06-0635-cv

IN THE

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

—against—

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

*Defendants-Appellant*s,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION IN SUPPORT OF AFFIRMANCE

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NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association,

Defendants-Intervenors-Appellants,

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Statutory-Intervenor-Appellant.

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INTEREST OF *AMICUS CURIAE*

In 1908, the New York County Lawyers' Association ("NYCLA") was founded on two fundamental principles: the inclusion of all who wish to join and reform of New York State's legal system. Over the last century, by remaining faithful to these principles, NYCLA has grown from a small community of practicing lawyers into a diverse, not-for-profit, public service association comprising thousands of lawyers, judges and law students.

NYLCA's mission statement articulates, *inter alia*, the following key institutional purposes: promoting the administration of justice and reforms in the law to advance the public interest; advocating for a strong and independent judiciary; encouraging diversity throughout the legal profession; and maintaining high ethical standards for the bench and bar.

Since its inception, NYCLA has been at the forefront of some of the most far-reaching and tangible reforms in American jurisprudence. NYCLA has continuously led the effort to strengthen and maintain the independence of New York State's judiciary, and it was the first bar association in the nation to issue ethics opinions. Early in the twentieth century, NYCLA proposed legislation to revise the New York City Municipal Court, and spearheaded the effort to enact a unified civil and

criminal court system in New York City. Since 1979, NYCLA has directed significant attention to the nomination process for New York State Supreme Court Justices, the subject of this appeal.

NYCLA believes that a stronger, more independent judiciary can be achieved through appointment by the Executive from a set of judicial nominees proposed by a broad-based, representative bipartisan commission solely on the basis of the nominees' qualifications for the bench. The members of the bipartisan commission should be chosen by the leaders of the three branches of government. NYCLA has consistently urged the enactment of such a selection system. In September 2003, NYCLA empanelled a special Judicial Selection Task Force to evaluate all aspects of the judicial selection process, including both the elective and appointive systems. The Task Force, which continues its work today, comprises a broad cross-section of NYCLA's membership, including judges, both elected and appointed, and large-firm, small-firm and solo practitioners.

The Task Force has issued a series of reports and recommendations designed to maintain and enhance the integrity of and public confidence in the judiciary. Simultaneously with the filing of this brief, NYCLA has released a report proposing short-term and long-term

reforms of the selection process for Supreme Court Justices, including meaningful reforms of the convention system based upon proposals advanced by New York's Unified Court System, and eventual adoption of a constitutional amendment to establish an appointive system. That proposal is directed to the New York State Legislature, the branch of government that NYCLA believes is best suited to enact permanent reform of the present, constitutionally flawed system. Nevertheless, NYCLA urges this Court to affirm the District Court's decision, because the present system is flawed, public confidence in the judiciary is a cornerstone in a free society, and the Legislature has thus far failed to act.

All parties have consented to the filing of this brief.

ARGUMENT

By decision dated January 8, 2006, the United States District Court for the Eastern District of New York (Gleeson, J.) found that plaintiffs had demonstrated a clear likelihood of successfully proving their claim that the existing convention system used to nominate candidates for election as Justices of the New York State Supreme Court violates the First Amendment. *López Torres* v. *N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212 (S.D.N.Y. 2006). The district court thus preliminarily enjoined the implementing provisions of the convention system, codified as Sections 6-106 and 6-124 of the New York Election Law. *Id.* at 256; N.Y. Elec. Law §§ 6-106, 6-124 (McKinney 1998).

Having determined that the existing convention system is unconstitutional, the district court implemented a temporary remedy, which was to last "only until the [New York State] legislature enacts a new method of electing Supreme Court Justices." 411 F. Supp. 2d at 255-56. In choosing a temporary remedy, the district court undertook the "least intrusive course," *id.* at 256, and adopted the nomination process provided for by Section 6-110 of the Election Law, direct primary elections. N.Y. Elec. Law § 6-110 (McKinney 1998).

As the district court noted, there is precedent for this remedy—direct primaries are "the nomination mechanism currently in place for numerous elective judicial posts." 411 F. Supp. 2d at 256. There is also legislative imprimatur: with Sections 6-106 and 6-124 invalidated, Section 6-110 requires that Supreme Court Justices be nominated by direct primary. N.Y. Elec. Law § 6-110 (McKinney 1998); 411 F. Supp. 2d at 256 (explaining that Section 6-110 requires that "[a]ll other party nominations of candidates for offices to be filled at a general election, except as provided for herein, shall be made at the primary election").

