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The Honorable Andrew M. Cuomo
Governor of New York State
New York State Capitol Building
Albany, NY 12224

Dear Governor Cuomo:

Pursuant to Article IV, Section 4, of the New York State Constitution, the Governor of New York has the enviable “power to grant ... pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper” New York has always been in the forefront of permitting the chief executive, in his sole discretion, to mitigate what may be deemed a harsh and inflexible punishment. In fact, New York was one of only few of the original states where the pardoning power rested with the governor. *See*, N.Y. Const. of 1777, art. XVIII. Most states have since followed.

This petition is respectfully submitted on behalf of Mr. John O’Hara, who was convicted for a harmless mistake under the exceptional circumstances of a historical anomaly. The conviction is his first and only infraction of the law and has left devastating effects in its wake. He was cut off from his legal career and political aspirations early in his professional development, fined heavily, and served three years probation with 1,500 hours of community service. All this for casting his vote over a period of one year from an address deemed not to be his “principal and permanent” residence.

There was never an intention of duplicating his vote in the elections of that year, nor did he manipulate or induce fraud on anyone else’s vote. Yet, in view of the progeny of election cases, which are very few, the punishment endured would seem beyond the pale.

Even in Susan B. Anthony's case, the only other conviction for unlawful voting, the court levied a fine of \$100.00, plus the costs of the prosecution, and then decided not to pursue any payment. See, D. Linder, *The Trial of Susan B. Anthony for Illegal Voting*, 2001.

Looking back, it would be unthinkable to hold a grudge against Susan B. Anthony for voting in 1872. It is just as untenable to continue to withhold our forgiveness for Mr. O'Hara's mistaken residency filings in 1992 - 1993. We cannot take back his conviction; he has paid his fine and served his full sentence. We cannot annul his shame and loss of legal status, although, fortunately, he has been reinstated as an attorney, almost twelve years later.

O'Hara has paid an inordinately high price for a relatively minor offense of a law that is typically not enforced. His pardon can, however, retrieve his professional reputation and dignity. In the scheme of things, Mr. O'Hara's conviction may appear relatively insignificant to other more serious ones seeking to be pardoned. But, restoring his reputation is not insignificant to Mr. O'Hara. Further, granting him the pardon carries with it no repercussions. It would not prejudice the public or put anyone in danger.

Procedural History

On or about October 23, 1996, an indictment was handed down against John Kennedy O'Hara for crimes of false registration and voting during the election year November, 1992 to November, 1993, a total of seven counts. Two of the counts pertained to false registration; the remaining five counts related to illegal voting.¹ Mr. O'Hara, who maintained an apt on 61st Street in Brooklyn, began living at his girlfriend's residence on 47th Street, Brooklyn, and registered and voted from her address during 1992 – 1993.

For reasons still mired in speculation, charges were initiated against Mr. O'Hara in 1996, three years later, for wrongfully registering and voting from the 47th Street residence. The relationship had already ended and Mr. O'Hara no longer stayed at that address.

At the conclusion of the trial in May, 1997, O'Hara was convicted of the charges, but the Appellate Division, Second Department, reversed for an improper charge to the jury regarding a missing witness. *People v. O'Hara*, 253 A.D.2d 560 (2d Dept, 1998). A second trial was held, which ended in a deadlocked jury. At the third trial held in October, 1999, O'Hara was again convicted of all charges; that holding was affirmed by the Appellate

¹ See Indictment, *People v. O'Hara*, Oct. 23, 1996.

Division, Second Dept. in July, 2000. *People v. O'Hara*, 274 A.D.2d 486 (2d Dept, 2000). Mr. O'Hara sought relief in the state's highest court, but the Court of Appeals affirmed the judgment. *People v. O'Hara*, 96 N.Y.2d 378 (2001).

