SUPREME COURT OF THE STATE OF NEW YORK
OSWEGO COUNTY

In the Matter of

CLAUDIA TENNEY, candidate for Member of Congress,
22nd District of New York State,

Petitioner,

-against-

OSWEGO COUNTY BOARD OF ELECTIONS,
ONEIDA COUNTY BOARD OF ELECTIONS,
CORTLAND COUNTY BOARD OF ELECTIONS,
MADISON COUNTY BOARD OF ELECTIONS,
BROOME COUNTY BOARD OF ELECTIONS,
TIOGA COUNTY BOARD OF ELECTIONS,
HERKIMER COUNTY BOARD OF ELECTIONS,
CHENANGO COUNTY BOARD OF ELECTIONS,
NEW YORK STATE BOARD OF ELECTIONS,
KEITH D. PRICE, JR., candidate for Member of Congress,
22nd District of New York State
and
ANTHONY BRINDISI, candidate for Member of Congress,
22nd District of New York State,

Respondents.

MEMORANDUM OF LAW

Index No. EFC-2020-1376
Hon. Scott J. DelConte, J.S.C.

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INTRODUCTION

Petitioner Candidate Tenney submits this memorandum of law in response to the Court's invitation to address legal issues presented to date in this Article 16 proceeding.

ARGUMENT

I. The Court Has No Authority to Alter Election Law Deadlines, Including But Not Limited to Cure Affirmation Deadlines

As this Court is aware, several cures were received after the statutory deadline.[1] See 12/21/20 Tr. p. 79. While Respondent Brindisi acknowledged that the cures were late, he took the position that the voter "substantially complied" with the Election Law and their votes should therefore be counted. Id. at 80-81. In other words, according to Respondent Brindisi, "substantial compliance" for absentee ballots applies to deadlines as well as any other defects with the ballot. Id. Your Honor noted that there was an important distinction between "substantial compliance as it relates to the Election Law and substantial compliance with timing, not -- not the issues of completing the instructions or the information on the face of an affidavit ballot envelope but timing." Id. at 82.

When the parties returned to the issue the following day, this Court questioned "why should some voters get more time than other voters to get the cure out" and asked "[w]hat about if the cure comes in next month." 12/22/20 Tr. pp. 325-26. Respondent Brindisi essentially responded that it was his position that any cures received prior to the Board's certification of the results should

[1] For any ballot envelope requiring a cure received before the day of the election, any cure affirmation must be filed (postmarked if by mail) with the Board of Elections on or before either the last day to apply for an absentee ballot or seven business days after notification by mail, whichever is later. For any ballot envelope requiring a cure received on or after the day of the election, such cure affirmation shall be filed (postmarked if by mail) with the board no later than five business days after notification is sent to the voter by email or mail or the voter is reached by phone." Election Law § 9-209(3)(c) and Executive Order 202.58. The Executive Order modified the statute to shorten the post-Election Day cure response time to 5 business days.

be counted. Id. at 324-26. For the following reasons, Candidate Tenney asserts that this Court does not have the authority to extend statutorily imposed deadlines, such as the deadline for cures.

Pursuant to § 16-100 of New York's Election Law, this Court "is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally." Election Law § 16-100(1). As to the casting and canvassing of ballots, this Court's authority is limited to "direct[ing] 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." Election Law § 16-106(4). Notably absent from both § 16-100 and § 16-106 is the jurisdiction to extend statutorily imposed deadlines. Nor has New York's highest court created such an authority. Indeed, quite the opposite.

As recently as May 21, 2020, the New York Court of Appeals held that a candidate's filing deadlines required "strict compliance," despite the extraordinary circumstances of the pandemic. Seawright v. Board of Elections in the City of New York, 35 N.Y.3d 227, 233 (2020) ("we have consistently mandated strict compliance with the time limitations imposed by the Election Law, notwithstanding a candidate's unique or extenuating circumstances"). Indeed, the Court of Appeals had repeatedly noted that

> "[b]road policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process . . . . Strict compliance also reduces the likelihood of unequal enforcement" . . . . The sanctity of the election process can best be guaranteed through uniform application of the law.

Gross v. Albany County Bd. of Elections, 3 N.Y.3d 251, 258 (2004) (citations and internal quotations omitted).

The Court in Seawright also reiterated its holding from nearly four decades' prior, id. at 233-34, that

> [i]t is wholly immaterial that the courts might reasonably conclude that what they perceive as the ultimate legislative objectives might better be achieved by more flexible prescriptions, prescriptions which might be judged by some to be more equitable. Whatever may be our view, the Legislature has erected "a rigid framework of regulation, detailing as it does throughout specific particulars."

Hutson v. Bass, 54 N.Y.2d 772, 774 (1981) (quoting Higby v. Mahoney, 48 N.Y.2d 15, 20, n. 2 (1979)). In other words, that the parties or this Court "might reasonably conclude" that it would be more equitable to extend a deadline is "wholly immaterial." See Id. The Court in Seawright made clear that "[o]ur adherence to the legislature's strict compliance rule, in other words, remains intact." Seawright v. Board of Elections in the City of New York, 35 N.Y.3d at 234.

