Index No:
SHORT FORM ORDER

Index No.: 04268/2012

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOTION DATE: 8-13-12
ADJ. DATE: 9-6-12
MOT. SEQ: 001-MG;
002-MG;
003-MD;
004-MD.

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

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THOMAS J. SPOTA, as District Attorney of Suffolk County, New York, VINCENT F. DEMARCO, as Suffolk County Sheriff, and JUDITH A. PASCALE, as Suffolk County Clerk,

Plaintiffs,

-against-

COUNTY OF SUFFOLK,

Defendant.

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By Notice of Motion, the plaintiffs have made an application seeking summary judgment and declaring a local law unconstitutional, as well as an order denying a proposed intervenor's motion to be named as a party-defendant.

By Notice of Cross-Motion, the defendant County of Suffolk seeks summary judgment and an order declaring the local law to be constitutional and dismissing the plaintiffs' complaint.

It raises a number of affirmative defenses, but is silent as to the nomination of an intervenor.

By Notice of Motion, Peter Nichols, the proposed intervenor, seeks an order permitting him to be added to this action as a party-defendant. By Notice of Cross-Motion he also seeks an order denying the plaintiffs' motion for summary judgment and declaring the local law to be constitutional; he also raises a number of affirmative defenses.

By written application, the District Attorneys Association of the State of New York (hereinafter DAASNY) seeks permission to appear *amicus curiae* and to file a brief; it too, is silent as to intervention.

PROCEDURAL POSTURE

Initially, it should be noted that there is no dispute that a necessary preliminary predicate for this action - the absence of a factual dispute - has been satisfied. Stated otherwise, the central issue of this matter is a legal and not a factual argument. The undisputed facts are as follows:

THE PARTICIPANTS

Each of the plaintiffs is currently a publicly elected official of Suffolk County. The lead plaintiff, Thomas J. Spota, is in his third consecutive four-year term as Suffolk County District Attorney. His term is due to expire at the end of next year, December 31, 2013. The remaining two plaintiffs, Vincent F. De Marco and Judith A. Pascale, are, respectively, the Suffolk County Sheriff and the Suffolk County Clerk. Both are in their second terms. DeMarco's current term is due to expire at the end of next year (simultaneously with that of the District Attorney). Pascale's current term is due to expire at the end of the following year.

The plaintiffs have commenced this declaratory judgment action to challenge the validity of Local Law 27-1993 of the Laws of Suffolk County, which, as discussed below, purports to impose a 12 year term limit upon the elected offices currently held by each of the plaintiffs.[1] The crux of their cause of action is that the law - as applied to their individual public offices - violates State constitutional and statutory provisions.

The defendant is, as noted, the County of Suffolk, and is the initiator and now defender of the County's term limit law. As was indicated, it has taken no position regarding the intervention motion. As also is above-noted, in addition to a denial of the plaintiffs' various contentions, it pleads a number of affirmative defenses.

The proposed intervenor, Peter Nichols is a registered voter of Suffolk County. He purportedly voted in favor of the term limits law when it was placed upon the county-wide Suffolk ballot in 1993. With respect to his motion to intervene, he opposes the plaintiffs' application and does not believe the parties adequately represent his interest. Additionally, as explained below, he alleges that the plaintiffs De Marco and Pascale have no standing as to their claims, and, somewhat similarly, that Spota's cause of action is not yet ripe for judicial review.

Finally, the DAASNY is an association which represents the 62 elected District Attorneys of this state, the New York City Special Narcotics Prosecutor, as well as their assistants. As

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[1] As explained below, the law also embraces other elected positions within Suffolk County. This litigation, however, is not directed toward those other offices, and the plaintiffs specifically "affirmatively make no challenge whatsoever to the term limits imposed on the other County offices, since quite clearly those office do not represent constitutional officers under New York law and have nothing to do whatsoever with the argument advanced in the Complaint." Plaintiffs' Memorandum of Law, p.17.

indicated within its papers, among its purposes is to advance its members' interests via the filing of *amicus* briefs in courts so as to make such courts aware of the organization's views with respect to issues which might tend to impact on its members' functions. With respect to the matter at bar, its brief is solely concerned with the issue of a county setting term limits upon its District Attorney. It supports the position of the plaintiff Spota, but specifically "expresses no views and takes no position with respect to the argument on any of the other officeholders who are plaintiffs in this case." (Affirmation of Edward D. Saslaw, Esq. p.5, fn.1). Additionally, it does not address any other legal questions, *viz.*, intervention, ripeness, etc.

ISSUE PRESENTED

Plaintiffs argue that the Suffolk County Legislature's adoption of a local law which imposes terms limits upon their respective offices was invalid pursuant to the New York State Constitution and New York State County Law.

In pertinent parts, the Suffolk County Legislature's resolution for the law in question states:

> Section 17-1 of the SUFFOLK COUNTY CHARTER is hereby amended by the addition of a new paragraph (B) to read as follows:
>
> Section 17-1. Position established; election; term.
>
> A.) There shall be a Sheriff, who shall be elected from the county at large.
>
> His or her term of office shall be four (4) years from and including

the first day of January following his (sic) election.

B.) No person shall serve as County Sheriff for more than twelve (12) consecutive years.

