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' REPLY CONCLUSIONS OF LAW
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTIVE RELIEF**

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Introduction and Precis of Points

Unable to counter the ample evidence of severe burdens in the nomination process and their constitutional implications, Defendants respond by raising procedural red herrings, *see* ¶¶ 1 to 8, *infra*, and then presenting a single argument in a host of different forms: that adequate general election ballot access forecloses any claims by candidates and voters to rights within the nomination process, except perhaps when the State creates a primary election. This argument fails in each of its guises. *See* ¶¶ 9 to 18.

Candidates' and voters' rights to participate in a nomination process free of severe burdens on competition are entirely distinct from the right to general election ballot access. The right to a nomination process free of undue burdens depends, not on the form of the nomination process that the State chooses to employ, but on the decision by the State to make partisan nominations an "integral part of the election machinery." *See* ¶ 12. Defendants argue that the cases recognizing rights to compete in a primary election free from severe burdens depended on the State's decision to create a primary ballot. But that argument makes no sense—it would mean that the State cannot burden the right to compete for the nomination, but can extinguish it altogether with impunity. Such a theory would render the decisions of the Supreme Court and courts within the Second Circuit upholding rights to compete for nominations, whether in primaries or through conventions, completely incoherent. *See* ¶¶ 19 to 34.

The State may choose among many different nomination systems, but it may not severely burden the rights of voters and challenger candidates. Contrary to Defendants' strawman suggestions, Plaintiffs neither argue that primary elections are the only constitutional nominating system nor demand a right to win nomination. Primary

elections with reasonable ballot access would satisfy voters' rights to be free of severe burdens in influencing their party's nomination; but other nomination processes, such as conventions that permit direct voter involvement, would be equally permissible. What is not constitutional is a system, like New York's judicial conventions, that imposes the ultimate burden on voters' rights by systematically excluding rank-and-file party members from any meaningful role in the nominating process. *See* ¶¶ 20 to 28.

The candidates, for their part, do not have a right to win, but do have a right to compete for the nomination free from severe burdens. The formal ability to make a token showing does not satisfy this right. A right to a process that allows candidates to request a vote of the party leadership but provides essentially no opportunity for candidates who lack the party leadership's support to gain the nomination would be a hollow right. Instead, the structure of the nomination process must ensure that the opposition of party leadership does not impose a severe burden on the effort of a candidate with substantial popular support within the party to compete for the nomination. *See* ¶¶ 29 to 34.

Because Defendants rely on theories that would render meaningless the rights of candidates and voters during the nomination phase, they fail to effectively counter any of the evidence Plaintiffs presented demonstrating the severe burdens faced by challenger candidates and their supporters. *See* ¶¶ 35 to 50. The statutory rules for nominating candidates for the Supreme Court impose severe burdens on insurgent candidates and their supporters. The severity of those burdens is unique to the New York Supreme Court. No other candidates face similar burdens when seeking nomination, whether for other offices in New York State or for judicial office in any other state. The inability of Defendants to come forward with evidence of challenger candidates that have

surmounted the obstacles provides the ultimate proof of the severity of the burdens created by the current system. *See* Pl. C. ¶¶ 16-19.

While Defendants advance a variety of state interests to justify the burdens that the convention system inflicts, none of the state interests satisfies strict scrutiny, or even a lesser standard. *See* ¶¶ 51 to 71. Party associational rights are the only interest that Defendants assert is compelling, but use of a different nomination system would not in any way infringe those associational rights. If it did, the rule that all other elected judges in New York State must be nominated in primary elections would be unconstitutional. *See* ¶¶ 53 to 55. While diversity is at least a legitimate state interest, the convention system does not significantly advance that interest. In any event, it is not narrowly tailored to do so, in light of the other ways in which the State could better serve this interest without burdening the rights of candidates and voters. *See* ¶¶ 56 to 61. Similarly, geographic diversity might be a legitimate state interest, but if the State wished to ensure geographic diversity it could easily do so much more effectively by creating smaller judicial districts or by imposing residency requirements. *See* ¶¶ 62 to 66. The last purported state interest advanced by Defendants, incumbency protection, may not even be legitimate at all. But to the extent that protecting incumbents from the dangers of being outspent is a legitimate state interest, it could be more narrowly served through improved campaign finance laws, such as public funding or limits on contributions, or other electoral reforms, such as retention elections. *See* ¶¶ 67 to 71.

I. No Barriers to Court Granting Full Relief

1. Defendants make three arguments to suggest that the Court cannot grant Plaintiffs the relief sought. First, Defendants claim that Plaintiffs lack standing to bring

this suit. Def. C. ¶¶ 23-27. Second, they assert that the New York State Democratic Party is an indispensable party. *Id.* at ¶¶ 28-33. Third, Defendants claim that the Voting Rights Act precludes relief because of the lack of preclearance. *Id.* at ¶¶ 34-36. None of these arguments has merit.

A. Plaintiffs' Have Standing

2. Defendants' standing argument is meritless. The Supreme Court has long held that voters have standing when they "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)); *accord Dept. of Commerce v. United States House of Representatives*, 525 U.S. 316, 332 (1999) (following *Baker* and *Coleman* to uphold standing of voters who alleged that Census would dilute the effectiveness of their votes for members of Congress); *FEC v. Akins*, 524 U.S. 11, 20-21 (1998) (voters had suffered injury in fact by FEC's refusal to designate political committee as such, depriving them of information); *Bush v. Vera*, 517 U.S. 952, 957-58 (1996) (voters who lived in gerrymandered districts had standing to challenge state action); *California Med. Ass'n v. FEC*, 453 U.S. 182, 187 n.6 (1981) (voters had standing to challenge constitutionality of federal campaign limitations); *Rockefeller v. Powers*, 74 F.3d 1367, 1375-76 (2d Cir. 1995) (voters had standing to challenge petitioning requirements).

3. In addition, a candidate such as Judge López Torres, who has been denied ballot access, is a paradigm of a plaintiff with a concrete injury. *See, e.g., Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974) (candidates had "ample standing" to bring ballot access challenge); *Krislov v. Rednour*, 226 F.3d 851,857-58 (7th Cir. 2000) (candidates

had standing to bring § 1983 challenge to state petitioning requirements for ballot access); *Miller v. Moore*, 169 F.3d 1119, 1122 (8th Cir. 1999) (candidate had standing to challenge ballot designation that would adversely affect his chances of election); *Coalition for a Progressive New York v. Colon*, 722 F. Supp. 990, 993 (S.D.N.Y. 1989) (candidate possessed requisite standing to challenge his exclusion from primary ballot); *Williams v. Sclafani*, 444 F. Supp. 906, 911 (S.D.N.Y. 1978) (candidates have standing to assert right of access to ballot).

4. Taken as a whole, Defendants' standing argument is essentially circular. Defendants argue that Plaintiffs have not been deprived of any rights, and therefore lack the injury necessary to create standing. Framing that argument in terms of standing adds nothing to the substantive analysis of Plaintiffs' rights and should be rejected.

B. State Party Committees Are Not Indispensable Parties

5. Relying on dicta in *Wymbs v. Republican State Executive Committee of Florida*, 719 F.2d 1072 (11th Cir. 1983), Defendants argue that the case should be dismissed for failure to join the New York State Democratic Party. That argument is nonsense. To be sure, the *Wymbs* court bolstered its conclusion that a challenge to the Republican Party's internal rules was nonjusticiable by observing that plaintiff "still may not get the relief he seeks because the Republican National Convention, not the state executive committee, determines which delegates are seated." 719 F.2d at 1080. Here, in contrast, New York's "Legislature has conferred upon the State Board of Elections 'authority and responsibility for the execution and enforcement of all laws relating to the elective franchise.'" *Matter of New York State Board of Elections*, 49 A.D.2d 806, 806, 373 N.Y.S.2d 420, 423 (4th Dept. 1975) (quoting former Election L. § 466); *see* Election

L. § 3-104[1] ("state board of elections shall have jurisdiction of, and be responsible for, the execution and enforcement of…statutes governing campaigns, elections and related procedures"). Orders binding on the Board will therefore afford Plaintiffs complete relief in the case. *See Harmon v. Forssenius*, 380 U.S. 528, 537 n.14 (1965) (local registrar was not indispensable party to action invalidating state voting restrictions where the named defendants were clearly capable of effecting the relief requested); *Louisiana v. United States*, 380 U.S. 145, 152 (1965) (voting registrars were not indispensable parties to suit brought against state board of registration); *Hoblock v. Albany County Board of Elections*, No. 1:04CV1205 (LEK/DRH), 2004 WL 2376505, at *1 (N.D.N.Y. Oct. 25, 2004) (complete relief available through suit against county election board).

