SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

CLAUDIA TENNEY,	:	
Petitioner,	:	INDEX NO. EFC-2020-1376 (Justice DelConte)
-against-	:	
OSWEGO COUNTY BOARD OF ELECTIONS, et al.,	:	MEMORANDUM OF RESPONDENT ANTHONY BRINDISI IN SUPPORT OF PROPOSED ORDER TO SHOW CAUSE
Respondents.	:	
For an Order, etc.	:	

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT REPRESENTATIVE ANTHONY BRINDISI'S PROPOSED ORDER TO SHOW CAUSE

Respondent Representative Anthony Brindisi ("Petitioner Brindisi") submits this memorandum supporting his Proposed Order to Show Cause under CPLR 2214(d), which Petitioner Brindisi files pursuant to this Court's Notice directing the Parties to file "proposed orders to show cause and supporting papers, returnable Monday, December 7, 2020 at 1:00 p.m. . . . on or before 4:00 p.m. on Wednesday, December 2, 2020." Docket No. 70, EFC-2020-1376 (the "Letter Order").

I. Introduction

The Parties do not dispute that some of the respondent county boards of election (each a "Board" and collectively the "Boards") failed to abide by certain requirements of New York law and this Court's November 10 Order during the canvass of absentee and affidavit ballots cast in the November 3 race to represent New York's twenty-second congressional district in the United States House of Representatives in the 117th Congress. *See, e.g.*, Tr. at 220:8-10; *id.* at 225:15-21.[1] Specifically, at least some Boards did not make a proper record on the ballot or the ballot envelope of the "objections . . . made," including but not limited to when such objections were made, who made them, on what basis, and regarding which ballots. *Id.* at 225:16-20. Rather, Boards used a variety of other recordkeeping practices—such as "sticky notes," spreadsheets, or labeled stacks—to record objections and the Boards' resolution of those objections. As the Court has recognized, these shortcomings make the Court's task of adjudicating disputes over Boards' decisions to count or to refuse to count certain ballots more difficult in at least two ways.

First, the absence of a clear notation on a ballot or ballot envelope describing an objection made to such ballot or ballot envelope and the relevant Board's resolution of such objection makes it difficult for the Court to quickly determine what ballots are in dispute, the nature of the dispute, and how to rule on the Boards' determinations. Second, for a much smaller group of ballots, at least one Board's recordkeeping procedures made it impossible to determine whether a challenged ballot at issue had already been canvassed by the Board, precluding the Court from being able to direct the Board to adjust the tally based on the record currently before the Court. In response to these issues, the Court ordered the parties to propose an appropriate remedy in the form of an Order to Show Cause.

State law affords the Court the power to direct a recanvass, but this is not the only remedy available to the Court: in addition, the Court may order the correction of an error, or the

performance of any duty imposed by law upon the Boards. As frustrating as the Boards' recordkeeping shortcomings are, a full recanvass is unnecessary to remedy the record to afford the parties an opportunity for meaningful judicial review. Instead, as detailed below, the Court should exercise its discretion to order the Boards to remedy the specific recordkeeping issues identified during the Court's evidentiary hearing, to correct errors in the canvassing record. Once these discrete errors are specifically corrected, the Court will be able to resume its review and adjudication of contested ballots pursuant to Election Law § 16-106(4). In addition, a full recanvass would be inequitable and against the public interest. The delay caused by a full recanvass would make it likely that citizens of the district would not be represented in the House at the start of the 117th Congress. Furthermore, a full recanvass would allow campaigns to expand the scope of their objections beyond what they validly preserved during the canvass, a result inconsistent with the statutory framework for judicial review.