Section 18-1 of the SUFFOLK COUNTY CHARTER is hereby amended by the addition of a new paragraph (B) to read as follows:

Section 18-1. Position established; election; term.

A.) There shall be a County Clerk, who shall be elected from the county at large. His or her term of office shall be four (4) years from and including the first day of January following his (sic) election.

B.) No person shall serve as County Clerk for more than twelve (12) consecutive years.

Section 19-1 of the SUFFOLK COUNTY CHARTER is hereby amended by the addition of a new paragraph (B) to read as follows:

Section 19-1. Position established; election; term; private practice prohibited.

A.) There shall be a District Attorney, who shall be elected from the county at large. He or she shall give his or her whole time to the duties of the office and shall not engage in the private practice of law. His or her term of office shall be four (4) years from and including the first day of January following his (sic) election.

B.) No person shall serve as District Attorney for more than twelve

(12) consecutive years.

The legislative intent which accompanied the Suffolk County Legislative resolution indicates it was based upon a finding and determination that there was "public dissatisfaction with elected officials holding office for extended periods of time [and it] has reached a fever pitch because of a public perception that elected officials are able to entrench themselves in public office at the taxpayers' expense." It further found the officials were "insulated and isolated from the needs and demands of their constituents." As support, it pointed to the similar referenda of various states and cities, as well as the 14 states which had at that time imposed term limits on their members of the United States Congress.[2] Additionally, and among other things, it alleged that in the absence of term limits "special interests are able to wield a greater influence on the governmental process" and there would be an incentive to perpetuate the *status quo.*[3]

The resolution was approved by the then-County Executive and thereafter submitted to the voters of Suffolk County as a proposition in the next general election. It prevailed, and the

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[2]At least two of those states' provisions were subsequently invalidated by Federal Courts. *See, U.S. Term Limits, Inc. v. Thorton, infra; Thorstead v. Gregoire, infra.* The year before the resolution, another state which was not included in the resolution had already had its provision similarly invalidated by its state's highest court. *Stumpf v. Lau,* 108 Nev. 826 (1992).

[3] At this juncture it is important to underscore two facts: First, none of the plaintiffs held their present (or any other) elected public office until years after the County's term limit legislation was crafted. Second, their present public offices are only three of the two dozen included in the legislation. Therefore, any inference that the allegations contained within the resolution's statement of intent were directed at any of them would be erroneous.

Equally important to note is that the moving papers do not contain any allegations that the concerns the legislature expressed at that time (*viz*, public dissatisfaction, insulation, *et cetera*,) are specifically applicable to any of the plaintiffs. Moreover, no other wrongdoing is alleged.

so-called "Charter Law to Form County Government and Restrict Special Interests by Limiting the Terms of Office of Elected County Officials" was adopted as Local Law 27-1993.

With respect to the District Attorney, the Constitution of the State of New York, Article XIII, §13(a) states: "In each county a district attorney shall be chosen by the electors once in every three or four year as the legislature shall direct." It further states, "Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his or her county of any provision of this article which may come to his or her knowledge, shall be removed from office by the governor . . . ."

As regards the Sheriff and County Clerk, Article XIII, §13(a) states: ". . . the sheriff and the clerk of each county shall be chosen by the electors once in every three or four years as the legislature shall direct."

New York State County Law § 400 states: "Officers; manner of selection; term; vacancies. 1) Elective. There shall be elected a sheriff, county clerk, district attorney and county treasurer. . . . Unless otherwise provided in this chapter, the term of office of each such officer shall continue to be three years, except that the terms of office of sheriff, county clerk and county treasurer and coroner shall be four years from and including the first day of January next succeeding his election . . . ."

New York State County Law § 400(1-a) states: "District attorney in counties outside of New York city. The term of the office of the district attorney of each county outside of New York city shall be for four years commencing on the first day of January following the general election for district attorney in each respective county."

Finally, New York State Municipal Home Rule Law Chapter 36-A, Article 2, § 10 (1) provides that "[i]n addition to powers granted in the constitution, the statute of local governments or in any other law, (I) every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government . . . . "

PRELIMINARY ISSUES

AMICUS CURIAE

As above indicated, in addition to the named parties' applications, there are two others: one for *amicus curiae* status by the DAASNY and the other for intervention by Peter Nichols.

With respect to the DAASNY's request for permission to submit a brief as *amicus curiae,* there are relatively few cases which address the issue, reportedly due at least in part because the nominal parties might often stipulate to conferring such status upon another. *Kruger v. Bloomberg*, 1 Misc 3d 192 (Sup Ct., NY County 2003). However, and although a discussion of such request is not often found in published decisions, there are some rules, as well as some guidelines.

As to its definition, *amicus curie,* commonly referred to as "friend of the court," has been described as "'one who, as a stander by, when a judge is in doubt or mistaken in a matter of law, may inform the court.'" *Id.* at 194 (citation omitted). As was noted in *Kruger*, the standards are provided by the Court of Appeals. Amended since they appeared in *Kruger,* those standards are included within McKinney's New York Rules of Court § 500.23 and provide that:

> Any nonparty other than the Attorney general seeking to file an amicus brief on an appeal, certified question or motion for leave to appeal must obtain permission by motion.
>
> (a) Motions for amicus curie relief. . . .
>
> (4) *Criteria*. Movant shall not present issues not raised before the courts below. A motion for amicus curiae relief shall demonstrate that:
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> > (i) the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;
> >
> > (ii) the amicus could identify law or arguments that might otherwise escape the Court's consideration; or
> >
> > (iii) the proposed amicus curiae brief otherwise would be of assistance to the Court.

