

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

Index No. CV 04-1129 (JG)

NEW YORK STATE BOARD OF ELECTIONS; NEIL W. KELLEHER,
CAROL BERMAN, HELENA MOSES DONOHUE, AND EVELYN J.
AQUILA, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF
THE NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK
REPUBLICAN STATE COMMITTEE, ASSOCIATION OF JUSTICES
OF THE SUPREME COURT OF THE STATE OF NEW YORK,
ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE
CITY OF NEW YORK, AND JUSTICE DAVID DEMAREST,
INDIVIDUALLY, AND AS PRESIDENT OF THE STATE
ASSOCIATION,

Defendant-Intervenors,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Statutory Intervenor.

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**PLAINTIFFS' PROPOSED FINDINGS
OF FACT IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTIVE RELIEF**

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I. Overview of the New York State Supreme Court Selection System

a. A Unique Three-Step Process

1. The Supreme Court is the trial court of general jurisdiction in New York State. N.Y. Const. Art. VI, § 7. Justices of the Supreme Court hear civil and criminal cases across the State, and also serve, when appointed by the Governor, in the four Appellate Divisions, which hear appeals as of right from trial court decisions and from administrative agencies. N.Y. Const. Art. VI, § 4.

2. New York State is one of 39 states that elect some or all of their trial courts of general jurisdiction. Out of those 39 states, nine states, including New York, select all of their general jurisdiction trial judges through partisan elections. In all of these states, but not in New York, the voters select their party's nominees for the general election in direct primary elections. Schotland Decl. ¶¶ 10-14.

3. Eighteen out of these 39 states select all of such judges through non-partisan elections that involve an initial non-partisan primary election and then, if necessary, a "general" or run-off election between the top candidates. Six out of the 39 states use an initial appointment system followed by a retention election at or near the end of the judge's term in which she faces no opponent, but rather a vote on whether she should be retained for an additional term. Six additional states employ various combinations of the three selection methods already identified. Schotland Decl. ¶¶ 10-14.

4. Unlike all other states in the country, New York uses a convention system to select its trial court (*i.e.*, Supreme Court) justices. Schotland Decl. ¶¶ 10-14. All party nominations for Supreme Court justice are required by law to be made by judicial district conventions. N.Y. Elec. L. § 6-106.

5. In all of the 33 states that elect some or all of their general jurisdiction trial court judges in contestable elections (*i.e.*, not those six states that use retention elections alone) – but not in New York State – candidates are provided the opportunity to be placed directly on a primary election ballot by filing a notice, gathering a reasonable number of signatures, paying a filing fee, or fulfilling some combination of these requirements. Pl. Ex. 13, 13(A)-13(H).

6. In addition, all other elected judges in New York State are nominated in a direct primary election, rather than in a judicial convention. *Compare* N.Y. Elec. L. § 6-106 *with* § 6-110. In fact, for *all* elective offices except Supreme Court justice, New York State allows candidates to petition onto a primary ballot by gathering signatures among the voters.¹ By contrast, N.Y. Elec. L. § 6-106 requires that the major parties select their Supreme Court candidates exclusively at a judicial convention in order to appear on the ballot. The absence of any alternate routes onto a ballot as a major party candidate, and of primary elections decided by voters, are unique among New York State's elective offices. Berger Decl. ¶ 19; Schotland Decl. ¶ 8.

7. In addition, for statewide offices in New York, the major parties select *additional* candidates for the primary election at a party convention in June. Whichever candidates obtain at least 25% of the convention delegates' votes are automatically

¹ New York State's Assembly and Senate candidates, as well as candidates for Civil Court (in New York City), city courts (in upstate cities like Rochester and Albany), and county courts (outside New York City), all obtain a place on the primary ballot by gathering signatures directly from voters. *See* N.Y. Elec. L. §§ 6-104, 6-106, 6-108, 6-110, 6-136, 6-168. Similarly, in statewide elections for U.S. Senator, governor, lieutenant governor, attorney general, and state comptroller, candidates can obtain a place on the Democratic or Republican Party primary election ballot by petitioning directly among voters, as well as by obtaining votes at a convention. *Id.*

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

8. The Supreme Court selection system is divided into three steps: (1) the election of judicial district convention delegates and alternates; (2) the judicial district convention; and (3) the general election. Berger Decl. ¶¶ 11, 40; Cain Decl. ¶¶ 7, 8, 10-15, 16.

b. The Judicial Districts

9. New York State is divided into 12 judicial districts. *See* N.Y. Jud. L. §140; Pl. Ex. 1-3. Each judicial district includes numerous Assembly Districts (“AD”), in whole or in part. Pl. Ex. 1-3. Judicial districts often include more than one county, but at present, no counties are divided between two or more judicial districts.²

c. Requirements for Office

² The 12 districts, with the counties that are included in each district listed in parentheses, are as follows: 1st Judicial District (New York); 2nd Judicial District (Kings, Richmond); 3rd Judicial District (Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan, Ulster); 4th Judicial District (Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren, Washington); 5th Judicial District (Herkimer, Jefferson, Lewis, Oneida, Onondaga (including Syracuse), Oswego); 6th Judicial District (Broome, Chemung, Chautauque, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga, Tompkins); 7th Judicial District (Cayuga, Livingston, Monroe (including Rochester), Ontario, Seneca, Steuben, Wayne, Yates); 8th Judicial District (Allegany, Cattaraugus, Chautauque, Erie (including Buffalo), Genesee, Niagara, Orleans, Wyoming); 9th Judicial District (Dutchess, Orange, Putnam, Rockland, Westchester); 10th Judicial District (Nassau, Suffolk); 11th Judicial District (Queens); and 12th Judicial District (Bronx). N.Y. Jud. L. § 140.

10. New York State has not required that Supreme Court justices reside, either before or after election, in the judicial district in which they are elected. Justices may also be assigned to sit in districts other than the one from which they are elected. N.Y. Const. Art. VI, § 26(a); Sise Tr. 1511-13. The only legal requirements for office are that the candidate must be a citizen of the United States, must reside within New York State, and must have been admitted to practice law in the State for at least ten years. N.Y. Pub. Off. L. § 3(1); N.Y. Jud. L. § 140-a.

d. Term of Office

11. The New York State Constitution provides that Supreme Court justices shall be elected for 14-year terms. N.Y. Const. Art. VI, § 6(c).

12. New York State's 14-year terms for Supreme Court justice are longer than those for all but one other state's trial court judges. Def. Ex. S (Roy Schotland, "Judicial Elections and State Court Reforms," in 2003 *Book of States* at 237 (published by The Council of State Governments)); *see also* Schotland Tr. 746:10 (New York term is "best in the nation").

e. The Number of Duly Elected Supreme Court Justices

13. The numbers of authorized positions for duly elected Supreme Court justices in each judicial district are as follows (N.Y. Jud. L. § 140-a):

Judicial District	Authorized Duly Elected Supreme Court Justices
First	38
Second	52

Third	15
Fourth	13
Fifth	17
Sixth	10
Seventh	18
Eighth	26
Ninth	26
Tenth	47
Eleventh	38
Twelfth	24

14. Judges of the Court of Claims, County Court, Surrogate’s Court, Family Court, Civil Court, and Criminal Court may be appointed to serve as Acting Supreme Court justices to hear specific cases or for a period of time within a specified jurisdiction. Sise Tr. 1508:12-15; N.Y. Const. Art. VI, § 26. While serving as Acting Supreme Court justices, these judges have the full “powers, duties and jurisdiction” of a Supreme Court justice. N.Y. Const. Art. VI, § 26(k).

15. New York State does not elect any of the judges of inferior trial courts that may serve as Acting Supreme Court justices using the judicial convention system for nominations. Judges of the Court of Claims are appointed by the Governor with the advice and consent of the Senate. N.Y. Const. Art. VI §9. Judges of the County Court, Surrogate’s Court, and Family Court outside of New York City are elected in partisan, county-wide elections following nominations by primary elections. N.Y. Const. Art. VI, §§ 10(a), 12(b), and 13(a); N.Y. Elec. L. § 6-110. Judges of the Civil Court are elected in partisan elections either county-wide or by districts, following nominations by primary elections. N.Y. Const. Art. VI, § 15(a); N.Y. Civil Ct. Act § 102-a; N.Y. Elec. L. § 6-110. Judges of the Criminal Court and the Family Court within New York City are appointed by the mayor. N.Y. Const. Art. VI, § 15(a); N.Y. Const. Art. VI, § 13(a).

II. The Selection of Judicial Delegates and Alternate Delegates

a. Overview

1. Selection By Assembly District (or Part Thereof)

16. While Supreme Court justices are selected at large by delegates from within the judicial district, those judicial delegates (and alternates) are selected separately from each Assembly District (“AD”) within that judicial district. *See* N.Y. Elec. L. § 6-124. In heavily populated areas, each judicial district contains many ADs. The Second Judicial District, for example, covers all of Brooklyn and Staten Island and includes 21 ADs in Brooklyn and three in Staten Island. Pl. Ex. 1-3. Typically, each AD in New York City includes its own political clubs whose political organizing and other activities are discreet from those in other ADs. Levinsohn Decl. ¶¶ 16-17.

17. New York State presently includes 150 ADs. Pl. Ex. 1-3. The boundaries of ADs are often not contiguous with county or judicial district lines. *Id.* As envisioned in the relevant provision of New York’s election law, “if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide,” then delegates and alternates are elected “separately from the part of such assembly district contained within each such county.” N.Y. Elec. L. § 6-124. At present, the Democratic Party in New York State does not divide ADs for purposes of electing delegates and alternates, except where the AD crosses judicial district lines. Pl. Ex. 14. The Republican Party does divide ADs along county lines, as well as judicial district lines, for purposes of electing delegates and alternates. Pl. Ex. 15.

2. The Role of Alternate Delegates

18. If a delegate elected from an AD or portion of an AD is not present at the convention, an alternate elected from that AD is called upon to serve as a voting delegate. N.Y. Elec. L. § 6-124. The alternates are selected to replace delegates in the order reflecting the number of votes they received in the election, if there was a contested election. *Id.*

19. Absentee rates for judicial delegates are significant. Using information from the delegate lists and the minutes, Dr. Bruce Cain was able to calculate the convention absenteeism rate for 16 conventions outside New York City between 1995 and 2002: *i.e.*, 32.3%. Within New York City, the numbers are similar. In 1999 and 2000, the two years for which data are available, the absentee rate for Democratic Party judicial conventions in New York City was 24.5%. For the three Republican Party conventions between 1999 and 2002 for which data are available, the average absentee rate was 69.1%. Cain Decl. ¶ 10. Senator Connor estimated that approximately “19 to 20 percent” of the delegates do not attend the convention for which they were elected in the Second Judicial District. Connor Tr. 2236:1-2; *see also* ¶ 151.

20. For this reason, alternates frequently are called upon to serve as delegates at the convention, and are virtually always run on the petitions circulated for delegates. Kellner Tr. 1575:16-18; Carroll Tr. 447:21-22; Giske Decl. ¶¶ 6, 11; Connor Tr. 2159:1-4. Justice Freedman, for example, testified that she contacted alternates “because a lot of times the alternates come to the convention, the delegates don’t come. A lot of times the

alternates get to vote.” Freedman Tr. 1786:14-17. Emily Giske has served as an alternate approximately seven times and voted at a convention 2-3 times. Giske Decl. ¶ 6.

21. If neither a delegate nor an alternate from an AD is present to fill a delegate seat at the judicial convention, state law allows the delegates from that AD, often overseen by district leaders, to appoint replacements. N.Y. Elec. L. § 6-124; Carroll Decl. ¶ 29. Such replacements are appointed without submitting their names (much less signed petitions) to the county board of elections. Connor Tr. 2159:7-13.

3. The Number of Delegates and Alternate Delegates

22. The Election Law grants to the political parties substantial control over the number of delegates and alternate delegates at the judicial convention,

but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state.

N.Y. Elec. L. § 6-124. The number of alternates from any district shall not exceed the number of delegates therefrom. *Id.*

23. The Democratic Party currently allots each AD one delegate and one alternate delegate, plus an additional delegate and alternate for each 2,500 votes cast for the party’s gubernatorial candidate at the most recent general election. The Republican Party follows the same formula for eight of the twelve judicial districts, but uses 4,000 votes

(rather than 2,500) as the multiplier in the Third and Fourth Judicial Districts, and 5,000 in the Seventh and Eighth Judicial Districts. Pl. Ex. 14, 15.

24. In 2004, for example, these formulas produced the following numbers of delegates and alternates in each judicial district, as listed in the Party Calls:

Judicial District	Democratic		Republican		Number of Assembly Districts within the Judicial District	
	Total Number of Delegates	Total Number of Alternates	Total Number of Delegates	Total Number of Alternates		
Non- NYC	3	41	41	50	50	11
	4	32	32	54	54	10
	5	35	35	81	81	12
	6	24	24	66	66	9
	7	43	43	48	48	11
	8	62	62	62	62	13
	9	76	76	139	139	17
	10	102	102	185	185	21
NYC	1	93	93	57	57	12
	2	124	124	98	98	24
	11	87	87	77	77	18
	12	63	63	32	32	11

Pl. Ex. 92(I) and 92(J); Pl. Ex. 1-3. Because the numbers of delegates are based on the number of votes in the preceding gubernatorial election, the numbers could be considerably higher following a more closely fought election.

25. The laws governing elections for other offices within New York State that involve conventions do not require the selection of nearly as many delegates. While two state committee members are elected from each AD to serve as to the statewide conventions in June to nominate candidates for Governor, U.S. Senator, and other statewide offices, frequently as many as 6-7 delegates are elected from each AD to nominate Supreme Court candidates. The presidential primaries elect roughly 5-6

delegates per congressional district -- approximately the same number of delegates as from the average AD in the Second Judicial District, despite the fact that congressional districts are typically more than three times larger than ADs. Berger Decl. ¶ 41.

4. No Indications on Ballot of Allegiance to Supreme Court Candidates

26. Unlike presidential delegates, New York's judicial delegates cannot appear on the ballot with any indication of their allegiance to a specific Supreme Court candidate. As a result, even if a Supreme Court challenger candidate were to petition successfully to place a supportive delegate candidate on the ballot, he or she would still be required to inform the voters through campaign literature or advertising of that delegate's allegiance. Further, the challenger would have to repeat that public education campaign in each AD for different slates of delegate candidates. Berger Decl. ¶ 16; Carroll Decl. ¶ 15; ¶¶ 287-92, *infra*.

b. Limited Ballot Contests

27. The overwhelming weight of evidence demonstrates that, in all judicial districts, delegates and alternates are usually selected without opposition from candidates who have petitioned to obtain a place on the September election ballot. As a result, for most voters in most years across the State, they do not even see a delegate's or alternate's name on the ballot when they vote and thus play no role whatsoever in choosing those who will serve in those positions.

28. In New York City, which the parties agree has more competition in delegate selection than any other part of the State (*see, e.g.*, Kellner Tr. 1600:7-10), from 1999 through 2003 only 12.7% of the judicial delegate seats filled by Democrats and Republicans were contested at the September elections. For Democrats, the dominant party within New York City, the figure was only 19.3% during that period. Pl. Ex. 97.

29. The testimony of many witnesses confirmed the paucity of delegate contests at the polls across the State. Freedman Tr. 1783:5-15; Kellner Tr. 1622:20 – 1623:12; Sise Tr. 1529:3-13; Ward Tr. 1372:3 – 1373:3; Schiff Tr. 1277:15 – 1278:3; 1298:5-14; Connor Tr. 2245:1-20; Berger Tr. 43:15-17; 45:20-22; 46:10-24; 80:16-25; Regan Tr. 396:22 - 397:3; Keefe Tr. 849:7-12; Ostrer Tr. 1407:17-19; *see also* Pl. Ex. 69 ¶ 60; Levinsohn Tr. 1912:2-11 (stating that he had been a delegate or alternate for 35 years without ever facing a contest at the primary). The extent of contested elections for delegates is summarized in Plaintiffs' Ex. 97.

30. The following paragraphs summarize the extent of contested delegate elections in the various judicial districts for which data were available. Except as specifically noted, they do not include alternates.

i. First Judicial District

31. From 1999 through 2003, there were 518 delegate positions in the Democratic Party. Pl. Ex. 92A, 92C, 92E, 92G. Despite the fact that this judicial district produces more contested elections for delegates than any other judicial district, nevertheless only 212 (40.9 %) were filled through contested elections. Pl. Ex. 18-22. There were no years

in which a majority of the delegate positions were filled through contested elections. *Id.* In the same time period, there were 241 Republican delegate positions. Pl. Ex. 92B, 92D, 92F, 92H. None of the Republican delegates were elected in contested elections. Pl. Ex. 18, 19, 20, 21, 22.

ii. Second Judicial District

32. From 1999 through 2003, the Democratic Party had 670 delegate positions. Pl. Ex. 92A, 92C, 92E, 92G. Only 65 (9.7 %) were filled through contested elections. Pl. Ex. 18-22. In the same time period, there were 442 Republican delegate positions. Pl. Ex. 92B, 92D, 92F, 92H. Only 8 (1.8 %) of the Republican delegates were elected in contested primaries. Pl. Ex. 18-22.

iii. Third Judicial District

33. In the years for which information was available, 1999 through 2002, no contests for judicial delegates or alternates took place in Albany County. Pl. Ex. 53. Albany County includes 35.4 % of the voting-age population of the Third Judicial District. Pl. Ex. 82.

iv. Fourth Judicial District

34. Justice Sise testified that he was “not aware of contested primaries” for judicial delegates in the Fourth Judicial District. Sise Tr. 1529:3-13.

v. Seventh Judicial District

35. Judge Regan testified that his effort to run delegate candidates in 1994 was “the only contested delegate race within the Seventh Judicial District of which I am aware in the many years I have been in Rochester.” Regan Decl. ¶ 23; Regan Tr. 396:22 – 397:3.

vi. Eighth Judicial District

36. Mr. Ward testified that, with the exception of 2000 and 2004, there have been no contested elections for delegates in this judicial district at least from 1995 through 2004. Ward Tr. 1372:3 – 1373:3.

vii. Ninth Judicial District

37. Mr. Ostrer testified that, in his experience, “there has never been a contested delegate or alternate race” in this district. Ostrer Decl. ¶ 9; Ostrer Tr. 1407:17-19.

viii. Tenth Judicial District

38. There were no contested delegate or alternate delegate elections for either party between 1999 and 2002, the years for which information was available. Pl. Ex. 53.

ix. Eleventh Judicial District

39. From 1999 through 2003, the Democratic Party had 498 delegate positions. Pl. Ex. 92A, 92C, 92E, 92G. Only 27 (5.4 %) were filled through contested elections. Pl. Ex. 18-22. In the same time period, there were 338 Republican delegate positions. Pl. Ex. 92B, 92D, 92F, 92H. Only 4 (1.2 %) of the Republican delegates were elected in contested primaries. Pl. Ex. 18-22.

x. Twelfth Judicial District

40. From 1999 through 2003, there were 340 delegate positions in the Democratic Party. Pl. Ex. 92A, 92C, 92E, 92G. Only 87 (25.6 %) were filled through contested elections. Pl. Ex. 18-22. In the same time period, there were 137 Republican delegate positions. Pl. Ex. 92B, 92D, 92F, 92H. None of the Republican delegates were elected in contested primaries. Pl. Ex. 18-22.

III. The Judicial Convention

a. Overview

1. Statutory Framework

41. Section 6-106 of the Election Law provides that “[p]arty nominations for the office of justice of the supreme court shall be made by the judicial district convention.” N.Y. Elec. L. § 6-106. There is no alternative way to get a place on the general election ballot in November as a recognized political party’s candidate.

42. Section 6-158 of the Election Law provides that:

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

N.Y. Elec. L. § 6-158(5).

43. Section 6-124 of the Election Law provides for the number and election of delegates and alternate delegates at the judicial conventions, stating in relevant part:

A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county.

The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. . . .When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, . . . and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

N.Y. Elec. L. § 6-124.

2. The Timing of Judicial Conventions

44. Pursuant to the statutory framework governing Supreme Court elections, judicial delegates are selected in the first two weeks of September, the judicial convention occurs in the third week of September, and the general election is in early November. N.Y. Elec. L. § 6-158(5).

