

At a Special Term of the Supreme Court of the State of New York held in and for the County of Oswego on January 20, 2021.

PRESENT: **HON. SCOTT J. DELCONTE**  
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK  
OSWEGO COUNTY

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**CLAUDIA TENNEY,**

Petitioner,

v.

**OSWEGO COUNTY BOARD OF ELECTIONS,  
ONEIDA COUNTY BOARD OF ELECTIONS,  
CORTLAND COUNTY BOARD OF ELECTIONS,  
MADISON COUNTY BOARD OF ELECTIONS,  
BROOME COUNTY BOARD OF ELECTIONS,  
TIOGA COUNTY BOARD OF ELECTIONS,  
HERKIMER COUNTY BOARD OF ELECTIONS,  
CHENANGO COUNTY BOARD OF ELECTIONS,  
NEW YORK STATE BOARD OF ELECTIONS,  
KEITH D. PRICE, JR., and ANTHONY BRINDISI,**

Index No. EFC-2020-1376

Respondents.

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**ORDER REMANDING BALLOTS TO ONEIDA COUNTY  
(Motions Nos. 4 and 5)**

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**APPEARANCES:**

- Paul DerOhannesian, Esq., and Joseph Burns, Esq., *for Claudia Tenney*
- Bruce Spiva, Esq., and Martin Connor, Esq., *for Anthony Brindisi*
- Robert Pronteau, Esq., Vincent Rossi, Esq., and John Dillon, Esq., *for Oneida County Board of Elections*
- Richard Mitchell, Esq., *for Oswego County Board of Elections*
- Karen Howe, Esq., *for Cortland County Board of Elections*
- Tina Marie Wayland-Smith, Esq., *for Madison County Board of Elections*
- Robert Behnke, Esq., *for Broome County Board of Elections*
- Peter De Wind, Esq., *for Tioga County Board of Elections*
- Lorraine Lewandrowski, Esq., *for Herkimer County Board of Elections*
- Alan Gordon, Esq., *for Chenango County Board of Elections*
- Kimberly Galvin, Esq., and Nicholas Cartagena, Esq., *for New York State Board of Elections*

On December 8, 2020, following a two-day hearing that revealed the County Boards of Elections in this action failed to comply with the affidavit and absentee ballot canvassing procedure set forth in Election Law § 9-209, this Court returned those ballots to the Boards with an order to correct their errors and fulfill their statutory canvassing duties. The most serious error occurred in Oneida County, where the Board had administratively rejected nearly 1,800 affidavit ballots without canvassing them at all. Remarkably, even after the ballots were remanded to be properly canvassed, the Oneida County Board attempted to summarily reject them once again, before finally agreeing, on December 21, 2020, to actually review the affidavit ballots and the statewide voter registration database, resulting in the casting of 700 additional votes.

When the judicial review of the challenges in Oneida County resumed in January, new concerns were raised by a series of rejected affidavit ballots that the Board claimed had been cast by voters who were “not registered,” despite incontrovertible evidence that those voters had timely filed voter registration applications. In astonishing testimony on January 8 and 11, 2021, the Court learned that the Board had failed to process over 2,400 timely-filed voter registration applications and, to make matters worse, did not openly disclose this fact until January 6, 2021. The Board had also failed to review any of the unprocessed applications during its canvass, despite the law requiring it to do so and the fact that the voters who filed those applications were, as a matter of law, duly registered and entitled to vote in the 2020 general election.

The Oneida County Board of Elections remains subject to this Court’s jurisdiction and to the directives in its December 8, 2020 Order (NYSCEF Docs. 110, 111). Accordingly, for the reasons set forth below, **ALL** affidavit ballots submitted by voters residing in Oneida County are hereby remanded to the Oneida County Board of Elections, and the Board is **ORDERED** to immediately comply with this Court’s prior Order and properly canvass those ballots.

## I.

The role of the Court in this proceeding is to preserve the integrity of the electoral system by ensuring that the laws governing the conduct of elections are strictly and uniformly followed (*Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). This means that the Court’s jurisdiction and authority are narrowly limited to: (1) determining whether a challenged ballot is valid on its face, pursuant to Election Law § 16-106(1); and (2) directing the correction of errors made by canvassers, pursuant to Election Law § 16-106(4) (*Delgado v Sunderland*, 97 NY2d 420, 423 [2002]; *citing Corrigan v Bd. of Elections of Suffolk County*, 38 AD2d 825, 827 [3d Dept 1972] *affd* 30 NY2d 603 [1972]).

