

**Matter of O'Hara v Board of Elections in the City of  
N.Y.**

2022 NY Slip Op 32070(U)

June 30, 2022

Supreme Court, Kings County

Docket Number: Index no. 517420/22

Judge: Larry D. Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At the Special Election Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30<sup>th</sup> day of June 2022.

PRESENT:  
HON. LARRY D. MARTIN,  
Justice.

-----X  
In the Matter of the Application of JOHN O'HARA, as a Candidate for the Democratic Party designation for the Public Office of Member of the New York State Senate from the 17<sup>th</sup> Senate District, within the County of Kings, City and State of New York,

Petitioner,

Index No. 517420/22

-against-

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent,

-and -

VICTORIA KELLY and NICHOLAS B. ZIMMITTI, seeking an Order as objectors, pursuant to the Election Law, and declaring invalid the Petition designating of the aforesaid named Candidate for the above-described public office,

Respondent-Objectors,

-and -

Seeking an Order, pursuant to the Election Law, declaring valid the Petition designating the aforesaid named Candidate for the aforesaid described public offices,

-and-

Ordering the Board of Elections to place the name of the Aforesaid Petitioner-Candidate upon the ballot to be used at the Primary Election of the Democratic Party to be held on August 23, 2022, for the above mention public office.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Order to Show Cause/Petition \_\_\_\_\_  
Other papers \_\_\_\_\_

1, 5, 6  
10

Upon the foregoing papers, upon oral argument held on the record on June 28, 2022, and upon the line-by-line review conducted by court-appointed special referees, the court denies petitioner John O’Hara’s petition, pursuant to Election Law § 16-102, to validate the designating petition to designate him as a candidate for the public office of Member of the New York State Senate from the 17<sup>th</sup> Senate District within the County of Kings, City of New York that petitioner had filed with the Respondent Board of Elections in the City of New York (City Board) on June 10, 2022.

In addition, the court denies petitioner’s application, made during the course of this proceeding, for an order barring the City Board from, in effect, invalidating petition signatures where the signatories reside out of district on the ground that it failed to produce street finders and maps identifying which election districts were within the 17<sup>th</sup> Senate District.<sup>1</sup>

Petitioner commenced this Election Law § 16-102 special proceeding on June 16, 2022. The factual allegations in the petition are limited to the boilerplate language typically used by candidates who bring anticipatory validating petitions under section 16-102 before

<sup>1</sup> The court notes that although petitioner, in his Memorandum of Law submitted in support of his application, asserted that testimony from the City Board would show that creation of the maps and street-finders at issue could have been created simply by “hitting a button” with a computer mouse, petitioner did not request a hearing on the issue. Rather, petitioner relied solely on the Memorandum of Law and arguments raised during oral argument. In addition, the court notes that the City Board did not submit opposition papers, but rather opposed the application based on the arguments its counsel made on the record in opposition at oral argument. During oral argument, respondent-objectors Victoria Kelly and Nicholas B. Zimmitti adopted the arguments made by the City Board in opposition.

the City Board rules on the specifications of objections filed against the designating petition.

Upon review of respondent objectors' specifications of objections against O'Hara's designating petition, the City Board, in its Clerk's Report, dated June 20, 2022, found that petitioner's designating petition contained 634 valid signatures – 216 signatures less than the 850 signatures required to be placed on the ballot for this office in this primary election.<sup>2</sup> Notably, the Clerk's Report indicates that 956 of the signatures were ruled invalid because the address listed by the signatory was out of district (i.e., did not reside in the 17<sup>th</sup> Senate District).<sup>3</sup> The City Board's Commissioners, at their hearing held on June 24, 2022 with respect to the designating petition, voted to adopt the Clerk's Report, and determined that petitioner did not have enough signatures to be placed on the ballot for this office. Petitioner asserts that, at the hearing, the Commissioners declined to hear his arguments regarding the City Board's failure to produce maps and street finders prior to, or during, the petitioning process.

Relevant to the proceedings in this court, petitioner first raised the instant arguments regarding the City Board's failure to produce maps and street finders on June 24, 2022, as an affirmative defense to the invalidating petition brought by Victoria Kelly against petitioner (Invalidating Petition) (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 12, Answer in a Special Proceeding, in *Kelly v O'Hara*, Sup Ct, Kings County, index No.

---

<sup>2</sup> The court notes that the Clerk's Report indicates that petitioner submitted 2,437 signatures, of which 1,803 were found to be invalid.

<sup>3</sup> It is undisputed that the respondent objectors specified other objections to many of the signatories ruled out of district, including objections that they are not registered or not enrolled.

