SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM, PART ___

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THE PEOPLE OF THE STATE OF NEW YORK	:	**NOTICE OF MOTION**
	:	Ind. No. 13525/96
-against-		
	:	
JOHN O'HARA,		
	:	
Defendant.		
	:	

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PLEASE TAKE NOTICE that, upon the annexed Affirmation of JOEL B. RUDIN and accompanying Appendix of Exhibits, and upon the annexed Affidavit of JOHN O'HARA, and upon all prior proceedings herein, the undersigned will move this Court, at the Criminal Term, at the Courthouse, 320 Jay Street, Brooklyn, New York 11201, on February 18, 2015, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order, pursuant to C.P.L. §§ 440.10(1)(g) and (h), and the Free Speech, Right of Petition, Equal Protection, and Due Process guarantees of the New York State and United States Constitutions, vacating John O'Hara's judgment of conviction in this matter, granting an evidentiary hearing to resolve any disputed issues of fact, or granting other and further relief as would be just and proper.

Yours, etc.,

JOEL B. RUDIN
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Attorney for defendant John O'Hara

Dated: New York, New York
January 6, 2015

To: Kenneth Thompson, Esq.
District Attorney of Kings County
350 Jay Street
Brooklyn, New York 11201

RUDIN
AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM, PART ___

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THE PEOPLE OF THE STATE OF NEW YORK	:	**AFFIRMATION**
		Ind. No. 13525/96
-against-	:	
JOHN O'HARA,	:	
Defendant.	:	

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JOEL B. RUDIN, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms, under penalties of perjury, that the following is true:

INTRODUCTION

1. I am the attorney for JOHN O'HARA, the defendant, and am fully familiar with the facts and circumstances described herein. I make this affirmation in support of Mr. O'Hara's motion under C.P.L. §§ 440.10(1)(g) and (h) to vacate his conviction due to selective prosecution, in violation of his state and federal constitutional rights.

2. Mr. O'Hara, then a licensed and practicing attorney, was convicted in 1999 following a jury trial of seven felonies: one count of false registration under Election Law § 17-104(4), one count of offering a false instrument for filing (first degree) under Penal Law § 175.35, and five counts of illegal voting under Election Law § 17-

132(3). These charges arose from O'Hara's having registered to vote, and having voted, from his girlfriend's Brooklyn address which, the People charged, was not his actual residence. The trial court charged, correctly in the Court of Appeals' view, that O'Hara could be convicted if he chose as his electoral residence one of multiple addresses when that address was not his "'fixed, permanent and principal home and to where he wherever temporarily located always intends to return.'" *People v. O'Hara*, 96 N.Y.2d 378, 383 (2001) (quoting trial court's charge).

3. The present motion to vacate O'Hara's conviction is primarily based on new evidence discovered after 2005, when O'Hara unsuccessfully brought a previous CPL 440 motion, that O'Hara was selectively targeted for prosecution by the Kings County District Attorney, Charles J. Hynes, in violation of O'Hara's right to Equal Protection of the Law, and that his conviction resulted from this selective prosecution. The present totality of evidence shows that former District Attorney Hynes singled out O'Hara for prosecution, as an act of political retribution, while turning a blind eye to similar acts by others, including, most extraordinarily, himself and others in his own prosecutorial office. O'Hara's prosecution thus violated the First, Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 1, 6, 8 and 11, of the New York State Constitution. His criminal conviction should be vacated and the charges dismissed.

4. The new evidence we present in this motion includes the following:

(a) The Appellate Division for the Second Judicial Department, in

reinstating O'Hara to the Bar, found that O'Hara had been singled out for prosecution in apparent retaliation for his political activities – the very issue raised in this motion;

(b) Since 2005, *no other* criminal prosecution has been initiated and pursued to judgment for Election Law violations similar to those with which O'Hara was charged and convicted;

(c) Since 2005 (and before), in Brooklyn and elsewhere in New York, there have been numerous false registration and voting cases, as well as numerous instances of outright Election-related fraud, all of which have been handled civilly only;

(d) Hynes himself, his top lieutenant, Dino Amoroso, and Hynes's good friend, Brooklyn Democratic leader Vito Lopez, engaged in false voter registration – Hynes registered to vote from his office, while Amoroso, a married man with children living on Long Island, registered from his parents' Queens home -- but they were not prosecuted;

(e) Hynes, his chief assistant, Amy Feinstein, Amoroso, and even O'Hara's prosecutor, John O'Mara, engaged in long-term violations of residency requirements related to their official positions, but none were prosecuted and such violations were affirmatively blessed by Hynes; and

(f) Hynes himself, as well as other top prosecutors in his Office, including the Chief of the Rackets Bureau, Michael Vecchione, committed the crime of offering a

false instrument for filing (for which O'Hara also was convicted), but none were even investigated for such criminal activity, let alone prosecuted.

5. This Court should exercise its discretion under Criminal Procedure Law Sect. 440.10(3)(b) to reach the merits of this motion even though a previous motion that raised a similar claim was denied in 2005. This motion is based upon a great deal of new evidence that was not and could not have been submitted with the prior motion. In addition, the prior motion was decided at a time when Hynes, who was running for re-election, had threatened the entire Brooklyn judiciary, through deliberate leaks to the media, with investigation and possible prosecution on allegations of widespread judicial corruption, and already had a track record, including in this case, of vindictively investigating and prosecuting his political opponents. Hynes and his chief of rackets, Vecchione, who was leading the judicial corruption investigation, had the power to destroy the reputation of any judge through a media leak, and Justice Abraham Gerges, who denied O'Hara's motion, had been repeatedly named in the media as a "hack" judge with political ties and thus had reason to be concerned about alienating Hynes while Hynes' judicial investigation was underway. The strange "reasoning" of the court's 2005 decision, which we examine below, is cause for concern about whether the judge went out of his way to ingratiate himself with Hynes in this politically-charged case. Based upon the totality of the circumstances, this court should exercise its discretion to hear all the relevant facts and decide this motion on its merits.

PROCEDURAL BACKGROUND

6. John O'Hara is a long-time Brooklyn political activist. His accompanying Affidavit, which we incorporate herein by reference, describes his political activities, leading to his prosecution, in more detail. In brief, O'Hara has run in and supported insurgent political campaigns in Brooklyn since his youth. Until he was indicted in 1996, O'Hara was a member of his Community Board in Brooklyn for nine years, and he stood as a candidate for office in and from Kings County in several elections in the 1990s. During most of the 1990s preceding his indictment, he was an opponent of District Attorney Hynes or the political leaders in Brooklyn with whom Hynes was aligned. Hynes' allies had repeatedly tried to knock O'Hara off the ballot by challenging his petitions.

7. On November 2, 1992, O'Hara registered to vote from the basement apartment at 533 47th Street in Brooklyn, a building owned by his ex-girlfriend. O'Hara also maintained an apartment at his prior registration address, located at 579 61st Street, which he testified he used primarily as an office. During the next three years, he voted from the 47th Street address. In October 1996, he was indicted for the offenses described above. The charges all stemmed from O'Hara having registered and voted from the 47th Street basement apartment, which the People maintained, contrary to the defense witnesses, was uninhabitable.

8. O'Hara was brought to trial three times on these charges. At his first trial in 1997, before Justice Priscilla Hall, he was convicted on all counts. The conviction

was reversed by the Appellate Division on the ground that the submission of a "missing witness" charge to the jury constituted reversible error. *See People v. O'Hara,* 253 A.D.2d 560 (2d Dept. 1998).

9. O'Hara was tried for a second time in May 1999, before Justice Abraham Gerges. That trial ended in a hung jury; a mistrial was declared.

10. O'Hara was tried a third time—rare in Kings County, if not unprecedented—in July 1999, again before Justice Gerges. He was convicted on all seven felony counts, and sentenced to three years conditional discharge, 1500 hours of community service, a fine of $6,000, and restitution of $9,192. (Justice Gerges also ordered O'Hara to pay $5,000 in a civil penalty to the New York City Campaign Finance Board, but later vacated that penalty. *See People v. O'Hara,* 199 Misc.2d 248 (Sup. Ct. Kings Co. 2002).)

11. On appeal, the Appellate Division affirmed. *People v. O'Hara,* 274 A.D.2d 486 (2d Dept. 2000). The New York Court of Appeals granted leave and then also affirmed, by 5-2 vote. *People v. O'Hara,* 96 N.Y.2d 378 (2001). In his dissent, Associate Judge Albert Rosenblatt observed that O'Hara's prosecution for voting from a "false" residence was "unique" and essentially unprecedented. 96 N.Y.2d at 390 n.3. He reasoned that the trial court's charge was confusing and appeared to direct the jury to apply an onerous statutory definition of "residence" as one's "principal" residence even though the civil case law had significantly relaxed that definition. He expressed disquiet about the deployment of the criminal law

here, in a dispute that to him seemed "politically motivated." *Id.* at 390.

12. O'Hara thereafter brought various collateral attacks. His motion to vacate the conviction due to ineffective assistance of counsel was denied; this decision was affirmed on appeal. *See People v. O'Hara,* 297 A.D.2d 758 (2d Dept. 2002). His petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of New York on the ineffectiveness issue, also was denied. Finally, O'Hara brought an initial selective prosecution motion, pursuant to CPL Art. 440, which the trial court denied, too. *See People v. O'Hara,* slip op., 9 Misc.3d 1113(A)(Kings Co. Sept. 23, 2005) (Gerges, J.S.C.) (Exh. 5).

13. O'Hara has completed his sentence and paid his fines.

FACTS RELEVANT TO THIS MOTION

O'Hara's Reinstatement to the Bar

14. Four years after O'Hara's first 440 motion raising selective prosecution was denied, the Appellate Division essentially concluded that O'Hara really had been the victim of a selective, politically-motivated prosecution. On June 1, 2009, following a full hearing on O'Hara's motion to be reinstated as an attorney, an investigating subcommittee of the Committee on Character and Fitness for the Appellate Division, Second Judicial Department, issued a remarkable decision. *See In the Matter of John Kennedy O'Hara,* No. 1997-05257, slip op. (2d Dept., Committee on Character and Fitness, filed June 1, 2009). (Exh. 1)

15. The decision first noted O'Hara's anti-establishment political activism

and how it "angered the local political machine":

> Mr. O'Hara was actively involved in politics during [the early 1990s] and ran primaries against organization candidates in Brooklyn. These campaigns were quite successful and for a period of years Mr. O'Hara was able to unseat a number of organization incumbents which, inevitably, angered the local political machine. Mr. O'Hara also ran himself for State Assembly and City Council.

(Exh. 1, at 2)

16. The Report then described the political motivation for Mr. O'Hara's prosecution:

> Mr. O'Hara, *accurately it appears*, claims that the machine was gunning for him and pounced on his change of residency calling it election fraud.

(Id. at 2 [emphasis added]). Agreeing with Judge Rosenblatt's dissent, it noted:

> After the third trial, the Court of Appeals affirmed [O'Hara's] conviction. In his dissent, Judge Rosenblatt noted that Mr. O'Hara was the only person ever prosecuted under this section of the Election Law, although the applicant claims he is the first prosecution since Susan B. Anthony was charged in 1843. Judge Rosenblatt cited numerous cases, with similar allegations, all of which were resolved in *civil* proceedings in the voter's favor where the facts were far more egregious than the facts here."

(Id. at 4 [emphasis in original]).[1]

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[1] Actually, the Report misstates the year of Ms. Anthony's prosecution. She was charged in 1872, for registering in Monroe County and voting in that year's general election, before women had the franchise. She was tried in 1873. Ms. Anthony was charged by federal authorities, however, not the State, for violation of a federal Reconstruction law, the Enforcement Act of 1870. Her trial was

17. The Report's concluding "Recommendation" highlighted the committee's deep skepticism about the criminal proceedings brought against O'Hara:

> Although *the committee has grave doubts that Mr. O'Hara did anything that justified his criminal prosecution*, even if Mr. O'Hara was guilty of the offense for which he was convicted, we believe that Mr. O'Hara now has the requisite character and fitness to be reinstated as a member of the bar.