6. Even if the State Democratic Party were a necessary party, Rule 19(b) would require the case to proceed following joinder. *See Viacom International, Inc. v. Kearney*, 212 F.3d 721, 728 (2d Cir. 2000) (abuse of discretion to dismiss under Rule 19 where claims may be asserted without destroying subject matter jurisdiction). To the extent that the New York State Democratic Party Committee believes it has interests that should be heard by this Court, the presence in this case of the New York County Democratic Committee, whose leader, Mr. Farrell, is also the Chair of the State Democratic Committee, provides a voice for those interests. Further, if the New York State Democratic Committee wished to timely intervene, it had as much opportunity to do so as the other intervenors in this action. *Hoblock*, 2004 WL 2376505, at *5; *accord Griffin v. Burns*, 431 F. Supp. 1361 (D.R.I. 1977) (noting that "none of these candidates, whom the state believes are so interested as to require joinder, made any attempt to intervene in this

Court."). Plaintiffs provided a courtesy copy of the complaint to the New York State Democratic Party Committee when it was filed on March 18, 2004.

C. Preclearance Does Not Pose an Obstacle to Relief

7. Court orders are not subject to preclearance under the Voting Rights Act. *See Connor v. Johnson*, 402 U.S. 690, 691 (1971) ("A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act."). Defendants' suggestion that the Court's ruling would be subject to the Voting Rights Act misapprehends the Act. *Lopez v. Monterey County*, 525 U.S. 266 (1999), cited by Defendants, holds that "as a general rule, voting changes crafted wholly by a federal district court in the first instance do not require preclearance." Thus, this Court can grant the relief requested without any preclearance process. To be sure, if the Legislature acts in response to an order of this Court, preclearance may then be appropriate. But a rule requiring Justice Department preclearance of a court order would raise separation of powers concerns and simply does not exist. *Id.* at 268.

II. The Overbreadth Doctrine Applies Here

8. Defendants' effort to invoke the so-called *Salerno* standard for facial challenges (Def. C. ¶¶ 37-39) is misplaced. Overbreadth analysis is not a "last resort" as Defendants suggest (*id.* ¶ 42), but is the proper mode of analysis where statutes pose a substantial risk to voters' and candidates' First Amendment rights. *See Lerman v. Board of Elections of the City of New York*, 232 F.3d 135 (2d Cir. 2000). *Lerman* was a ballot access case. With regard to overbreadth, the court stated:

> The District Court concluded that the plaintiffs lacked standing to raise a facial challenge to the section 6-132(2)

> witness residence requirement, asserting that in order for that challenge to go forward, the plaintiffs need to "establish that no set of circumstances exists under which the act would be valid." The standard relied upon by the District Court derives from the Supreme Court's statement in *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *Salerno*, however, does not apply to this case, in which the plaintiffs assert the violation of rights protected by the First Amendment. Rather, since the plaintiffs challenge a statute regulating the ability to engage in interactive political speech and association activity, their standing to challenge the statute on its face is governed by the overbreadth doctrine. Under the overbreadth doctrine, the plaintiffs need only "demonstrate a substantial risk that application of the provision will lead to the suppression of speech."

232 F.3d at 144 (citations and footnote omitted). The reasoning of *Lerman* applies fully to Plaintiffs' claims.

III. Ability to Access the General Election Ballot Does Not Undermine Plaintiffs' Claims

9. As discussed in Pl. C. ¶¶ 5-9,[1] the ability to access the general election ballot does not vitiate rights to a nomination process free of severe burdens on participation.

10. Defendants' argue that reasonable alternative means of ballot access to the general election preclude a finding of unconstitutionality in a nomination process that does not have a separate primary ballot. Def. C. ¶¶ 57-67. They make this argument several times in slightly different variations. They base their initial argument on cases addressing general election ballot access, such as *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party of Texas v. White*, 415 U.S. 767 (1974), *Storer v. Brown*, 415 U.S. 724 (1974), *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Burdick v.*

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[1] Plaintiffs' Conclusions of Law are referred to as "Pl. C. ¶ __." Defendants' Proposed Conclusions of Law are referred to as "Def. C. ¶ __."

Takushi, 504 U.S. 428 (1992). Defendants attempt to use those decisions to undermine cases establishing a right to a nomination process free of barriers by arguing that the only right involved is a ballot access right and that the absence of a primary ballot eliminates any constitutional rights in the nomination process. Def. C. ¶¶ 68-76. Defendants next argue that ballot access schemes need to be considered in their totality, in an effort to show that general election ballot access renders the nomination process immune to constitutional scrutiny. Def. C. ¶¶ 77-84. In essence, this is simply a retread of the claim that access to the general election ballot is sufficient. Defendants return to this theme yet again when they argue that Plaintiff López Torres's appearance on the general election ballot demonstrates that the burdens are not severe. Def. C. ¶ 100.

11. Defendants' arguments amount to the assertion that while there are rights of ballot access, there is no right to compete for a party's nomination unless state law creates a primary ballot. Under this theory, state law could provide that nominations are to be made by party leaders with absolutely no input from the rank-and-file members of the party, without impairing the constitutional rights of either challenger candidates or rank-and-file party members. It defies logic to conclude that when state laws allow for primaries, and thus some chance to compete for nominations, they must not create undue barriers to challengers, but that if the State eliminates any chance to compete at all, the nomination process is beyond review. This is not the law.

A. Precedent Establishes Nomination Process Rights Without Regard to General Election Ballot Access

12. To determine whether the nomination process should be governed by the same rights as apply during the general election, the Supreme Court has looked to whether state

law makes party nominations an "integral part of the election machinery." *United States v. Classic*, 313 U.S. 299, 318 (1941). *Bullock v. Carter*, 405 U.S. 134 (1972), concerns itself with the constitutionality of the primary ballot access provisions not because of the existence of a ballot, but because the burden on participation "prevents potential candidates for public office from seeking the nomination of their party." *Id.* at 141. Similarly, *Lubin v. Panish* considered the burdens to ballot access in the primary election because the primary election is an integral part of the overall election process. 415 U.S. 709, 715-16 (1974) (noting that "the role of the primary election process . . . is underscored by its importance as a component of the total electoral process"). Because the constitutional analysis depends on the role of the nominating process in the overall election system, Defendants' illogical effort to define these cases as only applying when the State has created a primary as an act of grace cannot succeed.

13. *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164 (D. Conn. 2003), struck down a nomination process where almost all nominations for districts larger than one municipality were determined through conventions. No decision upholding New York's judicial convention system could be reconciled with *Campbell*, and the only way this Court could uphold the system would be to flatly reject *Campbell*'s reasoning. Defendants only distinguish *Campbell* by ignoring its central holding. *See* Def. C. ¶ 75. As Defendants say, *Campbell* struck down the Connecticut statutory rule requiring that only enrolled party members who are entitled to vote in the primary could circulate petitions. But Defendants turn a blind eye toward *Campbell*'s principal holding invalidating the convention system that Connecticut used for nominating candidates for offices elected from districts encompassing more than one municipality. *Campbell*, 242

F. Supp. 2d at 171-47. The *Campbell* Court concluded that a system that required candidates to perform well in a convention in order to have any chance at the nomination violated the First Amendment rights of candidates and rank-and-file party members. That conclusion applies with even greater force in this case, where candidates must actually win the convention in order to secure their party's nomination and there is no primary after the convention at all. Defendants' failure to even acknowledge the central holding of *Campbell* suggests their awareness that their arguments cannot be reconciled with that holding.