II. Statutory Framework

New York law specifies certain procedures to facilitate the judicial review of ballots cast in an election. Under New York Election Law Section 16-106, a court has subject matter jurisdiction to review "[t]he casting or canvassing or refusal to cast challenged ballots . . . absentee . . . and ballots voted in affidavit envelopes[.]" N.Y. Elec. Law § 16-106(1); *Alessio v. Carey*, 10 N.Y.3d 751, 753, 883 N.E.2d 352, 353 (N.Y. 2008). A ballot may "be the subject of a judicial challenge" only if an "objection is lodged to the [board of election's] decision to canvass or refuse to canvass a particular ballot during the canvass[,]" *Stewart v. Chautauqua Cnty. Bd. of Elections*, 894 N.Y.S.2d 249, 253 (N.Y. App. Div. 2010). Section 16-106 does not require proof of an objection in any specific form. *Cf. In re Baker*, 213 N.Y.S. 524, 526 (Sup. Ct. Oneida Cty. 1925) (stating court has jurisdiction over challenged votes even though statement of canvass listed no void or challenged ballots and no challenge sheets were produced where evidence from witnesses

established that votes were challenged). It is the *objection* that prevents waiver of the ability to seek review, not the form in which it was recorded by the Boards.

New York law provides procedures that Boards are directed to follow to facilitate objections to a Board's decision to canvass or refuse to canvass a ballot. Those procedures vary somewhat depending on whether they involve (1) objections to the counting of ballots themselves; (2) objections to the canvassing of absentee, military, special federal and special presidential voters' ballot envelopes; or (3) objections to the canvassing of affidavit ballot envelopes. The procedures were supplemented by the Court's November 10 Order, as set forth below.

Objections to the counting of ballots: For objections to the counting of a ballot based on face of the ballot, as opposed to the contents of an affidavit or absentee ballot envelope, Election Law Section 9-114(1) contains specific guidance. A board must, after ruling on the objection, "write in ink *upon the back of the ballot* a memorandum of the ruling and objection." Election Law § 9-114(1) (emphasis added). Section 9-114(1) further provides that, "[t]he memorandum of the ruling shall be in the words 'Counted void', or 'Counted blank', or 'Counted for (naming the candidate or candidates or the presidential ticket)'" and that "[t]he memorandum of the objection shall be in the words 'Objected to', followed by a brief statement of the nature of the objection, the name and address of the challenger and the signature of the chair or inspector."

Objections to the canvassing of absentee, military, special federal, and special presidential voters' ballot envelopes: For objections to canvassing these types of ballots based upon the voter's eligibility to cast such a ballot or whether the signature on the voter's ballot envelope corresponds to the signature on file with the Board, Election Law Section 8-506 contains specific guidance. It directs the board to "endorse upon the envelope the nature of the challenge," record the disposition of the challenge (i.e. sustained or not sustained) and sign the endorsement. The Court's November

10 Order required additional procedures in order to preserve the opportunity for meaningful judicial review of ballot envelopes for which an objection was interposed but not sustained by the Board (or on which the Board split). Specifically, the November 10 Order required that, "if a Board of Elections does not sustain an objection to an envelope containing a ballot, then that Board of Elections shall: (1) open each such envelope and make a photocopy of the ballot inside before canvassing that ballot, without revealing how the votes on the ballot were cast; (2) place the photocopy of that ballot into the envelope, and reseal the envelope; (3) endorse the original mailing envelope with a minimal notation sufficient to memorialize that an objection was not sustained, the ballot was canvassed, a photocopy of the ballot was inserted in the envelope, and the envelope was resealed pursuant to Court Order; (4) canvass the original ballot; and (5) secure and preserve the envelope and enclosed photocopy until further order of this Court."

Objections to the canvassing of affidavit ballot envelopes: For objections to affidavit ballots, New York law provides less specific guidance on the *method* for recording an objection, but it is clear that Boards must memorialize objections to preserve a record for review. Election Law Section 8-506, by its plain terms, applies to "absentee, military, special federal and special presidential voters' ballot envelopes[,]" but does not mention affidavit ballots. And although Election Law Section 9-209, which sets forth procedures for the canvassing of affidavit ballots, clearly contemplates that watchers can object both to the counting and the failure to count affidavit ballots, it does not set out a specific method by which the Board must memorialize such objections and the Board's ruling. The Court's November 10 Order partially fills this gap by providing clear instructions if a Board "*does not sustain an objection* to an envelope containing a ballot" and the ballot is therefore set to be counted: it requires Boards to photocopy the ballot before it is counted and memorialize the objection on the envelope. But neither statute nor the Court's November 10

