

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE**

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In the matter of

PETER M. FORMAN,

Index No. EF _____-2020

Petitioner,

-against-

VERIFIED PETITION

DUTCHESS COUNTY BOARD OF ELECTIONS,
JESSICA SEGAL, Candidate for the County Court Judge
in Dutchess County,

Respondents.

For an ORDER, pursuant to §§ 16-102, 16-106, 16-112 and 16-113 of the Election Law, directing the preservation of all ballots cast in the General Election held on November 3, 2020, for the public office of County Court Judge in Dutchess County, and invoking the jurisdiction of the Court to rule upon the casting or canvassing or the refusal to cast or canvass any ballot as set forth in Election Law § 16-106(1), and preserving the rights of Petitioner under Articles Five, Six, Seven, Eight, Nine, Ten, Eleven and Sixteen of the Election Law and § 16-113 of the Election Law and any / all related sections of law; and, pursuant to § 16-100 of the Election Law, as well as Article 78 CPLR and CPLR § 3001, declaring Petitioner Candidate the lawfully elected candidate in this Election and ordering the certification of said Petitioner Candidate by Respondent Board of Election.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner Peter M. Forman, by his attorney, respectfully alleges as follows:

PARTIES

1. Petitioner Peter M. Forman is a candidate for County Court Judge in Dutchess County, New York in the November 2020 general election. Petitioner is the candidate for the Republican, Conservative, Independence and Libertarian political parties. Petitioner currently

sits as a County Court Judge in Dutchess County and has been a judge in Dutchess County since 2001.

2. Petitioner has standing to bring the instant proceeding under the Election Law.
3. The pertinent election area is Dutchess County.
4. Respondent Dutchess County Board of Elections, and the Commissioners of that Board, are responsible for the canvassing the returns of the elections from the various municipalities and other political subdivisions within Dutchess County, and further, are responsible for certifying the results of elections for the office of County Court Judge for Dutchess County, acting in their capacity as County Board of Canvassers. The Respondent Dutchess County Board of Elections, and the Commissioners of that Board, as part of their responsibilities are charged with conducting all of the post-election procedures and those mandated by their rules, so long as such rules are not violative or inconsistent with the law, the rights of the parties and the supervision of the courts over the exercise of such powers and responsibilities including canvassing, re-canvassing voting machine results, canvassing affidavit, absentee and military as well as special ballots, the compilation of the final tallies of the votes cast and the certification of the results of the election.

5. The Sheriff, Police Department and/or Department of Public Safety in each County and municipality of this state is charged by the Election Law and related statutes with maintaining order during the elections within the various counties and municipalities and preserving the integrity of the voting machines, the canvass sheets, the ballots cast and the memory sticks that are part of the computer process of recording the votes of the voters at this election and are further required to act upon request of the Board of Elections and order of this Court to assign officers to such tasks for the preserving the integrity of the voting machines, the

canvass sheets, the ballots cast and the memory sticks that are part of the computer process of recording the votes of the voters at this election.

6. Pursuant to the provisions of Article 9 of the Election Law, and other statutes, police agencies must respond to requests and orders for assistance in securing the election process by the Board of Elections and this Court. This Court has the inherent right to order the said Board of Elections to require the cooperation of the Sheriff, Police Department and/or Department of Public Safety in each County and municipality to preserve and protect the ballots in the subject election.

7. Respondent Jessica Segal is the Candidate for the public office of County Court Judge in Dutchess County of the Democratic, Green, Working Families and SAM political parties in the instant General Election.

8. This petition is made in order to preserve Petitioner's and the public's rights under the Election Law, including Election Law § 16-112 thereof, to preserve all voting materials, in the canvass and return as well as the re canvass of returns from the General Election of November 3, 2020 for the public office of County Court Judge in Dutchess County. Such voting materials include unopened and/or non-scanned ballots including emergency ballots, absentee ballots, applications for absentee ballots, special ballots and applications for such ballots, affidavit ballots and envelopes containing such ballots, special ballots and military ballots, machine breakdown reports, mechanic or custodian logs, election day affidavits, election day court orders, poll books, ballot stubs, spoiled ballots, voided or defective ballots, unused ballots and all copies of close of polls reports, all printed and electronic records and vote tallies, for the public office and relative to the public office of County Court Judge in Dutchess County; preserve inviolate and separate the ballots voted upon by the voters of Dutchess County for the

office of County Court Judge in Dutchess County, from all others, and that such listed items be preserved, separated and held under a security system requiring bipartisan participation in order to access such material by the use of a two lock system with a Commissioner of each party having the key to only one lock of the storage facility in which election materials and ballots and other materials, and further together with court review of the canvass, recanvass and/or audit of the electronic voting machines, ballot marking devices and or ballot scanners and the direction of an expanded audit and if so determined an audit pursuant to Election Law § 16-113 and also to allow for comprehensive review of the matters under the jurisdiction of this Court.