This Court has no authority to grant any other relief, regardless of the severity of the transgression or the innocence of the affected voters (*Gross*, 3 NY2d at 260). Accordingly, this Court cannot – as the Appellate Division admonished in *Mondello v Nassau County Bd. of Elections* (6 AD3d 18 [2d Dept 2004]) – “render a determination as to whether a voter was ‘lawfully registered and eligible to vote’” (*Mondello*, 6 AD3d at 20-21), nor can it direct that an unregistered voter be registered (*Johnson v Martins*, 30 Misc3d 844, 847 [Sup Ct Nassau Cty 2010]). Other than in a special proceeding under Election Law § 16-108 brought by the voter herself, only a Board of Elections can make the determination that an individual is, or is not, a “registered voter.”

However, this Court does have the express statutory authority, and constitutional responsibility, to order the Boards of Elections to perform “any duty imposed by law” relating to their canvassing of ballots (*Mondello*, 6 AD3d at 21; *Carney v Niagara County Bd. of Elections*, 8 AD3d 1085, 1086 [4th Dept 2004]; Election Law § 16-106[4]), and it cannot allow the Oneida County Board of Elections’ incomplete and improper canvass of affidavit ballots to

compromise the true election results, nor to disenfranchise any voter. The primary purpose of the Election Law, which this Court must enforce, is to secure the right of qualified individuals to vote, and to safeguard them from disenfranchisement whenever possible (*Hirsh v Wood*, 148 NY 142, 147 [1895]; *Carney*, 8 AD3d at 1086). This is particularly true here, where the validity of affidavit ballots, which serve as a constitutional safeguard against reoccurring and systemic errors by Boards of Elections, are at stake (*Common Cause/New York v Brehm*, 432 FSupp3d 285, 289-300 [SDNY 2020]).

## II.

### A.

This is the last, undecided congressional election in the nation. Unofficial results on election night for early and same day in-person voting placed Petitioner Claudia Tenney, the Republican candidate, 28,422 votes ahead of Respondent Anthony Brindisi, the Democratic candidate, with over 60,000 affidavit, military, special and absentee ballots remaining to be canvassed and counted. On November 4, 2020, the day after the polls closed, Tenney commenced this special proceeding to preserve any ballot challenges for judicial review (NYSCEF Doc. 1). Brindisi thereafter counter-petitioned for the same relief (NYSCEF Doc. 23). On November 10, 2020, this Court issued a Decision and Order permitting the canvasses to proceed and directing the Boards of Elections to take additional steps to preserve certain types of challenged ballots during the canvassing process (NYSCEF Doc. 40).

On November 19, 2020, the parties reported that the Boards' canvasses were completed, and that there were several hundred challenged ballots preserved for judicial review. The Court then set a hearing to begin on November 23, 2020, to review those challenges pursuant to

Election Law § 16-101(1) (NYSCEF Doc. 54), which would be broadcast virtually for the parties and the public. At that time, based upon unofficial reports from the Respondent Boards, it was the understanding of the parties and the Court that, out of just over 310,000 votes cast, Tenney led Brindisi in the race by less than 200 votes.

By November 24, 2020, the end of the second day of the judicial hearing, it was apparent to the Court that the Oswego, Oneida, Madison, Herkimer, Chenango, Broome and Cortland County Boards of Elections had failed to comply with the plain and unambiguous statutory mandates governing the performance of their duties with respect to the canvassing of affidavit, absentee, military and special ballots, including the preservation of challenges to rulings by the Boards on objections, the sending of notices to cure, and the canvassing of affidavit ballots. The most egregious error was in Oneida County, where 1,797 affidavit ballots had been administratively rejected by the Board, and were not canvassed at all.

