

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.

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.
-----X

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

Index No. CV 04-1129 (JG)

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PRELIMINARY STATEMENT

Defendants essentially ignore—and certainly fail to rebut—Plaintiffs’ showing that the burdens placed upon insurgent candidates for Supreme Court are “severe.” Even Defendants’ expert concedes that the “high barrier to entry” caused by the need to obtain the support of party leadership “significantly narrows the pool of candidates.” Creelan Decl. ¶ 2, Ex.1, at 7, ¶ 9. And, by their silence, Defendants accept that New York’s uniquely burdensome selection system for Supreme Court stands in sharp contrast with the practice in all other New York elections, including judicial elections, and in all other states that elect their trial judges.

Defendants seek to (i) avoid the significance of the concededly “high” barriers to entry; and (ii) justify them. As to avoidance, Defendants claim the burdens are irrelevant. Why? Because challengers could always get on the general election ballot as an independent or as a

candidate of some (third) party other than their own. This is plainly insufficient for many reasons (*see infra* at 8 to 10), first among them that the Supreme Court long ago flatly rejected the argument. *See Bullock v. Carter*, 405 U.S. 134, 146-47 (1972) (“we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens . . . imposed by state law.”).

As for the purported justifications, they fail on the facts. But, again, there is a simpler answer straight from the cases. If the burdens are severe, Defendants must show that such burdens are “necessary,” and the challenged requirements “narrowly tailored,” to serve the purported interest. Defendants simply ignore this plain requirement and for good reason: the burdens imposed upon candidates and voters by the present system are not necessary by any measure to serve the interests identified by Defendants. Nor have Defendants demonstrated that the current selection system serves those interests in any event. *See infra* at 21-32.

Defendants also put forward straw-man characterizations of our arguments. For example, Defendants suggest we say conventions are always unconstitutional. We do not. As the cases show, conventions can be a constitutional means of selecting party nominees. *See infra* at 10-15. Unlike voters, however, not all conventions are created equal. Significantly, not a single case cited by Defendants upheld a closed convention system, like New York’s, which excludes voter participation. *See infra* at 15-19.

Defendants say we would *require* a primary. Not so. If the Legislature came up with a convention system that passed constitutional muster, no primary would be necessary. Plaintiffs’ prayer for relief expressly contemplates an opportunity for the State to craft a new selection system that both serves its interests and ends the unconstitutional burdens faced by candidates and voters across the state.

FACTS

Since our motion papers were served, the Commission to Promote Public Confidence in Judicial Elections (the “Feerick Commission”), in its Report to the Chief Judge of the State of New York, found that:

“[t]he uncontested evidence before the Commission is that across the state, the system for selecting candidates for the Supreme Court rests almost total control in the hands of local political leaders.”

Creelan Reply Decl. ¶ 13, Ex. 11, at 13. By silence, as well as by explicit admissions, Defendants concede the severe burdens that New York’s Supreme Court selection requirements place on challenger candidates seeking to compete for their party’s nomination, as well as upon voters. Indeed, Defendants’ expert concedes that the “high barrier to entry significantly narrows the pool of candidates” because “it is difficult to attain the nomination without the support of party leadership.” Creelan Reply Decl. ¶ 2, Ex. 1, at 7.

Defendants do not provide evidence of a *single* Supreme Court candidate who successfully obtained his or her party’s nomination without the support of the party’s county leadership (or, in the case of one judicial convention in one year, without a large-scale internal split over who should be the party’s county leadership itself).

With respect to Republican Party conventions, Defendants do not even try to suggest there is ever any competition from challengers, let alone success.

With respect to Democratic Party conventions, Defendants put forward contests in only two judicial districts: the Eighth and the First.

The evidence in the Eighth simply confirms our point – and Defendants’ expert’s admissions – that only the exceedingly rare situation of an internal struggle over party leadership itself, rather than an individual challenger candidate who seeks the nomination, can produce any chance for insurgent candidates to compete. Thus, because of a factional fight in 2000, for the

first and only time in anyone's memory, the convention did more than simply rubber-stamp the Erie County Chairman's chosen nominees.¹

With respect to the First District (Manhattan), Defendants' proof actually makes Plaintiffs' point. They provide two examples of candidates who *originally* did not have such support but, after failing at conventions without the County Leader's support and after *many* years of extensive party activities none of which involved direct appeals to voters but rather to party leaders (and included their husbands being party district leaders), they *were able to obtain such support* and were nominated as part of the County Leader's package of candidates by voice vote acclamation without *any* candidates in opposition.² In short, the County Leader can block any nominee he wishes, according to his own testimony.³ At best for Defendants, the Manhattan

¹ The Erie County Democratic Committee Secretary, Dennis Ward, highlights the judicial convention of 2000 in the Eighth Judicial District, where as a result of a massive struggle for the chairmanship of the Erie County Democratic Committee itself (which resulted in the ultimate victory of Mr. Ward's faction over former County Chairman Steve Pigeon), the convention did not just rubber-stamp the Chairman's chosen nominees. Cain Decl. ¶ 15, Ex. B at 2. As one of the delegates to that convention said afterward, "This is the first time, and I've been coming to these things for many years, when the delegates' votes counted for something." *Id.* at 2. Indeed, Mr. Ward himself acknowledges 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; Creelan Reply Decl. ¶ 12, Ex. 10, at 47-49, 80.

² Justice Gangel-Jacob concedes that because she had successfully run a primary for Civil Court against the candidate endorsed by the County Leader, she was many years later prevented by the County Leader from obtaining the Supreme Court nomination for two successive years. This despite her being evaluated as "highly qualified" by a screening panel and already having been honored by being designated as an Acting Supreme Court Justice. In her third year of trying, Justice Gangel-Jacob withdrew her candidacy after she was told the County Leader would support her the following year. She testified that the "primary" reason she withdrew was that she did not want to take the risk of losing again. Gangel-Jacob Dep. at 178-79. The next year she was nominated by acclamation with the County Leader's support.

³ In his deposition in *France v. Pataki*, 71 F. Supp. 2d 317 (S.D.N.Y. 1999), the County Leader, Herman D. Farrell, Jr. testified about his control over the nomination process at the judicial convention:

You keep everybody in the air. And because I have the votes to be able to kill someone – in other words, *I can't guarantee I can always make you, but I can surely block you.* No one wants to get me angry, so they will not go against me until they have nothing to lose.

Creelan Reply Decl. ¶ 5, Ex. 4, at 193:9-15 (emphasis added).

So far, no one has figured out yet that they can break my block. . . . [W]e became the package[r]s. Because whoever packages, controls making of the judges, or filling of the slots."

