SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

CLAUDIA TENNEY,	:	
Petitioner,	:	
-against-	:	INDEX NO. EFC-2020-1376 (Justice DelConte)
OSWEGO COUNTY BOARD OF ELECTIONS, et al.,	:	
Respondents.	:	
For an Order, etc.	:	

HEARING BRIEF OF RESPONDENT ANTHONY BRINDISI

PERKINS COIE LLP
Marc E. Elias* (*pro hac vice* to be filed)
Bruce V. Spiva (admitted *pro hac vice*)
Shanna Reulbach (admitted *pro hac vice*)
Alexander G. Tischenko (admitted *pro hac vice*)
Alexi M. Velez (admitted *pro hac vice*)
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
ATischenko@perkinscoie.com
SReulbach@perkinscoie.com
AVelez@perkinscoie.com

MARTIN E. CONNOR
61 Pierrepont Street, #71
Brooklyn, New York 11201
Telephone: 718-875-1010
Cell phone: 347-645-9146
Email: mconnorelectionlaw@gmail.com

Attorneys for Respondent Brindisi

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

Cross-Petitioner and Respondent Anthony Brindisi ("Brindisi") submits this brief to address legal issues that arose in the hearing that took place from Monday, December 21, 2020, through Wednesday, December 23, 2020 (the "Hearing"), where this Court undertook a judicial review of challenged ballots pursuant to New York Election Law section 16-106.[1]

Brindisi reserves the right to offer additional argument and evidence related to any affidavit or absentee ballot envelopes or ballots presented at the Hearing, irrespective of whether the issue is raised in this brief. Brindisi also notes that the Hearing will resume on Monday, January 4, 2021, and reserves the right to supplement this briefing to address additional issues that arise on or after January 4, 2021 or to provide a summary of the ballots and envelopes reviewed by the Court.

I. INTRODUCTION

Between 2019 and 2020, the New York Legislature passed sweeping reforms to the state's election laws to make it easier for voters to participate in the electoral process and to have their votes counted. These reforms included the adoption of a universal voter registration transfer law and the passage of laws that require election officials to disregard certain technical defects and omissions in the voting process as long as a voter substantially complied with the law. The stated goal of that legislation was to remove barriers to voting and to prevent voter disenfranchisement.

In an extraordinarily close race for New York's 22nd Congressional Seat, the legislative mandate to ensure that lawful votes are counted is of utmost importance. Brindisi has identified numerous ballots rejected by respondent county boards of election (each a "Board" and collectively, the "Boards") or challenged by the Tenney Campaign that must be counted because they substantially comply with New York law, were rejected for ministerial errors by the Boards,

[1] Brindisi submitted similar briefing on November 22, 2020 and November 24, 2020. *See* Brief Regarding Uncounted, Counted, and Rejected Ballots, Docket No. 58 (Nov. 22, 2020); Brief Regarding Affidavit Ballots and Certain Jurisdictional Questions, Docket No. 62 (Nov. 24, 2020). For the convenience of the Court, Brindisi includes many of the same arguments in this brief in addition to addressing the issues that arose during the most recent canvass.

or were submitted by qualified New York voters who moved to a new address within the state and were entitled to have their votes counted under the universal voter registration transfer law. Failure to count these votes would result in unlawful disenfranchisement of hundreds of New York voters.

II. PROCEDURAL BACKGROUND AND STATUS OF COUNTY CANVASSING EFFORTS

During the Court's initial judicial review of challenged ballots in November, the parties identified multiple errors and irregularities in the canvassing procedures of several Counties. As a result, the Court issued an order requiring the Boards "to fulfill their statutory canvassing duties, immediately correct all of the canvassing errors and, where their errors cannot be corrected, recanvass those ballots." Decision and Order, Docket No. 111, at 2 (Dec. 8, 2020).

Over the last few weeks, the Boards engaged in additional canvassing and error correction as required by the Court's order. On December 21, the Court began its review of challenged ballots, and this process will continue on January 4, 2021.

III. ANALYSIS

This brief addresses numerous legal issues related to ballots reviewed during the initial portion of the Hearing. Specifically, this brief discusses the Court's ability to consider additional evidence from voters and the Boards related to the rejection or challenge of specific ballots and ballot envelopes (Section III(A)), and provides an analysis of why certain categories of affidavit ballot envelopes (Section III(B)) and absentee ballot envelopes (Section III(C)) should be counted. Finally, this brief addresses several additional legal issues common to both absentee and affidavit ballots (Section III(D)).

A. The Court May Consider Additional Evidence Related to Specific Ballots and Ballot Envelopes

During the most recent hearing, Brindisi sought to offer sworn statements, live testimony, and other evidence from voters, poll workers, and counties regarding the challenge or improper

rejection of the voters' ballots and ballot envelopes ("Additional Evidence"). Tenney argued that the Court may not consider evidence beyond the ballot and the ballot envelopes to determine whether ballots and ballot envelopes were properly rejected or counted. This is incorrect.

1. New York Election Law expressly authorizes this Court to consider Additional Evidence in reviewing challenged ballots and ballot envelopes.

The Election Law explicitly authorizes courts to consider Additional Evidence in proceedings under the article. Under section 16-116, "[a] special proceeding under the foregoing provisions of this article shall be heard upon a verified petition *and such oral or written proof as may be offered . . . .*" (Emphasis added.) The inquiry should end here—the Court is specifically empowered by statute to hold these hearings in the first place to consider sworn statements, live testimony, and other evidence proffered by Brindisi.

Indeed, outside the narrow contexts discussed below, courts routinely consider Additional Evidence to determine whether ballots should be cast and canvassed. *See, e.g.*, *Meyer v. Whitney*, 18 N.Y.S.3d 195, 197-98 (N.Y. App. Div. 2015) (discussing documentary evidence and testimony offered as to the voter's residency); *Alessio v. Carey*, 854 N.Y.S.2d 830, 833 (N.Y. App. Div. 2008) (stating that, based on testimony, the court would hold that disputed affidavit ballots were inserted into envelopes because of poll workers' ministerial errors); *Maas v. Gaebel*, 9 N.Y.S.3d 701, 704-705 (N.Y. App. Div. 2015) (discussing testimony offered regarding voters' residences); *Mondello v. Nassau Cnty. Bd. of Elections*, 772 N.Y.S.2d 693, 695-96 (N.Y. App. Div. 2004) (describing testimony presented regarding voters' registrations and qualifications); *Stewart v. Chautauqua Cnty. Bd. of Elections*, 894 N.Y.S.2d 249, 252 (N.Y. App. Div. 2010) (describing testimony offered regarding a voter's residence); *Smith v. Sullivan*, 959 N.Y.S.2d 588, 599 (N.Y. Sup. Ct. 2012) (discussing affidavit provided by handwriting expert regarding whether certain signatures matched); *Stewart v. Rockland Cnty. Bd. of Elections*, No. 2259–2013, 2013 WL 6509197, at *4 (N.Y. Sup. Ct. Dec. 9, 2013) (concluding, based on voter's "testimony and the lack of a postmark," that the voter's absentee ballot was "not postmarked prior to

election day"); *Teets v. Belcher*, 976 N.Y.S.2d 351, 357 (N.Y. Sup. Ct. 2013) (describing testimony given by voter regarding his intent in using his initials as a signature on his absentee ballot); *see also Panio*, 4 N.Y.3d at 128 ("Therefore, *on this record*, the voters' error of going to the wrong polling place cannot be attributed to the ministerial error of election workers.") (emphasis added); *id.* at 123 (Read, J., dissenting) (criticizing majority opinion based upon lack of testimonial evidence in record).[2]

2. *Gross v. Albany Board of Elections* did not invalidate section 16-116.

Despite the clear statutory authority and precedent allowing the Court to consider Additional Evidence, Tenney asserted during the Hearing that *Gross v. Albany Board of Elections*, 781 N.Y.S.2d 172 (N.Y. App. Div. 2004) somehow prohibits this Court from hearing any testimony and considering any affidavits or other documentary evidence in this action. *Gross* does not stand for this broad of a proposition.

In *Gross*, the court held—in a single paragraph—that it could not count two mailed-in absentee ballots where the Board of Election did not retain the postmarked envelopes in which the ballots were mailed because, in that case, the court could not determine whether those ballots were timely posted *without* what the court described as "extrinsic evidence." *Id.* at 175. But the *Gross* court did not state or even imply that the Election Law prohibits such evidence with respect to any and all other issues of ballot validity.

[2] New York courts also consider Additional Evidence related to who a voter voted for. *See, e.g.*, *Rice v. Power*, 280 N.Y.S.2d 381, 383-84 (N.Y. App. Div. 1967) ("The defect in the returns as to machine #83867 . . . was subject to correction upon the testimony of all four inspectors that 16 votes were recorded on this machine."); *Longo v. D'Apice*, 546 N.Y.S.2d 907, 908 (N.Y. App. Div. 1989) ("[W]e are in agreement with the Supreme Court's determination that the testimony of voters regarding how they cast their ballots is admissible."); *Shaughnessy v. Monahan*, 361 N.Y.S.2d 101, 104 (N.Y. Sup. Ct. 1974), *aff'd sub nom* Farano v. Monahan, 359 N.Y.S.2d 598 (N.Y. App. Div. 1974), *aff'd* 35 N.Y.2d 729 (1974) ("The only serious question before this court is: 'can this primary election be decided in this section 330 proceeding by affidavits of eligible voters as to how they voted?' . . . . It is the opinion of this Court that the question has been answered by the Court of Appeals in the affirmative."

Had the *Gross* court intended to establish a sweeping rule that no Additional Evidence may be considered on *any* issue when courts are engaging in judicial review of ballots and envelopes under Election Law section 16-106—in contravention of the express language in section 16-116 and stacks of precedent—it would have said so. But it did not. It stated merely that, "[w]ithout the postmarked envelope, [the ballots at issue] cannot be counted because extrinsic evidence would be necessary to determine whether the ballots were timely received." *Id.* at 175. The *Gross* case *at most* stands for the proposition that the Court cannot consider Additional Evidence to determine whether certain ballots sent in the mail were timely delivered.[3]

Furthermore, *Gross* discussed only absentee ballots and envelopes sent in the mail, not absentee ballots delivered in person. The absentee envelopes at issue in this case for which Additional Evidence is relevant were delivered *in person*. *See infra* Section III.C.1. These ballots were never postmarked because they were dropped off by the voters in person at polling places and then mailed to the correct county by the county that received the ballots. Any case law that prohibits Additional Evidence to determine whether absentee ballots *mailed* by voters were timely received should not be applied to absentee ballots *returned in person* to polling places and subsequently mailed to the correct Board.

Accordingly, Tenney is wrong that the Court cannot consider Additional Evidence at all. The Court is empowered by statute to receive testimony and accept into evidence affidavits offered by Brindisi in evaluating whether rejected ballots should be counted.

