

At a Special Term of the Supreme Court of the State of New York held in and for the County of Oswego on December 8, 2020.

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

SUPREME COURT OF THE STATE OF NEW YORK
OSWEGO COUNTY

CLAUDIA TENNEY,

Petitioner,

v.

**OSWEGO COUNTY BOARD OF ELECTIONS,
ONEIDA COUNTY BOARD OF ELECTIONS,
CORTLAND COUNTY BOARD OF ELECTIONS,
MADISON COUNTY BOARD OF ELECTIONS,
BROOME COUNTY BOARD OF ELECTIONS,
TIOGA COUNTY BOARD OF ELECTIONS,
HERKIMER COUNTY BOARD OF ELECTIONS,
CHENANGO COUNTY BOARD OF ELECTIONS,
NEW YORK STATE BOARD OF ELECTIONS,
KEITH D. PRICE, JR., and ANTHONY BRINDISI,**

Index No. EFC-2020-1376

Respondents.

DECISION AND ORDER
(Motions Nos. 4 and 5)

APPEARANCES:

Paul DerOhanessian, Esq., and Joseph T. Burns, Esq., *for Petitioner Claudia Tenney*
Richard C. Mitchell, Esq., *for Respondent Oswego County BOE*
Robert E. Pronteau, Esq., *for Respondent Oneida County BOE*
Karen L. Howe, Esq., *for Respondent Cortland County BOE*
Tina Marie Wayland-Smith, Esq., *for Respondent Madison County BOE*
Robert G. Behnke, Esq., *for Respondent Broome County BOE*
Peter J. De Wind, Esq., *for Respondent Tioga County BOE*
Charles E. Crandall, III, Esq., *for Respondent Herkimer County BOE*
Alan E. Gordon, Esq., *for Respondent Chenango County BOE*
Kimberly Galvin, Esq., and Nicholas Cartagena, Esq., *for Respondent NYSBOE*
Bruce V. Spiva, Esq., and Martin E. Connor, Esq., *for Respondent Anthony Brindisi*

This is a special proceeding pursuant to Article 16 of the Election Law. Petitioner Claudia Tenney, the Republican candidate for Member of Congress in New York's 22nd Congressional District, commenced this action seeking Court intervention in the general election – before any absentee or affidavit ballots had been canvassed – to preserve challenged ballot envelopes and protect her right to judicial review (NYSCEF Doc. 1). Respondent Anthony Brindisi, the Democratic candidate, crossclaimed for similar relief (NYSCEF Doc. 23). Thereafter, both Tenney and Brindisi asked this Court to review hundreds of challenges to election officials' rulings on the validity of affidavit and absentee ballots. Judicial review of the candidates' challenges is now impeded because the Boards of Elections failed to follow the canvassing procedures set forth in the Election Law. Those failures caused the candidates – who may be separated by as few as 12 votes – and their prospective constituents, to endure changing and confounding vote tallies, perplexing ballot rulings (or, at times, no rulings at all), and mysterious uncanvassed and “mislaidd” ballots.

By Order to Show Cause, Tenney now asks this Court to end the canvassing process immediately, and direct the Boards to certify the election results based upon the current tally because, as she contends, the Court lacks jurisdiction to correct the Boards' canvassing errors. Brindisi, also by Order to Show Cause, asks the Court to direct the Boards to correct certain canvassing errors – but not all of the problems in all of the counties – and then resume the now suspended judicial review of the candidates' challenges. For the reasons set forth below, Tenney's motion is **DENIED**; and Brindisi's motion is **DENIED**, in part, and **GRANTED**, in part. Specifically, the Respondent Boards of Elections are hereby **ORDERED** to fulfill their statutory canvassing duties, immediately correct all of the canvassing errors and, where their errors cannot be corrected, recanvass those ballots.

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 in them, the New York State Legislature designed, and adopted, the Election Law, a comprehensive statutory framework consisting of 17 articles governing the entire electoral process from start to finish (*Higby v Mahoney*, 48 NY2d 15, 21 [1979]). Under the Election Law, a Court's power to intervene in an election is intentionally limited, and can only be called upon by a candidate to preserve procedural integrity and enforce statutory mandates (*Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). It is through the judiciary's rigid and uniform application of the Election Law that, fundamentally, "[t]he sanctity of the election process can best be guaranteed" (*Id.* at 258).