These errors by the Boards of Elections precluded meaningful judicial review of the challenged ballots by the Court at that time. In response to this problem, and upon motions brought on by both Tenney and Brindisi by Orders to Show Cause (NYSCEF Docs. 91-92), the Court issued a Decision and Order on December 8, 2020 directing the Boards to properly canvass all of their affidavit, absentee, military and special ballots in accordance with the procedure set forth in Election Law § 9-209 (NYSCEF Doc. 110, 111). This was to be done publicly, and before representatives from both campaigns, on a staggered schedule over the following three weeks. The Oneida County Board of Elections was the last of the scheduled court-ordered canvasses, set to begin on December 17, 2020.

**B.**

Judicial review of the challenged ballots resumed the week of December 21, 2020, and was to start with the challenges in Oswego, Herkimer, Madison, Cortland and Chenango Counties, which had already been completed, and then conclude the following week with the challenges in Broome and Oneida Counties. During a December 21, 2020 videoconference, however, the Court was notified by counsel for two of the Respondents that the Oneida County Board of Elections Commissioners were, once again, administratively rejecting all of the affidavit ballots without canvassing them. After discussing this matter with the Court, counsel for the Oneida County Board agreed to restart the court ordered canvass, and properly canvass all affidavit ballots in accordance with the procedure set forth in Election Law § 9-209.

Although this further delayed proceedings and pushed the Court's judicial review of the challenged ballots over into 2021, it resulted in the casting of 700 affidavit votes that had previously been improperly, and systematically, rejected by the Oneida County Board of Elections. Specifically, the Board had originally determined that the voters casting those ballots were "not registered" without having reviewed the statewide voter registry list (known as NYSVoter), which clearly listed those voters as duly registered and entitled to vote under the statewide voter portability law (Election Law § 5-208). As a further consequence of this error, none of these affidavit ballots were cast or counted in the original certifications of any of the other contested races in Oneida County, including elections for State Assembly, State Senate, State Supreme Court Justice, and President of the United States.

### C.

On January 4, 2021, following the belated completion of the (restarted) correction of errors by the Oneida County Board of Elections, the Court once again resumed its judicial review of challenged ballots, starting with Broome County. At that time, the latest unofficial counts reported by the Boards of Elections placed Tenney in the lead by only 29 votes, with a total of 1,188 ballots presented to the Court for review (NYSCEF Docs. 138, 140, 144, 145, 148, 150, 152 and 162). Following two days of testimony, argument and evidence on the challenges in Broome County, on the morning of Wednesday, January 6, 2021 the Court turned to the challenged ballots in Oneida County.

At the outset, the Court expressed concern about Oneida County's canvass because of the strikingly high number of affidavit (1,797) and rejected ballots (1,103), as well as the strikingly low number of voters submitting ballots by court order (only one voter cast a judicial ballot in the 2020 general election). As the day progressed, additional concerns were raised about several potential violations of the Election Law, including individuals whose registrations were improperly terminated by the Board or whose paper registration applications (including affidavit ballots) were never processed, as well as individuals who were denied a machine ballot without being provided the required Notice to Voters form (the Court has reserved decision as to these matters). A much greater concern, however, were dozens of rejected affidavit ballots that the Board of Elections claimed were cast by voters who were "not registered," despite incontrovertible evidence that those voters had timely filed an electronic voter registration application with the Department of Motor Vehicles.

Specifically, counsel for Respondent Brindisi introduced 68 Department of Motor Vehicle voter registration applications produced by the Oneida County Board of Elections on January 5, 2021 in response to a FOIL request, along with the transmittal reports showing that these applications had been electronically received by the Oneida County Board (Exhibits accepted and marked as ON-45a, b, ON-47a, b, ON-55a, b, ON-81a, b, ON-86a, b, ON-88a, ON-90a, b, ON-91a, c, ON-92a, b, ON-93a, b, ON-99a, b, ON-101a, b, ON-105a, b, ON-116a, b, ON-158a, b, ON-172a, b, ON-194a, b, ON-199a, b, ON-253a, b, ON-264a, b, ON-274a, b, ON-275a, b, ON-283a, b, ON-284a, b, ON-287a, b, ON-291a, b, ON-296a, b, ON-300a, b, ON-309a, c, ON-319a, b, ON-320a, b, ON-321a, b, ON-322a, b, ON-324a, b, ON-325a, b, ON-327a, b, ON-337a, ON-341a, b, ON-342a, b, ON-348a, b, ON-352a, b, ON-354a, b, ON-358a, b, ON-360a, b, ON-373a, b, ON-374a, b, ON-376a, b, ON-384a, b, ON-387a, b, ON-388a, b, ON-391a, b, ON-392a, b, ON-395a, b, ON-396 a, b, ON-398a, b, ON-400a, b, ON-403a, b, ON-404a, b, ON-407a, b, ON-412a, b, ON-414a, b, ON-417a, b, ON-420a, b, ON-423a, b, ON-425a, b, ON-428a, b, ON-431a, b, and ON-433a, b; Transcript, p. 1,646).

