

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 CURIAE¹

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 reelected 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 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.

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.

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 County 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 County 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 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.

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.

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 County 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

