

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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

Civil Action No. 04cv1129 (JG)

Plaintiffs,

v.

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

Defendants.  
-----X

**MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT  
NEW YORK COUNTY DEMOCRATIC COMMITTEE IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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**PRELIMINARY STATEMENT**

Plaintiffs ask this Court on a motion for a preliminary injunction to declare unconstitutional the entire system of electing justices of the New York Supreme Court throughout the State and to throw into disarray a carefully crafted process which has remained in place since it was adopted over 80 years ago by the New York State Legislature.

Plaintiffs complain that candidates who are not endorsed by major political party leaders are precluded from winning their party's nomination through the judicial convention process. Plaintiffs further contend that, unless nominated by one of the major political parties, they "will never see [their] name on any ballot, and . . . will have literally no chance of being elected." (Pl. Br. at 10). This is simply untrue. There is no ballot access issue here. Any candidate, regardless of whether they are backed by party leaders, has the opportunity to gain enough delegate support to win the party's nomination or, alternatively, petition onto the ballot in the general election as an independent candidate or even run as a minor party candidate, as Plaintiff Margarita Lopez Torres did in the 2003 election. (*See* Tab 5).

At its heart, the basis for the breathtaking relief Plaintiffs seek is simply their preference for a direct primary election for choosing major party judicial candidates rather than the convention process which New York has long employed. As support for their sweeping claim that the entire nominating process is constitutionally flawed because it systematically excludes "challenger" candidates who do not receive the support of the party leader for each county, Plaintiffs merely invoke their own alleged anecdotal experience. But this is not the experience in New York County or many other counties across the State as demonstrated by the Declarations proffered in opposition to this motion, which describe the open and often contested process by which delegates are elected and then congregate to choose judicial nominees. Even more

dispositive, there is no constitutional bar to a party's selection of its own judicial nominees at a convention of locally-elected delegates and, in any event, disappointed candidates remain free to access the general election ballot.

The New York County Democratic Committee (the "Democratic Committee"), a local Democratic county committee created and operated pursuant to and by virtue of the New York Election Law, has intervened as a Defendant in this action to oppose the relief Plaintiffs seek.

The Democratic Committee urges the Court to deny Plaintiffs' motion for the following principle reasons:

1. If granted, Plaintiffs' proposed preliminary injunction would seriously injure the First Amendment rights of the Democratic Committee and its members (as well as other voters) to associate with themselves as an organized political party, engage in collective discussion and debate and select its party representatives in elections for New York Supreme Court. *See California Democratic Party v. Jones*, 530 U.S. 567 (2000). Thus, the preliminary injunction should be denied to avoid irreparable injury to others. (*See* Section II.B).
2. Plaintiffs or their preferred candidates had unimpeded access to the general election ballot. Thus, they have no standing to assert a claim because they suffered no constitutional injury and, plainly, no irreparable injury. None of Plaintiffs' First Amendment rights, including the right to vote for the candidate of their choice, was infringed. Indeed, Plaintiff Lopez Torres succeeded in getting her name on the ballot as the nominee of the Working Families Party, giving all of her supporters the ability to vote for her. (*See* Sections II.A, III and IV).
3. There is simply no constitutional right to a primary electoral system. The Supreme Court has squarely held that states may utilize conventions rather than primaries as a means for selecting party candidates for elective office. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) ("[i]t is too plain for argument . . . 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") (emphasis added). Nor is there a right to win a party's nomination. (*See* Section IV.B.1).
4. There is no constitutionally-protected class of "challenger" candidates. Such candidates bear no identifying marks such that it would be invidious to discriminate against them, nor can they even be distinguished from party-backed candidates prior to the commencement of the election season. In other words,

there is no *a priori* designation of any particular candidate as a challenger. Had Plaintiff Lopez Torres succeeded in obtaining the support of the party leader, then by Plaintiffs' own arbitrary classification she would have been the party-backed candidate and presumably someone else would have been the challenger. Nor is a classification by elective office suspect as the difference between Supreme Court elections and those of other offices are attributable to rational policy choices made by the legislature which reflect legitimate differences between the position of Supreme Court justice and other offices, including other judgeships. Thus, Plaintiffs' equal protection claim has no merit. (*See* Section V).

5. New York's convention system for selecting major party judicial candidates not only has a rational basis, but it serves a number of compelling state interests, including: (1) improving the quality of the judiciary and instilling public confidence in it through the use of independent panels of lawyers to screen candidates, (2) protecting the associational freedoms of major parties and their members to organize themselves and select their own standard bearers, (3) increasing the diversity of judicial candidates along racial, ethnic, gender, sexual orientation and other lines, (4) ensuring broad geographic representation and participation in the candidate selection process and (5) avoiding the expense and burden of primary campaigns, particularly for sitting judges. (*See* Section IV.C.2).

If Plaintiffs believe that New York Election Law is not the best method for selecting judicial candidates, they are free to petition the New York Assembly and Senate to have it amended. It is not unconstitutional. This Court should not overturn it.

### STATEMENT OF FACTS

#### Declarations Submitted<sup>1</sup>

The principle facts relied upon in this memorandum are set forth in four accompanying declarations which are briefly described below:

- **Robert E. Levinsohn:** A veteran of judicial politics in the First Judicial District and currently a partner at Proskauer Rose LLP, Levinsohn provides a step-by-step summary of the judicial selection process in New York County, and describes how the convention system for nominating candidates for Supreme Court ensures that the most highly qualified candidates are nominated, promotes a diversity of party

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<sup>1</sup> All citations to accompanying Declarations are referred to as "Decl. at ¶ \_\_\_\_"; "Exh. \_\_\_\_" refers to an exhibit attached to a Declaration; citations to Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Injunctive Relief are referred to as "Pl. Br. at \_\_\_\_;" and "Tab" refers to the Tab number in the accompanying Appendix of Declarations and Other Material.

nominees across gender, racial, geographic, and sexual orientation lines, and insulates incumbent Supreme Court judges from extensive political activity.

- **Douglas A. Kellner:** A current commissioner of the Board of Elections in the City of New York and an authority on judicial politics in New York City, Kellner outlines the history of the judicial convention, explains why the Legislature made a conscious decision in 1921 to return to the convention system after experimenting with a direct primary process, and describes the value of using nominating conventions as opposed to primaries.
- **Dennis E. Ward:** The current secretary of the Erie County Democratic Committee and an election lawyer who has been active in judicial politics for over two decades, Ward describes his experience in the 2000 Eighth Judicial District race where a Niagara County insurgent candidate and unlikely nominee was able to win the party nomination in a district dominated by Erie County by forming a coalition with other insurgent candidates.
- **Emily Giske:** An experienced judicial delegate alternate from the 66<sup>th</sup> Assembly District in New York County, Giske explains how the judicial convention nominated a diverse slate of candidates along racial, gender, geographic and sexual orientation lines and how Rosalyn Richter – an openly gay, disabled, female candidate – was able to parlay the solid support of ten delegates into a county-wide bloc of support by building coalitions with other candidates.

In addition, the Democratic Committee relies on the declarations submitted by the other defendant-intervenors which are incorporated by reference.

### Overview

New York State, like 32 other states, provides for a system of direct election of its general trial level judges known as Justices of the State Supreme Court. The remaining states choose their judges by some method of appointment. There is no dispute that both approaches are constitutionally permissible. What Plaintiffs challenge in this lawsuit as unconstitutional is the method by which each of the two major political parties in New York select their nominees who will run on the party ticket in the general election. Unlike other states, New York does not hold a direct primary election for selecting nominees for State Supreme Court Justice, but instead has adopted a convention system. A party convention in and of itself is unremarkable and has been embraced by the United States Supreme Court as a perfectly acceptable means of selecting a

party's nominee. See *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974) ("It is too plain for argument . . . 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.*") (emphasis added).

Nevertheless, Plaintiffs claim that New York's method of electing delegates from geographical districts who represent their constituents at the judicial convention and congregate to decide on the party's nominee or nominees is unconstitutional. In essence, Plaintiffs complain that New York's convention system unfairly advantages candidates who receive the backing of major party leaders over so-called "challenger" candidates who lack the resources to deploy successfully a slate of challenger delegates. In their view, challenger candidates should instead have the right to be voted on directly in a primary by voters of each major party.

Plaintiffs' attack fundamentally misapprehends the nature of New York's delegate-based convention system. In its wisdom, the New York legislature deliberately crafted a form of *representative* democracy in lieu of a direct primary election process. (See Kellner Decl. at ¶¶ 18, 19, 48). Party nominees are selected by delegates who represent the interests of their particular communities at the nominating convention. A delegate does not serve as a proxy for a particular candidate. In fact, each delegate is typically called upon to vote for multiple judicial nominees to fill multiple seats. Because they are not pledged to any particular candidates, delegates can change their preferences and build coalitions in a cooperative effort to forge a consensus within the party on judicial candidates. Comparing a convention system to a direct primary election process, as Plaintiffs do, is completely inapt. Doing so also ignores the compelling state interests that are served by electing delegates, including: (1) improving the quality of the judiciary, (2) protecting the First Amendment rights of political party members, (3)

increasing diversity among candidates, (4) ensuring broad geographic representation and (5) avoiding expensive and protracted primary campaigns, especially for incumbents.