517371/22). Petitioner, however, did not seek leave to amend or supplement the petition in this validating proceeding at that time (CPLR 401, 402, 3025). At oral argument held on the record before Justice Lawrence L. Knipel on June 27, 2022 (the initial return date for the instant petition and the Invalidating Petition), petitioner raised the issue in this proceeding as well as for the related Invalidating Petition. Justice Knipel denied the application with leave to renew before this court. Petitioner filed his memorandum of law on the morning of June 28, 2022, in both this proceeding and the Invalidating Proceeding, and renewed his application with respect to both proceedings at oral argument held later that same morning.

Petitioner's arguments in the application arise from the consequences of reapportionment of New York State Senate districts required by New York State Constitution, article III, § 4 to account for population shifts found as a result of the federal census (*see Matter of Harkenrider v Hochul*, \_\_\_ NY3d \_\_\_, 2022 NY Slip Op 02833, \*2 [2022]). On April 27, 2022, the Court of Appeals, in *Matter of Harkenrider*, held that the congressional and senate redistricting maps created by the redistricting legislation signed into law by the New York State Governor Hochul on February 3, 2022 were created in violation of both procedural and substantive requirements of the Constitution and that judicially created maps were necessary to remedy the violation (*Matter of Harkenrider*, 2022 NY Slip Op 02833, \*9-10; NY Const, art III, § 4 [b], [c] [5], [e]). The Court of Appeals recognized that its ruling would render it likely that the primary for congressional and senate seats would have to be moved to August and remitted the matter to the Supreme

Court to, with the assistance of a special master and upon other relevant submissions, adopt constitutional maps (*Matter of Harkenrider*, 2022 NY Slip Op 02833, \*10).

Upon remitter in the Supreme Court, Steuben County, Acting Supreme Court Justice Patrick McAllister issued an order on April 29, 2022 that provided that the Special Master's redistricting maps would be made available by May 20, 2022, and that the congressional and senate primary would be held on August 23, 2022 (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, April 29, 2022, McAllister, J., index No. 0116/22).<sup>4</sup> In an order dated May 11, 2022, Justice McAllister provided that candidates who had previously qualified for ballot access for the June 28, 2022 primary for a particular party could be designated as a senate candidate for the same party in the August 23, 2022 primary for any senate district by filing a declaration with the appropriate board of elections no later than May 31, 2022 (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, May 11, 2022, McAllister, J., index No. 0116/22). The May 11, 2022 order provided that candidates could also obtain ballot access for the August 23, 2022 primary by filing a designating petition with at least 850 signatures obtained in a senate district (*id.*). Justice McAllister, in this order, established a political calendar for the designating petition process and provided that, as is relevant here, that the candidates could first circulate designating petitions on May 21, 2022, that the last date to circulate petitions was June 10, 2022, and that the petitions had to be filed with the relevant board of elections by June 10, 2022 (*id.*). In an order dated May 20, 2022, Justice McCallister certified the senate district maps appended

---

<sup>4</sup> A federal court, in an order dated May 10, 2022, approved the August 23, 2022 primary date for the congressional seats (*United States v State of New York*, 2022 WL 1473259, \*3 [U]).

to the order as the 2022 New York State Senate maps (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, May 20, 2022, McAllister, J., index No. 0116/22).

In making this application, petitioner contends that the City Board did not publish any maps, street finders or publish "Election Districts" despite directions to do so contained in the Court of Appeals decision in *Matter of Harkinrider* and Justice McAllister's May 11, 2022 order.<sup>5</sup> Because of this failure, petitioner asserts that:

"In short, had the Petitioner O'Hara been able to obtain street finders, Maps or Election Districts (ED's) from the Respondent Board of Elections than the subscribing witnesses who took to the streets over that 20-day period would not have gathered 956 signatures out of the district. And since the lists Petitioner obtained from a vendor could not be matched by ED's, the use of any lists became impossible for determining who is a registered Democrat. Many of the out of district signatures were just on the wrong side of the avenue or a block or two out of the Senate District #17" (NY St Cts Elec Filing [NYSCEF] Doc No. 10 at 5).

According to petitioner, these failures by the City Board infringed on the First Amendment associational rights that apply to the states through the Fourteenth Amendment to the United States Constitution (*see Anderson v Celebrezze*, 460 US 780, 787-788 [1983]; *Lerman v Board of Elections in the City of N.Y.*, 232 F3d 135, 145-147 [2d Cir 2000], *cert denied* 533 US 915 [2001]; *Matter of La Brake v Dukes*, 96 NY2d 913, 914 [2001]) and deprived petitioner of Equal Protection under the Fourteenth Amendment to the United States Constitution (*see Hayden v County of Nassau*, 180 F3d 42, 48 [2d Cir 1999]). In

---

<sup>5</sup> The attorney who appeared on behalf of the City Board essentially conceded that the City Board did not provide such maps or street finders.

addition, petitioner asserts that in the absence of maps and street finders, his designating petition substantially complied with the Election Law and City Board rules (*see Matter of Magelaner v Park*, 32 AD3d 487, 488 [2d Dept 2006]), and that, in view of the City Board's failure to provide the maps and street finders, the City Board should be equitably estopped from ruling signatories out of district (*see Matter of Berg v Planning Bd. of the City of Glen Cove*, 169 AD3d 665, 668-669 [2d Dept 2019]).

