SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X Index No.: 100678/2016

MARK WARREN MOODY,

Individually and as Class Representative
Petitioner,

Petitioners,

-against-

THE NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI, DOUGLAS A. KELLNER, ANDREW J. SPANO, and GREGORY P. PETERSON in their official capacities; and THE NEW YORK CITY BOARD OF ELECTIONS; FREDERIC M. UMAME, JOSE MIGUEL ARAUJO, JOHN FLATEAU, LISA GREY, MARIA R. GUASTELLA, MICHAEL MICHEL, MICHAEL A. RENDINO, ALAN SCHULKIN and SIMON SHAMOUN in their official capacities; and THE NEW YORK STATE DEMOCRATIC COMMITTEE; BYRON BROWN in his official capacity as Executive Committee Chair; and THE NEW YORK STATE REPUBLICAN PARTY; EDWARD F. COX in his official capacity as Chairman,

Respondents.

----------X

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO THE STATE RESPONDENTS' AND THE CITY COMMISSIONERS AND BOARD OF ELECTIONS' MOTIONS TO DISMISS

Mark Warren Moody, Esquire
Pro Se
43 West 43rd Street
New York, New York 10036
t. 917-414-7886
e. mwm@mwmoody.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

N.Y.S. Constitution

Cases

Statutes

PRELIMINARY STATEMENT

There is only one way to achieve government of the people, by the people, and for the people – assertive and vigorous protection of the franchise. In 1846, New York State first acknowledged this basic principle in our Constitution and roundly declared in its *first* line: "No member of this state shall be disfranchised". N.Y.S.Const. Art. I § I. Article II outlines constitutionally appropriate limitations on the franchise – none of which include discrimination based upon party affiliation.

In spite of Article 1 § 1.'s incontrovertible prohibition to the legislature, "millions of New Yorkers"[1] were disenfranchised in the April 19, 2016 New York State presidential primary because of their failure to register a party affiliation on or before October 9, 2015 – ***more than six months*** before the primary – as required by the legislative whimsy of Election Law § 5-304.[2] I was amongst those *millions*, as were numerous voters who had no idea that Bernie Sanders or Donald Trump might become their party's nominee on October 9, 2015[3], and Donald Trump's *own children* who provide unique evidence of New York State's closed primary's obvious unconstitutionality under the New York State Constitution.[4] Moreover, Petitioner in fact changed his party affiliation on March 24, 2016[5] which the state in fact

---

[1] Amended Verified Petition sworn to June 14, 2016, ¶¶20, 47 (hereinafter "Petition, ¶_".

[2] Petition, ¶19.

[3] Petition, ¶18.

[4] Petition, ¶¶20-28.

[5] Petition, ¶14.

registered before April 15, 2016.[6] This proves beyond cavil that the State was *able* to permit Petitioner to vote in the primary, but *chose* not to permit it. There is no rational basis for this choice.

Neither of Respondent New York City Board of Elections and its members' ("City")[7] nor Respondent New York State Board of Elections and its members' ("State")[8] motions to dismiss mention these facts. Ignoring them is a principal reason their motions should be denied. *See* Argument, Point I, *infra*. The City's and State's failure to justify the October 9, 2015 date (5-304) with anything more than glib lip service to unmet ideals of election regulation underscores not only that their motions to dismiss should be denied, but that the declaration sought by Petitioner should be issued.

At least Respondents are no longer arguing that "petitioner may have commenced this case too soon [] or may have commenced this case too late []! [emphasis in the original]"[9]

In short, the constitutional question at issue is whether 6 months and 10 days is a burden on the right to vote that is constitutionally justifiable. Neither the State nor the City makes any effort to discuss this question, and on this basis alone their motions should be denied.

---

[6] Petition, ¶¶30-32.

[7] Pages in the City's Memorandum of Law dated September 15, 2016 shall be referred to as "CC Memo, p._".

[8] Pages in the State's Memorandum of Law dated September 15, 2016 shall be referred to as "AG Memo, p._".

[9] *See* This Court's May 2, 2016 Reasons for not Granting TRO Application in this proceeding.