It is important to stress that voters retain the final say under New York election law as there is a general election for all candidates. Any candidate, including challenger candidates who fail to win a major party nomination, can petition to appear on the ballot as independent candidates. Plaintiffs do not allege that the process, including signature requirements, for appearing on the general election ballot as an independent is unconstitutionally onerous. Frustrated candidates may also seek the nominations of minor party organizations. In fact, that is precisely what Plaintiff Margarita Lopez Torres did after failing to win the Democratic party nomination when she successfully gained access to the general election ballot by running on the Working Families Party ticket. In this fashion, every eligible voter had the opportunity to vote for Ms. Lopez Torres. Nonetheless, she did not win.

**New York's Delegate-Based Convention System**

For the purposes of selecting State Supreme Court justices, New York State is divided into twelve judicial districts comprised of one or more counties. New York County comprises the First Judicial District. Each judicial district is comprised of a number of Assembly Districts. The Assembly Districts are the same political subdivisions by which New Yorkers elect their representatives to the State legislature. New York County has twelve Assembly Districts. (Levinsohn Decl. at ¶ 6).

The New York County Democratic Party's system is illustrative of how the convention system functions on a major party level throughout the State and provides valuable benefits to the State of New York and its voters. Under New York Election Law, the New York County Democratic Party holds a party convention to select its nominees for the Supreme Court. N.Y.

Election Law Section 6-106. Under this system, registered Democratic voters in each local Assembly District within the First Judicial District elect delegates and alternate delegates as their representatives to the party convention. (Levinsohn Decl. at ¶ 7).

### **The Independent Screening Panel**

Under the New York County Democratic Party's rules in effect since 1977, the first step in the process of selecting Supreme Court nominees for the general election in the First Judicial District involves an independent screening panel. The purpose of the independent screening panel is to ensure that the most highly qualified candidates for Supreme Court justice are given the opportunity to become the party nominees and run as Democrats in the general election. (*Id.* at ¶ 8; Giske Decl. at ¶ 9).

The independent screening panel is chosen using what is known as a "double blind process" to ensure that the judicial screening procedure is truly independent and free from undue political influence. Initially, to promote a diverse representation on the panel and meaningful participation by minority groups, the Judiciary Committee for the New York County Democratic Party (the "Judiciary Committee") invites various community, civic, professional and legal services organizations each to designate one person to serve as a member of the independent screening panel. (Levinsohn Decl. at ¶ 9). In 2003, for instance, fifteen organizations selected members of the independent screening panel. (*Id.* at Exh. A) (listing organizations). Although the Judiciary Committee votes on and selects these organizations, the organizations – not the Judiciary Committee – choose the panel members – hence the first "blind" in the double-blind process.

Once the independent screening panel is in place, the party advertises in the New York Law Journal for potential candidates to submit applications to the panel for its consideration.

The Democratic candidates for Supreme Court in the Judicial District are typically individuals who have served as judges of one of the lower courts. (*Id.* at ¶ 10).

The candidates submit their applications directly to the independent screening panel with no input from the party leader or any other political leader – hence the second “blind” of the independent screening process. (*Id.* at ¶ 11).

After the independent screening panel obtains all of the applications of interested applicants, it begins an exhaustive review process. Panel members gather information about candidates through initial interviews and references checks. Each candidate then appears before the full panel. Typically, the panel reports out three candidates as the most qualified for each open seat and they become eligible for nomination. (*Id.* at ¶ 12).

For incumbent Supreme Court justices running for re-election, the independent screening panel simply evaluates whether the incumbent justice merits continuation in office based on his or her record. The panel must report out as approved any sitting Supreme Court justice that it so finds to merit continuation in office, and no other candidate may be considered for the seat held by that justice. (*Id.* at ¶ 14).

The contest for the nomination culminates at the annual judicial convention where elected delegates vote for candidates who have emerged from the independent screening panel. The county leader is prohibited under the rules from endorsing or supporting any other candidates. (*Id.* at ¶ 13).

#### **The Delegate Selection Process**

The function of a judicial delegate is to represent and vote on behalf of the Democrats from the local Assembly District at the judicial convention. The delegates are elected through the party primary process, as required by New York Election Law. (*Id.* at ¶ 15).

In the First Judicial District, choices for delegates within each Assembly District are vigorously contested at local club membership meetings. It is also not unusual for competing slates of candidates to be presented in the primary. Individuals or groups that want to run for delegate or alternate delegate without a local club's support may also make preparations to petition for the September primary election. (*Id.* at ¶ 16).

Local Democratic clubs circulate petitions designating candidates for delegates in each Assembly District for signatures from Democratic voters residing in the Assembly District. Each delegate requires a minimum of 500 signatures. If multiple candidates satisfy the petition requirement, then they run against each other in the primary in September. In New York County, the election of delegates has been frequently contested in the primary. (*Id.* at ¶¶ 17-18).

In no way do the county party leader or the local district leaders control the local delegate selection process, as Plaintiffs assert. As the accompanying Declarations attest, the selection of delegates and alternate delegates is a very competitive process that occurs at the local club level. The registered Democratic voters who are members of their local political clubs choose the delegate candidates who will be on the petitions circulated by the clubs. The county party leader plays no role in this process. (*Id.* at ¶ 19).

### **The Road To The Convention**

As the delegate selection process is going on and after the delegates are chosen, Supreme Court candidates are permitted to garner support from prospective and selected delegates. But the delegates are not necessarily committed to any single candidate and are not required to vote for any particular candidate. (*Id.* at ¶ 20; Ward Decl. at ¶ 12; Giske Decl. at ¶ 14).

During the Assembly District election in which delegates are elected, each delegate candidate's name on the ballot is not linked to any individual judicial candidate. This serves to

underscore that the delegates at this stage are not necessarily committed to any single judicial candidate, but rather that the delegates represent the registered Democratic voters in their respective Assembly Districts. Who eventually becomes a judicial nominee is thus not a pre-ordained fact. (Levinsohn Decl. at ¶ 21).

During the time period between the end of the independent screening panel process and the convention, the players involved in the process (*e.g.*, candidates, campaign managers, delegates) endeavor to reach consensus on particular candidates with an eye toward forging a convention majority that will select the judicial nominees. This process involves extensive discussions and maneuvering, as the candidates garner support and build coalitions. As the convention gets closer, a convention majority often emerges. (*Id.* at ¶ 22; Giske Decl. at ¶¶ 15-16).

Contrary to what Plaintiffs assert, the county leader does not dictate which delegates support which judicial candidates. Because the judicial selection process is a consensus building exercise, the county party leader cannot simply impose his will even if he wants to, particularly where there is widespread support for a particular candidate. (Levinsohn Decl. at ¶ 23; Ward Decl. at ¶¶ 13-16).

The result has been a Supreme Court judiciary in New York County, which reflects the great diversity of Manhattan along the lines of race, gender, religion, ethnic origin, and sexual orientation. (Levinsohn Decl. at ¶ 23; Giske Decl. at ¶ 19). Today, of the thirty-eight Supreme Court justices in New York County, twenty-two are women, nine are African-American, four are Hispanics, two are Asian, and three are openly gay (all females). (Levinsohn Decl. at ¶ 23).

The delegate-based convention process also serves to enhance geographic diversity. (Levinsohn Decl. at ¶ 27; Giske Decl. at ¶ 19). As Mr. Ward attests, the convention system

empowers candidates from smaller counties, such as Niagara County, to gain the nomination through coalition building. (Ward Decl. at ¶ 19).

The judicial convention for the First Judicial District meets in September to select the party nominees for the open Supreme Court seats. The convention provides a forum for the judicial candidates and delegates to present their cases. Although a consensus on whom the party nominees should be is often reached before the convention, floor battles at the convention are not unheard of. (Levinsohn Decl. at ¶ 24).

Thus, it is not impossible for an insurgent candidate to be nominated instead of a candidate supported by the party leader. The key for an insurgent candidate to successfully win a nomination is to garner support by building coalitions in the same way that a candidate with the party leader's backing forms coalitions. No candidate – insurgent or otherwise – can single-handedly capture the nomination. Coalition-building is a critical component of the process. (*Id.* at ¶ 25). The successful campaign of Rosalyn Richter provides an excellent example of the importance of building coalitions. (Giske Decl. at ¶¶ 8-16).

### **Benefits Of The Convention System**

Far from being arbitrary, New York's convention system serves a number of compelling state interests. First, the convention system helps to ensure that the parties will select high quality judicial candidates and thus bolsters public confidence in the judiciary in two ways. It concentrates selection power in the hands of elected delegates who have the interest and opportunity to become more informed about the strengths and weaknesses of judicial candidates than the public at large. (Kellner Decl. at ¶¶ 27-28). The convention system also enables the establishment of a meaningful independent screening panel such as the one used in New York County. (Levinsohn Decl. at ¶¶ 8-14).

Second, New York's system protects the associational rights of members of each major political party to organize themselves, forge coalitions and select their standard bearers as they see fit. This is the beating heart of organized political parties and their members' rights should not be abridged by dictating the method of selecting a candidate. (*See generally* Levinsohn Decl. *passim*).

Third, the convention process enhances diversity of judicial candidates on the bases of race, ethnicity, gender, religion and sexual orientation. (Levinsohn Decl. at ¶¶ 23, 27; Ward Decl. at ¶¶ 12, 13, 20; Giske Decl. at ¶¶ 13, 14, 18, 19). As the Giske Declaration poignantly reveals, minorities and other members of historically disadvantaged groups benefit greatly from a system that rewards coalition building.