JURISDICTION

9. This proceeding is commenced pursuant to the provisions of Articles Five, Six, Seven, Eight, Ten, Eleven, Nine and Sixteen of the Election Law, Sections 16-100, 16-106, 16-112, 16-113, 16-116 Election Law, and Article 78 of the Civil Practice Law and Rules, which confer authority upon this Court to determine and receive any disputes arising out of or relating to the canvass, re canvass of ballots and returns as well as the handling of memory sticks and to preserve the ballots, including challenged ballots, the machines and the memory sticks employed in the General Election for the public office of County Court Judge in Dutchess County.

10. Further, to the extent that it becomes relevant, application is made pursuant to the provisions of CPLR § 3001 for a declaratory judgment of the Court declaring any statute, rule or executive order of the State of New York, or of the Respondent Board of Elections as being invalid under the laws of the State of New York and/or unconstitutional under the provisions of the New York State Constitution.

VENUE

11. Venue is proper pursuant to CLPR § 506(a)-(b) because this is a special

proceeding against a public body or officer that is in the same judicial district. Election Law § 16-112 provides for a proceeding for the examination or preservation of ballots in “[t]he supreme court, by a justice within the judicial district.”

12. While there is normally a preference for trying actions in the county concerned (Dutchess), Petitioner is a sitting judge in Dutchess County, and it is nearly certain that all Justices and Acting Justices of the Dutchess County Supreme Court would recuse themselves, resulting in a transfer of this case to another Supreme Court in the Ninth Judicial District. Thus, we have filed this matter in the Supreme Court of Orange County in order to expedite the issuance of an Order to Show Cause.

THE REASON FOR THIS ACTION

13. Due to the COVID-19 state of emergency, and changes to the laws of the State of New York, this Election already has an unprecedented number of paper ballots being cast, many of which are being sent via the mail (which are being received after the date of the election).

14. 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.

15. This influx of mailed and other paper ballots necessarily means that the outcomes of many elections in this State were not determined by the election night canvass.

16. The current state of affairs and the facts surrounding this election require that this Court use its powers under Election Law § 16-112 to preserve the ballots and election materials related thereto so that any contest related thereto, and any administrative determination of the Respondent Board of Elections may be heard and reviewed by this Court.

17. Upon information and belief, several Board of Elections are planning to alter canvassing processes so as to reduce or eliminate poll watchers from having meaningful and effective access to election materials and ballots so they might make objections to absentee, military, special, affidavit, or federal ballots.

18. Upon information and belief, the abbreviation of ordinary and statutorily required canvassing procedures may include an elimination of the recording and preservation of records of objections, depriving Petitioner of due process and depriving this Court of the ability to review board Actions.

19. New procedures for “cures” for defective ballot envelopes may adversely affect Petitioner’s rights under the Election law and related laws. This Court is required to order full disclosure of the “cure” process so as to protect Petitioner’s rights and allow for the Court to review Board actions.

20. New procedures for the Board of Elections to review signatures on ballot envelopes and related documents are in place for the first time in New York’s history.

21. The State Constitution and the Election Law require identification of each voter by signature. The judgment that a signature on an application, ballot envelope or affidavit is within the exclusive jurisdiction of this Court.

22. Upon information and belief, the Respondent Board may or will make errors in its determinations as to cures and the authenticity of signatures. Such matters are properly before this Court for review. Further, the Respondent Board must be ordered to preserve and produce the records relating to such processes.

23. Any determinations as to signatures must, therefore, come before this Court for review where there is an objection made at the Board.

24. Further, upon information and belief, predicated upon news reports and reports of polls and the like, the outcome of this election appears to be very close.

25. Upon information and belief, certain Boards of Elections are requiring the filing of objections in advance. The Boards, in turn, are providing copies of all relevant documents (on paper or electronically) to the candidates before the canvass proceeds.

26. In any event, this Court should order the advance production of relevant election materials to the Petitioner so that the canvass can proceed expeditiously, and Petitioner can adequately prepare for the canvass.

