

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

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In the Matter of the Application of

Index No.:

Rebecca Shiroff

-against-

The New York State Board of Elections,
The Oswego County Board of Elections, and
The Onondaga County Board of Elections, and
John Mannion, candidate

AFFIRMATION

Respondents.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK

John Ciampoli, Esq. an attorney admitted to the practise of Law before the Courts of the State of New York does hereby affirm pursuant to the provisions of the CPLR and moves this Court as follows:

1. Your affirmant represents the above captioned Petitioner, Rebecca Shiroff, in these proceedings.
2. This affirmation is offered in support of a motion to require the Respondent Boards of Elections to allow for the full participation of poll watchers in the canvassing procedures of the Affidavit Ballots in the subject election.
3. Petitioner has previously submitted a letter application to this Court and requested a conference thereon.
4. The conference was held this morning, at which time a motion schedule was set by the Court for the instant motion.
5. The letter application to the Court is incorporated by reference herein, see Docket No. 14.

6. So as not to repetitively burden this Court with conferences and appearances, we seek to address certain items stricken from the Order to Show Cause which should not be controversial, but which are essential to the integrity of this election. Petitioner also moves the Court for a preservation order pursuant to Section 16-112 Election Law requiring the ballots and voting materials associated with the election in the 50th State Senate District to be secured and held inviolate under a two lock system, to which neither political party's representatives shall have more than one key or combination to the locks used to secure the ballots and voting materials.
7. Such preservation has become standard for the Elections "business" over the past 25 years or so.
8. Unfortunately, this Court struck the portion of the original Order to Show Cause as required this protection even though there was no showing that such order was in any way improper.
9. Petitioner is concerned that certain individuals might be taking advantage of the Court striking the security aspects of its prior order. Restoring this part of the preservation order will do much to set the minds of the candidates as well as the public at ease knowing that there is security in place for the ballots associated with this close election.
10. The central offices of the Boards of Elections are designated by the law as polling places at the time of recanvass.
11. Petitioner seeks an order of this Court providing that any attorney representing a party and his/her agent(s) and/or employee(s) be admitted to the place of canvass or recanvass of the affidavit ballots in the General Election and be allowed full participation in the administrative proceedings of the Boards of Elections held in relation thereto, pursuant to

the provisions of Article 8 Election Law and §9-206(7) Election Law, and the existing body of case law on this subject.

12. Petitioner further seeks an Order of this Court that the local Boards of Elections prepare all necessary records for the canvass of all affidavit ballots utilized in the General Election Early Voting Period and on the 8th day of November, 2022, as soon thereafter as the ballots and supporting records can be made available and prepare all necessary records, Voting Material, for the recanvass of the affidavit ballots, subject to this Court's review, and that such materials and research as relates to the Affidavit Ballots be made available to the Petitioner a reasonable time prior to the time of canvass.

13. Petitioner also seeks an Order of this Court requiring that the Respondent local Boards of Elections, the Commissioners and employees thereof shall record and preserve all objections made by the petitioner's poll watchers, and further shall maintain records of each objection made to any ballot, ballot envelope, application, or ancillary election document or material, and further that a full record of any split votes of the two Commissioners (or their designees) be preserved for review by this Court.

14. Petitioner requests that an order issue from this Court that any objected to unopened affidavit ballots, special ballots, and military ballots, be preserved and set aside unopened and un-scanned pending further review and Order of this Court.

15. Anticipatorily, *in the event that a full hand count is required by the statute*, that the Petitioners be provided with the images of all scanned ballots.

ARGUMENT

16. This Election has an unusually high number of paper ballots being cast, including hundreds of Affidavit Ballots.

17. Due to changes in the Laws of the State of New York there has been an increase in the number of Affidavit Ballots, and requirement for additional layers of research and review of same.
18. Due to changes in the law most absentee, special, military and other ballots were already canvassed without the benefit of an opportunity for judicial review, or the ability for a poll watcher or Commissioner of Elections to set aside any improper or illegal ballots filed by persons who were not qualified to vote in the subject election.
19. These ballots are beyond our reach at this point, however, the remaining affidavit ballots are currently preserved, therefore, they may be reviewed by this Court, see Decker v. Jutkofsky, 77 A.D.2d 159 (3rd Dept., 1980).
20. The rule of Decker applies here to the Affidavit Ballots.
21. All affidavit ballots will receive the same treatment under Petitioner's requested order.
22. Based upon the arguments this morning, it is clear that the Onondaga 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.**”
23. This is in error.
24. The terms of §9-206(5) **limit** the effect of the Legislature's unconstitutional power grab to deny the Courts Jurisdiction to review Board of Elections determinations and to gag any poll watcher present so as to preclude objections to illegal and improper ballots.
25. The legislature may have intended to squelch any attempt by a candidate to protect against election fraud, but here, it simply did not do so.
26. By limiting this “no objections” clause of the statute to subdivisions two three and four of §9-209, the Legislature left standing the body of law governing the canvass of

Affidavit Ballots. At best, the provisions of subdivision seven limit the grounds for objections to the list set forth therein.

