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

BRIEF OF AMICUS CURIAE CHARLES J. HYNES, DISTRICT ATTORNEY FOR KINGS COUNTY, NEW YORK, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Since 1990, I have served as the elected District Attorney of Kings County (Brooklyn), New York. In that capacity, I have overseen and presently oversee criminal investigations and prosecutions into allegations that the leaders of the Kings County Democratic Party have corruptly used their power to select, influence, and control the state judiciary in Brooklyn. These include the recent (February 2007) successful prosecution of Clarence Norman, who at the time of his crimes was the chairman and the de facto "boss" of the Kings County Democratic County Committee.

As a result of my work as District Attorney and of my long career as an attorney in New York State, I believe I have a distinct insight into the issues presented by this case. In particular, I believe, indeed I know, that New York's uniquely constructed and statutorily-mandated nominating process for the state Supreme Court, which in effect places ultimate control over who becomes a state Supreme Court justice in the hands of powerful county political party leaders, creates and sustains a breeding ground for corruption and malfeasance and undermines the public's confidence in the judiciary. Under the current system, party leaders select Supreme Court nominees based on their political connections and/or contributions to the party or its leaders; voters lack any meaningful opportunity to nominate, let alone elect, an alternative candidate to those nominees; and, once elected, the judges (desiring to be re-nominated and re-elected or, in the case of lower-court judges, desiring to be promoted to the Supreme Court) come under great pressure to carry out their duties in a manner that satisfies party

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for any of the parties, and no person or entity other than the Amicus, the staff of the Kings County District Attorney's Office, or counsel to the Amicus made a monetary contribution to the preparation or submission of this brief. Counsel for Amicus wishes to thank Craig Heeren and Tian Tian Mayimin for their stellar assistance in the preparation of this brief.

leaders. The result is a system in which only party-chosen candidates attain the Supreme Court bench and in which public confidence in the administration of justice and the rule of law is low.

I submit this amicus brief to give the Court a practical, ground-level illustration of these problems, in part by recounting official corruption cases that the Kings Country District Attorney's Office has prosecuted. I similarly participated as amicus curiae in the Court of Appeals. I respectfully urge this Court to affirm the decision below.

SUMMARY OF ARGUMENT

As the record below and the record of prosecutions brought by the Kings Country District Attorney's Office show, for more than a decade, Clarence Norman, who was the leader of the Democratic Party in Kings County, maintained essentially complete control over the nominations for the office of Justice of the New York Supreme Court in Brooklyn.[2] This was not an isolated instance of a party leader's control of the judicial selection process. Instead, it reflected a widely-known fact of life in New York State: to become a justice of the state Supreme Court, one must be selected by party leaders.

In theory, rank-and-file party members are to have a meaningful say in the nominations process for the Supreme Court. Under New York's Election Law, party members vote, at the primary election, for the delegates to judicial district conventions, at which the nominees for the Supreme Court are then chosen. *See* N.Y. Elec. Law § 6-124 ("[a] judicial district convention shall be *constituted by the election at the preceding primary of delegates* and alternate delegates") (emphasis added). In reality, however, the power to select nominees for the Supreme Court has always resided with

[2] The Second Judicial District encompasses the New York City boroughs of Brooklyn (Kings County) and Staten Island (Richmond County). Because the Second Judicial District, like most of the eleven other judicial districts in New York, has long been dominated by a single party, nomination by the dominant party is tantamount to election.

party leaders, like Mr. Norman. That is because, as the District Court and Court of Appeals below have chronicled, New York's statutory scheme was designed to, and does, place severe and all-but-insurmountable barriers in the path of any aspirant for a Supreme Court judgeship who has not been chosen by party leaders.

The District Court and the Court of Appeals were correct to hold that this "Potemkin Village" arrangement, which creates the illusion but lacks the reality of popular sovereignty, violates voters' and candidates' First Amendment rights. Having decided to regulate how political parties select their state Supreme Court nominees, New York was required to erect a selection mechanism that abides by the "limits imposed by the Constitution." *California Democratic Party* v. *Jones*, 530 U.S. 567, 573 (2000). Specifically, because New York has chosen "to tap the energy and the legitimizing power of the democratic process" by mandating a process by which elected delegates choose nominees who then stand in a general election, it must "accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 788 (2002) (internal quotation marks and alteration omitted). As the courts below recognized, the process that New York has statutorily mandated violates two closely related and basic rights protected by the First Amendment: "the right of individuals to associate for the advancement of political beliefs" and "the right of qualified voters . . . to cast their votes effectively." Pet. App. 34 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)).

Petitioners seek to caricature the dispute in this case by asserting that the Court of Appeals' logic would broadly invalidate any method in which nominees to any elective office in any State are chosen by delegates to a party convention. However, as its decision makes clear, the Court of Appeals narrowly ruled on the basis of the unique operation and the dismaying history of the judicial district convention system used to select Supreme Court nominees in New York State. The Court of Appeals inquired whether that system burdens the rights of candidates and voters and held that it did. That

was the correct analysis, because, as this Court has emphasized, the First Amendment inquiry is at bottom practical, contextual, and granular, not abstract: "[I]t is essential to examine in a realistic light the extent and nature of [that scheme's] impact on voters." *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972).

As to this inquiry, the record below and the historical record, including prosecutions brought by the Kings Country District Attorney's Office, reveal two things. First, New York's extraordinarily burdensome and opaque petitioning requirements to become a convention delegate effectively prevent all but those candidates who have been anointed by party leaders from offering themselves as candidates at the party's nominating conventions. Second, even if an independent candidate were improbably to muster the resources to contend for a party's nomination, the judicial conventions are stacked formalities that reliably rubberstamp the party leaders' hand-picked candidates. In effect, a rank-and-file party member's rights of political association and to vote for judicial delegates in the primary are meaningful only if the party member's preferred candidate happens to coincide with the candidate pre-selected by the party leaders.

This amicus brief reviews the evidence of "boss control" over the nomination process, first in Brooklyn, and then more broadly in New York State, and focuses particularly on the tendency of this system to breed corruption. By ceding to party leaders nearly complete control over who sits on New York's trial-level bench, New York's statutory scheme invites corruption and diminishes the public's confidence in the state judiciary. In Brooklyn, the experience of plaintiff Margarita López Torres, whose experience as a Civil Court judge was chronicled below and in the Kings Country District Attorney's Office's recent successful prosecution of Clarence Norman for grand larceny by extortion, is revealing. In a 2002 direct primary for the Civil Court, Judge López Torres beat the Democratic Party machine's hand-picked candidate and ultimately garnered over 200,000 votes in the general election. Yet because he controlled the nomination process, Clarence Norman was able to single-

handedly deny her the nomination to the state Supreme Court. He did so in express retaliation for her earlier refusal to hire the court attorney foisted on her by the party leaders. Similarly, in the recent trial of Mr. Norman, the prosecution demonstrated that another judicial candidate for the Civil Court, cowed by Mr. Norman's ability to "dump her [candidacy]" and to withhold a future Supreme Court nomination, succumbed to his demands that she divert her campaign funds to the coffers of his associates. *See infra*, pp. 15-16.