45. At the earliest, Supreme Court candidates can learn which delegates and alternates have filed petitions by going to the Board of Elections after the second week of July. Carroll Decl. ¶ 23; Kellner Tr. 1572:6-8; Schiff Tr. 1296:18 – 1298:25; Berger Tr. 80:8-12; 211:8-12; López Torres Decl. ¶¶ 43-46. They must wait until after primary election day in early September – less than two weeks before the judicial convention – to learn who has actually been selected as a judicial delegate or alternate delegate. Carroll Decl. ¶ 23; Schiff Tr. 1296:18 – 1298:25.

46. Even if a prospective candidate were to identify all potential delegates by expending the resources to review nominating petitions as they are filed this would only add two months to the process during the height of the summer when most people are

preoccupied with vacation and are difficult to contact. Carroll Decl. ¶ 23. Indeed, Mr. Kellner testified that one of the reasons why the First Judicial District screening panel does not report out candidates until after Labor Day each year is that “if you reported before Labor Day, then you’d be interfering with people’s vacation schedules . . . almost by definition you would be excluding some people from the process. . . .” Kellner Tr. 1672:20 – 1673:21.

47. By contrast, the party conventions to nominate candidates for statewide office are held in June in election years, a primary election for the candidates for those offices (rather than for delegates to the convention) is held in September, and the general election is held in November. The identities of convention delegates (i.e., state party committee members) are known for at least eight months prior to the statewide conventions. Candidates for these offices thus have ample opportunity to contact, lobby, and obtain commitments from party delegates if they are not assured of sufficient support by party leaders. Carroll Decl. ¶ 24. The statutory timeframe does not allow, much less facilitate, such opportunities for candidates to argue their case to delegates fully.

48. In the First Judicial District, the period during which occurs the bulk of communications between prospective Supreme Court candidates who have been reported out of the screening panel and the County Leader, district leaders, and delegates is a two- or three-week period before the convention in September:

[M]y experience is that there is not a great deal of lobbying done at all prior to – prior to the screening panel reporting out the new group of candidates. To the lobbying, the politicking, if you will, begins essentially the next day, and that usually is scheduled within maybe two weeks or maybe – certainly not more than three weeks before the convention.

Schiff Tr. 1298:22 - 1299:1-3.

49. In all judicial districts, the Chairman of the Democratic or Republican State Committee notifies the selected delegates and alternates of the date and time of the convention only days prior to the convention. Carroll Decl. ¶ 29; Ostrer Decl. ¶ 23. The conventions in the Second Judicial District are always held at the State Supreme Court itself or in another downtown Brooklyn location during a weekday lunch hour rather than in the early morning, early evening, or on a weekend. Senator Connor testified, for example, that in 1997 the Chairperson of the Democratic State Committee wrote a letter to delegates and alternates on September 8 announcing that the convention would be held on September 16. Connor Tr. 2215:10-24; Pl. Ex. 34C. The combination of such short notice and the routinely inconvenient time ensures that many delegates and alternates are unable to attend the convention for which they were selected. Carroll Decl. ¶ 29; Ostrer Decl. ¶¶ 21-22.

3. Votes Needed at the Judicial Convention

50. A candidate must receive the votes of a majority of the delegates present at the judicial district convention in order to obtain her party's nomination and appear on the general election ballot as her party's candidate. Carroll Decl. ¶ 34; Berger Decl. ¶ 40.

51. By contrast, at the statewide nominating conventions held in June to select the candidates for statewide primary elections in September, candidates can obtain a place on that ballot by gaining 25 percent of the state committee members' votes. (If a candidate fails to obtain even those 25 percent, she can still get on the primary election ballot by petition.) Berger Decl. ¶ 40; Carroll Tr. 559:2-560:11.

b. Screening Panels

52. There was testimony about the use of screening panels prior to the convention in two judicial districts, the First and Second, and, at least in Monroe County, the bar association performs a screening function of some kind. Kellner Tr. 1599:22 – 1600:1; 1723:1 – 1725:3; Sise Tr. 1527:24 - 1528:7; Ostrer Decl. ¶ 21; Regan Tr. 384:2-24. Such panels are neither required by, nor even addressed at all in, the statutes of New York State. Berger Tr. 139:9-11; Kellner Tr. 1698:12-15.

53. In the First Judicial District, the Democratic Party uses a unique “double blind” independent screening panel to assess candidates for Supreme Court and for Civil Court:

Q. And you believe, don't you, that Manhattan, or the First Judicial District, is absolutely better than judicial districts in the rest of the state, correct?

A. I do believe that, yes.

Q. And you believe that because of what reasons?

A. The principal reason is the use of the independent screening panel with its double-blind selection procedure

Q. And with respect to the use of the panel, there isn't any other judicial district in the state that has a panel with the so-called double-blind methodology that the First Judicial District has; is that correct?

A. That's correct.

Kellner Tr. 1599:9-1600:1; *see also* Levinsohn Tr. 1919:24-1920:5 (no other screening panel like the panel in the First Judicial District and some districts do not have screening panels at all).

54. Outside the First Judicial District, the screening panels that do exist do not insulate the panel from the political party leaders and members are, in fact, chosen by

those leaders directly. Kellner Tr. 1723:1 – 1725:3.

55. Even in the First Judicial District, the screening panel has been criticized by the County Leader and by Mr. Kellner for basing certain of their decisions on candidates upon politics rather than upon merit:

Q. Are there occasions when the panel members decide not report out someone, not because of their view of qualifications but because they choose not to report out someone who is qualified and strong because they feel doing so will hurt the candidacy of some other judicial candidate they favor?

A. I and many other people believe that that has happened with panels, but let me say that no panel member will ever say that the reason they did not vote for a candidate was for a reason other than the qualifications and the merits.

* * *

A. But I am saying that I believe, as well as others who have closely studied the process, believe that that has happened on occasion.

* * *

Q. Now, Mr. Farrell also believes that the panels play politics, correct?

A. Yes.

Kellner Tr. 1605:11-24; 1606:6-8; 1607:10-14; Pl. Ex. 99(A) at 129-31.

56. In the First Judicial District, the screening panel does not report out any candidates who are not sitting judges on a lower court. Schiff Tr. 1304:5 – 1305:5; Kellner Tr. 1602:4-7; 1603:7 – 1604:20; 1731:10 – 1733:11. Nor has any Democratic judicial convention in Manhattan nominated a candidate for Supreme Court who was not a sitting judge, at least in the last twenty years. Kellner Tr. 1602:4-7. As a result, it is known to the legal community in New York City that the path to Supreme Court must include first obtaining a position on either the Civil Court or the Criminal Court (or the

Family Court) in New York County. Kellner Tr. 1731:10 – 1733:11. Pl. Ex. 99(A) at 102-03 (Farrell: “We choose from both sides, but you tend to get more from the Civil Court because they are more politically related, having come out of the political system.”).

57. In the First Judicial District, the Supreme Court candidates are reported out of the screening panel shortly after Labor Day. Kellner Tr. 1569:24 – 1571:5; Abdus-Salaam Tr. 1870:10-16; Schiff Tr. 1298:22 – 1299:23. The candidates thus generally have approximately two weeks to contact the County Leader, district leaders, and delegates prior to the judicial convention. *Id.* The County Leader has made it clear that he does not want the screening panel to report candidates earlier than three weeks before the convention. Kellner Tr. 1621:11 – 1622:7.

58. For many years, in the Second Judicial District Mr. Norman relied upon a judicial screening committee to review potential candidates for Supreme Court judgeships. Until this past year, Mr. Norman approved all the screening committee’s members. Similarly, until this past year, the screening committee’s formal rules stated under the heading “Sources of Candidates” that the County Chairman (*i.e.*, Mr. Norman himself) was entitled to name all of the candidates for the committee’s consideration. The screening committee then reviewed the candidates, interviewed them, and determined by majority vote whether to deem them “qualified at this time” or simply to take no action. Carroll Decl. ¶ 25; *see also* Connor Tr. 2253:16-21; López Torres Decl. ¶ 33.

59. Plaintiff Philip Segal, a former Family Court judge, applied to and was interviewed by the screening panel in the early 1990s and was asked by panel members

whether he knew who his Democratic Party district leaders were. When he replied that he did not, the panel members laughed at his response. He did not receive any notification, positive or negative, about the panel's consideration of his qualifications after the interview. Segal Tr. 808:19 - 809:9; Segal Decl. ¶ 8-11.

60. In the wake of the extensive negative press coverage of alleged corruption in Brooklyn's judicial selection process and on the bench itself in 2002-03, Mr. Norman was pressured by rank-and-file party members to implement changes in the judicial screening committee process in October of 2003. The principal changes included a diversification of the membership of the screening committee to be appointed not only by the party's Executive Committee but also by independent organizations such as various bar associations and associations of lawyers within New York City and the Second Judicial District, and an application process that allows any lawyer in good standing to apply for consideration by the screening committee for Supreme Court. Plaintiff John Carroll was appointed to serve on the reconstituted screening committee. Carroll Decl. ¶ 26.

61. Despite these reforms, however, the screening committee has been criticized recently for several reasons. First, the Executive Committee of the Kings County Democratic County Committee declined the screening committee's request to be allowed to provide more information than simply a "qualified" or "not qualified" rating when it reports candidates. Second, unlike the First Judicial District committee, the Second Judicial District screening committee is not limited in the number of candidates for a vacancy that it can report, thus allowing party leaders greater opportunities to choose among a large pool of candidates some of whom may have been told to apply to the

committee by such leaders. In 2004, the Democratic Party's judicial convention under pressure from Mr. Norman re-nominated a sitting Supreme Court justice who had been found unqualified by the screening committee. Carroll Tr. 537:15-19; 539:4-12; Kellner Tr. 1744:4-1745:13.

IV. The Role of Party Leaders in Selecting Supreme Court Candidates

a. Summary Findings

62. The judicial convention system places substantial control over the selection of those Supreme Court candidates who will be nominated at the convention in the hands of party leaders, rather than party voters. This is shown both by evidence relating to the judicial convention system generally throughout the State (*see* ¶¶ 64 to ¶¶ 90), and by evidence relating to particular judicial districts (*see* ¶¶ 91 to ¶¶ 189).

63. In particular, even in the First Judicial District, which Defendants' expert, Mr. Kellner, testified is unique in its high level of involvement at the club level in Supreme Court delegate selection, the evidence shows clearly that no candidates have been nominated over the objection of the County Leader and, in the County Leader's own words, he is able to "block" or "kill" any candidate under the current selection system. *See* ¶¶ 95 to ¶¶ 112.

b. Evidence Relating to the Convention System Generally

64. In virtually every case, the county party leadership determines who will be – and who will not be – nominated at the judicial convention prior to the convention itself. As detailed below with respect to specific judicial districts across the State, the most important local party leader in the nominating process is the County Party Leader(s) for

the county (or counties) and party that dominates the judicial district. Although the precise degree of control exercised by individual County Party Leaders varies between judicial districts and over time, in every case the County Party Leader plays an indisputably dominant role in the selection of judges. While at least certain County Party Leaders plainly consult with fellow party leaders (*e.g.*, district leaders) as to who should be nominated at the convention, for example, it is clear that a candidate whom the county party leader (or leaders) wishes to block has no realistic opportunity to compete for his or her party's nomination at the convention.

65. In 2003, Chief Judge Judith Kaye appointed the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), which released its unanimous principal report on June 29, 2004. Pl. Ex. 78.

66. The Commission's 29 members, which included at least one member from each judicial district, were selected by Chief Judge Kaye "for their professional, political, geographic and social diversity." Pl. Ex. 78 at 1-2. The Commission's Chair is widely-respected former Fordham University Law School Dean John Feerick. The Commission's membership includes seven sitting Supreme Court Justices (Acosta, Cozier, Hurkin-Torres, Klein, Marlow, O'Shea and Spolzino, two of whom sit on an Appellate Division. (Pl. Ex. 78 at iii-iv)). It also includes three former Supreme Court justices: Bartlett, who was also the Chief Administrative Judge; Friedman, who had been Bronx County Leader before becoming a Supreme Court Justice, Connor Tr. 2261:8-19; and Murphy, who was elected to the Supreme Court who also presided over the Appellate Division First Department for many years. Pl. Ex. 78 at iii-iv. Three additional current and former judges were on the Commission: Roth, the current New York County

Surrogate; Hancock, a former judge on the New York Court of Appeals; and Lock, currently a judge on the New York Court of Claims. *Id.* Other members include: the former Counsel to Governor Pataki (James McGuire), and the former counsel to Governor Cuomo (Evan Davis), who also was recently the President of the Bar Association of the city of New York, and the principal author of the Report of the Task Force on Judicial Diversity, which analyzed the Supreme Court selection process and its negative impact on diversity, *see* Pl. Ex. 91; Landy, recently the President of the New York County Bar Association; Dunne, a long-time State Senator and Chair of its Judiciary Committee, who was also Assistant Attorney General in charge of Civil Rights during the first Bush Administration, Connor Tr. 2261:1-7; Barnett, currently President of the Legal Services Corporation; and Patterson, former Democratic Party candidate and leader. Pl. Ex. 78 at iii-iv, 1.

67. The Feerick Commission held and transcribed public hearings across the State; conducted a survey of New York State judges (which netted responses from 1,129 judges); commissioned the Marist Institute for Public Opinion to conduct a major public opinion poll to measure public perceptions of the judicial selection system that included interviews with 1,003 registered voters in representative numbers across the State; conducted a series of focus groups through Albany Law School across the State; and established subcommittees on key issues including Candidate Selection that conducted comprehensive research on judicial selection across the State. Pl. Ex. 78 at 2-3.

68. Based on this extensive research and “after long deliberation among a politically, geographically, socially, and professionally diverse group,” Pl. Ex. 78 at 1, the Feerick Commission unanimously found that “[t]he uncontested evidence before the

Commission is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders.” Pl. Ex. 78 at 13.

69. The Feerick Commission also noted: “Witnesses at our public hearings, the media, non-profit organizations, judges, politicians, citizens groups, academics, litigants and law enforcement agencies, expressed concern over voter disenfranchisement in the selection of judicial candidates.” *Id.* at 7.

70. Defendants’ expert, Dr. Michael Hechter, drew the same conclusion based on his own analysis of New York State’s judicial convention system:

The consequences of the New York judicial convention are well-appreciated. In politically unified districts it is difficult to attain the nomination without the support of the party leadership. *This high barrier to entry significantly narrows the pool of candidates.* Party leaders have great influence over the nomination process when their party is unified. Indeed, judicial conventions generally take little time. Decisions are often unanimous. Since insurgent candidates are only likely to be nominated when the party is internally divided, rates of incumbency are high.

Pl. Ex. 69 at ¶ 9 (emphasis added).

71. Based upon his extensive analysis of evidence, including depositions by, and interviews of, the New York, Brooklyn, Queens, and Bronx County Leaders (Farrell, Norman, Manton, and Friedman), and a number of key district leaders, as well as “expert witness” Henry (Pl. Ex. 69 at ¶¶ 71, 78), Professor Hechter also concluded that (i) “district leaders effectively select delegates to the judicial convention,” *see* ¶¶ 60-63 and citations throughout report, and (ii) “county leaders are considerably more influential than district leaders,” although their influence varies across boroughs. *Id.* at ¶¶ 64-71.

72. In the words of Mr. Kellner, Defendants’ second expert:

In every county, whether it’s Manhattan, where there is an independent screening panel, the reform system put in place, or whether it’s a county

which is much more closely under a particular individual's leadership, there is a system for how you go about getting that nomination. If you want the nomination in a county with a closely controlled leader, then what you do is you work up in approaching that leader and communicating your qualifications to that leader and building up support among the people who are closest advisers and confidants of that leader. So, if you don't want to go through that system, which is the system the legislature has put in place and that has evolved, then you are talking about an upheaval of the party structure and then you have to challenge it the hard way.

Kellner Tr. 1721:19 – 1722:9; *see also* Kellner Tr. 1619:8-13 (“The people who have the most influence are the party leadership . . .”).

73. Mr. Kellner further acknowledged:

Q: . . . [Y]ou are aware, aren't you that there are judicial districts in the State of New York that today operate precisely as you described the smoke-filled room in Manhattan before the reformers prevailed?

* * *

A: . . . Yes there are places where the leadership of the party will hold a meeting and try to work things out before the convention.

Q: And tell the delegates what they're to do when the meeting occurs.

A: Make recommendations to the delegates, yes.

Q: Which are always followed?

A: Generally, yes.

Kellner Tr. 1630:8 - 1631:7.

74. In his declaration (¶¶ 42–44), Mr. Kellner had relied upon a report by M.L. Henry, the Executive Director of the Fund for Modern Courts. In his testimony, Mr. Kellner testified that while he did not agree with Mr. Henry's view that merit selection of judges would be preferable to the current system, Mr. Henry was “an honest reporter of the facts” and the Fund was usually “factually accurate.” Kellner Tr. 1647:16-22.

75. Defendants did not introduce the report upon which Mr. Kellner relied. Plaintiffs did. *See* Pl. Ex. 111. The Report contrasts the selection system for Civil Court judges with that for Supreme Court justices. The former are nominated (and elected) by voters and thus referred to as the “People’s Court.” The latter are “nominated at politically dominated judicial conventions.” Pl. Ex. 111, at 2-3.

76. Kellner did not refer to Mr. Henry’s Fund for Modern Courts’ report focused on Supreme Court Elections. Plaintiffs also introduced this report. Pl. Ex. 110. The Report marshals extensive and detailed evidence (which supports Plaintiffs’ assertions). The facts are summarized in six bullets on the page behind the cover page, including:

the nomination, not the election, is the lynchpin of the judicial selection process. Political leaders, not the voters, control judicial conventions and decide who will receive the nomination—and thus who will be the judge.

Pl. Ex. 110, page behind the cover page.

77. Robert Levinsohn has been involved in judicial politics for over 40 years Levinsohn Decl. ¶ 3; Levinsohn Tr. 1899:16-24. While much of his testimony relates only to the First Judicial District, he gave two pieces of testimony that have more general application.

78. Levinsohn was a father to the First Judicial District’s “double blind” judicial selection panel. Levinsohn Tr. 1918:21-24. While leaving party leaders with substantial power, and to some extent flawed in application, this system should be credited with reducing the First Judicial District's proclivity to nominate unqualified judges. Mr. Levinsohn testified that he was not aware of any screening panel with features like the First District’s elsewhere in the State and that some districts have no panel at all. Levinsohn Tr. 1919:24 – 1920:5. Levinsohn then described two of the criteria of the

First Judicial District's screening panel: (i) first, that they do not simply report out people who are “qualified:” they must be the “most highly qualified,” and (ii) second, that they do not report out everybody who meets the test, but conform to a limit “not to exceed three for each vacancy, but not less than two for each vacancy.” Levinsohn Tr. 1920:11-14.

79. Levinsohn then testified that such guidelines were important “given the degree of manipulation.” *Id.* at 1921:12. Asked what he meant by “degree of manipulation,”

Levinsohn testified:

well, in the counties where there is either no screening panel or a panel which reports on everybody they find qualified, I am talking about the party leadership of the County.

Id. at 1921:22 – 1922:11.

80. Levinsohn also compared the features of the First Judicial District—before the reform movement was successful—with many of the other judicial districts today. Prior to 1976, the “main concern” in the First Judicial District was “the closed nature of the system in which the party—organizations in both counties [then Manhattan and the Bronx] controlled the process with no public input into the—particularly the quality of the judges.” And, “the delegates, in effect, followed the wishes of their leaders as to who would be selected.” *Id.* at 1909:13 – 1910:11.

81. Levinsohn then agreed that he had testified at his deposition that “many of the other judicial districts retained features like the ones that existed in the first judicial district before it was reformed,” while noting that his “view is simply my impression.” *Id.* at 1911:10 – 1912:1.

82. Most of Senator Connor’s testimony is limited to the Second Judicial District.

However, his testimony on the inferences to be drawn from contributions made to political leaders from people seeking nomination as Supreme Court justices, has more general force. Connor's specific testimony was about contributions made by numerous aspirants seeking Supreme Court nominations in the Second Judicial District. The Feerick Commission Report at Appendix G-3 laid out contributions to three groups (controlled by County Leader Clarence Norman) from 1999 through 2003 from 28 persons seeking nominations for the Supreme Court in the Second Judicial District. The contributions were made to (i) the Committee to re-elect Clarence Norman, (ii) the Kings County Democratic Committee, of which Connor testified that Norman was the Chair of its Executive Committee—or "in common terminology the chief executive," and (iii) the Brooklyn Democrats, which Connor testified Mr. Norman controlled. *See* Connor Tr. 2185:12 – 2187:2.

