

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

DOREY HOULE,

Petitioner

-against-

THE NEW YORK STATE BOARD OF ELECTIONS,
THE ORANGE COUNTY BOARD OF ELECTIONS, and
JAMES SKOUFIS,

Respondents.

Index No. EF006424-2022

Hon. Craig Stephen Brown,
A.J.S.C.

[PROPOSED] AMICUS CURIAE BRIEF OF REPRESENTATIVE PATRICK RYAN

Representative Patrick Ryan, a candidate for Congress for New York's 18th Congressional District, hereby submits this amicus curiae brief in opposition to the relief requested in the Verified Petition in the above-captioned matter, and in support of the New York State Board of Elections' motion to vacate the temporary restraining order (TRO) provisions of the Order to Show Cause signed by the Court in this matter on November 11, 2022.

This Court should promptly grant the State Board of Elections' motion to vacate because there is no legal basis in the New York Election Law for granting the broad relief Petitioners seek. At this point, the Orange County Board of Elections is not canvassing any ballots because the Court's Order required the immediate impoundment of all election machinery. Unless and until the Order granting the TRO is vacated, the Orange County Board of Elections will not be able to complete its work of timely certifying the County's election results, which could impair Representative Ryan's ability to timely have his re-election certified.

INTERESTS OF AMICUS CURIAE

Representative Ryan is a candidate for election to represent New York's 18th Congressional District in the United States House of Representatives.¹ Representative Ryan holds a lead of more than one thousand votes over his opponent, Colin Schmitt. On Friday, November 11, multiple media organizations including the Associated Press called the race for Representative Ryan.² Representative Ryan's victory cannot be certified until all county boards of elections have transmitted results to the State Board of Elections. *See* N.Y. Elec. 9-214, 9-216.

Since the Court signed the Order to Show Cause including the TRO provisions in this matter, the machinery of the electoral process in Orange County has ground to a halt. The Orange County Board of Elections cannot complete its canvass of the ballots and cannot certify election results, including Representative Ryan's re-election to the House of Representatives. Representative Ryan therefore seeks to file this brief as amicus curiae to ensure that the canvass and certification of results proceed in accordance with the Election Law.

BACKGROUND

Petitioner Dorey Houle, a candidate for State Senate for the 42nd Senate District, commenced this action by Order to Show Cause with a Verified Petition on November 10, 2022. This Court signed the Order to Show Cause on November 11, 2022, and ordered sweeping preliminary relief, including by directing the Orange County Board of Elections "not to proceed with any scheduled canvass/ recanvass proceedings" and enjoining certification of results in the

¹ Representative Ryan currently represents New York's 19th Congressional District.

² *See, e.g., New York 18th Congressional District Election Results*, New York Times (Nov. 14, 2022), <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-new-york-us-house-district-18.html>;

Democrat Pat Ryan Wins Reelection to U.S. House in New York's 18th Congressional District, Associated Press (Nov. 11, 2022), <https://www.usnews.com/news/best-states/new-york/articles/2022-11-11/democrat-pat-ryan-wins-reelection-to-u-s-house-in-new-yorks-18th-congressional-district>.

42nd Senate District. On November 14, the Democratic Commissioners on the New York State Board of Elections filed an affirmation and memorandum of law seeking vacatur of the interim relief on various grounds, including that Petitioner failed to follow the required procedure for initiating a suit for injunctive relief against the Board of Elections. *See* NYSECF Doc. 4, 5. On November 15, the Democratic Commissioners filed a proposed Order to Show Cause seeking vacatur of the interim relief for the reasons described in their affirmation and memorandum of law. The Court has not taken any action on the Democratic Commissioners' proposed Order to Show Cause.