The City Board initially asserts that the application should be denied because petitioner failed to plead the claims relating to the map and street finder issue in his petition. Given that the petition does not give respondents notice of petitioner's assertions regarding the map and street finder issues, this court concludes that the failure to plead the issue is fatal to his claims in his petition to validate (*see Matter of McGuire v Gamache*, 5 NY3d 444, 448-449 [2005]; *cf. Matter of La Brake*, 96 NY2d at 914; *Matter of Wagner v Elasser*, 194 AD3d 891, 892-893 [2d Dept 2021], *lv denied* 36 NY3d 913 [2021]). Notably, even though petitioner did not know the exact number of signatures that the City Board would ultimately determine were invalid because they were out of district at the time this action was commenced, petitioner knew at that time that the City Board had not provided maps and street finders. Moreover, by looking at the addresses of the signatories on the designating petition, petitioner knew, or should have known, that there might be an issue as to whether the signatories were out of district. Although, in the context of the Invalidating Proceeding, the assertion of the issue as an affirmative defense might be deemed sufficient (*cf. Matter of La Brake*, 96 NY2d at 914), petitioner never sought leave of court to amend the petition to add the map and street finder claims to the petition in this

validating proceeding (*cf. Matter of Segarra v Clausen*, 153 AD3d 834, 834-835 [2d Dept 2017], *lv denied* 29 NY3d 915 [2017]; *Nagubandi v Polentz*, 131 AD3d 639, 641 [2d Dept 2015]) and thus may not rely on those claims as a ground for validating the designating petition.

Even assuming that this court could reach the merits of petitioner's assertions in this respect, the application must be denied as it has no merit under any of the legal grounds alleged by petitioner. In this regard, petitioner identifies no statutory or administrative provision requiring the City Board to provide maps and street finders relating to senatorial districts. Under Election Law § 4-102 (3), it is the New York State Board of Elections (State Board), not the City Board, that bears the statutory responsibility of publishing maps of senatorial districts and distributing copies thereof for display at the local boards of election (*see* Election Law § 4-102 [3], [4]; *Tiraco v New York State Bd. of Elections*, 963 F Supp2d 184, 196-197 [EDNY 2013]). Further, contrary to petitioner's contentions, nothing in the Court of Appeals determination in *Matter of Harkenrider* or Justice McAllister's May 11, 2022 order imposed any duty on the City Board to produce the maps or street finders relating to the senate district at issue.<sup>6</sup>

---

<sup>6</sup> Petitioner relies on a statement made by the Court of Appeals in *Matter of Harkenrider* that was quoted by Justice McAllister in his May 11, 2022 decision that, "[w]e are confident that, in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act" (*Matter of Harkenrider*, 2022 NY Slip Op 02833, \*10). Given that the State Board was a party to the *Matter of Harkenrider* proceeding and the City Board was not, the reference to the Board of Elections in the statement refers to the State Board not the City Board. In any event, nothing in this statement regarding "consultations" imposes any specific duty on the City Board with respect to maps or street finders.

While the City Board has a responsibility to prepare maps and lists of voters in election districts (Election Law §§ 4-100 [2], [3], [5], 4-102 [5], 5-604; *Matter of Grimm v New York*, 35 Misc 3d 1233 [A], 2012 NY Slip Op 50991, \*4 [U] [Sup Ct, Richmond County 2012]), petitioner has submitted no factual or legal basis for finding that the change in senate districts resulted in or mandated a change in the election districts requiring updated election district maps or voter lists (*see* Election Law §§ 4-100 [5], 4-102 [5], 5-604; *cf. Grimm*, 2012 NY Slip Op 50991, \*4). Nor has petitioner shown that, if such a change in the election district maps and lists was required, the City Board could have reasonably produced such maps and lists prior to, or during, the time for circulating petitions. Moreover, as it is the borders of the senate district that determine whether a voter resides within the district, petitioner has failed to establish that the absence of revised election district maps or street finders, if such were even required, had a significant bearing on his failure to obtain in-district signatures.