(Id. at 6 [emphasis added]). In July 2009, the full Second Department Committee on Character and Fitness voted to adopt the Report and agreed unanimously to reinstate O'Hara to the New York bar. *See* Final Report to the Court, *In the Matter of the Application of John Kennedy O'Hara for Reinstatement to the Bar of the State of New York*, No. 1997-05257, slip op. (2d Dept. Committee on Character and Fitness, filed July 27, 2009). (Exh. 2)

18. Finally, in October 2009, following receipt of the Character Committee reports, a panel of Appellate Division judges unanimously ordered that O'Hara be immediately reinstated to the bar. *See* Decision & Order on Motion for Reinstatement, *In the Matter of John Kennedy O'Hara, a Disbarred Attorney*, No. 1997-05257, slip op. (2d Dept., filed Oct. 6, 2009). (Exh. 3)

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held in the Federal Circuit Court sitting at Canandaigua, before a single Justice of the U.S. Supreme Court, the Honorable Ward Hunt, who formerly had been a Judge on the New York Court of Appeals. Justice Hunt directed the jury to return a guilty verdict. Ms. Anthony was duly convicted and fined $100. On information and belief, she never paid the fine (unlike Mr. O'Hara), and federal authorities decided not to try to collect it. Nor did Ms. Anthony seek appellate or collateral review of her conviction. *See United States v. Anthony,* 11 Blatchf. 200, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873); *see* N.E.H. Hull, *The Woman Who Dared to Vote: The Trial of Susan B. Anthony,* 67-68, 114-49, 177-78 (Univ. Kansas Press 2012); Hammond, *Trial and Tribulation: The Story of* United States v. Anthony, 48 Buffalo L. Rev. 981, 1030-32 (2000).

19. Since his reinstatement, Mr. O'Hara has devoted much of his law practice to assisting people in great need. He successfully represented very elderly clients threatened with eviction from their assisted-living facility. He also worked for the release of a Brooklyn man who was wrongfully convicted of murder and incarcerated for nearly three decades. *See, e.g.,* O. Yaniv, *Man Who Hurricane Carter Claimed Was Wrongfully Convicted Set to Be Released,* N.Y. Daily News, Oct. 14/15, 2014; D. Murphy, *Judge Blasts Eviction Plan for Park Slope Seniors,* N.Y. Daily News, Nov. 24, 2014 (Exh. 4).

O'Hara's Case Is Unique

20. Several highly knowledgeable political observers have remarked on how unique Mr. O'Hara's prosecution was.[2] The conviction still is the only one of its kind in New York State legal history.

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[2] This includes a spokesman for the New York State Board of Elections, who reportedly said: "Usually cases like this aren't prosecuted. . . . They're not high on most D.A.'s lists, this sort of thing." D. McGrath, *New York Man Fights Illegal Voting Conviction,* Boston Globe, Jan. 8, 2004. (Exh. 4) *See also* Editorial, *Hynes Catch-Up,* N.Y. Daily News, Aug. 18, 2014; J. Sapien, *For Prosecutor under Fire, a Verdict at the Polls,* ProPublica, Sept. 6, 2013 (contrasting failure to prosecute sexual predators with three trials for O'Hara); Editorial, *Begging the Gov's Pardon for John O'Hara,* N.Y. Daily News, Sept. 23, 2012; J. Caher, *Lawyer Convicted for Illegal Votes Revives Bid for Pardon,* N.Y.L.J., Sept. 29, 2011; Editorial, *Gov. Andrew Cuomo Should Pardon Political-Vendetta Victim John O'Hara,* N.Y. Daily News, Oct. 24, 2011; Editorial, *Begging Gov's Pardon,* N.Y. Daily News, Dec. 28, 2010; D. Kaczynski, *Gov. Paterson, Pardon John O'Hara,* Albany Times Union, Nov. 23, 2010; D. Santo, *A Life in Court: Friendship and Corruption Inside the Brooklyn System,* Brooklyn Ink, Dec. 16, 2010; *Ballad of John Kennedy O'Hara,* Bay Ridge Interpol, Aug. 25, 2010; *Pardon Him, Sir,* N.Y. Daily News, July 21, 2010; Editorial, *Pardon Him, Governor: Brooklyn Victim of Political Persecution Should Be Exonerated,* N.Y. Daily News, Dec. 21, 2009; *A Voter, a Felon and a Lawyer,* Albany Times Union, Oct. 14, 2009; C. Ketcham, *Voter Injustice Best Redressed with a Pardon,* Albany Times Union, Dec. 18, 2006; *In the Name of Justice,* Albany Times Union, Nov. 15, 2006; Editorial, *Triple Jeopardy,* N.Y. Sun. Jan. 9-11, 2004; Editorial, *Democracy Defeated,* N.Y. Daily News, Sept. 9, 2003; C. Main, *A Stench Grows in Brooklyn,* N.Y. Post, Mar. 10, 2003; J. Caher, *Former Attorney Loses Appeal of Conviction for Illegal Voting,* N.Y.L.J., June 15, 2001; Editorial, *A*

21. This is demonstrated by several cases occurring after O'Hara's 440 motion was denied in 2005 in which civil courts found that candidates for office gave false addresses for themselves or others when registering to vote or in designating petitions, but there was no criminal consequence. *See, e.g., Eisenberg v. Strasser,* 100 N.Y.2d 590 (2013)(appeal from Kings County; 47th Council District designating petition invalidated because "*candidate did not actually reside at address* he listed on designating petition and which he had used for purposes of voter registration" [emphasis added]); *Tischler v. Hikind,* 98 A.D.3d 926 (2d Dept. 2012)("subscribing witness inserted incorrect address for the signer" in designating petition); *Robinson v. Sharpe,* 32 A.D.3d 488 (2d Dept. 2006)("the evidence established that *[candidate] was not a resident of the 58th Assembly District" for year preceding election; candidate had moved out, transferred ownership of property, and canceled utilities at address* [emphasis added]). *See also Walkes v. Farrakhan,* 286 A.D.2d 464 (2d Dept. 2001)("Based on the credibility of the witnesses, the Supreme Court determined that the *address which [candidate] listed on the designating petition was not ... his residence*" [emphasis added]; petition invalidated).

22. This new evidence in support of O'Hara's selective prosecution claim is consistent with historical practice, before O'Hara's indictment and trial, to limit the response to such "fraud" to civil remedies only. *See, e.g., Scarfone v. Ruggieri,* 301 N.Y. 662 (1950)(enrollment of voter cancelled; registered at 18th Avenue address,

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Voting Outrage, N.Y. Sun, May 19, 2001. (Exh. 4)

voter actually resided at Shore Road address with family; "with the consent of his wife" Ruggieri used 18th Avenue address "in order to further his political ambitions," but did not bill utilities at that address); *Ramos v. Gomez,* 196 A.D.2d 620 (2d Dept. 1993)(candidate's petition invalidated: *candidate "falsely stated her address* as 460 7th Avenue in the 51st Assembly District in Kings County," *basement apartment at that address was just a storage space*); *Carey v. Foster,* 164 A.D.2d 930 (2d Dept. 1990)(designating petition for Assembly candidate invalidated where "there was *no evidence that he resided at" address in district* and "chose to invoke his Fifth Amendment right against self-incrimination" when asked about his residency status in another State); *Markowitz v. Gumbs,* 122 A.D.2d 906 (2d Dept. 1986)(senatorial primary candidate's petition invalidated where *evidence showed he was not resident in district* for requisite period); *Gregory v. Board of Election of the City of New York,* 93 A.D.2d 894 (2d Dept.), *aff'd*, 59 N.Y.2d 668 (1983)(*candidate's address within district did not have electricity or cooking utensils, had sparse furniture; held, address was not his residence*).

23. Kings County candidates have been disqualified or civilly sanctioned for a variety of other apparently fraudulent electoral filings, too, since O'Hara's prior motion was denied, but none were prosecuted criminally. *See, e.g., Straker v. New York City Campaign Fin. Bd.*, 41 Misc.3d 1213 (A) (Kings Co Oct. 16, 2013)($22,000 in inadequately documented election fund expenditures ordered returned to CFB); *Gangemi v. Board of Elections in the City of New York,* 40 Misc.3d 1232(A)(Kings Co

Aug. 8, 2013)(Borough President's designating petition properly rejected, "when the defect presents risk of fraud or confusion"); *Mobley v. Cioffe*, 40 Misc.3d 1232(A)(Kings Co Aug. 7, 2013)(Board removed candidate from ballot who inaccurately stated on cover sheet that he had requisite number of signatures).

24. This was consistent with historical practice, where candidates would submit petitions "permeated with fraud" – the deliberate submission of fraudulent signatures and/or false addresses -- and at most have their petitions invalidated, with no criminal consequence. *See, e.g., Haskell v. Gargiulo,* 51 N.Y.2d 747 (1980)(appeal from Kings County; *evidence of fraud permeated the petitions*, invalidating candidacy); *Saitta v. Rivera,* 264 A.D.2d 490 (2d Dept. 1999)(signatures in designating petition obtained by *fraud* and *candidate charged with knowledge of fraud*; petition invalidated); *Sullivan v. New York City Board of Elections*, 224 A.D.2d 565 (1996)(petition signatures invalidated due to "unqualified" witnesses); *Heitzner v. Neglia,* 196 A.D.2d 616 (2d Dept. 1993)("the evidence supports . . . conclusion that the designating petition must be invalidated in its entirety due to its being *permeated with fraud*" [emphasis added]); *Villafane v. Caban,* 104 A.D.2d 579 (2d Dept. 1984)(court found "*level of fraud was of such magnitude so as to permeate the [designating] petition as a whole*" and that candidate "was closely involved in the petitioning process"; petition invalidated [emphasis added]); *Hicks v. Santiago,* 104 A.D.2d 471 (2d Dept. 1984)(designating petition invalidated; *trial court properly inferred candidate's fraudulent intent* behind irregularities); *Boyland*

v. Board of Elections of the City of New York, 90 A.D.2d 523 (2d Dept. 1982)("substantial difference between the number of [ballot] irregularities and the plurality"; new election ordered); *Layden v. Gargiulo,* 77 A.D.2d 933 (2d Dept. 1980)(candidate's petition *permeated with fraud*; candidate stricken from ballot); *Bloom v. Power,* 21 Misc.2d 885 (Kings Co. 1959)("candidate, a middle aged lawyer seeking high judicial office must be held to the highest degrees of veracity . . where a *candidate actively aided, abetted and participated in the presentment of forged petitions* he forfeits his right to a place on the ballot" [emphasis added]).

25. Since the denial of O'Hara's prior motion in 2005, the same pattern has held true *outside* Kings County: candidates have registered from false addresses or submitted fraudulent petitions and suffered at worst civil consequences. *See, e.g., Stewart v. Chautauqua County Board of Elections,* 14 N.Y.3d 139 (2010)(affidavit ballot invalidated where voter had no electricity or running water at claimed residential address, and had paid no rent, and the property could be sold from under her); *Chaimowitz v. Calcaterra,* 76 A.D.3d 685 (2d Dept. 2010)(appeal from Nassau County, state senatorial primary candidate's petition invalidated for *failure to meet residency requirement*); *Willis v. Suffolk County Bd. of Elections,* 54 A.D.2d 436 (2d Dept. 2008)(candidate's petition should be invalidate where *candidate claimed to reside at Suffolk address of his parents, but really lived out of State*); *Tapper v. Sampel,* 54 A.F.2d 435 (2d Dept. 2008)(appeal from Queens County; designating petition invalidated where *candidate directed witnesses to falsely*

confirm signatures); *Drace v. Sayegh,* 43 A.D.2d 481 (2d Dept. 2007)(appeal from City of Yonkers; "petitioners made a prima facie showing that *[candidate] participated in fraudulent procuring signatures for his designating petition*" [emphasis added]); *Butler v. Duvalle,* 32 A.D.2d 514 (2d Dept. 2006)(appeal from Queens County; clear and convincing evidence showed that method of collecting designating petition signatures was "*permeated with fraud*" [emphasis added]; petition invalidated).