Shortly after issuing the preliminary injunction, the district court stayed its ruling until after the 2006 election cycle. (JA 2106.) This appeal followed. For the following reasons, the district court's decision should be affirmed in its entirety.

I.

THE DISTRICT COURT PROPERLY FOCUSED ITS SCRUTINY ON THE CONVENTION SYSTEM FOR NOMINATING SUPREME COURT JUSTICES.

Defendants assert that the district court failed to account for the fact that, apart from the convention system used by the major parties to nominate candidates for Supreme Court Justice, there are other, allegedly non-burdensome ways that candidates can gain a spot on the general election

ballot for Supreme Court Justice. (Appellants' Brief ("App. Br.") at 41-45.) Defendants argue that "because candidates have the ability to appear on the general election ballot" through other means—for example, by petitioning onto the general election ballot as an independent candidate—"the judicial convention system does not infringe upon the First Amendment." (*Id.* at 44.) This is not correct. Given the substantial—indeed determinative—effect that the convention system has on the ultimate outcome of elections for Supreme Court Justice in New York, the district court properly subjected the convention system to scrutiny.

A. Where, As Here, the Nomination Phase of an Electoral Process Effectively Determines the Outcome of the General Election, a District Court Properly Subjects That Phase to Scrutiny.

Courts apply a careful balancing test when evaluating the constitutionality of an electoral system. As the Supreme Court has instructed, in "pass[ing] on constitutional challenges to specific provisions of election laws . . . no litmus-paper test . . . separate[s] those restrictions that are valid from those that are invidious. . . . The rule is not self-executing and is no substitute for the hard judgments that must be made." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974); *see also Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986) (setting forth balancing test).

In New York State, the system for electing Supreme Court Justices has two phases: (i) a nominating convention for major parties, followed by (ii) a general election. The district court correctly found that, of these two phases, the convention always or almost always determines who ultimately will be elected as a Supreme Court Justice. 411 F. Supp. 2d at 230-31. In particular, the court found that (i) in four out of twelve judicial districts "the Democratic Party nominees are always elected," (ii) in four other judicial districts "the Republican nominees are always elected [or] they usually are," and (iii) "[i]n districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Id.*

Where, as here, the nominating phase of an electoral system is outcome determinative, the Supreme Court has instructed that the nominating phase—rather than the general election—is the proper focus of scrutiny. In *Terry* v. *Adams*, the last of the so-called "White Primary" cases,[1] the Supreme Court struck down a primary system (known as the

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[1] There are four "White Primary" cases in which the Supreme Court struck down election restrictions that excluded non-white voters: *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); and *Terry* v. *Adams*, 345 U.S. 461 (1953). Although the Supreme Court found that
(continued ...)

"Jaybird primary") after finding that it was always determinative of the general election. The Court explained its reasoning as follows:

> The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds. . . . The Democratic primary and the general election have become no more than perfunctory ratifiers of the choice that has already been made in Jaybird elections. . . . The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.

Terry v. *Adams*, 345 U.S. 461, 469 (1953).

As Justice Stevens summarized more recently (dissenting in *Clingman* v. *Beaver*):

> If the so-called "[W]hite primary" cases make anything clear, it is that the denial of the right to vote cannot be cured by the ability to participate in a subsequent or different election. Just as the "only election that has counted" in *Terry* [v. *Adams*], 345 U.S. [461], 469 [(1953)], was the Jaybird primary, since it was there that the public official was selected in any meaningful sense, the only primary that counts here is the one in which the candidate respondents want to vote for is actually running.

(... continued)

these restrictions violated the Fifteenth Amendment, the holdings are relevant here because in each case the Court focused on the *nominating phase* (as opposed to the general election) to find that the entire election process was unconstitutional. That is precisely what the district court did in this case.

Clingman v. *Beaver*, 544 U.S. 581, 611 (2005) (Stevens, J., dissenting).

Like the Jaybird primary in *Terry*, the district court properly held that the convention system used to select Supreme Court Justices in New York is "the only election that . . . count[s]." 345 U.S. at 469. The district court thus properly focused its scrutiny on the convention system, as opposed to the general election.

B. The District Court Correctly Held That the Availability of Alternate Means To Appear on the General Election Ballot Does Not Save the Convention System.