All of these applications were timely filed on or before the statutory deadline of October 9, 2020, and they were timely received by the Oneida County Board of Elections on or before the statutory deadline of October 14, 2020 (*Id.*; Election Law § 5-210[3]). Nonetheless, none of the individual voters who had submitted one of these applications was entered into the NYSVoter database, and every single one of their affidavit ballots was rejected by the Board based upon a determination by the Commissioners that the voter was “not registered.” Late in the afternoon on January 6, 2021, counsel for the Oneida County Board of Elections advised that the reason these individuals were not in the NYSVoter database and the



Board had rejected their ballots was because over 2,200 timely-filed voter registration applications had not been processed by the Board in time for the election (Transcript, p. 1030).

Subsequent testimony on January 8, 2021 from Oneida County Board of Elections principal clerk Kelly Comeskey revealed that the Oneida County Board of Elections had essentially ceased handling all online voter registration applications after September 24, 2020, and that 2,418 timely-filed voter registration applications had been received by the Oneida County Board of Elections, but not processed (Transcript, pp. 1,657, 1,659). Ms. Comeskey further testified that the Oneida County Commissioners knew that the applications had not been processed (Transcript, p. 1,660).

On January 11, 2021, Democratic Commissioner Carolanne Cardone testified that she first learned of the over 2,400 unprocessed voter registration applications on Wednesday, January 6, 2021, and that neither Commissioner had known about, or reviewed, the unprocessed voter registration applications when conducting the court-ordered canvass (during the week of December 21, 2020), even though she conceded that such information was important (Transcript, pp. 1,743, 1,748). While the Court finds Commissioner Cardone's testimony suspect in many respects, there is no question that the Board failed to review, or even consider, the unprocessed voter registration applications when it canvassed and improperly rejected at least 68 valid affidavit ballots cast by legally registered voters (Transcript, p. 1,748).<sup>1</sup>

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<sup>1</sup> Because the Board did not process the voter registration applications, thousands of eligible voters' names did not appear in the election day and early voting poll books. No one will ever know how many individuals, when told by a poll worker that they were not listed in the poll book, simply walked away from the polling site, without completing and casting an affidavit ballot or seeking a court order.

### III.

#### A.

In light of the evidence presented at the hearing on January 6, and given the significance of the testimony that followed, the Court directed counsel for Tenney and Brindisi to submit briefs and present argument as to how the Court should respond to the possible violation of its December 8 Order, and what actions, if any, should be taken with respect to the 68 affidavit ballots that were rejected and for which a timely-filed-but-unprocessed voter registration application was entered into evidence, as well as the other 1,028 rejected affidavit ballots for which it is unknown if there is a timely-filed-but-unprocessed voter registration application.

In their responses, both candidates press this Court to disregard either some, or all, of the potentially valid ballots because it is strategically advantageous for them in this election. Specifically, Brindisi – seeking to make up a vote tally deficit – contends that the individuals who timely filed registration applications were lawfully entitled to vote, their ballots should be counted, and that Court must act – but only by saving the 68 (or 69) ballots that he previously challenged (NYSCEF Doc. 170). Tenney, in turn – currently holding a narrow lead – argues that the Court can do nothing about the Board’s rejection of any of the affidavit ballots because it lacks jurisdiction, and that the impacted voters are not legally “registered” and, therefore, ineligible to vote. (NYSCEF Doc. 169). Both of these arguments ignore the fact that this problem only exists because, as Commissioner Cardone testified, the Oneida County Board of Elections failed to comply with the express procedure under Election Law § 9-209(2)(a)(v) and review its records during the court-ordered canvass.