The State justifies this failure – in part – by arguing that New York's closed primary should be analyzed under the lowest level of judicial scrutiny. It should not. How can it possibly be that a burden is "minimal" when millions of people, including individuals with unlimited resources *and* a direct personal stake in the outcome fail to meet that burden? *See* Point II, *infra*.

As with the facts of this special proceeding, both the City and the State largely ignore Article I § I of the N.Y.S. Constiution's mandate, relying almost exclusively upon *Rosario v. Rockefeller* and the 2 Court of Appeals cases that cite it even though the issue at bar was not presented to those Courts. The question before this Court is one of first impression. *See* Point III, *infra*.

Both the City and the State believe that a political party's interest and a state's interest are identical for the purposes of constitutional analysis. They're not, but from this faulty proposition, the City argues that an open primary is unconstitutional unless the political parties decide otherwise. The parties' associational rights, however, are barely even implicated by this matter, and whatever such rights are implicated certainly do not trump the deprivation of the absolutely fundamental right to vote. *See* Argument, Point IV, *infra*.

Finally, the State's (the City makes no mention of it) less than half page argument that 5-304 is not unconstitutionally vague *must* be summarily rejected. *See* Point V, *infra*.

FACTS

For the complete factual background to this matter, the Court is respectfully referred to the Petition.

ARGUMENT

POINT I

ON A MOTION TO DISMISS PURSUANT TO CPLR 3211, THIS COURT MUST ACCEPT ALL OF THE PETITION'S ALLEGATIONS AS TRUE; AND THUS SHOULD DENY THE MOTION.

A motion to dismiss assumes the truth of the petition's material allegations and everything reasonably to be implied therefrom. *See Foley v. D'Agostino*, 21 A.D.2d 60, 65 (1st Dep't 1964). In determining such a motion, it is not the function of the Court to evaluate the merits of the case, *Carbillano v. Ross*, 108 A.D.2d 776, 777 (2d Dep't 1985), or express an opinion as to Petitioner's ability to ultimately establish the truth of the averments. *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509 (1979). Rather, the Petitioner must be "given the benefit of every possible favorable inference", *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976), and the motion to dismiss will fail if, "from [the Petition's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law". *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). *See also Nistal v. Hausauer,* 308 N.Y. 146 (1954)(holding that in a special proceeding a petition's allegations must be accepted as true on a motion to dismiss).

If the children of a purported billionaire who is actually running for president were precluded from voting for their father were 2 of millions of New Yorkers prohibited from voting because of Election Law § 5-304's arbitrary and capricious – not to mention indefensible – time limits to change party affiliation, there can be little doubt that the Petition must survive a motion to dismiss.

"No member of this state shall be disfranchised" asserts our Constitution and yet the Attorney General and Corporation Counsel defend § 5-304 against the disenfranchisement of millions of New York voters. They do so even though on October 9, 2015 very few New Yorkers can have had any idea that either Bernie Sanders' or Donald Trump's nomination was a possibility.

Accordingly, on October 9, 2015 ***only*** those New Yorkers who knew that they would vote for Hillary Clinton (and could not be swayed from that position under any circumstances) were capable of exercising their individual franchise meaningfully. This even though "[t]he whole purpose of the Election Law and of the Constitution under which it is enacted is that, within reasonable bounds and regulations, all voters shall, so far as the law provides, have equal, easy, and unrestricted opportunities to declare their choice for each office." *Callaghan v. Voorhis*, 252 N.Y. 14, 18-19 (1929). If millions of New Yorkers, including the multimillionaire children of a billionaire candidate could not declare their choice for office, how can it possibly be that the regulation prohibiting that choice is constitutional?

One answer that both the State and the City give[10] is that primary elections are somehow less constitutionally significant than general elections – an argument that has, rightly, been directly repudiated by more than a century of New York jurisprudence.

