

No. 06-766

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IN THE  
*Supreme Court of the United States*

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NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

*Petitioners,*

v.

MARGARITA LOPEZ TORRES, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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## **QUESTION PRESENTED**

*Amicus curiae* addresses the following question only:

Whether a New York State election scheme that, in practice, has placed control over the selection of judges in the hands of the leader of the political party that is dominant within each judicial district violates the First Amendment rights of voters and would-be judicial candidates.

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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**INTERESTS OF *AMICUS CURIAE***

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.<sup>1</sup> WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

In particular, WLF has regularly appeared in this and other federal courts in cases raising First Amendment issues regarding the conduct of elections. *See, e.g., Gonzalez v. State of Arizona*, 485 F.3d 1041 (9th Cir. 2007). WLF strongly supports both the First Amendment right of individuals to associate for the advancement of political beliefs and the First Amendment rights of qualified voters, regardless of their political persuasion, to cast their votes effectively.

WLF has long advocated in support of the First Amendment rights of political parties and believes that they should be granted considerably leeway in the manner they go about choosing their standard bearers for general elections. For example, WLF supports the right of a party to insist that the selection of candidates be limited to those affiliated with the party. However, contrary to the views of Petitioners and their *amicus* supporters, WLF does not believe that the Second Circuit decision poses any threat to political parties' First Amendment associational rights. The district court injunction

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

is directed at New York election laws, not at the activities of party officials.

WLF supports the selection of state court judges through the electoral process. Because common law courts possess the power to create new law, elections provide an appropriate check on the use of that power by state court judges. WLF also believes that states have a legitimate interest in shielding judicial selection from some of the excesses of the electoral process. But the First Amendment does not permit a State to advance that interest in the manner New York has employed: establishing a system that effectively places control of the electoral process in the hands of a small number of political party leaders. The judicial election systems adopted by numerous other States demonstrate that it is possible to craft measures designed to eliminate excessive partisanship from the electoral process without trampling on First Amendment rights.

WLF takes no position regarding the appropriate judicial remedy for the First Amendment violations identified in this case. WLF is filing this brief with the consent of all parties. Copies of the consent letters have been lodged with the Court.

### **STATEMENT OF THE CASE**

Petitioners challenge the decision of a federal district court granting a preliminary injunction against New York State's system of electing Justices to its Supreme Court. The Second Circuit upheld the district court's findings of fact as "not clearly erroneous," Pet. App. 10, and none of the Petition's Questions Presented challenge any of those factual findings. Accordingly, the findings (*id.* 96-150) should be accepted as accurate for purposes of this appeal.

WLF sets forth herein only a brief summary of those findings. Since 1846, New York law has provided for the popular election of Supreme Court Justices. In 1921, New York eliminated direct primaries as the means of selecting party nominees; thereafter, nominees have been chosen by judicial district conventions. New York Election Law § 6-106. There are 12 judicial districts in the State, each with its own conventions for each major party. Delegates are chosen for the conventions by means of “delegate primaries” open to all party members. New York Election Law § 6-124. To gain a spot on the delegate primary ballot, a party member must gather (during a 37-day period) 500 valid signatures from party members residing in his assembly district. Pet. App. 12.<sup>2</sup>

In actual operation, the selection of delegates “is dominated by party leadership,” and claims that a candidate seeking her party’s nomination “who lacks party leader support can clear all the hurdles necessary to elect supportive delegates to the convention” are “unsupportable.” *Id.* 100. The district court also rejected as “unsupportable” claims that “challenger candidates need not elect their own supportive delegates because they can lobby the delegates elected by their party’s machinery”; the court found that “[t]he structural and practical impediments” to doing so are “insurmountable.” *Id.* The court found that nominating conventions are “perfunctory, superficial events” and that they do not actually determine the parties’ nominees but rather merely “formally endorse determinations made elsewhere.” *Id.* 125. The district court determined that the general elections are a “formality” because there are virtually never any contested elections. *Id.* 129. In

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<sup>2</sup> This nominating process is unique to Supreme Court Justices. The State conducts open primaries with respect to *all other* elective offices, and individuals can gain a spot on the primary ballot for all such offices by gathering a specified number of signatures. Pet. App. 98.

most of the 12 judicial districts, the candidate of the dominant party (either the Republicans or the Democrats) always or virtually always wins. *Id.* “In 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.* 130.