The Court simply cannot allow the Board or the parties to disregard the express mandates of the Election Law (*People for Ferrer v Bd. of Elections*, 286 AD2d 783, 783-84 [2d Dept 2001]), especially where it would result in the unconstitutional disenfranchisement of duly registered voters who cast valid ballots. While both candidates offer favorable and distinct statutory interpretations, each overlooks the connection that runs between several crucial provisions of the Election Law – from Election Law § 5-212 (voter application process and eligibility) to § 5-210 (application filing deadline, registration effective date and verification process) and § 9-209 (canvassing process and review of qualifications). Those connections cannot be ignored, however, and these provisions must be read together as part of the comprehensive legislative system intended to protect, not circumvent, the right to vote (*Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 105, 115 [2007]; *Hirsh*, 148 NY at 147; *Carney*, 8 AD3d at 1086).

**B.**

Every United States citizen who is over the age of 18; has been a resident of a political subdivision in the State of New York for 30 days or more; and is not currently incarcerated, on parole, or adjudged incompetent, is qualified to vote (NY Const. Art. II, §§ 1, 3; Election Law §§ 5-102[1], 5-106[2]; 9 NYCRR 6217.5[a][1]). The Legislature is charged with creating a voter registration system to organize, and track, the identities of those individuals who are qualified to vote, and what elections and offices they are entitled to vote for (NY Const. Art. II, §§ 5, 6). Unless provided otherwise by a specific law, an individual is not entitled to vote in an election “unless he shall be registered” or “present a court order directing that he be permitted to vote” (Election Law § 5-100). The statewide electronic voter registration database operated by the New York State Board of Elections – known as “NYSVoter” – serves as “the official voter

registration list for the conduct of all elections in the state which are administered by local boards of elections” (Election Law § 5-614[3][h]).

There are several ways for a qualified individual to register to vote in New York (Election Law Article 5, Title II; 52 USC § 20503). One of the more common, and convenient, registration options for individuals who have a statewide identification card (such as a driver’s license) is to complete an electronic voter registration application on the New York State Department of Motor Vehicles’ website (Election Law § 5-212; 52 U.S.C. §§ 20504, 20506). The Department of Motor Vehicles is required to transmit completed applications to the proper County Board of Elections within 10 days (or 5 days if the application is submitted close to an election) (Election Law § 5-212[6]). Upon receipt of applications from the Department of Motor Vehicles, the local Boards of Elections are then required under Election Law § 5-212(9) to process those applications in the same manner as all other registration applications: in accordance with the process set forth in Election Law § 5-210.

Fundamental to that process – and critical to this proceeding – is that under the plain and unambiguous language of the Election Law § 5-210(9), a “voter’s registration and enrollment shall be complete upon receipt of the application by the appropriate county board of elections” (*see also* Election Law § 5-210[5][c] [requiring all voter registration application forms to contain a notice advising the applicant that her “registration and enrollment is not complete until the form is received by the appropriate county board of elections”]). In other words, as a matter of law, a qualified individual is “registered” to vote under the Election Law as soon as her completed voter registration application is received by the proper Board of Elections.

In order for a qualified and registered individual to be entitled to vote in an upcoming election, her voter registration application must have been filed at least 25 days before that election (Election Law §§ 5-210[3], 5-212[7]). In particular, as it relates specifically to individuals like those, here, who filed voter registration applications with the New York State Department of Motor Vehicles, the Election Law states that:

Completed application forms received by the department of motor vehicles not later than the twenty-fifth day before the next ensuing primary, general or special election and transmitted by such department to the appropriate board of elections so that they are received not later than the twentieth day before such election shall entitle the applicant to vote in such election provided the board determines that the applicant is otherwise qualified. (Election Law § 5-212[7]).

Since an individual is registered to vote the moment her completed application is received, and also entitled to vote at the next ensuing election if the application deadline is met, Election Law § 5-210 mandates that the local Board of Elections shall – upon receiving an application – immediately review the application to ensure that it is substantially complete and that the individual appears qualified to vote, and then, without delay, transfer the applicant's information to the NYSVoter database (Election Law § 5-210[8]). In other words, a local Board of Elections is not to verify the identity of an applicant prior to registering her to vote. Instead, every individual who has submitted a completed registration form shall, by law, be immediately added to the NYSVoter database as a registered voter. Where an application has been filed at least 25 days before an election by an individual who meets the constitutional qualifications to vote, then that individual is – as a matter of law – a duly registered and qualified voter entitled to vote in that election.