Additionally, the rule of the Appellate Division, Second Department provides the method for seeking *amicus status, viz,* by a non-party, by motion on notice to each of the parties, and only with that court's permission. It also provides a caveat: in the absence of the court's order, oral argument is not permitted. *Id.* at § 670.11 (b).

As was noted in *Price v. NYC Bd. of Educ.*, 16 Misc 3d 543 (Sup. Ct. NY County 2007), such submissions are not a matter of right in the trial courts, and their acceptance or rejection is left to a court's discretion; in doing so, the court may adopt its own rules, those of another court, or by *ad hoc* determinations. Typically, an *amicus* brief is confined to issues of law, not fact. *Id.*

Indeed, since the proper purpose and function of such a brief,

> "is to advise the court of the law and the implication of a decision of the Court on the matter before it on other matters, the inclusion of factual material is almost always improper. Factual material submitted to a court by an *amicus* should not be subject to less scrutiny and contravention by opposing parties than factual material submitted by a party. Unless the Court makes the *amicus* a party, such is impossible when factual material is submitted by an *amicus*."

Id. at 553.

Price, supra, also underscores what is also equally inappropriate: an *amicus* which does no more than advise a court of the author's position and/or includes signed petitions so as to endeavor to sway the court from deciding an issue on something other than the facts and the law. Also improper is an *amicus* which merely repeats authority or arguments previously submitted; this is wasteful of a Court's time since a court must read the papers before the application can be determined.[4]

It has, however, also been held that where a motion for intervention has been denied, a court might still confer *amicus* status upon the would-be intervenor. *Kruger v. Bloomberg, supra.*

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[4] As was also noted in *Price, supra*, any so-called "*amicus*" who violates the rules is not a party to the litigation, and therefore might escape sanctions.

In view of the importance of this matter as well as the fact that it appears to be an issue of first impression, the undersigned will grant the DAASNY's *amicus* application. In so doing, the Court notes that the proposed intervenor has also annexed to his intervention application that association's 1982 *amicus* brief submitted in the case of *Harvey v. Finnick, infra*, which was subsequently decided by our Court of Appeals as a companion case to *Kelley v. McGee, infra*.[5]

INTERVENTION

Pursuant to CPLR §1012(a)(2), the proposed intervenor has made an application for permission to enter the litigation.

Before determining the application, it should be noted that by letter dated July 3, 2012, Nichols' attorney maintained that the Court "can not consider [his] opposition to the motion for summary judgment . . . until an order is granted and entered on intervenor status." In support, he cited *Brown v. Waryas*, 45 Misc 2d 77 (Sup Ct Dutchess Cty 1965). As a reading of that case demonstrates, the *Brown* court's determination relied upon *United Baking Co. v. Bakery & Confectionary Workers' Union, Local 221,* 257 AD 501 (3d Dept 1939).

After reviewing the letter, *Brown* and *United Bakery*, and although dehors the record, the Court had the parties as well as the proposed intervenor instructed that it would entertain all the

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[5]Purely as a parenthetical, the undersigned notes that their 1982 *amicus* brief, in addressing salaries of district attorneys, stated: "The Legislature also provides raises to encourage experienced judges to remain on the bench . . ." pg. 3. *Cf., Maron v. Silver*, 14 NY 3d 230, 264-65 (2010)(Smith, J., dissenting): "It is a depressing truth that some of our finest judges have left, or are thinking of leaving, their jobs because of the Legislature's failure to deal with the salary issue . . . ."

applications simultaneously. The reasons for that method are as follows:

First of all, proceeding in such a manner does no violence to either the *Brown* or *United Baking* case as both are readily distinguishable from the case at bar. For instance, the proposed intervenor of *Brown* submitted an identical answer to that of one of the parties. Moreover, *Brown's* underlying issue involved a proposal for a zoning ordinance, an event unlike the matter at bar which would appear to require a more expeditious resolution. As for *United Baking,* and as stated therein, it involved an "action predicated upon a contract between two other parties." 257 AD at 504. Its proposed intervenor, the State Labor Relations Board, was not a party to the contract. Also, the appellate court found the trial court capable of determining the controversy and that it was therefore unnecessary for the Board to "interfere." *Id.* at 505.

Additionally, the facts of this matter also appear to require deviation from the path suggested by the *Brown* decision. For example, it appears more appropriate to entertain the intervention motion while simultaneously permitting the proposed intervenor to respond to the central issue in the case—term limits—and to somewhat contemporaneously decide that issue as well as the intervention request. In so opining, the undersigned initially notes that it is Nichols' application which questions the zealousness of the County's anticipated defense to the plaintiffs' claim. Furthermore, and as noted below, the intervention statute, CPLR §1012, provides that intervention may be ordered when the representation of a person's interest "is or may be inadequate." Both Nichols' concern and the statute's mandate appear to require some preliminary measure of the adequacy of the representation. Beyond peradventure, that task can not be undertaken until all of the County's papers have been submitted. Yet to wait until a) issue

has been joined and, b) all the papers and responses have been submitted and, c) all have been reviewed and, d) their sufficiency determined, and only then decide the merits of the intervenor's application would be time consuming.[6]

