

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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MARGARITA LOPEZ TORRES, et al., : 04 Civ. 1129 (JG) (SMG)

Plaintiffs, :

-against- :

NEW YORK STATE BOARD OF ELECTIONS, :

et al., :

Defendants. :

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**MEMORANDUM OF LAW OF STATUTORY INTERVENOR ATTORNEY  
GENERAL OF THE STATE OF NEW YORK IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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**Preliminary Statement**

This memorandum of law is respectfully submitted by Eliot Spitzer, Attorney General of the State of New York, statutory intervenor, in opposition to plaintiffs' motion for an order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, declaring unconstitutional N.Y. Election Law § § 6-106, 6-124 and 6-158, governing party nominations for the office of Justice of the State Supreme Court, and preliminarily enjoining the enforcement of those provisions.

**Facts Pertinent To This Motion**

The facts pertinent to this motion are as set forth in the several opposing declarations submitted herewith on behalf of defendant-intervenors, and in such expert reports as may be submitted on behalf of defendants and defendant-intervenors, to which the Court is respectfully referred. This memorandum of law will set forth *post* the provisions of law challenged in the action and the history of their enactment, all of which is subject to judicial notice.

Further facts in opposition to the motion will be developed in the course of the evidentiary hearing on the motion scheduled to commence on September 13, 2004, for the reason that delegates and alternate delegates to New York's 2004 judicial nominating conventions are to be elected in the primary to be conducted on September 14, 2004, and the party conventions will take place during the week beginning September 20, 1004.

### **Statutory Scheme**

#### **A. New York Chooses Election Of Supreme Court Justices At The Constitutional Convention Of 1846.**

Until the constitutional convention of 1846, Supreme Court Justices, like most of the principal officers of state government other than the Governor and Lieutenant Governor, were appointed rather than elected.<sup>1</sup> By 1846, however, Jacksonian democracy was sweeping even resistant New York. M. Klein, ed., *The Empire State: A History of New York* (2001), ch. 22. Barnburners and Hunkers were struggling for the soul and patronage of the Democratic Party, and the Whigs fought them both. *Id.*, pp. 386-91. Minor parties, like the Liberty and Anti-Masonic parties, contributed to the general ferment as the modern party system took root. *Id.*

Amid this exuberant small-d democracy, it was no surprise that the 1846 constitutional convention proposed, and the people ratified, a Constitution providing for the election of Supreme

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“The governor shall nominate, by message, in writing, and with the consent of the senate, shall appoint, all judicial officers.” 1821 Constitution, Article IV, § 7. See also, Article IV, § 6 (council of appointment selects secretary of state, comptroller, treasurer, attorney general, surveyor general, and commissary general) Under the 1777 Constitution, all these officers were appointed by a council of appointment except the treasurer, who was appointed by the Legislature. 1777 Constitution, §§ XXII, XXIII.

Court Justices.<sup>2</sup> 1846 Constitution, Article VI, § 12. What was surprising was the reluctance of a significant minority to approve judicial elections. The convention's Committee on the Judiciary, unable to come to agreement, reported out a judiciary article that presented the convention with alternate proposals for selection of Supreme Court Justices: nomination by the Governor and appointment with the advice and consent of the Senate, or election by district. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846 ["1846 Convention Report"], p. 787.

However reluctant some Committee members may have been to support judicial elections, the public demand was too powerful to resist.<sup>3</sup> Most of the floor debate concerned the appropriate electoral unit rather than the principle of election itself. 1846 Report, pp. 787-795. In the end, advocates of statewide election and advocates of election from relatively small Senate districts compromised on dividing the State into eight judicial districts, all bounded by county lines, except in New York City, 1846 Const., Art. VI, § 4, and electing Supreme Court Justices from those districts. *Id.*, Art. VI, § 12.

The basic structure created by the 1846 Constitution remains in place today. Constitutional developments since 1846 have altered the composition of judicial districts, *see, e.g.*, 1905

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The 1846 Constitution also made elective the offices of secretary of state, comptroller, treasurer, attorney general, and state engineer and surveyor. 1846 Const., Art. V, §§ 1,2.