"The franchise of which no 'member of this state' may be deprived is not only the right of citizens who possess the constitutional qualifications to vote for public

[10] AG Memo, p.12; CC Memo, p.5.

officers at general and special elections, but it also includes the right to participate in the several methods established by law for the selection of candidates to be voted for. [citations omitted]" *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 242 (1912); *see also Burke v. Terry*, 203 N.Y. 293, 295-6 (1911).

Indeed, in New York it has been held unconstitutional to prohibit choice of party affiliation to vote in a primary seven (7) days before the party primary. *See In re McManus*, 185 Misc. 489, 491 (S.Ct. N.Y.Cty. 1945)(holding: "The constitutional right to vote in a primary election is no less fundamental than the right to vote in a general election [citation omitted]. To vote in a primary election, necessarily, one must enroll with a political party. Not to make reasonable provision for enrollment is to deprive citizens otherwise qualified of their right to participate in the selection of the candidates of the political party of their choice."). *See also In re Barber,* 24 A.D.2d 43, 45 (3d Dep't 1965).

Federal jurisprudence is no different. *See United States v. Classic*, 313 U.S. 299, 318 (1941) (holding: "Where the state law has made the primary an integral part of the procedure of choice, or where, in fact, the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2."). *See also Smith v. Allwright,* 321 U.S. 649, 661-2 (1944)(holding: "it may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution.").

The notion that New York State can impose upon its citizens' right to vote in such an arbitrary and unjustified manner is totally repugnant to the New York State Constitution. The Court of Appeals has perhaps put it best:

> "By section 1 of article 1 it is enacted that no member of this state shall be disfranchised unless by the law of the land or the judgment of his peers. It is therefore clear that the otherwise plenary power granted to the Legislature to prescribe the method of conducting elections cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting for the candidate of his choice violates the Constitution. We have said 'unnecessarily,' for there is no practicable system of conducting elections at which some electors by sickness or other misfortune may not be able to vote. Under our law the blanket ballot affords a voter who may be unable to read the ballot from illiteracy or physical defect an opportunity to vote by securing assistance, and to every elector the right to vote for whom he chooses by writing the name in the blank column if the name of his candidate is not on the ballot. If these rights were not accorded, the present election law would be unconstitutional." *Hopper v. Britt*, 203 N.Y. 144, 150 (1911).

Accepting as true the fact that millions of New Yorkers, including a fairly politically active lawyer, were prohibited from voting for the candidate of their choice in the 2016 presidential primary because on October 9, 2015 none of those millions could have known that Bernie Sanders or Donald Trump might have been a viable option renders 5-304 facially and as applied unconstitutional. If these facts are true, respectfully, one can only conclude that 5-304 "unnecessarily prevents the elector from voting for the candidate of his choice [which] violates the Constitution." *Id*.

Respondents' motions to dismiss should be denied.

POINT II

STRICT SCRUTINY IS THE APPROPRIATE CONSTITUTIONAL ANALYSIS, THOUGH § 5-304 FAILS ANY TEST APPLIED.

There can be no doubt that voting in a primary election constitutes "core political speech". This conclusion is required if "the circulation of designating petitions on behalf of a candidate" is core political speech. *La Brake v. Dukes*, 96 N.Y.2d 913, 914 (2001). Indeed, the State concedes – as it must – that "[v]oting is a fundamental right" (AG Memo, p.5)[11].

Accordingly, the question becomes whether 5-304 imposes a "severe burden" upon that right. Petitioner finds the severity of the burden beyond question given that millions of New Yorkers found themselves disenfranchised, including Petitioner himself (a fairly politically active lawyer) and the multimillionaire children of a billionaire who was in fact *running for President*. It is hard to conceive of a more severe burden on a fundamental right. While strict scrutiny is the appropriate standard to judge the constitutionality of this statute, for the reasons set forth herein, 5-304 could not even survive a rational basis challenge.[12] Even under the liberality of rational basis, the word rational still means *something* and bars legislative caprice.

---

[11] And although the State argues for the applicability of a different standard of constitutional scrutiny, the State in fact agrees that the appropriate standard is strict scrutiny stating: "To be sure where a statute or regulation imposes severe burdens on fundamental rights such as voting and political expression, strict scrutiny is required" (AG Memo, p.6).

