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 FINDINGS OF FACT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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I. Introduction

Defendants' Proposed Findings of Fact do not rebut, or even address, the most significant evidence introduced by Plaintiffs to prove their claims. Among other key evidentiary points that Plaintiffs have established and which Defendants do not dispute or proffer evidence to counter:

- That Party Leaders can block insurgent Supreme Court candidates if they choose to do so, and no successful insurgent candidate has been identified, much less proffered as a witness (Pl. F. ¶¶ 62-189);
- The miniscule percentages of contested nominations (*i.e.*, the number of true challenges, successful or otherwise) at the judicial conventions across the State (Pl. F. ¶¶ 190-206);
- The absence of a single candidate for Supreme Court who has successfully run their own slates of judicial delegates. (The only example from anywhere in the State, Judge Regan, was entirely unsuccessful, as was the effort on the part of Judge Keefe in the Third Judicial District to challenge the party leaders' slates) (Pl. F. ¶¶ 240-46, 248-50, 266, 289, 297);
- The petitioning requirements faced by an insurgent Supreme Court candidate – including the numbers of valid signatures that must be gathered, the number of ADs, the numbers of delegates and alternates, the absence of ballot cues, the need for voter education – as well as the comparisons with petitioning requirements for other offices inside and outside New York that show how severely New York's requirements burden such candidates (Pl. F. ¶¶ 24-25, 247-98);

- The tiny proportion of contested delegate elections across the State (Pl. F. ¶¶ 27-40);
- The fact that no independent, or even minor party, candidate for Supreme Court has ever, or could ever, come close to competing at a general election with the candidate(s) nominated by the Republican and/or Democratic Parties(Pl. F. ¶¶ 237-39);
- The uniqueness of New York's judicial convention system both inside and outside New York State, including its barriers to candidates and to voters (Pl. F. ¶¶ 1-8, 51); and
- The extent of non-contested and non-competitive general elections for Supreme Court that render the judicial convention nomination tantamount to election in most cases (Pl. F. ¶¶ 207-39);

While the following Proposed Reply Findings of Fact seek to address Defendants' Proposed Findings of Fact[1] in detail, Defendants' failure to proffer evidence to counter these and other showings significantly supports Plaintiffs' claims.

II. New York State's Unique Judicial Convention System

A. Legislative History

1. Defendants attempt to suggest that the current judicial convention system is the product of the New York State Legislature's "experiment" with direct primary elections and a groundswell of support from civic organizations for a return to the judicial convention system. Def. F. ¶¶ 29-31. The documents upon which Mr. Kellner relied for

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[1] Defendants' Proposed Findings of Fact are referred to hereafter in citations as "Def. F. ¶____" and Plaintiffs' Proposed Findings of Fact are referred to as "Pl. F. ¶___." Plaintiffs' Proposed Reply Conclusions of Law are referred to as "Pl. R. C. ¶____."

this view, however, lead to an entirely different conclusion. Indeed, one of the reports relied on by Mr. Kellner, Albert S. Bard's presentation to the Association of the Bar of the City of New York in 1914, argues that political party control of the judicial nomination process is one of the major evils to be combated. Pl. Ex. 112. In describing the prior system of conventions, Mr. Bard stated:

> The primary used to be an election within a party at which representatives of its members were selected who were charged with the duty of conferring together and selecting party candidates to make the race at the general election. But when this system degenerated everywhere, and apparently hopelessly, into a method of placing a meaningless rubber-stamp approval on candidates really selected by political bosses and oligarchies largely for personal or pecuniary reasons, and in the face of the public needs, the system was doomed and the direct nominations wave inevitable.

Pl. Ex. 112 at 5. Far from proposing a return to the convention system, Bard advocated switching to nonpartisan elections for judges:

> With this rapidly growing recognition of non-partisanship in connection with municipal elections, may we not hope that the same principle will soon be extended to include the judiciary?

Pl. Ex. 112 at 9 n.*. *See also id.* at 12 (advocating that judges not be elected as part of the same party-column ballot as other offices).

2. While Bard did criticize the primary system, *id.* at 14, 16, he did so in the context of advocating changes that would give the party organizations less power, not more. Indeed, his strongest language against a primary system came in support of a proposal to switch to nonpartisan elections, about which he said:

> The effect of such a measure would be threefold. (1) It would relieve the judicial candidate and his friends of the serious labor and expense attendant upon any primary contest—a labor and expense which the best-qualified aspirant for judicial honors is often the least qualified to meet, and to which the *unsuccessful* primary candidate may well be reluctant to subject himself. (2) It would likewise relieve the *successful* candidate

> from the wear-and-tear of a double election. (3) It would put a desirable emphasis upon the essentially non-partisan character of a a judicial election, both by minimizing the necessity of recourse to the party masters for a nomination, and by presenting the candidates' names to the electorate in a non-partisan form.

Id.

3. As for the reports of the Association of the Bar of the City of New York endorsing a proposal to use nominating conventions instead of primaries, neither report Mr. Kellner cites contains any analysis of the proposed bills, Pl. Ex. 113 and 114, and one report contains equal criticism of nominating by judicial convention as it does of nominating by primary election. Pl. Ex. 114. Contrary to Defendants' Proposed Finding ¶ 30, none of the reports support abolishing primaries in favor of the convention system because it is "unseemly" for judges to solicit contributions. The word "unseemly" never appears in any of the reports, and, while Pl. Ex. 112 does advocate eliminating primary elections in favor of a one-round nonpartisan election, it does not advocate a return to the old convention system. Beyond these reports, Defendants do not rely upon any true legislative history of any kind (*e.g.*, committee reports, floor debates, etc.) and Mr. Kellner acknowledged that he did not look for any such materials. Kellner Tr. 1632:18 – 1633:17.

B. New York's System Compared

4. As discussed in detail in Plaintiffs' Proposed Findings of Fact (¶¶ 2-7) and in Professor Schotland's declaration (¶¶ 8-18), New York State's judicial convention system is unique both within New York and among the fifty states. Unlike all of the 32 other states with contestable elections for trial court judges, New York does not allow candidates to compete for their party's nomination (or a place on a non-partisan election

ballot) by simply filing notice, paying a small fee, and/or gathering signatures directly among voters. Pl. F. ¶ 5, Pl. Ex. 13, 13(A)-13(H).

5. Without disputing any of Mr. Schotland's conclusions, Defendants distort his testimony significantly. Defendants suggest that the variations in state practices, including the use of fully appointive systems, means that those states that have chosen to elect their judges, like New York, need not comply with the U.S. Constitution in those elections. Def. F. ¶ 14-15. As Professor Schotland testified on cross-examination, while diversity itself does not render a state's selection system unconstitutional, all states' selection systems must comply with the Constitution and can be found "unconstitutional." Schotland Tr. 741:24 – 742:6.

6. Contrary to Defendants' statements (Def. F. ¶ 15), in states with non-partisan elections for trial court judges, political parties do not and cannot *nominate* candidates for those positions. Unlike in New York, any candidate can get on the ballot to compete with other candidates without the benefit or detriment of a party label. Schotland Decl. ¶¶ 11, 15. Among the many states with non-partisan elections for trial court judges, moreover, the political parties do not even *endorse* or campaign on behalf of candidates in such elections.[2] Schotland Tr. 751:5 – 754:21. In short, New York State is the only state that chooses to use fully partisan elections (in which the party labels are essentially determinative of the outcome) yet allow the voters no direct role whatsoever in selecting their party's nominees. Pl. F. ¶ 2.

[2] As Professor Schotland also made clear, it is *only* in the selection of its statewide Supreme Court judges (*i.e*., the highest court in that state) that Michigan allows any kind of partisan involvement, and even there, candidates have the opportunity to obtain their party's designation through a party convention and, if they do not succeed there, they can still petition directly onto the non-partisan election ballot by gathering signatures and appear on that ballot in the same manner as all other candidates, i.e., without a party label. Schotland Tr. 754:3 – 756:21. Defendants suggest incorrectly and without any basis that Michigan trial courts are selected in the same manner as those in Ohio. Def. F. ¶ 15.

7. Finally, Defendants suggest erroneously that Michigan's selection system for its *statewide* Supreme Court bears any relation to New York's judicial convention system for its Supreme Court *trial court* judges. Def. F. ¶ 20. It does not. Candidates for Michigan's highest court can obtain a place on the non-partisan election ballot *either* by being selected at a party convention or by gathering signatures among voters. All candidates appear on that ballot without any party labels. *See* Mich. Comp. Laws §§ 168.392, 168.392a, 168.590, 168.643; Mich. Const. art. VI, Sec. 2. Second, like all other states with contestable elections for trial court judges except New York, Michigan uses a primary election with reasonable petitioning requirements rather than a convention to select its trial court judges. Schotland Decl. ¶ 11-12.

C. Delegate Selection

1. Burdens on Supreme Court Candidates and Voters in Delegate Selection

a) The Role of Party Leaders

8. Notwithstanding Defendants' assertion that "Plaintiffs have presented no credible evidence" or any "live witness" testimony indicating party leaders select the delegates (Def. F. ¶¶ 39, 60, 118), extensive live and written testimony from across the State documents that such party leaders do, in fact, select and control the bulk of delegates. *See* Pl. F. ¶¶ 71 (Hechter: "district leaders effectively select delegates to the judicial convention"); 89 (Kellner); 127 (Carroll on Second Judicial District); 168 (Keefe on Third Judicial District); 172, 176-77 (Regan on Seventh Judicial District); 185 (Ostrer on Ninth Judicial District), 186 (Hechter on Eleventh Judicial District); *see also* Pl. F. ¶¶ 27-40. Even in Manhattan, which Mr. Kellner testified is unique because of the "high level of involvement down to the club level in judicial politics," County Leader Farrell

testified in *France v. Pataki* that the district leaders "select them [*i.e.*, delegates]" and thereby usually control their votes.[3] *See* Pl. F. ¶¶ 110; *see also id*. ¶¶ 111, 116 (Berger).

9. Defendants point to testimony elicited from various witnesses that they were never actually told by a party leader how to vote as a delegate. Def. F. ¶¶ 61-71. Defendants ignore testimony such as that from Mr. Ostrer from the Ninth Judicial District, who testified that he was "told who we were going to take direction from," but that they have never actually received instruction because "[t]here has never been a contested vote." Ostrer Tr. 1422:17 to 1423:3. He added: "I don't know whether we were with or against the insurgent. We were going to get our direction from the Duchess County chair through our vice chair." Ostrer Tr. 1423:6 to 8. Similarly, Judge López Torres testified that she actually witnessed an Assemblywoman at the judicial convention telling her Assembly District's delegates how they should vote. López Torres Tr. 620:13 – 621:25. Moreover, Plaintiffs proffered extensive evidence concerning the ways in which district leaders and County Leaders exercise control over the selection and votes of many delegates. *See, e.g.*, Pl. F. ¶¶ 73, 88-89, 97, 106-89; Carroll Decl. ¶¶ 8-9; Berger Decl. ¶¶ 11-12; Ostrer Decl. ¶¶ 8-9; Regan Decl. ¶¶ 13-15.

10. In any event, Defendants' reliance on testimony as to whether delegates were actually told how to vote places form over substance and obfuscates what their own witnesses acknowledge to be the true dynamic between party leaders and delegates. First, as Mr. Schiff articulated, delegates and district leaders have every reason not to choose a Supreme Court candidate whom they understand their district leader or County Leader opposes. Pl. F. ¶¶ 106-07. As a result, they need not be actually told by that

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[3] Counsel for Defendant New York County Democratic Committee indicated at the hearing that Defendants might choose to call Mr. Farrell as a live witness at the hearing. They did not.

leader how to vote. In addition, Defendants cite the fact that neither Mr. Carroll nor Mr. Berger, both well-known figures in the Democratic reform movement in Brooklyn and Manhattan, were told how to vote by their counties' party leaders. Def. F. ¶¶ 61, 64. Yet, both witnesses testified to the subtle but significant ways by which delegates are, in fact, selected and effectively controlled by district and county leaders. Pl. F. ¶¶ 111, 126. That they themselves were not told how to vote is neither surprising, given their reform roles in Democratic Party politics in their respective boroughs, nor significant.

11. Defendants also cite the testimony of Emily Giske, an alternate delegate whom they allege "exercised her independence as a delegate by nominating Troy Webber" at a judicial convention. Def. F. ¶ 71. In reality, there is no evidence and Defendants do not even suggest that Ms. Webber was not a part of Mr. Farrell's "package" of candidates and, indeed, she prevailed. Pl. Ex. 39A; Giske Tr. 2008:9 – 2009:11. Moreover, Ms. Giske testified erroneously on direct examination that it was Judge York who was nominated and defeated by Ms. Webber rather than Mr. Bradlow, and did not realize the error until she was made aware of it on cross examination. Giske Tr. 2008:9-17. The other candidate whom Ms. Giske voted for, and who was nominated without opposition at the same convention, Rosalyn Richter, was also supported by Mr. Farrell who referred to her in his speech at her "swearing in ceremony" as a "4-fer" because she is disabled, a lesbian, Jewish, and female. Giske Tr. 2007:5-21.[4]

[4] Defendants also cite Dr. Cain's response to a question on cross-examination whether "as far as you understand the law, there is no prescribed requirement that a delegate be pledged [to] any particular candidate, correct?" Def. F. ¶ 78. Dr. Cain responded: "No. [The] delegate is free to do as he or she sees fit." Cain Tr. 310:16-19. While Defendants misleadingly cite this response to suggest that Dr. Cain believed that delegates were not controlled or influenced by party leaders, the context makes clear that he was simply agreeing that the law does not require that a delegate be pledged to a particular Supreme Court candidate, unlike presidential delegates.