Besides the cumbersome procedure, the *Brown* procedure is otherwise unattractive. For myriad practical reasons, so-called "election law cases" receive expedited determinations. *See, e.g., Suarez v. Sadowski,* 48 NY2d 620 (1979); *see, generally, Elec. L. § 16-102 (4).* While the matter at bar is perhaps not technically an "election law case," its focus is eligibility for election and therefore should merit similar considerations.[7]

Focusing, therefore, on the application to intervene, it begins with Nichols' Notice of Motion which claims CPLR §1012 (a)(2) "permits [him] an absolute right" to intervene. In support of his application he indicates that he is so entitled because, *inter alia*, he is a registered voter in the County of Suffolk, supported the law's passage, and will be affected if the law is removed. Moreover, as is referred-to above, he expresses concern that his interests are not properly protected by the County Attorney. Indeed, he is "especially concerned that the County Attorney, appointed by the County Executive, is the employee of a term-limited official, and is also representing all the term-limited legislators." (para. 17). Additionally, he is "concerned that the voters (sic) perception is the lawsuit will not be fully litigated." (para. 19). He has also

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[6]This is analogous to the dilemma with an *amicus curiae* brief discussed above—they must be read first before determining whether they are appropriate.

[7] See also the remarks at fn. 9, *infra.*

expressed his dismay with the County's choice of counsel.[8] In support of his position, he included a news article, a 1979 informal New York State Attorney General's opinion, and the DAASNY's above-noted 1982 *amicus curiae* brief.

Although only mentioned in a passing reference above, an amplified CPLR §1012(a)(2) provides for intervention as of right "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." In interpreting the statute, it has been held that "whether intervention is sought as a matter of right under CPLR § 1012(a), or as a matter of discretion under CPLR § 1013 is of little practical significance," and the "intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." *Perl v. Aspromonte Realty Corp.*, 143 AD2d 824, 825 (2d Dept 1988) (citations omitted). *See, also*, *Berkoski v. Bd. of Trustees of Inc. Village of Southampton*, 67 AD3d 840 (2d Dept 2009); *County of Westchester v. Department of Health of the State of N.Y.*, 229 AD2d 460 (2d Dept 1996). The rule offers some latitude, but by no means does it provide for completely unbridled discretion. *Compare, Vantage Petroleum, Bay Oil Co. v. Bd. of Assessment & Review, Town of Babylon*, 61 NY2d 695 (1984)(denied, despite potential impact upon proposed intervenor's tax base) *and, Bay State Heating & A.C. Co., v. Amer. Ins. Co.*, 78 AD2d 147 (4th Dept 1980)(granted, to avoid multiplicity of lawsuits) .

A reading of the proposed intervenor's submission shows that while he may be concerned and interested in the issue of term limits for elected officials, he fails to allege that his interest in

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[8] Additionally, he alleges legal defects purportedly fatal to the plaintiffs' application; those will be addressed below.

the instant matter is superior to, much less any different than, any other voter (or potential voter) in Suffolk County. Manifestly, any decision rendered in this matter will have the identical effect on him as it does on all the other voters within Suffolk County. As one of the countless members of that group, he is not in any distinct, exclusive, or unique position—nor has he demonstrated any reason why he should be. If the statute permitted him a right to intervene, presumably it is a right enjoyed by all. Therefore, standing alone, his status is clearly insufficient cause for his intervention. Indeed, as was stated elsewhere with respect to another large class, to wit, taxpayers: "Any other rule could result in allowing each taxpayer to intervene and voice his views which would lead to a most chaotic situation." (*Zara Contracting Co. v. City of Glen Cove*, 22 Misc 2d 279, 280 [Sup. Ct Nassau 1960]). Additionally, it would "create limitless horizons for intervention." *Horn Const. Co. v. Town of Hempstead*, 33 Misc 2d 381 at 383 (Sup Ct Nassau 1962) (citing *Zara, supra*).

Lastly, but also failing to support his application are his other claims regarding the alleged insufficiency of the County's defense. First of all, they are at odds with the age-old presumption in our law that public officers will act in good faith, and neither act contrary to their official duties nor omit to perform any required act. *See, e.g., Evans v. Berry*, 262 NY 61 (1933); *Shieffelin v. Goldsmith*, 253 NY 243 (1930); *In re Whitman*, 225 NY 1 (1918). Secondarily, he has submitted not a scintilla of a fact as support for his contentions. Thirdly, an objective review of the defense's presentation reveals it to be aggressive and professional, as well as a focused and robust examination of the issues as well as the facts. It was authored, parenthetically, by private, independent, "outside" counsel.

Accordingly, the motion to intervene is denied. However, the papers and their legal arguments will be accepted and treated as an *amicus* brief. *See, Kruger v. Bloomberg, supra.*

STANDING-MOOTNESS-RIPENESS

To begin with, it appears that throughout the various moving papers the issues of standing, mootness and ripeness have been used interchangeably and synonymously. The focus, however, is clearly the contention of the defendant County of Suffolk as well as the proposed intervenor that the action cannot go forward at this time because the present plaintiff District Attorney has not expressed an "interest" in running for a fourth term and because the plaintiffs Sheriff and County Clerk have not reached the statutory "term limit" as yet because they are still in their second four-year term.