In an effort to deflect attention from the constitutional infirmities in the convention system, defendants argue that the district court erred by failing to account for the fact that there are "alternate means of access" to the general election ballot in New York. (App. Br. at 41-42.) In support of this argument, defendants rely on a series of Supreme Court cases that upheld laws limiting the ability of "independent and minor-party candidates" to appear on the general election ballot. (App. Br. at 42; *see also id.* at 43-45.) These cases do not provide any basis for overturning the district court's decision.

First, as the district court found, this case is not about the rights of a candidate seeking "to access the general election ballot as an independent." 411 F. Supp. 2d at 245. Rather, it concerns the ability of

candidates "to compete for their major party's nomination for Supreme Court Justice by garnering support among the rank-and-file members." *Id*. Second, none of the cases on which defendants rely involved convention systems or primaries that were found to be outcome determinative. By contrast, the district court in this case found that "nominations, not general elections, are the critical determinant in electing Supreme Court Justices in New York." *Id.* at 247-48.

These striking factual differences significantly undercut defendants' reliance on the cited Supreme Court cases. In *Jenness* v. *Fortson*, 403 U.S. 431, 432 (1971) (cited in App. Br. at 42), for example, the Supreme Court entertained a challenge brought against a Georgia election law that required a nonparty candidate who sought to appear on the general election ballot to file "a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question." The Supreme Court recognized, however, that nonparty candidates had not only secured access to the general election ballot, but had gone "on to win a plurality of the votes cast at the general election." *Id.* at 439. Georgia's alternative method of appearing on the general election

ballot thus provided nonparty candidates with a meaningful way to participate in the election.

By contrast, the district court in this case found that in New York's general elections for Supreme Court Justice, "no . . . independent candidate ha[d] ever succeeded." 411 F. Supp. 2d at 231. Contrary to defendants' assertions, the district court did not ignore the supposed "alternative means" by which a candidate can access the general election ballot in New York (App. Br. at 41)—the district court instead found that these alternative means have absolutely no effect on the outcome of the general election. For this reason, the district court correctly focused its scrutiny on the convention system, not on access to the general election ballot.

Similarly, in *Storer* v. *Brown*, 415 U.S. 724, 733 (1974) (cited in App. Br. at 42-43), the Supreme Court evaluated the route by which an independent candidate could compete in a California general election without "being nominated in one of the direct party primaries." As defendants note (*see* App. Br. at 43), the Supreme Court upheld the provision of California law that denied general election "ballot position to an independent candidate [who] had a registered affiliation with a qualified

political party at any time within one year prior to the immediately preceding primary election." 415 U.S. at 726.

But the Supreme Court "c[a]me to a different conclusion" with regard to California's requirement that an independent candidate seeking to appear on the general election ballot "file a petition signed by voters not less in number than 5% of the total votes cast in California at the last general election." *Id.* at 738. As to this requirement, the Supreme Court remanded the case for further factual development "to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates." *Id*. California's petition requirements thus were subject to scrutiny notwithstanding "'the write-in alternative provided by California law.'" (App. Br. at 43 (quoting 415 U.S. at 737 n.7).)

Moreover, nothing in *Storer* suggests that the winner of a particular party primary in California was guaranteed to prevail at the general election. With respect to New York's elections for Supreme Court Justice, however, the district court found that the Democratic and Republican parties "divvy up the judgeships" so that the candidate that is selected by a particular party's convention is assured of victory at the general election. 411 F. Supp. 2d at 230-31. The district court thus properly

found that the alternative means of appearing on the general election ballot in New York did not excuse the flaws in the convention system.

The remaining Supreme Court cases cited by defendants are similarly distinguishable. In *Burdick* v. *Takushi*, 504 U.S. 428, 430 (1992), the Supreme Court upheld Hawaii's "prohibition on write-in voting" during the general election only after concluding that this prohibition placed "a limited burden on voters' rights." The Supreme Court reached the same conclusion in *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 191 (1986), when it upheld Washington state's requirement that minor-party candidates obtain "at least 1% of all votes cast" during a "blanket primary" in order to appear on the general election ballot. The Supreme Court based this conclusion on the fact that candidates had "easy access to the primary election ballot" itself, at which point such candidates could seek to demonstrate that "they enjoy a modicum of community support." *Id.* at 197, 199. Here, however, the district court found that New York's convention system places "severe" burdens on the ability of a reasonably diligent candidate to obtain a "major party nomination" through the convention system, and that these severe burdens are not alleviated by the alternative

means by which a candidate can appear on the general election ballot. 411 F. Supp. 2d at 249.