14. *Campbell* is consistent with other decisions from within the Second Circuit focusing on preventing state law from creating severe burdens on the rights of challenger candidates and their supporters during the nomination process, without regard for the ability to access the general election ballot. *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000), struck down the highly burdensome petitioning requirements imposed on presidential candidates seeking delegates in the New York primary. While the decision in *Molinari* followed a stipulated settlement, this Court carefully noted that "Because this is a matter that goes beyond the interests of the parties to the litigation and involves the invalidation of a legislative scheme, I accepted the stipulation only after independently concluding that the scheme, both in its totality and by virtue of two of its individual but related elements, places an undue burden on the right to vote under the First Amendment." *Id.* at 69. *Molinari* should thus be afforded the full respect its reasoning is due. Defendants' efforts to limit *Molinari*'s impact by pointing out that judicial candidates do not get to appear on any primary ballot and delegates do not pledge to support any judicial candidate actually demonstrates that the burdens faced by a

judicial candidate are more severe than those faced by the presidential candidates in *Molinari*.

15. Moreover, *Molinari*'s conclusions were a straightforward elaboration on *Rockefeller v. Powers*, 917 F. Supp. 155 (E.D.N.Y. 1996), *aff'd*, 78 F.3d 44 (2d Cir. 1996). Much as Defendants attempt to argue that *Rockefeller* deserves little weight, the Second Circuit's decision remains persuasive and binding on this Court. While *Prestia v. O'Connor*, 178 F.3d 86 (2d Cir. 1999), limited *Rockefeller*, it did so by making clear that *Rockefeller*'s ultimate conclusion depended on the specifics of a nominating process that requires a candidate to petition on slates of delegates in many different districts to elect delegates who can ultimately vote for the nomination of the candidate. In other words, *Prestia* distinguished *Rockefeller* as only applying to convention systems, like this one, where burdens that are surmountable for any one set of delegates combine over the whole process to create a severe burden. Indeed, the burdens in this case are more severe than those faced by the candidates in *Rockefeller*.

B. The Cases Cited by Defendants Are Not To the Contrary

16. Instead of adequately addressing these cases directly, Defendants rely on a set of cases that did not even consider the scope of the rights of challenger candidates and their supporters during the nomination process. *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party of Texas v. White*, 415 U.S. 767 (1974), *Storer v. Brown*, 415 U.S. 724 (1974), *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Burdick v. Takushi*, 504 U.S. 428 (1992), all address access to the general election ballot. None of these cases address barriers to participating in major party nominating processes, because the issue was not implicated by the claims of the minor party, independent, and write-in

candidates in those cases. The cases do consider different alternative means to reach the voters, but all within the context of the access to the general election ballot that plaintiffs in those cases sought. None of these cases undercut *Bullock*'s clear statement that access to the general election ballot is not a "reasonable alternative" to the right to compete for a party's nomination, especially when, as here, the nomination process "may be more crucial than the general election." *Bullock*, 405 U.S. at 146-47. Defendants' description of *Munro*'s holding is particularly inapposite, because of the disregard that their characterization shows for *Bullock*'s holding. Holding that a candidate who cannot demonstrate a reasonable modicum of support need not be placed on the general election ballot is simply not at all inconsistent with the proposition that a candidate who can show substantial support is entitled to the opportunity to compete in the nominating process. Defendants' assertion that "a general ballot position *must be constitutionally sufficient*," Def. C. ¶ 65, cannot be reconciled with the diametrically opposite holding of *Bullock*—or with common sense.

17. For similar reasons, *LaRouche v. Kezer*, 990 F.2d 36 (2d Cir. 1993), does not sweep as broadly as Defendants claim. *LaRouche* dealt with Connecticut's statutory scheme for access to the presidential primary. Under Connecticut law, presidential candidates could gain a place on the primary ballot either by submitting a petition signed by 6,518 registered Democrats or by showing that they were generally recognized as a serious candidate by the national or state media. *Id.* at 37-38. The Second Circuit concluded that, because the petition process permitted candidates to qualify for the primary ballot through petitioning, the additional route onto the primary ballot could not render the statutory system unconstitutional. *Id.* at 39-41. In *LaRouche*, either option

within the ballot access scheme produced the same result: a spot on the primary ballot. That is fundamentally different from the relationship between running as an independent and running as a major party nominee in a general election: the party label on the general election ballot leaves candidates who win their party's nomination in a dramatically different position than candidates who petition on as independents. The barriers to one route onto the primary ballot can be cured by an alternate route onto the ballot, but the barriers to competing for a major party's nomination for the general election can only be cured by other means to compete for that party's nomination.

* * *

18. In sum, states need not make party nominations part of the machinery of an election. States could instead make elections nonpartisan and eliminate any official role for the political parties, although those parties might still issue endorsements and try to influence the election. But once the State chooses to incorporate a partisan nomination process into the ultimate election, it must accept the consequent burden of ensuring that the nomination process complies with the Constitution. As the Supreme Court unambiguously held in *Bullock*, access to the general election ballot does not eliminate the obligation to permit challengers to compete for their party's nominations without unjustified barriers in their path.

IV. The Right to a Nomination Process Free of Severe Burdens to Challengers

19. Defendants characterize Plaintiffs' claim as demanding a right to a primary election and then rebut that hypothetical claim. Def. C. ¶¶ 85-96. To this end, Defendants rely on *American Party of Texas* and a series of cases addressing nomination processes used to fill vacancies in nominations and other situations where insufficient

time exists for the ordinary nomination process. Defendants seek to equate the judicial conventions to the very different conventions used to nominate presidential candidates so that they can rely on cases about presidential conventions. Defendants also dispute Plaintiffs' analysis of *Morse v. Republican Party of Virginia*'s application of *United States v. Classic*.

20. The Constitution entitles challenger candidates and their supporters to a nomination process free from severe burdens on the ability to vie for a nomination. While the rights of voters and of candidates are intertwined, *Bullock*, 405 U.S. at 143, examining the burdens that the convention system imposes on each separately can be illuminating. Defendants argue that Plaintiffs seek a right to a primary election and assert a right of challenger candidates to win their party's nomination. Instead of the two strawmen that Defendants seek to knock down, Plaintiffs seek the well-established right of voters and candidates to a nomination system free of severe burdens; primary elections are only one of many nominating processes that would pass constitutional muster. Likewise, while candidates do not have a right to win their party's nominations, they do have a right to be free from severe burdens on their ability to compete. The ability to force a purely formalistic vote does not satisfy this right. When a nominating system deprives candidates of the ability to compete for nomination free from severe burdens, it violates their constitutional rights.

A. Party Members' Right to Nominating Process Free From Severe Burdens on Their Participation

21. In order to vindicate the rights of rank-and-file party members, the nomination process must not impose severe burdens on the participation of rank-and-file members.

This requirement does not extend as far as a right to a direct primary. The state legislature can choose among a variety of schemes that leave ultimate control over nominations in the hands of the voters, such as: primary elections; systems—such as the system New York uses for statewide offices—that feature a convention followed by a primary if a challenger candidate files a petition with sufficient signatures; conventions where delegates expressly pledged to support specific candidates at the convention run in primaries; and conventions or caucuses that are open to all registered party members. The conventions open to all party members in *White* and *Morse v. Republican Party*, 517 U.S. 186 (1996), satisfy these requirements. So do the presidential convention delegate nominating processes upheld in *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), and *New York State Democratic Party v. Lomenzo*, 460 F.2d 250 (2d Cir. 1972); in each case, voters could support the candidate of their choice for the ultimate nomination at issue by voting for the appropriate slate of delegates. But whatever system the State chooses, the voters must ultimately be able to participate meaningfully in the nomination process.