Fourth, New York's system ensures geographic representation and participation in the political process. As the Ward declaration describes, candidates from smaller counties can use the coalition building process to their advantage to win nominations that would otherwise be out of their reach. (Ward Decl. at ¶ 19).

Fifth, the judicial convention also has the benefit of avoiding the enormous expense and burden of public primary campaigns. (Kellner Decl. at ¶¶ 45-46). As a result, the convention system insulates incumbent judges, who have been removed from the political arena for nearly fourteen years, from public campaigning. Unlike in the case of Civil Court judges where most new candidates are seeking office from private life, almost all candidates for Supreme Court are already on the bench. The rules governing the conduct of judges prohibit sitting judges from engaging in a wide range of political activity, and permit such judges to participate in their own campaigns *only* after they have announced their candidacies. This puts sitting judges at a

significant disadvantage to non-judges, who are not restricted from engaging in political activity before they announce their candidacies. (Levinsohn Decl. at ¶ 28).

### ARGUMENT

#### **I. THE HEIGHTENED STANDARD FOR GRANTING A PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTES**

A preliminary injunction “is an extraordinary and drastic remedy that should not be routinely granted.” *Medical Society of the State of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977). Where, as here, “the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,” a preliminary injunction should *not* be granted “unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.” *Id.*; *see also No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (under such circumstances, a preliminary injunction “should be granted only if the moving party meets the more rigorous likelihood-of-success standard”); *Eisberg v. Dutchess County Legislature*, 37 F. Supp. 2d 283, 285 (S.D.N.Y. 1999), *aff’d*, 181 F.3d 82 (2d Cir. 1999) (applying heightened standard in upholding constitutionality of New York Election Law provision). This is because “governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.” *Able v. United States.*, 44 F.3d 128, 131 (2d Cir. 1995); *see also Toia*, 560 F.2d at 538 (“where the grant of interim relief may adversely affect the public interest in a manner which cannot be compensated for by an injunction bond, plaintiffs undertake an even greater burden of persuasion”).

Further, as Plaintiffs concede, when the injunction sought “will alter rather than maintain the status quo the movant must show ‘clear’ or ‘substantial’ likelihood of success.” *Id.* (citing

*Rodriguez v. DeBuono*, 175 F.3d 227, 223 (2d Cir. 1999)) (emphasis added). (See Pl. Br. at 32).<sup>2</sup>

“[L]ike a mandamus, [a mandatory injunction] is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion,” *Heckler v. Lopez*, 463 U.S. 1328, 1333-34 (1983) (quoting *Morrison v. Work*, 266 U.S. 481, 490 (1925)), and should “issue[] to remedy a wrong, not to promote one,” *Morrison*, 266 U.S. at 490. See also *Tom Doherty Assoc., Inc. v. Saban Entm’t., Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995) (where “injunction will provide all the relief sought and that relief cannot be undone” motion for such relief is held to a higher standard).

Because, as discussed below, Plaintiffs cannot meet even the minimum standards, much less the heightened standards, for a preliminary injunction required under the circumstances of this case, Plaintiffs’ motion for preliminary injunction should be denied.

## **II. PLAINTIFFS CANNOT ESTABLISH THAT THEY WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION THEY SEEK IS DENIED**

### **A. There Is No Irreparable Harm Because Plaintiffs Can Directly Petition Onto The Ballot In The General Election**

Plaintiffs claim that they will suffer irreparable harm unless the Court grants the following extraordinary and drastic relief: (1) declares the New York statutes governing election of Supreme Court justices unconstitutional, (2) directs the Legislature to repeal these statutes and pass new legislation within 90 days of the Court’s ruling and (3) if the Legislature does not act, order that the 2005 election for justices of the Supreme Court be governed by a primary election. (Pl. Br. at 47-48). Plaintiffs imply that unless mandatory injunctive relief is granted, those

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<sup>2</sup> Other Circuits have suggested that even when a constitutional violation is established, courts must first grant the proper state authorities the opportunity to devise an appropriate remedy, and that “[f]ederal courts may impose their own remedy only if the responsible state authorities fail to take corrective action within a reasonable time.” *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (citing *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988)).

Plaintiffs who want to run for Supreme Court justice and those who want to vote for such candidates will be precluded from doing so. This is simply not true.

First and foremost, New York's ballot access provisions, which have been in effect since 1921, do not preclude candidates who are not endorsed by major political parties from gaining enough delegate support to win their party's nomination through the judicial convention process.

Second, under New York law, all candidates for Supreme Court justice have the option of directly petitioning onto the ballot in the general election. *See* N.Y. Election Law Sections 6-138 and 6-142.2. To enable their name to appear on the general election ballot, a candidate for Supreme Court justice in the First Judicial District has the option of collecting 4,000 signatures and filing an independent nominating petition. *Id.* at Section 6-142.2(c). Candidates for Supreme Court justice in all other Judicial Districts are required to collect only 3,500 signatures. *Id.* at Section 6-142.2.

Finally, even candidates who belong to a major political party are not precluded by reason of such party affiliation from seeking a place on the general election ballot as the nominee of a minor party. *See* Election Law Sections 1-104 and 6-106. After failing to gain the Democratic Party's nomination in 2003, this is exactly what Plaintiff Lopez Torres did when she ran for Supreme Court on the Working Families' ticket in the 2003 general election. (*See* Official Ballot for the General Election, City of New York, County of Kings, November 4, 2003, at Tab 5).

To imply, therefore, as Plaintiffs do, that candidates who are not endorsed by major political parties will be foreclosed from consideration in the general election is simply incorrect. Such candidates, regardless of whether they try to win their party's nomination through the judicial election convention, may still petition onto the general election ballot or even run as a

minor party candidate. In light of these alternatives, Plaintiffs will not be irreparably harmed by denial of the extraordinary and drastic relief they seek.

In determining whether constitutional rights have been violated, the United States Supreme Court has repeatedly looked to whether challenged electoral schemes provide alternative means for accessing the ballot:

- *Jenness v. Fortson*, 403 U.S. 431, 441 (1971) (rejecting Equal Protection challenge based on existence of alternative methods of accessing general election ballot).
- *Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974) (recognizing that California law provided adequate alternative paths of ballot access, by primary or nominating petition, and that candidates simply failed to qualify for the general election ballot under either alternative).
- *Lubin v. Panish*, 415 U.S. 709 (1974) (determining that, in order to be constitutional, election law provisions requiring filing fees must necessarily provide indigent candidates with an alternative means, such as petition, of accessing the ballot).
- *Munro v. Socialist Workers Party*, 479 U.S. 189, 198-99 (1986) (determining that a state election scheme that provides any candidate with the ability to access a statewide ballot is less restrictive than other schemes upheld by the Supreme Court which were more restrictive).
- *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (finding filing deadline too far in advance of party primaries was not adequate alternative means for independent candidates to access the general election ballot).
- *Burdick v. Takushi*, 504 U.S. 428, 436 n.4-5 (1992) (reiterating *Jenness* Court's determination that alternative means to access ballot prevents "freeze [of] the status quo" and distinguishing *Anderson v. Celebrezze* on grounds that the election scheme before that Court effectively foreclosed independent candidates from accessing the general election ballot).

**B. The Parties' Counterbalancing First Amendment Associational Rights Will Be Harmed By The Grant Of A Preliminary Injunction**

When Plaintiffs seek to enjoin enforcement of New York's judicial election provisions, which provide for election of judicial delegates who, in turn, vote for a candidate to become their party's nominee, the other constitutional rights which must be considered and which may be

harméd are those of the political party itself and its members. The Supreme Court has repeatedly held that there is a constitutionally protected right of association of political parties and their members, including the right to determine the process for selecting nominees, that must be respected. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986).

The Supreme Court has recognized that the First Amendment protects “the freedom to join together in furtherance of common political beliefs,” *Tashjian*, 479 U.S. at 214-215, which “necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only,” *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). “Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association’s being.” *Id.* at 122, n. 22 (quoting L. Tribe, *American Constitutional Law* 791 (1978)); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574-575 (2000). The Supreme Court has “vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party ‘select[s] a standard bearer who best represents the party’s ideologies and preferences.”” *Jones*, 530 U.S. at 575 (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (internal quotations omitted)).

Election Law Sections 6-106 and 6-124, whose enforcement Plaintiffs seek to enjoin, are among the provisions of the Election Law which are directly governed by party rules. *See Balletta v. Secretary of State of the State of N.Y.*, 65 A.D.2d 583, 584 (2d Dep’t 1978) (an “examination of New York’s Election Law dealing specifically with judicial conventions specify

particular areas which must be governed by party rules,” including Sections 6-106 and 6-124).

Under these provisions, the process of selecting judicial nominees for Supreme Court indisputably implicates the associational freedoms of members of the Democratic and Republican parties. Clearly the act of selecting judicial delegates, just as the act of voting for the relevant party’s nominee(s) at the judicial delegate convention, exemplify the associational freedoms which the Supreme Court has vigorously protected under the First Amendment.

The associational freedom of the parties and its members is evident throughout the entire judicial selection process. In the spring of an election year, local political clubs in each Assembly District determine who they are going to run as judicial delegates. (Levinsohn Decl. at ¶ 16). In the First Judicial District, choices for delegates are vigorously contested at local club membership meetings and, often, competing slates of candidates will be determined in the primary. (*Id.*). After delegates are selected, the judicial convention for the First Judicial District meets in September to select the party’s nominees for the open Supreme Court seats. (*Id.* at 24). The convention provides a forum for the judicial candidates and delegates to give presentations and to make their cases, and the entire process culminates in voting for the party’s nominee(s) for Supreme Court justice. The “moment of choosing the party’s nominee . . . is ‘the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.’” *Jones*, 530 U.S. at 575 (quoting *Tashjian*, 479 U.S. at 216).

