

At a Special Term of the Supreme Court of the State of New York held in and for the County of Onondaga on November 15, 2022.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
ONONDAGA COUNTY

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.

**DECISION AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION
RELATING TO AFFIDAVIT BALLOTS (Motion No. 1)**

APPEARANCES

Messina Perillo & Hill, LLP by *John J. Ciampoli, Esq. for Petitioner Rebecca Shiroff*

Greenberg Traurig, LLP by *Robert M. Harding, Esq. and Joshua L. Oppenheimer, Esq., for Respondent John W. Mannion*

Onondaga County Department of Law by *Benjamin M. Yaus, Esq. for Respondent Onondaga County Board of Elections*

Oswego County Attorney's Office by *Richard C. Mitchell, Esq., for Respondent 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. and Kimberly Galvin, Esq., for Commissioners Peter S. Kosinski and Anthony J. Casale*

This is a special proceeding pursuant to Article 16 of the Election Law brought by Petitioner Rebecca Shiroff, the Republican candidate for State Senate in New York's 50th Senate District, to preserve ballots for prospective judicial review and to subsequently validate the tallies of those ballots (NYSCEF Doc. 1). There is a companion action brought by her Democratic opponent, Respondent John Mannion, involving the same parties and ballots, under Onondaga County Index Number 009195/2022. In advance of the return, Shiroff now moves by Order to Show Cause (NYSCEF Doc. 19) for an injunction directing the Respondent County Boards of Elections to: (1) turn over copies of the affidavit ballot envelopes in advance of the affidavit ballot review; (2) permit the candidates to object during the review, canvassing and casting of affidavit ballots; and (3) preserve the ballots corresponding to the candidates' objections in accordance with the procedure set forth in *O'Keefe v Gentile* (1 Misc3d 151, 155 [Sup Ct Kings Cty 2003]).

Shiroff, joined by Commissioners Kosinski and Casale of the New York State Board of Elections, contends that – despite the 2021 legislative overhaul of the Election Law – a candidate's right to participate in the affidavit ballot canvassing and object to the validity of ballots is unchanged and, more importantly, necessary to preserve meaningful judicial review. Mannion, joined by Commissioners Kellner and Spano of the New York State Board of Elections and the Onondaga County Board of Elections, opposes the motion, contending that the recent amendments to the Election Law place the responsibility for reviewing and determining the validity of affidavit ballots solely onto designated teams of poll clerks representing the two major political parties, and that candidates may only object to a unanimous final determination that an affidavit ballot is invalid. The Oswego County Board of Elections takes no position. For the reasons below, Shiroff's motion is **DENIED**, and the Boards of Elections are directed to proceed with the scheduled affidavit ballot canvassing in accordance with Election Law § 9-209(7).

I.

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, the New York State Legislature has designed and adopted a comprehensive statutory framework consisting of 17 articles governing the entire electoral process (*Higby v Mahoney*, 48 NY2d 15, 21 [1979]). Under the Election Law, the power of the judiciary to intervene is intentionally limited, and can only be called upon by candidates to preserve procedural integrity and “ensure the strict and uniform application of the election law” (Election Law § 16-106[4]; *Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). As such, the Courts are prohibited from altering “the schedule or procedures” for the canvassing of paper ballots pursuant Election Law § 9-209, since those duties are the sole responsibility of the Boards of Elections and may not be abdicated, modified or usurped (Election Law §§ 9-200[1]; 16-106[4]; *Testa v Ravitz*, 84 NY2d 893, 895 [1994]). The role of the Court is, therefore, very simple: to set forth the law as enacted, and make sure that everyone follows it.

II.

Election Law § 9-209 – which was repealed and replaced in 2021 – governs the review, canvassing and casting of absentee, military, special and affidavit ballots (“paper ballots”). Under former Section 9-209, paper ballots were canvassed within 14 days of the general election, upon notice to candidates who had the express right to “object to the refusal to cast or canvass any ballot [on certain, specified grounds]. When any such objection [was] made, the central board of inspectors [was to immediately] determine such objection and reject or cast such ballot according to such determination.” (Election Law § 9-209[d] [2019 ed.]). The opportunity to object was critically important because candidates could only seek judicial review of ballots that they had protested during the canvass (*Delgado v Sunderland*, 97 NY2d 420, 423 [2002]).

