

At a Special Term of the Supreme  
Court of the State of New York held  
in and for the County of Onondaga on  
November 10, 2022.

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

SUPREME COURT OF THE STATE OF NEW YORK  
ONONDAGA COUNTY

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**JOHN W. MANNION,**

Petitioner,

Index No. 009195/2022

v.

**REBECCA SHIROFF; THE ONONDAGA COUNTY  
BOARD OF ELECTIONS; THE OSWEGO  
COUNTY BOARD OF ELECTIONS; and THE NEW  
YORK STATE BOARD OF ELECTIONS,**

Respondents.

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**REBECCA SHIROFF,**

Petitioner,

Index No. 009200/2022

v.

**THE NEW YORK STATE BOARD OF  
ELECTIONS; THE OSWEGO COUNTY BOARD  
OF ELECTIONS; THE ONONDAGA COUNTY  
BOARD OF ELECTIONS; and JOHN MANNION,**

Respondents.

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**DECISION AND ORDER ON REQUEST TO AMEND      TEMPORARY  
RESTRAINING ORDER**

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## I.

These are two special proceedings pursuant to Article 16 of the Election Law brought by John Mannion and Rebecca Shiroff, candidates for New York State Senate in New York's 50th Senate District. The candidates seek to preserve absentee and election day affidavit ballots for prospective judicial review, and to subsequently validate the tallies of those ballots. Immediately upon the filing of the underlying Petitions (NYSCEF Doc. 1 under Index No. 009195/2022 and NYSCEF Doc. 1 under Index No. 009200/2022), this Court issued emergency Orders to Show Cause (NYSCEF Doc. 5 under Index No. 009195/2022 and NYSCEF Doc. 4 under Index No. 009200/2022) that included temporary restraining orders halting the canvassing of the absentee, military, special or affidavit ballots by the Onondaga and Oswego County Boards of Elections pursuant to Election Law § 16-106(5), and directing the preservation of all election materials pursuant to Election Law § 16-122.

Following service of the Verified Petitions and Orders to Show Cause and the appearance of counsel, a conference in accordance with 22 NYCRR 202.8-e and 202.12(j) was held on November 10, 2022, at 2:00 p.m. via Microsoft Teams, during which Counsel for all parties in both actions appeared and offered argument with respect to the temporary restraining orders. In addition, counsel for Commissioners Douglas Kellner and Andrew Spano of the New York State Board of Elections, Brian L. Quail, Esq., submitted an Affirmation affirmed November 10, 2022, in opposition to the requested temporary restraining orders in the *Shiroff* action (NYSCEF Doc. 9 under Index No. 009200/2022), and the Oswego and Onondaga County Boards of Elections submitted their notices to candidates of the canvassing schedule (NYSCEF Docs. 12 and 13 under Index No. 009195/2022 and NYSCEF Docs. 11 and 12 under Index No. 009200/2022).

## II.

In 2021, the New York State Legislature amended the process by which absentee, military, special and affidavit ballots (“paper ballots”) are canvassed under Election Law § 9-209, as well as the procedure by which those canvasses can be challenged under Article 16 of the Election Law (Laws 2021, Chapter 763). In these special proceedings, the candidates seek the issuance of temporary restraining orders altering that canvassing process under Section 9-209 to direct, among other things, the preservation of the paper ballot envelopes during the post-election canvassing, similar to the procedure followed in *O’Keefe v Gentile* (1 Misc3d 151 [Sup Ct Kings Cty 2003]), as well as the advanced production of records and materials by the Boards of Elections that the candidates claim will assist them in reviewing the validity of paper ballots during the canvassing.

However, the authority of the Courts in an Election Law proceeding is strictly limited, and the only relief that may be awarded is that which has been expressly authorized by statutory provision (*Jacobs v Biamonte*, 38 AD3d 777, 778 [2d Dept 2007]). The Courts cannot intervene in the actual canvassing of ballots by the Boards of Elections, and do not have the authority to modify the statutory procedures governing that canvassing or its timing (*People v Board of Elections*, 286 AD2d 783, 783-84 [2d Dept 2001]; Election Law § 16-106[4] [“The court shall ensure the strict and uniform application of the election law and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter...”]). The Courts also lack the express statutory authority to order the production of any material by the Board of Elections prior to the canvassing other than “a complete list of all applicants to whom absentee voters’ ballots have been delivered or mailed” under Election Law § 8-402(7) (*Jacobs*, 38 AD3d at 778-79).

Moreover, while Petitioner Shiroff articulates a good faith challenge to the constitutionality of Election Law § 9-209 as it has been applied, this Court is bound by the holding of the Appellate Division, Third Department in *Amedure v State of New York et al.* (CV-222-1955), and cannot interfere with the paper ballot canvassing process enacted by the Legislature under Section 9-209. “Granting [P]etitioners the requested [temporary] relief during an ongoing election would be extremely prejudicial to candidates, voters and the State and local Boards of Elections” (*Amedure*, at 9). Accordingly, to the extent that the prior Orders to Show Cause in these actions directed the Oswego and Onondaga County Boards of Elections to take, or refrain from taking, any action that impairs or prevents them from carrying out their statutory duties to canvass and cast the absentee, military, special and affidavit ballots in this election race, those Orders are hereby **VACATED** and **RESCINDED**.

### III.

Accordingly, upon due deliberation, it is hereby

**ORDERED** that all ordered provisions in the Order to Show Cause in the action captioned Mannion v Shiroff et al. under Index No. 009195/2022 (NYSCEF Doc. 5) except those relating to service of process and commencement of the special proceeding are **VACATED**; and it is further

**ORDERED** that all ordered provisions in the Order to Show Cause in the action captioned Shiroff v New York State Board of Elections et al. under Index No. 009200/2022 (NYSCEF Doc. 4) except those relating to service of process and commencement of the special proceeding are **VACATED**; and it is further

**ORDERED** that Respondent Onondaga County Board of Elections and Respondent Oswego County Board of Elections shall immediately resume casting and canvassing absentee,

military, special and affidavit ballots pursuant to the provisions of Election Law § 9-209 and consistent with their publicly noticed canvassing schedule; and it is further

**ORDERED** that Petitioners Mannion and Shiroff be permitted to have counsel or other designated poll watchers observe the canvassing of absentee, military, special and affidavit ballots; and it is further

**ORDERED** that a Continuing Court Conference with counsel to the parties shall be held in these special proceedings pursuant to 22 NYCRR 202.12(j) on Tuesday, November 15, 2022, at 3:00 p.m. via Microsoft Teams.

Dated: November 10, 2022



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

**ENTER.**

#### **APPEARANCES**

Greenberg Traurig, LLP by *Robert M. Harding, Esq. and Joshua L. Oppenheimer, Esq. for Petitioner John W. Mannion*

Messina Perillo & Hill, LLP by *John J. Ciampoli, Esq. for Petitioner Rebecca Shiroff*

Onondaga County Department of Law by *Benjamin M. Yaus, Esq. for Respondents Onondaga County Board of Elections*

Oswego County Attorney's Office by *Richard C. Mitchell, Esq., for Respondents Oswego County Board of Elections*

New York State Board of Elections by *Brian L. Quail, Esq. for Commissioners Douglas A. Kellner and Andrew J. Spano*

New York State Board of Elections by *Todd Valentine, Esq. for Commissioners Peter S. Kosinski and Anthony J. Casale*