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"The present mode of appointment by the Governor and Senate had received too general popular condemnation, and had in his judgment been attended with such results as not to justify its continuance. The judgment and feeling not only in the Convention but throughout the State was against it. The idea is fast being abandoned that any portion of the public servants should enjoy independence of the people whose interests they have in charge, whose business they transact, whose rights they protect or disregard." Ansel Bascom, Seneca County Delegate, 1846 Report, p. 585. *See also* Enoch Strong, Monroe County Delegate, *id.*, p. 604.

amendments to 1894 Const., Art. VI, § 1, or the number of Justices, see, e.g., 1894 Const., Art. VI, § 1, but the system of electing Supreme Court Justices from relatively large judicial districts has not changed, despite advocacy of an appointive system at every constitutional convention following that of 1846. See F. vanP. Bryan, Report to the Temporary Commission on the Courts: A Study of Methods and Proposals as to the Selection of Judges, p. 56 (1956) (“Bryan Report”).<sup>4</sup>

**B. The Judicial Nominating Convention System: A Brief History.**

The details of the electoral system devised in 1846 were to be filled in by statute. Neither the 1846 Constitution nor any of its successors spoke to the process by which political parties nominated judicial candidates for the general election. Until 1921, so far as statutory law was concerned, a party’s judicial candidates were to be chosen by the same method as other candidates for state office. See, e.g., Laws of 1909, ch. 22, § 45. Until 1914, that method was the state party convention, unless a party chose to have a primary system. Id.

In 1914, the “Democratic Legislature ... passed a real honest genuine primary law. . . . It abolishes the State Convention and gives to the voter the right to name his candidates directly.” Approval Message, Public Papers of Governor Martin H. Glynn, 1913-14, p. 846. See Laws of 1914, ch. 5 (party nominations shall be made by primary). This law was, however, short-lived. Within four years, support grew for a return to a convention system, particularly for nominations to judicial office. That year, a bill restoring a convention system was introduced in the Assembly, with the support of the Association of the Bar of the City of New York, among other good government

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In 1869, the people adopted a proposed amendment revising the judiciary article, which called for a referendum at the 1873 general election on retaining elected judges or moving to an appointive system. The elective option won by a 3-1 margin. Bryan Report, p. 19.

organizations, which considered it “inherent in the function of the judicial office that the office should seek the man and not the man the office.” New York Times, 3/18/18, p. 19.

The Senate’s Special Committee on Primary Law described the purposes behind the proposed change. The primary system allows a plurality of voters to nominate candidates, but “provides no method whereby these groups of voters may assemble to declare their purposes to all the voters.” Report No. 34, p. 1. The proposed convention system would allow parties to “make manifest, after consultation and deliberation, what its aims are, and at such meeting or convention, propose candidates in support of such aims.” Id., p. 2. Such “consultation and deliberation” on aims is impossible in a direct primary, and deprives the parties of an opportunity to express its aims as an organized party: candidates may be nominated who “may or may not write their own platforms, making them in effect, independent candidates for office, and not representative of a group organized for the political purposes in which it believes.” Id. If a candidate elected in a primary represents the views and aims of the party, that is only a happy coincidence, not a consequence of the nominating system. “Party aims and purposes cannot be articulated by candidates who may be nominated, because they, themselves, have no method of discovering what is the party will.” Id.

The next year, the Bar Association again supported a similar bill, New York Times, 2/21/19, p. 8, as did the Union League Club Committee on Political Reform, chaired by the eminent lawyer William D. Guthrie. Id., 2/25/19, p. 10. The Committee noted that, under the direct primary system, “a small minority may nominate a candidate about whom the majority knows nothing,” and who can, in effect, buy the nomination, since only the affluent or those able to obtain funds in other ways could mount an effective primary campaign. Id. To the implied charge that a primary was more democratic than a convention, the Committee replied: “If we have representative government, why

should we not have a representative body to select candidates for office and lay down party platforms?” Id. The Times supported the return to a convention system precisely because, “[i]n the name of the people’ the direct[] primary has enfeebled and to a great extent destroyed, popular control of the parties.” Id., 3/20/19, p. 12.

Governor Alfred E. Smith vetoed the bill. Veto Memorandum, 5/17/20, in Public Papers of Alfred E. Smith, 1920, pp. 323-24. The next Governor, Nathan Miller, was of a different view, however, and approved a similar bill, which became Laws of 1921, chapter 479.

The following year, the Legislature re-codified the Election Law, the provisions of which had, over time, become scattered and disorganized. Laws of 1922, ch. 588. As part of that re-codification, the judicial nomination convention system was carried over, despite the protests of some legislators:

We emphatically dissent from the proposal of the majority that nominating conventions shall be continued. We need not at this time review the long struggle whereby the forces of progress secured to the people at large, the right to nominate, as well as to elect. What happened a year ago was a flareback, a reverse, but not a defeat. As surely as the sun rises tomorrow, and nearly as soon, direct nominations will be restored.