Although § 9-209 permits an *affidavit* ballot to be counted if "the voter substantially complied with the requirements of this chapter," Petitioner Tenney is unaware of any application of that law to a statutory deadline. Election Law § 9-209(2)(a)(v) (emphasis added). See Hutson v. Bass, 54 N.Y.2d 772, 774 (1981) ("While substantial compliance is acceptable as to details of form, there must be strict compliance with statutory commands as to matters of prescribed content") (citations omitted); see also Matter of Forman v. Haight, 69 Misc. 3d 803 (Sup. Ct. Dutchess Co. 2020) ("where, as here, an application has been submitted to the voter and responded to, challenges to the content of the application fall within Election Law § 9-209(2)(a)(v)'s substantial compliance standard"); see also Smith v Sullivan, 38 Misc. 3d 727, 738 (Sup. Ct. Orange Co. 2012) (noting that, when considering "substantial compliance," "courts found certain omissions were not fatal and allowed the ballot to be accepted. All such instances, however, have

been 'instances [of] inconsequential deviations from the letter of the law' and technical irregularities.")[2] (quoting Gross, 3 N.Y.3d at 258).

Based on the foregoing, Petitioner Tenney respectfully submits that neither New York's Election Law, nor the Court of Appeals' interpretation of that law, vests this Court with the jurisdiction to extend a statutory deadline including but not limited to the statutory deadline for submitting cure affirmations.

II. Absentee Ballots Must be Postmarked by November 3 If Delivered to a County Other Than the Voter's Board of Elections

New York State voters unable to vote in-person at their respective polling places may cast their ballots ahead of time. These voters are called absentee voters. According to New York Election Law § 8-410, the absentee voter is required to notify the County Board of Elections of his or her inability to vote in person, and once the County Board of Elections reviews their application, they send the voter an envelope containing the ballot for the voter to complete and sign. Election Law § 8-410. Once the voter has completed the absentee ballot, the voter must then mail or deliver the ballot to the County or City Board of Elections office by the close of polls on Election Day. Election Law §§ 8-410, 8-412.

The statute allows Boards of Elections to count an absentee ballot that is received in their offices prior to Election Day or so long as it is postmarked by the United States Postal Service or endorsed by another agency of the United States government no later than Election Day and

[2] Examples included "where a voter asserted unavailability but failed to include where he/she would be at the time of the election and dates he/she would be absent from the district . . . .The failure of the applicant to provide the name of the applicant's physician . . . . [and the voter's] failure to sufficiently specify the reasons for the voter's absence from the voting district." Smith v Sullivan, 38 Misc. 3d at 738 (citations omitted).

received by the County Board of Elections no later than seven days after Election Day. Election Law § 8-412.[3]

Governor Cuomo signed an Executive Order on September 9, 2020 in an effort to facilitate early voting and absentee voting amid the COVID-19 pandemic. Specifically, the Executive Order states:

> "[a]ll boards of elections shall develop a plan to allow a registered voter to drop off a completed absentee ballot at a board of election, early voting location, or election day voting location, without requiring they wait in line with in-person voters, to help minimize delays during in-person voting and promote contactless voting. Plans must be submitted to the State Board of Elections by September 21, 2020, and made publicly available in the county board of elections office and on their website when submitted."

Exec. Order No. 202.61. In a press release from Governor Cuomo discussing the Executive Order, his press office instructed that all "[a]bsentee ballots can be dropped to county boards of elections offices . . . at polling locations on Election Day." See id. The press office also detailed the reasoning behind the order, that "[b]y dropping off an absentee ballot at a county board of elections office, early voting site or polling location, New Yorkers can avoid Post Office delays and the need for a stamp." Id. The press release makes no reference to suspending the requirements and mandates of Election Law §§ 8-410 and 8-412.

New York Executive Law is the statutory basis for the Governor to suspend or modify a state or local law. *See* Executive Law § 29-a(1). Under this authority, the governor is to "specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension." Executive Order 202.61 did not suspend or modify the provisions of Election Law §§ 8-410 and 8-412. Thus, the "dictates" of those election law

[3] A 2020 amendment to the statute allows Boards of Elections to count an absentee ballot that was received by mail and presume it timely, even if it does not display a postmark on the envelope so long as it was received and time stamped by the Board through the day after the election. Election Law § 8-412.

provisions remain in full force and effect. See e.g. Ellington v. Kings County Democratic Committee, 2020 N.Y. Misc. LEXIS 7837 at *15-16 (Sup. Ct. Kings Co. 2020).

The issue presented to the Court is whether the absentee ballots dropped off to the polling sites outside the voter's county of residence were done in accordance with the Election Law and the September 9, 2020 Executive Order. There is no dispute that a voter may drop off their absentee ballot to the polling place on Election Day, but the question turns to which specific polling place the absentee voter must drop off their ballot and whether they must do so at their county polling site.

According to the New York State Board of Elections website in 'Absentee Voting' file, 'How to Cast an Absentee Ballot' section of the document, there are four means set out by the State on how a voter may return the absentee ballot. New York State Board of Elections, https://www.elections.ny.gov/VotingAbsentee.html (last visited Dec. 23, 2020). Of those four methods, line number 2 instructs that the voter should "bring[] it to the *County Board of Elections Office* no later than November 3rd by 9pm" (emphasis added). Id. Line number 4 instructs the voter to "bring[] it to a *poll site* on November 3rd by 9pm." Id. (emphasis added). The State Board document fails to specify which County Board of Elections location the absentee voter may drop off the absentee vote, but significantly the document does not state 'any' Board of Elections location. By only stating "County" in their instructions and consciously keeping the term "any" out, it can be inferred the voter should drop off to the County where the vote is to count. The State Board document also fails to specify which poll site location the absentee voter may drop off the absentee vote to. Like the argument above in reference to the second County Board drop off line-

option, the State Board was careful not to include the term "any," and as a result, the polling site should be understood to mean the voter's registered polling place[4].