22. Courts have long recognized that the "right of participation" in a nominating process that is "by law made an integral part of the election machinery" is "protected just as is the right to vote at the election." *United States v. Classic*, 313 U.S. 299, 318-19 (1941). A system such as New York's judicial nominating conventions violates this "right of participation" by excluding voters altogether from the ultimate choice of which candidate will receive the party's nomination.

1. Special Procedures Are Justified by the Timing Exigencies of Special Elections and Vacancies in Nominations

23. Special elections, interim appointments, and the like present special circumstances under which the State may use electoral mechanisms that would violate the Constitution if used to select a party's candidates on a regular basis. Defendants rely on many of these cases, without noting the special context. Def. C. ¶¶ 87-89. Like most voting rights, the right of party members to participate in their party's choice of nominees is not absolute. This right may be constitutionally burdened by laws that are narrowly tailored to serve compelling state interests. Special elections and filling vacancies in nominations represent the exceptional case where the burdens on voters' rights remain constitutional. Two separate rationales support such exceptions, neither of which applies here. First, as the Supreme Court noted in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982), the impact on voters' rights is minimal, because vacancies only arise under unusual circumstances. 457 U.S. at 11-12. Second, such vacancies, whether created by the death of an incumbent or the sudden withdrawal of a nominee shortly before an election, produce precisely the sort of compelling government interest in preserving the larger interests of a democratic election that justify constraints that would otherwise be forbidden.

24. In *Rodriguez*, for example, the Supreme Court upheld a Puerto Rico law that filled vacancies caused by the death or resignation of a legislator by conducting a primary election in which only members of the party of the former legislator could participate, with no general election at all. The Court acknowledged, of course, that when a State makes an office elective, the citizens of the state have the right to participate fully and

equally in the elections for that office. *Id.* at 10. But under the special circumstances of a legislative vacancy, the office could be filled by an appointment, whether by another elected official or by a political party. *Id.* at 12. The other appellate decisions upholding special systems in filling vacancies in nomination have relied on similar principles. *See, e.g., Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991); *Montano v. Lefkowitz*, 575 F.2d 378 (2d Cir. 1978).[2]

25. *Shapiro v. Berger*, 328 F. Supp. 2d 496 (S.D.N.Y. 2004), addressed the nomination for a Town Justice position that, under New York law, "must be made through a primary election," but which was filled by the town's Democratic county committee because the position itself was created too late for a primary election to be held. *Id.* at 500. While *Shapiro* includes some sweeping dicta, its conclusion is fully justified by the compelling interest in ensuring the timeliness of nominations when no time exists for the standard nomination process. *Shapiro*'s reasoning should not be applied outside the context of vacancies where there is insufficient time for the regular nomination process.

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[2] In *Trinsey*, the Third Circuit upheld a procedure whereby the parties would nominate candidates according to party rules to fill a vacancy in the United States Senate. In reversing the district court, which had ordered a primary, the Third Circuit noted that "[t]he issue before us is limited to whether a primary is required to nominate a candidate to fill a senatorial vacancy." 941 F.2d at 231. The court held that the special demands of time justified wide discretion on the part of the states in how to fill such vacancies. *Id.*

In *Montano v. Lefkowitz*, 575 F.2d 378 (2d Cir. 1978), Judge Friendly found that "Appellants accept as they must that the exigencies of special elections for the House of Representatives do not afford time for a primary." *Id.* at 386. Defendants' reliance on *Seergy v. Kings County Republican County Comm.*, 459 F.2d 308 (2d Cir. 1972), is even more misplaced. In that case, the Second Circuit required the Republican Party county committee to comply with one-person, one-vote when filling vacancies in nominations. The court struck down the voting rules of the committee in those "rare instances" when it nominates a candidate, while allowing it to use any voting rule when the party committee makes purely private acts that are not part of the State mandated election process. *Id.* at 310-12. Under the Defendants' reasoning, no rights to a fair nomination process at all should have applied, because there was no primary.

In short, while courts have permitted political committees to make nominations when the press of time or emergency vacancies make it necessary to burden candidates' and voters' rights, these cases do not justify depriving voters of their control over the nominating system when no compelling state interests require it.

2. Cases Upholding Aspects of the Presidential Convention System Address a System Where Voters Participate Vigorously in Choosing the Nominee

26. While Defendants seek to equate the judicial nominating convention with the presidential nominations at the national conventions, the two systems are dramatically different in terms of the role played by rank-and-file party members. The evidence shows that rank-and-file voters have almost no opportunities even to influence the judicial nominating convention process. The voters never have the opportunity to express their support for specific candidates. The only role that state law provides for voters at all is in the selection of delegates. But voters rarely get to make a choice between different slates of delegates. Pl. F. ¶¶ 27-40. The statutory design creates a fragmented selection process where delegates are elected by Assembly District and winning an election for delegates in one A.D. is largely meaningless without a full-fledged drive to take over the political organization throughout the judicial district. The voters rarely face a choice at the primary ballot among candidates to be delegates precisely because the system makes the position hardly worth seeking. Even when voters are offered a choice, the choice is not meaningful. The voters do not know how the delegates will vote within the convention—not only do the ballots not label delegates based on which candidates they will vote for, but it is essentially unheard of for delegates to campaign on that basis. A presidential campaign can overcome the voter education difficulties in explaining which delegates represent a vote for which presidential candidate, distinguishing the situation considered in *Lomenzo*, 460 F.2d at 251. The burdens on a judicial campaign would be exponentially higher. The difference can be

easily seen by the fact that presidential campaigns did publicize which delegates were their slates in the days before the presidential candidates names were listed on the ballot, Connor Tr. 2159:19-2160:11, whereas similar activity by judicial candidates is all but unheard of.

27. State law creates the obstacles to voter participation in the nomination process. This is fundamentally unlike *Bachur*, where the voters could vote for delegates supporting their choice of presidential candidates and only complained of a party rule that limited their choices for delegate by gender—the fundamental right of voters to have their voices heard in choosing the presidential nominee was not implicated by *Bachur*, despite any dicta to the contrary. Furthermore, in *Rockefeller*, the Second Circuit noted *Bachur*'s limited reach as being confined to issues governed by national party rules. *Rockefeller*, 74 F.3d at 1375 n.12. The rules challenged in this case are a matter of state law, like the rules considered in *Molinari* and *Rockefeller*, with the party rules simply governing some implementation details. In any event, concerns that limit the ability to intervene in the processes of the national parties, because of their unique roles in the American polity, *see Cousins v. Wigoda*, 419 U.S. 477, 489-91 (1975), are not implicated by this case.

3. Clubs Do Not Lessen the Burdens on Voters' Participation

28. Defendants claim that political party clubs provide voters with a mechanism to influence the convention. The only relevance that political party clubs have to this case is the claim that rank-and-file voters can indirectly influence the nominations process through participation in club elections for delegates. The clubs do not, however, open up the nomination process. First, there is no dispute that the clubs only exist within

New York City (and only Democratic clubs were discussed); they are not required by statute. Any role that the clubs may play in providing party members a voice in the nomination process is completely absent throughout most of the state. Furthermore, even where the clubs exist, they only provide a miniscule fraction of the party's members with a voice. Pl. F. ¶¶ 115-16. The overwhelming majority of Democrats in New York City are not members of any club and have no vote at all in club elections. Kellner Tr. 1624:15-1625:14 (estimating that only approximately 8,000 of the 660,000 Democrats in the First Judicial District are members of clubs (1.3%)). Because clubs require membership dues, there are financial barriers to participation that amount to poll taxes. Plaintiffs' expert, Dr. Hechter, testified that costs of voting – even $10 – discourage voters and discourage participation by poor voters more than wealthy voters. Hechter Tr. 1208:21-1209:7. The clubs also do not represent the full diversity of the Democratic Party. Cain Tr. 330:9-332:2 (noting selection bias in club membership); Schiff Tr. 1276:3-1277:8 (acknowledging difficulty in recruiting club members in public housing development). The clubs thus do not provide a meaningful voice for the bulk of rank-and-file members of the party. Even if they did allow some influence in the delegate selection process, moreover, the clubs plainly do not adequately alleviate the severe burdens party members face in any effort to participate in the selection of Supreme Court nominees.