What is noteworthy in the Court of Appeals decision is the lengthy dissent written by Judge Albert Rosenblatt and concurred by Judge Howard Levine. Both jurists believed that the narrow definition of residence given to the jury was error and "confusing" without further explanation. *Id.* at 388; *see, also*, Election Law, section 1-104(22). Further, it was in contradiction to prior holdings and the prevailing practice of permitting a broader application for choosing between dual residences. *See, also, People v. Ramos*, 223 A.D.2d 495 (1st Dept, 1996) (affirming dismissal of indictment for insufficient explanation of election law definition of residence). A more recent case decided in 2008 in the Third Department iterated the Court's broad application for choosing between dual residences. *See, Matter of Wilkie v. Delaware County Bd. Of Elections*, 55 A.D.3d 1088 (3d Dept, 2008).

That being said, the possible misunderstanding of election residency requirements is not the reason for requesting Mr. O'Hara's pardon. Mr. O'Hara was tried by a jury of his peers who concluded that the address from which he registered and voted was not his principal and permanent residence. This petition does not request that you override or annul the decision. I only wish to point out that under similar circumstances there continue to be differing results.

Nonetheless, the conviction stands, affirmed by the brethren of our highest court. Mr. O'Hara took his battle all the way to the U.S. Supreme Court, but certiorari was denied. Mr. O'Hara paid his fines and served his sentence. It is too late to undo the deed. But, it is not too late to pardon Mr. O'Hara.

That is the focus of this plea for pardon. Pardons are generally for the personal benefit of the convicted party. However, I believe that a pardon on behalf of Mr. O'Hara carries with it a salutary effect for the public, and I ask your indulgence while I make my argument for the requested relief.

Background Summary

Mr. O'Hara is a graduate of CUNY Law School and was admitted to the bar in 1991 with an apparent penchant for public service. In 1990, he was already a member of his Community Board, and that same year made his first attempt for public office by entering the

primary for New York State Assemblyman, but was unsuccessful. During his tenure on the Community Board, he chaired the Economic Development Committee and was instrumental in bringing the large discount company, Costco, into the area. He was also chair of the Youth Services Committee, which allocated millions of dollars to various youth programs within the community. He resigned from the Board in 1997, following his conviction at his first trial.

Mr. O'Hara quickly became known for his outspoken manner and as a maverick in political circles. In 1992, O'Hara again opposed the party's choice for State Assemblyman, and lost by just a few hundred votes. The election year of 1992 – 1993 was the basis of his indictment for false registration and voting. But, there was no prosecution of the charges in 1992 or 1993.

Mr. O'Hara continued to challenge the party incumbent for State Assembly up through the election year 1996, each time without success. That was his final challenge; it was the year he was arrested and indicted. But, not in that order. In fact, a grand jury had already been convened prior to his arrest and ended with the true bill filed on October 23, 1996, about a week before election day.

Thereafter, the saga of repetitive trials and continuing appeals began. I became involved in 2000, while serving as President of the NYC League of Women Voters.² A year later, Mr. O'Hara approached me again to encourage me to run as an opposition candidate for judge in the election year 2001. To Mr. O'Hara's credit, after my election to the bench, Mr. O'Hara at no time solicited any requests, references or counsel, legally or socially. In fact, Mr. O'Hara honored the ethical distance required by judges and we spoke only a few times by telephone during my entire tenure.³

O'Hara displays a high level of ethics in his work and personal life, along with a strong commitment to public service. He is the first in his family to complete college and, then, exceeded their expectations by going on to law school. The task was further laden by

² Mr. O'Hara requested that the organization file an *amicus curie* brief to support his appeal of conviction at his third trial in 1999. The New York City League agreed in view of its avid position on open access to voting.

³ My petition on his behalf is not made out of indebtedness. When Mr. O'Hara solicited my participation in his petition for pardon, I recognized another opportunity to contribute to the judicial system. As a retired judge, acting as Judicial Hearing Officer, I may handle private matters that do not create a conflict with my duties at court. I do this simply because I believe that it is judicially important for public policy as much as it is for Mr. O'Hara. My belief is strong enough to do it *pro bono*.

his having to work nights to support his costs of higher education. Until his conviction, he never shirked his duty to vote and took pride in his community activism. The conviction not only caused him to lose his right to vote and legal livelihood, but also dashed his dreams of political participation.

