

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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THOMAS F. LIOTTI, ESQ., on behalf of himself  
And the Pro Bono Publico Bar Association, Inc.,

Plaintiff,

-against-

**Index No.: 19-cv-04264(WFK)(LB)**

THE NASSAU COUNTY BOARD OF  
ELECTIONS, THE NEW YORK STATE BOARD  
OF ELECTIONS, THE NASSAU COUNTY  
REPUBLICAN COMMITTEE, THE NASSAU  
COUNTY DEMOCRATIC COMMITTEE, THE  
NASSAU COUNTY CONSERVATIVE PARTY,  
THE BAR ASSOCIATION OF NASSAU  
COUNTY, INDEPENDENCE PARTY OF NEW  
YORK STATE, and WORKING FAMILIES  
PARTY,

Defendants.

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**MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS OPPOSITION AND IN  
FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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### **PRELIMINARY STATEMENT**

This Reply Memorandum of Law is submitted on behalf of the Defendants, The Nassau County Republican Committee and The Nassau County Conservative Party, in reply to Plaintiffs' Composite Memorandum of Law in Opposition to Defendants' Motions to Dismiss and Composite Declaration of Thomas F. Liotti in Opposition to the Defendants' Motions to Dismiss the Amended Verified Complaint (collectively referred to as "Plaintiffs' Opposition") and in further support of their Motion to Dismiss the Amended Complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure.

Plaintiffs' Opposition utterly fails to address any of the arguments raised by the any of the Defendants in their Motions to Dismiss. Instead, Plaintiffs' Opposition expresses Plaintiff Liotti's generalized grievances dating back to the 1970's. Plaintiffs merely assert their opinions on alleged rampant corruption and improprieties by sitting judges (*see* Plaintiffs' Memorandum of Law pgs. 7-8). Plaintiffs' Opposition never addresses why their Amended Verified Complaint fails on numerous procedural grounds, such as lack of standing, or failure to name indispensable parties, or failure to commence this action within the applicable statute of limitations. Moreover, Plaintiffs fail to refute or even attempt to address the Supreme Court of the United States review and approval of New York's system of judicial nominations in *New York State Bd. of Elections v Lopez Torres*, 552 US 196, 128 S Ct 791, 169 L Ed 2d 665 (2008). Therefore, the Amended Verified Complaint must be dismissed.

### **ARGUMENT**

#### **I. Plaintiffs Fail To Address The Numerous Procedural Grounds Raised By The Defendants In Their Motion To Dismiss**

As fully set forth in Defendants' Memorandum of Law in Support of their Motion to Dismiss, Plaintiffs' Amended Complaint fails on numerous procedural grounds, including lack

of standing, failure to name indispensable parties, and failure to commence this action within the applicable statute of limitations. Plaintiffs' have failed to address these procedural infirmities and the Amended Verified Complaint should be dismissed.

First, both Plaintiffs lack standing to maintain this action. "Article III standing requires: (i) injury in fact that is concrete and particularized; (ii) a causal connection between the injury and the conduct complained of; and (iii) a likelihood that the injury will be redressed by a favorable decision." *Bender v Obama*, 653 Fed Appx 31, 32 (2d Cir 2016); *see, Lujan v Defs. of Wildlife*, 504 US 555, 112 S Ct 2130, 119 L Ed 2d 351 (1992). In the instant matter, Plaintiffs fail to even allege that they meet this burden. Plaintiffs fail to allege any concrete or particularized injury and fail to even articulate a likelihood that the injury will be redressed by a favorable decision. Furthermore, as for organizational standing, other than listing the Pro Bono Bar Association, Inc.'s status as a not-for-profit organization, the Amended Verified Complaint sets forth no facts related to such organization. Plaintiffs' silence in its opposition confirms that they lack the requisite standing to bring this action.

Second, the Plaintiffs have failed to name indispensable parties. As stated in the Motion to Dismiss, currently, the State is divided into thirteen judicial districts, with the Tenth Judicial District being composed of Nassau and Suffolk Counties. *See*, NY Const. Art. VI, § 6. Justices of the Supreme Court are chosen by the electors of the district in which they serve and hold fourteen-year terms. *See*, NY Const. Art. VI, § 6. As the Tenth Judicial District spans both Nassau County and Suffolk County, the Nassau County Board of Election and the Suffolk County Board of Election oversee elections related to judicial candidates for the Tenth Judicial District. As such, to the extent the Nassau County Board of Elections is an indispensable party, the Suffolk County Board of Elections is also an indispensable party and has not been joined in

this action.