During the second day of the canvass hearing on December 22, 2020, New York State Board of Elections attorney Kim Galvin, when asked to offer the State Board's interpretation of the September 9 absentee voter Executive Order, stated, "this is a bipartisan position, that the absentee ballot should be returned to the correct Board of Elections." (12/22/20 Tr. p. 311). She further stated the State Board's position that if the absentee ballot is returned to the incorrect Board of Elections and that incorrect site subsequently mails the absentee ballot to the correct site, the ballot *must be timely postmarked by Election Day* for the vote to be valid and counted. Id. (emphasis added). In other words, the statutory requirements of Election Law §§ 8-410 and 8-412 still apply.

Petitioner Tenney concedes that an appropriate drop-off place for absentee ballots submitted on Election Day includes any polling site of the registered voter's county. This position is supported by the Kolodziej case which held "[o]n Election Day, the polling places for each election district are extensions of the central offices of the Board of Elections . . . [t]he Board is authorized by statute to establish 'branch offices' in a number it deems appropriate." Kolodziej v. Niebel, 175 Misc. 2d 361, 363 (Sup. Ct. Chautauqua Co. 1997) (citing Election Law § 3-214(2)). Consequently, election inspectors at the polling places may "receive and deliver absentee ballots to the Board of Elections, absentee ballots may be *accepted* at the polling place on Election Day." Id. at 362 (emphasis added). If an absentee voter dropped off their absentee ballot on Election Day in the correct county but at the incorrect polling site/or election district, the absentee ballot

[4] To the extent instructions provided by a Board of Elections are vague, unclear, or incorrect, the instructions do not supersede statutory requirements. See e.g., Matter of Teets v. Belcher, 42 Misc.3d. 513, 518–19 (Sup. Ct. Orange Co. 2013).

remains valid and may be counted as long as it is time stamped (assuming all other requirements are met).

The Albany County Supreme Court was faced with a similar issue where a voter-candidate submitted an application to change their registration from no political party to the Libertarian Party and filed the documents with the incorrect County Board of Elections on the last eligible day. See Matter of Saini v. N.Y. State Bd. of Elections, 2020 N.Y. Misc. LEXIS 7852 (Sup. Ct. Alb. Co. 2020). The incorrect County Board of Elections promptly mailed the form change to the correct Board of Elections and it was then received four days later. Id. With regard to compliance with election law deadlines, the Court found the legislative intent concerning registration and enrollment would be deemed completed "when their 'home' BOE received the form[,]" and where voters process changes, the filing is effective "when received by the 'appropriate' BOE, not 'any' BOE." Id. at 5, 11. Although Matter of Saini concerned deadlines for mailing/receipt of voter registration and the case before this Court concerns mailing/receipt of absentee ballots, the holding should be applied here. In other words, legislative intent should transcend to other election deadline situations to prescribe that a ballot filed with the incorrect Board of Elections in the absence of a postmark establishing the ballot's mailing by November 3 to the voter's County Board of Elections and or received by the correct Board of Elections office after the voting deadline is invalid and should not be counted. See id. at 12.

III. A Statutory or Legal Requirement of a Postmark is Not Met by a Postage Meter Stamp

Throughout the second canvass hearings held the week of Dec. 21, 2020, the parties were having difficulty differentiating the legal and factual significance of a postmark stamp and a postage meter stamp. Respondent Brindisi asserted that a ballot which arrived to the Bronx Board

of Elections on an unknown date that was intended to be counted in Chenango County bearing no postmark stamp is valid on the improper premise that it should be inferred the ballot was dropped off to the Bronx Board of Elections on Election Day. See 12/22/20 Tr. p. 335. The only mark on the ballot was a postage meter stamp on a transmittal envelope from the Board of Elections in the City of New York[5]. See 12/22/20 Tr. p. 337.

The Appellate Division Third Department holds that "a postage meter stamp is not the equivalent of a postmark date" when tasked with the question of whether to allow court interpretation on election postmark deadlines and requirements. Matter of Gallo v. Turco, 131 A.D.3d 785, 786-87 (3rd Dept. 2015). The Court in Gallo also found that "cases interpreting this statutory provision have consistently held that . . . the postmark date . . . is determinative" (internal citations omitted.) Id. The Gallo decision has been cited in recent cases ranging from election to motor vehicle and the Courts in the motor vehicle cases have come to the same conclusion, "[f]or proof of mailing, respondent reasonably looks to the official U.S. postmark, and we have recognized that "a postage meter stamp is not the equivalent of a postmark date"" (citing Gallo, 131 A.D.3d at 786-87). See Matter of Bainton v. N.Y. Dept. of Motor Vehicles, 179 A.D.3d 1211, 1212 (3rd Dept. 2020). In Bainton, the Court refused to look to or consider any of the writing on the transmittal envelope other than that which was considered a postmark stamp, which the Court held included a "return to sender" postmark.[6] Id.[7]

[5] The Judge, in response to Brindisi's attorney, asks "[w]here does it even say it was delivered to a polling place? We've got a - - we've got a mailer, transmittal envelope from the Board of Elections in the City of New York with the looks like Stamps Are Us stamp. I don't see a postmark." 12/22/20 Tr. p. 337.

[6] "The only valid postmark date on the April 2018 transmittal envelope is the May 17, 2018 "return to sender" postmark, which fell outside the time period to file. Nor does the handwriting on the envelope establish that the Board timely received the envelope, as respondent's regulations require all mail to be date-stamped upon receipt — not to be returned to sender." Matter of Bainton v. N.Y. Dept. of Motor Vehicles, 179 A.D.3d 1211, 1212 (3rd Dept. 2020).

[7] See Petitioner's Memo, Dkt. 57, pp. 2-5. Also, as discussed in memorandum, the "[t]he absence of a postmark on [an] envelope as required by statute [is] a "fatal defect."" Raimone v. Sanchez, 253 A.D.2d 506-07 (2d Dept. 1998).

