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QUESTIONS PRESENTED

1. May the IAS Court force a “free church” organized under Article 9 of the Religious Corporations Law (“RCL”) to have “members” with voting rights, in violation of that Article?

(The lower court appears to have answered this question in the affirmative.)

2. Is there a disputed material issue of fact over whether the so-called “1970 By-laws” were ever adopted?

(The lower court has never addressed this question.)

3. Should this Court vacate its prior decision and order in this case (a) that was based upon material improperly excluded from the prior record; (b) that was based on an erroneous determination of fact; and (c) that would, if carried out, require the IAS Court to violate the RCL, the United States Constitution and the New York Constitution?

(The lower court has never addressed this question.)

4. May a Court-appointed Referee determine the ecclesiastical question of “membership” in a Hindu Temple and conduct and election of “members” appointed by the Referee, thereby violating the rights of the Temple and its devotees to freedom of religion, freedom of speech, and

freedom of association arising under the United States and New York Constitutions?

(The lower court appears to have answered this question in the affirmative, without addressing the constitutional questions.)

5. Did the Court-appointed Referee exceed the scope of this Court's reference?

(The lower court answered this question in the affirmative.)

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NATURE OF THE CASE

This is an appeal from an order of Supreme Court, Queens County (the “IAS Court”), that directs an agent of the State of New York to reorganize a religious institution formed under Article 9, Sections 180-183 of the Religious Corporations Law (“RCL”). The order approves the Referee’s Interim Report which proposes to create a class of voting members, allow any person in the world over the age of eighteen—regardless of religious belief—to have an equal voice in choosing the governing body of the nation’s oldest Hindu temple¹ and to conduct an election of new trustees for the Temple by these “members” created by the State. This order violates many laws: the First Amendment rights of the Temple and its devotees to free exercise of religion and free association, the autonomy secured to the Temple by the First Amendment, the Establishment Clause, parallel provisions of the New York Constitution, and the RCL.

The IAS Court felt itself compelled to issue this illegal order because of an August 2003 decision and order of this Court on a prior appeal that itself entailed 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 “1970 By-laws” even though the Temple is a “Hindu

¹ The Temple is and always has been a non-membership organization.

Free Church” incorporated under Article 9 of the RCL—an Article that that does not allow for voting members. Second, this Court issued that 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.

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 the fact that non-Hindus will, in practical terms, be dictating how the Temple is 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.

In order to prevent this denial of the Temple’s constitutional and statutory rights, this Court should reverse the IAS Court’s order, vacating (or otherwise overruling) its own August 2003 decision and order in the prior appeal, and/or rejecting the Referee’s report. The Court may do this on two distinct state law grounds and/or on state or federal constitutional grounds. It can avoid deciding constitutional issues simply by holding that membership

and elections would violate the RCL or by holding that the issue of whether the “1970 By-laws” was a factual one that was not properly before this Court on the first appeal and remanding it for a hearing on that issue before the trial court. If this Court decides that membership and elections do not violate the RCL, then it must decide whether the RCL, both facially and as applied to the Temple, is unconstitutional.

STATEMENT OF FACTS

1. The Temple was founded, and has operated to this day, as a religious body with no voting members.

In February 1970, the Hindu community in Flushing organized itself as the “Hindu Temple Society of North America” (hereafter, “Hindu Temple Society” or “Temple”). The organizers of the Temple chose a nonmember corporate form of governance, electing to organize as a “free church” under RCL Article 9 (RCL §§180-83).² The Hindu Temple Society’s certificate of incorporation stated that it was made “[p]ursuant to Article 9 of the Religious Corporations Law” and that “[t]he purpose of its organization is to found and continue a Hindu Free Church in the City of New York” (Prior Record [“PR”] 56-60.)³

The Temple’s organizers specifically chose to organize the Temple as an Article 9 free church—which by statute must be governed by an unelected, self-perpetuating board of trustees—because they wanted to avoid the sort of ego-driven struggles over power that have proved to be common in Hindu temples with voting memberships. In an interview conducted for a

² Seven non-Hindus were the incorporators, as American citizenship was required under the law then in effect. (Former General Corporation Law, §7; repealed by L.1973, c. 451, §2.) The “organizers” referred to here are those within the Hindu community of New York who requested the incorporators to form the Hindu Temple Society.