Minority Report of the Joint Legislative Committee on Recodification and Revision of the Election Law, Legis. Doc. (1922), p. 3.

The judicial nominating convention abides despite occasional calls for its abolition.<sup>5</sup>

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A relatively recent and prominent example was the 1973 report of the State Temporary Commission on the New York State Court System, generally called the Dominick Report, after the Commission’s chair, Senator D. Clinton Dominick, which advocated retaining the electoral system, eliminating judicial districts, electing trial court judges (which would be named “Superior Court” judges to reflect expanded jurisdiction and avoid the confusion inherent in using “Supreme Court” for something other than a court of last resort) on a county-wide basis, and eliminating the judicial

Although now unique to New York State, as recently as the late 1950's, the states of Illinois and Iowa also used the judicial nominating convention system. Bryan Report, p. 25.

**C. The Current System.**

Currently, political parties select their candidates for Supreme Court seats at district-wide judicial nominating conventions for each of the current 12 judicial districts. N.Y. Elec. Law (“Elec. Law”) §§ 6-106, 6-124. The delegates to those conventions are elected not district-wide, but from each assembly district contained within the judicial district. N.Y. Elec. Law § 6-124. Subject to certain limits, the number of delegates, and alternates, if any, are determined by each party’s internal rules. Id.

Aspiring judicial nominating convention delegates, like most other candidates for public office, get on the ballot by petition. During the 37-day petitioning period, N.Y. Elec. Law § 6-134(4), candidates for delegate must obtain signatures of party members in the assembly district from which they seek to run equaling the lesser of 500 or five percent of the party’s registered voters in the district. N.Y. Elec. Law § 6-136(2)(i), (3). Those candidates who get on the ballot and win the approval of the voters attend the judicial nominating convention in the third week of September. N.Y. Elec. Law § § 6-158(5), 8-100.

At the convention, candidates’ names are placed in nomination for each position. If more than one candidate is placed in nomination, the delegates vote and the candidate receiving a majority of the votes cast becomes the party’s nominee. N.Y. Elec. Law § 6-126.

As in most representative bodies, for example the United States Congress or the New York State Legislature, the floor proceedings and formal vote are merely the tip of the iceberg. Just as

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nominating convention. Dominick Report, Part II, pp. 54-55.

terms of and support for legislation are often hammered out in committees and negotiations off the floor, support for particular candidates is often negotiated in advance of the formal vote and party leaders, who are themselves selected through unquestionably democratic processes, play a role.

Although the judicial nominating convention is the exclusive means for becoming the candidate of a political party,<sup>6</sup> individuals who demonstrate sufficient public support by gathering the requisite number of signatures on a nominating petition can run as independent candidates. N.Y. Elec. Law § § 6-138-144.

### **Preliminary Injunction Standard**

In this Circuit, a “clear” or “substantial” showing of a likelihood of success is required where, as here,

(1) the injunction sought “will alter, rather than maintain, the status quo” -- i.e., is properly characterized as a “mandatory” rather than “prohibitory” injunction; or (2) the injunction sought “will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits.”

Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996), quoting Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995).

Both factors are present here. Plaintiffs seek a preliminary injunction vitiating a nominating system that has been in place for over eighty years, and to mandate the use of new system of their own choosing. The judicial intervention sought by plaintiffs would certainly upset the “status quo”.

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Newly-formed political parties have special rules for their first set of nominations. N.Y. Elec. Law § 6-128.

Jolly, *id.* at 474 (injunction would mandate a “dramatic shift” in established statutory or regulatory scheme).

The Second Circuit in Jolly made clear, in addition, that “[w]here a moving party challenges ‘government action taken in the public interest pursuant to a statutory or regulatory scheme’ . . . the moving party cannot resort to the ‘fair ground for litigation’ standard, but is required to demonstrate irreparable harm “ as well as “a likelihood of success on the merits.” *Id.*, citing Able v. United States, 44 F.3d 128,131 (2d Cir. 1995) (quoting Plaza Health Labs, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989), and Catanzano v. Dowling, 60 F.3d 113, 117 (2d Cir. 1995)).

## POINT I

### NOMINATING CONVENTIONS ARE FACIALLY VALID

Nominating conventions, such as the judicial nominating conventions established by the New York Election Law, are valid on their face, as a basic mechanism for the regulation of party nominations from the office of President of the United States on down to village trustee.

Plaintiffs cite no case impugning state laws requiring parties to nominate their standard bearers by convention or caucus, and we have found no such case. On the contrary, as the Supreme Court has held,

It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election *or by party convention*.

