

Justice Card Alliance, Inc.

Bridging the Community to the Justice System



Honorable Governor David Paterson

Executive Pardon Petition

John Kennedy O'Hara

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August 25, 2008

The Honorable David Paterson,
Governor, State of New York
State Capitol
Albany, New York 12224

Dear Governor Paterson:

Pursuant to Article IV, Section 4 of the New York Constitution, Justice Card Alliance¹ earnestly pleads that your Honorable Sir issue an order pardoning John Kennedy O'Hara, Esq., for his political lynching conviction of illegal voting. John O'Hara has exhausted all his appeal options up to and including The Supreme Court of the United States. This Petition for Pardon respectfully requests of you, as Executive Officer of the State of New York, to correct this historical retaliatory injustice that has not been experienced since Suffragist Susan B. Anthony in 1873, and to reinforce our State's upholding of the most basic and fundamental of our constitutional rights- our right to Freedom of Speech as expressed in our vote as guaranteed by the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution.

WHY THIS PETITION FOR PARDON IS IMPORTANT

Other than civil rights leader and Women's Suffragist, **Susan B. Anthony**, John Kennedy O'Hara, Esq. is the only American in the history of New York State to have been criminally prosecuted for casting his vote. On October 23, 1996, John O'Hara was arrested in Brooklyn for casting his Constitutionally bestowed vote. John O'Hara so valued his right to vote that he voted in every single election since his 18th birthday until he was made a felon as a "**political hit**"² as

¹ Justice Card Alliance, Inc. (hereinafter referred to as JCA) is a State of New York non-partisan, politically active not-for-profit organization, particularly with an emphasis on criminal justice issues in bridging the community to the justice system. One of its fundamental goals is increased voter participation, particularly targeting the minority, new American and the just-turned-18 population.

² **The New York Times**, 8/6/07, "**Selective Prosecution**" – The Editorial Board opines on the dangers of using criminal prosecutions as a partisan political weapon.

a favor to Martin Conner, former New York State Senate Minority Leader and Jim Brennan, of the Brooklyn Democratic Party Machine by the self-serving District Attorney Charles Joe Hynes.³ This DA Joe Hynes intentionally, willfully and with ***"The Presence of Malice"***⁴ initiated a prosecution that to date has been the only criminal case whereby the defendant was tried three times on the same charge - a non-violent hyper technical charge, at that. This DA Joe Hynes selected Mr. O'Hara, a commended community activist⁵, out of 967,823 registered voters in Brooklyn for criminal prosecution based on a single year's residence on a criminal charge that had never been prosecuted in the history of the State of New York. DA Hynes issued a press release dated October 21, 1996:

A public office is a public trust, and to seek election and to vote while fraudulently claiming residence at an address where you do not reside undermines the system.

Ironically, in an investigative report by *Harper's Magazine*⁶ it was discovered that during this very same time period, DA Joe Hynes had himself actually illegally registered to vote not from his "primary residence" but rather from his work place- the Brooklyn DA's Office at the Joralemon Street address. Hynes' press spokesperson later conceded that Hynes was in "residential limbo" during the same contemporaneous time that Hynes issued this highly hypocritical press release. In essence, Hynes had NO Brooklyn address, which is a statutory requirement for holding the position of Brooklyn DA, violation thereto would also result in criminal prosecution. Such that, DA

³ New York State Election Law Section 1-104(22)

⁴ In *The New York Times*, 8/2/07, ***"The Presence of Malice"*** Richard Moran states in his OP-ED, pursuant to his statistical research of death row cases, "2/3rds of wrongful convictions resulted not from good-faith mistakes or errors, but from intentional, willful, malicious prosecutions by criminal justice personnel." It is further stated that, "since so many wrongful convictions result from official malicious behavior", thus, these are not "wrongful convictions which are based on good-faith errors," but rather "unlawful convictions" based upon the malicious willful intent of those charged with the dispensation of justice. It is concluded, ***"A crucial part of the problem rests in the hearts and souls of those whose job it is to uphold the law."***

⁵ A community board member from 1990 to 1997, as Land Use committee member was responsible for bringing a Costco, with many accompanying jobs, to the community; and personally responsible for providing approximately \$3.5 million dollars in funding for youth programs as Chairman of the Youth Services Committee; Mr. O'Hara has been commended as "a crusader for justice", in Institute For Judicial Studies, "Judicial Reports: Fallen Guardian Angels," Leah Nelson, September 12, 2007, in reporting on Mr. O'Hara's caring and tenacious dedication on behalf of the late Kung Fu Judge John L. Phillips in fighting to restore his dignity also ripped apart by DA Hynes; and Mr. O'Hara because of his dedicated work for "justice not politics" to empower voter's rights particularly in the minority and new immigrant citizen communities, was awarded the Justice Card Alliance Community Service Award, 2005.

⁶ ***Harper's Magazine***, December 2004, Christopher Ketcham, **MEET THE NEW BOSS: MAN VS. MACHINE POLITICS IN BROOKLYN**

Hynes himself, whose office prosecuted Mr. O'Hara, would be convicted of this same crime, if he had ever been tried on it- particularly, if DA Hynes had been likewise been subjected to three jury trials on this same residency crime.⁷ Rather, DA Hynes lived in Breezy Point, Queens, out of his statutorily mandated geographical denomination of Brooklyn. Thus, DA Hynes, himself, as many other elected officials would be subjected to this same politically charged criminal prosecution.