[3] The very cases cited by *Gross* demonstrate that its holding does not apply to situations beyond postmarking of mail-in ballots. For example, *Gross* cites to *Carney v. Davignon*, in which the Appellate Division, Fourth Department affirmed the Supreme Court's decision to disregard "extrinsic evidence" of postmark dates, while simultaneously affirming the Supreme Court's reliance upon witness testimony and the trial judge's credibility determinations in ruling upon the validity of other types of challenged ballots: "With respect to the two remaining ballots (Exhibits 11 and 12), one of which was invalidated, we do not disturb the findings of the court with respect to those ballots where, as here, 'the findings of fact rest in large measure on considerations relating to the credibility of witnesses[.]'" *See* 735 N.Y.S.2d 263, 265 (N.Y. App. Div. 2001).

3. *Gross* and similar cases incorrectly extended inapplicable case law dealing with situations in which the Court did not have jurisdiction to undertake judicial review.

For the reasons set out above, this Court need not address the question of whether *Gross* was correctly decided. Tenney's argument fails for the additional reason, however, that *Gross* contradicts section 16-116 and longstanding case law allowing Additional Evidence, *see supra* Section III.A.1, and improperly relies on older cases that address the separate issue of whether a court has jurisdiction to review problems related to voting machine ballots that were not protested.

Gross and the cases it cites make conclusory statements that courts cannot consider Additional Evidence related to postmarks. *See Gross*, 781 N.Y.S.2d at 175 (citing *Carney v. Davignon*, 735 N.Y.S.2d 263 (N.Y. App. Div. 2001) and *In re Kroening*, 590 N.Y.S.2d 628, 628 (N.Y. App. Div. 1992)); *Carney*, 735 N.Y.S.2d at 265 (stating, without reasoning or analysis, that an absentee ballot is invalid where the court cannot determine the postmark date without additional evidence and citing to *In re Kroening*); *Kroening*, 590 N.Y.S.2d at 628 (holding without analysis that the court cannot consider additional evidence related to postmarks, citing *In re Bennett v. Bd. of Elections of Onondaga Cnty.*, 169 N.Y.S.2d 222 (N.Y. Sup. Ct. 1957)). *Gross*, *Davignon*, and *Kroenig* inappropriately extend the holding in *Bennett*, which dealt with a situation in which the court did not have jurisdiction to engage in judicial review of ballots under the predecessor to section 16-106, by applying the reasoning in *Bennett* to cases dealing with absentee ballots where the court clearly had such jurisdiction.

Bennett was part of a line of cases addressing whether the courts could undertake judicial review of voting machine ballots that had not been protested. Under a former version of Election Law section 16-106, courts had "jurisdiction . . . to determine . . . any question of law or fact arising as to 'protested, wholly blank or void ballots shown upon the statement of the canvass in any election district.'" *Bennett*, 169 N.Y.S.2d at 229 (quoting Elec. Law § 330, recodified in Elec. Law § 16-106). In *Bennett* and related cases, the courts analyzed whether they could consider evidence related to the machine ballots at issue, which were marked with illegible votes

(*Bennett*, 169 N.Y.S.2d at 229), failed to reflect the votes for one candidate due to defective machines (*Hogan v. Supreme Court*, 281 N.Y. 572, 575-76 (N.Y. 1939); *In re Carson*, 299 N.Y.S. 978, 980, 982-83 (N.Y. Sup. Ct. 1937)), or incorrectly marked by voters (*In re Lester*, 127 N.Y.S.2d 272, 276 (N.Y. Sup. Ct. 1953)). The courts in those cases held that the machine ballots were not protested, wholly blank, or void ballots and therefore the court did not have jurisdiction to review the ballots under former section 330. *Hogan*, 281 N.Y. at 525 ("It is argued for Ahern that each time the defective machine failed to register a vote cast for him the result was a ballot 'wholly blank' in the sense of that phrase as used in [former section 330]. We are unable to assent to that argument."); *In re Lester*, 127 N.Y.S.2d at 276 ("The word 'ballot' as used in connection with voting machines is defined [by statute], and such definition clearly excludes any such thing as a 'protested ballot' on a voting machine, within the meaning of that term as employed in Section 330); *In re Carson*, 299 N.Y.S. at 982 ("A determination of how electors attempted to vote on a voting machine which failed to record their votes surely cannot be made under the authority of a statute authorizing a review, through an inspection by the court of those ballots deemed by the inspectors to be void, wholly blank, or which were protested."); *Bennett*, 169 N.Y.S.2d at 229-30 (implying illegible votes cast on machines did not constitute protested, wholly blank, or void ballots). Thus, while these cases held that the court could not consider testimony or other evidence related to those ballots, it was based on lack of jurisdiction, not any other general rule prohibiting additional evidence. *Hogan*, 281 N.Y. at 525; *In re Lester*, 127 N.Y.S.2d at 276; *In re Carson*, 299 N.Y.S. at 982-83; *Bennett*, 169 N.Y.S.2d at 229-30.[4]

[4] Another case, *People ex rel. Feeny v. Bd. of Canvassers of Richmond Cnty.*, 156 N.Y. 36, 44-45 (N.Y. 1898) (Haight, J., concurring), also found that the court could not consider Additional Evidence related to markings on ballots. Like the *Bennett* line of cases, *Feeny* is inapplicable here. In *Feeny*, the court held it could not review Additional Evidence because, as the Court of Appeals, it did not have jurisdiction under the New York Constitution to review issues of fact. *Id.* ("Our power is limited to the review of the law, and we cannot review a reversal upon the facts. But there has been no reversal on the facts in this case. . . . The reversal being upon the law, we must review all questions of validity arising upon the ballots, and not depending upon extrinsic evidence. Such questions are purely conclusions of law based upon the ballots, . . .") (citing former New York Const. art. 6, § 9 (current New York Const. art. 6 § 3)).

Other cases in which jurisdiction was not challenged have allowed review of Additional Evidence. *See supra* Section III.A.I and cases cited therein.

Kroenig was the first case that applied the *Bennett* line of cases to absentee ballots with postmarks. In a one-sentence analysis, *Kroenig* held that the absentee ballot should not be counted under *Bennett* because it "was received after election day and the postmark date could not be ascertained without extrinsic evidence." 590 N.Y.S.2d at 628 (citing *Bennett*, 169 N.Y.S.2d 222). This holding was erroneous because, unlike in *Bennett*, the court in *Kroenig* clearly had jurisdiction to undertake a judicial review under section 16-106, and therefore could rely on "oral or written proof" under Section 16-116. *Gross* and *Carney* simply adopted the holding in *Kroenig* with no additional analysis and no consideration of Section 16-116 or the many other cases allowing consideration of evidence in connection with judicial review of ballots. *See Kroening*, 590 N.Y.S.2d at 628 (stating only that the ballot at issue "cannot be counted" because "the postmark date could not be ascertained without extrinsic evidence"). As a result, these cases are not good law, and this Court should follow the statutory mandate and case law cited in Section III.A.1 above and consider Additional Evidence submitted by the parties.

B. Challenges to Affidavit Ballots and Ballot Envelopes

The Hearing involved the judicial review of hundreds of affidavit ballots and envelopes that were either rejected by the Boards and challenged by Brindisi or counted by the Boards and challenged by Tenney. All of these affidavit ballots should be counted.

A voter may be required to vote by affidavit ballot on election day for several reasons, including if (1) the voter's registration poll record is missing; (2) the voter's signature does not appear on the registration list; or (3) the voter's identity has not been verified. Elec. Law § 8-302(3)(e). Voters who fall into these categories "swear to and subscribe an affidavit" in a form prescribed by the state board of elections, which is printed on the envelopes containing their ballots. *Id.* § 8-302(3)(e)(ii).

After the election, New York law requires the county board of elections to "cast and canvass" (i.e., count) an affidavit ballot if the board determines the voter submitting such a ballot was entitled to vote and finds, as relevant here, that one of the following circumstances applies:

- a "ministerial error" by the board of elections or any of its employees caused the "ballot envelope not to be valid on its face," *id.* § 9-209(2)(a)(ii);
- the voter "appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district," *id.* § 9-209(2)(a)(iii);
- the voter "substantially complied with the requirements" of the Election Law, meaning that "the board can determine the voter's eligibility based on the statement of the affiant or records of the board," *id.* § 9-209(2)(a)(v); or
- the voter failed to "to include on the envelope the address where such voter was previously registered," as long as "the statewide voter registration list supplies sufficient information to identify a voter," *id.* § 9-209(2)(a)(vi).

Significantly, the mandate in section 9-209(2)(a)(v) to cast and canvass affidavit ballots that "substantially complied" with election laws was passed by the Legislature and signed into law in 2019, 2019 Sess. Law News of N.Y. Ch. 717 (A. 1320-A), abrogating prior case law that required courts to strictly construe election laws when adjudicating ballot challenges. *See, e.g.*, *Gross v. Albany Cnty. Bd. of Elections*, 3 N.Y.3d 251, 258 (2004) (describing general requirement for strict compliance with election laws).

Applying the above-described principles, the following categories of affidavit ballots must be "cast and canvassed" by the Boards:

1. Voters who voted at the correct polling place but in the wrong election district;
2. Voters who voted at the incorrect polling place;
3. Voters who submitted affidavit ballots in unsealed envelopes;
4. Voters who submitted affidavit ballot envelopes with missing or incorrect information, including:
   a. Missing prior address;
   b. Missing date of birth, current addresses, checked boxes, or other information; and
   c. Missing signatures;
5. Voters whose registration was wrongfully purged or never recorded;
6. Ballots alleged by Tenney to be fraudulent;
7. Voters who moved without updating their registration (these voters' ballots should be counted under the new Statewide Transfer law); and

8. Voters whose names are listed in the registration database as "purged" as a result of a county board's determination that the voter has moved away from their registration address.

1. Affidavit ballots cast by voters who appeared at the correct polling place but voted in the wrong election district must be counted.

The Boards erroneously rejected affidavit ballots submitted by voters who appeared at the correct polling place but cast their votes in the wrong election district.

Voters from different election districts often share a single polling location that contains multiple "tables" for each of the different election districts. Unfortunately, voters may join the line for the wrong election district, arrive at the table and find that they are not listed on the pollbook. Instead of catching the error and directing the voter to the correct table in the same polling location, some poll workers provided the voter with an affidavit ballot to complete. State law is clear that these affidavit ballots must be counted.

Section 9-209(2)(a)(iii) provides, "If the board of elections determines that a person was entitled to vote at such election, *the board shall cast and canvass such ballot if such board finds that the voter appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district*." (Emphasis added). *See also Panio*, 4 N.Y.3d at 127–28 (holding that affidavit ballots cast in the correct polling site but the wrong election district should be counted). The plain text of that statute requires boards to cast and canvass these affidavit ballots.

Accordingly, votes from individuals who went to the right polling place but voted in the wrong election district must be counted.

2. Affidavit ballots cast by voters who appeared at the wrong polling place and were provided affidavit ballots by poll workers must be counted.

The Boards incorrectly rejected affidavit ballots submitted by voters who went to the wrong polling place but were offered affidavit ballots by poll workers.

Under Election Law section 8-302(e), poll workers must advise a voter who comes to the wrong polling place of the voter's proper polling place and election district based on the voter's address. Furthermore, section 8-302(e)(ii) authorizes poll workers to offer affidavit ballots only to voters "whose residence address is in [the] election district." Had poll workers followed these statutory instructions, voters whose affidavit ballots were rejected would never have voted in the wrong polling place in the first place. These voters should not be disenfranchised because poll workers did not comply with their statutory obligations.

