

**NEW YORK STATE SUPREME COURT
SARATOGA COUNTY**

IN THE MATTER OF,

RICH AMEDURE, GARTH SNIDE, ROBERT
SMULLEN, EDWARD COX, THE NEW YORK
STATE REPUBLICAN PARTY, GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN, THE SARATOGA COUNTY
REPUBLICAN PARTY, RALPH M. MOHR, ERIK
HAIGHT and JOHN QUIGLEY,

Petitioners /Plaintiffs,

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS
OF THE STATE OF NEW YORK, GOVERNOR OF
THE STATE OF NEW YORK, SENATE OF THE
STATE OF NEW YORK, MAJORITY LEADER AND
PRESIDENT PRO TEMPORE OF THE SENATE OF
THE STATE OF NEW YORK, MINORITY LEADER
OF THE SENATE OF THE STATE OF NEW YORK,
ASSEMBLY OF THE STATE OF NEW YORK,
MAJORITY LEADER OF THE ASSEMBLY OF THE
STATE OF NEW YORK, MINORITY LEADER OF
THE ASSEMBLY OF THE STATE OF NEW YORK,
SPEAKER OF THE ASSEMBLY OF THE STATE OF
NEW YORK,

Respondents / Defendants.

Case No: 20232399
RJI No: 45-1-2023-1089

**AFFIDAVIT OF KRISTEN
ZEBROWSKI STAVISKY
IN OPPOSITION**

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

KRISTEN ZEBROWSKI STAVISKY, being duly sworn, does depose and say:

1. I am a Co-Executive Director of the New York State Board of Elections and
previously served as an Election Commissioner of the Rockland County Board of Elections, as

such I am familiar with the facts and circumstances of this matter, and I make this affidavit on personal knowledge except where expressly stated otherwise. I am competent to testify to the truth of the statements made in this affidavit if called to testify.

2. I submit this affidavit in opposition to this complaint and petition in this matter and in furtherance of the Objections in Point of Law made in the Answer of Commissioners Kellner and Spano.

Procedural History of Case

3. This case is the second chapter in the chaotic saga of the challenge to Chapter 763 of the Laws of 2021. Plaintiffs knew about the current law for canvassing since it became law on December 22, 2021. But plaintiffs dallied and brought litigation nearly identical to this proceeding in September 2022 which was ultimately dismissed on the grounds of laches. *See Amedure v State of New York*, 210 AD 3d 1134 (3rd Dept 2022) (holding “granting petitioners the requested relief during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections. Under these circumstances, petitioners' delay in bringing this proceeding/action precludes the constitutional challenges in this election cycle, and warrants dismissal of the petition/complaint based upon laches.”).

4. The *Amedure I* proceeding involved eight motions before the Appellate Division and created significant uncertainty during the run up to the 2022 election which included a period when certain election commissioners refused to follow the law and canvass ballots thereunder. And indeed Mr. Ciampoli advised them to do that during the pendency of the litigation. Worse, more than 165,000 voters were left uncertain about how or even whether their absentee ballots would be counted in 2022. It was an unparalleled period of acrimony and

uncertainty—even though the law was smoothly applied in the preceding primary and multiple special elections that year. And indeed the canvassing law has been yet again smoothly applied this year in special elections and the June Primary.

5. It is shocking that this case which is virtually indistinguishable from the 2022 *Amedure I* was yet again held in abeyance and brought in September on the eve of the 2023 General Election, such that an Order to Show Cause was issued providing less than a week for respondents to respond to a 41 page complaint, and yet again plaintiffs are obviously well aware any final disposition of this case will overlap with the canvassing process creating the same issues as were present in 2022.

6. More strangely, the petitioners dangle the instant litigation over the 2023 election calendar while more directly targeting 2024. *See* Petition ¶ 5 averring that “[p]etitioners seek their declaratory judgment and other relief, as to the 2024 election cycle, ***unless the court determines that the relief may be applied immediately.***” In other words, petitioners are using the possibility ***the court*** will *sua sponte* apply remedies in 2023 to create a manufactured emergency, even though all of the other components of the pleadings indicate only concern for 2024. The manufactured 2023 emergency is designed to disadvantage the respondents and/or create the same preelection uncertainty in 2023 as existed in 2022. This borders on, if it is not, abuse of process.