The Court of Appeals has stated that a controversy is considered "live . . . where the rights of the parties will be directly affected by the determination and where judgment has an 'immediate consequence' for them." *Johnson v. Pataki*, 91 NY2d 214, 222 (1997) (citation omitted).

Furthermore, that court had previously indicated that,

> "In this court, the exception to the doctrine of mootness has been subject over the years to a variety of formulations. However, examination of the cases in which our court has found an exception to the doctrines discloses three common factors: (1) a likelihood of repetition, either between the parties or among other

> members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues."

Hearst Corp. v. Clyne, 50 NY2d 707, at 714-15 (1980).

Moreover, even what might otherwise at first blush be perceived as factual and/or legal mootness may not always result in such a finding. Indeed, although the issue before the *Hearst* panel - a lower court's previous closing of a courtroom during a criminal case's hearing - had been rendered resolved by subsequent guidelines, the Court of Appeals did note that:

> "We acknowledge, as we have before, the very substantial character of the interests represented by the petitioners in this proceeding. We also note that questions such as the one posed may occasionally escape review. It is for this reason that on occasion we have entertained appeals even where the issues in the particular controversy have been resolved."

Id. at 715.

In fact, a similar issue regarding courtroom closing had been before that court some eight years before. In addressing that appeal, the court noted that "[a]lthough the trial has rendered the appeal academic and moot, *the questions presented, particularly since they are likely to recur, are of sufficient importance and interest to justify our entertaining it." Oliver v. Postel*, 30 NY2d 171, 177 (1972)(citations omitted)(emphasis supplied).

Moreover, and quite instructive to the issue at bar is *Phelan v. City of Buffalo*, 54 AD2d

262 (4th Dept 1976). In addressing a durational residency requirement for election to a public office, that court unanimously held that the courts "should not refrain from deciding serious constitutional issues . . . where the controversy is of public importance and is 'of a character which is likely to recur . . . with respect to others'" *Id.* at 265-66 (citations omitted). Additionally, the *Phelan* panel indicated that its failure to determine the residency requirement for a public office would leave the municipality, potential candidates and voters "to speculate on the constitutionality" of the issue. *Id.* at 266.

With respect to standing, a party must show: "The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in the form traditionally capable of judicial resolution.'" *Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 772 (1991).

Under the guidance of those cases, it appears obvious that with respect to the District Attorney the controversy here is clearly "live" and has "an immediate consequence" for him.[9] As a third term District Attorney, it is appropriate that he know whether he may or may not run for re-election within the next year. Given that circumstance, a determination on this issue could not be more ripe. Also, any contention that he has no "interest" in seeking another term is

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[9] This observation is undisturbed by the allegation that he has yet to announce his candidacy. Indeed, that contention begs the question. To anyone with even a scintilla of knowledge of politics, it would be obvious that without a timely resolution of his eligibility for a fourth term, his ability to seek the nomination and/or launch and finance a campaign would be manifestly and unfairly hindered—if not doomed. Also, anyone acquainted with the judicial system recognizes that any trial court decision is subject to a proper but time-consuming and often protracted appellate review. *See, e.g., Thorsted v. Gregoire, infra.*

incompatible with his participation in this litigation.

While it is true that the Sheriff and the County Clerk are only "second termers," they are still harmed by the application of the law since they are currently the holders of offices that are directly effected by the application of the County's Local Law at this moment. Indeed, it is their personal and professional future which is in doubt. Moreover, as witnessed by the moving papers and the arguments of counsel, this case undeniably presents a constitutional question. Equally irrefutable is its importance to the public. In the event this matter were to remain unresolved, it is also likely that any or all three of the instant plaintiffs (or other similarly situated potential candidates impacted by the Local Law) would reinitiate this action. Finally, the issue at bar is novel and substantial, and important to resolve in a time frame that is meaningful to the parties; i.e., before it becomes moot and enters the realm of declaratory judgment actions that are "capable of repetition, yet evading review." *Rosario v. Rockefeller* 410 US 752, 756, fn.5 (1973); *see also*, *Phelan v. City of Buffalo*, *supra*.

Therefore, the arguments with respect to these claims and defenses are rejected.

TERM LIMITS

Although the precise issue of term limits as disputed within the four corners of the matter at bar is novel, it is not totally without precedent. Indeed, in the voluminous report of *U.S. Term Limits, Inc. v. Thorton*, 514 US 779 (1995), the Supreme Court gave an exhaustive examination to the issue of term limits and an amendment to the Arkansas Constitution which placed such limits on its members of the United States Congress.

As noted within the decision, the majority off-handedly rejected the contention that such a provision was no more that a mere "ballot access amendment" or a simple regulation of the "manner of elections." Instead, the majority found it to be a *qualification* for the office, a qualification which was in addition to those set forth and specified by the Constitution of the United States. As such, the Arkansas amendment was stricken because, as the case teaches, "[i]f the qualifications set forth in the text of the Constitution are to be changed, that text must be amended." *Id.* at 783. The decision also rejected the contention that the Constitution's qualifications were not fixed, but rather could be supplemented. In this regard, the majority's historical analysis indicated that the Framers' intent was to exclude other qualifications and, aware of the maxim and concept of *expressio unius exclusio alteri us*, "adopted the wording nonetheless." *Id.* at 793, fn. 9.