As this brief further demonstrates, and as the courts below found, New York's Election Law has given party leaders similar control over Supreme Court judicial nominations in other counties throughout the state, a reality that is common knowledge among judges, judicial aspirants, politicians, and lawyers. As a result, nominations to these important judgeships have been turned into currency with which party leaders bargain. Numerous judicial disciplinary decisions, public inquiries, and news reports make clear that improprieties linked to the Supreme Court nomination process are all too common. The problem of corruption thus is closely interwoven with the constitutional infirmity identified by the courts below.

No matter how aggressive and effective law enforcement officials may be in investigating and prosecuting corrupt participants in this system, such after-the-fact efforts are no solution to what is fundamentally a systemic shortcoming that denies voters and candidates their First Amendment rights. These efforts cannot redress the de facto exclusion of rank-and-file party members from the Supreme Court nomination process; they cannot give voters a meaningful say in who the state's judges are; they cannot replace political cronies with able jurists; and they cannot stem the loss of public confidence in the courts. Rather, these problems—the inevitable results of New York's unconstitutional statutory scheme—can be remedied only by the invalidation of that scheme and its replacement by a system that is constitutional. I therefore respectfully urge that the decision below be affirmed.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES NEW YORK TO GIVE RANK-AND-FILE POLITICAL PARTY MEMBERS A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN CHOOSING STATE SUPREME COURT NOMINEES

Whether the process that political parties in New York are required to use for choosing their Supreme Court nominees is constitutional turns on two related questions. First, does the First Amendment protect members of political parties who seek by voting in a statutorily mandated selection process to meaningfully participate in their parties' nomination decisions? Second, if so, does New York's statutory scheme, which effectively precludes party members from associating with candidates not pre-selected by the party leadership, unjustifiably burden the rights protected by the First Amendment?

As the courts below recognized, the answer to both questions is yes. Although the Constitution does not compel New York ab initio to afford party members an opportunity to vote to select the party's judicial nominees, New York has enacted a comprehensive statutory scheme for the election by such party members of judicial nominating delegates. This in turn requires New York to ensure that this scheme respects the First Amendment right to associate of party members and candidates. New York's statutory scheme abridges those rights. The hurdles it imposes make it all but impossible for a candidate who has not been pre-selected by party leaders to win such a nomination. This burdens the rights both of candidates and of voters, who are denied a meaningful opportunity to participate in the nominating process.

A. The First Amendment Protects Party Members' Right To Associate To Determine Their Party's Nominees And Direction

The First Amendment protects an individual's right to associate with others to press common political views, including the "basic constitutional freedom" to join together under the aegis of political parties "for the common advancement of political beliefs and ideas." *Cousins* v. *Wigoda*,

419 U.S. 477, 487 (1975) (internal quotation marks omitted). Joining a political party, however, does not extinguish the associational rights of the individual party members or subsume them under the banner of the party's right of association. For a state to demand that a party member acquiesce to every decision of the party's leaders as to the party's objectives could not be squared with the First Amendment. Rather, party members retain an "independent right" of association to determine their party's goals and practices. *See Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 225-226 (1989) (in the party primary context, "the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members [and fails to show] that the members authorized the parties to consent to infringements of members' rights").

The independent associational right of party members is particularly salient when they seek to have their voices heard in a state-sponsored primary, a context in which the preferences of party leaders often "diverge[] significantly from the views of the . . . rank and file." *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting); *see also Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973) (a "prime objective" to join a party for many in the rank-and-file is to "gain a voice in [the nominee] selection process"). As this Court recognized in *Anderson* v. *Celebrezze*, "voters can assert their preferences only through candidates or parties or both." 460 U.S. 780, 787 (1983). In the context of an intra-party primary election, rank-and-file party members' associational right would be rendered worthless were they denied any meaningful opportunity to associate with candidates not favored by the party leaders, and were the leader-selected candidate instead assured of the party's nomination. Such a denial would be manifestly inconsistent with the state's duty, in erecting a statutory electoral process that "tap[s] the energy and the legitimizing power of the democratic process," to "accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 788 (2002) (internal quotation marks and alteration omitted);

see also California Democratic Party v. *Jones*, 530 U.S. 567, 573 (2000).

B. The Constitutionality Of New York's Unique Statutory Judicial-Nominating Scheme Requires A Realistic Assessment Of That System's Effect On Party Members, Candidates, And The Judiciary

In order to determine whether the system that New York has mandated for nominating candidates for Supreme Court judgeships accords candidates and party members their First Amendment rights, this Court must conduct a concrete, tangible inquiry into the operation and effects of that particular system. Petitioners posit that this case presents the generalized issue of whether all electoral systems in which convention delegates rather than party members make the ultimate nomination decision are constitutionally infirm. *See, e.g.*, Pet. Br. of N.Y. County Democratic Comm., *et. al*. 15-16, 20; Pet. Br. of N.Y. Att'y Gen. 29; Pet. Br. of N.Y. State Bd. of Elections, *et. al*. 29. But that is a straw man. The proper inquiry is instead at the level of the specific nominee-selection system under review. The Court must consider "the character and magnitude of the asserted injury to the [First Amendment] rights" by this system, "identify and evaluate the precise interests [asserted] by [New York State] as justifications," and "weigh[] all these factors" together. *Anderson*, 460 U.S. at 789; *see also Tashjian*, 479 U.S. at 234 (Scalia, J., dissenting) (examination "requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case"). At base, then, "it is essential to examine in a realistic light the extent and nature of [New York's electoral scheme's] impact on voters." *Anderson*, 460 U.S. at 786 (quoting *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972)).

The courts below conducted the requisite realistic assessment of the burdens on the associational right of party members imposed by New York's statutory scheme. As the District Court and Court of Appeals each concluded, the ballot access requirements for the judicial delegate election are baroquely designed (for no purpose other than to allow party leaders to exercise complete control over the judicial district

convention) and uniquely stringent. The signature collection process alone requires candidates to collect, realistically, between 1,000 and 1,500 signatures *within each assembly district* within the candidate's judicial district to withstand the cost-prohibitive signature challenges financed by the party. Pet. App. 12-13, 108. Even if a candidate were to obtain the necessary signatures to run a slate of delegates, she faces a further hurdle, in that the primary ballot does not identify which candidate a putative delegate favors; she must find a way to educate the voters in each assembly district about which delegate candidates will support her. *Id.* at 13, 107. After the judicial delegates are elected, or "deemed elected" when, as is more often than not the case, there are no challenger delegates, only two weeks, at most, remain for a judicial candidate to learn the identities of the delegates and to lobby for their support, making meaningful meetings all but impossible. *Id.* at 18, 116-117. Given these seemingly Kafkaesque hurdles, it is no surprise that the judicial nominating conventions are, in the words of a long-time delegate to the Ninth District Republican Party judicial convention, "merely a formality" to rubber-stamp the party leaders' choices. *See* JA 242.

