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.

SUPPLEMENTAL[1] AMICUS CURIAE BRIEF OF REPRESENTATIVE PATRICK RYAN

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Representative Patrick Ryan, a candidate for Congress for New York's 18th Congressional District, hereby submits this supplemental 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 as modified by order of the Court on November 16, 2022 (the "November 16 Order").

This Court should promptly dismiss the Petition and vacate the remaining portions of the TRO because neither the TRO nor the ultimate relief Petitioner seeks has any basis in the New York Election Law in direct contradiction to the Court of Appeals' command that: "[a]ny action

[1] Representative Ryan moved on November 15 by Order to Show Cause for leave to file a proposed amicus brief. The Court signed Representative Ryan's proposed Order to Show Cause, with modifications, on November 16. Doc. 19. Representative Ryan interprets the Order to mean that his amicus brief should be filed on November 18. After a hearing on November 16, the Court issued a Decision and Order, Doc. 18, substantially modifying the TRO previously entered in this matter, thereby obviating significant portions of Representative Ryan's proposed amicus brief. Accordingly, Representative Ryan has designated this brief, which is more specifically addressed to the issues left outstanding after the November 16 hearing in this matter, as "supplemental."

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) (cleaned up). The TRO as amended by the November 16 Order enjoins the Orange County Board of Elections (the "Board") from certifying the results of the election for the 42nd Senate District and requires the Board to record and maintain all objections made by the parties' attorneys to affidavit ballots. Unless and until the remaining TRO provisions are vacated, the Board will not be able to complete its work of certifying the County's election results, which would impair the timely certification of Representative Ryan's reelection. Furthermore, the preservation procedure contemplated by the November 16 Order runs headlong into the Equal Protection Clause of the U.S. Constitution by ensuring that ballots cast in Representative Ryan's race for Congressional District 18 will be canvassed different depending upon the county of the voter's residence.

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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.[2] The 18th Congressional District encompasses both Orange County and portions of Dutchess and Ulster Counties. 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.[3] Representative Ryan's victory cannot be certified until

[2] Representative Ryan currently represents New York's 19th Congressional District.

[3] *See, e.g.*, *New York 18th Congressional District Election Results*, N.Y. Times (Nov. 17, 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.

all county boards of elections have transmitted results to the State Board of Elections. *See* N.Y. Elec. Law §§ 9-214, 9-216.

Representative Ryan submitted an initial proposed amicus brief on November 15 explaining why the Court should vacate the November 11 TRO and dismiss the Petition. Representative Ryan now submits this supplemental proposed amicus brief to urge the Court to vacate the remaining provisions of the TRO as amended by the November 16 Order and to reject the merits of the Petition as it relates to affidavit ballots because the affidavit ballot canvassing procedure envisioned by the November 16 Order has no basis in the New York Election Law and violates the United States Constitution.

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Representative Ryan is uniquely positioned to present the federal constitutional issues raised by Petitioner's requested relief and the TRO. Representative Ryan has an interest in ensuring that the canvass and certification of election results proceed in a timely manner, in accordance with the Election Law. Petitioner's requested relief and the remaining portions of the TRO jeopardize the orderly and timely certification of election results by the Board. Petitioner seeks to impose a layer of judicial review that is explicitly prohibited by state law. The Court has already enjoined the Board from certifying election results. Should it grant Petitioner's requested relief, it would require that affidavit ballots cast in Orange County are subject to different canvassing and review procedures than those governing affidavit ballots cast in other New York counties, including the two other counties that comprise the 18th Congressional District. This would not only further delay canvass of the ballots and certification of election results, including Representative Ryan's reelection to Congress, it would also violate the U.S. Constitution's Equal Protection Clause.

BACKGROUND

Petitioner Dorey Houle, a candidate for State Senate for the 42nd Senate District, commenced this action by an 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 Board "not to proceed with any scheduled canvass/recanvass proceedings" and enjoining certification of results in the 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 Docs. 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.

