NEW YORK STATE SUPREME COURT
ONONDAGA COUNTY

IN THE MATTER OF

REBECCA SHIROFF

Petitioner,

- against -

NEW YORK STATE BOARD OF ELECTIONS, et al

Respondents.

Case No: 009200/2022
RJI No:

IN THE MATTER OF

JOHN W. MANNION

Petitioner,

- against -

NEW YORK STATE BOARD OF ELECTIONS, et al

Respondents.

Case No: 009195/2022
RJI No:

MEMORANDUM OF LAW IN OPPOSITION

Respondents DOUGLAS KELLNER and ANDREW J. SPANO, in their official capacities as Commissioners of the New York State Board of Election, submit this memorandum of law in opposition to the petitioners' application before this court.

Dated: Albany, New York
November 10, 2022

By: */s/*
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TABLE OF CONTENTS

I. THE PROVISIONS OF THE PROPOSED IMPOUND ORDER HEREIN EXCEED THE AUTHORITY OF THE COURT AND THE ORDER SHOULD BE DENIED OR MODIFIED TO COMPLY WITH ELECTION LAW

There is no basis at this time to alter the statutory procedures to ensure an orderly unfolding of post-election procedures. Nor should the post-election calendar – already duly noticed to all candidates and parties – be modified in any manner. The calendar of post-election canvass dates for the relevant boards, in whole or in part, are attached as Exhibit "A" to the Affirmation of Brian Quail. There is no possible exigency or emergency basis that even remotely invites such judicial intervention.

Election Law § 16-106 (4), amended in 2021, provides that "[t]he court shall ensure the strict and uniform application of the election law ***and shall not permit or require the altering of the schedule or procedure in section 9-209 of this chapter*** but may direct a recanvass or the correction of an error, or the performance of any duty imposed by law…" Election Law § 16-106 further provides that "[i]n the event of procedural irregularities or other facts arising during the election" the court can grant injunctive relief if the criteria of CPLR article 63 are met by "clear and convincing evidence" demonstrating that a candidate-petitioner "will be irreparably harmed absent such relief." *Id.* The legislation further provides that "allegations that opinion polls show that an

election is close is insufficient to show irreparable harm to a petitioner by clear and convincing evidence." *Id.*

An election impound order can only command a board of elections to "perform its statutory duty to canvass the ballots and file the requisite tabulated statements." *See Testa v Ravitz*, 84 NY 2d 893 (1994). The courts cannot, even if all the candidates agree, change or modify the canvassing procedures established by law and set by the board of elections. *See e.g. Larsen v Canary*, 107 AD2d 809, 810 (2nd Dept 1985) *affd for the reasons stated below* 65 NY2d 634 (1985).

> Public confidence in our electoral system is the foundation of American democracy, and it must never be compromised. To ensure fair and orderly elections, and promote public confidence in them, the New York State Legislature designed, and adopted, the Election Law, a comprehensive statutory framework consisting of 17 articles governing the entire electoral process from start to finish (*Matter of Higby v Mahoney,* 48 NY2d 15, 21 [1979]). Under the Election Law, a court's power to intervene in an election is intentionally limited, and can only be called upon by a candidate to preserve procedural integrity and enforce statutory mandates (*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). It is through the judiciary's rigid and uniform application of the Election Law that, fundamentally, "[t]he sanctity of the election process can best be guaranteed" (*id.* at 258).
>
> Accordingly, this court has no authority to, and will not, count votes, interfere with lawful canvassing, or declare the winner. Those are the statutory duties of the respondent Boards of Elections; duties that cannot be abdicated, modified or usurped by the courts (Election Law § 9-200[1]; *Testa v Ravitz*, 84 NY2d 893, 895

> [1994]; *Matter of People for Ferrer v Board of Elections of the City of N.Y.,* 286 AD2d 783, 783-784 [2d Dept 2001]). Instead, this court—as explicitly restrained by Election Law § 16-106—is empowered only "to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots[,]" and to "review the canvass and direct a recanvass or correction of an error or performance of any required duty by the board of canvassers" (*Matter of Delgado v Sunderland,* 97 NY2d 420, 423 [2002]). Simply put, this court has only one role in this election: to make sure that everyone, including every public election official, follows the law.

Tenney v Oswego County Board of Elections, 70 Misc.3d 680, 682-83 (Supt Ct. Oswego County 2020).