Prior to 2009, the election law did not affirmatively require poll workers to advise voters of their correct polling place, and voters who voted in the wrong polling place would not have had their ballots counted absent evidence of poll worker error. For example, in 2004, the Court of Appeals in *Panio* held that "[i]t would be unreasonable to require poll workers to ensure that voters are in their proper polling site. Therefore, on this record, the voters' error of going to the wrong polling place cannot be attributed to the ministerial error of election workers." 4 N.Y.3d at 128.

However, in 2009, the Legislature disagreed and amended section 8-302(e) to include the language discussed above requiring poll workers to advise voters of their correct polling place and election district. ELECTION DISTRICT—PROPER POLLING PLACE, 2009 Sess. Law News of N.Y. Ch. 489 (A. 1002–C) (McKinney's) (adding language to section 8-302(e) requiring a poll worker to "consult a map, street finder or other description of all of the polling places and election districts within the county in which said election district is located *and advise the voter of the correct polling place and election district within the county* for the residence address provided by the voter to such poll clerk or election inspector") (emphasis added). Simultaneously, this legislation amended sections 4-128 and 4-132 to require boards of election to provide each polling place sufficient information so that poll workers could locate the correct polling place for any voter who mistakenly went to the wrong polling place. *Id.*

Because the Legislature added the language to section 8-302(e) requiring election workers to determine and advise voters who appear at the wrong polling place of the proper

polling place in 2009, *Panio* is no longer controlling. The *Panio* Court's decision not to count the ballots cast by voters from the wrong polling places explicitly rested on its reasoning that, based on the record before it, poll workers did not commit ministerial error by not directing the voters to the correct polling site because it "would be unreasonable to require" that poll workers do so. In addition, poll workers are also only allowed to give an affidavit ballot to a voter who resides in the election district. Elec. Law § 8-302 (McKinney) ("The inspectors of election shall offer such an affidavit to each such voter whose residence address is in such election district."). Because a poll worker may not provide an affidavit ballot to someone who does not reside in the election district and because the amendment to section 8-302 requires the poll worker to direct the voter to the correct polling place, the failure of a poll worker to ensure that voters are at the correct polling place *must* be ministerial error—unless there is specific evidence that the unlikely situation occurred in which a poll worker fully informed the voter of the location of her correct polling place but the voter disregarded the poll worker's advice and demanded to vote an affidavit ballot at the wrong location. Absent such specific evidence, this Court should count the ballots of voters who voted at the wrong polling place.[5]

Moreover, *Panio* was decided well before the Legislature amended Election Law section 9-209 in 2019 to require ballots to be counted "[i]f the board of elections determines that a person was entitled to vote at such election" and "finds that the voter substantially complied with the requirements of this chapter." Elec. Law § 9-209(2)(a)(v); *compare Panio*, 4 N.Y.3d at 59 (decided in 2005) *with* N.Y. Comm. Rep., A.B. 1320, 242d Leg. Sess. (2019) (stating that the 2019 bill would add subsection (v) to section 9-209(2)(a)). Substantial compliance means that "the board can determine the voter's eligibility based on the statement of the affiant or records of the board." Elec. Law § 9-209(2)(a)(v). Because the Board can determine the voter's eligibility

[5] To be sure, for a voter who votes in the wrong election district or polling place, only the contests for which the voter was eligible to vote in their correct election district can be counted. As relevant here, as long as the voter's correct election district was in the 22nd Congressional District, a ballot cast in the wrong election district in the 22nd Congressional District contest must be counted.

to vote based on its records or the voter's affidavit even if the voter casts an affidavit ballot in the wrong polling place, section 9-209(2)(a)(v), not *Panio*, controls here. The otherwise eligible voters who voted by affidavit ballot in the wrong polling place substantially complied with the provisions of the Election Law and their ballots must be counted.

Finally, even if the Court were to disregard the changes to the statutory framework governing votes cast in the wrong polling place since *Panio* was decided, many of the affidavit ballots at issue in this case cast in the wrong polling place are valid even under the pre-2009 statutory framework. This is because *Panio's* holding did not set forth an absolute rule prohibiting the counting of affidavit ballots cast in the wrong location under any circumstances. Rather, it turned on the sufficiency of evidence in the record of that case. In *Panio*, the party seeking to count the votes of voters who cast them in the wrong polling place did not present sufficient evidence that those voters did so because of poll workers' ministerial errors. *Id.* at 128 ("[*O*]*n this record*, the voters' error of going to the wrong polling place cannot be attributed to the ministerial error of election workers.") (emphasis added). Indeed, the *Panio* Court makes no mention of voter testimony establishing that poll workers misdirected or misinformed those voters. By contrast, here, Brindisi intends to offer testimony that, not only did some poll workers provide voters with an affidavit ballot and fail to direct voters to the correct polling place in contravention of their statutory requirement, but in many cases, they also incorrectly ninformed these voters that their affidavit ballots would be counted. Under *Panio*, the voters' error of going to the wrong polling place can be attributed to the ministerial error of election workers if the party seeking to have those ballots counted presents sufficient evidence of those ministerial errors. The evidentiary record Brindisi will submit to the Court will meet this burden.

3. Affidavit ballots in unsealed envelopes should be counted.

Some voters submitted affidavit ballots in unsealed envelopes. In some cases, where the Oneida Board had rejected affidavit ballot envelopes for other reasons, Tenney responded to

Brindisi's challenge by claiming that the affidavit ballots should not be counted, regardless of the reason why they were rejected by the Board, if those ballots were not properly sealed.

In Oneida County, testimony will show that some poll workers wrongly informed voters that they did not need to seal their affidavit ballot envelopes and did not make any attempt to seal unsealed affidavit ballot envelopes before depositing them into bags of completed ballots. *See* Affidavit of Mahadevi Ramakrishnan ("Ramakrishnan Aff.") ¶¶ 9-10. Other poll workers attempted to seal the envelopes submitted by voters, but the envelopes would not always stay sealed. Affidavit of Eric Yoss ("Yoss Aff.") ¶ 10. Some poll workers did not actively misinform voters, but they also did not inform voters that they needed to seal their affidavit ballot envelopes. Ramakrishnan Aff. ¶¶ 11-12; Yoss Aff. ¶ 14. Many voters did not seal their envelopes because they were concerned about removing their masks indoors and increasing the risk that they and others, including the inspectors, would be exposed to COVID-19. Yoss Aff. ¶¶ 6, 8-9. Tenney also objected to envelopes where the "I VOTED" sticker or tape was used to seal envelopes. But poll workers used the sticker or tape because (1) they were concerned about taking off their masks and risking exposure or exposing others to COVID-19, and (2) the ballot envelopes were not staying sealed when poll workers licked the envelopes or used wet paper towels to try to seal the envelopes. Yoss Aff. ¶¶ 10-11.

Voters who relied upon poll workers' instructions or did nor seal their ballot envelopes for fear of risking exposure to COVID-19 or not complying with COVID-19 protocols should not be disenfranchised because they followed both poll worker instructions, New York law regarding wearing masks in public spaces, and general CDC guidance about reducing transmission of COVID-19. Nor should voters who relied on the Board to provide envelopes that would stay sealed once licked be disenfranchised because their envelopes would not stay sealed. Likewise, voters should not be disenfranchised because poll workers could not ensure that the envelopes provided by the Board would stay sealed without affixing tape or a sticker to them. *See* Elec. Law § 9-209(2)(a)(ii) ("If the board of inspectors determines that a person was entitled to vote at such election it shall cast and canvass such ballot if such board finds that ministerial

error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face."); *cf. People ex rel. Simons v. Knickerbocker*, 232 N.Y.S. 399, 400 (N.Y. App. Div. 1929) (holding that cross-mark in blank voting square in front of write-in space did not void ballot because election officials invited the voter to make the mark by providing the blank square, and distinguishing earlier cases where no such invitation to make extraneous mark occurred).

4. Affidavit ballot envelopes with missing or incorrect information must be counted.

Several affidavit ballots were either rejected by the Boards or challenged by Brindisi because of missing or incorrect information on the affidavit envelope. Under the new law, these ballots should be counted as long as they substantially comply with New York election law and "the board can determine the voter's eligibility based on the statement of the affiant or records of the board." Elec. Law § 9-209(2)(a)(v).

a. Affidavit ballot envelopes that fail to include the voter's prior address.

Voters who submit affidavit ballots because they moved to a new election district are asked to provide their previous address in section "B" of the affidavit printed on the ballot envelope. However, pursuant to section 9-209(2)(a)(vi), a voter's failure to include his or her prior address on the affidavit ballot envelope is not grounds for rejecting the ballot. That statue provides: "If the board of elections finds that the statewide voter registration list supplies sufficient information to identify a voter, failure by the voter to include on the envelope the address where such voter was previously registered shall not be a fatal defect and the board shall cast and canvass such ballot." *Id.* The plain text of the statute demonstrates that the Legislature intended to *require* boards to cast and canvass affidavit ballots even if a voter fails to provide his or her prior address if the board is able to identify the voter using the statewide voter registration list.

Although the statute is unambiguous, if there is any doubt about this point, the legislative history provides further support for the proposition that the omission of a voter's prior address on the affidavit ballot envelope is not fatal. The relevant language in section 9-209(2)(a)(vi) was added to the statute in July 2020. NY LEGIS 717 (2019), 2019 Sess. Law News of N.Y. Ch. 717 (A. 1320-A). A legislative report that accompanied the bill confirms that the objective was to ensure that, "if a voter does not fully identify the address at which they were previously registered, this cannot be considered a material defect and such vote must be cast and canvassed." *See* Sponsor's Mem., Bill Jacket S3045B (https://www.nysenate.gov/legislation/bills/2019/s3045/amendment/b). Additionally, because boards can determine the voter's eligibility based on the statewide voter registration file, these ballots "substantially compl[y]" with the applicable requirements and section 9-209(2)(a)(v) provides a second, independent basis for casting and canvassing these ballots.

Indeed, Tenney has all but conceded that the voters' failure to complete Section B does not invalidate their affidavit ballots. Although Tenney's counsel has not been consistent, they have argued that affidavit ballots cast by voters affiliated with the Republican Party should be counted even where those voters failed to complete Section B of the affidavit ballot envelope. Hr'g Tr. 479:3-9 (Dec. 23, 2020) (agreeing that the Court provided "a good characterization of [their] argument regarding CH-49" when it stated that they "argued . . . that failing to complete Section B should not invalidate your vote"); *see generally* Hr'g Tr. 475:18-484:18 (Dec. 23, 2020) (arguing the failure to complete Section B of affidavit ballot envelopes does not invalidate the ballots cast by voters affiliated with the Republican Party).

Accordingly, this Court should rule that the Boards are required to cast and canvass affidavit ballots where the voter omitted prior address information from the ballot envelope.

b. Affidavit ballot envelopes that omit other information.

Affidavit ballot envelopes with other minor omissions—for example, ballot envelopes that omit the date of the signature or the voter's date of birth, or where the voter's name on the

envelope does not exactly match the voter's name in the registration records—substantially comply with Election Law and must therefore be counted and canvassed pursuant to section 9-209(2)(a)(v) ("substantially complied" means that "the board can determine the voter's eligibility based on the statement of the affiant or records of the board").