The unprecedented increase in the use of absentee ballots during the 2020 election resulting from the Covid-19 pandemic caused substantial delays in the reporting of results in races across the nation (New York Committee Report, Bill Jacket, L 2021, ch 763). In response, the New York State Legislature significantly amended multiple provisions of the Election Law in 2021 “in order to obtain the results of an election in a more expedited manner and to ensure that every valid vote by a qualified voter is counted” (*Amedure v State* __ AD3d __ [3d Dept 2022] quoting Sponsor’s Mem, Bill Jacket, L 2021, ch 763; Laws 2021, Chapter 763). Pursuant to the amendments, all absentee, military and special federal and presidential ballots must now be reviewed and canvassed within four business days if received before the election, and within one business day if received after the election (Election Law § 9-209[2]), and all affidavit ballots must be reviewed and canvassed within four business days of the election (Election Law § 9-209[7]).

To ensure that Boards of Elections are able to complete their review and canvass of all paper ballots within the shortened time period, the Legislature repealed and replaced Election Law § 9-209 to “provide a new, more streamlined process” for canvassing paper ballots (*Amedure*, __ AD3d at __). Under the new statute, absentee ballot envelopes are reviewed on a rolling basis by bipartisan teams of poll clerks representing the two major political parties as designated by the Boards of Elections. The poll clerks are directed to “to determine whether there is a name on the ballot envelope and, if so, whether the name is that of a registered voter, and that the ballot was timely received and properly sealed – then the absentee ballot is thereafter presumptively valid unless both poll clerks object to its validity” (*Amedure*, __ AD3d at __; Election Law § 9-209[2][g]). Absentee ballots that the poll clerks invalidate are set aside to provide an opportunity to cure, and for subsequent post-election review (Election Law § 9-209[2][a], [3]). All other absentee ballots must be canvassed and cast (*Amedure*, __ AD3d at __; Election Law § 9-209[6]).

Because the amendments to Election Law § 9-209 direct the review of absentee, military and special ballot envelopes on a rolling basis – both before and after the election – as opposed to at a scheduled and noticed time, the amendments make it clear that candidates have the right to observe the entire envelope review process, “without objection” (Election Law § 9-209[5]).

The process is essentially the same for affidavit ballots, except that it is carried out in a single post-election day review (Election Law § 9-209[7]). Specifically, within four days of the election, designated bipartisan teams of poll clerks representing the major political parties must review all affidavit ballot envelopes and any relevant Board of Elections and statewide voter records to determine whether each voter named on an affidavit ballot envelope is entitled to vote. If the right of the named individual to vote is confirmed by the poll clerks, then the affidavit ballot is thereafter presumptively valid unless both poll clerks find that the voter already voted by absentee ballot, or voted at the wrong polling place (Election Law §§ 3-402; 9-209[7][a]-[g]). Affidavit ballots that the clerks invalidate must be set aside to provide for an opportunity to cure (if possible), and a subsequent post-election review (Election Law § 9-209[7][i], [j]). All other affidavit ballots must be cast and canvassed (Election Law § 9-209[6]). Under the new procedure, no one has the right to object to the poll clerks’ initial review of the affidavit ballot envelopes (Election Law § 9-209[7]).

Simply put, as a result of the 2021 amendments, electioneering now ends when a voter signs the absentee, military, special or affidavit ballot envelope and submits it to the Board of Elections, and candidates can no longer strategically object to that ballot’s validity. As part of this, the Legislature narrowed the jurisdiction of the Courts to allow judicial review only when a ballot is unanimously found invalid, expressly admonishing that “in no event may a court order a ballot that has been counted to be uncounted” (Election Law § 9-209[7][j], [8][e]).