Accordingly, the Court properly corrected counsel in their attempt to assert a postage meter stamp and a time stamp should hold the same legal and factual significance as a postmark stamp by offering the Stamps Are Us envelope from the Bronx with no official markings. See 12/22/20 Tr. p. 336. The Judge observed that such is "not a postmark, it looks like Stamps Are Us or something like that . . . [t]hat's not a postmark[,]" "[b]ut that's a time stamp, not a postmark[,]" and again "[t]here's no postmark for the Court to review is there?" whereby the Brindisi attorney responded "I don't believe so, Your Honor." See 12/22/20 Tr. p. 336. As the Court and attorney for Tenney concluded, the ballot must have a postmark and that a postmark is determinative evidence in validating or invalidating a ballot, rather than Respondent Brindisi's assertion that "to the extent there's any ambiguity, it should be construed in favor of the voter." See 12/22/20 Tr. p. 338.

Subsequently, the Court should find that any ballot not bearing a postmark stamp and instead bearing a postage meter stamp be deemed invalid.

IV. Purported Cures Provided by Candidate Brindisi Fail to Follow and Adhere to Statutorily Mandated Procedure and Form

Candidate Brindisi seeks to offer "cures" for defective absentee ballots. These cures are attorney prepared affidavits which were solicited from a number of voters. These affidavits must be rejected.

Chapter 141 of the New York Laws of 2020 created for the first time in New York law, the process for a voter to "cure" an otherwise defective ballot envelope filed with a local Board of Elections. Where the Board determines that there is a defect or deficiency in the ballot envelope executed by a voter, notice is provided to the voter of the defect together with a form affirmation to be completed to effectuate the correction.

The cure returned by the voter to the Board of Elections must be on the form created by the New York State Board of Elections. The statute states:

> "The voter may cure the aforsaid defects by filing a duly signed affirmation attesting to the same information required by the affirmation envelope and attesting that the signer of the affirmation is the same person who submitted such absentee ballot envelope. The board shall include a form of such affirmation with the notice to the voter. *The affirmation shall be in a form prescribed by the state board of elections."* Election Law § 9-209(3)(b) (emphisas added).

The affidavits prepared by Brindisi's counsels are not the form prescribed by the New York State Board of Elections. They are facially insufficient.

Moreover, nothing in this new Chapter Law allows for a cure outside the statutory process. Affidavits offfered in the context of these proceedings must be rejected. This Court lacks the power to receive and act upon these belated and non-conforming "cure" affidavits. In a post election proceeding the Supreme Court's powers are limited to those expressly delegated to the Judiciary by the Legislature. The Court of Appeals holds:

> "Any action Supreme Court takes with respect to a general election challenge 'must find authorization and support in the express provisions of the [Election Law] statute' (Schieffelin v. Komfort, 212 N.Y. 520, 535 (1914) (citation and internal quotation marks omitted); see also Matter of Hogan v. Supreme Ct. of State of N.Y., 281 N.Y. 572 (1939)). In a summary proceeding under Election Law article 16 respecting the conduct and results of a general election, "[Supreme Court's] only powers are (1) to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots and to direct a recanvass or correction of any error in the canvass of such ballots * * * and (2) to review the canvass and direct a recanvass or correction of an error or performance of any required duty by the board of canvassers" (Matter of Corrigan v. Board of Elections of Suffolk County, 38 A.D.2d 825, 827 (citation omitted), aff'd. without op. 30 N.Y.2d 603 (1972); see Election Law § 16–106(1), (2), (4))"

Delgado v. Sunderland, 97 N.Y.2d 420 (2002), see also Mondello v. Nassau County Board of Elections, 6 A.D.3d 13 (2nd Dept. 2004). When the Legislature enacted Chapter 141 of the laws of 2020 it did not amend Article 16 Election Law to create a *de novo* proceeding based upon newly

manufactured extrinsic evidence which was not before the Board of Elections at the time a cure notice was sent / received.[8]

Here, Brindisi attempts to enter these purported cures, where no "cure" affirmation was put before the Boards of Elections. Where there is no cure made at the Board of Elections phase of the canvass, the ballot fails. Most importantly, with no "cure" before the Board, there is no ruling for this Court to review.

Petitioner respectfully submits that the law which precludes Court review of an objection never made to a ballot applies well to the circumstances at bar. Here, there was never a "cure" on the required form placed before the local Board of Elections. Respondent Brindisi must be precluded from raising this issue, which was not preserved, at this late juncture.

All ballots without a "cure," meeting the statutory requirements, must be and must remain invalid.

V. Purged Voters Are Not Qualified Voters and The Court Has No Jurisdiction to Restore a Purged Voter

As the Court has noted, candidate Brindisi argues that the Court has the authority to "re-register" purged voters. See 12/22/20 Tr. p. 152. Respondent county Boards of Elections, through a unanimous, bipartisan vote, have determined that a number of affidavit voters whose registration status is "purged," are not qualified voters and should not have their affidavit ballots counted. A

[8] It should also be noted Executive Order 202.48 precludes an Article 16 action against a Board of Elections which Respondent is seeking to do in this proceeding: "Article 16 of the Election Law is modified to the extent necessary to provide that no cause of action shall be maintained against a board of elections if, for the general election taking place on November 3, 2020, notice is not able to be made within the time period set forth in § 9-209(3) after a good faith effort, and through no fault of the board of elections."

"purged" voter — unlike an inactive voter — is no longer registered to vote. See 12/22/20 Tr. p. 151. Candidate Brindisi, through his attorneys, contends that the Court should count a number of these purged affidavit voters (who, again, are not registered voters).