Accordingly, this Court has no authority to, and will not, count votes, interfere with lawful canvassing, or declare the winner. Those are the statutory duties of the Respondent Boards of Elections; duties that cannot be abdicated, modified or usurped by the Courts (Election Law § 9-200[1]; *Testa v Ravitz*, 84 NY2d 893, 895 [1994]; *People v Bd. of Elections*, 286 AD2d 783, 783-84 [2d Dept 2001]). Instead, this Court – as explicitly restrained by Election Law § 16-106 – is empowered only “to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots[,]” and to “review the canvass and direct a recanvass or correction of an error or performance of any required duty by the board of canvassers” (*Delgado v Sunderland*, 97 NY2d 420, 423 [2002]). Simply put, this Court has only one role in this election: to make sure that everyone, including every public election official, follows the law.

II.

Petitioner Tenney and Respondent Brindisi – along with Respondent Kenneth Price of the Libertarian Party – are candidates for the House of Representatives in New York’s 22nd Congressional District. Unofficial results on election night for early and same day in person voting placed Tenney firmly in the lead; 28,422 votes ahead of the incumbent, Brindisi. There were, however, over 60,000 affidavit, military, special and, predominantly, absentee ballots that had not yet been canvassed and counted.

This extraordinary surge in absentee voting was not a surprise but, rather, an expected response to the public health emergency presented by the global pandemic and the Legislature’s June 2020 amendment to Election Law § 8-400(1)(b), which temporarily permitted absentee ballots by voters “unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.” Anticipating an increase in first-time absentee voters, the Legislature also added a new cure provision to the Election Law, which requires Boards of Election to: review absentee ballot envelopes as they arrive; identify minor, curable defects (such as missing signatures); and immediately inform voters of their right to correct those problems (Election Law § 9-209[3]). Voters who remedied, or cured, defects in their ballots within the statutory period (either five or seven days), were lawfully entitled to have their absentee ballot canvassed (*Id.*; Executive Order 202.58).

On November 4, 2020, the day after the polls closed, Tenney commenced this special proceeding to preserve challenged ballots for prospective judicial review and, subsequently, to validate the final vote tallies by the Boards of Elections (NYSCEF Doc. 1). As part of her initial filings, Tenney also sought, by proposed Order to Show Cause, a temporary restraining

order and preliminary injunction directing the Respondent Boards to, among other things, preserve any envelopes containing affidavit and absentee ballots that were challenged during the subsequent canvassing and recanvassing processes (NYSCEF Docs. 2, 3).

This Court granted Tenney's Order to Show Cause, returnable on November 9, 2020 (NYSCEF Doc. 9) and, following a conference with counsel to all parties pursuant to 22 NYCRR 202.7(f) on November 6, 2020, issued a temporary restraining order staying all canvassing and recanvassing of ballots until after it had ruled upon Tenney's application for a preliminary injunction (NYSCEF Doc. 21). Upon stipulation by Tenney's counsel during that conference, Brindisi also joined in Tenney's request for a preliminary injunction, and filed an Answer with Counterclaim and Crossclaim seeking the same relief as that sought in the Petition, including to review any challenged ballots (NYSCEF Docs. 23, 93). Tenney subsequently filed an Answer to the Counterclaim, raising no affirmative defenses (NYSCEF Doc. 59).

On November 10, 2020, this Court issued a Decision and Order granting a preliminary injunction. Specifically, after Tenney and Brindisi established that irreparable harm would result if protective measures were not implemented before envelopes under continuing objection were opened and vote counting began, the Court ordered the Respondent Boards to preserve all challenged affidavit and absentee envelopes for judicial review in strict accordance with the procedure set forth in *O'Keefe v Gentile* (1 Misc3d 151, 155 [Sup Ct Kings Cty 2003]) (NYSCEF Doc. 40). This directive was in addition to the Boards' statutory obligation to preserve the ballots themselves, under Election Law § 3-222. The Court also directed that each of the Boards were to, upon request, immediately provide the candidates with any documents to which they were entitled by statute, and set a compliance conference for November 19, 2020, to discuss the status of the canvasses (NYSCEF Doc. 40).

At the November 19 compliance conference, the Boards of Elections and counsel for Tenney and Brindisi advised the Court that the canvasses had been completed, and that several hundred rulings by the Boards on the validity of envelopes and ballots had been challenged by the candidates. Accordingly, the Court set a judicial hearing to begin on November 23, 2020, to review the validity of the challenged affidavit, absentee, military and special ballots pursuant to Election Law § 16-101(1) (NYSCEF Doc. 54). At that time, based upon reports from the Respondent Boards, it was the understanding of the parties and the Court that, out of just over 310,000 votes cast, Tenney led Brindisi in the race by less than 200 votes.