A standard-bearer for *Selective Prosecution*⁸ DA Joe Hynes has unabashedly made his position so very clear- he only upholds, abides and enforces those Laws and against those persons, as he did against John O'Hara, that he deems in his self-serving political best interest or at the behest of the then powerful, James Brennan- not the best interests of those he was elected to serve-*The People of the State of New York*.⁹ In a classic example of which, Joe Hynes maliciously and over-zealously singled out Mr. O'Hara for criminal prosecution in retaliation against him as a political irritant. Otherwise, this DA Joe Hynes would not have so over-zealously pursued this non-violent case merely based on the vague hyper-technical interpretation of a buried arcane unconstitutional residency statute that had never been used before against Mr. O'Hara, which so over-burden our already strained State taxpayers' resources. The *Harper's Magazine* investigative reporter uncovered incontrovertible evidence,

⁷ Harpers Report: Hynes Did Crime, O'Hara Did Time, Jonathan Sederstrom, THE BROOKLYN PAPER, November 27,2004.

⁸ During the pendency of Mr. O'Hara's case, there has been media reports which links this case to further politically-charged indictments by DA Joe Hynes: Hynes' prosecution of former Assemblyperson Clarence Norman; Hynes' political selective prosecution against the undersigned in retaliation, merely because I, as a Black Latina credibly challenged Hynes' for the office of Brooklyn DA in 2001, as a default candidate after Hynes' political hit on the highly regarded and loved Kung Fu Judge John Phillips, who had prepared his self-made multimillion dollar assets to challenge Hynes. Such New York State notables, as former **Senator Alfonse D'Amato**, Republican, and former **Mayor Edward Koch**, Democrat, have stated that the prosecutor herein is "**out of control**", his conduct an "**abuse of power**" and "**not prosecution, it's persecution**" in bringing criminal charges for matters that actually are run of the mill civil election matters for political expediency. ***New York 1 – Inside City Hall* 10/20/03; *New York Times*, 10/12/03; *New York Daily News*, 10/12/03; *Newsday* 10/12/03; and *New York Post* 10/12/03.** This is the rare criminal case brought to eliminate a political insurgent, with no power, no money, and merely a will to promote dialog amongst the citizenry. It may be the only one where the crime in question is voting. Such abuse of power should not be tolerated in a free society. On Primary Day, September 9, 2003, the **New York Daily News Editorial Board** opined: **It isn't just about ballot access at stake. People could be thrown in jail for voting from an address that the courts won't accept. In her ruling, the judge [*sic*, J. Dabiri] cited as precedent, the case of John O'Hara, a Brooklyn Democratic Activist, who was convicted on 7 felony counts for voting.**

⁹ See fn 7, supra

that DA Joe Hynes had indeed targeted Mr. O'Hara as a "**political hit**" for prosecution at the behest of James Brennan of the Brooklyn Democratic Party Machine.¹⁰

This **political lynching** of Mr. O'Hara much akin to the attempted *political lynching* Trooper Gate inflicted upon State Senate Majority Leader Joseph Bruno¹¹, has drawn opprobrium from quite literally around the globe, exposing Brooklyn and New York to international shame and embarrassment. The *New Zealand Herald*, the country's largest daily newspaper, embarrassingly and shamefully referred to the Brooklyn Democratic Party's controlled justice system as "**that scandalous thing ... a place of crooked courts, political patronage ... shabby justice system of Brooklyn ... that judges answer not to the blindfolded woman with the sword and scales but to the local political bosses,**" April 16, 2005. Closer to home, John O'Hara's plight has indeed garnered much editorial criticism of Brooklyn's justice system - Newspapers across New York City and our State (including the *Albany Times-Union*, the *New York Daily News*, the *New York Sun*, the *New York Press*, and the *Amsterdam News*) have heaped criticism on DA Joe Hynes for his continued persecution, variously calling his prosecution against Mr. O'Hara an "**injustice,**" a "**bizarre case,**" a "**voting outrage,**" a "**grievous wrong,**" "**politically motivated,**" a "**farce,**" and "**a prosecutorial jihad.**"¹² Unsurprisingly, Oscar award-winning filmmaker Alex Gibney¹³ for *Taxi To The Dark Side* (whose previous credits include *Enron: The Smartest Guys in the Room*, and *The Trials of Henry Kissinger* is producing a documentary, entitled, "**The Dissidents**" centered on Mr. O'Hara's prosecution and other instances of self-serving prosecutorial malfeasance by Brooklyn District Attorney Joe Hynes., which was chronicled by the *New York Sun*.¹⁴

¹⁰ **Harper's Magazine**, December 2004, Christopher Ketcham, **MEET THE NEW BOSS: MAN VS. MACHINE POLITICS IN BROOKLYN.**

¹¹ Indeed, Trooper Gate, even influenced your Honorable Sir to publicly reveal certain personal revelations as a result of this political selectively targeted renegade group.

¹² "**Voting isn't a Crime**" July 23, 2003, *New York Daily News*; "**Democracy Defeated**" September 9, 2003, *New York Daily News*; "**A Voting Outrage**" May 19, 2001, *Times Union – Albany*; "**Voters as Convicts**" January 13, 2003, *Times Union – Albany*; "**Triple Jeopardy**" January 9, 2004, *The New York Sun*; "**Justice and the Ballot**" December 22, 2003, *Times Union – Albany*, *THE NEW YORK LAW JOURNAL*, published a series of articles during the last decade concerning the O'Hara case.

¹³ "**Ready for a Close-Up, Noted Filmmaker Focuses on Hynes, O'Hara**" *The Brooklyn Paper*, June 25, 2005; "**Documentary Chronicles Brooklyn DA's Alleged Silencing of Democratic Machine Critic O'Hara**" *The New York Sun*, June 30, 2005; "**Director Eyes Film on Hynes**" *Daily News*, July 5, 2005; "**Award-Winning Filmmaker turns Focus on Brooklyn D.A.**" *Brooklyn Daily Eagle*, July 7, 2005.