Id. at 56:12-24.

story is pretty pale tea. In any event, however, even if there were evidence of rare contests in one judicial district, such limited evidence would not undermine Plaintiffs' proof that the burdens are severe statewide.

Defendants' do not even try to rebut our showing that the burdens make it impossible for challenger candidates to contemplate running their own delegates. See Plaintiffs' Memorandum of Law in Support of Preliminary Injunctive Relief (hereinafter "Pl. Br.") at 10-18. As Defendants concede by silence, it never happens. Nor is there any evidentiary challenge to our showing that the vast majority of delegates never appear on a ballot.⁴ Finally, Defendants do not rebut that the vast majority of judicial delegates are selected by local party leaders for their loyalty and their votes are effectively controlled by those leaders. Even in Manhattan, notwithstanding the utopian vision portrayed by Defendants of frequent delegate contests and robust debate between them over the nominations, County Leader Farrell testified that the district leaders "select them" and can then "move[] [them] around" to support different Supreme Court nominees.⁵

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.

Id. at 123:16-25. See also *id.* at 65:8-22.

⁴ From 1999 through 2002, in New York City as a whole the elections records show that only 12.1% of all delegates "elected" actually appeared on any ballot – 17.1% of Democratic Party delegates and 1.6% of Republican Party delegates. Creelan Decl. ¶ 11, Ex. 9; Creelan Reply Decl. ¶ 4, Ex. 3. (NB: These figures differ slightly from those included in Plaintiffs' opening brief because Plaintiffs received from the New York City Board of Elections the final certification list for 2002 delegates after that filing. The new records are included as Exhibit 3 to the Creelan Reply Declaration.)

⁵ See Creelan Reply Decl. ¶ 5, Ex. 4 at 53:12-54. Defendants' expert also agreed with Plaintiffs' evidence on this point:

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

Despite their assertions that New York's judicial conventions provide an "open selection system" with real debate and coalition-building ferment, Defendants do not even attempt to square such assertions with the overwhelming evidence that judicial conventions in New York State are virtually entirely pre-scripted, so brief as to prove that almost no true deliberations, representation, or independent choices by delegates ever occur, and so tightly controlled by party leaders that contested nominations almost never occur and never succeed. Cain Expert Decl. at ¶¶ 13-15. Indeed, Defendants' expert acknowledges that in "counties (such as Kings) . . . nominees are *de facto* selected prior to the judicial conventions" by party leaders – in Hechter's words, "a small group of politically sophisticated actors." Creelan Reply Decl. ¶ 2, Ex. 1, at 23-26.

With these burdens on potential challenger candidates without the party leadership's support, contested nominations at judicial conventions virtually never occur. In New York City, for example, from 1994 through 2002, Democratic Party conventions considered two or more candidates for only 9 of the 137 Supreme Court nominations during that period, a mere 6.6%. By contrast, from 1990 through 2002 the Democratic Party had contested primaries for 23.7% of the Civil Court seats elected during that period – three-and-a-half times the rate of contested convention nominations for Supreme Court. Overall, from 1994 through 2002, only 3.3% of the two major parties' nominations for Supreme Court were so contested. Outside New York City, contested nominations are even more rare.⁶

Defendants have not attempted – nor could they – to overcome the obvious: party leaders, and not party voters, control Supreme Court nominations; the burdens on candidates

Creelan Reply Decl. ¶ 2, Ex. 1, at 60.

⁶ None of the 133 Republican Party nominations for Supreme Court were contested during the period studied. Creelan Decl. ¶ 13, Ex. 11.

(and their supporters) who seek to compete for their party's nomination with public support, but without the support of their party's leadership, are uniquely and insurmountably severe.⁷

ARGUMENT

Unable to rebut the severe burdens on challenger candidates and voters created by the present selection requirements, Defendants must demonstrate that New York's Supreme Court selection requirements are "narrowly drawn to advance a state interest of compelling importance," *Lerman v. Bd. of Elections*, 232 F.3d 135, 145 (2d Cir. 2000), or, phrased differently, that such an interest "make[s] it necessary to burden [] plaintiff[s'] rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y. 1996), *aff'd* 78 F.3d 44 (2d Cir. 1996). Instead, Defendants raise numerous straw men arguments that misconstrue not only Plaintiffs' claims but also the case law. First, Defendants suggest without basis that an insurgent's ability under New York's election laws to petition onto the general election ballot as an independent candidate, or to compete for a minor party's nomination, eliminates any injury or constitutional violation. Second, Defendants argue that

⁷ While plaintiffs have produced a comprehensive showing of the "high barrier[s] to entry," the conclusions that flow from a detailed presentation of the facts have long been obvious to observers. Thus, among countless examples:

- "Judicial nominations today in the State of New York fall to the choice of boss-manipulated conventions" (NYC Chamber of Commerce Committee on Law Reform (2/28/44). Creelan Reply Decl. ¶ 6, Ex. 5).
- "The State Constitution contained an 'absolutely false' pretense. 'It pretends', he said, 'that the people select the judges. That is the greatest farce that has ever been enacted in the history of democracy ... The selection of judges is made not by the people, but by the leaders of the predominant parties.'" (N.Y. Times editorial quoting a New York State Supreme Court justice (12/22/52). Creelan Reply Decl. ¶ 7, Ex. 6)
- "Supreme Court justices are nominated by large judicial conventions which lie as bulky buffers against possible insurgence." (Letter to *New York Times* from the Vice Chairman of the Citizens Union of New York City (10/6/54). Creelan Reply Decl. ¶ 8, Ex. 7)
- Justices are elected "by a process that mocks choice. Most voters can never know the candidates and have to accept party slates. The real choice is thus left to political bosses ... who control nominations." (N.Y. Times (11/16/83) Creelan Reply Decl. ¶ 9, Ex. 8).

because courts have upheld certain types of party conventions that this Court is bound as a matter of law to uphold the current selection requirements for New York Supreme Court. In essence, Defendants suggest, erroneously, that Plaintiffs here challenge any and all forms of party convention and claim a constitutional right to a primary election; in reality, Plaintiffs challenge only New York's uniquely burdensome judicial convention system as presently constructed. Third, Defendants raise the specter of this Court's intrusion upon the First Amendment associational rights of political parties to select or endorse candidates for office – another straw man that is simply not implicated by Plaintiffs' challenge. Finally, Defendants seek to justify the challenged selection system through reference to five purported state interests – without any showing that addressing such interests makes it necessary to impose such severe burdens on Plaintiffs' rights or even that the challenged selection system serves such interests effectively at all. Defendants' arguments are without merit.