III.

At 9:00 a.m. on November 23, 2020, the evidentiary hearing to review the challenged ballots, one-by-one, began in person in the Oswego County Courthouse. The proceedings were streamed live, virtually, for the parties and the public in accordance with effective Administrative Orders and operational safety protocols. As framed by the candidates and the Election Law, the Court's attention was initially focused on rulings by the various Boards of Elections to challenges by the candidates on their determination as to the validity of ballots, in order to determine if those rulings were proper (*see e.g. Gross*, 3 NY3d at 257). The hearing began with a review of the Oswego County Board's determinations.

However, problems – seemingly minor at first – were immediately apparent to the Court and counsel to the candidates. Specifically, while the Oswego County Board of Elections presented only six disputed ballots, none of the candidates' challenges were properly notated directly on the face of those ballots, in pen and initialed by the commissioners, as required under Election Law § 9-114. Instead, partial notations were written by someone on “post-it” or “sticky” notes – small pieces of adhesive paper designed to be temporary and easily removed –

which were then affixed to the disputed ballots. These partial notations failed to clearly identify the challenging candidate, or the grounds for his or her challenge.

Problems for the Court and the candidates' counsel intensified as attention turned next to the rulings of the Oneida County Board of Elections. In particular, in sworn testimony, Commissioners Rose Grimaldi and Carolann Cardone acknowledged several consequential violations of the Election Law during their canvassing process, including that challenges by both candidates to rulings on disputed ballots were not notated on the ballots but were, instead, affixed on cryptic – and occasionally missing – sticky notes, and that, because of the Boards' improper use of sticky notes to mark challenges, it was impossible in some cases to know whether a challenged ballot had been counted or not. Despite adamant testimony from Commissioner Cardone, at least seven of the dozens of sticky notes used by the Oneida County Board to mark challenged absentee ballots (and an unknown number used to mark challenged affidavit ballots), were missing when the ballots were produced in court.

Most concerning, however, was the admission by the Commissioners that even though approximately 1,500 affidavit ballots had been administratively rejected by Board of Elections staff, none of those ballots had ever actually been canvassed under the procedures set forth in Election Law § 9-209, which explicitly requires that affidavit “ballots voted by voters who moved within the state after registering, voters who are in inactive status, [and] voters whose registration was incorrectly transferred to another address even though they did not move” be canvassed. Instead, the Commissioners simply handed piles of the already rejected affidavit ballots over to campaign representatives, who (while working cooperatively at separate tables) reviewed, sorted, restacked and challenged those ballots on their own. Stacks of the challenged affidavit ballots were then delivered to, and personally received by, the Commissioners,

but never ruled upon. Rather, as credible testimony revealed, the over 400 challenged affidavit ballots were merely bound in batches with rubber-bands with (purportedly) a sticky note on the front indicating that they had been challenged, and then placed in a cardboard box in a secure room, without any further action. The Commissioners offered no explanations for why the rejected ballots were omitted from the actual canvass or, more importantly, why the campaigns were not given an opportunity to object to the Board's refusal to cast those ballots, including challenging ministerial and clerical errors, during the canvassing process as required under Election Law § 9-209(2)(d).

This is particularly troublesome because affidavit ballots are a critical component of New York State's electoral process, serving to safeguard every citizen's right to vote and a necessary check on systemic administrative mistakes (*Common Cause/New York v Brehm*, 432 FSupp3d 285, 289-300 [SDNY 2020]). Indeed, this constitutionally mandated voting option must be meaningfully presented to all purportedly inactive voters on election day, along with the option to seek a court order, as Fifth Judicial District Administrative Judge Hon. James P. Murphy reminded the Boards of Elections in advance of the election (NYSCEF Doc No. 107-1). Nonetheless, the Oneida County Board failed to include these critical ballots in its formal canvassing process.