26. The above post-2005 decisions are consistent with the decisions preceding O'Hara's prosecution and his subsequent 440 motion. *See, e.g., Flower v. D'Apice,* 63 N.Y.2d 715 (1984)(appeal from Westchester County; candidate knowingly obtained signatures without proper identification; *candidate's "fraudulent acts* warranted that his name be stricken form the ballot" [emphasis added]); *Proskin v. May,* 40 N.Y.2d 829 (1976) (designating petition in Albany County *permeated with fraudulent signatures*); *Lerner v. Power,* 22 N.Y.2d 767 (1968)(appeal from Queens County; "undisputed evidence establishes as a matter of law that the questioned petitions were a product of the *knowing, systematic acceptance of purported signatures of innumerable person subscribed by others, thus constituting permeating fraudulent representation*" [emphasis added]); *Gladwin v. Power,* 14 N.Y.2d 771 (1964)(*voter/candidate registered and voted in a district where she clearly did not reside "for purposes of furthering her career professionally, politically, and socially*" [emphasis added]); *Fernandez v. Monegro,* 10 A.D.3d 429

(2d Dept. 2004)(appeal from Queens County; "petitioners established by clear and convincing evidence ... that appellant *did not reside at the address listed* as his residence on his designating petition" [emphasis added]); *Camardi v. Sinawski,* 297 A.D.2d 357 (2d Dept. 2002)(appeal from Nassau County; *Assembly candidate for Nassau County district actually resided in Manhattan*; nominating petition invalidated); *Leonard v. Pradhan,* 286 A.D.2d 459 (2d Dept. 2001)(appeal from Rockland County; *designating petition permeated by fraud and the "candidate himself, as a subscribing witness, has participated in the fraud*" [emphasis added]; petition invalidated); *Schaefer v. Perez,* 275 A.D.2d 430 (2d Dept. 2000)(appeal from Suffolk County; "many instances of fraud in obtaining signatures for designating petition [which was] *permeated with fraud*" [emphasis added]; petition invalidated); *D'Andre v. Canary,* 114 A.D.2d 430 (2d Dept. 1985)("*numerous forgeries*" on six sheets of designating petition; *clear and convincing proof of fraud*; petition invalidated); *Pilat v. Sachs,* 59 A.d.2d 515 (1st Dept. 1977)(*petition had perjurious authentications of hundreds of forged signatures*); *Thompson v. Hayduk,* 45 A.D.2d 955 (2d Dept. 1974)(appeal from Westchester County; *nominating petition of senatorial primary candidate invalidated, where candidate claimed to reside in Westchester, but had registered and voted in the Bronx during the same period*).

27. It is astonishing that, given this history of deliberate fraud by candidates for office, O'Hara is the only individual to have been selected for prosecution and

convicted for such Election Law violations.[3]

Hynes's Non-Prosecution of Similar Conduct By Himself And His Allies

28. In his 2005 decision, Justice Gerges appeared to approve of O'Hara's prosecution because of his "prominence in the community, his notoriety or his public status." Slip op. at *7-*8, 9 Misc.3d 11134(A), 808 N.Y.S.2d 919. (Exh. 5). In the judge's view, singling out O'Hara was constitutionally permissible because "a prosecution of a prominent figure would have a more deterrent effect on the public than the prosecution of an unknown individual." *Id.*

29. However, new evidence shows that there have been numerous "prominent figures," particularly in Brooklyn, who have not been prosecuted for similar Election Law violations.

(a) Vito Lopez

30. It was reported in 2013 that Vito Lopez, the former longtime Chair of the Democratic Party organization in Brooklyn, while claiming to be a Brooklyn resident, actually has long lived in Queens, but he was never investigated or prosecuted for registering at a false address. *See, e.g.*, T. Salinger, *Vito Lopez's Bushwick Legacy: A Mix of Scandal and Progress*, City Limits, Dec. 12, 2013 Exh.

[3] In one other case in the Bronx *People v. Ramos,* Slip op., Ind. No. 5993/94 (Bronx Co. Jan. 30, 1996), *aff'd,* 223 A.D.2d 495 (1st Dept. 1996) (Exh. 32), a "false residence" charge was brought, but it was dismissed without prejudice before trial. The court criticized grand jury instructions that relied on the Election Law definition of "residence"—that is, the definition that was later used against O'Hara here—as insufficient to enable grand jurors to "intelligently" decide whether the evidence supported elements of the crime. *Id.* The Bronx District Attorney did not refile, but rather dropped the case.

6).

31. Lopez had registered to vote, and voted, from a residential address in Bushwick. His neighbors, however, rarely saw him there. The reason for this, according to the news reports, was that Lopez actually has lived for many years with his girlfriend in Ridgewood, Queens. *See, e.g.*, J. Jackson, E. Durkin & A. Lisberg, *Brooklyn Dem Boss Vito Lopez Is Hard to Find at Bushwick Home, but Spends Much of His Time in Queens*, N.Y. Daily News, Oct. 10, 2010 (Exh. 6).

32. Mr. Hynes, a political crony of Lopez's, must have known for years where Lopez was registered and voted and that these did not correspond to where he actually lived. Indeed, Hynes proudly acknowledged that "the Kings County Democratic Party, led by Assemblyman Lopez," was a longtime political supporter of his. C. Campbell, *Brooklyn D.A. Calls for Special Prosecutor for Vito Lopez*, N.Y. Observer, Aug. 31, 2012. (Exh. 6). He has been quoted saying, "I have convicted more politicians than any other district attorney in this state's history, and I know the difference between a crook and others. . . . So Vito is a good guy." Staff Report, *The DA & the Boss*, N.Y. Post, July 31, 2011 (Exh. 6).

33. As District Attorney, Hynes took himself off other investigations of Lopez, including Lopez's sexual conduct with aides and the operation of the Ridgewood Bushwick Senior Citizens Council, with which Lopez is closely associated. These Hynes recusals enabled investigations to proceed with a special prosecutor.

34. However, Hynes did not distance himself from, or ask for a special prosecutor for, matters related to Lopez's residency or his voting address, which if undertaken might have had significant implications for Lopez's ability to continue as Brooklyn Democratic Party Chair and as a Brooklyn-based State Assemblyman. It appears no investigation ever was undertaken into these matters. *See, e.g.*, D. Hakim, *Special Prosecutor to Investigate Lawmaker in Harassment Case,* N.Y. Times, Aug. 31, 2012; W. Sherman & E. Durkin, *Brooklyn DA Charles Hynes Takes Himself Off Hot-Potato Vito Lopez Case,* N.Y. Daily News, Sept. 23, 2010; J. Margolin, *Special Prosecutor Appointed in Probe of Lopez Grope Case,* N.Y. Post, Aug. 31, 2012. (Exh. 6)

(b) False Address Issues within Hynes's Own Office

35. Until 2007, New York County Law § 702(6) required Kings County Assistant District Attorneys to reside within New York City. Public Officers Law § 3(1) has continuously required the Kings County District Attorney himself to reside within Kings County. County Law § 702(4) requires the District Attorney's "designated assistant" to perform the "duties" of the office of district attorney in the latter's absence. (On information and belief, Amy Feinstein filled this role during Hynes's incumbency.) *See also* R. Blau, *Push Bill Letting Asst. DAs Live Outside the City,* The Chief-Leader, Apr. 27, 2007 (Exh. 7). O'Hara's 2005 motion raised questions about Hynes's knowledge and indulgence of several assistants in his office who resided outside New York City or used a false New York City address for voting

purposes, but after the denial of O'Hara's motion, Hynes took no action against any of these subordinates, just as he hadn't before.

36. In the 2005 motion, O'Hara alleged that Dino Amoroso, Chief Counsel to Hynes, lived with his family in Nassau County, but registered and voted from his parents' address in Queens County, ostensibly in order to meet the New York City residency requirement for Brooklyn ADAs. A Hynes spokesman acknowledged in 2013 that Hynes had "permitted" this. *See* J. Schram, *Brooklyn DA's Staffers Live in NJ, Violating State Residency Law,* N.Y. Post, Feb. 25, 2013 (Exh. 7); *see also D.A. Hynes and the Residency Meltdown,* Huffpost New York, Sept. 14, 2010 (Exh. 4); Z. Haberman, *Prosecutor Cleared in Tit-for-Tat Vote Fraud Rap,* N.Y. Post, June 18, 2005; Editorial, *Hitting 'Em Where They Live,* N. Y. Daily News, Apr. 18, 2005; T. Perrotta, *DAs Differ on Holding Assistants to City's Residency Requirement,* N.Y.L.J., Apr. 12, 2005; D. Hafetz, *Hynes' "Home" Team: Out-of-Town ADAs,* N.Y. Post, Apr. 10, 2005 (Exh. 7).

37. Hynes also was aware of other assistants living outside New York City, contrary to law. He "permitted" Amy Feinstein, for example, his Chief Assistant D.A., or top aide, who also served as the "designated assistant" when Hynes was unavailable, to live in Manhattan, even though the law required that assistant to reside in Brooklyn if she were to be qualified to assume the "duties" of Hynes's office in his absence. *See, e.g.,* J. Saul, *Hynes' Deputy Sent Email on Shredding Documents,* N.Y. Post, June 30, 2014; V. Yee, *Under Fire, Brooklyn Deputy*

Prosecutor Will Retire, N.Y. Times, Nov. 14, 2013; S. Shifrel, *Brooklyn D.A. Charles Hynes Recovering from Heart Surgery, Plans to Continue Running for Sixth Term,* N.Y. Daily News, Aug. 6, 2009 ("Chief Assistant District Attorney Amy Feinstein will run the office while Hynes is recovering").

38. In 2013, Hynes, through an official press spokesman, acknowledged that while "[a]ll Kings County assistant district attorneys must live within the state of New York," five of Hynes's assistants, including ADA John O'Mara, resided in *New Jersey*, all with Hynes's "permission." J. Schram, *Brooklyn DA's Staffers Live in NJ, Violating State Residency Law*, N.Y. Post, Feb. 25, 2013. This was remarkable, considering that O'Mara was the prosecutor who convicted John O'Hara of voting from a residence that was not his principal one. (The District Attorney's Office admission of the existence of the other four New Jersey residents is new evidence that supports this selective prosecution claim.)

39. Hynes did not possess the legal authority to "permit" such violations of the law which, if enforced, would have required these ADAs to resign their positions and forfeit their salaries. Until 2007, such prosecutors would have been vulnerable to legal disqualification. *See, e.g., Mileto v. Sleight,* 178 Misc.2d 652, 565 (Franklin Co. 1998).

40. Significantly, in the case of Dino Amoroso, who voted from a Queens address several times, the Queens County District Attorney investigated and decided not to prosecute his registration from an address at which he did not live.

See T. Perotta, *Brooklyn Prosecutor Cleared over Voting Address*, N.Y.L.J., June 20, 2005; Z. Haberman, *Prosecutor Cleared in Tit-for-Tat Vote Fraud Rap,* N.Y. Post, June 18, 2005 (Exh. 7). Only Hynes antagonist John O'Hara, has not received such treatment.

(c) Hynes' Own Commission of Voter Fraud

41. In his 2005 decision, Justice Gerges distinguished Amoroso's situation from O'Hara's by referring to O'Hara as having registered not just "at a false address" but also at "an *uninhabitable* address." Slip op. at *7, 9 Misc.3d 1113(A), 808 N.Y.S.2d 919 (emphasis added)(Exh. 5). (In fact, O'Hara was convicted, under the jury charge, of registering and voting from an address that was not his "principal" residence.) But Hynes himself, at the very time he was bringing a case against O'Hara, appears to have registered from an address that was uninhabitable: a municipal office building on Joralemon Street. *See* Hynes registration card dated May 7, 1996 (Exh. 8). He did so evidently because he was without a residence in Brooklyn, but was residing at such time at his condominium in Breezy Point, Queens.[4] Rather than confront this remarkable, documented fact, Justice Gerges conveniently accepted an unsworn, out-of-court statement by O'Hara's prosecutor, John O'Mara, that Hynes's Joralemon Street registration, which was on file with

[4] Hynes has occasionally depicted his Breezy Point address as "his summer home." *See, e.g.,* N. Onishi, *New Beach Land Poses Issue for a Gated Town in Queens,* N.Y. Times, Aug. 25, 1997 (Exh. 9). As discussed below, however, after Hynes moved out of his home on East 17th Street in Brooklyn, he engaged in several publicly filed transactions, all from the Queens address, and none during the summer—in November 1996, January 1997, and December 2001.

the Board of Elections, was a "forgery." Indeed, Justice Gerges made the extraordinary ruling that O'Hara had failed a burden to prove that this official, publicly-filed record was *not* a forgery. *Id.*, slip op. at *2, 9 Misc.3d 1113(A), 808 N.Y.S.2d 919 (Exh. 5).

42. The issue was raised in the Harper's Magazine article, *Meet the New Boss* by Christopher Ketcham (who, unlike O'Mara, did submit an affidavit to the Court [*see* article in Exh. 4, and affidavit in Exh. 34]). It should be noted that Hynes's own explanation in response to the article was different from O'Mara's. Hynes did not say that someone else had signed his name, but that some unknown office worker in the Board of Election, for an inexplicable reason, had decided on his own to cut Hynes's signature from his previous voter-registration "buff card," and to tape it to a new card bearing the Joralemon Street office address. *See* C. Hynes, *Letter to Editor,* Harper's Magazine, February 2005 (Exh. 9). Hynes does not explain why this happened. Significantly; it is unclear from his explanation how the BOE got the Joralemon Street address in the first place.

