

NEW YORK STATE SUPREME COURT  
ORANGE COUNTY

IN THE MATTER OF

DOREY HOULE

*Petitioner,*

- against -

NEW YORK STATE BOARD OF ELECTIONS, et al

*Respondents.*Case No: ~~unknown~~

RJ No:

EF006424-2022

BRIAN L. QUAIL, an attorney admitted to practice in the State of New York, affirms under penalty of perjury as follows:

1. I make this affirmation on behalf of Commissioners Douglas A. Kellner and Andrew J. Spano, the Democratic commissioners of the New York State Board of Elections.
2. I make this application to vacate and rescind the TRO provisions of the Order to Show Cause previously issued in this matter as they have no basis under the currently applicable law related to canvassing and judicial proceedings related thereto after amendments implemented by Chapter 763 of Laws of 2021. Attached as **Exhibit "A"** is a true copy of the Order of Justice Scott DelConte vacating virtually identical decretal paragraphs providing for TRO relief in a matter commenced in Onondaga County by Mr. Ciampoli a few days ago which

were initially granted pursuant to an *ex parte* application without any prior notice to the State Board of Elections or the relevant local board of elections – as is the case in this matter.

### **GOVERNING LAW**

3. Election Law 16-106 (5) was amended in 2021 to provide 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 procedures 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 this chapter...” [emphasis added]

4. Well knowing this is the governing law, Mr. Ciampoli nonetheless submitted *ex parte* an Order to Show Cause to this Court that did exactly this. The Order to Show Cause has halted ALL canvassing pending further order of this court and has set aside the board of elections’ canvassing schedule which has previously been provided to all candidates as required by law.

5. With respect to provision of temporary relief by Order to Show Cause, Election Law 16-106, as amended, now provides in subdivision 5 that:

In the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvassing schedule, as provided for in section 9-209 of this chapter, may be warranted, a candidate may seek an order for temporary or preliminary injunctive relief or an impound order halting or altering the canvassing schedule... **Upon**

**any such application, the board or boards of elections have a right to be heard.** To obtain such relief, the petition must meet the criteria in article sixty-three of the civil practice law and rules and show 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. For the purposes of this section, allegations that opinion polls show that an election is close is insufficient to sow irreparable harm to the petitioner by clear and convincing evidence.” [emphasis added]

6. 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 NYCRR § 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 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.”). This did not occur here.

7. Rule III.A. (4) of Judge Brown’s individual part rules further command: “[w]hen seeking a Temporary Restraining Order (other than statutory automatic restraints), the Order to Show Cause shall indicate the request for a TRO on the face page in bold letters and shall include proof of advance notice to the adverse party, or an explanation of why such notice is inappropriate. Except in

emergent circumstances, which should be explained, advance notice is deemed to mean at least 24 hours notice.” Neither this notice nor any notice to respondents prior to submission of the OTSC occurred in this case, upon information and belief.

8. Nothing in the record demonstrates a basis for the TRO relief ordered herein. *First*, upon information and belief no board of elections was provided notice of the TRO provisions presented to the court. Accordingly, the boards of elections were not afforded their right to be heard thereon. *Second*, nothing in any of the papers presented to the court allege any actual procedural irregularity or other facts causing or about to cause injury to the petitioners. *Third*, no putative showing of how the petitioners meet the TRO elements has been presented to the court, as required by article 63 of the CPLR.

9. Election Law §16-112 provides a court may direct the examination of a voting machine and order the “preservation of any ballot in view of a prospective contest, upon such conditions as may be proper.” All ballots cast at the election will be preserved in accordance with law and duly canvassed according to law. As described in the accompanying Memorandum of Law, courts do not have the power to interfere with the statutory procedures for the canvass beyond ensuring preservation of ballots. In this regard notably a proceeding under Election Law 16-106 with respect to counting particular ballots is now limited to “[t]he post-election

refusal to cast” such ballots. Election Law § 16-106 (1). There is no longer a generic court proceeding authorized by the election law related to the “casting and canvassing” of ballots generally.

### **HARM FLOWING FROM TRO PROVISIONS**

10. The immediate effect of the TRO provisions of the current order is to stop important unfolding processes and to cancel the canvassing presently scheduled for this week prior to the court’s return date of the OTSC herein. *See* Exhibit “B” (Orange County Board of Elections Schedule duly noticed to candidates as required by statute).