12. In addition, even if delegates were fully independent from party leaders in their choice of Supreme Court candidates at the convention, as Messrs. Kellner and Hechter both acknowledge the judicial convention system is expressly designed to place the control of Supreme Court nominations in the hands of party leaders rather than voters. *See* Pl. F. ¶¶ 72, 240-41. At no time do any voters have any direct involvement or choice in the nomination of their party's Supreme Court candidates.

b) Electing Delegates in ADs Across a Judicial District vs. Within a Single AD

13. Nor does the ability of voters in an isolated Assembly District ("AD") to challenge the slate of delegates and alternates put forth by the local party leaders or, in New York City by a political club, suggest that the burdens faced by a Supreme Court candidate who tries to do so in ADs *across an entire judicial district* are not severe. *See* Pl. F. ¶¶ 240-301. For this reason, the fact that any voters can petition for delegate candidates (Def. F. ¶ 45), or run write-in campaigns (*id.* at ¶ 58), or, as in Mr. Allen's case, run for and prevail as a delegate candidate in his AD (*id.* at ¶¶ 102-07), does not address the burdens faced by a Supreme Court candidate. Nor do these facts lessen the burden faced by voters who, while they might conceivably run for or even elect a delegate from their AD, have virtually no hope of actually affecting their party's choice of Supreme Court candidates because their AD is one of many within a large judicial district. Pl. F. ¶ 253. The system is, therefore, designed to dilute the impact and value of any individual delegate or slate of delegates running within a single AD.

14. In addition, notwithstanding Defendants' efforts to suggest that voters could "pull the fire alarm" and hold judicial delegates accountable as with any other

elective office, voters cannot do so here because the delegate has been chosen for the sole purpose of attending a single year's judicial convention. Def. F. ¶ 59. As Dr. Cain explained: "They might catch [the delegate] in the next round perhaps, but not [in] this particular election. Once the delegate is there the delegate is beyond electoral retribution." Cain Tr. 310:24 – 311:2.

15. Without any evidence to counter the obviously insurmountable burdens faced by a Supreme Court candidate who seeks to run slates of delegates across the judicial district, Defendants instead simply turn the evidentiary record on its head. For example, Defendants state: "Notably, one of Plaintiffs' experts, Henry Berger, testified that individuals and slates of individuals have ample opportunity to run for delegate in a primary." Def. F. ¶ 42. The testimony they cite to support this statement is as follows:

> Q: I want to deal with this concept of transparency and accountability. Could you explain how the system that exists today for nominations for assembly in a district where there has been no primary for 22 years is any more transparent or accountable than the system by which judicial delegates are selected?
>
> A: Because in that district whether it is for assembly, state senate, district leader, state committee, anything, if somebody wants to run, the system permits them to get their [name] on the ballot by simply filing a designated petition. The opportunity to participate, the opportunity to force a primary is readily available. Anybody can do it, and people see it happening not only in their own district but in other districts. They know that if somebody wants to challenge a candidate for whatever reason, there's a readily available way to do it. There is no way of doing that for Supreme Court so –
>
> Q: But there is for judicial delegate, is there not?
>
> A: For individual judicial delegate there is.
>
> Q: And for the slate of delegates?
>
> A: For slate of delegates.

> Q: And for county-wide slate of delegates is there also not a way to do that?
>
> A: Under the law it can be done subject to all the burdens that we discussed.

Berger Tr. 264:15 – 265:14. The burdens faced by Supreme Court candidates – *i.e.*, those burdens relevant to this case – are not mitigated by the ability of an individual delegate, or even a slate of delegates, to run in a single AD.

16. The paucity of contested delegate elections is strong evidence that these structural disincentives for insurgent delegates to run, and most importantly for insurgent Supreme Court candidates to run delegates, succeed in keeping such candidates from doing so. The voters are thus precluded from playing even an indirect role in the selection of their parties' Supreme Court justice nominees.

17. Defendants proffered no evidence of a Supreme Court candidate ever having run their own delegates in any AD, much less across a judicial district, successfully or otherwise.

c) Petitioning and Electing Delegate Slates

18. The burdens on a Supreme Court candidate who seeks to run sufficient numbers of delegate and alternate candidates to have a reasonable hope of obtaining a majority of votes at the judicial convention are severe. Pl. F. ¶¶ 16-26, 41-51, 64-189, 240-301.

19. Defendants attack Mr. Lipton's detailed analysis of the costs that would be associated with such a challenge, but the weight of the evidence presented at the hearing suggests that his analysis may actually understate the costs. Indeed, Defendants themselves argue that a countywide primary election campaign for Supreme Court – an

effort that would not be nearly as costly as recruiting, petitioning, and electing scores of delegates in each of many ADs – would cost as much as $1 million and, in their own view, would "closely mirror" Mr. Lipton's estimate. Def. F. ¶¶262, 273; *see also* Kellner Tr. 1715:14-19; Connor Tr. 2178:22 - 2179:6; 2182:19 - 2183:3.

20. Contrary to Defendants' assertions (Def. F. ¶ 214), Mr. Lipton has had extensive experience with every aspect of campaigns in New York State in Democratic and Working Families Party campaigns, including Democratic primary petitioning drives.[5] In both 1991 and 1993, he was heavily involved in the Democratic primary election of Guillermo Linares to the City Council and was responsible for organizing the candidate's petitioning effort and coordinating Election Day activities. Lipton Tr. 969:5

21. In 1997, Mr. Lipton served as campaign manager for Luis DeJesus, Democratic candidate for City Council, and was responsible for every aspect of that primary election campaign including petitioning. Lipton Tr. 969:24 – 970:21. As the political director and organizing director for the Working Families Party since 1998, Mr. Lipton has developed and implemented campaign plans and budgets for over 20 different political campaigns in New York City and State that include the "full host of activities that go into any political campaign;" recruited volunteers and paid campaign workers for those campaigns; hired and supervised campaign staff; supervised door-to-door canvassing; raised campaign funds; run GOTV operations; and overseen all other aspects of those campaigns. Lipton Tr. 964:21 – 967:15. All of these activities are virtually identical to those addressed in detail in his declaration and analysis. Lipton Corrected

[5] Defendants state that Mr. Lipton "has never been involved in any Democratic petitioning process for any public office or party position." Def. F. ¶ 214. Their citation for this erroneous statement does not include any evidence whatsoever to support this assertion (*see* Tr. 1013:14-25), and the statement itself is contradicted by the record. Lipton Tr. 969:5 – 970:19 (discussing Mr. Lipton's direct involvement in two Democratic candidates' petitioning efforts).

Decl. ¶¶ 6, 12-19, Ex. A, B; Lipton Tr. 970:22 – 972:13 (discussing similarities and differences between door-to-door canvassing and petitioning). He oversaw all of the petitioning operations in Upstate New York to gather signatures for the Working Families Party candidate for governor and thereby launch the Party as an officially recognized political party in New York State in 1998. Lipton Tr. 967:16 – 968:23. In addition, because the Working Families Party has "a very strong interest in assuring that its nominee is also on a major party line in the general election," Mr. Lipton communicates daily with Democratic Party consultants and campaign managers about the elements and costs of the petitioning, field, GOTV, fundraising, and all other aspects of their candidates' Democratic primary election campaigns in New York State. Lipton Tr. 972:14 – 973:14. Mr. Lipton also oversaw the Working Families Party campaigns for those candidates, including Margarita López Torres, whom the party nominated in 2003 for Supreme Court. Lipton Corrected Decl. ¶ 5. In short, Mr. Lipton has extensive expertise in those areas covered in his analysis and testimony, namely the elements and costs of campaigns in New York State.

22. Defendants rely upon the testimony of district leader Arthur Schiff to suggest that gathering signatures is easy and that he alone could gather enough signatures to put delegates on the ballot. Def. F. ¶¶ 46-47. Mr. Schiff's testimony not only runs contrary to that of Messrs. Lipton, Berger, Carroll, Regan, and Keefe (*see* Pl. F. ¶¶ 258-78; Carroll Tr. 497:11-25), but also to that of Defendants' witnesses. For example, Mr. Allen testified that one has to plan 50 to 60 days in advance of petitioning to establish a petitioning operation; that he reached out to approximately "200 tenant and block association groups and leaders" to recruit petitioners; required 10 people just to gather

signatures in a single AD in an area with "open buildings" without the kind of doormen and "high security" that prevents door-to-door petitioning in other parts of the First Judicial District; and despite the fact that he obtained through door-to-door petitioning three times the number of signatures required, his petitions were still challenged every year except for this past year (for district leader). Allen Tr. 2027:14 – 2030:23; 2038:19 – 2043:24; Berger Tr. 195:1-13 (explaining burdens on petitioners in Manhattan where buildings are inaccessible). Mr. Schiff himself testified that his AD has only one Democratic political club and, as a result, his club's petitions are never challenged. As a result, the quality of the many signatures he asserts can be gathered so easily and quickly has literally never been tested. Schiff Tr. 1277:15 – 1278:3.

23. Moreover, the weight of the evidence from both Plaintiffs' and Defendants' witnesses demonstrates that candidates must gather at least twice, and usually more than three times, the number of signatures required to resist legal challenges. This would be particularly true given that there would be a virtually inevitable challenge from the county party organization to the petitions of a challenger Supreme Court candidate attempting to elect delegates across a judicial district. Pl. F. ¶¶ 267-74; Lipton Tr. 1140:19 – 1142:7; Berger Tr. 85:13 – 86:6.[6]

24. This year, there was a coordinated effort to run and elect slates of insurgent delegates across the Second Judicial District. As a result of such petition

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[6] Defendants cite Mr. Berger's testimony at Tr. 164:21 – 165:24 allegedly in support of the proposition that only "a candidate today need only obtain roughly 1 ½ times the required number of signatures." See Def. F. ¶ 53 n. 56. The cited transcript does not even relate to the subject matter, much less support that proposition. In fact, Mr. Berger testified clearly that he advises candidates to gather at least 2-3 times the required minimum. *See* Pl. F. ¶¶ 268-69. Similarly, even Mr. Connor, Defendants' witness, indicated on direct examination that a candidate should gather at least twice the number of required signatures, not 1½ times. Connor Tr. 2132:7-13.

challenges, out of 60 delegate candidates, the organizers were only able to get 16 on the ballot, and only five of those were elected. PL. F. ¶ 293; Lipton Tr. 1143:3-20.

25. Defendants do not dispute in any respect the cumulative signature requirements that would be involved in running slates of delegates and alternates in each AD within a judicial district. *See* Pl. Ex. 96; Pl. F. ¶ 258. Nor do they dispute any of the comparisons between those requirements and those for other offices, judicial and non-judicial, within New York State and in other states – comparisons that starkly demonstrate the unique severity of New York's cumulative petitioning requirements. *See* Pl. F. ¶¶ 260-65, 275-76.

26. Rather, Defendants assert that an insurgent Supreme Court candidate would not need to run slates in all or even substantially all of the ADs within a judicial district. Def. F. ¶¶ 207-09. As Mr. Kellner acknowledged as "self-evident," however, such a candidate would be taking a "huge risk" by running delegates only in enough ADs to get a bare majority of votes at the convention. Pl. F. ¶¶ 254-55; *see also* Ostrer Tr. 1431:20 – 1432:3; Berger Tr. 85:13 – 86:6.

27. In response to a question from the Court, Mr. Lipton explained why, in his view, an insurgent candidate would be mistaken in choosing not to run slates in all of the ADs within a judicial district:

> I think there's a three-step burden that is severe and, therefore, that a -- in its inception the plan should not seed (sic) any ground. The first step is petition onto the ballot, you know, in all 24 assembly districts. If -- even in the event you're able to do that in all 24, it is unlikely you would win all the primaries. Then, even if you were able to win a majority of the primaries, it is -- I'm sorry, majority of the delegates who ran for all those primaries, then you would have to maintain all those votes. It is hard for me to believe that a challenger supreme candidate when they are recruiting would have the capacity to do all background checks necessary to ensure

> each person to be delegate or alternate would be unequivocally their supporters at convention.
>
> There is yet another burden after primary before convention when the party organization could perhaps speak to the elected delegates and obtain their support of those delegates for the leadership's candidate.
>
> So, I think because of those three steps, the three-step burden, that you should really start off running independent slates in all 24 districts.
>
> In addition, I would add that some districts have eight, you know -- some districts have a large number of delegates. If you focus your resources only on those districts, it is very clear to me that the county leadership would also focus its resources in those districts and you would be gambling if you put all your marbles in that basket of trying to win all your delegates in those big assembly districts, because the information you have that there's more delegates in those assembly districts, that's the same information the county leadership has.
>
> So, for all those reasons I would argue starting off with trying to petition and win contested primaries in as many assembly districts as possible.

Lipton Tr. 1140:24 – 1142:7.