American Party of Texas v. White, 415 U.S. 767, 781 (1974) (emphasis supplied) (citing Storer v. Brown, 415 U.S. 724, 733-736 (1974)).

There is simply no constitutional right to a primary as opposed to a convention or caucus, as the Court held in White, a case in which political insurgents contended that “the State ha[d] invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election.” Id. See Jenness v. Fortson, 403 U.S. 431, 438 (1971) (praising Georgia for not imposing upon a small or new party “the Procrustean requirement of establishing elaborate primary election machinery”); Duke v. Smith, 784 F.Supp. 865, 871 (S.D. Fla. 1992) (“nor is there any constitutional right to primary participation”); Consumer Party v. Davis, 633 F.Supp. 877, 888 (E.D. Pa. 1986) (same).

The nomination process is not constructed for the benefit of hopeful candidates for nomination, such as some of the plaintiffs in this action, nor even party members, but for the benefit of the party itself. “[T]he party” is “an organization formed to elect candidates,” FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 448 (2001), and “parties’ rights are more than the sum of their members’ rights.” Id. at 448 n. 10 (citing California Democratic Party v. Jones, 530 U.S. 567, 575 (2000) (“referring to the ‘special place’ the First Amendment reserves for the process by which a political party selects a standard bearer”)). Thus, the gathering of members of a political party in a “political convention in order to . . . nominate candidates for political office is at the very heart of the freedom of assembly and association,” Cousins v. Wigoda, 419 U.S. 477, 491 (1975) (Rehnquist, J., *concurring*) (citing cases), and “a vital business.” Id. at 490. On the other hand, there is no fundamental right to be a candidate. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 879 (1995) (citing Bullock v. Carter, 405 U.S. 134, 142-143 (1972)); Belluso v. Poythress, 485 F.Supp. 904, 912 (N.D.Ga. 1980) (“a person simply does not have a constitutionally protected right to run as the representative of his current chosen political party”).

“[I]t is *all the same* whether the party conducts its nomination by a primary or by a convention open to all party members,” as in the case of New York’s judicial nominating conventions whose delegates are elected by the rank-and-file. “Each is an ‘*integral part* of the election machinery.” Morse v. Republican Party, 517 U.S. 186, 207 (1996) (emphasis added) (quoting United States v. Classic, 313 U.S. 299, 318 (1941)). “The distinction between a primary and a nominating convention is just another variation in electoral practices.” Morse, 517 U.S. at 214. See also Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 457 (1965) (statement of Rep. Bingham concerning § 5 of the Voting Rights Act) (“It is clear that political party meetings, councils, conventions, and referendums which lead to endorsement or selection of candidates who will run in primary or general elections are, in most instances, a vital part of the election process”) (quoted in Morse, 517 U.S. at 219 n. 31); Montano v. Lefkowitz, 1978 U.S. Dist. LEXIS 20201 (S.D.N.Y., Jan. 12, 1978) (Haight, D.J.) (“a political party’s delegation of nominating authority to a committee is a familiar device”), rev’d on other grds., 575 F.2d 378 (2d Cir. 1978); Moritt v. Rockefeller, 346 F.Supp. 34, 38 (S.D.N.Y.) (three-judge court) (holding that challenge to State conventions under N.Y. Elec. Law § 6-104 failed to present “substantial constitutional question”), aff’d, 409 U.S. 1020 (1972).

Accordingly, in addition to judicial nominating conventions, party nomination by party committee or caucus is prevalent in hundreds of towns and villages throughout the State. In the fifty-three counties in New York having a population of fewer than 750,000 inhabitants, party nominations of candidates for town offices may be made by caucus or primary election as party rules may provide. N.Y. Elec. Law § 6-108. The same is true for villages. N.Y. Elec. Law § § 6-202, 15-108. There are 872 towns in New York in counties having a population of under 750,000 inhabitants,

see [www.ofc.state.ny.us/ecommerce/localgovt/background.htm](http://www.ofc.state.ny.us/ecommerce/localgovt/background.htm), and 554 incorporated villages. See [www.nylovesbiz.com/nysdc/census2000/corrections/pltab1.pdf](http://www.nylovesbiz.com/nysdc/census2000/corrections/pltab1.pdf). Parties in 1,426 municipalities are therefore entitled to nominate their candidates by caucus rather than by direct primary, under procedures that the courts repeatedly have sustained.