¹⁴ "Documentary Chronicles Brooklyn DA's Silencing of Democratic Machine Critic O'Hara, Daniel Hemel, *NEW YORK SUN*, Thursday, June 30, 2005.

As a result of DA Joe Hynes' malice of unbridled prosecutorial power fueled by James Brennan of the Brooklyn Democratic Party Machine, John O'Hara was disbarred as a Wall Street lawyer and lost his right to vote under the pre-text that he registered to vote from a second residence where he lived with his girlfriend in the same Irish-Italian Bay Ridge neighborhood where he had lived all of his life. John O'Hara had long been a political activist and crusader against corruption, which made him a political irritant¹⁵ to Jim Brennan of the Brooklyn Machine, who he had challenged routinely . He was indicted on six counts of voter fraud, facing a potential of 27 years of jail time, instigated by the very same operatives in the Brooklyn Democratic Party Machine that John O'Hara had tried to clean up. Mr. O'Hara was a relentless political irritant that would not be deterred in the exercise of his First Amendment Rights. DA Joe Hynes' political persecution was at an exorbitant cost to our State taxpayers (three trials, nine appeals and a writ of certiorari application before The United States Supreme Court).

JCA proselytizes citizen participation in voting and running for elective office. JCA's interest in the granting of this Pardon is the serious and significant impact that the singling out of John O'Hara for criminal prosecution in retaliation against him as a **political hit** has upon our most fundamental of rights, our First Amendment Right of Freedom of Speech as expressed in

¹⁵ Mr. O'Hara's political background clearly was the reason for his prosecution. For one thing, his long-term adversary, Assemblyman James Brennan, embarked on a long-time witch hunt against Mr. O'Hara that culminated with direct discussions with members of the District Attorney's Office to initiate the prosecution against him. In an interview with Chris Ketcham, of Harper's Magazine in December 2004, Mr. Ketcham disclosed that the supervising investigating detective in the case, Christopher Cincotta, stated "that's how we got involved; Assemblyman Brennan was calling the precinct repeatedly." Mr. Ketcham further revealed in the article that Cincotta conducted the investigation under the auspices of Detective Alan Presser, of the Brooklyn District Attorney's Office.

Mr. Ketcham also detailed a long history of efforts on the part of Assemblyman Brennan predating the prosecution that was maliciously intended to disrupt Mr. O'Hara's political activities, ultimately culminating in the political prosecution. From the 1980's up to the time of his indictment, Mr. Brennan initiated over 25 lawsuits against Mr. O'Hara, all of them being unsuccessful. When Mr. O'Hara passed the bar exam in 1990, Assemblyman Brennan filed a complaint with the Committee of Character and Fitness claiming that Mr. O'Hara was "morally depraved."

On September 10, 1996, Assemblyman Brennan's Chief of Staff, John Keefe, was arrested on four counts of assault for a brutal attack on Mr. O'Hara's girlfriend while she was handing out flyers for his Assembly campaign on the last occasion Mr. O'Hara ran for public office. During an interview for the Harper's Magazine article, the prosecutor on the case, John O'Mara, admitted to a series of meetings with both Assemblyman Brennan and Mr. Keefe, and that the Grand Jury assembled to indict Mr. O'Hara was convened shortly after the September 10, 1996 attack by Mr. Keefe on Mr. O'Hara's girlfriend. Mr. Keefe was allowed to plead to one count of second degree criminal harassment, a violation, and served one day of community service as a result.

the right to vote and the attendant right to run for elective office.¹⁶ Thus, we issue a sincerely passionate plea to you, Honorable David Paterson, as John O'Hara's last resort.¹⁷

Your pardoning¹⁸ of John Kennedy O'Hara upholds what we should hope for from our democratic system of government- the courageous open debate and discussion of matters of public concern without fear of retaliatory criminal prosecution based on buried arcane unconstitutional laws.

THE PUBLIC'S LEGAL INTEREST SERVED BY JOHN O'HARA'S PARDON

This criminal case against Mr. O'Hara is one of *First Impression*, being the only criminal conviction for voting in our nation's history since *Susan B. Anthony's* illegal voting charges for her civil disobedience protest in 1873 during the Woman's Suffragist Movement, which resulted in the formation of *The League of Women Voters*. It is of note that *The League of Women Voters* also sought to likewise redress this injustice brought upon John O'Hara when it filed an *Amicus Curiae Brief* in his Court of Appeals case.

JCA argues that the statute upon which this conviction is based is unconstitutional and where, as here, it is being used as the basis of a criminal conviction, *for the first time*, it is crucial that an Executive Statement be made, through your Pardon of John O'Hara. Your Pardon would send a strong message to the legislature that this buried arcane election residence law, which was for the *first time* used to impose felony criminal conviction, must be brought into constitutional compliance. At a minimum, due process demands statutory precision and predictability. JCA believes it *imperative* that since Election Law Statute 1-104 has been deemed unconstitutional by the courts, it therefore must be once and for all time, amended. The uncertain and unpredictable current state of the law where the courts have stated that although

¹⁶ ***"Putting political opponents in jail is the sort of thing that happens in third-world dictatorships. In the United States, prosecutions are supposed to be scrupulously nonpartisan." The New York Times, 8/6/07, "Selective Prosecution".***

¹⁷ Mr. O'Hara is without right of further appeal at this stage, as 28 U.S.C. § 2244(b)(3)(E) provides that an order denying authorization to file a second or successive habeas corpus application shall not be subject of a petition for rehearing or appeal to the United States Supreme Court.

