To be Argued by:
JOHN CIAMPOLI, ESQ.
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

In the Matter of Application of

OLA HAWATMEH,

Petitioner-Appellant,

Docket No.: 531344

– against –

THE NEW YORK STATE BOARD OF ELECTIONS,
Peter Kosinski, Andrew Spano, and Douglas Kellner,
Commissioners Constituting the Board,

Respondents-Respondents,

– and –

James Goblet, Benjamin Cooper, and Michaela Marmorato,

Objectors-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

1. Should this Court, in light of the Pandemic affecting this State and Nation, the Governor's proclamation of a State of Emergency, and the *ex post facto* change in the Election Law regarding filing deadlines, allow for a one day late post marked acceptance to be validated, where the document was received within the statutory window, where a reasonable excuse is offered, there is no fraud or deception, and no party is adversely effected, order the validation of Appellant Ola Hawatmeh's certificate of acceptance?

   The Court below denied the application because it did not have the authority to do so under the existing case law.

   Appellant urges an affirmative answer to this question, and a modification / reversal of the Order below.

2. Alternatively, should this Court certify a question to the Court of Appeals in this case?

   This question was not before the Court below as it is in the exclusive jurisdiction of this Appellate Division.

Appellant, in the alternative, urges an answer in the affirmative to this question.

PRELIMINARY STATEMENT

This case was commenced by way of a verified petition and Order to Show Cause filed, signed, and served on April 30, 2020. The matter came to be heard on May 4th before the Supreme Court. A decision and order was issued on May 6th and entered on May 7, 2020. This appeal ensued.

Before this Court is an appeal from the Decision and Order of the Supreme Court, Albany County, Platkin, J., which denied a petition to have the Conservative Party Designation of Petitioner, Ola Hawatmeh, declared valid and effective.

The New York State Board of Elections had declared the designation to be invalid on April 27, 2020 on the grounds that the candidate's acceptance was post marked on the day after the filing deadline, despite the fact that the certificate was timely dated and received within the statutory window, see Election Law Section 1-106(1). The Supreme Court ruled that it did not have the authority to award the relief requested under the prevailing case law.

This Appeal ensued.

STATEMENT OF FACTS

This matter is inextricably intertwined with the current pandemic which has swept across our country and the entire world. By March of 2020, it was obvious that the Corona Virus was breaking out in communities across New York State. On March 14, 2020, Governor Andrew M. Cuomo responded to the global pandemic by, *inter alia*, altering the requirements for candidates to qualify for New York's June 23, 2020 primary ballot.

The process of collecting signatures on designating petitions began on February 25, 2020, see Section 6-134(4) Election Law. Relevant to this case, the Governor modified the application of Election Law article 6, which governs the designation of candidates for public office, by (1) reducing the number of signatures required to obtain ballot access and (2) suspending the collection of signatures as of 5 p.m. on March 17, 2020 (*see* Executive Order [Cuomo] No. 202.2 ["EO 202.2"]). Prior to the Governor's order, candidates had until April 2, 2020 to collect signatures and file their designating petitions (see Election Law Section 6-158 [1]).

Late on March 18, 2020, the Legislature enacted, and still later that night, the Governor approved, a law requiring candidates to file their designating petitions no later than March 20, 2020 (*see* L 2020, ch 24

["Chapter 24"], § 1). Chapter 24 further provided that "the political calendar with respect to objections, acceptances, authorizations, declinations, substitutions and the last day to commence an election law article 16 proceeding shall be adjusted accordingly" (*id*.).

The following facts were alleged, and were not disputed at the hearing conducted by the Supreme Court on May 4, 2020:

Petitioner / Appellant's certificate of acceptance would have been timely under the original political calendar published by the New York State Board of Elections (hereinafter, SBOE) (*see* Petition, ¶ 21, see page Record 28). The late postmark on the acceptance Express Mailed to the SBOE was "occasioned by a last minute change in the statute by the Legislature which significantly shortened the time within which to file petitions, authorizations and acceptances" (*id*., ¶ 22, Record page 28).