The Legislature further streamlined the canvassing process under Election Law § 9-209 by directing all presumptively valid paper ballots to be scanned by the Boards of Elections' voting machines and cast electronically (Election Law § 9-209[6][b][i] and [ii], [c]). As long as a voting machine is able to process a validated ballot, the poll clerks do not canvass or cast that ballot themselves, and the candidates have no ability to object to the ballot's validity or invalidity. It is only when a voting machine is unable to process a ballot that it must then be canvassed and cast manually in accordance with the procedure under Election Law §§ 9-102(3)(b) and 9-110 (Election Law § 9-209[6][b][iii]). During the manual canvassing and casting of a ballot, the poll clerks must examine that ballot and every section within it to determine whether the ballot itself is valid in accordance with Election Law § 9-112, and the candidates have the right during that manual canvassing to object to the clerks' determinations (Election Law § 9-114).

The final step of the new canvassing process under Election Law § 9-209 is the post-election review of ballots determined to be invalid by both poll clerks (Election Law § 9-209[8]). This final review, as with the initial review of the affidavit ballot envelopes, must be held within four business days of the election (Election Law § 9-209[8][a]). During the final post-election review, each candidate has the right to object to the Board of Elections' "determination that a ballot is invalid" (Election Law § 9-209[7][j], [8][e]). Objections made to a Board's ultimate refusal to canvass and cast a paper ballot during the final post-election review of paper ballot envelopes, or to paper ballots challenged during a manual canvass under Election Law § 9-110, are then subject to judicial review under amended Election Law § 16-106. However, a court may not order a Board of Elections to remove an electronically scanned ballot that was counted (Election Law § 9-209[7][j], [8][e]).

III.

Turning the instant motion, Petitioner Shiroff makes three specific requests. First, she seeks advance copies of the affidavit ballot envelopes that are set to be reviewed pursuant to Election Law § 9-209(7)(a)-(g). The Court may not, however, issue an order in an Election Law proceeding unless there is a statutory provision specifically authorizing the requested relief (*Jacobs v Biamonte*, 38 AD3d 777, 778 [2d Dept 2007]), and there is no statutory provision authorizing the Courts to compel the production of copies of affidavit ballot envelopes to candidates in advance of the initial review by the poll clerks. The requested relief must, therefore, be **DENIED**. Registration records, however, as well as any other public records under Election Law § 3-220 (or Election Law § 8-204[7]), are statutorily required to be made available to the candidates. Any claim that public records are not being made reasonably available may, given the exigencies, be promptly presented to the Court by telephone or email.

Second, Shiroff seeks an order permitting her to object during the poll clerks' review of the affidavit ballot envelopes, or their subsequent electronic canvassing and casting. Shiroff contends that while the Legislature may have eliminated her ability to object to the canvassing of absentee ballots pursuant to Election Law § 9-209(5), she retains the right to object to the validity of election-day affidavit ballots under the provisions of Election Law § 8-506. However, Election Law § 8-506 only applies to "absentee, military, special federal and special presidential voters' ballot envelopes" that are canvassed at polling sites. Section 8-506 does not address election-day affidavit ballots, which are not canvassed at polling sites (Election Law § 9-110[3]). Moreover, absentee, military and special federal and special presidential ballot envelopes are no longer canvassed at election-day polling sites, since Election Law § 8-412 was amended in 2011 to require all such ballots received by a board of elections to be "retained at the

board of elections and cast and canvassed pursuant to the provisions of [Section] 9-209” (Election Law § 8-412 as amended by Laws 2011, Chapter 308).

Accordingly, while candidates and their designees may observe the paper ballot canvassing process, they have no right to object during the poll clerks’ initial review of absentee, military, special and affidavit ballot envelopes, or during the electronic canvassing and casting of absentee, military, special and affidavit ballots under the newly enacted provisions of the Election Law (Election Law § 9-209). The requested relief must, therefore, be **DENIED**. As prescribed by the Legislature, candidates may only object: (1) during the final post-election review of invalid ballots to the determination of a Board of Elections not to electronically canvass and cast a ballot contained in an absentee, military, special or affidavit ballot envelope (Election Law § 9-209[7][j], [8]); or (2) to the determinations of a Board of Elections made during a manual canvass for ballots that were unable to be processed electronically in a voting machine or during a manual recount (Election Law §§ 9-110; 9-208[4][a][ii]).