³ “Prior Record” or “PR” refers to the Record on Appeal in Docket no. 2002-5018. “RA” refers to the Record on Appeal in this Appeal.

1997 academic research study on the Temple, Dr. Alagappan, one of the chief organizers of the Temple and later Chairman of the Board of Trustees, stated that the Temple was specifically organized as it was to avoid elections:

“You see many Indian, people who came here were very gifted. I’m sure many of them had ambitions to become high up in their own country in the political life. They came here, they didn’t know how they could get into the political life of this country. One of the places they got into is the temples. And then politics start. It didn’t happen in New York because our bylaws are like that. But in many temples they are more proving grounds for democracy than running the institution, this has created lots of problems-annual elections, who will win, who will lose, the situations, enmities. Here we managed because we knew how to structure the by-laws differently as for serious institutions and not social or cultural institutions and we escaped that. To this day we have not had a vote. It has always been the consensus-25 years, board of trustees, always the consensus.”

RA (154-55) .⁴

During this time the Temple governed itself as required by the terms of Article 9 of the RCL, and without separate by-laws. (RA 131-139 and documents supporting, RA 145-204.) As is discussed at length under Point I

⁴ Appellants do not assert, as Appellees have claimed elsewhere, that no Hindu temple anywhere has ever been organized along the congregational lines that Appellees apparently wish that the organizers of the Hindu Temple Society had chosen instead of the Article 9 free church form. Hinduism, like Christianity or Judaism, is a religion with many variants. Appellants do assert that this Temple was organized without voting membership because its organizers wanted to avoid—for religious reasons—the kind of ego-driven contests for control that are common in congregational bodies and are evident in Appellees’ attempt to take over this Temple. The organizers believed, and the Temple’s devotees believe today, that the Temple is a sacred space that should not be profaned with the kind of electoral strife that the Appellees have, with the unwitting assistance of the State, thrust upon it.

of the Argument, *infra*, the various articles of the RCL govern most of the requirements of matters usually found in by-laws, such as who may vote on incorporation, who has the right to vote on the governing body, the rights, or lack thereof, of “members”, and the powers of the governing body. The RCL does not require the adoption of separate by-laws, and of course any by-laws which conflict with the statutes or the certificate of incorporation are perforce invalid. *Christal v. Petry*, 275 A.D. 550 (1st Dept. 1949), *aff’d*, 301 N.Y. 562 (1950).

After several years, land for the Temple was purchased, and a house of worship dedicated to the Hindu deity Ganesh was erected. It was dedicated on the Fourth of July, 1977. (RA 134; *see* PR 99-100.)

On 15 June 1978, the Hindu Temple Society adopted its first set of By-laws. (PR 363-371; *see* RA 135 ¶¶12-25, RA 196.) In accord and with the requirements of RCL Article 9, the Certificate of Incorporation and the organizers’ desire that the Temple be a nonmember “free church” under RCL Article 9, the Board of Trustees was organized on a self-perpetuating basis. (1978 By-laws, Art. III, §3; PR 366.) The Hindu Temple Society operated under the 1978 By-laws, as duly amended, until the 2003 decision of this Court. (See PR 372-445.) No one other than members of the Board of Trustees has ever voted on any issues, had any control over the Temple’s

ecclesiastical or temporal affairs, or even claimed any rights to govern the Temple. Non-voting “memberships” were created to recognize donations, much in the way that other charitable foundations will recognize donors with titles as a means of encouraging such donations. No “member” ever voted for any trustee or claimed any right to vote for a trustee.