27. Here, Affidavit Ballots are to be canvassed pursuant to §9-209(7) Election Law. No preclusion of objections is made in this part of the law. No other provision expressly applies the “no objection” rule for absentees to Affidavit Ballots.
28. To rule otherwise would require an activist Court that is legislating from the bench.
29. It is not the job of this Court to “fix” what might be a perceived error by the Legislature. The Legislature must be presumed to have known what it was doing; and intended to do so.
30. This Court is required to merely apply the statute as written. This is not, as some Respondents argue, an opportunity to fill in the blanks.
31. Subdivision seven of the law allows for (the first time in these terms) 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...”.
32. 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.
33. 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 statutes 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).

34. 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.
35. Further, Ballots must be declared invalid where, as a result of the failure on the part of the individual voters to accurately complete them (subject to any cure provisions), or where the voter fails to meet the statutory requirements for the ballot to be included in the canvass or the affidavit is otherwise fatally deficient.
36. 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).
37. Petitioner has requested 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, see Tenney, supra. We further request that the Election Law §16-112 preservation Orders of this Court be reinstated as to these ballots, see King, infra.
38. 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.
39. The Constitutional standards may be enforced by this Court within the four corners of the statute, Articles 8 & 9 Election Law, which clearly do NOT preclude objections to

affidavit ballots, as well as by enforcement of §16-112 Election Law Preservation for Judicial Review.

40. Alternatively, Petitioner has already requested 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.
41. 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.

42. The Constitution, case law, and the Election Law allow for the processing of Affidavit Ballots much 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.
43. 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.
44. It is established law that even where the Legislature might expressly proscribe Judicial review of administrative determinations, there must still be a level of Judicial scrutiny allowed, particularly where Constitutional Rights are involved.
45. The Third Department held, “statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute a grant of unlimited and potentially arbitrary power too great for the law to countenance (see Matter of Pan Am. World Airways v. New York State Human Rights Appeal Bd., 61 N.Y.2d 542, 548, 475 N.Y.S.2d 256, 463 N.E.2d 597 [1984]; Matter of Baer v. Nyquist, 34 N.Y.2d 291, 298, 357 N.Y.S.2d 442, 313 N.E.2d 751 [1974]). Thus, even when proscribed by statute, judicial review is mandated when constitutional rights are implicated by an administrative decision or ‘when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction’ (Matter of New York City Dept. of

Envtl. Protection v. New York City Civ. Serv. Commn., 78 N.Y.2d at 323, 574 N.Y.S.2d 664, 579 N.E.2d 1385)” DeGuzman v. NY Civil Service Commission, 123 A.D.3d 1189 (3rd Dept., 2015).

46. There can be no question that Constitutional rights are at stake here, whether they are the rights of voters, poll watchers, candidates political party committees or even the Judicial branch of Government itself.
47. Accordingly, it must be concluded that any proscriptions against objections, such as those the Respondents seek to have this Court write into the law here, to ballots, review of Board determinations must be subject to Judicial Review, and to the extent that Chapter 763 laws of 2021 conflicts with the Constitution, or that a Board acts in excess of its authority it must fall.
48. The Courts are inherently empowered to review the qualifications of voters through the Constitution and doctrine of Judicial Review, see Matter of Gross v Albany County Bd. of Elections, 10 AD3d 476, 479 [3d Dept 2004], affd 3 NY2d 251 [2004] Matter of Gross v Albany County Bd. of Elections, 10 AD3d 476, 479 [3d Dept 2004], affd 3 NY2d 251 [2004]; Stewart v. Chatauqua County Board of Elections, 14 N.Y.3d 115 (2015); Smith v. Sullivan, 38 Misc.3d 727 (Sup. Ct. Orange Co., 2012).
49. Pursuant to the Constitution, the Judicial branch of Government has jurisdiction over all matters arising under the provisions of the Election Law. The Constitution as opposed to a shoddy statutory enactment must prevail.
50. The Courts cannot be removed from the process. This Court is empowered by the State Constitution to adjudicate all matters relating to Elections, see Article II, § 8 N.Y. Constitution. This is the supreme law of this State.
51. The Respondents are so presumptuous as to prohibit objections, decide for a litigant what case he / she might put forward and them prevent judicial review of any questions they might not like.

52. This violates due process rights of your Petitioner.
53. Petitioner challenges the standing of the two Democratic Commissioners to make or enter any motions herein. Because they are not a majority of the Board they may not speak for or act for the Board of Elections, see Nassau v. NYS, 100 A.D.3d 1052 (3rd Dept., 2012).
54. The current state of affairs and the facts surrounding this election require that this Court use its powers under Section 16-112 Election Law to preserve the ballots and election materials related thereto so that any contest related thereto, and any administrative determination of the Respondent Boards of Elections may be heard before and reviewed by this Court.
55. The policy of this state for over a century has to allow for Court review of the administrative process so that the voters have confidence in the electoral system – that is to say that where Constitutional rights – including the right to vote – are involved the State of New York must be committed to getting it right, even where the process might take time and inconvenience those who desire quick results.
56. That policy, which protects the rights of due process, free speech, free association and the right to vote under the State Constitution are intertwined and protected by the Article 16 Election Law relief sought by the Plaintiffs here. It must be effectuated by this Court.
57. Petitioners make their claims herein under the New York State Constitution and the Laws of the State of New York.
58. Any claims based upon the United States Constitution or Federal law are expressly reserved for a Federal forum, see England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).
59. The State Constitution and the Election Law require identification of each voter by

signature. This applies to Affidavit Ballots as well as other types of voting by the voters of this state.