[12] *See e.g. Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir.2008) (requiring laws that impose minor non-trivial burdens be reasonably tailored and justified by an important state interest).

None of the State's cases on this point require any contrary conclusion, and the City does not make this argument.

Indeed, the State relies upon *Matter of Esler v. Walters*, 56 N.Y.2d 306 (1982) (which (in an inapposite setting) upheld a limitation of voter eligibility in water district elections to landowning residents)(AG Memo, p.8). In doing so, the *Esler* Court expressly recognized that Article I, § I of the New York State Constitution is one area where New York's Constitution affords the individual greater rights than those provided under the federal constitution.[13] Specifically, the Court held that a person's right to vote:

> "may not be taken away or diminished **except under certain extraordinary circumstances**. [emphasis supplied]" *Id*. 56 N.Y.2d at 314.

It is impossible to fathom what the "certain extraordinary circumstance" that might justify 5-304's theft of millions' right to vote, and neither the State nor the City articulate one.

The State relies upon numerous additional cases in support of its argument that something less than strict scrutiny should apply; none of which are apposite. By way of limited example, *Walsh v. Katz*, 17 N.Y.3d 336 (2011)(AG Memo, pp.6-7) is distinguishable for many reasons, not least that *Walsh* involved an equal protection challenge under the United States Constitution to the residency requirement for an office seeker whose direct impact on the franchise "is not on one's right to vote, but on an individual's right to be a candidate for public office." *Id*. 17 N.Y.3d at 344.

[13] To conclude otherwise is to render meaningless Articles I and II of our Constitution since the U.S. Constitution has no similar or comparable provisions.

Johnson v. New York, 274 N.Y. 411 (1937) (AG Memo, p.8) stands for the contemporaneously unremarkable proposition that Article II, § I of the New York State Constitution does not prohibit a system of minority representation or proportional voting. Specifically, the *Johnson* Court found that Article II, § I was intended "to prescribe the general qualifications that voters throughout the State were required to possess to authorize them to vote for public officers or upon public questions relating to general governmental affairs." *Id*. 274 N.Y. at 419. That's got nothing to do with whether New York State can require party affiliation to vote in a primary at a time when it will likely, if not inevitably, be a meaningless choice.

If we take it as a given – as we should – that voting in a primary is as core "core political speech" as voting in a general election, then the next prong of the constitutional analysis is whether the burden imposed by the legislation is severe. In the 2016 New York State primary, the burden on New Yorkers' right to vote was not merely severe. It was, and particularly so if the right includes the right to *meaningfully* exercise the franchise, incontrovertibly ***insurmountable***.

On October 9, 2015, the vast majority of people had not heard of Bernie Sanders much less believed that he was a viable challenger to Hillary Clinton, and while everyone had heard of Donald Trump, very few believed that he had any chance of becoming his party's nominee.[14] What could have possibly motivated any one of these people to think that they should change their party affiliation on October 9, 2015? I didn't think to do so, and nor did millions of other people; including – arguably – 2 of the most important people to consider in this equation:

[14] Petition, § 18.

Donald Trump's children. Ivanka and Eric prove the insurmountability of the burden – not only are they the multimillionaire children of a billionaire with all the ability in New York to be informed of what the law is, but they had a particular and unique interest in ***being able*** to vote.

If these facts standing alone aren't sufficient to prove a severe deprivation of the franchise, the severity is further magnified by the fact that millions more New Yorkers were precluded from its exercise. It bears pointing out, again, that neither the City nor the State reference these facts; though the State does repeatedly describe the burden as "***modest***" (*see e.g.* AG Memo, p.6 [emphasis supplied]). And contrary to the State's conclusory argument, these facts demonstrate beyond cavil that there was "'no action [an individual] can take to make herself eligible to vote" (AG Memo, p.11).

