No. 06-766

IN THE

Supreme Court of the United States

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

v.

MARGARITA LÓPEZ TORRES, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

TODD D. VALENTINE
NEW YORK STATE
BOARD OF ELECTIONS
40 Steuben Street
Albany, NY 12223
(518) 474-6367

RANDY M. MASTRO
JENNIFER L. CONN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue, 47th Floor
New York, NY 10166-0193
(212) 351-4000

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
MICHAEL S. DIAMANT
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners
New York State Board of Elections, Douglas Kellner, Neil W. Kelleher, Helena Moses Donohue and Evelyn J. Aquila

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

Respondents contend that Sections 6-106 and 6-124 of the New York Election Law violate the First Amendment right of "members of a recognized political party to participate in the choice of their party's nominees." Resp. Br. 16. Sections 6-106 and 6-124 are said to burden the associational rights inuring to "party members" in two ways: Respondents argue that, by "requiring political parties to fence out" from the nomination process "their rank-and-file," the two statutes impermissibly interfere with the right of party members to select autonomously the candidates who will represent the party in the general election. *Id.* at 22 (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000)). Alternatively, respondents contend that the two statutes, "'practically, if not formally, exclud[e]'" "challenger candidates" "from the nomination process,'" *id.* at 25 (quoting Pet. App. 45), and thereby impermissibly burden the ability of those candidates and "like-minded members of their parties" to associate with one another. *Id.* at 25, 26 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). Both contentions—the new and the not new—lack merit.

As to respondents' first theory, if, as respondents now for the first time suggest, the challenged statutes interfere with the ability of *party members* to select their parties' nominees, they must also and equally impede the ability of the *parties* to do the same, for "parties' rights are [at least] the sum of their members' rights." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 448 n.10 (2001). Yet the *parties* do not press this claim; indeed, they intervened to oppose it. This Court's standing doctrine does not permit dissident *party members* to assert the rights and interests of the whole of their *parties*—particularly where the parties deny that they are injured at all. But even if respondents had standing to bring such a claim, this Court's decision in

American Party of Texas v. White, 415 U.S. 767 (1974), forecloses it. There, in confirming the States' authority to "insist that intraparty competition be settled before the general election . . . by party convention, " *id.* at 781, this Court endorsed precisely the "fenc[ing] out" of the "rank-and-file" of which respondents here so bitterly complain. Resp. Br. 22.

Respondents' second theory—the sole basis for the injunctive relief awarded by the courts below—fares no better. The question is not—as respondents put it—whether Sections 6-106 and 6-124 burden "*party members'* and candidates' access to the ballot . . . at the *nomination phase*." Resp. Br. 17 (emphases added). Rather, the question is—as the Second Circuit put it—whether Sections 6-106 and 6-124 impose severe burdens on the right of "candidates and *voters* . . . to . . . associate through[] *the State's chosen electoral process*." Pet. App. 44 (emphases added). This Court's decision in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), is dispositive of the latter inquiry, holding that state laws limiting ballot access do not "substantially burden[]" associational rights so long as the State affords candidates and like-minded voters a reasonable opportunity to associate in the context of a "ballot-connected campaign." *Id.* at 198, 199. Neither respondents nor their *amici* have any answer to *Munro*, except to argue that the general election should not be deemed a "ballot-connected campaign" because historical patterns of "one-party rule" render that event a *fait accompli*. Even if that were the case uniformly throughout the State—and, as respondents acknowledge, it is not—respondents suggest no reason why an election must be "up for grabs" before it can offer voters and candidates an opportunity to associate. The competitiveness of general elections would matter only if the right of association included a "'right to win,'" a proposition that respondents themselves reject. *See* Resp. Br. 21 (quoting Pet. App. 45).

Even indulging the assumption that the First Amendment confers upon "members of a recognized political party" a

unique associational right "to participate in the choice of their party's nominees," Resp. Br. 16, respondents have failed to demonstrate that either Section 6-106 or Section 6-124 imposes any significant burden on that "right." Respondents rail against a "'network of restrictive regulations,'" *id.* at 4 (quoting Pet. App. 53), but the *challenged statutes* require only that: (i) party nominations be made at judicial district conventions; (ii) the conventions be comprised of delegates elected at the delegate primary; and (iii) that there be at least one delegate from each assembly district. N.Y. Elec. L. §§ 6-106, 6-124. They nowhere require candidates "to assemble and run a slate of delegates." Resp. Br. 25. Quite the contrary: Sections 6-106 and 6-124 provide that it is the delegates who select the candidates—not the converse. Respondents nowhere suggest that Section 6-106 or Section 6-124 impose burdens on the ability of party members to choose like-minded *delegates*. Thus, it seems that respondents want not "'the First Amendment rights that attach to their roles.'" *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). Rather, they want different "roles." But that plea is far more appropriately directed to the New York State Legislature.