Order provides a specific procedure if the Board declines to count an affidavit ballot at all, and a party objects to the Board's action. Despite this gap, Boards plainly must take some action to adequately preserve the fact of such objections to afford meaningful judicial review. Indeed, there is no question that each Board is under a legal obligation to adopt and follow a procedure for memorializing such objections in some clear and uniform manner. For example, 9 N.Y.C.R.R. § 6210.12 requires every county board to adopt general procedures for ballot counting and "the challenge process", including "audit trails and documentation." The necessity for procedures were implicit in the Court's November 10 Order, which required Boards to memorialize objections to affidavit ballot envelopes that were eventually canvassed on the envelope itself.

III. This Court has broad discretion to direct the Boards to make targeted corrections to the canvass, including those corrections described above.

Although Section 16-106(4) allows this Court to order a full recanvass, it does not require the Court to do so. Election Law § 16-106(4) provides: "The court may direct a recanvass *or the correction of an error, or the performance of any duty imposed by law on such a state, county, city, town or village board of inspectors, or canvassers*." (emphasis added). Here, a sweeping order requiring a full recanvass is unnecessary to remedy the Boards' specific recordkeeping deficiencies identified during the November 23 and 24 evidentiary hearing. Rather, the Court has discretion to craft a less invasive and more particularized remedy, directing the Boards to correct specific deficiencies, errors, and gaps in knowledge, in order to prepare an accurate record for this Court's review. *See, e.g.*, *Di Benio v. Panaro*, 1962, 34 Misc.2d 814, 230 N.Y.S.2d 642 (describing the court's "plenary powers" regarding election petitions and, if errors are discovered, "to direct a correction of canvass accordingly"); *Montalbo v. Westall*, 1961, 31 Misc.2d 1020, 222 N.Y.S.2d 497 (describing the broad discretion of the Supreme Court to order ballots "recounted, and recanvassed and that tally thereof be reported to the court."); *Albertson v. Morgan*, 1944, 49

N.Y.S.2d 454 (explaining the "plenary power of court," which "empowered court to call for opening of sealed envelopes containing ballots challenged and claimed to be void."). The more targeted approach proposed by Petitioner Brindisi below is well within the Court's broad authority to "direct . . . the correction of an error" and to "direct . . . the performance of any duty imposed by law on such a state, county, city, town or village board of inspectors, or canvassers." Election Law § 16-106(4).

IV. The Court should order the Boards to remedy the specific deficiencies in recordkeeping identified during the evidentiary hearing.

Each of the deficiencies identified during the evidentiary hearing call for discrete and manageable remedies and solutions, all of which are well within this Court's broad discretion and authority to implement.

Issue One: The Boards did not properly memorialize objections in writing on ballots and/or ballot envelopes per Election Law § 9-114(1) and the November 10 Order.

Testimony presented to the Court during the evidentiary hearing demonstrated that the eight Boards did not clearly and consistently memorialize objections in writing directly onto contested ballots or envelopes as required under New York law and the Court's November 10 Order. As the testimony demonstrated, Boards used a variety of other methods to memorialize objections, including placing "sticky notes" on ballots or ballot envelopes, arranging ballots or ballot envelopes into stacks that shared a common disposition, or recording objections and dispositions in a separate document (such as a spreadsheet) that corresponded back to individual ballots or ballot envelopes. The net result of these methods is a record of objections that is intelligible to the Boards themselves, but which is not immediately apparent to the Court examining the ballots or ballot envelopes for the first time, particularly where, as here, the Court

must perform the examination outside the physical presence of the Board members due to COVID restrictions.

For these ballots, the Court should order each Board to retrieve their ballots and ballot envelopes and, in a public hearing with watchers present, translate their current record of objections—be they "sticky notes," spreadsheets, or stacks—into a written record of the objection and disposition written on the back of the ballot or on the ballot envelope itself. Specifically, the Boards should be ordered to, on the contested ballot or envelope itself, indicate the Board's disposition of the ballot (i.e., whether such ballot was "Counted" or "Not Counted") and include a written memorandum of the objection beginning with the words "Objected to." *See e.g.*, Election Law § 9-114(1); *id.* at § 8-506; 9 N.Y.C.R.R. § 6210.12; November 10 Order. To avoid any further confusion, the Court should order the same practice of memorializing all objections to all ballots and both absentee *and* affidavit ballot envelopes.