28. Defendants have suggested, based on the 2002 judicial convention, which only 96 of the 137 delegates actually attended and voted at, that an insurgent candidate in the Second Judicial District would only need to run sufficient numbers of delegates to obtain 46 votes. What Defendants ignore, however, is that if County Leader Norman had had any real fear that Judge López Torres could garner a majority of convention delegates, rather than simply the usual minority of reform-minded delegates from specific ADs, the county party organization would have ensured that many more of the 137 delegates and 137 alternates actually showed up at the convention. Lipton Tr. 1140:24 – 1142:7; *see also* Cain Decl. ¶ 10 (on absenteeism at judicial conventions). In 1997, for example, when County Leader Norman faced a potential fight over control of the convention nominations, 165 delegates attended and voted (or abstained) in the contested vote for the Convention Chair won by Mr. Norman's choice, Senator Connor. *See* Pl. Ex. 34C. In fact, however, Judge López Torres herself and everyone else knew in advance of

the convention that the vote would constitute merely a protest vote, rather than a truly competitive nomination, because the Party's executive committee and its chairman, Mr. Norman, had already voted prior to the convention to determine who would be nominated, including the "unqualified" candidate whose poor qualities lead the convention chairman Connor to quit in protest. *See* Pl. F. ¶¶ 300-01. As a result, not only did not all of the delegates show up for the convention, but there were not even enough alternates in attendance to avoid having 41 votes less than the full count. For this reason, if Judge López Torres or a similar insurgent candidate had run their own slates of delegates and alternates, she would have been taking an unwise risk if she had not viewed the necessary majority as being 69 (out of 137) rather than 46. *See* Pl. F. ¶ 254.

29. In addition, the fact that alternates only vote when a delegate from their AD is absent does not obviate the need to recruit and run alternates as well as delegates. Def. F. ¶¶ 211-12. It is undisputed that alternates are very frequently required to replace absent delegates to vote. As for example, Defendants' witness Emily Giske did 2-3 times out of the roughly 7 times she has served as an alternate. Pl. F. ¶¶ 19-20. Indeed, because of the party leaders' control over the timing and location of the convention and the extremely short notice provided to delegates which Defendants fully acknowledge,[7] the county organization would be able to pick up a significant number of loyal votes at the convention by replacing absent insurgent delegates who could not attend with their own alternates. *See* Pl. F. ¶¶ 18-21, 49.

30. Notwithstanding Judge Keefe's experience in producing his own petitions when he was involved in petitioning (*see* Def. F. ¶ 49), the cost of printing petitions – only $7,200 in Mr. Lipton's analysis – is a standard cost even in insurgent campaigns.

[7] Pl. F. ¶ 49 (discussing Senator Connor's testimony).

Indeed, Senator Connor included this cost in his discussion of what an insurgent should do to seek the nomination. Connor Tr. 2153:3-8. Mr. Carroll, who has represented and advised reform candidates in Brooklyn for many years, testified that even in a single AD, the costs of printing petitions often exceeds several thousand dollars. Carroll Tr. 484:11-17.

31. Defendants suggest that Mr. Lipton unreasonably failed to assume the use of volunteers for the insurgent Supreme Court candidate's petitioning operation. Def. F. ¶¶ 216-17. In fact, Mr. Lipton's assumptions were conservative and included literally hundreds of volunteers. While Mr. Allen testified that he used 10 petitioners to gather signatures in a single AD, Mr. Lipton conservatively assumed the use of only 72 petitioners (60 petitioners and 12 field managers who also gather signatures) to cover *all of the 24 ADs* within the Second Judicial District. Lipton Corrected Decl., Ex. A. While Mr. Lipton reasonably concluded that it would be a mistake to assume that an insurgent candidate could rely upon volunteer petitioners, he did assume that such a candidate would be able to find 192 volunteers to distribute palm cards, 24 volunteer attorneys with their own transportation to monitor key polling places on Election Day, and sufficient numbers of volunteers to make *over 17,000 phone calls* on behalf of the candidate to likely voters. Lipton Decl. Ex. A, B; Lipton Tr. 1082:5-8. In short, it is clear that Mr. Lipton's assumptions with respect to the extent of volunteer participation were quite reasonable and, if anything, perhaps overstated the extent of such assistance that would be available.

32. It is also important to note that, even if Defendants were correct that Mr. Lipton's estimates of the costs of petitioning were inflated in some manner, those costs

($199,544) constitute less than 14% of the total estimated cost of the insurgent's campaign envisioned by Mr. Lipton ($1,453,434). *See* Lipton Decl. Ex. A.

33. Similarly, Mr. Lipton's assumptions concerning the legal costs that would be involved were amply supported by the testimony of Messrs. Berger and Carroll. *See* Pl. F. ¶¶ 279-85.

34. Defendants' suggest that it would be a "routine" burden for an insurgent candidate to educate voters in each of the many ADs in which he or she is running slates of delegates and alternates to overcome the absence of any ballot cues indicating which Supreme Court candidates a delegate candidate is pledged to support at the convention. *See* Def. F. ¶ 210. Defendants argue that "candidates and political clubs routinely educate voters as to which slates of delegates to elect." *Id.* To the contrary, the evidence is clear that only a small minority of delegates – 12.7% in New York City (Pl. Ex. 88) and even fewer in most of the rest of the State – ever even appear on a ballot much less are the subject of "routine" voter education efforts. Pl. F. ¶¶ 27-40. Even in those few instances where delegate elections are contested, moreover, the fact that political clubs in a given AD may circulate literature only demonstrates the significant burden that would be involved for an insurgent candidate to do so for each separate slate of delegates and alternates in each of many ADs across an entire judicial district. *See* Pl. F. ¶¶ 286-93.

35. Notwithstanding Defendants' assertion that Judge Regan successfully obtained "sufficient signatures to control the convention" (Def. F. ¶ 204), in fact he was entirely unsuccessful in doing so. Regan Decl. ¶¶ 12-25. His last-ditch strategy for trying to recruit delegates and gather sufficient signatures, like that of Judge Keefe in the

Third Judicial District, foundered in the face of the various systemic barriers to such a challenge. *Id.*; Regan Tr. 389:17 – 390:23; Keefe Tr. 931:17 – 932:2.

d) The Resulting Rarity of Delegate Contests

36. The paucity of contested delegate elections reflects the severe and systemic burdens on Supreme Court candidates who would try to run delegate slates in numerous ADs. Far from being selected by the voters, the vast majority of delegates and alternates across the State never appear on any ballot at all. Pl. F. ¶¶ 27-40. This is true even in Manhattan, where only 40.9% of the Democratic delegates and not a single one of the 241 Republican delegates selected from 1999 through 2003 appeared on the ballot. *Id.* ¶ 32. As a result, most voters are not even indirectly involved in the selection of Supreme Court justices.[8]

37. In fact, the precious few examples of a campaign to run delegate slates across an entire judicial district have resulted from a reform movement to change the county party leadership, rather than from an individual Supreme Court candidate's efforts, or even the efforts of a group of such candidates. *See* Pl. F. ¶¶ 240-46. Moreover, the only two successful instances of such reform campaigns (First Judicial District and Eighth Judicial District) in the last 30 years were multi-year efforts – in Manhattan, over 25 years. Berger Tr. 61:23 – 62:1; 63:13-24; 68:14 – 69:14; 93:7 – 95:2; Pl. F. ¶¶ 244-46. There is no evidence that any individual candidate could come close to reproducing such an effort.

[8] Nor does the fact that delegate candidates are "deemed elected" by New York's election laws alter or mitigate the judicial convention system's real impact on voters. Def. F. ¶¶ 55-56.

38. Indeed, there is no evidence in the record of even a single Supreme Court candidate at any time successfully running and electing their own delegate slates to compete for their party's nomination.

39. Indeed, even robust reform movements themselves, like that discussed by Senator Connor in Brooklyn in the 1970s, have failed to elect nearly a majority of delegates to the convention. Connor Tr. 2243:19 – 2244:20. That movement ended in the 1970s. *Id.* This year, a coordinated effort by a group of party regulars seeking to compete with Mr. Norman for control over the party ran delegate slates in 17 of the 24 ADs in the Second Judicial District, failed to get more than 16 of the group's 60 delegate candidates on the ballot, and elected only 5 of those 16 as delegates. Pl. F. ¶ 293.

2. Political Clubs

40. By seeking to demonstrate that political clubs are "highly democratic" entities, Defendants misconstrue the relevance of political clubs to this matter. *See* Def. F. ¶¶ 79-93. Their only relevance to this case is whether, as urged by Defendants, such clubs provide voters with what the vast majority of delegate elections do not, namely a meaningful role in the selection of their party's nominees for Supreme Court. Political clubs are, in essence, Defendants' attempt to answer the impact of the paucity of delegate elections upon voters. The evidence shows that political clubs do not provide anything close to what an actual election provides to voters, and do nothing to address the impact of the structural barriers to running delegate contests in more than one or two ADs, *i.e.*, the "drop in the bucket" effect.

41. To begin, Defendants acknowledge that political clubs are only a significant factor in New York City (and their only evidence concerned Democratic Party

clubs). Def. F. ¶¶ 116-17. They do not dispute that clubs charge annual dues. *Id*. at ¶ 84. In addition, their expert, Dr. Hechter, opined that even dues as low as $10 would deter people from joining (and thus voting), particularly the poor. *See* Pl. F. ¶ 116. Most important is that such clubs include only a miniscule percentage of the registered party voters within an AD, and only those members can vote in club elections for judicial delegate candidates. Pl. F. ¶ 115. Regardless of how democratically such clubs operate, therefore, a contested delegate election within a political club simply does not alleviate or eliminate the lack of voter choice or involvement in the election of delegates or, most importantly, in the nomination of Supreme Court justices.

D. The Convention

1. Burdens on Supreme Court Candidates and Voters in the Judicial Convention

a) The Role of Party Leaders

42. Defendants' expert, Dr. Hechter, analyzed the judicial convention system in depth and not only reviewed the deposition transcripts of county party leaders in the *France v. Pataki* case, but also conducted telephone interviews with Mr. Kellner and many other persons involved in the leadership of the Democratic Party's judicial conventions in New York City. Pl. Ex. 69. Based on that analysis, he concluded precisely what Dr. Cain did, as follows:

> 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 ¶ 9; *see also* Cain Decl. ¶¶ 12-15, 18-24; Cain Tr. 287:2-20; 292:1-14; 329:9-18.

43. Although Defendants assert that Dr. Cain's "conclusions are completely unreliable, particularly Professor Cain's opinion that the convention process is undemocratic because the conventions themselves are short formulaic affairs," therefore, Defendants' expert reached precisely the same conclusion as Dr. Cain based in part upon the brevity and unanimity of judicial conventions. Def. F. ¶ 153.

44. Far from relying solely upon the fact that conventions are brief and scripted, moreover, Dr. Cain analyzed the extent of contested delegate elections and, most importantly, searched for any examples of Supreme Court candidates successfully challenging the party-backed candidates at the convention. As Defendants have effectively conceded, the only example of such a candidate prevailing since 1990 occurred in 2000 at the Democratic Party's judicial convention in the Eighth Judicial District at which a factional split within the party resulted in a candidate who was not supported by the County Leader being nominated. Cain Decl. ¶ 15; Pl. F. ¶¶ 194, 246. As Dr. Cain reasonably concluded, the absence of any similar challenges in the hundreds of nominations that occurred since 1990 strongly supports the conclusion that the "barriers to entry," as Dr. Hechter refers to them, for insurgent Supreme Court candidates are insurmountable. Cain Decl. ¶¶ 18-23.

45. Contrary to Defendants' suggestion that contested nominations or "floor fights" are frequent (*see* Def. F. ¶ 154), the minutes indisputably show that from 1994 through 2002 94% of the 1107 nominations made by both parties were not contested at their respective conventions. Pl. Ex. 86.

b) No Voter Involvement

46. In the words of Dr. Cain, "[t]he whole process lacks that democratic moment [in] 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. Dr. Kellner put it differently: "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.

47. Dr. Cain also draws an important distinction – entirely ignored by Defendants – between the presidential conventions and New York's judicial conventions. *Compare* Cain Tr. 322:13-21 *with* Def. F. ¶ 28. Although both types of party nominating conventions are highly scripted and essentially devoid of suspense, presidential conventions – and the choice of nominee itself – constitute the result of direct primary elections and caucuses in which voters directly select the presidential candidate (or the delegates expressly committed on the ballot to that candidate) whom they wish to nominate. Cain Tr. 322:13-21. By contrast, New York's judicial conventions simply ratify choices made not by voters, but by a small group of local party leaders. *Id.*

48. As Judge Keefe summarized the role of the convention in the Third Judicial District – a far cry from the presidential conventions at which the voters' choice of candidates from their party is nominated by pledged delegates:

> All of the judicial delegates from the entire seven counties arrive in Albany for effectively a cocktail party, during which there is a brief convention where the candidates chosen by the party leaders whether by cross-endorsement or not are selected.

Keefe Tr. 934:17-21.

49. Most importantly, the evidence demonstrates clearly that county party leaders can virtually always block a Supreme Court candidate from obtaining their party's nomination for any reason. To be sure, Mr. Kellner opined that County Leader Farrell could not block a candidate who has garnered a majority of delegates. *See* Def. F. ¶ 170. But Mr. Farrell himself testified under oath that he "[has] 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*." Pl. Ex. 99(B) at 193:9-15 (emphasis added); *see also* Pl. F. ¶¶ 64-206. The Plaintiffs respectfully suggest that it is the County Leader himself, rather than Mr. Kellner, who best knows the scope of his own control over the nomination process. Thus, even in Manhattan which Mr. Kellner acknowledges features greater involvement at the club level in delegate selection and greater competition for Supreme Court nominations than other districts, the present selection system features significant barriers to entry by placing so much control in the hands of the county party leadership. Pl. F. ¶¶ 92-117.