ARGUMENT

I. RESPONDENTS' NEW ARGUMENT, WHICH IS PREDICATED ON RIGHTS BELONGING TO *PARTIES*, MUST BE REJECTED

In their brief on the merits, respondents invoke this Court's decisions in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), and for the first time advance the argument that Sections 6-106 and 6-124 impermissibly interfere with the rights of political parties and their members to define the contours of their association and to determine their candidates for the general elec-

tion. Specifically, respondents contend that Sections 6-106 and 6-124 "requir[e] political parties to fence out their rank-and-file members" and thereby "'prevent . . . parties from taking internal steps affecting their own process for the selection of candidates.'" Resp. Br. 22 (quoting *Eu*, 489 U.S. at 227). Without even a trace of irony, respondents—self-described "insurgent candidates" and their supporters—suggest that Sections 6-106 and 6-124 operate to "'saddle[]'" political parties "'with [] unwanted, and possibly antithetical, nominee[s].'" *Id.* at 23 (quoting *Jones*, 530 U.S. at 579).

That respondents assert this entirely new ground for relief as their *primary* basis for affirmance is an implicit, but nonetheless startling, confession of the legal infirmity of the decisions below. For at least three reasons, however, this argument, too, fails to sustain the lower courts' judgments.

A. Respondents cannot at this late hour advance an argument that "was neither raised nor considered below." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999). It is the longstanding policy of this Court that, "only in the most exceptional cases," will it "entertain issues withheld until merits briefing." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) (citation and internal quotation marks omitted).

Through three-and-one-half years of litigation in three different courts, respondents never once argued that Sections 6-106 and 6-124 interfere with the ability of political parties to select their candidates for the general election. To the contrary, in the district court, in the court of appeals, and in opposing *certiorari* in this Court, respondents argued only that the statutes violated the right—supposedly found in this Court's ballot access decisions (most prominently, *Storer v. Brown*, 415 U.S. 724 (1974), and *Bullock v. Carter*, 405 U.S. 134 (1972))—of insurgent candidates to participate and com-

pete in political parties' nomination processes.[1] And accordingly, neither the Second Circuit nor the district court ever addressed the question respondents now pose—whether Sections 6-106 and 6-124 interfere with the right of political parties and their members to select the candidates who will be their standard-bearers. Any doubt about that is resolved by respondents' own brief in opposition, which recognized that it was the "ballot access cases that undergird the Second Circuit's decision" (Br. in Opp. 19), and found no occasion even to cite either of the two cases (*Jones* and *Eu*) that respondents *now* suggest mandate a ruling in their favor.

Inasmuch as respondents have failed to identify any "unusual circumstances" that could overcome the many prudential considerations that counsel against addressing arguments not pressed or passed upon below, the Court should decline to entertain respondents' new argument. *See Clingman v. Beaver*, 544 U.S. 581, 598 (2005).

B. One reason respondents may have declined to raise this argument below is that they rather obviously lack standing to do so. Respondents contend that Sections 6-106 and 6-124 violate "the associational rights of party members" (Resp. Br. 24) by interfering with the "'[parties'] own process for the selection of candidates,'" and thereby fostering the possibility that "rank-and-file members would be forced 'to give their official designation to a candidate who is not preferred by a majority or even plurality of party members.'" *Id.* at 22 (quoting *Eu*, 489 U.S. at 227, and *Jones*, 530 U.S. at 579). In arguing that Sections 6-106 and 6-124 impermissibly interfere with "the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences,'" *Jones*, 530 U.S. at 575 (quoting

---

[1] All pertinent lower court filings may be found at a website published by counsel for respondents. *See* Brennan Center for Justice at NYU Law School, Lopez Torres v. NYS Board of Elections, *available at* http://www.brennancenter.org/stack_detail.asp?key=102&subkey=34412.