B. Candidates' Right to Nomination Process Free of Severe Burdens on Competition

29. Beyond the rights of voters, candidates are entitled to the right to compete for a nomination without being subjected to the severe burdens created by the judicial

convention system. To evaluate the burdens faced by challenger candidates, the entire nomination process must be considered as a whole. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

30. The ability to receive a few protest votes at a convention or to make a futile challenge is insufficient. At the same time, no candidate has the right to win. What the candidates do have, however, is the right to a process in which they may compete without severe burdens and could win, regardless of whether they are opposed by party leaders. The opportunity to appear on a primary ballot is a sufficient opportunity to compete, because candidates can and do win primaries while running against the candidates backed by party leaders. But when party leaders can almost always block challenger candidates from winning in a convention system, such as in the conventions considered in *Campbell* or even more so in the judicial conventions here, the mere opportunity to make a token display of opposition is insufficient. Where the structures of the convention system give party leaders control except in the most unusual circumstances, challenger candidates face a severe burden that must be narrowly tailored to serve a compelling state interest.

31. Courts need to take particular care to ensure that challenger candidates have the ability to challenge candidates of the major party establishment because those same two party organizations control the legislature that writes the statutes that govern nominations. *See* Cain Decl. ¶¶ 20-21. The major parties' leadership essentially controls the statutory background and can manipulate the laws to increase the ability of party leaders to choose who will be nominated. *See Molinari*, 82 F. Supp. 2d at 59 ("it has been the practice in recent presidential election years, including this one, for the New York Legislature to pass an authorizing statute that merely codifies each party's preferred

method of organizing its primary; thus, what appear to be the options from which the parties may choose are in fact the choices they have already made.”).

32. Legislative deal-making proves the relationship between party leaders and the legislature, as well as the party leaders control over Supreme Court nominations. Indeed, increases in the number of justices have frequently involved deals among party leaders about how the new seats would be allocated between the major parties. *See* Levinsohn Tr. 1926:18-1928:9. Those deals are only possible because of the interrelationship between party leaders and the legislature, and because the legislature understood that it had established a nomination process that would allow the party leaders to enforce whatever deal had been brokered during the legislative process.

33. Defendants argue that *Burdick* shows that alternate means of general election ballot access can eliminate any concerns about burdens. *Burdick* emphasizes, however, that the central role of elections is to determine who will be elected. 504 U.S. 428. Voters need not be given the ability to write in candidates, partially because write in candidates do not contribute significantly to determining who will win the election and serve largely as a means of expressing various forms of protest. What matters is that candidates with reasonable support have the opportunity to win. This case presents the inverse situation: Defendants claim that there is no harm because candidates are capable of receiving protest votes. But those rights do not satisfy the right to vote, which is oriented towards the opportunity to have a fair chance to win, any more than the ability to write in candidates would eliminate any right of ballot access.

34. Under Defendants’ analysis, a statutory system where the party executive committee made the nomination by voting among candidates who had put their names

forward would satisfy the Constitution. Indeed, a system that delegated the nomination expressly to the county party leader would be constitutional. After all, the reasoning goes, a challenger candidate has the same formal opportunity to get a majority of the vote as a candidate backed by the party leadership, even if in reality challenger candidates rarely get any votes and never win. This conclusion would make the right to compete for the nomination meaningless. For all practical purposes, it would mean that there are no rights during the nomination process unless state law creates a primary. As previously discussed, *see* ¶¶ 9-18, *supra*, that conclusion is not tenable, is illogical, and contradicts precedent such as *Bullock*, *Campbell*, *Molinari*, and *Rockefeller*.

V. The Judicial Convention System Imposes Severe Burdens Upon Candidates and Voters

35. Defendants' arguments that the burdens are not severe are primarily rhetoric, without citation. *See* Def. C. ¶¶ 102-08, 110-13. What little argument they actually present is an argument that no individual delegate faces a severe burden, and that the signature requirements are comparable to requirements, without distributional requirements, that were upheld in *American Party of Texas* and *Storer*. Defendants also argue that the danger of voter confusion does not require that delegates be pledged to specific candidates or that the ballot list the names of the candidates supported by each delegate. Def. C. ¶¶ 116-17. In doing so, they ignore the true significance of the lack of pledged delegates: the severe burden on the rights of party members to participate in the nomination process.

36. Defendants fail to counter the significant evidence proffered by Plaintiffs that the present nomination process – *i.e.*, the judicial convention system – imposes severe

burdens on candidates and voters. That evidence fully supports the following key conclusions:

- The statutory selection rules for Supreme Court impose severe burdens on insurgent candidates who seek the opportunity to compete for their party's nomination—the key question under *Bullock*, *Molinari*, *Rockefeller*, and *Campbell*;

- The extreme severity of those burdens on candidates is unique to New York State when compared to the burdens imposed on candidates by the selection systems of the other states that elect general jurisdiction trial judges, and unique *within* New York State when compared to the burdens imposed for all other state elective offices, including other elected judgeships, *see* Pl. C. ¶ 20 (collecting cases establishing that this is a standard test for evaluating a burden);

- *Not a single* insurgent candidate has successfully overcome those severe burdens to obtain the nomination for Supreme Court from the Democratic or Republican Parties in any judicial district since at least 1994, and in all likelihood, for many years earlier. The only exceptions to this historical record are two conventions – one in the First Judicial District in 1976 and the other in the Eighth Judicial District in 2000 – both of which resulted from internal factional struggles for control of the leadership of the party rather than from the campaign efforts of any Supreme Court candidate, *see* Pl. C. ¶ 18 (collecting cases relying on lack of past challengers to establish severity of burden). While Defendants try to argue

with the factual record, they make no effort to respond to the legal significance of the lack of challenges.

New York's statutory requirements for Supreme Court selection thus impose a severe burden upon Plaintiffs' right to associate and to express political preferences by competing as candidates for their party's nomination and by voting – *i.e.*, their First Amendment right to vote effectively.

37. Unlike the burdensome requirements struck down in the numerous cases cited in Pl. C. (¶¶ 14-32), the requirements challenged here involve not simply a threshold barrier to earn a place on a primary ballot, but an unparalleled gauntlet that imposes upon challenger candidates much more severe and multi-layered burdens. When another district court within the Second Circuit considered similar, though even less burdensome, barriers to the ballot, it struck them down without hesitation. *See Campbell*, 242 F. Supp. 2d at 171-77 (striking down requirement that party candidates obtain support of 15% of convention delegates to earn place on party primary ballot).

38. Defendants fail to address the specific and severe burdens shown by Plaintiffs:

A. No Voter Input

39. Defendants do not dispute that voters have no direct role of any kind in the nomination of Supreme Court justices. Indeed, their own expert, Mr. Kellner, testified: "By definition, the convention system is designed that the political leadership of the party [including the delegates] is going to designate the party's candidates," Kellner Tr. 1671:15-19, and "[t]he system is designed for candidates to be appealing to the judicial delegates and not to the electorate at large." Kellner Tr. 1572:1-7; *see also* Pl. F. ¶¶ 240-

42. Nor do Defendants dispute that New York's selection system is unique both within New York State and in the nation in precluding insurgent judicial candidates from competing for their party's nomination by placing their names before the voters. Pl. F. ¶¶ 2-7; Proposed Conclusions ¶ 20. Finally, Defendants do not dispute that only a small fraction of judicial delegates – 12.7% from 1999 through 2003 in New York City, for example, *see* Pl. Ex. 97 – actually appear on a ballot and are elected by the voters, *see* Pl. F. ¶¶ 27-40.

