

November 22, 2022

VIA NYSCEF

Honorable Scott Del Conte, J.S.C.
Supreme Court of the State of New York
Onondaga County Courthouse
401 Montgomery Street
Syracuse, New York 13202

RE: *Shiroff v. New York State Board of Elections, et al*,
Onondaga County Index No.: 009200/2022

Dear Justice Del Conte:

We are aware of electronic communication between Mr. Ciampoli and your Chambers, wherein Mr. Ciampoli confirmed that he was permitted to provide more than just the citations to the cases cited during the hearing conducted before Your Honor today. I trust we are being afforded the same courtesies and, for that reason, we provide this brief letter to highlight two points.

1. *Powers of Attorney may be exercised when completing an affidavit ballot.*

As this Court is well aware, current law provides that “affidavit ballots are valid when cast at a polling site permitted by law by qualified voters.” N.Y. ELEC. L. § 9-209(7)(b). Moreover, an affidavit ballot issued to a voter shall be cast and canvassed as long as “the voter substantially complied,” with the applicable requirements, which has been defined to mean that “the board can determine the voter’s eligibility based on the statement of the affiant or records of the board.” N.Y. ELEC. L § 9-209(7)(f).

It is true that if an individual is completing an absentee ballot and that voter is unable to sign the voter’s name, the voter is to place a mark on the absentee ballot envelope, and a witness is to sign in the voter’s stead. Similarly, courts have held that a voter may place a mark on an absentee ballot envelope, and someone who holds a power of attorney of that voter may sign the absentee form. *See Matter of Stewart v. Rockland County Bd. of Elec.*, 41 Misc. 3d 1238A (Sup. Ct. Rockland Cty. 2013); *aff’d* 112 A.D.3d 866 (3d Dep’t 2013). In *Stewart*, an absentee ballot was completed by a voter, and the voter’s wife signed the absentee envelope with the name of the voter, and noted “POA/MHL,” meaning power of attorney and the wife’s initials. *Stewart*, 41 Misc. at 1238A. After a communication with the county board of elections, “Mr. L placed his initials (or mark) on the envelope.” *Id.* The Supreme Court ultimately concluded that “[a]lthough Mrs. L signed Mr. L’s name on the signature line, her notation “POA/MHL” was the equivalent of Mr. L’s mark being witnessed. As such, Mr. L’s ballot envelope was considered valid because

the wife's signature and notation was sufficient to meet the absentee ballot requirements that there be both a voter mark and a witness's signature. *Id.*

There is no comparable requirement for an affidavit ballot. It is without contention that the affidavit must simply be completed and signed. Here, the voter was issued an absentee ballot by the board of elections' representatives, and his wife, who holds power of attorney, completed the affidavit for him – with a complete valid signature. As the Supreme Court, Albany County noted,

the General Obligations Law codifies as the public policy of this State that there be liberal use and judicial recognition of the efficacy of powers of attorney and further states that the general authority with respect to all other matter authorizes the agent to act as alter ego of the principal with respect to any and all possible matters and affairs . . . in determining matters pertaining to election proceedings, this Court is acutely aware of the fact that, although not absolute, voting is of the most fundamental significance under our constitutional structure. Article II, § 1 of the New York State Constitution states that every citizen shall be entitled to vote at every election. It follows, therefore, that [t]he right of the voter to be safeguarded against disenfranchisement and to have his intent implemented wherever reasonably possible . . . transcends technical errors.

Matter of Fatata v. Phillips, 52 Misc. 3d 701, 702 (Sup. Ct. Albany Cty. 2016) (citations and internal quotations omitted) (applying rules regarding the use of powers of attorney in the context of designating petitions); *aff'd* 140 A.D.3d 1295 (3d Dep't 2016).

For all of these reasons, we respectfully submit that with regards to affidavit ballots, a voter's signature may be completed by a power of attorney. An absentee ballot envelope may similarly be completed by a power of attorney, as long as the envelope contains the voter's mark or initials.

2. *The Court need not consider any extrinsic evidence to conclude that a cure notice that arrived at the board of elections the day after election day was post marked as of the day before election day.*

In *Democratic Congressional Campaign Committee ("DCCC") v. Kosinski, et al*, the Southern District of New York was faced with the question of how to handle absentee ballots that arrived at the board of elections "between two days and seven days after Election Day," when the outer envelopes contained no postage mark. In prior proceedings, the court had concluded, based on testimony from the United States postal service, "that mail is virtually never delivered within one day – meaning that it was reasonable to assume that ballots received two days after Election Day were mailed on or before Election Day." *DCCC v. Kosinski et al*, Case No. 22-CV-1029, 2022 U.S. Dist. LEXIS 124144 (S.D.N.Y. July 13, 2022) *citing Gallagher v. N.Y.S. Board of Elections*, 477 F. Supp. 3d 19 (S.D.N.Y. 2020). But, in the 2022 proceeding, there was no expert testimony. The Court nonetheless was able to take notice that ballots which arrive within the period of two days after the election until seven days following an election were potentially mailed

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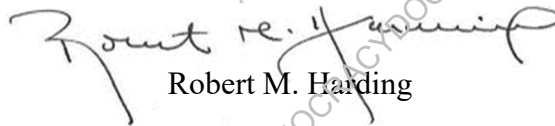
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in a timely fashion, and that it would be wrong to penalize a voter who took all appropriate measures to complete his or her vote timely, but there was no United States postal service mark to establish that fact. The court concluded that it would be fundamentally wrong to “disenfranchise [] voters who do meet the deadlines imposed by state law by invalidating their ballots that, through no fault of their own, are not postmarked and are delivered two or more days after Election Day. The Court finds that these circumstances likely constitute a severe burden on the right to vote.” *Id* at 51.

Here, there are voters who took all steps required of them – pursuant to state law and New York State Board of Elections regulations –to have their absentee ballots count. It would be unfortunate if voters are disenfranchised because a county board erred in not maintaining the outer-envelope to identify a postmark. For these reasons, we respectfully submit that the two voters whose cure affidavits arrived at the county board of elections that day after election day be treated as timely.

We appreciate the Court’s continued attention and assistance in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Harding", written in a cursive style.

Robert M. Harding

RMH/

cc: All parties via NYSCEF

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