7. The plaintiffs’ application for a preliminary injunction should be denied for many reasons—including that petitioners have made no evidentiary submission nor pleadings delineating how they meet *any* of the elements of the showing required for a preliminary injunction or a temporary restraining order. That aside, no preliminary relief should be considered for the 2023 general election because the election is demonstrably underway and the

failure of petitioners to bring this proceeding in a time frame that allows orderly adjudication of their claims without uncertainty and chaos in the ensuing weeks is unforgivable.

2023 Election Absentee Balloting is Underway

8. The New York State Board of Elections certified the multi county components of the ballot on September 11, 2023, two days prior to the statutory deadline of September 13, 2023 (Election Law § 4-112 (1)). Local boards of elections had a September 14, 2023 deadline to certify ballots for the General Election (Election Law § 4-114). At any time after certification ballots can be issued, and indeed the *last day* to transmit military and overseas ballots for which applications have already been received is September 22, 2023. Three counties have already issued military and overseas ballot as of Friday, September 15, 2023. Upon information and belief others will have issued ballots before the return date in this matter, and some ballots may have been returned by then. Canvassing/processing ballots under the process prescribed by Election Law § 9-209 as amended by Chapter 763 of the Laws of 2021 must occur within four days of the receipt of the ballot by the board of elections. **(EXHIBIT “A” [political calendar] to Affirmation of Brian Quail dated September 18, 2023).**

9. Notices have been sent to candidates and stakeholders and the process is underway. **(EXHIBIT “F” [exemplar notices] to Affirmation of Brian Quail dated September 18, 2023).**

10. The result of the current canvassing law has been a more orderly canvassing process, timely election results, less post-election litigation, and a presumption in favor of enfranchisement of absentee ballot voters that is the same presumption applied to election day voters. In 2022 and 2023 this meant no outstanding primary contests delaying the certification of

the November ballot. By contrast the delay in bringing this proceeding is again threatening to inject disorder and uncertainty into the process for no imaginable reason given this case could have—and needed to have been-- brought months ago.

Absentee Voting Process

11. Under New York law a voter can apply to vote by absentee ballot pursuant to Election Law §§ 8-400 et seq (civilian voters); 10-100 et seq (military voters); 11-100 et seq (various special voters). Generally, the process involves making an application to the appropriate local board of elections either using a paper form, letter, or an on-line portal. The board of elections then processes the application and, if found valid, issues the voter an absentee ballot subject to relevant deadlines. The voter is required to return the ballot to the board of elections by election day or secure a postmark on the return envelope on or before election day with mail delivery to the board no later than seven days after the election (thirteen days for military voters). New York also provides electronic transmittal of ballots to voters with certain accessibility needs and to voters who reside overseas or are in the military services. All ballots in New York must be returned to boards of elections in paper form.

12. Generally when an absentee ballot is issued, the “package” has four components: (i) **Ballot** – the appropriate ballot for the voter; (ii) **Ballot Envelope** -- into which the voter places the voted/marked ballot, and the voter signs the statement on this envelope attesting to the voter’s eligibility; (iii) **Return Mailing Envelope** – a preaddressed return mailing envelope into which the sealed ballot envelope is placed, and (iv) **Outbound Mailing Envelope to Voter** – envelope addressed to the voter that contains the ballot, ballot envelope and the return mailing envelope. (EXHIBIT “H” [exemplar notices] to Affirmation of Brian Quail dated

September 18, 2023).

13. In 2021, New York amended its processing and canvassing procedures for ballots that are not voted on election day scanners. A significant motivation for the new law was to ensure absentee ballot vote totals were included within election night results to the extent possible. The 2021 law ensures that voters regardless of the means of voting have their ballots treated with equivalent importance and that there is a clearer picture of an election's result sooner.