Further, "[d]uring the relevant time, [Petitioner / Appellant] was absent from New York getting Medical treatment [from a medical specialist] in St. Louis" (*id*., ¶ 23, Record page 28), subsequent to cancer surgery. Her absence went from March 14, 2020 to March 24, 2020 (*see* NYSCEF Doc No. 18 ["Hawatmeh Aff."], ¶¶ 3-4, *see* Record page 155). Petitioner / Appellant had purposefully scheduled these medical appointments to accommodate the

political calendar published by the SBOE (*see id*., see ¶ 6, *see* Record page 156).

Petitioner / Appellant did not learn that the political calendar had been changed until March 22, 2020 (*see id*., ¶ 7, see Record page 156). She unsuccessfully attempted to find a notary in St. Louis. She then returned, as soon as possible, to New York to have her acceptance executed and filed (*see id*., ¶¶ 8-9, *see* Record page 135).

Ola Hawatmeh was able to execute the Certificate in the presence of a notary public on the evening of March 24, 2020, however, by that time the post offices were closed. Her first opportunity to mail the Certificate was not until March 25, 2020 (*see id*., ¶¶ 10-11, *see* Record page 156). "Petitioner Appellant did return to New York and did file an acceptance when she was belatedly informed of the new filing schedule that had been enacted just days earlier, and which had not been published by the [SBOE] on [its] web site until after the fact" (*id*., ¶ 24). Petitioner / Appellant's failure to timely accept the designation "was directly related to the current pandemic and the revision of statute that followed. It [was] no fault of the Petitioner" (*id*., ¶ 26).

The documents admitted to evidence proved that a petition purporting to designate Ola Hawatmeh as a Conservative Party candidate for the Office timely

was filed with the SBOE on March 20, 2020 (*see* NYSCEF Doc No. 8), and the Conservative Party timely authorized Petitioner / Appellant's candidacy on March 23, 2020 (*see* NYSCEF Doc No. 9, *see* Record page 132; *see also* Election Law § 6-120 [3]). Ola Hawatmeh is the only candidate designated for nomination by the Conservative Party.

Petitioner / Appellant then accepted the designation by executing an acknowledged certificate of acceptance on March 24, 2020 (*see* NYSCEF Doc No. 10, *see* Record page 135). The Certificate was mailed for overnight delivery via Priority Mail Express on March 25, 2020 and was received by the SBOE the next day on March 26, 2020 (*see id*.).

The documents admitted to evidence proved that the Certificate of Acceptance was executed prior to the deadline; and that the SBOE received the subject Certificate by mail within two days of the deadline (*see* Election Law Section 1-106 [1]). The Court determined that there was no claim that respondents (SBOE or Objectors) or anyone else would be prejudiced by excusing the brief delay in mailing the Certificate, *see* Record page 9, Decision p. 7.

Petitioner further alleged that the Petition implicates the constitutionality of Chapter 24, for violating Equal Protection, Free Speech and Free

Associational Rights, requesting an order from the Court to provide Executive law notice to the Attorney General.

The Court below denied the relief requested. This appeal ensued.

POINT I

THIS COURT SHOULD GRANT THE RELIEF REQUESTED & VALIDATE THE DESIGNATION UNDER ITS PRECEDENTS

The Courts have exercised their powers to adjust the Election Law's deadlines and validate filings under the appropriate circumstances in a large number of circumstances, see Pell v. Coveney, 37 N.Y.2d 494 (1975) [allowed late filing of validating proceeding after statute of limitations had run]; Cozzolino v. Columbia County Board of Elections, 218 A.D.2d (3rd Dept., 1995) [allowed filing outside specifications of Election Law 1-106]; Acca v. Kosinski, 176 A.D.3d 1305 (3rd Dept., 2019) [allowed late filing of Judicial Convention minutes]. This Appellate Division has gone so far as to craft a court designed remedy for a technically defective petition which was invalidated (an opportunity to ballot election), see Hall v. Dussault, 109 A.D.3d 679 (3rd Dept., 2013), citing to Matter of Harden v. Board of Elections in City of N.Y., 74 N.Y.2d at 797 (1989), where the Legislature has made no provision for such relief. In Curley v. Zacek, 32 A.D.3d 954 (3rd Dept., 2005) this Court validated a petition where it found a witness' provided address was sufficient to prevail over incorrect information, where the legislature had declared that "The following information *must be completed prior to filing with the board of elections in order for this petition sheet to be valid", Election Law 6-134, emphasis added.*

Indeed, it is fair to say that where there is "… nothing more than [an] innocent violation of a technical requirement which has no logical bearing upon the prevention of fraud * * * [t]he better result is to permit the members of the Conservative party to exercise their right to choose a candidate" Cozzolino v. Columbia County Board of Elections, 218 A.D.2d 921 (3rd Dept., 1995.). Here the Conservative Party will be deprived of a candidate should the decision below be allowed to stand.