Additionally, the High Court noted that the issue of term limits, or "rotation," had fueled a debate among the Framers. As reported by *U.S. Term Limits*, such restrictions were considered by the Federalists as incompatible with the people's right to choose and,

> "Robert Livingston argued: '[t]he people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism.'" (citing 2 Elliot's Debates, 292-293).

Id. at 813-14

Of further interest is the majority's warning that allowing diverse qualifications among

the various States would invite a "patchwork" of qualifications, thereby undercutting the uniformity and national character the sought by the Framers. *Id.* at 822.

Citing more recent events, *U.S. Term Limits* reaffirmed and underscored its opinion in *Powell v. McCormack*, 395 US 486 (1969), where it had held that even the United States House of Representatives could not supplement those qualifications found in the Constitution so as to exclude an otherwise duly elected member.

As regards the Arkansas amendment reviewed by *U.S. Term Limits*, the opinion notes that "[c]onstitutional rights would be of little value if they could be . . . indirectly denied." 514 US at 829 (citation omitted). Moreover, it found that the amendment's sole purpose was to achieve a result which the Federal Constitution forbade: to prevent incumbents' re-election. It also rejected Justice Thomas' dissent's suggestion that the amendment "was designed merely to level the playing field" and found that contention to be "wholly unpersuasive" as "the sole purpose [of the Arkansas amendment] . . . was to limit the terms of elected officials . . . ." *Id.* at 836. Holding the amendment unconstitutional, the High Court found its likely effect would have been to be a handicap to "a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.*

Focusing now upon the instant matter and as a reading of the papers indicates, much of the dispute at bar surrounds whether the parties are "State" or "local" officers. However, as a reading of a number of cases demonstrates, none of those offices appears wedded to any category and the classification appears to be determined by the circumstances and the context. *Compare, Kelley v. McGee*, 57 NY2d 522 (1982)(District Attorney is no longer a "State officer" but a

"local officer") *with, Davis Constr. Corp. v. County of Suffolk*, 112 Misc 2d 652 (Sup Ct Suffolk 1982)(District Attorney is a "constitutional officer," a "local officer," and a "quasi-judicial officer"). *See, also, Blass v. Cuomo*, 168 AD2d 54 (2d Dept 1991)(County Clerk is a "quasi-State office"); *Twin City Service Station v. City of North Tonawanda*, 162 Misc 271 (Sup Ct Niagara 1937) (County Clerk is a "constitutional officer," a "State officer," and a "county officer").

With respect to state versus local versus county nomenclature, the question appears to pivot on the presence and weight of the State's interest or concern For example, *Kelley, supra*, found that District Attorneys were "local officers" and thereby subject to some local control. Notwithstanding that determination, however, it specifically held those controls were not without limitations, particularly in matters of State concern. The test it offered was gauging whether the matter was of "sufficient importance to the State generally to render it a proper matter of State[wide] legislation." *Id.* at 538. In the matter before it—District Attorneys' compensation—it found a State concern so as to allow the State to legislate on the issue. Conversely, the local county could not. Indeed, the *Kelley* panel held that the governing State law's purpose was to "maintain the security and independence of District Attorneys . . . ." *Id.* at 539 (citation omitted). In *Harvey v. Finnick*, 88 AD2d 40, 43 (4th Dept 1982) a companion case to and affirmed with *Kelley,* a unanimous Appellate Division endorsed a simple and succinctly written statement: "*No one disputes that the State has a significant interest in maintaining the integrity and effectiveness of district attorneys*." (emphasis supplied.)

Moreover, in *Carey v. Oswego County Legislature*, 91 AD2d 62 (3d Dept 1983) it was

unanimously held that *only* the Governor and *not* local legislators could fill a vacancy in the office of a District Attorney. In the *Carey* decision, the panel relied upon *Kelley, supra*, and further opined that: "There can be little doubt that a statute governing the filling of a vacancy in the office of District Attorney *promotes [the State's] concern to the same if not an even greater degree than one fixing minimum salary requirements*." *Id.* at 265 (emphasis supplied).

Both *Kelley* and *Carey* were followed in *Blass v. Cuomo, supra,* where it was held that the authority to fill a vacancy in the position of County Clerk of Suffolk County was vested in the Governor pursuant to the State County Law § 440 (7).[10] As such, the Governor's power to appoint a replacement took precedence over the Suffolk County Legislature's power to appoint an interim replacement purportedly authorized by the Suffolk County Charter.

Furthermore, and although *Kelley* specifically held that the "precise question" before it was the compensation issue, it did include in its analysis that "District Attorneys are to be chosen by the electors one in every three or four years *as the Legislature shall direct*." 57 NY2d at 536, fn 11 (citing *NY Const. Art. XIII*)(emphasis supplied).