83. When asked whether a fair inference to be drawn was that all these judicial candidates believed Mr. Norman's support was important to their aspirations to become a Supreme Court justice, Senator Connor testified "certainly." Connor Tr. 2189:4-13.

84. While Connor's acceptance of the inference was specifically focused on the Second Judicial District, the same inference arises more generally and should be applied to the findings of the Feerick Commission about contributions made to political parties. (See the general findings made in the first full paragraph on page 14 of the Commission's Report (*e.g.*, "evidence shows that some candidates have directed thousands of dollars to political parties through political fundraisers and paying exorbitant prices for goods and services"), the text of its Appendix G-3 (*e.g.*, referring to the risk, as recognized by the New York Court of Appeals, that contributions to a political party "may be perceived as

‘an effort to buy—and parties attempting to sell—judicial nominations,’” App. G-3 at 3, and detailing examples of contributions in Supreme Court contests in the 2nd, 5th, 8th and 11th Judicial Districts, *id.* at 4-16)).

85. Senator Connor had found in his files a flier from the Fund for Modern Courts that depicted and praised him and 21 other members of the State Legislature (both Senate and Assembly) for their stance in favor of court reform. The flier answered the question “why merit selection?” by stating:

At the heart of the public’s distrust of our court system is the uneven quality of judges who preside over the courts, and the inadequate method of selection. Theoretically, most of our judges are elected; in practice, most judicial offices are filled as a result of political deals.

Def. Ex. BBB, cover page.

86. Dr. Cain testified that his review of convention minutes showed examples of successful candidates for nomination being very “open and honest about the fact that they owe a debt to their district and county leaders.” Cain Tr. 332:11-14.

87. The evidence shows that the extent of party leaders’ control over who becomes a delegate or alternate varies from judicial district to judicial district. In all districts, however, it is clear that voters play virtually no role in selecting a majority of the delegates and alternates at the conventions. In addition, as discussed in detail below, the burdens on an insurgent Supreme Court candidate in overcoming both the party leaders’ influence over delegates and the difficulties faced in trying to elect sufficient delegates and alternates to compete for a party’s nomination are daunting.

88. Dr. Cain summarized his conclusions on this point as follows:

The reality is that these are discussions among dues paying party members at the least and more likely party leaders, county party leaders and district

leaders. In some cases it is the selection of a county leader. This is the choice made by one small segment of the party foisting choices on the rest of the party. . . . [The] [f]act [that] the party electorate doesn't have a real input seems to me to be a very important point. The whole process lacks that democratic moment which the voters get to say whether or not they believe the party's organization is doing the right thing. It is just not there in the process.

Cain Tr. 329: 9-18.

89. Mr. Kellner opined that:

in the competitive districts [where Democratic candidates can prevail in the general election], . . . it usually happens at a meeting where I'm reminded of the old song, politics and poker from Fiorello, where they're sitting around the table, say who do we run? We have to run judicial delegates. Who wants to be a delegate, and it will be done that way. Does the district leader ultimately sign off on it? I guess that's what happens, but it's done in a collective fashion rather than the district leader sitting at his desk saying who am I going to run for delegate.

Kellner Tr. 1623:21 – 1623:14.

90. The control exercised by party leaders over the nomination process has been noted and criticized for at least 60 years:

- “Judicial nominations today in the State of New York fall to the choice of boss-manipulated conventions” Pl. Ex. 71 (NYC Chamber of Commerce Committee on Law Reform (2/28/44)).
- “The State Constitution contained an 'absolutely false' pretense. ‘It pretends’, he said, ‘that the people select the judges. That is the greatest farce that has ever been enacted in the history of democracy ... The selection of judges is made not

by the people, but by the leaders of the predominant parties.” Pl. Ex. 72 (N.Y. Times editorial quoting a New York State Supreme Court justice (12/22/52)).

- “Supreme Court justices are nominated by large judicial conventions which lie as bulky buffers against possible insurgence.” Pl. Ex. 73 (Letter to *N. Y. Times* from the Vice Chairman of the Citizens Union of New York City (10/6/54)).
- Justices are elected “by a process that mocks choice. Most voters can never know the candidates and have to accept party slates. The real choice is thus left to political bosses ... who control nominations.” Pl. Ex. 74 (*N.Y. Times* (11/16/83)).

c. District-By-District Evidence

91. Notably, despite an extensive record of evidence concerning county leader control over both delegate selection and Supreme Court nominations across the State, Defendants chose to focus their evidentiary presentation on the First Judicial District. Even with a strong history of reform, moreover, that District retains the same burdens on insurgent candidates without party leaders’ support.

i. First Judicial District

92. Defendants’ expert, Mr. Kellner, opined that the First Judicial District’s selection process is better than that in other judicial districts in the rest of the State because of its screening panel and “the relatively high level of involvement down to the club level in judicial politics.” Kellner Tr. 1599:13-21.

93. Yet, even in the First Judicial District, the County Party Leader himself exerts

extraordinarily effective control over the nomination process. According to Mr. Kellner and other witnesses, the Democratic County Leader, Assemblyman Herman “Denny” Farrell, Jr., meets with each Supreme Court candidate reported out of the screening panel, consults with district leaders, assembles a “package” or slate of candidates to present at the convention, and a majority of delegates approves that slate of candidates for nomination. Kellner Tr. 1565:15-23; 1580:17-19; 1622:11-14.

94. When asked to name all of the justices for whom Mr. Farrell had failed to secure the nomination during his tenure as County Leader since 1981, Mr. Farrell could only name three of such candidates (out of well over 50 total justices elected).³ All three of those candidates, moreover, were nominated and elected shortly thereafter.

95. Most important is the fact that neither Mr. Kellner nor any other witness could identify a single candidate for Supreme Court who had been nominated over the County Leader’s objection at a convention. Mr. Farrell himself explained under oath why such a candidate could not be found: “You keep everybody in the air. And because I have the votes to be able to kill someone – in other words, *I can’t guarantee I can always make you, but I can surely block you.* No one wants to get me angry, so they will not go against me until they have nothing to lose.” Pl. Ex. 99(B) at 193:9-15 (emphasis added).

96. Mr. Schiff confirmed the County Leader’s success in blocking candidates whom he does not want to be nominated:

Court: Don’t you think you would know about it if someone were nominated for

³ The election records indicate that 52 justices were elected in the First Judicial District just within the period from 1990 through 2002. Pl. Ex. 54-66. Mr. Kellner estimated that, on average, there have been three vacancies every year. That estimate would suggest a total number of justices nominated and elected since 1981 of approximately 65-70. Mr. Kellner then indicated that he believed that number was too high, but it is likely that it is conservative given the number elected since 1990. Kellner Tr. 1610:1 – 1612:5.

Supreme Court Justice over the county leader's objection? Isn't that the sort of thing that as a district leader you would know about?

A: I think I would know about it.

* * *

Court: Has it ever happened?

A: No. I can't remember it ever happening that way.

Schiff Tr. 1291:21-25; 1292:10-12.

97. Mr. Schiff also testified that Mr. Farrell has exercised his control at least in part by controlling the votes of a substantial block of delegates at the convention:

Q: In determining which candidates are going to be in his package, do you understand that Mr. Farrell begins with a substantial number of votes that he controls from his home district and aligned districts?

A: Again, I am not certain of what he controls, but I have always understood that he does—that he does have influence over—over a number of votes in Manhattan, yes. I don't know if it is a fact, but I have—I guess over the years I have been able to see that he has been able to influence a number of votes.

Q: Does the number twenty-three sound about right?

A: I would have thought it was more than that....[T]wenty-three seems like a low number to me.

Schiff Tr. 1302:4-14; 18-21.

98. Mr. Farrell testified at his deposition in *France v. Pataki* that:

I basically think I would keep the nominating conventions, because and I am now speaking from a self-serving point of view, as opposed to whether it is best in terms of electing minorities. I take the position that it works best for me, because it gives me a better chance to control what goes on, and that, I think, is important in terms of doing some of the things we have done.

Pl. Ex. 99(A) at 123:16-25.

99. The testimony of several sitting Supreme Court justices who had originally not been supported by Mr. Farrell in years prior to their election only confirmed the

extent of his control over the nomination process.

100. For example, Justice Phyllis Gangel-Jacob had been informed by several people and had read in numerous newspapers that Mr. Farrell planned to block her efforts to obtain the Democratic Party's Supreme Court nomination because she had defeated his preferred candidate in the 1984 civil court primary election. Gangel-Jacob Tr. 1807:5-12; 1831:22 - 1832:23. Initially, in 1990, she was reported out of the screening panel and met with Mr. Farrell, as is the practice for all aspiring Supreme Court candidates reported out of the panel – in her words, “you would meet with the county leader, and you would hope that he would bless your ambition.” Gangel-Jacob Tr. 1806:11-13. In 1991, after she had failed to obtain her party's nomination without Mr. Farrell's support, her husband became a district leader from the Upper East Side of Manhattan. Gangel-Jacob Tr. 1808:15 – 1809:17. In 1992, Justice Gangel-Jacob withdrew at the convention after receiving a promise from Farrell that if she withdrew he would not oppose her in the following year's election. Gangel-Jacob Tr. 1834:14-24. Justice Gangel-Jacob acknowledged that at her deposition, in discussing why she decided to withdraw, she had accepted the relevance of the aphorisms that “it ain't over til its over,” “there's many a slip between the cup and the lip,” and “don't count your chickens before they're hatched.” Gangel-Jacob Tr. 1834:25 - 1835:25. At trial, when asked what was the “primary” reason she decided to withdraw in 1992 after she heard Mr. Farrell would not oppose her the next year, the Justice responded “harmony.” Gangel-Jacob Tr. 1836:1-4. Pressed whether the primary reason for withdrawing was not concern she might lose again, the Justice again said “harmony,” and added “I felt very certain that I would win” in 1992. Gangel-Jacob Tr. 1837:2-15. However, after her deposition was read and shown to her,

the Justice conceded that at her deposition she had testified that:

The first reason [for withdrawing] was that counting votes is a skilled task and it looked as if I had more than enough votes, but that can change, and so I was a little concerned that I might not actually pull it off and therefore I didn't want to take that risk. That was, I would say, primary.

Gangel-Jacob Tr. 1837:20 - 1838:25; *see also* Gangel-Jacob Tr. 1839:1 – 1840:9. In the following year, she was nominated by acclamation at the convention with the County Leader's support. Gangel-Jacob Decl. ¶ 16. Her husband stopped serving as a district leader shortly after she took office as a Supreme Court justice. Gangel-Jacob Tr. 1840:21 – 1841:3. Justice Gangel-Jacob thus did not get nominated until she had obtained the support of Mr. Farrell to become part of the "package" at the 1993 convention.

101. Justice Alice Schlesinger began her run for Supreme Court in 1995. Schlesinger Tr. 1963:22 – 1964:15. After several years of trying to gain her party's nomination, in 1999 she was nominated by acclamation at the convention without opposition. Schlesinger Tr. 1968:3-25. Prior to the convention, she and her husband met with Chairman Farrell and, in her words, she remembered "leaving the meeting believing that the county leader would probably support me based again on the fact that I had accumulated clearly more votes than anybody else." Schlesinger Tr. 1975:10-19; 1980:1-9. Like Justice Gangel-Jacob, therefore, Justice Schlesinger was nominated at the convention without the County Leader's opposition and without any opposing candidate. Pl. Ex. 36A.

102. Justice Helen Freedman testified that she was nominated in 1988 at the convention as part of the "package" of candidates without opposition from the County Leader or from any other candidate. Freedman Tr. 1780:9 – 1781:20. She also testified

that, while she did not believe that the County Leader exercised complete control over the nominations, she recalled that she did not have confidence that she would be chosen at the convention until her campaign manager spoke with the County Leader and received such assurance. Freedman Tr. 1768:21 – 1769:14; 1779:9 – 1780:8. In short, she was plainly not nominated over Mr. Farrell’s objection.

103. In addition, during the same year in the days leading up to the convention, Mr. Farrell was quoted in the *New York Law Journal* as threatening that “anyone who messes with the package will be punished.” Pl. Ex. 116. In the end, the candidates whom Mr. Farrell had publicly indicated were in the “package” were, in fact, nominated without opposition from the potential challenger, Judge Crane. *Id.*; Freedman Tr. 1789:5-12. Justice Freedman had no recollection of Mr. Farrell’s public threats. Freedman Tr. 1786:24 – 1787:1.

104. Justice Sheila Abdus-Salaam testified that Mr. Farrell initially told her that he would not support her nomination at the 1993 convention. Abdus-Salaam Tr. 1863:14-25. She testified that, based on that call from Mr. Farrell, “I think it might be a very difficult thing if I didn’t have the county leader[’]s support.” Abdus-Salaam Tr. 1894:11-12. Subsequently, Mr. Farrell contacted her again and indicated that he would, in fact, support her nomination at the convention based on her showing of support among certain district leaders and the entrance into the race of Judge Harold Tompkins. Abdus-Salaam Tr. 1880:13-19; 1865:7 – 1867:3. She testified that knowing that Mr. Farrell would support her gave her “a higher degree of confidence that I might be selected at that time.” Abdus-Salaam Tr. 1894:13-17. She acknowledged that she was nominated as a part of the County Leader’s “package” of candidates at the convention. Abdus-Salaam

Tr. 1894:18-25.

105. Mr. Kellner suggested in the hearing that Mr. Farrell's control is as much about creating the "appearance of being in control" and of "running the show" as it is about actually being able to determine the outcome of the conventions. Kellner Tr. 1663:11-14. But the evidence makes clear that, whether as a result of his success in creating such an appearance or in exercising control in more direct ways, Mr. Farrell has succeeded in influencing delegates and district leaders sufficiently so as to be able to block candidates whom he does not wish to nominate. In his own words, "I can't guarantee I can always make you, but I can surely block you." Pl. Ex. 99(B) at 193:8-15.

106. Indeed, Mr. Schiff, a longstanding district leader and delegate from the Upper East Side, explained the nuanced but forceful influence on delegates that is facilitated by the current judicial convention system and exercised by Mr. Farrell to ensure that no true insurgents can obtain the nomination at the convention. Schiff testified that nomination decisions were always made in advance of the convention because:

there is a general concept that it is sort of not gentlemanly or not -- not womanly to get into a fight, a squabble, if you will, over these nomination on the floor of the convention, to force the delegates to make choices, especially if the delegates are aware that the county leader may be leaning in one way or another, to *force the delegates to make a choice between supporting a candidate that they might -- that they might want to support and offending the county leader*, when the process has already demonstrated that these three candidates or these four candidates are the ones that have the majority support.

Schiff Tr. 1295:12-23 (emphasis added).

107. It is not necessary for the County Leader to tell any delegate directly how to vote; the district leaders and delegates have their own reasons not to support a

candidate not supported by the County Leader. According to Mr. Schiff:

The second part, where [Mr. Berger] talks about it not making sense to alienate the county leader over a choice of Supreme Court candidates, well I think there is something to that. *I certainly would – as I said earlier, if the county leader called me and asked me to support a candidate that he was supporting, I would certainly give that respect, and I would recognize that if I chose not to do it, that there might come a time a year, two years, three years down the line when we were seeking something from the county leader, some support for some – some change that we wanted to make in some way or another, he might remember that I didn't support him at a different time.* So I suppose, if the county leader asked me for support, that would be in my mind as I was considering who to support for judge. It would be one of a number of things I would think about, but, as I've said earlier, that – so I would say that Henry Berger's statement to that effect is simply pointing out political reality in a democratic process.

Schiff Tr. 1263:11 – 1264:7 (emphasis added).

108. Mr. Schiff indicated that he was “really not certain exactly what involvement the county leader has in the process,” Schiff Tr. 1260:22-23, that he has no way of knowing whether Mr. Farrell has the ability to block a candidate, Schiff Tr. 1287:24 – 1289:23, and that he could not identify any examples of delegates choosing to nominate a candidate whom Mr. Farrell did not support. Schiff Tr. 1290:18 – 1292:12.

109. The County Leader's control is based, at least in part, on his direct influence over sizable blocks of delegates:

“The way I, as county leader, can normally win, is that I can bring enough people together to get the votes I need.” Pl. Ex. 99(A) at 44:19-22.

“There are in my Assembly District eight judicial delegates. Though they are not all black and Latino, they will vote with me, and that is a block I start with. There are eight in the Harlem district, which is the 70th Assembly District, and there are seven in the Spanish Harlem district, which is the 68th. So that immediately starts us somewhere around 23 in a block needing 48.”

Pl. Ex. 99(A) at 48:7-16.

110. According to Mr. Farrell, district leaders often control blocks of delegates' votes that can then be placed together to produce a majority:

Q: Is it your testimony that the district leaders control the delegates?

A: They select them.

Q: Do they control them?

A: When you put someone in there, the chances are they will listen to you. But as I testified earlier, I had one person who would not listen to me, so it could happen to everybody.

Pl. Ex. 99(A) at 68:20 - 69:2-3.

A: It is the leaders who have the ability to talk to their delegates to the convention, and those delegates then can be moved around by their leaders.

Q: So the district leaders, and there are 70 of them, influence the votes of the delegates from their districts?

A: That's correct.

Pl. Ex. 99(A) at 53:18-25.

111. Mr. Farrell's testimony closely corroborates that of Mr. Berger:

In my experience, the district leaders almost always follow the wishes of the county party chairperson [or, as clarified, the County Party Leader, *see* Berger Tr. 207:14-18] when it comes to voting for Supreme Court candidates at the convention. In turn, the delegates follow the wishes of the district leaders who have selected them and support the county party chairperson's [or County Party Leader's] chosen candidates.

Berger Decl. ¶ 11; *see also id.* at ¶ 12.

We didn't deal and to this day we don't deal directly with the delegates. We dealt with the district leaders who would tell us where their delegates were. The district leaders could tell us what their delegates were going to do very easy and so as always, we just dealt directly with the district leaders and we still do that today.

Berger Tr. 75:5-12.

112. Mr. Farrell himself summed up his success in maintaining control over the nomination process: “That’s why it is so important that I must control, because the day I lose control is the day they beat me.” Pl. Ex. 99(A) at 97:10-12.

113. With respect to delegate selection, County Leader Farrell himself has testified that it is the district leaders in Manhattan who select the judicial delegates in this district and usually control their votes. Pl. Ex. 99(A) at 68-69. Dr. Hechter, Defendants’ expert, agreed:

District leaders effectively select delegates to the judicial convention. . . . There is wide agreement that district leaders have great influence on their delegates at the judicial convention. At the convention, the district leader notifies ‘his’ delegates which Supreme Court Justice candidate he is supporting.

Pls. Ex. 69 ¶ 60; *see also* Berger Decl. ¶ 11; Berger Tr. 117:10-12 (“In most districts the district leaders choose the judicial delegate candidates.”); Kellner Tr. 1566:7 – 1567:9.

114. Other witnesses have suggested that delegate candidates are selected in political clubs across the judicial district, rather than by county or district leaders. Schiff Tr. 1252:1-20; Levinsohn Decl. ¶¶ 16-17, 19. Indeed, Defendants suggest that the absence of a primary election in September during which voters could choose among candidates for delegate and alternate frequently masks the presence of unwritten agreements between such clubs to divvy up delegate slots each year to avoid unnecessary contests. Berger Tr. 164:4-12.

115. Still, it is clear that even in those ADs in which political clubs select delegates and alternates through club elections, the number of voters that are provided a

meaningful opportunity to participate in that selection process is miniscule. As Mr. Kellner acknowledged, for example, of the 660,000 registered democrats in Manhattan only approximately 8,000, or 1.3 percent, of them are political club members. Kellner Tr. 1624:15 – 1625:14. Inevitably, moreover, the membership of such clubs cannot always represent fully the diverse population of a particular AD, as in the case of Mr. Schiff's 73rd AD in which he acknowledged that it has been difficult to get residents of two public housing complexes in that AD to become involved. Schiff Tr. 1276:3 – 1277:8.

116. In Mr. Berger's words,

In most districts the district leaders choose the judicial delegate candidates. They are put on the club petition. The petitions are filed and there is no other participation. In some clubs, particularly those in Manhattan and a couple of other clubs in other places, the leaders' choices may actually be put to a membership vote, but once again, the membership of these clubs is somewhere between 100 and 300 people . . . the only people who can participate in the vote are those people who are the members of the club, and all the other thousands of Democrats in that district who have not paid the dues aren't members of the club, do not participate in any way in this selection of those judicial convention delegates in many, many, many districts.