Finally, to the extent Plaintiffs seek to invoke the supplemental jurisdiction of this Court, it should be rejected summarily. Even if this Court were to find that a state law cause of action has been adequately plead, the Plaintiffs failed to commence this proceeding within the applicable statute of limitations, which is governed by NYS Election Law § 16-102. Once again, the Plaintiffs failed to even address the statute of limitations issues in their opposition. As the Plaintiff failed to timely commence this action, the Amended Verified Complaint should be dismissed.

## **II. Plaintiffs Fail To Dispute That Defendants Are Not State Actors Or That The Practices Complained Of Have Been Approved By The U.S. Supreme Court**

Plaintiffs causes of action pursuant to 42 U.S.C. § 1983 and the Voting Rights Act of 1965 should be dismissed for failure to state a cause of action. Plaintiffs fail to address the Defendants' assertion that they are not state actors. As stated in Defendants' Memorandum of Law, "[t]o state a claim under 42 U.S.C. § 1983, a plaintiff must plausibly allege that the party charged with the deprivation of a federal right 'be a person who may fairly be said to be a state actor.'" *Jacobson v Kings County Democratic County Comm.*, 788 Fed Appx 770, 772 (2d Cir 2019). Internal party affairs, which have no direct relation to the electoral process, are not subject to constitutional scrutiny under § 1983, as the party acts as a private organization and not a state actor. In *Jacobson*, the Court held that the endorsement procedure is "not a *de jure* part of the state-regulated nomination process." *Id.* at 773. Plaintiffs' instant claims are no different from those in *Jacobson*. Plaintiffs are trying to regulate the internal affairs of the Defendant Parties' endorsement process, which has been held to be an internal affair of the parties. Plaintiffs' Opposition fails to set forth any argument related to why this matter differs from *Jacobson*. Stated simply, Defendants are not state actors, Plaintiff has not refuted this argument,

and Plaintiffs' claims pursuant to § 1983 must be dismissed.

Furthermore, as discussed more fully in Defendants' Memorandum of Law, New York's system of judicial nominations has recently been scrutinized and approved by the Supreme Court of the United States in *New York State Bd. of Elections v Lopez Torres*, 552 US 196, 128 S Ct 791, 169 L Ed 2d 665 (2008). In *Lopez Torres*, the plaintiffs, who possessed the requisite standing as judicial candidates, claimed the process for nominating judges in New York violated their First Amendment rights. The Court after an extensive analysis of New York's judicial nominating process, held that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." *Id.* at 202. Simply stated, the Supreme Court found no constitutional violations in New York's judicial convention process. Plaintiffs' Opposition fails to even cite to *Lopez Torres*, let alone attempt to distinguish it from the instant matter. Accordingly, the Plaintiffs fail to state a cause of action and the Amended Verified Complaint should be dismissed in its entirety.

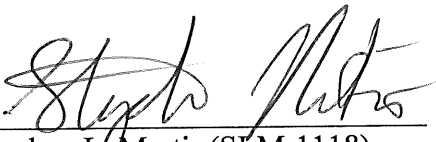
### **III. Plaintiffs' Failure To Oppose Defendants' Argument Is Deemed A Concession Of Such Argument And Abandonment Of The Claims**

Plaintiffs' claims should be deemed abandoned by this Court as Plaintiffs' Opposition utterly fails to address any of the arguments raised by the any of the Defendants in their Motions to Dismiss. "It is well-settled that the failure to oppose an argument raised in a motion to dismiss is deemed a concession of the argument and abandonment of the claims." *Ross v Port Chester Hous. Auth.*, 17-CV-4770 (NSR), 2019 WL 4738941, at \*7 (SDNY Sept. 27, 2019)(see also, the litany of cases cited in *Ross*). As demonstrated above, Plaintiff failed to address any of the arguments raised by the Defendants in their Motion to Dismiss. Accordingly, the Plaintiffs' claims should be deemed abandoned by this Court.

**CONCLUSION**

For the foregoing reasons, as well as the reasons set forth in their moving papers, Defendants, The Nassau County Republican Committee and The Nassau County Conservative Party, respectfully request that the Court issue an Order dismissing Plaintiffs' Amended Verified Complaint in its entirety, with prejudice, and granting such other and further relief as the Court may deem just and proper.

Dated: Mineola, New York  
April 30, 2021

By:   
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