TO BE ARGUED BY:
GARY L. DONOYAN, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: Third Department

(Index No. 0489-22)

In the Matter of the Application of

LARRY SHARPE, as Aggrieved Candidate of the Libertarian Party for the Office of Governor of the State of New York,

Petitioner-Appellant,

-against-

NEW YORK STATE BOARD OF ELECTIONS and JOHN P. O'CONNOR, as purported Objector herein,

Respondents-Respondents,

Appellate Division Docket No. 535999

For an Order pursuant to the Election Law and the Constitution of the State of New York and the Constitution of the United States declaring valid, proper and legally effective the nomination of the Petitioner and directing the Board of Elections to place the names of the candidate Petitioner upon the official ballots and voting machines as a candidate for such office in the General Election to be held on November 8, 2022.

(Caption Continued on Inside Cover)

BRIEF FOR PETITIONERS-APPELLANTS

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Supreme Court, Albany County, Index No. 904990/2022

(Index No. 904990-22)

Application of
ANDREW HOLLISTER, as Aggrieved Candidate of the Libertarian Party for the Office of Lieutenant Governor of the State of New York, WILLIAM K. SCHMIDT, as Aggrieved Candidate of the Libertarian Party for the Office of Comptroller of the State of New York, THOMAS D. QUITTER, as Aggrieved Candidate of the Libertarian Party for the Office of United States Senator from the State of New York, and WILLIAM CODY ANDERSON, as Chair and on behalf of the Libertarian Party of New York, an unincorporated association,

Petitioners-Appellants,

-against-

NEW YORK STATE BOARD OF ELECTIONS, and JOHN P. O'CONNOR, as purported Objector herein,

Respondents-Respondents,

For an order pursuant to the Election Law and the Constitution of the State of New York and the Constitution of the United States declaring valid, proper and legally effective the nomination of the Petitioner and directing the Board of Elections to place the name of the candidate Petition upon the official ballots and voting machines as a candidate for such office in the General Election to be held on November 8, 2022.

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PRELIMINARY STATEMENT

Petitioners-Appellants Larry Sharpe ("Appellant Sharpe"), Andrew Hollister ("Appellant Hollister"), William K. Schmidt ("Appellant Schmidt"), Thomas Quiter ("Appellant Quiter"), and William Cody Anderson ("Appellant Anderson") ("Appellants") appeal from a final decision and order of the Supreme Court, Albany County (Weinstein, J.), dated August 10, 2022, which denied the petitions of Appellant Sharpe, *pro se*, and Appellants Hollister, Schmidt, Quiter, and Anderson, represented by present counsel, to validate the independent nominating petition to place five names on the November 8, 2022 general election ballot as the Libertarian Party of New York ("LPNY") candidates for statewide office (the "Nominating Petition"), filed with Respondent-Respondent New York State Board of Elections ("Respondent NYSBOE"). Although the briefing for this appeal is also made on behalf of Appellant Sharpe, that party remains *pro se* for other purposes, and reserves the right to make oral argument in support of his appeal.

QUESTIONS PRESENTED

(1) Have the rights to freedom of speech of Appellants Hollister, Schmidt, and Quiter been unconstitutionally abridged by Respondent NYSBOE's enforcement of Election Law §6-142(1) as against them? The Supreme Court, Albany County (Weinstein, J.) held in the negative.

(2) Does the Nominating Petition appear to bear the requisite number of signatures, such that it shall be presumptively valid? The Supreme Court, Albany County (Weinstein, J.) declined to answer that question.

(3) Did Respondent NYSBOE properly invalidate the Nominating Petition, despite its explicit refusal to consider whether any valid and sufficient objection to it had been filed? The Supreme Court, Albany County (Weinstein, J.) held in the affirmative.

STATEMENT OF FACTS

The present dispute take place against the backdrop of amendments to New York State's ballot access laws enacted in April 2020, which increased the requirements for independent candidates to gain a place on the ballot in statewide elections, and thus for new (or demoted) political organizations who nominate them to have a chance to become recognized parties. Such new (or demoted) political organizations have the status of independent body, and could formerly obtain a place on the statewide ballot by obtaining 15,000 valid signatures on a nominating petition, and could formerly become recognized parties for four years if their Governor candidate received a certain number of votes.