11. In sum the TRO provisions of the instant *ex parte* issued OTSC halt the application of Election Law 9-209 with no legal basis whatsoever.

12. Boards of Election have a duty under Election Law 9-209 (2) to “within one day of receipt on or after the election....examine the ballot affirmation envelopes as nearly as practicable in the following manner...(d) [i]f such person is found to be registered and has requested a ballot, the ballot envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope...” The ballots are thereafter scanned. The TRO provisions of the OTSC stop this, among other, statutorily required processes.

13. The putative restraining order seeks to reach and establish judicial intervention over the entire post-election process which was never permissible

under New York law, as demonstrated in the accompanying Memorandum of Law.

14. Stopping a governmental process effectuating the canvass of votes as provided for by law, ensuring all such ballots are canvassed in the same manner, is a *per se* injury.

15. Attached hereto as Exhibit “B” is a true copy of the notice sent to candidates by the board of elections for the jurisdiction at issue in this litigation. Well before the election, the candidates in this matter were on notice of the canvass schedule at the Orange County Boards of Elections. Moreover, the political calendar on the New York State Board of Elections website has included the relevant canvassing dates for months. See <https://www.elections.ny.gov/NYSBOE/law/2022PoliticalCalendar.pdf>. There is no surprise or change of circumstance as to any candidate about the schedule of the canvass process warranting judicial alteration of the statutory framework for canvass.

16. As described in the accompanying Memorandum of Law, the bipartisan security processes in place at each board of elections is sufficient to secure all election materials.

## CONCERNING CONDUCT OF COUNSEL FOR PETITIONER

17. Mr. Ciampoli is well aware that the boards of elections are entitled to

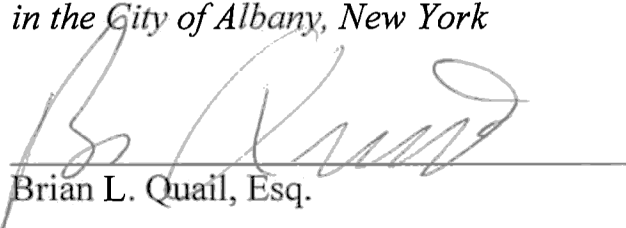
notice of any application to a court seeking TRO relief. In prior years he has afforded such notice. Mr. Ciampoli was on the phone and had email communications with counsels for the New York State Board of Elections in another matter on Friday and made no mention he had made the instant application to the court, and he served same on Orange County Board of Elections in the early morning hours of Saturday, November 12, 2022. Upon information and belief the Orange County Board also had no advance notice that the instant TRO applications had been made.

18. Mr. Ciampoli's application to the court made no mention of the highly relevant decision of the Third Department (*Amedure v New York State Board of Elections* cited in the accompanying Memorandum of Law) which rejected the constitutional claims that the new canvassing law was unconstitutional on laches grounds and went on to note in *dicta* that canvassing ballots under two different standards in the same election would be inappropriate. Nor did Mr. Ciampoli call to the Court's attention that Election Law 9-209 and Election Law 16-106 were amended in 2021 in a manner which requires those sections of law to be wholly ignored in order for a court to sign the Order to Show Cause in this matter.

**WHEREFORE**, it is respectfully requested that this honorable court (i) forthwith **VACATE and RESCIND** all "Ordered" provisions of the prior Order to Show

Cause in this matter, in like manner to the vacatur attached as Exhibit "A" or, (ii) if the court declines to grant this application, that such denial be rendered in a writing or written endorsement memorandum.

*Affirmed this <sup>4</sup>1<sup>st</sup> day of November 2022  
in the City of Albany, New York*

  
Brian L. Quail, Esq.