Issue Two: **Some Boards did not properly preserve a record of objections.**

Testimony presented to the Court during the evidentiary hearing demonstrated that at least one Board may have failed to properly *preserve* a record of objections made to the refusal to count certain ballots. Specifically, undisputed testimony during the evidentiary hearing demonstrated that the Brindisi Campaign, following the Oneida Board's instructions for lodging objections, objected to the Oneida Board's refusal to count approximately 400 affidavit ballots. *See* Tr. 358:1-12, 359:9-16, 366:23-367:7, 368:8-370:15. The Oneida Board did not record the objection on each affidavit ballot envelope; instead, the Oneida Board maintained the objected-to affidavit ballots in stacks bundled together with rubber bands and sticky notes and stored in a specific box placed in a secure room and subsequently transported to the Court. *Id.* at 364:6-22, 370:16-371:14. However, upon preliminary examination by the parties and the Court of the materials transported to the Court

by the Oneida Board, it is not clear that the objected-to affidavit ballots remain bundled together with sticky notes. *Id.* at 372:17-375:10.

As with the ballots discussed in Issue One above, the Court should order the Oneida Board to retrieve these affidavit ballot envelopes and create a written record of the objection and disposition of each of these objected-to affidavit ballot envelopes in writing on the ballot envelope itself. If the Oneida Board cannot determine which affidavit ballots the Brindisi Campaign objected based upon the arrangement of the affidavit ballots in the Board's boxes, the Oneida Board should so inform the Court. The Court should then issue findings of fact, based on the testimony and exhibits entered into evidence during the November 24 hearing,[2] regarding the uncounted affidavit ballots to which Brindisi Campaign objected, and order the Oneida Board to memorialize those objections by marking all affected ballots.

To the extent any similar issue arises between the candidates and any other Board regarding whether or not a Board preserved a record of an objection interposed by a candidate during the original canvass, the Court should utilize a similar procedure: the Court should issue findings of fact based on testimony and exhibits presented during the evidentiary hearing and, to the extent needed, the Parties should proffer additional evidence of their objections for the Court's review so the Court can make additional limited findings of fact as to which ballots the Parties properly lodged an objection.

Issue Three: **Certain ballots set aside for court review lack a clear record of whether they were canvassed**

Testimony presented to the Court during the evidentiary hearing demonstrated that at least one Board's recordkeeping practices made it impossible to determine whether certain challenged

[2] *See, e.g.*, ON-40 (Brindisi campaign watcher's list of objected-to affidavit ballot envelopes); ON-41 (same); Tr. at 302-332, 335-54 (testimony regarding same).

ballots had already been canvassed by the Board. The testimony showed that the Oneida Board marked ballots to which an objection had been interposed with a sticky note that indicated the Board's decision whether to count the ballot. However, for a subset of those ballots, the sticky note became separated from the associated ballot. As the Court noted, the Commissioners for the Oneida County Board testified "it was simply not possible to know whether some of the ballots [or envelopes] before this court were canvassed or not," and therefore "it was simply not possible [for the Court] to know whether some of the ballots . . . were canvassed," or to "direct the [Boards] on how to adjust the tally." Tr. 218:21-25; *see also id.* at 84-100; *id.* at 109:17-23.