* * *

It is a clear demonstration of closed the process really is. You've created a system where only those people who have taken an extra-legal step and have joined this small group of people are the only ones who are allowed to participate, or who actually can participate in the process of this selection of judicial convention delegates, and if you are not part[] of the small select group, simply don't participate in any way, you are excluded from the participation in the nomination process and ultimately the election process for Supreme Court judges.

Berger Tr. 117:10 – 118:24.

Only club members can vote in such delegate elections and it is undisputed that clubs require members to pay annual dues. Schiff Tr. 1237:10-16; 1274:25 – 1275:1; Berger

Tr. 113:8-22; Kellner Tr. 1552:19-24. Dr. Hechter testified that even dues of \$10 would deter voting:

The cost of voting is obvious[ly] going to limit -- to the extent that voting is costly, fewer people will engage in it. If voting cost \$10, fewer people will engage in it than if it cost \$1.50 or one cent.

Q And when you say fewer people will engage, it will particularly effect poor people, correct?

A Yes.

Q And based on your analysis of economic status in New York City, therefore, it would particularly effect the minorities, correct?

A To the extent that minorities are disproportionately poor, yes.

Hechter Tr. 1208:21 – 1209:7. When a club meets to discuss and elect judicial delegates, notice of such meeting is sent only to club members. Kellner Tr. 1626:14-17. The delegate and alternate candidates themselves are, moreover, drawn from within the membership of the club itself rather than the AD as a whole. Schiff Tr. 1275:5-11.

117. In addition, while the delegates selected through a club's election ostensibly represent the voters of the entire AD, generally the delegates "will feel morally bound, although they are not technically bound, to go with the endorsement vote [to endorse Supreme Court candidates] that the club has." Kellner Tr. 1566:15-22; *see also* Schiff Tr. 1319:20 – 1320:2. As Dr. Hechter states, "most of the delegates faithfully represent the preferences of their political clubs" and, significantly, the effective turnover rate for judicial delegates is only roughly 10 percent. Pl. Ex. 69 ¶ 52.

ii. The Second Judicial District

118. In the Second Judicial District, the County Leader and, at most, certain members of the executive committee of the county committee (who are district leaders), effectively control the nomination process. In the words of Plaintiff Margarita López

Torres:

Q: Let me ask you: Why do you believe that you did not have a meaningful opportunity to obtain your or compete for your party's nomination for Supreme Court?

* * *

A: I believe that because [] my understanding is the way that it works, at least in Brooklyn, that is the county leader and the district leader and particularly the person who first supported you initially to become a civil court judge, that it is in their hands and not in the hands of the delegates. *And if they block you, then you are not able to move forward.*

López Torres Tr. 715:10-12, 18-24.

119. In over thirty years of being involved in judicial politics in the Second Judicial District, Senator Martin Connor testified that he was not aware of a single Supreme Court candidate who was “recommended” by the county organization who lost the nomination at the convention to a challenger. Connor Tr. 2256:24 – 2257:9.

120. Senator Connor testified that during the tenure of Meade Esposito as chair of the Democratic Party executive committee – the County Leader – from the 1960s until 1984, Mr. Esposito and Harold Fisher, the secretary of the party, would have breakfast on the morning of the judicial convention and “decide on who it would be He and Harold would sit down and pick them.” Connor Tr. 2238:2 – 2239:8; 2248:15-22.

121. From 1984 until 1991, Howard Golden served as County Leader and, according to Senator Connor, would “talk to a lot of people” but would otherwise choose the Supreme Court nominees without any additional process of any kind. Connor Tr. 2239:25 – 2240:6. Senator Connor advised Carolyn Demarest, “why would anybody give you a nomination, you never visited any district leaders, you haven’t been active in the party” because “under Golden, it was important.” Connor Tr. 2243:11-18.

122. According to Senator Connor, Mr. Norman is “very important to the process of selecting Supreme Court judges” in the Second Judicial District. Connor Tr. 2240:15-18. Senator Connor also recognized that 28 candidates contributed to Mr. Norman’s committees because they “certainly” believed that Mr. Norman was important to the process. *See* ¶¶ 82-83, *supra*. Mr. Kellner testified that the County Leader and Mr. Jeffrey Feldman, the executive secretary of the Kings County Democratic Committee, “are very influential in that process.” Kellner Tr. 1600:11-22. Based on his research, Dr. Hechter concluded that “[i]n Kings County, nomination slates [for Supreme Court] are largely determined by the party executive committees (composed principally of district leaders and the county leader – thus this constitutes a small group of politically sophisticated actors).” Pl. Ex. 69 ¶ 55. Mr. Berger testified that he has been told prior to primary election day by officials of the Democratic Party in this District who would be nominated at the judicial convention. Berger Tr. 246:1-14.

123. Significantly, just recently, the 42 district leaders in Brooklyn that have significant control over the delegate selection process and consult with Mr. Norman concerning Supreme Court nominations as members of the Executive Committee, reelected Mr. Norman as County Leader in a vote that included only two dissenting votes against him. Given that Mr. Norman is currently under indictment for activities related to Supreme Court selection, this showing of loyalty among district leaders is strong evidence of his influence over those leaders and, in turn, their delegates. Connor Tr. 2247:1 – 2248:3.

124. In the Second Judicial District “[t]he Democratic Chairman is viewed by the public as having enormous influence over the names that are placed on that slate. Pl.

Ex. 78 (Appendix G-2) at 3. “Nominating conventions for candidates for Justice of the Supreme Court in the 2nd District are seen as a mechanism for party leaders to select Supreme Court justices. Nominating conventions are believed to rubber stamp party leader nominees and due to an overwhelming Democratic voter majority, a Democratic nomination ensures election.” *Id.* at 4.

125. Plaintiff Philip Segal’s brief experience with the Second Judicial District nominating process confirms that, even in the screening panel process in the Second Judicial District, candidates have been deterred from pursuing Supreme Court nomination because they do not have district leader support:

Q: . . .The affidavit, the declaration sets forth that you were interviewed by the screening panel in the Second Judicial District in 1994, is that correct?

A: That is correct?

Q: And it indicates that you were asked during that interview who your Democratic district leaders were, is that correct?

A: Yes it does.

Q: And what did you tell the screening panel in response to that question?

A: I told them that I had not been involved in Democratic politics and, other than being an enrolled Democratic, [] I had no idea who my district leaders were.

Q: And how did they respon[d] to your response?

A: They laughed.

Segal Tr. 808:19 – 809:9; *see also* Segal Decl. ¶¶ 8-11.

126. With respect to delegate selection, while there are certain reform clubs that

hold a membership vote to select their judicial delegate candidates, the district leaders often control the selection of judicial delegates and alternates. Carroll Decl. ¶ 7-8; Carroll Tr. 523:2-13; 524:10-17; 541:2-7. In addition, those district leaders effectively control the votes of most of the judicial delegates and alternates from their AD, whether through party loyalty, patronage, or employment connections. *Id.*; López Torres Tr. 621:24-25; Pl. Ex. 69 ¶ 60.

127. Judge López Torres' experience demonstrates that candidates without the County Leader's support cannot convince a majority of district leaders and delegates to vote for her at the convention because they do not wish to cross the County Leader.

128. Judge López Torres is originally from Puerto Rico, but has lived most of her life in Brooklyn. López Torres Decl. ¶ 2.

129. From her graduation from Rutgers University School of Law in 1979 until she joined the Civil Court in 1992, she was a legal services attorney and attorney for the City of New York. She served as the Deputy General Counsel of Children and Family Services for the Human Resources Administration, where she headed the citywide legal department which represented the Child Welfare Administration in all matters, including cases of child abuse and neglect. Before that, she was the Director of Family Law at Brooklyn Legal Services Corp., where she supervised the unit that represented parents in Family Court in child abuse/neglect, custody, foster care review, termination of parental rights, and other proceedings, and also represented victims of domestic violence. She also served as an Assistant Corporation Counsel for the City, and as a Managing Attorney of MFY Legal Services. She has also been an adjunct professor of law in the Women's Rights Litigation Clinic at Rutgers University School of Law and a lecturer on ethics at

the Practicing Law Institute. As a member of the City Bar Association's Committee on the Legal Needs of the Poor, she coauthored a report on the need to ensure adequate interpreter services in the courts. López Torres Decl. ¶ 3.

130. She is a registered voter enrolled in the Democratic Party and has voted regularly in Brooklyn for over 30 years. López Torres Decl. ¶ 4.

131. In 1992, after many years of practicing in state courts representing both disadvantaged families and individuals and City agencies, she became a candidate for a countywide seat on the Civil Court of the City of New York in Brooklyn. Unlike Supreme Court justices, judges of the Civil Court are nominated through a direct primary election in September. Democratic candidates can petition directly onto the primary election ballot by gathering at least 4,000 signatures from voters anywhere in the borough. N.Y. Elec. L. § 6-136. In her election, the Kings County Democratic County Committee endorsed her for a vacancy on the Civil Court that did not involve a contested primary election. She was elected by the voters of Brooklyn in the general election in November of 1992. López Torres Decl. ¶¶ 5-6.

132. She was the first Latina elected to the Civil Court in New York City, and has now served longer than all but two other judges on the Civil Court in Brooklyn. López Torres Decl. ¶ 7.

133. All judges of the Civil Court are provided funding to hire one court attorney, an attorney who serves as a permanent law clerk. Given the large caseload in our court, Civil Court judges rely heavily upon their court attorneys to conduct legal research, to conference cases with attorneys, to assist in writing opinions and orders, and to handle the operations and scheduling of cases. Judge López Torres, as well as former

Civil Court judges Abdus-Salaam and Schlesinger, indicated the importance of their court attorneys to the quality of their work and the absolute need to have exclusive control over the hiring for that position. López Torres Decl. ¶ 8; Schlesinger Tr. 1971:19 – 1972:8; Abdus-Salaam Tr. 1890:13 – 1891:18.

134. Shortly after she was elected to the Civil Court, she began her search for qualified applicants to serve as her court attorney. On or about November 4, 1992, she received a cover note and resume from an official of the Democratic Party in Brooklyn, Steven Cohn. López Torres Decl. ¶ 9; Pl. Ex. 85. The cover note reads:

Dear Judge

Congratulation on your election. Clarence and Vito have asked me to refer this wonderful gentleman to you as your Law Secretary.

Please be so kind as to interview him and obtain the necessary paperwork for his employment.

Thank you

Pl. Ex. 85.

135. Although the applicant did not appear to her have the requisite experience for the job – he had only graduated from law school the year before – she both interviewed him and spoke with a listed reference to determine whether he was, in fact, qualified for the position. That reference, Supreme Court Justice Carolyn Demarest, for whom he had worked, told her that “his work was mediocre. That he had spent an enormous amount of time on the phone doing political work.” López Torres Tr. 704:12 – 705:8. After a careful review of his application, Judge López Torres thus determined that he was not the right person to serve as her first court attorney. López Torres Decl. ¶ 9.

136. The attorney whom she ultimately hired for the position had practiced for almost twenty years as a legal services attorney, and she was very familiar with his legal abilities because he had been her co-worker at MFY Legal Services, Inc. Based on her experience, she felt that he had tremendous legal experience, judgment, integrity, and a strong work ethic. López Torres Tr. 705:9 – 706:12; López Torres Decl. ¶ 10. After several years as her court attorney, he is now an Administrative Law Judge for the State of New York. López Torres Decl. ¶ 10.

137. In December of 1993, while attending what is commonly referred to as “judge school” for new judges, she received a message that County Leader Clarence Norman wished to speak with her. When she called him, he was polite but extremely upset that she had not hired the person whose resume the Party had sent to her. Mr. Norman told her that she did not “understand the way it works.” He explained that attorneys work hard for the Democratic Party’s political clubs to get candidates elected and that the court attorney job is a way to reward them. He expressed that she had obtained her Civil Court judgeship “for nothing.” Judge López Torres told him that she had interviewed the person whose resume the County Democratic Organization had forwarded but had found him unqualified for the position, and had already hired another person as her court attorney. He responded by demanding that she “unhire” him and hire either the original applicant or another attorney whom the party would find for her. She replied that she could not do that. In response, Mr. Norman told her that some day she would want to become a Supreme Court justice and that the party leaders would not forget this. He reiterated that she had been given her position “for nothing” and “as a gift” and that the party leaders would remember her refusal to hire their applicant and that

without the “County’s” support any nomination for Supreme Court “will not happen.”

López Torres Decl. ¶ 11.

138. Similarly, at a Christmas party that same winter, Assemblyman Vito Lopez, the district leader who had championed her for the Civil Court vacancy, confronted her angrily about her failure to hire the party’s referral. He told her that it was an embarrassment to him and “made him look bad” because he had supported her and in return she was refusing to show her appreciation by hiring the person referred by “County.” He called her ungrateful and demanded that she “make it right” by hiring the party’s applicant. Judge López Torres told him that she could not do that, that she needed to have the most qualified and reliable person for that position, which she had found.

López Torres Decl. ¶ 12.

139. In or around June, 1995, Judge López Torres received a phone call from a friend who indicated that she was relaying a message from a close associate of Assemblyman Lopez. It was conveyed to her that Mr. Lopez wanted her to hire his daughter, who had recently finished law school, as her court attorney, and that in exchange he would “make it happen” for her to be selected for a Supreme Court vacancy that was opening up and had been designated for a Latino by the county party leadership. Subsequently, in or about September 1995 she received a phone call from another source who conveyed the same request. López Torres Decl. ¶ 13.

140. Judge López Torres told both persons that she could not fire a highly qualified court attorney in order to hire a recent law graduate. Assemblyman Lopez’ daughter was ultimately hired by another Civil Court Judge in Brooklyn who subsequently was nominated and elected to the Supreme Court a few years later. Mr.

Lopez has since not supported Judge López Torres in any of her efforts to obtain the Democratic Party's nomination for Supreme Court, and in fact was the main supporter of a candidate who ran against her when she sought re-election to the Civil Court in 2002. López Torres Decl. ¶ 14.

141. In 1997, she first sought her party's nomination for Supreme Court. She contacted party officials to indicate her interest in being considered by the judicial screening committee for Supreme Court that Mr. Norman had established to consider and approve candidates for judgeships. López Torres Decl. ¶ 15.

142. In late July of 1997, she contacted Mr. Norman to request a meeting to discuss her candidacy. He told her to come to Junior's Restaurant in Brooklyn for a breakfast meeting with him on August 22, 1997, which she did. In that meeting, he reiterated that her failure to hire as her court attorney the people chosen by the party had been a "serious breach of protocol." She told him that since she was at that point between court attorneys, that she would be prepared to consider an application referred by him if the applicant were qualified. He indicated that the way it worked was that she needed to get the support of the "Latino" district leaders. López Torres Decl. ¶¶ 16-17.

143. In August of 1997, several Democratic elected officials in Kings County approached her directly and indirectly to see if she would be willing to be considered for nomination to the Supreme Court at the judicial convention. She agreed to be considered for nomination. López Torres Decl. ¶ 18.

144. On September 15, 1997, while she was on the bench in court, she received an urgent phone call from Mr. Norman. He insisted and demanded that she remove her name, in writing, from consideration for Supreme Court. He told her that if she did not

do so she would never be supported for Supreme Court, that to run in an open convention was “not the way it works” and that it would be a direct challenge to him. He urged that she carefully consider her decision. Judge López Torres replied that she was under the impression that we lived in a democracy and that she had a right to participate in the judicial convention as a candidate. In the end, her name was never even proposed at the judicial convention for nomination. López Torres Decl. ¶¶ 19-20.

145. Before the 1997 convention, Jeffrey Feldman asked Senator Connor to chair the judicial convention that year, and Mr. Norman nominated Connor for that position at the convention. Connor Tr. 2192:6 – 2196:1; Pl. Ex. 34C.

146. In the following year, Judge López Torres once again sought nomination to the Supreme Court. She applied to and was interviewed by the Kings County Judicial Screening Committee. On September 22, 1998, she telephoned the then-chair of the Screening Committee, Mr. Jerome Karp, to request the results of the committee’s evaluation of her candidacy. Mr. Karp refused to divulge this information to her, rather, he told her that the results of the screening committee’s evaluations were confidential and were only provided to Mr. Norman. López Torres Decl. ¶¶ 21-23.

147. Accordingly, she twice wrote to Mr. Norman requesting the results of the Screening Committee’s evaluation of her qualifications, and, receiving no response, she called him several times and left several messages. He did not respond to these letters or calls. Without any access to the Democratic County Committee’s endorsement, she realized that she could not proceed any farther and ended her bid for the nomination. López Torres Decl. ¶¶ 24-25.

148. In 2002, she decided to seek her party’s nomination for Supreme Court

again. On January 14, 2002, she wrote to Mr. Norman and to Jerome Karp, still the chairperson of Mr. Norman's judicial screening committee, to declare her interest and to seek their guidance as to the nomination process. *See* Pl. Ex. 4. In reply, Mr. Karp wrote to her two days later to "advise that it is not necessary for you to declare your candidacy to me or my Committee. Candidates are only considered by our Committee upon referral of the County Leader [*i.e.*, Mr. Norman]." *See* Pl. Ex. 5. Mr. Norman did not refer her name to his screening committee even for an interview, which effectively ended any real possibility for her to compete for her party's nomination. López Torres Decl. ¶¶ 32-33.

149. Judge López Torres met with Mr. Norman again on February 1, 2002, to discuss her candidacy both for re-election to the Civil Court that year and for nomination to the Supreme Court. He told her that her refusal in 1997 to withdraw her name from consideration and her failure ever to hire a person connected with the Kings County Democratic Organization were his major concerns. She met with Mr. Norman again on May 2, 2002, to discuss her candidacy. Mr. Norman told her that her qualifications were not the issue. He again reiterated that she had been "disloyal" to the party by allowing her name to be considered for Supreme Court without his permission. Mr. Feldman, another County Democratic Party official, stated his view that he had a problem with her "lifestyle." López Torres Decl. ¶¶ 34-35.

150. During the 2002 judicial convention, judicial delegate Paul Bader placed her name in contention for nomination to the Supreme Court from the floor. The effort failed because the overwhelming majority of delegates voted instead for the party-backed candidate for Supreme Court. López Torres Decl. ¶ 36. Senator Connor, who himself declined to chair that 2002 convention and left early because he was so disturbed by the

nomination of someone he considered to be “unqualified,” testified that he regarded Judge López Torres as “well-qualified.” Connor Tr. 2209:10 – 2212:6. In fact, on the morning of the convention, Senator Connor told Mr. Feldman: “I said you have Margarita López Torres, she might put her name in. You people are supporting Laura Jacobson and it’s a horrible choice.” Connor Tr. 2208:17-25. According to Senator Connor, Judge Jacobson (*i.e.*, the candidate who was nominated and elected in 2002) was reversed as a Civil Court judge many, many times, and was rude to lawyers. Connor Tr. 2209:14-22.

151. Despite the fact that there were 137 delegates elected and the same number of alternates in 2002, the minutes of the judicial convention for that year reflect that only 96 people were involved in the vote (including 3 abstentions and 2 voting present) over Margarita López Torres’ nomination. Pl. Ex. 39(C); 92(E). In other words, not only did at least one third of the delegates fail to attend, but there were not even sufficient alternates to stand in for the missing delegates. Connor Tr. 2235:21 – 2236:13. As Dr. Cain found in his review of all of the convention minutes across the State, the absentee rate for delegates supports the conclusion that the conventions are not where the nominees are truly selected. Cain Tr. 312:7-25.

152. Not only did Mr. Norman decline to support her nomination for Supreme Court, but he also chose to have the county party support another candidate against her for her Civil Court seat when it was up for re-election in 2002, a virtually unprecedented action by the County’s Democratic Party. During that campaign, she received endorsements from the *New York Times* (*see* Pl. Ex. 6) and numerous other newspapers, as well as approvals from the major bar associations that considered the race, and she

prevailed in the primary election. In the general election, Judge López Torres received more votes than any of the other seven Democratic countywide judicial candidates, and was the only judicial candidate in Brooklyn to receive over 200,000 votes. In fact, she received more votes (200,710) for Civil Court than *any* of the Democratic candidates for *Supreme Court* did in Brooklyn on the same day. López Torres Decl. ¶ 37.