¹⁸ **Sometimes a Pardon Is a Good Thing** – states that there appears to likewise be partisan politics as well as a tinge of classism and favoritism in the pardoning process, such that, "***no pardons for nobodies. Somebodies can catch a break.***" *The New York Observer*, Roger Simon, June 25, 2007. Indeed, John Kennedy O'Hara is indeed a disbarred lawyer with no political influence, or rather a "***nobody***", if you will, by some people's standards. JCA argues that it is the "nobodies" like John Kennedy O'Hara that more so need the help of the Executive Branch to right wrongs committed by criminal justice personnel whose hearts and souls are governed by **The Presence of Malice**.

the statute is unconstitutional, it will be left to the courts on a case-by-case basis¹⁹ is untenable where criminal prosecution is a result thereof.

JCA fears that the precedent established by the rulings of the various courts in Mr. O'Hara's case threaten to deter the many voters of this State's ambulatory citizenry with multiple and transient residences from participating in the electoral process.²⁰ Of further concern is the chilling effect on those who would otherwise run for elective office but for their fear of criminal prosecution, where their manifest intent to reside in a particular voting district is considered wrong *after the fact*, pursuant to this unconstitutional statute. Judge Albert Rosenblatt, dissenting²¹ in The Court of Appeals' opinion in John O'Hara's case, found that his case is a "unique one" in that it was a criminal prosecution as opposed to merely a civil election matter, which is routinely how these types of residency issues had been dealt with before Mr. O'Hara's case.²²

As Court of Appeals Judge Rosenblatt²³ further states in his harsh dissent:

If politically-charged disputes such as this and questions of "residence" are going to be resolved in the criminal arena and decided by juries, with the possibility of criminal conviction and incarceration, we would ensure that the

¹⁹ *Levy v. Scranton*, 780 F. Supp. 897 (N.D.N.Y. 1991)

²⁰ *Footnotes*, a New York City journal published bimonthly, conducted a survey in minority and immigrant communities of Central Brooklyn, New York City, January, 2003, and found:

...one out of every 12 voters who went to the polls in September and November committed the exact crime that John O'Hara was convicted for. And when we narrowed that poll to Crown Heights, East Flatbush, Bed-Stuy and Prospect Heights, our statistics showed one out of every 7 voters was guilty of O'Hara's "crime. ... If you are reading this article, and voted in September or November, there's a good chance that Brooklyn District Attorney Joe Hynes could convict you of a felony if he chose to... The District Attorney can go back 5 years and charge you for each of the times you voted. So, if you're one of those "prime" voters who votes in Primaries, General Elections, Special Elections and School Board Elections, you could be charged as many as 14 felonies within 5 years.... The last time anyone was convicted for these offenses was in 1876. And that was Susan B. Anthony, a champion for Women's right to vote. ...John O'Hara was not even a candidate. He was an ordinary voter [sic, like you and me]. Ordinary voters are never charged with false registration until now. ... And because of the John O'Hara precedent, hundreds of thousands of voters could be facing, felony charges today or tomorrow or next week. It's a serious matter...

²¹ In the Court of Appeals case there were two dissenting votes—in of itself remarkable, when one considers how regularly, in criminal matters, the Court issues a unanimous decision.

²² *People v. O'Hara*, 2001 WL 670112 Fn2 (N.Y. 2001)

²³ Of note –Judge Albert Rosenblatt, not known as a pro-defense jurist, yet issued a harsh dissent in favor of reversal of Mr. O'Hara's conviction.

definition of residence is plainly fixed and easily understood.²⁴

John Kennedy O'Hara's conviction for illegal voting erodes the very fiber of security to our citizens' First Amendment Rights in its chilling of the exercise of our right to vote, the bedrock upon which our democratic form of government is based.²⁵ Your Pardon, Hon. David Paterson, will bolster, underscore and emphasize the need for legislative revision with your Executive Statement that where this buried arcane election law statute's unconstitutionality and uncertainty remains un-remedied, faces unwitting voters - with the risk of criminal charges, with the attendant revocation of liberty through incarceration, and the ultimate imposition of the civil disability-revocation of that voter's right to vote altogether. Such is the irony- that the exercise of the right to vote is the cause of the ultimate loss of that very same right brought about by the intentional, willful and malicious selective prosecution because of political rivalry. In essence, it was because of his political activism- conduct that ought to be protected in a free and vibrant democracy- that ultimately led directly to John O'Hara's selective prosecution.

STATEMENT OF THE LEGAL CASE

After being tried three times, John O'Hara, a political activist, was convicted of one count of false registration (Election Law §17-104(4)), one count of offering a false instrument for filing (P.L. §175.35), and five counts of illegal voting (Election Law §17-132(3)). The essential element of each count was that Mr. O'Hara, a lawyer with no prior criminal record²⁶, chose the wrong one of his two residences from which to register to vote because that residence was found not to be a legal "residence" under the Election Law. Election Law, which §1-104(22), defines "residence" as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." Mr. O'Hara²⁷ maintained that inasmuch as he had legitimate, significant and continuing attachments with both

²⁴ Clearly, Judge Rosenblatt early on recognized that Mr. O'Hara had been singled out as a political hit and that this case was one of Selective Prosecution. *People v. O'Hara*, 2001 WL 670112 Fn2 (N.Y. 2001)

²⁵ See fn 11 , *supra*

²⁶ It was admitted by DA Hynes that all of Mr. O'Hara's financial information during his criminal trials, including 20 years worth of credit card slips, cancelled checks and tax returns, had found nothing improper. And, Mr. O'Hara had never been the subject of any disciplinary actions as an attorney prior to this politically charged criminal conviction.