14. The voter must apply for the ballot and sign a statement affirming their eligibility subject to prosecution for perjury if it is false. No absentee ballot is issued to a voter unless the two commissioners or their designees agree to issue the ballot as provided for in Election Law § 8-400 et seq. When the ballot envelope is returned, the envelope containing the ballot includes a second affirmation from the voter (the equivalent of a sworn affidavit) that asserts the voter's eligibility to cast the ballot. *See* Election Law § 7-122 (6).

15. Contrary to prior statements of petitioners' counsel, voters who apply for a ballot via the online application portal do sign their application, and are equally subject to penalties for perjury if it is false. Election Law § 8-408 (2) (ii) requires the voter using the electronic absentee ballot application system to "affirm[], subject to penalty of perjury, by means of electronic or manual signature, that the information contained in the absentee ballot application is true."

Ballot Review

16. Under prior law, the canvass of absentee votes typically did not begin until a week after the election was held. Under the new canvassing procedure, absentee ballot return envelopes must be examined within four days after the ballot is received. At that time there are

three possible dispositions of the ballot envelope. (i) The ballot envelope may be opened and the ballot removed in a manner that preserves its secrecy, and the ballot is then placed in a special container to await scanning by a tabulator at a later time; (ii) the ballot envelope may be found incurably invalid and laid aside unopened (albeit the voter, if identifiable, will be notified so they may vote in another manner); (iii) the ballot envelope will be found to have a curable defect and a cure notice will be sent to the voter, which if returned, will result in the later canvassing of the ballot.

17. The initial review of the ballot looks at whether the individual whose name is on the envelope is a registered voter, whether the ballot is timely received, and whether the envelopes are sufficiently sealed. *See* Election Law § 9-209 (2) (a). At this first initial review, a single commissioner can cause a ballot to be laid aside for these three reasons. “[S]uch ballot shall be set aside unopened for review ... [post-election] with a relevant notation indicated on the ballot envelope ***notwithstanding a split among the central board of canvassers as to the invalidity of the ballot...***” In sum at this stage of review, a single commissioner can cause a ballot to be set aside for review after the election. Moreover, at the post-election review “[e]ach such candidate, political party, and independent body shall be entitled to object to the board of elections’ determination that a ballot is invalid.” *Id.*

18. After the initial review of the ballot, the board of canvassers must perform a signature match whereby the voter’s signature on file is compared to the signature on the returned ballot envelope. At this stage and after “[i]f the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed” in the manner provided for in Election Law § 9-209 (2) of the election law.” Election Law § 9-209 (2) (g).

19. The sponsors of the new canvassing law described the law as creating “a

presumption of validity” ... “in favor of the voter and the ballot is processed for canvassing.”

(EXHIBIT “D” [sponsors’ memorandum] to Affirmation of Brian Quail dated September

18, 2023). This is the same presumption that exists in favor of election day voters. *See e.g.*,

Election Law § 8-504, § 8-506 (applied to challenges to absentee ballots that are canvassed in the

election districts after the close of polls on election day). Election Law § 8-506 has limited

applicability now because absentee ballots are canvassed centrally. However, that provision

provided “[u]nless the board by majority vote shall sustain the challenge, an inspector shall

endorse upon the envelope the nature of the challenge and the words ‘not sustained’, shall sign

such endorsement, and shall proceed to cast the ballot as provided herein.” This is the exact

same presumption the legislature now applies to absentee ballots canvassed centrally, and indeed

this has been a fixture of New York Election Law since at least 1889.

20. The foundational wisdom of this presumption was articulated at length by the Court of Appeals in *People Ex Rel. Stapleton v. Bell*, 23 N.E. 533 (NY 1889). The Court determined that a voter who makes the requisite oaths (which your affiant notes are equivalent to the attestations the absentee voter makes subject to perjury prosecution when signing the statement of voter on the ballot envelope) shall have his vote counted, and a contrary determination of election inspectors that the voter is not entitled to vote on the basis of unsatisfactory answers to the oath questions cannot be allowed, lest partisan inspectors be able to disenfranchise the voter.

