court voters do not have even have a choice among two candidates at a primary election of any kind.

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For imposing burdens that are plainly severe on both an absolute and a comparative basis, the Supreme Court selection requirements must be subjected to strict scrutiny and be “narrowly drawn to advance a state interest of compelling importance.” *Lerman*, 232 F.3d at 145. As demonstrated below, the current requirements cannot satisfy that – or even a less stringent – standard.

**2. New York’s Severely Burdensome Supreme Court Selection Requirements Are Not Narrowly Tailored to Serve Any Compelling or Even Important State Interest**

Whether the Court applies strict or intermediate scrutiny in weighing the burdens imposed by the current Supreme Court selection requirements, those requirements do not serve any compelling, or even important, regulatory interests. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson*, 460 U.S. at 789. In fact, the present system directly *disserves* the state’s most compelling interest in the selection of Supreme Court justices: facilitating voters’ choice of their justices. By taking the process almost entirely out of voters’ hands, New York statutes contravene the New York State Constitution’s command that justices “shall be chosen by the electors [*i.e.*, the voters].” N.Y. Const. art. VI, § 6.

Nor can the Supreme Court selection requirements be justified as the means to serve the traditional justifications for reasonable ballot access restrictions: to ensure “a significant modicum of support” or to “avoid[] confusion, deception, [or] even frustration of the democratic process.” *Jenness*, 403 U.S. at 442. The judicial convention system plainly provides no measure of a candidate’s support among voters or even party members. In fact, there is absolutely no mechanism for voters to indicate their support for a Supreme Court candidate of their party. To the contrary, the voters rarely have an opportunity even to demonstrate their support for *delegate* candidates, much less for Supreme Court candidates. Delegate “races” are almost always

uncontested, and on those rare occasions when they are, the ballot provides no hint of a delegate candidate's support for a particular Supreme Court candidate at the convention. As a result, a delegate's choice of Supreme Court candidates at the convention bears no relation to any support for such candidates among the voters or rank-and-file party members. The only "modicum of support" measured by the current requirements is whether the Supreme Court candidate in question is supported by the tiny handful of county party leaders who control the process.

Moreover, the current requirements routinely exclude Supreme Court candidates who *do* have significant public support. In 2002, for example, Plaintiff Margarita López Torres obtained more votes (200,710) as a Democratic candidate for re-election to her countywide Civil Court seat than *any* of the Democratic Party's winning candidates *for Supreme Court* did in Brooklyn on the same day. She also received endorsements from the *New York Times* and other newspapers. Yet, because of her unwillingness to succumb to the Kings County party leaders' wishes wherever they might lead – including their requests on two separate occasions to hire an unqualified party attorney and an Assemblyman's daughter as her court attorney – the county party Chairman repeatedly chose not to have her nominated for Supreme Court. López Torres Decl. ¶¶ 8-20. The Supreme Court selection requirements have prevented her from having *any* opportunity to earn a place on a Democratic primary ballot for that office, or from having any alternative opportunity to obtain her party's nomination. Far from *ensuring* a modicum of support for candidates on the ballot, therefore, the current selection requirements *prevent* challenger candidates with overwhelming support among their party's voters from reaching the ballot.

By contrast, the petitioning requirements used by New York State to fill other judgeships and every other elective office – as well as by other states that elect their trial judges – *directly*

measure a candidate's support among voters who have signed his or her petitions. It is plainly not "necessary to burden the plaintiff[s'] rights" with New York's impenetrable Supreme Court selection requirements. *Anderson*, 460 U.S. at 780; *Illinois Bd. of Elections*, 440 U.S. at 185 ("[W]e have required that states adopt the *least drastic means* to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved.") (internal citation omitted) (emphasis added); *Norman v. Reed*, 502 U.S. 279, 294 (1992) (striking down internally inconsistent Illinois electoral law and holding "the State's requirements for access to the statewide ballot become criteria in the first instance for judging whether rules of access to local ballot are narrow enough to pass constitutional muster"); *Rockefeller*, 917 F. Supp. at 165 (holding less burdensome ballot access rules for New York's Democratic presidential primary demonstrated that New York could not justify the requirements for the state's Republican primary).