A court may make an order to ensure ballots are preserved for judicial review provided such order does not in any way impinge "upon the board of inspectors' ability to make a determination and count challenged ballots." *O'Keefe v Gentile,* 1 Misc3d 151 (Kings County Sup Ct 2003). As of 2021, the legislature has clarified that ballots found to be invalid "shall not be counted absent an order of the court." But as to ballots that are counted; "[i]n no event may a court order a ballot that has been counted to be uncounted." Election Law § 9-209(8)(e). Accordingly, no interim relief can stop a board in the proper performance of its duties from canvassing a ballot. Subject matter jurisdiction related to the canvass of ballots attaches only after the Board's canvass is complete. The Court of Appeals clarified that "Supreme Court 'lacks jurisdiction to conduct its own

canvass ... and determine a winner before the Board of Elections has conducted its canvass" [citations omitted]. In contrast, this case involves no such interference with the Board's statutory authority to conduct a canvass in the first instance. It is undisputed that the canvass here was completed..." *Alessio v Carey*, 10 NY3d 751 (2008).

The Third Department on November 1, 2022 rejected a Constitutional challenge to Election Law § 9-209 and the provisions of 16-106 on the basis of laches and noted:

> Moreover, the granting of petitioners' relief would result in substantial prejudice. According to an affidavit from counsel for the Board of Elections, over 488,000 absentee ballots had been mailed and over 127,000 had been returned as of October 24, 2022. Pursuant to the process as outlined in Election Law § 9-209, those ballots that have been returned will have already been reviewed and those ballots found valid have been counted (see Election Law § 9-209 [2] [f]; [6] [b]).

Amedure v State of New York, CV-22-1955 (Third Department November 1, 2022). The same logic attends here. The process which unfolded before the election as to the canvassing of absentee ballots must be permitted to unfold unhindered with respect to ballots returned after the election.

A. TRO and Injunction Standard

CPLR § 6313(a)[1] expressly prohibits a Court from issuing a TRO against a public officer, board or municipal corporation of the state "to restrain the performance of statutory duties." To the extent that the proposed order seeks a stay of or abrogates ministerial, lawful, statutorily commanded actions of boards of elections, the proposed impound order in this matter is improper. Of course, a Court may issue a TRO against a public board to force it to perform its statutory duties. Even then, however, the applicant must meet the showing articulated by Election Law § 16-106 (5) (showing by "clear and convincing evidence" that "because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief.").

"A party may obtain temporary injunctive relief only upon a demonstration of (1) irreparable injury absent the grant of such relief, (2) a likelihood of success on the merits, and (3) a balancing of the equities in that party's favor." *Winter v Brown*, 49 AD3d 526 (2nd Dept 2008). Absent these showings, an impound order cannot be issued. A party seeking to mandate specific conduct—like dictating how ballots will be canvassed—must meet a "heightened standard." *Roberts v. Paterson*, 84 A.D.3d 655, 655 (1st Dep't 2011). A mandatory preliminary injunction "is an extraordinary and drastic remedy which is rarely granted and then

[1] CPLR § 6313: "No temporary restraining order may be granted in an action arising out of a labor dispute as defined in section eight hundred seven of the labor law, nor against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties."

only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Zoller v. HSBC Mtge. Corp. (USA),* 135 A.D.3d 932, 933 (2d Dep't 2016).

B. *An Alleged or Actual Small Margin in the Vote Between Candidates Is Not Basis For Impound Order*

A small vote margin or anticipated small margin separating candidates in an election is not a basis for the issuance of an impound order. *See* Election Law § 9-209 (5) ("… allegation that opinion polls show that an election is close is insufficient to show irreparable harm…); s*ee also Larsen v Canary*, 107 AD2d 809, 810 (2nd Dept 1985) *affd for the reasons stated below* 65 NY2d 634 (1985). Courts have no authority to alter the statutory scheme for any phase of the canvass. *See Id.; Testa v Ravitz*, 84 NY 2d 893 (1994); *Ferrer v Board of Elections of City of New York,* 286 AD2d 783 (2nd Dept 2001); *Taratino v Westchester County Board of Elections*, 8 AD3d 672 (2nd Dept 2004).

C. *The Canvass Process Prescribed By Election Law Cannot Be Altered By Courts*

In *Larsen v Canary*, the trial court "[i]n light of the narrow margin" impounded ballots and ultimately undertook a canvass "under the official jurisdiction of this Supreme Court." The Appellate Division reversed, noting "[t]he Election Law contains specific provisions relating to the canvassing of votes," and Special Term improperly "conducted its review of the ballots before

the board of elections had conducted the official canvass." *Larsen* at 107 AD2d 810.