Even while serving his sentence of community service, O'Hara was acknowledged by the Coordinator of his community service for his diligence and admirable work ethic.⁴ It was joined with another letter of praise written on behalf of Mr. O'Hara when he applied for readmission to the bar.⁵ The Character and Fitness Committee, consistent of twenty-five members, unanimously recommended O'Hara's reinstatement in May, 2009. Of note is that, following a review of the documents of the case and a personal interview of Mr. O'Hara, the Committee stated that it had "grave doubts that Mr. O'Hara did anything that justified his criminal prosecution ...". Decision of Committee on Character and Fitness, May 21, 2009, p. 6; *see, also*, NY Law Journal, Oct. 13, 2009. The Appellate Division, Second Department, restored the name of John Kennedy O'Hara to the roll of attorneys in October, 2009.⁶ This year, in April, 2011, he was admitted to practice in the U.S. District Court, Eastern District of New York.

Why The Pardon Should Be Granted

A. For Reasons of Justice and Fairness

In our tripartite system of government, the Judiciary is often the last word. But, we know that it is not a perfect system. Your extrajudicial powers of clemency and pardon provide a safety valve for the problems inherent in an overloaded and rigid system of criminal justice. It provides another opportunity to review the offense more thoroughly than, or at least differently from, what was offered at trial. It also offers a new perspective on how fairly the justice system is operating.

Although there is a dearth of cases with which to compare the *O'Hara* case, it is clear that disparate punishment was meted out to other parties involved in similar circumstances. Mr. O'Hara paid a high fine, was sentenced to three years probation, and went on record as a felon. Others in similar cases, at the very worst, faced losing their right to vote in the current

⁴ *See*, Letter of Robert Bourne, dated March 11, 2009.

⁵ *See*, Letter of Paul D. Montclare, Partner of Mitchell Silberberg & Knupp LLP, dated March 16, 2009

⁶ Decision/Order on Motion for Reinstatement (A.D. 2nd Dept, Oct. 2009). The Decision is concomitant with the Decision of the Character and Fitness Committee and Law Journal article.

election. Mr. O'Hara, on the other hand, was stripped of his voting rights and, more importantly, his legal license.

In New York, there have been a few civil cases on the issues of false voter registration and residency. But, none of them, whether the party wins or loses, would result in a criminal conviction. In *Matter of Bressler v. Holt-Harris*, 30 N.Y.2d 529 (Ct of Appeals, 1972), the Court affirmed the decision of the lower court in denying a petition to strike Mr. Holt-Harris' name from the registry of voters. Even if petitioner prevailed, the only consequence for respondent Holt-Harris would have been his inability to vote in the district where he claimed he resided.

The same issue arose in a more recent case, *Matter of Wilkie v. Delaware County Bd. of Elections*, 55 A.D.3d 1088 (3rd Dept, 2008). Mr. Wilkie successfully sought an order to reinstate his voter registration. No criminal consequences were ever considered in the proceeding.

As a matter of fact, there has been only one other attempt to convict a party for false registration and illegal voting. In *People v. Ramos*, 223 A.D.2d 495 (1st Dept, 1996), Mr. Ramos, like Mr. O'Hara, was charged with false voter registration and illegal voting. A true bill of the Grand Jury was returned, but the case never made it to trial. The Supreme Court Judge dismissed the indictment, holding that the statutory definition of "residence" did not provide enough information to sustain the charge. *Id.* An interesting note here is that the trial judge gave the prosecutor leave to re-present, which apparently (s)he did not. Not so for O'Hara, where juries were convened for three separate trials.

The similarities in the voter residency cases are undeniable and the Court has given in each such case, with the exception of O'Hara, a broad application to the governing election statute. A good example is the *Bressler* case, *supra*, where despite respondent's lack of any meaningful contact with his registered address, the Court declared it a lawful voting residence. The same applies to the *Wilkie* case, *supra*, in which the appellate court followed the bent of the high court and chose not to interpret the statute narrowly and reinstated Mr. Wilkie's voter registration.

In the O'Hara case, the same charges of registering and voting from an unlawful residence resulted in punishment far afield of a violation of the Election Laws. Without

excusing his conduct, we entreat you to use your power of leniency to pardon Mr. O'Hara for his unprecedented conviction.