50. Similarly, while Senator Connor opined that County Leader Norman could not block the nomination of a judicial candidate who has majority support among the delegates, he testified as well that Plaintiff Margarita López Torres was denied the nomination because she had incurred the political enmity of a "powerful district leader" in Vito López ("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.

51. As detailed in Plaintiffs' Proposed Findings of Fact, the evidence demonstrates that County Leaders across the State have exercised sufficiently complete control over Supreme Court nominations such that in only two instances since 1975 anywhere in the State have insurgent candidates been nominated over the objection of such leaders and, in those cases, a larger fight for party control was involved. Pl. F. ¶¶ 64-194, 240-46. To be sure, County Leaders may consult with district leaders in determining who should be nominated. *See* Def. F. ¶¶ 174, 182. But that fact does not alter the essential concentration of control over nominations in the hands of a few party leaders rather than the voters.

52. Nor do any of the examples cited by Defendants suggest otherwise:

(1) Margarita López Torres (Def. F. ¶¶ 188-94, 197-99)

53. Senator Connor testified that Judge López Torres was "well qualified," that he supported her for Supreme Court, that he refused to chair the 2002 convention in Brooklyn because he had been informed by Jeffrey Feldman, the Secretary of the Democratic Party, that the convention would nominate a candidate whom he believed to be a "horrendous" and "unqualified" choice while refusing to nominate Judge López Torres, because she had refused to hire the attorney whom Mr. Norman and Mr. Lopez told her to hire. *See* Pl. F. ¶¶ 150, 300-01.

54. Nonetheless, in a regrettable *ad hominem* attack, Defendants have chosen to suggest that the reason why Judge López Torres was not nominated was that she was allegedly unqualified and "did nothing to build delegate support." Def. F. ¶¶ 188-94, 197-99. The overwhelming evidence is to the contrary on both counts.

55. With respect to her qualifications, Judge López Torres has repeatedly received the highest ratings and endorsements for her judicial conduct and casework from every bar association in New York City that reviewed her record. López Torres Tr. 708:12 – 709:2. All of the major newspapers that endorsed candidates have endorsed her candidacy. *Id.* 709:3-5; López Torres Decl. ¶¶ 37, 50; Pl. Ex. 6. She was found qualified by the Democratic Party's Second Judicial District screening panel on several different occasions, including in 2004 by the newly-reformed panel. López Torres Tr. 709:6-8. In addition to Senator Connor, literally scores of elected officials within and outside Brooklyn endorsed her in her bid for re-election to Civil Court in 2002. *Id.* at Tr. 665:12-20;b 692:7-9; 709:20-25; Def. Ex. N. Even Mr. Norman, who had every reason to manufacture a pretextual reason such as this to justify his refusal to support her nomination, made clear on several occasions that he believed that she was well qualified. Pl. F. ¶ 149. Similarly, none of the 35 district leaders whom she met with to discuss her nomination for Supreme Court ever suggested in any way that she was not qualified to serve on the Supreme Court and, in fact, indicated that she was well qualified.[9] López Torres Tr. 709:9-14; López Torres Decl. ¶ 52; Pl. F ¶¶ 164-65. Unlike numerous Supreme Court candidates who have been nominated after being party leaders of one

[9] At the hearing, counsel for Defendant New York County Democratic Committee attempted to impugn Judge López Torres' judicial temperament by raising an incident that occurred in her courtroom in 1997. As Judge López Torres explained and the transcript of that incident confirmed, however, the attorney involved in that incident was not only disrespectful to the court and chose to walk out of the courtroom while Judge López Torres was addressing her, but also was mistreating her client in the presence of the court in a disturbing manner. López Torres Tr. 711:5 – 714:21. In response, Judge López Torres held her in contempt and then, shortly thereafter on the same day, expunged that order after explaining in measured detail why she believed that the attorney had acted improperly and giving her an opportunity to address the court and state her own view. Far from indicating a "poor temperament on the bench," the incident shows Judge López Torres' concern both for the parties that come before her and for the maintenance of civility in the courtroom. In the end, Mr. Greig brought an action in New York State Supreme Court on behalf of the attorney in question against Judge López Torres, which was dismissed in part because Judge López Torres had expunged the contempt order virtually immediately. *Id.*

kind or another (*see, e.g.*, Connor Tr. 2219:6-18 (Gerald Garson); 2261:8-13 (George Friedman)), moreover, Judge López Torres not only has extensive experience as a Civil Court judge but also had a distinguished career as a legal services attorney (including managing attorney positions) and as Deputy General Counsel of Children and Family Services for New York City's Human Resources Administration. López Torres Decl. ¶ 3.

56. Defendants attempt to cast Judge López Torres' decisions to serve in different courts to obtain a broader base of judicial experience as a sign of weakness. Def. F. ¶ 189. In fact, however, that professional enthusiasm and breadth of experience – a result of her own efforts to serve in various different courts (*see* López Torres Tr. 710:15 – 711:4) – has rendered her particularly well qualified to serve on the Supreme Court.

57. Although Defendants also attempt to suggest that the Administrative Judge's failure to appoint her as an Acting Supreme Court justice reflects poorly on her qualifications (Def. F. ¶ 189), there is absolutely no evidence that her status has anything to do with her qualifications or experience. Indeed, there is as much or more evidence to suggest that that it is the result of what Mr. Kellner suggests may be quite common, namely that Administrative Judges who decide such matters are "not fully independent of the county leaders who certainly give their input." Kellner Tr. 1745:11-13.

58. Contrary to Defendants' assertions regarding Judge López Torres' efforts to obtain support for her nomination, Judge López Torres has worked over a period of approximately eight years to court not only delegates but, most importantly, the decision-makers who truly control the nomination process: County Leader Norman, Assemblyman and District Leader Vito Lopez (López Torres' original supporter for Civil

Court and the most powerful "Latino" district leader), and the district leaders. She met with at least 35 of the 42 Democratic district leaders in Brooklyn about her candidacy on multiple occasions. To a person, those district leaders all indicated that she would need the support of Norman and Lopez in order to obtain their support. Neither Norman nor Lopez nor any of the district leaders with whom she met *ever* suggested that it was the delegates, rather than them, whom she must persuade. Rather,

> 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.
>
> * * *
>
> I believe that because that my understanding is the way that it works, at least in Brooklyn, that it 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.
>
> It is not a matter of contacting the delegates. No one ever suggested that that was the way that you became elected. It was always has, always roads pointed to me being – having to get the support of the County leader, the County chairman, and the support of Assemblyman [Vito] Lopez. It didn't seem to matter what your qualifications were. Everyone I met with seemed to be impressed with my actual experience and qualification[s]. They didn't even want to hear – a lot of them didn't even want to hear about my qualifications. Their question to me was, i[s] the County leader supporting you, are you being supported by Assemblyman Lopez?

López Torres Tr. 707:22 – 708:5; 715:18 – 716:11.

59. This is not surprising given that the nominations are essentially decided not at the convention itself, but rather days beforehand at the executive committee meeting of Mr. Norman and the district leaders *which the delegates do not even attend.*

Connor Tr. 2202:3 – 2208:25. As Assemblyman James Brennan, a delegate, explained to her:

> He essentially told me that the delegates really aren't the people who determine who gets selected. That it is, everything is pretty much selected beforehand by the district leaders, by Clarence Norman. That in my case Assemblyman Lopez would play [a] role in who would be selected.

López Torres Tr. 702:7-11.

60. Judge López Torres also went to years of political dinners – the "rubber chicken circuit" – to build support for her nomination. López Torres Tr. 707:14-15. As shown by her campaign literature for Civil Court in 2002, Judge López Torres worked hard to garner the endorsements of many elected officials and, as a result, obtained more votes on Election Day from Brooklyn Democratic voters for countywide Civil Court than *any* of the Democratic candidates for Supreme Court. López Torres Tr. 697:11 – 698:10; Def. Ex. K, N; López Torres Decl. ¶ 37. Far from not working hard enough for support, Judge López Torres has worked harder and for a longer period of time (eight years) to obtain support for her nomination for Supreme Court than *any* of the sitting Supreme Court justices whom Defendants proffered as witnesses. Unlike those justices, however, Judge López Torres has been stymied at every turn by the County Leader and Mr. Lopez for failing to accede to their requests for patronage. Pl. F. ¶¶ 127-66.

61. Defendants' analysis of Judge López Torres' Civil Court petitions demonstrates just how insurmountable the burdens faced by an insurgent Supreme Court candidate who sought to run their own slates of delegates and alternates would be – if it ever were attempted. Judge López Torres hired someone to establish and oversee her petitioning operation in 2002 (as contemplated by Mr. Lipton), and the campaign was able to gather approximately 30,000 signatures across the county in part by asking her

supporters among elected officials to allow her name to be included on their petitions. Def. Ex. R, S. As Judge López Torres testified, however, obtaining such assistance for Civil Court was entirely different than it would be for Supreme Court:

> Q: Did you personally contact the other candidates with whom you appeared on joint petitions to ask if they were supporting your candidacy for the Supreme Court?
>
> A: Well, when I spoke to all of these individuals, I told them that I was running for both Civil Court and Supreme Court. They indicated that [they] thought I was qualified for both. Some of them told me that they would carry my petition with respect to the Civil Court campaign. Others [] with respect to the Supreme Court said that that was a whole different other, you know, process. And that that essentially was something that was decided by the district leader and the by County Leader.

López Torres Tr. 694:15 – 695:1. Even despite the fact that it was much easier to obtain assistance from elected officials for her Civil Court campaign than for her Supreme Court nomination because of the extent of control given to the County Leader by the judicial convention system (rather than a direct primary), Judge López Torres was still only able to gather most of her signatures within eight of the 24 ADs within the Second Judicial District. *See* Pl. F. ¶ 292; Def. Ex. R, S. Only 17 of the 47 judicial delegates on the petitions were actually elected, 15 without any opposition. *Id.* In other words, even these dismal numbers do not reflect any of the kind of concerted efforts the Democratic county organization would mount to defeat an insurgent's slates of delegates if they were actually part of a campaign for Supreme Court. *If* she had actually attempted to run her own slates of delegates and alternates, she would have been stymied by the cumulative signature requirements, by the geographic distributional requirements, by the difficulties of recruiting sufficient numbers of delegates and alternates, and by the task of educating

voters in each AD (and likely being required to counter the county organization's efforts to do so for its slates) to get them elected.

(2) Philip C. Segal (Def. F. ¶¶ 195-98)

62. In essence, Defendants attempt to lump together Judge Segal's limited efforts to seek the nomination for Supreme Court with Judge López Torres' extensive efforts to suggest that Plaintiffs' claims boil down to a few lazy candidates' "sour grapes." Def. F. ¶¶ 195-99. To the contrary, not only has Judge López Torres done virtually everything within a candidate's power (except hire the party leaders' relatives and cronies) to compete for her party's nomination, but Judge Segal's testimony was plainly not proffered to suggest that he would or should succeed in obtaining a nomination based on his efforts before he was deterred from proceeding. Rather, his testimony demonstrates precisely how the present judicial convention system deters potential candidates from pursuing such a nomination and, as Dr. Hechter concludes, "significantly narrows the pool of candidates" who would consider even trying to overcome the barriers to entry at issue in this case. Pl. Ex. 69 ¶ 9. In addition, Judge Segal's testimony demonstrates that, at least in the Second Judicial District and at least through last year, one of the few party screening panels in existence across the State focused more upon an applicant's political connections to district leaders than upon his judicial record or legal experience. Segal Tr. 808:19 – 809:9; Segal Decl. ¶¶ 2-11; Pl. F. ¶¶ 52-61.

(3) Justice Phyllis Gangel-Jacob (Def. F. ¶¶ 171-72)

63. Defendants state erroneously that Justice Gangel-Jacob obtained her Supreme Court nomination "over the opposition of the County Leader." Def. F. ¶¶ 171-72. Defendants also simply ignore the hearing record, as set for in Pl. F. ¶ 100. In truth, according to her own testimony, she withdrew in the year prior to the convention because County Leader Farrell asked her to do so and she was concerned about the risk that she would not have the votes to prevail over his opposition, and then was nominated unanimously as part of Mr. Farrell's "package" of candidates in the following year. At the hearing, Justice Gangel-Jacob suggested that she had withdrawn to maintain "harmony." After her deposition was read and shown to her, however, she 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 (where witness initially tried to offer construction of her own language that made no sense); Pl. F. ¶ 100.

(4) Justice Alice Schlesinger (Def. F. ¶ 173)

64. Similarly, Justice Alice Schlesinger did not succeed in obtaining her party's nomination until the year in which, 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; Pl. F. ¶ 101.

65. Defendants suggest that Judge Schlesinger "beat" the county leader and point to testimony in which she agreed with counsel that "with him or without him you were to be a Supreme Court justice." Schlesinger Tr. 1980:10-15. But the numbers further undercut that testimony. At the 1997 convention, Judge Schlesinger received 49 votes, which was not sufficient to gain a majority. Schlesinger Tr. 1973:14-19. She lost the vote at the convention that year. Then, in 1999, when Judge Schlesinger met with Mr. Farrell she had "27 or 28 [delegates], which is not enough to get a majority." Schlesinger Tr. 1974:13-17. Nevertheless, as noted, she left the meeting "believing that the county leader would probably support me based on again the fact that I had accumulated clearly more votes than anybody else" (*id.* at 1980:5-9), though clearly far short of a majority.

(5) Justice Abdus-Salaam (Def. F. ¶ 166)

66. 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.

(6) Justice Helen Freedman (Def. F. ¶ 168)

67. 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. 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.

