**DISTRICT OF COLUMBIA**
**BOARD OF ELECTIONS**

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| James Harnett, Challenger | ) | Administrative Order #24-022 |
| v. | ) | Re: Challenge to Nominating Petition Submitted for Elector of President and Vice President of the United States |
| Robert Kennedy and, Nicole Shanahan, Candidates. | ) | |

## MEMORANDUM OPINION AND ORDER

This matter came before the District of Columbia Board of Elections ("the Board") on September 6, 2024. It is a challenge to the nominating petition submitted in connection with the candidacy of Robert Kennedy and Nicole Shanahan ("Candidate(s)") for the offices of President and Vice President of the United States, respectively. The challenge was filed by James Harnett ("the Challenger"), a registered voter in the District of Columbia, pursuant to D.C. Official Code § 1-1001.08(o)(1). Chairman Gary Thompson and Board members Karyn Greenfield and J.C. Boggs presided over the hearing. The Candidates were represented by attorney Paul Rossi on a *pro hac vice* basis. The Challenger appeared *pro se*. The Board's General Counsel was also present.

## BACKGROUND

### Prehearing Proceedings

On June 28, 2024, nominating petition forms were issued to Nick Brana, the Candidate's authorized agent for receiving and filing ballot access documents. The forms were issued as part

of the process that applies to including the names of the Candidates on the printed ballot for the 2024 General Election, and were to be used for gathering signatures from D.C. voters in support of such ballot access. The following caption is set forth at the very top of the forms:

DISTRICT OF COLUMBIA
NOMINATING PETITION of REGISTERED VOTERS
for ELECTOR of PRESIDENT and VICE PRESIDENT of the UNITED STATES in the
NOVEMBER 5, 2024 GENERAL ELECTION

Below that caption were fields for the names, state of residence and party, if any, of the Presidential and Vice Presidential candidates. Underneath those fields were fields for the names, addresses and voter registration numbers of three "CANDIDATES FOR ELECTORS." New York appeared on the form as the state of residence in the field for Candidate Kennedy. California was the state noted for Candidate Shanahan. The names of Peter Kevin Scaturro Jr., Sarah Louise Reynolds, and Mary Elizabeth Keane and District of Columbia addresses for each were listed in the fields for the three electors. Although the caption of the petition forms advised that it was for electors, below these fields was a note that provided that only the names of the Candidates would appear on the General Election ballot.

On August 7, 2024, the petition forms with the signatures gathered on behalf of the Candidates were submitted (collectively, the "Petition").

On August 10, 2024, the Petition was posted for public inspection for ten (10) days, as required by law.

On August 19, 2024, the Candidate challenged the Petition ("the Challenge"). The Challenge included a four-page printed narrative that argued at the outset that the Candidates were "ineligible to be elected … due to the 'dual residency clause' of Article II, Clause 1, Section 3 of the United States Constitution and D.C. Official Code §1-1001.08(g)(2) and D.C. Official Code §1-1001.08(g)(3)" and that the Candidates' presidential electors should be disqualified. The

narrative went on to explain that, on August 14, 2024, the Albany Supreme Court for New York had issued a decision finding that Candidate Kennedy's claim of residency in New York is a sham and that his residence is California and disqualifying him from New York's ballot. Page four of Mr. Harnett's narrative submission contended that the District of Columbia should accept the New Your court's decision and find that:

> (1) This presidential ticket is ineligible under the U.S. Constitution to be elected in the District of Columbia, and (2) that Candidate Kennedy supplied false statements to declare his candidacy in the District of Columbia (which were listed on all nominating petition sheets).

The narrative concludes that such findings would require that the Petition be declared invalid. At the end of the type-printed narrative was a hand-written "Narrative Addendum" that states:

> I hereby withdraw the part of my challenge with respect to my constitutional challenge. I maintain all of my other challenges (including the intentional deception of Candidate Kennedy's address) as part of this challenge.
>
> Please strike request for relief #1 from page four and maintain request for relief #2 from page four [of the narrative].

Bracketed and underlined material in original. Attached to the challenge submission was the New York court opinion.

The Candidate's agent was promptly notified of the Challenge via an email from the Board's Office of General Counsel ("OGC"). The notice also apprised the parties that a prehearing conference would be convened in the matter on September 4, 2024. On August 21, 2024, the OGC attorney assigned to the matter sent an email to the parties requesting that, by August 28, 2024, the Challenger identify any authority pertaining to the obligation of Presidential candidates to provide the Board with state of residency information, the standard for determining residency for District of Columbia purposes, and his asserted remedy of invalidating the Petition. The email requested that the Candidate respond to Challenger Harnett's position by September 3, 2024.