I. INSURGENTS' ABILITY TO PETITION ONTO THE GENERAL ELECTION BALLOT AS AN INDEPENDENT CANDIDATE OR SEEK A MINOR PARTY'S CONVENTION NOMINATION IS IRRELEVANT AS A MATTER OF LAW

It is well established that a candidate's right to compete *for his or her own party's nomination* without facing severe and unnecessary burdens is entirely distinct from and in no way satisfied by an independent candidate's right to get onto the general election ballot. In *Bullock v. Carter*, 405 U.S. 134, 149 (1972), the Supreme Court unanimously struck down unreasonably burdensome filing fees to qualify for the primary ballot in Texas, despite the fact that candidates could petition directly onto the general election ballot as an independent or member of another party without any filing fee at all. *Id.* at 137 n.5 and 146-47. The Court rejected an argument virtually identical to Defendants' argument here:

Instead of arguing for the reasonableness of the exclusion of some candidates, appellants rely on the fact that the filing-fee requirement is applicable only to party primaries, and point out that a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition. Apart from the fact that the primary election may be more crucial than the general election in certain parts of Texas, we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law.

Id. at 146-47 (footnotes omitted); *see also Brown v. North Carolina State Board of Elections*, 394 F. Supp. 359, 362 (W.D.N.C. 1975) (three-judge court). Of course, as in *Bullock*, in most of New York's Supreme Court elections it is the dominant party's nomination at the convention, and not the general election, that is entirely determinative of who will become a justice.⁸ It is no answer to the burdens faced by candidates and voters in their party's nomination phase to refer them to their ability to seek, or vote for, what amounts to a purely symbolic line on the ballot. Significantly, moreover, Defendants do not even attempt to rebut Plaintiffs' evidence (from the official election records) that independent and even minor (but officially recognized) party candidates for Supreme Court have literally *no* chance of even coming close to winning election anywhere in New York State.⁹ To preclude voters from exercising the only meaningful choice in the election – *i.e.*, their party's nomination of candidates – is no answer to Plaintiffs' claims.

But even if running as an independent (or as a minor party) candidate were not such a hollow option, *Bullock* held, in any event, that requiring candidates and voters to abandon their party in order to compete for election is never a reasonable or constitutionally required alternative. To suggest otherwise would be to reject virtually all of the cases that have struck

⁸ More than three quarters (76%) of the Supreme Court elections from 1990 through 2002 across the state were either uncontested or wholly non-competitive at the general election. *See* Pl. Br. at 23-24; Cain Expert Decl. ¶ 16; Creelan Decl. ¶ 17, Ex. 14.

⁹ From 1990 through 2002 (and likely long before that period), for example, such candidates never prevailed in *any* election without an endorsement by one of the two major parties, and received less than 20% of the lowest-vote-getting winner's votes in 96% of the races. Cain Decl. ¶¶ 16, 17; Creelan Decl. ¶ 17, Ex. 14.

down burdensome barriers to primary election ballots for challenger candidates (and their supporters) even where such alternative routes onto the general election ballot existed. In *Rockefeller*, for example, this Court struck down burdensome statutory rules used by Republican Party leaders to keep insurgent Republican candidates off its primary ballot, certain of which required candidate Steve Forbes to obtain 1,250 signatures (or 5% of the registered Republicans) in each of 31 Congressional districts, for a total of approximately 37,000 signatures. *Rockefeller*, 917 F. Supp. 155. The Court found these requirements to be unconstitutional notwithstanding the fact that Mr. Forbes could have petitioned onto the general election ballot simply by gathering 15,000 signatures statewide. N.Y. Elec. L. § 6-142. See also *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000); *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164 (D. Conn. 2003) (striking down byzantine convention system for access to major party primary ballots for Connecticut's Legislature notwithstanding that such candidates could have petitioned directly onto general election ballots by obtaining signatures from lesser of one percent of votes cast for that office at preceding election or 7,500).

II. DEFENDANTS' STRAW MEN NOTWITHSTANDING, PLAINTIFFS' RIGHT TO A LESS BURDENSOME NOMINATION PROCESS NEITHER REQUIRES A PRIMARY ELECTION NOR PRECLUDES A PARTY CONVENTION

Defendants construct two additional straw men in an effort to insulate the burdensome Supreme Court selection requirements from this Court's scrutiny. Plaintiffs, it is argued, must fail if there is either no absolute right to a primary election or if any nominating conventions have passed constitutional muster in the courts. Plaintiffs do not claim any right to a primary election, however, nor do they suggest that all party conventions are unconstitutional. Rather, they have demonstrated that New York's unique judicial convention system imposes unconstitutionally severe burdens on candidates and voters that are plainly unnecessary to serve

(and, in fact, undermine) the state's interests. By proposing that a direct primary election system could redress the challenged burdens and better serve those state interests, Plaintiffs do not indicate any absolute right to such a system. Indeed, that is precisely why Plaintiffs propose that the Legislature be provided with the opportunity to craft new selection requirements that meet constitutional muster.

a. Voters Have a Right to an Open Nomination Process To Choose Their Party's Candidates

While the Constitution does not entitle voters to direct primary elections, the voters do have a right to a nomination process that is sufficiently open to allow them, rather than just party leaders, to have a meaningful role in the ultimate selection of their party's candidates for the general election. Barriers to an "unaffiliated candidate," meaning a candidate who is not "the favored candidate" of the party leadership, heavily burden the right to vote if unaffiliated candidates can "only rarely" succeed in being considered by the voters at the nomination stage. *Rockefeller*, 917 F. Supp. at 165, quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974); *see also Campbell*, 242 F. Supp. 2d at 174 (same).

Contrary to Defendants' assertions, that fundamental right applies regardless of whether it is a primary election or a convention that is used to select a party's nominees. The critical question is not whether a convention or a primary is used, but instead whether the specific selection rules that govern either mechanism impose severe and unjustified burdens on candidates and voters. When the Supreme Court concluded more than sixty years ago that elections officials tampering with votes cast in a primary deprived voters of their right to vote, the Court reasoned that

[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the

right protected. . . . And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery. . . . [W]e cannot close our eyes to the fact . . . that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice.

United States v. Classic, 313 U.S. 299, 318-19 (1941); *see also Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) (upholding application of one-person, one-vote to nominating petitions because “[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote”). *Classic*’s reasoning applies with equal force to a convention system that is plainly an “integral part of the election machinery.” 313 U.S. at 38.

Indeed, when the Court was called on to determine whether the right to vote, as protected by the Voting Rights Act, extended to include participation in a convention, it followed the functional analysis of *Classic*. In *Morse v. Republican Party*, Justice Stevens announced the judgment of the Court and stated:

Virginia, like most States, has effectively divided its election into two stages, the first consisting of the selection of party candidates and the second being the general election itself. Exclusion from the earlier stage, as two appellants in this case experienced, does not merely curtail their voting power, but abridges their right to vote itself. To the excluded voter who cannot cast a vote for his or her candidate, it is all the same whether the party conducts its nomination by a primary or by a convention open to all party members except those kept out by the filing fee. Each is an “integral part of the election machinery.”

