

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

In the matter of
CHELE C. FARLEY, Candidate Aggrieved,
Petitioner(s),

-against-

THE NEW YORK STATE BOARD OF ELECTIONS, and
THE WESTCHESTER COUNTY BOARD OF ELECTIONS, and
THE PUTNAM COUNTY BOARD OF ELECTIONS, and
THE DUTCHESS COUNTY BOARD OF ELECTIONS, and
THE ORANGE COUNTY BOARD OF ELECTIONS,
And
SCOTT SMITH, Candidate, 18th Congressional District of the State of New York, and
SEAN PATRICK MALONEY, Candidate, 18th Congressional District of the State of New York,
Respondent(s).

DECISION & ORDER
Index No.: 63496/2020

Petitioner commenced this proceeding for an order: (a) requiring and mandating the respondent New York State Board of Elections to amend and correct the ballot certified for the 2020 General Election in the 18th Congressional District of New York; (b) requiring and mandating respondent New York State Board of Elections to correct the certified ballot to reflect that Scott Smith was not properly nominated for the Public Office of Member of Congress, 18th Congressional District, in the 2020 General Election, by the Libertarian Party; (c) requiring and mandating each respondent Boards of Elections in the Counties of Westchester, Putnam, Dutchess, and Orange Counties to immediately correct all ballots to be used in the 2020 General Election for the Public Office of Member of Congress, 18th

Congressional District so as to reflect the fact that respondent Scott Smith was not nominated for said public office by the Libertarian Party, and (d) requiring and mandating each respondent Boards of Elections in the Counties of Westchester, Putnam, Dutchess, and Orange Counties and respondent New York State Board of Elections not to canvass any ballots for respondent Candidate Scott Smith on the Libertarian Party line.

The following papers were read:

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By way of background,¹ petitioner is a candidate for the office of Member of Congress for the 18th Congressional District of New York for the Republican and Conservative parties. The 18th Congressional District includes all of Orange and Putnam Counties and portions of Dutchess and Westchester Counties. On March 19, 2020, respondent Scott Smith filed a designating petition, nominating him as a candidate for the office of Member of Congress for the 18th Congressional District for the Libertarian Party. On April 27, 2020, the Commissioners of the State Board of Elections met in a public meeting and voted on a report, which included determinations as to certain candidates that lacked the proper certificate of authorization and were thus ineligible as a candidate for the particular party. No issue relating to respondent Scott Smith's candidacy was raised at this meeting or in the report. On September 8, 2020, the Commissioners of the State Board of Elections met and determined all ballot access objections, making final determinations as to who would appear on the ballot. The certification included respondent Scott Smith as a candidate for the 18th Congressional District of New York for the Libertarian Party. On October 19, 2020, the State Board of Elections received a letter from petitioner, dated October 15, 2020, requesting that the Board remove respondent Scott Smith's name from the Libertarian Party line on the ballot for the 18th Congressional District.

On October 26, 2020, petitioner commenced this proceeding seeking, among other things, to remove respondent Scott Smith's name from the Libertarian Party line on the ballot for the 18th Congressional District. The order to show cause was signed on October 27, 2020 and a hearing was scheduled for October 28, 2020 at 2:00 p.m. Prior to and/or contemporaneously with this hearing, various parties filed papers in response to the petition.

Respondent Scott Smith, through counsel, filed an affirmation wherein he conceded that he was not entitled to the Libertarian Party line and does not take issue with the removal of his name as the Libertarian candidate. Respondent New York State Board of

¹ These background facts are drawn from the affidavit of Thomas Connolly, who is the Director of Operations of the New York State Board of Elections.

Elections (State Board) filed opposition papers, including an affidavit of Thomas Connolly, who is the Director of Operations of the New York State Board of Elections. The State Board opposes the application on the grounds that it is untimely brought under Election Law § 16-102, barred under the doctrine of laches, seeks relief that is impossible to grant at this late date, and failed to name a necessary party (that is, the Libertarian Party). Respondent Putnam County Board of Elections (Putnam County) filed opposition papers, indicating that it opposes the application on the grounds that it is untimely brought under Election Law § 16-102. In addition, Putnam County also notes that all of the caselaw cited by petitioner pre-dates early voting under Election Law § 8-600. Thus, Putnam County contends, the petition is not brought on the eve of the election, but, in fact, while the election is taking place. Respondent Orange County Board of Elections filed opposition papers, joining the opposition papers filed by Putnam County.

After hearing from the parties, it is clear that there is no dispute that respondent Scott Smith was improperly placed as the candidate for the Libertarian Party. The only issue is whether the petition is timely brought.

If, as various respondents argued, this petition is in actuality a judicial proceeding that is properly brought under Election Law § 16-102 (2), then petitioner's time to bring this proceeding would have expired in April 2020.² The Second Department has explained that "[a]s the proceeding seeks to remove candidates from the ballot based on the nomination and designation procedures of Election Law article 6, it is governed by the statute of limitations set forth in Election Law § 16-102 (2) (*see Matter of Lewis v Garfinkle*, 32 AD3d 548, 549 [2d Dept 2006]). Here, petitioner seeks this precise relief and, as such, the petition is governed by that statute of limitations. Accordingly, the petition is dismissed as untimely.

Even if, as petitioner argued, this petition was properly brought under Election Law § 16-104, the timeliness becomes more fact specific. Here, petitioner failed to act after respondent Scott Smith filed a designating petition, nominating him as a candidate for the Libertarian Party on March 19, 2020. Petitioner failed to act after the State Board met and voted on a report on April 27, 2020, which did not address the candidacy of respondent Scott Smith. On or about September 8, 2020, the form of the ballot, which listed respondent Scott Smith as a candidate for the 18th Congressional District of New York for the Libertarian Party, was made available to the public. Petitioner failed to act until October 15, 2020, when petitioner sent a letter to the State Board. Further, as noted by Putnam County, petitioner failed to act prior to the onset of early voting on October 24, 2020. In a word, petitioner slept on her rights (*see Flake v Bd. of Elections of New York City*, 122 AD2d 94, 96 [2d Dept 1986]). As such, the Court finds this to be an independent basis to dismiss the petition as untimely.

² At the hearing, it was unclear from the parties' submissions when exactly the triggering event for the statute of limitations under Election Law § 16-102 (2) would commence. However, it was clear that the event occurred in March 2020.

Lastly, the State Board proffered the affidavit of Mr. Connolly (the Director of Operations of the New York State Board of Elections), who avers that making the changes that petitioner seeks is simply not possible this close to election day. Mr. Connolly outlines the reasons why he believes this to be so. Petitioner submitted no evidence that Mr. Connolly's position was unfounded. Having reviewed this uncontested evidence, the Court credits it and finds in it an independent basis to deny the petition. "Under the circumstances of this case, it would be impossible, if this Court were to entertain the merits, to render meaningful relief in compliance with the Election Law" (*Hunter v Orange County Bd. of Elections*, 11 NY3d 813, 815 [2008]).

For the foregoing reasons, the petition is dismissed.

Dated: October 29, 2020
White Plains, NY



Hon. Mary H. Smith
Supreme Court Justice