²⁷ Mr. O'Hara consistently maintained that he had multiple residences to which he had physical presence and an intention to remain for the time at least.

residences, in accordance with New York seminal cases he was legally entitled to choose either of his two multiple residences as his voting address.²⁸ However, the trial court's jury charge was effectively the literal reading of Election Law Statute Section 1-104(22), which has been found unconstitutional. The state courts and the courts below in this instant case failed to rule on the constitutionality of this statute charged to the jury, but rather ruled on the 6th Amendment issues as to ineffective assistance of counsel. The courts never considered the constitutionality of the statute because said objections were unpreserved.

NEW YORK STATE ELECTION LAW §1-104(22)
DEFINITION OF RESIDENCE IS UNCONSTITUTIONAL

A. The Strict Statutory Standard of Review For Restraints On The Right To Vote

Where a statutory restraint on a residence requirement for voting purposes is not necessary to further a compelling state interest, it has been found to be unconstitutional in that it violates the Fourteenth Amendment. *Dunn v. Blumstein*, 405 U.S. 330, 336-337 (1972). To survive strict constitutional scrutiny, the restrictions imposed by such a statute must advance a compelling governmental interest by the least drastic means. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336-337 (1972). Absent a compelling state interest, a state may not statutorily restrain the right of a resident to move from one jurisdiction to another. *Id.* Accordingly, the definition of residence in New York State Election Law 1-104 is unconstitutional where it denies the right to choose of multiple or non-traditional residences.

The right to vote is an expression of our most basic of rights, freedom of speech, unquestionably a fundamental right. As the Supreme Court states in *Wesberry v. Sanders*, 376 U.S. 1, 17-18(1964): No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our constitution leaves no room for classification of people in a way that unnecessarily abridges this right. Accordingly,

²⁸ *Matter of Gallagher v. Dinkins*, 41 A.D.2d 946, 343 N.Y.S.2d 960 (2nd Dep't 1993) aff'd 32 N.Y.2d 839, 346 N.Y.S.2d 268, 299 N.E.2d 681 (1973) and See, *Matter of Ferguson v. McNab*, 60 N.Y.2d 598, 467 N.Y.S.2d 192, 454 N.E.2d 532. In *Matter of Gallagher v. Dinkins*, the rule of law was stated as follows: There is no rule which prohibits a candidate for public office from having two residences; and, where the record is clear, as at bar, that both residences are places where he maintains significant and legitimate attachments, it is for him to decide which address he considers as his voting address. *Id.*, 41 A.D.2d at 947, 343 N.Y.S.2d at 961. In *Matter of Ferguson v. McNab*, New York's Highest Court stated: "Respondent candidate having two residences may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law." *Id.*, 467 N.Y.S.2d at 193, 60 N.Y.2d at 600, 454 N.E.2d at 533.

where a statute places restraint on a person's right to vote, the statute is subject to strict constitutional scrutiny. *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Board of Elections*, 383 U.S. 663 (1966), *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 709 (1969); *Evans v Cornman*, 398 U.S. 419 (1970); *Phoeniz v. Kolodziejski*, 399 U.S. 204 (1970).

These principles were reiterated and reinforced in *Dunn v. Blumstein*, 405 U.S. 330, 336-337 (1972), a law professor who was denied the vote because of the move to another geographical district, where the Supreme Court made it unquestionably clear that all substantial restrictions upon the right to vote, including the imposition of "residence requirements", must be closely scrutinized in constitutional terms:

In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, e.g., *Evans v. Cornman*, 398 U.S. 419, 421-22, 426 (1970); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 709 (1969); *Harper v. Board of Elections*, 383 U.S. 663 (1966), *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, *supra*. This 'equal right to vote', *Evans v. Cornman*, *supra*, 398 U.S. at 426, is not absolute; the States have the power to impose qualifications, and to regulate access to the franchises in other ways. See, e.g., *Carrington v. Rash*, *supra*, 380 U.S. at 91, *Oregon v. Mitchell*, 400 U.S. 112, 144 (opinion of Justice Douglas), 241 (opinion of Justices Brennan, White and Marshall), 294 (opinion of Justice Stewart, in which Chief Justice Burger and Justice Blackmun joined). But as a general matter, 'before the right [to vote] can be restricted, the purpose of the restriction and that assertedly overriding interests served by it must meet close constitutional scrutiny.' *Evans v. Cornman*, 398 U.S. 419, 422 (1970); see *Bullock v. Carter*, 405 U.S. 134 at 143 (1972).

Election Law § 1-104(22), the cornerstone of the court's charge on residence in the instant case, clearly places restraint and abridges a citizen's right to vote. Because the statute requires a voting address to be a "permanent" home and the place to which a person "always intends to return", persons living in multiple or non-traditional residences are effectively disenfranchised. The body of case law makes clear that this state's restriction renders this statute unconstitutional on its face. The United States Court of Appeals examined whether a state could require a voting address to be a "permanent" home in a case concerning the rights of college

students to vote from their dormitory rooms. The court concluded such a requirement was unconstitutional, stating:

The District Court correctly noted that, as a matter of state law, this definition - - particularly the requirement that the home be “permanent” - - should not be read literally but rather “is intended to approximate the test for domicile, i.e., physical presence and an intention to remain for the time at least.”

Auerbach v. Rettaliata, 765 F.2d 350,351 (2nd Cir. 1985)(*citations omitted*).