517 U.S. at 207 (internal citations omitted), quoting *Classic*, 313 U.S. at 318; *see also Cousins v. Wigoda*, 419 U.S. 477, 490 (1975) (“As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.”) (internal quotation omitted). When the State makes partisan nominations an “integral part of the election machinery,” as New

York has done, the selection system chosen for such a purpose must provide a party's voters with a meaningful role in the ultimate selection of their party's nominees (and candidates with a meaningful opportunity to compete for that nomination). The selection system must do that always in such circumstances, but particularly where the party's nomination "effectively controls the choice," *Classic*, 313 U.S. at 318, or even where it "may be more crucial than the general election." *Bullock*, 405 U.S. at 146-47.

Thus, Defendants fundamentally misconstrue established precedents, and then ignore others, by asserting that candidates and voters only have a fundamental right to vote with respect to the general election and not in a party's nomination process. See Letter from Jamison A. Diehl to Hon. John Gleeson, Aug. 25, 2004, at 2; Memorandum of Law of Intervenor-Defendant New York County Democratic Committee in Opposition to Plaintiffs' Motion for Preliminary Injunction (hereinafter "N.Y. County Dem. Comm. Br.") at 17, 23-25. Defendants assert, without any basis in logic or law, that because certain cases addressed the right of parties or candidates to appear on the general election ballot, then this Court should presume that candidates and voters have no such right in the nomination phase. To be sure, *Williams v. Rhodes*, 393 U.S. 23, 25 (1968), *Jenness v. Fortson*, 403 U.S. 431 (1971), and *Storer v. Brown*, 415 U.S. 724 (1974), directly ruled on whether barriers to accessing the general election ballot were too severe. But the Supreme Court itself, as well as many other courts, have plainly developed and expressly applied the standards developed in those cases to scrutinize barriers in the nomination phase. See *Bullock*, 405 U.S. at 143, 145 (relying upon *Williams* and *Jenness* in addressing right to participate in nomination stage); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 205-6, 218 n.31 (1996) (rejecting argument that party nominating conventions are not "integral part of the election machinery" to hold that filing fee for party delegates must comply

with federal law); *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (access to primary ballot).

Defendants' misreading of the case law is demonstrated most plainly by their citation to *Lubin v. Panish* in their list of cases purportedly limited to consideration of rights associated with the general election ballot, despite the fact that *Lubin* actually addressed whether the barriers to entry onto a primary election ballot were too severe. 415 U.S. at 716-19.

It also defies logic and precedent to suggest, as Defendants do, that the First Amendment limits the ability of a State to burden the right to vote in a primary, but does not apply at all if the State adopts into law a closed convention system to nominate party candidates. NY Cty Dem. Comm. Br. at 27-28. Under Defendants' theory of the case, a State could construct a totally arbitrary process for selecting nominees for elective office, so long as the selection process were done in a closed convention system that completely excludes party voters. To describe the argument is to demonstrate why it fails. If Defendants' theory were correct, the Connecticut Legislature could have fully remedied the constitutional burden on voters found in *Campbell* – namely, an impenetrably closed convention system to earn a place on the primary ballot – simply by eliminating primary elections altogether without altering the convention system. *Campbell*, 242 F. Supp. 2d 164. Similarly, had New York chosen to eliminate the Republican presidential preference primary altogether, according to Defendants' reasoning, the plaintiff candidates and voters in *Rockefeller v. Powers*, 78 F.3d 44 (2d Cir. 1996), and *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000), would have had nothing to complain about as a constitutional matter.

While Plaintiffs do not claim any absolute right to a primary election for Supreme Court, therefore, the absence of such a primary in state law does not exempt the current judicial selection requirements from constitutional scrutiny. In other words, to say that New York has chosen a convention system does not end, but rather begins, the constitutional inquiry. As the

Supreme Court recently reaffirmed in the context of judicial elections, “[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (internal quotation marks omitted). The fact that New York’s judicial convention system so severely limits voters’ and challenger candidates’ roles in the nomination process hardly can be used as a justification for extinguishing their First Amendment rights in that process.

b. Unlike Many Types of Nominating Conventions, New York’s Judicial Conventions Are Unconstitutionally Burdensome

Defendants rely upon *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), to argue that because a state can “insist that intraparty competition be settled before the general election by primary election or by party convention,” New York’s judicial convention system must be constitutional. Defendants’ argument proves too much: if their reading of *American Party of Texas* were correct, then every primary election process a State might adopt would automatically be constitutional, a proposition flatly contradicted by later cases. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (striking down California’s primary law for depriving voters of the Democratic Party of their control over choice of party nominee); *Lerman v. Board of Elections*, 232 F.3d 135, 149 (2d Cir. 2000) (striking down primary ballot access rule for imposing severe burden without being narrowly tailored to compelling state interest); *Rockefeller* 917 F. Supp. at 159-164 (rules governing access to primary imposed severe burden and violated Constitution); *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) (same). So too, the constitutionality of a convention system depends upon its specific contours and the burdens they place, if any, upon voters and candidates.

Unlike voters, not all conventions are created equal. The convention systems upheld by courts in cases cited by Defendants address one of three types of convention that are entirely different from New York's judicial convention system – being open to any party member, or in some cases any voter at all, and uniformly allowing such voters to participate fully and effectively in the nomination process. For example, the Attorney General devotes substantial space to one such open system: New York State's town caucus system, which allows *any* resident party member in towns located in counties with a population of not more than 750,000 and in any villages to attend an open caucus to nominate candidates for local offices. Memorandum of Law of Statutory Intervenor Attorney General of the State of New York in Opposition to Plaintiffs' Motion for Preliminary Injunction (hereinafter "AG Br.") at 12-13; *see also* N.Y. Elec. Law §§ 6-108, 6-202, and 15-108. The openness of New York's caucus system is shared by those convention systems analyzed in *Morse v. Republican Party*, 517 U.S. 186, 190 (1996) ("[A]ll registered voters in Virginia who were willing to declare their intent to support the Republican Party's nominees for public office at the next election could participate in the nomination of the Party's candidate for the office of United States Senator. . . .") (Stevens, J., announcing the judgment of the court) and in *American Party of Texas*, 415 U.S. at 784 ("Any voter, however registered, may attend the new party's precinct convention. . . ."). *See also* Tex. Elec. Code § 181.065 ("To be eligible to participate in a precinct convention held under this chapter, a person must be a registered voter of the precinct or a precinct resident who is eligible to vote a limited ballot.").¹⁰ Open conventions or caucuses such as these raise no significant

¹⁰ It should be added as well that the *American Party of Texas* Court considered the question of whether a minor party has a right to a state-run primary, but never addressed the analytically distinct issue of whether the convention process at issue provided members of the party with a sufficient role in the nomination process. Indeed, the Court did not address the process by which the conventions select nominees at all, but rather focused on whether "the State has invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election." *American Party of Texas*, 415 U.S. at 781. Nor did it consider whether the

constitutional issues. Any party member can participate fully, casting a vote for the candidate of their choice just as if they were participating in a primary. Indeed, as Justice Breyer noted in *Morse*, “the case before us involves a nominating convention that resembles a primary about as closely as one could imagine. The convention (but for the \$45 fee) was open to any voter declaring loyalty to the Republican Party of Virginia . . . just like a primary.” 517 U.S. at 238 (Breyer, J., concurring in the judgment). These open conventions thus share the term “convention” with New York’s Supreme Court selection system, but little else.