21. The logic of the *Stapleton* Court is as powerful today as it was in 1889:

I think it would be a far greater menace to the security of this constitutional right, if the law regulating its exercise might prevent the vote of a citizen, duly qualified to cast it, from being received and counted, than that some fraud might be practiced by a false personation. For, in the one case, there would be the disfranchisement of the elector; while, in the other, for the wrong done to the people, or to the individual, penalties and remedies are

provided, and tribunals exist for their enforcement against a wrongdoer and for the establishment of the right.

We must assume that the person, whose right to vote was challenged, submitted to all the statutory tests prescribed by the law in such cases, for the appellants concede that he was "sworn" and only allege that his "answers were unsatisfactory." They did not claim that his answers were not full or that he was disabled by reason of any conviction. Their position is that they had knowledge that persons offered ballots, who were not registered electors they claimed to be and were not registered at all, and their argument is that notwithstanding those persons satisfied the statutory tests, such questions are always outstanding for the determination of the board; which only a majority can make.

I must say, that, to my mind, this claim is as unreasonable as it is absolutely lacking in support in the fundamental, or in statutory law. It is repugnant to fundamental principles and to authority. I may fairly premise what brief discussion I may feel bound to enter upon, in connection with the law regulating elections in this state, with the remark, that if these appellants are right in their contention, then a way is made possible to perpetrate a great outrage upon the rights of electors. Under the present scheme of non-partisan boards of election inspectors, wherein the principal political parties in the state are intended to have equal representation, by a contumacious refusal of party adherents to sign an election return, based on the pretense that they were not satisfied in their minds that all of the ballots taken were cast by qualified and registered electors, the disfranchisement of all the electors in the election district could be effected. They could prevent the reception of a ballot from a proposed elector, on their theory that a ballot is not finally received until by action of the majority of the board; for they would only have to oppose to the proofs required by the election law and made by the person, their mental convictions that, notwithstanding them, he was not the elector he swore he was. I do not, and cannot think such a result was ever intended, or can be fairly reached upon a consideration of the law. It is inconceivable that any such power should be lodged in election inspectors; or that they should be clothed with a discretion to reject a ballot offered by a proposed elector, whose qualifications, in case of challenge, are proved by the statutory methods.

22. More saliently, the predictions of petitioners of partisan Armageddon unleashing massive fraud have proven over time to be completely false. Attached **EXHIBIT "I" to the Affirmation of Brian Quail dated September 18, 2023** are the affidavits of 19 county election

commissioners who between them have canvassed tens of thousands of ballots under the new law. They report few splits between the commissioners or their designees on whether to count a ballot. These affidavits are representative of the experience of the entire state.

<u>County</u>	<u>2022 Number of Partisan “Splits” on Whether to Count Absentee</u>
Albany	0
Allegany	0
Chemung	0
Chenango	0
Clinton	0
Franklin	0
Montgomery	10
Oneida	0
Onondaga	0
Putnam	0
Saratoga	0
Schuyler	0
Seneca	0
St. Lawrence	0
Tioga	0
Tompkins	0
Warren	0
Washington	0
Yates	0

23. A partisan divide predicted by the plaintiffs causing allegedly fraudulent ballots to be canvassed simply has not happened and there is no evidence that it will. Indeed, every election commissioner takes an oath to faithfully follow the laws of the state.

24. The statutory mechanisms treat absentee voters equivalently to voters who vote in person. If a voter who votes in person is challenged, that voter will be required to do essentially what absentee voters do *as a matter of course* – affirm under penalty of perjury their eligibility. Contrary to the past statement of counsel for petitioners, if a challenged voter whose name is in the poll book on election day takes the required oath attesting to eligibility, such voter must be

permitted to vote. This is so even if **all** of the election inspectors do not believe the voter should be able to vote. Election Law § 8-504 (6) states “if he shall take the oath or oaths tendered to him he shall be permitted vote.”

25. To be very clear, the end result of the challenge process on election day is that the challenged voter will vote on the voting machine provided they affirm their eligibility. The treatment of absentee voters is now essentially the same except the affirmation is required, even without challenge, as a matter of course.