The balance of this brief focuses on the statutory system's practical operation and impact on voters, judicial aspirants, and the judiciary. It focuses first on Brooklyn, where it spotlights several notorious case studies of "boss control," the evidence relating to which was developed both below and in criminal prosecutions brought by the Kings County District Attorney's Office. It then canvasses materials relating to "boss control" statewide. This evidence confirms the dynamic found by the District Court, in which local party leaders exert nearly total control over the state Supreme Court nomination process, shut out rank-and-file party members from any meaningful participation in choosing their nominees for judicial office, and choose candidates on the basis of loyalty or quid pro quo, rather than purely on merit. And it illustrates a system in which the proper administration of justice takes at best a back seat and the public justifiably loses confidence in the judicial system.

II. NEW YORK'S SYSTEM FOR ELECTING STATE SUPREME COURT JUDGES INVITES CORRUPTION AND IMPROPRIETY: THE EVIDENCE RELATING TO BROOKLYN

The domination by political party leaders of the judicial-selection system in Brooklyn is revealed by the history of lead plaintiff Margarita López Torres, a former Brooklyn Civil Court Judge (and current Brooklyn Surrogate's Court Judge) who was long stymied in her efforts to gain a Supreme Court nomination. Judge López Torres's history was developed below, and was further fleshed out in testimony during the Brooklyn District Attorney's Office's recent prosecution of former party leader Clarence Norman for grand larceny by extortion and coercion. More broadly, the evidence in the Norman criminal trial, and also in a second prosecution by the Kings Country District Attorney's Office (of Gerald Garson, a long-time power in the Democratic Party in Brooklyn and a former Justice of the Kings County Supreme Court), underscores how party leaders' control over nominations to the King County Supreme Court have fostered corruption in the nomination process and corruption on the bench. Consistent with this evidence from court proceedings, many public reports and news stories have recounted the ways through which influence, favors, and money have played an inappropriate role. Drawing on those sources, this section provides an account of "the way it works"—to quote Mr. Norman—in Kings County under the judicial district nominating system. JA 173.

A. The History Of López Torres's Attempts To Obtain A Supreme Court Seat

When Judge López Torres won a seat on the Civil Court in Brooklyn with the support of the Kings County Democratic Party in 1992, she did not expect that the party's endorsement indebted her to the party during her tenure on the bench. As the District Court's findings demonstrate, she was wrong. As Judge López Torres testified, shortly after she was elected, she was instructed by a party functionary

to make a patronage hire.[3] JA 172. In a letter "congratulating" her on her election, a party official explained that Clarence Norman and Vito Lopez, the state assemblyman (and current leader of the Democratic Party in Brooklyn) through whose primary sponsorship Judge López Torres had obtained her endorsement, wanted her to hire a particular lawyer as her court attorney. *Id.* Judge López Torres testified that she reviewed the resume attached to the letter, interviewed the candidate, and followed up on his references. She was unimpressed—the candidate's prior employer, a Brooklyn Supreme Court justice for whom he had served as law secretary, called his work mediocre and stated that he spent too much time on the phone doing political work—and so she hired a more qualified attorney. JA 172-173.

While the choice of her court attorney was a professional employment decision from the perspective of Judge López Torres, the leaders of the Brooklyn Democratic Party saw it as an act of ungrateful betrayal, disqualifying her from ever again receiving the party's support for any judgeship. As Judge López Torres testified, Mr. Norman was "extremely upset" by her refusal to comply with his demands, and he called Judge López Torres to explain that she did not "understand the way it works." JA 173. Mr. Norman instructed Judge López Torres that the "way it works" is that court attorney positions are handed out as rewards to those attorneys who work hard for the party. *Id.* Mr. Norman further told her that she had obtained her Civil Court judgeship "for nothing," and he demanded that she "unhire" the individual she had selected over the party's choice and instead hire a candidate of the party's bidding. *Id.* When Judge López Torres refused, Mr. Norman made the stakes clear: he told her that the party would not forget her actions when it came time for her to seek a seat on the Supreme Court, as

[3] Under the District Court's procedure for receiving testimony, Judge López Torres submitted a sworn declaration and was then subject to cross-examination. In the interests of simplicity, both the declaration and the cross-examination are referred to herein as "testimony."

many Civil Court judges do. As Judge López Torres testified, Mr. Norman reminded her that without the "County's"—that is, his own—support, her nomination for the Supreme Court "will not happen." JA 173-174.

Mr. Norman was not alone in expecting patronage favors from Judge López Torres. As Judge López Torres testified, Assemblyman Lopez also chastised her for her refusal to hire the candidate recommended by Mr. Norman. He complained that she had "made him look bad" in the Brooklyn party organization, given his support of her candidacy. JA 174. He, too, demanded that she fire her court attorney and make a patronage hire instead. Once more, she refused. *Id.* Notwithstanding her refusal, party leaders continued to try to influence her hiring decisions. Judge López Torres testified that, after she had been on the bench for several years, Assemblyman Lopez reached out again and dangled the prospect of a Supreme Court position for her if she would hire his daughter, who was fresh out of law school, as her new court attorney. *Id.* She again refused. Tellingly, Assemblyman Lopez's daughter was hired by another Brooklyn Civil Court judge, who ultimately was nominated and elected to the Supreme Court. *Id.*

Consistent with his threats, Mr. Norman had the power to punish the judges who did not "play ball," and he used that power to block Judge López Torres from advancement. In 1997, Judge López Torres decided to seek a Democratic nomination for Supreme Court justice, and she sought out Mr. Norman for a meeting on that issue. JA 175. At that meeting, Judge López Torres testified, Mr. Norman told her that her failure to hire his candidate five years earlier had been a "serious breach of protocol." *Id.* She expressed her willingness to consider a qualified applicant from the party, and he told her that she now needed to get the support of the "Latino" district leaders. *Id.* She did not have much opportunity to seek this support, however, because several weeks later Mr. Norman placed "an urgent phone call" to her while she was on the bench, demanding that she remove her name from consideration at the convention. JA 175-176. She refused. Ultimately, her efforts failed: although several

party officials had originally asked her if she would be willing to seek the party nomination, not one dared to propose her name at the convention itself. *Id.* Judge López Torres's efforts in 1998 to obtain the party's nomination to the Supreme Court were similarly thwarted: after she was interviewed by the Kings County Judicial Screening Committee—which was under party control—both the chair of that committee and Mr. Norman himself refused to inform her whether the committee had found her qualified. JA 176.