The Challenger timely responded to the OGC attorney's request. In his submission, the Challenger notes that the Board's regulations at 3 D.C.M.R. §1500.6 impose certain filing requirements on Presidential Candidates. He claims (at p. 1) that under those regulations, "presidential candidates are required to certify their state of residence and residential address[.]" The Challenger attached three Board forms to his response: 1) an Agent Affidavit: Authorization to Receive and File Ballot Access Documents and Materials form that had been completed by Candidate Kennedy ("Agent Affidavit") to authorize Mr. Brana to act as his agent; 2) a Receipt of Ballot Access form completed by Mr. Brana; and 3) a Receipt of Ballot Access form completed by Mr. Brana. In the candidate information section of each of these three forms, Candidate Kennedy was identified as the candidate, and a New York address was provided as the address for Candidate Kennedy. While acknowledging (at p. 5) that there is no regulation that requires that the petition form include the Candidates' states of residency, the Challenger asserts (at pp. 3-4) in his response that the necessity for disclosing the state of residence of the Candidates derives from the requirements surrounding Congress's certification of the electoral college results. He argues (at pp. 5-6) that, under the Full Faith and Credit Clause of the Constitution, the Board should be bound by the New York court's residency findings. Finally, with respect to the remedy, the Challenger notes that making false statements to a D.C. government entity is a criminal offense and could trigger civil fines, and that the Board has authority to invalidate the petition signatures associated with such false claims.[1]

Counsel for the Candidates timely responded. In their response, they argue that Candidate Kennedy is a domiciliary of New York for purposes of the Constitution's 12th Amendment and that the states cannot impose local ballot access rules to disqualify a Presidential candidate. The

[1] On August 30, 2024, the Challenger also submitted the New York Supreme Court Appellate Division's decision affirming the lower court finding that Candidate Kennedy's name should not appear on the ballot in that state.

Candidates also emphasize that the Challenger failed to identify either any D.C. Code section or regulation that expressly requires a presidential or vice presidential candidate to identify their state of residence or any authority for the proposition that the remedy for a misidentification of a Presidential candidate's state of residency is disqualification from the ballot. They argue that the Challenger's focus on the electoral college certification process is misplaced because the issue here is ballot access. In addition, the Candidates note that the Full Faith and Credit Clause is inapplicable because: 1) the Challenger is not seeking to disqualify them from the New York ballot; 2) the instant matter is not a collateral attack on the New York court finding; and 3) that, to rely on that Clause, the Challenger must plead and prove that the residency standard in New York is the same standard that must be imposed in D.C.

On September 4, 2024, the prehearing conference before OGC was convened.[2] The Challenger and counsel for the Candidate's campaign appeared. Both parties were given an opportunity to elaborate on their positions. Notably, the Challenger made clear that he was not arguing that a D.C. Code provision or regulation directly mandated the removal of the Candidates from the ballot; rather, his position was that the Board, in the exercise of its discretion over ballot access and in the interest of ballot integrity, could strike a candidate's name from the ballot. The OGC attorney assigned to the matter inquired of the Challenger whether, with respect to the Board's exercise of discretion over the ballot, he had any evidence of a petition signer who would not have signed the Candidates' Petition had they known that the New York courts would disagree with Candidate Kennedy's claim of New York residency, or who were otherwise misled into signing the Petition for reasons related to Candidate Kennedy's claim of New York residency. The

[2] 3 D.C.M.R. § 415.1 (General Counsel's conference authority).

Challenger acknowledged that he had no evidence that any Petition signatures were obtained as a result of the Petition's indication that Candidate Kennedy was a resident of New York.

Following the prehearing conference, the parties were formally notified that the case was set for a Board hearing on September 6, 2024.

**September 6, 2024 Board Hearing**

At the Board hearing, the parties reiterated their arguments. After hearing from the parties, the Board Chair asked the General Counsel for her recommendation. The General Counsel recommended that the Board deny the challenge and grant ballot access to the Candidates. The Chair then so moved. The motion was seconded and the Board voted unanimously to grant the Candidate ballot access.

## DISCUSSION

Chapter 10 (Elections), subchapter 1 (Regulation of Elections) provides that "[i]n the District of Columbia electors of President and Vice President of the United States . . . shall be elected as provided in this subchapter."[3] While the District's elections laws impose residency requirements for the electors of President and Vice President,[4] no D.C. law, much less any D.C. law that we are charged with administering, imposes a residency requirement for Presidential and Vice Presidential candidates. The silence of the D.C. Code with respect to any residency requirements for Presidential and Vice Presidential candidates is elucidated by *Kamins v. Board of Elections*, 324 A.2d 187 (D.C. 1974). There, the D.C. Court of Appeals explained that the

[3] D.C. Official Code §1-1001.01.