Thus, the relief which Plaintiffs seek would desecrate the associational freedoms which the judicial convention system embodies.

**III. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF ANY OF THEIR CLAIMS BECAUSE THEY LACK STANDING**

The constitutional minimum of standing, “an essential and unchanging part of the case-or-controversy requirement of Article III,” contains three elements: (1) “the plaintiff must have suffered an . . . invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent,” (2) “a causal connection between the injury and the conduct complained of” must exist and be “fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court” and (3) “it must be ‘likely’, as opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs lack standing because there is no injury, either actual or imminent. Because requirements for winning the party’s nomination are identical for all candidates, any conceivable constitutional injury could only depend on whether the judicial convention system is the *only opportunity* for a voter to cast a ballot for a candidate. The statutes which Plaintiffs seek to enjoin do not foreclose those Plaintiffs or, for that matter, other eligible persons who want to run for Supreme Court justice and those who want to vote for such candidates from doing so, as New York Election Law affords any candidate the option of petitioning directly onto the general election ballot, New York Election Law Section 6-138, or running as a minor party candidate. New York Election Law Sections 1-104 and 6-106. In other words, judicial conventions are not determinative of who will ultimately become a New York Supreme Court justice. Voters across New York State ultimately choose their candidates for office during the general election. If a candidate has the right to appear on the general election ballot, as Plaintiff Lopez Torres did, what constitutional right does the judicial convention system infringe? The answer to this question is simple and obvious, none.

The provisions of New York's Election Law, when considered along with those provisions which provide for alternative means of ballot access – which are part and parcel of New York's electoral scheme – do not abridge Plaintiffs' right to vote and associate under the First Amendment and do not deny Plaintiffs equal protection under the Fourteenth Amendment. Because no actual or imminent harm has been shown, Plaintiffs lack standing.

#### IV. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM

##### A. Standard

“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). “It does not follow, however, that the right to vote in any manner . . . through the ballot [is] absolute.” *Id.* Instead, the Constitution entrusts States with the regulation of the “‘Times, Places, and Manner of holding Elections’ . . . and the Court therefore has recognized that States have the power to regulate their own elections.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see also California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000).<sup>3</sup>

“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). “To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes, [e]ach provision of

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<sup>3</sup> The Constitution “does not specify how state or local offices are to be selected, and the Supreme Court has made clear that states need not hold democratic elections to fill those positions.” *Shapiro v. Berger*, No. 04 Civ. 5895(CM), 2004 WL 1769078, \*6 (S.D.N.Y. Aug. 5, 2004) (citing *Fortson v. Morris*, 385 U.S. 231, 234 (1966) (holding “[t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor”); *Sailor v. Board of Ed. of Kent County*, 387 U.S. 105, 108 (permitting appointment of school board members); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (permitting appointment of state legislatures to fill vacancies).

[which] . . . whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual’s right to vote and his right to associate with others for political ends.

Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonably non-discriminatory restrictions.” *Anderson*, 460 U.S. at 788.

Given the practical necessity of regulating elections, coupled with the presumption of constitutionality that attaches to all duly enacted statutes, *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944), the Supreme Court has recognized that “[c]onstitutional challenges to specific provisions of a State’s election laws cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions.” *Anderson*, 460 U.S. at 789.

Instead, when deciding whether a State election law violates the First and Fourteenth Amendment, a 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 seeks to vindicate, [and] must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the 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 the plaintiff’s rights.

*Id.* “Under this standard, the rigorousness of [the Court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). “Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), *aff’d*, *Twin*

*Cities Area New Party v. McKenna*, 117 F.3d 1423 (8<sup>th</sup> Cir. 1997) (internal quotations and citations omitted). Nor does a court require “elaborate, empirical verifications of the weightiness of the State’s asserted justifications.” *Id.* at 364.

Here, as a threshold matter, no constitutional right is violated. In any event, the judicial convention process is not the only way for a judicial candidate to appear on the ballot, and therefore it does not unreasonably interfere with the right of voters to associate with and have candidates of their choice appear on the ballot.

**B. As A Threshold Matter, There Is No Constitutional Issue Because Plaintiffs’ Fundamental Right To Vote Is Not Implicated**

**1. Plaintiffs Have Ballot Access And Therefore No Fundamental Right To Vote Is Abridged**

In an effort to subject New York’s Election Laws for justices of Supreme Court to strict scrutiny by this Court, Plaintiffs claim that New York’s Election Laws impose a severe burden upon their fundamental right to vote. (Pl. Br. at 35). Plaintiffs attempt to rely upon the *Williams v. Rhodes* line of ballot access cases to argue that their fundamental right to vote is severely burdened as “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.” (*Id.* at 34-35) (emphasis added).

Plaintiffs’ reliance on the *Williams v. Rhodes* line of Supreme Court decisions is totally misplaced. Plaintiffs obfuscate the plain significance of these cases, all of which concern the separate and distinct issue of the political opportunity for *independent* candidates – as opposed to *challenger* candidates, as is the case here – to gain ballot access in *general* elections as opposed to *primary* elections. See *Williams v. Rhodes*, 393 U.S. 23, 25 (1968) (involving lawsuits brought by the Ohio American Independent Party and the Socialist Labor Party challenging the validity of Ohio election laws on the grounds that Ohio’s electoral statutes made “it virtually impossible

for any party to qualify on the ballot except the Republican and Democratic Parties” to choose electors pledged to particular candidates for the Presidency and Vice-Presidency of the United States); *Storer v. Brown*, 415 U.S. 724 (1974) (involving individuals in California who sought ballot position as independent candidates for members of Congress and the Presidency and Vice Presidency); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (involving a lawsuit brought by an independent candidate for Presidency of the United States and three voters challenging the constitutionality of Ohio’s early filing deadline for independent candidates); and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (involving a challenge to Illinois’ signature requirement as applied to independent candidates and new political parties). It is the denial of an independent candidate’s or minority party’s opportunity for a general ballot position which implicates an individual’s fundamental right to vote in these cases, not a candidate’s right to obtain a particular party’s endorsement.

Here, there was no denial of ballot access. Plaintiff Lopez Torres appeared on the 2003 general election ballot as the candidate for the Working Families party amply demonstrating that New York’s electoral scheme affords a “reasonably diligent candidate” access to the ballot as the nominee of a minor party under Election Law Sections 1-104 and 6-106. A “reasonably diligent candidate” also has the option of accessing the ballot as an independent candidate under Election Law Section 6-138. *See also id.* at Section 6-142.2. Plaintiffs thus disregard critical features of New York’s judicial election scheme to argue that the challenged statutes infringe Plaintiffs’ fundamental right to vote under the *Williams v. Rhodes* line of cases.

Plaintiffs’ attempt to rely on *Lubin v. Panish*, 415 U.S. 709, 716 (1974) is equally unavailing. (*See Pl. Br.* at 34). In *Lubin*, where an indigent candidate was denied access to the primary election ballot for county supervisor because of his inability to pay a filing fee, the issue

of whether a candidate need “clamor for a place on the ballot” only arose because *there was a primary ballot*. Here, there is no primary. *Lubin* has no application to the situation here, where candidates are nominated at a convention. As discussed in greater detail in Section IV.B.2, immediately below, it is well-established that conventions are constitutional, and that there is no constitutional right to a primary election. Moreover, *Lubin* was decided on Equal Protection grounds, and here there is no suspect class, as discussed *infra* at Section V. Further, the outcome in *Lubin* hinged on the fact that imposition of a mandatory filing fee that the indigent plaintiff was unable to pay meant there was no “alternative means” of gaining access to the ballot. *Id.* at 717 (“[t]he absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants”). Here, Plaintiff’s clamoring for a place at the convention are free to show up and seek delegate support. Lopez Torres did so in 2002 and 2003 and simply failed to gain the support she needed. By running in 2003 as the candidate for the Working Families party, Plaintiff Lopez Torres helps to demonstrate that the New York system for electing Supreme Court justices provides alternative paths to the ballot.

Perhaps hoping to mask these fatal deficiencies in their argument, Plaintiffs erroneously suggest that the Supreme Court’s analysis of the severity of the burdens on independent candidates in *Storer v. Brown* is equally applicable to candidates not endorsed by their particular party. (Pl. Br. at 34). Plaintiff’s argument fails for several reasons. As an initial matter, Plaintiffs must concede they literally have failed the *Storer* test, which analyzes the severity of burdens imposed by an electoral scheme by asking the simple question, “[c]ould a ‘reasonably diligent *independent* candidate’ get on the ballot?” (Pl. Br. at 34-35) (emphasis added). Notwithstanding Plaintiffs’ baseless assertion to the contrary, (*see* Pl. Br. at 35), the answer is loud and clear: “Yes” – *they can* under the express provisions of New York’s Election Law; and,

“Yes”, *they have done so*, as Plaintiff Lopez Torres demonstrated in the 2003 election as the Working Families Party’s candidate. There is no authority for the proposition that, in addition to a fundamental right to have the opportunity for ballot access in a general election, an individual has a fundamental right to her party’s nomination.