43. Meanwhile, Hynes's spokesman Jerry Schmetterer reportedly told the media, "the card was authentic, but had been copied by the Board of Elections from an older card." J. Sederstrom, *Harpers Report: Hynes Did "Crime," O'Hara Did Time,* Bay Ridge Paper, Nov. 27, 2004 (Exh. 4). Puzzling and bizarre as all these explanations are, the contradictory explanations of the facts surrounding the false registration of the former District Attorney were not considered by Justice Gerges

and have never been examined by any court.[5]

44. Also not before the court in 2005 was Schmetterer's explanation that, for a few months during this time, Hynes was without any residence at all in Brooklyn, after Mr. Hynes vacated his home at the old Flatbush address, but "had not yet closed on" his new Bay Ridge co-op. *See* J. Sederstrom, *supra.*

45. Lest there should be any doubt about the genuineness of Hynes's May 1996 registration, however, Exhibit 8 also contains a second registration card that Hynes completed, affirmed, signed, and submitted to the New York Board of Elections six months later. In his October 29, 1996, registration Hynes declares that his *new* address changed to "Oliver Street" in Brooklyn (Exh. 8). But he also lists "210 Joralemon" as a *prior* address. (*See* the October 29, 1996, buff card, in Exhibit 8, where it says that Hynes had two prior addresses from which he had registered or voted, the East 17th Street address, and the "210 Joralemon" address.) Furthermore, we now know when Hynes sold his old 17th Street home, and newly-discovered evidence confirms his non-Brooklyn residency during this period. Specifically, Exhibit 10 contains documentation of Hynes's sale of his East 17th Street home in July 1996. Exhibit 11 shows his November 1996 UCC1 Financing Statement, on file with the NYC Department of Finance Office of the City Register for a condo at "12th Avenue" in "Rockaway Point" (or Breezy Point), Queens. After

[5] Hynes threatened to sue for defamation over the published allegation of false registration, which was printed in Ketcham's December 2004 Harper's article, but he never did. *See* G. Thrush, *May Sue Harper's: Brooklyn DA: Article Was a Smear,* N.Y. Newsday, Nov. 22, 2004; J. Sederstrom,

leaving the 17th Street home in Brooklyn, the Hyneses used "Rockaway Point" in Queens as their home address over several years. For example, a January 1997 UCC1 Financing Statement also gave their address as the "12th Avenue" address in "Breezy Point," Queens (when he purchased a co-op apartment in Bay Ridge) (Exh. 11).[6] Moreover, Charles Hynes' December 2001 power of attorney form (appointing Amoroso) shows Hynes still "residing" in Queens, at the "12th Avenue" address in "Rockaway Point." (Exh. 16). (More serious problems with the purported "Patrica Hynes" power of attorney form, completed at the same time, are discussed below at ¶¶ 57-60.) These documents, reflecting Hynes's long-term year-round use of the Breezy Point address, were discovered after O'Hara's 2005 motion.

46. In short, it seems that several events occurred at approximately the same time in late 1996 and early 1997: (a) District Attorney Hynes gave up his home in Brooklyn; (b) he moved into Breezy Point, Queens; (c) he was registered to vote from a "residential" address that was actually uninhabitable, the Joralemon Street municipal building; and (d) he singled out John O'Hara for prosecution for having registered to vote from a supposedly "uninhabitable" residential address in Kings County.

(d) False Filings Related to Hynes' Own Campaign

47. O'Hara also was tried and convicted for offering a false instrument (his

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Harpers Report: Hynes Did "Crime," O'Hara Did Time, Bay Ridge Paper, Nov. 27, 2004 (Exh. 4).

[6] A November 1999 UCC1 Financing Statement shows Amoroso again acting as "attorney in fact" for other members of the Hynes family—the D.A,.'s son Patrick and daughter-in-law Brenda—

voter registration card) for filing, in violation of Penal Law § 175.35. However, new evidence has recently emerged of systemic misconduct by Hynes himself and by other high-level officials in his own office involving false filings, which Hynes deliberately approved of or overlooked and which thus escaped, under his regime, any criminal or other sanction. This is further new evidence of selective prosecution.

48. In June 2014, the New York City Department of Investigation released a report, "Findings Regarding Misconduct by Former Kings County District Attorney Charles J. Hynes, Justice Barry Kamins and Others" ("DOI Report") (Exh. 13). (The exhibit copy of the DOI Report bears redactions which appear in the version that the DOI released to the public.)

49. The DOI found that the Kings County District Attorney's Office ("KCDA") had "ostensibly hired" Mortimer Matz, a political and public relations consultant, "to provide public relations services to the office," but in fact "Matz was serving primarily if not exclusively as a political consultant to Hynes personally, and . . . he had a major role in orchestrating Hynes' 2013 reelection campaign." (Exh. 13, at 2). Invoices from Matz's firm (Matz, Blancato & Associates) filed with the District Attorney's Office billed the *District Attorney's Office* for "Public Relations and Communications Services rendered," at the rate of $536.40 per day, or $2,682.00 per week.

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for the purchase of a co-op on "Janet Lane" in Breezy Point. (*See* Exh. 12.)

50. According to the DOI, approximately 80 such invoices were submitted to the D.A.'s office, sent to the attention of Deputy Assistant District Attorney Dino Amoroso, or Chief Assistant District Attorney Amy Feinstein, and paid. According to the DOI Report, "from January 1, 2013 to November 26, 2013, the [KCDA] office typically issued on average two to three checks each month to Matz, Blancato & Associates." *Id.* at 2. The DOI revealed that during 2013, Matz's firm was paid $219,924.00 in this way. Over a longer period, during Matz's "tenure" at the District Attorney's Office of 11 years, the Office paid Matz's firm "approximately $1.1 million." *Id.* According to the DOI, money for such payments was improperly extracted from an official subaccount of the Kings County District Attorney's Office, called the "ASSET FORFEITURE" account (which raises other criminal concerns). *Id.*

51. Penal Law §§ 175.30 and 175.35 prohibit the offering of false instruments for filing with a public agency. The Kings County D.A.'s office is a public agency, and the approximately 80 bills sent to Amoroso and/or Feinstein, to the extent they invoiced the office for services to Hynes, appear to have been false filings.

52. On information and belief, Hynes and his two top aides, Feinstein and Amoroso, were aware that the Office was paying out of public funds an election consultant who was really working on Hynes' personal election campaign. This was apparent criminal activity that they certainly didn't prosecute; they were all apparent co-conspirators.

53. Indeed, during the Jabbar Collins civil lawsuit, handled by the undersigned, I took the deposition of George Arzt, who was Hynes's campaign manager for the District Attorney primary in September 2013, which Hynes lost to Kenneth Thompson. Arzt confirmed that Matz functioned as a campaign consultant and held weekly campaign meetings, during office hours, which Assistant District Attorneys Feinstein, Amoroso, and Hughes, the D.A.'s official spokesman Schmetterer, and occasionally Hynes himself, would attend. (*See* Exh. 14, at 10-15, 30-32.)

(e) Hynes Own False Real Estate-Related Filings

54. Hynes also failed to prosecute the involvement of himself, and top aides, in a false filing of a fraudulently executed, notarized, and witnessed real estate document in connection with Hynes' personal real estate transactions, specifically, a 2001 power of attorney for his wife, Patricia. The instrument in question was filed in the New York City Department of Finance Office of the City Register, and was intended to be relied on by others as the basis for real estate transactions.

55. Public records show Charles Hynes and his wife Patricia Hynes owned a home on East 17th Street in Brooklyn until 1996, as several recorded documents, signed by both Hyneses, attest. (Exh. 15) In the summer of 1996, they sold this home. In the autumn of 1996—when John O'Hara was indicted in this case—Deputy Assistant District Attorney Amoroso appears to have been appointed by District Attorney Hynes to represent the private interests of Hynes and his wife

Patricia in several personal transactions (almost certainly a violation of the City's Conflict of Interest laws).

56. Specifically, in July 1996, Mr. and Mrs. Hynes sold the 17th Street, Brooklyn, home to new owners. The conveyance was recorded in August 1996. (Exh. 10) Later, in November 1996, Mr. and Mrs. Hynes acquired their condominium in Breezy Point, Queens. (Exh. 11) According to a UCC1 filed in connection with the transaction, Amoroso represented Charles and Patricia Hynes as attorney. (Exh. 11) Later, in January 1997, Amoroso represented them in another transaction involving the purchase of property at Oliver Street, Brooklyn, as another UCC1 shows. (Exh. 11) But both UCC1s showed Hynes's address was in Queens.

57. In December 2001, Hynes executed a formal appointment of Amoroso with power of attorney. (Exh. 16) (Note that this document also contains Hynes's representation that he was "residing" at 216-35 12th Avenue, Rockaway Point (Queens), and Amoroso's confirmation that he was "residing" at 164 Canterbury Gate, Lynbrook (Nassau County)). The same day, a similar document was executed purporting to appoint Amoroso with Patricia Hynes's power-of-attorney as well. (Exh. 17) This is the document that is a fraud.

58. Patricia Hynes' signature on this document, purporting to appoint Dino Amoroso as her power of attorney and to authorize him to, among other things, execute "[a]ny and all documents relating to the refinance of the residence located

at 216-35 12th Avenue Rockaway Point, N.Y.," is forged. Comparison of the "Patricia Hynes" signature on this document with her signatures in previous documents, such as the aforementioned pre-2001 power of attorney and real estate closing documents, (*compare* Exhs. 10 and 15 *with* Exh. 17) shows that Mrs. Hynes did not actually sign this document. In fact, upon information and belief, as a comparison of Charles Hynes' handwriting and the "Patricia Hynes" signature suggests, the "Patricia Hynes" signature was affixed by District Attorney Hynes. (*Compare* Exhs. 10 and 15 *with* Exhs. 16 and 17.)

59. The problem is that this document states it is signed under oath by Patricia Hynes. Mrs. Hynes's purported signature is notarized by Hynes' long-time executive, ADA Virginia Modest, then in the Appeals Bureau. (Exh. 17) ADA Modest's additional sworn acknowledgement that Mrs. Hynes personally executed the document in her presence, which was notarized by Hynes' long-time personal assistant, Mary Hughes (Exh. 17), is perjurious. Similarly false is Dino Amoroso's affidavit, notarized by Modest, stating that the Power of Attorney was in "full force and effect" – inasmuch as Amoroso was present and knew that Mrs. Hynes had not really signed the document and it was a nullity. Amoroso's affidavit further acknowledges that the document "will be relied upon in accepting the execution and delivery of the Instrument(s) and in paying good and valuable consideration therefor" – in other words, that innocent third parties would be relying on a fraudulent power of attorney to conduct financial transactions with the Hyneses.

This document was in fact filed at the NYC Office of the City Register. (Exh. 17).

60. This was a criminally false filing. Of course, it was never prosecuted. Hynes would never prosecute himself, his chief counsel, and two other of his top executives for conspiring to publicly file a fraudulently-executed and falsely notarized power of attorney intended to induce innocent parties to engage in substantial real estate transactions, all so as not to inconvenience Mrs. Hynes. He was too busy prosecuting John O'Hara for the "false filing" of his voter registration card.

(f) False Filings by Hynes's Office of Fraudulent Warrant Applications

61. In the recent federal civil rights case, *Jabbar Collins v. City of New York et al.*, U.S. District Court, E.D.N.Y., No. 11-cv-00766 (FB)(RML), in which the undersigned represented the plaintiff, Jabbar Collins, the evidence showed that prosecutors in Hynes' Office, including then chief of the Homicide Bureau, Michael Vecchione, followed the frequent practice of filing warrant applications that purported to be under oath, but in fact contained signatures in the individual prosecutors' names that had been forged by paralegals.

62. Vecchione admitted that someone else had signed his name to at least twelve "sworn" documents, most of which consisted of applications for material witness warrants to physically arrest mere witnesses, and for *Damiani* orders, allowing mere witnesses to be removed from prison or jail and brought to the D.A.'s

Office for interrogation. (Exh. 18, at 25, 38, 43, 54, 59-60, 65 and 67; Exh. 19.) Of course, it is basic that the Fourth Amendment to the United States Constitution, Art. I, Sect. 12 of the New York State Constitution, and state case law, require a sworn affidavit establishing probable cause as a predicate to the lawful arrest or detention of a person for court proceedings.

63. While Vecchione insisted that he never gave anyone authority to sign his name to any "sworn" document, (Exh. 18, at 54-55, 57, 60-61, 69, 72-73, 365), his personal paralegal, Liza Noonan Fitzpatrick, who had no reason to lie, testified at her deposition that she would regularly sign for Vecchione and other prosecutors, that it "was pretty much common practice. If he was not around I would sign it," that some of these documents were notarized, and that Vecchione and other prosecutors were well aware of the practice (as they had to be, since the witnesses were procured at their command to be available to testify or to be interviewed). (Exh. 20, at 37-50, 100-112). Indeed, Vecchione acknowledged that he never delegated to any paralegal his function of authorizing material witness warrants and orders to produce to be sought from the court. (Exh. 18, at 70-73).