Eu, 489 U.S. at 224), respondents seek to vindicate not just their rights as "party members," but the rights of their *parties*, which is to say, at least the sum of the rights of *all* of the members of those parties. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 448 n.10 ("political parties and other associations derive rights from their members").[2]

In this respect, this case stands quite apart from *Jones* and *Eu*. In *Jones*, it was four political parties that challenged the State's blanket primary law in furtherance of the parties' and their members' interest in ensuring that their nominees were selected by party members. *See* 530 U.S. at 571. In *Eu*, "the official governing bodies of political parties," including "[v]arious county central committees of the Democratic and Republican Parties," challenged California laws interfering with internal party governance and prohibiting those governing bodies from endorsing candidates in primaries, and thereby preserved each party's autonomy over its affairs, including debates over its nominees. 489 U.S. at 217, 219. Similarly, in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), it was the State's Republican Party that

---

[2] In an effort to manufacture an injury personal to "party members," respondents argue that "[t]he associational rights of rank-and-file members are of independent significance and warrant constitutional protection, separate and apart from the interests of party leaders." Resp. Br. 21. This might be true if "party leaders" were not also "party members," but such is not the case. If respondents mean to distinguish between "rank-and-file members" and other "party members," they suggest no basis for doing so, nor for believing that respondents better represent the interests of the "rank-and-file" than the parties with which they voluntarily have associated and the party leaders they have elected. *See* N.Y. Elec. L. § 2-112. Finally, to the extent that respondents suggest that "party members" have rights distinct from those of their parties, their brief elsewhere forcefully rejects the proposition. *See* Resp. Br. 36 (deriding the "rights of 'parties' (whatever that word can mean when divorced from the membership of the party)"). And, indeed, if members' and parties' rights are not coterminous, *Colorado Republican Federal Campaign Committee* strongly suggests it is only because "parties' rights are more than the sum of their members' rights." 533 U.S. at 448 n.10.

preserved the parties' ability to determine for themselves the contours of their association by challenging the State's closed primary law. *Id.* at 211.

It would be a bizarre and chaotic world if dissident members of a political party could sue, for example, to strike down a closed primary law on the associational autonomy ground asserted in *Tashjian*, and could do so even against the wishes of the party whose rights the dissident members purported to assert. And, indeed, this Court's standing doctrine does not admit of such absurdities. It establishes instead, sensibly, "that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Accordingly, in a challenge to a state election law brought by party leaders, this Court suggested "that rights the committee members can exercise only in conjunction with the other members of the committee must be defended by the committee itself." *Renne v. Geary*, 501 U.S. 312, 320 (1991); *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." (footnote omitted)); *Osburn v. Cox*, 369 F.3d 1283, 1287 (11th Cir. 2004) ("standing to challenge a state's regulation of a political party's primary belongs only to the party itself").

Among the many sound rationales for limiting third-party standing is that, in some cases, "the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). That rationale is surely applicable here, where the political parties whose rights respondents seek to vindicate not only "do not wish to assert them," but have intervened (in an exercise of their "association[al] . . . standing to bring suit on behalf of [their] members," *Hunt v. Wash. State Apple*

Adver. Comm'n, 432 U.S. 333, 343 (1977)) to oppose respondents' lawsuit.

C. Assuming they could obtain standing to assert it, respondents' contention that the First Amendment is offended by any state law that "effectively requir[es] political parties to fence out their rank-and-file members" from the "nomination processes" proves far too much. Resp. Br. 22.

1. States have "broad power . . . over the election process for state offices." *Clingman*, 544 U.S. at 586 (quoting *Tashjian*, 479 U.S. at 217); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."). While that power is not without boundaries—States may not regulate "internal party governance," *Eu*, 489 U.S. at 230-31, "forc[e] political parties to associate with those who do not share their beliefs," *Jones*, 530 U.S. at 586, or prohibit a political party from doing the same, *see Tashjian*, 479 U.S. at 224-25—this Court previously has considered it "too plain for argument . . . that the State," just as it "may insist that intraparty competition be settled before the general election by primary election," also "may insist that intraparty competition be settled . . . *by party convention*." *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added).

Respondents suggest that their new argument does not call into doubt the constitutionality of *all* conventions; they allow that "a party convention *may* serve as a constitutional method of resolving intra-party disputes." Resp. Br. 35 (emphasis added). A convention that "effectively excludes a party's members from the nomination process," however, cannot in respondents' view pass constitutional muster. *Id.* Yet there is no indication in *American Party* that the Court, in finding "convention[s]" to be "plain[ly]" constitutional, meant to limit the term only to those "convention[s]" open to all of a party's members. Indeed, to "[in]clude" the party's rank-and-file members in a convention is to transmogrify it.