60. The ultimate judgment that a signature on an affidavit is valid is within the exclusive jurisdiction of this Court pursuant to the Constitution, Article II, §8.
61. Upon information and belief, the Respondent Board(s) may / will make errors in their determinations as to cures and the authenticity of signatures. Such matters are properly before this Court for review.
62. Further, the Respondent Board (s) must be ordered to preserve and produce the records relating to such processes.
63. Any determinations as to signatures must, therefore, come before this Court for review where that is objection made at the Board.
64. Petitioner respectfully asserts that it is incontrovertible that she is irreparably harmed when any ballot is counted where the voter is not qualified under the Constitution and the Election Law and included in the count of the ballots in her election.
65. This irreparable harm would / will occur where the respondent Local Boards are in error on a unanimous basis and determine to count an improper or illegal ballot; where a ballot is canvassed in error due to a split vote on validity and immediately bursting the ballot envelope and counting the ballot therein; where the Local Boards are unable or refuse to take evidence or objections as to the validity of a ballot or the qualifications of a voter which will prove or disprove the qualifications of that voter.
66. As this is a General Election, petitioner has requested that the Board of Elections, acting in its capacity as the Board of Canvassers, be enjoined from certifying the results of this election until such time as these court proceedings are finally resolved and determined.

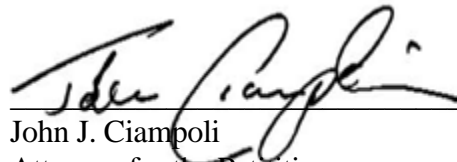
Absent such injunction Petitioner may lose his or her right to proceed directly before the courts of this state to correct the canvass of the returns of the General Election, and the matter will be removed from the jurisdiction of this Court, except, possibly, by way of a *quo warranto* proceeding initiated by and at the sole discretion of the Attorney General of the State of New York, or left to be taken up as a matter within the constitutional jurisdiction of the legislative body seating a new member.

WHEREFORE, Petitioner respectfully demands,

- (1) The signing of the accompanying Order to Show Cause and the granting of the relief requested therein, including but not limited to the temporary relief requested, and
- (2) An Order as described herein that the Board of Elections allow for full and meaningful participation in the administrative process of canvassing Affidavit Ballots, and preserving any objected to ballots for Court review, and
- (3) An order of this Court that the Respondent Board of Elections be temporarily enjoined and restrained from certifying any candidate other than the Petitioner, Rebecca Shiroff, as the candidate duly elected to the office of State Senator 50th State Senate District, and
- (4) The preservation of ballots and elections materials (including any ballots scheduled to be cast and canvassed at the offices of the Board(s) of Elections after Election night) under a two lock system, as specified herein, and
- (5) A judgment of this court correcting, adjusting and finalizing the canvass of returns for the General Election for election to the office of Member of New York State Senate, 50th Senate District and further declaring that the Respondent Board of Elections certify the name of Petitioner, Rebecca Shiroff, as the candidate duly elected to the said public office, together with the relief requested in this and the

initial Orders to Show Cause, and such other, further, and different relief that this court may deem to be just and proper.

DATED: SUFFOLK County, New York
November 14, 2022



John J. Ciampoli
Attorney for the Petitioner
Messina, Perillo and Hill LLP
285 W Main St. Ste 203, Sayville, NY 11782
Tel: (631) 582-9422 Cell: (518) 522-3054
Fax: (516) 450-3473
Email: ciampolilaw@yahoo.com

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ATTORNEY'S VERIFICATION

STATE OF NEW YORK)
COUNTY OF SUFFOLK) s.ss:

JOHN CIAMPOLI, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. He is the attorney for the plaintiff(s) - petitioner (s) in this action.
2. He has reviewed the contents of this document with his client(s), and / or their workers, and elections officials, and upon the conclusion of said review as to the facts alleged therein, believes same to be true.
3. He has personally reviewed originals or copies of the relevant documents, petitioners' records, and ancillary documents on file with or published by the Boards of Elections together with other papers relating thereto, and upon the conclusion of the said review, believes the within allegations to be true, on the basis of his personal knowledge.
4. This affirmation is being used pursuant to the provisions of the CPLR and applicable case law, due to the fact that time is of the essence and that petitioners and counsel are in different counties. Counsel having offices in the County of Suffolk and Petitioner(s) residing in a County / Counties other than the County of Suffolk.

DATED: Sayville, New York
November 14, 2022



John Ciampoli, Esq.
Of counsel to
Messina, Perillo and Hill, LLP
285 W. Main Street, Suite 203
Sayville, New York 11782
Phone: 631-582-9422
Cell: 518 - 522 - 3548
Email: Ciampolilaw@yahoo.com

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