It is and has been Appellant Ola Hawatmeh's position throughout this matter, that where there is no fraud to be prevented; no prejudice to any party or other person; a state of emergency has been declared relating to a pandemic; a change in the statutory deadlines *after* the petition process has been started (along with the attendant facts concerning the Appellant's cancer treatment); that the Court is free to fashion an exception to the body of law that forced the hand of the Supreme Court below.

It can not be gainsaid that the facts of this case distinguish from *any* case that has ever been placed before the Courts of this State.

The Supreme Court observed, " Petitioner and her counsel make a persuasive case that the equities favor the relief requested in the Petition." RECORD p. 8, Decision, p. 6.

The Court below then concluded that it did not have the authority to grant the relief requested stating, ". . . '[i]t is now well established that the time limitations of

the statute are mandatory and that the judiciary is foreclosed from fashioning exceptions, however reasonable they might be made to appear' (Matter of Sheehan v Aylward, 84 AD2d 602, 603 [3d Dept 1981], affd 54 NY2d 934 [1981]; see also Matter of Gallo v Turco, 131 AD3d 785, 786 [3d Dept 2015]; Matter of Dixon v Clyne, 87 AD3d 812, 813 [3d Dept 2011], appeal dismissed 17 NY3d 824 [2011]).", RECORD pp. 8-9, Decision p. 7.

The command of Section 1-106 of the Election Law at play in Cozzolino, supra, are no less absolute than the provisions of Section 1-106 that are at play in the case at bar.

This Court held in Cozzolino:

> "In Matter of Rutherford v. Jones, 128 A.D.2d 978, 512 N.Y.S.2d 934, lv. denied 69 N.Y.2d 606, 514 N.Y.S.2d 1023, 507 N.E.2d 319, we declared invalid an independent nominating petition which a candidate handed to a village clerk in the hallway outside the village clerk's office at 8:30 A.M.; the clerk agreed to file the petition when the office opened. We held that the petition was filed when it was handed to the clerk and that the failure to file within the time period specified in Election Law § 1–106(1) was a fatal defect. We noted our similar prior holding in Matter of Hutchins v. Culver, 104 A.D.2d 533, 479 N.Y.S.2d 883, on virtually identical facts.
>
> *Our cases have adhered to an inflexible rule which holds all filings fatally defective if they occur outside the ... period specified in Election Law § 1–106* (see, e.g., Matter of Stempel v. Kinley, 176 A.D.2d 1063, 1064, 575 N.Y.S.2d 209; Matter of Rutherford v. Jones, supra, at 979, 512 N.Y.S.2d 934), but we

are of the view that such an inflexible rule no longer reflects the Legislature's intent regarding technical requirements of the Election Law. The Election Reform Act of 1992 (L.1992, ch. 79) was enacted in response to the "hyper technical intricacy" of New York's Election Law, which "sets traps for the unwary to protect the incumbent" (Governor's Mem., McKinney's 1992 Session Laws of N.Y., at 2877). As a result of the Act, technical requirements as to the form of a petition have been eased (see, L.1992, ch. 79, §§ 10, 11, 12, 13, 14), and "[h]armless mistakes on the petition forms will no longer have to mean the end of a campaign" (Governor's Mem., McKinney's 1992 Session Laws of NY, at 2877).