(7) The 1992 Third Judicial District Democratic Convention (Def. F. ¶ 179)

68. Defendants attempt to cast as evidence that county leaders do not control the nomination process a successful effort in 1992 orchestrated by the Democratic

County Leaders of several counties in the Third Judicial District to prevent the Albany County Democratic County Leader from securing a cross-endorsement of a controversial Republican candidate for Supreme Court. Def. F. ¶ 179. As Judge Keefe testified, however, the Democratic Supreme Court candidate who was nominated at that convention instead of the Republican was not an insurgent candidate, but rather the candidates chosen by the County Leaders of the outlying counties. Keefe Tr. 936:10-20; 921:2-10.

(8) The 2000 Eighth Judicial District Democratic Convention (Def. F. ¶¶ 177-78)

69. The 2000 Democratic judicial convention in the Eighth Judicial District was one of only two examples since 1976 anywhere in New York State of a Supreme Court candidate being nominated at a judicial convention over the objection of the dominant County's Leader. Pl. F. ¶¶ 240-46. Like the other example, the 1976 convention in the First Judicial District, the 2000 convention in Buffalo manifested a factional struggle for control of the Democratic Party leadership in Erie County and was in no way the result of any Supreme Court candidate's individual campaign efforts. Indeed, in his declaration submitted in August, Dennis Ward testified unequivocally 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; *see also* Pl. F. ¶¶ 178, 246. Notwithstanding Defendants' efforts to backtrack from this evidence (Def. F. ¶¶ 177-78) and suggest that this convention reflected significant independence among delegates, alternate-turned-

delegate Patricia K. Fogarty who voted at that convention explained just how complete the Erie County Leader's control had been: "This is the first time, and I've been coming to these things for many years, when the delegates' votes counted for something." Pl. Ex. 70. It is clear that an individual insurgent Supreme Court candidate, or even a slate of such candidates, simply cannot overcome the control exercised by county party leaders over the nomination process without being lucky enough to become part of a much larger struggle for party control.

(9) Justice Joseph Sise (Def. F. ¶ 180)

70. Defendants state that Justice Sise would have continued to campaign for the Republican Party's nomination even if he had not received the endorsement of the Republican County Committee of his home county of Montgomery. Def. F. ¶ 180. In fact, Justice Sise testified at the hearing to precisely the opposite: that he would "absolutely not" have continued to seek the nomination if he did not get past the "first step," *i.e.*, his County Committee's endorsement. Sise Tr. 1491:18 – 1492:2.[10] Notably, moreover, when asked on direct examination whether he knew "if prior to the judicial convention [he] had advised any of the judicial delegates to the convention of [his] candidacy," Justice Sise did not suggest that he had made any affirmative effort to mail to or otherwise contact all of the delegates. Rather, he testified on direct examination that:

> I know that throughout my campaign when I appeared at different events, met in different circles, I became aware of delegates and introduced

[10] In fact, at his deposition, Justice Sise testified that he and the other candidate (a Surrogate Court judge) who sought the County Committee endorsement had essentially agreed beforehand that they would abide by that Committee's endorsement and that the non-endorsed candidate would not pursue the nomination thereafter. Sise Dep. Tr. 32:23 – 34:6. Although this portion of Justice Sise's deposition transcript is not in evidence, if Defendants actually persist in suggesting that Justice Sise testified that he would have continued to pursue the nomination without his County Committee's endorsement, Plaintiffs will respectfully seek to introduce that portion of his deposition to clarify the record.

> myself, presented my qualifications to the delegates, asked for their consideration.

Sise Tr. 1503:21 – 1504:4. In short, as detailed in Plaintiffs' Proposed Findings of Fact (¶¶ 170-71), Justice Sise's nomination in 1998 principally demonstrated the control exercised by county party leaders (including his own brother, the County Leader of Schenectady County), rather than by voters or even delegates, over that choice.

(10) Justice Robert Lunn

71. Defendants suggest that Judge Lunn's testimony supports the notion that local county leaders have no control over the nomination process. Here are the facts. One of the first things that Judge Lunn did in seeking the nomination for Supreme Court justice was contact county chairmen, including Conservative party leader Thomas Cook. Lunn Dep. 82:16-23. Judge Lunn did this even in advance of becoming a candidate. *Id.* at 83:14 - 84:8.

72. Judge Lunn started spending money on his candidacy in February 1994. *Id.* at 45:10-18. This money was "essentially" for the purpose of "advertising [him]self to the political leaders." *Id.* at 46:12-14. By May 1994, Judge Lunn had received the conservative party endorsement. Regan Tr. 387:1-14. And by July 1994, Judge Lunn knew he had the support of the Monroe County Republican leader. Lunn Dep. 57:15-20. This is the same county leader who told Judge Regan that he "controlled the judicial convention delegates in the District and 'that's all that matters.'" Regan Decl. ¶ 12.

73. Before the Judicial Convention, Judge Lunn spent tens of thousands of dollars on palm cards, balloons, parades, billboards, t-shirts, and even radio advertising. Lunn Dep. 53:21 - 54:18 ("This is preconvention."). In contrast, Judge Lunn did not do

anything in a systematic way to meet with delegates. *Id.* at 87:24 - 88:2. He did not send any direct mailings to delegates. *Id.* at 88:10-12. He did not set up a phone bank to call delegates. *Id.* at 55:25 - 56:2. Even before the convention, he was "looking beyond…the nomination to the general election." *Id.* at 88:13-19. Judge Lunn ultimately spent "in the neighborhood of $160,000, possibly more." Lunn Dep. 59:17-21.

74. Judge Lunn claimed repeatedly that he was politically naïve. *Id.* at 88:16-17 ("politically naïve"), 58:13-16 ("absolutely not" politically connected), 87:3-7 (not politically savvy), 103:8-11 ("political novice"), 118:5 ("not politically astute"). Yet he knew enough to secure the support of his local county political leaders before all else. He felt confident enough once he had their support—even before the nominating convention—to spend tens of thousands of dollars mostly out of his own pocket (*id.* at 37:24 - 38:3) on general media to oppose a "very popular incumbent" (*id.* at 87:4). And he begrudgingly admitted that without their support, he would not have won the nomination:

> Q: [I]s it fair to say that the support of the county leaders, individual leaders was important in your obtaining the nomination?
>
> A: I thin, again, that's helpful. I didn't receive one dime of financial support from them and did not use them as part of my media consultants… But I think yes, I would rather have them with me than against me….
>
> Q: Do you think if they were against you, you would have gotten the nomination?
> MR. SIFRE: Objection.
>
> A: THE WITNESS: I have no way of knowing. I think that would have made it difficult.

Id. at 119:3-18.

c) Timing

75. Defendants do not dispute that, even if a Supreme Court candidate were to obtain the list of delegate candidates from the Board of Elections in late July, the statutory timeframe for contacting and attempting to persuade those delegates (and their opponents) to support her candidacy if they are selected is less than two months. Def. F. ¶¶ 124-42. In addition, they do not dispute that, in the First Judicial District, Supreme Court candidates generally do not contact delegates at all until after Labor Day when they have been reported out of the screening panel. *Id.* at ¶¶ 44-46, 48. Nor do they dispute that the candidates for statewide office who seek their party's designation at the June conventions have at least eight months (and in the case of state committee members in their second year of their two-year term, almost two years) to contact and persuade delegates to those conventions. Pl. F. ¶ 47.

76. Rather, Defendants assert that the statutory timeline is overcome regularly by candidates who campaign from January through September by paying money to attend party functions where they court party leaders and potential delegates. Def. F. ¶¶ 124-42. In addition, they note that candidates frequently seek their party's nomination over a period of several years and thereby build support over that period. *Id.* at ¶¶ 130-37. As discussed in Plaintiffs' Proposed Reply Conclusions of Law, there is no precedent for a court to answer evidence of a burdensome path to ballot access in the year of the suit by noting that the plaintiff candidates could simply keep trying over a period of years to obtain sufficient support among party leaders to avoid such statutory burdens. Pl. R.C. ¶¶ 49.

77. Indeed, the relevant factual question is not, as Defendants would suggest, whether *sitting* Supreme Court justices who were nominated are "comfortable" with the statutory timeframe (*see* Def. F. ¶¶ 141-42), but rather whether that timeframe poses yet another burden for an insurgent candidate who does not have the support of the County Leader or powerful district leaders to mount a sufficient campaign to persuade actual delegates to buck their party's leadership and vote for the insurgent candidate at the convention. The evidence is clear that the present timeframe does, in fact, pose such a barrier.[11]

E. Independent or Minor Party Nomination

78. As detailed in Plaintiffs' Proposed Findings of Fact (¶¶ 237-39), a candidate's ability to obtain a place as an independent candidate, or even as the nominee of another political party other than her own, on the general election ballot are neither viable nor legally sufficient alternatives to alleviate the burdens faced in seeking her own party's nomination. *See* Def. F. ¶¶ 218-22; *see also* Pl. R.C. ¶¶ 9-18.

III. State Interests

79. Defendants have put forth six state interests that they assert are served by the challenged judicial convention system. The evidence establishes, however, that (a) certain of these purported interests are not compelling as they must be; (b) the present system does not serve these interests at all; and (c), even if the current system did serve

[11] Defendants cite the procedures used to fill emergency vacancies in elective offices to suggest that the statutory timeframe for electing all Supreme Court justices accords with that of other offices. Def. F. ¶ 140. As the courts that have addressed the balance between voters' rights and the State's interests in ensuring that such vacancies are filled without a significant period of delay have concluded, emergency vacancies are entirely inapposite to the assessment of the burdens imposed upon candidates and voters in the statutory selection of *routine* elections. Pl. R.C. ¶¶ 23-25.

these state interests, they could be better and more directly served without burdening candidates' or voters' rights as the present system does. In addition, the most compelling State interest – ensuring that voters are able to choose their Supreme Court justices in accordance with the New York State Constitution – is not being served by the current statutory selection requirements. The New York State Constitution commands that Supreme Court justices "shall be chosen by the electors [*i.e.*, the voters] of the judicial district in which they are to serve." N.Y. Const. art. VI, § 6.

A. A High-Quality Bench (Def. F. ¶¶ 227-29)

80. Defendants assert that the current judicial convention system "helps to ensure that parties will select high quality judicial candidates by concentrating the power to select Supreme Court justices in the hands of elected delegates" and by "enabl[ing]" parties to establish screening panels. Def. F. ¶¶ 227-28.[12]

81. There is no evidence in the record, however, that the judicial convention system produces Supreme Court justices of a higher caliber than a direct primary election system would. Indeed, there is substantial evidence to suggest that the "concentration" of control over the nomination process in the hands of party leaders not only limits the eligible pool of potential candidates but also prevents the kind of competition that allows the qualifications of a candidate to be fully aired prior to the choice of nominees.

82. Defendants do not dispute that all other states with contestable trial court elections – and New York State itself with respect to all other judicial elections – use a

[12] Defendants cite to Professor Schotland's testimony allegedly to support this statement. Def. F. ¶ 227 n. 307. But Professor Schotland testified only that "we have a problem with voter information in this country for all offices," particularly for judicial candidates. Schotland Tr. 773:22-25; 777:5 – 778:11. In no way did he opine that New York's judicial convention system better addresses this problem than direct primary elections or other measures, or selects more high-quality judicial candidates than other systems.

direct elective system that relies upon voters, rather than party officials, to choose candidates for the general election. Pl. F. ¶¶ 2-6. There is no evidence that those other states, or the many other courts within New York State, suffer in terms of the quality of the bench for their decision to rely upon voters (and not convention delegates or party leaders) in this manner.

83. Based on his many years of experience as the chair of the New York State Commission on Judicial Conduct as well as his work as a Democratic Party district leader and election lawyer, Mr. Berger testified as to the ways in which the current judicial convention system actually disserves this state interest:

> [W]hile many talented Supreme Court justices have been and continue to be selected, the current system inevitably rewards candidates more for their loyalty and service to their political party leaders than for their legal experience, integrity, or judicial temperament. While the election of judges inherently creates a tension between judicial independence and political campaign success, New York's closed system without a primary election not only lacks any kind of transparency to voters or party members but also ensures that only candidates who have obtained the party leaders' backing will get on the ballot. As a result, the pool of truly eligible candidates is severely limited and cannot include many talented lawyers who have spent their careers focusing on legal work rather than political party service. The quality of the Supreme Court bench as a whole thus suffers.
>
> * * *
>
> [A] direct primary system with reasonable petitioning requirements would remove the truly severe burdens now faced by challenger candidates. It would allow well-qualified lawyers and judges who would not be able to obtain the backing of their party's leaders to earn the opportunity to compete for their party's nomination by demonstrating a modicum of support by gathering signatures among voters in their communities. Local bar associations and other organizations would be able to review and rate their qualifications and, where appropriate, to endorse specific candidates before the primary election. Such information, along with that disseminated by the candidates themselves, could then be used by the party's voters and leaders to choose on Election Day. In addition, if they chose to do so, the major political parties could even hold judicial conventions at some point prior to the September primary election as they

> do for statewide offices to provide additional paths onto the ballot based on support among state committee members.

Berger Decl. ¶¶ 43,45.