26. The idea proffered by plaintiffs that it is only sensible to wait until after election day to process absentee ballots is rejected by thirty-eight states which process and qualify absentee ballots to some extent before election day. Indeed, if plaintiff’s “preservation” logic were taken to its logical conclusion, it would be proper to make all election day voters tender their ballots in envelopes that would be subject to later objection. If plaintiffs find rolling review of ballots at 62 elections boards violative of their imaginary right to complain, they must object to voters voting on election day and early voting days at thousands of poll sites beyond the gaze of their cadre of attorneys.

27. There is no reason to single out absentee ballots for later review. Already under New York law absentee voters receive heightened review and scrutiny given the application process, the affidavit required on the returned ballot and the careful review by the board of elections of the returned ballot envelope.

Cure Provisions

28. The new cure provisions also act as powerful fraud deterrence. The cure provisions allow a board of elections to seek an affidavit from a voter reaffirming their ballot

when there is a finding by the board that the voter's signature on the ballot envelope does not seem to match the signature of the voter on file with the board of elections. *See* Election Law § 9-209 (3). The cure provisions also allow other defects to be similarly cured, including an unsigned ballot envelope, no required witness, missing ballot envelope, and incorrect signature of another voter. *Id.*

Scanning the Ballots

29. Scanning absentee ballots involves running them through a scanning ballot tabulator which counts the votes. Absentee ballots are scanned at three times. All ballots withdrawn from envelopes that have been opened as of the day before the beginning of early voting (October 27, 2023) are scanned into voting machines. All ballots withdrawn from validly opened envelopes between October 28, 2023 and November 5, 2023 will be scanned "after close of the polls" on the last day of early voting, on November 5, 2023. Finally, absentee ballots processed after November 5, 2023 will be scanned subsequent to the close of polls on election day.

30. As a result of Chapter 763, election night vote totals now include the vast majority of absentee ballots.

31. Though the absentee ballots are scanned on two occasions before the election, the aggregated tabulated results from those ballots may be obtained not earlier than "one hour before the scheduled close of polls on election day." Election Law § 9-209 (6) (e). No such results may be publicly announced or released "in any manner until after the close of polls on election day."

No County Boards Made Party

32. The New York State Board of Elections does not canvass absentee ballots. A significant portion of the instant litigation seeks to cause county boards of elections to canvass or refrain from canvassing specific ballots (i.e., those allegedly stemming from certain pre-filled applications), yet no county boards of elections whose officers are specifically sought to be enjoined are a party to this litigation.

Changed Mind After Issuance of Ballot

33. There is no Constitutional right to be able to change your mind about whom to vote for after the voter has submitted their ballot. Under New York law, a voter who votes during early voting cannot change his or her mind because the vote is already counted on a machine and cannot be unvoted. See Election Law § 8-600. The present law related to absentees is very similar. If, as of election day, the voter's ballot has been parted from the absentee envelope and thus anonymized to be prepared for counting, the ballot cannot be unvoted. If an absentee voter votes by affidavit on election day and the ballot has not been received, the affidavit ballot of such voter would be counted.

34. On its website, the New York State Board of Elections indicates to voters as follows:

New Absentee Ballot Procedure

Due to a recent change in law, New York State voters are no longer permitted to cast a ballot on a voting machine if they have already been issued an absentee ballot for that election. Voters who have already been issued an absentee ballot can still vote in person using an affidavit ballot. The affidavit ballot will be kept separate until the election is completed. Election officials will verify whether the voter's absentee ballot has been received. If the voter's absentee ballot has been received, the affidavit ballot will not be counted. If

the voter's absentee ballot has not been received, the affidavit ballot will be counted.

If a voter requests a second absentee ballot, any previously issued absentee ballot that is returned by the voter will be set aside unopened to provide the voter a chance to return the second ballot, unless the first ballot has already been opened. If both ballots are received before the return deadline, the ballot with the later postmark date is accepted and any other ballots that have been received are rejected, unless the first ballot has already been opened. If a voter submits more than one timely absentee ballot and cast an affidavit ballot, the last received ballot, either submitted in person during the election or by mail within the absentee return deadline, will be canvassed.