In 2002, Mr. Norman endorsed another candidate to oppose Judge López Torres in the primary election for the Civil Court seat she held, leading her to mount an independent campaign for the Democratic nomination for that seat. She simultaneously again sought the party's nomination for the Supreme Court, writing both to Mr. Norman and to the chair of the judicial screening committee to declare her interest in a Supreme Court seat. JA 180, 189-190. The chair of that committee responded that the committee reviewed only those applications that had been referred by Mr. Norman. JA 180, 191. Judge López Torres then met with Mr. Norman to request his support. He told her that, while she was qualified, he would not support her because she had been "disloyal." JA 180. At the judicial nominating convention, the need for Mr. Norman's backing was apparent. A supportive delegate did submit Judge López Torres's name for consideration, and she received a number of votes. However, with the delegates having been handpicked by party leaders, the slate backed by Mr. Norman unsurprisingly won by a landslide. JA 180-181.

Meanwhile, the Brooklyn party leaders mobilized the party organization to actively work against her candidacy for reelection to the Civil Court. Indeed, as Judge López Torres and others testified at the Norman criminal trial, on the eve of the meeting at which the party's district leaders would select which candidates to endorse for Civil Court, Mr. Norman's own choices were invited to wait inside the diner in which district leaders were conferring so that the candidates could thank the district leaders after the endorsements were made official. Norman Tr. 780-786, 1023-

1028, 1152-1156, 1290-1292.[4] Judge López Torres, having been cut out of the process by Mr. Norman, nonetheless learned of the date, time, and place of the meeting, and stood outside the diner in a fruitless attempt to garner support. *Id.* at 780-783, 785-786, 1025, 1153-1154, 1290-1291. The difference between the candidates' experiences—for Mr. Norman's hand-picked candidates, showing up to a meeting whose favorable outcome was clear; for the candidate who had refused to grant Mr. Norman the patronage position he demanded, handing out leaflets in vain—demonstrated Mr. Norman's power. Yet notwithstanding Mr. Norman's retaliatory efforts, Judge López Torres (aided by an army of supporters frustrated by party control over the Civil Court bench) won the primary. This was possible because, for Civil Court seats, unlike for Supreme Court seats, rank-and-file party members had the opportunity to vote directly for candidates in a primary.[5] JA 181.

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[4] "Norman Tr." refers to the transcript from the most recent criminal trial of Mr. Norman, prosecuted by the Kings County District Attorney's Office in January and February 2007. *See People* v. *Norman*, Indictment No. 7189/03. A letter request to lodge this transcript with the Court has been filed with the Clerk pursuant to Rule 32.3.

[5] While the primary system for the Civil Court, in contrast to the primary system for the Supreme Court, permits party members to have a voice in the selection of the party's nominee, party leaders like Mr. Norman have nonetheless been able to leverage their control over the Supreme Court nomination process into power over candidates for and judges on the Civil Court. This is so because New York has come to have an "informal [chain] of judicial promotion" from state courts of more limited or specialized jurisdiction (such as the Civil Court) to the state Supreme Court bench, of which candidates, judges, and party leaders are all well aware. *See* Testimony of James A. Gardner to The New York State Commission to Promote Public Confidence in Judicial Elections 7, *available at* http://law.fordham.edu/commission/judicialelections (hyperlinks: Public Hearings Information > Buffalo > Sept. 23, 2003); *see also* Sections II.B and III.B *infra*. (This Commission was formed in 2003 by New York State Chief Judge Judith S. Kaye, in part based on "[r]eports of undignified judicial campaign activity in local elections around the State, connections drawn between campaign contributions and judicial decision-making, and attacks on political party control of judicial elections." *See Final Report to the Chief Judge of the State of New York* 1, *available at*

In 2003, Judge López Torres began another campaign for nomination to the Supreme Court. JA 182. In light of adverse publicity, Mr. Norman agreed to forward her name to the screening committee, but he continued to refuse to support her candidacy because of her perceived disloyalty to him. Judge López Torres testified that he explained to her that she did not have enough support—clearly referring to the support of the party leaders rather than the support of the electorate—and that "County" would only support candidates who support "County." *Id.* In an effort to learn the identity of the delegates, so that she could lobby them for support, she wrote to Jeffrey Feldman, Mr. Norman's handpicked second-in-command, over the course of some months. JA 183. When he finally wrote back, less than two weeks before the convention, he chastised her for thinking that the party possessed such a list, belittled her lack of knowledge of election law, and denied her request to address the delegates. JA 183-184, 200-201. Mr. Feldman's letter further accused her of contacting him through an unlawful fax machine that, purportedly, was out of compliance with Federal Communication Commission regulations. JA 201.

Judge López Torres was nominated by two delegates at the judicial nomination convention. However, not surprisingly, Mr. Norman's slate of candidates won. JA 184. The criteria upon which the boss-dominated slate of delegates acted are illustrated in a letter that Ralph Perfetto, a district leader in the Brooklyn Democratic Party, circulated shortly after the convention. Mr. Perfetto wrote that, while there was no question that Judge López Torres was "highly qualified," her refusal to fall in line with the patronage system made her an "ingrate" and thus undeserving of a nomination. JA 184-185, 198. In the eyes of the party leaders, Judge López Torres could not be counted on because she had "courted Vito Lopez to support her for Civil Court, but then

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http://law.fordham.edu/commission/judicialelections (Feb. 6, 2006) (Feerick Commission Final Report).

decided she didn't need him anymore and denied his daughter a job." JA 185, 198.

B. Other Evidence Of Corruption In The System For Selecting Supreme Court Nominees

Testimony in the recent criminal trial of Mr. Norman further illustrates how, in return for bestowing judgeships, Brooklyn Democratic Party leaders have expected to be rewarded—by the judge. This was the third trial of Mr. Norman that the Kings Country District Attorney's Office had successfully prosecuted since 2005. It focused on Mr. Norman's efforts to extort campaign funds from two candidates for nomination to the Civil Court in 2002. *See People* v. *Norman*, Indictment No. 7189/03. The evidence adduced at that trial revealed that Mr. Norman forced judicial candidates to pay for services of vendors used by Mr. Norman in his own campaign for reelection to the State Assembly or risk being "dumped" by him and the party. On the strength of this evidence, the jury convicted Mr. Norman of coercion and grand larceny by extortion.

In 2002, Karen Yellen and Margaret Cammer were, like Judge López Torres, sitting Civil Court judges who were seeking to be reelected to that position. Norman Tr. 787. Marcia Sikowitz was a Housing Court judge seeking election to the Civil Court. *Id.* at 1010-1012. All three sought, and ultimately received, the endorsement of the Democratic Party in Brooklyn, through the approval of Mr. Norman. *Id.* at 1015-1018, 1153-1154, 1272. Mr. Norman directed Judge Sikowitz to run for Judge López Torres's seat. *Id.* at 1158-1159.