153. In January of 2003, she again wrote to Mr. Norman and to Mr. Karp to declare her candidacy for Supreme Court and to request that the screening committee consider her application. She also requested to know whether “the rules, procedures, and criteria of the Committee are set forth in writing, and if so, whether I might obtain a copy of these documents.” *See* Pl. Ex. 7; López Torres Decl. ¶ 39.

154. Apparently due to the escalating scrutiny from the press, Mr. Norman chose to allow the screening committee to interview her. In addition, after almost five months and repeated requests in writing, the screening committee actually developed written “Procedure and Policy” for the first time and sent that document to her. *See* Pl. Ex. 8. That document made clear that the only source of candidates considered by the committee was the “County Chairmen [*i.e.*, Mr. Norman and his Republican counterpart, when cross-nominations were contemplated].” *See id.* at 1 ¶ 3. After submitting answers to the screening committee’s questionnaire and her curriculum vitae, she interviewed in May of 2003 before its members and was found qualified. López Torres Decl. ¶¶ 40-41.

155. However, once again she did not receive the support of the County Leader. She met with Mr. Norman on June 6, 2003. He told her that she did not have sufficient support (although she had gotten more votes than any of the party’s other candidates in 2002), and he again reiterated his displeasure at her failure in 1997 to withdraw her name

from consideration for Supreme Court. He summed up his concerns by stating that “County” would only support candidates who support “County.” López Torres Decl. ¶ 42.

156. On September 4, 2003, she wrote to Jeffrey C. Feldman, the executive director of the Kings County Democratic County Committee, to learn the date, time, and place of the Democratic Party’s judicial convention, whether candidates were permitted to address the convention’s delegates, and the identity of the Party’s judicial delegates. López Torres Decl. ¶ 43.

157. In response to her letter, Mr. Feldman wrote that the Kings County Democratic County Committee “does not now, nor has it ever, maintained or published such a list [of delegates or delegate candidates].” Pl. Ex. 9 ¶¶ 1, 2. Responding to her request to learn whether candidates may address the convention, Mr. Feldman summarized the convention’s openness to challenger candidates who do not enjoy the party leaders’ backing:

158. While I am neither an attorney nor a graduate of Law School, I suffer from the innocent belief that the floor of the Convention is open, only, to elected Delegates and their successors. I am not aware of any Convention in my thirty (30) years of attendance, which permitted a non-accredited member to be accorded the privilege of the floor, prior to it having issued nominations.

Pl. Ex. 9; López Torres Decl. ¶ 45.

159. In addition, Mr. Feldman added that he had been advised, “just in the last 24 hours, that the Chairman of the Democratic State Committee has scheduled the

Convention for Tuesday, September 16, 2003.” Pl. Ex. 9 at 2.

160. At the Democratic Party’s judicial convention in 2003, two delegates again attempted to nominate her for Supreme Court from the floor. Again, the motion did not gain many delegates’ votes. The convention instead chose to nominate those candidates endorsed by Mr. Norman and his Executive Committee. López Torres Decl. ¶ 47.

161. On September 18, 2003, shortly after the convention, a Democratic Party District leader, Ralph Perfetto, circulated a letter to the other District Leaders in Brooklyn that purported to explain his vote against Judge López Torres’ nomination. Although he stated that “Judge Torres is highly qualified,” he indicated that he wished to explain “the true reason why I voted as I did”:

Last year I voted for Judge Torres, but this year I checked with two judges who were not candidates this year, and four attorneys. They all labeled her an “ingrate.” They told me that she courted Vito Lopez to support her for Civil Court, but then decided she didn’t need him anymore and denied his daughter a job. I see nothing wrong with a district leader recommending a candidate to a judge or elected official for a position provided they are qualified and work for every dollar they are paid.

Pl. Ex. 10 at 4; López Torres Decl. ¶ 48.

162. During this period, she was approached by the Working Families Party, a minor party in New York State that customarily cross-endorses Democratic candidates. In the end, the Working Families Party ran a slate of Supreme Court candidates under the banner of restoring judicial integrity to the Supreme Court selection process in Brooklyn. She agreed to run in that slate in the general election, though she remains a registered Democrat and would like to run as a Democrat. López Torres Decl. ¶ 49.

163. The results of the 2003 election demonstrate clearly that minor-party

candidates for Supreme Court who do not enjoy the endorsement of the Democratic Party cannot prevail, or even come close, in the Second Judicial District. Despite the endorsement of the Working Families Party's slate by most of the daily newspapers (the *New York Times*, the *Daily News*, the *New York Sun*, and *El Diario*), well-publicized accusations and indictments of wrongdoing involving Mr. Norman and Mr. Feldman in Brooklyn concerning the Kings County Democratic County Committee, and her own receipt of over 200,000 votes for Civil Court just one year earlier, none of the slate's members beat the Democratic Party candidates. Indeed, although she received the most votes among the six Working Families Party candidates (32,594), she still received only about one half as many votes as the Democratic candidate with the fewest votes. López Torres Decl. ¶ 50; Pl. Ex. 67.

164. Over a period of eight years, Judge López Torres has tried to obtain her party's nomination for Supreme Court based on her qualifications. On multiple occasions over that period, she met with "over 35" of the 42 district leaders in Brooklyn to seek their support for her nomination. Neither any of those district leaders nor Mr. Norman himself ever suggested that her qualifications as a judge were not sufficiently strong to serve on the Supreme Court. López Torres Tr. 709:9-14; López Torres Decl. ¶ 52. Rather, Judge López Torres testified,

they all indicated that the process and the way you became a Supreme Court judge is through the County Leaders essentially selected them and the district leaders selected them. And in my particular situation, everyone indicated that I would need the support and the approval of the County Leader and also of Assemblyman Lopez.

López Torres Tr. 707:22 – 708:5.

165. For reasons unrelated to her qualifications, the County Leader and

Assemblyman Lopez have chosen not to support her for the Democratic Party's Supreme Court nomination year after year. Connor Tr. 2213:21 – 2214:14. Senator Connor agreed that she had incurred the political enmity of a “powerful district leader” in Vito Lopez because “she refused to take Vito's recommendation for hiring someone,” and Mr. Norman's opposition both because of that refusal and because she had agreed to allow her name be put into nomination in 1997, though it never was. Connor Tr. 2212:15 – 2213:2; 2213:21 – 2214:8.

166. She was again a candidate for Supreme Court for the 2004 elections, was found qualified by the screening committee, but was not nominated at the judicial convention.

iii. The Third Judicial District

167. In the Third Judicial District, as Albany City Court Judge Thomas Keefe explained based on his many years as a Democratic Party leader in Ulster and Albany Counties, the “dominant county party chairmen choose the Supreme Court candidates.” In particular, “it is the Albany County Democratic chairman, in tandem with the Rensselaer County Democratic chairman, who choose who the Democratic candidates will be.” Keefe Tr. 850:2 – 851:16.

168. The county party chairpersons and their respective county committees also select the delegate and alternate candidates, circulate their petitions, and get them elected. Keefe Tr. 848:5 – 849:22; 934:5 – 935:6.

169. Those same County Leaders “more often than not” then broker cross-endorsement agreements with Republican Party leaders for their candidates within the judicial district. Keefe Tr. 851:21 – 852:14.

iv. The Fourth Judicial District

170. Justice Joseph Sise testified about his own nomination in 1998. When he learned that Justice White from Montgomery County was retiring, he wrote to the County Chairwoman of the Republican Party “to let her know what [his] intentions were.” Sise Tr. 15173-14. The Montgomery County Republican committee endorsed him on or around May 27, 1998. The eleven county chairpersons of the Republican county committees within the judicial district then met by the end of the first week in June, and the Montgomery County Chairwoman introduced Sise to her fellow county chairs. Sise Tr. 1517:15 – 1519:6.

171. At that time, Justice Sise’s brother was the county chairperson of the Schenectady Republican county committee, the second largest county in the judicial district with respect to the number of delegates at the convention. Sise Tr. 1519:8-24; Sise Decl. ¶ 2; Pl. Ex. 48D. By early June, a third potential Supreme Court candidate had dropped out of the race. Sise Tr. 1520:8-12. Although Justice Sise claimed that he remained concerned that another candidate might somehow appear, he never heard “any explicit statements made to [him] that another candidate was ready to take [him] on in the convention.” Sise Tr. 1521:25 – 1522:5. He also was aware that since 1925, whenever a Supreme Court justice from Montgomery County had retired, that county’s Republican county committee was able to secure that nomination for another Montgomery County candidate. Sise Tr. 1522:9-1523:7. In addition, the minutes of the Fourth Judicial District Republican Party judicial conventions in the record, reflecting all nine of the conventions held since 1990, establish that none of the nominations at those conventions were contested. Pl. Ex. 42D, 43D, 44D, 45D, 47B, 48D, 49D, 50B, 51D. In short, despite

Justice Sise's decision to run a campaign with full paraphernalia (lawn signs, etc.), Sise Tr. 1502:22 – 1503:20, the evidence shows that the principal decision-makers in the nomination process were the county chairpersons, particularly the Montgomery County chairperson and the Montgomery County Republican committee. Not surprisingly, Justice Sise made a point of thanking the eleven Republican county chairpersons, as well as the rest of his family and the delegates, in his acceptance speech at the convention. Pl. Ex. 48D at 30.

v. The Seventh Judicial District

172. Former Rochester City Court Judge John Manning Regan testified that, based on his experience from 1966 through 1970 as counsel to the Monroe County Democratic Committee, the eight county chairpersons of the Democratic county committees would select the delegates to the convention who were “reliable people in the sense that they would adhere to the instructions of each county chairman,” and then the chairpersons would meet in April or May to determine who they were going to nominate for Supreme Court. Regan Tr. 344:13 – 345:25; 377:22 – 379:7.

173. With respect to the Republican Party, which dominates Supreme Court elections in this judicial district, the evidence shows that the Monroe County Party chairpersons, especially the chairperson of the Conservative Party in that county, effectively control the nomination process. Regan Tr. 394:1-24. By the early 1990s, the Republican power base was concentrated in the County government, both its Legislature and its Executive. Regan Decl. ¶ 10-11. The Democratic power base had concentrated in the City government, both its Council and its Mayor. The Conservative Party nomination often affected the balance of political power in the County, *e.g.*, four or five County

Legislature seats turned on which candidates had the Conservative Party's support. *Id.*

174. To maintain control of the County Legislature, the Republican Party Chairman had brokered an agreement whereby the Conservative Party Chairman would have control over Republican Supreme Court nominations in exchange for Conservative Party support for the Republican Chairman's chosen candidates for the County Legislature. *Id.* Consequently, Republican candidates for Supreme Court had to obtain the support of the Conservative Party Chairman in order to be considered for the Republican Party's nomination. *Id.* In fact, the entire Republican nomination process for Supreme Court effectively ends at the Conservative Party dinner held on the third or fourth Friday in May when "you find out who the candidate is going to be," "who has the nomination." Regan Tr. 388:2-14. This is true despite the fact that the Republican candidates are nevertheless told by their county chairman to appear before the various Republican Party committees in the towns, villages and city from May through early July. Regan Decl. ¶ 12; Regan Tr. 385:15-17.

175. The county leaders (and particularly the Monroe County leader) also select the judicial delegates. Regan Tr. 344:17 – 345:10; 378:25 – 379:7.

176. Judge Regan's efforts to compete for the Republican Party nomination illustrate the extent to which the Conservative Party chairman and the Republican Party's Monroe County Chairman control the nomination process. Judge Regan had angered the Conservative Party leader in Monroe County by informing Democratic voters that the Democratic candidate for City Court, who was supported by the Conservative Party, was not a genuine Democrat and had been promised the Democratic nomination after he changed parties. Regan Tr. 369:1-25. As a result, the Conservative Party chairman

would not support his nomination for Supreme Court in 1994. Despite significant popularity among voters and Republican Party county committee members across the judicial district, Judge Regan was told by the Republican Party chairman of Monroe County that he controlled the judicial convention delegates in the District and “that’s all that matters.” Regan Decl. ¶ 12.

177. Subsequently, he contacted many of the Republican Party county committee members from each of the Assembly Districts within the Seventh Judicial District to determine their level of support for his candidacy. In those meetings, they apparently indicated their desire to support his candidacy. However, because the Republican and Conservative Party chairmen in Monroe County did not support him they indicated that they had no choice but to serve as delegates when asked and to back the Republican Party Chairman’s choice of nominee at the convention, which they did. Regan Decl. ¶ 13; Regan Tr. 386:4-25; Pl. Ex. 44H.

vi. The Eighth Judicial District

178. In the Eighth Judicial District, for many years the Erie County Democratic and Republican Party chairpersons have exercised significant control over the nomination process in their respective parties. Until 2002, Mr. G. Steven Pigeon was the Democratic Party Erie County Chairman and, in the words of Dennis Ward, a Democratic Party official in Erie County, Mr. Pigeon was “someone of influence” and “had a lot to say” when it came to Supreme Court nominations. Ward Tr. 1378:9-24. In discussing the pressure on her to support Mr. Pigeon’s slate at the 2000 convention – the only nomination of a candidate not supported by the County Leader across the State since the 1970s – alternate-turned-delegate Patricia K. Fogarty explained: “Normally the Erie

County chairman couldn't care less about the Southern Tier. . . . This was bizarre." Pl. Ex. 70. She continued: "This is the first time, and I've been coming to these things for many years, when the delegates' votes counted for something." *Id.* Contemporaneous reports show that the fight at the convention was part of a broader struggle over control of the Erie County Democratic Party. *Id.* Amherst Town Court Judge Mark Farrell was one of numerous candidates for Supreme Court who were asked by Mr. Pigeon to pay \$7,500 in non-itemized nomination expenses to the Erie County Democratic Party in exchange for their party's nomination at the convention. Pl. Ex. 79 at ¶¶ 3-6; Ward Tr. 1378:25 – 1381:21; Pl. Ex. 78 (App. G-2) at 16.

vii. The Ninth Judicial District

179. Benjamin Ostrer, an attorney in and resident of Orange County, has been a registered Republican since approximately 1980. He has served as a member of the Town of Chester Republican Committee for 15 years, as a member of the Executive Committee of the Orange County Republican Party, and as either a judicial delegate or alternate delegate to each of the Ninth Judicial District Republican judicial conventions since 1990. Ostrer Decl. ¶¶ 2-7.

180. Based upon his experience both as a delegate and as a party leader in Orange County, Mr. Ostrer testified that the Westchester Republican Party Chairperson is the single most important individual in selecting Supreme Court justices in the Ninth Judicial District for two reasons. First, in the 9th Judicial District Republican Party candidates usually prevail in general elections for the Supreme Court and have won each of these elections since 1996. Second, approximately 45% of the registered Republican voters in the Judicial District reside in Westchester. Under existing Republican Party

rules, there are delegates assigned for every 2,500 votes cast for the party's gubernatorial candidate in the most recent general election. For this reason, Westchester possesses the largest block of delegates and alternates to each judicial convention. An alliance between Westchester County and any one of the other counties within the district provides sufficient delegate strength to ensure the nomination of a particular candidate. Ostrer Decl. ¶¶ 13-16.

181. In response to objections raised by the Northern Counties, however, an agreement was reached between the various Republican Party county organizations in the 1980s whereby courtesy was to be extended to the Republican chairperson of the county in which a vacancy was to be filled in the coming election. Ostrer Decl. ¶ 15.

182. Despite this arrangement, given the imbalance in power within the District no county would dare mount a contest or support a candidate other than one who has been deemed acceptable by the Westchester County Republican Committee. The penalty for such a challenge was demonstrated in 2003. Although Justice Joseph G. Owen, a resident Orange County jurist, reached retirement age last year and his judicial seat was to become vacant, Orange County's Republican chairperson was denied the opportunity to name a candidate to succeed him. In retaliation for efforts by the Orange County Chairman to obtain an additional seat, an alliance between Rockland and Westchester County substituted a judge from Rockland, thereby further reducing Orange County's bench strength. Ostrer Decl. ¶ 16.

183. Generally, the Republican county chairman in the county that controls the seat selects the nominee. Ostrer Decl. ¶ 19. At least since 1990 when Mr. Ostrer began attending judicial conventions, no Supreme Court candidate has obtained the Republican

Party's nomination in this district over the objection of the Westchester County Republican chairman. Ostrer Tr. 1449:17-25; 1451:22 – 1452:3.

184. In fact, Mr. Ostrer testified that Jim Cavanaugh, the Westchester County Republican chairman, threatened him directly “that if any one of the Republican candidates who were ultimately nominated lost [as a result of Orange County Republicans choosing not to support the candidates selected by the Westchester County chairman], that Judge Ritter’s seat, which would be available next year in Orange County, would also be taken away from us.” Ostrer Tr. 1415:3-7.

185. In the Ninth Judicial District, the Republican county party leaders also control the selection of their party’s delegates and alternates, and most of the delegates are attorneys, elected officials, or senior party members with close ties to party leaders. Ostrer Decl. ¶ 7-9.

viii. The Eleventh Judicial District

186. As Defendants’ expert, Dr. Hechter, explained in his report:

[T]he party Executive Committee plays no formal role in selecting nominees. However, there are ad hoc discussions between the district leaders and the county leader, and some consensus seems to be worked out at these discussions. District leaders have influence over delegates, as in any convention.

Pl. Ex. 69 ¶ 62.

187. Dr. Hechter quotes M.L. Henry to summarize the convention process in the Eleventh Judicial District:

In Queens (Henry Dep. 1995 at 51-2), the chair calls the meeting to order, delegates are certified, and then the chair announces that there are three nominations tonight. As expert witness Henry characterizes the process, [“]Are there any nominations for vacancy number one? Oh, Bill, you have a nomination, and good old Bill will stand up and read, I am pleased to

nominate judge so-and-so for the justice of the Supreme Court. Sometimes they don't even know how to pronounce their name. They say, is there a second. Mary, do you have a nomination. Yes. She gets up and seconds it. Are there any other nominations. No. Then let's cast one unanimous ballot for judge so-and-so, who then gets up and thanks everybody. Then they do the same thing for candidates two and three." Sometimes the process takes as little as ten minutes (Henry Dep. 1995 at 62).

Pl. Ex. 69 ¶ 77.

188. Frequently, the minutes of the conventions are already typed out with blanks left only for the names of the person nominating the candidates, whose names are already included. *See* Pl. Ex. 31E, 32E, 33C, 34E, 36 E, 38E, 39E.

ix. The Twelfth Judicial District

189. Dr. Hechter testified in his report, based on his review of "expert witness" M.L. Henry's deposition in the *France v. Pataki* case, that Mr. Henry's description of the Eleventh Judicial District's judicial convention (quoted above) applies as well to the Twelfth Judicial District because "[m]uch the same occurs in the Bronx." Pl. Ex. 69 ¶ 78.

Dr. Hechter further notes that:

Traditionally, the Bronx County Leader had greater autonomy from his district leaders. Even so, the county leader's power over the process inevitably is constrained by the composition of their constituencies. Before deciding which judges to support George Friedman first solicited the views of his district leaders (Friedman Dep. 1995 at 87): "they are the most important part of our party structure and they are the people whom I deal with for the most part in reaching decisions that I have to reach.

Pl. Ex. 69 ¶ 66.

d. The Absence of Competition at the Judicial Conventions

190. It is undisputed that the judicial conventions around the State feature a virtually complete absence of real competition or decision-making by the delegates. Mr.

Kellner explained, for example, that “since 1977, I have known what the result would be before every roll call that has happened. Maybe not the exact number, but known what the outcome would be.” Kellner Tr. 1579:11-13. Most of the time, according to Mr. Kellner, “the real voting happens on the telephone before the convention.” Id. at 1578:4-5. Similarly, Dr. Cain testified that, based on his analysis of the minutes of the various conventions across the State since 1990, it is clear that the judicial convention is not the locus of any deliberative decision-making concerning the nomination of candidates. Cain Tr. 312:17-23.

191. Senator Connor echoed this conclusion with respect to the Second Judicial District conventions over which he presided. Acknowledging that the 2001 convention took only 20 minutes but included 30 different acts, including nomination of 6 judges, but no real deliberations or contested votes, Mr. Connor commented aptly: “Yes, you can do anything if no one objects, without objection it’s done that fast.” Connor Tr. 2271:11-12; Pl. Ex. 38C.