2. This Special Proceeding

Describing themselves as “disaffected members” (PR 33, 37), six individuals began this special proceeding on 10 June 2001, seeking to dissolve the Board of Trustees and establish a voting procedure to elect new Trustees. (PR 32-49.) None of the Petitioners-Appellees were trustees of the Temple.⁵ In their Verified Petition, they themselves identified the operative By-laws as the then-current amendment to the 1978 By-laws. (PR 33, ¶ 4.) The self-perpetuating nature of the Board was unchanged. (PR 63, ¶ 3.) Most significantly, the Petition did not refer to the controlling statute which provides that the only way that trustees of an Article 9 free church may be chosen is by a vote of the trustees then in office. (RCL, Article 9,

⁵ It is therefore unclear whether the Appellees had standing to bring the special proceeding in the first instance, since the only “members” of a free church for statutory purposes, are the trustees, (*see* Point I, *infra*.) and this action was brought under Section 706(d) of the N-PCL which requires ten percent of the “members” to bring such an action. Even if the Petitioners-Appellees were considered members for purposes of 706(d), the prior record at pages 254-357 demonstrates that there were at least eighty-four persons in the same classes of non-voting membership as the Petitioners-Appellees. Thus even on Petitioners-Appellees’ reading, the petition was brought by only approximately seven percent of the members, and should have been dismissed for that reason alone.

Section 182.) Instead, the Petition directs the Court's attention to various contradictory provisions of the *Not-for-Profit Corporations Law*, which applies to corporations organized under the *Religious Corporations Law* only if they do not conflict with the RCL. See RCL § 2-b.

Issue was joined on 7 August 2001, by affidavit. (PR 186-224.) On 15 August 2001, certain temporary restraining orders were vacated, and a supplemental submission ordered. (PR 227, ¶ 2.) On 11 September 2001, Petitioners-Appellees alleged for the first time that "By-Laws adopted by the founders of the Society" existed and produced a document which they called the "1970 By-laws." (PR 233, ¶ 18; PR 451-62.)

Respondents-Appellants promptly challenged the document. Nonparty L. Ramachandran, a Trustee in 1975 and a former Executive Director of the Hindu Temple Society, swore that the "1970 By-laws" were never adopted, and that the Hindu Temple Society never had voting members. (RA 235-36, ¶¶ 3-5.) The current president of the Hindu Temple Society, Dr. Uma Mysorekar, also submitted affidavits confirming that the Hindu Temple Society had *never* had voting members and had always been run by a self-perpetuating board. (RA 239 ¶¶ 6-7; RA 247 ¶¶ 2-3.) Respondents-Appellants also noted that the IRS Form 1023, to which the "1970 By-laws" was attached, clearly contradicted the "1970 By-laws" by

indicating that the Hindu Temple Society was a nonmember organization. (RA 205 ¶ 7.) All of these facts demonstrated that the so-called “1970 By-laws” never were meant to be, and never in fact were, the operative by-laws of the Hindu Temple Society.

3. The First Appeal

Avoiding the issue of fact presented by the “1970 By-laws,” the IAS Court substantially denied the Petition on 14 February 2002. The Board was ordered to be reduced in size, and certain current By-laws were invalidated. In all other respects, Respondents-Appellants prevailed. (PR 8–23.) Petitioners-Appellees then appealed to this Court.

Though purporting to proceed on a full record (PR 1, ¶ 7), Petitioners-Appellees selectively edited it. Omitted were most of Respondents-Appellants’ August opposing papers and all of Respondents-Appellants’ October response to the “1970 By-laws.” Applications to restore the omitted items were opposed, and were denied both below and in this Court. (Docket no. 2002-05018, decision of 14 February 2003.)⁶

Upon this materially incomplete record, this Court erred by reaching and resolving the factual issue of whether the “1970 By-laws” had been

⁶The October 2001 affidavits cited above, are found in the record of that Motion. They also appear as Exhibits C-E on Respondents’ Motion to Reconsider in that docket number, which was denied 17 November 2003.

validly adopted by the Hindu Temple Society. See Matter of Venigalla v. Alagappan, 307 AD 2d 1041 (2 Dept. 2003). The Court issued this ruling despite the fact that the “1970 By-laws” directly conflict with Article 9, section 182 of the RCL, with the Temple’s Certificate of Incorporation, and with the Temple’s rights under the United States and New York Constitutions to choose a form of governance that does not include a voting membership. The ruling also forced the Hindu Temple Society to become a member corporation after 25 years of operation as a nonmember entity. The Court ordered elections pursuant to the “1970 By-laws” and a referee to oversee those elections. Motions for reconsideration and leave to appeal to the Court of Appeals were denied.