35. Like New York, many states, spanning the ideological spectrum – including Alabama, Arizona, Kansas, Maryland, Mississippi, Nebraska and Rhode Island – require voters to vote by affidavit or provisional ballot if they had requested an absentee ballot. New York's rule like those of many sister states is sensible. It allows a voter who has received an absentee ballot to nonetheless vote by affidavit ballot on election day, and if the absentee ballot was not returned to the board of elections and processed, the affidavit shall count.

Fraud

36. Chapter 763 does not invite fraud. Chapter 763 requires an initial review of all ballot envelopes, and at this stage the objection of any one commissioner will cause the ballot to be set aside for post-election review if the voter is not registered, there is no name on the affirmation envelope allowing it to be properly identified, the return of the ballot is untimely and both inner and outer envelopes are unsealed. *See* Election Law § 9-209 (2) (a). Only after the board of elections has made a bipartisan finding that the absentee voter named on the envelope is a qualified voter, does the presumption of validity that allows a ballot to be counted in the event

of a tie, apply. See Election Law § 9-209 (2) (c).

37. This is not a significant departure from prior law. Under prior law, if the commissioners split as the validity of a ballot, there was a waiting period, and the absentee ballot was then opened absent a court order to the contrary in three days. Similarly, the New York State Board has long held that an affidavit ballot is presumptively valid and will be counted over the objection of one commissioner. See Formal Opinion 1979 # 1 (providing “[w]hen the election commissioners disagree and cannot make a determination as to the invalidity of an affidavit ballot, the ballot must be counted.”). Indeed, in 1979 the Board described the state of the law with respect to absentees cast by election inspectors in poll sites. The board noted:

The Election Law provides that inspectors of elections shall decide all questions by majority vote (§3-402). Specifically, in the area of challenges to absentee and other ballots, challenges shall be overruled, and the ballots shall be counted unless the Board of Inspectors by majority vote sustains the challenge. An even vote of the inspectors, therefore, would result in the casting of the ballot. Election Law §8-506(2). There is a presumption of validity stemming from the elector's oath appearing on the envelope enclosing the ballot. 1928 Op. Atty.Gen. 218.

In sum, applying a presumption of validity to voter's absentee ballot is time-honored in New York and not an invitation to fraud. What Chapter 763 does is translate this presumption into the context of a rolling review of ballots designed to ensure that election night vote totals reflect to the extent possible as much of the cast vote as possible.

No Constitutional Right to Object to Canvass of Ballot
No Interference with Election Commissioners' Duties

38. The absentee process provides for a manner in which absentee ballots are authenticated, processed and counted. There is no requirement that an interested party be able to

“participate” in this process before an election official opens a ballot envelope. New York law provides for complete transparency in observing the process, but it relies on the determinations of its canvassing officers. In this respect New York law is like that of Texas (and other states), which have no provision for objecting to the canvass of a ballot.

39. New York law does allow a ballot envelope to be set aside by a single commissioner when the voter is not able to be identified or is found not to be registered. New York law has long applied presumption of validity to ballots.

Secret Ballot

40. The opening of a ballot envelope to remove the voted ballot, face down, to prepare it for canvassing does not cause a voter’s secrecy in voting to be lost. Indeed, under any scenario where ballots are returned in an envelope, at some point the envelope must be opened and the ballot withdrawn. That this preparation now occurs before the election is not momentous. Many states begin removing voted ballots from envelopes to prepare them for canvassing before the election. Thirty-eight states allow processing absentee ballots before the election. As reported by the National Conference of State Legislatures, “[i]n some states, once the signature is verified the envelope can be opened and the ballot prepared for tabulation by removing it from the envelope, flattening it and stacking it with the other ballots. Some states may allow ballots to be run through the scanner, as well, but without hitting the “tally” button to actually obtain results.” See <https://www.ncls.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>

41. As ballots are removed from the envelope and unfolded to be stacked, New York State Board of Elections Canvassing Guidance, p. 6-7 provides that “[a]side from confirmation of

proper enrollment [for a Primary Ballot], no further review of the ballot or the votes contained therein, shall be made.” Moreover, “the board shall take all measures necessary to ensure the privacy of the voters’ votes.” (EXHIBIT “E” [canvassing guidance] to Affirmation of Brian Quail dated September 18, 2023).