First, ballot envelopes that contain an undated signature do not prevent the board from determining the voter's eligibility because the voter completes the affidavit envelope in front of polling officials. There is no question, then, that these ballots were timely completed and submitted. *See Hoyt v. Dewitt*, 18 Misc.3d 540 (N.Y. Sup. Ct. 2007) (holding that erroneous date on affidavit ballot did not disqualify it from being counted because "the court can reasonably infer that an affidavit ballot presented to a voter at the polling place on election day, completed by the voter in the presence of board personnel, was properly issued and collected").

Similarly, ballot envelopes that lack the voter's date of birth or current address or do not contain the voter's name as recorded in the registration records (because, for example, the voter's name has changed or the ballot envelope does not reflect a voter's hyphenated last name) are not invalid because this information is not necessary for the board to ascertain a voter's eligibility. Because valid affidavit ballots are cast by voters who are already registered to vote, boards already have on file the voters' dates of birth. In addition, affidavit envelopes contain many indications of the voter's identity—such as the voters' driver's license numbers, last four digits of social security numbers, addresses, and signatures—and so a missing birth date or truncated surname does not pose an insurmountable obstacle to a board's determination of the voter's eligibility. *Cf. Stewart v. Rockland Co. Board of Elections*, 41 Misc. 3d 1238(A) (Sup. Ct. Rockland Co.), *aff'd* 112 A.D.3d 866 (2d Dep't. 2013) (use of initials rather than full signature on absentee ballot did not invalidate the ballot where the handwriting matches the voter's registration form).

In each of the omissions described above, the voter "substantially complied with the requirements" of the Election Law because "the board can determine the voter's eligibility based on the statement of the affiant or records of the board." Elec. Law § 9-209(2)(a)(v); *see also*

Gross v. Albany Cnty. Bd. of Elections, 3 N.Y.3d 251, 258 (2004) ("There is no question that the object of election laws is to secure the rights of duly qualified electors, not to frustrate them by posing technical obstructions that bear no relationship to the policies underlying the statutes.") (internal quotations and citation omitted). This interpretation is consistent with the legislative history of section 9-209(2)(a)(v), which confirms that the legislature did not intend such defects to result in the disenfranchisement of voters. To the contrary, as illustrated by a legislative report describing the purpose of the law, "This bill is necessary because the current law is often exploited by those seeking to invalidate ballots by employing hyper-technical legal challenges to ballots in an all-too-often successful effort to deny a person their constitutional right to vote." Sponsor's Mem., Bill Jacket, L 2019 (available at https://www.nysenate.gov/legislation/bills/2019/s3045/amendment/b).

Because the Boards are able to verify voters' eligibility to vote notwithstanding such defects, such ballots substantially complied with the law and must be counted.

c. Affidavit ballot envelopes that omit signatures.

This court should also count affidavit ballot envelopes without signatures as long as it is possible to identify the voter. Although the Appellate Division once held in *Mondello v. Nassau County Board of Elections* that an affidavit ballot envelope is void on its face when the voter did not sign the affidavit, that case was decided in 2004—before the Legislature amended the Election Law to add the substantial compliance requirement previously discussed. *Compare Mondello*, 772 N.Y.S.2d at 697 *with* 2019 NY A.B. 1320 (NS) (stating that the 2019 bill would add subsection (v) to section 9-209(2)(a)). Accordingly, as with voters who omitted other information from the affidavit ballot envelope, the substantial compliance standard governs here.[6]

[6] Although Article 2, section 7 of the New York Constitution provides that the "legislature shall provide for the signatures . . . of all persons voting in person by ballot . . . ," it does not provide that voters' failure to provide such a signature constitutes grounds for not casting and canvassing their ballot. Accordingly, Article 2, section 7 does not require this Court to invalidate the ballots at issue here.

Here, a number of voters inadvertently neglected to sign the oath or to include their current address on their affidavit ballot envelope. Some of these voters are prepared to testify that they intended to vote, did not sign the oath or include their address (whichever is applicable) only by mistake, and still wish their votes to count. The Board can tell whether these voters are eligible to vote from their affidavit or from the Board's records even without their signatures on their oath or their current addresses; accordingly, these voters have substantially complied with the Election Laws and their ballots should be counted. *See* Elec. Law § § 9-209(2)(a)(v); *Weinberger v. Jackson*, 280 N.Y.S.2d 235, 235 (N.Y. App. Div. 1967) ("the right of the voter to be safeguarded against disenfranchisement and to have his intent implemented wherever reasonably possible . . . transcends technical errors . . . .").

5. Ballots cast by voters who registered but whose registration was wrongfully purged or not recorded due to ministerial error must be cast and canvassed.

The law requires votes to be cast and canvassed if "ministerial error" by the board of elections or any of its employees caused the "ballot envelope not to be valid on its face." Elec. Law § 9-209(2)(a)(ii); *see also id.* § 16-106 ("If the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face."). "'The right of the voter to be safeguarded against disenfranchisement and to have his intent implemented wherever reasonably possible . . . transcends technical errors.'" *Carney v. Niagara Cnty. Bd. of Elections*, 778 N.Y.S.2d 631, 632 (2004) (quoting *Carney v. Davignon*, 735 N.Y.S.2d at 265).

Some voters had their ballots rejected because, though they were registered to vote prior to election day, they were wrongfully moved to "purged" status or their registration was not processed by the relevant county board of election. All of these voters' ballots should be counted.

First, voters who were registered to vote and improperly moved to purged status as a result of ministerial error should have their ballots counted. New York courts have long required the casting and canvassing of affidavit ballots completed by voters whose registrations are erroneously cancelled.[7] *See*, *e.g.*, *Marraccini v. Balancia*, 582 N.Y.S.2d 232, 233 (1992) (holding lower court erred in excluding affidavit ballots submitted by student voters whose registrations had been cancelled in error); *cf. Carney*, 778 N.Y.S.2d at 632 (holding the "failure of the Board to date/time-stamp [an] otherwise properly cast ballot was a mere ministerial error" and the ballot should be counted); *Nicolaysen v. D'Apice*, 472 N.Y.S.2d 458, 460 (N.Y. App. Div. 1984) ("[W]e find that this ballot should have been counted, since the record indicates that the voter was duly registered and her registration was improperly counted."); *McClure v. D'Apice*, 497 N.Y.S.2d 770, 723 (N.Y. App. Div. 1986) ("The other two affidavit voters would have been properly registered but for mistakes by the board of elections. Therefore, the Supreme Court properly directed those affidavit ballots be counted.") (citing *Nicolaysen*, 472 N.Y.S.2d at 460).

Next, voters who registered to vote but submitted affidavit ballots because their registration was not recorded due to ministerial error must have their votes counted and canvassed.[8] These voters should be on the registration records, and the county's failure to process their registrations is a ministerial error. The erroneous failure to record a voter's registration is little different than the erroneous cancellation of a valid registration. Because the

[7] As discussed in Section III.A, the Court may consider Additional Evidence in determining whether rejected ballots should be counted. This evidence includes voting records from previous years that demonstrate these voters were erroneously moved to purged status.

[8] Brindisi is prepared to offer evidence to this Court establishing that the voters in this category registered to vote prior to the deadlines to register to vote in the November 3 election. For voters who registered by mail, applications needed to be postmarked by October 9 and received by a Board by October 14. Voters who registered in person needed to do so by October 9. NYSBOE, *Voter Registration Deadlines*, https://www.elections.ny.gov/VotingDeadlines.html (last visited Dec. 30, 2020). As discussed in Section III.A, the Court may receive this evidence, whether in the form of confirmation emails, voter affidavits, or voter testimony.

latter is not grounds for excluding voters, neither is the former. *See Marraccini*, 582 N.Y.S.2d at 233 (directing the canvassing of affidavit ballots submitted by student voters whose registrations had been cancelled in error).

6. Tenney's allegations of fraud do not meet the high standard required to invalidate ballots.

The Tenney campaign challenged several affidavit ballot envelopes that it claims are fraudulent. Each should be counted.

In election contests, as in other areas of the law, a party alleging fraud must meet a high burden. Challengers must allege fraud with particularity, setting "forth facts supporting the claim that irregularities occurred . . . . Allegations based on mere information and belief, omitting the source of the information or the basis for the belief, are insufficient." *Graham v. Umane*, 678 N.Y.S.2d 660, 660 (N.Y. App. Div. 1998); s*ee also In re Malone v. Rockland Cnty. Bd. of Elections*, 973 N.Y.S.2d 235, 235 (N.Y. App. Div. 2013) (finding that the petitioner did not allege sufficiently specific allegations of fraud in a petition challenging absentee ballots). Further, a party seeking to invalidate votes on the basis of fraud must prove that fraud occurred by clear and convincing evidence. *Vacco v. Spitzer*, 685 N.Y.S.2d 583, 585-86 (N.Y. Sup. Ct. 1998). The party challenging a ballot or ballot envelope is unlikely to meet this high burden where alternative explanations for alleged fraud exist. *Cf. Vacco v. Spitzer*, 685 N.Y.S.2d 583, 586 (N.Y. Sup. Ct. 1998) (to void an election, a plaintiff must show (1) "there is a reasonable basis for the inquiry as to each vote challenged;" (2) "that the alleged irregularities are not susceptible [to] inferences other than fraud;" (3) "that specific acts of fraud, misconduct and/or irregularity occurred;" and (4) "that the fraud or other unlawful behavior changed the outcome of the election").

Here, Tenney has not—and cannot—meet this high standard for any of the ballot envelopes that she alleges are fraudulent. In Broome County, Tenney challenged one affidavit ballot envelope on the basis of fraud because the voter's last name, address, and signature did not match the information for that voter in the voter file, despite the fact that the driver's license

number provided by the voter matched the license number in her voter file.[9] The Board of Elections was prepared to overrule Tenney's objection and count the ballot. It did not do so only because Tenney erroneously asserted that the Board had no authority to rule on allegations of fraud.[10] Tenney claims that this voter, whose last name and address changed since the voter registered, has committed fraud by casting an affidavit ballot under the voter's new last name and new address. Yet, Tenney has produced no evidence to suggest that the voter's name change was fraudulent and has provided no reason to discount a much more probable explanation: that the voter changed her last name after she got married and that she moved. Indeed, Tenney cannot even show that the voter's use of a different last name and address constitutes an *irregularity*,

[9] Because the Board was able to determine the voter's eligibility based on the match between the driver's license number on her affidavit and the same number in her voter file, the voter "substantially complied" with the requirements of the Election Law. *See* Elec. Law § 9-209(2)(a)(v).

[10] Courts have held that Boards may not rule on allegations of fraud in passing on the sufficiency of *designating and nominating petitions* because the jurisdiction of the Board of Elections in that context "is confined to ministerial as distinguished from judicial duties." *See Bednarsh v. Cohen*, 267 AD 133, 135 (1st Dept 1943). This line of cases does not apply to allegations of fraud in *ballot challenges*. Ballot challenges are governed by Election Law section 9-209(2)(d), which provides that any person may object to the canvassing of any ballot on grounds that the voter was "not entitled to cast such ballot." Because a person is not entitled to cast a ballot fraudulently, a challenge on that basis is encompassed by the terms of the statute.