As Judges Sikowitz and Yellen testified at trial, and as the testimony of their campaign staffs corroborated, they did not set up or prepare to finance any field operations of their own to gather signatures for designating petitions to win a place on the primary ballot in September. Instead, they reasonably assumed that, because they were party-endorsed candidates, the party organization would include their names on the petitions circulated by the party. Norman Tr. 1019, 1277-1281, 1630, 1749. However, in a series of meetings in July 2002, as the petitioning process was drawing to a

close, Mr. Norman and Mr. Feldman for the first time told the candidates that they were expected to finance a $300,000 joint campaign using vendors designated by Mr. Norman. *Id.* at 1029-1031, 1159-1161, 1283-1284. Judge Cammer dropped out of the race, abandoning her judicial career because she could not afford to continue on those terms. *Id.* at 1163-1164. Her place on the ballot was handed by Mr. Norman to party loyalist Robin Garson, who, with the assistance of the party, succeeded in preventing her opponent from appearing on the primary ballot and thus ran an unopposed race in the primary. *Id.* at 1165-1168, 1198-1199, 1347. As the trial testimony demonstrated, Judges Sikowitz and Yellen were specifically instructed that they must issue joint mailings through one Ernest Lendler and use the services of one William Boone III to distribute literature in "central Brooklyn," which included Mr. Norman's Assembly District. *Id.* at 1053, 1072, 1171-1172. Testimony from Mr. Norman's campaign treasurer revealed that Mr. Lendler also provided campaign services to Mr. Norman's own reelection campaigns, and that Mr. Lendler charged Mr. Norman no interest on long unpaid bills. *Id.* at 2115-2116. For his part, Mr. Boone was Mr. Norman's old friend and worked regularly at Mr. Norman's direction in his Assembly District. *Id.* at 1182. Mr. Boone provided, as he testified, "voter empowerment" services for Mr. Norman in that district, which largely entailed pulling down posters of candidates whom Mr. Norman did not support. *Id.* at 2016-2019, 2065-2066.

Judges Yellen and Sikowitz desperately attempted to salvage their candidacies, although they did not have the campaign resources to finance the joint campaign and they did not believe that the campaign strategy dictated by Mr. Norman made any sense for them. Norman Tr. 1081-1088, 1161-1162, 1189-1190, 1196-1197, 1642-1643, 1664-1665. Mr. Norman informed Judge Yellen that if she did not comply with his plan in full, the party would "dump" her. *Id.* at 1086-1087, 1195, 1323-1324, 1778-1779. Judge Yellen testified that the withdrawal of party support at this crucial phase in the campaign would have been fatal to her chances of getting on the ballot, much less winning the primary, and so she ac-

ceded to Mr. Norman's demands. *Id.* at 1344-1346, 1863. This conduct formed the basis of Mr. Norman's conviction for attempted grand larceny by extortion. *Id.* at 2449.

Mr. Feldman testified that, in the week immediately before the September 2002 primary, he called Judge Yellen's campaign staff at the direction of Mr. Norman and demanded an additional $10,000, allegedly for primary day operations. Norman Tr. 1200-1202, 1797-1799. Mr. Feldman told them at the time that $1,000 of this money was supposed to be spent on primary day operations in Assemblywoman Adele Cohen's district (with the implication, consistent with the requirements of New York Election Law, that such operations were specifically to support Judge Yellen's campaign), while the remaining $9,000 was to go to Mr. Boone for primary day operations throughout central Brooklyn. *Id.* at 1200-1204, 1797-1799; *see also* N.Y. Elec. Law § 17-162 ("No candidate for a judicial office shall, directly or indirectly, make any contribution of money or other thing of value, nor shall any contribution be solicited of him . . . ."). When Judge Yellen's campaign staff attempted to determine whether these amounts were negotiable, or whether they could target where the money would be spent, Mr. Feldman told them—at, he testified, the direction of Mr. Norman—that the party would give no support to Judge Yellen anywhere in the county if they did not use the money exactly as Mr. Norman had demanded. Norman Tr. 1203-1206. Recognizing that losing party support would be fatal to her candidacy, Judge Yellen again acquiesced, although she had already taken out a personal loan to finance her campaign. *Id.* at 1359-1367, 1863. Testimony further exposed that Mr. Boone campaigned only for Mr. Norman in Mr. Norman's Assembly District and later deposited Judge Yellen's $9,000 check in his personal account. *Id.* at 2033-2039, 2100-2103. Assemblywoman Cohen testified that no one told her to spend Judge Yellen's $1,000 check on activities to promote Judge Yellen's campaign and that she spent the check on her own reelection campaign. *Id.* at 1533-1535. The jury found that these actions by Mr. Norman constituted grand larceny by extortion and coercion. *Id.* at 2450.

Revealingly, in the primary that took place the following week, where there were contested Civil Court races, the electorate strongly supported the independent Civil Court candidates: Judge Yellen lost her reelection bid to an independent candidate named Delores Thomas, and Judge Sikowitz lost to Judge López Torres. Norman Tr. 1211-1212. (By contrast, the judicial district convention system denied the public a practical opportunity to nominate or support a challenger candidate for Supreme Court positions.) Judge Yellen nonetheless fulfilled her promise to pay Mr. Boone $9,000 because, as she testified, it was not only her campaign that year for the Civil Court that concerned her. According to Judge Yellen, she understood Mr. Norman's power over the nominations to the Kings County Supreme Court to mean that crossing him would ruin any chance she might have in the future for a seat on that court. *Id.* at 1370-1371; *see also id.* at 1804.

Apart from this prosecution, there are ongoing investigations that the Kings Country District Attorney's Office is conducting into related matters. I am not liberty to disclose the content of such investigations. However, I am persuaded, from my long experience as a prosecutor, voter, citizen, and lawyer, that, corrupt as Mr. Norman's administration was, the problems of corruption in Brooklyn involving Supreme Court judgeships are not attributable to a single corrupt party leader. Rather, as the public record demonstrates, corruption in judicial politics has a long history paralleling the long history of the judicial district convention system.