Similarly, Defendants rely upon cases that have upheld barriers to participation in the presidential nominating conventions, but their reliance is entirely misplaced. *See, e.g., Cousins v. Wigoda*, 419 U.S. 477 (1975); *Ripon Society, Inc., v. Nat’l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc); *Duke v. Smith*, 784 F. Supp. 865 (S.D. Fla. 1992); *Belluso v. Poythress*, 485 F. Supp. 904 (N.D. Ga. 1980). These cases are inapposite for two reasons. First and foremost, unlike New York’s closed judicial conventions, of course, in the presidential convention system the voters of each party get to vote, through direct caucuses and primaries (at which voters choose delegates based upon the presidential candidate with whose name they are listed), for the presidential candidate whom they wish to nominate.

Second, when the Second Circuit has addressed the presidential nomination system, it has unambiguously held that First Amendment rights of ballot access apply with full force to the process of supporting presidential candidates for nomination by selecting such pledged delegates to the national conventions. To the extent that the cases from other circuits cited by Defendants suggest otherwise, they do not reflect this Circuit’s careful conclusions on this point. *Compare*

constitutionality of the more limited restrictions on participation by members of the minor party may have been justified by the “enhanced need on the part of fringe parties for strong centralized leadership and for consistent adherence to the party’s platforms. . . .” *Mrazek v. Suffolk County Board of Elections*, 630 F.2d 890, 897 (2d Cir. 1980).

Rockefeller, 78 F.3d 44 (upholding voters' rights to consider for president any candidate with demonstrated support) and *Duke v. Connell*, 790 F. Supp. 50 (D.R.I. 1992) (same) with *Smith*, 784 F. Supp. at 865 (holding that candidates have no right to participate in presidential primary) and *Belluso*, 485 F. Supp. at 904 (same). Similarly, this Court's discussion in *Molinari*, 82 F. Supp. 2d 57, focused on the burdens faced by Senator John McCain and Steve Forbes in their efforts to gain access to the presidential primary ballot state-wide, rather than focusing upon each delegate. These decisions would be inexplicable if the national parties' choice to nominate through a convention meant that voters have no right to participate in the nomination of their presidential candidate of choice—a claim directly parallel to the claim that Defendants make in this case.¹¹

In addition to conventions or caucuses in which any party member may participate and conventions where voters elect delegates to support specific candidates, conventions also may be used constitutionally as one of *several* means to obtain a place on a primary ballot. New York State's statewide nominating conventions in June of each year, for example, select the major party's nominees for the September primary for statewide offices, but additional candidates can petition directly onto the primary ballot if unsuccessful at the convention. See N.Y. Elec. Law §§ 6-124, 6-126, and 6-158; see also *Moritt v. Rockefeller*, 346 F. Supp. 34, 36-38 (S.D.N.Y. 1972) (rejecting "vague" challenge to statewide convention's role in nominating candidates for party's primary ballot where candidates could also petition directly onto primary ballot). Conversely, *Campbell* struck down Connecticut's burdensome convention system for state

¹¹ Defendant New York County Democratic Committee's argument that *Molinari* and *Rockefeller* have no application to a convention system is unfounded. See NY Cty Dem. Comm. Br. at 26. The presidential primaries at issue in *Molinari* and *Rockefeller* form part of the convention system that the Republican Party uses to nominate its presidential candidates. The *Molinari* and *Rockefeller* courts vindicated the First and Fourteenth Amendment rights of New York's Republicans to participate in the nomination of their party's candidates for president, a right that could only be exercised through the convention.

offices principally because obtaining support from convention delegates, rather than from voters, provided the only route to the primary ballot and nomination. *Campbell*, 242 F. Supp. 2d at 164. Where a direct primary election process exists, a convention that provides automatic primary ballot access and the institutional party's endorsement is constitutionally sound.

In summary, courts have upheld conventions – all of which differ profoundly from New York's judicial convention system – where voters themselves either (a) attend and their votes are directly counted, (b) vote for delegates who are listed on the ballot with the name of a specific candidate to whom they are pledged, or (c) can petition their favored candidate onto a primary ballot if their party's convention does not nominate their candidate of choice. Not a single case has upheld a closed convention system like New York's uniquely burdensome judicial convention system, where only delegates can vote, where – in those rare instances when delegates' names ever appear on a ballot at all – the voters must select delegates without any indication on the ballot of which candidate the delegates favor, and where the convention's decision is the final word on nomination.¹²

¹² Nor can cases that have allowed the selection of candidates by a party committee in special elections or during emergencies to fill a vacancy save New York's routine Supreme Court selection requirements. Special elections, interim appointments, and the like present special circumstances under which the State may use electoral mechanisms that would violate the Constitution if used to select a party's candidates on a regular basis. Two separate rationales support such exceptions, neither of which applies here. First, as the Supreme Court noted in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982), the impact on voters' rights is minimal, because vacancies only arise under unusual circumstances. 457 U.S. at 11-12. Second, such vacancies, whether created by the death of an incumbent or the sudden withdrawal of a nominee shortly before an election, produce precisely the sort of compelling government interest in preserving the larger interests of a democratic election that justify constraints that would otherwise be forbidden.

In *Rodriguez*, for example, the Supreme Court upheld a Puerto Rico law that filled vacancies caused by the death or resignation of a legislator by conducting a primary election in which only members of the party of the former legislator could participate, with no general election at all. The Court acknowledged, of course, that when a State makes an office elective, the citizens of the state have the right to participate fully and equally in the elections for that office. *Id.* at 10. But under the special circumstances of a legislative vacancy, the office could be filled by an appointment, whether by another elected official or by a political party. *Id.* at 12.