Moreover, party nominations for offices to be filled at a special election, and to fill a vacancy in an office required to be filled at the next general election, may be made by a committee of party leaders. N.Y. Elec. Law § § 6-114, 6-116. As Judge Haight observed in Montano:

[T]he power given the broadly-constituted executive committee to nominate candidates for offices representing narrower constituencies is supportable on the ground that such discretion has been validly delegated by the voters of the [district]. Thus, it was the electorate which chose the [county] committeemen who, in turn, have transferred certain powers to the executive committee. Since there is no showing that any voters were discriminated against in those elections, the delegation is valid in the first instance, and consequently, the subsequent delegations are similarly valid . . . . To the extent that such nominations may become too far removed from the people, the problem must be redressed by the reform of the party rules.

Montano, 1978 U.S. Dist. LEXIS 20201 at \*22. See Ballentine's Law Dictionary (3<sup>rd</sup> ed.), for the meaning of "delegate," defined as "a representative; an agent; a person who is substituted for another." The Second Circuit did not fault Judge Haight's reasoning in reversing Montano on an entirely different ground. See 575 F.2d 386. On the contrary, the Court earlier had validated nomination by committee provided only that such party bodies comply with the principle of one person-one vote. Seergy v. Kings County Republican County Committee, 459 F.2d 308 (2d Cir. 1972).

Similarly, in Mrazek v. Suffolk County Board of Elections, 630 F.2d 890 (2d Cir. 1980), the

Circuit perceived, as plaintiffs do not, that

acting in a nominating capacity, a delegate may speak for a group broader than simple party membership: rather, the constituency may properly be defined as a mix of the district's total population, unenrolled party sympathizers, affiliated party members and certain other factors such as the importance of the district to the party and the past or foreseeable success of the party in that locale.

Id. at 898 (citing, among other cases, Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C.Cir.1975) (*en banc*), cert. denied, 424 U.S. 933 (1976)).

The Mrazek Court added,

The parties are best situated to define the proper constituencies of their nominating delegates, and these determinations should not be invalidated unless such definitions are utilized to exclude or disadvantage discrete groups or minorities.

Id. (citing City of Mobile v. Bolden, 446 U.S. 55 (1980)). Here, of course, the parties not only endorse the judicial nominating system, but through their elected officials established the system challenged in this action.

In sum, nothing in the United States Constitution, or in the basic theory of government by the people, requires that, once a state decides to make an office elective, the electoral system must ratify the direct and unmediated preferences of a plurality of voters. Fortson v. Morris, 385 U.S. 231 (1966) (upholding system whereby if no candidate for Governor obtains a majority, the Georgia General Assembly selects from the two candidates with the largest number of votes). The Constitution imposes no fixed method of selecting state officials. Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982). That the judicial convention system “commits to intermediate hands” the selection of candidates for judicial office is, therefore, an objection of no Constitutional force, and the statutory scheme is valid on its face.

## POINT II

### NEW YORK STATUTES PERTAINING TO JUDICIAL NOMINATING CONVENTIONS ARE VALID AS APPLIED

The New York scheme of judicial nominating conventions is constitutional as applied as well as on its face.

As noted, plaintiffs do not object to the nominating convention *per se*, nor to the delegate selection process, which is of course by vote of all interested, enrolled party members by Assembly District, the basic unit of political organization in New York. All of their objections have to do with the present day political landscape in specific localities, whether in New York City or in various areas elsewhere, which circumstances have no inherent relationship to the statutory scheme.

That plaintiffs' complaint is about political conditions on the ground, and not the statutory scheme, is underlined by the fact that they do not actually challenge the way in which delegates are elected. They say only, in effect, that judicial districts are large, so that it is difficult for a candidate to cover so much ground. Judicial districts are indeed large, by needs when a State with a population of 18,976,457 is divided only into twelve. But this is an element of the State's governmental structure, chosen by the sovereign, with which the Federal courts ought not readily interfere. See Nipper v. Smith, 39 F.3d 1494, 1532 (11<sup>th</sup> Cir. 1994) (*en banc*) (finding no viable remedy that might entail restructuring Florida's system of trial courts), cert. denied, 514 U.S. 1083 (1995).

As discussed *post* in respect to campaigning on the part of incumbents and judicial campaign finance, the size of the districts affords one of the rationales for the convention system of nomination. A "convention" is "an organized assemblage of *delegates* representing a political party or a political principle." Ballentine's Law Dictionary (3<sup>rd</sup> ed.) (emphasis added) (citing 18 Am J1st

Elect § 135). As noted, a “delegate” is “a representative; an agent; a person who is substituted for another.” Ballentine’s Law Dictionary (3<sup>rd</sup> ed.).

