MESSINA PERILLO HILL

November 13, 2022

Hon. Scott DelConte
Justice, Supreme Court of the State of New York
25 East Oneida Street
Oswego, NY 13126 ***by electronic transmission***

RE: In the matter of Shiroff v. NYS Board of Elections, et al, **009200/2022**

Dear Justice DelConte:

I am writing this letter to you to make application for relief from actions taken by the Onondaga County Board of Elections in contravention of Law and posing imminent and irreparable harm to my Client as the canvass and re-canvass of this elections proceeds. Let me state at the outset, that we have not, to date, experienced a problem with the Oswego County board of Elections.

Specifically, the Board of Elections represented to persons with the Shiroff Campaign that they would be provided with copies of the face of affidavit ballots (and the associated research thereon) that they had requested. On the eve of the Veterans Day holiday the Shiroff representatives were informed that there would

be no documents produced as this Court had stricken the requirement for production from the Order to Show Cause bringing on this action.

It appears, further, in contravention of law, that the Commissioners of said Board intend to prohibit the Shiroff poll watchers from making and preserving objections to various affidavit ballots in this race. Upon stifling objections, the Board, upon information and belief, intends to permanently and irreparably harm my client by proceeding to burst the affidavit ballot envelopes and remove the ballots therefrom (intermingling them with others) so that objections are removed from this Court's oversight.

We bring on this application now because the Respondent Board of Elections has already refused once to pause its process so that we might be heard by Your Honor. By the time we were heard on our last request the Onondaga Board of Elections had already proceeded with the bursting of envelopes and removal of the ballots therefrom knowing that its actions would serve to moot our application. We want to avoid a repeat occurrence in the current situation.

The failure to intervene now would result in a most acrimonious confrontation at the Board when they begin to impede Shiroff's Constitutional and Statutory rights by forcing ballots through the process without challenge or Court review.

It appears to us that the Board is acting under the provisions of §9-209 (5) which states:

> "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**."

Here, Affidavit Ballots are canvassed pursuant to §9-209(7) Election Law. While that section of the law allows for certain objections to be made to ballots which have been ruled to be invalid by the Commissioners of Elections; there is no language in the applicable section that makes the permitted objections exclusive or limits poll watchers to only the objections delineated therein and otherwise [in contrast with subdivision 5] specifically precludes objections from being made much as is elsewhere stated in §8-506 Election Law, that "any watcher or registered voter properly in the polling place may, challenge the casting of any ballot upon the ground or grounds allowed for challenges generally…".

In any event, this is not a review of ballot envelopes made pursuant to Election Law §9-209(2), (3), or (4). This fact limits the applicability of the unconstitutional limitation that has been placed on candidates and poll watchers under subdivision five. In addition, the application of subdivision seven of the law does not impose, *inter alia*, the unconstitutional removal of Judicial review of the Board's Administrative processes, on the Affidavit Ballot canvass.

We recognize the incompetent and shoddy draftsmanship of the subject statute. The law, however, informs us that the Legislature is presumed to know of the existing body of case law and of statues in existence at the time in makes a new law, see People ex. Rel. Sibley v. Sheppard, 54 N.Y.2d 320 (1981); People v. Keyes, 141 A.D.2d 227 (3rd Dept., 1988); Conesco Industries v. St Paul Fire & Marine Ins. Co., 184 A.D.2d 956 (3rd Dept., 1992); Matter of Caroline, 218 A.D.2d 388 (4th Dept., 1998).

Here there is a body of law that applies to affidavit ballots. Notwithstanding, any cure provisions (and reserving the right to challenge any cure which might allow post-election voting), the uniform rule of law is that affidavit ballots that are incomplete may not be cast or canvassed. An incomplete affidavit ballot, which is incomplete because the voter failed to provide the statutorily required information

should not be counted See Kolb v. Casella, 270 AD 2d 964 (4th Dept. 2000). It is the responsibility of a voter seeking to vote by affidavit for whom there is no registration or no evidence to justify an assertion of registration, and thus eligibility to vote, to provide the information in order that they may exercise the franchise.

