



STATE OF NEW YORK  
SUPREME COURT  
ALBANY COUNTY COURTHOUSE  
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ROGER D. MCDONOUGH  
JUDGE

STEVEN M. CONNOLLY  
LAW CLERK  
ERIN M. GOLEN  
SECRETARY

October 16, 2018

James E. Long, Esq.  
668 Central Avenue  
Albany, NY 12206  
VIA E-MAIL AND FIRST CLASS MAIL

Re: Marzullo v. DelConte, et al.  
Index No.: 6109-18

Dear Mr. Long:

Enclosed for filing please find an executed Decision and Order in the above-captioned action.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Erin M. Golen".

Erin M. Golen

Enclosure

cc (w/enc): James E. Walsh, Esq.  
Via E-Mail Only

Brian Quail, Esq.  
Via E-Mail Only

Thomas C. Buckel, Esq.  
Via E-Mail Only

**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ALBANY**

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In the Matter of Theresa L. Marzullo,

Objector/Petitioner,

vs.

**DECISION AND ORDER**

Index No. 6109-18

RJI No. 01-18-129657

Scott J. DelConte, as candidate for the Office of Justice of the Supreme Court in the 5<sup>th</sup> Judicial District, James P. Murphy, as candidate for the Office of Justice of the Supreme Court in the 5<sup>th</sup> Judicial District, Gerry Neri, as candidate for the Office of Justice of the Supreme Court in the 5<sup>th</sup> Judicial District, Donald A. Greenwood, as candidate for the Office of Justice of the Supreme Court in the 5<sup>th</sup> Judicial District, the New York State Board of Elections, the New York State Conservative Party, H. Leonard Schick and Sherene Pavone, Permanent Chairperson and Permanent Secretary of the 5<sup>th</sup> Judicial District Conservative Party Convention,

Respondents,

For a Judgment pursuant to Election Law §§ 6-124 and 6-126 invalidating the nomination of the Respondents Scott J. DelConte, James P. Murphy, Gerry Neri, and Donald A. Greenwood as the candidates of the Conservative Party for the public office of Justice of the Supreme Court for the 5<sup>th</sup> Judicial District in the General Election to be held on November 6, 2018.

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(Supreme Court, Albany County All Purpose Term)

Appearances:

JAMES E. LONG, ESQ.  
Attorney for Petitioner  
668 Central Avenue  
Albany, New York 12206

JAMES E. WALSH, ESQ.  
Attorney for Respondent Candidates  
Murphy, Neri and Greenwood  
20 Church Avenue  
Ballston Spa, New York 12020

NEW YORK STATE BOARD OF  
ELECTIONS

BUCKEL LAW FIRM, PLLC  
Attorney for Respondent DelConte

(Brian Quail, Esq., Special Counsel)  
40 North Pearl Street, 5<sup>th</sup> Fl.  
Albany, New York 12207

(Thomas C. Buckel, Jr., Esq., of Counsel)  
107 Hampshire Road  
Syracuse, New York 13203

**Roger D. McDonough, J.:**

Petitioner seeks an Order declaring invalid and null and void the Certificate of Nomination and the nomination purportedly made by the Judicial Nominating Convention of the Conservative Party for the Fifth Judicial District which names the Respondent candidates Scott J. DelConte, James P. Murphy, Gerry Neri, and Donald. A. Greenwood, as the candidates for the Conservative Party for the office of Justice of the Supreme Court for the Fifth Judicial District in the general election to be held on November 6, 2018. The respondent candidates answered and oppose the requested relief.<sup>1</sup> The State Board of Elections does not take a position on the merits of the case.

This matter was made returnable on October 5, 2018. The Court held a hearing on that date, at which time the principal parties stipulated that there were no questions of fact, only questions of law. The parties' post-hearing submissions were received on October 9, 2018.

**Legality of the 5<sup>th</sup> Judicial District Convention**

Petitioner argues that the certificate of nomination of the respondent candidates is invalid and null and void because the convener, H. Leonard Schick, exercised additional duties enumerated in the minutes, including acting as temporary and permanent Chair of the Convention in violation of Election Law § 6-126.