64. The falsely sworn affirmations and affidavits were filed in the Supreme Court, Kings County, by Vecchione and other ADAs and staff, were intended to be relied upon by the court, and were relied upon, leading to the arrest and detention of numerous witnesses. (Exh. 20, at 103.) These were all false filings, since they were falsely notarized and not truly "sworn."

65. Ms. Noonan explained that this was not an exceptional occurrence within the District Attorney's Office, specifically, the Homicide Bureau. She stated that this was routine practice during the first seven years of District Attorney Hynes's tenure, from 1991 to approximately 1997, when a new homicide chief, Kenneth Taub, put an end to it. (Exh. 20, at 40-50, 110-12). This was the period during which O'Hara was investigated, and indicted. Shortly after this, O'Hara was tried.

66. Numerous high-level executives in Hynes's Office became aware of the illegal practice at various times and conducted no investigation of it. This included Vecchione himself, who knew about his own practice; Taub, after he became chief of homicide (Exh. 21, at 28-32[7]); Kevin Richardson, an Assistant District Attorney who worked under Vecchione in the Rackets Bureau, who learned of it during the Jabbar Collins federal habeas litigation in 2010 (Exh. 22, at 147); Chief Assistant D.A. Amy Feinstein, whom Richardson told in 2010 (Exh. 23 at 167-68), and Hynes himself[8] (Exh. 23, at 256-60; Exh. 24, at 356-62.)

(g) Vecchione's False Affirmation, Filed in 2006, in the Collins Case

67. On November 3, 2006, Vecchione executed a sworn affirmation (containing his genuine signature) in opposition to Jabbar Collins' 440 motion seeking to vacate his conviction for *Brady* violations, witness coercion, and knowing

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[7] In error, the court reporter marked the transcript pages as "Confidential."

[8] But note that Hynes said he had no "specific recollection" of having learned about the practice; when he was shown numerous, prominently-placed articles describing it in newspapers he claims to have read regularly, Hynes still said, "I don't recall independently." (*See* Exh. 24, at 356-62.)

presentation of false testimony and argument. In this sworn affirmation, Vecchione stated: "No witness had to be threatened or forced to testify." (Exh. 25, ¶ 7). This sworn statement, when filed in court, was a false filing (and a perjurious one).

68. Documents later uncovered during federal habeas corpus proceedings in 2010 revealed that a witness, Angel Santos, who had refused to cooperate with the D.A.'s Office, was taken into custody pursuant to a material witness warrant Vecchione obtained (using a falsely-notarized affidavit signed by Ms. Noonan) (see Exh. 26), held prisoner for a week at the Bronx House of Detention to coerce him to testify, and then held under armed guard for another week by detective-investigators for the D.A.'s Office at Vecchione's behest, until he finally testified. A second witness, Edwin Oliva, was remanded to prison after he refused to meet with the D.A.'s Office to prepare his testimony and had recanted, and then was brought to the D.A.'s office to meet with Vecchione, *against his will* (and in violation of a court or *Damiani* order), after Oliva wrote out his refusal to go voluntarily. (Exh. 27). Only after Oliva was imprisoned because of his refusal to cooperate, and was taken against his will to a meeting with Vecchione, did he finally "agree" to testify.

69. Evidence showed that Hynes was briefed on the above coercive tactics to force these two witnesses to testify, as were Feinstein, Richardson, and later Amoroso (who attended all the depositions), yet no action was taken against Vecchione for his false filing in court of a perjurious affirmation. To the contrary, Hynes, against the protest of District Attorney-elect Thompson, insisted on paying

Vecchione a retirement package that included a payment of $285,623 (Exh. 28); *see also* S. Weichselbaum, *Incoming Brooklyn District Attorney Ken Thompson Slams Michael Vecchione's Golden Parachute,* N.Y. Daily News, Dec. 16, 2013.[9]

(h) False Filings of Freedom of Information Law Certifications

70. On at least two occasions in connection with the *Collins* matter, FOIL officers for the District Attorney's office issued, knowing they would ultimately be filed in court, sworn "Certifications" falsely representing that certain records requested by Jabbar Collins or on his behalf, including material-witness orders and supporting affidavits in Collins's criminal prosecution (attached as exhibits here) "could not be located" following "a careful and diligent search of this office's files" (*Compare* Exh. 29 *with* Exhs. 19, 26 and 27.)

71. However, the chief FOIL officer for the D.A.'s Office, Morgan Dennehy, then testified at his deposition that the routine practice of the Office was to use such language in certifications even though *only* the case file would be searched, not the remaining files of the office. The certifications, routinely filed with courts in opposition to FOIL motions under CPLR Article 78, were routinely false. Clearly, no one at the Brooklyn D.A.'s Office was prosecuted for following the Office's routine official policy of filing false FOIL certifications. (Exh. 30)

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[9] Because of the voluminous nature of the exhibits to this motion, we are not attaching all the transcript excerpts from the Collins case that prove the allegations about Vecchione, but they are in my possession and can be produced in the event the current District Attorney disputes any of

ARGUMENT

NEWLY-DISCOVERED EVIDENCE SHOWS THAT JOHN O'HARA WAS SINGLED OUT FOR PROSECUTION FOR THEN-DISTRICT ATTORNEY HYNES'S POLITICAL PURPOSES, IN VIOLATION OF O'HARA'S EQUAL PROTECTION RIGHTS; THE PROPER REMEDY IS DISMISSAL OF THE INDICTMENT

The Applicable Law

72. The Equal Protection Clause of the Fourteenth Amendment long has prohibited enforcement of the law "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." *Yick Wo v. Hopkins,* 356, 373-74 (1886); *see also United States v. Armstrong*, 517 U.S. 456, 464 (federal selective prosecution prohibited "by the equal protection component of the Due Process Clause of the Fifth Amendment"). "[I]ntentional or purposeful discrimination in the administration of an otherwise nondiscriminatory law violates equal protection." *People v. Goodman,* 31 N.Y.2d 262, 268 (1972). Even-handed law enforcement is "one of the governing principles of our society." *Matter of 303 West 42d Street v. Klein,* 46 N.Y.2d 686, 693 (1979).

73. The U.S. and New York Constitutions prohibit prosecutors and police from targeting protected classes of people for prosecution. *People v. Acme Mkts,* 37 N.Y.2d 326, 330-31 ((1975); *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12 (4th Dep't 1962). Targeting groups and individuals for prosecution because they have

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them.

exercised their political rights is just as invidious as targeting groups and individuals based on their race or religion. *See, e.g., Berrios*, 501 F.2d at 1211; *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973)(en banc); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972). Equally, targeting an individual because he has exercised his First Amendment rights is also unconstitutional. *See, e.g., Moss v. Hornig*, 314 F.2d 89, 93 (2d Cir. 1963). "[T]he more basic threshold question [is] whether the court, as an agency of government, should lend itself to a prosecution because of personal animosity, nonconformity, unpopularity, or some other illegitimate reason offensive to our notions of fair play and equal treatment under the law." *People v. Goodman*, 31 N.Y.2d 262, 269 (1972).

74. Analysis of a selective prosecution claim like this one is subject to "ordinary equal protection standards." *Armstrong*, 517 U.S. at 465; *United States v. Wayte*, 470 U.S. 598, 608 (1985); *People v. Acme Mkts*, 37 N.Y.2d 326, 330 (1975). The prima facie case of selective prosecution is established when the defendant can show that (1) "while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against [the defendant], he has been singled out for prosecution," and (2) "the government's discriminatory selection of [the defendant] has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitution rights." *United States v. Berrios*, 501 F.2d 1207,

1211 (2d Cir. 1974); *accord Blount,* 90 N.Y.2d at 999; *303 West 42nd Street* at 46 N.Y.2d at 693. Where the defendant shows that the decision to prosecute was because of the way in which he exercised his First Amendment rights, the proper remedy is dismissal for selective prosecution. *People v. Goodman*, 31 N.Y.2d 262, 268 (1972); *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 16 (4th Dep't 1962).

75. The Legislature authorized a hearing court to determine on the merits a motion, such as this, that relies on new evidence in support of a legal claim that previously was denied. *See* CPL § 440.10(3). The court has discretion to reach the merits of such a motion "in the interest of justice and for good cause shown." *Id.*

76. Here, as we establish below, it would be in the interest of justice, and O'Hara has demonstrated good cause, to determine this motion on the merits, in view of the overwhelming evidence of selective prosecution that became available or that O'Hara discovered only after the denial of his previous motion; the obvious defects in the prior court's reasoning based just on the evidence that it had available, and the political intimidation of the Brooklyn judiciary that District Attorney Hynes was engaged in at the time that O'Hara's previous motion, which had obvious political ramifications for Hynes, was before the court.

O'Hara Was Selectively Prosecuted

77. The evidence is overwhelming that John O'Hara was singled out for prosecution for Election Law offenses and false filing. It is undisputed that he is the only individual since Susan B. Anthony to have been prosecuted to trial for

voting from a false address. Countless others implicated in the same or related Election Law violations have not been criminally prosecuted, but at most civilly sued. Such practices have included registering and voting from phony addresses, using false addresses in voter petitions, and forging signatures. Hynes, Amoroso, and Brooklyn Democratic leader Vito Lopez appear to have personally engaged in illegally registering and voting from false alleged residences. None, of course, were prosecuted.

78. Further, Hynes, and his top staff, have repeatedly committing criminal acts in falsely executing and publicly filing fraudulent documents in support of criminal prosecutions and private business endeavors. None of the above cases were prosecuted, but O'Hara's registration and voting from his girlfriend's house because it allegedly was under construction and was currently uninhabitable was prosecuted as a felony, at three trials, cost him his law license, and nearly landed him in prison.

79. There can be no serious question that Hynes singled out O'Hara. The evidence and record amply shows that "that the law was not applied to other similarly situated" and "that selective application of the law was deliberately based upon an impermissible standard such as race, religion, or some other arbitrary classification." *People v. Blount,* 90 N.Y.2d 998, 999 (1997)(quoting *303 West 42nd Street,* 46 N.Y.2d at 693.

80. The record is overwhelming. Mr. O'Hara, a political gadfly, was literally

singled out for felony prosecution, while others similarly situated, of whom the District Attorney's office was aware (many close associates of the former District Attorney himself), were not criminally investigated or sanctioned in any way. O'Hara is the *only* person in the history of Kings County to have been criminally charged for illegally registering and voting, notwithstanding these similar instances, many of which occurred at the same time O'Hara was being prosecuted.

81. Plainly, Mr. O'Hara was not the only New Yorker (or indeed the only Kings County resident) to have been accused of deficient or inaccurate electoral filings.[10] Yet registering to vote from his girlfriend's home was deemed the only example of known wrongdoing heinous enough to attract seven felony charges.

O'Hara Was Singled Out For Impermissible Political Purposes

82. John O'Hara's political history in Brooklyn is detailed in his accompanying Affidavit and in various news articles.[11] O'Hara was in a continuous

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[10] As described in the accompanying O'Hara Affidavit, ¶¶ 8, 9,, 10, 11, 12, 16, and 17, quite a few election-year suits were filed against O'Hara, either by Assemblyman James Brennan, or by people closely associated with Brennan. Sometimes these claims raised the 47th Street address issue, but no adverse findings were ever made against O'Hara on it—a fact which offers insight into Hynes's decision to finally resort to an election-season criminal indictment against O'Hara, in 1996.

[11] *See, e.g.,* articles cited in fn.3 *supra*. *See also* J. Dwyer, *Weighing Political Risk against Mercy for Prisoners,* N.Y. Times, Jan. 24, 2013; *D.A. Hynes and the Residency Meltdown,* Huffington Post, Sept. 14, 2010; A. Street, *A Political Dissident Appeals,* Brooklyn Daily Eagle, Nov. 20, 2006; *Convicted of Voting Violations, O'Hara Appeals to Governor,* N.Y. Sun, Nov. 13, 2006; R. Karlin, *Political Maverick Hits Final Appeal,* Albany Times Union, Nov. 11, 2006; D. Hemel, *Documentary Chronicles Brooklyn DA's Alleged Silencing of Democratic Machine Critic O'Hara,* N.Y. Sun, June 30, 2005; C. Ketcham, *O'Hara vs. Hynes: The Case against the Lawless D.A.,* N.Y. Press, Apr. 6, 2005; J. Sederstrom, *Harpers Report: Hynes Did "Crime," O'Hara Did Time,* Bay Ridge Paper, Nov. 27, 2004; C. Ketcham, *Meet the New Boss,* Harper's Magazine, Dec. 2004; Editorial, *Triple Jeopardy,* N.Y. Sun, Jan. 9, 2004;*Voting Isn't a Crime,* N.Y. Daily News, July 23, 2003; P. Sweeney, *Voters as Convicts,* Albany Times Union, Jan. 134, 2003; G. Weber, *Hope for a Busted Voter,* N.Y. Daily News, Nov. 6, 2002; Editorial, *A Voting Outrage,* Albany Times Union, May 19, 2001; J. Hicks, *Charges of Fraud*

political confrontation with the Brooklyn political "Old Guard" for several years before his indictment. He had run for office against several incumbents, including James F. Brennan , and he had supported and run campaigns for others challenging the Brooklyn Democratic and Republican Party establishments. He regularly had squared up against Brennan and the "Machine" politicians during election years, and, with equal regularity, he attracted vitriol from those same politicians.