Assuming that the Court agrees that 5-304 imposes at least a severe (if not impossible to surmount) burden on a fundamental right, then 5-304 is subject to strict scrutiny and thus "'must be narrowly drawn to advance a state interest of compelling importance'" *La Brake*, *supra*, 96 N.Y.2d at 914. Or as the United States Supreme Court has put it:

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [citations omitted] This 'equal right to vote,' [citation omitted] is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. [citations omitted] But, as a general matter, 'before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' [citations omitted]" *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).

5-304 is neither "narrowly tailored" nor does it advance a "compelling state interest.

On these motions to dismiss, neither the State nor the City suggest that 5-304's 6 month 10 day time limitation is narrowly tailored, apart from to suggest that because the *Rosario* Court (*see* Point III, *infra*) justified a longer period *ergo* 5-304 must be constitutional. That's about the best argument that can be made.

In order to justify the time limitation on so-called 'party-raiding' grounds, there would need to be some evidentiary basis upon which to disenfranchise millions of New Yorkers. On what evidentiary basis – what compelling state interest – is 6 months and 10 days justifiable, but one day is not? Although even if there were such a basis, respectfully it would not be resolvable on a motion to dismiss.

Nor can Respondents claim that 5-304 is narrowly tailored from an administrative perspective as they were quite able to register Petitioner's changed party affiliation less than 1 month before the primary vote.[15] As pointed out in *California Democratic Party v. Jones*, 530 U.S. 567, 585 (2000), where there are less onerous ways in which a state can place justifiably severe burdens on fundamental rights, the state must use them. Indeed, the *Jones* Court found that all of California's justifications for the blanket primary system that it struck down, could be protected without any constitutional deprivation "by resorting to a *nonpartisan* blanket primary." *Id*.[16]

---

[15] Petition, ¶¶30-32.

[16] This passage also totally undermines the City's extraordinary argument that "the United States Constitution requires states, when they conduct primary elections, allow the parties to determine whether or not such primary election should be open

On these motions to dismiss, neither the City nor the State has argued (beyond a cursory explanation by the State (*see* AG Memo, pp.13-15)) *any* state interest that justifies the regulation, much less one of "compelling importance". On this basis alone, the motions should be denied. The State rotely regurgitates uncontroversial doctrine that gives the State the power to regulate elections such that the fairness and integrity of the process is not in question. That is beyond cavil. But the State makes no argument that 5-304 in fact serves to promote the fairness or integrity of an election, much less *how*. There is merely the assertion that it does.

By way of limited example, the State argues that party-raiding is a state interest (largely because *Rosario's* majority says it is), though it's not obvious to Petitioner how it's a state interest rather than a party interest. The State certainly presents no evidence from which to conclude that it's a state interest (much less a compelling one that would justify 5-304's massive deprivation of constitutional rights). The State does not suggest whether there is any evidence that supports a conclusion that party-raiding exists in New York State (or anywhere else).

Upon what basis should the state be able to deny the ideological adherent of one party the opportunity not to vote in that party and vote, instead, in that party's ideological opposite? Why shouldn't the individual voter be permitted – under the dictates of her own conscience – to decide how best to promote her own ideology at the ballot box? Indeed, while it is obvious that party raiding would be undesirable to

---

to non-members" (CC Memo, pp.2; 8-10). As with many of the State's and the City's other arguments, they appear to totally conflate the state with a party. Yet neither has cited a single case that stands for the proposition that when determining the constitutionality of a state election law, that a compelling *party* interest must justify that law. Of course there is no such case, because it is the *state's* interest that must be compelling.

a party in some circumstances, it is equally obvious that in the very instances that party raiding would be undesirable to one party, it would be *desirable* to another. No matter the niceties of those issues, it is impossible to comprehend how the issue of party raiding implicates a "state" interest, yet it is all too clear how the right to vote is burdened.

It is inconceivable how the state's interest in orderly elections (undoubtedly a legitimate state interest) would be impacted by party raiding; the state is still simply amassing the votes of appropriately registered voters and tallying them.