With respect to any authority vested in a county by the "Home Rule" provision of Article IX of the State Constitution, that also offers no support for term limiting the specific offices at bar. For example, even though *Kelley, supra*, acknowledged a county's home rule powers to be doubtlessly broad and generous, it also recognized that its grant is not without boundaries. As noted, when applied to the competition between the State's interest in district attorneys' salaries

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[10] County Law § 440 (7) provides in pertinent part: "Filling of vacancies. Except as hereinafter provided, a vacancy in an elective county office, shall be filled by the governor by appointment and for the office of sheriff with the advice and consent of the senate if in session."

versus that of a county, the former trumped the latter. Stated otherwise, "in areas of State-wide interest, the [State] Legislature is free to act without being restricted by the municipal home rule provisions of the State Constitution, and . . . the home rule powers will not be implicated even where the resulting legislation affects local concerns." *Carey v. Oswego County Legislature, supra,* at 64-65 (citing *Kelley v. McGee, supra*, at 538). Moreover, in *Enders v. Rossi*, 45 AD2d 447 (4th Dept), *aff'd*, 34 NY2d 966 (1974), while discussing the authority for home rule, the unanimous panel specifically stated that it found "no indication of any intent in the Constitution or in the legislative action thereunder to permit local county governments to establish *disparate,* unbridled terms in the offices of sheriff, county clerk or district attorney." *Id.* at 449 (emphasis supplied).

SUMMARY

In general and to summarize, the "black-letter" and case law support a number of inescapable conclusions. First and foremost, term limits are not *per se* illegal. Simultaneously, the concept is in no way inherently immoral or unjust. To the contrary, for generations they have been accepted as a part of the political process. *See*, *U.S. Const., Amendment XXII* (President of the United States limited to two terms).

Moreover, a common thread among the cases that deal with the concept or related issues is that their focus is not on the product, but the process. Where the underlying legislation followed the proper procedural path, the result was sustained; conversely, the opposite is found where the legislation went elsewhere. Stated otherwise, the means must be justified before the

end.

With respect to "home rule" provisions for term limits, there is some latitude offered to local governmental entities. That authority is not, however, unfettered. As germane to the matter at bar, those margins may be exceeded when a local government intrudes into an area of State concern; when the matter is of a more significant State concern, legislative authority is retained by the State. The State's retention of control over filling certain geographically "local" vacancies as well as regulating compensation for certain similarly situated officials supports that conclusion. Also, the State may specifically delegate some of its authority to local government in certain matters, *viz,* abolishment of certain offices.

These conclusions do not appear to contradict existing decisional law. For example, *Westchester County Civ. Serv. Empls. Assn. v. Del Bello*, 70 AD2d 604, *rev'd for the reasons stated in its dissent*, 47 NY2d 886 (1979), turned on the *specific*, unambiguous home rule grant of power to local authorities to "abolish" the office of the county sheriff. As regards the issue at bar, any such specificity is absent. Moreover, it should be observed that the abolishment of an office - the inanimate creation of a statute - is distinct from precluding an otherwise qualified candidate from an existing office.

Similarly not controlling is *Roth v. Cuevas*, 158 Misc 2d 218, *aff'd*, 197 AD2d 369 (1st Dept 1993). The central issue in that case was term limits placed upon the New York City Mayor, Public Advocate, Comptroller, Borough Presidents, and members of the City Council. While it upheld the local legislation, absent from that decision or discussion was any mention of any of the offices at bar. Notwithstanding that the case is not on a l fours with the instant matter,

the case did state that: "The term limit legislation proposed [there] would affect New York City public officers only. The State has no paramount interest in term limits placed on those public officers and it is not a matter, which to a substantial degree is a matter of State-wide concern." 158 Misc 2d at 245. As underscored from the analysis above, however, that interest is relevant as regards the offices at bar.[11]

Also confined to its facts should be *Golden v. NYC Council*, 305 AD2d 598 (2d Dept 2003) which dealt with City Council members' term limits and amending a voter-initiated referendum without referendum.[12]

Additionally, there is no dispute that there is a presumption of constitutionality affixed to local laws, a presumption which is weighty and cloaks such legislation with formidable protection. *See, e.g., Amsterdam Brush Co. v. City of Amsterdam,* 105 AD2d 881 (3d Dept 1984); *Statutes § 150 subd. c.* That protection, although solidly ingrained in our law, is not, however, considered invulnerable nor the rule sacrosanct. *See, e.g., F.T.B. Corp. v. Goodman,* 300 NY 140 (1949); *Tyner v. City of Buffalo*, 152 AD2d 978 (4th Dept 1989); *Zumbo v. Town of Farmington,* 60 AD2d 350 (4th Dept 1978). In the matter at bar, "there is a substantial degree of

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[11] Moreover, *Roth* was decided before *U.S. Term Limits, Inc. v. Thorton, supra.* Under the light of that decision, as well as subsequent events (i.e., the re-re-election of New York City's Mayor) *Roth's* precedential value lends itself subject to debate.

[12] Similarly unpersuasive and of questionable value to the defense are the two as yet unofficially reported cases provided by the proposed intervenor and annexed to his attorney's letter dated August 13, 2012. Clearly, they are interpretations of each respective State's law. Moreover, *In re O'Connor v. Mallory*, ___ Nev. ____ (decided August 9, 2012) invalidated legislation term limiting a District Attorney. *Tell v. Broward County*, ___ Fla. ___ (decided May 10, 2012) dealt with a county commissioner.