Changes to these rules were enacted as part of the legislation accompanying the budget for fiscal year 2021. Under those amendments, the opportunity to become a recognized party arises every two years instead of four years, in every

gubernatorial and every presidential election, but that status also lasts only two years instead of four years, and the number of votes required to obtain (or keep) recognized status is vastly higher. See Election Law §1-103(3). Moreover, the requirement for independent bodies to obtain a place on the statewide ballot was raised from 15,000 valid signatures, to 45,000 valid signatures, or one per cent of the votes cast in the previous gubernatorial election, whichever is less (the latter is much more). Election Law §6-142(1).

In the 2018 New York election for Governor, LPNY candidate Larry Sharpe, an appellant herein, received 95,033 votes, meeting the threshold for recognized party status then in effect. In the 2020 presidential election, however, Libertarian Party candidate Jo Jorgensen received 60,234 votes in New York, or 0.7% of the total, falling short of the new requirement for recognized party status. As a result, the LPNY reverted to independent body status. [R. 21, citation omitted]

On May 31, 2022, Appellants Sharpe, Hollister, Schmidt, Quiter, and one other LPNY statewide candidate timely submitted the Nominating Petition, by which the said candidates sought to qualify as LPNY candidates for the five statewide public offices. The Nominating Petition was and still is in due and proper form as prescribed by law, appears to contain more than the purportedly requisite number of signatures of duly registered voters of the State of New York (45,000),

and concededly contains more than the previously (pre-April 2020) requisite number of such signatures (15,000). [R. 5356, 5376-77]

After the filing of the Nominating Petition, written Objections and Specifications of Objections to the Nominating Petition were apparently filed with Respondent NYSBOE by Respondent-Respondent John P. O'Connor ("Respondent O'Connor"). On June 13, 2022, Respondent O'Connor also brought a proceeding in the Albany Supreme Court by Order to Show Cause and Petition, to preemptively challenge the Nominating Petition in the event it was approved by Respondent NYSBOE, with a return date of July 14, 2022. [R. 5356-57, 5377] It has not been determined whether those Objections and Specifications of Objections are sufficient, or comply with the Rules of Respondent NYSBOE, as they were concededly not "considered" by Respondent NYSBOE. [R. 5367]

It was not until June 28, 2022, that Petitioners learned that (1) the staff of Respondent NYSBOE had purported to conduct "a prima facie examination" of the Nominating Petition, and had "found" that it contains "no more than 42,356 signatures," thereupon referring "the matter" to the Commissioners of Respondent NYSBOE, who (2) on June 27, 2022, held a formal meeting, and determined that the Nominating Petition "is invalid," without any "consideration of the objection" filed by Respondent O'Connor, or by anyone else, whatsoever. [R. 5357, 5377-78]

On June 30, 2022, Appellants filed separate proceedings in the Albany Supreme Court, one brought by Appellant Sharpe *pro se*, and one by the remaining appellants, represented by present counsel, by Orders to Show Cause and Petitions, to validate the Nominating Petition. At the *ex parte* conference before Justice David A. Weinstein that day, the court set the return date for the proceeding for July 25, 2022, and indicated that Respondent O'Connor's proceeding would be adjourned to that date as well, also indicating that that proceeding became moot with Respondent NYSBOE's validation of the Nominating Petition.

At the July 25, 2022 hearing, all parties appeared, and the court heard argument, and reserved decision.

DECISION BELOW

On August 10, 2022, the Supreme Court, Albany County, issued its final decision and order, which constitutes a judgment in this special proceeding, denying and dismissing the petitions to validate the Nominating Petition, and denying Respondent O'Connor's petition as moot. This appeal followed.