Further, Ballots must be declared invalid where, as a result of the failure on the part of the individual voters to accurately complete them, the voter fails to meet the statutory requirements for the ballot to be included in the canvass or the affidavit is otherwise deficient. Additionally, there can be no claim that voters were misled into omitting the required information; or providing inaccurate information, by Board personnel. Only where Board of Elections personnel make a "ministerial error" which "causes such ballot envelope(s) not to be valid on (their)face", then the ballot should be counted **if it is without any other legal defect**. Matter of Panio v Sunderland, 4 NY3d 123, 128-129 (2005) emphasis added. See also In Re Frank K. Skartados, 81 AD 3d 757 (2d Dept 2011).

We request that the Court order Respondent Boards of Elections to provide the documentation (or access to that information) that is needed to meaningfully participate in the canvass of these ballots. We further request that the Election Law §16-112 preservation Orders of this Court be reinstated as to these ballots.

To the extent that certain respondents seek to violate, *inter alia*, the Constitutional right Petitioner has to due process, a bipartisan board of elections making determinations, and especially to the Judicial review of any / all determinations of the Board of Elections as set forth in the verified Petition they are reasserted here. While we believe that the Constitutional standards may be enforced by this Court within the four corners of the statute which clearly does NOT preclude objections to affidavit ballots, §16-112 Election Law Preservation or Judicial Review; we alternatively request an order of the Court providing for

notice to the Attorney General of Constitutional Claims, a pause in the process of the canvass and a hearing and briefing schedule for such claims. In the event that the Onondaga County Board of Elections processes Affidavit Ballots in derogation of the Constitution and the Election law or in contravention of the Orders of this Court we request the opportunity to submit an Order to Show Cause requesting that said board and the Commissioners thereof be held in contempt.

Clearly, the Respondent Onondaga County Board of Elections by denying the Petitioner's request for information and precluding both Objections and Judicial review of their determinations will be acting in contravention of the Constitution and the Election Law, see Docket No. 1, Verified Petition, and in flagrant violation of the case law applicable here, see Tenney v. Oswego County Board of Elections, 2020 WL 8093628 (N.Y.Sup.), 2020 N.Y. Slip Op. 34388(U) (Trial Order), (2020 Sup. Ct. Oswego Co., Del Conte, J.), where it was held:

> " … **irreparable harm will result if protective measures are not implemented before envelopes under continuing objection are opened and vote counting begins**. The Court agrees that the minimally burdensome protective measures narrowly tailored in *O'Keefe*, and requested by Tenney and Brindisi in this proceeding, are necessary and proper. **As fully set forth below, when an objection to an envelope is overruled, a meaningful opportunity for judicial review of that objection must be preserved – and the canvass may continue with minimal delay – by the Respondent Boards of Elections making, and securely maintaining, a photocopy of the ballot within the disputed envelope without revealing how the votes on that ballot were cast**. **Further, the inspectors shall endorse the original mailing envelope with a notation sufficiently memorializing that an objection was not sustained, the ballot was canvassed, a photocopy of the ballot was inserted in the envelope, and the envelope was resealed pursuant to Court Order.** (King v Smith, 308 AD2d 556 [2d Dept 2003]).

Second, the candidates mutually request that the Respondent Boards of Elections produce voter and other election data, including registration records for all absentee voters, in advance of the canvass. However, this Court has no authority to compel the production of any material by the Board of Elections prior to the canvass except "a complete list of all applicants to whom absentee voters" ballots have been delivered or mailed," which is required by Election Law § 8-402(7) (Jacobs, 38 AD3d at 778-79). This jurisdictional limitation does not, however, diminish the statutory right of both Tenney and Brindisi to inspect, pursuant to Election Law § 3-220, all public records maintained by the Respondent Boards of Elections relating to voter registration, as well as the affidavit, absentee and other ballots in the 22nd Congressional District. **Accordingly, the Respondent Boards of Election must make all public election records immediately and reasonably available for inspection throughout the canvassing process.** Any good faith claim by either Tenney or Brindisi that these records are not reasonably available to their designees for inspection may, given the exigencies, be promptly presented to the Court by counsel via a telephone call or email to Chambers" Tenney, supra, emphasis added.