Larsen specifically held the provisions of Election Law § 9-100 *et seq* governing the poll site canvass by inspectors as well as the provisions of the Election Law related to the board of elections canvass (*i.e.* Election Law § 9-206 *et seq*) could not be abrogated in favor of a judicially fashioned canvass. *Id.* The Court further noted "the board not only has the right, but the statutory duty, to conduct an independent canvass, ***without judicial intervention***, and that duty cannot be abdicated." *Id.* This is true even if all of the candidates in a contest stipulate to a modified procedure because the canvassing process does not belong to the candidates but rather the canvass is a duty imposed by law exclusively on the board of elections. *Id*; *Cf Gentile v O'Keefe*, 1 Misc. 3d 151 (Kings County Sup. Ct 2003) (ordering a process for ballot preservation for later judicial review in a manner that "in no way modified the statutory procedure for judicial review or impinges upon the board of inspectors ability to make a determination and count challenged ballots."). The convenience of the competing candidates does not outweigh the board's interest in performing its statutory duty in accordance with the Election Law under the board's own direction. If a candidate wants an accommodation within the bounds of law related to the canvassing process, that request must be directed to the Board of Elections, not the Court.

In *Ferrer v Board of Elections of City of New York*, the Second Department held, consistent with *Larsen,* that Supreme Court has "no authority to modify the statutory procedures set forth in Election Law § 9-209 (2)(d) for the judicial review of ballots challenged by a candidate..." And nor does it have authority "to vary the statutory procedure set forth in Election Law § 8-302 (3)(e)(ii) and in the regulations promulgated by the Board of Elections governing the canvassing of affidavit ballots." 286 AD2d 783 (2nd Dept 2001).

D. Securing Election Results, Ballots and Materials After Close of Polls Is Provided For By Election Law and Established Procedures of the Board of Elections

There is no showing in the moving papers that the statutorily prescribed procedures provided by law are in any manner inadequate. Every board of elections has a plan to provide for the safe return of ballots to the board of elections and provide for the bipartisan security of election materials. *See* Election Law § 9-100; 9-102 (providing for canvass of machine results at polling site). Bipartisan ballot reconciliation at the poll site and ballot security are provided for in detail in Election Law §§ 9-106; 9-108; 9-110; 9-114; 9-116. The manner by which the returns of canvass, ballots, ballot stubs, result tapes generated by voting machines, portable memory sticks containing the election results, absentee ballots delivered to the poll site, affidavit ballots, registration records, voting machine keys, and reports are sealed on a bipartisan basis and returned to the board of

elections is provided for in detail by the Election Law. *See* Election Law §§ 9-120 to 9-126.

In sum, all of the relevant voting materials are sealed or locked in a bipartisan manner after completing the machine canvass, and these materials are then "deposited by an inspector designated for that purpose" with the board of elections. Election Law § 9-124(2). While the Election Law does permit the filing of voting materials in some instances within twenty-four hours of the close of polls (*id.*), all of the voting materials described herein are returned to the boards of elections on the night of the election.

Upon return to the board of elections, every board of elections has a bipartisan security plan for securing all aspects of the voting system. *See* 9 NYCRR §§ 6210.11; 6210.12.

E. Scheduling of Canvass is Statutory Prerogative of the Board, Not Candidates

The Election Law commands the board of elections to establish the schedule for the canvassing of absentee ballots and other ballots not counted on Election Day. Election Law § 9-209(8)(b) requires all candidates and political parties be provided five days notice by first class mail of the "time fixed for such meeting." The court cannot disrupt, hinder or delay the schedule lawfully established by the board of elections pursuant to the Election Law. *See e.g. Ferrer v Board of Elections of the City of New York*, 286 AD2d 783 (2nd Dept 2001) ("Supreme Court

had no authority to modify the procedures set forth in Election Law (2) (d) for the review of ballots challenged by a candidate or his or her representative…Nor did it have the authority to vary…the regulations promulgated by the Board of Elections governing the canvass of affidavit ballots.")

While a candidate has a statutory right to attend the post-election canvass to observe, the candidate has no right to set the schedule for the canvass of ballots. To the extent necessary, the candidate may send an attorney or duly appointed watchers to attend the canvass. *See* Election Law § 9-209(8)(c). When the canvass is at multiple tables or at multiple boards of elections, the candidate can appoint as many watchers as needed or hire as many attorneys as needed to attend the canvass. The duty of the board of elections to complete its work as required by the statute takes precedence over the candidate's logistical concerns. *Larsen* at 107 AD2d 810.

Candidates suffer no irreparable harm if the board's schedule -- of which the candidate had notice -- is adhered to. The candidate simply needs to appoint watchers or secure additional attorneys. *See* Election Law § 9-209 (8)(c), (d). This is not an irreparable harm, but rather a foreseeable circumstance that can be planned for. The balance of equities weighs in favor of the board of elections completing its work and timely determining the winner of the election as mandated by the Election Law. And, finally, in as much as it is beyond the jurisdiction of the

court to interfere with the canvass, there can be no likelihood of success on the merits in seeking judicial scheduling of the canvass. *See e.g. Roberts v Paterson*, 84 AD3d 655 (1st Dept 2011).

Candidates were provided notice of the canvass time frames and there is no basis for those to be disturbed now.