Nor do the Supreme Court selection requirements serve to avoid "confusion, deception, [or] even frustration of the democratic process." *Jenness*, 403 U.S. at 442. To the contrary, those requirements indisputably *create* extensive confusion and frustrate the democratic process at virtually every turn. Not surprisingly, a 2003 survey of voters conducted by the Marist College Institute for Public Opinion for the Commission to Promote Public Confidence in Judicial Elections (appointed by Chief Judge Judith Kaye and chaired by John D. Feerick) found that 66% of New York State's voters either believe that Supreme Court justices in New York are appointed or are unsure whether they are elected or appointed.<sup>16</sup> Berger Expert Decl. ¶ 47; Creelan Decl. ¶ 18, Ex. 15. Such confusion is not surprising given the unparalleled complexity and secrecy of the current selection process.

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<sup>16</sup> 43% of voters indicated erroneously that Supreme Court justices are appointed, while another 23% were unsure whether justices of that court are elected or appointed. Creelan Decl. ¶ 18, Ex. 15.

Significantly, New York's voters are considerably more aware of their right to vote for County and Civil Court judges – offices that involve direct primary elections rather than judicial conventions. According to the same survey, 60% of New York's voters correctly believe that County and Civil Court judges are elected, while only 19% erroneously believe that such judges are appointed. Thus, voters' awareness of their right to elect appears to correspond directly to whether that right is truly honored by the selection rules used.

The current system is not justified by the voter-confusion rationale for another reason. Avoiding voter confusion is not an end in itself. It is a means to the end of enabling voters to choose the public officials they prefer; a Supreme Court selection system that completely deprives voters of any meaningful choice is self-defeating. It would be less confusing to have only one name on the ballot for each office, and least confusing of all to do away with elections altogether. But the state can hardly claim that depriving voters of any input into candidate selection is a narrowly tailored or least drastic means to avoid confusing voters. Stifling voter choice altogether cannot be so perversely justified.

Nor can the current selection rules be justified by the only interest they actually serve, namely allowing county party leaders to hand-pick Supreme Court justices without regard to their support among party members or voters. *See Anderson*, 460 U.S. at 803 (a political party cannot “invoke the powers of the State to assure monolithic control over its own members and supporters); *Campbell*, 242 F. Supp. 2d at 174 (“While the state may not impair the right to associate, either of the party or individual voters, that prohibition, from the First Amendment, does not insulate a party monopoly, particularly against insurgents within the party seeking to carry its banner.”); *see also Illinois Bd. of Elections*, 440 U.S. at 187 (“Historical accident, without more, cannot constitute a compelling state interest.”). Party leaders' preference for a

system that “consistently and decisively advantages” party favorites and “disadvantages” challenger candidates who are not in favor with party leadership cannot be “characterized as a legitimate state interest.” *Rockefeller*, 917 F. Supp. at 165.

The Supreme Court selection requirements were not designed to avoid confusion, to protect the integrity of the ballot, or to ensure that candidates have demonstrated a sufficient modicum of support. The state has not narrowly tailored its law to achieve any of these, or any other, purportedly compelling or even important state interests. *See Illinois Bd. of Elections*, 440 U.S. at 185 (“[W]e have required that States adopt the least drastic means to achieve their ends.”). In fact, the current requirements undermine these interests on virtually every score. The evidence demonstrates that the current system was designed to produce one result: to allow party leaders to dictate to voters who will serve on the Supreme Court. That end, and the burdensome requirements embodied in state law to serve it, violate the First Amendment.