42. This is done in a number of ways. Typically, once a grouping of ballot envelopes are determined to be opened, they are shuffled. The envelope is opened by one worker who does not observe whose envelope is being opened and the folded ballot is removed. Unless it is a primary election, no further review of the ballot is required and the ballot is only unfolded once other ballots have also been opened. In the context of a primary ballot, the name of the party (which must be checked to ensure it matches the voter’s enrollment) is provided on the top of the ballot allowing election officials to confirm the correct party of the ballot with minimal examination that does not even require fully unfolding the ballot at this stage. The Central Board of Canvassers which does this work is comprised of the Election Commissioners or their designees, in a bipartisan, paired manner.

43. New York law makes it a crime for an election official to reveal how a voter has voted. See Election Law § 17-126 (a misdemeanor for any election officer to “reveal[] to another person the name of any candidate for whom a voter has voted...or [c]ommunicate to another person his opinion, belief, or impression as to how or for whom a voter has voted.”).

44. There is no right for objectors to see the face of any ballot before it is tabulated by a voting machine. It is axiomatic that a voter in a polling place does not reveal the voted ballot to anyone before placing it in a scanner whether or not they object. This assertion by petitioners in their pleadings is simply false.

45. As the State Board notes in its Canvassing Guidance, “...since the ballots are

prepared for later scanning without examining the face of the ballot, observers cannot inspect the face of the ballot to make any objections on the ballot itself. In this way, absentee and affidavit ballots are treated in a manner consistent with election day voters' ballots, which are placed into the scanner directly without any prior review." New York State Board of Elections Canvassing Guidance, p. 4 (**EXHIBIT "F" [canvassing guidance] to Affirmation of Brian Quail dated September 18, 2023**).

46. The face of all ballots will be inspected after the election when they are anonymized, in the event of a close contest audit. New York hand counts ballots in all extremely close contests. See Election Law § 9-208.

No Tension Between Election Law §§ 8-506 and 9-209

47. Election Law § 8-506 sets out a procedure that was employed for challenging absentee ballots at poll sites. Even under the law prior to 2021, the procedures for objecting provided in that section were modified by Election Law § 9-209. For example, Election Law § 9-209 provided for a three-day set aside for ballots on which the central board of canvassers split, whereas Election Law § 8-506 commanded the immediate counting of ballot when objections were not sustained. It is clear that the 2021 enactment makes Election Law § 9-209 the exclusive controlling provision. Election Law § 9-209 (5) provides watchers may review the canvass but they are limited to "observing, without objection, the review of ballot envelopes required by subdivisions two, three and four of this section." The Appellate Division has definitively held watchers cannot object during the Election Law § 9-209 canvassing process, to wit:

To accomplish its policy objectives, the Legislature significantly limited objections and post-election judicial review of absentee ballots. **Watchers may still observe the review of absentee ballots during canvassing, but they must now do so "without objection"**

(Election Law § 9-209[5]). Election Law § 9-209(2) allows for a limited initial examination of the absentee ballot envelopes and enumerates the exclusive criteria when determining the validity of a ballot.[7] If a ballot envelope is deemed invalid for a reason set forth in Election Law § 9-209(2)(a), it will be set aside, not opened and then reviewed as provided by Election Law § 9-209(8).[8] After that review, an objection can be made to the determination that a ballot is invalid, in which case "[s]uch ballot[] shall not be counted absent an order of the court" (Election Law § 9-209[8][e]).

Matter of Hughes v Delaware County Board of Elections, 2023 NY Slip Op 3431 (3rd Dept).

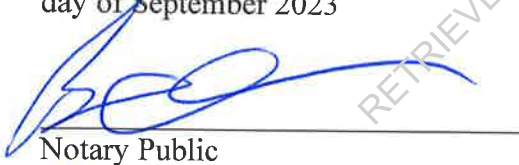
WHEREFORE, the instant proceeding should be dismissed.

Dated: 9-18-23



KRISTEN ZEBROWSKI STAVISKY

Sworn to before me this 18th
day of September 2023



Notary Public

Brian L. Aquil
qualified in Schenectady County
02Q06395806