The district court summarized its factual findings as follows:

[T]he plaintiffs have demonstrated convincingly that local major party leaders – not the voters or the delegates to the judicial nominating conventions – control who becomes a Supreme Court Justice and when. The highly unusual processes by which that extremely important office is filled perpetuate that control, and deprive the voters of any meaningful role.

*Id.* 95.

Plaintiffs, a group of New York voters, aspirants to the Supreme Court, and Common Cause/NY, filed a challenge to the system of selecting party nominees for the Supreme Court, alleging that the system violated the First Amendment and the Fourteenth Amendment’s Equal Protection Clause, both facially and as applied to them. The complaint alleged that the system placed severe and unjustified burdens on candidates seeking to challenge the candidate backed by the party leader, deprived rank-and-file party members of their rights to associate to choose party candidates, and denied all voters their rights to vote effectively.

In January 2006, the district court granted a preliminary injunction against continued use of the challenged election system. *Id.* 93-185. Specifically, the district court enjoined

continued enforcement of New York Election Law §§ 6-106 and 6-124. The court found that the system imposed a “severe” burden on Respondents’ First Amendment rights. *Id.* 172. It further found that none of the interests that, according to Petitioners New York State Board of Elections, *et al.* (collectively, “the Board”), were being served by the electoral system were sufficiently compelling to justify the burden imposed on Respondents’ rights. *Id.* 172-79.<sup>3</sup> In light of its First Amendment ruling, the court did not reach Respondents’ equal protection claims. *Id.* 185.

The result of the district court’s preliminary injunction was to put in place the State’s default position for the selection of party nominees: a primary election open to all party members submitting the requisite signatures. The district court made clear, however, that it was not seeking to impose a new nominee selection procedure on the State; rather, it stressed that the final choice of a new procedure was up to the New York legislature, and it stayed its injunction pending appeal to provide New York an opportunity to devise a new plan of its own. *Id.* 183-84.

The Second Circuit unanimously affirmed. *Id.* 1-85. The appeals court held that the district court did not abuse its discretion in finding that New York’s election system severely burdened Respondents’ First Amendment rights and, as such, should be enjoined because it was not narrowly tailored to serve a compelling state interest. *Id.* 85. In making that determination, the appeals court relied on the district court’s findings of fact, which were made following a 13-day hearing and which the appeals court concluded were not “clearly

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<sup>3</sup> The court also found that Respondents had established that they would suffer irreparable harm in the absence of an injunction. *Id.* 150-52.

erroneous.” *Id.* 10.<sup>4</sup> The appeals court rejected the Board’s arguments that the First Amendment is inapplicable to New York’s nominating process, *id.* 37-41, and, alternatively, that the First Amendment guarantees, at most, *access* to the nominating process, not a realistic opportunity for success. *Id.* 41-46. The court also rejected the Board’s arguments that the First Amendment associational rights of political parties are sufficiently strong to permit a party, if it so chooses, to place control of the nominating process in the hands of party leaders. *Id.* 49-54.

### SUMMARY OF ARGUMENT

If New York were to adopt a law declaring that Supreme Court Justices are to be popularly elected, but only the leaders of the most powerful political party within each judicial district are allowed to vote in that election, the law would surely amount to an unconstitutional abridgement of voting rights. Such a severe limitation on the franchise would be subjected to the strictest of constitutional scrutiny, and the Court has never recognized a state interest sufficiently compelling to justify voting abridgement of that magnitude. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). Based on the detailed (and uncontested) factual findings of the district court, the New York election system has exactly the same effect on voting rights as the hypothetical election statute described above. Because of those severe effects on First

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<sup>4</sup> The appeals court also conducted its own “independent investigation of the whole record” to assure that the district court judgment did not “constitute a forbidden intrusion on the field of free expression.” *Id.* 58 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). After conducting that review, the court concluded, “We cannot say that the District Court clearly erred in finding that New York’s judicial nominating scheme imposes severe burdens on the associational rights of voters and candidates.” *Id.* 59.

Amendment rights, the New York election system was properly subjected to strict scrutiny by the courts below. The courts below also properly held that the interests identified by the Board in support of the election system were not sufficiently compelling to justify the State's infringement of Respondents' First Amendment rights.