### C.

Verifying a voter's identity is a secondary step, after an applicant's registration information has been entered into the statewide voter database, to confirm the applicant's qualifications. Boards of Elections have 21 days from receipt of an application to, if necessary, "verify the information contained within the application," and then notify the individual that: (1) her application has been accepted; (2) her application has been accepted, but further information is needed to verify her identity; or (3) her application has been rejected (Election Law § 5-210[9]; *also* 9 NYCRR 6217.5(b); 52 USC § 20507[a][1][A]). A Board may only reject an application if it finds, after further inquiry, that the applicant is not qualified to vote. In that case, the Board must notify the applicant of this finding in writing at least 10 days before an upcoming election (Election Law § 5-210[11]).

Importantly, a local Board cannot reject, or even ignore, an application merely because it cannot verify the applicant's identity. Rather, where a Board is unable to verify an applicant's identity based upon the information contained in her application alone, it must then send the applicant a written "notice of approval" advising her that the application was nonetheless accepted, and requesting whatever additional information the Board needs to verify her identity (Election Law § 5-210[9]). If the Board does not receive a response within 45 days of the date the application was filed, it must send a second written notice to the applicant, again requesting the information (*Id.*). Both of these notices must contain a warning, in capital letters, that the applicant's failure to provide the requested information "may result in a request for identification at the polls in order to cast a vote on a voting machine" (*Id.*). This is because a Board may not, at any time, remove an applicant from the NYSVoter database merely because it was unable to verify her identity – she remains a lawfully registered voter.

Anticipating situations where a local Board may be unable to determine a voter's identity during the 21-day verification process, the Election Law provides three additional methods to verify the qualifications of an applicant so that the voter can cast a ballot on election day. First, poll workers can verify the applicant at the poll site itself by reviewing her identification (Election Law § 5-210[9]). Second, a judge can verify the voter's identity and issue an order permitting her to vote by machine ballot (Election Law § 16-108). And, third, the applicant can request an affidavit ballot, and her qualifications can then be reviewed later by the Board of Elections during its canvass of paper ballots (Election Law §§ 5-210[3], 9-209(2)(a)(v); *see also* 52 USC § 20507[a][1]).

**D.**

The procedure for canvassing affidavit and other paper ballots is set forth in Election Law § 9-209. As part of the statute's preamble, the Boards are explicitly required to canvass, among other ballots, all affidavit ballots submitted by "voters whose registration poll records were missing on the day of such election [and] voters who have not had their identity previously verified" (Election Law § 9-209). This covers ballots cast by qualified individuals who timely filed voter registration applications but were not properly entered on the NYSVoter database, as well as ballots cast by voters properly entered on the NYSVoter database whose identities had not been verified by the Board prior to the election.

In 2019, the Legislature enacted Election Law § 9-209(2)(a)(v) to further protect the rights of voters in these particular circumstances. Specifically, it compels the Boards to review the qualifications of individuals who voted by affidavit ballots under Election Law § 5-210[3] because their applications were not fully processed and their identities verified prior to the election. The 2019 amendment requires that the Boards review all of their existing records

during the canvass to confirm a voter's qualifications and make a final determination as to whether she is eligible, and entitled, to vote:

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 substantially complied with the requirements of this chapter. For purposes of this subparagraph, substantially complied shall mean the board can determine the voter's eligibility based on the statement of the affiant or records of the board.

Under this provision, the Oneida County canvassers were mandated to review all of the records that the Oneida County Board of Elections was legally required to maintain concerning voters' eligibility, including the voter registration applications that it had received, but failed to process. If, during that review, the Board was able to determine that an application had been filed on or before October 9, 2020 and, also, that the applicant met the constitutional qualifications to vote under Article II of the New York State Constitution – *i.e.* she was over 18, resided in New York for more than 30 days, and was not incarcerated, on parole or incompetent – then the Board should have determined that she was an eligible voter who was “entitled to vote” in the 2020 election. Such an individual's ballot should have been “cast and canvass[ed]” (Election Law § 9-209[2][a][v]).