Section 9-209 is unequivocal: Boards have the authority to rule on such challenges. Elec. Law. § 9-209(2)(d) ("When any such objection is made, the central board of inspectors shall forthwith proceed to determine such objection and reject or cast such ballot according to such determination."). Although the Board's decision may be subject to judicial review, courts have affirmed that the Boards, not the courts, must first rule on these challenges. *See O'Keefe v. Gentile*, 757 N.Y.S.2d 689, 691 (Sup. Ct. 2003) ("Justice Fisher's order, which provided for [judicial] immediate review of challenged ballots, precluded the board of inspectors from rejecting or counting a challenged ballot in the first instance, as set forth in Election Law 9–209(2)(d), thus, resulting in a modification of the statute."); *see also Testa v. Ravitz*, 84 N.Y.2d 893, 895 (1994) (recognizing that the "Supreme Court lacks jurisdiction to examine the ballots and conduct its own canvass prior to the Board of Elections conducting its canvass"). Accordingly, Tenney was wrong in asserting that the Board did not have the authority to overrule her objection that the ballot envelope at issue was invalid because of fraud.

much less fraud—both are so common that the Election Law contains provisions allowing for voters who have changed their names or addresses but not yet updated their registration to vote. *See* Election Law § 8-302(3)(c) (allowing voters who "claim[] a changed name . . . to vote in the same manner as other voters unless challenged on other grounds"); Election Law § 5-208(1) (requiring the Board of Elections to transfer the registration of a voter who submits an affidavit ballot with a new address in the state to that new address).

Likewise, Tenney's assertion that this voter's signature does not match the signature on file does not establish fraud. For the reasons discussed in Section III.D.2 below, it is far more likely that Tenney is simply wrong in asserting that the voter's handwriting did not match the signature on file.[11]

In Oneida County, Tenney alleged that two affidavit ballot envelopes were fraudulent because the voters signed their oaths with only their first name and did not include their last names. With respect to these ballots, Tenney has made no attempt to explain how a signature comprised of only a first name constitutes evidence of fraud. Whatever theory Tenney might assert is far less plausible than the alternative, common-sense explanation: the voter simply neglected to include her last name when she signed her ballot envelope. Moreover, ballot envelopes with signatures that do not comprise a voter's entire name are valid under New York law. *See Stewart v. Rockland Cnty. Bd. of Elections*, 979 N.Y.S.2d 598, 599 (N.Y. App. Div. 2013) (finding valid an absentee ballot contained in an envelope signed with a voter's initials); *Teets v. Belcher*, 976 N.Y.S.2d 351, 357-59 (N.Y. Sup. Ct. 2013) (stating "requiring a full signature as a condition precedent to counting an absentee ballot where there is no instruction or

[11] To the extent Tenney asserts that the voter's signature does not match the one on file because the voter's last name changed, this argument does not withstand scrutiny. New York permits individuals who have changed their name to vote without first updating their registration and requires inspectors to get an updated signature from the voter. *See* Elec. Law § 8-302(3)(c). If the inspectors did not follow the statutory direction to obtain a new signature from the voter and update her file with it, the voter should not be disenfranchised because of their error, especially when the voter provided other information, like her driver's license number, which matched her voter file.

cautionary language to that effect amounts to elevating form over substance" and finding valid absentee ballot contained in an envelope signed with the voter's initials). If ballots with incomplete signatures are not invalid, they certainly are not fraudulent based on the absence of a complete signature alone.

In any case, Tenney cannot show that a signature comprised of only a voter's first name, a purported signature mismatch, or a voter's name and address change constitute fraud, much less do so by clear and convincing evidence. More plausible innocuous explanations exist for each of these supposed "irregularities." The Court should reject Tenney's attempt to disenfranchise these voters without clear and convincing evidence of fraud.

7. New York's universal registration transfer law requires boards to count votes that were submitted by affidavit ballot for voters who are registered to vote in another New York county.

Both parties agree: a recent change to New York's Election Law makes clear that affidavit ballots must now be counted where a voter moves within New York state and attempts to vote without having first updated his or her registration with the election board in the new election district. *See* Elec. Law § 5-208(1); Hr'g Tr. 29:9-12 (Dec. 21, 2020) (counsel for Tenney arguing that an affidavit envelope is valid under the transfer law where it was cast by a voter who moved to a new county). Under section 8-302(3)(e), a voter may be required to vote by affidavit ballot if the voter claims to live in an election district but no registration poll record can be found for the voter in that district's poll ledger or if the voter's name does not appear in the district's computer-generated registration list. With a 2019 statutory amendment, the Legislature significantly expanded the class of New Yorkers whose affidavit ballots required under this section must be counted—a class that includes many voters whose affidavit ballots are at issue here.

Prior to the 2019 revision, New York law provided that a voter who moved to a new address *within the same county or city* and was required to cast an affidavit ballot due to an outdated voter registration address was entitled to have that affidavit ballot counted. *See* § 5-

208(1) (as added by L. 1996, ch. 200 § 1) ("The board of elections shall transfer the registration and enrollment of any voter for whom it receives a notice of change of address *to another address in the same county or city*, or for any voter who casts a ballot in an affidavit ballot envelope which sets forth such a new address.") (Emphasis added); *see also* Jerry H. Goldfeder, *Modern Election Law* 90 (5th ed. 2018) ("The otherwise registered voter may have moved without notifying her Board of Elections. If she has moved within the county (or within New York City), she must be allowed to vote at her new [election district]—but only on an Affidavit Ballot."). But voters who moved across county lines did not receive this benefit. Instead, the affidavit ballots cast by these cross-county movers served merely as a registration and change of address form for future elections.

In 2019, the Legislature eliminated this discrepancy and determined that affidavit ballots submitted by New Yorkers who moved across county lines should be treated no differently than those submitted by New Yorkers who moved within their county or within New York City. *See* 2019 Sess. Law News of N.Y. ch. 3 (A. 775). A legislative report summarizing the proposed change makes clear the Legislature intended that boards will now count the affidavit ballots submitted under section 8-302(3)(e) by *any* New Yorker who changed residence within the state:

> New York's election law currently creates unnecessary impediments that make it difficult for eligible voters to participate in elections and also creates unnecessary challenges for election officials administering elections. This bill would remove one such impediment.
>
> New York State's election law currently allows a registered voter who moves within a county or within New York City to vote in his or her new election district without re-registering. Boards of elections automatically transfer such a voter's registration when they receive notice of a change of address or when a voter completes an affidavit ballot envelope attesting to a new address. However, voters who move within the state in or out of New York City or from one county to another outside of New York City are barred from voting on election day unless they update their registration by the registration deadline.
>
> *This bill will amend the law to allow a voter who moves anywhere within the State to vote in his or her new election district.* Boards of elections would automatically transfer registrations for such a voter, as they currently do for voters who move

> within their county or within the New York City. *Affidavit ballots would be verified using the state-wide voter file.*

Sponsor's Mem., Bill Jacket, L 2019, ch. 3, https://www.nysenate.gov/legislation/bills/2019/s1099 (emphases added).

As the above summary demonstrates, the purpose of the 2019 revision was to allow registered voters to cast votes in new election districts—and to have those votes counted—without having first to re-register to vote. The amended language in section 5-208 accomplishes that goal precisely by expanding automatic registration transfer and uninterrupted voting eligibility from voters who experience a change of address "in the same county or city" to include any voters who change their address within "New York state." The operative text of the statute now reads:

> The board of elections shall transfer the registration and enrollment of any voter appearing on a statewide voter list pursuant to subdivision one of section 5-614 of this article for whom it receives a notice of *change of address to another address in New York state*, or for any voter who submits a ballot in an affidavit ballot envelope which sets forth such a new address.

Elec. Law § 5-208(1) (emphasis added). Additionally, the introduction to section 9-209 provides "the board of elections shall proceed in the manner hereinafter prescribed *to cast and canvass* . . . any ballots voted by voters who moved within the state after registering" (emphasis added). This instruction plainly directs that the ballots at issue will be counted.[12]

The use of the word "shall" shows that the transfer of a voter's registration is mandatory upon the submission of an affidavit ballot setting forth a new address. *See Centennial*

[12] Guidance issued by the New York Board of Elections further confirms that affidavit ballots submitted by voters whose eligibility to vote is subsequently confirmed are entitled to have their ballots counted. *See* 2020 Election Law Update, New York State Board of Elections at 13 (https://www.elections.ny.gov/NYSBOE/download/law/2020ElectionLawUpdate.pdf) (observing that "[a]ffidavit ballots must be provided to voters who assert they live in the election district and who claim to be entitled to vote" and citing sections 8-302(3)(e) and 52 U.S.C. § 21082); 52 U.S.C. § 21082(a)(4) ("If the appropriate State or local election official . . . determines that the individual is eligible under State law to vote, the individual's provisional ballot *shall be counted as a vote in that election* in accordance with State law.") (emphasis added).

Restorations Co. v. Wyatt, 248 A.D.2d 193, 195, 669 N.Y.S.2d 585, 587 (1998) ("Statutory language providing that a court 'shall' take some action should be read to mean that the court has no discretion to refrain once the party seeking relief has fulfilled the statutory requirements."). When the transfer of registration occurs via affidavit ballot, the Legislature understood that the boards would verify the voter's existing registration by reference to the state-wide voter file, which allows boards to determine whether the voter is entitled to vote in the new county and thus count the affidavit ballot. Because the transfer happens automatically, a voter who submits such an affidavit ballot is required to do nothing more to ensure that the voter's registration is transferred, and the ballot is counted.

Further support for this argument is found in section 9-209(2)(a)(vi), also enacted in 2019, which provides that a voter's failure to include his or her prior address on the affidavit ballot envelope is not grounds for rejecting the ballot "[i]f the board of elections finds that the *statewide* voter registration list supplies sufficient information to identify [the] voter." (Emphasis added.) The only reason why a board would need to review the "statewide voter registration list" to identify a voter who omitted "the address where such voter was previously registered" is because the voter had moved from another county. The fact that the board "shall cast and canvass" a ballot even when the previous address is omitted shows that the board has to count the ballots when a voter moves from another county in New York without updating their registration. By contrast, requiring a voter to change the voter's registration address by putting it on an affidavit ballot envelope but then refusing to count the enclosed votes—which occurred with many ballots at issue in this case—is directly contrary to the stated goals of this legislative revision and cannot be what the Legislature intended in adopting the universal registration transfer law. Prior to 2019, New Yorkers who moved across county lines within the state without submitting a new voter registration application and cast an affidavit ballot would not have their ballot counted. That affidavit ballot functioned as a voter registration application, and as a result, such voters were eligible to vote at their new address in the subsequent election under the pre-2019 statutory language. Reading the revised language to require the exact same result *after* the

2019 legislation would eviscerate the legislative purpose motivating the change and render the amendment meaningless. Accordingly, this Court should order affidavit ballots that were rejected due to missing registration poll records or because a voter's name did not appear in the computer-generated registration list to be counted if the board determines that such voter was registered to vote anywhere in the State of New York.

8. Voters listed on the statewide voter list with a registration status of "purged" because they moved from their prior registration address should also have their affidavit ballots counted under the statewide transfer law.