Finally, defendants' reliance on this Court's decision in *LaRouche* v. *Kezer*, 990 F.2d 36 (2d Cir. 1993) (cited in App. Br. at 44-45), is perplexing. In that case, this Court upheld a Connecticut law that limited access to the Presidential primary election ballot to candidates who were either "recognized" as viable candidates by the media or gathered "signatures from one percent of their party's registered voters." *Id.* at 37. After reviewing the facts, this Court concluded that Connecticut's signature requirement did "not appear to require an impractical undertaking for one who desires to be a candidate for President." *Id.* at 40.

The district court here considered the burdens imposed on those who seek a major party nomination to be a Supreme Court Justice in New York. The district court properly concluded that "[r]easonably diligent candidates who lack the support of entrenched party leaders stand virtually no chance of obtaining a major party nomination, no matter how qualified they are and no matter how much support they enjoy among the registered voters of the party." 411 F. Supp. 2d at 249. The district court thus found that the *only* way to become a Supreme Court Justice in New York is

through the convention system established by the major parties. *Id.* Under these circumstances, the district court did not err in subjecting the convention system to scrutiny, notwithstanding the availability of alternative means by which a candidate can appear on the general election ballot.

II.

THE DISTRICT COURT CORRECTLY APPLIED A "MEANINGFUL PARTICIPATION" STANDARD.

In evaluating the constitutionality of the convention system used to select New York Supreme Court Justices, the district court considered whether the convention system violated the right of "voters and candidates" to "participate meaningfully" in the nomination process. 411 F. Supp. 2d at 246. Defendants argue that in doing so the district court created a "new constitutional standard"—allegedly "unprecedented" in Supreme Court or Second Circuit jurisprudence—that is equivalent to establishing a "right to win" a major political party's nomination. (App. Br. at 48-50.) As explained below, the district court did not err in applying a standard based on "meaningful" participation. Nor did it create a "right to win."

A. First Amendment Principles Require That Candidates Be Able To Participate Meaningfully In the Dispositive Stage of the Electoral Process.

The district court correctly found that New York State's judicial districts are subject to "one-party" rule, and therefore rarely, if ever, result in competitive general elections for Supreme Court Justice. 411 F. Supp. 2d at 230-31. Because the general election is almost never competitive, the district court held that "voters and candidates have a right to participate meaningfully" in the convention system, "which includes a realistic opportunity to challenge the selections of party leadership." *Id.* at 246.

This right to meaningful participation is well grounded in Supreme Court jurisprudence. The First Amendment unquestionably protects the associational rights of voters and candidates, which include the right of voters to have "candidates of their choice placed on the ballot," *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992), as well as the correlative right of candidates "to a place on a ballot," *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974). *See also Anderson* v. *Celebrezze*, 460 U.S. 780, 786 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."). Defendants concede that candidates have a right to access the ballot "without undue burden," but assert that whatever

participation flows from that access need not be "meaningful." (App. Br. at 47, 54.) There are several problems with defendants' position.

First, by asserting that participation need not be "meaningful," defendants seem to suggest that "meaningless participation" is enough to satisfy the First Amendment. That cannot be the law. Indeed, this Court has explicitly disapproved of such "empty standards," which "do little to sustain important public policies." *Engel* v. *CBS, Inc.*, 182 F.3d 124, 130 (2d Cir. 1999).

Second, defendants incorrectly assert that "the Supreme Court has never followed a standard based on 'meaningful participation.'" (App. Br. at 47.) In *Terry* v. *Adams*, the Supreme Court condemned the exclusion of minority voters "from meaningful participation in the only primary scheme set up by the State." 345 U.S. at 476. In *Anderson* v. *Celebrezze*, the Supreme Court noted that "ballot access restrictions" must be evaluated in light of the burdens that they place on the rights of voters "'to cast their votes effectively.'" 460 U.S. at 787 (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968)). And in *Regents of University of California* v. *Bakke*, 438 U.S. 265, 305 (1978), the Supreme Court stated that the "relevant opportunity" at issue in its prior election cases encompassed the opportunity

for “meaningful participation in the electoral process.” *See also Rogers* v. *Lodge*, 458 U.S. 613, 640 n.21 (1982) (Stevens, J. dissenting) (stating that “meaningful participation” in the electoral process is a hallmark of representative democracy).