As the hearing continued on with the Madison County of Board of Elections, Commissioner Mary Egger admitted during her sworn testimony that, similar to what happened in Oswego and Oneida Counties, challenges by the Tenney campaign to 132 rulings by the Board on the validity of absentee ballots, and the outcomes of those challenges, were not notated on the face of the ballots. Instead, the ballots challenged by the Tenney campaign were simply placed in piles, and then an incomplete spreadsheet including only 123 of the challenged ballots was

hastily created (either during or just before the Court's hearing), in an attempt to recreate the Tenney campaign's challenges and the Board's rulings upon them.

By the end of the first day of the hearing, it was apparent to the Court and counsel to the candidates that meaningful judicial review of the challenged ballots pursuant to Election Law § 16-106(1) was frustrated by the compounding canvassing errors and an inexact canvassing record. It was simply not clear, based upon the evidence before the Court, exactly what challenges to the absentee and affidavit ballots and envelopes had been properly preserved for judicial review, who had made all of those challenges, and what the original objections were. Additionally, it was also unclear whether some of the challenged ballots from Oneida County had been counted or not counted by that Board. Indeed, based upon the testimony of Oneida County Commissioner Cardone, it was impossible to know whether the seven challenged ballots that were missing sticky notes had been canvassed or not. Accordingly, the Court directed counsel to separately brief the issue of whether the candidates' challenges to the absentee, affidavit, military and special envelopes and ballots had been properly preserved by the Boards of Elections for judicial review.

At the opening of the second day of the hearing, the Court directed the candidates to focus on the Boards' canvassing operations generally, and to specifically address whether or not the challenges to the rulings of the Boards of Elections had been properly recorded. Consistent with the evidence presented on the first day, it was clear that they had not. In particular, the Herkimer County Board of Elections had also used incomplete sticky notes to mark seven challenges to ballot rulings. Christina Dutko, a Broome County Deputy Elections Commissioner, testified (after reporting that the commissioners serve only part-time and play an extremely limited role in the canvassing of ballots) that, among other violations of the Election Law:

(1) hundreds of affidavit ballots were not properly canvassed; (2) candidate objections were not ruled upon by the commissioners; and (3) over 300 candidate challenges to rulings on absentee ballots' validity were not recorded on the face of the ballots. While the Broome County Board of Elections did not use sticky notes to record candidate challenges, it nonetheless improperly grouped the ballots into a creative numbering system, which it later reproduced on a spreadsheet.

With respect to Chenango County, non-party witness Lucy McIntosh, Brindisi's campaign manager, credibly testified that, among other violations of the Election Law: (1) cure notices for at least 12 absentee ballots had not been sent by the Board, despite the fact that those ballots had apparently curable defects requiring the Board to provide the voter with notice under Election Law § 9-209(3) and an opportunity to cure; (2) candidate objections were not ruled upon by the commissioners; and (3) candidate challenges to rulings were not recorded on the face of the ballots (but, instead, were recorded in spreadsheets prepared much later). In addition, the challenged ballots produced for judicial review by the Chenango County Board of Elections also included 12 absentee ballots that had been inexplicably found in a drawer, marked "undetermined," and never canvassed pursuant to Election Law § 9-209.

In Cortland County, Board of Elections Commissioner Robert Howe testified that there were approximately 100 affidavit ballots that had been administratively rejected and never canvassed in accordance with Election Law § 9-209, despite their constitutional importance. In fact, it appears that the campaigns only learned of the existence of these administratively rejected affidavit ballots at the hearing. Neither candidate challenged any of the rulings of the Tioga County Board of Elections during its canvass, and no evidence of any errors in its canvassing process was presented to the Court.

Late in the afternoon of the second day, the Court was advised that – although final tallies had still not been provided to either campaign – updates from several Boards received that day showed Brindisi overtaking Tenney by a very thin lead of, perhaps, only a dozen votes. That potential lead was well within the margin of the challenged and uncanvassed ballots before the Court, making the Court’s rulings upon those challenges potentially determinative upon the outcome. On Tenney’s motion, which was not objected to, the Court suspended the hearing, enjoined the Boards’ certification of the election, and set an accelerated briefing schedule to allow the candidates until November 30, 2020 to submit motions and argument on how to proceed with the judicial review of the challenged and uncanvassed ballots given the failure of the Boards to comply with the statutory mandates under the Election Law (NYSCEF Doc. 64).

IV.