To the extent that Plaintiffs contend that *Molinari v. Powers*, 82 F.Supp.2d 57 (E.D.N.Y. 2000) suggests otherwise, (*see* Pl. Br. at 34), *Molinari*, which dealt with a Presidential primary election system, sheds no light on a convention system where there is no primary ballot that judicial candidates are seeking to access. *Id.* at 58-59. It bears noting that the Court’s perfunctory application of *Storer* is not binding as it was conducted in the context of a stipulated settlement, *id.* at 68-69, and represents nothing more than *dicta* by the District Court, *id.* at 70-71. Indeed, Mr. Keyes, whom Judge Korman acknowledged “arguably was not entitled to the relief as it applies to him because he made no attempt to gather petitions . . . [and who] sought to intervene only after the petitioning period had ended,” nevertheless, had his delegate candidates placed on the ballot pursuant to the stipulation. *Id.* at 78. Moreover, as this District Court earlier recognized in *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y. 1996), *aff’d*, 78 F.3d 44 (2d Cir. 1996), *cert. denied*, 517 U.S. 1203 (1996), “a presidential primary requires a kind of campaign that is very different from an ordinary campaign for local office.” *See also Anderson*, 460 U.S. at 795 (“the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State’s boundaries”). Applying the *Molinari* group of cases, including *Campbell v. Bysiewicz*, 242 F.Supp.2d 164 (D. Conn. 2003), to a convention system is not only putting a square peg in a round hole; it also threatens a party’s First Amendment associational

rights to select its own standard bearer as it sees fit, as discussed *supra* at Section II.B., and would be completely unprecedented.

Accordingly, because all candidates for Supreme Court justice have the option to petition directly onto the ballot in the general election, Plaintiffs' fundamental right to vote and associate is not implicated by New York's judicial election provisions, and Plaintiffs' First Amendment claims must fail.

**2. There Is No Constitutional Right To A Primary Election And Therefore No Fundamental Right To Vote Is Implicated**

Plaintiffs' claim that their fundamental right to vote is violated, which is predicated on burdens purportedly associated with New York's judicial election laws, essentially amounts to the argument that these laws are unconstitutional because they do not provide an opportunity for a primary election. (*See* Pl. Br. at 37-40). Plaintiffs claim that "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," (*id.* at 38), as they face hurdles, such as signature requirements, not just to place themselves on the ballot, but just to place slates of delegate candidates onto the ballot, (*id.* at 37). As support for their argument, Plaintiffs allege that New York's judicial election provisions "impose heavier burdens on the First Amendment rights of candidates and voters than the trial court selection requirements of any other state," (*id.* at 39), because, of the states that elect their judges, New York is the only state that does not utilize a *primary election*, (*id.* at 39, 25-26). Plaintiffs also allege that the statutes governing judicial selection for Supreme Court justice impose more severe burdens than ballot access rules for any other elective office within New York, including other judgeships, (*id.* at 39-40, 26-31), as the "Supreme Court is the *only* elective office without the opportunity for a primary election in which candidates may compete before voters," (*id.* at

39-40, 28-29) (emphasis in original). At bottom, Plaintiffs are merely attacking the fact that New York does not provide a primary election for nomination of Supreme Court justices.

But Plaintiffs' argument is fatally flawed because there is no constitutional right to a primary electoral system. The Supreme Court has squarely held that states may utilize conventions rather than primaries as a means for selecting party candidates for elective office. *See American Party of Tex. v. White*, 415 U.S. 767 (1974). In *White*, the Supreme Court rejected a challenge to a Texas ballot qualification system under which the major political parties were required to nominate candidates by primary elections, smaller parties could use either primaries or nominating conventions, and new and even smaller parties had to use precinct nominating conventions in the first instance. *Id.* Justice White, writing for seven other Justices, stated:

[i]t is too plain for argument . . . 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.

*Id.* at 781 (citing *Storer v. Brown*, 415 U.S. at 733-736) (emphasis added); *see also Storer*, 415 U.S. at 735 (the State is within its rights to reserve "[t]he general election ballot . . . for major struggles . . . [and] not a forum for continuing intraparty feuds"); *Trinsey v. Commonwealth of Pa.*, 941 F.2d 224, 234 (3d Cir. 1991) (according to "available precedent . . . the Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states") (quoting *White*, 415 U.S. 767).

Indeed, just this month, United States District Judge McMahon in the Southern District of New York, addressed a constitutional challenge to New York election statutes providing for vacancies for town offices to be filled by appointment if the vacancies arise too late for a primary. *Shapiro v. Berger*, No. 04 Civ. 5895(CM), 2004 WL 1769078 (S.D.N.Y. Aug. 5, 2004). Plaintiff claimed that the statutes in question deprived voters and rank-and-file members of the

Democratic party rights to ballot access and to vote, as guaranteed by the First and Fourteenth Amendments. In rejecting the challenge, the court relied on *White* as “confirm[ing] the right of a State to provide for party conventions as an alternative to primaries as a means for selecting party candidates for public office.” *Id.* at \*6.

*White* thus confirms the right of a State to provide for conventions as an alternative to primaries as a means to resolve intraparty disputes in selection of candidates for elected office. Accordingly, Plaintiffs’ argument, which amounts to the bare claim that the New York system is unconstitutional because it does not provide for a primary election for Supreme Court, fails as a matter of law.

**C. In Any Event, The New York Electoral System Does Not Violate The First Amendment Right To Vote And Associate**

Plaintiffs argue that New York State’s judicial election statutes violate the fundamental right to vote by imposing severe burdens on candidates and voters, and that these statutes must, therefore, be strictly scrutinized to determine whether they are narrowly tailored to serve a compelling state interest. (Pl. Br. at 35). Plaintiffs further contend that the selection provisions do not serve any compelling, or even important, state interest. (*Id.* at 41). Plaintiffs are wrong on both counts.

Under New York State’s judicial electoral system, a “reasonably diligent” candidate suffers absolutely no injury as she will not be denied access to the general election ballot. Because there is an alternative means of ballot access, New York’s judicial convention system does not unreasonably interfere with an individual’s right to vote and associate. Therefore, the State’s numerous compelling and legitimate interests amply justify any restrictions associated with New York’s statutory convention system.

**1. Plaintiffs Suffer No Injury Under New York's Electoral System For Supreme Court**

**a. An Alternative Means To Ballot Access Is Provided Under New York Law Which Means That Plaintiffs Suffer No Constitutional Injury**

As discussed above, the first step of a First Amendment analysis requires consideration of the "character and magnitude of the asserted injury to the rights protected by the First . . . . Amendment[]." *Anderson*, 460 U.S. at 789. (*See* Section IV.A., *infra*). Here, the purported injury is depriving candidates of a place on the ballot as a member of their own party in the general election. (*See* Pl. Br. at 35). However, as discussed above, New York's ballot access provisions do not preclude candidates who are not endorsed by major political parties from gaining enough delegate support to win their party's nomination through the judicial convention process. And under New York law, all candidates for Supreme Court justice have the option of directly petitioning onto the ballot in the general election or running as a minor party candidate.

In fact, Plaintiff Lopez Torres, herself, demonstrates that there is no constitutional injury. Lopez Torres' name appeared on the general election ballot as follows:

**OFFICIAL BALLOT FOR THE GENERAL ELECTION**  
**City of New York - County of Kings - November 4, 2003**

|   | <b>A</b> <b>Republican</b>   | <b>B</b> <b>Democratic</b>                             | <b>C</b> <b>Independence</b> | <b>D</b> <b>Conservative</b>                             | <b>E</b> <b>Working Families</b>                             |
|---|--|--|------------------------------|--|--|
| 1 | Bruce M. Baiter<br><small>1A Republican</small>                                | Bruce M. Baiter<br><small>1B Democratic</small>        |                              | Bruce M. Baiter<br><small>1D Conservative</small>        | Margarita Lopez Torres<br><small>1E Working Families</small> |
| 2 | Theodore T. Jones, Jr.<br><small>2A Republican</small>                         | Theodore T. Jones, Jr.<br><small>2B Democratic</small> |                              | Theodore T. Jones, Jr.<br><small>2D Conservative</small> | Theodore T. Jones, Jr.<br><small>2E Working Families</small> |
| 3 | Michael L. Pesco<br><small>3A Republican</small>                               | Michael L. Pesco<br><small>3B Democratic</small>       |                              | Michael P. Tempesta<br><small>3D Conservative</small>    | Rosemary Palladino<br><small>3E Working Families</small>     |
| 4 | Justices of the Supreme Court<br><small>4A Republican</small>                  | Herbert Kramer<br><small>4B Democratic</small>         |                              | Marlo Romano<br><small>4D Conservative</small>           | Herbert Kramer<br><small>4E Working Families</small>         |
| 5 | Jueces de la Corte Supreme<br><small>5A Republican</small>                     | Martin M. Solomon<br><small>5B Democratic</small>      |                              |  | Robert Newman<br><small>5E Working Families</small>          |
| 6 | Vote for any EIGHT<br>Vote pour cualquier OCHO<br><small>6A Republican</small> |  |                              | Michael V. Ajello<br><small>6D Conservative</small>      | Alexander Eisenmann<br><small>6E Working Families</small>    |
| 7 |  | Arthur M. Schack<br><small>7B Democratic</small>       |                              | Arthur M. Schack<br><small>7D Conservative</small>       | Lyle Silvermith<br><small>7E Working Families</small>        |
| 8 | Ralph J. Porzio<br><small>8A Republican</small>                                | Raymond Guzman<br><small>8B Democratic</small>         |                              | Ralph J. Porzio<br><small>8D Conservative</small>        |  |
| 9 | Helene Donlan Sacco<br><small>9A Republican</small>                            | Barnadette F. Bayne<br><small>9B Democratic</small>    |                              | Helene Donlan Sacco<br><small>9D Conservative</small>    |  |

SP  
 NEW YORK COUNTY CLERK  
 100 NASSAU ST. (12th Fl.)  
 NEW YORK, NY 10038  
 TEL: (212) 467-5300

(Tab 5).