[4] D.C. Official Code §1-1001.08(g)(1) (requiring that each elector must be a D.C. registered voters and must have been a bona fide resident of the District for a period of 3 years immediately preceding the date of the presidential election).

placement of the Presidential and Vice Presidential candidates' names on the ballot is "to avoid confusion" and "[t]his is required even though under the Constitution it is the electors who elect the President and Vice President, and it is for the electors that the people actually vote."

Thus, our forms provide, for example, for attestations by those seeking the position of elector to swear that they have been "a bona fide resident of the District of Columbia for a period of three (3) years immediately preceding the date of the presidential election"[5] but do not contain similar attestations as to residency for the candidates that the electors will support. Notably, Presidential and Vice Presidential candidates are required to execute a Board form - the "Affidavit of Presidential and Vice Presidential Candidates" form - by which they represent generally that they meet the qualifications of office. That form does not require that the candidates provide their residential address, but rather requests only the addresses of their three electors (who, again by law, must be D.C. residents) and of their campaign committee. While the form does not define the qualifications of office and the District's laws and regulations do not establish qualifications for purposes of Presidential and Vice Presidential candidates, we have long posted on our website the qualifications of all elected offices and have indicated there that the qualifications are only those in the U.S. Constitution, Article 2, Section 1, that the President be at least 35 years of age and a natural born United States citizen and resident for fourteen (14) years.[6] By contrast, we have not identified in the list of office qualifications on our website that Presidential and Vice

[5] *See* the Board's Affidavit of Presidential Elector Candidate form.

[6] Specifically, the Presidential candidate qualification clause that we have relied upon for ballot access purpose (or the "natural born citizen clause," as it is commonly known), states that:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Presidential candidates must be from different states. Such a qualification depends on the meaning of language applicable by its plain terms to electors that is also in Article 2, Section 1, which provides that:

> [t]he Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an *Inhabitant* of the same State with themselves.

(Emphasis added).

This statutory and regulatory approach and our website guidance makes sense because issues of ballot access for national offices may not fall with the purview of the states or District of Columbia. For example, in *U.S. Term Limits, Inc., et al., v. Thornton et al.*,[7] the U.S. Supreme Court held that the states may not impose qualifications for offices of the United States Representative or United States senator beyond those set forth by the Constitution. Along these lines, in *Schaefer v. Townsend*,[8] a federal court struck down a state application of residency requirements on the office of U.S. Representative. Similar to the inhabitant provision for Presidential and Vice Presidential candidates, the Qualification Clause of the Constitution at issue in *Scheafer* states:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years and been seven Years a Citizen of the United States, and who shall not, when elected, be an *Inhabitant* of the State in which he shall be chosen.

The *Scheafer* court found that the state could not enforce a minimum 29-day residency requirement on candidates as that would be inconsistent with the Constitutional language of habitation "when … chosen."

[7] 514 U.S. 779 (1995).

[8] 215 F.3d 1031, 1034 (9th Cir. 2000).

Notably, in *Jones v. Bush*,[9] a federal court considered a challenge to the nomination of Vice President of Richard B. Cheney for the reason that he lived, allegedly, in the same state as Presidential Candidate George Bush. In interpreting the prohibition on electors voting for a President and Vice President who are "inhabitant[s] of the same state with themselves", the court relied on the intent of the Framers and stated that its inquiry "into the meaning of 'inhabitant' [was] informed by definitions of the term contained in dictionaries in use at the time the [language] was adopted and ratified." *Id*. at 719. The first such definition noted by the court was from a 1792 law dictionary's definition of "inhabitants" of a town or parish as "with respect to the public assessment, not only those who dwell in an house there, but also those who occupy lands within such town or parish, although they be dwelling elsewhere. But the word inhabitant doth not extend to lodgers, servants, or the like; but to householders only." *Id.* After considering dictionary guidance on the term, the court held, for the purposes of the Constitutional limitation that the electors not vote for a President and a Vice President who are inhabitants of the same state: "[A] person is an 'inhabitant' of a state, … if he (1) has a physical presence within that state and (2) intends that it be his place of habitation." *Id.* at 719-20.

Importantly, the foregoing cases instruct that the standard for determining whether a Presidential candidate inhabits the same state as his or her Vice Presidential candidate is based on the meaning of the term "inhabitant" as it was intended to be used in the Constitution and not on any state residency requirements. They also suggest that the proper forum for deciding such issues is the federal courts. This approach makes sense as a practical matter because to conclude otherwise would mean that there could be over fifty different standards for determining whether Presidential and Vice Presidential candidates run afoul of the inhabitant limitation.