Similarly, in *Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991), the Third Circuit upheld a procedure whereby the parties would nominate candidates according to party rules to fill a vacancy in the United States Senate. In reversing the district court, which had ordered a primary, the Third Circuit noted that "[t]he issue before us is limited to whether a primary is required to nominate a candidate to fill a senatorial vacancy." *Id.* at 231. The court held that the special demands of time justified wide discretion on the part of the states in how to fill such vacancies.

III. REFORMING NEW YORK'S SUPREME COURT SELECTION REQUIREMENTS WOULD IN NO WAY IMPAIR THE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES

Defendant New York County Democratic Committee suggests that reforming the present judicial convention system would intrude upon the party's First Amendment associational rights to select its candidates for Supreme Court. NY Cty Dem. Comm. Br. at 3, 37-38. It would not. To the contrary, vindicating the rights of a party's rank-and-file voters to participate in their party's nomination process in no way threatens any cognizable rights of the party or its leaders.

It is firmly established that political parties do not have any right to exclude their own members from the nomination process. The Supreme Court has "considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000), quoting *American Party of Texas v. White*, 415 U.S. 767 (1974). To be sure, as established in the cases cited by Defendants, the party has a right to exclude *non-members* from its nominating processes, *California Democratic Party*, 530 U.S. at 576-77, or, conversely, to permit independents to participate in its primary, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986). Those rights are completely distinct, however, from the purported right that Defendants assert that would allow a party to exclude *its own members* from its nomination process. If such a right

Id. In *Montano v. Lefkowitz*, 575 F.2d 378 (2d Cir. 1978), Judge Friendly found that "Appellants accept as they must that the exigencies of special elections for the House of Representatives do not afford time for a primary." *Id.* at 386. Similarly, *Shapiro v. Berger*, 2004 WL 1769078, 2004 U.S. Dist. LEXIS 15782 (S.D.N.Y. Aug. 5, 2004), addressed the selection of a Town Justice position that, under New York law, "must be made through a primary election," but which was filled by the town's Democratic county committee because the position itself was created too late for a primary election to be held. *Id.* at *3. Defendants' reliance on *Seergy v. Kings County Republican County Comm.*, 459 F.2d 308 (2d Cir. 1972), is even more misplaced. In that case, the Second Circuit actually struck down the voting rules of a Republican Party county committee in those "rare instances" where such a committee may nominate a candidate to fill vacancies after a primary or choose candidates for special elections. *Id.* at 310-12. In short, while courts have permitted political committees to make nominations when the press of time or emergency vacancies make it necessary to burden candidates' and voters' rights, these cases plainly do not justify

existed, the State would not only be permitted to establish closed conventions, it would be required to do so at the request of the political parties, in direct contravention of *California Democratic Party* and *American Party of Texas*.

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

IV. NEW YORK'S SEVERELY BURDENSOME SUPREME COURT SELECTION REQUIREMENTS ARE NEITHER NECESSARY TO SERVE, NOR DO THEY IN FACT SERVE, ANY COMPELLING STATE INTERESTS

Defendants set forth five purportedly compelling state interests that they assert are served by the current judicial convention system. Significantly, however, Defendants ignore entirely the burden they must meet under the law to demonstrate that it is "necessary to burden the

imposing similar burdens, as New York's judicial convention system does, in the absence of such exigent circumstances.

plaintiff[s]’ rights” with New York’s impenetrable Supreme Court selection requirements in order to serve any of those interests. *Anderson*, 460 U.S. at 780; *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (“We have required that states adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved.”); *Rockefeller*, 917 F. Supp. at 165 (holding that less burdensome ballot access rules for New York’s Democratic presidential primary demonstrated that New York could not justify the requirements for the state’s Republican primary). Not surprisingly, those interests could in fact be far better and more directly served by remedial legislation or other actions that would be entirely consistent with – and are, in fact, contemplated by – Plaintiffs’ prayer for relief on this motion. In addition, the most compelling State interest – ensuring that voters are truly able to choose their Supreme Court justices in accordance with the New York State Constitution – is plainly not being served by the current statutory selection requirements.¹³

¹³ In 1846, the New York State Constitution was amended to provide for the popular election, rather than appointment by the governor and senate, of Supreme Court justices. The debates held at the 1846 Convention for the Revision of the Constitution of the State of New York establish that the purpose of this change was to replace an appointment system controlled entirely by the political party leaders with an elective system in which the people themselves would choose their judges. In the words of Delegate Enoch Strong of Monroe County, “All parties in [that] county expected that the people were to elect all their judges. The people have called for it; and their mandate has gone forth to this Convention that they will have this principle engrafted in the Constitution.” Giving the people their choice directly was expressly understood to be the best way to avoid the control exercised by party leaders. Delegate Conrad Swackhamer of Kings County summarized the appointment system then in place:

He supposed it was generally known how appointment was made now-a-days. . . . It was customary for a political committee to meet together in some secluded place, when there was an appointment to be made, and quietly resolve that Mr. S--- was just the man for the office. The matter was perfectly understood by the ‘knowing few.’

Delegate Ansel Bascom of Seneca County echoed the same rationale for direct elections:

The present mode of appointment by Governor and Senate had received too general popular condemnation, and had in his judgment been attended with such results as not to justify its continuance. The judgment and feeling not only in the Convention but throughout the state was against it. The idea has fast been abandoned that any portion of the public servants should enjoy independence of the people whose interests they have in charge, whose business they transact, whose rights they protect or disregard.

a. Defendants Have Failed to Demonstrate That the Burdensome Supreme Court Selection Requirements Produce Racial Diversity and Are Necessary or Narrowly Tailored To Do So

Defendants assert that “the convention system ensures that minorities have the opportunity to win the nomination and a seat on the Supreme Court.” NY Cty Dem. Comm. Br. at 38. Even if one assumes (as Plaintiffs do) that diversity is a compelling interest, however, the evidence demonstrates that the judicial convention system has not promoted diversity on the Supreme Court, whether considered in absolute terms or relative to courts in New York State and across the country that use direct primary elections. Defendants themselves acknowledge, moreover, that the severe burdens imposed by the present system on candidates and voters are not necessary – as they must be to survive this Court’s review – to create a more diverse Supreme Court bench. The State has much less burdensome alternatives at its disposal to serve this interest that are entirely consistent with Plaintiffs’ prayer for relief.

Defendants fail to address, much less prove, the true status of diversity on New York’s Supreme Court bench. As noted by the Defendants’ purported expert, Michael Hechter, “minority representation in [the New York City Civil Court, which is elected through direct primary elections] now exceeds that of the Supreme Court in New York City.” Creelan Reply Decl. ¶ 2, Ex. 1, at 40.¹⁴ Additional evidence from other sources shows that the Supreme Court

At the next Constitutional Convention held in 1867, some proponents of an appointive system proposed elimination of the people’s power to elect their Supreme Court justices. The Convention resolved to put the question to the people by referendum in 1873. Speaking with a clear voice, the people of New York defeated the 1873 measure to restore the appointment system overwhelmingly.