By definition and common usage, party conventions generally do not include the rank-and-file members. *See* Black's Law Dictionary 355 (8th ed. 2004) (providing the "parliamentary" definition of "convention" as "a deliberative assembly that consists of delegates elected or appointed . . . within a state or national organization, or elected directly from the organization's membership"). This Court's embrace in *American Party* of conventions as a constitutional method for settling intra-party disputes thus can only be viewed as affirming the States' authority to exclude parties' rank-and-file members from participating in those same disputes.

2. In any event, Sections 6-106 and 6-124 do *not* "fence out" rank-and-file party members in the manner respondents suggest. To the contrary, Section 6-124 *invites* the participation of party members in the delegate primaries. Respondents do not dispute this, but argue that the benefits they draw from such participation are but a shadow because few persons who share their views are "willing 'to contribute significant energy, time, and money to run as delegates.'" Resp. Br. 7 (quoting respondents' witness). (Even those who do make the investment respondents deride as "lone gadfl[ies]." *Id.* at 26.) But the apathy pervading respondents' ilk is hardly a "direct and inevitable consequence of New York's statutory scheme." *Id.* at 2; *see also Munro*, 479 U.S. at 198 ("States are not burdened with a constitutional imperative to reduce voter apathy"). It reflects, if anything, the powerful influence of party leaders. *See* Resp. Br. at 7 (suggesting that delegates who openly oppose party leaders "'jeopardiz[e] their political future'"). As respondents concede, however, "the fact that party leaders act as one would expect them to" "is not" a "constitutional offense." *Id.* at 38.

Thus, it seems that respondents' real complaint in this case is not that New York has failed to accord to them "'the First Amendment rights that attach to their roles.'" *Republican Party of Minn.*, 536 U.S. at 788 (quoting *Renne*, 501

U.S. at 349 (Marshall, J., dissenting)). Respondents instead want different, more powerful roles in the nomination process. But this Court's cases make clear that the First Amendment does not require States to accede to political parties' wishes—let alone the particular wishes of any dissident party member.[3]

II. RESPONDENTS' UNIMPEDED ACCESS TO THE GENERAL ELECTION BALLOT SATISFIES THEIR ASSOCIATIONAL BALLOT ACCESS RIGHTS

Advancing in the alternative the rationale upon which their injunctive relief is premised, respondents contend that Sections 6-106 and 6-124 violate the First Amendment because they place severe burdens on the ability of insurgent candidates to access the ballot and to associate, in that context, with like-minded voters. They argue that reasonable access to the general election ballot provided by state law is insufficient. According to Respondents, the First Amendment requires "access to the ballot at both the nomination phase and the general election." Resp. Br. 17. Alternatively, they contend that access to the general election ballot fails to afford insurgent candidates a genuine opportunity to associate with voters, because those elections are dominated historically by one major party or another. Neither contention withstands scrutiny.

---

[3] Even if New York law completely excluded rank-and-file members from party nomination processes, such a restriction would infringe upon parties' associational rights only to the extent that the restriction threatened to distort the associations' expressive character, either by directly limiting their speech, *see Eu*, 489 U.S. at 224, or interfering with their ability to identify "'who constitute[s] the association,'" *Tashjian*, 479 U.S. at 214, and who does not, *see Jones*, 530 U.S. at 586. Respondents have not even attempted to show how "vest[ing] *de facto* appointive power in . . . party leaders" distorts the associational ideals of their political parties. Resp. Br. 26.

A. As noted in the Board's opening brief (at 22-23), this Court has concluded that a ballot access restriction violates the First Amendment only when the restriction presents "an absolute bar to candidacy." *Storer*, 415 U.S. at 737 (upholding one-year disaffiliation requirement for ballot access for independent candidates); *see also Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) ("the challenged Ohio statute totally exclude[s] any candidate" failing to comply with its early filing deadline). Respondents nowhere dispute that this is the law, but they still contend that reasonable access to the general election ballot is insufficient to dispose of their First Amendment claim. *See* Resp. Br. 29. "*[A]ll* state-imposed severe burdens on ballot access," respondents assert, "must survive strict scrutiny." *Id.* at 30 (emphasis in original). That is a correct statement of the law, but it has little relevance here. Respondents fail to recognize what this Court has repeatedly made clear: state laws that leave open "reasonable alternative means of ballot access," as a categorical matter, do *not* impose significant burdens on ballot access. *Lubin v. Panish*, 415 U.S. 709, 718 (1974); *see also Clingman*, 544 U.S. at 592 ("not every electoral law that burdens associational rights is subject to strict scrutiny," which is "appropriate only if the burden is severe").