The ballot qualification requirements for delegates and alternate delegates are the same as for any other race in an Assembly District and are therefore unexceptionable: the signatures of 5%, as determined by the preceding enrollment, of the then enrolled voters of the party residing within the political unit in which the office or position is to be voted for, or 500 signatures, whichever is less. N.Y. Elec. Law § § 6-136(2), 6-136(2)(i). The figure of 500 generally operates as a cap for the major parties in districts with substantial enrollment, and the enactment of the cap already represents lenity, or a “reform,” on the part of the Legislature. For example, the 52d Assembly District, in which this Court is located, has 58,526 enrolled Democrats, and 500 signatures is well under 1%. New York Assembly Districts have an average population of 126,510.<sup>7</sup>

The 5%/500 requirement and similar requirements contained by N.Y. Elec. Law § 6-136 for other subdivisions repeatedly have been sustained by the courts, including by the Second Circuit, recently, in Prestia v. O’Connor, 178 F.3d 86 (2d Cir.), cert. denied, 528 U.S. 1025 (1999), in which the Court reaffirmed “the general rule that ballot access requirement of signatures from 5% of the relevant voter group ordinarily does not violate constitutional rights.” Id. at 87.

N.Y. Elec. Law § 6-136 is viewed as part of a ballot access scheme that is reasonably tailored to meet the state’s legitimate interest in assuring that candidates have a reasonable modicum of support, and in preventing fraud and voter confusion. Id. See also, e.g., Rodriguez v. Pataki, 2002 U.S. Dist. LEXIS 13685, \*8-9, 2002 WL 1733676, \*1-3 (S.D.N.Y. Jul 25, 2002) (three-judge court)

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Statistics of this type are available, among other places, on the Web site of the State Board of Elections, [www.elections.state.ny.us](http://www.elections.state.ny.us).

(5% signature ballot access requirement a reasonable requirement that furthered the important state interest in assuring that a candidate has a significant modicum of support); Hewes v. Abrams, 718 F.Supp. 163, 167 (S.D.N.Y.) (“the signature caps . . . serve to ‘liberalize ballot access in heavily populated [parties]’ . . . and certainly cannot be said to impinge on the rights of members of minority parties”), aff’d, 884 F.2d 74 (2d Cir. 1989).

As the Circuit squarely held in Prestia, well-publicized disputes about the election of delegates to a party convention, as had strenuously been argued in Prestia, did not alter the *general rule*. See Prestia, 178 F.3d at 89-90, distinguishing Rockefeller v. Powers, 78 F.3d 44 (2d Cir.), aff’g 917 F.Supp. 155 (E.D.N.Y. 1996). For one thing, Powers concerned presidential candidates campaigning not only in New York’s then-31 congressional districts but in the remaining 49 states. Nothing comparable is present here, where several of the plaintiffs who would like to run for judge need not leave their home borough or county.

More important, unlike in the case of the election of delegates in Powers, the judicial convention delegates are not *pledged*. See 2003 N.Y. Laws, c. 637; 1999 N.Y. Laws, c. 137; 1995 N.Y. Laws, c. 586, governing the selection of delegates to the national conventions. Delegates to the national conventions therefore run as surrogates for specific candidates. The election of delegates to the judicial nominating conventions is structured very differently. Delegates run on their own merits, as representatives of party members in the way the Circuit recognized and approved in Mrazek, 630 F.2d at 898. The delegates are elected by the rank-and-file and responsible to the rank-and-file; they might make promises and representations as do candidates of all kinds, but they are simply not pledged.

Just as “a petition procedure may not always be a completely precise or satisfactory barometer of actual community support” for a party or candidate, “the Constitution has never required the States to do the impossible,” that is, by finding a perfect measure. American Party of Texas v. White, 415 U.S. at 786. Because the process of selecting delegates, and the convention process itself, are fair and non-discriminatory by the terms of the statute, plaintiffs’ grievance can only be with their fellow party members. Yet they must be held subject to the political reality stated by the Court, that “[h]ard work and sacrifice by dedicated volunteers are the lifeblood of any political organization.” *Id.* at 787. See also Hynes v. Oradell, 425 U.S. 610, 626-627 (1976) (Brennan, J., *concurring*) (“unquestionably, the lifeblood of today's political campaigning must be the work of volunteers”); Schulz v. Williams, 44 F.3d 48, 57 (2d Cir. 1994) (following American Party of Texas); Koppell v. New York State Bd. of Elections, 8 F.Supp. 2d 382 (S.D.N.Y.) (citing American Party of Texas in denying preliminary injunction motion), *aff’d*, 153 F.3d 95 (2d Cir. 1998).