Although the Act contains no specific provision which expressly relaxes the time limits set by Election Law § 1–106, the Act clearly and unambiguously reflects the Legislature's recognition that "an innocent violation of some technical requirement having no logical bearing upon the underlying purpose of preventing fraud" should no longer "abort candidacies and disenfranchise voters" (Matter of Montgomery v. Goodspeed, 196 A.D.2d 675, 677–678, 601 N.Y.S.2d 356, affd. 82 N.Y.2d 710, 602 N.Y.S.2d 793, 622 N.E.2d 293). *It is clear that the filings which occurred at 8:00 A.M. in this case were nothing more than innocent violations of a technical requirement which has no logical bearing upon the prevention of fraud*. * * * [T]here is no evidence of any fraud or other misconduct; nor did Cozzolino gain any advantage by the [untimely] filing. * * * The better result, and the one which is consistent with the legislative intent evidenced by the Election Reform Act of 1992, is to permit the members of the Conservative Party to exercise their right to choose a candidate." Cozzolino, supra, emphasis added.

Here, the particular facts adduced, demonstrate that the Appellant's efforts to comply with the law (as it existed when she departed for her medical treatment), and efforts to comply with the Legislature's *ex post facto* enactment, during a state of emergency, all point to an exception being granted to the strict application of Section 1-106 that has prevailed thus far.

Indeed, throughout the state there have been very few cases of a late filing due to the Public Health Crisis / State of Emergency / Executive Order / *ex post facto* change in the political calendar. Most recently the Supreme Court in New York County held where a certificate of acceptance was filed after the deadline specified by the Election Law:

> "*While Seawright's certificate of acceptance and cover sheet were not timely filed under the revised primary election calendar, the Court notes that "the People's will should not be fettered by technicalities requiring precise compliance*." (Rosen v McNab, 25 N.Y. 2d 789 [1969]). Therefore, "[i]n the absence of allegations of fraud substantial compliance with the Election Law is sufficient." (Id. at 799 [validating petitions which are not properly numbered as per the Election Law requirements]). A requirement of strict compliance rather than substantial compliance, even if requested by the Board of Elections, does not assist the Board in any way, nor does it play a role in preventing fraud. Election Law rules "are to be liberally construed … where there has been substantial compliance and there is no evidence of confusion either by potential voters or the Board." (Matter of Siems v Lite, 307 AD2 1016 [2d Dept 2003)]. * * *

Regarding the certificate of acceptance, the Court finds that the Board's reliance on Plunkett was also misplaced as that case is factually inapplicable to the circumstances here. The Court of Appeals there found that the untimely cover sheet was a defect, but the Respondent Candidate was provided an "opportunity to ballot" as an appropriate alternative remedy. *Furthermore, the Court of Appeals has also made it explicitly clear that courts have the discretion to direct a Board of Elections to receive a late certificate of acceptance as sufficient in form and timely* (Battista v Power, 10 NY2d 867 [NY 1961]), *especially when "no harm can come to any party and the election machinery in other respects will be in no way affected*" (Mellen v Board of Elections, 262 NY 422 [NY 1933]).

Here, given that Seawright rectified her errors and submitted her certificate of acceptance for her Working Families Party petition and cover sheet for her Democratic Party petition on April 2, the Court finds that Seawright has substantially complied with Election Law requirements and the Board of Elections thus erred in deeming Seawright's untimely submissions to be fatal to her candidacy. The Court is not inclined to invalidate the petitions as Seawright's untimely submissions do not constitute an egregious failure to comply with Election Law requirements. The Court is also not inclined to penalize Seawright for committing clerical errors while an unprecedented and catastrophic health crisis was enveloping the state. There is no claim by any party that Seawright's errors "defrauded or misled public" or were "used for any improper purpose" and thus the errors do not implicate policy considerations that override "the right of electorate to fully exercise its franchise" (Flacks v Bd. of Elections in City of New York, 109 AD3d 423 [2013]). There is no prejudice associated with the Court directing the Board of Elections to accept the late filed certificate and cover sheet under the unusual circumstances presented. Therefore, Seawright's

> applications to validate her petitions are granted and Puliafito's applications to invalidate said petitions are denied.", Seawright v. Board of Elections in the City of New York, Sup. Ct., N.Y. County, Index No. 100435/20 & 100436 / 20, Edmead, J., May 8, 2020, emphasis added.