84. Senator Connor's refusal to chair the 2002 judicial convention in Brooklyn supports the conclusion that the present system does not allow, as a system with voter choice would, the qualifications of a potential candidate to be fully aired and potentially unqualified candidates to be rejected. According to Connor, he learned in advance of the convention that the executive committee had chosen to nominate a candidate for Supreme Court whom he believed was a "horrendous" and "unqualified" choice with a history of frequent reversal and rudeness to litigants as a judge. Pl. F. ¶¶ 300-01. The delegates had not been involved in that choice at all. *Id.*

85. Plaintiff Philip Segal's experience as a potential candidate also supports Mr. Berger's conclusion that the present system deters many judges and attorneys who do not have a history of party involvement from even attempting to seek their party's nomination. Segal Decl. ¶¶ 2-13.

86. Substantial evidence suggests that, at least in many judicial districts, the delegates do not even know who the candidates for nomination are before they arrive at the convention, and then usually have no actual choices between candidates in any event. *See* Pl. F. ¶¶ 190-206; Carroll Tr. 487:8-16; 490:10 – 491:3; 518:15-19; Ostrer Tr. 1412:2-8. To suggest that this system facilitates a full investigation or understanding of the candidates' qualifications by the delegates is simply not tenable.

87. To be sure, the First Judicial District's unique screening panel has succeeded in requiring that all nominees have been considered and approved by a panel of attorneys appointed through a "double blind" process. Even that district's panel,

however, has put forth candidates with weaker qualifications for political reasons, according to Mr. Kellner. In addition, it is undisputed that the First Judicial District's panel does not generally report out, and the convention never nominates, candidates who are not already sitting judges on another court, usually Civil Court. Pl. F. ¶¶ 52-61. For that reason, the pool of potential Supreme Court candidates is severely limited, and excludes accomplished attorneys in private practice, prosecutors, legal services attorneys, and many other leaders of the bar who could seek their party's nomination in a different system but not in the current system in that district. *Id.*

88. Nor are such independent panels part of the statutory system challenged by Plaintiffs; they nowhere appear in New York law. Pl. F. ¶ 52; Def. F. ¶ 35. Indeed, the Feerick Commission has recommended the creation of such panels to improve the quality of Supreme Court nominees and improve public confidence in the Supreme Court precisely because the present system does not include such panels. Pl. Ex. 78 at 17-22. Mr. Kellner testified that the First Judicial District's panel is unique in New York State, and Mr. Levinsohn not only agreed but added that the few panels in other judicial districts were influenced by the county party leaders in adverse ways – those panels facilitate "manipulation" by the party leadership of the county. Pl. F. ¶¶ 78-81; 52-61.

89. In any event, to the extent that such independent screening panels, even if used in all judicial districts, could serve this state interest, they could do so without imposing unconstitutional burdens on candidates and voters. Indeed, Manhattan's panel currently reviews and reports out the candidates for Civil Court for the Democratic Party's consideration and endorsement, despite the fact that Civil Court uses a direct primary election to select its nominees. Gangel-Jacob Decl. ¶ 5; Levinsohn Tr. 1918:25 –

1919:23. As can be seen during primary election season for Civil Court at subway stops across the City, moreover, the results of such screening panel reviews or those conducted by bar associations, as well as endorsements by trusted elected officials and other relevant information to assess a candidate's quality and experience, could be presented to voters by Supreme Court candidates in a manner that would serve this interest far better than the present system that features few, if any, independent assessments of quality in most judicial districts across the state. *See, e.g.,* Pl. Ex. 80. In short, using such independent screening panels does not require imposing the burdens on candidates and voters imposed by the current selection system.

B. Protecting Party Associational Rights (Def. F. ¶¶ 230-34)

90. Defendants assert that the judicial convention system serves to protect the associational rights of political party members by limiting the extent of party raiding, whereby a candidate who is not enrolled in the party in question is able to obtain the party's nomination. This interest, and the rights upon which it is based, are discussed more fully in Plaintiffs' Proposed Reply Conclusions of Law. Pl. R.C. ¶¶ 53-55. As a factual matter, however, Defendants have failed to demonstrate either that the present system serves this interest or that it could not be served far more effectively without burdening voters and candidates.

91. Defendants provide no evidence that judicial conventions better facilitate party members' nomination of enrolled members of their party than a direct primary system would. In fact, substantial evidence suggests that the judicial convention system facilitates precisely the opposite, namely county party leaders forging cross-endorsement deals that prevent their own party's members from choosing among candidates of their

own party. Indeed, in the Eighth Judicial District from which Defendants' only evidence on this point comes, from 1990 through 2002, when 20% of the 34 candidates who were elected to the Supreme Court were cross-endorsed by the two major parties. Pl. F. ¶ 232. During the same period, 41.3% of all Supreme Court candidates elected across the state were cross-endorsed by the two major parties. Pl. F. ¶ 209.

92. In addition, Defendants acknowledge that the only reason why party raiding is a legal possibility at all in New York State is that New York has chosen to exempt judicial elections from the requirements of what is known as the "Wilson-Pakula Law." Connor Tr. 2121:17-25. That law requires candidates for non-judicial elections who are not enrolled members of a party to obtain permission from that party's leaders in order to run as a candidate of that party in an election. *Id.*; Ostrer Tr. 1419:22 – 1420:17. In other words, New York State has made a determination that its interest in avoiding party raiding is, in fact, not sufficiently important in judicial elections to apply this law to those elections. If, as Defendants suggest, the State does have this interest it could easily amend this statute to bring Supreme Court elections (or any other elective judicial office) within the Wilson-Pakula requirements. Connor Tr. 2253:24 – 2254:1. Such action would address this concern directly, and would obviate any need to preserve the judicial convention system and the burdens it imposes upon voters and candidates.

93. As discussed in Plaintiffs' Proposed Reply Conclusions of Law, moreover, nothing in Plaintiffs' claims or prayer for relief would, if adopted by this Court, implicate or affect the political parties' right to endorse a Supreme Court candidate for office. Pl. R.C. ¶ 54.

C. Diversity

94. Defendants must show that the judicial convention system (a) produces greater diversity than an alternative selection system and (b) does so in the most narrowly tailored or least burdensome manner. They fail on both counts.

95. Rather than rely upon data comparing the diversity produced by primary elections with that in the Supreme Court, Defendants principally rely upon Dr. Hechter's theory of logrolling. Dr. Hechter's testimony is unpersuasive. To begin with, Hechter admitted that his assumptions about race were deeply flawed. At the heart of his report was the conclusion that direct elections of judges should be avoided because New York City voters would vote only on the basis of a judicial candidates' race/ethnicity and upstate voters would vote for judges only on the basis of what county the candidate came from.[13] Hechter Tr. 1171:18 – 1172:7; Pl. Ex. 69 ¶¶ 15-16, 32 n.11. Based upon this assumption, Hechter concluded that in Manhattan, Brooklyn and Queens, no minority judges could ever be elected in a direct primary election. Hechter Tr. 1172:16-23; Pl. Ex. 69 ¶ 18. Hechter conceded that this conclusion was based on his assumption that only race would matter to voters, and further on data that was (i) stale, and (ii) the wrong data.[14] Hechter Tr. 1172:20 – 1179:4.

96. During his extensive cross-examination on these points, Hechter Tr. 1170-1196, Hechter conceded that his predictions were "likely to be falsified in certain cases," Hechter Tr. 1189: 4-5, and were based "to some degree on unrealistic assumptions," *id.* at

[13] Leaving its realism aside, these assumptions also clash with another Hechter assumption: "many voters may not ever be aware of the ethnicity and/or race of judicial candidates." Pl. Ex. 69 ¶ 15; Hechter Tr. 1183:1-10.

[14] As to concededly stale, the data as to minority versus white registration was from 1990, rather than the more recent 2000 Census. Pl. Ex. 69, tbl. 1, at 55; Hechter Tr. 1172:20 – 1175:16. As to being the wrong data, Hechter conceded that (a) given the fact that Democrats always win the general election, it would be more relevant to look at Democratic Party registration by race, and (b) differences in turnout by race would also have to be analyzed. Hechter Tr. 1175:17 – 1179:4.

6-7; *see also* Hechter Tr. 1193: 14-1194: 14; agreed that he had not done the analysis necessary to have any idea whether his assumptions were valid, Hechter Tr. 1190: 1-9; and agreed he had no idea what the actual facts were, Hechter Tr. 1191: 4-5.

97. Far from supporting Dr. Hechter's concededly flawed assumptions, both the testimony and the available data support the conclusion that minority and other traditionally underrepresented candidates would perform as well or better in direct primary elections for Supreme Court than they do under the present system.

98. Every judicial district in New York State has a substantial minority voting age population, but many districts have no minority justices at all:

Judicial District	Minority Justices	Total authorized justices	Percentage of Minority Justices	Percentage of Minority VAP
First	17	38	44.7	50
Second	18	52	34.6	56.8
Third	0	15	0.0	12.9
Fourth	0	13	0.0	7.4
Fifth	1	17	5.9	10.3
Sixth	0	10	0.0	7.4
Seventh	0	18	0.0	13.9
Eighth	2	26	7.7	13.1
Ninth	0	25	0.0	27
Tenth	2	47	4.3	21.8
Eleventh	12	38	31.6	64
Twelfth	10	24	41.7	82.3
Statewide	62	323	19.2	35.5

Pl. Ex. 125.

The Ninth Judicial District has no minority justices despite the fact that 27% of its voting-age population consists of minorities. The Third and Seventh Judicial Districts have no minority justices despite the fact that more than 10% of their voting-age population are minorities. *Id.*

99. Most importantly, New York City judicial districts elect the overwhelming majority of the minority justices of the Supreme Court: 57 of 62 (*i.e*., 92%). Pl. Ex. 125. Significantly, minorities make up at least 50% of the voting-age population in each of the four New York City judicial districts. *Id.* In other words, those districts in which minorities serve on the Supreme Court in any significant numbers are also those in which minority candidates can, and would, perform well in direct primary elections. Indeed, there is strong evidence from Defendants' own witnesses that minorities would, in fact, do better in a direct primary system within New York City.

100. For example, Senator Connor testified that, while at one time an African American could not have prevailed in an open primary in the Second Judicial District, by contrast now if you had an open primary,

> . . . you could not elect an Italian American, an Irish American, maybe have a hard time with a Latino. If you look at who votes in primaries in Brooklyn today, this has been true since Jessie Jackson ran for President, you see changes in primary participation. Forty-five percent of the primary vote in Brooklyn today is African American, which is a good thing. It may not be good for the Democratic Party to end up not being able to get any other group represented on its slates, because you want to include people, you don't want to exclude people, and the problem with an open primary is you end up excluding groups. Year after year, they don't get any participation, the answer becomes I might as well join the Republicans or do something else, the Democratic Party doesn't worry about the Irish American community in [Bay Ridge], the Italian community in Bay Ridge. Over time people in those neighbor[hoods] also have occasion to go to court too and be in court and I believe a lot of African American litigants, I guess, you can call them, or people who found themselves in court, decades ago felt estranged because, gee, I didn't see many black judges who look like them, I think you would find other groups feeling the same . . . .

Connor Tr. 2124:4 – 2125:4. In other words, according to Senator Connor, as a result of demographic changes, a direct primary election system would actually elect more African Americans and possibly other minorities at the expense of white Irish or Italian American

candidates. *Id*. Preserving access for white candidates, over African American candidates whom the voters would choose if they had the opportunity in a primary election, can hardly be said to serve any legitimate, much less a compelling state interest.

101. In the First Judicial District, County Leader Farrell stated in his deposition in *France v. Pataki* that as early as 1987 two Asian-American candidates, one backed by the party leadership and one running as a challenger, defeated two white candidates in a county-wide Civil Court primary. Pl. Ex. 99C at 315:4-21. Mr. Carroll testified that minority candidates won contested county-wide Civil Court primaries in Brooklyn as recently as 2004. Carroll Tr. 567:11-14. Plaintiff Margarita López Torres, a Puerto Rican woman, prevailed in a hard-fought primary election against a white female candidate for re-election to a countywide Civil Court seat in 2002. The other candidate who prevailed in that election for a countywide Civil Court seat in Brooklyn was Delores Thomas, an African American woman. Pl. Ex. 89M. African American borough presidents have been elected in Manhattan on numerous occasions extending as far back as the 1970s, including Percy Sutton and David Dinkins. Pl. Ex. 99C at 312:7 – 314:16. In Queens, the current Borough President is an African American woman. In the Bronx, Fernando Ferrer and Adolpho Carrion, both Latino, were elected to that countywide office.[15] In short, in the only part of the State where minority candidates are elected to the Supreme Court in any significant numbers, minority candidates perform at least as well in direct primaries, disproving any assertion that the convention system is necessary to promote diversity.

[15] See http://bronxboropres.nyc.gov/ ; www.queensbp.org/content_web/depts/Press/bio_marshall.html .

102. The available data also suggests that, within New York City, Latino candidates would likely increase their numbers substantially on the Supreme Court if they were given the opportunity through primary elections:

Hispanic Representation on the New York State Supreme Court (2001)

Judicial District	Hispanic Justices	Total authorized justices	Percentage of Hispanic Justices	Percentage of Hispanic Voting-Age Population
First	4	38	10.5	23.9
Second	4	52	7.7	17.2
Third	0	15	0.0	3.5
Fourth	0	13	0.0	2.2
Fifth	0	17	0.0	2.1
Sixth	0	10	0.0	1.6
Seventh	0	18	0.0	3.2
Eighth	0	26	0.0	2.3
Ninth	0	25	0.0	11.4
Tenth	0	47	0.0	9.4
Eleventh	1	38	2.6	23.4
Twelfth	4	24	16.7	45.3
Statewide	13	323	4.0	13.8

Sources: Plaintiffs' Ex. 81-84.

Pl. Ex. 125.

103. Although as of 2001 in the Twelfth Judicial District (Bronx) 45.3% of the voting-age population was Hispanic, a mere 16.7% of the Supreme Court justices were Hispanic. Similarly, the Eleventh Judicial District (Queens) had only one Hispanic Supreme Court justice (2.6%) despite a Hispanic voting-age population of 23.4%. Hispanic voters are underrepresented in all four of New York City's judicial districts on the Supreme Court. Similarly, Asian Americans constituted 17.5% of the voting-age population in Queens yet only 2.6% of the Supreme Court bench (*i.e.*, a single justice out of 38); 9.8% of the voting-age population in Manhattan yet only 2.6% of the Supreme

Court bench (again, a single justice); and 7.4% of the voting-age population in the Second Judicial District yet do not have even a single Supreme Court justice on the bench. Pl. Ex. 125. While African Americans have obtained representation in the First and Eleventh Judicial Districts beyond their proportions in those districts' voting-age population, at least as of 2001 they still were underrepresented in the Second and Twelfth Judicial Districts. *Id.* These numbers suggest that, if given the opportunity, the voters of these districts would be well-positioned to elect minority candidates to the Supreme Court in a primary election.

104. By contrast, the present system substantially limits the pool of potential candidates for Supreme Court, which has a negative impact on diversity. Berger Decl. ¶ 46. In 1991, Governor Cuomo appointed a blue-ribbon Task Force on Diversity in the Judiciary to analyze the Supreme Court selection system and its impact on diversity. Chaired by then-counsel to the Governor, Evan G. Davis, the Task Force included distinguished members of the bar and bench committed to promoting diversity on the bench. *See* Pl. Ex. 91 at 1-2, 21.

105. In 1992, the New York State Task Force on Judicial Diversity concluded with respect to diversity on the Supreme Court:

> We believe that another major cause of lack of diversity in the judiciary is the closed nature of the system now used in New York State to select judges.
>
> As we all know, our system is only nominally one of election. In practice it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election.
>
> The Task Force believes that opening up this system is essential to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be a

> viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials. They may be political independents, or members of a party that is not dominant in the area or, if party members, may not have been active in the organization in power. Rightly or wrongly, these lawyers perceive themselves as having no chance of becoming a judge under the current system for the "election" of judges. Our own experience is that their perception is well founded.

Pl. Ex. 91 at 13-14.

106. Defendants attempt to obscure these data by arguing that the relevant comparison for purposes of determining whether the judicial convention promotes diversity is that between the percentage of minority justices and the percentage of minorities among attorneys, rather than the percentage of minorities among the voting-age population. Def. F. ¶¶ 242-43, 250-51. But this analysis fundamentally obscures the relevant factual question. Defendants argue that the burdens imposed on candidates and voters by the judicial convention system are justified by the need to avoid primary elections that would prevent the election of minority candidates to the Supreme Court. This theory relies on the assumption advanced by Dr. Hechter that primary voters will vote solely on the basis of race—an assumption never proven by any evidence in this case (and admitted by Hechter himself to be deeply flawed). Even assuming such racially polarized voting, the relevant question is not how difficult it is to find minority candidates for these offices, but rather whether the judicial convention system does a better job of nominating such minority candidates than, for example, a direct primary election. To answer that question, the total population of minority voters is the relevant figure for determining the ability of minority voters to influence a direct primary election in favor of their preferred candidates. (Of course, even that figure may understate the influence of minority voters: because nomination is often equivalent to election, relying

on overall minority voting-age population inevitably understates minority influence in districts where minority voters make up a higher percentage of the dominant party than they do of the whole population.) In order for any claim that the judicial convention system better promotes diversity to be viable, Defendants must demonstrate that there are districts where the minority population is substantial, but less than a majority, where the convention system has promoted minority opportunities better than another system that would not impose severe burdens on candidates and voters. They cannot make this demonstration.

107. Even if the relevant comparison were with the percentage of minority attorneys, moreover, the 1990 census data is a poor proxy for determining the percentages of minority attorneys admitted for at least 10 years in 2001. Presumably, many of the attorneys counted in 1990 had retired, died, or left New York by 2000. Because of historic discrimination, the older attorneys who were disproportionately likely to have died or otherwise left the pool of eligible candidates for judicial office are overwhelmingly white. While using occupational data from 2000 counts some attorneys (of all races) who are not yet eligible to run for Supreme Court, it is also far less likely to introduce the sort of systematic bias that the 1990 data would include.

108. The table set forth at Defendants' Proposed Finding ¶ 243, but showing 2000 census data, is set forth here:

Judicial District	Total % Minority Justices 2001	Total % of Minority Attnys 2000	Total % of Minority Attnys 1990
1	44.70%	13.37%	6.81%
2	34.60%	23.11%	14.80%
3	0.00%	4.10%	3.07%
4	0.00%	1.77%	0.58%
5	5.90%	3.45%	2.60%
6	0.00%	6.11%	1.56%

7	0.00%	5.78%	1.39%
8	7.70%	4.21%	3.03%
9	0.00%	7.14%	4.62%
10	4.30%	6.30%	4.25%
11	31.60%	30.03%	16.62%
12	41.70%	33.76%	27.20%
Statewide	19.20%	12.07%	8.67%
Non-City (3-10)	2.92%	5.84%	3.70%
City (1,2,11,12)	37.50%	18.26%	10.66%

Def. Ex. MMM, NNN (percentages of minority attorneys for Judicial Districts 3, 6, 7, and 8 are approximations because 2000 census data combined certain counties. Even applying Defendants' improper standard for judging whether this system better produces diversity, therefore, the convention system plainly fails to produce a diverse bench outside of New York City: the percentage of minority justices outside of New York City (2.92%) is one half the percentage of minority attorneys (5.84%).

109. Similarly, Defendants' comparison of diversity between the county courts and the Supreme Court is fatally flawed because it includes the New York City Supreme Court justices, *despite the fact that there is no county court in New York City*. Indeed, Dr. Hechter specifically concluded that comparing county court to the Supreme Court bench in New York City was not valid for that reason. Pl. Ex. 69, ¶ 86. The only arguably valid comparison is between the Supreme Court bench outside New York City and the county court bench:

	County Court	Non-NYC Supreme Court
Number of Judgeships	128	171
Number of African American (Black Judges	2 (2%)	5 (3%)
Number of Hispanic Judges	0 (0%)	0 (0%)

Number of Native American Judges	0 (0%)	0 (0%)
Number of Asian/Pacific Island Judges	0 (0%)	0 (0%)
Number of All Minority Judges	2 (2%)	5 (3%)

Def. F. ¶ 246; Pl. Ex. 125. This comparison demonstrates clearly that the judicial convention system serves the interest of promoting racial diversity poorly, and no better than a direct primary election system. While the percentage of African-American justices is one percent (1%) higher than the percentage of African-American county court judges, this difference is negligible and the two systems are equally abysmal with respect to every other minority group. In short, the judicial convention system does not promote racial diversity well, and what little it does surely cannot justify the severe burdens imposed by that system.

110. Defendants further attempt to explain away substantial evidence that direct primary elections can and do serve diversity far more effectively than the closed judicial convention system. As Defendants acknowledge, the New York City Civil Court has produced a much more diverse bench, including several of the witnesses in this case who have served on that court at one time or another. Def. F. ¶ 244. Dr. Hechter found that from 1992 to 2002, minorities occupied 39% of the seats on the Civil Court whereas only 27% of the Supreme Court seats in New York City were held by minorities. Pl. Ex. 69, ¶ 86 n.17. Moreover, Mr. Kellner testified that, largely as a result of political deals, the Civil Court districts are drawn in a manner that produces significant discriminatory under-representation of minority voters, *i.e.*, "if judges were assigned on the basis of population to the municipal court districts, we would probably have more black and

Hispanic [Civil Court] judges than we have now." Kellner Tr. 1642:6 – 1646:11. These data alone show that other election systems (in this case, primary elections with a mix of smaller districts and county-wide districts) could produce better diversity without imposing the severe burdens imposed by the judicial convention system.

111. Similarly, while only 3% of the Supreme Court bench outside New York City are minorities, 6% of the district courts on Long Island are minorities. Pl. Ex. 83, 84. City Courts upstate are also substantially more diverse than the upstate Supreme Court. Regan Tr. 347:17- 348:15 (2 African-American and 1 Hispanic judge on Rochester City Court, but no minorities in the Supreme Court); Keefe Tr. 940:24-941:25 (1 African-American on Albany City Court out of 5 judges, but no minorities in the Supreme Court); Ward Tr. 1384:21-1386:21 (4 out of 12 Buffalo City Court judges, but only 2 out of 26 Supreme Court justices are minorities). Like the New York City Civil Court, those courts are both nominated through a direct primary election. Pl. F. ¶ 15.

112. Defendants argue that these comparisons are inappropriate because these more diverse judgeships are elected from smaller districts that may include higher proportions of minority voters than the present Supreme Court judicial districts. Def. F. ¶¶ 244-45. This factual assertion has not been proven by Defendants, and runs counter to the obvious conclusion that, within jurisdictions such as the four major counties of New York City where the minority voting-age population constitutes a majority, the overall percentage of minorities elected from the district as a whole will likely not vary significantly from the percentage of minorities elected from smaller districts within that larger district or county. In any event, the better performance of these other courts in promoting diversity on the bench demonstrates that, if the State wished to serve this

interest, it could do so in many ways (discussed below) without burdening candidates and voters with the closed judicial convention system.

113. Available data also demonstrate that the Supreme Court convention system may systematically impair gender diversity. In 1996, the New York State Committee on Women in the Courts, appointed by the Chief Judge and chaired by Appellate Division Justice, Hon. Betty Weinberg Ellerin, concluded that while there had been substantial progress in increasing gender diversity on other courts in New York State, with respect to Supreme Court progress was virtually non-existent:

> But progress is uneven. Women interested in achieving judicial office have more success in some courts and some regions of the state than others. Particularly difficult for women is winning seats on Supreme Court benches. The state's highest trial level court, the Supreme Court, is important not just because of the nature of the cases it hears but also because, according to New York's Constitution, only justices elected to Supreme Court seats may serve on the Appellate Division. In 1986, women held only 22 or 8% of these positions on the trial level. Although 40 of these Supreme Court Justices are now women, this is only 12% of this bench, a percent far below the 20% for the judiciary as a whole. Nor is there any evidence of much recent progress. The percent and number of women elected and serving as trial Supreme Court Justices has remained virtually the same for the past five years.

Pl. Ex. 122 at 26.

114. In 2002, in their next report, the Committee cited statistics that show that the Supreme Court had a lower percentage of women on the bench than *any* other court in New York State except for the upstate county courts: only 17% statewide. Pl. Ex. 90 at 69. While the county courts had only 9% women as of 2001, moreover, the Supreme Court outside New York City had only 11% women. Pl. Ex. 90 at 71. Moreover, 37% of Family Court judges outside of New York City were women, as were 24% of District Court judges, and 18% of City Court judges. Pl. Ex. 90 at 69. Justice Sise confirmed

that there are many women on other courts in the Fourth Judicial District. Sise Tr. 1531:11-1533:4. By contrast, not a single one of the 14 justices elected in the Fourth Judicial District is a woman. Pl. Ex. 90 at 71.

115. Similarly, while 47% of the Civil Court judges in New York City were women as of 2001, only 26% of the Supreme Court justices in New York City were women. *Id*. at 70, 71.

116. Nor could Defendants even suggest that the differences in the size of the districts from which these various courts are elected could be responsible for the comparatively abysmal performance of the Supreme Court selection system in producing gender diversity. It is beyond cavil that the voting public includes at least one half women regardless of how district lines are drawn. Pl. Ex. 81.

117. Similarly, Defendants suggest that the testimony of Emily Giske demonstrates that the judicial nominating conventions promote diversity. In fact, Ms. Giske's testimony primarily demonstrates her lack of knowledge about the diversity of the bench. Ms. Giske testified that she did not know whether the Supreme Court is in fact diverse and or whether the Supreme Court is more or less diverse than the Civil Court. Giske Tr. 2002:3 - 2003:5. To the extent that she knew specific facts, Ms. Giske testified that there are more openly gay, lesbian, bisexual, or transsexual individuals sitting on the Civil Court in New York County than on the Supreme Court in the First Judicial District. Giske Tr. 1999:2-15.

118. No evidence suggests that the convention system promotes economic diversity better than any other system. Defendants have not proffered any comparative evidence to suggest that candidates elected through primaries are inevitably richer than

those elected through the judicial convention. Indeed, as Ms. Giske acknowledged, the present members of such bodies as the State Assembly and City Council are not demonstrably wealthy at all, and certainly no more wealthy than Supreme Court justices. Giske Tr. 2004:19 – 2005:13.

119. Even if Defendants were able to demonstrate that the judicial convention system did serve any of these forms of diversity well, it is clear that alternatives exist that would promote diversity more effectively and do so without imposing the burdens on candidates and voters at issue. As Defendants' witnesses acknowledge, selecting Supreme Court justices from smaller judicial districts could promote the election of minorities. Kellner Tr. 1656:8-20; Berger Tr. 221:16-223:10. Indeed, County Leader Farrell testified that "a smaller subdivision would give us a better chance to put more minorities on the bench," and indicated that he himself might favor such a system. Pl. Ex. 99A at 113:20-23; *see also id*. at 112:21-25. In the end, however, for entirely different but quite relevant reasons he concluded he preferred the current judicial convention system:

> 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.