ARGUMENT

POINT I: THE COURT BELOW ERRED IN DENYING THE VALIDATING PETITIONS, BECAUSE THE FREEDOM OF SPEECH OF APPELLANTS HOLLISTER, SCHMIDT, AND QUITER HAS BEEN UNCONSTITUTIONALLY ABRIDGED BY ENFORCEMENT OF ELECTION LAW §6-142(1).

Appellants Hollister, Schmidt, and Quiter, by their counsel, emphasized their claim that the Election Law provision now being enforced against them violates their Constitutional rights, at the July 25, 2022 hearing:

> [T]he constitutional hook with regard to the difficulties this year were only discovered or revealed after the end of the petition period, that's the First Amendment of the U.S. Constitution as well as the New York State Constitution, the right to vote, which has been clearly applied to the right to have free and clear elections and candidates for office without undue burdens.

[R. 76]

The right to vote is included within the freedom of speech, which has coordinate protections found in the U.S. Constitution, Amendment I, and in the New York State Constitution, Article I, §8. See, *e.g.*, Burdick v. Takushi, 504 U.S. 428, 441 (1992) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live"), referencing "the First and Fourteenth Amendment rights of the state's voters."

The court below suggests that the constitutional issues underlying petitioners' argument are resolved by the decision in SAM Party of New York v. Kosinski (576 F.Supp.3d 151 (S.D.N.Y. 2021)) (though the court's citation is actually to a previous denial of a preliminary injunction motion in the same case, on similar grounds, styled Libertarian Party of New York v. New York Board of Elections (539 F.Supp.3d 310 (2021)), under the doctrine of collateral estoppel. But with regard to Appellants

Hollister, Schmidt, and Quiter, that case does not resolve the constitutional issues, because those petitioners herein were not parties or in privity with parties to that action, and the doctrine of collateral estoppel, or issue preclusion, does not serve to bar their claims herein. See Avilon Automotive Group v. Leontiev, 168 A.D.3d 78, 86 (1st Dept. 2019) ("However, the Court of Appeals has cautioned that privity is an amorphous concept, that does not have a technical and well-defined meaning. Relationship alone is not sufficient to support preclusion. Ultimately, we must determine whether the severe consequences of preclusion flowing from a finding of privity strike a fair result under the circumstances." Internal citations omitted.)

At the time of its decision – December 2021 – the federal district court in SAM Party had the benefit of experience with just one cycle of statewide independent candidates seeking to qualify for recognized party status under the newly-increased petitioning requirements of Election Law §6-142(1), the 2020 cycle. Not a single independent candidate for President qualified that year. That court did not have the benefit of experience with the second cycle of such independent candidates, during 2022, when not a single independent candidate for Governor has (yet) qualified, nor did it have the benefit of the particular experience of Appellant Sharpe as set forth in the record of this proceeding. [R. 56-61, 5379-83]

The single statewide independent candidate who did qualify was not on a petition with a candidate who could qualify her independent body as a recognized

party, was not on a petition that was properly objected to, and was not on a petition that was subject to a *prima facie* review for the sufficiency of its signatures, as acknowledged by Respondent NYSBOE. [R. 66-67] There is no known explanation or justification for Respondent NYSBOE's disparate treatment of Appellant Sharpe and U.S. Senate candidate Diane Sare, which raises questions about whether Appellants' equal protection rights were violated by Respondent NYSBOE, and why.

The court below refers to "the Supreme Court precedents cited by the federal district court" which "would defeat such a challenge even if the decision in [SAM Party] did not formally bind this court," and cites only to the case of Jenness v. Fortson (403 U.S. 431 (1971)). As explained above, because three of the appellants herein are not parties or in privity with parties to that action, the case of SAM Party does not formally bind this court. But the case of Jenness v. Fortson and its progeny also should not defeat such a challenge.

When it comes to the interpretation of the U.S. Constitution, "we place a high value on having the matter 'settled right' … Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions." Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2262 (2022). Appellants Hollister, Schmidt, and Quiter submit, it is now necessary to overrule the case of Jenness v. Fortson, which is one of the most influential of the several Supreme Court decisions concerning the constitutionality of state election laws that

control ballot access for minor parties and independent candidates. That decision essentially put a halt to virtually all successful litigation against onerous ballot access laws.

Jenness had been filed in 1970 by the Socialist Workers Party, and by its candidates for Georgia Governor and for two U.S. House of Representatives seats. The party complained that its nominees were required to obtain the signatures of 5% of all the registered voters, on separate petitions. Linda Jenness, candidate for Governor, needed 88,175 valid signatures. Joseph F. Cole, candidate for Congress, 4th district, needed 10,904 valid signatures on a different petition. Francis Grinnor, candidate for Congress, 5th district, needed 11,008 valid signatures on yet another petition. See National Archives, U.S. Supreme Court October 1970 Term Case File 5714, retrieved by Richard Winger ("National Archives"),

The Socialist Workers Party described itself as a small party with ideas not yet accepted by most voters. As a result, the party said that it could not get that many signatures on petitions. Therefore, it could not place its nominees on the ballot, and its electoral campaigns were stifled. The party argued that the Georgia ballot access laws violated the First Amendment.

In upholding every aspect of the Georgia ballot access laws, the Jenness court asserted four points, all of which are inaccurate. The opinion suggested that (1) the Georgia ballot access laws are not onerous, and therefore they do not violate the First

Amendment (403 U.S. at 440); (2) tolerant ballot access laws cause confusion; (3) tolerant ballot access laws cause deception; and (4) tolerant ballot access laws cause frustration of the democratic process. 403 U.S. at 442.

A. The Georgia ballot access laws were onerous.

Each independent petition needed the signatures of 5% of the registered voters in the area for which the nominee was running. That requirement was the nation's toughest percentage at the time. The Court had full knowledge of the petition requirements of each of the 50 states. National Archives. The Appendix in Jenness, jointly prepared by attorneys for both sides, included the petition requirements of all 50 states. They showed that Georgia was the only state with a 5% (of the number of registered voters) requirement. There were two states with a 5% of the last vote cast requirement, but of course, 5% of the last vote cast, is far easier than 5% of the number of registered voters. Although Ohio in 1969 had passed a law providing for a petition requirement of 7% of the last gubernatorial vote, that law had been declared unconstitutional by a three-judge U.S. district court in July 1970. See Socialist Labor Party v. Rhodes II, 318 F.Supp. 1262 (S.D.Oh. 1970).

What did the Court say? "The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States." 403 U.S. at 442. Now, even if the Court had acknowledged that Georgia had the highest percentage requirement, that fact wouldn't necessarily mean that Georgia's law was

unconstitutional. After all, if every state independently writes its own rules, obviously one state will have a more difficult requirement than any other state (unless there is a tie). What is interesting about the Court's "apparently somewhat higher than … in many states" quote, is that the Court couldn't even write an honest, factual sentence on this point. To say that Georgia is "apparently" "somewhat higher than many States" when the truth (known to the Court, through the Joint Appendix) is that Georgia was the highest of all 50 states, shows an inclination to shade the truth, not to tell the truth.

The Jenness court also eagerly seized on the fact that Georgia's 5% petition requirement had been met in 1966 and 1968 (403 U.S. at 439), but the Court failed to note that that the 1966 and 1968 petition deadline had been in September. The 1969 legislature had moved the petition deadline three months earlier, to June. Georgia State Session Laws of 1969, Ch. 224, p. 336.

In summary, the Georgia laws were onerous. The Jenness court was able to make them seem reasonable by omitting much material and by making outright misstatements of fact.

B. Harsh ballot access laws are not required in order to prevent voter confusion.

Jenness had only one sentence to explain the state interest in Georgia-style ballot access laws. "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name

of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process." 403 U.S. at 442.

The irony is that Georgia gubernatorial elections between 1944 and 1962 all had just one candidate on the general election ballot (Guide to U.S. Elections, Editor Robert A. Diamond, p. 404), and the overwhelming majority of Georgia congressional and legislative elections in those years had also been one-candidate elections. Guide to U.S. Elections, pp. 545 *et seq.* One would think that one-candidate elections would be an obvious source of concern to the Court. No mention of one-candidate elections is found in the decision. Instead, the Court used the hypothetical problem of "voter confusion" to justify its opinion.

The Jenness decision also says, "In the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries." 403 U.S. at 440. The reference is to the 1970 gubernatorial primaries, at which nine candidates ran for the Democratic nomination, and three ran for the Republican nomination. America Votes 9, Richard Scammon. The Democratic primary resulted in a win for State Senator Jimmy Carter. Carter, of course, is modern-day Georgia's most renowned Governor. He brought honor to his state and his region by being the first person from the Deep South to be elected president since 1848. If the presence of nine candidates on the ballot for a single office is deemed

to cause voter confusion, surely it is the Democratic primary ballots in Georgia, not one-candidate or (more recently) two-candidate general election ballots, that cause voter confusion. Yet the 1970 Democratic gubernatorial primary seems to have been free of voter confusion.

C. Harsh ballot access laws are not needed to prevent deception.

As noted above, the Court cited the need to prevent "deception" as a justification for Georgia-style ballot access laws. What did the Court mean?

"Dirty tricks" such as qualifying a bogus candidate with the same name as a popular candidate, particularly in a primary election, are a danger, but the solution in such cases is to provide for additional descriptive material on ballots. Such incidents cannot logically be used to support laws that make it virtually impossible for independent or minor party candidates to get on the ballot.

D. Harsh ballot access laws are not needed to prevent frustration of the democratic process.

Jenness was written by Justice Potter Stewart. Although he didn't explain what he meant by "frustration of the democratic process," he probably meant that if there are three candidates on the ballot, and no one gets a majority, perhaps the result might have been different if there had been only two candidates on the ballot. Stewart had dissented in Williams v. Rhodes (393 U.S. 23 (1968)), and this fear had been his objection to letting Governor George Wallace on the Ohio ballot. Of course,

historians don't even agree as to whether most Wallace voters would have been more likely to vote for Herbert Humphrey or Richard Nixon, if Wallace had been kept off the ballot. A clearer example is provided in the 2000 election, when most people assume that most of the Nader voters would have voted for Gore, if Nader had been kept off the ballot.

Justice John M. Harlan had rebutted Justice Stewart in his concurrence in Williams v. Rhodes. Justice Harlan had pointed out that if a state was concerned that the presence of a third candidate on the ballot might cause the outcome to be different than it would have been with only two candidates on the ballot, there were solutions. A state could provide for a run-off general election (in fact, Georgia since 1964 has provided for run-off general elections if no one gets a specified percentage of the vote in the first general election). Or, Justice Harlan said, a state could provide for "single transferable voting," now commonly called "instant run-off voting." Williams, *supra*.

Another answer to Justice Stewart's point, is to recognize the sovereignty of voters. A voter who chose to vote for Nader in the 2000 election, understood that his or her vote was thereby not helping Al Gore. But if the voters are sovereign, what right does the government have to tell any voter that he or she may not vote for a candidate like Nader? The right to vote includes the right of choice for whom to vote. The right to vote is meaningless, without free choice.

In 1964, the Supreme Court said, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). Despite the small amount of public attention paid to the Jenness decision at the time, it had a big policy influence. It is time that influence ends, finally.

POINT II: IN THE ALTERNATIVE, THE COURT BELOW ERRED IN DENYING THE VALIDATING PETITIONS, BECAUSE THE NOMINATING PETITION APPEARS TO BEAR THE REQUISITE NUMBER OF SIGNATURES AND NO VALID OBJECTION TO THE NOMINATING PETITION HAS BEEN CONSIDERED.

Election Law §6-154(1) provides:

> **§6-154. Nominations and designations; objections to**
>
> 1. Any petition filed with the officer or board charged with the duty of receiving it shall be presumptively valid if it is in proper form and appears to bear the requisite number of signatures, authenticated in a manner prescribed by this chapter.

The current purported "requisite number of signatures" for a nominating petition for statewide independent candidates, such as the Nominating Petition, is 45,000. Election Law §6-142(1). The Nominating Petition is made up of over 5,200 sheets, each with space for 10 signatures. [R. 117-5333]

The court below suggests that Respondent NYSBOE may conduct "just such a facial review for the sufficiency of a nominating petition, regardless of whether

there has been an objection," referring to the case of Sloan v. Kellner (120 A.D.3d 895 (3rd Dept. 2014)). But the Sloan case is clearly distinguishable, and there is no precedent for just such a facial review to be found in the Third Department or in any state court. The designating petition in Sloan, unlike in the instant case, had a proper objection to the sufficiency of the number of its signatures. As a result of that objection, and only as a result of that objection, the Sloan petition was found not to bear the requisite number of signatures, and thus could not be "presumptively valid." 120 A.D.3d at 895; see Election Law §6-154(1). Respondent NYSBOE may not conduct such a facial review for the sufficiency of a nominating petition that appears to bear the requisite number of signatures, if there has not been a valid objection to that petition.

The actual holding of the court in Sloan was that "the present proceeding is jurisdictionally defective due to the 'failure to name and serve all those who filed objections to the designating petition,'" (120 A.D.3d at 895), not because the petition had been objected to due to a lack of sufficient signatures, which also distinguishes that case from the instant case.

The Sloan court also (1) found that an objection had been filed with and ruled on by the board of elections, that the petition contained fewer than the required number of signatures, and (2) did not decide whether the petition "appear[ed] to bear the requisite number of signatures." Without one of those being true (a valid

objection as to the number of signatures OR a petition that does not appear to bear the requisite number of signatures), the board can not properly invalidate such a petition, and the Third Department did not find to the contrary. Appellants argue only that the designating petition in Sloan involved a valid objection to the numerical sufficiency of the petition, that was ruled on by the board of elections, unlike the instant proceeding.

Contrary to the description of the Sloan case in the court below, the Sloan court did not "rule on the Board's facial review power" at all, because there had been a valid objection that had been considered by the board of elections, obviating any need for a "facial review" by the board. Of course, boards of election have "facial review power" whether or not a valid objection is ultimately made and ruled on, and Appellants have not suggested otherwise. But in the absence of such an objection, that is the limit of their power, and the Sloan case provides no support for a different view.

Thus Socialist Labor does not address the circumstances of this case, where no objection was considered by Respondent NYSBOE in determining that the Nominating Petition (which appears to bear the purported requisite number of signatures) is invalid. In fact, no case can apparently be found where a board of elections in New York has invalidated such a petition, without ruling on the validity

of an objection, because such a ruling would violate Election Law §6-154(1). As Appellants' attorney stated during the hearing before the court below:

> In the case described by both counsel, as well as in the case referred to by counsel, Sloan, they either referred to an objection having been made and reviewed, or in the case of Sloan, an objection having to do with one out of many of the candidates. This is unique, to my knowledge, where the board explicitly said, if you read their determination, this is without consideration of whether there was an objection. And that removes one of the protections in the Election Law for petitions which appear to bear the requisite number of signatures.

[R. 48-49]

Appellants do not suggest there is any legal impediment to one or more employees of Respondent NYSBOE actually adding up the signatures of a petition in any event. But if that petition appears to bear the requisite number of signatures, even if it does not actually bear the requisite number of signatures, it is still "presumptively valid" according to Election Law §6-154(1). In other words, whether the board of elections "counts" or not, any petition that "appears to bear the requisite number of signatures" is one that "shall be presumptively valid." This rule puts the onus on potential objectors, not on boards of election, to identify shortfalls in such petitions.

Some petitions will appear to bear the requisite number of signatures, and some will not. Appellants suggest that the Nominating Petition does appear to bear the requisite number of signatures, and Respondents apparently do not even dispute

that. Therefore the Nominating Petition shall be presumptively valid (Election Law §6-154(1)), and as a result, Respondent NYSBOE's determination that the Nominating Petition is invalid, is incorrect and should be vacated by this court.