Before examining the main issue, the standing of candidate Brindisi to seek an order from the Court to "re-register" these purged voters must first be addressed. Election Law § 16-108 gives a voter — and only a voter — standing to seek a judicial order to register him or her as a voter. Candidate Brindisi is asking the Court to order the re-registration of other voters. Under Election Law § 16-108, candidate Brindisi, as a candidate for Congress in the 22nd District of New York, does not have standing to seek a judicial order to register affidavit voters.

New York State Constitution, Article II, Section 5 establishes that a voter registration system shall be established in New York State, and this provision of the New York State Constitution states that voters are only qualified to vote in an election if their registration is completed earlier than at least ten days before an election. Election Law § 5-100 reiterates this requirement that voters be properly registered before voting in an election. The State Legislature has codified this requirement by requiring that voter registrations be submitted at least twenty-five days prior to an election. See Election Law §§§ 5-210, 5-211, 5-212. In 2020 by virtue of the Election Law the legislature declared October 9, 2020 as the last day to register in person to be qualified to vote in the general election. See Id. October 9, 2020 is also the last day to postmark an application to register to vote for the general election in which event it must also have been received by Board of Elections by October 14, 2020. See Election Law § 5-210(3).

Under Election Law § 16-108, when a ballot has been denied to a voter on the basis of voter registration, the voter may seek an order from a Justice of the New York State Supreme Court

permitting the voter to cast a ballot[9]. The Court is also empowered to order the registration of the voter. See Election Law §§ 16-108(1), 16-108(3). It should be noted that post-election judicial challenges to ballots, the canvassing of ballots, the recanvassing of ballots and the final count of an election are not contained in this section of the Election Law. See Election Law § 16-106.

The caselaw on this issue is well settled. In Mondello v. Nassau County Board of Elections, 6 A.D.3d 18 (2nd Dept. 2004), the Appellate Division, Second Department held that the Courts were without the ability to order a voter to be registered to vote and have his/her ballot counted in an Election Law Section 16-106 proceeding. The Second Department in Mondello stated, "On the day of the election, if a voter is denied the right to vote in a general election, the voter may seek a court order…." The Court went on to note that voters who voted by affidavit ballot did not avail themselves of this remedy. In more recent decisions, Courts have continued to hold that a post-election judicial proceeding under Election Law Section 16-106 is not the proper vehicle to register affidavit voters. See e.g., Johnson v. Martins, 30 Misc.3d 844 (Sup. Ct. Nassau Co. 2010), *aff'd* by Johnson v. Martins, 79 A.D.3d 913 (2nd Dept. 2010); Skartados v. Orange County Bd. of Elections, 81 A.D.3d 757 (3d Dept. 2011); Stewart v. Rockland County Bd. of Elections, 41 Misc.3d 1238(A) (Sup. Ct. Rockland Co. 2013).

Even if the Court has the authority to review the registrations of voters, candidate Brindisi, in his purported crossclaim and counterclaim, does not even seek for the Court to review the registrations of voters. In this document, candidate Brindisi invokes the Court's authority to "preserve the ballots" cast in the 2020 General Election in Congressional District 22 and determine the validity or invalidity of ballots "protested at the canvass" by either candidate. See Dkt. No. 23, p. 1, 2. Even if the Court had authority under these circumstances to review the registration and/or

[9] The Court noted that Supreme Court Justices were available to voters in the Fifth Judicial District. See 12/22/20 Tr. pp. 222-223.

order the registration of affidavit voters from the 2020 General Election, candidate Brindisi has not properly asked the Court to exercise this power, and the Court could not, under any circumstances, validate the votes of voters who are not duly registered to vote.

VI. Affidavit Ballots from Voters Who Appeared at the Wrong Election District and Wrong Polling Site Must be Rejected

It is settled law that a voter who chooses to cast an affidavit ballot at the wrong election district and the wrong poll cite may not have the ballot counted. In spite of the clear rule of law set by the New York State Court of Appeals, Respondent candidate Brindisi persists in asserting that where the voter presented him / herself at the wrong poll site (and, necessarily the wrong election district), this Court must validate the affidavit ballot. Petitioner candidate Tenney maintains that to rule in Brindisi's favor on this point would be clear error.

The Court of Appeals has mandated a clear standard to determine whether an affidavit ballot is valid or not and has left little to interpretation and imagination. In Panio v. Sunderland, 4 N.Y.3d 123 (2005), the Court of Appeals reviewed several subsets of affidavit ballots challenged at the post-election canvass. In Panio, the first group were affidavit ballots cast at the wrong election district in the same location or polling site as the election district that the voter was supposed to vote at (the "right church" but a "wrong pew" circumstance as it has been commonly referred to by the parties to the current proceedings). Id. at 127. A second group of affidavit ballot voters appeared at the wrong polling site altogether (commonly referred to as the "wrong church" and "wrong pew" circumstance). See Id. at 128.

The Court of Appeals found that "whenever a voter presents himself and offers to cast a ballot, and the address at which he claims to live is in the election district in which he seeks to vote but no registration poll record can be found for him [. . .] or his name does not appear [. . .] or his

signature does not appear next to his name [. . .] the voter may vote only by court order or by sworn affidavit" (internal citations and quotations omitted). Election Law § 8-302(3)(e); Panio v. Sunderland, 4 N.Y.3d at 127. At the time that the voter requests an affidavit ballot, the polling inspectors shall offer the affidavit to the voter only when such voter's "residence address is in such election district." See Election Law § 8-302(3)(e)(ii).