**B. New York Law Violates Equal Protection by Placing Significantly Greater Hurdles Before Supreme Court Candidates Than Before Candidates for Offices Serving Much Larger Jurisdictions**

The Supreme Court selection system violates the Equal Protection Clause for much the same reason that it fails the First Amendment’s narrow tailoring prong: New York makes it much more difficult for challenger candidates to run for Supreme Court than for other elective offices, and it has no proper justification for doing so. The differences between Supreme Court elections and all other elections in New York—including other judicial elections—have been discussed in detail and need not be rehashed here. Suffice it to say that the barriers to election as a Supreme Court justice differ dramatically in their nature and degree from those for other offices.

Of course, the state does not have to have precisely the same ballot qualifications for every office. But the Equal Protection Clause forbids arbitrary differences in the treatment of

candidates for Supreme Court and those for every other office. In *Illinois Bd. of Elections*, 440 U.S. at 185, the Supreme Court held that more signatures could not be required to qualify for the ballot in a Chicago municipal race than Illinois required for statewide offices. Because the “right of qualified voters . . . to cast their vote effectively” is “fundamental,” the city’s ballot restriction had to be narrowly tailored to its legitimate interest in restricting the ballot to “serious candidates with some prospects of public support.” *Id.* at 184-86. Plainly, the rules for Chicago’s offices were not the “least restrictive means” to protect this interest because Illinois was satisfied that its own interest in that respect was satisfied by a less onerous burden on statewide candidates and their supporters. *Id.* For reasons discussed in connection with the First Amendment claims, the much lower burdens New York places on candidates for all other offices and their supporters would adequately serve the state’s interests if applied to Supreme Court elections.

The Supreme Court selection requirements also arbitrarily burden challenger candidates and their supporters far more than party-backed candidates. Because the barriers to obtaining access to the ballot are so significant for such challengers, the practical effect of the requirements is to devalue the votes of their supporters relative to those cast by their fellow voters. In fact, the supporters of such challengers are never even allowed to vote for their candidates of choice. Such unequal treatment of one class of candidates and voters who support them violates the Equal Protection Clause. *See Anderson*, 460 U.S. at 793 (“Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process.”) (internal citations and quotation marks omitted; alteration in original); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899

(D. Ill. 2002) (“Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional.”).

## **II. Plaintiffs Will Suffer Irreparable Injury In The Absence Of A Preliminary Injunction**

Courts in this circuit presume irreparable harm when a defendant threatens to violate a plaintiff’s constitutionally protected rights, particularly rights guaranteed by the First Amendment. *See, e.g., Brewer*, 212 F.3d at 744-45; *Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996); *Beal v. Stern*, 184 F.3d 117, 123-24 (2d Cir. 1999); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Green Party v. N.Y. State Board of Elections*, 267 F. Supp. 2d 342, 352 (E.D.N.Y. 2003).

This presumption is particularly appropriate in cases involving allegations of a threat to the right to vote. *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (finding irreparable harm because plaintiffs were denied ability to register to vote); *Montano v. Suffolk County Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) (“An abridgement or dilution of the right to vote constitutes irreparable harm.”). Infringement on the right to vote in the nominating phase of an election has long been held to cause irreparable harm of the sort necessitating injunctive relief. *See Gray v. Saunders*, 372 U.S. 368 (1963); *Rockefeller*, 917 F. Supp. at 166. Plaintiffs have therefore established irreparable injury by alleging (and demonstrating) that the statutes governing Supreme Court elections severely burden Plaintiffs’ right to vote and to run for office and violate the First and Fourteenth Amendments.