As the Honorable Robert J. Ward wrote in response to similar complaints from vocal insurgents, members of the New Alliance Party (“NAP”),

Assuring NAP political success is beyond the scope of this Court; NAP is accountable for its own destiny. In the words of Jean Paul Sartre: ‘Man can will nothing unless he has first understood that he can count on no one but himself.’ *Being and Nothingness* (1943).

New Alliance Party v. New York Bd. of Elections, 861 F.Supp. 282, 299 (S.D.N.Y. 1994).

The lack of success, or sense of pessimism, described in the complaint in this action are therefore not owing to the statutory scheme on its face or as applied, but to plaintiffs’ own efforts or lack thereof, and to local political characteristics that are not a function of the statute challenged in this action.

### POINT III

#### BALLOT ACCESS IS READILY ATTAINABLE BY PETITION

No one is excluded from the general election ballot – plaintiffs and others can readily attain ballot access by petition.

Plaintiffs disdain the petition route, at least in New York City, because of the preponderant Democratic enrollment, 2,761,472 Democrats to 524,669 Republicans, out of a total of 4,144,257 registered voters. This thinking, aside from being defeatist, ignores several things:

(1) Reasonable ballot access is a right; electoral victory is not. There is no such concept in elections jurisprudence as a right to proportional representation for any minority including self-proclaimed reformers or party-outsiders such as most of the plaintiffs. This has recently been confirmed by the Court's rejection of claims of political gerrymandering in Pennsylvania.

[T]he Constitution . . . guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

Vieth v. Jubelirer, \_\_\_ U.S. \_\_\_, 124 S. Ct. 1769, 1782 (2004).

(2) Republican candidates have won the last three mayoral elections, even though greatly outnumbered in enrollment by plaintiffs and their fellow Democrats. See [www.vote.nyc.ny.us](http://www.vote.nyc.ny.us). It might be argued that money played a significant part in those results. Money ought not, however, be permitted to dictate the results of the election of judges as plaintiffs' proposed restructuring of the system would so plainly encourage.

(3) Independents can determine electoral outcomes. In 2001, Michael R. Bloomberg won the mayoralty with 744,757 votes, only 68,070 more votes than rival Mark Green. See

[www.vote.nyc.ny.us](http://www.vote.nyc.ny.us). There are 692,939 independent, non-enrolled voters in the City of New York, ten times Bloomberg's margin of victory. The same holds true in the judicial districts.

The independent nominating procedures, which are not challenged in this action, repeatedly have been sustained. See, e.g., Kuntz v. New York State Bd. of Elections, 113 F.3d 326, 327-29 (2d Cir. 1997) (concerning Congressional elections); Van Allen v. Pataki, 2000 U.S. Dist. LEXIS 20144 (N.D.N.Y. Aug. 21 2000) (Hon. David N. Hurd) (dismissing constitutional challenges to § § 6-138 and 6-140 governing independent nominations), aff'd mem., 9 Fed. Appx. 41, 2001 U.S. App. LEXIS 8434 (2d Cir. May 3, 2001); Schulz v. Williams, 44 F.3d 48 (2d Cir. 1994) (upholding certain requirements applicable to the contents of independent nominating petitions); Herschaft v. N.Y. Bd. of Elections, 99 F.Supp.2d 258, 261 (E.D.N.Y.) (independent nomination requirements "do not unduly burden the rights to vote, to run as a candidate, or to assemble"), aff'd in part and rev'd in part on other grds., 234 F.3d 1262 (2d Cir. 2000), cert. denied, 531 U.S. 1078 (2001); Johnson v. Cuomo, 595 F.Supp. 1126 (N.D.N.Y. 1984) (upholding signature requirements for independent nominating petitions); Jaquith v. Simon, 35 Misc.2d 508, 512-13 (Sup. Ct. Albany Co.) (*per* Hon. Lawrence H. Cooke) (sustaining constitutionality of Election Law former § 138, now § 6-142, governing independent nomination petitions), aff'd, 12 N.Y.2d 660 (1962).

Moreover, the number of petition signatures required for an independent nominating petition for Supreme Court Justice is a small fraction of the number of signatures required to elect convention delegates committed to a particular candidacy. The Second Judicial District, for example, in which this Court sits, encompasses all or part of 24 Assembly Districts, 21 in Kings County and three in Richmond County. Qualifying 24 slates of delegates (and there is no reason why delegates have to run on slates) would require a minimum of  $500 \times 24 = 12,000$  signatures. But general election ballot

access requires a third of that, only 4,000 signatures. See N.Y. Elec. Law § 6-142. There are 1,488,366 registered voters in Kings and Richmond, so that 4,000 is less than three-tenths of 1%.