It is important for the Court to note that pursuant to Election Law § 4-117, each of the affidavit voters who are properly registered to vote in New York in the 2020 General Election received a written publication notice from the Board of Elections informing them of the location of the polling site and the specific election district that they were to vote at. See also Executive Order 202.58 (requiring county Boards of Election to "send an informational mailing to every registered voter by September 8, 2020 . . . regarding the date and hours for the November 3, 2020 general election, and the voter's election day polling place location").

When presented with the issue of where to draw the line concerning the responsibility or duty to impose on a polling inspector to direct a voter whose voting records do not appear in an election district's pollbook, the Court found that:

> Because the risk of fraud inherent in absentee balloting is less in affidavit voting, where the voter presents himself or herself in person before board personnel on Election Day, *imposing such a minimal requirement of directing a voter to the correct election district within the same polling site will not invite impermissible deviation from statutory requirements devised to ensure fair elections* (compare Matter of Gross v Albany County Bd. of Elections, 3 N.Y.3d 251, 260, 819 N.E.2d 197, 785 N.Y.S.2d 729 (2004)). We can reasonably infer that casting an affidavit ballot at the correct polling site but at the wrong election district is the result of ministerial error on the part of a poll worker in failing to direct the voter to the correct table, and instead providing the voter with an affidavit without first properly verifying such voter's right to vote in the election district (Election Law § 8-302 (1)).

(emphasis added). Panio v. Sunderland, 4 N.Y.3d at 128.

Subsequently, the Court found that the voters who cast their affidavit ballots in the wrong election district but were voting at the correct polling place were valid and should be counted, finding a minimal requirement of imposing on the polling inspectors to direct the voter to another election district within the same polling site is permissible. See Id. at 127, 128. Contrastingly, the Court refused to validate the affidavit ballots of voters who voted at the incorrect election site *and* the incorrect polling site, in essence drawing a line in the sand of how much duty a polling inspector has to direct a voter to another polling site. See Id. at 128 ("[T]he voters' error of going to the wrong polling place cannot be attributed to the ministerial error of election workers").

Petitioner Tenney urges this Court to heed the admonition of the Court of Appeals, and to adhere to the rule of law espoused in Panio. The Panio court determined "[i]t would be unreasonable to require poll workers to ensure that voters are in their proper polling site[,]" precisely the argument advanced by Respondent candidate Brindisi, and therefore this Court should rule that the polling inspectors were under no duty to notify voters on Election Day of their correct polling site considering the voters have been previously instructed as to the location via the Board of Election publications pursuant to Election Law § 4-117. Panio v. Sunderland, 4 N.Y.3d at 128. Here, the voter error of going to the wrong polling site is just that, an error. The error by the voter cannot and should not be attributed to some imaginary ministerial error by the polling inspector.

Brindisi asks this Court to create new law and overrule the Court of Appeals. This is error. Brindisi would adopt a rule that forces Courts to interpret even the signs posted outside polling places that say "vote here / vote aqui" as ministerial error by the polling inspectors and would carry the effect to allow anyone to appear at any polling place and vote. This position is a self-serving distortion of the law seeking a benefit for the Respondent Candidate at the expense of the integrity

of the election system. It would peel away protections against fraud and, in fact, serve to disenfranchise voters who would not receive the ballot they were supposed to vote on, containing all the proper offices that they were entitled to vote for.

Binding and established precedent requires that affidavit ballots cast at "the wrong church and wrong pew" be rejected.

VII. The Constitutional Requirement of a Signature and the Board's Duty to Compare a Voter's Signature at Canvass

A signature is the *sine qua non* of the act of voting under the New York Constitution. ("The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine, whether or not they have registered in person, save only in cases of illiteracy or physical disability." N.Y. Constitution, Article II, §7). Thus, when a voter leaves the signature portion of the affidavit ballot blank, the ballot is void on its face ("since the voter who voted by the affidavit ballot designated as Exhibit IX failed to sign the affidavit on her ballot, her ballot was void on its face") (see Election Law § 8-302(3)(e)(ii)). Mondello v. Nassau Cty. Bd. of Elections, 6 A.D.3d 18, 22 (2nd Dep't 2004). Election Law § 8-302(3)(e)(ii) requires the voter to "swear to and subscribe an affidavit stating," inter alia, that he or she is duly registered to vote and remains a qualified voter in the election district by placing a signature in the space provided on the affidavit ballot envelope. Election Law § 8-302(3)(e)(ii); see Mondello v. Nassau Cty. Bd. of Elections, 6 A.D.3d at 20.

Because the signature is the cornerstone of and indispensable to an individual's vote, canvassers have the duty and right to compare the signature on the affidavit ballot envelope with the signature on voter registration cards filed with the Board of Elections. If the canvassers find

that the ballot envelope signatures of voters are "substantially different" from the signatures on their voter registration cards, such ballots may not be counted (Matter of Hosley v Valder, 160 AD2d 1094, 1096 (3rd Dept. 1990)). Kolb v. Casella, 270 A.D.2d 964, 964 (4th Dept. 2000).

Settled appellate authority establishes a Board's right to compare a voter's signature on a ballot with the registration poll records. ("The Supreme Court properly determined that the absentee ballots designated as exhibits 2 and 3 should not be cast and canvassed, since the signatures on the envelopes in which those absentee ballots were submitted did not correspond to the signatures on the voters' registration poll records (see Election Law §§ 8-506(1); 9-209(2)(a)(i)(C); see also Matter of Johnson v Martins, 79 A.D.3d 913, 920-921 (2nd Dept. 2010), *aff'd* 15 NY3d 584 (2010); Matter of Kolb v Casella, 270 A.D.2d 964 (4th Dept. 2000)" Matter of Stewart v. Rockland Cty. Bd. of Elections, 112 A.D.3d 866, 866 (2nd Dept. 2013)).