The Court has explained that statutes imposing voting restrictions affect two interwoven strands of constitutionally protected rights: the First Amendment right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. The factual findings of the district court make clear that both strands are severely affected by New York's system of electing Supreme Court Justices. The district court found that the party leader chooses his party's candidate and that rank-and-file party members who support a different candidate are "never" successful in their challenges to the party leader's choice – regardless of how large a percentage of party members support the challenger. Pet. App. 171. The role of the party leader is not written into the challenged election statutes; but in evaluating the burdens an election system imposes on voters, the constitutional analysis requires a detailed analysis of how the system actually functions in addition to an analysis of the statutes themselves. Here, as the district court found, the inevitable practical effect of New York's statutory scheme for selecting Supreme Court nominees is to place exclusive control of the nominating process into the hands of the party leader.

There is often nothing inherently unconstitutional about political party rules that grant a small group of party leaders authority to select party nominees. After all, if a group of party members is dissatisfied with their party leader's choice of candidates and (as is often the case) any attempt to remove

the leader from office would take too long to allow for the candidate choice to be overturned, they can exercise their associational rights by placing their preferred candidate on the ballot as an independent or as the candidate of a different political party. But, as the district court found, this procedure not a realistic option in Supreme Court races: in virtually every case, the winner of the dominant party's convention is the automatic winner of the general election. Thus, the New York electoral system, by denying rank-and-file members *any* effective access to the candidate-selection process, imposes a severe burden on the associational and voting rights of party members. Under those circumstances, the burden of proof falls on the Board to demonstrate that the electoral system serves a compelling government interest in a narrowly tailored manner. The Board did not come close to meeting that burden in the district court; accordingly, the district court did not abuse its discretion in granting a preliminary injunction. In particular, the Board failed to demonstrate that the State's interest in avoiding excessive partisanship in judicial elections could not be satisfied by means that impose far less burdens on voting rights of rank-and-file party members.

The decision below poses no threat to the associational rights of New York's political parties. The district court issued an injunction against State officials only; political party officials are not required to do anything. The parties fault the district court for allegedly ordering the Board to conduct primary elections for the selection of party nominees; but even if that were an accurate description of the district court's injunction, it would not infringe on the parties' associational rights because this Court repeatedly has made clear that States may *require* parties to select their nominees through primaries in which all party members are entitled to participate. WLF would agree, *as a policy matter*, that political parties generally should be granted broad leeway in selecting a method for

choosing candidates, but they have no constitutional right to select their candidates through a convention system. Nor can the district court fairly be said to have prohibited all convention systems; rather, it merely prohibited one convention system that imposed particularly severe burdens on constitutional rights. Nothing in the decisions below suggests that similar election systems would be problematic if (contrary to the facts in this case) the general election provided voters and candidates with an effective alternative means of exercising association rights.

## **ARGUMENT**

### **I. NEW YORK'S ELECTORAL SYSTEM IMPLICATES 1ST AND 14TH AMENDMENT RIGHTS**

#### **A. The Electoral System Implicates the Rights of Individuals to Associate for the Advancement of Political Beliefs and the Rights of Qualified Voters to Cast Votes Effectively**

As the uncontested factual findings of the district court indicate, rank-and-file party members are deprived of “any meaningful role” in the selection of their party’s Supreme Court Justice nominees. Pet. App. 95. Although New York has established a primary election process – involving the election of delegates to a convention where nominees supposedly are to be chosen – the system is actually “designed to freeze the political status quo, in which party leaders, rather than the voters, select the Justices of the Supreme Court.” *Id.* 183. Given those findings, it is difficult to argue that the

district court abused its discretion in determining that the ballot access burdens imposed in this case are “severe.” *Id.* 172.<sup>5</sup>

Petitioners nonetheless insist that a party’s selection of its nominees operates in a First Amendment rights-free zone. *See, e.g.,* Brief of Petitioners New York State Board of Elections, *et al.*, (“Board Br.”) at 14 (“[T]his Court has never held that the *First Amendment* grants to candidates a right of unfettered access to [party nomination] contests. . . . And with good reason: a political party is not a traditional public forum.”) (emphasis in original). But while a party itself is not a public entity, a state-run primary election quite clearly is a public affair subject to all the constraints on state action imposed by the Constitution. Having mandated the use of elections to select Supreme Court nominees and having chosen to conduct primary elections in connection with the parties’ selection of judicial nominees, New York is obligated to ensure that that selection process complies with constitutional rights. As the Court recently explained, although States are entitled to dispense with judicial elections altogether, “[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 that role.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (internal citation omitted).