Because Plaintiff Torrez Lopez was on the ballot, her supporters could vote for her. Their fundamental right to cast their votes effectively was not impaired. Lopez Torres' supporters retained their freedom to associate for the advancement of their political beliefs, with candidate Lopez Torres, and her campaign, available as a rallying point.

Notwithstanding that, like Plaintiff Lopez Torres, candidates for Supreme Court justice can access the ballot as a minor party candidate, or even by means of the independent nomination petition, Plaintiffs complain that if Plaintiff Lopez Torres "does not have the [county party] leaders' support, the voters will never see her name on any ballot, and she will have literally no chance of being elected." (Pl. Br. at 10). In addition to overlooking Plaintiff Lopez Torres' name on the ballot, Plaintiffs also overlook the fact that there is no fundamental right to

be a candidate in the first place. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) (“Far from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny’”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). If there is no fundamental right to be a candidate, clearly there is no constitutional right to win an election.<sup>4</sup>

**b. Signature Requirements For Delegates Are Not Unduly Burdensome And Give Rise To No Constitutional Injury**

As discussed above, the purported burdens associated with collecting signatures for delegate and alternate delegate candidates is simply Plaintiffs’ attempt to argue that they are constitutionally entitled to a primary system. Again, Plaintiffs are wrong because there is no constitutional right to a primary system and, for this reason, Plaintiffs suffer no constitutional injury under New York’s judicial election scheme. In any event, it bears noting that the signature requirements for delegate and alternate delegate candidates, in and of themselves, do not present a burden of constitutional magnitude. As Plaintiffs rightly point out, for most Assembly Districts, delegate and alternate delegate candidates must collect valid signatures from at least 500 voters enrolled in the relevant party to appear on the September ballot. (Pl. Br. at 13). On a cumulative basis, this means that 4,000 to 12,000 valid signatures must be collected in each judicial district (or 12,000 to 36,000 indulging Plaintiffs’ allegation that candidates must amass triple the number of signatures required to resist legal challenges). (*Id.* at 13-14). The Supreme

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<sup>4</sup> Plaintiffs also complain that political party endorsements further hinder an independent candidate’s ability to win in the general election. (*See, e.g.*, Pl. Br. at 24). However, endorsements by political parties are constitutional. Indeed, the Supreme Court has explicitly protected the right of political party organizations to campaign actively for some party candidates at the expense of other party candidates. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (“Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association”). Nor is there a constitutional question raised by cross-endorsements of candidates as such endorsements do not interfere with voters’ right to associate with and vote for candidates of their choice in the general election.

Court has upheld signature requirements comparable to and, in some cases, far in excess of the number of signatures required for judicial delegates for New York's judicial convention.

For example, in *American Party v. White*, 415 U.S. 767 (1974), the Court upheld a Texas ballot access statute that required political parties to have secured 2% of the vote in the previous general election, and to file nomination petitions signed by registered voters equaling at least 1% of the votes cast in the prior election. *Id.* at 776. The Court pointed to the fact that the qualification requirements did not freeze the political status quo, noting that two of the plaintiffs had previously satisfied them and qualified for a place on the ballot. *Id.* at 787-88 (“[Texas] affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more”). The Court found that the 1% signature requirement amounted to approximately 22,000 signatures, *id.* at 776, but said it was “neither unreasonable nor unduly burdensome,” to require potential candidates to obtain 22,000 signatures within 55 days. *Id.* at 787, n.18. Given that time span, signatures would have to be obtained only at the rate of 400 per day to secure the entire 22,000, or four signatures per day for each 100 canvassers – only two each per day if half the 22,000 were obtained at the precinct conventions on primary day. *Id.* at 786. The Court was “wholly unpersuaded” that the convention process is “invidiously more burdensome than the primary election.”<sup>5</sup> *Id.* at 768.

Similarly, in *Storer v. Brown*, 415 U.S. 724 (1974), the Court was asked to determine the reasonableness of a California statute that “absolutely denie[d] ballot position to independent candidates who, at any time within 12 months prior to the immediately preceding primary

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<sup>5</sup> Plaintiffs assume that if there were a primary as part of the system for electing Supreme Court justices in the State of New York, that such a primary would necessarily provide an opportunity for multiple candidates to win a spot on the general election ballot as the relevant party's nominees. This assumption is groundless, as a primary as easily could provide only for a single primary winner.

election, were registered as affiliated with a qualified political party,” *id.* at 757 (Brennan, J., dissenting), and required independent candidates to collect signatures from 5% of the total votes cast in California at the last general election within a 24-day period. *Id.* at 738-39. The Court approximated that this amounted to gathering 325,000 signatures in 24 days. *Id.* at 739. While the Court remanded to determine whether the available pool of signers might render the signature requirement unduly burdensome, nevertheless, the Court stated that “[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden.” *Id.* at 740. The Court reasoned that an independent candidate should be able to attract 1,000 volunteers who would gather fourteen signatures per day for twenty-four days, in order to fulfill a state signature requirement of 325,000 signatures. *Id.*

Even putting aside such Supreme Court precedent, here, Plaintiffs are confusing the relevant inquiry, which does *not* concern signature requirements for judicial convention delegates, but signature requirements for gaining access to the general election ballot. Indeed, the only constitutional issue concerns whether there is an opportunity for ballot access.<sup>6</sup> Here, in addition to the opportunity to run as a minor party candidate, an independent candidate for Supreme Court justice in the First Judicial District need collect no more than 4,000 signatures and candidates in all other Judicial Districts only need to collect 3,500 signatures. *See* Election Law Section 6-142.2. Plaintiffs fail to mention these facts.

**c. There Is No Constitutional Injury Based On Voter Confusion Regarding Delegates**

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<sup>6</sup> In this regard too, the analysis the Court undertook in *Storer* is instructive. The *Storer* Court reviewed the entire California electoral scheme and found that independent candidates who failed to qualify for the ballot could “nevertheless resort to the write-in alternative provided by California law,” *id.* at 737 n.7, and thus held that the provisions did not make it “virtually impossible” for new candidates and parties to appear on the ballot. *Id.* at 728 (quoting *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)).

Plaintiffs also argue that including the names of delegates without identifying the delegate with a particular candidate for Supreme Court justice is unconstitutional because it causes voter confusion. (*See* Pl. Br. at 9 (“it is impossible for voters to tell which delegate candidates support [which candidate]”); *see also id.* at 42). Plaintiffs’ argument fundamentally misunderstands that delegates are elected to represent the interests of voters in an Assembly District, not to act as proxies for an individual judicial candidate. Where there are multiple vacancies, for instance, delegates are called upon to vote on multiple judicial candidates. As the accompanying Declarations show, delegates have the right and often the proclivity to exercise independent judgment in selecting candidates. Delegates frequently view their charge to vote not for particular candidates but for whichever candidates will best advance the interests of the constituents in the particular district. Those interests can be racial, ethnic, geographic, or of almost any nature, depending on the demographics and political will of each Assembly District.

In *New York State Democratic Party v. Lomenzo*, 460 F.2d 250 (2d Cir. 1972), the Second Circuit rejected the argument that voter confusion constitutionally required placing, alongside the names of candidates for delegate and alternate delegate, the name of the candidate whom the delegate and alternate delegate ultimately intended to support for nomination at the party convention. *Id.* at 251. In that case, the court went on to state,

[t]he determination of what should be included [on a ballot] is a state function. Given the wide latitude which the state has in deciding the manner of conducting elections, and, therefore, both the form and content of the ballot, appellee’s prohibition against this type of information or designation appearing on the ballot does not raise a substantial constitutional question.

*Id.* at 251-252.

2. **A Limited Burden Associated With New York’s Judicial Election System Need Be Justified Only By A Legitimate State Interest And Here Numerous Compelling State Interests Are At Stake**

Assuming there is injury – and none is shown here – the next step of a First Amendment analysis is for the Court to determine the legitimacy and strength of the state’s interest in burdening these freedoms. The Supreme Court has consistently held that where a challenged law imposes “reasonable, nondiscriminatory restrictions” on voters’ protected rights, then it need only be reasonably related to a legitimate state interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788). In such cases, “the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* (quoting *Anderson*, 460 at 788). Here, the judicial convention process is not the only way for a judicial candidate to appear on the ballot, and therefore the election laws which govern this process do not unreasonably interfere with the right of voters to associate with and have candidates of their choice appear on the ballot. Thus, the judicial convention system is amply justified by New York’s legitimate and, indeed, compelling state interests.