For similar reasons, voters whose registration status is listed as "purged" because they have moved from their registration address are entitled to have their affidavit ballots cast and canvassed.[13]

Under New York law, the NYSVoter database "shall serve as the single, interactive, statewide voter registration list for storing and managing the official list of registered voters throughout the State." 9 NYCRR § 6217.1. Each voter in the NYSVoter database is assigned a voter registration status by a county board. 9 NYCRR § 6217.9(a). A voter is listed as "active" (the voter is properly registered and is eligible to vote in elections), "inactive" (the voter is still eligible to vote in elections, but is not included in the poll book), or "purged" (the voter is no longer eligible to vote in an election, and will not appear in the list of registered voters). *Id.* New York "purges" certain voters' registrations to "prevent deceased voters from overwhelming valid voters when doing voter searches and to allow for voters who later re-register to vote to resurrect and utilize their unique identifier." *Id.* A voter whose registration is purged is assigned a reason code that explains the reason for the specific voter's status. 9 NYCRR § 6217.9(a)(5) (listing the

[13] These voters are different than the voters discussed in Section III.B.5 who had their registrations wrongfully purged. The voters discussed in this section were moved to "purged" status, but their votes should be counted notwithstanding that status because of the universal transfer law.

following purged status codes: "death, voter request, felon, ADF (adjudicated) incompetent, NVRA, moved out of country").

As relevant to this case, voters whose status is listed as "purged" because of the "NVRA" reason code were purged under state list maintenance procedures that are required by the National Voter Registration Act (the "NVRA"). These particular procedures affect voters who a Board has reason to believe have moved from their registration address.[14] But when a voter is put in purged status on the ground that she has moved from her registration address, the voter's information is not deleted from the statewide registration list; instead, the voter's record in that list simply indicates their status as purged. *See, e.g.*, Ex. OS-23 (showing all of the voters' registration information is still listed in the state database after voters are moved to "purged" status). Accordingly, voters who were purged because a Board believed they had moved from their registration address would not be found in the pollbook at their previous registration address, but election officials can still search for and find all their registration information in NYSVoter.

Under the statewide voter transfer law discussed above, these voters should have their ballots counted. That law provides that voters who moved to another address within the state should have their votes counted because their registration should be transferred to their new address when they provide it on an affidavit ballot. *See supra* Section III.B.7; Elec. Law §§ 8-302(3)(e), 9-209 at opening paragraphs. That is precisely what should have occurred for these voters. They were previously registered to vote in New York, moved to a new address within the state without updating their registration, went to a polling place to vote in the November 3 election and cast an affidavit ballot, and were then located in the NYSVoter statewide registration database. That they were put in "purged" status in between moving and attempting to

[14] Those procedures require voters to be purged based upon evidence that they moved (first, mail has to be returned undeliverable or they have to be on the national change of address list provided by the USPS; then, they have to be sent a removal notice; finally, two election cycles have to pass and then they can be removed). Elec. Law §§ 5-712; 5-213; 5-400; *see generally* 52 U.S.C.A. § 20507(a)(4).

vote in the November 3 election is immaterial under the universal voter transfer law, which makes no distinction between "purged" voters and "active" or "inactive" voters. Rather, it simply directs that a Board "shall transfer the registration and enrollment of *any voter appearing on a statewide voter list pursuant to subdivision one of section 5-614 of this article* [. . .] for any voter who submits a ballot in an affidavit ballot envelope which sets forth such a new address." Elec. Law § 5-208(1) (emphasis added). These "purged" voters "appear" in the NYSVoter database, and the NYSVoter database contains all the information needed to identify these voters, who are entitled to have their votes counted.

C. Challenges to Absentee Ballot Envelopes

New York voters are normally permitted to vote by absentee ballot for several reasons, including because the voter expects to be absent from the county (or, if from New York City, from the city), due to illness or physical disability, or because the voter is a resident or patient of a veterans' health administration hospital or in jail or prison but still eligible to vote. Elec. Law § 8-400(1). In 2020, the right to vote absentee was extended to everyone, as a result of the coronavirus pandemic. Executive Order No. 202.58, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_58.pdf (last visited Dec. 30, 2020).

As with affidavit ballot envelopes, the county board of elections must cast and canvass absentee ballots if the Board determines the voter was entitled to vote. Indeed, the county board of elections must cast and canvass even ballots contained in technically defective envelopes, as long as one of the following circumstances applies:

- a "ministerial error" by the board of elections or any of its employees caused the "ballot envelope not to be valid on its face," *id.* § 9-209(2)(a)(ii); or
- the voter "substantially complied with the requirements" of the Election Law, meaning that "the board can determine the voter's eligibility based on the statement of the affiant or records of the board," *id.* § 9-209(2)(a)(v).

Applying the above-described principles, the following categories of absentee ballot envelopes must be "cast and canvassed" by the Boards:

1. Voters who timely submitted an absentee ballot to a county other than the voter's home county, and the receiving county mailed it to the correct county;
2. Voters who substantially complied with election laws by curing their absentee ballots after the purported deadline; and
3. Voters who mailed absentee ballots from foreign countries.

1. Absentee ballots should be counted when voters relied on Board instructions when returning ballots to a county other than their county of residence.

In reliance on the plain instructions printed on the back of every absentee ballot envelope for every New York voter, many voters dropped their absentee ballots off in New York polling places outside their county of residence and registration. The instructions provided to those voters by their county board of elections (per the New York State Board of Elections) on their ballot materials instructed voters as follows:

Instructions to voter:

1. First mark your ballot, then fold it and place it in this envelope, and then seal this envelope.
2. Sign and date the statement on the reverse side of this envelope. Your signature will be compared to the signature on file with the board of elections to verify your identity.
3. Place this envelope in the return envelope.
4. Your ballot can be returned to any Early Voting or Election Day poll site, or to your local Board of Elections by 9:00 pm on Election Day, if delivered in person, or be postmarked by Election Day and received not later than seven days following the election.

If you have an application for an absentee ballot, do not place it in this envelope. Instead, place it in the return envelope along with this sealed envelope.

Instruction four provides that absentee ballots may be returned to "*any* Early Voting or Election Day poll site," without limitation. (Emphasis added.)

In these instances, the county Board that received the ballot forwarded it to the Board in the voter's county of registration. Each of these ballots—which were sealed in envelopes

addressed to the correct Board—were necessarily dropped off by voters in person; if they had been mailed in the provided envelopes, on which the address of the correct Board was prewritten, those ballots would have been delivered to the correct Board. Furthermore, each of these ballots must have been dropped off by election day because such ballots can only be returned outside a voter's county of registration and residence through the mail or returned to "*any* Early Voting or Election Day poll site," which are open only before the election day deadline.[15]

The Boards that received these ballots thereafter put them in a different envelope and forwarded them to the voter's local Board. However, here, the voter's local Board often rejected those forwarded ballots because the *forwarding envelopes*, not the voter's return envelopes, were postmarked after election day or lacked a traditional postmark because the sending board used a postage meter rather than a stamp. But Elec. Law § 8-412 makes no mention of *forwarding* envelopes, and the postmark requirement necessarily applies only to the envelopes containing ballots that *voters* return by mail. In contrast, the ballots at issue here were undeniably timely delivered, in person, on or before election day. *See* Hr'g Tr. 184:24-186:23 (Nov. 23, 2020) (testimony by Mary Egger, Commissioner from Madison County, that the Commissioners did not retain outer ballot envelopes for ballots that were dropped off at a poll site in another county and forwarded to Madison County because there was no question that the ballots were dropped off by voters in those counties on or before November 3, even though the forwarding envelopes were not stamped received by Madison County until after election day).

Voters should not be penalized for reasonably relying on State Board instructions in returning their ballots to a different county's polling site. The instructions permitted voters to return their absentee ballots to "*any* Early Voting or Election Day poll site," without limitation. The State Board of Elections otherwise repeats these same instructions for returning an absentee

[15] Counsel for Brindisi will provide evidence at the Hearing establishing the date and location of voting for some of these ballots.

ballot in person on its website, telling voters they may return their absentee ballot by "bringing it to the County Board of Elections Office no later than November 3rd by 9 pm, bringing it to *an early voting poll* site between October 24th and November 1st, and bringing it to *a poll site* on November 3rd by 9pm."[16] And, as noted above, the return envelopes provided by the Boards included the following instructions: "Your ballot can be returned to *any* Early Voting or Election Day poll site. . . if delivered in person . . . ." (Emphasis added). These instructions do not specify that the ballots must be returned in the *voter's* county of residence, and in fact state the opposite—that the ballots can be returned in *any* county, and to *any* polling place.[17]

To be clear, disenfranchising a voter for nothing other than relying on instructions provided by state and local elections officials would violate both the New York and the United States Constitutions.[18] *See People ex rel. Hirsh v. Wood*, 148 N.Y. 142, 146–47, 42 N.E. 536, 537 (1895) ("We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake, or even the willful misconduct, of election officers in performing the duty cast upon them," because "[t]he object of elections is to ascertain the popular will, and not to thwart it," and "to secure the rights of duly-qualified electors, and not to defeat them."); *id.*

[16] *See* NYSBOE, *Absentee Voting* https://www.elections.ny.gov/VotingAbsentee.html (last visited Dec. 31, 2020) (emphasis added).

[17] Brindisi does not, however, argue that voters can return their ballots to an out-of-county Board *office*—the instructions are clear that voters returning their ballots in person to a Board office must do so at their local Board's office. By contrast, the instructions make clear that voters can return their ballots in person to any *polling place*. That is what the voters who cast ballots at issue in this Section did, and that is why their ballots are necessarily timely.

[18] These ballots are also valid regardless of whether the receiving board properly stamped the absentee envelope on the date that board received the ballot at a polling place, which was necessarily on or before election day. *See* Hr'g Tr. 413:11-23 (Dec. 23, 2020) ("Accordingly, it is the finding of this court that the Madison County Board of Elections failed to properly reflect upon the face of each hand-delivered absentee ballot the date it was actually delivered to a polling place . . . . That . . . is a ministerial error which this Court cannot and will not allow to be the basis to invalidate an otherwise valid vote . . . ."). Ballot envelopes missing a date/time stamp indicating when they were received by a board of elections constitute a "mere ministerial error," through no fault of the voter, and such voters' ballots cannot be rejected for that reason. *See Niagara Cnty. Bd. of Elections*, 778 N.Y.S.2d at 632.

("Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult."); *Reich v. Bosco*, 195 N.Y.S.2d 117, 122 (N.Y. Sup. Ct. 1959) (finding voter, "when he found [the candidate's] name on the Liberal Party line as he was about to cast his vote, had the right to assume that [the candidate's name] was rightfully on the voting machine under that line and that a vote for [the candidate] under that line would not be nullified by Court decree" and citing N.Y. Const. art. 1 § 1, art. 2 § 2).[19]

But even if voters were not plainly induced by the instructions on the absentee ballot materials themselves to return their sealed absentee ballots to *any* polling location throughout the state—and they were—these voters otherwise "substantially complied" with the statutory requirements by timely returning their absentee ballots. *See Hirschfeld v. Bd. of Elections in City of N.Y.*, 799 F. Supp. 394, 395 (S.D.N.Y. 1992). In either case, their valid ballots should be cast and canvassed.[20]

[19] *See also Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77 (2d Cir. 2005) (the New York state boards violated the Fourteenth Amendment to the United States Constitution in not counting ballots when those boards "at least arguably [] misled the voters into not filing new absentee-ballot applications by issuing" unsolicited ballots to voters); *Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978) (voters had "follow[ed] the instructions of the officials charged with running the election"); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595 (6th Cir. 2012) ("NOCH") (explaining pollworker error induces voters to submit invalid ballots, and that allowing state to reject ballots at issue would "require[] voters to have a greater knowledge of their precinct, precinct ballot, and polling place than poll workers"); *State ex rel. Oaks v. Brown*, 249 N.W. 50, 53 (1933) ("When the matter has been allowed to proceed to that point, the will of the electors is to be given effect, even though there may have been informalities or in some respect a failure to comply with the statute."); *Gallagher v. N.Y. St. Bd. of Elections*, --- F. Supp. 3d ---, 2020 WL 4496849, at *17-18 (S.D.N.Y. Aug. 3, 2020) (ruling ballots lacking postmarks, through no fault of the voter, could not be rejected because those voters "accept[ed] the state's offer to vote by absentee ballot and follow[ed] the state's instructions"); *cf. Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) ("Until such time as the Board makes public its new determination, it is constitutionally prohibited from imposing that rule on unsuspecting persons.").

[20] As this brief was being finalized for filing, counsel for Brindisi became aware of an emerging factual dispute among the parties and the Madison County Board regarding a set of absentee ballots challenged by Tenney on the grounds that the Madison County Board did not sufficiently

In arguing to the contrary at the December 22 hearing, Tenney directed the Court to an opinion that is believed to be *Saini v. New York State Bd. of Elections*, 133 N.Y.S.3d 729, 731-35 (N.Y. Sup. Ct. 2020), which is inapposite. *See* Hr'g Tr. 311:20-23 (Dec. 22, 2020). In *Saini*, the court held that a voter's application to change her party enrollment was untimely when it was timely mailed to the wrong Board but received by the correct Board after the deadline for a change in enrollment to become effective. 133 N.Y.S.3d at 731-35. The court reached that conclusion because the Legislature deviated from "other election law provisions that allow filing by mail (and measure the filing date by postmark)" to require that a change in enrollment be effective "only when 'received'" by the appropriate Board. *Id.* at 734-35 ("The Legislature expressed its intention that voters who used a 'statewide' application form to register, enroll, or change party enrollment (rather than applying at their county BOE) would complete the process when their 'home' BOE received the form" by requiring the form to provide "'[n]otice that registration and enrollment is not complete until the form is received by the appropriate county board of elections.'") (quoting Elec. Law § 5-210).

By contrast, the Legislature has expressed no such intent with respect to returning absentee ballots. Instead, Election Law section 8-412(1) emphasizes the postmark date as the date of filing when there is any question as to whether the ballot was timely. Specifically, that section requires Boards to cast and count all absentee ballots not received by election day so long as they are contained in an envelope bearing a postmark with a date that is not later than the day of the election, so long as they are received within seven days following the election. *Saini*'s reasoning does not apply where, as here, the Legislature did not indicate that an absentee ballot is returned only when it is delivered to the correct Board.

---

record the date of receipt of such ballots. However, incontrovertible testimony already in the record and previously relied upon by the Court establishes that these ballots were timely returned. Brindisi incorporates by reference his arguments regarding the use of Additional Evidence to establish timeliness and regarding the doctrines of substantial compliance and voter reliance upon instructions and procedures provided by state and local elections officials and reserves the right to offer additional briefing and argument on this issue after further development of the factual record.

Tenney also suggests that the Court cannot order that these ballots be counted because the postmark requirement in section 8-412 applies to the forwarding envelope in which the counties transmitted the ballots at issue to the correct Board. *See* Elec. Law § 8-412(1) (requiring valid absentee ballots be "contained in envelopes showing a cancellation mark of the United States postal service or a foreign country's postal service, or showing a dated endorsement of receipt by another agency of the United States government" no later than the date of the election). But the envelope referenced in section 8-412 is the outer absentee ballot envelope, not a forwarding envelope used by a Board. Were the rule otherwise, the result would be absurd. If a postmark is required on forwarding envelopes, virtually every single forwarded ballot would be invalid. Under Tenney's construction of section 8-412, if voters return their ballots to another County's polling place on election day—as they are permitted to do according to the instructions on the absentee ballot envelope—that Board must (1) mail out the ballot to the correct Board *and* (2) ensure that the forwarding envelope is postmarked that same day for the sealed absentee ballots inside to remain valid. But it is virtually impossible for Boards to ensure that the forwarding envelopes containing ballots dropped off on election day are postmarked the same day they are mailed, as envelopes are not necessarily marked upon mailing. Accordingly, under Tenney's interpretation of the law, any voter who relies on and complies with the instructions on the back of the absentee envelope and returns her ballot to a polling place in another county will be disenfranchised. That cannot be the law. If it is, then that law violates the New York and the United States Constitutions. *See supra* at note 19 and accompanying text.

Because the postmark requirement does not apply to forwarding envelopes, the ballots sent to the correct Boards in forwarding envelopes with postmarks dated after election day or with only postage meter stamps should be counted.

2. Absentee ballots should be counted when voters substantially complied with election laws by submitting cures but did so past the purported cure deadline.

Other ballots were rejected because the voters received notice of a defect and returned the cure affirmation required by statute but did so after the deadline to cure. Counsel for Brindisi has proffered and/or is prepared to proffer notarized cure affirmations from some of these voters.

A Board must count a ballot "[i]f the board of elections determines that a person was entitled to vote at such election" and "finds that the voter substantially complied with the requirements of this chapter." Elec. Law § 9-209(2)(a)(v). Substantial compliance means that "the board can determine the voter's eligibility based on the statement of the affiant or records of the board." *Id.*

With respect to ballots that were rejected because voters missed the cure deadline, it is undisputed that the voters were entitled to vote in the election and timely submitted ballots. The only deficiency was that the voters did not cure their ballots prior to the deadline.[21] Because "the board can determine the voter's eligibility based on the statement of the affiant or records of the board" for these ballots, these ballots should be counted. *Id.* Furthermore, the cure deadlines are not tethered to the deadline for Boards to certify election results to the State Board of Elections and are therefore unnecessary to preserve the timeliness of election results. Legislative enactments (or, in this case, executive orders) that unnecessarily prevent constitutionally eligible voters from exercising their fundamental right to vote—for example, by imposing arbitrary deadlines regarding the time to cure—violate the New York State Constitution and are invalid. *See* NY Const, art II, § 1 (guaranteeing the right to vote to any citizen who meets the minimal qualifications of age and residency); *id.* art I, § 1 ("No member of this state shall be dis[en]franchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers[.]"). The Court should permit

[21] As with other Additional Evidence and as explained in Section III.A, the Court may review the cure affidavits offered by Brindisi—whether on the Board of Election form or in another form.

cures to be accepted until such time as it rules on this case. *See Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1023, 1032-33 (N.D. Fla. 2018) (ordering election officials to allow voters to cure signature mismatches "before the second official results are fully counted," even though statute permitted cures only up until the day before the election). This is especially true for the many voters who should not have been required cure in the first place.

3. Ballots in envelopes containing overseas postmarks should be counted.

Tenney also challenged one absentee ballot envelope because it bore a foreign postmark dated October 30, 2020.[22] Tenney's challenge to this ballot is misplaced. Under section 8-412(1), "all ballots contained in envelopes showing a cancellation mark of the United States postal service *or a foreign country's postal service* . . . with a date which is ascertained to be not later than the day of the election and received by such board of elections not later than seven days following the day of election" must be "cast and counted."[23] (emphasis added). The ballot at issue clearly

[22] The postmark appears to be German—it contains the word "briefzentrum," which means "mail center" in German.

[23] A "cancellation mark" refers to the fact that postmarks "cancel[] affixed postage." *See* USPS, Handbook PO-408 – Area Mail Processing Guidelines 1-1.3 Postmarks, https://about.usps.com/handbooks/po408/ch1_003.htm (last visited Dec. 28, 2020). *See also*

complies with the express terms of section 8-412(1): it contains a foreign postmark dated October 30, 2020—before election day—and also bears a lower marking labeled November 3—election day.[24] Either one of these marks is sufficient to establish that the ballot was timely posted and must be counted.

D. Challenges Applicable to Both Absentee and Affidavit Ballots and Envelopes

There are also four categories of issues that apply to both absentee and affidavit ballots and envelopes:

1. Voters who submitted ballots with marks on them;
2. Voters whose signatures purportedly did not match the signature on file for them;
3. Voters who submitted ballots in envelopes with extraneous materials; and
4. Voters who made errors with respect to write-in candidates.

1. Ballots with markings or erasures on them should be counted.

Under New York law, it is "well settled that inadvertent marks on a ballot do not render a ballot void in whole or in part." *Mondello*, 772 N.Y.S.2d at 698-99; *see also* Elec. Law § 9-112(1) ("No ballot shall be declared void or partially blank because a mark thereon is irregular in form."). As long as these marks do not "distinguish the ballot or identify the voter," the ballots remain valid. *Brilliant v. Gamache*, 808 N.Y.S.2d 728, 730-31 (2006). Accordingly, New York courts have held that markings like food stains are inadvertent and do not invalidate ballots. *Id.* Further, marks made by poll workers or individuals other than the voter do not invalidate a ballot. *Smith v. Sullivan*, 959 N.Y.S.2d 588, 593-94 (N.Y. Sup. Ct. 2012) (noting "[t]he law is clear that '[w]here, . . . there were written words deliberately placed on the ballot *by the voter* the

---

USPS, Celebrating with Pictorial Postmarks 10, https://about.usps.com/publications/pub186.pdf (last visited Dec. 28, 2020) (noting that "the terms cancellation and postmark are often used interchangeably, . . .").

[24] The November 3 mark is not captured in the photo of the ballot envelope included in this brief, but it is visible on the ballot envelope itself.

entire ballot is void'" and holding ballot with extraneous word on it was valid where word was likely written on ballot by poll workers, not the voter) (quoting *Mondello*, 772 N.Y.S.2d at 699).

Here, to the extent ballots were marked with stains from food or possibly blood or with colored ink, Tenney has presented no evidence to show or to even suggest that these markings on these ballots are anything but inadvertent, and the markings do not identify the voter. These ballots are therefore valid and should be counted.[25] *See Brilliant*, 808 N.Y.S.2d at 730-31. To the extent ballots are marked with other kinds of extraneous markings, the Boards should have rejected them only to the extent that the markings identified the voter and only when the Board found that the markings were made by the voter, not poll workers.

Tenney also challenges a ballot on which the voter used white out to erase marks. Erasures on ballots void only the races on which they are made, not the entire ballot. *O'Shaughnessy v. Monroe Cnty. Bd. of Elections*, 223 N.Y.S.2d 408, 415-16 (N.Y. App. Div. 1961). Therefore, if the white out marks are only on other races and not the congressional race, this ballot should be counted.