B. Party Leader Control

40. Defendants do not deny the remarkable paucity of contested nominations at the judicial conventions, Pl. F. ¶¶ 190-206, or the absence of any successful insurgent candidates who prevailed in a vote at a convention over the county leader's objection without being the beneficiary of an internal fight for party control, Pl. F. ¶¶ 244-46. Rather, Defendants attempt to explain such evidence by suggesting that such leaders *always* end up supporting those candidates who would prevail in any event, regardless of their own personal preferences. Def. C. ¶ 103. The evidence suggests, however, that county party leaders are not nearly as passive as Defendants would suggest. Instead, as articulated by County Leader Herman "Denny" Farrell, Jr. in Manhattan and reflected in the experience of Plaintiff Margarita López Torres and numerous other witnesses, such leaders have "the votes to be able to kill someone – in other words, [in Farrell's words,] *I can't guarantee I can always make you, but I can surely block you.*" Pl. Ex. 99(B) at 193:9-15 (emphasis added); Connor Tr. 2189:4-13 ("certainly" fair to draw inference from 28 Supreme Court judicial aspirants' contributions to County Leader Norman's

committees that the candidates believed that Norman's support was important to aspirations to become a judge). *See* Pl. F. ¶¶ 62-206.

41. Defendants further suggest that delegates can and do vote, free of influence or instruction from party leaders, for their choice of Supreme Court candidates at the convention. Def. C. ¶¶ 104-05. To be sure, particularly in Assembly Districts in which ties to the county party organization are weakest, delegates and district leaders may be independent of such county leaders in rendering their decisions. The testimony of both Defendants' and Plaintiffs' witnesses establishes, however, that only a small handful of party leaders – at best district leaders, at worst a single County Leader – control the selection of Supreme Court candidates sufficiently to allow them to block an insurgent candidate from competing in any meaningful respect for the party's nomination. *See* Pl. F. ¶¶ 62-189; Pl. R. F. ¶¶ 8-12.

C. Petitioning Requirements

42. Defendants do not dispute the cumulative signature requirements that would be faced by a Supreme Court candidate if that candidate chose to run delegates in each Assembly District within the judicial district. Def. F. ¶¶110-15; Pl. F. ¶¶ 258-78; Pl. Ex.96. Rather, Defendants note that those signature requirements apply to candidates for judicial delegate but not for Supreme Court, and assert that those requirements are not unconstitutionally burdensome in any event. *Id.*

43. To be sure, in each AD the relevant signature requirements are those for judicial delegate candidates rather than for Supreme Court candidates and, if this case were a challenge to the burdens on insurgent delegate candidates in their efforts to obtain a place on the ballot within a single AD rather than a challenge to the burdens faced by a

Supreme Court insurgent, the requirement of 500 signatures without any geographic distribution requirements might pass muster. But the evidence from within New York State and from other states demonstrates that, when considered from the vantage point of a Supreme Court candidate attempting to elect a sufficient number of delegates and alternates to try to obtain a majority of votes at the convention, those cumulative signature requirements are severely burdensome. *See* Pl. F. ¶¶ 258-78.

44. Nor do the only two cases cited by Defendants on this point support their position. In *American Party v. White*, 415 U.S. 767 (1974), the Supreme Court upheld Texas' requirement that *a political party* – not an individual candidate – must gather signatures (or attract voters to precinct conventions) *anywhere in the state* in sufficient numbers to reach 1% of the most recent gubernatorial vote (or 22,000) over a period of *55 days* (plus the additional open-ended time available prior to that period during which the party could recruit voters to attend its precinct conventions) in order to obtain a ballot line for *statewide* office. 415 U.S. at 773-87. By contrast, the cumulative requirements for Supreme Court would require an individual insurgent candidate (rather than a whole statewide political party) to gather as many as 12,000 valid signatures (without the additional alternative of simply attracting voters to events) equally distributed in as many as 24 separate Assembly Districts in only 37 days. Pl. F. ¶¶ 258-67. Even with the obviously less severe burdens imposed by Texas' requirements, the Supreme Court upheld those requirements only after noting that they fell within the "outer boundaries of support the State may require before according political parties ballot position." *Id.* at 783. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court did not rule upon any signature

requirements and commented only upon those for statewide office, again without any geographic distribution requirements.

D. The Numbers of Delegates and Alternates

45. Defendants dispute neither the numbers of delegates and alternates that are selected in each judicial district (Pl. F. ¶¶ 22-25), nor that those numbers are significantly higher than the numbers of delegates selected for New York's statewide designating conventions or for the presidential primary elections. Pl. F. ¶ 25.

E. The Absence of Ballot Cues in Selection of Delegates

46. Defendants entirely misconstrue Plaintiffs' assertion concerning the absence of any indication on the September ballot of which Supreme Court candidates a delegate candidate would support, if elected. Def. C. ¶ 116-17. Plaintiffs do not rely upon the fact that this feature of New York's judicial convention system causes "voter confusion," but rather that it prevents voters from having any input into the selection of their party's Supreme Court nominees and adds an additional burden on insurgent Supreme Court candidates who, if they choose to run their own judicial delegates, are forced to educate voters in each Assembly District that their delegate candidates will vote for them at the convention, if elected. For this reason, even if it were proven as a factual matter, which it has not been, Defendants' only argument in defense of this aspect of the present system – that it does not cause voter confusion – is misplaced. Indeed, this feature of the system imposes a significant burden upon Supreme Court candidates and voters.

F. Campaign Costs

47. The evidence adduced at the hearing established that the costs faced by an insurgent candidate seeking to run their own slates of judicial delegates and alternates would be – and have been – prohibitive for most candidates. Pl. F. ¶ 291. Indeed, Defendants do not dispute that such costs would significantly exceed those required to run a countywide primary election, which their witnesses themselves estimate to be at least $500,000. Kellner Tr. 1587:4-10; Def. F. ¶¶ 262-64. Senator Connor testified that insurgent candidates would have a "reasonable chance for prevailing" in effort to run own slates of delegates with a budget of $1 million, demonstrating the reasonableness of Mr. Lipton's comparable estimate. Connor Tr. 2182:22-2183:21.

G. The Timeframe

48. While Defendants assert that candidates for Supreme Court generally campaign for support from party leaders and potential judicial delegates beginning in January through to the judicial convention, they do not dispute that Supreme Court candidates cannot learn who the *candidates* for delegate and alternate to the convention will be until at least the end of July. Def. C. ¶¶ 119-21. Nor do they dispute that candidates for statewide office have at least ten months – and often almost two years – to contact and persuade delegates to the statewide designating conventions. Pl. F. ¶ 47. This compressed timeframe plainly need not prejudice those Supreme Court candidates who have the support of county party leaders. But for insurgent candidates it adds yet another barrier to their efforts to persuade delegates and alternates to support them at the convention rather than a candidate backed by their district leaders or county party leaders.

49. Defendants argue that the burdens faced by a candidate in one year should be considered less significant because candidates can run in multiple years and gradually build support. Def. F ¶¶ 130-32. No legal precedent supports this conclusion. It is not consistent with constitutional principles to permit the violation of First Amendment rights to compete for the nomination for one year on the ground that in some future year those rights will not be burdened. Indeed, in *Rockefeller*, the party leadership backed candidate for president had been the disfavored challenger candidate in a previous election, yet the court did not reject the plaintiffs' claims by pointing out that they might be able to win the party leadership's support in some future election. *Rockefeller*, 917 F. Supp. at 157-58.

* * *

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

VI. The Burdens Are Not Narrowly Tailored to Serve Compelling State Interests

51. Defendants advance four state interests that the convention system purportedly serves: protecting the right of association of the political parties; promoting geographic diversity; promoting racial diversity; and protecting incumbent justices. They assert that protecting party associational rights is a compelling state interest and that the other three interests are "legitimate." Def. C. ¶¶ 125-28. While Defendants' Proposed Findings of Fact include sections arguing that the convention system promotes a high-

quality bench and increases public accountability, their failure even to suggest those interests in their Conclusions of Law implies a great deal about their perception of the strength of those interests. Only the interest in protecting the associational rights of political parties is supported by any citation to legal authority. Because the convention system imposes severe burdens on challenger candidates, legitimate state interests are insufficient. Even if some of the interests are compelling, the burdens are not narrowly tailored to serve any of these interests.