Also on November 15, Representative Ryan moved for leave to file a proposed amicus brief in support of the Democratic Commissioners' motion and in opposition to the Petition. The Court granted that leave on November 16.

Following oral argument on November 16, the Court entered a Decision and Order vacating portions of the interim relief but leaving in place the provision barring the Orange County Board of Elections from certifying the results of the election for the 42nd Senate District. The November 16 Order also included a new interim provision requiring the Board to "preserve" any objections from the parties' attorneys during the canvass of affidavit ballots, currently scheduled for November 28. The Court further ordered parties to submit briefs by today, November 18.

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ARGUMENT

The Verified Petition should be dismissed and the TRO should be vacated. First, the Election Law specifies the narrow circumstances under which ballot decisions made by board of elections may be challenged and subject to judicial review. The provision of relief contemplated in the November 16 Order related to the preservation of objections to affidavit ballots would insert a step into the canvassing procedure that has no authority in the Election Law. Second, Petitioner's

implied challenge to the constitutionality of Chapter 763 of the Laws of 2021 ("Chapter 763")—which, among other things, amended the canvassing procedure for affidavit ballots—is foreclosed by stare decisis because the Appellate Division, Third Department already has held such challenges are 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). Another court recently dismissed a near-identical petition for relief filed by Petitioner's counsel in the 50th Senate District on those grounds. Third, the TRO entered by this Court violates the Equal Protection Clause of the United States Constitution by treating ballots differently depending solely on the county where the voter lives. Fourth and finally, 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 Representative Ryan's reelection.

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I. The Election Law does not allow for judicial review of counted affidavit ballots.

"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) (cleaned up). Thus, the Court of Appeals has been clear 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*, 97 N.Y.2d at 421. The November 16 Order went beyond that legal authority, applying requirements that do not exist in the Election Law, and assuming authority that the law does not confer. The November 16 Order must therefore be vacated.

Section 9-209(7) of the Election Law governs the canvass of affidavit ballots. Under that section, "[w]ithin four business days of the election, the board of elections shall review all affidavit ballots cast in the election." N.Y. Elec. Law § 9-209(7)(a). Upon review of an affidavit ballot, "[i]f the central board of canvassers determines that a person was entitled to vote at such election it

shall cast and canvass such affidavit ballot." *Id.* (emphasis added). Section 9-209(7)(a) is mandatory. *See Nat. Res. Def. Council, Inc. v. N.Y.C. Dep't of Sanitation*, 83 N.Y.2d 215, 220 (1994) ("The use of the verb 'shall' throughout the pertinent provisions illustrates the mandatory nature of the duties contained therein."). If the Board determines that the person who cast the affidavit ballot was entitled to vote at the election, and has not already voted absentee, then the Board *must* count and canvass that ballot, notwithstanding any objections made by candidates or their lawyers.

If the Board "determines that an affidavit ballot is invalid due to a missing signature on the affidavit ballot envelope, or because the signature on the affidavit ballot envelope does not correspond to the registration signature, such ballots *shall* be subject to the cure procedure in subdivision three [of Section 9-209]." N.Y. Elec. Law § 9-209(7)(i) (emphasis added). Section 9-209(3), in turn, outlines a detailed procedure through which a voter may cure certain defects to have their ballot counted. It requires the Board to notify the voter of the deficiency and how to correct it. *Id.* § 9-209(3)(c). The Election Law then provides the voter with seven days to cure the defect "by filing a duly signed affirmation attesting to" the required information. *Id.* § 9-209(d), (e). The Board must then determine whether the affirmation addresses the curable defect. "If the board of elections is split as to the sufficiency of the cure affirmation, [the affidavit ballot] *shall* be prepared for canvassing." *Id.* § 9-209(e) (emphasis added). This procedure is, again, mandatory.