The Supreme Court has upheld a wide range of election laws that imposed limited and even severe burdens on the right of association. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-365 (1997) (state interests in protecting integrity, fairness and efficiency of ballots and election processes justified law prohibiting individual from appearing on ballot as a candidate for more than one party); *Burdick v. Takushi*, 504 U.S. 428, 440 (1992) (finding legitimate state interests in prohibiting “write-in” voting for primary and general elections); *Rosario v. Rockefeller*, 410 U.S. 752, 761-762 (1973) (upholding time limitation for voter to enroll in party and vote in party primary because state had legitimate interest in maintaining integrity of electoral process); *Storer v. Brown*, 415 U.S. 724, 736 (1974) (recognizing compelling state interest in upholding law denying independent candidate a ballot position in the general election if they were affiliated with a political party during the year prior

to the primary); *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (holding state interest in maintaining integrity of the state's Justices of the Peace justified requiring justices to wait until their terms expired before running for legislature); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-197 (1986) (recognizing state interest in restricting access to general ballot justified conditioning access to ballot on a showing of a modicum of voter support).

**a. New York's Judicial Convention System Promotes Compelling State Interests, Including Protecting Parties' First Amendment Right To Associate And Ensuring Diversity**

Here, the State of New York has several compelling and legitimate interests in enforcing New York's judicial election provisions. First and foremost, as discussed *supra* at Section II.B., the State has a compelling interest in protecting the constitutional right of association of the New York Democratic and Republican parties. The United States Supreme Court has repeatedly made clear that the constitutionally protected right of association of political parties and their members, including the right to determine the process of selecting their party nominees, must be respected by the States. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986).

Second, the State has a legitimate interest in preserving the convention system because it promotes the nomination of candidates who reflect the geographic diversity of localities within a judicial district. For example, in the Eighth Judicial District, candidates from counties outside of Erie County would have little hope of winning a Democratic Party nomination for Supreme Court if those candidates were required to compete in a general primary, since the overwhelming majority of registered Democratic voters in the judicial district reside in Erie County. (*See Ward Decl.* at ¶ 19). Under the current convention system, however, a candidate from an outlying county has an opportunity to garner delegate support across county lines by forming coalitions

with other candidates from either Erie County – the largest county with the most judicial delegates – or other counties within the Eighth Judicial District. Indeed, in the 2000 Eighth District judicial contest, the candidate from Niagara County, Paul Crapsi, was able to obtain a party nomination because he was part of a coalition slate of candidates, which overcame the slate of candidates backed by the then-Erie county leader. (*See id.* at ¶¶ 13, 19).

Third, the convention system ensures that minorities have the opportunity to win the nomination and a seat on the Supreme Court because by its nature, the convention process is a representative system that lends itself well to coalition-building. Delegates are elected to represent the interests and values of their constituencies and to vote for the most qualified judicial candidates who reflect those interests and values. In doing so, they are permitted to form coalitions with other delegates to ensure that their candidates are successful in winning the nominations for Supreme Court. Thus, for example, in the 2002 judicial election in New York County, the six nominees who captured the Democratic party nominations and went on to win the general election for Supreme Court, included an African-American female (Carol Edmead), a Hispanic male (Relando Acosta), an Asian-American female (Doris Ling-Cohan), a white male (Richard Price), a lesbian, disabled female (Rosalyn Richter), and an African-American female (Troy Webber). (*See Giske Decl.* at ¶ 19). And in the case of Rosalyn Richter, her victory was the result of her ability to garner the firm support of a bloc of ten delegates from her Assembly District and parlay that support into a county-wide coalition. (*See id.* at ¶ 15). Notably, of the thirty-eight Supreme Court justices sitting in New York County today, twenty-two are women, nine are African-American, four are Hispanics, two are Asian-American, and three are openly gay (females). (*See Levinsohn Decl.* at ¶ 23). Surely, the State has a legitimate interest in ensuring that the bench remains this diverse.

Fourth, the convention system ensures that qualified incumbent Supreme Court justices remain on the bench without having to (a) expend significant sums of money for a primary campaign, (b) re-engage in politics after being politically inactive for fourteen years, and (c) fear adverse consequences of making politically unpopular but correct decisions. (*See id.* at ¶¶ 14, 28). The current system insulates sitting justices, who have been prohibited from engaging in a wide range of political activity during most of their tenure, from campaigning at least on the primary level. (*See id.* at ¶ 28). Given the huge docket that sitting justices have, it would be unfair to require sitting justices to engage in a primary campaign, which would entail raising significant funds and extensive politicking. Thus, the convention system safeguards sitting justices from being defeated for re-nomination in a direct primary by insurgent candidates who are willing to expend large sums of money and run a demagogic campaign. (*See id.*). The system also safeguards sitting justices from feeling pressured to make politically expedient decisions in order to garner support for a primary campaign. Certainly, a system designed to ensure that qualified incumbent justices have a fair opportunity to remain on the bench serves a legitimate state interest.

**b. Plaintiffs Also Have Not Demonstrated That Compelling And Legitimate State Interests Are Absent**

Plaintiffs raise four points in support of their contention that New York's current Supreme Court selection system fails to satisfy any recognizable state interest test, each of which is unavailing. (Pl. Br. at 41-45). First, Plaintiffs contend that the current Supreme Court justice selection system fails to "facilitat[e] the voters' choice of their justices [b]y taking the process almost entirely out of voters' hands." (*Id.* at 41). Plaintiffs are simply wrong. The current system absolutely involves the voters. Voters in the local Assembly Districts across the state choose their representative delegates to select the most qualified candidates to be the party

nominees. Nothing precludes these voters from participating in the local political clubs where the choice of delegate candidates is contested. Moreover, once the judicial nominees are chosen by the delegates at the convention, the general electorate has the opportunity to cast their vote at the polls on election day.

Plaintiffs' claim that the "judicial convention system plainly provides no measure of a candidate's support among voters or even party members" is equally unavailing. (*Id.* at 41). In proffering their argument, Plaintiffs assert that delegate races are rarely contested and that voters are denied the opportunity to demonstrate support for delegate candidates. (*Id.* at 41-42). Again, Plaintiffs are simply wrong. In the First Judicial Department, for example, delegate choices are vigorously contested at local political club meetings, and it is not unusual for competing slates of candidates to be presented in the primary. (*See* Levinsohn Decl. at ¶¶ 16, 19). Indeed, this was the case in the 2002 judicial race in New York County where there were rival slates of delegates from the 66<sup>th</sup> Assembly District, supported by different political clubs, vying for the delegate seats. (*See* Giske Decl. at ¶¶ 11-15). Likewise, in the 2000 judicial contest in the Eight Judicial District, every Assembly District in Erie County and Niagara County had a contested primary for delegate and alternate delegate seats. (*See* Ward Decl. at ¶ 11).

Plaintiffs further complain that the ballot for delegates "provides no hint of a delegate candidate's support for a particular Supreme Court candidate." (Pl. Br. at 42). That the delegate candidates named on a ballot at the primary are not linked to any judicial candidates simply illustrates that the delegate candidates are not wedded to any particular judicial candidate and that the winner of the party nomination is not a pre-ordained fact. (*See* Levinsohn Decl. at ¶ 21). The mere absence of the judicial candidates' names from the ballot does not mean that the

judicial candidates who are nominated have no modicum of support from the voters.<sup>7</sup> To the contrary, the voters directly elect delegates who represent their constituencies' interests and preferences, and the delegates, in turn, vote for the most qualified judicial candidates who most closely reflect those interests and preferences. Further, there is nothing precluding voters from participating in the delegate races, engaging delegate candidates before the primary and expressing their preferences for particular Supreme Court candidates.

Plaintiffs' third contention that the current convention system causes voter confusion is unfounded. (Pl. Br. at 43). As support, Plaintiffs' rely on a Marist poll showing an apparent disparity between the percentage of voters who correctly responded that County and Civil Court judges are elected and the percentage of voters who incorrectly believed that Supreme Court justices are appointed. (*Id.* at 43). But the fact that voters are allegedly confused as to the manner of selection does not mean the process is confusing. The apparent confusion suggested by the Marist poll – to the extent it was even conducted properly – can just as easily be explained by (1) the moniker “Supreme Court” and (2) the complexity of the State Supreme Court system itself, not the judicial selection process. The moniker “Supreme Court” generally connotes the highest court in the state or the highest court in the country, the judges of which are commonly known to be appointed. But in New York, the “Supreme Court” is a trial court of general original jurisdiction, as well as an intermediate appellate court. While all Supreme Court justices are elected, all of those serving on the four Appellate Divisions are appointed by the governor.

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<sup>7</sup> Also, Plaintiffs contrast the widespread support that Plaintiff Lopez Torres obtained in her re-election to the Civil Court with her inability to win the Democratic Party nomination for Supreme Court in an attempt to demonstrate that the current Supreme Court justice selection system fails to ensure a modicum of support for the Supreme Court candidates on the ballot. (Pl. Br. at 42). But apparently, Plaintiffs fail to appreciate that Civil Court judge is a different office from Supreme Court justice. Just because Lopez Torres had widespread support for the lower Civil Court office does not automatically mean that she would have the same support or that she would even be qualified for the higher Supreme Court office. If that were the case, she should have won the Supreme Court seat the year she ran on the Working Families' ticket.

Further, numerous lower court judges, are appointed as Acting Supreme Court justices by the Chief Administrator of the Unified Court System. Thus, it is more likely that any confusion that voters might have with respect to how candidates become judges stems not from the party convention system, but from the name and complex structure of the Supreme Court itself. Certainly, there is nothing in the Marist poll that would suggest otherwise.