In sum, the origins of this state constitutional provision establish that it was intended to give the people of New York State the meaningful voice in choosing their Supreme Court justices. In any discussion of the State’s interests that purportedly necessitate such severe burdens on candidates and voters as are imposed by the current requirements, this paramount interest must not be forgotten.

¹⁴ Defendants served the expert report of Dr. Michael Hechter on Plaintiffs’ counsel on August 20, one week after they were required to under this Court’s Order. Pursuant to Magistrate Judge Gold’s Order of July 27, Plaintiffs’ time to submit materials in reply to that report was thereby extended automatically to September 3. Plaintiffs reserve their right to reply to Mr. Hechter’s analysis on diversity and other issues.

selection system does not promote diversity. In 1993, despite having been county leader of the Democratic Party in Manhattan for 12 years, Assemblyman Herman D. Farrell, Jr. testified that Manhattan was “the best of the terrible” with respect to diversity, and supported public hearings on the issue to address the problem. Creelan Reply Decl. ¶ 5, Ex. 4, at 101:14-21.

In the Eighth Judicial District, the State’s diversity record is even worse. Of the 26 sitting Supreme Court justices in that District, only two are minorities and only one sits in the trial division. Not a single minority justice has been elected to the Supreme Court since the “early 1990s,” Creelan Reply Decl. ¶ 12, Ex. 10, at 123-26, and only one has even been nominated by either party. *Id.* at 131. By contrast, five of the eleven sitting City Court judges in Buffalo (where direct primary elections are used) are African American. In short, despite having been in place for at least 80 years, the Supreme Court selection system simply has not produced a diverse bench.

Even if the present judicial convention system did promote diversity, moreover, it is indisputable that less burdensome alternatives exist to produce diversity that would not burden the rights of challenger candidates or voters at all. As both Dr. Hechter and County Leader Farrell have acknowledged, the direct election of Supreme Court justices from smaller judicial districts would allow majority-minority districts to elect minority judges much more easily than has been possible under the present system. Creelan Reply Decl. ¶2, Ex. 1, at 40; Creelan Reply Decl. ¶ 5, Ex. 4, at 112:21-25; 133:4-22.¹⁵ If the State truly seeks to serve this compelling interest, such a system would produce greater diversity while eliminating the severe burdens on

¹⁵ County Leader Farrell was asked specifically whether, if the Supreme Court selection system were changed to a primary system with smaller judicial districts, the voters of a majority-minority district in Manhattan would nominate a minority Supreme Court candidate. He answered “Yes. . . No doubt.” He then acknowledged that, in contrast with that virtually guaranteed outcome, in the current judicial convention system covering the entire county of Manhattan he “can’t guarantee that I would nominate county-wide a black, because the numbers are not there.” Creelan Reply Decl. ¶ 5, Ex. 4 at 132:5-133:22.

challenger candidates and voters imposed by the present system. In addition, by reducing the barriers to competing for nomination, the elimination of those burdens would allow well-qualified minority lawyers without strong connections to their party's leadership to join the pool of potential Supreme Court nominees. In short, the current selection requirements – and the severe burdens they impose – are not necessary to produce and, in fact, do not serve diversity.

b. The Present Selection Requirements Are Neither Narrowly Tailored to Produce, Nor in Fact Produce, Geographic Diversity

Even if one assumes that geographic diversity among Supreme Court justices is a compelling interest, it is plain not only that the current selection system serves this interest poorly but also, and more importantly, that the State could more narrowly tailor its requirements to produce such diversity without imposing any of the burdens challenged by Plaintiffs.

Defendants argue 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* Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction of Association of Justices of the Supreme Court of the State of New York et al. (hereinafter "Ass'n Br.") at 4-5; *Sise Decl.* at ¶¶ 7, 10, and 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. *See Creelan Reply Decl.* ¶ 11. Even in the five judicial districts identified by Defendants' expert 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. *Creelan Reply Decl.* ¶ 1, Ex. 1, at ¶ 94, *Creelan Reply Decl.* ¶ 11. For example:

- **Second Judicial District.** Staten Island (Richmond County) has approximately 17% of the registered voters in that judicial district, but, according to 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.** Monroe County has only 59% of the voters within the district, but 19 out of the 22 justices – *i.e.*, 86% of the total. *Id.*
- **Eighth Judicial District.** Notwithstanding Dennis Ward’s paean to the geographic diversity created in that district by the judicial convention, Mr. Hechter’s own 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 in that district – *i.e.*, 89% of the total. *Id.*; Ward Decl. ¶¶ 21-22. According to Mr. Ward himself, only two out of the eight counties within that judicial district have *any* justices who reside within them. Creelan Reply Decl. ¶ 12, Ex. 10, at 181.
- **Ninth Judicial District.** As Orange County attorney Benjamin Ostrer explains in his declaration, 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.

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

Even if the present selection system did produce geographic diversity, moreover, the State could address that concern more effectively and without creating barriers to participation by party voters and challenger candidates. Even without altering the current judicial district lines, the State could require that specific judicial seats be elected from among the residents of specific counties, even if they are elected at large. *See, e.g., Dallas County v. Reese*, 421 U.S. 477 (1975) (upholding system for electing county commissioners in which county voters elected four commissioners at large, but each commissioner was required to live within a different residence district). Similarly, if the State decided that residence during the justice’s term of office (but not residence at the time of election) was the goal, it could establish county residence requirements. *See, e.g., Weidman v. Starkweather*, 80 N.Y.2d 955, 956 (1992) (enforcing state law requirement that candidate for county legislature be resident of election unit at least 30 days prior to election); N.Y. Elec. L. § 6-122 (candidates for nomination must meet constitutional or statutory requirements for office at time of election or, in case of judicial offices, within 30 days

of commencement of term of office); N.Y. Pub. Off. L. § 3(1) (holders of local office must be residents of political subdivision or municipal corporation for which they are chosen at time of selection).¹⁶ Moreover, if the State wished to ensure that certain counties could elect one of their own or keep a justice in residence, it could also make such counties separate judicial districts.¹⁷

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.

c. The State Could Address Campaign Finance Concerns Directly and More Effectively Without Burdening Candidates or Voters in the Selection of Supreme Court Justices

Defendants raise the specter of skyrocketing campaign costs and "demagogic" campaigns to suggest that the current selection system serves a compelling interest in avoiding such campaign finance abuses. Defendants' argument fails because much less burdensome alternatives exist for the State to address such concerns, Defendants provide no evidence to suggest that such a specter would materialize in any event, and substantial evidence demonstrates that the current system creates a far more disturbing "campaign finance" problem than real democratic elections would.