192. Senator Connor explained that when he chaired the judicial conventions, he would meet with the executive secretary of the Democratic County Committee in Brooklyn, Jeffrey Feldman, before the convention and Mr. Feldman would tell him who would be nominated at the convention and would give him a script to follow, Connor Tr. 2200:22-25; 2202:12-15; there were no contested nominations, Connor Tr. 2196:2-18; at every convention several nominees were approved as a group rather than individually, Pl. Ex. 34C, 36C, 37C, 38C, 39C; Connor Tr. 2197:2-15; 2200:16-21; 2218; 2221; 2224; 2228; and a typical nominating speech is “when there is no contest somebody gets up and says, I nominate and reads the names;” Connor Tr. 2197:24 – 2199:11.

193. Almost all Supreme Court nominations statewide are uncontested. From 1994 through 2002, 96.2% of Supreme Court nominations were uncontested at conventions for which the minutes were available. Pl. Ex. 31-39, 44-52. No evidence suggests that the handful of conventions during that period for which minutes were unavailable were any different. The conventions with unavailable minutes were: the Republican convention in the 8th Judicial District in 1995; the Democratic conventions in the 2nd, 11th, and 12th Judicial Districts and Republican conventions in the 1st, 2nd, 11th, and 12th Judicial Districts in 1998. Cain Decl. ¶ 14, n.1.

194. Significantly, Dr. Bruce Cain concluded that there was no evidence of even a single successful challenge anywhere in the state to the candidates backed by the county party leaders between 1994 and 2002. Cain Decl. ¶ 14. Convention minutes were not available for New York City prior to 1994, but the minutes from outside New York City for 1990 to 1993 also show no successful challenges. Cain Decl. ¶ 14. The only convention at which a candidate who was not supported by the county party leadership obtained the nomination was in the Eighth Judicial District in 2000, at which candidates supported by a rival faction of party leaders won as a result of a split within the county party leadership, rather than an individual challenger candidate's efforts. Cain Decl. ¶ 15; Pl. Ex. 70.

i. First Judicial District

195. In the 7 years for which Democratic convention minutes were available

between 1994 and 2002, 26 of the 29⁴ candidates nominated faced no opposition at the convention. Pl. Ex. 31A, 32A, 34A, 35A, 36A, 37A, 38A, 39A. None of the 30 Republican nominees faced any opposition at the conventions throughout that period. Pl. Ex. 31B, 32B, 34B, 35B, 36B, 37B, 38B, 39B. In total, 94.9% of the nominations in the First Judicial District from 1994 through 2002 were uncontested.

ii. Second Judicial District

196. From 1994 through 2001, none of the seven Democratic judicial conventions had any contested nominations. Pl. Ex. 31C, 32C, 33A, 34C, 36C, 37C, 38C, 39C. In 2002, Plaintiff Margarita López Torres contested a nomination. Pl. Ex. 39C. The party-backed candidate won by a vote of 66 to 25. *Id.* None of the other nominations were contested. *Id.* None of the 47 Republican nominees faced any opposition at the conventions from 1994 through 2002. Pl. Ex. 31D, 32D, 33B, 34D, 36D, 37D, 38D, 39D. In total, 98.9% of the nominations in the Second Judicial District from 1994 through 2002 were uncontested.

iii. Third Judicial District

197. From 1990 through 2002, only 3 of the 20 candidates nominated by the Democratic Party faced opposition at the convention. Pl. Ex. 40A, 41A, 42A, 43A, 44A, 45A, 46A, 48A, 49A, and 51A. Only 1 of the 18 candidates nominated by the Republican Party faced any opposition at the convention. PEX 40B, 41B, 42B, 43B, 44B, 45B, 46B, 48B, 49B, and 51B. In total, 89.5% of the nominations in the Third Judicial District from 1990 through 2002 were uncontested.

⁴ These numbers do not include the four candidates nominated at the 2001 Democratic convention, for
Footnote continued on next page

iv. Fourth Judicial District

198. From 1990 through 2002, all 14 of 14 Republican nominations were uncontested at the convention. Pl. Ex. 42D, 43D, 44D, 45D, 47B, 48D, 49D, 50B, 51D. Only one out of 12 Democratic nominees, in 1994, was nominated in a contested vote. Pl. Ex. 42C, 43C, 44C, 45C, 47A, 48C, 49C, 50A, 51C. In total, 96.2% of the nominations in the Fourth Judicial District from 1990 through 2002 were uncontested.

v. Fifth Judicial District

199. From 1990 through 2002, all 21 of 21 Republican nominations were uncontested at the convention. Pl. Ex. 40D, 42F, 43F, 44F, 45F, 46D, 47D, 49F, 50D, 51F, 52B. Only 5 of the 15 Democratic nominees faced contested nominations at the conventions. Pl. Ex. 40C, 42E, 43E, 44E, 45E, 46C, 47C, 49E, 50C, 51E, 52A. In total, 95.8% of the nominations in the Fifth Judicial District from 1990 through 2002 were uncontested.

vi. Sixth Judicial District

200. From 1990 through 2002, all 12 of 12 (100%) Republican and Democratic nominations were uncontested at the convention. Pl. Ex. 41C, 41D, 43G, 45G, 46E, 48E, 49G, 50E, 51G.

vii. Seventh Judicial District

201. Only 2 of the 20 candidates nominated by the Republican Party between 1990 and 2002 faced a contested nomination during the convention. Pl. Ex. 41E, 42H,

Footnote continued from previous page
which the minutes are incomplete. Pl. Ex. 38A.

43I, 44H, 45I, 46G, 47F, 48G, 49I, 50G, 51I. All 12 of the 12 Democratic nominees were uncontested at the convention. Pl. Ex. 41D, 42G, 43H, 44G, 45H, 46F, 47E, 48F, 49H, 50F, 51H. In total, 93.8% of the nominations in the Seventh Judicial District from 1990 through 2002 were uncontested.

viii. Eighth Judicial District

202. None of the 34 candidates nominated by the Republican Party between 1990 and 2002 faced a contested nomination during the convention. Only 2 of the 34 Democratic nominees faced contested nominations, all at the 2000 convention at which the party factional fight over the leadership of Erie County manifested itself. Pl. Ex. 41G, 41H, 42I, 42J, 43J, 43K, 44I, 44J, 45J, 45K, 47G, 47H, 48H, 48I, 49J, 49K, 50H, 50I, 52C, 52D. In total, 97.1% of the nominations in the Eighth Judicial District from 1990 through 2002 were uncontested.

ix. Ninth Judicial District

203. None of the 36 candidates nominated by the Republican Party between 1990 and 2002 faced opposition at the convention. Pl. Ex. 41J, 42L, 43M, 44L, 45M, 46K, 47J, 48K, 49M, 50K, 51K, 52F. Only 3 of the 36 Democratic nominees faced contested nominations. Pl. Ex. 41I, 42K, 43L, 44K, 45L, 46J, 47I, 48J, 49L, 50J, 51J, 52E. In 1996, three candidates competed for two positions, with the losing candidate withdrawing before the roll call was completed when his defeat was apparent. Pl. Ex. 46J. In 1999, the winning candidate received 55 votes, with the losing candidate receiving 3 votes. Pl. Ex. 49L. In total, 95.8% of the nominations in the Ninth Judicial District from 1990 through 2002 were uncontested.

x. Tenth Judicial District

204. From 1990 through 2002, all 161 of 161 (100%) Republican and Democratic nominations were uncontested at the convention. Pl. Ex. 41K, 41L, 42M, 42N, 43N, 43O, 44M, 44N, 45N, 45O, 46L, 46M, 47K, 47L, 48L, 48M, 49N, 49O, 50L, 50M, 51L, 51M.

xi. Eleventh Judicial District

205. From 1994 through 2002, all 64 of 64 (100%) Republican and Democratic nominations were uncontested at the convention. Pl. Ex. 31E, 31F, 32E, 32F, 33C, 33D, 34E, 34F, 36E, 36F, 37E, 37F, 38E, 38F, 39E, 39F.

xii. Twelfth Judicial District

206. Only two of the 24 Democratic nominees faced contested nominations, both at the 1994 convention. Pl. Ex. 31G, 32G, 33E, 34G, 36G, 37G, 38G, 39G. None of the 24 candidates nominated by the Republican Party between 1994 and 2002 faced a contested nomination during the convention. Pl. Ex. 31H, 32H, 33F, 34H, 36H, 37H, 38H, 39H. In total, 95.8% of the nominations in the Twelfth Judicial District from 1994 through 2002 were uncontested.

V. The General Election

a. Limited Contested Elections

207. In the general election in November, the evidence shows that, in the majority of judicial districts, Supreme Court positions are contested less than half the time. Specifically, from 1990 through 2002, eight of the 12 judicial districts in New York State had uncontested races with respect to the two major parties (*i.e.*, there was

only one candidate from the Democratic or Republican Party for a seat) at least 50% of the time, thus leaving 62% of the State's voters without any choice between major party candidates to make in November. Cain Decl. ¶ 16.

208. Across the State, 47% of the general elections for Supreme Court during that period were not contested by the two major parties. Cain Decl. ¶ 16-17.

209. Cross-endorsement is common. From 1990 through 2002, 190 candidates (41.3%) were cross-endorsed to fill the 460 total seats filled in general elections across the State. Pl. Ex. 54-66.

210. When asked about the State as a whole, Defendants' expert, Douglas Kellner, testified that "there are relatively few judicial districts where there are contested general elections." Kellner Tr. 1601:23-24.

b. Limited Competitive Elections

211. If elections where the second-place candidate gets at least 80% of the winner's total are considered "competitive," as is standard in political science, fewer than 24% of the general elections for Supreme Court across the State were competitive from 1990 through 2002. Cain Decl. ¶ 17; Pl. Ex. 54-66.

212. Only 2% of the general elections for Supreme Court in New York City were competitive during that period. Cain Decl. ¶ 17; Pl. Ex. 54-66.

213. Within New York City, where the Democratic Party dominates, the only time in at least 25 years in which a Supreme Court candidate without the Democratic Party nomination was elected occurred in 1982, when the Democratic Party failed to file proper nomination papers at the Board of Elections. Pl. Ex. 78, App. G-2, at 1; Kellner Tr. 16-19.

214. Outside New York City, in Upstate New York, the Republican nominees almost always prevail in the general election. Kellner Tr. 1601:25 – 1602:3; Sise Tr. 1524:10 – 1525:4; Ostrer Decl. ¶ 13; Regan Decl. ¶ 10; Pl. Ex. 54-66.

215. In all, more than three quarters (76%) of the Supreme Court elections from 1990 through 2002 across the state were either uncontested or non-competitive. Cain Decl. ¶ 17.

216. The evidence concerning the extent of contested and competitive general elections by judicial district is as follows:

i. First Judicial District

217. From 1990 through 2002, 85% of the races were uncontested. Cain Decl. ¶ 16; Pl. Ex. 54-66. During that period, 44 of the 52 candidates elected were cross-endorsed by both major parties. *Id.*

218. The Democratic nominees win every seat. Pl. Ex. 54-66; Kellner Tr. 1601:16-19;.

219. From 1990 through 2002, none of the contested races were competitive. Pl. Ex. 54-66.

ii. Second Judicial District

220. In the Second Judicial District, the Democratic nominees always win by large margins. Pl. Ex. 54-67; Pl. Ex. 78, App. G-2, at 1; Kellner Tr. 1601:16-19.

221. Plaintiff John Carroll testified, based upon his 30 years of experience observing electoral politics in New York City and Brooklyn, that “[t]o be elected to the Supreme Court from the second judicial district you must be the democratic candidate.” Carroll Tr. 544:15-18.

222. From 1990 through 2003, the Republican Party cross-endorsed 45 of the 86 Democratic nominees (*i.e.*, 52%). *Id.*

223. In 2003, the Working Families Party nominated its own candidates for Supreme Court, including Plaintiff Margarita López Torres, who did not receive the Democratic or Republican Party nominations as well. The Democratic nominees who received the fewest votes in the general election received approximately twice as many votes as Plaintiff Margarita López Torres, who received the highest number of votes among the Working Families Party nominees. Pl. Ex. 67.

iii. Third Judicial District

224. Cross-endorsement occurs commonly in the Third Judicial District. Albany City Court Judge Thomas Keefe testified that “[m]ore often than not, in the period of time between 1968 and the present, the two major parties Republicans and Democrats have divvied up the Supreme Court seats by cross-endorsing each other’s candidates.” Keefe Tr. 851:21 – 852:14.

225. Between 1990 and 2002, there were 10 years in which the 3rd Judicial District had Supreme Court elections. Pl. Ex. 54-66. In five of those ten elections, including the most recent three, the two major parties cross-endorsed the Supreme Court candidates. *Id.*

iv. Fourth Judicial District

226. Republican nominees for Supreme Court always prevail in the general election in the Fourth Judicial District. According to Justice Richard Sise, the last Democratic nominee was elected in the 1970s, and before that, “there was one other, who might have run on the Bull Moose Party, in – in like the first decade of the 20th century,

like 1912 or 1910.” Sise Tr. 1524:13 – 1525:4; *see also* Pl. Ex. 54-66.

227. From 1990 through 2002, the Democrats cross-endorsed the Republican candidate in 2001 and 1995, and only ran one candidate for two vacancies in each of 1998 and 1999. Pl. Ex. 54-66. The only year in which the strongest Democratic candidate received at least 80% of the weakest Republican candidate’s vote total was 1992. *Id.*

v. Fifth Judicial District

228. In most years, Republican nominees prevail in general elections for Supreme Court in the Fifth Judicial District. Pl. Ex. 54-66. The two major parties frequently cross-endorse candidates. From 1990 through 2002, the two major parties cross-endorsed for the single open position in 1993 and 1997, and they cross-endorsed for one of two open seats in 1994 and 2000. *Id.* During that period, the Democratic Party nominated fewer candidates than there were vacancies in 1996, 1999, 2001, and 2002. *Id.*

vi. Sixth Judicial District

229. The Republican nominees have won every election in the Sixth Judicial District from 1990 through 2002. Pl. Ex. 54-66. The Democratic Party has not even nominated a candidate since 1991, which meant that 91% of the elections for Supreme Court were uncontested during that period. *Id.*; Cain Decl. ¶ 16. In 1991, the Republican candidate defeated the Democratic candidate in a non-competitive race. Pl. Ex. 55.

vii. Seventh Judicial District

230. General elections in the Seventh Judicial District are usually non-competitive Republican victories. Pl. Ex. 54-66; Regan Decl. ¶ 10. From 1990 through

2002, the Republican nominees won eight of 12 seats in non-competitive elections. Pl. Ex. 54-66. The elections in 1990, 1992, 1994, and 2001 were competitive, and Democrats won at least one seat in three of those years. Pl. Ex. 54, 56, 58, 65. In three of the four years when multiple seats were available, the Democrats nominated fewer candidates than there were vacancies. Pl. Ex. 54, 56, 60, 62.

231. Former Rochester City Court Judge John Manning Regan testified that, since Watergate, candidates for Supreme Court with the Democratic nomination alone have only been elected “three, four times.” Regan Tr. 399:18 – 400:4; 396:19-21.

viii. Eighth Judicial District

232. The Eighth Judicial District can be competitive when the two major parties nominate different candidates, but most winning candidates are cross-endorsed. Pl. Ex. 54-66. From 1990 through 2002, for example, the two major parties cross-endorsed 20 of the 34 justices elected during that period. *Id.*; Pl. Ex. 78, App. G-2, at 16 (“Cross-endorsements are common in the 8th District”).

ix. Ninth Judicial District

233. The Republican nominees usually prevail in the Ninth Judicial District and have won every election since 1996, although Democratic candidates won several elections in the early 1990s. Pl. Ex. 54-66; Ostrer Decl. ¶ 13. The major parties cross-endorsed one candidate in 1995 and two candidates in 1990. Pl. Ex. 54, 59.

x. Tenth Judicial District

234. In the Tenth Judicial District, Republican nominees prevail more than Democratic nominees, but some Democratic candidates have won. Pl. Ex. 54-66. From 1990 through 2002, the 1994, 1995, and 1997 elections were uncompetitive, but the other

nine elections between 1990 and 2002 were competitive. *Id.*

xi. Eleventh Judicial District

235. The Eleventh Judicial District has non-competitive general elections with the Democratic nominees always winning by large margins. Pl. Ex. 54-66; Pl. Ex. 78, App. G-2, at 1; Kellner Tr. 1601:16-19. In addition, the Republican Party frequently cross-endorses the Democratic nominees; 31 of the 53 Democratic nominees from 1990-2002 were cross-endorsed by the Republican Party. *Id.*

xii. Twelfth Judicial District

236. The Twelfth Judicial District is non-competitive in the general election, with the Democratic Party nominees winning every election. Pl. Ex. 54-66; Pl. Ex. 78, App. G-2, at 1; Kellner Tr. 1601:16-19. In addition, from 1990 through 2002 the Republican Party cross-endorsed the Democratic nominees in every election except for 2001 (*i.e.*, 95% of the candidates elected were cross-endorsed). *Id.* In 2001, the two Democratic nominees defeated their Republican opponents by a wide margin. *Id.*

c. Candidates Without Democratic or Republican Party Nomination Never Come Close to Prevailing in General Election

237. As a matter of law, a candidate has the right to obtain a place on the general election ballot as an independent candidate by gathering 4,000 valid signatures for those judicial districts within New York City, and 3,500 valid signatures outside for those judicial districts outside New York City. N.Y. Elec. L. §§ 6-138, 6-142.2, 6-142.2(b-1), (c); Berger Tr. 102:10-16.

238. No independent candidate has been known to have prevailed, or even run, in any Supreme Court election anywhere in New York State at any time. Kellner Tr.

1601: 9-15; Ostrer Tr. 1450:1-5; Keefe Tr. 927:7-20; Carroll Tr. 542:2-7; 544:4-23; Regan Tr. 396:19-21; 399:18-21; Pl. Ex. 54-67.

239. Even minor party nominees have no chance without the nomination of either or both of the Democratic and Republican Parties: from 1990 through 2002, for example, such candidates not only never prevailed in any election without an endorsement by one of the two major parties, but also each candidate received less than 20% of the lowest-vote-getting winner's votes in 96% of the races during that period. Cain Decl. ¶ 17; Pl. Ex. 54-66.

VI. Barriers to Obtaining Majority of Delegate Votes at Convention as an Insurgent Supreme Court Candidate

a. Introduction: Insurgent Candidates Never Prevail at Judicial Conventions (with two exceptions in 25 years for party reform splits)

240. Defendants have readily acknowledged that the present judicial convention system is not designed to allow Supreme Court candidates to run and elect judicial delegates who will support them at the convention. Indeed, Mr. Kellner testified that:

A: The system isn't designed for individual candidates to be campaigning directly among the voters. The system is designed for the voters to select delegates who will perform that function of screening candidates and deciding who the party's candidate should be. *So the idea that an individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head.*

* * *

Q: In your experience, at the point in which delegates are elected, are they committed to any particular Supreme Court candidate?

A: That's very rare, and generally the answer is no, they're not. Indeed, you know, the rules are basically set up to discourage that. I mean, you don't even know who's going to be -- until recently, in Manhattan, you wouldn't know who is going to be reported out of the screening panel until after the primary or at the time of the primary.

Kellner Tr. 1567:17 - 1568:10 (emphasis added); *see also* Schiff Tr. 1256:23 – 1257:13;

Berger Tr. 52:1-7. (In fact, in many districts delegates do not even know who the Supreme Court candidates are until they arrive at the convention itself. Carroll Tr. 487:8-16; 490:10 - 491:3; 518:15-19; Ostrer Tr. 1412:2-8.)

241. Mr. Kellner testified further that:

[O]bviously everybody who I am aware of who has gotten a nomination has gotten it without running a slate pledged to their candidacy, and that's not how the system is designed. The system is designed for candidates to be appealing to the judicial delegates and not to the electorate at large.

Kellner Tr. 1572:1-7.

242. Similarly, Mr. Schiff testified that he had “never heard of a candidate for Supreme Court nomination putting together slates of delegates to be run in the various assembly districts around the county.” Schiff Tr. 1267:2-4.

243. The evidence is clear that the current selection system is, as Defendants’ witnesses unequivocally assert, designed to discourage candidates from running and electing their own delegates, and instead to require them to obtain the support of party leaders for nomination. Accordingly, it comes as no surprise that the burdens a candidate would face if she attempted to “twist the design of the system on its head” by running her own slates of delegates are overwhelming and the examples of successful efforts to do so non-existent across the State. Schiff Tr. 1294:2-3 (Supreme Court candidates running their own delegates “is not what goes on in the world today.”).