Justice Friendly stated in the majority opinion: “[W]e think the only constitutionally permissible test is the one which focuses on the individual’s present intention and does not require him to pledge allegiance for an indefinite future:

We think therefore that, in determining bona fide residence for a person physically present, the state cannot constitutionally go further than the test set out in the Restatement (Second) of the Conflict of Laws § 18 (1971), namely, that he “**must intend to make that place his home for the time at least.**”

Ramey v. Rockefeller, 348 F. Supp. 780 at 788 (E.D.N.Y. 1972).

Auerbach v. Kinley, 594 F. Supp. 1503, 1507 (N.D.N.Y. 1984) further examined this issue of permanence, in which again the rights of college students to vote from their dormitory rooms were at issue. Relying on *Ramey v. Rockefeller*, the Court found:

The word “permanent” as used in the statute is not meant to be taken literally, but rather, is intended to approximate the test for domicile, i.e. physical presence and an intention to remain for the time at least. In discussing this point New York Jurisprudence states: “To satisfy constitutional requirements the test of a student’s intention to remain in a college community must focus on his present intention; he is not required to pledge that he will remain permanently or indefinitely. 18 N.Y. Jur, Elections @ 145 at 195 (1979).

Id. at 1507, n5.

Further, in *Levy v. Scranton*, 780 F. Supp. 897 (N.D.N.Y. 1991), again the Court, examining the rights of college students to vote from dormitory rooms, found:

Several courts in this Circuit, and the Court of Appeals itself, have recognized that such a literal reading of this definition would be an unfair and unconstitutional interpretation of the word “residency.” Therefore, these courts have given section 1-104(22) a much broader construction enabling them to save the statute from constitutional invalidity.

780 F. Supp. at 902 (*emphasis added*).

The body of case law makes clear that a literal application of Election Law § 1-104(22) is both unfair, but moreover, unconstitutional. A State simply cannot require a voting address to be “permanent”, a requirement that is inconsistent with the ambulatory society in which we live, and that is especially punitive to forced moves because of financial hardship. *Wit v. Berman*, 306 F.3d 1256 (2002). It is well-settled law that the state can go no further than to require a voting address to be a place where a person physically lives and intends to remain for at least the time being. This is where the New York State statute runs afoul of the constitutional standards for restraint or abridgement on the voter’s rights, particularly in a criminal prosecution based upon said statute. The statute deprives the voter of her intent to remain for at least the time being, where it requires permanency. The constitutional violation is in failing to provide for the right to choose of multiple or non-traditional residences that cannot comport to the definition of permanence.

B. The 14th Amendment Classification of Voters living in Non-traditional or Multiple residences are Disenfranchised by the Unduly Burdensome Statutory Restraint, which violates The Equal Protection Clause

In *Ramey*, citing *Dunn v. Blumstein*, the Court ruled that the meaning of this election law provision on residence remains uncertain. Surely, to require a permanent home where one always intends to return is too restrictive particularly with the ambulatory nature of our society, particularly in the urban areas, where the housing crisis has resulted in many sorts of multiple and non-traditional residential arrangements. Should that voter be the subject of criminal charges because of already strained unfortunate financial circumstances, or, similarly because of affluence that affords multiple residences? JCA thinks not. These families, who comprise this class of persons disenfranchised by the unconstitutional statute, are overwhelmingly indigent minority in non-traditional residences, who are already plagued with disproportionate statistical incidences of criminality. You, Honorable Eliot Paterson, possess the sole executive power with the compassionate stroke of your pen to right this wrong.

C. The Remedial Cure

The overriding interest of a statutory residency requirement is to prevent fraud. *Dunn v. Blumstein*, 405 U.S. 330, 336-337 (1972), but, if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose the less drastic means. *Id.* It is indeed important that the state has an interest in the prevention of fraud, but in this technologically advanced era, there are much less restrictive methods to ensure against fraud, such as dual voting, while still complying with the constitutional standard as enunciated by Honorable J. Marshall in *Dunn v. Blumstein*. The codification of the case laws' standard as enunciated would indeed cure the abyss that exists for the class in non-traditional and multiple residences. The constitutionally viable standard for residence as per case law should be physical presence with intent to stay for at least the time being.²⁹

JCA believes that the statute may be brought into constitutional compliance, where the statutory definition of residence be purged of the requirement of permanence to be replaced by language as used in the body of case law- ***physical presence with intent to remain at least for the time being. Where a citizen has more than one place to which she has physical presence with intent to remain for at least the time being, then she may choose from either of those residences to which she may register to vote.***

FACTUAL BACKGROUND

1. John O'Hara is a 47 year old man who has lived in the same Brooklyn neighborhood his entire life.

2. Prior to his arrest, Mr. O'Hara was a practicing Wall Street attorney with no prior criminal record and a proud product of our public school system and CUNY.

3. In the late 1980s and early 1990s Mr. O'Hara ran unsuccessfully for local and state elected office as a "maverick" candidate on the Democratic ticket—that is, without the support of Brooklyn Democratic Party machine.

²⁹ On November 18, 2003, it was reported that the board of elections planned to carry out a massive purging of hundreds of thousands of voters, "many of who are temporary residents [*sic*, with an intent to remain for at least the time being] who will return to another address", from the voters rolls based upon this state's unconstitutional definition of residence. *The New York Sun*, 11/18/03.

4. In his first outing as a politician, Mr. O'Hara ran for the State Assembly against a Brooklyn Democratic Party Machine (hereinafter referred to as The Machine) incumbent James F. Brennan, supported by James Brennan. The Machine challenged Mr. O'Hara's nominating petitions successfully in court, and Mr. O'Hara withdrew from the race.