In instances where the voter does not provide a full signature, but instead uses little markings or circling of other parts of the ballot and ballot envelope, the issue is whether the voter intended those markings to be a signature. People v. Lo Pinto, 27 A.D.2d 63, 66 (3rd Dept. 1966). Courts find that in the absence of a clear signature, writings such as the circling of material on a ballot cannot be considered as the signature of another and they emphasize that intention is a necessary requisite of determining whether a mark should or should not be considered (internal citations omitted). Id. Whether the mark is a signature or just merely a mark is a question of law or a question of fact depending on the circumstances.

The Third Department finds in interpreting General Construction Law § 46 which defines a signature, "'[i]ntention is a necessary requisite'" (see Matter of Lynn v. DeWitt, 862 N.Y.S.2d 815 (Sup Ct. Tompkins Co. 2008), citing People v Lo Pinto, 27 A.D.2d 63, 66 (3d Dept 1966), see also Matter of Teets v. Belcher, 42 Misc.3d 513, 523 (Sup. Ct. Orange Co. Nov. 2013), N.Y. Gen.

Constr. Law § 46. A circular scrawl with curves or loops and writings that constitute merely a mark are dramatically different than a signature and should not be construed as such and must be distinguished from the Belcher case. See Matter of Lynn v. DeWitt.

The signature match requirement was most recently reaffirmed when the State of New York adopted the cure provision for deficient absentee ballots. Chapter 141 of the Laws of 2020 as well as Executive Order 202.58 established earlier this year the cure provision and cure process for deficient absentee ballots. Chapter 141 and EO 202.58 together require that should a Board of Elections determine that an absentee voter's signature on the absentee oath envelop not match what is on file with the Board of Elections, the Board is required to send the appropriate cure documentation to the voter.

VIII. Extrinsic Matter in the Ballot Envelope Invalidates the Ballot

Election Law § 9-112(1) addresses the circumstances when whole ballots — this includes absentee and affidavit ballots — must be voided by a Board of Elections. One circumstance that requires the invalidation of an entire ballot is when a voter places any "extrinsic" material in the ballot envelope. Specifically, § 9-112(1)(a) states that an entire ballot is to be invalidated if a voter "does any act extrinsic to the ballot such as enclosing any paper or other article in the folded ballot." While voiding an entire ballot because extrinsic material was placed in the ballot may seem extreme, courts have held that voiding the ballot is necessary because "the purpose of the statute is to preserve secrecy." Pavlic v. Haley, 40 Misc.2d 975 (Schenectady Co. Sup. Ct. 1963).

In the present matter, Boards of Elections have not counted ballots because extrinsic material was included with ballots in violation of Election Law § 9-112. This includes an absentee

ballot with an attached note that praises those in law enforcement (12/21/20 Tr. p. 68). Also included is a ballot envelope that includes a fully or partially completed voter registration form and a ballot envelope that includes two ballots (12/23/20 Tr. pp. 442-447).

Candidate Brindisi cites Stewart v. Chautauqua County Bd. of Elections, 69 A.D.3d 1298 (4th Dept. 2010) to argue that these ballots containing extrinsic material should be canvassed. In Stewart, the Fourth Department allowed the canvassing of ballots that contained extrinsic material in a very narrow and particular situation. In allowing these ballots to be canvassed, the Fourth Department relied on the dissent by Justice Ughetta in Altimari v. Meisser, 22 A.D.2d 933 (2d Dep't 1964), which was later adopted by the Court of Appeals. The circumstances in Altimari, however, are starkly different from what is before this Court.

The majority in the Altimari state that the letter from the voter was only "mailed together" with the voter's ballot. In the portion of the dissent that addresses the ballot and the letter, Justice Ughetta writes, "It is not shown that this note… was within the ballot itself." Unlike the ballots before the Court today, there is no indication or proof that the extrinsic material in the Altimari case (in the form of a letter from a voter) was *within* the absentee or affidavit envelope, allowing the voter to be identified with a ballot and compromising the secrecy of the voter's ballot (emphasis added).

The circumstances in the present matter are also easily distinguishable from those in Alessio v. Carey, 49 A.D.3d 1147 (4th Dept. 2008). In Alessio, the Fourth Department held that affidavit ballots inserted into "extra envelopes" should be counted. The Fourth Department's justification for this position was that the extra envelopes did not "have the effect of identifying those ballots…." In Alessio, the extrinsic material — the extra envelopes — did not identify the voters who cast those affidavit ballots and did not compromise the voters' secrecy. Because voter

secrecy was not compromised, those affidavit ballots should be canvassed. In the present matter, however, the extrinsic material — in the form of a note, a completed or partially completed voter registration form and an additional ballot — can connect a specific voter to a specific ballot and compromises voter secrecy and requires that these ballots not be counted.

With regard to the one affidavit ballot envelop from Chenango County that contained two ballots (Exhibit CH-33), in addition to the fact that two ballots being in one envelope would require the voiding of a ballot because the envelope contained extrinsic material, the Court should not order the counting of a ballot because it would be impossible to know which ballot to count. The fact that the ballots in Exhibit CH-33 are of two different types (Election Day machine ballots versus absentee or affidavit ballots) is irrelevant. It is also irrelevant that one of the ballots found in the Exhibit CH-33 envelope is blank. Just this year, the New York State Board of Elections counted some 43,541 ballots as "BLANK" for the office of President of the United States, see Certified Election Results, NYSBOE December 3, 2020, https://www.elections.ny.gov/2020ElectionResults.html. It would not be surprising nor would it be unreasonable for a voter to cast a blank ballot as a way to make a statement on choices the voter had for elective office in the 2020 General Election.