In this regard, Petitioner made a motion on October 5, 2016 seeking various items of disclosure from the City and State, including any evidence of party-raiding in New York, and how much it cost New York's tax-payers to put on the primary election which millions were unable to participate in.[17] As the Supreme Court held in *Anderson v. Celebrezze*, 460 U.S. 780, 789-790 (1983):

> "Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. [citation omitted] Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [citations omitted] The results of this evaluation will not be automatic; as we have recognized, there is

[17] The motion is annexed hereto as Exhibit A. The motion was withdrawn without prejudice at Respondents' request pending the determination of the instant motions to dismiss.

> 'no substitute for the hard judgments that must be made.' [citation omitted]"

It bears pointing out resoundingly that Petitioner is not making the argument that the Legislature is unable to regulate the right secured by Article I, § I of our Constitution. Rather, consistent with just about every case to have considered the subject (or a related one), Petitioner is arguing that the Legislature's appropriate capacity to regulate is strictly bounded when it comes to the disenfranchisement of voters, and that the New York State Constitution mandates that those boundaries are more strictly drawn than the same boundaries drawn by the federal constitution.[18]

Strict scrutiny should be applied, and the motions to dismiss should be denied.

POINT III

THIS IS AN ISSUE OF FIRST IMPRESSION.

The City and the State both rely heavily upon *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *Neale v. Hayduk*, 35 N.Y.2d 182, 185 (1974) and *Fotopoulos v. Board of Elections of City of New York*, 45 N.Y.2d 807 (1978), even though neither is apposite.

Preliminarily, it bears pointing out that not one of these Courts considered the constitutionality of 5-304 (or its progeny) under the New York State Constitution. Unless this or any other Court is willing to conclude that the express language protecting the right to vote in Article I § I and Article II of the New York State

[18] *See e.g. Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964), holding that the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote.

Constitution is no broader than the absence of such language in the United States Constitution, the matter before this Court is an issue of first impression.

Even if these Courts had been asked to consider the New York State constitutionality, none had the *facts* of this matter before them. There is no mention in any of the decisions of millions of people being denied the vote based upon party affiliation, there is no mention of a candidate's own children being denied the vote, and there is no mention of a reasonably politically active lawyer being denied the vote. Nor is there any mention in any of those decisions of it being impossible for a voter on the primary registration date to know who that voter might vote for. Accordingly, to the extent those Courts hold any precedential power it is insignificant.

Statutes that are constitutionally valid when enacted frequently become invalid because of changed conditions. *See e.g. Municipal Gas Co. v. Public Service Comm.*, 225 N.Y. 89 (1919); *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 407 (1935); *Perrin v. United States*, 232 U.S. 478, 487 (1914); *Realty Revenue Corp. v. Wilson*, 44 N.Y.S.2d 234, 236 (S.Ct. N.Y.Cty. 1943). In *Nashville*, *supra*, the Court held: "'A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it applied.'" *Id*. 294 U.S. at 415. In *Municipal Gas Co.*, *supra*, the Court (Cardozo, J.) held: "But the argument is that a statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation, but none for confiscation that results from changed conditions. We do not view so narrowly the great immunities of the Constitution or our own

power to enforce them." *Id*. 225 N.Y. at 95. Put differently, "the validity of a statute upon one set of facts is *immaterial* if in its application to another situation it results in invalidity [citation omitted; emphasis supplied]" *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451, 459 (1951).

In *Neale*, *supra*, the Court (dealing with the ability of a voter to vote in a primary though the voter had just changed residence address to another county) seemed duty bound to follow the United States Constitution[19] because it was not asked to do otherwise (i.e expand a New Yorker's voting right beyond federal jurisprudence consistent with the New York State Constitution), and explicitly held that the result was only "insofar as here applicable." *Id*. at 188. *Fotopoulos*, *supra*, cites *Rosario* but engages in no analysis of it whatsoever.

"Self-expression through the public ballot equally with one's peers is the essence of a democratic society. [citation omitted]" *Rosario*, *supra*, 410 U.S. at 764 (Powell, J. in dissent). Put differently, "[s]o-called voter suppression measures, common around the country, have no place in a true democracy."[20]

Petitioner posits that the *Neale* Court limited its conclusion to the facts of *Neale* because *Rosario* was, as the 4 Justice dissent believed, so clearly wrong – even as applied to the facts as they existed in 1973. First, there is no analysis in *Rosario* of the appropriate level of constitutional scrutiny (as noted by the dissent (410 U.S. at 767)). Second, the *Rosario* majority openly criticizes the plaintiffs as being

---

[19] It was hardly a resounding defense of *Rosario's* reasoning for the Court to state: "The effect of this statute, held valid in [*Rosario*]" *Neale*, *supra*, 35 N.Y.2d at 185.

[20] This Court's May 2, 2016 Order denying Petitioner's request for a TRO.

"failure[s]" (410 U.S. at 758) a criticism which if leveled at Petitioner or the other approximately 3 million voters in the case at bar (including Mr. Trump's children) would demand the question: why is it *our* failure and not the failure of the legislature to respect our constitutional rights? Third, the *Rosario* Court appears to have totally abandoned the need for evidence. The Court justified the compelling state interest supporting the legislation on the basis that "we are told" it "is to inhibit party 'raiding' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Id*. 410 U.S. at 760. Even in the contentious election of 2016, Petitioner is unaware of any party-raiding in any state, and Respondents certainly provide no evidence of the possibility of party-raiding in New York on their motions to dismiss.

This Court in its May 2, 2016 decision in this matter expressed "concern[]" that there may be "party raiding". Petitioner has 2 questions about party raiding which Petitioner respectfully submits should only serve to highlight the fact that the motions to dismiss should be denied. First, how is party raiding a "state" interest? It's perfectly comprehensible why a *party* would want to inhibit or prohibit party raiding, but what interest is that of the State's?

Had the Supreme Court been asked the question at issue in this special proceeding, one if not all of Justices Stewart, Burger (C.J.), White, Blackmun, Rehnquist would likely have come out differently. It is unfathomable that not one of these Justices would conclude that the New York State Constitution affords its citizens broader voting rights than the United States Constitution based upon the

explicit language of Articles I and II. To do otherwise would require either ignoring constitutional language or stretching the interpretation of that language beyond linguistic, logical, or historical boundaries; something Petitioner sincerely doubts they'd do.

POINT IV

THE ASSOCIATIONAL RIGHTS OF THE POLITICAL PARTIES ARE NOT IMPLICATED, AND ARE BARELY RELEVANT TO THIS MATTER.

In this Court's May 2, 2016 Order denying Petitioner's request for a TRO, the Court wrote that it "is concerned that a ruling in petitioner's favor will denigrate the associational rights of the political parties."

There can be little doubt that the associational rights of a political party (whether to include or disinclude as it sees fit) are no greater than the associational rights of an individual (whether to be included or not). The exercise of one is the deprivation of the other since "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom [of association]." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

Accordingly, to choose to vote in the primary requires nothing more than an expression of that choice to the state. The question in the matter at bar is *when* the state can require the voter to choose such that the voter's right to vote will not be unconstitutionally burdened. When Petitioner expressed his preference to vote in the presidential primary (too late pursuant to 5-304), the state accepted that choice. No condition was placed upon that choice by the state or by the Democratic Party.

Indeed, Petitioner's "future" party affiliation was registered by the state well in advance of the primary being held.[21]

The parties cannot argue that their associational rights[22] are being burdened if there is *no* barrier to association other than the time at which a voter chooses to associate. If the parties can make no such argument, then the state has even less of a basis to do so; and Petitioner respectfully submits that any such argument would be irrational and thus fail to withstand *any* level of constitutional scrutiny.

Indeed, the *Rosario* majority found: "a person may, if he wishes, vote in a different party primary each year. All he need do is to enroll in a new political party between the prior primary and the October cutoff date. For example, one June he could be a registered Republican and vote in the Republican primary. Before enrollment closed the following October, he could enroll in the Democratic Party." *Id*. 410 at 759. *See also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 219 (1986) finding that independent voters "need *only* register as Republicans and vote in the primary. [emphasis supplied]"

These conclusions also counsel against a finding that party-raiding constitutes a legitimate state interest; the Supreme Court appears to repeatedly encourage it. Contrarily, Ivanka and Eric Trump were precluded from voting for *their father*. If a political party's associational rights are as practically minimal as the Supreme Court

---

[21] Petition ¶¶14; 30-31.