120. Dr. Hechter also conceded that his conclusions about racial (and geographic) diversity depended upon the size of judicial districts because:

> with respect to minority representation, if the judicial districts were very much smaller and were either ethnically or geographically homogeneous,

> it is very likely that there would be greater representation of those particular groups.

Hechter Tr. 1204:15-25; 1207:14-15. Hechter "absolutely" agreed with County Leader Farrell's testimony to the same effect. Hechter Tr. 1205:1-18.

121. In addition to reducing district sizes, there are other changes that would promote diversity without imposing the burdens of the convention system. Dr. Hechter said he was "sure" there were other "electoral rules" that would help assure both democracy and diversity. One was "proportion[al] representation, which guarantees much more representation to numerical minorities." Hechter Tr. 1207: 15-17. Then, after cumulative voting was described, he testified:

> Q. Now, describe[d] that way[,] cumulative voting could be used to increase the likelihood of minorities getting elected?
>
> A. I haven't thought it through, but it sounds on the base of it quite plausible, yes.

Hechter Tr. 1207:19 - 1208:6.

D. Geographic Diversity (Def. F. ¶¶ 252-58)

122. The evidence makes clear not only that the current selection system does not serve an interest in geographic diversity well, but also, and most importantly, that the State could guarantee such diversity without imposing any of the burdens imposed by the current judicial convention system.

123. Defendants suggest that the convention system ensures geographic diversity in judicial districts that would otherwise be dominated by one or two populous counties in direct primary elections. *See* Def. F. ¶¶ 252-58; Sise Decl. ¶¶ 7, 10, 11. As a factual matter, however, the distribution of Supreme Court justices under the current system routinely deprives smaller counties of their proportionate share of justices. Even

in the five judicial districts identified by Defendants' expert, Dr. Hechter, as the "most geographically diverse," the current selection system disproportionately selects many more justices from the county with the greatest voting-age population than the distribution of voters would dictate. Pl. Ex. 69 at ¶ 94. For example:

- **Second Judicial District**. Staten Island (Richmond County) has approximately 17% of the registered voters in that judicial district, but, according to Dr. Hechter's data, it is the home of only seven of the 83 justices in the district – *i.e.*, 8.4% of the total.

- **Seventh Judicial District.** Although Monroe County has only 59% of the voters within the district, 19 out of the 22 justices (including certificated justices) reside in Monroe County – *i.e.*, 86% of the total. At present, there are no sitting duly elected Supreme Court justices in the Seventh Judicial District from the seven counties outside Monroe County. Regan Tr. 348:4-15.

- **Eighth Judicial District**. Notwithstanding Dennis Ward's opinions regarding the geographic diversity created in his district by the judicial convention, Mr. Hechter's figures show that Erie County includes 61% of the registered voters in that district, but is the home of 33 out of the 37 justices (including certificated justices) in that district – *i.e.*, 89% of the total. *Id.*; Ward Decl. ¶¶ 21-22. According to Mr. Ward, out of the 26 duly elected and authorized justices sitting at present in the Eighth Judicial District, only two are from outside Erie County, and those two are from Niagara County, the second largest county. In other words, only two out of the eight counties within that judicial district have *any* justices who reside within them. Ward Tr. 1383:17 – 1384:20.

- **Ninth Judicial District.** As Orange County attorney Benjamin Ostrer testified, Westchester has a disproportionate share of the sitting Supreme Court justices in this district relative to the other counties. *See* Ostrer Decl. at ¶¶ 15-17, Ex. A (as corrected in his testimony at hearing, Ostrer Tr. 1389:24 – 1390:12).

In short, Defendants have failed to demonstrate that the present system actually serves geographic diversity at all.

124. Moreover, notwithstanding Justice Sise's opinions concerning the extent to which the current system serves geographic diversity and the negative impact of a direct primary election system on this interest, his own testimony demonstrated that the current system does not serve this interest well. First, he acknowledged on cross-

examination that three counties within the Fourth Judicial District, including the fourth and sixth most populous counties out of the 10 counties that comprise that district, do not have any sitting Supreme Court justices with chambers within their boundaries.[16] Sise Decl. ¶ 2. Indeed, he further volunteered upon questioning by the Court that the only justice sitting in a fourth county, Franklin County, had been appointed Deputy Chief Administrative Judge and, as a result, stopped "hearing a calendar" and, if he hears cases at all, he does so only "now and again, but probably on an emergency basis." Sise Tr. 1510:20 – 1511:4.

125. To the extent that geographic diversity is served presently, moreover, it is served not by the judicial convention system but by an assignment and calendaring system that has no connection whatsoever to the method by which Supreme Court justices are nominated or elected. New York's Supreme Court justices are expressly subject to assignment anywhere in the State. Sise Tr. 1511:16-18. Justice Sise himself has been assigned to serve as far away as New York City, and testified that Supreme Court justices from his and other judicial districts "do get assigned throughout the State where the case load is needed." Sise Tr. 1512:6 – 1513:20; *see also* Connor Tr. 260:8-15. He has been assigned to serve in 11-14 different counties. Sise Tr. 1508:9-11. In addition, judges in the Fourth Judicial District routinely have "split" calendars, whereby they are responsible for cases filed in other counties. Sise Tr. 1508:16 – 1511:15. Sise testified to his belief that this split calendar system is "purposefully put in place to allow

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[16] Although he did not disclose this fact in his declaration, Washington and Clinton Counties have only Appellate Division justices. *Compare* Sise Decl. ¶¶ 5, 11 *with* Sise Tr. 1506:22 – 1507:13. Moreover, there is no evidence in the record to suggest that either of those Appellate Division justices in fact hear any cases beyond their appellate caseload.

for greater coverage for the people of the districts so that two judges are available in close proximity for each county." Sise Tr. 1511:10-15.

126. None of these numerous ways in which the court system ensures that the people of each county have access to a Supreme Court justice have anything to do with the method by which those justices are elected, but rather are parts of an assignment and calendaring system that moves judges and cases across county, and even across judicial district, boundaries. Those assignment and calendaring policies would not be disturbed in any respect by the elimination or modification of the judicial convention system.

127. Finally, even if the present selection system did produce geographic diversity, as Justice Sise himself acknowledged 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. Sise Tr. 1515:11-16; *see also 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).[17] Moreover, the State could ensure that each and every county could elect one of its own or keep a justice in residence by making each county a separate judicial districts.[18] Sise Tr. 1514:3-14. The concerns expressed by Defendants' witness, Justice Sise, that his home county of Montgomery retain its share of resident judges, for example, could be easily addressed in this manner without burdening candidates or voters in the ways the current system does.

E. Protecting Incumbent Justices from Costly Campaigns (Def. F. ¶¶ 259-81)

128. Mr. Kellner testified at the hearing that protecting incumbents is not a compelling state interest. Kellner Tr. 1650:20 – 1651:1; 1652:16 – 1653:6. Moreover, New York State has chosen to protect its elected Supreme Court justices from re-election contests already by providing that each term shall be 14 years in length, longer than those for trial court judges in all but one other state (Maryland) in the country. Def. Ex. S, at 237 tbl. C.

129. Moreover, nothing in the present statutes provides incumbency protection from expensive judicial campaigns. Defendants do not suggest, much less prove, that incumbents on New York State's Supreme Court are re-elected with any more frequency

[17] Indeed, the fact that the State has imposed such specific residence requirements on other officers, but not on Supreme Court justices, suggests how important this interest really is to the State with respect to the Supreme Court.

[18] The legislature has the power to alter the boundaries of the judicial districts by legislation once every ten years. N.Y. Const. Art. VI, Sec. 6(b). The last time it did so was when it split the Bronx from the First Judicial District and created the Twelfth Judicial District (that only includes the Bronx) in a law passed in 1982, effective January 1, 1983. *See* Notes to N.Y. Judiciary Law § 140. Accordingly, the Legislature has clear authority to address geographic diversity, if it chooses, in crafting a constitutional system to replace the challenged requirements. *See* Kellner Tr. 1612:10-20; 1670:17 – 1671:6.

than in other states' trial courts or even in other elected courts within New York. And even one of their own witnesses is living proof that the statutory scheme does nothing, by itself, to protect incumbents from expensive races. Justice Robert Lunn of Rochester testified (by deposition) that he unseated an able, well regarded incumbent, Richard Rosenbloom, who, had he been reelected, would have "continued to serve ably and been a meritorious judge." Lunn Dep. 98:17-20. Indeed, Justice Rosenbloom was "a very popular incumbent," Lunn Dep. 87:4, and "a very fine judge," Lunn Dep. 99:9-10. Lunn began efforts to unseat Justice Rosenbloom understanding "that to run a credible campaign would take somewhere between $150 and $200,000," and he "was prepared to either raise that money or commit my own resources." Lunn Dep. 37:24 - 38:3. Justice Lunn ultimately spent "in the neighborhood of $160,000, possibly more," to defeat a sitting justice. Lunn Dep. 59:17-21.

130. In the Ninth Judicial District, two incumbents are running this year for re-election – a Democrat and a Republican – along with candidates for five additional spots. A third incumbent, Justice Nicoli, chose not to run at all for re-election to Supreme Court, but rather chose to drop back to county court because he did not believe he could prevail. Ostrer Tr. 1426:7-18; 1450:6-25.

131. In any event, 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. 69 at 35-37, App. G-7. As Mr. Kellner acknowledged, the evidence demonstrates that in states that employ such retention elections for their trial courts incumbent judges virtually always prevail in such elections. Pl. Ex. 120; Kellner Tr. 1655:21 – 1656:1. Even if protecting incumbents from undue challenges were a compelling state interest, therefore, the State has many options to serve that interest without burdening candidates or voters.

132. Defendants raise the related specter of rising campaign costs in a system other than the present judicial convention system. Def. F. ¶¶ 267-73. Defendants do not dispute, however, that much less burdensome alternatives exist for the State to address such concerns whether through campaign finance regulation or public financing. Berger Tr. 219:11-21. To that end, earlier this year the Feerick Commission proposed several specific changes to New York law that would address many of the concerns raised by Defendants as well as some of the many campaign finance problems that exist under the current selection system. Pl. Ex. 78 at 23-34. Similarly, City Council member David Yassky has introduced legislation already to expand New York City's public campaign financing system to include judicial elections, including Supreme Court. Pl. Ex. 124 at n. 40. Messrs. Kellner and Connor both acknowledged that campaign finance abuses could

and could be addressed directly. Kellner Tr. 1649:3 – 1650:16; 1652:3-10; Connor Tr. 2189:14-25.

133. Nor have Defendants demonstrated that the present judicial convention system serves this interest better than other election systems. In fact, substantial evidence suggests that the closed Supreme Court selection system actually produces egregious campaign finance abuses. In its final report earlier this year, the Feerick Commission documented pervasive large-scale contributions and payments to party leaders' campaigns and party organizations by Supreme Court candidates. *See* Pl. Ex. 78, App. G-3, 2-5, 9-16; Kellner Tr. 1727:17-25. Unlike the campaign expenditures that Defendants fear, moreover, these expenditures are not always subject even to public disclosure and, at least in some districts, cannot but discourage well-qualified candidates who are not comfortable making such payments to party leaders. In the Eighth Judicial District, for example, Supreme Court candidates in both major parties have been required by their respective county party leaders to pay "nomination expenses" of $7,500 to both parties' Erie County Committees in exchange for their respective Supreme Court nominations. Ward Tr. 1379:7-23; 1380:24 – 1381:21. Most recently, Amherst Town Court Judge Mark G. Farrell was admonished by the New York State Judicial Conduct Commission for having his campaign committee pay that sum to the Erie County Democratic Committee and for making political calls in support of the Democratic County Leader in exchange for the Party's nomination, which Judge Farrell obtained. Pl. Ex. 79 at 2. Mr. Ward testified to the high campaign costs spent in the Eighth Judicial District under the present system. Ward Tr. 1346:11 – 1347:2. In short, far from serving any interest in keeping money out of Supreme Court politics, the present system grants

county party leaders such tight control over their party's nomination process that it facilitates and encourages certain leaders in making improper financial demands on candidates. *See* Pl. F. ¶¶ 82-84 (Senator Connor agreeing with inference that contributions to County Leader's campaign committees shows significance of his control over nomination process).

134. Defendants distort the testimony, and the research, of Professor Schotland on this point. Def. F. ¶¶ 166-74. To be sure, Schotland has expressed in both his writings and his testimony his concerns about campaign finance costs in judicial elections. However, he testified that the evidence from across the country indicates that this concern relates principally to statewide supreme courts (*i.e*., the highest courts in most states), rather than trial courts. The only state in which there is any evidence of recent increases in campaign finance costs at the trial court level is Florida, and Professor Schotland testified that the reasons for increases in that state were anomalous. Schotland Tr. 760:22 – 764:12. Moreover, he testified that recent changes to the Surrogate Court's administrative rules have dramatically reduced the uniquely high campaign contributions and expenditures to candidates for that court (nominated through a primary election) which had resulted from the extraction of contributions from attorneys wishing to be appointed as surrogates. Schotland Tr. 787:2 – 788:4.

F. Public Accountability

135. Although Defendants assert that the current judicial convention system is "more open and democratic than a primary" election system, the evidence drawn from their own witnesses show precisely the opposite. Pl. F. ¶¶ 72-73, 89, 95; Pl. Ex. 69 ¶ 9.

Indeed, it is precisely the burdens on voters at issue that make the present system less directly accountable to voters than a primary election system.

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Respectfully submitted,

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