27. Based on past experience, and on information and belief, when the outcome appears to be very close the result of an election will hinge upon the re-canvass of voting machines, the condition and reliability of the memory sticks, and the canvass of paper ballots including emergency, affidavit, absentee and military as well as special ballots.

28. Numerous paper ballots, electronic records of votes remain uncanvassed, and the canvass of such ballots will determine the outcome of this election.

29. Upon information and belief, the unofficial canvass of the votes cast by voting machines, the ballots, scanners, “sticks” or flash drives (the electronic record of voting similar to USB port devices), and ballot stubs for or computer records for “on demand” ballots for the subject public office is incomplete and or inaccurate.

30. Upon information and belief, several of the machines used in this election may have been defective, which would have resulted in inaccurate tallies of votes, and additionally other irregularities in the election process may give rise to improper votes being canvassed or the canvass of inaccurate returns.

31. The machines employed in this election are computer operated optical scan machines which are notoriously insecure; may not have been fully or properly tested for a General Election; create issues concerning over-voting; raise privacy and security issues; and are prone to “hacking” and other fraudulent attacks which can compromise the results of an election.

32. In addition, the programming of the machines used in this election provides for the canvass and counting of ballots that are otherwise invalid under the terms of the Election Law and the body of case law in New York State.

33. The programming of the machines used in this election fails to provide for the canvass and counting of ballots that are otherwise valid under the terms of the Election Law and the body of case law in New York State.

34. Upon information and belief, the numbers of improper and invalid ballots that were counted and canvassed by the respondent Board of Elections’ computerized voting equipment are significant and will influence the final results of the election, hence the Petitioner requests information necessary to review same.

35. Upon information and belief, there are several “affidavit ballots” which have not yet been reviewed or canvassed by the Respondent Board of Elections. Recent changes in the law require that these affidavit ballots be checked against a statewide database before they can be considered for canvassing.

36. Upon information and belief, there are several “absentee ballots” and “military ballots” which have not yet been fully reviewed or canvassed by the Respondent Board of Elections.

37. Further, upon information and belief, many of these ballots are yet to be received by the Respondent Board. Properly post marked absentee ballots may be received by Respondent

Board of Elections for canvassing until seven days after the election, Election Law § 8-412(2), and military ballots may be received as late as ten days after the election.

38. Accordingly, the Petitioner has requested an order of this Court preserving such ballots until the canvass and re-canvass of paper ballots is conducted by the Board.

39. Upon information and belief, Respondent Board of Elections, acting by local Boards of Inspectors, in canvassing these ballots may have tie votes, may be unable to determine the validity of individual ballots, may exceed the ministerial powers delegated to the Board of Elections (and enter into the area reserved by the Legislature for judicial review), or may err in determining the invalidity of individual ballots.

40. Upon information and belief, the time required for the canvass of these ballots will exceed the 3 day preservation period provided for in Election Law § 9-209. This is particularly true here as the number of absentee ballots has grown exponentially due to the changes in the law and the COVID-19 health emergency.

41. Upon information and belief, the facts alleged in the paragraphs hereinabove, point to the fact that the final results of this election hinges upon the canvass of the various types of paper ballots mentioned hereinabove, as well as a review of the canvass of the machine cast ballots, voting machines, ballots, scanners, “sticks” or flash drives (the electronic record of voting similar to USB port devices), the ballot images, and ballot stubs, and the audit of the voting machines as well as the review of the paper ballots contained in said machines (or otherwise preserved).

42. Finally, the Legislature, the New York State Board of Elections and the Governor have all made recent changes to the Election Law in the form of new legislation, regulations, directives and executive orders. Upon information and belief, some of these changes may violate

Article II of the New York State Constitution or may be found to have resulted in the casting of ballots that violate Article II of the New York State Constitution.

43. Petitioner is aware of one action in which a court has taken jurisdiction over some of the ballots at issue here. Specifically, the matter *Astorino v. New York State Board of Elections, et al.*, Index No. 63957/2020 (Sup. Ct., Westchester Co. filed Nov. 2, 2020), concerns the 40th Senate District, which includes 2 towns of the 20 towns and 2 cities that comprise Dutchess County. Petitioner filed a notice of motion to intervene on short notice, which that court denied because of the short notice. Thus, the only viable means to expeditiously invoke a court's jurisdiction and obtain an Order to Show Cause is to commence a new action.