For these ballots, the Court should order the Oneida Board to undertake a straightforward procedure to determine whether the objected-to ballot was in fact counted.. If an objected-to ballot lacks a clear record of whether the ballot was counted, the Oneida Board should, in a public hearing with watchers present, utilize the electronically stored copies of ballots from that ballot's election district (which are scanned and retained by the County's automatic tabulation machine) to determine whether the objected-to ballot was among the ballots counted during the canvass.[3] The Board should compare the objected-to ballot with the electronic images of ballots scanned and retained by the Board's automatic tabulation machines for that election district. If the Board locates a scanned electronic image of the objected-to ballot, the Board can infer that the objected-to ballot was in fact scanned and counted. The Board should then write on the objected-to ballot that it was counted. If the Board is unable to locate a scanned electronic image of the objected-to ballot, the Board can make the opposite inference: that the objected-to ballot was never scanned and counted, and the Board should write on the objected-to ballot that it was not counted. The Court should

[3] *Cf. Kosmider v. Whitney*, 34 N.Y.3d 48, 51, 132 N.E.3d 592, 595 (2019) (describing scanning and record retention process).

order the Board to provide copies of all electronic images of scanned ballots from the election districts at issue to the candidates to provide an additional check on the process. *See* Election Law § 3-222(2) (permitting examination of voted ballots upon order of court); *accord Kosmider*, 34 N.Y.3d at 62 (permitting examination of electronic copies of voted ballots under judicial supervision).[4]

To the extent any similar issue arises with any other Board, the Court should order the same remedy.

Issue Four: **Some Boards' final tallies have changed multiple times in the last week, and at least one county recently discovered uncanvassed ballots**

Within the last several days and after this Court's deadline for the Boards to advise the Candidates of their final tabulations, Herkimer, Oswego, and Madison counties each indicated that their final tallies were not final and had changed. *See* Docket No. 70 at 2. Then, on December 1, for the first time, the Chenango Board told this Court that it had discovered an additional set of 55 affidavit ballots that had not yet been canvassed, let alone counted. *See* Docket No. 80. Of those 55 affidavit ballots, the Chenango Board has further asserted that it believes that only 40 of the affidavit ballots were eligible to be canvassed, cast, and counted. *Id.* However, as of the filing of this Memorandum, the Court has not yet ruled on how the Chenango Board should proceed.

[4] If for some reason an electronic ballot image-based procedure is infeasible, the Board should proceed with a limited manual audit in a public hearing with watchers present. First, the Board should obtain the machine tabulation of the total number of ballots scanned in the election district of the objected-to ballot. Next, the Board should manually count the total number of ballots scanned in the election district of the objected-to ballot (excluding the objected-to ballot from the total). Next, the Board should compare the total number of scanned ballots from the machine tabulation to the total number of scanned ballots from the board's manual count. If the two totals are the same, the Board can infer that the objected-to ballot was not counted, and should write on the objected-to ballot that it was not counted. On the other hand, if the machine tabulation total is one greater than the hand count total, the Board can infer that the objected-to ballot was counted, and should write on the objected-to ballot that the ballot was counted.

Although mistakes happen, these shifting tallies and discoveries of new uncanvassed and uncounted ballots almost a month after the election make it difficult for the candidates to assess their position and undermine public confidence. The Court's November 30 Letter Order helpfully directed the Boards to produce a final report of their original canvass of all ballots (including scanned and hand counted ballots) that particularized the final tally of early votes, election day votes, absentee votes, affidavit votes, and military votes. In response, the Boards generally produced summaries they created from other documents that contain tabulated results. As a result, though informative, the summaries ordered by the Court do not afford the parties an opportunity to fully understand and independently verify the final tallies reported by the Boards.

In order to ensure that all parties have all relevant information pertaining to how the Boards arrived at their current counts, and to ensure that all parties are operating from the same information, the Court should order the Boards to provide the documents set forth in Petitioner Brindisi's proposed Order to Show Cause. These include recanvass reports generated directly from the Boards' tabulation software (rather than a summary created by the Board that are more prone to human error), discrepancy reports, hand counted ballot reports, voting equipment maintenance logs, and audit reports. Although some Boards have previously produced some or all of the below documents to the parties, Petitioner Brindisi nevertheless submits this request in order to ensure that the parties have the same set of the most up-to-date copies of such documents.

Finally, the Court should order the Chenango Board to canvass the 55 affidavit ballots in a public hearing in the presence of watchers, after providing at least 48 hours' notice, with opportunity to object to the Board's determination that 15 of the ballots are not eligible to counting.