On Sunday, November 29, 2020, five days after the hearing was suspended and only one day before the candidates’ deadline to file motions, counsel to the Herkimer County Board of Elections advised the Court that its commissioners had miscalculated their vote tally, and that there were actually 10 more votes for Brindisi, and 25 more votes for Tenney, in their final tally. That adjustment put Tenney back into the lead by 12 votes. In response to both candidates’ motion adjournment requests given this new information, the Court *sua sponte* issued an Order extending the briefing scheduling, requiring the Boards to preserve all notes and records relating to their canvasses, and directing the Boards to upload a final report of their original canvass no later than 4:00 p.m. on November 30, 2020, to the New York State Courts Electronic Filing system (NYSCEF Doc. 70). Those reports were timely filed (NYSCEF Docs. 72-74, 76-81). The final reports confirmed that Tenney was 12 votes ahead of Brindisi after the initial canvass.

Then, even more surprisingly, on December 1, 2020, the Chenango County Board of Elections’ attorney advised the Court that its commissioners had just discovered an additional

55 uncanvassed early voting ballots, at least 44 of which preliminarily appeared to be valid (NYSCEF Doc. 82). This was in addition to the 12 uncanvassed ballots that the Chenango County Board had previously produced to the Court, marked “undetermined.” The Board took no further steps with these ballots, safeguarding them until further direction from the Court.

V.

The Election Law imposes very specific rules for the canvassing of absentee, affidavit, military and special ballots, which cannot begin until at least seven days after the general election (Election Law §§ 8-412[1]; 9-209), and only after the Boards provide at least five days written notice to the candidates (Election Law § 9-209[1][b]). In the presence of the candidates or their representatives (if they chose to participate), the Boards are required to canvass each and every single affidavit, absentee, military and special ballot, including the envelopes they are contained within (if any), one by one in each election district (Election Law §§ 8-506; 9-209[1], [2][a]). If the commissioners (or their appointed inspectors) determine that a ballot is valid, then it is counted (Election Law § 9-209[2]). If a candidate (or their representative) objects to the Board’s determination of a ballot’s validity, then the commissioners (or their inspectors) must make a ruling upon that objection (Election Law § 9-209[2][d]). Where a candidate (or their representative) subsequently challenges the Board’s ruling on a ballot’s validity – as was done hundreds of times in this election – then the challenger, the underlying objection, and the Board’s ruling must be recorded, in pen, on the face of the ballot (or envelope), to preserve the candidate’s challenge for subsequent judicial review (Election Law §§ 8-506, 9-114).

Here, based upon the evidence and testimony that was submitted by the parties, this Court finds, as a matter of law, that the Oswego, Oneida, Madison, Herkimer, Chenango, Broome and Cortland County Boards of Elections failed to comply with the plain and unambiguous statutory

mandates governing the performance of their duties with respect to the canvassing of affidavit, absentee, military and special ballots, including the preservation of challenges to rulings by the Boards on objections, the sending of notices to cure, and the canvassing of affidavit ballots.

To be clear, there is absolutely no evidence – or even an allegation – before this Court of any fraud on the part of the Boards or the campaigns. Nor is there any evidence that the Boards’ failures and errors were a result of the pandemic, recent amendments to the Election Law, or a strain upon the Boards of Elections’ capacity and resources.

Instead, the problems experienced by the candidates and, consequently, all of the voters across the eight counties in New York’s 22nd Congressional District, were a direct result of “the careless or inadvertent failure to follow the mandate of statute and case law” by the Boards of Elections (*Higby*, 48 NY2d at 20). Those failures have frustrated the candidates, and prejudiced their rights to meaningful judicial review of the Boards’ actions on the challenged ballots. In particular, this Court cannot rule upon the validity of those ballots without evidence establishing what candidate had challenged the Board’s ruling on a particular ballot’s validity, or what the basis for the underlying objection was (*Gross*, 3 NY3d at 257; *Messina v Albany County Bd. of Elections*, 66 AD3d 1111, 1114N [3d Dept 2009]). Nor can this Court rule upon the validity of the hundreds of ballots that were never canvassed by the Boards in the first place (*Testa*, 84 NY2d at 895).

VI.

Turning at last to the candidates' pending applications, on December 2, 2020, Tenney and Brindisi, as directed by the Court, filed motions by Order to Show Cause seeking to guide the Court as to how it should address the canvassing errors committed by the Boards of Elections. Tenney asks this Court to direct the Boards to certify their current tallies from the original canvasses as the final official election results, arguing that the Court has no authority to review any of the challenged or uncanvassed ballots because the Boards failed to properly record those challenges upon the face of the ballots, and Brindisi failed to obtain proper leave of the Court to file his Counterclaim and Crossclaim.