In a number of cases, the Court has invalidated state-mandated primary election procedures that violated constitutional rights, in each case without regard to whether judicial intervention entailed imposing limits on a political

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<sup>5</sup> When, as here, the burden imposed by the State on voting rights is severe, the burden of proof imposed on the State is more exacting: “the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

party's freedom to select nominees as it saw fit. *See, e.g., Bullock v. Carter*, 405 U.S. 134 (1972) (invoking Equal Protection Clause to strike down excessive primary election filing fees); *Smith v. Allright*, 321 U.S. 649 (1944) (invoking Fifteenth Amendment to prohibit political party from excluding non-whites from voting in its state-run primary election); *cf. California Democratic Party v. Jones*, 530 U.S. 567, 573 n.5 (2000) (political parties may not exclude voters from its primaries if doing so "violates some independent constitutional proscription," such as First Amendment associational interests). Petitioners have not articulated any coherent theory regarding why primary elections should be subject to these other constitutional protections but not to the First Amendment.

The Court has explained that statutes imposing voting restrictions affect two interwoven strands of constitutionally protected rights: the First Amendment right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). The factual findings of the district court make it plain that both strands of protected rights are implicated by the New York election system. By adopting a system "designed to freeze the political status quo, in which party leaders, rather than the voters, select the Justices of the Supreme Court," Pet. App. 183, New York has made it impossible for rank-and-file party members to associate for the purpose of electing their favored candidate and to cast their vote effectively for that candidate.

Noting that New York law makes no reference to party leaders, Petitioners insist that the enormous power wielded by party leaders in selecting judicial nominees is not a function of New York's electoral system but rather is simply an example

of “politics in action.” But that assertion is directly contrary to the findings of the district court, which found that the system is “designed” to ensure that parties leaders can control the selection of Supreme Court Justices, *id.* 183; in other words, the system is perpetuated to ensure that the anticipated “politics in action” reaches the desired result.

By reaching its findings based on an examination of how the election system has actually functioned over the course of many years (rather than focusing solely on the statutory language), the district court was proceeding precisely as this Court has instructed. *See, e.g., Bullock*, 405 U.S. at 143 (“In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.”). As the Court explained in *Anderson*, “Constitutional challenges to specific provisions of a State’s election laws . . . cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions.” *Anderson*, 460 U.S. at 789. Instead, courts must engage in a detailed analytical process that includes consideration of “the character and magnitude of the asserted injury” to constitutional rights; “identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed” by the challenged provision; and “consider[ing] the extent to which those interests make it necessary to burden the plaintiffs’ rights.” *Id.* The Court added, “The results of this evaluation will not be automatic; as we have recognized, there is no substitute for the hard judgments that must be made.” *Id.* (citation omitted). The district court conducted precisely the sort of detailed analysis mandated by *Anderson*, and its resulting factual findings – regarding the severity of the burden imposed on Respondents’ associational rights and the interests asserted by New York as justifications for the burdens imposed – are not subject to challenge in this Court.

**B. Regardless Whether Rank-and-File Party Members Have a First Amendment Right to Influence Party Nominee Selection, They May Not Be Shut Completely Out of the Process**

Petitioners argue alternatively that even if the First Amendment affords some protection to the associational rights of rank-and-file party members, those rights are satisfied when, as here, the plaintiffs have “reasonable access to the general election ballot.” Board Br. 15. Regardless whether providing party members with “reasonable access” to the general election ballot (while simultaneously denying them all influence over the party’s nominee selection) could *ever* satisfy those members’ associational rights, it does not do so here, where (as found by the district court) the general election is a mere “formality” because there are virtually never any contested elections. Pet. App. 129.

This Court has repeatedly held that party members may not be excluded from the process by which party nominees are selected in those instances in which that nominee is virtually certain to win the general election. *United States v. Classic*, 313 U.S. 299, 318 (1941); *Terry v. Adams*, 345 U.S. 461 (1953). *Terry* is closely analogous to Respondents’ case. It involved a challenge to the racially exclusionary practices of a private political group in Texas known as the Jaybird Democratic Association. Although the Jaybirds had no official status, they effectively controlled all elections in Fort Bend County, Texas. Whites in the county agreed that the winner of the whites-only “primary election” conducted by the Jaybirds would be the sole candidate in the Democratic Party primary – thereby assuring his ultimate election. The Court ruled that the exclusion of black voters from the Jaybird primary violated the Fifteenth Amendment, even though the Jaybirds themselves were not state actors and even though black voters

were entitled to participate in both the Democratic primary and the general election. *Terry*, 345 U.S. at 465-66 (plurality). Key to the Court's decision were its findings that the Jaybird primary was "[t]he only election that has counted in this Texas county for more than 50 years," and that the Democratic primary and general election were "no more than the perfunctory ratifiers" of the choice already made in the Jaybird primary. *Id.* at 469.