Munro is dispositive of this point. There, this Court rejected a challenge to restrictions on access to a *general election* ballot on the ground that the candidate was permitted to wage a ballot-connected campaign in a statewide blanket *primary*. *See Munro*, 479 U.S. at 198-99. In so doing, this Court reasoned that the "channel[ing] [of] expressive activity into a campaign at the primary as opposed to the general election" did "not substantially burden[] the 'availability of political opportunity.'" *Id.* at 199 (quoting *Lubin*, 415 U.S. at 716). If channeling expressive activity into blanket primaries—with their generally low voter turnout—imposes "no[] substantial[] burden[]" on the ability of candidates and voters to associate with one another, it follows *a fortiori* that chan-

neling expressive activity into general elections—with their higher turnout—imposes no greater burden on associational rights. *Munro*, 479 U.S. at 199. If there could be doubt that this is the import of *Munro*, it would be put to rest conclusively by the dissenting opinion, which chastises the majority for its holding "that access to *any* ballot is always constitutionally adequate." *Id.* at 201 (Marshall, J., dissenting) (emphasis in original).

Respondents have no answer to *Munro*. Respondents cite *Bullock* and *Lubin* (at 29-30), but those decisions could not possibly undermine the later-decided *Munro*, and their analyses are consistent with *Munro*, in any event. (Indeed, *Munro* relied on *Lubin*. *See* 479 U.S. at 199.) Respondents' strained efforts to recast them as free speech cases notwithstanding, both *Bullock* and *Lubin* were decided on an equal protection rationale, as both this Court and those below have recognized. *See Anderson*, 460 U.S. at 786-87 n.7 (recognizing *Bullock* and *Lubin* as "resting on the Equal Protection Clause of the Fourteenth Amendment"); Pet. App. 43 (citing *Bullock*, 405 U.S. at 144, 145-49, and characterizing it as decided "pursuant to the Equal Protection Clause of the Fourteenth Amendment").[4]

---

[4] Respondents' complaint (at 29) that providing access only to the general election compels insurgent candidates and the voters that support them to "abandon their party affiliations" is makeweight. Respondents' dispute *none* of the arguments that the Board directed to this point in its opening brief (at 24-25). And respondent López Torres's own experience demonstrates that New York hardly requires that insurgent candidates "abandon their party affiliation" to avail themselves of the opportunity to associate with voters in the general election. In the district court, respondents trumpeted the fact that, in 2003, López Torres obtained the nomination of the Working Families Party (at that party's judicial district convention, incidentally) and ran under that party's banner in the general election "*though she remain[ed] a registered Democrat*." Pls. Proposed Findings of Fact ¶ 162 (emphasis added).

That sets those cases apart; the First Amendment right of association is not co-extensive with the Fourteenth Amendment right to be free from discrimination. The Equal Protection Clause applies in some circumstances where the First Amendment applies only with diminished force. Accordingly, some ballot access restrictions, though patently and invidiously discriminatory, may nevertheless comport with First Amendment associational rights because they do not present "an absolute bar to candidacy," i.e., they leave ample opportunity for association. *Storer*, 415 U.S. at 737. But the opportunity for association elsewhere is no cure for the injury to the distinct right to be free from state-sponsored invidious discrimination. *See Bullock*, 405 U.S. at 146-47.

B. In the face of *Munro*, respondents and their *amici* retreat to the argument—made to great effect below—that patterns of single-party dominance throughout the State, though "not inconsistent with free elections" (Resp. Br. 27), nevertheless nullify any opportunity that the State provides to candidates and voters to associate in the general elections. Respondents contend, in so many words, that general elections do not count.