Indeed, Senator Martin Connor, a New York state senator representing Brooklyn for approximately 30 years, testified below that legendary former Brooklyn party leader Meade Esposito routinely had the ultimate say in who would be the party's nominee for a Supreme Court position and who therefore would win the judgeship. *See* Tr. 2107, 2237-2238. Consistent with this testimony, in an interview recounting the Esposito era, former state Supreme Court justice Thomas R. Jones, who sat on the bench between 1969 and 1985, later admitted that he paid $35,000 in cash to a

Brooklyn district leader, Thomas Fortune, in exchange for his seat, with the knowledge and acquiescence of Mr. Esposito. *See* Ron Howell, *Bench Came at a Price*, Newsday, June 17, 2003, at A3. Explaining that the exchange was "in accordance with the customs and practices of the day," Judge Jones stated that the funds collected through this practice were then distributed among district leaders. *Id.* It is easy to see a direct line between this decades-old practice of using money to buy loyalty within the party and Mr. Norman's contemporary use of Judge Yellen's money to pay his cronies, Mr. Lendler and Mr. Boone. Notably, Judge Jones stated that he eventually distanced himself from the party as much as he could, refusing when asked by party leaders for favors. *Id.* As a result, he believes, he was never appointed by the state's governors to the Appellate Division of the Supreme Court. *Id.*

C. The Link Between Corruption In The System For Electing Justices And Corruption In The Administration Of Justice

According to Judge Jones, when he complained to then-Brooklyn party leader Meade Esposito about being required to pay Mr. Fortune in exchange for a Supreme Court seat, Mr. Esposito told him, "We're gonna put you in the criminal part of the court . . . . A criminal court judge can sentence a man to 10 to 20, or 5 to 10. Ain't that worth money? . . . If you can't make money out of that, you're stupider than I thought." Howell, *Bench Came at a Price*. As this vignette suggests, corruption brought about by the architecture of the Supreme Court nomination system does not necessarily end once the judge is tapped by party leaders to serve on the Supreme Court, or when the judge is elected. It can continue, in the form of corruption in the administration of justice.

Earlier this year, in a case prosecuted by the Kings Country District Attorney's Office, a jury convicted former Supreme Court Justice Gerald Garson on several counts of receiving bribes and official misconduct. *See People* v. *Garson*, Indictment No. 5322/2003. The testimony revealed that Judge Garson had accepted thousands of dollars worth of

gifts from a (now disbarred) lawyer in exchange for giving the lawyer favors, including ex parte advice about a case pending before the judge and private access to the judge's robing room. Judge Garson is currently serving three consecutive sentences totaling three to ten years of imprisonment. *See* Daniel Wise, *Garson Loses Bid to Delay Prison Term During Appeal*, 237 N.Y.L.J. 1 (June 21, 2007). Judge Garson had a long history of leadership in the Brooklyn Democratic Party; before obtaining his Supreme Court seat, he had been a district leader and fundraiser, and had supported Mr. Norman's bid for party leadership when Mr. Norman's predecessor stepped down. *See* Tom Robbins, *Judicial Fever in Brooklyn*, Village Voice, May 6, 2003, at 24.

Several years earlier, in 2002, the Kings Country District Attorney's Office prosecuted Victor Barron, a former Supreme Court justice in Brooklyn, who pleaded guilty to receiving a bribe and was sentenced to a term of three to nine years imprisonment for soliciting $250,000 from a lawyer in exchange for approving a settlement involving a brain-damaged infant. *See People* v. *Barron*, Indictment No. 479/2002; *see also* William Glaberson, *Ex-Brooklyn Judge to Serve at Least 3 Years for Bribe*, N.Y. Times, Oct. 29, 2002, at B3. Judge Barron had risen through the ranks of the Brooklyn judiciary with party support. He was appointed to the Civil Court in 1987 and won election to that court in 1988; in 1998, he was elected to the Supreme Court. *See* William Glaberson, *Former Justice Said to Have Deal on Bribery Plea and Jail Term*, N.Y. Times, Aug. 3, 2002, at B1.[6]

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[6] Brooklyn Supreme Court justices have also been indicted, sanctioned, and/or removed from office for other forms of financial impropriety. For example, in fall 2007, the Kings County District Attorney's Office is scheduled to try Gerald Garson's cousin Michael Garson, also a former Supreme Court Justice and before that a leader in the Brooklyn Democratic Party, on charges that he stole hundreds of thousands of dollars in savings from his elderly aunt to cover his stock market losses. *See People* v. *Garson*, Indictment No. 7068/2004; *see also* Daniel Wise, *NY Judge Who Reportedly Offered to Wear Wire to Set Up Colleague Sees Plea Deal Evaporate*, 237 N.Y.L.J. 1 (June 14, 2007); *Judicial Fever in Brooklyn*. The Appellate Division has already ruled in a civil case that Michael Gar-

Party leaders' control over Supreme Court nominations has given rise to the appearance of impropriety in other contexts in the administration of justice. For example, several high-ranking officials in the Brooklyn Democratic Party have personally benefited from lucrative court appointments made by the judges themselves. A 2001 special inspector's report decried the role of cronyism and party connections in the process of appointing receiverships and guardianships. *See Fiduciary Appointments in New York: A Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman*, Executive Summary, *available at* http://www.courts.state.ny.us/ip/gfs/igfiduciary.html. Part of the impetus for this report was the public disclosure of a letter sent to the Law Chairman of the Kings County Democratic Party by two disgruntled attorneys affiliated with the party, explaining that they would no longer represent the party's candidates for office, including judicial candidates, because they were angry that the party had steered receiverships to another party insider instead of to them.[7] *Id.*,

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son must repay the unaccounted-for sum of $163,000, with interest. *See In re Gershenoff*, 793 N.Y.S. 397 (N.Y. App. Div. 2005); *see also* Andy Newman, *Judge Indicted on Charge of Taking Aunt's Money*, N.Y. Times, May 12, 2005, at B2. Earlier, in 2002, the New York State Commission on Judicial Conduct recommended that Reynold Mason, who was at the time a Supreme Court Justice in Brooklyn, be removed from office for misuse of an attorney escrow account. *See In re Mason*, 2002 WL 1477774 (N.Y. Comm'n Jud. Conduct June 21, 2002). Judge Mason, like Judge Barron, had first served as a Civil Court judge, and in 1997 was elected to the Supreme Court. In addition to finding that Judge Mason had failed to cooperate with the investigation and had given false testimony, the Commission found that his misuse of the escrow account began while he was an attorney and continued through his tenure on the bench. As a sitting judge, he improperly used the funds in this account for, among other things, contributions to a political club in Brooklyn. The Court of Appeals unanimously accepted the Commission's sanction recommendation. *See In re Mason*, 790 N.E.2d 769 (N.Y. 2003).

[7] At least one of these lawyers was not even statutorily eligible to be appointed as receiver at all, in that he was the son of a sitting Brooklyn Supreme Court Justice. (The other lawyer had previously served as law secretary to two Brooklyn Supreme Court Justices.) *Fiduciary Appointments in New York*, Appointments in Receivership Cases.