Finally, upon five days' notice to the candidates and political parties, the Board must hold a meeting to review those affidavit ballots (along with absentee ballots) that the Board has rejected as invalid. *Id.* § 9-209(7)(j), (8)(a) & (b). At that meeting, each candidate "shall be entitled to object to the board of elections' determination that an affidavit ballot is *invalid*." *Id.* § 9-209(7)(j)

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(emphasis added). Such objections are then preserved for judicial review. *Id.* But "in no event may a court order a ballot that has been counted to be uncounted." *Id.*

Thus, as amended by Chapter 763, the Election Law allows candidates or their representatives to object only to the Board's decision *not* to count an affidavit ballot. It does not allow candidates to object to the Board's decision to *count* an affidavit ballot, or to seek judicial review of that decision.

But that is precisely what the November 16 Order requires, in directing the Board to "record, preserve, and maintain *all* objections made by the parties' attorneys with respect to affidavit ballots and that a full record of any split votes of the two Commissioners (or their designees) be preserved for a potential review by this Court." Doc. 18 (emphasis added).

Nothing in the Election Law authorized the Court to insert this step into the affidavit ballot canvassing procedure. 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); *see also People for Ferrer v. Bd. of Elections*, 286 A.D.2d 783, 783–84 (2d Dep't 2001) ("The Supreme Court had no authority to modify the statutory procedure . . . 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 . . . governing the canvassing of affidavit ballots." (citation omitted)). The Legislature enacted Chapter 763 in part to "promote quicker election results" by "prohibit[ing] a court from changing the process for canvassing ballots, a common occurrence during litigation

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that delays election results."[4] The November 16 Order improperly displaces that clear legislative command by altering the canvassing process for absentee ballots and re-inserting a challenge procedure that the Legislature expressly eliminated.

Finally, Petitioner has incorrectly suggested that Section 16-112 of the Election Law authorizes the Court to "preserve" any objections to affidavit ballots. Not so. 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." Under prior law, Section 16-112 allowed 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."). Under the law as amended by Chapter 763, however, the only "objections" that may be heard by this Court are objections to the Board's decision *not* to count an affidavit ballot. N.Y. Elec. Law § 9-209(7)(j). Section 16-112 is a procedural mechanism. It does not allow the Court to circumvent the reforms of Chapter 763 by ordering the preservation of objections that, under those reforms, are not subject to judicial review.

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II. Petitioner's constitutional arguments are foreclosed by stare decisis.

Petitioner has hinted that this Court is not bound by the provisions of Chapter 763 because she believes that Chapter 763 is unconstitutional. She fails to acknowledge that her constitutional challenge is foreclosed by a recent Appellate Division decision. In *Amedure v. New York*, a State

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[4] *Memorandum in Support of Legislation*, N.Y. State Assembly, https://nyassembly.gov/leg/?leg_video=&bn=7931&term=2021&Summary=Y&Memo=Y (last visited Nov. 17, 2022).

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 (Sup. Ct., Saratoga Cnty. Oct. 21, 2022) (Freestone, J.). After the Supreme Court of Saratoga County granted the requested relief—which included preservation of ballots on terms nearly identical to those sought here—the Third Department vacated Justice Freestone's order in its 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 Nov. 1, 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." *Id.* at *3.[5]

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The 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."). The Supreme Court of Onondaga County (DelConte, J.) recognized the preclusive effect

[5] Although the Third Department's decision in *Amedure* was focused on the ongoing preelection processing of absentee ballots, the plaintiffs in that matter challenged Chapter 763 in its entirety—including its revisions to the affidavit ballot canvassing procedure. The Supreme Court granted that relief, and the Third Department reversed the decision and dismissed the petition in its entirety.

of *Amedure* in a well-reasoned opinion and order issued earlier this week, 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 Court's ordered relief runs afoul of the United States Constitution and cannot stand.