52. The convention system disserves the state's most compelling interest in the selection of Supreme Court justices: facilitating voters' choice of their justices. By taking the process almost entirely out of voters' hands, New York statutes contravene the New York State Constitution's command that justices "shall be chosen by the electors [*i.e.*, the voters]." N.Y. Const. art. VI, § 6.

A. Party Associational Rights Do Not Include Unfettered Control of the Nomination Process

53. While respecting the associational rights of political parties is a compelling state interest, whether the State chooses to require political parties to use judicial nominating conventions, a primary, or a different convention system does not implicate those associational rights. Political parties do not have any right to exclude their own members from the nomination process. The Supreme Court has "considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000), *quoting American Party of Texas v. White*, 415 U.S. 767 (1974). To be sure, as

established in the cases cited by Defendants, the party has a right to exclude non-members from its nominating processes, *California Democratic Party*, 530 U.S. at 576-77, or, conversely, to permit independents to participate in its primary, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986). Those rights are completely distinct, however, from the purported right that Defendants assert that would allow a party to exclude its own members from its nomination process. If such a right existed, the State would not only be permitted to establish closed conventions, it would be required to do so at the request of the political parties, in direct contravention of *California Democratic Party* and *American Party of Texas*.

54. Nor do Plaintiffs challenge the rights of party leaders to endorse or to support specific candidates for Supreme Court at a convention or otherwise. The party leadership, after all, has a right to engage in its own powerful speech, something county leaders already do routinely prior to Civil Court races in New York City. *See, e.g.,* Gangel-Jacob Decl. at 8 (testifying that she ran for Civil Court against the candidate backed by the Democratic Party's County Leader). In a nominating process that is open to party members, the party committees will remain completely free to make endorsements and to speak out on behalf of and associate with those candidates for Supreme Court whom they support. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). But the "ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership. . . ." *California Democratic Party*, 530 U.S. at 581. It is the associational rights of the rank-and-file party members that *California Democratic Party* and similar cases protect, and those rights are furthered, not infringed, by allowing such

party members to participate in choosing with whom the party will associate through its nominations.

55. To the extent that preventing party raiding is the concern, the judicial nominating convention is not narrowly tailored to serve that goal. The Wilson-Pakula laws prevent party raiding in the context of all non-judicial elections in New York. While the legislature has not seen fit to extend Wilson-Pakula to cover judicial elections, it could easily do so if it concludes that party raiding is a serious threat. Because a much narrower solution exists if the State wishes to address this problem, fears of party raiding cannot justify a severe burden on the rights of challenger candidates who seek nomination within their own party.

B. No Evidence That Convention System Promotes Racial Diversity or Is Narrowly Tailored to Do So

56. Plaintiffs agree that promoting racial diversity is a legitimate state interest. The evidence does not support a conclusion that the convention system actually promotes racial diversity.

57. The evidence shows that almost all of the diversity on the Supreme Court bench is in New York City, where the population of voters is sufficiently diverse that minority candidates can and do perform very well in primaries, as well. Pl. R. F. ¶¶ 99-101. Indeed, Senator Connor testimony suggests that African-Americans might be elected in higher numbers in New York City under a direct primary system. Pl. R. F. ¶ 100. The Ninth Judicial District, with a voting-age population that is 27% minority, and the Third and Seventh Judicial Districts, with minority voting-age populations of 12.9% and 13.9%, respectively, all have no minority Supreme Court justices. Pl. R. F. ¶ 98.

58. Defendants rely heavily upon the testimony of Dr. Hechter, but his testimony is unpersuasive; by his own admission, his analysis was "likely to be falsified in certain cases" and was based "to some degree on unrealistic assumptions." Pl. R. F. ¶ 96.

59. The Supreme Court selection system has done a particularly poor job of promoting diversity beyond African Americans. Even taking into account the different population sizes, Hispanics and Asian-Americans are much less well represented on the bench than African Americans. Pl. R. F. ¶ 103. Furthermore, the Supreme Court may systematically impair gender diversity, especially outside New York City. Pl. R. F. ¶¶ 113-17. The State's strong interest in promoting diversity does not extend to promoting the representation of a single minority racial group while failing to promote, and perhaps hurting, the representation of other racial groups and women.

60. Studies of diversity on the bench have concluded that the convention system impairs the ability of minority and women candidates to reach the Supreme Court bench. Pl. R. F. ¶¶ 113-14.

61. Defendants fail to show that the convention system is narrowly tailored to produce diversity. Diversity could be promoted better by electing justices through direct primaries from smaller districts. Pl. R. F. ¶¶ 119-20. Alternately, alternate election structures such as cumulative voting, limited voting, or proportional representation would also promote diversity. Pl. R. F. ¶ 121. Cumulative voting and limited voting are each systems that allow numerical minorities to win some share of the offices. In cumulative voting, each voter may cast a number of votes equal to the number of offices to be filled, but the voter may cast more than one vote for a single candidate. If there are 4 offices to be filled, a candidate backed by as few as 20% of the voters plus one could be guaranteed

election, if the candidates' supporters all cast all 4 votes for that candidate. Finally, the legislature could allow for primaries between slates of judicial candidates that would allow the voters to promote diversity directly, essentially allowing the log-rolling that Dr. Hechter desires to be done by the voters following coalition building by the candidates.

C. Geographic Diversity Could Be Better Served Through Other Systems

62. While the State may have a legitimate interest in promoting geographic diversity, Defendants have failed to show that the interest is compelling, the judicial nominating conventions serve that interest poorly, and other simple solutions are both more narrowly tailored and would accomplish the purported goal more effectively.

63. The current system does a poor job of promoting geographic diversity. In judicial districts that are dominated by one county, the largest county has a grossly disproportionate share of the justices. For example, Erie County contains 61% of the registered voters of the Eighth Judicial District, but 89% of the justices in the district, and only two of the eight counties in the district have any resident justices. *See* Pl. R. F. ¶ 123. The severe burdens on challenger candidates cannot be justified by a state interest that the convention system does not effectively serve.

64. Even if the present selection system did produce geographic diversity, moreover, the State could address that concern more effectively and without creating barriers to participation by party voters and challenger candidates. Even without altering the current judicial district lines, the State could require that specific judicial seats be elected from among the residents of specific counties, even if they are elected at large. *See, e.g., Dallas County v. Reese*, 421 U.S. 477 (1975) (upholding system for electing county commissioners in which county voters elected four commissioners at large, but

each commissioner was required to live within a different residence district). Similarly, if the State decided that residence during the justice's term of office (but not residence at the time of election) was the goal, it could establish county residence requirements. *See, e.g., Weidman v. Starkweather*, 80 N.Y.2d 955, 956 (1992) (enforcing state law requirement that candidate for county legislature be resident of election unit at least 30 days prior to election); N.Y. Elec. L. § 6-122 (candidates for nomination must meet constitutional or statutory requirements for office at time of election or, in case of judicial offices, within 30 days of commencement of term of office); N.Y. Pub. Off. L. § 3(1) (holders of local office must be residents of political subdivision or municipal corporation for which they are chosen at time of selection). The absence of any rules even requiring justices to live within the judicial districts they sit in undermines any argument that the State considers geographic diversity to be a compelling interest.

65. Moreover, if the State wished to ensure that certain counties could elect one of their own or keep a justice in residence, it could also make such counties separate judicial districts. The legislature has the power to alter the boundaries of the judicial districts once every ten years and can use this power to split judicial districts, as it did to create the Twelfth Judicial District by splitting off Bronx County from the First Judicial District. N.Y. Const. Art. VI, Sec. 6(b).

66. Justice Sise's testimony confirms that residence requirements or reducing the size of the judicial districts would better serve any state interest in geographic diversity. Pl. R. F. ¶¶ 124-25. When narrower solutions would accomplish its purported goals better, the severe burdens of the judicial convention system cannot be justified.