There is little basis in fact for respondents' assertion that "the general election for supreme court is virtually always 'little more than ceremony.'" Resp. Br. 11 (quoting Pet. App. 23). As respondents' *amicus* ACLU recognizes, there exist "districts where one party does not necessarily predominate." Br. Amicus Curiae of the ACLU and N.Y. Civil Liberties Union in Supp. of Resp. 7. The district court similarly observed that, between 1990 and 2002, nearly one quarter of general elections across New York State were competitive. *See* Pet. App. 130. Further belying claims of single-party dominance is respondents' own acknowledgement that, "'[i]n districts that are not dominated by a single party,'" major parties routinely cross-endorse candidates. Resp. Br. 12 (quoting Pet. App. 130). The district court took note of this practice in the Second, Third, Fifth, Eighth, Tenth, and Twelfth Judicial District—*one half* of the State's 12 judicial

districts. *See* Pet. App. 130, 130 n.26. And, indeed, in 2006, Democratic candidates prevailed in several judicial districts previously dominated by the Republican Party. *See* New York State Board of Elections, General Election Results Certified December 14, 2006, *available at* http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_8301:35_8306&_dad=portal&_schema=PORTAL.

A State in which at least half of the judicial districts "'are not dominated by a single party,'" Resp. Br. 12 (quoting Pet. App. 130), hardly resembles Texas in 1970—a place and time when, for "the overwhelming majority of . . . political offices nomination by the Democratic Party [wa]s tantamount to election." *Carter v. Dies*, 321 F. Supp. 1358, 1363 (N.D. Tex. 1970) (Thornberry, J., concurring) (cited in *Bullock*, 405 U.S. at 146 n.26). The court of appeals nevertheless found the Texas-*circa*-1970 analogy to be apt, *see* Pet. App. 50, and apparently, so do respondents. *See* Resp. Br. 28.

But even if New York were exactly as respondents and the court of appeals imagined it, respondents suggest no reason why the outcome of a general election must be in doubt before it may serve as an adequate platform for the candidates to associate with like-minded voters. There is no reason to believe that the absence of major-party competition actually impedes the ability of insurgent candidates to associate with voters; if anything, the absence of competition in the marketplace of ideas should enhance the ability of insurgent candidates to connect with voters.[5]

---

[5] Moreover, as the Republican National Committee explains, according constitutional significance to the mutable voting patterns of any particular jurisdiction leads to haphazard enforcement of electoral associational rights. If the constitutionality of a provision can hinge on whether that jurisdiction is currently experiencing an episode of "one-party rule," then a court reviewing an identical provision in another jurisdiction might reach the opposite outcome, unless it, too, is then experiencing one-party rule. *See* Br. Amicus Curiae of the RNC in Supp. of Pet'rs. 26.

Respondent López Torres is a case in point. In 2003, she ran for supreme court justice in New York's Second Judicial District under the banner of the Working Families Party, having earlier obtained that party's nomination at its judicial district convention. Despite the fact that the Republicans and Democrats cross-endorsed five candidates, López Torres took her campaign to the judicial district's voters and more than 35,000 of them ultimately cast ballots for her in the general election. *See* New York State Board of Elections, 2003 General Election Results—Second Judicial District, *available at* http://www.elections.state.ny.us/NYSBOE/elections/2003/2003_2jd.pdf.

That López Torres ultimately "lost by a massive margin to the Democratic Party's candidates," Compl. ¶ 96, could possibly be relevant only if the right of candidates and voters to associate for the advancement of political beliefs within the context of a "ballot-connected campaign," *Munro*, 479 U.S. at 198, subsumed a right to prevail in that electoral contest, which even respondents disclaim. *See* Resp. Br. 21 ("As the Second Circuit observed, challengers and their supporters have no 'right to win.'") (quoting Pet. App. 45); *see also Munro*, 479 U.S. at 198 ("States are not burdened with a constitutional imperative . . . to 'handicap' an unpopular [primary] candidate to increase the likelihood that the candidate will gain access to the general election ballot."). Voters in the Second Judicial District had ample "opportunity to cast a ballot for [López Torres] and [she] had [a] ballot-connected campaign platform from which to espouse . . . her views," which is all that the First Amendment requires. *Munro*, 479 U.S. at 198.

III. RESPONDENTS FAIL TO DEMONSTRATE THAT SECTIONS 6-106 AND 6-124 IMPOSE ANY BURDEN ON THEIR ASSOCIATIONAL RIGHTS

Substituting overwrought hyperbole for legal analysis, respondents contend that, through its elections laws, "New

York has mandated 'the smoke-filled room' as the method for all parties to nominate candidates for the supreme court bench," and, indeed, has "rigg[ed] the process" to "require that, when it comes to selecting supreme court nominees, *every* party is *required* to function as the Rubber Stamp Party." Resp. Br. 24, 26 34-35 (emphases in original). But tellingly, neither respondents nor their many *amici* ever deign to discuss the text of the two statutes they claim to be facially unconstitutional. As in the courts below, respondents urge this Court to focus on "the reality of Supreme Court elections in present-day New York," without regard to the authors of that "reality." Pet. App. 10.