2. Tenney's signature matching challenges should be rejected.

The Court should reject Tenney's numerous "signature mismatch" challenges. Signature matching by untrained laypersons is highly error-prone. *See, e.g.*, Rory Conn, Gary Fielding, et al., *Signature Authentication by Forensic Document Examiners*, 46 J. of Forensic Sci. 884-88 (2001). Studies conducted by experts in the field of handwriting analysis have repeatedly found that signature verification by laypersons is inherently unreliable and that errors committed by non-experts skew towards the misidentification of authentic signatures as forgeries. *See, e.g.*,

[25] Tenney's suggestion that a blood mark makes the ballot "identifiable" is without support in the law and should be rejected. Unlike other markings, a blood mark could only make a ballot identifiable if (1) the ballot was taken in for DNA testing, and (2) the specific voter's DNA was on file with the authorities. The possibility of identifying a voter through such blood testing is therefore tenuous at best, and at worst, impossible. Moreover, if extraneous biological markings on ballots could void ballots because the voter could be identified if the ballots are forensically processed, virtually every absentee ballot would be void, since voters could be identified by their fingerprints if their ballots are submitted for fingerprint matching.

Saucedo v. Gardner, 335 F. Supp. 3d 202, 218 (D.N.H. 2018); K. Gummadidala, *Signature authentication by forensic document examiners*, J. FORENSIC SCI., 46(4) 884-88 (2001). Even trained experts in handwriting have difficulty identifying authentic signatures because of the variable nature of signatures. *See* Michael P. Caligiuri et al., *Kinematics of Signature Writing in Healthy Aging*, 59 J. FORENSIC SCI. 1020 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4077921/. A person's signature or handwriting can change, and quickly, for a variety of reasons. Factors that can affect a person's handwriting include physical factors such as age, illness, injury, medicine, eyesight, alcohol, and drugs; mechanical factors such as pen type, ink, surface, position, paper quality; and psychological factors such as distress, anger, fear, depression, happiness, and nervousness. *See, e.g.*, Tomislav Fotak et al., Handwritten signature identification using basic concepts of graph theory, 7 WSEAS Transactions on Signal Processing 145 (2011).

Signature matching laws also are particularly problematic for racial and ethnic minority voters; younger, first-time voters; voters with disabilities; and senior-citizen voters, all of whom are more likely to have variations in their signatures or may require assistance from others to provide a consistent signature. *See* David A. Graham, *Signed, Sealed, Delivered—Then Discarded*, ATLANTIC (Oct. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/10/signature-matching-is-the-phrenology-of-elections/616790/ ("Regardless of the overall rejection rates, it's a safe bet whose ballots will be rejected most: those of the youngest voters, the oldest voters, disabled voters, and voters of color.") Because of the inherent difficulty in determining whether a signature is genuine, it is inevitable that an untrained layperson will—in good faith—erroneously reject legitimate ballots, resulting in the disenfranchisement of eligible voters. *See, e.g.*, *Saucedo*, 335 F. Supp. 3d at 217 ("[T]he task of handwriting analysis by laypersons [. . .] is fraught with error[.]").

The State Board of Elections has issued signature matching guidance that expressly acknowledges all of these shortcomings and makes clear that persons performing signature verification should err heavily on the side of the voter. "The bipartisan team shall presume that

the documents were signed by the same person. If any differences observed can be reasonably explained, the signature should be accepted[.]"[26] When conducting its review of the Tenney signature mismatch challenges, the Court should be similarly reluctant to reject a ballot envelope for a purported signature mismatch.[27]

Finally, in the event that the Court finds any signature mismatches, basic principles of equal protection and due process require that the voters casting those ballots be afforded the same opportunity for notice and an opportunity to cure as voters whose signatures were originally deemed mismatched by the Boards.

3. Ballots contained in envelopes with extraneous materials should be counted.

Tenney challenged a number of ballots contained in envelopes with extraneous materials, ranging from notes to law enforcement to official election materials. All of these should be counted as long as they were not folded in with the ballots in the envelopes.

Section 9-112(1) provides that a ballot is void "if the voter . . . does any act extrinsic to the ballot such as enclosing any paper or other article in the folded ballot . . . ." This provision applies only when such extraneous materials are actually folded into the ballot itself. *Stewart v. Chautauqua Cnty. Bd. of Elections*, 894 N.Y.S.2d 249, 254-55 (N.Y. App. Div. 2010) (finding that the presence of completed ballot applications in the envelopes did not void two ballots where the applications "were folded separately and were not within the absentee ballots contained in the respective envelopes"). To the extent the challenged ballots were merely contained in envelopes with extraneous materials but not folded with those materials, those ballots should be counted.

[26] *See* N.Y. State Board of Elections, Absentee Ballot Oath Envelope Cure Provisions, at 5-6 https://www.elections.ny.gov/NYSBOE/download/Voting/CureProcess.pdf.

[27] Brindisi nonetheless reserves his right to object to determinations of signature mismatches by the Boards, and, as set out above, any other grounds for rejection of ballots not included in this brief.

Tenney also challenged at least one affidavit ballot because it was contained in an envelope with a voter registration application, but this ballot should be counted. Recent New York State Board of Elections guidance provides that "[a]ny papers found in the affirmation envelope shall not void the ballot if the papers are materials from the board of elections, such as instructions or an application sent by the board of elections." NYSBOE, *Absentee Ballot Oath Envelope Cure Provisions* 6, https://www.elections.ny.gov/NYSBOE/download/Voting/CureProcess.pdf (last visited Dec. 29, 2020). Although this guidance applies to absentee ballots, there is no reason to permit Board materials in absentee ballot envelopes but not affidavit ballot envelopes. In fact, because poll workers were necessarily present when the voter put the application in the affidavit ballot envelope, they should have stopped the voter from doing so. Furthermore, voiding an affidavit ballot because a registration application was included in the affidavit envelope makes little sense because the affidavit ballot itself constitutes a voter registration application. Elec. Law § 8-302(3)(e)(ii) (providing affidavit ballot "shall constitute an application to register to vote" when the Board finds that a voter who completed an affidavit ballot is not registered to vote).

Finally, Tenney challenged a machine ballot that was submitted to the Board in an affidavit ballot envelope that also contained a blank affidavit ballot. The only way this could have occurred was if the voter was given an affidavit ballot and affidavit ballot envelope by an election official and, at or around the same time, the election official found the voter in the poll book and gave her a regular machine ballot. The voter voted only the machine ballot but put the completed machine ballot and the blank affidavit ballot into the affidavit envelope and returned it. The poll worker must have been aware that the voter put both ballots in the envelope but still accepted the affidavit envelope and included it with the others.[28] Although the Election Law provides that the ballots in a ballot envelope containing multiple ballots for the same offices should be rejected, here, the machine ballot should be counted. First, the voter's intent in casting

[28] An election official is prepared to testify that this must have been what occurred with respect to the ballot at issue.

her vote is clear because only one of the ballots was completed—this is not a circumstance in which the voter included two completed ballots and the Board could not be sure which ballot reflects the voter's intended votes. Second, a series of ministerial errors by poll workers caused the voter to return an affidavit envelope containing multiple ballots. Had the poll worker taken the affidavit ballot from the voter upon locating her in the poll book, prevented the voter from putting her machine ballot into the affidavit ballot envelope, or refused to accept the envelope, this voter's ballot would not be subject to a challenge. Because the voter was otherwise entitled to vote and because ministerial errors by election workers caused the ballot envelope not to be valid on its face, the Court should find that her machine ballot must be counted. Elec. Law § 9-209(2)(a)(ii).

4. Ballots on which voters made errors with respect to write-in candidates should be counted.

Tenney challenged two ballots because the voters made errors with respect to write-in candidates.[29] On one ballot, the voter began to write in the name of a candidate for the office of town justice in the wrong box under that race, crossed it out, and then wrote the name of the candidate for that office in the correct box. *See* Ex. CH-30. On the other ballot, the voter filled in the bubble next to Brindisi's name and also wrote in his name in the box provided for write-in candidates for the congressional race. *See* Ex. CH-29. Both of these votes are valid and must be counted.

On CH-30, the voter's error in writing in the name of a candidate for town justice does not invalidate that voter's vote for Brindisi. *See In re Flanagan*, 285 N.Y.S. 699, 703, 704 (N.Y. Sup. Ct. 1935) (holding where voters crossed out names of candidates and wrote in different people in two races, the votes for a different, properly marked race still counted). The voter did not commit

[29] While both ballots already in evidence in this category were absentee ballots, Brindisi anticipates that these and other similar issues will also apply to the face of affidavit ballots before the Court, and the same arguments apply to ballots of either category.

any error with respect to the congressional race, and her intent to vote for Brindisi is clear. This vote must be counted.

CH-29's voter's properly marked vote for Brindisi must also be counted, notwithstanding the fact that she also wrote in Brindisi's name on the write-in line provided for New York's 22nd Congressional Race. New York law clearly provides that the *write-in vote* is not valid but is silent as to the effect of the write-in vote on the properly marked, bubbled-in vote for Brindisi. *See* Elec. Law § 9-112(3) ("A vote shall be counted for the person whose name is written in under the title of an office or party position only if such name is written by the voter upon the ballot in the proper space provided therefor and only if such name is not printed under the title of such office or position."); 9 NYCRR 6210.13(a)(12)(i) ("Write-in votes for persons whose names appear on the official ballot for that office or party position shall not be counted."). In other cases where voters have voted more than once for the same candidate for the same office, courts have held that the additional vote is mere "surplusage" and does not void the proper vote for the candidate. *People ex rel. Feeny.*, 156 N.Y. at 40 (holding voting twice for the same candidate for the same office does not invalidate one of those votes because the other is merely "surplusage"); *Albertson v. Morgan*, 49 N.Y.S.2d 454, 457 (N.Y. Sup. Ct. 1944) (finding write-in vote for an identical name constitutes "surplusage" and one of the votes should count). The Election Law likewise considers such votes "surplusage." Elec. Law §9-112(4) (providing that where a candidate's name appears on a ballot more than once for the same office and the voter votes for that candidate in multiple places, one of the votes counts); 9 NYCRR 6210.13(a)(7) (same). The result should be no different here. The voter clearly intended to vote for Brindisi, and her bubbled in vote should be counted.

IV. CONCLUSION

For the reasons discussed above, each of the above categories of ballots should be cast and canvassed. Brindisi respectfully requests that this Court rule that the ballots and ballot envelopes falling into those categories are valid and must be counted.

Dated: Brooklyn, New York
December 31, 2020

/s/ Martine E. Connor

MARTIN E. CONNOR
61 Pierrepont Street, #71
Brooklyn, New York 11201
Telephone: 718-875-1010
Cell phone: 347-645-9146
Email: mconnorelectionlaw@gmail.com

Attorneys for Respondent Brindisi

PERKINS COIE LLP
Marc E. Elias* (*pro hac vice* to be filed)
Bruce V. Spiva (admitted *pro hac vice*)
Shanna Reulbach (admitted *pro hac vice*)
Alexander G. Tischenko (admitted *pro hac vice*)
Alexi M. Velez (admitted *pro hac vice*)
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
ATischenko@perkinscoie.com
SReulbach@perkinscoie.com
AVelez@perkinscoie.com