ARGUMENT

The TRO should be vacated, and the Verified Petition dismissed, for three independent reasons. First, the Election Law specifies the narrow circumstances under which ballot decisions made by the Board of Elections may be challenged and subject to judicial review, and the sweeping relief Petitioner seeks is not available under the Election Law and therefore is beyond this Court's power to grant. Second, Petitioner's implied challenge to the constitutionality of the Election Law—including specifically the provisions of Section 9-209 governing the canvassing of absentee, special, military, and affidavit ballots—is foreclosed by *stare decisis* because Appellate Division, Third Department already has held such challenges barred by laches (in an action in which counsel for Petitioner participated). *Amedure v. New York*, --- N.Y.S. 3d ---, 2022 WL 16568516 [3d Dep't 2022]. Earlier today, another Court dismissed a near-identical petition for relief filed by Petitioner's counsel in the 50th Senate District on those grounds. Third, the TRO (and Petitioner's proposed relief) will unnecessarily delay the certification of elections for offices other than State Senate for the 42nd Senate District, including Proposed Amicus's election.

I. The Election Law does not allow for the sweeping judicial review sought by Petitioner.

The Order to Show Cause presented by Petitioner and signed by the Court has, without any statutory or constitutional authority, halted the ongoing canvassing of ballots in *all* elections in Orange County, including the election for Representative from the 18th Congressional District. Moreover, there is no authority in the Election Law or any other statute for this Court to issue the ultimate relief sought in the Verified Petition—a Court order “determining the accuracy” of the Board of Elections’ canvass of ballots.

The Court of Appeals has long held that “[a]ny action Supreme Court takes with respect to a general election challenge must find authorization in the express provisions of the Election Law.” *Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002) (quotations and alteration omitted). “It is well settled that a court’s jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute.” *N.Y. State Comm. Of Indep. v. N.Y. State Bd. of Elections*, 928 N.Y.S.2d 399, 402 [3d Dep’t 2011] (quotations omitted). Petitioner has not identified any authority for the sweeping relief she seeks. She instead gestures at various and sundry provisions of the Election Law, without explaining how any of them apply here. They do not.

At the outset, nothing in the Election Law authorizes the Court’s intervention to halt the ongoing canvassing of absentee ballots. Instead, the Election Law expressly mandates that courts “shall ensure the strict and uniform application of the election law and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter but may direct a recanvass or the correction of an error, or the performance of any duty imposed by this chapter” N.Y. Elec. Law § 16-106[4]. Under Section 9-209, the *Board of Elections*, upon five days’ notice to all candidates and political parties, must set the date for the post-election canvass of affidavit ballots along with absentee, military and special ballots previously held invalid. *Id.*

§ 9-209[7][a]; [8][a]. Nothing in the Election Law authorizes the Court to seize control of the canvass and block the Board of Elections from carrying out its statutory duty to canvass outstanding votes. *People for Ferrer v. Bd. of Elections of the City of N.Y.*, 286 A.D.2d 783, 783-84 [2d Dep't 2001] (Supreme Court “had no authority to modify the statutory procedures set forth in [Election Law § 9-209] for the judicial review of ballots challenged by a candidate or his or her representative. Nor did it have the authority to vary the statutory procedure set forth in [§ 8-302] governing the canvassing of affidavit ballots.” (citation omitted)).

Petitioner also incorrectly relies upon Section 16-112. Section 16-112 provides that “[t]he supreme court, by a justice within the judicial district . . . may direct . . . the preservation of any *ballots in view of a prospective contest*, upon such conditions as may be proper.” (emphasis added). Section 16-112 serves an exceedingly limited purpose. It allows courts to “preserve for judicial review those paper ballots which are counted over an objection by a candidate or her representative.” *King v. Smith*, 308 A.D.2d 556, 557 [2d Dep't 2003]; *see also O'Keefe v. Gentile*, 1 Misc. 3d 151, 154 757 N.Y.S.2d 689, 691 [Sup. Ct., Kings Cnty. 2003] (“Under these circumstances, the court finds it appropriate to take steps to preserve the challenged ballots for an effective judicial review of the board of inspectors’ determination.” (emphasis added)). By its plain terms and as traditionally understood by New York courts, the statute contemplates that a court may preserve *particular ballots* that have been challenged so that the court may later adjudicate those specific objections. It does not authorize the court to issue a blanket injunction halting the ongoing canvassing process in its entirety. Nor does it authorize the wholesale impoundment of the County’s entire election machinery, including “memory devices,” “Voting Machines,” “notes,” “memos,” “records,” or any other so-called “Voting Material.” Order to Show Cause at 2-3.