However, the notations mandated by Election Law §§ 8-506 and 9-114 are not a jurisdictional requirement under Election Law § 16-106(1) and, accordingly, the Courts may rely upon testimonial and other evidence to determine whether or not rulings by the Boards of Elections were properly challenged by candidates during the canvassing process (*see Stewart v Chautauqua Cty Bd. of Elections*, 69 AD3d 1298, 1302 [4th Dept 2010]). Here, there is ample, uncontroverted evidence of hundreds of proper challenges to ballots by both candidates. In fact, Tenney's own counsel asserted to the Court on November 23, 2020 that Tenney had made 132 good faith challenges to Board rulings on ballots canvassed by the Madison County Board of Elections, which the Board then failed to properly notate on the ballot.

Although Tenney is free to withdraw the challenges she is advancing under her Petition, Brindisi has not withdrawn the challenges under his Counterclaim and Crossclaim, and the evidence before the Court clearly establishes that those challenges were properly made. The Court, therefore, has the statutory authority to grant the relief that Brindisi requests under Election Law 16-106 and review the Boards' canvassing processes and rulings

(*Jacobs v Biamonte*, 38 AD3d 777, 778 [2d Dept 2007]). Furthermore, Tenney's proposed resolution would require that this Court ignore multiple errors by the Respondent Boards of Elections, disregard proper challenges to invalid ballots that were counted and valid ballots that were not counted by both parties, and ignore hundreds of ballots that were never canvassed in the first place. That is not the role of the Court. The winner of this election must be decided by the real parties in interest: the voters. And to do so, every valid vote must be counted.

Tenney also raises an unavailing procedural argument in her motion papers, contending that Brindisi failed to obtain leave of the Court to file his Counterclaim and Crossclaim. In a Conference with the Court on November 6, 2020, counsel for Brindisi orally requested leave to file a counterclaim and crossclaim, and counsel for Tenney advised the Court that he had no objection. Brindisi then filed his Answer with Counterclaim and Crossclaim, seeking the same relief as that sought in the Petition, including judicial review of challenged ballots (NYSCEF Docs. 23, 93). Tenney thereafter answered the Counterclaim, without raising any affirmative defense based upon a failure to obtain Court leave (presumably because counsel had, literally, just consented to the filing of the counterclaims and crossclaims) (NYSCEF Doc. 59). Nonetheless, to ensure a complete and accurate record, the Court hereby explicitly grants Brindisi leave, *nunc pro tunc*, to file his Counterclaim and Crossclaim.

Brindisi's motion, in turn, asks this Court to order the individual Boards of Elections to produce electronic records from the canvassing software and to then hold a public hearing during which they would correct, to the extent possible, specific deficiencies and errors within their original canvases (NYSCEF Doc. 90). Brindisi stops short of requesting a full recanvass, however; in fact arguing that a full recanvass should not be ordered by the Court because it would further delay the final certification in this Congressional race, potentially depriving the

constituents of New York's 22nd Congressional District of representation in the House when the 117th Congress enters session on January 3, 2021 (NYSCEF Doc. 90).

In other words, Brindisi asks this Court to place expediency above the Boards' compliance with their statutory duties, if it becomes too time-consuming to determine who the actual winner is. The Court cannot do that. Again, the paramount role of the Court in this proceeding is to maintain public confidence in our electoral process by ensuring that all parties have complied with the Legislative mandates of the Election Law (*Gross*, 3 NY3d at 258). Similarly, Brindisi's requests that the Court impose additional procedures upon the Boards of Elections that are not found within the Election Law are also impermissible; no Court can modify the statutory procedures for how the Boards of Elections are to conduct their public duties (*see e.g. Mondello v Nassau County Bd. of Elections*, 6 AD3d 18, 22 [2d Dept 2004]).

VII.

Both candidates, of course, argue for relief that tactically presents the best option for their ultimate victory. However, the role of the Court is not to help one side, or the other, emerge as the winner. It is, instead, to enforce the law, ensure that every voter's right is safeguarded, and to maintain confidence in the electoral process (*Gross*, 3 NY3d at 258). Fundamentally, election integrity requires two things: uniformity and transparency (*Bush v Gore*, 531 US 9 [2000]). Accordingly, the only proper result here is to remand all of the challenged and uncanvassed ballots back to the Boards of Elections with specific orders directing the Boards to publicly correct their errors and fulfill their statutory duties by properly canvassing – or, where necessary, recanvassing – each and every single ballot, including properly recording every single challenge in New York's 22nd Congressional District race (*Testa*, 84 NY2d at 895-96; *Mondello*, 6 AD3d at 22).