B. For Reasons of Public Policy

Mr. O'Hara was convicted of registering and voting unlawfully. His is the only case in New York prosecuted successfully for doing so. That is, except for the conviction of Susan B. Anthony in 1873. For her punishment, she was fined \$100, but refused to pay it. The government never pursued collection action against her. *See*, D. Linder, *The Trial of Susan B. Anthony for Illegal Voting*, 2001.

Mr. O'Hara, on the other hand, was fined upwards of \$20,000, sentenced to three years probation and 1500 hours of community service. Even before his appeals were perfected, he was disbarred. Nevertheless, the request for pardon is not based on sympathy. It is a plea to reexamine how New York doles out comparative justice.

The determinative factor in John O'Hara's conviction was whether he registered and voted from his "permanent and principal home". *See*, Election Law, sect. 1-104(22). In other cases addressing the issue of dual residences, the courts applied the generally accepted broad definition of the rule. Both *Wilkie, supra*, and *Bressler, supra*, were permitted to register and vote from one of their addresses, although they admitted that they had minimal contact with the voting address and it was not the principal residence.

The opposite occurred in the O'Hara case, where a jury construed the definition literally and found that his chosen voting address did not comport with a permanent and principal place of residence. To be fair, it was the first time the issue was put before a jury, prior cases having been decided in a civil forum by a judge. What sets the *O'Hara* case apart is that it went the full course to trial, not once but three times. The first conviction was reversed by reason of an erroneous jury charge regarding a missing witness. The second attempt produced no conviction because the jury was deadlocked. The third trial was the tie breaker, which led to the final conviction and sentencing of O'Hara.

The fact remains that a different jury in a different case under similar circumstances could interpret the definition of residence under section 1-104(22) of the Election Law in a different light. Even more chilling is the fact that enforcement of the residency rule is random, at best, and selective, at worst. In the matter of O'Hara, the charges were brought three years (in 1996) after the alleged violations (in 1993). Out of more than a million

registered voters in Brooklyn, O'Hara was the only case investigated and then prosecuted for illegal voting.⁷ For those people who maintain dual residences, a danger looms that a vote from one of the addresses may lead to criminal allegations from opposing factions.

Despite Judge Rosenblatt's cogent dissent in the O'Hara case, the high court's majority would not upend the jury's determination. As a jurist, I understand the learned court's resistance. The jury is the proud foundation of our judicial system, and it works. We recognize and revere its findings. This petition for pardon does not ask that you alter the outcome.

What I do request in this petition is that you pardon Mr. O'Hara for his violations of voting, which, I believe, will have beneficial effects for not only Mr. O'Hara, but also for the public at large. Until the *O'Hara* case, it was unlikely that one would be prosecuted for violations of election registration or residency. Even if (s)he were, the potential consequence would be a nullification of the person's vote in that election. Until the *O'Hara* case, a broad application to the residency statute was the established precedent. That supports New York's favorable attitude towards open and accessible voting procedures. Our democracy depends on citizens getting involved and engaging the govt. A pardon in the O'Hara case offers an opportunity to encourage further clarification of the residency statute by the legislature or the courts, one way or the other.

Conclusion

The conviction of John O'Hara is one-of-a-kind and seeks a one-of-a-kind pardon. It provides an opportunity for a new perspective on the unprecedented decision in the O'Hara case. Admittedly, the power to pardon is generally applied to those convicted of more serious crimes, whereas those of less significant crimes go unnoticed. Yet, the punishment meted out to Mr. O'Hara far outweighs the criminal charges and may, in balance, even exceed some penalties for far more serious conduct.

A pardon on behalf of Mr. O'Hara will not conjure up any casualties, condemnation or correction. It will, however, help restore his reputation and sense of dignity, a small request for the substantial setback in his life.

⁷ New York State Board of Elections, voter enrollment as of November 2010.

For all the reasons set forth in this petition, we pray sincerely for your favorable consideration in granting a long-awaited pardon for John O'Hara.

Respectfully submitted,

Hon. Eileen N. Nadelson