

NEW YORK STTE SUPREME COURT
ONONDAGA COUNTY

IN THE MATTER OF

REBECCA SHIROFF,
-Petitioner,
-against-

Case No. 009200/2022
RJI No:

NEW YORK STATE BOARD OF ELECTIONS, et al.,
-Respondents.

IN THE MATTER OF

JOHN W. MANNION,
-Petitioner,
-against-

Case No. 009195/2022
RJI No:

NEW YORK STATE BOARD OF ELECTIONS, et al.,
-Respondents.

MEMORANDUM OF LAW IN SUPPORT

Respondents PETER S. KOSINSKI and ANTHONY J. CASALE, in their official capacities as Commissioners of the New York State Board of Elections, submit this memorandum of law in opposition to the petitioners' application before this court.

Dated: Albany, New York
November 10, 2022

By: 
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I. THE PROVISIONS OF SUBDIVISIONS 7 AND 8 OF ELECTION LAW SECTION 9-209 ALLOW FOR CANDIDATES OR THEIR REPRESENTATIVES TO RAISE OBJECTIONS TO REVIEW AND CANVASSING OF AFFIDAVIT BALLOTS.

The Election Law amendments enacted in 2021 (Chapter 763) do not limit the ability of candidates or their representatives to raise objections to the review and canvassing of affidavit ballots. The Election Law was specifically amended to limit the candidates or their representatives from raising objections to the review and canvassing of *absentee ballots*:

“Nothing in this section prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board’s jurisdiction from observing, without objection, the review of ballot envelopes required by subdivisions two, three and four of this section.” EL § 9-209(5).

The explicit language of this subdivision 5 bars only the raising of objections to the review and canvassing of *absentee ballots*, as objections to affidavit ballots are conducted pursuant to subdivision 7 of this section.

Election Law section 9-102(3)(b) provides:

“Election day paper ballots that have not been scanned shall be canvassed and tallied pursuant to this section and sections 9–108 and 9–110 of this title.” Affidavit ballots meet this definition and are clearly contemplated by this provision. Pursuant to the method of review and canvassing such ballots, Election law section 9-114 explicitly provides for the method for such objections to be raised.

Election Law section 9-209(7)(b) does limit the reasons by which an affidavit ballot may be invalidated by listing what is considered valid:

“Affidavit ballots are valid when cast at a polling site permitted by law by qualified voters: (i) who moved within the state after registering; (ii) who are in inactive status; (iii) whose registration was incorrectly transferred to another address even though they did not move; (iv) whose registration poll records were missing on the day of such election; (v) who have not had their identity previously verified; (vi) whose registration poll records did not show them to be enrolled in the party in which they are enrolled; and (vii) who are incorrectly identified as having already voted.”

Thus, objections are only permitted to be raised on these factors prior to ruling an affidavit ballot valid. And once an affidavit ballot has been ruled invalid, Election Law section 9-20(7)(j) sets forth the subsequent procedure to be followed:

“At the meeting required pursuant to paragraph (a) of subdivision eight of this section, each candidate, political party, and independent body shall be entitled to object to the board of elections’ determination that an affidavit ballot is invalid. Such ballots shall not be counted absent an order of the court. In no event may a court order a ballot that has been counted to be uncounted.”

This ability to object is further supported by the Election Law section 16-106(1)(d), which allows a court to review preserved challenges related to “ballots voted in affidavit envelopes.”

While the Legislature specifically limited the ability to raise objections with regards to absentee ballots, it did not restrain candidates or the representatives’ making objections with respect to affidavit ballots, only limiting the scope of such objections.