**E.**

The first error of the Oneida County Board of Elections here with respect to the ballots cast by individuals with unprocessed voter registration applications was its failure to take any steps to process the applications filed on the New York State Department of Motor Vehicles' website after September 23, 2020, and to enter the applicants' information into the NYSVoter system (Transcript, pp. 1,657, 1,659). To be clear, the Board's failure to process 2,418 voter registration applications that were timely filed – and delivered – to it, violated both state and



federal law (Election Law § 5-210[9]; 9 NYCRR 6217.5(b); 52 USC § 20507[a][1][A]; *see also Charles H. Wesley Educ. Found., Inc. v Cox*, 408 F3d 1349, 1354 [11th Cir. 2005]). Nevertheless, the individuals who filed those applications were duly registered to vote and entitled to vote in the 2020 general election, subject to a review of their qualifications to vote either by the poll workers or a judge on election day, or by the Board during its subsequent canvass of affidavit and paper ballots (Election Law §§ 5-210[3], [9]; 5-212[7]; 16-108).

This leads to the second error by the Oneida County Board with respect to these ballots. At the court-ordered canvass that commenced (for the third time) on December 22, 2020, the Board and its canvassers failed to review the Board's records relating to each voter who had filed an affidavit ballot – including the unprocessed voter registration applications – to determine whether that individual was eligible to vote. Specifically, the Board and its canvassers were statutorily required to review those applications and the transmittal reports to see if: (1) the applicant was constitutionally qualified to vote; and (2) the applications they were timely filed, thereby entitling her to vote in this election. By not doing this, the Board failed to perform its statutory duties under Election Law § 9-209(2)(a)(v).

#### IV.

The Oneida County Board of Elections' failure to perform its statutory duties under Election Law § 9-209(2)(a)(v) in turn violated this Court's December 8, 2020 Decision and Order directing "that every single ballot that was not previously properly canvassed in accordance with Election Law § 9-209, including uncanvassed affidavit and early voting ballots, shall be properly canvassed" (NYSCEF Doc. 110, 111). As a result, at least 68 registered voters had their affidavit ballots improperly and unlawfully rejected by the Board. The Board must correct this error by properly canvassing all of the affidavit ballots submitted in Oneida

County, including reviewing all of its records to ensure that every valid vote submitted by a lawfully registered voter entitled to cast a ballot in this election is counted (Election Law § 9-209[2][a][v]).

This means, as argued in the alternative by Tenney, that the records relating to every single ballot rejected by the Board as “not registered” must be reviewed, because the Equal Protection Clause requires that the Boards and the Courts treat every single ballot – and every single voter –the same (*Bush v Gore*, 531 US 9 [2000]; U.S. Const. Amendment 14, Sec. 1). Since no party has presented any evidence that any of other Board of Elections failed to timely process voter registration applications in violation of state and federal law, there is no equal protection issue as it relates to the ballots canvassed in any of counties except Oneida. If there is any evidence that another Board violated state and federal law by failing to process timely-filed registration applications, leave is hereby granted to the parties to submit such evidence, and this Court will then similarly direct the correction of that error.

V.

Accordingly, it is hereby, **ORDERED** that the Oneida County Board of Elections shall arrange for the secure return of the affidavit ballots currently held at the Oswego County Courthouse, comply with the provisions of the Court’s December 8, 2020 Order relating to the canvassing of all affidavit ballots in accordance with the provisions of Election Law § 9-209, and report the results of the correction of errors in its canvass in a writing filed to the NYSCEF system no later than 6:00 PM on January 27, 2021.

Dated: January 20, 2020



HON. SCOTT J. DELCONTE, J.S.C.