This Court is without the authority to order that the Boards of Elections simply conduct their original canvasses over again (Election Law § 16-106; *but see* § 9-208 [effective 1/1/21]). Nonetheless, the right to vote means that every single valid vote must be counted. Correcting the errors of the Boards of Elections or, where they cannot be corrected, directing the recanvassing of those ballots, is the only way to accomplish this, no matter how time consuming it may be (Election Law § 16-106[4]; *Delgado*, 97 NY2d at 423). The Court's role is not to rewrite the law and make the canvassing process convenient, nor to reach an amicable resolution. Instead, the Court must make sure that all parties have complied with the plain and unambiguous mandates of the Election Law, so that the correct result is reached. It is more important that this election is decided right, than that it is decided right now.

Given the incredible number of uncanvassed affidavit ballots at issue in this proceeding, it is also especially important that the Boards be required to follow the statutory canvassing process. The active voter registration records maintained by New York's Boards of Elections are, by their very nature, flawed, and affidavit ballots are necessary to prevent the unconstitutional disenfranchisement of lawful, registered voters (*Common Cause*, 432 FSupp3d at 289-300). Despite this fact – which, again, several of the Boards were explicitly reminded of by the Fifth Judicial District Administrative Judge in advance of the election (NYSCEF Doc. 107-1) – the Oneida and Cortland County Boards of Elections (and perhaps others), failed to properly process hundreds of affidavit ballots. Specifically, those Boards never canvassed the affidavit ballots as expressly required under Election Law § 9-209 but, instead, administratively rejected them, and denied the campaigns an opportunity to object to the Boards' refusal to cast those ballots. By violating the express provisions of Election Law § 9-209(2)(d), the Boards denied the candidates the opportunity to advance and record their objections – including good faith

challenges to ministerial and clerical errors – and to preserve those objections for judicial review (*see e.g. Panio v Sunderland*, 14 AD3d 627 [2d Dept 2005]).

To be clear, what the Oneida County Board of Elections did – granting permission to the campaigns to separately sort through stacks containing 1,500 or more affidavit ballots that Board officials had summarily rejected – is not a canvass, and that process has no support in the Election Law. Additionally, the failure of the Cortland County Board of Elections to notify the campaigns of nearly 100 administratively rejected affidavit ballots is also without any basis or support in the Election Law. Accordingly, every uncanvassed affidavit ballot, along with every single other uncanvassed ballot in New York’s 22nd Congressional District – including those ballots previously found in drawers or mysteriously mislaid – must be uniformly and transparently canvassed in accordance with the procedure under Election Law § 9-209 to ensure the integrity of this election.

This Court shall continue to retain jurisdiction over this matter, to subsequently and immediately review any properly challenged ballots, and to ensure that the final result – whatever it may be – was reached in accordance with the statutory mandates of the Election Law, and that the rights of the voters are preserved.

VIII.

Accordingly, upon due deliberation, it is hereby

ORDERED that each Respondent Board of Elections shall immediately conduct a complete inspection of all areas under their control to ensure that every single submitted ballot has been accounted for and promptly report the results of their inspection to the Court and the candidates in a writing filed to the NYSCEF system; and it is further

ORDERED that each Respondent Board of Elections is to retrieve all envelopes and ballots currently held securely by the Court no later than 12:00 p.m. (noon) on Wednesday, December 9, 2020, and to thereafter safeguard those ballots in accordance with the provisions of the Election Law and the directives of this Court; and it is further

ORDERED that each Respondent Board of Elections shall correct all errors with regards to past objections and challenges to their envelopes and ballots and properly mark each and every previously challenged envelope and ballot in accordance with the prior orders of this Court and Election Law §§ 8-506 and 9-114; and where such errors cannot be corrected based upon maintained records, including digital images and scanned files, then the Board of Elections shall hold a proper canvass in accordance with the statutory procedures set forth in Election Law §§ 8-506, 9-114 and 9-209, upon due notice to the candidates on a schedule that has been approved by the Court so that it is not in conflict with any proceedings of the other Respondent Boards of Elections; and it is further