The Constitution, case law, and the Election Law allow for the processing of Affidavit Ballots as they have been processed in the past, see Tenney v. Oswego Co. BOE, 71 Misc.3d 385 (2021 Oswego Co. Sup. Ct., DelConte, J.). Respondent Mannion requested exactly this relief in his Order to Show Cause. The Respondent Commissioners of the New York State Board of Elections, whatever their partisan desires, can and should not deny or obscure the provisions of the law as they denied the applicability of §8-506 Election Law previously.

Should this Court not act here with regard to the Affidavit Ballots the integrity of the canvass will be compromised by inclusion of improper or

illegal ballots. The votes of citizens duly qualified to exercise the franchise will be diluted.

The "right to vote" includes the right to ensure that one's "vote counts with full force and is not offset by illegal ballots." See League of Women Voters v. Walker, 357 Wis.2d 360, 385 (2014) (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)). Courts and elections officials must "ensur[e] that a constitutionally qualified elector's vote is not diluted by fraudulent votes." Id.

The U.S. Supreme Court and other courts have long recognized that illegitimate or fraudulent votes dilute the effect of legitimate ballots. See Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (*per curiam*) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); See also Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing."); See also Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots or diluted by stuffing of the ballot box."); See also Baker v. Carr, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally; or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box."); See also United States v. Saylor, 322 U.S. 385, 388 (1944) ("[T]he elector's right intended to be protected is not only that to cast his ballot but that to have it

honestly counted."); See also Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 952 (7th Cir. 2007), aff'd 553 U.S. 181 ("[V]oting fraud impairs the right of legitimate voters to vote by diluting their votes--dilution being recognized to be an impairment of the right to vote."); See also Ohio Republican Party v. Brunner, 544 F.3d 711, 713 (6th Cir.2008), Order Vacated 555 U.S 5.

Vote dilution cannot be undone after the fact. As a result, courts often issue preliminary relief to prevent vote dilution, whether from fraud or other causes. See, e.g., Brakebill v. Jaeger, 905 F.3d 553, 559-60 (8th Cir. 2018) (finding irreparable harm, reasoning: "Voters could cast a ballot in the wrong precinct and dilute the votes of those who reside in the precinct. Enough wrong-precinct voters could even affect the outcome of a local election."). "'[D]ilution of a right so fundamental as the right to vote constitutes irreparable injury.' There is 'no do-over and no redress' once the election has passed." See Richardson v. Trump, 496 F. Supp. 3d 165, 188 (D.D.C., 2020). (quoting Cardona v. Oakland Unified Sch. Dist., 785 F. Supp. 837, 840 (N.D.Cal., 1992).

The desires of certain of the Respondents to have a "quick and dirty" result must be rejected. The purpose, tradition and policy of this State embodied in the Constitution and the case law is to "get it right" when it comes to election results. We must not disregard accuracy to achieve a quick answer. This Supreme Court has proven itself dedicated to giving the voters confidence in the results of their elections. We must not abandon that principal now.

We might agree that this statute is poorly written, however, that must not stand in the way of this Court assuring that the candidates are allowed participation in the administrative process, and Judicial review. Moreover,

the voters must be protected from having their legal votes diluted by the votes of persons not qualified under the Constitution and Election Law.

We respectfully request a Teams Conference before the Board begins to process Affidavit Ballots. We are filing this on NYSCEF so all parties will receive it.

If there are any questions regarding this matter; the best way to reach me is on my cell phone, 518 522 3548.

We thank the Court for its continued attention to this matter.

Very truly yours,

John Ciampoli, Esq.
Of Counsel
Messina, Perillo and Hill, LLP
285 West Main Street, Ste. 203
Sayville, New York 11782
Cell: 518.522.3548
Phone: 631.582.9422
e-mail address:
Ciampolilaw@Yahoo,com

JC:abm

To: all parties by NYSCEF