The general election ballot is therefore readily accessible to candidates of all political persuasions. Beyond that, results at the polls are a product of the will of the voters, not the system of nomination challenged in this action. Ballot access jurisprudence focuses on whether hopeful candidates have alternative means of ballot access that need not promise electoral success. See, e.g., Jenness v. Fortson, 403 U.S. 431, 440-441 (1971), rejecting a claim that “Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available . . . alternative paths, neither of which can be assumed to be inherently more burdensome than the other.” The fact that plaintiffs’ views may be in the minority among their fellow party members, or the general electorate, or that their candidates may enjoy less rank-and-file support than mainstream candidates, does not entitle them the special protection or consideration that as they appear to seek. The Court made this explicit in Jenness, when it refused to extend special consideration to another brand of insurgents:

The argument that [one] alternative route is not realistically open to a candidate with unorthodox or “radical” views is hardly valid in the light of American political history. Time after time established political parties, at local, state, and national levels, have, while retaining their old labels, changed their ideological direction because of the influence and leadership of those with unorthodox or “radical” views.

Jenness, 403 U.S. at 441 n. 25. If anything, plaintiffs and their allies are better situated than plaintiffs in Jenness, as plaintiffs here are not “radicals.”

Therefore, so long as there is an alternative means of ballot access, as is the case here, plaintiffs cannot show irreparable harm, and a motion for the extraordinary remedy of a preliminary injunction must be denied.

#### POINT IV

##### **PARTY NOMINATION OF JUDGES BY CONVENTION FURTHERS THE PUBLIC INTEREST**

A heightened level of scrutiny is not applicable to this case because nominating conventions are a reasonable, non-discriminatory electoral mechanism.

The mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."

Burdick v. Takushi, 504 U.S. 428, 433-434 (1992) (citing Bullock v. Carter, 405 U.S. 134, 143 (1972); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802 (1969)). Thus, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id. at 434 (quoting Anderson, 460 U.S. at 788). Here, it is not apparent that there are any restrictions at all, as judicial nomination by convention is a process, not a restriction.

The political parties, which plaintiffs plainly do not represent, are expected to be heard on this motion arguing in favor of the nominating convention.<sup>8</sup> The nomination process is vitally at the heart of freedom of assembly and association, Cousins v. Wigoda, 419 U.S. at 491, and the State therefore has an important interest in safeguarding the parties' associational rights in the selection of candidates. California Democratic Party v. Jones, 530 U.S. 567 (2000).

Second, evidence has been tendered and more will be adduced on this motion demonstrating

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We join in and adopt the opposition papers submitted on behalf of the political parties and the Justices to the extent that they are consistent with the analysis in this memorandum.

that nominating conventions promote candidate diversity within judicial districts, including, among other things, geographic diversity, racial and ethnic diversity and gender diversity. This, too, is in the interest of the political parties as well as in the public interest, as demonstrated by the opposing papers submitted on behalf of the political parties, and the report of the Attorney General's expert witness Prof. Michael Hechter. See, e.g., Nipper v. Smith, 39 F.3d at 1544 (legitimate State interest to maintain a system encouraging the nomination of judicial candidates who "reflect . . . the racial and ethnic diversity of the population" within the applicable district).

Third, Professor Hechter's report will show that the conventions themselves are democratic, underlining the fact that, as the Court has said in respect to political aspirants among the racial minorities, insurgents such as plaintiffs and their allies "are not immune from the obligation to pull, haul, and trade to find common political ground." See Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). Were they to do so, or continue to do so, the political parties would apparently be strengthened, which is to the public good, not weakened.

In addition, as the political parties and intervenor the Association of Supreme Court Justices demonstrate in their opposing papers, the convention system minimizes the challenges facing incumbent judges up for reelection, including matters in respect to campaign finance. This circumstance furthers an important State interest in "an independent-minded judiciary," Nipper v. Smith, 39 F.3d at 1544, one in which trial court judges are not "elected to be responsive to their constituents nor expected to pursue an agenda on behalf of a particular group." Id. at 1534-35.

These interests are more than sufficient to justify a nomination system that is fair and non-discriminatory on its face and as applied.

**Conclusion**

**THE MOTION SHOULD BE DENIED IN ITS ENTIRETY.**

Dated: New York, New York  
August 13, 2004

Respectfully submitted,

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