D. Incumbent Protection and Campaign Finance

67. Defendants argue that incumbent justices should be protected from electoral challenges, particularly because of campaign finance concerns. Defendants cite no authority for the notion that incumbent protection can be considered even a legitimate, much less compelling, state interest. Nor did New York State include such an interest in its constitution when the constitutional convention of 1846 addressed Supreme Court selection. Indeed, during the constitutional convention of 1867, New York State rejected a proposal that judges serve to age 70 without needing to stand for re-election. Pl. Ex. 112 at 2-3. Even if it were considered compelling, however, Defendants have neither proved that incumbents would be unduly threatened by a constitutional selection system nor have they shown that it is necessary to impose severe burdens on Plaintiffs' rights in order to protect incumbent justices.

68. Numerous states that use primary elections to nominate their general jurisdiction trial court judges protect incumbent judges from undue competition through mechanisms that impose little or no burdens on voters or challenger candidates. Both Illinois and Pennsylvania, for example, employ partisan primary elections to select nominees for open seats on their trial courts but then subject incumbent judges to retention elections without opponents to determine whether they should remain on the bench for another term. If an incumbent loses a retention election, then and only then does that judge face a direct primary election in which candidates may join by meeting the reasonable primary ballot access requirements. See Pa. Const. Art. 5, § 13; Ill. Const., Art. VI, § 12. In New York State, moreover, the Feerick Commission has proposed statutory changes to provide retention elections for incumbent Supreme Court

justices. Pl. Ex. 78 at 35-37, App. G-7. If protecting incumbents from undue challenges is a compelling state interest, therefore, the State has many options to serve that interest without shutting out candidates and voters so severely from the nomination process. Pl. R. F. ¶ 131.

69. The State does have a legitimate interest in regulating campaign finance to prevent corruption or the appearance of corruption and to allow candidates with different financial resources to compete on an even footing. As with the other purported justifications advanced by Defendants, however, the current system does not serve this interest well and other, more narrowly-tailored solutions would serve it better without burdening the rights of challenger candidates and their supporters.

70. The current system is an abject failure to control campaign finance costs in districts with competitive general elections. Pl. R. F. ¶ 133. It is only by stifling all political competition that the convention system manages to keep campaign expenses low anywhere. Using Defendants' reasoning, reducing the influence of money on judicial elections would justify severe burdens on the opportunity to compete in general elections, as well. Furthermore, party leaders' control over the nomination process creates campaign finance problems of its own, including unseemly transfers and contributions from judges' campaign committees to committees controlled by party leaders. Pl. R. F. ¶ 133. And to the extent that the State interest is controlling corruption or the appearance of corruption, the standard justifications for campaign finance reform since *Buckley v. Valeo*, 424 U.S. 1 (1976), the popular perception that judges are indebted to party leaders creates the very problem that the system purports to cure. Pl. Ex. 78, App. C at 34.

71. Any interest in controlling the influence of money can be better served by more narrowly tailored solutions. Public financing of judicial elections could eliminate most of these problems and ensure that incumbent justices could finance their re-election campaigns without relying on contributions from lawyers. Pl. Ex. 124. More stringent rules governing campaign contributions without public financing could also eliminate most of the concern while still allowing for competitive elections. The State has wide latitude to impose contribution limits, even limits as low as $100. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). While the concerns underlying efforts to control the influence of money on elections are legitimate, they cannot justify stifling the elections in the name of protecting them.

VII. Plaintiffs Are Likely to Succeed on their Equal Protection Claim

72. Strict scrutiny applies to Plaintiffs' equal protection claim. In the leading case of *Bullock v. Carter*, the Court held that where a challenged restriction "has a real and appreciable impact on the exercise of the franchise," state action limiting access to the state ballot "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. at 144. This was the rule followed in *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), in which the Court held: "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure…. When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." *Id.* at 184 (citations omitted). Defendants attempt to distinguish that case on its facts, but do not and cannot deny that the case took up the equal

protection analysis under strict scrutiny. The only case to the contrary cited by defendants is a *plurality* opinion in *Clements v. Fashing*, 457 U.S. 957 (1982), which suggested limitations on strict scrutiny. But it was clear in that case that "a majority of the Court today rejects the plurality's mode of equal protection analysis." *Id.*, 457 U.S. at 977 n.1 (Brennan, J., dissenting).

73. Thus, Defendants are simply wrong when they contend that the court may dispense with strict scrutiny in this case. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 & n.3 (1976) ("equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right," *e.g.* right to vote); *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003) ("where the statute in question substantially burdens fundamental rights, such as the right to vote,…strict scrutiny applies and the statute will be upheld only if the state can show that the statute is narrowly drawn to serve a compelling state interest."); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003) ("When a statute burdens certain 'fundamental rights'—*e.g.*, voting rights or the right to interstate travel—a reviewing court will strictly scrutinize that statute, upholding it only if the government can clearly demonstrate a compelling interest incapable of being served by less intrusive means."); *United States v. Williams*, 124 F.3d 411, 422 (3d Cir. 1997) ("'classifications affecting fundamental rights are given the most exacting scrutiny.' Such laws must be 'suitably tailored to serve a compelling state interest.' For equal protection purposes, 'fundamental rights' include such constitutional rights as…the right to vote…."); *Robertson v. Bartels*, 150 F. Supp. 2d 691, 695-96 (D.N.J. 2001) (impairment of fundamental "right of persons to run for public office and the right of

voters to vote for candidates of their choice" is "subject to strict scrutiny and can only be impaired if the impairment furthers significant State interests"); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.").

74. Defendants do not seriously attempt to defend the statutory scheme under strict scrutiny, arguing only that extra burdens are appropriate because the Supreme Court is the "State's highest Court of original jurisdiction, which hears the most complex and important state cases." Def. C. ¶ 139. Defendants' asserted basis for the restriction on ballot access does not withstand strict scrutiny or any other kind of scrutiny.

75. Defendants offer no explanation of why citizens who have cases in Supreme Court need judges nominated by convention. The proffered distinction (Supreme Court cases are more "important") does not amount to a compelling interest. Are cases in Supreme Court really more important *to the actual litigants*? We doubt it, and the Court heard not one iota of evidence on it. We believe that for litigants who have limited means, even cases that involve lesser amounts are very important. And the so-called "inferior" courts include family courts, criminal courts, housing court, the court of claims, and the surrogates' courts. Surely those courts handle complex and important cases. Indeed, for many litigants, cases in those courts will be life altering.

76. *Second*, a great many judges serve in the job of *Acting* Supreme Court Justice, hearing those very same "complex and important" cases, without having to go through the nominating convention process. Acting Supreme Court Justices are appointed to that position by the Chief Administrator, having the full "powers, duties and jurisdiction" of

elected Supreme Court Justices. Pl. F ¶ 14 (citing N.Y. Const. Art. VI, § 26(k)). New York simply does not elect *any* of the judges who serve as Acting Supreme Court Justices using the judicial convention system. Some such judges are appointed by the Governor with the advice and consent of the Senate; others are elected in partisan, county-wide elections following nominations by primary elections; others are appointed by the Mayor of New York City. Pl. F. ¶ 15. As Defendants' own witness, Justice Alice Schlesinger explained in response to a question from the Court: "There is no actual difference in salary or responsibilities or the power or authority the judge has. There are no differences." Tr. 1962:5-7. If the state really had a compelling interest in ensuring that the powers and duties of Supreme Court Justice were only assumed by jurists who have run the gauntlet of the convention, then Defendants have fallen woefully short in explaining how the Rube Goldberg system of populating the Supreme Court bench is "narrowly drawn" to serve that interest.

77. These infirmities also shed light on Defendants' other justifications for statutory scheme. If the convention system actually were narrowly tailored to promote racial diversity, or geographic diversity, or incumbency protection, then why are so many judges assuming the powers and duties of the Supreme Court without going through the convention system? And why is New York permitting so many judges to ascend to the bench on *other* state courts through processes that by defendants' logic are not as good at promoting those compelling state interests? Defendants have no answer to these questions.

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Respectfully submitted,

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