That the Supreme Court has embraced the concept of meaningful participation is not surprising given that it has long recognized that First Amendment “access to the electorate” must “be real, not ‘merely theoretical.’” *American Party of Texas* v. *White*, 415 U.S. 767, 783 (1974) (citing *Jenness*, 403 U.S. at 439).[2] The district court’s application of a meaningful participation standard is thus well supported by Supreme Court precedent.

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[2] The Supreme Court has also endorsed the concept of meaningful participation in other contexts. *See*, *e.g.*, *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891 (1984) (noting that handicapped children must be afforded a degree of access to public education so as to “make such access meaningful”); *Halbert* v. *Michigan*, 125 S. Ct. 2582, 2594 n.8 (2005) (discussing a criminal defendant’s right to “meaningful access” to the judicial system); *Pharm. Research and Mfrs. of America* v. *Walsh*, 538 U.S. 644, 650 (2003) (discussing Medicaid patients’ right to “meaningful access” to prescription drugs).

B. The District Court Did Not Interpret Meaningful Participation As the Ability To Win the Nomination of a Major Party.

In testing the severity of the burdens imposed on plaintiffs' First Amendment rights, the district court, relying on *Storer*, 415 U.S. at 742, asked whether there was any chance that "a reasonably diligent challenger candidate for Supreme Court Justice" could "succeed in getting her own delegates and alternates on the ballot in each Assembly District?" 411 F. Supp. 2d at 248. Alternatively, the court asked whether that same reasonably diligent candidate could "succeed in lobbying the delegates installed by the party leaders?" *Id.* The district court answered both questions in the negative. *See id.* at 249.

In an unsuccessful effort to construe the district court's analysis as establishing a "right to win an election or, in the case of a convention, a nomination" (App. Br. at 47), defendants take out of context one quotation from the district court's decision, arguing that a candidate who "*succeed[ed] in lobbying the delegates*" necessarily "would have *won* the party's nomination." (App. Br. at 46 (emphasis in original) (citing SPA-62).) Considered in its proper context, however, it is plain that the district court struck down the convention system after concluding that it gave challenger candidates "virtually *no* chance of obtaining a major party nomination." 411

F. Supp. 2d at 249 (emphasis added). In place of the convention system, the district court entered a temporary remedy that "'assure[s] that intraparty competition [will be] resolved in a democratic fashion.'" *Id.* at 256 (quoting *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 572 (2000)). Moving from a democratic system that gives challenger candidates *some chance* of winning, rather than "virtually no chance" of winning, is a far cry from granting candidates an absolute right to win.

III.

THE DISTRICT COURT PROPERLY EXERCISED JUDICIAL RESTRAINT IN IMPOSING THE TEMPORARY REMEDY.

As explained above, the district court correctly held that plaintiffs demonstrated a clear likelihood of successfully establishing that the convention system violates the First Amendment. 411 F. Supp. 2d at 256. The district court therefore enjoined enforcement of Sections 6-106 and 6-124 of the Election Law. 411 F. Supp. 2d at 256. After properly noting that "the choice of a permanent remedy" was for the New York State Legislature, the district court imposed a temporary remedy that would

remain in place only "until the legislature of the State of New York enacts a new statutory scheme." *Id.* at 255-56.[3]

The district court's decision to enjoin the convention system is consistent with fundamental principles of statutory construction, as recently set forth by the Supreme Court in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006). In *Ayotte*, the Supreme Court considered a challenge to a New Hampshire law requiring minors to demonstrate parental notification prior to receiving an abortion. *Id.* at 964. In particular, the Supreme Court considered whether, having invalidated New Hampshire's parental notification law because it lacked an exception for the preservation of a minor's health, the lower courts erred by permanently enjoining enforcement of the statute, rather than implementing some narrower remedy. *Id.* at 966. The Supreme Court remanded the case to the Court of Appeals for further consideration of remedies.

In doing so, the *Ayotte* Court identified three "interrelated principles" that should inform a court's approach to remedies when a statute has been invalidated. *Id*. at 967. First, the Supreme Court noted that it is

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[3] As noted, *supra*, the district court then stayed the preliminary injunction pending this appeal. (JA 2106.)

best "not to nullify more of a legislature's work than is necessary," which means that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 967-68 (citations omitted). Second, because the "institutional competence" of the judiciary is limited, the Supreme Court instructed that, with one possible exception, courts should "restrain [themselves] from 'rewrit[ing] state law to conform it to constitutional requirements.'" *Id.* at 968 (citation omitted).[4] Finally, the Supreme Court noted that the "touchstone for any decision about remedy is legislative intent," because a court cannot use its powers to "circumvent the intent of the legislature." *Id.* (citation omitted).