Preface, Attachment B. The letter made clear the expectation that loyal party service was to be rewarded with such appointments. The special inspector's report found that this expectation was anchored in reality. It concluded that a small group of individuals affiliated with the Brooklyn Democratic Party had received a disproportionate number of appointments. *Id.*, Appointments in Receivership Cases. Indeed, the report noted evidence that the Brooklyn Democratic Party had long furnished judges likely to make receivership appointments with a list of "recommended" fiduciary appointees, all of them loyal party members. *Id.* n.16. It noted that this practice had, apparently, ended in the late 1990s, when rumors surfaced of a federal criminal investigation. *Id.*

III. Corruption And Abuse Due To Exclusion Of The Rank-And-File From Any Meaningful Role In Choosing Supreme Court Nominees Are Statewide Problems

Outside of Brooklyn, it is similarly well known that political party leaders have long controlled state Supreme Court nominations. These leaders have exploited that power to consolidate their political authority (including over lesser judgeships and other public offices), to extract political contributions, and/or to obtain personal gain. In some instances, as in Brooklyn, party control over the Supreme Court nomination process has given rise to findings of misconduct or corruption. Accounts of party leaders' improper influence over judicial candidates, sitting judges, and the judicial selection process have been documented in judicial sanction decisions, official commission findings, and news reports. These sources confirm that boss domination of these nominations is not a "Brooklyn" phenomenon but a statewide problem. The result is that rank-and-file party members, who ostensibly are empowered to elect the delegates who in turn select party judicial nominees, are functionally disabled from influencing this process throughout the state.

A. Party Leaders' Control Over Supreme Court Nominations Is A Statewide Problem

Testimony and documents submitted below and other public sources attest that party leaders outside of Brooklyn have similarly exploited New York State's restrictive ballot access requirements and judicial convention rules to exercise unilateral power over Supreme Court nominations. In the Ninth Judicial District, for example, an Orange County Republican Party leader and longtime delegate to the Republican Party judicial convention averred that "the *only* path [to obtain the Republican Party's nomination] is to obtain the support of his or her county Party chairman and then seek the blessing of the Westchester County chair." JA 244. Similarly, in the Seventh Judicial District, party leaders exercised complete control over such nominations, as illustrated by former Rochester City Court Judge John Regan's testimony about his futile efforts at obtaining a Republican nomination to the Supreme Court. JA 232-235; *see also* JA 234 (testifying that, without party sponsorship, a candidate lacked even "a realistic opportunity to compete" for consideration by voters). As the District Court aptly put after reviewing such evidence, in New York, "the local major party leaders—not the voters or the delegates to the judicial nominating conventions—control who becomes a Supreme Court Justice and when." Pet. App. 95.

Several reported judicial disciplinary decisions reinforce the control that party leaders have over judicial appointments and the interest that judges have in currying favor with these leaders. In 1994, the New York State Commission on Judicial Conduct censured Bronx Supreme Court Justice Barry Salman for violating New York's judicial conduct rules limiting the political contributions by judges. As Justice Salman admitted in that proceeding, while campaigning for a full term on the Supreme Court as an elected Civil Court judge, he had authorized his campaign committee to purchase $2,400 in tickets to the "annual dinner of the Bronx County Democratic Committee" and to donate $6,750 to three Democratic Party committees in the Bronx. *See In re Barry Salman*, 1994 WL 897717, at *1 (N.Y. Comm'n Jud.

Conduct Jan. 26, 1994). Justice Salman was rewarded for that display of loyalty—in 1990, he was chosen by the Bronx County party leaders for a nomination to the Supreme Court, which ensured his election to that seat. He still serves on the Supreme Court today. *See New York Judge Reviews and Court Directory* 7 (2007-2008 ed.).

Similarly, in 2004, the Commission on Judicial Conduct admonished Amherst Town Justice Mark Farrell for violating judicial conduct rules limiting political activities and contributions, based on various steps he took in an attempt to gain the Democratic nomination for a Supreme Court seat in Erie County. *See In re Mark Farrell*, 2004 WL 1813745, at *2 (N.Y. Comm'n Jud. Conduct June 24, 2004). Aware that his chances to obtain the nomination hinged on the support of the Democratic Party leader in that county, Justice Farrell acquiesced to a demand by the county chairman to contact members of the county Democratic Committee to solicit support for the chairman's reelection. Justice Farrell called 50 committee members and spoke to 20 of them on behalf of the chairman. *Id.* at *1. To further assist and thereby gain the support of the county leadership, he also contributed $7,500 of his campaign funds to the Erie County Democratic Committee. *Id.* He, too, still serves as a town justice. Elected Officials of Amherst Township, *available at* http://www.amherst.ny.us/contact/electa.asp (last visited July 12, 2007).

The 1988 Reports of the New York State Commission on Government Integrity reinforce the statewide nature and the long history of these problems. That Commission was created by then-Governor Mario Cuomo to address widespread concerns about, among other things, the integrity of the judicial nomination process. *See* Executive Order 88.1 ¶ 2.7 (Apr. 21, 1987) (charging the Commission with responsibility for investigating "weakness in existing laws . . . regarding the selection of judges to determine whether such weaknesses create an undue potential for corruption, favoritism, [and] undue influence"). Following an extensive investigation that included "interview[s with] approximately 50 sitting and former judges around the state, and more than 60

experts, political figures, spokespersons for various organizations concerned with judicial selection, and other individuals," the Commission issued a 31-page report setting forth its findings on the judicial nominations process. *Government Ethics Reform for the 1990s: Collected Reports of the New York State Commission on Government Integrity* 272 (Bruce A. Green ed. 1991); *see also id.* at 267-301.

The Commission found that the state's restrictive ballot access rules for the Supreme Court nominations process often rendered voters' "right to determine their parties' candidates, and, ultimately officeholders . . . meaningless." *Government Ethics Reform* 269 (internal quotation marks omitted). It stated that party leaders' control over the nominations process "eliminate[d] from consideration the vast majority of able candidates," making "the selection of talented judges a matter of pure happenstance," and "also undermine[d] confidence in the ability of judges to serve fairly and impartially after they are elected." *Id.* at 268. It found that a judicial candidate or a sitting judge's ability to win or to keep a Supreme Court seat depends on his or her "past service to the party organization" and efforts to "maintain favor of the party" leadership. *Id.* at 268, 280. Further, when judicial candidates run against the party leaders and win primaries, they "sometimes pay a price" for their independence and lose the opportunity to reach the Supreme Court. *Id.* at 278.

In Queens County, for example, a judge who ran for the Civil Court in defiance of leaders of the dominant Democratic Party was left languishing "for many years" on the Civil Court bench, even as "many other Civil Court judges with fewer years of judicial experience" were elevated to the Supreme Court. *Government Ethics Reform* 278. The Commission recounted that that experience had taught the judge an important lesson—one who aspires to a seat on the Supreme Court should not "make enemies with people who determine whether you get redesignated," i.e., the party leaders. *Id.* (internal quotation marks omitted). The Commission found that Queens County was far from unique in this respect; instead, it was "in important ways representative of . . . other areas" in New York. *Id.* at 276.

B. Party Leaders Exploit Supreme Court Nominations In A Variety Of Ways

Local party leaders have exploited their control over Supreme Court nominations as a means of determining who is appointed to other judicial or political positions, of controlling the conduct of judges in office, and of enhancing their fundraising. *See Government Ethics Reform* 280 ("party leaders [saw] the tremendous power they exercise over judgeships [as] first and foremost a political asset, not a public trust"); *see also id.* at 284-288.