F. Candidate Are Not Entitled To Court Order For Copies of Ballot Envelopes and Voter Records[2]

Candidates have a right to inspect ballot envelopes at the time of the canvass under the supervision of the Board of Elections or at some other time as established by the Board. Candidates do not have a right at a critical time in the electoral process to command the board of elections to stop its work to produce reams of copies of voter records and ballot envelopes if the board had planned for other means to provide candidates' access to relevant materials.

Persons have a right to inspect records "under the immediate supervision of the board of elections or its employees and subject to such reasonable regulations as such board may impose." Election Law § 3-220; *Waldman v Village of Kiryas Joel*, 31 AD 3d 569 (2nd Dept 2006) (certain election related documents subject to

[2] Nothing in this section is meant to suggest that provisions of FOIL, and the time frames thereunder, do not apply to boards of elections. Nor does this section suggest that a court cannot require the production of documents it deems relevant as part of a properly commenced proceeding challenging a canvass by subpoena or OTSC. Nor does this section stand for the proposition that boards of elections cannot agree to provide copies of documents in lieu of inspection. But the courts cannot order the production of documents as part ***of the board's canvass***.

inspection, not required to be copied). In *Ferrer*, the Appellate Division noted that "[a]lthough the Board of Elections has agreed to attach the voter's applications to the absentee ballots, it objects to the Supreme Court's usurpation of its prerogative to choose to do so." 286 AD2d 783 (2nd Dept 2001). The Second Department agreed the court did not have the power to order this production as part of the canvass process. "Since the Board of Elections had the initial authority to adopt this procedure, the Supreme Court exceeded its authority in this regard as well." *Id.*

In *Matter of Jacobs v Biamonte*, 38 AD3d 777 (2nd Dept 2007), the Second Department in a case described by the court as having "far reaching implications for the manner in which challenges of absentee ballots are issued" held litigants in that case are entitled only to the list of absentee applications provided for by the Election Law, not copies of the applications:

> "Any action Supreme Court takes with respect to a general election challenge must find authorization and support in the express provisions of the [Election Law] statute" (*Matter of Delgado v Sunderland*, 97 NY2d 420, 423 [2002] [internal quotation marks omitted]; *see Matter of Flood v Schopfer*, 20 AD3d 417, 419 [2005]; *Matter of Mondello v Nassau County Bd. of Elections*, 6 AD3d 18, 21 [2004]). Contrary to the contention of the petitioners, who are the Chairman of the Nassau County Democratic Committee and a candidate for the office of Member of the New York State Senate from the 7th Senatorial District, there is no express provision in the Election Law providing for the relief they seek. Election Law § 8-402 (7) provides for the production and disclosure, upon request, of "a

> complete list of all applicants to whom absentee voters' ballots have been delivered or mailed, containing their names and places of residence... including the election district ... and in the city of New York and the county of Nassau, the assembly district." As the Supreme Court found, this provision is both specific and limiting in the disclosure contemplated, and it does not authorize the dissemination to the petitioners of copies of all absentee ballot applications submitted in this special election. Contrary to the petitioners' contention, the provision of Election Law § 16-106 (1) which authorizes a challenge to original absentee voter's ballot applications does not implicitly provide them with the right to review or acquire copies of all absentee voter's ballot applications; as previously stated, any action taken by the Supreme Court with respect to a general election challenge must find support and authorization in the express provisions of the Election Law (*see Matter of Delgado v Sunderland*, supra at 423; *Matter of Flood v Schopfer*, supra at 419; *Matter of Mondello v Nassau County Bd. of Elections*, supra at 21).[3]

G. Board of Elections Must Have Notice and Opportunity to Be Heard Before Court Issues TRO

An election impound order issued by Order to Show Cause (OTSC) before Answer is a Temporary Restraining Order (TRO). *See* CPLR § 7502 (c). Boards of Elections must be provided an opportunity to be heard before the issuance of any OTSC containing TRO provisions. *See* 22 NYSCRR § 202.7 (f) (providing absent substantial prejudice to giving notice, the application for a TRO must provide a sworn statement "that a good faith effort has been made to notify the

[3] The trial court decision is even more detailed in its analysis. *See* 15 Misc.3d 223 (Suffolk County Sup Ct 2007).

party against whom the temporary restraining order is sought of the time, date and place that the application will be made…sufficient to permit the party an opportunity to appear in response to the application."). The Chief Administrative Judge has annually informed judges assigned to election duty that "[e]specially in the context of developments in the election law and procedures…which often affect the rights of numerous voters" and "have substantial implications for the integrity of the election process," notice to boards of elections is important to allow the court "a more nuanced understanding of these implications." *See* Letter of Lawrence Marks, Chief Administrative Law Judge, to Hon. George J. Silver and Hon. Vito C. Caruso dated October 14, 2020.

CONCLUSION

For the reasons stated herein the instant orders to show cause should be modified to comply with the requirements of law.