TO:

John Ciampoli, Attorney for Petitioner, (by NYSCEF)  
Orange County Attorney, Attorney For Respondent Orange County Board of  
Elections, (by email)

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# EXHIBIT A

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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

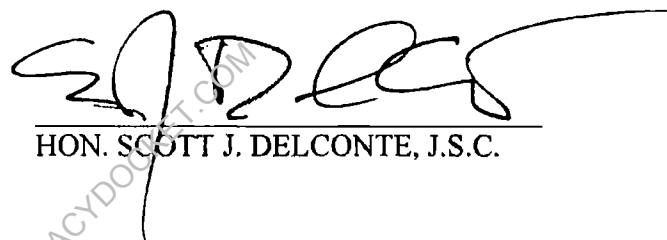
**ORDERED** that Respondent Onondaga County Board of Elections and Respondent Oswego County Board of Elections shall immediately resume casting and canvassing absentee,

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

# EXHIBIT B

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# Orange County Board of Elections

## COMMISSIONERS OF ELECTION

Louise B. Vandemark  
Democratic

Courtney Canfield Greene  
Republican

## DEPUTY COMMISSIONERS

Seth Goldman (D)

Chandler Campbell (R)

75 Webster Avenue, PO Box 30  
Goshen, New York 10924  
Telephone: (845) 360-6500  
Fax: (845) 291-2437  
[www.orangecountynygov.com](http://www.orangecountynygov.com)

## NOTICE TO CANDIDATES AND PARTY CHAIRS

October 2022

This correspondence will serve to advise you of the following schedule of events to take place at the Orange County Board of Elections. Be advised that you or your representative may attend any or all the following activities. However, it is not a requirement.

### Time(s)/Date(s) of Board Activities:

1. **Inspection of Sample Ballots:** Friday, October 7, 2022, 4:00PM
2. **Public Inspection and Pre-Election Testing of Machines for Election Day and Early Voting:** Friday, October 7, 2022. Pre-election testing will continue daily, between the hours of 9:00 AM. to 8:00 PM, until all pre-election testing has been completed.
3. **Post-Election Audit for Election Day and Early Voting:** Wednesday, November 9, 2022, following Absentee Audit Drawing at 10:30AM
  - a. **Scanners Used to Count Absentee Ballots Prior to Election Day (Audit):** Wednesday, November 9, 2022, 10:30AM
4. **Recanvass:** November 9, 2022, 12:00PM – 8:00PM
5. **Rolling Canvass of Absentee, Special and Military Ballots:** Tuesday, October 11, 2022, 11:00AM
  - a. **Scanning of Canvassed Ballots Prior to Election Day:** Friday October 28, 2022, 1:30PM and Monday, November 7, 10:00AM
  - b. **Scanning of Canvassed Ballots Post Election Day:** Tuesday, November 15, 2022, 1:00PM
6. **Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:** Wednesday November 9, 2022, 10:00AM
7. **Canvass of Affidavits:** November 9, 2022, 10:00AM

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1. **Inspection of Sample Ballots:**  
*NYS Election Law §7-128(2)*



You will have an opportunity to inspect the ballots to be used in the **General Election, November 8, 2022.** This ballot inspection will occur on **Friday, October 7, 2022, 4:00 PM** and will take place at **75 Webster Ave, Goshen, NY 10924.** The ballots may be viewed anytime thereafter.

**2. Public Inspection and Pre-Election Testing of Machines:**

*NYS Election Law §§7-128(3), 7-207 & NYCRR §6210.2(d)(e)*

You will have an opportunity to inspect voting machines and ballot marking devices to be used in the upcoming **General Election November 8, 2022 and** view the conduct of the logic and accuracy testing required to be performed on such voting machines and systems.

The inspection and pre-election testing will take place on **Thursday, October 6, 2022, at 9:00 AM** and will take place at **75 Webster Ave, Goshen, NY 10924** where the county test decks will be run, and machines may be viewed. Pre-election testing will continue daily, between the hours of **9:00 AM. and 8:00 PM,** until all pre-election testing has been completed. Lunch break will be **12:30 PM. -1:30 PM.**

**3. Post-Election Audit for Election Day and Early Voting:**

*NYS Election Law §9-211 & NYCRR §6210.18*

The post-election audit of randomly selected voting machines for Early Voting and Election Day will begin on **November 8, 2022, following the Absentee Audit** and will take place at **75 Webster Ave, Goshen, NY 10924** with 1 team conducting the audit, beginning at **10:30 AM.**

The drawing which will randomly select the voting machines for Early Voting and Election Day and 3% of Election Districts for Absentee that must be audited will take place on **Wednesday, November 9, 2022, at 10:30 AM** and will occur at **75 Webster Ave, Goshen, NY 10924.** The audit shall commence on the same day as the random manual selection process.