5. Thus began the political-legal wrangling between Mr. O'Hara and James Brennan and The Machine that continued until Mr. O'Hara's arrest, conviction, disbarment, and removal from political life. Among others:

- a) In 1990, Mr. O'Hara again challenged James Brennan and The Machine for the same State Assembly seat, whereupon an operative commenced suit against Mr. O'Hara in Supreme Court. Whereas the matter was resolved in Mr. O'Hara's favor, he nevertheless lost the election.
- b) In 1991, upon learning that Mr. O'Hara had passed the New York State Bar Examination, The Machine incumbent James Brennan filed a complaint against him with the Committee on Character and Fitness, claiming he was "morally depraved." The matter was dismissed and Mr. O'Hara was duly admitted to practice.
- c) In 1992, James Brennan and The Machine's attorney and operatives filed a civil action in Supreme Court against Mr. O'Hara for libel and slander. After three years of litigation, the plaintiffs dropped the suit during jury selection.
- d) In 1993, James Brennan and The Machine's attorney filed a challenge in Supreme Court to Mr. O'Hara's candidacy for the City Council on the basis of his petition signatures and residency. After a two week trial The Machine withdraws the action. Mr. O'Hara loses the election.
- e) In 1994, on Mr. O'Hara's run for the City Council, The Machine's attorney again brings suit against Mr. O'Hara, challenging his petition signatures and his residency. After a two week trial Mr. O'Hara [withdraws] from the case and loses the election.
- f) In 1995 James Brennan and The Machine's attorney again files a complaint against Mr. O'Hara with the New York State Board of Elections.
- g) In 1996, James Brennan and The Machine's attorney again filed a complaint in Supreme Court against Mr. O'Hara on his fifth run for State Assembly against incumbent James Brennan, again challenging his nominating petitions and residency. The Machine thereafter withdrew the action. Mr. O'Hara ran and lost.
- h) On primary day, September 10, 1996, the voting machines were delivered late to every polling place in the Fifty-first District, the seat, which Mr. O'Hara sought. Indeed, some polling places did not open until 5:00 p.m., eleven hours late. Suspecting foul play, Mr. O'Hara brought suit in Supreme

Court to invalidate the election results. James Brennan and The Machine's attorney opposed the suit.

- i) Thereafter, on September 20, 1996, Mr. O'Hara withdrew his challenge in state court as the U.S. District Court in Brooklyn had assumed jurisdiction over the matter. The court ordered the election continued, and both parties took appeal to the U.S. Court of Appeals for the Second Circuit.
- j) On October 9, 1996, the Second Circuit reversed the lower court.
- k) Also on primary day, Mr. O'Hara's girlfriend was attacked as she handed out flyers in front of a polling place by James Brennan and The Machine's incumbent chief of staff, John Keefe. Mr. O'Hara's girlfriend was taken to the emergency room and Keefe was arrested the following day on sexual assault charges because he touched and grabbed her in an inappropriate place. He later pleaded guilty to criminal harassment, for which he was required to perform ten hours of community service.
- l) Assistant District Attorney John O'Mara admitted to *Harper's* scribe Ketcham, to a series of meetings between himself, Brennan, and Keefe, and that the grand jury that indicted O'Hara was not assembled till after Keefe's arrest³⁰
- m) After the NYPD charged Assemblyman Brennan's Chief of Staff, John Keefe, with four counts of assault, including sexual abuse, Rhonnie Jaus, D.A. Hynes' Chief of Sex Crimes contacted Mr. O'Hara's girlfriend for an appointment to interview her.
- n) ADA Jaus informed Mr. O'Hara's girlfriend that in spite of two independent eyewitnesses to the attack and a hospital record verifying her injuries; it would be difficult to prosecute Mr. Keefe because he claimed to be a homosexual.
- o) Three weeks later on October 23, 1996, D.A. Hynes indicted Mr. O'Hara at the behest of James Brennan and The Machine.

6. On October 23, 1996 the Brooklyn District Attorney, Charles Joe Hynes, a well-entrenched Democrat and backed by The Machine, charged Mr. O'Hara under King's County Indictment No. 13525/96 with one count of, Offering a False Instrument for Filing in the First Degree (New York Pub. L. § 175.35), one count of False Registration (New York Elect. L. § 17-104[4]), and five counts of Illegal Voting (New York Elect. L. § 17-132[3]).

³⁰ Appendix G- Affidavit dated, April 18, 2005, Christopher Ketcham, author of *Harper's Magazine*, December 2004, **MEET THE NEW BOSS: MAN VS. MACHINE POLITICS IN BROOKLYN**

7. The indictment alleged, inter alia, that Mr. O'Hara wrongly registered to vote from 553 47th Street, where he sometimes lived with his girlfriend in Brooklyn when his principal residence was at 579 61st Street, his rent-stabilized apartment in Brooklyn, which he didn't want to give up until such time that he made the final commitment to marry. Accordingly, he argued that he could lawfully register to vote from either address, which had been the state of affairs until this type of criminal case was brought against him for the first time in New York State history.

8. O'Hara was tried in New York Supreme Court, Kings County, three times by DA Joe Hynes. At his first trial, he was convicted on all counts but the conviction was reversed on appeal on the grounds that the trial court erred in giving the jury an erroneous missing witness charge. *People v. O'Hara*, 253 A.D.2d 560 (2d Dep't 1998). The retrial ended in a mistrial.

9. At his third trial O'Hara was convicted on all counts and Mr. O'Hara sentenced to a three-year period of conditional discharge, 1500 hours of community service, restitution of \$9,192, and a fine of \$6,000. The court also imposed a civil penalty of \$5,000 payable to the New York City Campaign Finance Board, which penalty was later vacated by the trial court.