In addition to clearly violating the Election Law, the Court's ordered relief also runs headlong into the Fourteenth Amendment to the United States Constitution, violating the Equal Protection Clause in a manner squarely foreclosed by the United States Supreme Court.

In *Bush v. Gore*, the United States Supreme Court considered "whether the use of standardless manual recounts" by some—*but not all*—Florida counties in the aftermath of the 2000 presidential election violated the Equal Protection Clause. 531 U.S. 98, 101–03 (2000) (per curiam). In finding an equal protection violation, the Court emphasized that "the standards for accepting or rejecting contested ballots might vary . . . from county to county," leading to impermissibly "arbitrary and disparate treatment of the members of [the] electorate." *Id.* at 105–06. The Court explained that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government" and that the "uneven treatment" of ballots caused by "counties us[ing] varying standards to determine what was a legal vote" ran afoul of basic constitutional protections. *Id.* at 107 (first alteration in original) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)).

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Although the *Bush* Court expressly "limited" its holding "to the present circumstances," *id.* at 109, courts have not hesitated to reject election systems—and, in some cases, deny relief sought by litigants—where it would result in the arbitrary and inconsistent tabulation of ballots across the electorate, *see, e.g.*, *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 46–49 (S.D.N.Y. 2020) (citing *Bush* and rejecting postmark requirement that "subjects absentee voters

across the state to unjustifiable differences in the way that their ballots are counted"); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1380–82 (S.D. Fla. 2004) (citing *Bush* and rejecting plaintiffs' requested relief that would produce "a standard for accepting or rejecting contested ballots that varies from county to county"); *Black v. McGuffage*, 209 F. Supp. 2d 889, 898–99 (N.D. Ill. 2002) (finding an equal protection problem under *Bush* where "voters in some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office" due to election scheme); *see also Gallivan v. Walker*, 54 P.3d 1069, 1094 n.12 (Utah 2002) ("[I]n *Bush*, the United States Supreme Court reiterated the rule that states cannot treat voters differently under the Equal Protection Clause simply because they reside in different counties.").

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Here, this Court's order has produced precisely the sort of equal protection problem that *Bush* sought to remedy. Representative Ryan's congressional district, the newly drawn 18th, contains not only Orange County—the only jurisdiction impacted by this Court's ordered relief—but also portions of Ulster and Dutchess Counties. Consistent with the clear and express requirements of Chapter 763, absentee and affidavit ballots deemed valid by the boards of elections in these counties were counted and *not* subject to judicial review. Consequently, the plenary review of the Board's canvassing decisions now exercised by this Court has created varying tabulation practices across the counties in the 18th Congressional District—a result squarely at odds with equal protection safeguards and the one-person, one-vote principle, which prohibits "arbitrary and disparate treatment" that "value[s] one person's vote over that of another." *Bush*, 531 U.S. at 104–05.

In short, the course this Court has charted places it in direct conflict with the Equal Protection Clause of the United States Constitution. Strict compliance with the New York Election

Law is thus not only required as a matter of statutory imperative, but constitutional necessity as well. To ensure that the vote of each member of the 18th Congressional District's electorate is counted properly and consistently, this Court should and must vacate the TRO and dismiss the Petition.

IV. 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 affidavit ballot canvassing procedure ordered by the Court necessarily impacts other elections—including Representative Ryan's election to the United States House of Representatives. Maintaining the remaining provisions of the TRO, as amended by the November 16 Order, during the pendency of these proceedings causes prejudice to nonparties such as Representative Ryan and other candidates on the same ballot as the candidates for the 42nd Senate District, because their races cannot be completed and certified while statutorily disallowed objections to affidavit ballots are adjudicated. Representative Ryan therefore urges the Court to vacate the TRO as amended and dismiss the Petition so the electoral process may proceed as required by law.

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CONCLUSION

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

Dated: November 18, 2022

Respectfully submitted,

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**Pro hac vice application forthcoming*

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