Lastly, Plaintiffs' belief that delegates and candidates are "hand-pick[ed]" by political leaders "without regard to their support among party members or voters" is unfounded. (Pl. Br. at 44). As Robert Levinsohn attests in his Declaration, the party leader cannot simply impose his will even if he wants to, particularly where there is widespread support for a particular judicial candidate. (*See* Levinsohn Decl. ¶ 23). The judicial selection process is a consensus building exercise. Thus, the party leader monitors the process and participates in building consensus in order to ensure that no particular faction captures all of the party nominations and that all groups meaningfully participate and share in the convention outcome. *See id.* In this way, the voters' interests are effectively represented in the selection process.

In sum, the current system does not impose severe burdens on voters or candidates and, indeed, serves several compelling, not to mention legitimate, state interests. Accordingly, the Court should reject Plaintiffs' attempt to abolish New York State's judicial convention system.

**V. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM**

Under the Supreme Court's equal protection jurisprudence, a heightened level of scrutiny is only applicable where the statutes in question burden a "fundamental" right or "suspect class" of persons, neither of which is implicated here. *See, e.g., Clements v. Fashing*, 457 U.S. 957, 963 (1982). As discussed above, there is no fundamental right involved in this case. The issue, therefore, concerns whether either of the classifications on which Plaintiffs' equal protection

claims depend, in fact, constitutes a suspect category. However, neither a classification by elective office nor a purported classification based on a candidate's level of party support are suspect. (*See* Pl. Br. 45-46). Because there is no suspect class burdened in this case, rational basis review is the appropriate standard. The challenged statutes clearly are rationally related to numerous compelling, not to mention legitimate, state ends, which have already been discussed in detail above. *See supra* at IV.C.2. And Plaintiffs' attempt to base an equal protection claim on vote dilution or "devaluation" cannot salvage a fatally deficient equal protection claim. (*See* Pl. Br. at 46).

**A. The Standard For Rational Basis Review**

It is well-settled that states are allowed "considerable leeway" under the Equal Protection Clause to enact legislation that appears to affect similarly situated people differently. *Clements*, 457 U.S. at 962-63. "Legislatures are ordinarily assumed to have acted constitutionally." *Id.* at 963. Under traditional equal protection principles, distinctions must only "bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no ground can be conceived to justify them." *Id.* at 963 (citing cases). In evaluating the constitutionality of a challenged statute under equal protection, the Supreme Court has departed from traditional rational basis review and applied strict scrutiny "only when the challenged statute places burdens upon 'suspect classes' of persons or on a constitutional right that is deemed 'fundamental.'" *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)) (emphasis added). Thus, where, as here, there is no fundamental right implicated, strict scrutiny could only apply if a suspect class exists.

"Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution."

*Clements*, 457 U.S. at 967 (citation omitted). In the context of cases involving ballot access restrictions, courts “focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the ‘availability of political opportunity.’” *Id.* at 964 (citing *Lubin v. Panish*, 415 U.S. 709, 716 (1974)).

**B. The Challenged Statutes Are Subject To Rational Basis Review, Not Strict Scrutiny, Because There Is No Suspect Classification At Issue Here**

**1. Classification By Office Is Not A Suspect Class**

Notwithstanding Plaintiffs’ claim that “the Equal Protection Clause forbids arbitrary differences in the treatment of candidates for Supreme Court and those for every other office,” (Pl. Br. 45-46), treating Supreme Court judgeships differently from other elective offices is neither arbitrary nor suspect. *See, e.g., Anderson v. Quinn*, 495 F.Supp. 730, 733 (D. Me. 1980) (“[p]lainly, the burdens imposed on independent Presidential candidates must be compared with those imposed on other candidates for the same office, not with candidates for other offices who are elected through an entirely different process”). The purported classification does not exclude candidates for Supreme Court who are not endorsed by their party from the electoral process because, as discussed above, all candidates for Supreme Court justice have unfettered access to the ballot in the general election as independent or minor party candidates. Therefore, there is no burden on the “availability of political opportunity” for either the candidates themselves or the voters who wish to support them. Accordingly, there is no suspect class.

Indeed, courts have recognized that the election of the judiciary poses unique issues, which are not required to be addressed in the same fashion as the elections of other government officials from the executive or legislative branches. *See, e.g., New York State Ass’n. of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (recognizing the “general policy of the

federal judiciary of refusing to interfere with the internal administration by the states of their court systems” and holding that the “one person one vote” doctrine applicable to the legislative branch does not apply to the election of the judicial branch). As discussed in greater detail in the Memorandum of Law of The Associations, New York’s convention system promotes several compelling interests in treating New York Supreme Court judgeships differently from other elective offices and from other judgeships. For example, it is not unreasonable for the Legislature to determine that the enormous expense of a primary election, and the limitations the law places upon the ability of an incumbent Judge to “campaign,” make the convention method of nomination superior to the open primary method. Nor is it unreasonable to choose a different method for selection of Supreme Court nominees than for other Courts as the New York Supreme Court is the State’s highest Court of original jurisdiction, which hears the most complex and important state cases.

Plaintiffs’ sole source of authority for its equal protection argument is *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), where Plaintiffs point out that there were different signature requirements for candidates in citywide elections as compared to statewide elections. (Pl. Br. 46). While the Court took into account that discrepancy and ultimately found an equal protection violation, the fundamental right to vote was at stake as the signature requirements precluded independent and minority party candidates from gaining access to the ballot. *See Illinois State Bd.*, 440 U.S. at 184-186. In applying strict scrutiny to analyzing the signature requirements, the Court considered the requirements of other elective offices solely for the purpose of determining whether the requirement at issue was the “least restrictive means” to achieve the State’s interest. *Id.* at 186. The Court, in its decision, never found the existence of

a suspect class. Because our case does not involve the implication of a fundamental right to vote as there is no denial of ballot access, *Illinois Board* is clearly inapposite.<sup>8</sup>

**2. Candidates Who Ultimately Are Not Endorsed By Their Party Are Not A Suspect Class, And Plaintiffs' Claim Of Vote Dilution Or "Devaluation" Also Fails**

In an effort to save their feeble equal protection claim, Plaintiffs also argue that the practical effect of allegedly burdening "challenger candidates and their supporters far more than party-backed candidates" is to "devalue the votes of their supporters relative to those cast by their fellow voters." (Pl. Br. 46). Plaintiffs' argument is completely unavailing. As an initial matter, there is no classification here, let alone the existence of a suspect class. There is no *a priori* determination of who is a "challenger" candidate and which candidate ultimately wins party support. At the outset, any candidate can gain party backing. There is no discrimination or arbitrary classification which prevents this. The fact that a convention system favors those candidates who can win party backing does not create a colorable equal protection claim.

In any event, Plaintiffs' assertion that the selection requirements burden the candidate who does not win their party's nomination as a class more than party-backed candidates is simply false. The requirements for candidacy are the same for all candidates regardless of whether they have party-backing. *See Jackson v. Ogilvie*, 325 F. Supp. 864, 869 (D.C. Ill. 1971), *summarily aff'd*, 403 U.S. 925 (1971) (holding that there is no Equal Protection violation where "different logistics are involved in an independent's attempt to run for office as compared with a member of a political party" because the requirements for candidacy for the party-backed

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<sup>8</sup> It also bears noting that while the Supreme Court "has departed from traditional equal protection analysis in recent years in two essentially separate, although similar, lines of ballot access cases," *id.* at 964, neither of these situations applies here. The first involves classifications based on wealth, while the second "involves classification schemes that impose burdens on new or small political parties or independent candidates." *Id.* (citing *Illinois State Bd. of Elections*, *Storer*, *American Party of Tex.*, *Jenness*, and *Williams v. Rhodes*).

candidate and the independent are the same) (emphasis added).

While Plaintiffs' argument here is far from clear, to the extent that Plaintiffs are trying to assert a traditional vote-dilution claim, it inevitably must fail under *Wells v. Edwards*, 409 U.S. 1095 (1973). There, the Supreme Court affirmed a district court opinion that held that the principle of one-man, one-vote is not applicable in electing state court judges.<sup>9</sup> Alternatively, if Plaintiffs are attempting to advance a novel theory of vote "devaluation," this argument also falls short for much the same reason. As courts have recognized, "[i]t is the dilution of power in the vote of citizens situated in districts suffering from inadequate representation which brings into play the Equal Protection Clause." *New York Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153 (S.D.N.Y. 1967). Here, Plaintiffs simply do not claim that any of the voters in any of the Assembly Districts suffer from inadequate representation in this case. Quite to the contrary, as numerous delegates are elected from each Assembly District to represent the voters of their particular district at the convention, voters clearly have adequate representation.

Therefore, because it is clear that the challenged laws are neither "invidious, arbitrary, [n]or irrational," *Clements*, 457 U.S. at 967, Plaintiffs cannot demonstrate a likelihood of success on the merits of their equal protection claim.

### CONCLUSION

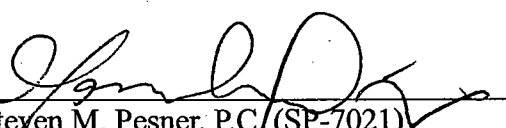
For the foregoing reasons, and for the reasons set forth in the Memoranda of Law of Defendants and intervenor Defendants, the Court should deny Plaintiffs the extraordinary and drastic relief they seek.

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<sup>9</sup> Lower courts had so held prior to the *Wells* decision. See e.g., *Holshouser v. Scott*, 335 F. Supp. 928 (D.C. Cir. 1971), *aff'd*, 409 U.S. 807 (1972); *New York Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967); *Stokes v. Fortson*, 234 F. Supp. 575 (N.D.Ga. 1964); *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Oh. 1960), *cert. denied*, 393 U.S. 839 (1968).

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