In Seawright, supra, the Court was faced with a clerical error only. The rational set forth by the Supreme Court was, "The Court is also not inclined to penalize Seawright for committing clerical errors while an unprecedented and catastrophic health crisis was enveloping the state.", Seawright, supra, *cf.* Jasikoff v. Commissioners, Westchester County Board of Elections, ____ A.D.2d ____ (2nd Dept., 2020), reversing Index No. 1376/20 (Sup. Ct., Westchester Co., Everett, J.).

That basis for validating the acceptance at issue in the Seawright case falls far short of the facts adduced here. The record before this Appellate Division demonstrates that the candidate was receiving specialized medical treatment after cancer surgery outside of New York; and had scheduled her absence so that she might be back in New York in time to execute and make the requisite filings, before the Governor and the Legislature radically changed the ballot access process for the 2020 elections.

Alternatively, we respectfully submit, that beyond the demonstrated basis for this Court to issue a one time, narrowly crafted, exception to the

terms of Election law Section 1-106; and the precedents of Cozzolino, supra, its progeny, and the authority cited herein; that this Court would be warranted to validate the subject designation under the authority of Settineri v. DiCarlo, 82 N.Y.2d 813, reversing 197 A.D.2d 724.

In Settineri v. DiCarlo, supra, the Court of Appeals validated designation of a candidate for New York State Senate on the basis of "impossibility" occasioned by the statutory schematic. Here, due to the pandemic / State of Emergency / *ex post facto* change to the statute, combined with the efforts of your Appellant to comply with the law *before* it was changed it became impossible for Ola Hawatmeh's acceptance to be timely post marked, resulting in invalidity.

Under any review of the facts, and the law, a compelling case for the relief requested has been set forth.

This Court is implored to reverse or modify the decision and order below, and to order the Validation of the subject certificate of acceptance and the designation that is based upon it.

POINT II

APPELLANT'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY INVALIDATION OF HER DESIGNATION

The Seawright, supra, decision demonstrates that in certain parts of the state there are candidates being placed on the ballot without the benefit of a timely filed acceptance. Clearly, if Seawright is restored to the ballot, and your Appellant is not, there is no equal application of the law. This Court has the power to assure equal protection of law for the Appellant.

Further, within the record below is the Independence Party designating petition of Ronald J. Pilozzi, a candidate for New York State Assembly in the 140th Assembly District, see Exhibit 5 to SBOE Answer, NYCEF Document 12, Record page 137. Pilozzi is an enrolled Republican, see NYCEF Document 22, Record page 161. The Respondent Board of Elections has placed him on the ballot without either an authorization or an acceptance.

This unequal application of the Law by the Respondent Board of Elections is patently unfair to your Appellant. If equal protection is applied by this Court, then the Appellant, Ola Hawatmeh, is entitled to her place on the ballot and the members of the Conservative party are entitled to have a candidate in the November Election for Congress.

Accordingly, this Court must reverse the portion of the Decision and Order below which denied the Appellants applications made for ballot status under the provisions of the State Constitution guaranteeing equal protection of law, free speech, and free association.

POINT III

ALTERNATIVELY, THIS COURT SHOULD CERTIFY A QUESTION OF LAW TO THE COURT OF APPEALS

The facts presented here are quite unique. The issues before this Court are related to a Pandemic, resulting in the proclamation of a state of emergency by our Governor, followed by actions taken by the Legislature to radically alter the ballot access process, which was already under way, via a new statute.

Of the hundreds of candidates filing petitions and associated paperwork for access to the 2020 Primary Election Ballot there are only three cases that have come before the Courts with late filings after the Legislature changed the Law. This is one of them.

Each of the three cases has its own set of facts. We respectfully suggest that this case, as set forth hereinabove, has the most compelling fact pattern of the three. But for the pre-pandemic body of case law; it seems to us that the Supreme Court would have granted your Appellant the relief requested. We respectfully assert again, that the facts here, combined with existing case law, make out an undeniable case for granting the Appellant relief. Additionally, we respect the rules that govern the Election Process, and have requested only a narrowly drawn order, applicable to these facts which we hope will never be repeated.

The effects of the ongoing pandemic on our democratic process cry out for the Courts to act and weigh in.

Accordingly, we respectfully request, pursuant to CPLR 5713, that this Court certify an appropriate question to the Court of Appeals.

DATED: May 11, 2020

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Dated: March 11, 2020