The New York legislature, when it wrote and enacted Election Law §6-154(1), did not use the phrase "bears the requisite number of signatures." Instead, it used the phrase "appears to bear the requisite number of signatures." Do those phrases mean the same thing? Of course not. Could there be a petition that appears to bear the requisite number of signatures, but does not bear the requisite number of signatures? Yes. Appellants do not concede that the Nominating Petition does not bear the requisite number of signatures, but it is perfectly clear, and Respondents can not even plausibly deny, that it appears to bear the requisite number of signatures.

The court below suggests that "this step is purely ministerial," but "this step" may be taken by a board of elections only in response to the filing of a valid objection, if in cases where the petition appears to bear the requisite number of signatures. It is therefore not "ministerial," rather, it is unauthorized, except in such cases. Thus, at this point, Appellants have established that the Nominating Petition is valid, because they have shown that it appears to bear the requisite number of signatures, and thus by operation of law "it shall be presumptively valid" in the absence of a valid objection and a disposition thereof by Respondent NYSBOE. Election Law §6-154(1), (2).

Appellants do not claim that Respondent NYSBOE erred in its procedures. But Respondent NYSBOE was not authorized by law to make the determination it purported to make, because the Nominating Petition is "presumptively valid" as a matter of law until and unless Respondent NYSBOE determines that a valid and sufficient objection has been filed. That did not happen, as Respondent NYSBOE concedes ("The consideration of the objection is academic, …").

CONCLUSION

The final decision and order appealed from should be reversed and the Nominating Petition declared valid, with costs.

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT
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Supreme Court of the State of New York
Appellate Division: Third Department

(Index No. 0489-22)

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(Index No. 904990-22)

Application of
ANDREW HOLLISTER, as Aggrieved Candidate of the Libertarian Party for the Office of Lieutenant Governor of the State of New York, WILLIAM K. SCHMIDT, as Aggrieved Candidate of the Libertarian Party for the Office of Comptroller of the State of New York, THOMAS D. QUITTER, as Aggrieved Candidate of the Libertarian Party for the Office of United States Senator from the State of New York, and WILLIAM CODY ANDERSON, as Chair and on behalf of the Libertarian Party of New York, an unincorporated association,

Petitioners-Appellants,

-against-

NEW YORK STATE BOARD OF ELECTIONS, and JOHN P. O'CONNOR, as purported Objector herein,

Respondents-Respondents,

For an order pursuant to the Election Law and the Constitution of the State of New York and the Constitution of the United States declaring valid, proper and legally effective the nomination of the Petitioner and directing the Board of Elections to place the name of the candidate Petition upon the official ballots and voting machines as a candidate for such office in the General Election to be held on November 8, 2022.

(Caption Continued on Next Page)

(Index No. 904469-22)

In the Matter of the Application of JOHN P. O'CONNOR, objector aggrieved,
Petitioner-Respondent,

-against-

Candidates, LARRY SHARPE, (Governor), ANDREW HOLLISTER (Lt. Governor), SEAN C. HAYES (Attorney General), WILLIAM K. SCHMIDT (Comptroller), THOMAS D. QUITER (U.S. Senator), Candidates, and New York State Board of Elections, and the
COMMISSIONERS THEREOF CONSTITUTING THE BOARD,
Respondents-Appellants,

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the Independent nominating Petitions Purporting to Nominate the Respondent Candidate in the 2022 General Election, and to Restrain the said Board of Elections from Placing the Name of said Candidate Upon the Official Ballots of Said Election.

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STATEMENT PURSUANT TO CPLR 5531

1. Supreme Court, Albany County, Index No. 904990/2022.

2. The full names of the original parties are the same; there has been no change.

3. Action commenced in Supreme Court, Albany County.

4. Action was commenced by the filing of an Order to Show Cause and Petition, filed on June 13, 2022.

5. Nature of action: Election Law.

6. This appeal is from the Decision and Order of the Hon. David A. Weinstein, dated August 10, 2022.

7. Appeal is on the Record (reproduced) method.