*Terry* is fatal to the Board's claim that New York's provision of reasonable access to the general election ballot satisfies Respondents' First Amendment concerns. In light of the district court's factual finding that access to the New York general election ballot provides no benefit because the general election for Supreme Court seats is a meaningless "formality," *Terry* dictates that Respondents must be provided a right of meaningful participation in the process of selecting their parties' nominees. As in *Terry*, the Board may not avoid constitutional objections by asserting that any violation of Respondents' associational rights is the product of private actions. To hold otherwise would be to permit New York to effectively shut Respondents out of the electoral process.

WLF believes that there is often nothing inherently unconstitutional about political party rules that grant a small group of party leaders authority to select party nominees. After all, if a group of rank-and-file party members is dissatisfied with their party leader's choice of candidates and (as is often the case) any attempt to remove the leader from office would take too long to allow for the candidate choice to be overturned, they can exercise their associational rights by placing their preferred candidate on the ballot as an

independent or as the candidate of a different political party.<sup>6</sup> But, as the district court found, that is not a realistic option in Supreme Court races: in virtually every case, the winner of the dominant party's convention is the automatic winner of the general election. Thus, the New York electoral system, by denying rank-and-file members *any* effective access to the candidate-selection process, imposes a severe burden on the associational and voting rights of the members. Under those circumstances, the burden of proof falls on the Board to demonstrate that the electoral system serves a compelling government interest in a narrowly tailored manner. *Burdick*, 504 U.S. at 434.

WLF does not mean to suggest that *nonmembers* of the dominant political party have any basis for complaining that they have been excluded from the party's candidate selection process. The Court in *Jones* rejected a contention that a nonmember should be deemed "disenfranchised" simply because the nonmember's "keen desire to participate in selection of the party's nominee" is not fulfilled. *Jones*, 530 U.S. at 583 (explaining that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership") (internal citation omitted). But members *do* have a valid constitutional claim. They may not be excluded from the nomination process of their own political party if the result is to deny them *any* ability to associate for the advancement of political beliefs regarding the election and *any* ability to cast an effective vote.

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<sup>6</sup> *But cf. Bullock*, 205 U.S. at 146-47 ("[W]e 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 [primary election] filing fees imposed by state law.").

**C. Petitioners Have Failed to Meet Their Burden of Proving That the Severe Burdens Imposed on Respondents' Associational Rights and Voting Rights Serve a Compelling Interest in a Narrowly Tailored Manner**

None of the interests asserted by the Board in support of its voting restrictions are sufficiently compelling, or sufficiently narrowly tailored, to justify the burdens imposed on Respondents by the New York electoral scheme. In particular, New York's interest in preventing excessive partisanship in judicial elections – as a means of promoting judicial independence – can be satisfied without imposing the severe burdens on associational rights and voting rights imposed under the current electoral scheme.

WLF notes initially that the district court's findings on this issue are entitled to substantial deference. The Court reviews a district court's "ultimate conclusion" on preliminary injunctions for abuse of discretion. *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 867 (2005); *see also Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) (Supreme Court "has always applied the abuse of discretion standard on review of a preliminary injunction"). In *Ashcroft*, the Court also held that when the constitutional question is close, the Court "should uphold the injunction and remand for trial on the merits." *Id.* 664-65. To the extent that issues regarding whether a State interest is compelling and whether the implementation is narrowly tailored are deemed issues of fact, even greater deference is warranted. Fed.R.Civ.P. 52(a) provides that findings of fact should not be set aside by a reviewing court unless "clearly erroneous." *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (Supreme Court reviews district court factual findings for "clear error"). When (as here) a federal appeals court has reviewed and affirmed a district court's factual findings, the

Court will “not lightly overturn” the district court’s findings. *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 193n.3 (1972)).

The trial court’s rejection of New York’s avoiding-excessive-partisanship argument was eminently reasonable and certainly did not amount to an abuse of discretion. Pet. App. 177-81. The trial court correctly viewed this type of argument (e.g., if open primaries are held, judicial candidates may have to “pander to individuals or corporations who will support their candidacy”) as “justifications for eliminating elections as a method for selecting judicial officers” rather than as justification for severely burdening associational rights and voting rights. *Id.* 178. More importantly, the argument rings hollow when one considers that nominees for all New York judgeships other than Supreme Court Justices are selected by open primaries. If New York really believed that its convention system served a compelling interest in reducing excessive partisanship in judicial elections, one would expect that New York would have abandoned open primaries for some or all of its other judgeships as well.