V. A full recanvass is not the proper remedy here.

New York law contemplates that, if a board's failure to perform a legal duty or other errors becomes apparent during a Court's initial review of a canvass, the proper remedy is for the court

to order such boards to fix their errors before resuming its review. *See* Election Law § 16-106(5) (providing, in instances where a board has erred, proceedings should begin (or, here, resume) at "the time when the board shall have acted in the particulars as to which it is claimed to have failed to perform its duty"); *id.* § 16-106(4) (vesting the courts with the authority to first order "the correction of an error, or the performance of any duty imposed"); *see also Matter of Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (Sup. Ct. 2002) (explaining that the courts must "to review the canvass and," depending on the circumstances, "direct a recanvass *or* correction of an error or performance of any required duty by the board of canvassers") (emphasis added); *Smith v. Sullivan*, 959 N.Y.S.2d 588, 603–04 (Sup. Ct. 2012) (same). In addition to the fact that the law strongly indicates that a correction of errors, rather than a full recanvass, is the proper remedy here, a full recanvass will also worsen delays and reopen and expand upon the number of ballots before this Court for its resolution.

A. A full recanvass will worsen delays.

The 117th Congress will begin at noon on January 3, 2021. *See* U.S. Const. amend XX. This date is only 32 days away. In order to resolve this matter prior to the start of the Congress, the Court must conduct its review and issue its ruling, the Parties must have the opportunity to exhaust any appeals from that ruling, if they so choose, the Boards must deliver the canvass statement to the State Board of Elections, N.Y. Elec. Law § 9-214, and the State Board of Canvassers must meet to canvass the statements of each Board and certify the election results, *id.* §§ 9-216(2), 9-218. Notably, New York state courts are closed on Christmas Day, and for holiday recess for the full week of December 28, 2020, which is the week before the seating of the next United States Congress.[5] Accordingly, the Court has significantly less than four weeks before the

[5] New York State Unified Court System, *Court Terms & Holidays*, http://ww2.nycourts.gov/Admin/holidayschedule.shtml (last visited Dec. 2, 2020).

seating of the 117th Congress to resolve this issue in time for New Yorkers in the 22nd congressional district to be assured representation when the new Congress commences.

Time is of the essence, and compelling the counties to fix their specific mistakes rather than start over—so this Court may quickly conduct the review it intended to complete on November 23rd and 24th—is of paramount importance in ensuring this matter is resolved before noon on January 3rd. Protracted delay as a result of a full recanvass runs the serious and unnecessary risk of leaving the voters in New York's 22nd Congressional District unrepresented when the 117th Congress begins.[6]

B. A full recanvass will expand the number of disputed ballots that require the Court's review, even though the parties did not make such objections during the canvass as required by law.

Ordering a full recanvass risks significantly expanding the number of disputed ballots that will require the Court's resolution. A full recanvass will invite if not encourage the campaigns to expand the scope of their objections beyond what they validly preserved during the canvass. The need to timely preserve objections during the initial canvass has passed: New York law is clear that a ballot may "be the subject of a judicial challenge" only if an "objection is lodged to the [board of election's] decision to canvass or refuse to canvass a particular ballot during the canvass[.]" *Stewart v. Chautauqua Cnty. Bd. of Elections*, 894 N.Y.S.2d 249, 253 (N.Y. App. Div. 2010). The Parties had ample opportunity to make their objections during the canvass, and they should remain bound to their positions, rather than changing course now based on the apparent margin. Accordingly, the narrower remedy as set forth herein is the most equitable and consistent with the statutory framework for judicial review.

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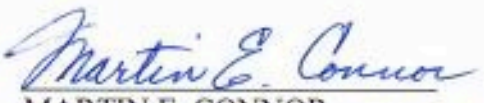
[6] Ordering a full recanvass, which is necessarily requires more in-person meeting time at county Boards than the tailored relief proposed by Petitioner Brindisi, could also unduly jeopardize public health and safety when the country is in throes of a massive "second wave" of the COVID-19 pandemic.

IV. Conclusion

For the foregoing reasons, Petitioner Brindisi respectfully asks that the Court grant his Proposed Order to Show Cause.

Dated: Brooklyn, New York
December 2, 2020



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