83. Much of John O'Hara's pre-indictment political career was publicly engaged in open opposition to Hynes and Brennan. (O'Hara Aff. ¶¶ 6, 7, 10, 11, 12, 13-15, 17-20, 22, 24.) Brennan's feelings about O'Hara's political activities were bitterly and unambiguously negative. (*See, e.g.,* Exh. 35, at 241-44, 261; O'Hara Aff. ¶¶ 10, 11, 19) For O'Hara's part, there was a time when O'Hara ran against the Brennan/Hynes camp in virtually every election. (O'Hara Aff. ¶¶5-7, 9-12, 13-15, 16, 17-18) He often supported other candidates similarly inclined. (*Id.* ¶¶ 13-15, 18, 20-21) He occasionally broke with his party's leadership, in the interests of opening up the political process. (*Id.* ¶¶ 13-15, 17-18) The list of election-related cases brought against O'Hara by the opposing camp, already part of the record in this case, is lengthy. (*See* Exh. 36.)

84. As noted above, the second element of the prima facie selective prosecution case is a showing of a discriminatory animus motivating the

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and Revenge Mark Candidate's 3d Trial, N.Y. Times, June 14, 1999. One account of O'Hara's more recent activities is in D. Murphy, *Judge Blasts Eviction Plan for Park Slope Seniors,* N.Y. Daily News, Nov. 24, 2014. (*See* Exh. 4.)

prosecution. The starkness with which O'Hara was singled out is evidence of the strength of the discriminatory motive underlying the prosecution. So are the resources devoted to this case, compared to the inattention given to similar instances of conduct that the former D.A. knew about. The efforts against O'Hara shows targeted efforts at political intimidation, not policy-driven priorities in law enforcement. *Oyler v. Boles,* 368 U.S. 448, 456 (1962).

85. Also unusual, at least in recent memory, is that the former District Attorney took O'Hara to trial before a jury three times before he was able to secure a conviction. He did so though his own office had acknowledged that there were legal difficulties with following the Election Law "to the letter." (*See* ¶ 91 below and Monique Ferrell letter, Exh. 33, at 4.) The discriminatory animus against O'Hara is clear from the District Attorney's singular determination to convict him, while doing nothing when confronted with several other similar cases.

86. Such a "consciously practiced pattern of discrimination" is sufficient to make out a claim of selective prosecution. *People v. Goodman*, 31 N.Y.2d 262, 268 (1972). Other victims of Hynes's campaign, however, include like-minded Brooklyn citizens and voters. Hynes's relentless pursuit of O'Hara didn't just mark O'Hara with "the opprobrium and stigma of criminal conviction"; it was likely to "cause [other] speakers to remain silent" rather than to speak out in Kings County and risk the displeasure of the political establishment. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 872 (1997). In sum, O'Hara has demonstrated his entitlement

to relief for discriminatory prosecution.

This Court Should Exercise Its Statutory Discretion to Reach The Merits Based Upon the New Evidence O'Hara Has Submitted and the Circumstances of the Prior Decision

87. On April 28, 2005, the defendant filed a Motion to Vacate Judgment of Conviction, which was assigned to Justice Gerges. The motion raised a selective prosecution claim, and he denied the motion. However, Justice Gerges did not have before him the evidence that has subsequently been discovered. Nor, in 2005, did he take into account the evidence that *was* before him, but instead drew arbitrary and unreasonable inferences against O'Hara, thereby abusing his discretion. This Court should not be bound by these earlier, plainly unjustified and erroneous findings; it should exercise its discretion, pursuant to CPL 440.10(3), to reach the merits of the present motion on the present record.

(a) In 2005 the Court Used a Double Standard when It Compared Amoroso's Use of a False Queens Address to O'Hara's 47th Street Address

88. Several of Justice Gerges's 2005 findings concerning selective prosecution overlooked that much more forgiving legal standards were applied in other cases than were applied in O'Hara's. One example was Justice Gerges's rejection of O'Hara's argument that ADA Dino Amoroso had been permitted to get away with the same thing that O'Hara was indicted for, registering and voting from an address that he did not in fact reside at. Amoroso was registered at a home in Queens (his parents') even though he was married and living with his wife and children on Long

Island. The Court rejected this contention, however, based upon media reports that the Queens District Attorney had decided not to pursue the Amoroso matter because Amoroso supposedly had a "legitimate, significant and continuing attachment" to his parents' Queens address. *See* slip op. at *2, 9 Misc.3d 1113 (A), 808 N.Y.S.2d 919 (citing T. Perrotta, *Brooklyn Prosecutor Cleared over Voting Address,* N.Y.L.J., June 20, 2005); *see also* Z. Haberman, *Prosecutor Cleared in Tit-for-Tat Vote-Fraud Rap,* N.Y. Post, June 18, 2005 (Exh. 7).

89. However, this was a far more lenient definition of "residence" than the jury had been instructed to apply in O'Hara's case just before it pronounced him guilty. As discussed above at ¶¶ 2, 11 and 41, O'Hara's conviction was based on an instruction that the jury should decide whether his voting address was his "principal" address. Amoroso's registration in Queens surely would not have withstood this "principal" address test, but the Queens D.A. used the much more lenient "continuing attachment" standard.

90. As another legal commentator (before he became a Justice of this Court) observed, O'Hara's case was "most unusual in that the Court applied a standard for residence under the Election Law that was substantially more inflexible than any standard applied before." P. Sweeney, *Residency Redefined under the Election Law,* N.Y.L.J., July 19, 2000 (Exh. 31). It apparently has never been applied since then—and it certainly was not applied in Amoroso's situation. To date, the only person convicted under the "principal residence" standard is

O'Hara.

91. Even the Kings County District Attorney conceded at one point in these proceedings—when the Office had lost the first appeal and sought further review from the Court of Appeals—that the definition of "residence" used in O'Hara's was unrealistically exacting:

> Although the People reasonably maintained that the trial court was correct in concluding that the Election Law definition of residence must be satisfied by whatever residence an elector with multiple homes selects as his voting address, it can be argued that there is an unresolved question about how the Election Law definition can be interpreted in a manner that is reflective of the reality that an individual can have more than one residence, as that term is commonly interpreted, while nevertheless potentially *not being able to satisfy to the letter all of the requirements of the Election Law with regard to any one of those places of residence.*

Letter of ADA Monique Ferrell to Judge Richard Wesley, N.Y. Court of Appeals, Oct. 20, 1998, at 4 (emphasis added) (Exh. 33). Application of such a stringent standard to O'Hara, and a more permissive standard to Amoroso, underscores the discriminatory nature of the prosecution.

92. Another application of this double standard occurred when the Court considered the matter of Hynes's Joralemon Street registration. The Court claimed it was relying on O'Hara having registered not just at a false address but "at an *uninhabitable* location" as well, and that O'Hara's conviction was properly based on this factor. Slip op. at *7, 9 Misc.3d at 1113(A), 808 N.Y.S.2d 919 (emphasis added)

(Exh. 5).[12] However, it simultaneously gave short shrift to evidence that District Attorney Charles Hynes himself had registered at an uninhabitable location: his Office at 210 Joralemon Street, and had done so at approximately the same time O'Hara was indicted.

93. In 1996, Hynes was registered to vote from the non-residential; municipal office building located at 210 Joralemon Street. (Exh. 8) Justice Gerges took note of this—it had been revealed in an article by Christopher Ketcham, who had submitted an affidavit supporting of O'Hara's 2005 motion. Ketcham initially revealed the Joralemon registration in his Harper's Magazine article, *Meet the New Boss,* which was attached to his affidavit. To the extent that the matter needed further clarification, Ketcham, a Brooklyn resident, who had submitted an affidavit under oath, would have been able to testify at an evidentiary hearing.

94. Instead, Justice Gerges discredited the allegations involving Hynes by crediting unsworn, self-serving statements made by ADA O'Mara in a tape-recorded interview with Ketcham. O'Mara was never called to testify, and did not submit an affidavit.

95. Specifically, Justice Gerges credited O'Mara's statement that Hynes's

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[12] The Court also reasoned that O'Hara was not selectively prosecuted because Amoroso's Queens registration (2000-2003) spanned different years than O'Hara's 47th Street registration (1992-1995), and so were not similar. Slip op. at *2, 9 Misc.3d 1113(A), 8-08 N.Y.S.2d 919. But this is not the law; cases need not be simultaneous in order to be considered "similar" for purposes of selective prosecution. *See, e.g., People v. Acme Markets, Inc.,* 37 N.Y.2d 326, 329-30 & n.1 (1975)(analysis of 1972 charges considered "glaring . . . nonenforcement" of ordinance for many years). In any event, Hynes's Joralemon Street registration occurred the same year O'Hara was

Joralemon Street registration card was a "forgery." Seizing on this, Justice Gerges rejected without a hearing Ketcham's (and O'Hara's) assertion that Hynes was registered in an uninhabitable address in 1996. Instead, crediting O'Mara's unsworn denial, the Court found fault with O'Hara for not proving "that the [Hynes's Joralemon voter] registration card was anything but a forgery." Slip op. at *2, 9 Misc.3d 1113 (A), 808 N.Y.S.2d 919. This stood on its head the usual presumption of regularity with publicly-filed records. Hynes' registration card was a matter of public record and Justice Gerges was not entitled to presume it was forged simply because of self-serving, unsworn speculation by Defendant O'Hara's own prosecutor, O'Mara.

96. The law provides that the Court must base its consideration of a defendant's § 440.10 motion on the "the existence or occurrence of facts [and] sworn allegations thereof" from the defendant, and proper evidence submitted by the People that tends to refute the allegations. CPL § 440.30(1)(a). An affidavit in support of such a motion may be made upon information and belief, so long as the source of the information is specified. The Court may not deny a hearing upon mere hearsay, but only upon "conceded or uncontradicted ... documentary proof..." § 440.30(2). In cases where the Court must "make findings of fact essential to the determination" of the motion, it should conduct an evidentiary hearing. § 440.30(5).

97. Disregarding these fundamental rules, however, the Court based its

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indicted.

decision on the unsworn, out-of-court hearsay of a person identifying himself as O'Mara. The Court rejected sworn evidence submitted by O'Hara. Nor did the Court ever question O'Mara. Nor did it follow up on Hynes's own reported explanation that his original buff card's signature supposedly was cut and pasted onto a new card with the Joralemon Street address. Nor did it consider statements by Hynes's official spokesman, explaining that Hynes was actually between homes at the time. (Other evidence not before the Court, because it was more recently discovered, is the evidence from Hynes's UCC1s and other documents, where he stated that his "residence" was in fact in Queens, also support O'Hara on this issue.

98. Justice Gerges should have held a hearing on the sworn statements offered in support of O'Hara's motion. The witnesses with knowledge were available to testify. Instead, he made his decision without a hearing, based on their unsworn hearsay, not based on personal knowledge.

99. Justice Gerges's reliance on unsworn hearsay did not end there. Ketcham's 2005 affidavit also described an interview that he had with a retired NYPD detective, Christopher Cincotta. Cincotta told Ketcham, *inter alia,* that he had been assigned to "surveil" O'Hara in 1996, while acting under the supervision of a detective who worked for Hynes. Cincotta told Ketcham that the surveillance was instigated by Hynes's political ally, State Assemblyman James F. Brennan, who made calls to his precinct on multiple occasions. (Exh. 34, ¶5(a)) This was direct evidence that the investigation was political from its inception. But based again, on

the unsworn tape-recorded comments of O'Mara, the Court decided that the surveillance must have been done in connection with a "different"—though still mysteriously unspecified—criminal investigation. The nature of this purportedly independent basis to investigate O'Hara was never disclosed.