ORDERED that every single ballot that was not previously properly canvassed in accordance with Election Law § 9-209, including uncanvassed affidavit and early voting ballots, shall be properly canvassed by each respective Respondent Board of Elections, upon due notice to the candidates on a schedule that has been approved by the Court so that it is not in conflict with any proceedings of the other Respondent Boards of Elections; and it is further

ORDERED that if, during a Court ordered canvass or recanvass, a Board of Elections sustains an objection to an envelope containing an affidavit ballot and the ballot will not be counted, then the Board of Elections shall mark the challenged envelope in the same manner as prescribed in Election Law § 8-506 for the marking of absentee ballot envelopes; and it is further

ORDERED that if, during a Court ordered canvass or recanvass, a Board of Elections does not sustain an objection to an envelope containing an affidavit or absentee ballot, then that Board of Elections shall: (1) open each such envelope and make a photocopy of the ballot inside before canvassing that ballot; (2) place the photocopy of that ballot into the envelope, reseal the envelope, and endorse upon the envelope a notation indicating what the objection was, by whom it was made, and the Board's ruling; (3) canvass the ballot; and (4) secure and preserve the envelope and photocopy until further order of this Court; and it is further

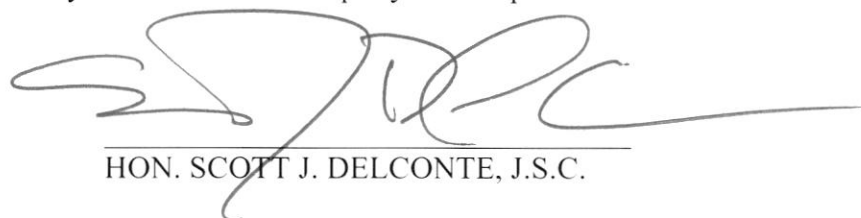
ORDERED that each Respondent Board of Elections shall correct all errors with regards to any failure to send notice of the right to cure as prescribed under Election Law § 9-209(3) and Executive Order 202.58, by sending a proper statutory notice and providing the voter an opportunity to cure; and it is further

ORDERED that Respondent Anthony Brindisi is granted leave to file counterclaims and crossclaims, *nunc pro tunc* to November 8, 2020, which will be deemed to have been timely filed and answered (NYSCEF Docs. 23 and 59); and it is further

ORDERED that the Court shall retain jurisdiction over this action, and a compliance conference for counsel only via Microsoft Teams is scheduled for Friday, December 18, 2020, at 1:00 p.m.; and it is further

ORDERED that any good faith claim by Petitioner Claudia Tenney or Respondent Anthony Brindisi that a Board of Elections is failing or refusing to comply with this Order shall be presented promptly to the Court by an attorney affiliated with that party via telephone call or email to the Court's Chambers.

Dated: December 8, 2020



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

ENTER.

PAPERS CONSIDERED

1. Order to Show Cause on Motion by Petitioner Claudia Tenney, entered December 2, 2020 (NYSCEF Doc. 91);
2. Affirmation by Attorney Paul DerOhannesian, II, affirmed December 2, 2020 (NYSCEF Doc. 86);
3. Affirmation in Opposition to Motion to Dismiss Counterclaim/ And Cross-claim by Attorney Martin E. Connor, affirmed December 3, 2020 (NYSCEF Doc. 94);
4. Order to Show Cause on Motion by Respondent Anthony Brindisi, entered December 2, 2020 (NYSCEF Doc. 92);
5. Affirmation in Support of Respondent Brindisi's Proposed Order to Show Cause by Attorney Martin E. Connor, affirmed December 2, 2020 (NYSCEF Doc. 89);
6. Affidavit of Christina Dutko and Joseph Bertoni, sworn to December 3, 2020 (NYSCEF Doc. 96);
7. Affidavit of Laura Costello and Mary Egger, sworn to December 4, 2020 (NYSCEF Doc. 98);
8. Affidavit in Response of Kim Tranter and Robert A. Drumm, sworn to December 4, 2020 (NYSCEF Doc. 101);
9. Affidavit of Laura J. Brazak and Carol M. Bickford, sworn to December 4, 2020 (NYSCEF Doc. 104);
10. Affirmation by Attorney Robert E. Pronteau, affirmed December 4, 2020 (NYSCEF Doc. 105); and
11. Affirmation by Attorney Peter J. DeWind, affirmed December 4, 2020 (NYSCEF Doc. 106).