10. On direct appeal to the Appellate Division of the New York State Supreme Court, Second Department, and on appeal by permission to the New York Court of Appeals, Mr. O'Hara's judgment of conviction was affirmed. *People v. O'Hara*, 274 A.D.2d 486 (2d Dept. 2002), *aff'd*, 96 N.Y.2d 378 (2001).

11. In the Court of Appeals, however, there were two dissenting votes—in of itself remarkable, when one considers how regularly, in criminal matters, the Court issues a unanimous decision. The harsh dissent by Judge Albert Rosenblatt, not known as a pro-defense jurist, took note of the “politically charged” nature of the dispute, and opined that if “questions of ‘residence’ are going to be resolved in the criminal arena, and decided by juries, with the possibility of criminal conviction and incarceration, we should ensure that the definition of residence is plainly fixed and easily understood.”

12. Since the Court of Appeals' ruling there has been consistently raised by DA Joe Hynes the erroneous pre-textual and manufactured out of whole-cloth for purposes of prejudicial media coverage, the issue of a “sham” address. No where in any of the trials was the jury to consider an issue of a sham address. Rather, the fact-finders, to wit, the jury, were to consider which of both addresses would be Mr. O'Hara's principal and permanent address, rather than

whether either address was not really a place where he resided. There was never an issue as to whether either of the addresses was a sham.

13. On October 8, 2002, Mr. O'Hara filed a petition for habeas corpus in the United States District Court for the Eastern District of New York, claiming that his judgment of conviction should be vacated on the grounds of ineffective assistance of trial and appellate counsel. The court, by oral opinion on March 7, 2003, denied the petition and further denied O'Hara a certificate of appealability.

14. On August 26, 2003, the United States Court of Appeals for the Second Circuit denied Mr. O'Hara a certificate of appealability.

15. Thereafter new evidence came to Mr. O'Hara's attention demonstrating that he was selected for prosecution. In or about December 2004, *Harper's Magazine*, a highly regarded centuries old monthly periodical, published a lengthy article on the prosecution of Mr. O'Hara, entitled "Meet the New Boss: Man vs. Machine Politics in Brooklyn."

16. In this article investigative reporter Christopher Ketcham concluded after numerous background interviews that Mr. O'Hara's indictment and prosecution of O'Hara was selective and malicious, and that he had been targeted for his maverick challenges to the Brooklyn political establishment. In particular, Ketcham concluded, District Attorney Hynes had brought charges against O'Hara as a favor to The Machine incumbent New York State Assemblyman James F. Brennan; whom during the late 1980s and early 1990s, O'Hara had repeatedly opposed in elected contests.

17. Indeed, as noted by the New York Court of Appeals, Mr. O'Hara is the only one ever to have been convicted in the state for the failure to establish a legal residence inside a voting district. *People v. O'Hara*, 96 N.Y.2d 378, 390 n.3(2001).

18. Further, on April 6, 2005, the *New York Press*, a weekly newspaper in New York City, ran an article, "**O'Hara vs. Hynes: The Case against the Lawless DA,**" in which there was reported how numerous members of the Brooklyn District Attorney's Office had failed to abide by residency requirements mandated by New York State law, with DA Joe Hynes' full knowledge, consent and approval in direct and flagrant violation of State law.

19. Mr. O'Hara, upon discovery of such new evidence, brought a motion in New York State Supreme Court, Kings County, pursuant to New York Crim. Proc. L. § 440.10(1)(g)(h) to vacate his judgment of conviction. In that motion, Mr. O'Hara claimed that his indictment, prosecution, and conviction resulted from the DA Joe Hynes' improper and selective prosecution

of him, resulting in a denial of his constitutional right of equal protection of the law under both the Federal and New York State Constitutions.

20. Brooklyn District Attorney Joe Hynes submitted no sworn affidavits in opposition to such allegations. Nor, did the court order an evidentiary hearing. Mr. O'Hara's motion for selective prosecution was denied on September 23, 2005, even without opposition and without an evidentiary hearing which case law has strongly held to be required in such motions because the prosecutor has facts at his ken that the movant is entitled to flesh out.

21. Thereafter, on October 14, 2005, Mr. O'Hara filed a notice of motion with the New York State Supreme Court seeking leave to appeal its denial of his earlier motion to vacate his judgment of conviction. Subsequently, the Appellate Division of the New York Supreme Court, Second Department, denied Mr. O'Hara's leave to appeal.

22. On June 12, 2006, petition filed with the United States Court of Appeals, Second Circuit, an application for leave pursuant to file a second or successive habeas corpus petition pursuant to 28 U.S.C § 2244 (b) on the basis of newly discovered evidence, to wit the foregoing media accounts, which was denied on July 12, 2006.

23. Mr. O'Hara is without right of further appeal at this stage, as 28 U.S.C. § 2244(b)(3)(E) provides that an order denying authorization to file a second or successive habeas corpus application shall not be subject of a petition for rehearing or appeal to the United States Supreme Court.

Conclusion

For all the foregoing reasons, the Justice Card Alliance prays that you, Honorable Governor David Paterson, in the interest of justice and fairness, with compassion and with a recommitment of those values that we hold so very dear in our beloved country- Freedom of Speech, do grant to John Kennedy O'Hara Your Official Pardon.

Sincerely,

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APPENDIX
LIST OF EXHIBITS

A – Harper’s Magazine Article

B – New York State Court of Appeals Decision, People v. O’Hara

C – Newspaper Articles on Alex Gibney Documentary

D – Newspaper Editorial Boards Opinions

E – News Articles

F – Jury Charge, People v. O’Hara

G – Christopher Ketcham’s, Harper’s Magazine Author, Affidavit