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<sup>1</sup> Respondent DelConte initially moved to dismiss the petition pursuant to CPLR 3211(a)(1) and 3211(a)(7), but later submitted a verified amended answer. In any case, the Court has considered the arguments raised by DelConte in support of dismissal (*see infra* p. 3-4).

### Threshold Issues

As an initial matter, the respondent candidates aver that petitioner lacks standing to bring the instant proceeding because she was not a delegate to the convention. Pursuant to Election Law § 16-102, a proceeding regarding the designation of a candidate for public office must be instituted in the Supreme Court by an aggrieved candidate or by a person who has filed general and specific objections in accordance with Election Law § 16-154(2). Written objections may be filed “by any voter enrolled to vote for such party position” (Election Law § 16-154[2]). An objector must be a qualified voter and timely file objections and specification as a citizen-objector (*see Matter of Doran v Scranton*, 49 AD2d 976 [3d Dept 1975]). In this case, the petition states that petitioner Theresa L. Marzullo, a resident of Jamesville (Onondaga County), is enrolled in the Conservative Party, and is duly registered and eligible to vote in the general election on November 6, 2018 for the office of Supreme Court Justice for the Fifth Judicial District. The respondent candidates do not dispute the timeliness of petitioner’s objection or that she is a “qualified voter.” Accordingly, inasmuch as petitioner has alleged irregularities in the procedures undertaken at the convention, the Court concludes she has standing as an “objector.”

Nor is the Court persuaded that dismissal is warranted due to petitioner’s failure to name the State Committee of the Conservative Party of New York State (hereinafter “State Committee”) as a respondent. Under CPLR 1001(a), necessary parties are those “who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.” Here, the petition does not challenge the authority and/or jurisdiction of the State Committee to enact rules or procedures. Rather, petitioner’s challenge is to the conduct of the convention, such that the State

Committee's direct participation in this litigation is not essential (*see Matter of Max v Ward*, 107 AD3d 1597, 1599-1600 [4<sup>th</sup> Dept 2013]; *Matter of Michaels v New York State Bd. of Elections*, 154 AD2d 873, 874 [3d Dept 1989]). In other words, the requested relief can be granted completely without joining the State Committee and/or any subdivision, and without the State Committee being inequitably affected by any resulting judgment (*see Matter of Michaels v New York State Bd. of Elections*, 154 AD2d at 874; *cf. Matter of Dixon v Reynolds*, 65 AD3d 819, 820 [4<sup>th</sup> Dept 2009], *lv denied* 13 NY3d 701 [2009]). For the same reason, respondents' argument concerning petitioner's failure to name the Chair of the State Committee as a party is equally without merit.

Finally, respondents Murphy, Neri and Greenwood maintain that the petition fails to state a cause of action upon which relief can be granted. It is well established that "[c]ourts considering a motion to dismiss a complaint for failure to state a cause of action must liberally construe the pleadings, accept the facts alleged in the complaint as true, give [petitioner] the benefit of every possible favorable inference, and determine whether the alleged facts fit within any cognizable legal theory" (*ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 930 [3d Dept 2012]). Upon review, the Court finds that the petition alleges facts that fit within a cognizable legal theory, stemming from the alleged violations of Election Law §§ 6-124 and 6-126 at the Judicial Nominating Convention (*see e.g. Matter of Brouillette v Cerio*, 55 AD3d 1039 [3d Dept 2008] ). Accordingly, the Court concludes that the petition states a cause of action.

### **Standard of Review**

The Court is mindful of the Court of Appeals' admonition that:

[W]here, as here, the Legislature erects a rigid framework of regulation, detailing...specific particulars, there is no invitation for the courts to exercise flexibility in statutory interpretation. Rather, when elective processes are at issue, the role of the legislative branch must be recognized as paramount. Broad policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process. Strict compliance also reduces the likelihood of unequal enforcement. The sanctity of the election process can best be guaranteed through uniform application of the law.