44. Should there not be any impoundment order entered with regard to races statewide or such an overarching order be withdrawn or vacated prior to this Court taking jurisdiction of this matter, there will be no protection of the machines and paper ballots in the subject state senate district. Such a situation would present a lapse in security for the electoral process in this senate district and leave the election returns vulnerable to fraud.

45. Any lapse in security or breach of protective measures for the voting machines, ballots, scanners, "sticks" or flash drives (the electronic record of voting similar to USB port devices), and ballot stubs relating to the election for state senator in the subject state senate district would irreparably harm Petitioner, and, indeed, undermine public confidence in the electoral process.

46. Petitioner requests leave to, and reserves the right to submit further proofs by way of witnesses, affidavits, and evidence upon the date set by this Court for the trial and hearing of this matter, and to amend these pleadings to reflect the facts adduced by way of further

investigation and/or a canvass of the ballots for election to the subject public office by the Board of Elections.

47. This action is being brought via e-filing which was authorized for Elections Matters in 2020 by the Chief Administrative Judge of the Courts of New York. The immediate attention of the Court to the Order to Show Cause submitted herewith is required so as to ensure preservation of the ballots and the election materials.

48. This proceeding is commenced pursuant to the provisions of Article Five, Six, Seven, Eight, Ten, Eleven, Nine and Sixteen of the Election Law, and related statutory provisions, which confers authority upon this Court to preserve the ballots and voting materials, and to determine and resolve any disputes arising out of or relating to the canvass of ballots and returns for public office.

49. Anticipatorily, Petitioner respectfully brings this matter before the Court under CPLR §§ 3001, 7801, 7803, to the extent that the facts adduced require application relief under any one or more said provisions of law.

50. In order to assure that the ballots and voting machines in the subject political subdivision(s) are immediately protected, and that every step is taken to prevent tampering and fraud, it is respectfully submitted that service of the within requested order must be made as soon as possible. This would require service prior to the filing of these papers and application for an index number and RJI.

51. In the event necessary, further application is made to this Court, pursuant to CPLR § 304, for commencement of this proceeding by the signing of the Order (before it is posted with NYSCEF) and for leave to serve a copy of the within order and papers upon the

parties hereto, or to provide notice of the Index Number and RJ number to the parties hereto, subsequent to the filing, purchase, and posting with NYSCEF thereof.

52. It is respectfully submitted that the circumstances described herein present this Court with an emergency situation requiring immediate action, and further that the very nature of an election proceeding, particularly with regard to ballot integrity, presents an exemption to any rule which might bar the Court's action in other circumstances. *See Banko v. Weber*, 9 A.D.2d 720 (4th Dep't), *aff'd*, 7 N.Y.2d 758 (1959).

53. If this action is assigned to the Justice of the Court assigned by the Office of Court Administration and the Administrative Judge of this Judicial District for signature, the matter should remain with such Justice as the IAS judge, as he / she has supervised matters referred to the Supreme Court in the subject election. The proposed order so requests that the Election Part Justice retain this case.

54. 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 proceedings are finally resolved and determined. Absent such injunction Petitioner will 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.

55. The Board of Elections is required by law to re-canvass the returns within 15 days from the date of the General Election pursuant to Election Law § 9-208. The request for said

injunction as to certification is requested only to protect the rights of the Petitioner in the event of delay in the conclusion of all administrative and court proceedings extending beyond 15 days.

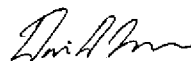
56. The temporary restraining order (“TRO”) requested herein will not prejudice any party’s rights, but rather, will serve to allow for an orderly review of the process by this Court and insure the integrity of the election process.

WHEREFORE, Petitioner respectfully demands:

- (i) 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
- (ii) An order of this Court in the first instance that the Respondent Dutchess County Board of Elections be temporarily enjoined and restrained from certifying any candidate other than the Petitioner, Peter M. Forman, as the candidate duly elected to the office of County Court Judge in Dutchess County, and
- (iii) The preservation of ballots and elections materials (including any ballots cast and canvassed at the offices of the Dutchess County Board of Elections on Election night as specified herein) so as to assure the review of same by the Courts of this state, and
- (iv) A judgment of this Court correcting, adjusting and finalizing the canvass of returns for the General Election for election to the office of County Court Judge in Dutchess County and further declaring that the Respondent Dutchess County Board of Elections certify the name of Petitioner, Peter M. Forman, as the candidate duly elected to the said public office, together

with the relief requested in the attached Order to Show Cause, and such other, further, and different relief that this Court may deem to be just and proper.

Dated: Beacon, New York
10 November 2020



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