Moreover, the ultimate relief sought in the Verified Petition—a judicial order “determining the accuracy” of the Board of Elections’ canvass of votes—is not available under the Election Law. Chapter 763 of the Laws of 2021 substantially amended key provisions of the Election Law, including §§ 9-209 and 16-106. As amended, Section 9-209 allows candidates or their representatives to object only to “the board of elections’ determination that a[n affidavit or absentee] ballot is *invalid*.” N.Y. Elec. Law § 9-209[7][j] (affidavit ballots), [8][e] (absentee, military, and special ballots) (emphasis added). The law no longer allows candidates to seek judicial review the counting of an absentee or affidavit ballot deemed valid by the Board of Elections. *See* N.Y. Elec. Law §§ 9-209[7][j], [8][e] (“In no event may a court order a ballot that has been counted to be uncounted.”). And here, Petitioner asks this Court to exercise plenary review of the Board of Elections’ canvassing decisions in contravention of the express command of the Election Law.

II. Petitioner’s request for relief is foreclosed by stare decisis.

Petitioner fails to acknowledge that the relief she requests is foreclosed by a recent Appellate Division decision rejecting the very same constitutional challenges raised here. In *Amedure v. New York*, a State Senate candidate (along with various Republican entities) challenged the constitutionality of the revised Section 9-209, arguing that the streamlined canvass process created by the Legislature deprived candidates and third parties of a purported right to challenge absentee ballots. 2022 N.Y. Slip. Op. 22326, 2022 WL 14731190. After Supreme Court, Saratoga County (Freestone, J.) granted the requested relief—which included preservation of ballots on terms nearly identical to those sought here—Appellate Division, Third Department vacated her orders in their entirety, holding that the last-minute lawsuit was barred by the equitable doctrine of laches. *Amedure v. New York*, --- N.Y.S. 3d ---, 2022 WL 16568516 [3d Dep’t 2022]. In so holding, Appellate Division noted that “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,” including because “absentee ballots that have already been returned were canvassed under the new process, while any ballots returned going forward could not be similarly canvassed,” constituting “disparate treatment [that] cannot be countenanced.”

Appellate Division, Third Department’s decision in *Amedure* bars Petitioner from challenging the constitutionality of the revised canvassing procedures under the doctrine of *stare decisis*. See *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 [2d Dep’t 1984] (“[T]he doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.”). Supreme Court, Onondaga County (DelConte, J.) recognized the preclusive effect of *Amedure* in a well-reasoned opinion and order issued earlier today rejecting a materially identical suit brought by a candidate for the 50th Senate District (represented by the same counsel as represents Petitioner here). See NYSECF Doc. 8. This Court should promptly do the same.

III. The Petition should be promptly dismissed to avoid any potential delay in certification of other races on the challenged ballots.

Petitioner seeks relief only with respect to the election for the 42nd Senate District, but the preservation of all ballots and prohibition on proceeding with the canvass ordered by the TRO necessarily impact other elections—including Representative Ryan’s election to the U.S. House of Representatives. There is no legal basis under the Election Law for this Court to order preservation and review of ballots (with the limited exception of ballots that have been ruled invalid by a unanimous vote of the Board of Elections), and any constitutional challenge to the Election Law is barred by *stare decisis*. The ultimate result therefore is clear: the petition must be dismissed. Maintaining the TRO during the pendency of these proceedings causes prejudice to

non-parties such as Proposed Amicus and other candidates on the same ballot as the candidates for the 42nd Senate District, because their races cannot be completed and certified while the TRO remains in effect. Proposed Amicus therefore urges the Court to vacate the TRO and act expeditiously in resolving this action so that the electoral process may proceed as required by law.

CONCLUSION

For the reasons set forth above, the TRO in this matter should be vacated and the Petition should be dismissed in its entirety.

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Respectfully submitted,

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**Pro hac vice application forthcoming*