Third, and finally, Shiroff seeks a preservation order pursuant to Election Law § 16-112 requiring the poll clerks to place a copy of the affidavit ballot inside its respective envelope every time there is an objection to an envelope that they have determined to be valid, in what is commonly referred to as the *O’Keefe* method (1 Misc3d 151). But under Election Law § 9-209 as amended, the poll clerks’ determination that a paper ballot envelope is valid is not subject to judicial review (Election Law § 9-209[7][j], [8][e]; 16-106[1]), and the Courts have no jurisdiction to “order a ballot that has been counted to be uncounted” (Election Law § 9-209[7][j]). As such there is no statutory basis to order the preservation of ballots for further review under current law, and the requested relief must be **DENIED**. The 2021 amendments to Election Law § 9-209 have rendered the *O’Keefe* method of ballot preservation unnecessary and, therefore, improper.

IV.

In addition to her statutory construction argument, Petitioner Shiroff also asserts, in the alternative, that the 2021 amendments to Election Law § 9-209 violate the New York State Constitution by, among other things, impermissibly prohibiting candidates from seeking judicial review of objections to the canvassing and casting of paper ballots, and abrogating bipartisan determination of voter qualifications. Shiroff relies on Special Term's holding in *Amedure v State* (2022 NY Slip Op 22326). While Petitioner does not directly challenge the constitutionality of Section 9-209 at this time, she seeks a preservation order pursuant to *O'Keefe* to secure the affidavit ballots until the constitutional issues can be addressed by either this Court; the Appellate Division, Fourth Department; or the Court of Appeals.

However, the trial court in *Amedure* was reversed by the Appellate Division, Third Department, which vacated Special Term's preservation orders on the grounds that they "would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections" during the 2022 election (___ AD3d at ___), and then dismissed the Petition seeking to declare Election Law § 9-209 unconstitutional pursuant to the equitable doctrine of *laches*. Given the Appellate Division's ruling, Shiroff's constitutional argument, while zealously and articulately presented to this Court, cannot be reached since "the doctrine of *stare decisis* requires trial courts in one department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division of its department pronounces a contrary rule" (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 [2d Dept 1984]). Accordingly, this Court is without authority to issue a preservation order, nor can it consider the constitutionality of Election Law § 9-209.

V.

Accordingly, upon due deliberation, it is hereby

ORDERED that Petitioner Rebecca Shiroff's motion for injunctive relief pursuant to the Order to Show Cause entered on November 14, 2022 (NYSCEF Doc. 19) is **DENIED** in all respects; and it is further

ORDERED that Respondent Onondaga County Board of Elections and Respondent Oswego County Board of Elections may review, canvass and cast 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 this Court retains jurisdiction over the canvassing of ballots and the parties until further order of the Court.

Dated: November 15, 2022


HON. SCOTT J. DELCONTE, J.S.C.

ENTER.

PAPERS CONSIDERED:

1. Verified Petition, sworn to November 9, 2022 (NYSCFE Doc. 1);
2. Order to Show Cause, entered November 14, 2022 (NYSCEF Doc. 19);
3. Affirmation of Brian L. Quail, Esq., affirmed November 10, 2022 (NYSCEF Doc. 9);
4. Affirmation of John Ciampoli, Esq., affirmed November 14, 2022 (NYSCEF Doc. 15);
5. Second Affirmation of Brian L. Quail, Esq., affirmed November 14, 2022 (NYSCEF Doc. 17); and
6. Affirmation in Opposition to Order to Show Cause of Robert M. Harding, Esq., affirmed November 14, 2022 (NYSCEF Doc. 20).