100. Ketcham's affidavit also quoted O'Mara saying that O'Hara was prosecuted for "particularly egregious conduct" because "[h]e was not deterred by civil actions against him" which had been brought by Assemblyman Brennan or his associates. According to Ketcham, O'Mara told him that Assemblyman Brennan had spoken with O'Mara "a couple of times" over the phone, and that Brennan had once visited him in the D.A's office, while the investigation leading to O'Hara's prosecution was underway. (Exh. 34, ¶5(d)) This, too, was evidence that O'Hara was singled out by the D.A.'s Office to advance the political interests of Hynes' political ally Brennan.

101. Again, however, the Court credited and relied on O'Mara's out-of-court utterances, over Ketcham's sworn statement, to decide the issue. On the tape, the voice attributed to O'Mara is heard saying that O'Hara's prosecution had been triggered by a request from "counsel" for the Board of Elections. The Court concluded from this remark that the indictment was not instigated by Brennan (or anyone else) exercising a political vendetta. *See* slip op. at *4, 9 Misc.3d 1113 (A), 808 N.Y.S.2d 919 (Exh. 5). Meanwhile, the Court disparaged the significance of Ketcham's sworn allegation that O'Mara told him he had personally telephoned

Brennan to inform him of the guilty verdict at O'Hara's first trial, (Exh. 34, ¶5(d)), even though the Court acknowledged that such an O'Mara-Brennan phone call, if proven, *might* be evidence of Brennan's influence over the prosecution. Slip op. at *5, 9 Misc.3d 1113 (A), 808 N.Y.S.2d 919 (emphasis added) (Exh. 5). In other words, the Court accepted O'Mara's unsworn self-serving hearsay over Ketcham's sworn affidavit containing O'Mara's admissions.

102. Meanwhile, Justice Gerges's decision further ignored *Brennan's* own sworn testimony (in an arbitration, the transcript of which O'Hara submitted to this Court), in which Brennan admitted: "after the first conviction in spring '97 I spoke for a few seconds with the district attorney and I, you know, and he said he had won and I said good." (Exh. 35, at 266)

103. Justice Gerges also referred to a remark of O'Mara's, quoted in Ketcham's affidavit, that O'Hara "was not deterred by the civil actions against him," (Exh. 5, at *6; *see also* Exh. 34, ¶ 5(d).) The Court reasoned that Hynes zeroing in on O'Hara was constitutionally unremarkable because "a government agent may properly consider that civil action did not deter the defendant from criminal activity. The fact that a person was told and had an opportunity to discontinue the illegal behavior but was not deterred by such non-criminal proceedings is a constitutionally valid factor in determining whom to prosecute." (Exh. 5, at However, the factual premise of this ruling was false.

104. It is true, of course, that Brennan and his cohorts, for their own political

purposes, brought several election-related civil claims against O'Hara. Justice Gerges seemed to assume, however, that their claims related to O'Hara's 47th Street registration address had been successful, and that O'Hara was thus found to have engaged in "illegal behavior." As discussed above and in the accompanying (and sworn) Affidavit of John O'Hara (¶¶ 12, 17), however, just the opposite occurred. Neither Assemblyman Brennan nor his allies (or cronies, or lawyers) prevailed on any legal claim regarding the propriety of O'Hara's 47th Street voter registration address. One could hardly justify a criminal prosecution on the basis of failed civil proceedings. (This error, too, underlying the Court's decision, could have been avoided if the Court had held an evidentiary hearing in 2005.)

(b) The 2005 Decision Was Based on a Record that the Court Itself Determined to Be Incomplete

105. Justice Gerges concluded that O'Hara was prosecuted for "valid and neutral considerations," but he made this affirmative finding despite complaining that the parties had only supplied him with "partial information." Slip op. at *5, 9 Misc.3d 1113 (A), 808 N.Y.S.2d 919 (Exh. 5). For example, the Court identified several weaknesses in the District Attorney's version of events. The District Attorney had failed adequately to explain many of his office's actions. According to the Court:

> It is noted that *the prosecution has not submitted any affidavit from any person with actual knowledge of the facts. There is no affidavit from ADA O'Mara. Especially disturbing is the fact that there is no affidavit from a person with actual knowledge as to the circumstances*

> *of the commencement of the action.* It is clear to this court, based on the taped [Ketcham] conversation, that ADA O'Mara does not have actual knowledge regarding the circumstances regarding the commencement of this criminal proceeding. Not satisfactorily explained is the reason a homicide ADA was chosen to prosecute a low level felony. The failure of the People to supply the court with actual information regarding Assembly person Brennan's involvement in the case is extremely troubling.

Slip op. at *5, 9 Misc.3d 1113 (A), 808 N.Y.S.2d 919 (emphasis added) (Exh. 5). In view of this unsatisfactory evidentiary picture, the Court should have held an evidentiary hearing on "the circumstances of the commencement of the action," rather than resolve unanswered questions in the People's favor by relying on unsworn statements by O'Mara and others which the Court itself complained were inadmissible hearsay or were not based upon competent knowledge of how the O'Hara prosecution got started.[13]

106. Justice Gerges criticized the lack of sworn affidavits from other

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[13] Unsworn representations made in 2005 by the District Attorney's Office also support the impression that Brennan was directly involved in the decision to prosecute. In a July 7, 2005, letter to the Court, ADA Anne Gutmann wrote that both Brennan and his aide Keefe had a meeting with ADA Angelo Morelli "[a]t the end of May or beginning of June of 1996." The supposed topic was a physical attack against Brennan's lawyer, Jack Carroll. Oddly, the supposed assault victim himself did not attend the meeting, but Brennan and Keefe told Morelli that the District Attorney should go after O'Hara for the crime. Simultaneously, they mentioned suspicions—this is according to the Gutmann letter—that O'Hara was culpable for having registered to vote from a false address. (*See* Exh. 37, at 1-2.) A few days later ("[a]pproximately mid-June 1996," according to ADA Gutmann), Morelli found himself discussing O'Hara with an investigating attorney at the Board of Elections, named Jeff Waite. (*See id.*, at 2.) Then Morelli told ADA O'Mara to get in touch with Waite. O'Mara did so, and was informed that "the Board of Elections was pursuing an investigation" into O'Hara. (*Id.*). Waite asked O'Mara for help on this BOE investigation and sent O'Mara information. Then, according to Gutmann, "[t]he investigation was commenced." (*Id.*) It's difficult to square this representation with Gutmann's previous statement, that the BOE *already* "was pursuing" the investigation. But Gutmann's sequence of events shows that Brennan met Morelli, and complained about O'Hara's residency. Morelli and O'Mara then discussed the matter with BOE and started this prosecution. Gutmann's explanation raised more questions than answers, which further show that

witnesses, as well, such as the NYPD detective and a former Brennan staffer. *Id.* at *4-*5. Again, the unsatisfactory condition of the evidence could have been cured by conducting an evidentiary hearing. This Court should not defer now to the 2005 findings given Justice Gerges' own recognition he was relying upon unreliable hearsay that was self-serving to the D.A.'s Office

107. In addition, this Court should also consider the tenor of the times in which Justice Gerges's findings were made. When Justice Gerges considered and decided O'Hara's motion, the Kings County judiciary was under an intense and "noisy" investigation by the District Attorney after Justice Gerges's name repeatedly had surfaced as someone who had ties to the political machine and should or might be scrutinized. As early as 2002, for example, the New York Daily News wrote about a shake-up of "Brooklyn's scandal-scarred bench" and its "rotten" elected Supreme Court justices, focusing on bribery and political influence. *See* Editorial, *Justice Betrayed Is Justice Denied,* N.Y. Daily News, Feb. 8, 2002. (Copies of articles related to the investigation are contained in Exhibit 38.) It named Justice Gerges as one of the "unfit" and "questionable" jurists who merited close scrutiny for qualifications and conduct. *Id.* It singled him out for his family connections to the Brooklyn "machine": his son-in-law, Donald Kurtz, was a Civil Court judge; his daughter, Nina Kurtz, was law secretary to the politically-connected Justice Edward Rappaport. According to the Daily News, Justice Gerges

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the Court should have held an evidentiary hearing.

had been "made" a judge by Brooklyn Democratic "boss" Howard Golden. *Id.* While O'Hara's motion was being considered in 2005, former Brooklyn Democratic boss Clarence Norman was facing trial on the first of four indictments brought against him by Hynes's office, to force him to name, and cooperate against, allegedly corrupt judges in Brooklyn. Speculation was growing that Norman would make a "deal" to assist Hynes's investigation into the judiciary, in which he "would also have to give [Hynes] judges who allegedly paid to get the party's backing for the bench." N. Katz, *Deal Could Spare Norman Jail,* N.Y. Daily News, Mar. 22, 2005. Norman's political connections to Brooklyn judges were by that time commonly discussed in the press. *See, e.g.,* Editorial, *Friends of the Court,* N.Y. Times, Feb. 27, 2005.

108. Criticism of Justice Gerges did not soften as the year progressed. Shortly before his September 2005 decision against O'Hara, the Daily News again threw a spotlight on Justice Gerges, in a piece that observed that Clarence Norman had "dictate[d] whom the delegates will support" for judgeships at the Kings County Democratic nominating convention—adding that the convention took place "just a couple of blocks from the state Supreme Court building where the borough's Democratic leader—and chief judge maker—happens to be on trial." Editorial, *What Were They Ashamed Of?,* N.Y. Daily News, Sept. 22, 2005. The Daily News compared judges and delegates assembled at the convention to "puppets" and "cockroaches," and it singled out for special attention Justice Kurtz, whom the paper pointedly asked, "Are you Judge Kurtz and is your-father-in-law Abe

Gerges?" *Id.* The Daily News piece observed that "[Justice Kurtz] paced in agitation and refused to speak." Then it commented, "[Justice] Gerges is an old-time Brooklyn hack judge." *Id.*

109. As Justice Gerges issued his 2005 decision against O'Hara, the first trial against Clarence Norman was winding up. The jury convicted Norman after a day's deliberations. *See Norman Is Latest Pol in Scandal,* N.Y. Daily News, Oct. 2, 2005; N. Katz, *Norman Convicted: Dem Leader Is Guilty of Campaign Abuses,* N.Y. Daily News, Sept. 28, 2005; N. Katz, *War of Words Yet to Start in Norman Trial,* N.Y. Daily News, Sept. 6, 2005.

110. Immediately following the first Norman verdict, the media openly discussed the possibility that Norman "might be moved cooperate"—a prospect that, in previous months, had been widely discussed in the legal community and written about in the press. A. Newman, *Brooklyn Democratic Figure Enters 2nd Corruption Trial,* N.Y. Times, Nov. 15, 2005. Hynes also discussed the possibilities openly. The Daily News quoted him saying, "Clarence Norman, Jr., . . . clearly knows the answer to the questions that have been asked for eons. Are judgeships for sale? He has an opportunity to cooperate with this investigation." D. Seifman, *Hynes Urges Disgraced Pol: Tell All,* N.Y. Daily News, Sept. 29, 2005. According to the same story, "Hynes said that was the only way Norman could avert a maximum sentence recommendation from his office. . . . 'We'll try the next [case] and the next one. We're pleased with the progress of the investigation.'" *Id.* The New York Times

reported the general understanding that, with a verdict against Norman, Hynes "ha[d] his eye on a bigger target: a judicial selection system he says is rotten to the core," which would have implicated nearly all Brooklyn judges. A. Newman, *supra. See also* N. Katz, *Norman Urged to Sing; He's Got Key to Cleaning Up City, Sez Crook-Buster,* N.Y. Daily News, Nov. 7, 2005; D. Hamill, *Getting Judgeship a (50) Grand Thing,* N.Y. Daily News, Oct. 25, 2005; N. Katz, *Disgraced Judge Wore Wire in Plot,* N.Y. Daily News, Oct. 23, 2005; N. Katz, *Norman May Sing; Disgraced Dem Boss Eyes Deal,* N.Y. Daily News, Oct. 10, 2005; F. Lombardi, *Norman Can Sing Way to Deal,* N.Y. Daily News, Sept. 29, 2005; A. Hartocollis, *Clarence Norman Is Guilty of Illegal Campaign Contributions,* N.Y. Times, Sept. 27, 2005.

111. Thus, the public alarm about the Brooklyn judiciary in 2005, repeatedly stoked by Hynes's well-reported attacks, reached a crescendo in the Autumn of 2005, just when Justice Gerges was deciding O'Hara's first selective-prosecution motion. At that point, the Hynes "probe" into the Brooklyn judiciary was in high gear. Justice Gerges had already been identified in the press as one of several Brooklyn judges warranting close scrutiny. Clarence Norman was rumored to be weighing "cooperation " with Hynes, in a wide-ranging investigation into Brooklyn judicial offices. He was tried and convicted. Other Brooklyn Supreme Court Justices, such as Victor Barron who had been tried, and Gerald Garson, under indictment, were under investigation. More charges were expected.