Even without the presumption, moreover, Plaintiffs would still satisfy the irreparable injury requirement. Absent a prompt injunction, Plaintiffs López Torres, Banks, and Macron will be unable to have any realistic opportunity to compete for their party’s nomination for Supreme Court. They, like all other insurgent candidates, cannot recruit, run, and elect enough

delegates from enough ADs to challenge the party leaders' anointed candidates. Nor will they have any opportunity to petition onto the ballot among party voters because, unlike the election requirements for every other elective office in New York, the Supreme Court selection rules do not include such a route onto the ballot. Six Plaintiffs (including Judge López Torres herself) are Democratic voters from Brooklyn who would vote for Judge López Torres if she were allowed, through this Court's intervention, to compete among party voters for a Democratic Party line on the ballot. The remaining Plaintiff voters from different parts of New York State, as well as Plaintiff Common Cause/NY which represents over 20,000 members across the state, will continue to suffer irreparably every election year if they are deprived of any input into their parties' nomination of Supreme Court candidates. *See* López Torres Decl. ¶¶ 51-54; Leon Decl. ¶¶ 2, 4-5; Carroll Decl. ¶ 38; Segal Decl. ¶ 13. Only preliminary injunctive relief can produce meaningful relief for Plaintiffs in time for the 2005 election.

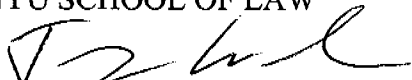
### CONCLUSION

For the reasons stated, a preliminary injunction should issue declaring that the current Supreme Court selection requirements are unconstitutional, providing the Legislature and Governor with 90 days to replace those requirements with a system that is consistent with this Court's findings and with the Constitution, and, in the absence of such action by the Legislature and Governor, ordering that the 2005 Supreme Court elections shall be governed by a direct primary election.

Dated: New York, New York  
June 9, 2004

Respectfully submitted,

BRENNAN CENTER FOR JUSTICE AT  
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# **APPENDIX**

**STATUTORY PROVISIONS CONCERNING**  
**SUPREME COURT SELECTION**

I. New York State's Annotated Election Laws provide in part:

**§ 6-106. Party nominations; justice of the supreme court**

Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

**§ 6-124. Conventions; judicial**

A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates; the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate, substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

**§ 6-136. Designating petitions; number of signatures [Delegate]**

(2)(i) For any office to be filled by all voters of any assembly district, five hundred signatures;

(3) The number of signatures on a petition to designate a candidate or candidates for the position of delegate or alternate to a state or judicial district convention or member of the state committee or assembly district leader or associate assembly district leader need not exceed the number required for member of assembly, and to designate a candidate for the position of district delegate to a national party

convention need not exceed the number required for a petition for representative in congress.

**§ 6-158. Nominating and designating petitions and certificates, conventions; times for filing and holding**

(5) A judicial district convention shall be held not earlier than the Tuesday following the third Monday in September preceding the general election and not later than the fourth Monday in September preceding such election.

**STATUTORY PROVISIONS CONCERNING SIGNATURE  
REQUIREMENTS FOR OTHER  
ELECTED OFFICES**

II. New York State's Annotated Election Laws provide in part:

**§ 6-136. Designating petitions; number of signatures [Mayor]**

(2)(a) For any office to be filled by all voters of the city of New York, seven thousand five hundred signatures;

**§ 6-136. Designating petitions; number of signatures [Civil Court Judge]**

(2)(b) For any office to be filled by all the voters of any county or borough within the city of New York, four thousand signatures;

**§ 6-136. Designating petitions; number of signatures [County Court]**

(2)(d) For any office to be filled by all the voters of cities or counties, except the city of New York and counties therein, containing more than two hundred fifty thousand inhabitants according to the last preceding federal enumeration, two thousand signatures;

**§ 6-136. Designating petitions; number of signatures [Congressional District office]**

(2)(g) For any office to be filled by all the voters of any congressional district, twelve hundred fifty signatures;

**§ 6-136. Designating petitions; number of signatures [Senate]**

(2)(h) For any office to be filled by all voters of any state senatorial district, one thousand signatures;

**§ 6-136. Designating petitions; number of signatures [Assembly Member]**

(2)(i) For any office to be filled by all voters of any assembly district, five hundred signatures;