**ENTER.**

**PAPERS CONSIDERED**

1. Order to Show Cause on Motion by Petitioner Claudia Tenney, entered December 2, 2020 (NYSCEF Doc. 91);
2. Affirmation by Attorney Paul DerOhannesian, II, affirmed December 2, 2020 (NYSCEF Doc. 86);
3. Affirmation in Opposition to Motion to Dismiss Counterclaim/ And Cross-claim by Attorney Martin E. Connor, affirmed December 3, 2020 (NYSCEF Doc. 94);
4. Order to Show Cause on Motion by Respondent Anthony Brindisi, entered December 2, 2020 (NYSCEF Doc. 92);
5. Affirmation in Support of Respondent Brindisi's Proposed Order to Show Cause by Attorney Martin E. Connor, affirmed December 2, 2020 (NYSCEF Doc. 89);
6. Affidavit of Christina Dutko and Joseph Berton, sworn to December 3, 2020 (NYSCEF Doc. 96);
7. Affidavit of Laura Costello and Mary Egger, sworn to December 4, 2020 (NYSCEF Doc. 98);
8. Affidavit in Response of Kim Tranter and Robert A. Drumm, sworn to December 4, 2020 (NYSCEF Doc. 101);
9. Affidavit of Laura J. Brazak and Carol M. Bickford, sworn to December 4, 2020 (NYSCEF Doc. 104);
10. Affirmation by Attorney Robert E. Pronteau, affirmed December 4, 2020 (NYSCEF Doc. 105);
11. Affirmation by Attorney Peter J. DeWind, affirmed December 4, 2020 (NYSCEF Doc. 106);
12. Exhibits ON-45, ON-45a, ON-45b, ON-47, ON-47a, ON-47b, ON-55, ON-55a, ON-55b, ON-81, ON-81a, ON-81b, ON-86, ON-86a, ON-86b, ON-88, ON-88a, ON-90, ON-90a, ON-90b, ON-91, ON-91a, ON-91c, ON-92, ON-92a, ON-92b, ON-93, ON-93a, ON-93b, ON-99, ON-99a, ON-99b, ON-101, ON-101a, ON-101b, ON-105, ON-105a, ON-105b, ON-116, ON-116a, ON-116b, ON-158, ON-158a, ON-158b, ON-172, ON-172a, ON-172b, ON-194, ON-194a, ON-194b, ON-199, ON-199a, ON-199b, ON-253, ON-253a, ON-253b, ON-264, ON-264a, ON-264b, ON-274, ON-274a, ON-274b, ON-275, ON-275a, ON-275b, ON-283, ON-283a, ON-238b, ON-284, ON-284a,

ON-284b, ON-287, ON-287a, ON-287b, ON-291, ON-291a, ON-291b, ON-296, ON-296a, ON-296b, ON-300, ON-300a, ON-300b, ON-309, ON-309a, ON-309c, ON-319, ON-319a, ON-319b, ON-320, ON-320, ON-320a, ON-320b, ON-321, ON-321a, ON-321b, ON-322, ON-322a, ON-322b, ON-324, ON-324a, ON-324b, ON-325, ON-325a, ON-325b, ON-327, ON-327a, ON-327b, ON-337, ON-337a, ON-341, ON-341a, ON-341b, ON-342, ON-342a, ON-342b, ON-348, ON-348a, ON-348b, ON-352, ON-352a, ON-352b, ON-354, ON-354a, ON-354b, ON-358, ON-358a, ON-358b, ON-360, ON-360a, ON-360b, ON-373, ON-373a, ON-373b, ON-374, ON-374a, ON-374b, ON-376, ON-376a, ON-376b, ON-384, ON-384a, ON-384b, ON-387, ON-387a, ON-387b, ON-388, ON-388a, ON-388b, ON-391, ON-391a, ON-391b, ON-392, ON-392a, ON-392b, ON-395, ON-395a, ON-395b, ON-396, ON-396a, ON-396b, ON-398, ON-398a, ON-398b, ON-400, ON-400a, ON-400b, ON-403, ON-403a, ON-403b, ON-404, ON-404a, ON-404b, ON-407, ON-407a, ON-407b, ON-412, ON-412a, ON-412b, ON-414, ON-414a, ON-414b, ON-417, ON-417a, ON-417b, ON-420, ON-420a, ON-420b, ON-423, ON-423a, ON-423b, ON-425, ON-425a, ON-425b, ON-428, ON-428a, ON-428b, ON-431, ON-431a, ON-431b, ON-433, ON-433a and ON-433b;

13. Transcripts of the hearing, which include the testimony of witnesses and arguments of Counsel, from January 6, 2021, January 7, 2021, January 8, 2021 and January 11, 2021; and
14. December 8, 2020 Decision and Order of this Court (NYSCEF Docs. 110 and 111).