244. On only two occasions in the last 25 years have insurgent Supreme Court

candidates successfully challenged candidates backed by the dominant county party leaders for the nomination of the Democratic or Republican Party anywhere in New York State. Cain Decl. ¶¶ 14-15; Cain Tr. 332:15 - 333:2. First, in 1976, after more than twenty years spent building an infrastructure of reform clubs in Manhattan under the mantle of the New Democratic Coalition to overthrow the leadership of Tammany Hall, reformers were successful in recruiting, running, and electing a majority of delegates to the convention such that their slate of Supreme Court candidates prevailed over that of the county leaders of Manhattan and the Bronx. Berger Decl. ¶¶ 37, 38; Berger Tr. 61:23 - 62:1; 63:13-24; 68:14 - 69:14; 93:7 - 95:2; 248:5 - 249:6; Levinsohn Tr. 1900:6 – 1906:17.

245. In the Second Judicial District, the same movement tried and failed over several years to elect sufficient delegates to mount a similarly successful challenge at the judicial conventions. Connor Tr. 2244:1-20. Indeed, the reform movement has not been nearly as strong outside of Manhattan as it has within that judicial district. Berger Tr. 139:9-11. In Brooklyn, for example, only 3-4 of the more than 30 political clubs in that borough could be considered even remotely "reform" clubs. Carroll Tr. 562:8-19.

246. Second, in 2000, a factional fight over the leadership of the Erie County Democratic Party led by the a large coalition called the Task Force to Renew the Democratic Party succeeded in electing sufficient numbers of delegates committed to opposing County Leader Pigeon that, for the first time in memory, a challenger candidate prevailed at the Eighth Judicial District convention over Mr. Pigeon's candidates. Far from being the result of a single Supreme Court candidate's effort, or even a slate of such candidates, the 2000 convention success resulted from the work of an entire coalition

seeking to overthrow Mr. Pigeon. Indeed, Mr. Ward himself acknowledged that “[i]f these [insurgent] candidates had run individually without a coalition, they would no doubt have had a far more difficult time defeating the candidates for the nomination who were backed by then-Chairman Pigeon.” Ward Decl. ¶ 16; Ward Tr. 1333:17-22; 1368:19-22; Connor Tr. 2257:10-25.

b. Recruiting Delegate and Alternate Candidates

247. One of the many burdens that a challenger candidate would face in trying to run and elect sufficient delegates and alternates to compete for their party’s nomination at the convention is successfully finding individuals who are willing to serve as candidates for those positions. In the words of Defendants’ witness, district leader Arthur Schiff:

Well, if a candidate for judge wanted to run delegates in each of the assembly districts, it would be a substantial proposition. First of all, to find the delegates that – who would then – who would then he – he could be then sure that they would support him, and then to – I guess – when you say run a delegate, I guess you mean go out and then campaign for those delegates, print literature that would be distributed, get people, volunteers, to do all the things that are necessary to get candidates elected. That would be a substantial – substantial effort, both in time and money. . . . I mean, I couldn’t answer right now how much time and money would be involved. But I know that a – it would be an effort.

Schiff Tr. 1318:8-14.

It is – that would be a much more difficult process, to run delegates. It would be an expensive process. Most of these candidates are not political people in a sense. They are not really prepared to . . . [t]hroughout the county to try to select delegates and run them. They are not prepared to raise the money and that could be a really hard thing to do.

Schiff Tr. 1294:4-11; *see also* López Torres Decl. ¶¶ 25-26; Carroll Decl. ¶¶ 13; Segal Decl. ¶ 12; Regan Decl. ¶¶ 13-15; Ostrer Decl ¶ 10; Cain Decl. ¶¶ 8-9; Lipton Corrected Decl. ¶¶ 12-15.

248. When Judge Regan attempted to seek the Republican Party's nomination for Supreme Court in the Seventh Judicial District in 1994, he could not recruit delegate candidates even in the few ADs that he had targeted for delegate campaigns:

Despite the difficulties discussed below, I decided to try to organize a challenge by running supportive delegate candidates in the September election. Subsequently, I contacted many of the Republican Party county committee members from each of the Assembly Districts within the 7th Judicial District to determine their level of support for my candidacy. In those meetings, they indicated their desire to support my candidacy. However, because the Republican and Conservative Party chairmen did not support me and because the current nominating system did not allow me, personally as a candidate, to petition onto any ballot, the support of these committee members and other rank-and-file party members could not be easily translated into a real opportunity to earn my party's nomination for Supreme Court. They indicated that they had no choice but to serve as delegates when asked and to back the Party Chairman's choice of nominee at the convention.

The idea of running these supportive committee people as delegates who would defy the County Chairman, nominate me from the floor, and support me at the judicial convention was thus not a realistic option. The barriers to organizing such campaigns were insurmountable in the first instance because almost all committee persons had a relative, or were themselves, employed in a government job for which they owed loyalty to the Party Chairman. Even if nothing else were required, recruiting the necessary number of delegates and alternate candidates alone would have been an impossible task. To have any realistic opportunity to compete for the nomination at the convention, I would have had to recruit over 55 people to represent the 11 Assembly Districts that were within my Judicial District in whole or in part, each of whom would have had to be willing to contribute significant energy, time, and money to run as delegates and win a campaign *against the county Republican Party's leaders' candidates* for the elusive satisfaction, if successful, of voting for me at a single Judicial convention, and thereby jeopardizing their political future.

Having extensive experience conducting political campaigns and even petitioning efforts, I tested the feasibility of running slates of delegate candidates in each AD. In June, I hired an experienced petitioning lawyer to run a petitioning drive to

place such delegate candidates on the ballot. With his help, I then tried to recruit delegate candidates but quickly realized that it would be impossible. I phoned and met with scores of potential delegates, but could not convince any of them to run against their party's candidates. Accordingly, despite significant support among Republican Party members, I simply could not overcome the practical barriers to recruiting such a large number of willing delegate candidates.

Regan Decl. ¶¶ 12-15; see also Regan Tr. 389:22 – 390:2. In the end, Judge Regan concluded that he had to put himself and his sons – also named “Regan” – on the September ballots as delegate candidates, a last-ditch strategy that failed. Regan Decl. ¶¶ 18-23.

249. Judge Keefe encountered similar difficulties in his efforts to recruit delegate and alternate candidates in the Third Judicial District in 1991:

Well, initially the difficulty of even getting people to say yes on putting their names on as delegates, that was the initial difficulty. That's why we actually started late. We weren't able to get our petitions out at the beginning of the petition process because it was – it took so much time to fill up the delegate slate and I noticed by looking at Exhibits V and W that in the 106th Assembly District we weren't even able to find an alternate candidate. In other words, we exhausted our efforts by merely filling up the delegate slate. That in and of itself took an enormous amount of time that was unanticipated.

Keefe Tr. 931:17 – 932:2.

250. Judge Keefe explained part of the cause of the burdens faced in recruiting such candidates, as against candidates for other, better-known offices as follows:

Recruiting delegate candidates is a formidable task. Recruiting candidates for Congress, city council or dog catcher does not require the recruiter to explain the nature of the job or what the position is. Try recruiting someone to run for judicial delegate and one immediately realizes the difficulties in this step of the process.

Keefe Decl. ¶ 11.

251. Mr. Berger summarized this burden in the First Judicial District:

So that in Manhattan, . . . there are now 93 delegates, you need 47 to win. In order to elect 47 delegates, you don't run just 47 because you are not likely to win every slot and so you have got to run all or virtually all of the districts. You may even run in a district you don't think you could possibly win. If you don't run a slate of delegates there, the people from that district can go down to an adjacent district and support their friends there, the organizations' friends there where there is a slate running so you try to run if you are going to do it, you would have to run in all or virtually all of the districts. . . . The first thing you have to do is recruit candidates for these slates. You have to recruit 93 delegate candidates and 93 alternate candidates disbursed across the county. They all have to be enrolled Democrats, all have to live in the county.

Berger Tr. 85:13 – 86:6.

252. Mr. Kellner also noted that, in judicial districts in Upstate New York, “the other problem is that people have to drive substantial distances to actually attend the judicial convention, usually at their own expense, and so there is not a lot of incentive to make that investment in the process because it is such a significant investment.” Kellner Tr. 1689:21-25.

253. In addition, the incomparably high numbers of delegates and alternates in each judicial district creates, in essence, a “drop-in-the-bucket” effect whereby any individual considering whether to agree to run for delegate has a strong disincentive to do so because he knows that, even if elected, he will be only one vote among so many delegates committed to supporting the county party leaders' slate of nominees. Carroll Decl. ¶ 13. Mr. Berger summarizes this effect as follows:

Without victory by a majority of delegates, there is little purpose in running individual delegates who are willing to support a judicial candidate not selected by the party chairman. As a general matter, only the party leadership for an entire county possesses the resources and

political organization to overcome this fragmented system of judicial delegate selection by AD.

Berger Decl. ¶ 14.

254. Mr. Lipton and numerous other witnesses testified that an insurgent Supreme Court candidate would be unwise just to run in a few of the ADs because such a strategy would not only increase the likelihood that, first, if an entire slate of delegate and alternate candidates is knocked off the ballot by petitioning challenges the campaign could be effectively doomed, and second, that the county party organization would focus its considerable resources in those same few ADs and succeed in electing its own slates of delegates and alternates. Lipton Tr. 1140:19 - 1142:7; Berger Tr. 85:13 – 86:6. Indeed, Mr. Kellner acknowledged that it is “self-evident” that an insurgent Supreme Court candidate would be taking a “huge risk” by running delegates only in enough districts to get a bare majority of votes at the convention. Kellner Tr. 1717:16-22.

255. In Mr. Ostrer’s words, with respect to the Ninth Judicial District:

Q: Is it therefore correct to say that I could run delegates in a portion of the judicial district and still control the convention?

A: If you won every election that you ran a delegate in, but I – and you were certain that none of your petitions would be challenged. But you – there is a certain required redundancy in these sorts of political races. So to start with half a loaf would I think consign you to the loser’s heap. If you run in 60 percent of the districts, you’d have to bat a thousand. So 51 percent of the districts you’d have to bat a thousand.

Ostrer Tr. 1431:20 – 1432:3.

256. This is particularly true given that the party leaders control when and how the notice that indicates when the convention will be held is distributed to delegates and

alternates. Carroll Decl. ¶ 29. Choosing to run delegates and alternates only in certain ADs would allow party leaders to use such tools to prevent an insurgent from ensuring that all of their limited numbers of elected delegates are able and willing to attend the convention. Even without a challenge from an insurgent Supreme Court candidate, it is customary for the notice provided to be so short as to preclude many delegates from attending the convention. In addition, in some districts, like the Second Judicial District, the convention is held during lunch on a weekday, which also renders it difficult for many delegates to attend. *Id.*

257. Based on his years of experience recruiting candidates and running political campaigns and the evidence that such recruitment burdens are significant, Plaintiffs' expert William Lipton concluded that the burden of recruiting delegate and alternate candidates would require hiring a full-time staff member with substantial local political and community contacts to work for three months trying to find people willing to challenge their party leaders' delegates at the convention by running as delegates and alternates and attending the convention. Lipton Corrected Decl. ¶ 13. Mr. Lipton estimated conservatively that the cost of that work would be \$13,200. *Id.* at Ex. B.

c. Gathering Petition Signatures

i. Cumulative Signature Requirements

258. The petitioning rules with which a challenger Supreme Court candidate would have to comply to run delegate and alternate candidates in each AD across a judicial district are prohibitive. For an individual to petition onto the ballot as a Democratic or Republican candidate for delegate or alternate delegate, in most ADs 500

signatures must be gathered from members of the individual's political party who live within the AD. N.Y. Elec. L. § 6-136(2)(i), (3).⁵ Moreover, a Supreme Court candidate who seeks to run delegate candidates across the judicial district must gather an equal proportion of those signatures from each of the many ADs within each judicial district. As a result, an insurgent Supreme Court candidate would have to face cumulative minimum signature requirements equal to the number of ADs within her judicial district multiplied by 500. Berger Decl. ¶¶ 17-18. A chart of the cumulative petitioning requirements for all of the judicial districts can be found at Pl. Ex. 96.

259. A prohibition against any party member signing more than one petition for a slate of delegates makes it even more difficult to perform this geographical and organizational challenge; for the pool of eligible signatories shrinks with each signature gathered. Berger Tr. ¶ 18.

260. The petitioning requirements for other offices in New York State are much less burdensome not just proportionately but even, in several cases, in absolute terms. For instance, the signature requirement for *statewide* office is only 15,000 signatures. N.Y. Elec. L. § 6-136. To obtain a ballot line as a major party candidate for mayor in New York City, a candidate must gather a statutory minimum of only 7,500 signatures. *Id.* Moreover, a mayoral candidate need not gather those signatures from any particular

⁵ The statute requires 500 signatures or five percent of the voters enrolled in the party in the AD, whichever is less. As of March 1, 2004, Democratic candidates must collect 500 signatures in every AD in the state because there are more than 10,000 enrolled Democratic voters in all of the 150 ADs across the state. Republicans must collect 500 signatures in all but 48 of the 150 ADs; 47 of those 48 ADs are within New York City, and the remaining district is the 87th AD, which lies directly north of the Bronx. *See* Pl. Ex. 17. Because Democratic candidates for Supreme Court prevail with few exceptions in New York City, for all intents and purposes any challenger candidate in either party who would have a real chance to prevail at the general election if nominated by their party must gather at least 500 signatures.

geographic areas within New York City. To obtain a ballot line as a major party candidate for *countywide* Civil Court judgeships in New York City, a candidate must gather a statutory minimum of only 4,000 signatures, again without geographic distributional requirements. N.Y. Elec. L. § 6-136. In Queens, for example, a countywide Civil Court candidate must gather only 4,000 signatures while a Supreme Court challenger candidate would have to gather 9,000 signatures *despite the fact that the 11th Judicial District and Queens are entirely coterminous jurisdictions*. Berger Decl. ¶ 19.

261. By contrast, the combined statutory minimums required to run delegate candidates just in the four Judicial Districts that cover New York City is 32,500 signatures – *i.e.*, more than four times the requirement for mayoral candidates, more than eight times the requirement for countywide judgeships in New York City, and more than twice the requirement for *statewide* office.⁶ To run delegates in the Second Judicial District alone (covering only Brooklyn and Staten Island) would require a statutory minimum of 12,000 signatures drawn equally from each of the 24 ADs within the two counties. Berger Decl. ¶ 20.

262. In Nassau County, with a population of over 1.3 million, the signature requirement for county court is only 2,000 signatures gathered anywhere in the county. *See* N.Y. Elec. L. § 6-136(2)(d). In fact, the same requirement applies to all county court seats outside New York City with over 250,000 residents. By contrast, to run delegates in the 10th Judicial District that covers Nassau and Suffolk Counties would require a

⁶ There are 65 ADs within New York City. $65 \times 500 \text{ signatures/AD} = 32,500$. Pl. Ex. 2.

statutory minimum of 10,500 signatures gathered in equal parts from each of 21 ADs. Pl. Ex. 96; Berger Decl. ¶ 21.

263. Similarly, the signature requirement for a Congressional District, which is approximately 40% of the size of an average Judicial District, is, in most cases, only 1,250. N.Y. Elec. L. § 6-136(2)(g); Berger Decl. ¶ 22. The table below summarizes certain of these comparisons:

Signature Requirements for Various New York State Offices				
Statewide Offices (Governor, Attorney General, Comptroller, U.S. Senator)	NYC Mayor	NYC Civil Court (Countywide)	County Courts (Outside NYC)	Supreme Court (Cumulative Signature Requirements for Delegate/Alternate Candidates for Dominant Party)
15,000	7,500	4,000	2,000	12,000 2 nd J.D. (Kings, Richmond) (D) 9,000 11 th J.D. (Queens) (D) 10,500 10 th J.D. (Suffolk, Nassau) (D) (10,874 for R) 9,565 9 th J.D. (Dutchess, Orange, Putnam, Rockland, Westchester) (R)

264. The effective geographical distribution requirements imposed by the current Supreme Court selection system are burdens that are not found with respect to any other office, except for the relatively liberal requirements for statewide offices. *See* N.Y. Elec. L. § 6-136.1 (15,000 signatures of which not less than 100 (or 5%, whichever is less) are from each of one-half of the congressional districts of the state). As can be seen from the petitions filed by Judge López Torres when she ran for reelection to a countywide Civil Court seat in Brooklyn in 2002, over 75% of her signatures were

gathered in only nine of the 21 ADs in Brooklyn and the geographic source of the remainder could be those same ADs but cannot be determined. Def. Ex. R-S.

265. Such distributional requirements are not only significant because candidates must often gather signatures outside their base of support within a judicial district, but also because voters frequently do not know which AD they reside in and thus make gathering such signatures on the street, as against door-to-door, very burdensome. Carroll Tr. 506:18 – 507:1. Gathering signatures and communicating with voters can be even harder in rural counties where significant distances separate communities. Regan Decl. ¶ 16.

266. In addition, an insurgent Supreme Court candidate also faces unique difficulties in gathering signatures among voters for the position of judicial delegate and alternate delegate because voters have virtually no familiarity and even less enthusiasm for these offices. Keefe Tr. 932:3-14 (“I petitioned in my own neighborhood, the exact same neighborhood I had petitioned in the year before and found it very difficult to get people to sign because people didn’t understand it.”); 930:5-15; 918:12-25; Keefe Decl. ¶ 18; Regan Decl. ¶ 16.

267. As courts in this circuit have found, moreover, challengers typically must obtain many more signatures than the law nominally requires in order to withstand a virtually inevitable legal challenge to such petitions from the party leadership. *Molinari v. Powers*, 82 F. Supp. 2d 57, 60-61 (E.D.N.Y. 2000) (recognizing that candidates must seek as many as six times the number of signatures required by statute); *Rockefeller v. Powers*, 78 F.3d 44, 45 (2d Cir. 1996) (at least 140% of the number required by statute).

268. According to Plaintiffs’ expert William Lipton, an experienced campaign

manager and political director for Democratic Party and Working Families Party campaigns, as well as former candidates and experienced campaign advisers, a challenger delegate candidate would need to gather at least three times the statutory minimum required—*i.e.*, 1,500 signatures—in order to deter and defeat court challenges by the Democratic or Republican Party leaders. Lipton Corrected Decl. ¶ 12; Keefe Tr. 931:6-7; 932:15-21; Carroll Decl. ¶¶ 16-17; Carroll Tr. 461:13-20; 506:18 – 507:1; 563:15-22; 564:1-6; Regan Decl. ¶¶ 16-19; *see also* Berger Decl. ¶¶ 17-18 (2.5 to 3 times); Berger Tr. 203:2-8.

269. Defendants have sought to suggest that, with certain reforms by statute and in cases intended to liberalize the rules regarding petitioning, challenger candidates need not gather as many signatures as Plaintiffs’ witnesses suggest. *See* Kellner Tr. 1703:10-16; Connor Tr. 2132:7-13. The evidence from witnesses for both Plaintiffs and Defendants, however, shows that, often even in recent years (since the reforms to which Defendants allude), it is customary for candidates to gather at least two and, usually many more than three times, the statutory minimum number of signatures to resist potential or actual challenges. Berger Tr. 197:11 – 198:22.

270. For example, Mr. Schiff’s club filed “more than 3,000 signatures this year for the candidates of the club, including the judicial delegate candidates.” Schiff Tr. 1240:14 – 1241:7. Those candidates included judicial delegates (>6 times statutory minimum), Assemblyman Bing (>6 times statutory minimum), State Committee candidates (>6 times statutory minimum), Senator Kreuger (>3 times statutory minimum), Congresswoman Maloney (>2.4 times statutory minimum). *Id.*; N.Y. Elec. L. 6-136.

271. Similarly, Mr. Allen testified that, on both occasions when he ran for judicial delegate in contested races in 1999 and 2002, he gathered 1,500 signatures:

A: I think 500 is the number. Whatever the number of signatures was required for the position on that petition, that is what I would [collect] times three. If I needed 500 I would [f]ormally collect about 15[00] signatures.

Q: Do you recall how many signatures you actually collected in '99?

A: Probably around that amount, 1500.

Allen Tr. 2027:24 – 2028:5.⁷

272. Justice Sise testified that, when he ran for County Court in Montgomery County in 1995, he gathered 1400 signatures for an office that required as a minimum approximately 550 signatures, *i.e.*, 2.5 times that minimum. Sise Tr. 1515:17 – 1516:8.