Moreover, *White* discussed a wide range of alternative judicial election systems that, on the one hand, are designed to avoid excessive partisanship in judicial elections but, on the other hand, avoid placing effective control over selection of judges into the hands of political party leaders. *See, e.g., White*, 536 U.S. at 791 (15 States have adopted the Missouri Plan, under which judges are appointed by high elected official, then subsequently stand for unopposed retention elections in which all voters are permitted to decide whether judge should be recalled); *id.* 792 (at least 16 States use nonpartisan judicial elections). If New York really believes it has a compelling interest in avoiding excessive partisanship in judicial elections, it could significantly reduce the existing

severe burden on associational and voting rights by adopting one of the alternatives discussed in *White*.

## **II. THE DECISION BELOW POSES NO THREAT TO THE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES**

WLF has long advocated in support of the First Amendment rights of political parties and believes that they should be granted considerable leeway in the manner they go about choosing their standard bearers for general elections. Nonetheless, WLF does not share the concern of many of the Petitioners that the decisions below will undercut the associational rights of political parties.

In particular, the district court injunction poses no threat to the associational rights of New York's political parties. Indeed, the injunction names State officials only; political parties are not required to do anything. If the injunction is allowed to take effect, New York at least temporarily will have primary elections for Supreme Court Justices – identical to the primary elections currently used to select party nominees for other judgeships in New York and party nominees for judgeships in numerous other States. So long as the elections are limited to those willing to associate themselves with the party in whose primary they are participating, such primary elections do not constitute a burden on the political parties' associational rights. This Court has repeatedly made clear that States may *require* parties to select their nominees through primaries in which all party members are entitled to participate. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring in part and concurring in the judgment) (“Nearly every State in the Nation now mandates that political parties select their candidates for national or statewide office by means of primary elections.”); *American*

*Party of Texas v. White*, 415 U.S. 767, 781 (1974) (it is “too plain for argument” that States may require political parties to select their candidates through primary elections). Thus, a decision by New York to begin using primaries to select nominees for Supreme Court Justices will not burden any recognized associational right of political parties.

WLF would agree, *as a policy matter*, that political parties generally should be granted broad leeway in selecting a method for choosing candidates; but they have no constitutional right to select their candidates through a convention system. Nor can the district court fairly be said to have prohibited all convention systems; rather, it merely prohibited one convention system that imposed particularly severe burdens on constitutional rights.

As noted above, the current election system would not be objectionable but for a unique feature of that system: New York lacks judicial districts in which there are two credible political parties, and thus general elections for Supreme Court Justices are merely a “formality.” Pet. App. 129. Accordingly, it is not fair to criticize the decisions below for undermining convention systems. The precise “delegate primary”/convention system employed by New York would not, in WLF’s view, be constitutionally problematic if adopted in a State with competitive general elections for judges. Moreover, if several of the more severe burdens imposed by the New York system were removed (*e.g.*, the excessive number of signatures that delegates are required to gather, the extremely tight time frame for collection of signatures, and the strict limitation on the number of delegates), it might well be that the revised system could pass constitutional muster.

Nor is there any indication in Supreme Court case law that the Constitution prohibits a political party from selecting

its nominees at a political convention. For example, the Court reviewed Virginia's use of conventions to select party nominees in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). Although the Court faulted the Republican Party of Virginia for changing its convention rules (it began charging a filing fee for delegates) without obtaining preclearance from the U.S. Department of Justice as required by Section 5 the Voting Rights Act of 1965, the Court gave no indication that it viewed the convention system as constitutionally problematic. Similarly, the Court gave no hint that the convention system employed in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), raised any constitutional concerns. *Tashjian* addressed whether political parties had a constitutional right to require a State to allow the parties to invite independents to vote in their primaries, but access to the primary ballot in that case was significantly burdened by a statute that limited ballot access to candidates who received at least 20% of the delegate vote at the state party convention. *Id.* 220. The Court gave no indication that this ballot-access limitation was constitutionally suspect.

In sum, nothing in the decisions below calls into question the constitutionality of using conventions to select party nominees, and (should State officials so desire) it might even be possible for New York to redraft its Supreme Court Justice nominee selection rules in a manner that retains conventions yet conforms to the decisions below.

**CONCLUSION**

*Amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the decision of the court of appeals.

Respectfully submitted,

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