The statutory language here at issue thus bears repetition: Section 6-106 of the New York Election Law provides that "[p]arty nominations for the office of justice of the supreme court shall be made by the judicial district convention." N.Y. Elec. L. § 6-106. Section 6-124 further provides that each judicial district convention "shall be constituted by the election at the preceding primary of delegates . . . from each assembly district," and that "[t]he number of delegates . . . shall be determined by party rules." N.Y. Elec. L. § 6-124.

Respondents contend that this "statutory scheme" imposes six "obstacles" that "combine to create a burden on association." Resp. Br. 2, 3. *But see* Pet. App. 57-58, 61 (listing as the severe burdens imposed by New York law only (1) the expense and effort of running "a slate of delegates" and (2) the influence of party leaders over elected delegates). But *five* of these six "obstacles" result not from the operation of Section 6-106 or Section 6-124, but rather *other laws not at issue in this case*.[6] Respondents cannot in the guise of exam-

[6] Those five "obstacles" are: (*i*) "The entire slate of candidates for delegates and alternates in each [Assembly District] must be identified and recruited nearly four months before the primary." Resp. Br. 6 (citing N.Y. Elec. L. §§ 6-134, 6-158). (*ii*) "Each slate of delegates in each [Assembly District] or part of an [Assembly District] must file its *own* 500-plus signature petition [signed by registered party members in a particular

ining "New York's system" "'in a realistic light,'" Resp. Br. 2 (quoting *Anderson*, 460 U.S. at 786), enlarge their complaint, which makes clear which are the "Challenged Provisions of Law." Compl. ¶¶ 23-26.

The only "obstacle" that is even arguably traceable to Sections 6-106 or 6-124 is the "geographically dispersed delegate contests in every one of the numerous Assembly Districts located in each Judicial District." Resp. Br. 3 (citing N.Y. Elec. L. § 6-124). But the requirement that each assembly district be represented at the judicial district convention could possibly be considered a burden on associational rights only if one presupposes—as did the courts below—that New York law requires prospective judicial candidates to "assemble and run a slate of delegates." *Id.* at 25. Though one determined to "influence the actual choice of a nominee," *id.* at 26, might be well-served to organize such a slate, neither Section 6-106 nor Section 6-124 (nor, for that matter, any other provision of the New York Election Law) mandates or even suggests that candidates engage in such activity.

To the contrary, New York Election Law provides that it is the *delegates* who select the judicial candidates—not *vice versa*. And certainly, one need not be a member of a slate of delegates in order "'to participate in th[at] nominating process.'" Resp. Br. 15 (quoting Pet. App. 41). Only very modest and reasonable petition requirements, *see* N.Y. Elec. L. § 6-136, (also unchallenged in this litigation) stand between

---

[Footnote continued from previous page]

Assembly District]," "[e]ach party member may sign only one petition," and "petition circulators have a 37-day 'window' to gather petitions." *Id.* at 7 (citing N.Y. Elec. L. §§ 6-132, 6-134, 6-136) (emphasis added). (*iii*) "'[P]etition signatures are routinely and successfully challenged' on numerous technical grounds." *Id.* at 8 (citing N.Y. Elec. L. § 6-154). (*iv*) "[P]rospective judicial delegates 'cannot signify on the primary ballot an allegiance to a specific [supreme court] candidate.'" *Id.* at 9 (citing "rules"). (*v*) The "nominating convention must take place two weeks after the election of delegates." *Id.* (citing N.Y. Elec. L. § 6-158(5)).

any party member and candidacy within his or her assembly district for the position of delegate to the judicial district convention.

It may be the case that such a "lone gadfly" could not reasonably hope to "act as a counter-weight to the hand-picked delegate slates chosen by the county party leader." Resp. Br. 26. And it also may be true (though it seems a doubtful proposition) that "county party leaders[] . . . are the only ones capable of assembling and electing slates of delegates." *Id.* at 27. But this hardly means that Sections 6-106 and 6-124 impose severe burdens on respondents' associational rights. Neither Section 6-106 nor Section 6-124 accorded to those "county party leaders" the resources, organization, or "capab[ility]" to assemble those delegate slates, *id.* at 27; and neither statute otherwise burdens respondents' ability to run for delegate or to vote for the delegate of their choice. To the extent that respondents complain that, in the face of county leaders' superior organization, they are unable to prevail in nomination contests, they have failed to state a constitutional injury. *See Munro*, 479 U.S. at 198.