273. When Judge Keefe ran for Albany City Court in 2002 against the Albany Democratic organization, his campaign gathered 3,800 signatures for an office that required by statute only 1,000 signatures, *i.e.*, 3.8 times that minimum. Keefe Tr. 15-21; see also *id.* at 931:6-7.

274. In 2001, when six Democratic candidates gathered signatures for the same City Council district in Brooklyn, they reached agreement in advance of filing that they would not challenge each other's petitions yet still felt it necessary to gather between 3,000 and 4,000 signatures for an office that required only 900 valid signatures to be filed. Carroll Tr. 494:20 – 496:7; N.Y. Elec. L. § 6-136.

⁷ The bracketed text reflects the correction of the transcript as follows: "collect" was transcribed as "elect;" "normally" was transcribed as "formally;" and "1500" was transcribed as "15" in the first instance.

275. New York's cumulative petitioning requirements are considerably more severe than the ballot access rules for judicial candidates of all of the 32 other states with contestable elections for trial courts. The rules of those states are summarized in Pl. Ex. 13; *see also* Pl. Ex. 13A-H. In four states, a judicial candidate need only file a declaration of her candidacy to get on the ballot; in five, a judicial candidate need only file such a declaration *and* pay a small fee; in ten more, a judicial candidate need only declare her candidacy and either pay a small fee *or* gather a reasonable number of signatures. In other words, in 19 out of the 32 states (outside New York) that hold contestable judicial elections, judicial candidates can get on the ballot *themselves* directly and do so without gathering any signatures at all. *Id.*

276. New York's cumulative petitioning requirements for *delegate* candidates are, moreover, much more burdensome than the petitioning requirements for *judicial* candidates in those states that require petitions. In the 13 states that require signatures to be gathered to get on the ballot, the signature requirements are, with rare exceptions, nominal. In 10 of those 13 states, no judicial candidate is required as of 2004 to gather more than 2,000 signatures, and most of those 10 states require fewer than 500 signatures. The highest signature requirement in any of the 13 states is in Michigan (6,200), and even there the Secretary of State indicates that only four *out of 42* circuit court positions open for non-incumbents in 2004 require 6,200 signatures, four require 4,000 signatures, and the remaining 34 positions (*i.e.*, 81%) require 2,000 or fewer. Moreover, none of these states have any geographic distributional requirements with respect to gathering signatures within the relevant judicial district. *Id.*

277. Given the cumulative petitioning requirements that would be faced by an

insurgent Supreme Court candidate, the burden of recruiting more than a handful of volunteer petitioners would be equally daunting. Keefe Decl. ¶¶ 14-15; Regan Decl. ¶ 16. Mr. Lipton testified that such a challenge would require paying petitioners to gather signatures door-to-door to increase the likelihood that the signatures would be valid and to ensure that the geographical requirements would be met. Lipton Corrected Decl. ¶ 14, Ex. A, B.

278. In addition, gathering signatures in each AD would also require that separate petitions be printed for each AD. Lipton Corrected Decl. ¶ 14, Ex. A, B; Connor Tr. 2153:3-8; Carroll Tr. 484:11-17.

ii. Legal Costs

279. In addition to the costs of petitioning, moreover, the Supreme Court challenger candidate would also be required to expend substantial funds to hire election lawyers to review the petitions from each of the ADs for accuracy before submitting them to the board of elections and to defend those petitions against challenges in court. Berger Decl. ¶ 24; Carroll Tr. 503:12-21; Lipton Corrected Decl. ¶ 15.

280. The process begins with the preparation and binding of petitions. If an insurgent Supreme Court candidate were able to run slates of delegates in each AD, then he or she would have to retain lawyers to prepare, review, and bind separate petitions in each of the ADs across the judicial district. Once completed, the attorneys would then file these petitions with the New York City Board of Elections. Berger Decl. ¶ 26; Berger Tr. 196:9-22.

281. Anyone wishing to object to petitions must file “general” and then

“specific” objections to identified signatures. The staff of the board of elections reviews such objections and the commissioners of the board of elections then consider the validity of the petition. Berger Decl ¶ 27.

282. But a challenger candidate would be reckless in awaiting the results of these administrative proceedings. Indeed, to preserve the right to argue for the validity of the maximum number of signatures, a candidate needs to file a prophylactic lawsuit in Supreme Court before such administrative proceedings have been completed. Such a lawsuit must be filed and served within 14 days after the last date to file petitions, N.Y. Elec L. § 16-102(2), just four days after the last day to file objections and long before the board of elections has completed its administrative review. The following hypothetical explains the rationale for this approach:

Assume that Candidate A needed 500 signatures in the X AD, and that he filed 600 signatures;

After timely filing his general objection, Candidate B then filed specific objections to 175 signatures;

The Board of Election invalidates 75 of the 175 challenged signatures, but rejects B’s challenge to the remaining 100 challenged signatures;

At the end of the administrative phase, then, A has 525 valid signatures – more than enough to achieve ballot status;

B presses his claim in Supreme Court, arguing that the Board erroneously failed to invalidate 100 challenged signatures;

In B’s suit, however, A is *prohibited* from arguing that the Court should reinstate *any of* the 75 signatures struck by the Board; New York law is settled that A lacks standing to seek this relief *unless A has timely commenced his own suit*. *Suarez v. Sadowski*, 48 N.Y.2d 620, 421 N.Y.S.2d 50 (1979); *Krueger v. Richards*, 59 N.Y.2d 680, 463 N.Y.S.2d 413 (1983).

Because A plainly cannot afford to forfeit the right to argue for the validity of the maximum number of signatures (here 600, rather than the 525 he would be limited to in defending the challenger's lawsuit), the prudent course is to file his own prophylactic lawsuit.

Berger Decl. ¶ 28; Berger Tr. 196:9-22; Carroll Tr. 503:12-21.

283. A challenger Supreme Court candidate would thus need to be prepared with a legal team to file such prophylactic suits for every slate of delegate candidates against whom the county party leaders have filed general objections, *i.e.*, in all or substantially all of the ADs in the Judicial District. Moreover, such litigation almost always involves appeals to the Appellate Division of the Supreme Court and, at times, to the New York Court of Appeals. Berger Decl. ¶ 29.

284. In the view of Messrs. Berger and Lipton, preparing, reviewing, and defending the necessary petitions from challenges, and commencing and defending the inevitable spate of state court litigation that follows, could cost the insurgent Supreme Court candidate \$200,000 or more in legal fees and related costs. Berger Decl. ¶ 30; Lipton Corrected Decl. ¶ 18, Ex. A.

285. By contrast, such legal representation is generally provided free of charge to those Supreme Court candidates who are backed by the county party leadership which also, through its district leaders, provides the resources to mount challenges on an AD-by-AD basis. Berger Decl. ¶ 31; Berger Tr. 103:24 - 104:1.

d. Electing Delegates and Alternates

286. If an insurgent Supreme Court candidate were successful in placing slates of delegates and alternates on the ballots in the various ADs, the campaign would still be required to run “primary” campaigns against the delegate slates assembled by the county

leaders' organization and district leaders in each AD. Mr. Lipton testified that such a campaign would require a door-to-door operation to visit those voters in each AD who are most likely to vote for the challenger's slate of judicial delegates. The list of voters targeted by the campaign as likely to vote for the challenger's slate of judicial delegates would be constructed through an analysis of the voter file for the two boroughs. Lipton Corrected Decl. ¶ 16.

287. The burden of educating voters sufficiently so as to persuade them to identify and vote for specific judicial delegates in the September elections would be significant. As Mr. Kellner testified, such an effort would require the creation and distribution of literature to voters in each AD. Kellner Tr. 1576:23 – 1577:1; *see also* Lipton ¶ 16; Ostrer Tr. 1433:7 – 1435:15; Keefe Decl. ¶¶ 19-20; Regan Decl. ¶¶ 18-20.

288. The current system exacerbates this burden by precluding voters from choosing delegates based upon an indication on the ballot of which Supreme Court candidates they intend to support at the convention. Unlike the presidential primary system, delegate selection occurs *before* any Supreme Court candidates are even identified, much less chosen by anyone. Even if the timing were different, moreover, the September ballot on which such delegate candidates appear still would not indicate their support for a particular Supreme Court candidate. As a result, a Supreme Court challenger attempting to run delegates to support his candidacy at the convention would be required to inform the voters of a particular delegate's or slate's allegiance through expensive campaign advertising or contacts with voters. In addition, the challenger would have to duplicate this public education campaign in each AD across the judicial district and for different delegate candidates. Berger Decl. ¶ 16; Carroll Decl. ¶ 18.

289. Judge Regan's insurgent campaign illustrates this burden. To address the absence of a ballot cue with his name, Judge Regan chose to run as delegates himself and three of his children in all six Assembly Districts, all of whom had the REGAN surname. In each Assembly District, he had to educate voters through literature and advertising that they should support the REGAN delegate candidates because those delegates would support me as a candidate for Supreme Court. In the case of a presidential primary campaign, the burden of such a public education campaign is met largely by the massive press coverage of the presidential race, quite apart from any mailings or other unpaid media produced by the candidates themselves. For Supreme Court, no such press coverage is available. In the end, his campaign failed. Regan Decl. ¶¶ 18-20; Regan Tr. 390:4-23.

290. Finally, in the four days leading up to and including Election Day, the campaign would need to run a GOTV operation to get out the voters who are most likely to support the challenger slates of delegates. That operation would include, among other things, door-to-door contacts with the households previously contacted by the campaign from Saturday to Monday, an Election Day "pull operation" to encourage voters to vote through phone banking and door-to-door contacts, a palm card operation in key locations, and the monitoring of polling places by a team of volunteer lawyers. Lipton Corrected Decl. ¶ 17; Carroll Decl. ¶ 19; Berger Tr. 84:23 – 87:25; Giske Tr. 2009:12 – 2010:11.

291. Through a careful assessment, Mr. Lipton estimates the costs of having just a reasonable chance to elect a majority of delegates and alternates to be over \$1.4 million. Lipton Corrected Decl. ¶ 18, Ex. A, B; *see also* Freedman Tr. 1783:16 – 1784:10.

292. In 2002, Plaintiff Margarita López Torres petitioned onto the Democratic Primary ballot for Civil Court in Brooklyn countywide. Def. Ex. R-S. An analysis of those petitions is instructive. Petitions supporting Judge López Torres included 47 candidates for delegate and 20 candidates for alternate. Of these candidates, 17 candidates for delegate and 17 candidates for alternate were actually elected. Fifteen of these delegates and 15 alternates were from the 44th and 52nd Assembly Districts, where they ran unopposed. Thus, of the 139 delegates selected to serve at the 2002 Second Judicial District Democratic convention, only 17 appeared on petitions with Judge López Torres. The following chart summarizes these facts:

District	On the Petition (A)			Elected (B)		Total Delegates (C)
	Signatures	Delegates	Alternates	Delegates	Alternates	
40						8
41						7
42	331	5				6
43	2552	5				8
44	2427	6	6	6	6	6
45						5
46	2418	5				6
47						4
48						3
49						3
50						4
51						4
52	3710	9	9	9	9	9
53						5
54	3526	5	5	2	2	5
55	1800	4				7
56						8
57	1989					8
58	1708	8				8
59						6
60						7
61						5
62						4

63						4
Mixed	9096					
Total	29557	47	20	17	17	140

- (A) Def. Ex. R-S
(B) Pl. Ex. 21. Delegates from the 44th and 52d ran uncontested races.
(C) Pl. Ex. 92-E

293. In 2004, an effort to run insurgent delegate slates in the Second Judicial District failed to run, get on the ballot, and elect more than a small fraction of the number of delegates needed to influence the outcome of the convention. Specifically, the campaign ran over 60 delegate candidates, succeeded in getting only 16 on the ballot, and only five won contested primary elections in September. Connor Tr. 2140:22 – 2141:4; Lipton Tr. 1143:3-20. Mr. Berger concluded from this year's effort:

[T]his year . . . in Brooklyn, where there is a battle going on they filed 17 slates for judicial convention. That effort was led by a person who was one of the lead members of the Kings County Law Committee a few years ago and yet ten of those slates got thrown off. . . . I think it is still hard for an outsider to fathom the process, learn the process and do it well.

Berger Tr. 198:3-6, 9-13.

e. Post-Election Barriers

294. Even if an insurgent candidate were successful in electing sufficient delegates and alternates to compete at the convention, the party leaders within the relevant county would still have the opportunity to persuade those individuals to support the party-backed candidates rather than the insurgent. Lipton Tr. 1141:5-12.

f. Restrictions on Judicial Candidates

295. In addition to these burdens, the judicial canons also significantly limit the

extent to which a sitting judge – such as Plaintiff Judge López Torres – can participate in the campaign of another candidate such as a judicial delegate or alternate candidate. Specifically, Rules 100.5(A)(1)(c) and (d) of the Rules Governing Judicial Conduct preclude any judge from “participating in any political campaign,” including “publicly endorsing or publicly opposing” other candidates for office or “soliciting funds” or “attending political gatherings” or “making speeches on behalf of” or for another candidate. *See* Pl. Ex. 79; *see also* Schiff Tr. 1306: 2-6. This rule renders any direct involvement in a judicial delegate or alternate campaign potentially improper for a sitting judge who wishes to mount her own challenge to the judicial convention.

VII. Cumulative Burdens on Candidates and Voters

296. The current Supreme Court selection system deprives candidates of the opportunity to compete for their party’s nomination among the voters of their party, and deprives the voters of the opportunity to have a meaningful role in selecting their party’s nominees.

297. In the words of Judge John Manning Regan, who attempted unsuccessfully to compete at the convention for the Republican nomination in 1994 against the candidate chosen by the Monroe County Republican and Conservative Party Leaders:

Under the current system, and unlike the City Court selection system that allowed me to earn my party’s nomination in a primary election, there was no path for me to petition directly among voters onto a primary election ballot as a named Republican candidate. Nor was it sufficient, as it is for statewide offices in New York State, to garner 25% of the party’s state committee to get placed on the primary ballot as a candidate. Only a majority of the judicial convention’s delegates nominates a candidate and, unlike those statewide offices, that path is

the *only* one onto the general election ballot. As a result, I was prevented from earning a place on the ballot and my supporters among Republican voters were precluded from voting for me at any stage in the process.

Regan Decl. ¶ 27.

298. Similarly, Plaintiff Margarita López Torres:

The current Supreme Court selection system is designed to keep candidates like myself who do not have the backing of their party's county leadership from obtaining any opportunity to get on the ballot. My extensive experience as a Family Court judge, Criminal Court judge, Civil Court judge, and legal services attorney, as well as my demonstrated support among voters across the district, more than qualify me to be considered by the voters of my party and of Brooklyn and Staten Island for Supreme Court. . . .

Over a period of eight years, I have tried to obtain my party's nomination for Supreme Court based on my qualifications. But for reasons entirely unrelated to those qualifications, party leaders have chosen not to support me for the Democratic Party's Supreme Court nomination year after year. . . .

I am presently a candidate for Supreme Court for the 2004 elections. If this lawsuit is successful and the system is reformed to allow candidates like myself – *i.e.*, candidates who are well qualified and possess strong support among party voters but do not have the support of the county party leaders – to be selected as candidates and judges by the voters of Brooklyn and Staten Island, I will run again in 2005. If the current system remains in place, I will continue to be unable to obtain ballot status as a result of the severe burdens and barriers discussed in this declaration.

López Torres Decl. ¶¶ 51-54.

299. Dr. Cain analyzed the minutes and other evidence concerning the Supreme Court selection system and made the following conclusions:

Based on the data I analyzed and my knowledge of the process, I would characterize the system for selecting New York's State Supreme Court Justices as unusually closed and undemocratic. There is room in American democracy for a wide variety of nomination systems. A convention system is not necessarily undemocratic *per se*. But a convention nomination system can fall below an acceptable democratic threshold if its features are unusual in the degree to which they stifle openness and competition and fail to allow alternative ways to get onto the ballot. I believe that this is the situation with respect to New York's State Supreme Court system.

A democratic election is defined as one in which alternatives with more votes are preferred over those with less votes. Often that means the majority prevails, but it can also mean a mere plurality as long as the option with the most support is the one that prevails. A system in which policy options or candidates with fewer votes prevail over ones with more votes would not be democratic. A system can also be undemocratic if it restricts the franchise in a biased and unreasonable way, or if it limits the options voters get to choose from by highly restrictive means. This case deals with the latter problem. If the most preferred alternative cannot make its way onto the ballot, then the system violates basic democratic principles.

Many U.S. jurisdictions employ the so-called single member simple plurality rules for choosing electoral winners. This type of system tends to produce a two-party system. In the U.S., the two-party duopoly restricts competition to two major parties (that have reasonable prospects of holding office) while minor parties have largely expressive or spoiler functions. The restriction of competition in the November general election is consistent with democratic principles as long as the major parties are relatively open before that stage. When political parties restrict competition at the nomination phase, however, it can unacceptably restrict voters' choices to such a degree as to conflict with basic democratic principles.

This is in effect what the nomination system for the New York State Supreme Court does. By ceding the nomination to county party leaders and making it virtually impossible for challenger candidates to get the party nomination, the State has adopted an undemocratic nomination process. By then precluding other candidates from petitioning onto the November ballot as Democrats or Republicans, the State blocks entry at the post-nomination phase as well. Without the major party label, candidates stand no chance of election. Without the approval of the county party officials, they cannot win the party label.

The process by which the party leaders choose delegates and candidates is neither transparent nor democratic. The selection of alternatives is so narrowly restricted to one slate in most instances that there is no meaningful competition for State Supreme Court judgeships.

Denying potentially interested and qualified candidates an opportunity to run in an election for this judicial office deprives voters of their party any meaningful choice among candidates for their party's nomination. With no choice for voters at the nomination stage, moreover, the general elections become simply an undemocratic affirmation of a deal struck by party leaders.

Cain Decl. ¶¶ 18-23.

300. Senator Connor's testimony about the 2002 convention in the Second

Judicial District portrays a system which is—as Professor Cain, Cain Decl. ¶¶ 18-23, and Mr. Berger, Berger Tr. 138:1-8, testified—neither transparent, nor democratic, nor accountable. Just before the Convention opened, Connor told party headquarters that he would no longer agree to serve as Chair. His principal reason was that the list of judges agreed upon by Mr. Norman and his party Executive Committee included a candidate who was a “horrible” choice. She was “obnoxious,” “rude to lawyers,” and had been reversed “many, many” times as a Civil Court judge. She was, Senator Connor concluded, “unqualified.” He was “really mad.” Connor Tr. 2208:23-25; 2209:10 - 2210:17; 2261:24 – 2262:6; 2262:15-18. Senator Connor's second reason for refusing to continue to serve was that Margarita Lopez-Torres, whom he supported and regarded as qualified, was being barred from becoming a Supreme Court Justice by Clarence Norman and the powerful District Leader Vito Lopez because of reasons unrelated to her qualifications, but rather because of her refusal to hire people pushed by the party and for considering allowing her name to be put forward as a candidate for Supreme Court justice without backing by “county.” Connor Tr. 2211:19 – 2213:4; 2213:21 – 2214:14.

301. Despite his conviction that the Convention was, at the behest of party leaders, about to make a “horrible” choice and nominate an “unqualified” person for Supreme Court, despite knowing that her nomination as the Democratic Party candidate assured election to the bench, despite his aversion to the rejection of the qualified Margarita Lopez-Torres by Mr. Norman and his colleague District Leader Vito Lopez, and despite knowing that he was widely respected by the delegates, who had elected him as Chair for several years, Senator Connor did not tell the delegates any of this. Connor Tr. 2211:5-18. In his younger days in the 70s as a reformer, Connor had “spoken truth to

power” when he spoke out at judicial conventions about the closed process and about the judges who were being thrust upon the delegates, as the Declaration of Independence had accused King George of having done to the colonies. Connor Tr. 2248:4 – 2250:3; 2261:20-23; 2077:12-15. But in 2002, many years later, there was no more speaking truth to power. Instead, Senator Connor was silent about his strong conviction that “what was about to be done was wrong, and bad for the bench.” Connor Tr. 2262:15-18. This was because any criticism of the party might hurt the re-election of a state senator. Connor Tr. 2262:19 – 2264:15. Thus, the system serves the interests of the party leaders, at the expense of the judiciary, challenger candidates, and the rank-and-file party members who are deprived of any real role in the selection of Supreme Court justices.