*(Matter of Gross v Albany County Bd. of Elections, 3 NY3d 251, 258 [2004] [internal quotation marks and citations omitted]).*

**Election Law § 6-126(1)**

Election Law § 6-126(1) provides, in relevant part, that: “[t]he person who calls the convention to order shall exercise **no other function** than that of calling the official roll of the delegates upon the vote for temporary chairman and declaring the result thereof” (emphasis supplied). Here, the parties acknowledge that Schick acted as the convener by calling the meeting to order. According to the meeting minutes, he subsequently exercised additional duties including acting as temporary and permanent Chair of the Convention. Schick’s role as convener, however, statutorily precluded him from performing any other function at the Convention (*see* Election Law § 6-126[1]). In other words, he could neither serve as temporary, nor permanent Chairman of the Convention.

As such, the record establishes that the convener exercised functions in addition to “that of calling the official roll of the delegates upon the vote for temporary chairman and declaring the result thereof” in direct contravention of Election Law § 6-126(1). As a consequence, the nomination resulting from said convention is rendered null and void.

Therefore, based upon the clear and unequivocal language of the statute, and the subsequent violation of the Election Law, the Court is constrained to declare invalid the Certificate of Nomination made by the Judicial Nominating Convention of the Conservative Party for the Fifth Judicial District in the general election to be held on November 6, 2018. The parties' remaining contentions have been considered by the Court and were found to be without merit, or rendered academic in light of the foregoing determination.

**New Convention**

Pursuant to Election Law § 16-102(3), “[t]he court may direct reassembling of any convention or the holding of a new primary election, or caucus where it finds there has been such fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected.” Bearing in mind that the general election will be held in exactly three weeks, the Court finds that this remedy is appropriate provided that the reassembling of the Judicial Nominating Convention of the Conservative Party for the Fifth Judicial District occur on or before **Tuesday, October 23, 2018** (*cf. Matter of Gerke v Taddeo*, 5 Misc3d 1012(A), \*4 [Sup Ct, Albany Co. 2004]).

Accordingly, it is hereby

**ORDERED**, that the petition is hereby granted and the Certificate of Nomination made by the Judicial Nominating Convention of the Conservative Party for the Fifth Judicial District in the general election to be held on November 6, 2018, is hereby declared invalid and null and void; and it is further

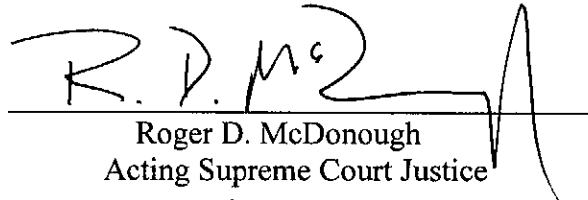
**ORDERED**, that on or before Tuesday, October 23, 2018, the Judicial Nominating Convention of the Conservative Party for the Fifth Judicial District shall reassemble for the

purpose of nominating candidates for the Conservative Party for the office of Justice of the Supreme Court for the Fifth Judicial District.

This shall constitute the Decision and Order of the Court. All papers are returned to the counsel for petitioner who is directed to enter this Decision and Order without notice and to serve all other counsel of record with a copy of this Decision and Order with notice of entry.

**ENTER.**

Dated: Albany, New York  
October 16, 2018

  
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Roger D. McDonough  
Acting Supreme Court Justice



Papers Considered:

1. Order to Show Cause, signed by the Hon. Roger D. McDonough on October 1, 2018; Verified Petition, dated September 30, 2018, with annexed exhibits;
2. Respondent Candidates Murphy, Neri and Greenwood's Verified Answer, dated October 4, 2018, with annexed exhibit;
3. Notice of Motion, dated October 4, 2018; Affidavit of H. Leonard Schick, sworn to October 3, 2018; Memorandum of Law in Opposition to the Petition and in Support of Scott J. DelConte's Motion to Dismiss, dated October 4, 2018;
4. Court Exhibit 1 (comprised of materials submitted by the State Board of Elections on October 5, 2018);
5. Verified Amended Answer of Respondent Scott J. DelConte, dated October 8, 2018; Affirmation of Thomas Buckel, Esq., undated, with annexed exhibits; Supplemental Memorandum of Law in Opposition to the Petition and in Further Support of Scott J. DelConte's Motion to Dismiss, undated [received by the Court on October 9, 2018];
6. Respondent Candidates Murphy, Neri and Greenwood's Memorandum of Law, undated [received by the Court on October 9, 2018]; and
7. Petitioner's Memorandum of Law, dated October 9, 2018.