State interest in the subject matter of the legislation" (*Radich v. Council of the City of Lackawanna*, 93 AD2d 559, 566 [4th Dept 1983]); as such, the local concern is not determinative and must yield to the State. As regards the issue at bar and as demonstrated above, the State clearly possesses the controlling interest, and in the opinion of the undersigned, that interest and legislative power unarguably supercede that of Suffolk County. As such, the presumption is also overcome.

Lastly, any argument that Suffolk County (or any county) is empowered to set term limits for the office holders in question because they are solely and exclusively elected by the voters of that county is faulty. Indeed, upon examination and carried to its logical conclusion, any member of the State Senate or Assembly whose district is solely within a county's boundaries as well as all members of a county's judiciary (i.e., County, Family, and Surrogates Court) would be susceptible to the rule.[13]

DETERMINATION

As applied to the instant matter, these cases, statutes, analysis and conclusions support a number of findings.

First of all, there can be no dispute that term limits are qualifications for an elected office. That issue has been resolved. They have been succinctly, clearly, and simply so-labeled by no less than our Nation's highest judicial authority.

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[13] By extension, and but for *U.S. Term Limits, Inc. v. Thornton, supra,* so would even member's of the United States Congress whose district did not extend beyond a county's borders (i.e., eastern Suffolk County's 1st C.D.).

Secondarily, with respect to the elected offices at bar, this State has established the qualifications. That is appropriate, as clearly the State's interest in those offices is paramount to that of a county, local, or other subdivision. That superceding interest, as indicated, not only controls with respect to the filling of vacancies and compensation, but is underscored by the language of the Constitution which prescribes their election "as the legislature shall direct." Additionally, and in accordance with that Constitutional provision, the State County Law provides for their "manner of selection; term; [and] vacancies." Simultaneously, the Municipal Home Rule Law's grant of power does not include authority for a local government to make determinations that are inconsistent with State law or other matters of concern to the State. Lastly, totally absent from any of this black-letter law is any expressed or implied provision for local authorities' intervention into this area or supplementation of the existing legislation. That absence, coupled with the maxim *expressio unius exclusio alterius* precludes any manipulation by any other entity.[14]

Without reservation and without any doubt, it is, therefore, the opinion of the undersigned that the plaintiffs have demonstrated the merits of their cause of action. Conversely, the defense's contentions are insufficient, and the various affirmative defenses have either not been demonstrated or are otherwise unsatisfactory.

In so opining, this Court specifically finds that it is beyond the power of a county to restrict the number of times that such county's district attorney, sheriff and/or clerk may run for

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[14] Beyond peradventure, the members of the Legislature, much like the Framers so many years before, were aware of the concept and consequences of *expressio unius exclusio alterius*.

office; under our existing law, the authority to promulgate such additional qualifications is solely vested with and retained by the State. This finding, however, is specifically confined and limited to the three (3) offices indicated.

Lastly, it should be underscored that this determination is neither colored nor clouded by any opinion regarding term limits and in no way passes on any such properly enacted legislation's possible merits or faults. The sole and exclusive focus of this decision is the mechanism which produced the term limits placed upon the plaintiffs' offices. That, and that alone, is the singular issue upon which this decision pivots, and the resulting opinion by the undersigned that the vehicle selected was improper. Indeed, in this regard, the sage observation of the United States Supreme Court bears repetition:

> "Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. It is not our province to resolve this longstanding debate."

U.S. Terms Limits, Inc. v. Thorton, 514 US 779 at 837 (1995).

Moreover, and as was so eloquently stated by no less than Chief Justice Roberts in the Supreme Court's recent opinion on the Patient Protection and Affordable Care Act:

> "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to

> make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if people disagree with them."

Nat'l Fed. of Ind. Business v. Sebelius, 567 US ___, 132 S.Ct. 2566, at 2580 (2012).

It is, therefore,

ORDERED that the plaintiffs' motion for summary judgment is granted, as is the plaintiffs' motion denying the proposed intervenor's motion to be named as a party-defendant. And it is further,

ORDERED that the defendant's motions for summary judgment and dismissal of the plaintiff's complaint are denied in all respects. And it is further,

ORDERED that the motion to intervene is denied, but on the Court's own motion, granted to the extent that the movant shall be deemed *amicus curiae*; the proposed intervenor's motion for summary judgment is denied in its entirety. And it is further,

ORDERED that the DAASNY's application to appear as *amicus curiae* is granted. And it is further,

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§ 2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

The foregoing constitutes the decision and order of the Court.

Settle judgment on notice.

In determining this application the Court has received and reviewed the following:

1) Plaintiffs' Notice of Motion and supporting papers dated May 31, 2012, (pages numbered 1- 5);

2) Defendant's Notice of Cross Motion and supporting papers dated July 28, 2012 as well as Reply Affirmation and supporting papers dated September 5, 2012 (pages numbered 6-13);

3) Peter Nichols' Notice of Motion to Intervene and supporting papers dated April 16, 2012, as well as Notice of Cross Motion for Summary Judgment and supporting papers, dated July 18, 2012, as well as letters dated July 3, 2012 (including the cases annexed thereto), and August 13, 2012 (including the two [2] cases annexed thereto)(pages numbered 14-20);

4) Application of DAASNY to appear *amicus curiae* and supporting papers dated July 16, 2012 (pages numbered 21-22).

Dated: 9/25/12
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

FINAL DISPOSITION

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