Most importantly, petitioner has made no allegation, let alone submitted any evidentiary proof, that the maps certified by Justice McAllister were not readily available (*see Matter of Tiracao*, 963 F Supp2d at 196-197) or that petitioner would have been unable to ascertain the borders of the 17<sup>th</sup> District in sufficient time to have a reasonable opportunity to circulate petitions within that District regardless of any failure by the City Board with respect to the maps (*see Grimm*, 2012 NY Slip Op 50991, \*4).<sup>7</sup> While

---

<sup>7</sup> In this respect, the court notes that the State Board's website currently has a link to the senate district maps certified by Justice McAllister in the May 20, 2022 order, and through this link, one can locate a map for the 17<sup>th</sup> District that shows the street borders of that District. Given that the parties did not raise or address this link and given that the court cannot determine from the State Board's website when the link was made available, this decision is not based or decided on the availability of this link.

petitioner asserts in his memorandum of law that “many of the out district signatures were just on the wrong side of the avenue or a block or two out of the Senate District #17” (NY St Cts Elec Filing [NYSCEF] Doc No. 10 at 5), he has failed to identify with any specificity which and how many of the out-of-district signatures were located at the borders of the District. Indeed, the court notes that the referees, during the line-by-line review of the designating petition, found that the addresses for several of the out-of-district signatures were not even located in Kings County or were otherwise not close to the 17<sup>th</sup> District’s borders.

Absent proof that the City Board had a duty to provide the senate district maps, or that such maps were not readily available, petitioner cannot demonstrate that the City Board’s invalidation of signatories on the designating petition on the ground that they did not reside within the 17<sup>th</sup> District as required by Election Law § 6-136 (2) impermissibly impeded rights guaranteed under the First Amendment (*see Matter of Tiracao*, 963 F Supp2d at 198-199; *cf. Anderson*, 460 US at 787-788).

Similarly, absent such proof, petitioner cannot demonstrate that the City Board engaged in fraud, misrepresentations or other affirmative misconduct that petitioner relied upon to his detriment to warrant a finding that the City Board should be equitably estopped from invalidating signatories on the ground that they reside out of district (*see Matter of Berg*, 169 AD3d at 668-669; *Kowsh v Board of Elections in the City of N.Y.*, 1996 WL 600863, \*1-2 [U] [EDNY 1996], *affd on other grounds* 99 F3d 78 [2d Cir 1996]).

Petitioner has also failed to demonstrate that the absence of maps and street finders justifies a finding that his designating petition is in substantial compliance with Election

Law requirements despite the inclusion of out-of-district signatories. In this regard, the requirement that signatories reside in district is a matter of statutorily prescribed content rather than a detail in form (*see* Election Law § 6-136 [2]), thus the defects relating to the inclusion of out-of-district signatories on the petition cannot be excused under such a rationale (*see Matter of Davin v Felberman*, 205 AD3d 855, 856 [2d Dept 2022]; *Matter of Griffin v Torres*, 131 AD3d 631, 632 [2d Dept 2015]).

Finally, petitioner has failed to establish an Equal Protection violation in that he has not provided any evidentiary proof that the City Board treated him differently than any other similarly situated candidate (i.e., any senate candidate who circulated a designating petition in May and June 2022 to appear on the ballot for the August 23, 2022 Primary Election) (*see Matter of Tiracao*, 963 F Supp2d at 199-200; *see also Matter of Arash Real Estate & Mgt. Co. New York City Dept. of Consumer Affairs*, 148 AD3d 1137, 1140 [2d Dept 2017]; *Hayden*, 180 F3d at 48-52). Undoubtedly, any candidate who circulated designating petitions commencing May 21, 2022 through June 10, 2022 faced similar issues in obtaining petition signatures from voters residing in the newly drawn districts. Moreover, while Justice McAllister's May 11, 2022 order treated candidates who had valid petitions for the June 28, 2022 primary differently than those who did not, petitioner has expressly stated that he does not rely on issues arising from Justice McAllister's orders as a basis for his current contentions, and, in any event, the City Board cannot be held responsible for the determinations made by Justice McAllister.

Accordingly, the court determines that the City Board, in reviewing the validity of petitioner's designating petition, properly invalidated signatures of voters who resided outside the 17<sup>th</sup> Senate District.

Turning to the line-by-line review conducted by the special referees, after conducting such review, the court found that the designating petition contained 567 valid signatures, 283 less than the 850 required to be placed on the ballot for the August 23, 2022 primary.

Accordingly, it is hereby

**ORDERED** that petitioner's validating petition is denied and dismissed.

This constitutes the decision, final order and judgment of the court.

ENTER FORTHWITH

  
\_\_\_\_\_  
J.S.C.

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT