

New York Supreme Court
APPELLATE DIVISION—SECOND DEPARTMENT

SAMBASIVA RAO VENIGALLA, *et al.*,
Petitioners-Respondents,
—against—
ALAGAPPA ALAGAPPAN, *et al.*,
Respondents-Appellants.

Docket Number 2004-5595

AFFIRMATION AND MOTION
FOR STAY, VACATUR AND EXPEDITED APPEAL

A. Introduction

1. Everyone agrees that this case is a “fine mess.”¹ The question before this Court on this motion is how big the Court will allow the mess to get before this Court reaches, as it must reach, the merits of the perfected appeal now pending before it. Or, to put it another way, what should the Court do when it realizes that, one of its orders has inadvertently given rise to serious violations of the federal and state constitutions and state law? Should it simply allow those violations to continue and worsen, or should it stay proceedings until it has the opportunity to fully consider the case? We believe that, consistent with the Court’s mission to uphold the federal and state constitutions, the wiser course is to stay the

¹ U.S. District Judge Raymond Dearie, observation from the bench at hearing held August 26, 2004.

unconstitutional acts being done in its name pending decision on the perfected appeal.

2. This Court, on its prior consideration of this case, in essence ordered the IAS Court to appoint a Referee to completely reorganize the church governance of the oldest traditional Hindu Temple in the United States. (See attached Decision and Order of August 25, 2003 (the “August 2003 Order”).) Because of the posture of the case on the prior appeal, the Court did not realize that the way in which it was ordering the Temple to be organized constituted a direct violation of Article 9 of the Religious Corporations Law, under which the Temple was organized. (The New York State Attorney General agrees that this is the case.) The reorganization therefore directly contradicts the Temple’s choices, based on its devotees’ constitutionally protected religious beliefs, as to how its “religious polity” is to be structured. Such a court order to change the polity clearly violates the First Amendment church autonomy doctrine. Respondents-Appellants believe that this Court did not anticipate that these consequences would result from its decision and that it will now act to correct the August 2003 Order so as to avoid clearly illegal and unconstitutional results.

3. If this Court believes that it might modify any one of the Referee’s or the IAS Court’s conclusions upon reaching the merits, it should stay all proceedings in those fora.

4. Respondents-Appellants are appealing the IAS Court's and the appointed Referee's attempts to radically remake Respondent-Appellant the Hindu Temple Society of North America (the "Temple") in a way contrary to the Religious Corporations Law and the U.S. and New York State Constitutions. The IAS Court and the Referee are attempting to (a) change the Temple, which is by statute and its certificate of incorporation, a non-membership religious corporation, into a religious corporation with voting membership, (b) allow anyone in the world over the age of 18, specifically including non-Hindus, to become voting members of the Temple, even though the Temple is a Hindu religious organization devoted to the worship of Hindu deities, and (c) conduct an election of new religious and temporal leaders of the Temple by the "members" hand-picked by the IAS Court and Referee. The Referee intends to finish picking "members" by December 31, and hold the election shortly thereafter. (Exhibit 1.)²

5. In the appeal, Respondents-Appellants argue that the IAS Court's and the Referee's attempts to change the Temple into a completely different entity violate §§ 180-183 of the Religious Corporations Law and the freedoms of religion, association, and speech guaranteed under the United States and New York Constitutions. In addition, Respondents-Appellants argue that the IAS Court and

² Exhibit 1 is an affidavit from one of the members of the Managing Committee appointed by the Referee to oversee the membership and election proceedings. Since the Referee has decided to conduct virtually all meetings without a record, does not issue written decisions concerning his orders, and does not permit counsel at his proceedings, such affidavits are the only available written evidence concerning his plans and orders.

Referee are acting in part on the basis of a prior appeal wrongly decided by this Court because the factual record before it was incomplete.

6. There are four main reasons this Court³ should issue a stay⁴ of all proceedings pending its determination of this appeal.

7. First, a stay will prevent irreparable injury to the Respondents-Appellants and the devotees of the Temple. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). Here Respondents-Appellants’ and the Temple devotees’ freedom of religion and freedom of speech are being denied. In addition to completely remaking the Temple’s hierarchical structure – a hierarchical structure dictated by religious belief – the Referee and the IAS Court have issued orders forbidding the Temple’s leaders from speaking with the devotees of the Temple.

³ Respondents-Appellants also asked the Supreme Court for a stay of its proceedings and its Referee’s proceedings during the pendency of this appeal. Although this request for a stay was brought by an order to show cause over two months ago—on September 28, 2004—the Supreme Court has yet to rule on it. The Supreme Court’s law secretary has told the Respondents-Appellants that if they seek a stay, they must ask this Court, not the Supreme Court. Therefore the Respondents-Appellants are forced to ask for a stay from this Court without having a ruling from the lower court.

⁴ This Court denied a request for a stay pending appeal in July. That denial has no preclusive effect on this motion. The situation facing the Court now is radically different, in that elections are imminent, and the appeal has been perfected. Since the brief has been perfected, the Court can see more clearly that not only have the IAS Court and the Referee violated constitutional norms, they have also violated the provisions of the Religious Corporations Law, all as set forth in the Brief on Appeal. And since the appeal is already perfected and an expedited resolution has been requested, the stay would be for a finite and relatively brief period of time.

8. Second, a stay will allow this Court the ability to decide this appeal without further complications based on the actions of the Referee and the IAS Court. Both the substantive issues of the dividing line between church and state and the New York appellate procedure issues before this Court are complex issues, and will become even more so without a stay. The Referee intends to create his class of voting members by early January and hold his election shortly thereafter, probably by very early February. Briefing in this case will not be finished until mid-January. Holding an election before this Court resolves these issues would serve only to complicate them further, making the Court's eventual decision in this appeal all the more difficult. Therefore this Court should issue a stay of all proceedings in this case until it has had a chance to consider and decide these issues.

9. Third, a stay will preserve the Court's jurisdiction over the appeal. Allowing the election to proceed would deprive this Court of jurisdiction over several of the core issues in this lawsuit. The insult to the Temple devotees' religious freedom and equality as citizens is not something this Court can simply "take back" by invalidating the election afterwards. The damage to the relationship between the Temple's leadership and the devotees will have been done, just as it will have been done to the devotees' understanding of their place as equal citizens in the United States. The Temple is already being irreparably harmed by the ego-seeking behavior – anathema to Hinduism – sparked by the

prospect of elections. By issuing a stay, this Court will stop the irreparable harm to the Respondents-Appellants (and the Temple's devotees') constitutional and statutory rights without causing any harm to Petitioners-Appellees.

10. Fourth, a stay will stop the ongoing violations of due process resulting in part from confusion about the meaning of this Court's order issued on August 25, 2003 (the "August 2003 Order"). The Referee has, among other things, forbidden Respondents-Appellants to have counsel or a court reporter present when meeting with him, refused to issue written rulings, and otherwise made it extremely difficult for Respondents-Appellants to have any record that could serve as the basis for an appeal of his orders. At the same time, he has repeatedly threatened Respondents-Appellants with contempt citations if they do not follow his vague, unwritten, oral orders. A stay from this Court would stop this ongoing denial of Respondents-Appellants' due process rights.

11. By issuing a stay, this Court can stop this case from becoming more of a mess than it already is. The alternative is to allow the mess to grow and become more complicated. One way or the other, this Court will have to address the mess. The only question is how difficult the cleanup job will be.

B. Factual Background

12. Respondents-Appellants direct the Court to pages 4 through 15 of the Brief (attached as Exhibit 2) for a complete description of the factual and procedural

history of this case. The appeal currently before the Court is from the IAS Court's June 10, 2004 denial of Respondents-Appellants' motion to reject the Referee's Interim Report issued on January 6, 2004.

13. The IAS Court felt itself compelled to issue this illegal order because of the August 2003 decision and Order of this Court on a prior appeal that inadvertently included two significant errors. First, this Court ordered the IAS Court to appoint a referee to oversee an election of "members" in the Temple in accordance with the supposed "1970 By-laws" even though the Temple is a "Hindu Free Church" incorporated under Article 9 of the Religious Corporations Law—an Article that that does not allow for voting members. Second, this Court issued the August 2003 Order because it reached and decided a disputed material issue of fact that was not properly before it and that had not been decided by the IAS Court: whether the so-called "1970 By-laws" had ever been adopted by the Hindu Temple Society. In fact, they had not.

14. It is undisputed that the Temple has been incorporated pursuant to Article 9, Sections 180-83, of the Religious Corporations Law as a "Hindu Free Church." Both the Temple's Certificate of Incorporation and the IAS Court in its initial decision have stated that the Temple is an Article 9 Hindu Free Church. (Record on Prior Appeal, p. 10.) That finding was not reversed on the initial appeal. However, on the initial appeal the Court neglected to consider that free churches

incorporated under Article 9 are governed by self-perpetuating boards of trustees, not by elective memberships.⁵ This issue is discussed at length in the Brief on Appeal at pages 21-34. As Respondents-Appellants argue there, Article 9 of the Religious Corporations Law clearly provides that Trustees of churches organized under that Article must be chosen only by the current members of the Board of Trustees. New York State Attorney General Eliot Spitzer has also argued in litigation related to this case that Article 9 free churches are managed by self-perpetuating boards of trustees, not by elective memberships.

As Respondents-Appellants argue in the Brief on Appeal, this is relevant in two ways. First, the Temple's operations in conformity with Article 9 were not illegal, as this Court wrote on the prior appeal; and second, since the "1970 By-laws" conflict with both Article 9 and the Temple's own Certificate of Incorporation, the so-called By-laws could not and cannot now govern the Temple, as this Court's prior ruling mandated. Because the "1970 By-laws" provide that anyone in the world – Hindu and non-Hindu alike – who is over 18 years of age and pays a nominal fee can become a voting member of the Temple, the "1970 By-laws" contravene both state law and the Temple's Certificate of Incorporation. State law simply does not allow the "1970 By-laws" to be applied to the Temple.

⁵ In the attached Brief on Appeal, the Respondents-Appellants also argue that this Court improperly decided a factual issue for which it did not have a full record, and which had not been fully addressed by the IAS Court.

The August 2003 Order has also resulted in violations of constitutional norms. The IAS Court and the Referee—in apparent belief that they are acting on this Court’s instructions—are creating a class of members of the Temple, allowing anyone (without regard to religion or participation in the Temple) to join it upon payment of a nominal fee, granting this new class of members the right to vote for trustees of the Temple, and compelling and controlling an election for such trustees. This is a classic violation of the First Amendment “church autonomy doctrine” The actions of the Referee and the IAS Court do not recognize that:

religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: ‘select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the (Free Exercise) Clause.’

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335-336 (1987) (Brennan, J., concurring) (quoting DOUGLAS LAYCOCK, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) (alterations in original), and citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) and *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952). In the Brief on Appeal, Respondents-Appellants

demonstrate that the Referee's and the IAS's Court's actions violate the church autonomy doctrine, as well as the Free Exercise Clause and the First Amendment right to freedom of association. (Attached Brief on Appeal, pp. 40-57.)

15. The Referee's and the IAS Court's actions in this case have sparked outrage in the Hindu religious community of New York, the United States, and even India, especially given the fact that non-Hindus are, in practical terms, dictating how the Temple is to be governed. The ongoing controversy has caused great consternation and confusion in the Temple, since it threatens to completely change the nature of the Hindu religious polity and casts doubt on whether this religious community is entitled to the same constitutional and statutory protections enjoyed by other faiths.

C. Bases for Granting a Stay

16. There are four separate grounds on which the Court should grant a stay: CPLR 5519 (c), CPLR 2201, the Court's inherent power to preserve its own jurisdiction, and the Court's inherent power to amend its own orders.

17. CPLR 5519 (c) provides that

The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case ... or may grant a limited stay

18. Whether to issue a stay pursuant to CPLR 5519 (c) is completely at the Court's discretion. As Professor Siegel puts it:

In considering whether to grant a stay under subdivision (c), the court's discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party.

DAVID D. SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, CPLR C5519:4. Here, both the "presumptive merits of the appeal" and the "hardship confronting [Respondents-Appellants]" favor granting the appeal.

19. The presumptive merits of the appeal are very strong. As the Brief on Appeal indicates, the IAS Court and the Referee are, in an attempt to apply this Court's August 2003 Order, violating the Religious Corporations Law of New York and the rights to freedom of religion, association, and speech guaranteed the Temple's devotees under the United States and New York Constitutions. Most outside observers of this case cannot understand how the State of New York can force elections on a religious body that has never had elections and has never asked for them. Nor can they understand how a Hindu temple can have all of its affairs determined by a non-Hindu. Respondents-Appellants refer the Court to the argument in the Brief for the details of their claims on this appeal. They submit that the unintended consequences of this Court's August 2003 Order must be corrected on this appeal.

20. The hardship to Respondents-Appellants is great if this Court does not grant a stay. First, the fact that they are being deprived of their constitutional rights constitutes an ongoing harm. As noted above, it has long been established that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). The Second Circuit has extended this rule to hold that the deprivation of *any* constitutional right constitutes irreparable harm. See *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 745 (2d Cir. 2000), *abrogated on other grounds*, *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2001) (“plaintiffs have met their burden of showing irreparable harm because the deprivation alleged involves a constitutional right”). Ever since the State of New York, acting through the Referee, began to interfere in the Temple’s day-to-day operations and to completely restructure the Temple, Respondents-Appellants and the Temple’s other devotees have been deprived of the freedom to order their religious community in accordance with their religious beliefs.

21. Respondents-Appellants’ hardship would only become greater if an election were held. An election would if held forever change the nature of the relationship between the Temple’s leaders and its devotees. The devotees now believe that the Trustees serve the deities by performing the sacred duty of stewarding the holy

place where the deities are located. If an election is held, it would become clear to the devotees that the Trustees serve not at the pleasure of the deities, but at the pleasure of the State of New York. This would be a grievous intrusion into the private sphere of religious belief.

22. Another significant hardship for Respondents-Appellants is the Referee's continuing violations of their due process rights. The Referee has ruled that he has plenary powers to change the Temple's organization, to prevent its leaders from engaging in constitutionally-protected speech, to manage the Temple's day-to-day operations, and to decide who will become a voting member of the Temple. In reaching these decisions, the Referee has repeatedly forbidden Respondents-Appellants to have counsel or a court reporter present when meeting with him. The Referee has for the most part refused to issue written rulings, instead relying on unrecorded, oral rulings even when the scope and meaning of his oral directives has been unclear. Finally, the Referee has remained consistently antagonistic towards Respondents-Appellants, repeatedly threatening them with contempt if they do not comply with his unwritten and therefore unappealable orders. In addition to constituting an ongoing due process violation, this maltreatment by the Referee has also caused and continues to cause Respondents-Appellants (who are volunteers for the Temple) huge expenditures of time and effort, as well as great emotional stress.

23. By contrast, the hardship to Petitioners-Appellees if the stay is granted is minimal. In fact, the only harm to Petitioners-Appellees is that they will have to wait a little longer for an election to be held. Given that Petitioners-Appellees waited almost thirty years to ask for elections and some of them served on the Board of Trustees during the time that everyone agreed that the Temple should be governed by a self-perpetuating Board of Trustees, the harm to Petitioner-Appellees' interests is *de minimis*.

24. In addition to the reasons outlined by Professor Siegel, courts have granted stays pursuant to 5519(c) where “[a]bsent a stay pending appeal ... the appeal would be rendered academic.” *Van Amburgh v. Curran*, 73 Misc.2d 1100 (Sup. Ct, Albany Cty. 1973). In *Van Amburgh*, the appellants contested, on constitutional grounds, their court-ordered participation in a hearing of the State Investigative Commission. Because the hearing would have been held prior to resolution of the appeal, the court granted the stay requested. Like the appellants in *Van Amburgh*, Respondents-Appellants are being forced to participate in a state proceeding imposed on them by court order. Because this Court’s decision could be rendered academic if made after the election is held, like the court in *Van Amburgh*, it should issue a stay pending the determination of this appeal.

25. Other courts have held that granting a stay is warranted “to avoid a duplicity of litigation involving the same subject matter.” *See, e.g., Westchester Fire Ins.*

Co. v. Lipsky, 9 Misc.2d 390 (Sup. Ct., N.Y. Cty. 1958). Here, unless a stay is granted, the same issues will be litigated in three fora – this Court, the IAS Court, and before the Referee. For example, the Referee, the IAS Court, and this Court are all currently deciding whether the Temple’s incorporation pursuant to Article 9 of the Religious Corporations Law allows the Temple to adopt by-laws that mandate voting membership. If the Court comes to a different conclusion than the Referee, the Referee would have to revisit all of the rulings he makes in the interim. Granting a stay would allow this Court to deliver a definitive pronouncement on the central issues and eliminate the need for constant litigation and appeal that will result from parallel proceedings while this appeal is under consideration.

26. CPLR 2201 also provides a statutory basis for granting a stay:

Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.

Id. “The general rule ... requires that [a CPLR 2201 stay] of an action should be sought from the court in which that action is pending.” *Safier v. Cohl*, 95 A.D.2d 933, 934 (3d Dept. 1983) (citations omitted). Here Respondents-Appellants brought on just such a motion before the IAS Court by order to show cause on September 28, 2004. Though orders to show cause are normally decided very quickly, the IAS Court, two months later, has not yet decided the motion. This

makes it impossible for Respondents-Appellants to appeal a denial of the stay; in effect the IAS Court's silence is a denial.⁶ Therefore Respondents-Appellants reurge the stay motion before this Court.⁷

27. Third, this court has the “inherent power in a proper case to restrain the parties before it from taking action which threatens to defeat or impair its exercise of jurisdiction.” *Schneider v. Aulisi*, 307 N.Y. 376, 384 (N.Y. 1954) (citing *Colson v. Pelgram*, 259 N.Y. 370, 375-376; *Cushman v. Leland*, 93 N.Y. 652, 653- 654; *Erie Ry. Co. v. Ramsey*, 45 N.Y. 637, 648-649; *Continental Illinois Nat’l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 675-676); *see also* *Schwartz v. New York City Housing Auth.*, 219 A.D.2d 47, 48 (2d Dept. 1996) (citations omitted) (Court has “inherent power to grant a stay of acts or proceedings, which, although not commanded or forbidden by the order appealed

⁶ In a conference held on December 1, 2004, the IAS Court's law secretary indicated to counsel for Respondents-Appellants that the IAS Court would consider issuing a ruling on the order to show cause, but did not promise to issue a ruling on the order to show cause or an anticipated date for such a ruling.

⁷ This Court should also note that it can issue a stay under CPLR 2201 because it is, under New York law, “the court in which an action is pending”:

the Supreme Court is a single great tribunal of general state-wide jurisdiction, rather than an aggregation of separate courts sitting in the several counties or judicial districts of the state. 'There is,' we have stated, 'but one supreme court in the state and the jurisdiction of its justices is coextensive with the state.'

Schneider v. Aulisi, 307 N.Y. 376, 381 (N.Y. 1954) (quoting *People ex rel. New York Central & H. R. R. Co. v. Priest*, 169 N.Y. 432, 435; other citations omitted). Although the Appellate Division has a different function than the IAS Court, they are both part of the same court, and both have the power to issue stays in this action under CPLR 2201.

from, will disturb the status quo and tend to defeat or impair our appellate jurisdiction”)

28. Here the Court’s appellate jurisdiction will clearly be impaired by the holding of an election before the resolution of this appeal. Although this Court would presumably be able to undo some of the effects of an election after it is held, the Court will not be able to “take back” the constitutional violations that have occurred in the interim. Nor does it make sense from an administrative standpoint to have the election before this Court decides the basic legal issues that determine whether an election should be held at all.

29. *Ohrbach v. Kirkeby*, 3 A.D.2d 269 (1st Dept. 1957), is a very similar case. *Ohrbach* was an appeal from a special proceeding overseen by a referee. Like the petitioners in this case, the *Ohrbach* petitioners sought to hold an election for the board of the corporation before the issues in the special proceeding had been resolved, thereby avoiding the constitutional and statutory issues entirely.

30. The *Ohrbach* court made it clear that courts have the authority, completely apart from any statutory basis, to exercise their inherent equitable powers to maintain the *status quo*:

in ordering the maintenance of the *status quo ante* pending its determination, a court is exercising an inherent power, not dependent upon statutory provisions governing the issuance of injunction *pendente lite*.

Id. at 273 (citing *Woerishoffer v. North River Const. Co.*, 99 N.Y. 398; *Wilkinson v. North River Const. Co.*, 66 How. Pr. 423, *Matter of Holle*, 160 A.D. 369; 10 CARMODY-WAIT, CYC. OF N.Y.PRAC. at 523). In this case, the only way to maintain the *status quo ante* is to stay proceedings before the Referee and the IAS Court so that the crucial issues in this case—whether membership and elections can be imposed by the State without violating the Religious Corporations Law and the United States and New York Constitutions—can be decided by this Court.

31. The *Ohrbach* case is instructive in another way. The First Department held that conducting elections before the underlying issues were resolved would result in needless repetition of elections and judicial process:

A new election would presumably raise some of the same issues, and a new proceeding would have to be started. Even if the same issues were not raised, this is a special type of corporation. The parties are all dwellers in a single building, and, therefore, intimately associated with one another, at least in certain respects. It is quite material, then, that the serious charges, which have been made, be resolved in a proper forum, so that the stockholders, when they do vote, will, in addition to the informational campaign associated with the solicitation of proxies, have the benefit of such proceedings.

Id. at 272. What was needed was “a proper ventilation of the issues” – something that neither the Referee nor the IAS Court have afforded the parties to this special proceeding or the devotees of the Temple. *Id.* at 273. Indeed, since the Referee and the IAS Court believe themselves to be carrying out the August 2003 Order of

this Court, they appear to think that they cannot even contemplate whether the constitutional and statutory issues are relevant. This Court must decide the statutory and constitutional issues in this appeal before an election is held.

32. This case presents even more compelling reasons to grant a stay than those that motivated the *Ohrbach* court, because it involves something far more important than apartment dwellers' rights: the religious freedom of Hindu believers. If it does not stay the proceedings before the Referee and the IAS Court, this Court will not be able to take back the disruption and intrusion into the relationship between the Temple's devotees and the Temple's leaders. The Court will not be able to assure the devotees that they have equal rights with believers in other, more well-known religions when it has allowed them to be subjected to a process that, for example, a similarly-situated Catholic parish or synagogue will never have to suffer. *Compare Congregation Yetev Lev D'Satmar, Inc. v. Kahan*, —Misc.3d—, NYLJ 10/28/04 (Sup. Ct., Kings Cty. Oct. 28, 2004) (First Amendment church autonomy doctrine forbade court to decide leaders or bylaws of Orthodox Jewish congregation); *Srouf v. Board of Trustees of Sephardic Congregation of Har Ha Lebanon, Inc.*, —Misc.3d—, 2004 WL 1261467 (Sup. Ct., Kings Cty. June 3, 2004) (court lacked jurisdiction to determine validity of Orthodox Jewish congregation's bylaws concerning the right of women to vote). If the Court allows the election to proceed, it will not later be able to assure the

devotees that they have an equal voice in the courts of this nation. In short, this Court will not be able to convince the devotees that they are anything other than second-class citizens.

33. This inability to provide a post-hoc remedy – the definition of irreparable harm – deprives the Court of appellate jurisdiction over the central constitutional and statutory issues in this case. The Court should therefore issue a stay of all proceedings before the IAS Court and the Referee.

34. The fourth ground to grant a stay is that this Court has the inherent power to stay the Referee's proceedings because all of the Referee's activities in this case have been undertaken pursuant to this Court's August 2003 Order. As the Court of Appeals has made clear, "[e]very court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made." *Aridas v. Caserta*, 41 N.Y.2d 1059, 1061 (N.Y. 1977). *See also Daniels v. Howell*, 9 A.D.3d 442 (2d Dept. 2004) (same). This Court therefore retains a continuing jurisdiction to alter or amend the effect of its prior intermediate August 2003 Order. Because the Referee's and the IAS Court's execution of the August 2003 Order has resulted in violations of the Religious Corporations Law and the United States and New York Constitutions, Respondents-Appellants respectfully submit that justice would be served if this Court granted a stay of all proceedings before the Referee and the IAS Court pending resolution of this appeal.

D. Motion for Vacatur

35. In the same vein, Respondents-Appellants also move this Court, both pursuant to CPLR 5015 and this Court’s inherent powers, to vacate its previous August 2003 Order in this case. A “motion to vacate for irregularity or to amend” a previous order of the Appellate Division may be made “in the Appellate Division or in the court in which the judgment is entered.” *Whitney v. Lyric-Rochester Corporation*, 246 A.D. 896 (4th Dept. 1936) (per curiam). Therefore this Court can vacate or amend its August 2003 Order.

36. CPLR 5015(a) provides in part that:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

...

3. fraud, misrepresentation, or other misconduct of an adverse party

...

Id. As set forth in the Brief on Appeal, Petitioners-Appellees misrepresented the facts to this Court by failing to include Respondents-Appellants’ evidence as to the contested factual issue of whether the “1970 By-laws” were ever adopted or used by the Temple. (Attached Brief on Appeal, pp 8-10, 32-37.) This misrepresentation led directly to the August 2003 Order. Since this Court as a result impermissibly reached and decided a contested factual issue that the IAS Court had not addressed, this Court should now vacate the August 2003 Order.

37. There are other grounds to vacate besides those set forth in CPLR 5015:

The grounds for vacatur delineated in CPLR 5015(a) are not exclusive, and the Supreme Court has the inherent authority to vacate its own order “for sufficient reason, in the furtherance of justice.” Here, the court providently exercised its discretion in vacating its prior order.

Bellevue-Santiago v. City Ready Mix, Inc., 270 A.D.2d 441 (2d Dept. 2000) (mem.) (quoting *Ladd v. Stevenson*, 112 N.Y. 325, 332 (N.Y. 1889) and citing *State of New York v. Kama*, 267 A.D.2d 224; *Marquis v. Mosello*, 239 A.D.2d 544; *Matter of Delfin A.*, 123 A.D.2d 318). See also *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68 (N.Y.2003) (“In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice”) (citations omitted). Respondents-Appellants submit that it would be in the interests of substantial justice for this Court to vacate or otherwise amend its August 2003 Order to allow the Temple to comply with the Religious Corporations Law and its Certificate of Incorporation, and to allow the Respondents-Appellants and the other devotees to enjoy their rights under the United States and New York Constitutions.

E. Conclusion and Prayer

38. For the foregoing reasons, Respondents-Appellants respectfully request that this Court:

- (a) vacate or amend its order issued August 25, 2003, in this case, and/or
- (b) issue a stay pending the determination of this appeal of all activity in this case before the Referee and the IAS Court, and/or
- (c) expedite this Appeal so that final resolution of this Appeal will occur on or before January 1, 2005, and/or
- (d) order such other, further, or different relief as to this court may seem just and proper.

39. Respondents-Appellants are willing to meet any bonding requirements or briefing schedule imposed by the Court.

Respectfully submitted,

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