Finally, it should be noted that the prohibition on extrinsic material found in Election Law § 9-112 is broad, as would be expected. The purpose of this section is to ensure that voters do not compromise the secrecy of their own ballots for nefarious ends.[10] This section prohibits the voter from doing *any* extrinsic act that would allow that particular voter to be identified with that particular ballot and compromise the secrecy of the ballot. People ex rel. Brown v. Keller, 170 A.D. 324 (2nd Dept. 1915). The facts before the Court clearly show that voters of the ballots in

[10] For example, the rule serves to prevent fraud such as a voter disclosing his identity and who he voted for by willingly inserting a note, or document etc. doing that to assure he gets rewarded for his vote.

question could easily be identified by the material placed inside their ballot envelopes, and those ballots must, therefore, remain uncounted.

IX. Absentee Ballots With Distinguishing or Identifying Mark Must Not be Counted

The Petitioner will expand on her previous filings relating to distinguishing or identifying marks appearing on absentee ballots. See Dkt. No. 57. Under § 9-112 of New York's Election Law, a "whole ballot is void if the voter . . . (c) makes any erasure thereon or (d) makes any mark thereon other than a cross X mark or a check V mark in a voting square, or filling in the voting square, or (e) writes, other than in the space provided, a name for the purpose of voting." Election Law § 9-112(1). Furthermore, a "cross X mark or a check V mark, made by the voter, in a voting square at the left of a candidate's name, or the voter's filling in such voting square, shall be counted as a vote for such candidate." Id. However, a vote for a person whose name is written in under the title of an office or party whose name is printed on the ballot under the same office or position shall not be counted and said vote invalidated. Id. In other words, when a voter writes in a candidate's name when the candidate's name is already printed in a voting square above on the ballot, the vote for that office will be void. Election Law § 9-112(3).

It is generally accepted within the Third Department that "[w]hile inadvertent marks on a ballot do not render a ballot void in whole or in part[,] extraneous marks that could serve to *distinguish* the ballot or identify the voter render the entire ballot invalid" (emphasis added). Matter of Young v. Fruci, 112 A.D.3d 1138, 1139 (3rd Dept. 2013) (internal citations and quotations omitted). Courts in both the Second and Third Departments find that extraneous marks on a ballot "render the ballot blank as to the relevant office if the mark is confined to the voting square pertaining to that office, and will otherwise render a ballot invalid as a whole if the mark appears

outside of the voting square[11]." Matter of Brilliant v. Gamache, 25 A.D.3d 605, 607 (2nd Dept. 2006) (citations omitted). In Brilliant, Second Department determined that a check mark made with a pen on a challenged ballot in the box labeled "Democratic," which appeared outside of the voting squares, constituted an extraneous mark which invalidated the ballot since it could have served to distinguish the ballot or identify the voter. Id. Whether certain marks on a ballot are considered "inadvertent" as opposed to "distinguishing" is the ultimate test to the invalidity of a challenged ballot. Franke v. McNab, 73 A.D.2d 679, 679 (2nd Dept. 1979).

Furthermore, when "there [a]re written words deliberately placed on the ballot by the voter, the entire ballot is void." Johnson v. Martins, 79 A.D.3d 913, 921 (2nd Dept. 2010) (citations and internal quotations omitted). Thus, where any challenged marks on a ballot constitute "written words deliberately placed on the ballot by the voter[s]", the entire ballot is rendered void because those markings "could *distinguish* the ballot from others cast and consequently mark the ballot for identification" (emphasis added). Young, 112 A.D.3d at 1139 (citations omitted).

Fourth Department courts are consistent with Third Department holdings concerning invalidating ballots containing stray markings, as is evidenced in Matter of Abramo v. Kadet where the Court ruled that a ballot which "contain[ed] irregular markings" must be invalidated. Matter of Abramo v. Kadet, 66 A.D.3d 1532, 1533 (4th Dept. 2009) (citing Matter of Alessio v. Carey, 49 A.D.3d 1147, 1148 (4th Dept. 2008)). Marks outside the voting square render a ballot invalid because they "could possibly identify the voter." Gross v. Albany Couty Bd. Of Elections, 10 A.D.3d 476, 480 (3rd Dept. 2004), *aff'd* 3 N.Y.3d 251 (2004); see also Matter of Nicholson v.

[11] The Second Department looks to the voter's individual intent as evidenced by the ballot itself and whether the ballot is clear that it represents the voter's choice. See Rosenblum v. Tallman Fire Dist., 117 A.D.3d 1064, 1065 (2nd Dept. 2014); see also Matter of Kelley v. Lynaugh, 112 A.D.3d 862, 863 (2nd Dept. 2013). Thus, a ballot is not invalidated simply because the voter may have used multiple marks where the intent of the voter is clear. Id. These decisions have not been followed in the Fourth Department.

Dewitt, 18 Misc.3d 1106(A). The Court in Carney v. Davignon upheld a lower court's invalidation of a ballot "based on marks made at the top of eight of the nine voting columns that could have identified the voter." Carney, 289 A.D.2d 1096 (4th Dept. 2001) (citations omitted). Similarly, the Court in Matter of Alessio v. Carey found that three absentee ballots' markings fell outside or extended well beyond the designated voting ovals, as do several of the ballots in this proceeding, and the Board therefore properly invalidated those absentee ballots in their entirety because "[t]he voter[s] improperly marked the ballot[s] outside the voting square[s]" and such marks could have identified the voters. Alessio, 49 A.D.3d at 1149.

Accordingly, Petitioner Tenney respectfully submits that absentee ballots with distinguishing or identifying marks must be invalidated.

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Albany, New York

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