Defendants rely on *Ayotte* to argue that, instead of enjoining enforcement of the convention system, the district court should have "set aside any provisions of the statutory scheme that it found problematic," and modified the statutes to address the identified infirmities. (App. Br. at 84-

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4 The exception to this rule is where the Supreme Court has "clearly . . . articulated the background constitutional rules at issue" such that the remedy can be easily articulated. 126 S. Ct. at 968. That exception is plainly not triggered in this case, where the constitutional issues are complicated, and where "line-drawing [would be] inherently complex." *Id.* As the Court explained in *Ayotte*, statutory modification under these circumstances "may call for a 'far more serious invasion of the legislative domain' than [courts] ought to undertake." *Id.*

85.) In advancing this argument, defendants misread the holding of *Ayotte*, as well as its factual context.

First, the fact that New Hampshire's parental notification law had a severability clause strongly suggested that the New Hampshire Legislature would have preferred a more limited remedy. 126 S. Ct. at 969. By contrast, New York's Election Law has no severability clause, which suggests that New York's Legislature did *not* intend for the convention system to remain in place if some portion of it were invalidated. (App. Br. at 81.)

Second, the constitutional question in *Ayotte*—whether there must be a health-of-the-minor exception to the parental notification law—was not in doubt, because the Supreme Court had recently invalidated a similar Nebraska law in its entirety for failing to have such an exception. 126 S. Ct. at 969. *See also Stenberg* v. *Carhart,* 530 U.S. 914, 930 (2000) (lack of a health exception was an "independent reaso[n]" for finding the

ban unconstitutional).[5] That is not the case here. Given the complexity of the convention system, as well as its unique nature, the district court would almost certainly have "inva[ded] . . . the legislative domain" had it attempted to modify rather than enjoin the convention system. 126 S. Ct. at 968 (citation omitted).

Defendants actually make this very point in their brief, noting that in this case "neither the constitutional rule nor the appropriate remedy are [sic] easily defined by prior case law," which means that "there is a significant risk that the remedy will improperly usurp legislative authority." (App. Br. at 82.) As explained in *Ayotte*, it is precisely for this reason that the district court properly imposed as a temporary remedy the only one with legislative imprimatur—direct primaries, as set forth by Section 6-110 of the Election Law. *See* 126 S. Ct. at 968 (courts should not modify statutes

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[5] The Supreme Court's holding in *Stenberg* further supports the district court's decision to enjoin enforcement of the convention system in favor of primary elections. As in *Stenberg*, in this case no defendant asked the district court for the more "limited" relief that they now advocate on appeal—judicial modification of the convention system. *Ayotte*, 126 S. Ct. at 969 (distinguishing *Stenberg* because "the parties [in *Stenberg*] . . . did not ask for, and [the Court] did not contemplate, relief more finely drawn").

where constitutional context is "murky," or where "line-drawing is inherently complex").

Section 6-110 of the Election Law provides: "All other party nominations of candidates for offices to be filled at a general election, except as provided for herein, shall be made at the primary election." N.Y. Elec. Law § 6-110 (McKinney 1998). Sections 6-106 and 6-124, which the district court correctly enjoined, and which implemented the convention system, fell within the "except as otherwise provided" exception to Section 6-110. *Id.* Having invalidated that exception, the district court was left with the remainder of Section 6-110, which requires that candidates for Supreme Court Justice, like many other judicial candidates in New York State, shall be nominated by "primary election." *Id.* The district court thus did not err in implementing a direct primary system as a temporary remedy, as it was constrained to do.[6]

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[6] Although NYCLA believes the district court was constrained to invoke Section 6-110 to implement a direct primary system on a temporary basis, NYCLA continues to believe that Supreme Court Justices should be selected through a commission-based appointive system solely on the basis of qualification. This brief should not be read to suggest, implicitly or otherwise, that NYCLA supports direct primaries, a judicial selection method that poses a grave risk to judicial independence, particularly for incumbents.

CONCLUSION

For the foregoing reasons, this Court should affirm the preliminary injunction entered by the district court in its entirety.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,092 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I have relied on the word count provided by Microsoft Word 2002, the word-processing system used to prepare this brief.

/s/ Christopher F. Nelson
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