**a. Scanners Used to Count Absentee Ballots Prior to Election Day (Audit):**

*NYS Election Law §9-211(2)*

The scanner(s) will be audited from 3% of Election Districts within three days after any Election Day (Early Canvassed Ballots). This audit will take place on **Wednesday November 9, 2022, at 10:30 a.m.** and will occur at **75 Webster Ave, Goshen, NY 10924.**

**4. Recanvass:**

*NYS Election Law §9-208*

The recanvass of all voting machines will begin on **Wednesday, November 9, 2022,** and will take place at **75 Webster Ave, Goshen, NY 10924.** This recanvass of these ballots will continue daily, with 5 teams conducting the recanvass, between the hours of **9:00 AM and 5:00 PM,** until all voting machines have been recanvassed. Lunch break will be **12:30 PM – 1:30 PM.**

**5. Rolling Canvass of Absentee, Special and Military Ballots:**

*NYS Election Law §9-209(1)(2)*

The rolling canvass of absentee, special and military ballots will begin within 4 days of receipt. The canvass starting date is **Tuesday October 11, 2022, 11:00 AM.** and will take place at **75 Webster Ave, Goshen, NY 10924.** The canvass of these ballots will continue **Tuesdays and Fridays.** There will be 1 team conducting the canvass, at **11:00 AM,** until all ballots have been canvassed for that day.

On or after Election Day, the canvass will be conducted within one day of receipt. The canvass shall end no later than **November 21, 2022**, and will take place at **75 Webster Ave, Goshen, NY 10924**.

**a. Scanning of Canvassed Ballots Prior to Election Day:**

*NYS Election Law §9-209(6)(b)(c)*

Ballots canvassed during this period will be scanned on **Friday, October 28, 2022, at 1:30 PM**. Absentee ballots received after this date will continue to be canvassed daily, and those ballots will be scanned after the close of polls of early voting on **Monday November 7, 2022, beginning 10 AM** and will take place at **75 Webster Ave, Goshen, NY 10924**.

**b. Scanning of Canvassed Ballots Post Election Day:**

*NYS Election Law §9-209(6)(b)(iii)*

The scanning of ballots canvassed after Election Day will continue **Wednesday, November 15, 2022, at 1:00 PM** and will take place at **75 Webster Ave, Goshen, NY 10924**.

**6. Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:**

*NYS Election Law §9-209(8)(a)* **Wednesday November 9, 2022, at 10:00 AM**.

**7. Canvass and Casting of Affidavits:**

*NYS Election Law §9-209(7)(a)*

The county will canvass the Affidavits four business days after Election Day. This canvass will take place on **Monday, November 14, 2022, at 10 a.m.** and will occur at **75 Webster Ave, Goshen, NY 10924**. Valid Affidavits will be cast with all other ballots received post-Election Day on **Monday, November 14, 2022, at 1:00 PM**.

**8. Manual Recount:**

*NYS Election Law §9-208(4)*

Following the completion of the canvass of all ballots, the Board of Elections will conduct a full manual recount of all ballots for a particular contest if the margin of victory is twenty votes or less or 0.5% or less. You will receive notice by mail of the date, time and processes for the manual recount should the office you are running for fall into this category.

**Additionally**, we are including a copy of the sample ballot image for the election district(s) in which you are running and a list of early voting dates and times:

- Electioneering is prohibited within 100 feet of the entrance to any poll site
- Candidates are allowed to have Poll Watchers representing them; each poll watcher must have a certificate issued to them by your respective Party Chair or Secretary
- Do not stay at the poll site for extended lengths of time
- Do not park vehicles with political advertising inside the 100ft. zone; if you or your representatives are transporting voters, drop them off and move your vehicle
- Do not leave political material inside the poll site; advise your supports that buttons, stickers, hats, and tee shirts cannot be worn while they are poll watching
- When the election inspectors are closing down the poll site and canvassing the vote, please wait quietly and do not interfere while they perform their work.