[22] It bears pointing out that both the New York Democratic and Republican parties were served in this special proceeding, and neither has seen fit to mount a defense of their associational rights. Perhaps that is because when the only barrier to entry is a date (October 9, 2015), the parties don't perceive much that's worth defending.

holds, then upholding their "zenith" (AG Memo, p.14) at a primary election appears to promote a meaningful difference between the top of a mote and its bottom.

Still, nowhere does the City or the State argue or explain what the state's possible legitimate (much less compelling) interest could be in burdening the individual's fundamental right to vote in favor of a party's associational rights, particularly where the state and the parties themselves apparently view such rights as being eminently, and annually, flexible.

It bears repeating (*see* fn16, *supra*) that contrary to the City's argument, *California Democratic Party v. Jones* does not mandate that states are constitutionally obligated to hold closed primaries unless a party permits its primary to be open (CC Memo, pp.8-10). *Jones*, *supra*, expressly contemplated the opposite of what the City argues, finding: "the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, *regardless of party affiliation*, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. [emphasis supplied]" *Id*. 530 U.S. at 585. *See also Tashjian*, *supra* (holding Connecticut's closed primary unconstitutional because it prohibited the Republican Party from adopting a rule permitting independents (registered voters unaffiliated with a party) to vote in its primary).

The question in the matter at bar has *nothing* to do with a party's associational rights. The question is how much burden New York State can impose upon not only an individual's right to vote but upon that individual's associational rights. Neither

the City nor the State in their motions to dismiss even begin to justify (and, in fact barely discuss) these individual rights guaranteed by the New York State Constitution Article I § I, and Article II.

The City "exaggerates the associational interest at issue" *Tashjian*, *supra*, 479 U.S. at 325 (Scalia, J. dissent). That is because there is no justification (rational or otherwise) for 5-304 – as the 2016 presidential primary has overtly demonstrated – and the motions to dismiss should be denied.

POINT V

ELECTION LAW § 5-304 IS UNCONSTITUTIONALLY VAGUE.

The State concedes that the phrase "general election" as used in 5-304, and throughout the Election Law, is not defined. There is no way, in other words, from the face of the Election Law to ascertain whether the phrase "general election" applies equally to presidential elections, senatorial elections, state legislative elections, district attorneys and/or town council members. There is good reason that a person of ordinary intelligence would be confused by the failure of the legislation to make such a distinction. First, in numerous other provisions, the Election Law expressly defines rules in presidential elections. *See e.g.* Election Law §§ 3-222.3.; 4-122.2.; 5-202.3. and 6.; 6-102; 7-104.3.(a); and 7-124. Secondly, a voter of ordinary intelligence would likely conclude that an election for town council or district attorney would be governed by different rules than an election for a senator or a president, since the latter offices set policy for much larger groups of people. *See Foss v. City of Rochester*, 65 N.Y.2d 247, 250 (1985). *See also Turner v.*

Municipal Code Violations Bureau of City of Rochester, 122 A.D.3d 1376 (4th Dep't 2014).

Rather than confront these arguments, the State argues (AG Memo, p.19), conclusorily, that Petitioner's argument is "frivolous".

Petitioner respectfully submits that the State is wrong, and that its motion in this regard should be summarily denied.

CONCLUSION.

The principal issue in this matter is whether or not the facts Petitioner alleges concerning the 2016 presidential primary render Election Law § 5-304 unconstitutional under the New York State Constitution since it impermissibly burdens the voting rights of millions of New Yorkers by making it impossible for them to meaningfully cast their vote, consistent with their individual consciences. A system that permits such a result is no democracy, and renders the right to vote no right at all.

Respondents' motions to dismiss should be summarily denied.

Dated: New York, New York
October 26, 2016

_____
Mark Warren Moody, Esquire
Pro Se and
On behalf of all those similarly situated