Even assuming for the moment that restraining rising campaign costs is a compelling interest, the current closed selection system cannot be justified by the fact that it so restricts competition in the nomination stage that it keeps campaign costs low. To be sure, eliminating voter choice and candidates' opportunities to run for their party's nomination altogether would

¹⁶ 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.

¹⁷ The legislature has the power to alter the boundaries of the judicial districts 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*

reduce campaign costs even further. But such a solution is plainly neither narrowly tailored to serve this interest, nor is it necessary to burden Plaintiffs' rights to do so. Campaign finance concerns can and should be addressed by campaign finance regulation, not by depriving voters and candidates of their constitutional rights to participate in a meaningful nomination election. To that end, earlier this year the Feerick Commission appointed by Chief Justice Judith Kaye 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. Creelan Reply Decl. ¶ 13, Ex. 11 at 23-34. For this reason alone, therefore, Defendants have failed to demonstrate, as they must, that addressing these concerns over campaign finance "make it necessary to burden plaintiff[s'] rights." *Anderson*, 460 U.S. at 789.

In any event, Defendants have failed to prove that the specter of unbridled campaign expenditures would, in fact, materialize if the present system were reformed to allow greater voter choice and opportunities for candidates. To support their argument, Defendants misleadingly cite studies of campaign expenditures in other states in races for those states' highest courts (*i.e.*, most states' "Supreme Court") with statewide campaigns, rather than trial courts comparable to New York's Supreme Court. Creelan Reply Decl. ¶ 2, Ex. 1, at 14; Ass'n Br. at 22-23. Similarly, while they include the testimony of one former Civil Court judge who suggests that her county-wide Civil Court race had exceeded \$100,000 in Manhattan – significantly, a race *against* the County Party Leader's candidate in one of the most expensive districts in the nation – they provide no other evidence or reason to believe that Supreme Court

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.

primary races across the state would match or exceed such a figure. Defendants simply do not prove that campaign costs would, in fact, skyrocket in any way.

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* Creelan Reply Decl. ¶ 13, Ex. 11, at Appendix G-3, 2-5, 9-16. 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. Robert J. McCathy and Michael Beebe, *Courting Big Money*, Buffalo News, July 14, 2002, at A1, included as Creelan Reply Decl. ¶ 14, Ex. 12; Creelan Reply Decl. ¶ 12, Ex. 10, at 103. 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. Creelan Reply Decl. ¶ 15, Ex. 13 at 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.

d. Incumbent Protection, If a Compelling Interest At All, Can Be Served As It Is In Other States, Without Burdening Voters' and Candidates' Rights

Defendants assert that the "convention system insulates incumbent judges" and thereby serves a legitimate or compelling interest. Ass'n Br. at 13. Defendants cite no authority for the notion that incumbent protection can be considered even a legitimate, much less compelling, state interest. (To be sure, Defendant-Intervenor Associations of Supreme Court Justices have an obvious interest in preserving their members' incumbency.) Nor did New York State include such an interest in its constitution when the constitutional convention of 1846 addressed Supreme Court selection. Even if it were considered compelling, however, once again Defendants have neither proved that incumbents would be unduly threatened by a constitutional selection system nor have they shown that it is necessary to impose severe burdens on Plaintiffs' rights in order to protect incumbent justices.

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. Creelan Reply Decl. ¶ 13, Ex. 11, at 35-37, App. G-7. If protecting incumbents from undue challenges is

a compelling state interest, therefore, the State has many options to serve that interest without shutting out candidates and voters so severely from the nomination process.

In any event, Defendants have failed to demonstrate that a different system would, in fact, unduly threaten incumbents. To be sure, the extent of competition for nominations would likely increase with a more open system. As already noted, however, party leaders would remain fully able to back incumbent justices for re-election over challengers – a power that plainly provides a significant benefit to such party-backed candidates. In the absence of any evidence to the contrary, Defendants' argument on this point fails for this reason as well.

e. Ensuring the Merit of Supreme Court Nominees Could Be Served By Much Less Burdensome Alternatives and, In Any Event, Is Not Served By the Present Selection System

Remarkably, Defendants assert that the current Supreme Court selection system “improve[s] the quality of the judiciary and instill[s] public confidence in it” through the use, in a single Judicial District, of an independent screening panel of lawyers. NY Cty Dem. Comm. Br. at 4. Yet such independent screening committees have operated only in the First Judicial District in Manhattan.¹⁸ Nor are such independent panels part of the statutory system challenged by Plaintiffs; they nowhere appear in New York law. 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. Creelan Reply Decl. ¶ 13, Ex. 11, at 17-22. Even if the First District's panel contributes to ensuring meritorious candidates, therefore, by no means can that exception to the rule justify a statutory system that does not even include such screening processes.

¹⁸ An independent screening panel was created in the Second Judicial District just this year, but it has already been the subject of controversy as two members resigned in protest. Daniel Wise, *An Unruly Year for Primaries In Brooklyn Judicial Contests*, N.Y.L.J., Aug. 10, 2004, at 4-5.

While it is difficult, moreover, to assess the merits of Supreme Court justices and most are surely honorable, according to the most recent data from the New York State Commission on Judicial Conduct, New York State Supreme Court justices compare unfavorably to their peers on other state courts with respect to virtually every measure of judicial misconduct:

- Over the five-year period from 1999 to 2003, Supreme Court Justices were 53% more likely to be subject to disciplinary action of any kind than other full time New York State judges;
- Between 1999 and 2003, a Supreme Court Justice was 62% more likely to receive a public discipline penalty than his peers on all other courts; and
- In 2003, the most recent year with published statistics, while on average one out of every 67 Supreme Court justices was publicly disciplined; the next worst average for any court under the Commission's jurisdiction in that year – the City Court – averaged only one out of every 288 judges.

See Creelan Reply Decl. ¶ 16.

In short, the limited data that are available do not support the conclusion that the present selection system serves this interest.

In any event, to the extent that such independent screening panels, if used in all judicial districts, could serve this 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. 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 (without any independent assessments of quality) in most judicial districts across the state. *See, e.g.,*

Creelan Reply Decl. ¶ 17, Ex. 14. In short, using such independent screening panels does not require imposing the burdens on candidates and voters imposed by the current selection system.

* * *

In sum, Defendants have failed to demonstrate – as they must, given the concededly severe burdens imposed by the current Supreme Court selection requirements – that those requirements serve these allegedly compelling state interests and do so in such a narrowly tailored way as to “make it necessary to burden plaintiff[s]’ rights.” *Anderson*, 460 U.S. at 789. For this reason, the challenged requirements are unconstitutional.

CONCLUSION

For the reasons stated, a preliminary injunction should issue.

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Respectfully submitted,

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