[9] 122 F.Supp.2d 713 (N.D. Tex.), *aff'd*, 244 F.3d 134 (5th Cir. 2000), *cert. denied*, 531 U.S. 1032 (2001).

Against this background, we consider the Challenger's position. The Challenger argues that the finding by the New York court that Candidate Kennedy's claim of residency in that state was a sham requires that we invalidate the District of Columbia nominating petition for District electors on which Kennedy's name appeared along with the listing of New York as his state of residence. In reaching its decision, the New York court applied a New York law that requires that each page of a nominating petition set forth the address of the candidate's place of residence and state court precedent that required strict compliance with, and a narrow construction of, that requirement.[10] The court relied on the New York state law as to the definition of residence, namely, "that place where a person maintains a fixed, permanent, and *principal home* to which he [or she], wherever temporarily located, always intends to return." *Id.* at 25 (emphasis added). The Challenger claims that, under the Full Faith and Credit Clause of the Constitution, we must likewise apply the New York decision to invalidate the petition.

Unlike New York, however, there is no statutory requirement here that the Candidates' states of residence appear on the petition form. Therefore, we do not believe that notions of Full Faith and Credit authorize us to apply the New York decision to invalidate the Petition. Similarly, given its silence as to the residency of Presidential and Vice Presidential candidates, it is not possible to construe the D.C. Code as authorizing us to deny ballot access for the *sole* reason that a Presidential candidate has misrepresented his state of residency.

The Board does, however, have authority over whether the signatures on the nominating petition filed in support of the District of Columbia's three electors for President and Vice President should be deemed valid. Our general authority over the administration of elections empowers us to reject a nominating petition where its signatures are sufficiently infected with

[10] *Cartwright et al. v. Robert F. Kennedy, Jr., et al*., slip op. (N.Y. Sup.Ct. Albany, August 12, 2024) at 23.

fraud. Indeed, the courts have affirmed our decisions to reject all of the signatures on petition sheets where the circulators of such sheets engaged in sufficiently egregious activity that the validity of any signature on the sheet was called into doubt.[11] In *Citizens Against Legalized Gambling*, *supra,* where the circulators of petition sheets swore that they were registered voters when they were not, the court concluded that discounting the signatures gathered by these circulators would elevate form over substance and suggested that the remedy should be sanctioning the circulators. In *Williams*, 804 A.2d at 321, by contrast, all of the signatures gathered by certain circulators were discounted where there was "widespread pollution of the petition-circulating process."

Although this is a novel question, the only arguable legally cognizable claim appears to be whether our authority to preserve the integrity of the ballot access process allows us to invalidate the Petition because its signers were misled into signing based upon the representation that the Presidential Candidate resided in New York and was therefore eligible to run for the office at issue. There is, however, no evidence that Petition signers were actually misled by the inclusion of New York as Kennedy's state of residence on the Petition. To show actual deception warranting rejection of the Petition in its entirety, we believe that the Challenger would have to produce some minimal number of signers who are alleging that they would not have signed the Petition at the time they did had they known that a New York court was likely to find that Candidate Kennedy was not a resident of the state and could not run for President there (although he would still likely be eligible to run (as he is) in other states). The Challenger has not produced any such signer. Accordingly, assuming that our authority to find petition signatures to be invalid where they were

[11] *Citizens Committee for the D.C. Video Lottery Terminal Initiative v. D.C. Board of Elections & Ethics*, 860 A.2d 813 (D.C. 2004); *Williams v. D.C. Board of Elections & Ethics*, 804 A.2d 316, 321 (D.C. 2002). *See also Citizens Against Legalized Gambling v. D.C. Board of Elections & Ethics*, 501 F.Supp. 786, 790 (D.C.D.C. 1980) (noting that invalidating a petition is a possible remedy where the circulator failed to comply with laws).

fraudulently gathered extends to the misstatement of a Presidential candidate's state of residency, we do not believe that the Challenger carried his burden of demonstrating that the signature gathering process here was sufficiently deceptive to deny ballot access to the Candidates.

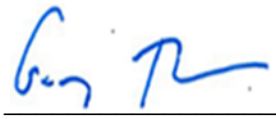
## CONCLUSION

The Board finds that the instant qualification challenge is insufficient to justify invalidating the Petition on grounds of fraud. Accordingly, it is hereby:

**ORDERED** that the names of Robert Kennedy and Nicole Shanahan shall appear on the 2024 General Election ballot.

The Board issues this written order today, which is consistent with our oral ruling rendered on September 6, 2024.

Date: September 7, 2024



Gary Thompson
Chairman
Board of Elections