112. This atmosphere was not conducive to a dispassionate assessment, in

the politically charged O'Hara case, of Hynes's decisions as prosecutor. A judicial finding against Hynes in the O'Hara matter, at a time when Hynes was known to be interested in higher office, would have infuriated Hynes. By this time Hynes himself had a track record of aggressive, indeed vindictive, moves against public critics and political opponents, particularly when they stood up to him in an election year. Hynes was known for exercising the powers of office against several who had challenged his performance.

113. This is clear from O'Hara's case, but it did not stop there. In addition to O'Hara, Hynes had charged Sandra Roper, who had run against him in the 2001 primary election) with theft of funds from a client. (The case ended in a mistrial, and the charges were finally dropped in 2005.) *See, e.g.,* C. Ketcham, *A Machine Divided,* N.Y. Press, Aug. 1, 2005; J. MacIntosh, *Hynes Picks on Foes: Pol,* N.Y. Post, Feb. 18, 2004 (Exh. 39). He also successfully petitioned to have Justice John Phillips declared incompetent to handle his own affairs, shortly after Phillips had announced his own intention to run against Hynes. *See, e.g.,* T. Lee, *John L. Phillips, Jr., 83, Civil Court Judge Is Dead,* N.Y. Times, Feb. 19, 2008; C. Ketcham, *Erasing the Kung Fu Judge,* Brooklyn Rail, July 6, 2007; D. Rubenstein, *Judge Not Crazy After All,* Brooklyn Papers, Apr. 15, 2006. (Exh. 39) Hynes had demoted and then dismissed an ADA, Robert Reuland, for having the "audacity" to concede the existence of a high murder rate in Brooklyn when Hynes was taking credit for bringing the murder rate down. *See, e.g., Reuland v. Hynes,* 460 F.3d 409 (2d Cir.

2006)(Assistant's demotion and adverse work assignment for remark about murder rates in Brooklyn violated First Amendment); W. Glaberson, *Prosecutor Denies Claim of Censorship,* N.Y. Times, July 14, 2004 (Hynes quoted saying demotion "was a sanction which I believed was fair")(Exh. 39).

114. The Court should not refrain from exercising its discretion now to reach the merits of this case, where prior adverse findings occurred during such a climate of fear.

CONCLUSION

FOR THE FOREGOING REASONS, the grounds stated in the accompanying Affidavit of defendant, and all prior proceedings in this matter, the defendant's conviction should be vacated and the indictment dismissed, a hearing should be held, or the Court should grant such other and further relief it deems just and proper.

JOEL B. RUDIN, ESQ.

Dated: New York, New York
January 6, 2015

O'HARA
AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM, PART ___

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THE PEOPLE OF THE STATE OF NEW YORK : **AFFIDAVIT OF JOHN O'HARA**

:

Ind. No. 13525/96

-against- :

JOHN O'HARA, :

Defendant. :

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State of New York)
) ss.:
County of New York)

JOHN O'HARA, being first duly sworn, deposes and says:

1. I am the defendant in the above-captioned case. I make this affidavit in support of my motion to vacate the judgment of conviction in this action pursuant to CPL § 440.10.

2. I have been actively engaged in political action my entire life.

3. I first encountered Charles Hynes in 1978, more than a decade before he became District Attorney of Kings County. Then, he was a candidate for New York Attorney General. In my senior year of high school, he came to my Democratic Club because he needed 20% of the members of the State Democratic Committee to vote for him at State Convention to get him on the ballot. The two State Committee

members of our club voted for him at the State Convention. (At risk of seeming immodest, I was the person who convinced them to vote for Hynes.) In the event, however, Hynes only got 6% of the vote, and his name was not put on the ballot.

4. In 1989, I worked on the Hynes campaign when he successfully ran for District Attorney for the first time. (At the time, he was a Special Prosecutor for New York State.) I raised some money for his campaign, and coordinated some parts of the petition drive. I sponsored a community forum for him to speak at. I got to know him a bit better then. (I also had some disputes with him about how the campaign budget could best be allocated, but I do not think either of us thought that an unusual event in a political campaign.)

5. In 1990, I announced my intention to run for the New York State Assembly seat occupied by James F. Brennan ("Brennan"). Hynes had previously promised to support me in this campaign. During the campaign, I was in regular contact with Dino Amoroso, who was then District Attorney Hynes's Deputy Assistant District Attorney, and I was initially promised Hynes's support with various constituencies.

6. In a meeting in the spring of 1990, however, Mr. Amoroso told me that Hynes had made a deal with Brennan. Amoroso told me that Brennan and Hynes offered to let me run unopposed in the Democratic State Committee District Leader race in Brooklyn, but that I had to pull out of the Assembly race. I told Amoroso that I did not agree to this, and that I expected Mr. Hynes to honor his promise to

support me. I continued to run for the Assembly seat, but I lost the primary.

7. From 1990, I became more identified with insurgent campaigns in Kings County, against the political organization (or the "establishment," or the "machine" as critics often call it) with which Mr. Hynes was aligned.

8. Based on my experiences, I understand that most insurgent candidates for office in Kings County have their candidacies challenged in New York Supreme Court. I (and most observers of whom I am aware) have always understood such court challenges to be a normal part of Kings County political life. Because election-related litigation challenges usually are assigned to expedited dockets, they are viewed as a way to distract and intimidate newcomers to the political battleground, in order to deter them from running for office.

9. In 1990, as described above, I stood for election for New York State Assemblyman. I ran in the primary and lost that contest. Attorneys for incumbent Assemblyman Brennan, my opponent, took me to court to challenge my district leader candidates. After several days' trial we prevailed in the litigation.

10. In 1991, I ran for New York City Council. My petitions were challenged in court; we prevailed in the litigation. (I lost in the primary.) Also in 1991 upon learning that I had passed the bar, Brennan filed a bar complaint against me with the Committee on Character and Fitness. Brennan said that I was "morally depraved." (The complaint was dismissed. I was admitted to the bar.)

11. In 1992, I ran again for New York State Assembly. Brennan's attorneys

successfully challenged the signatures and I ran and lost. Also in 1992, I was sued for defamation by parties represented by Brennan's lawyers. (The plaintiffs dropped their suit in 1995.)

12. In 1993, I ran for New York City Council again. Brennan's attorneys filed an action in the Supreme Court, challenging my residence address. After trial, the judge indicated that he was inclined to rule in my favor, whereupon Brennan's attorneys voluntarily dismissed their case against me. (I lost in the primary.)

13. Also in 1993, Hynes ran for re-election as District Attorney. He sought support of the Republicans in this race, with the aim of running unopposed. I was strongly against any deal that would have eliminated the race for District Attorney. I convinced a friend of mine, James P. McCall, to run against Hynes in the Republican primary.

14. I wrote a $1000 check to open his campaign committee. I was aware that campaign contribution disclosures were on the public record, and that this donation would not go unnoticed by Hynes or other political opponents. (In all, McCall was only able to raise about $5000.)

15. Mr. Hynes challenged McCall's nominating petition in court. Outside court one day, Dino Amoroso relayed to me that Hynes was enraged about my role in the McCall campaign. McCall defeated Hynes in the Republican primary.

16. In 1994, I ran for State Assembly again. Signatures on my designating petition were challenged. During the trial, I withdrew from the race.

17. In 1996, I ran in the primary for New York State Assembly again. Brennan's lawyers, again, challenged my candidacy in court, but, again, they voluntarily dismissed before judgment. (I ran but did not win.)

Also in 1996, Hynes supported Michael Feinberg in his race to become Kings County Surrogate Court Judge. Hynes's Chief of Staff Harvey Greenberg resigned from the District Attorney's Office to run the Feinberg campaign.

18. In that Democratic primary, I supported Feinberg's opponent, Lila Gold. I recall being incensed that, although the polls were supposed to be open for the September 10, 1996, primary from 6:00 a.m. to 9:00 p.m., voting machines were delivered late to precincts where Lila Gold was thought to be strongly supported. Many machines were not delivered until 3:00 p.m. Since absentee ballots were stored inside the voting machines it was impossible for many voters to cast ballots. Many observers called it the biggest political fiasco in recent Brooklyn history. I recall thinking at the time that it was the biggest "scam" that I had ever witnessed in politics. I still think it is.

19. Also during that primary in 1996, my girlfriend, who was handing out flyers for my campaign, was physically attacked by Brennan's chief of staff, John Keefe. She was injured and the police took her to the hospital. Keefe pled guilty to harassment, and was ordered to perform a term of community service.

20. At the polls, I collected as many names and contact details as I could, of voters who had been denied their right of access to the polls. Later, at my campaign

headquarters, I marshaled volunteers to go door-to-door to recruit people who had been denied access, for a federal lawsuit seeking a new election. I filed a suit under 42 U.S.C. § 1983 in the U.S. District Court for the Eastern District of New York in September 1996. Brennan's lawyers were the opposing counsel acting for Feinberg. U.S. District Judge David Trager denied our request for a new election, but ordered a continued election to take place in October 1996, for those who had been denied the vote in the September primary. The U.S. Court of Appeals for the Second Circuit, however, reversed this decision one day before the scheduled continued primary election, following Second Circuit precedent. *See Gold v. Feinberg,* 101 F.3d 796 (2d Cir. 1996), *citing Powell v. Power,* 436 F.2d 84 (2d Cir. 1970). Specifically, the Second Circuit found that a case for "willfulness" was needed and had not been made out.

21. In his concurrence, however, Judge Oakes noted that the primary was marked by "an almost impossible series of bureaucratic and official errors resulting in the deprivation of important, fundamental voting rights"; he commented that "the irregularities here were so gross as to call the flat statements in [*Powell*] into serious question," and that "the facts . . . went beyond the bounds of simple irregularity." 101 F.3d at 803; *see also Coto v. New York City Board of Elections,* 101 F.3d 803, 805 (2d Cir. 1996)(Oakes, J. concurring)(same).

22. Our counsel prepared an emergency appeal to U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, sitting as single justice, on or about

October 16, 1996.

23. On information and belief, the grand jury that indicted me in 1996 was convened soon after the September primary, soon after the arrest of Brennan's chief of staff. I was indicted three weeks later, on October 21, 1996.

24. While the aforementioned federal civil litigation was underway, District Attorney Charles Hynes also was busy obtaining a criminal indictment against me. Obviously, the indictment, which the grand jury returned on October 21, 1996, and my subsequent arrest, distracted me from further serious involvement in the primary race for Kings County Surrogate Judge.

25. Ultimately, we did not prevail in the civil rights litigation. Later, Surrogate Judge Feinberg was removed by the New York Commission on Judicial Conduct, reportedly for misapplication of monies from estates, favoritism, impropriety, and "fundamental incompetence" as judge. *See Matter of Michael H. Feinberg,* 5 N.Y.3d 206, 215-16 (2005); *see also Matter of Michael Feinberg,* 57 A.D.3d 1087 (3d Dept. 2008)(Feinberg disbarred; he had "demonstrated a shocking disregard for the very law that imbued him with authority [and the] record reflected . . . a wholesale failure of [his] duty, an indifference, if not cynicism, toward his judicial office, and debasement of his office").

26. On information and belief, Hynes never prosecuted Feinberg's alleged misconduct.

JOHN O'HARA

Sworn to before me this
30th day of December, 2014.

Notary Public

JOEL B. RUDIN
Notary Public, State of New York
No. 02RU4744885
Qualified in New York County
Commission Expires January 31, 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART ___

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THE PEOPLE OF THE STATE OF NEW YORK,	:	AFFIDAVIT OF SERVICE BY
-against-	:	HAND DELIVERY
JOHN O'HARA,	:	Ind. No. 13525/96
Defendant.	:	

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THERESA PETERS, being duly sworn, deposes and says:

I am employed at the Law Offices of Joel B. Rudin, 600 Fifth Avenue, 10th Floor, New York, New York 10020, am not a party to this action and am over the age of 18 years.

On January 7, 2015, I caused to be served by Hand Delivery, upon the Honorable Kenneth P. Thompson, District Attorney, Kings County, Office of the District Attorney, Renaissance Plaza, 350 Jay Street, Brooklyn, New York 11201, true and correct copies of the annexed **Notice of Motion, Affirmation, Affidavit, and Exhibits (one volume separately bound)**.

THERESA PETERS

Sworn to before me this
7th day of January, 2015

Notary Public

STEVEN R. AQUINO
Notary Public, State of New York
No. 02AQ6282121
Qualified in King County
Commission Expires May 20, 2017