Controlling appointments to other courts: As reported by the New York Times, on at least four occasions between 1991 and 1998, leaders of the Bronx County Democratic Party used nominations to the Bronx County Supreme Court as a means of placing their favored candidates for other offices on the general election ballot, without those candidates having to win a primary vote. *See* David Halbfinger, *Party Boss Has Firm Grip on Judgeships*, N.Y. Times, Oct. 19, 1998, at B1. This is possible because, under New York Election Law, the judicial nominating conventions where Supreme Court nominees are formally chosen take place after the primaries for Civil Court are held. This sequence enables party leaders to tap successful Civil Court nominees for Supreme Court positions, and then to act unilaterally to fill the resulting Civil Court seat. In 1991, for example, the Bronx County Democratic Party leader nominated a former City Councilman to a Supreme Court seat merely ten days after that Councilman had won a primary for the Civil Court. The resulting vacancy on the Civil Court ballot allowed the county leader to handpick a nominee for the Civil Court bench, who otherwise would have had to win a primary. *Id.* In 1994 and again in 1997, veteran politicians were given state Supreme Court nominations shortly after they had won primaries for the New York General Assembly—enabling the local party leader to pick the replacement nominees for the General Assembly without giving the rank-and-file an opportunity to vote on those candidates. *Id.* Finally, on August 1, 1998, Judge Peggy Bernheim abruptly retired from the Civil Court bench. This was "ideal" timing

for the Democratic Party county leader because it allowed him to handpick the party's nominee to succeed Judge Bernheim in the general election, without giving the rank-and-file voters a choice.[8] The serendipitous timing of Judge Bernheim's retirement was made even clearer the next month, when she "un-retired" to accept a nomination to the Bronx County Supreme Court. *Id.*

Controlling actions of judges in office: Local party leaders' control over state Supreme Court nominations has also enabled them to influence sitting judges' administrative decisions. As the Commission on Government Integrity found, party leaders often expect to have control over judges' personnel decisions—the "protocol" described by Clarence Norman to Judge López Torres, *supra*, p. 12. *Government Ethics Reform* 278. A Queens County judge admitted to the Commission "attempt[ing] to win [the party leaders'] good graces" by choosing his law secretaries based on the recommendations from the Democratic Party leaders in Queens County. *Id.*

Concerns about how party leaders may react—including whether they would withhold nomination or re-nomination—may also influence judges' decisions on the bench. In his testimony before the Commission on Government Integrity, a state Supreme Court justice acknowledged that if he had to decide a case involving the law partner of a political leader, the impact of adverse outcome on his re-nomination would weigh on him: "I'm human. . . . I would think about it. I would struggle with [the prospect that] I'm going to kill myself for the next election." *Government Ethics Reform* 287 (internal quotation marks omitted). As that Commission concluded, the necessity of securing the party leaders' support for re-nomination "can have a chilling effect on a judge's exercise of his [or her] duties." *Id.* at 286.

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[8] Had Judge Bernheim retired three weeks sooner, rank-and-file party members would have had the opportunity to vote on a nominee; had she retired on or after August 5, the Mayor of New York City would have had the right to appoint an interim successor for the next year. *See* N.Y. Elec. Law § 6-148(3); N.Y. City Civ. Ct. Act § 102-a(3).

Enhancing party fundraising: Local party leaders also have leveraged their control over Supreme Court nominations into an effective fundraising tool, as the episode leading to Justice Salman's censure illustrates. It is common for sitting judges, judicial candidates, their families, and courthouse employees to purchase tickets to political fundraisers, often costing several hundred dollars a ticket. *Government Ethics Reform* 285. Indeed, to circumvent the judicial ethics rules that ordinarily forbid judges from purchasing such tickets, judges would "sometimes announce their candidacies for another vacancy" on the same bench; this nominally enabled them to come within an exception that permits certain political donations by persons then running for office—and thereby to make donations to party leaders. *Id.* at 285.[9]

C. Party Leaders' Control Over Supreme Court Nominations Has Defied Repeated Calls For Reform

Affirmance of the decision below voiding New York State's judicial district nomination system is, finally, merited because New York State political leaders have proven durably unwilling and unable to reform this broken, corrupt, and unconstitutional system.

Boss domination of the judicial nomination process has been recognized for decades. As long ago as 1944, concerns about such control of judicial district nominating conventions by party leaders prompted the New York Times to call on the state legislature to reform a system in which the "choice of boss-manipulated conventions" was the only one that mattered. *See Ask Legislature to Act on Courts*, N.Y. Times, Feb. 28, 1944. As the Court of Appeals recognized below, the ensuing decades were full of known instances in which cele-

[9] Practicing lawyers who regularly appear before the Supreme Court Justices and receive guardianship and receivership appointments are also a mainstay of party-sponsored fundraisers. An analysis of Queens County campaign finance records for 2002 showed that close to 40% of the funds raised by the Queens County Democratic Party came from people associated with the courthouse, including practicing lawyers and court personnel. *See* Clifford J. Levy, *Where Parties Select Judges, Donor List Is a Court Roll Call*, N.Y. Times, Aug. 18, 2003, at A1.

brated bosses unilaterally selected Supreme Court justices, often with little or no regard to their juristic merit. *See* Pet. App. 29 ("reports and newspaper editorials from [1944] forward have decried an electoral practice 'that mocks choice,' and criticized a system in which 'voters can never know the candidates and have to accept party slates,' while the 'real choice is . . . left to political bosses'"). And by the late 1980s, the public's dissatisfaction with the system was sufficiently evident and the need for reform sufficiently apparent to lead Governor Cuomo to found the Commission on Government Integrity. But even that Report, with its strongly worded conclusions, did not lead to change.

Today, the public remains disenchanted by the system. In a December 2003 survey, a majority of registered voters in New York deemed it "very important" for judges to be independent from political party leaders, while an additional 34% deemed it "important." *See* Feerick Commission Final Report Appendix E at 18. Fully 86% of these voters believed that political party leaders had either "a great deal" (48%) or "some" (38%) influence over who became judges, more than campaign contributors (39%), voters (36%), or special interest groups (31%). *Id.* at 16-17. But, other than the prospect of judicially mandated reform as embodied by the decisions and orders of the courts below, there is no prospect or political impetus for reform— especially when the very legislators who could implement reform are frequently the county-level party leaders (e.g., former Assemblyman Clarence Norman) who benefit the most from the status quo. As Justice Steven Fisher, the chief administrative judge of the Queens County Supreme Court, has succinctly explained, "parties, like any institution, are not eager to give away power and influence," and they will oppose and seek to block any "change in the system that would diminish their influence." Levy, *Where Parties Select Judges*.

CONCLUSION

For the foregoing reasons, as well as for the reasons contained in the Respondents' brief, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

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JULY 2007