IV. RESPONDENTS FAIL TO JUSTIFY THE DISTRICT COURT'S EXTRAORDINARY INJUNCTIVE RELIEF

Respondents' brief fails to proffer any sound justification for either the district court's facial invalidation of Sections 6-106 and 6-124, or its mandate that the State hold primary elections to select party nominees for the position of supreme court justice. Even if this Court were to conclude that Sections 6-106 and 6-124 violate respondents' associational rights, the district court's extraordinary injunctive relief cannot stand.

A. Respondents assert that "[f]acial invalidation is proper []here" because "[t]he record leaves no doubt that the 'statute in *all its applications* directly restricts protected First Amendment activity . . . .'" Resp. Br. 48 (quoting *Sec'y of State v. J.H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984)) (emphasis added). Respondent López Torres's own experi-

ence indicates otherwise: In 2003, she attained the Working Families Party's nomination for supreme court justice from that party's *judicial district convention*. *See* Compl. ¶ 96; Tr. 2379. Unless respondents are now prepared to argue that even the nomination process in which their preferred candidate *prevailed* violated their associational rights, their own pleadings "establish . . . [a] set of circumstances . . . under which the [statutes] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Respondents otherwise make no effort whatsoever to demonstrate the substantial overbreadth necessary to support the facial invalidation of Sections 6-106 and 6-124. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Instead, in a transparent (and rather desperate) effort to evade review, respondents malign the entire inquiry as "inappropriate," suggesting—quite wrongly—that petitioners did not put facial invalidity in issue in the petition for certiorari. Resp. Br. 47 n.23. On respondents' own telling, facial invalidation of Sections 6-106 and 6-124 was a condition precedent to the district court's mandate of a primary. *See id.* at 48. The question whether Sections 6-106 and 6-124 were properly invalidated on their face thus is "'predicate to an intelligent resolution'" of the question whether the Second Circuit erred "by mandating a primary in lieu of a party convention" (Pet. for Cert. i), and, accordingly, is fairly comprised within that later inquiry. *See Ohio v. Robinette*, 519 U.S. 33, 38 (1996); *see also* Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

Respondents can fare no better on the substance of their overbreadth claim. Their contention of *substantial* overbreadth is deeply undermined by their reliance below on a "challenger candidate" paradigm. That one can imagine "some impermissible applications of a statute"—or some class of persons to whom a statute might be unconstitutionally applied—"is not sufficient to render [the statute] suscep-

tible to an overbreadth challenge." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). To justify facial invalidation of Sections 6-106 and 6-124, respondents were required to demonstrate (and the courts below were required to find) that the impermissible applications of the statutes are "substantial" in relation to their permissible applications. *See Hicks*, 539 U.S. at 118-19. The courts below never undertook that analysis and respondents do not even attempt to do so here.

B. At no point in their brief on the merits do respondents argue that primaries are necessary to remedy the alleged injuries to their associational rights. Respondents instead defend the propriety of the district court's extraordinary affirmative relief solely on the ground that the injunction gives effect to "'the default nature of section 6-110.'" Resp. Br. 48 (quoting Pet. App. 82). That defense is legally insufficient for at least two reasons: First, it is axiomatic "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Second, respondents suggest no reason why a federal court should ascertain in the first instance the "default nature of section 6-110" rather than the state agency charged with that state statute's administration. *See* N.Y. Elec. L. §§ 3-102, 3-104. If judicial district conventions are facially unconstitutional, it is the Board's work—not the federal courts'—to determine what, if anything, should replace them.

CONCLUSION

The decision of the court of appeals should be reversed and the injunction of the district court should be vacated.

Respectfully submitted.

TODD D. VALENTINE
NEW YORK STATE
BOARD OF ELECTIONS
40 Steuben Street
Albany, NY 12223
(518) 474-6367

RANDY M. MASTRO
JENNIFER L. CONN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue, 47th Floor
New York, NY 10166-0193
(212) 351-4000

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
MICHAEL S. DIAMANT
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners
New York State Board of Elections, Douglas Kellner, Neil W. Kelleher, Helena Moses Donohue and Evelyn J. Aquila

August 17, 2007