4. This Appeal

Far from resolving the litigation, this Court’s 2003 ruling gave rise to numerous other statutory, administrative, and constitutional issues, resulting in more than a year of continued litigation and now this Appeal. In successive orders to show cause, in October and November 2003, Petitioners-Appellees again sought the same severe restrictions which the IAS Court had denied two years before, and also sought to block the annual meeting of the Hindu Temple Society. Apart from document preservation, to which Respondents-Appellants consented, the IAS Court essentially

denied Petitioners-Appellees' requests. (RA 31, 32.) No appeal was taken from any of these orders.

Meanwhile, the IAS Court appointed Anthony Piacentini as Referee. (RA 58.) The IAS Court's order of reference was little more than a direct quotation of this Court's 2003 order. (*Id.*) The Referee issued an Interim Report on 6 January 2004 in which he claimed the power to determine the membership in a religious body, the Hindu Temple Society. (RA 51-56, the "Referee's Report".) Although the report favored Petitioners-Appellees, they neglected to move for confirmation. (See 22 NYCRR § 202.44[a].) In accordance with that rule, Respondents-Appellants moved to reject the Interim Report at their first opportunity, on 23 January 2004. (RA 37-39.) In response, Petitioners-Appellees again cross-moved for replacement of the Trustees. (RA 87-90.) In view of the challenges made, the Referee scheduled no further proceedings and awaited the guidance of the IAS Court.

As the litigation proceeded, it became apparent that crucial First Amendment issues arose regarding the Temple and its devotees as members of a minority religion. The expert assistance of a public interest law firm, The Becket Fund for Religious Liberty ("Becket Fund"), was obtained by the Hindu Temple Society. Respondents-Appellants duly moved the

admission of a Becket Fund attorney, Roman Storzer, Esq., pro hac vice. (RA 33-34.)

On 19 April 2004, the IAS Court denied pro hac vice admission, normally granted as a matter of course, to the Becket Fund's Director of Litigation, Roman Storzer. (RA 33-34.)⁷ The court indicated, without any examination of the constitutional principles involved, that anyone who gave money or attended services at the Temple should be given the right to vote for the Temple's leaders: "T[his] Court finds no ... violation of the First Amendment, or an entanglement of any kind. (RA 33)(emphasis in original). *Id.*⁸

The Referee had initially suspended proceedings during the pendency of Respondents-Appellants' motion to reject his Interim Report. When the Referee suddenly resumed his activities and the IAS Court rejected an interim stay, this Court denied, on 24 May 2004, the Hindu Temple Society's CPLR 5704(a) application. (Docket no. 2004-4457.)

The Referee's conduct at the 26 May 2004 meeting, which demonstrated further bias against Respondents-Appellants, prompted a motion to disqualify him on 2 June 2004. That motion was opposed, and was denied on 7 July 2004. (RA 35-36.) In docket no. 2004-6466,

⁷ This Court saw no problem in admitting Storzer pro hac vice on this appeal.

⁸ In docket no. 2004-4652, all Respondents-Appellants separately appeal from that order.

Respondents-Appellants separately appeal from the denial of that order.⁹

On 10 June 2004, the IAS Court denied the motion to reject the Referee's Interim Report. It should be noted that, at this point in time:

(a) The Referee had suspended all proceedings before him from 23 January 2004, the date of that motion, until 10 May 2004;

(b) When proceedings were scheduled to resume on 26 May 2004, Respondents-Appellants promptly sought relief from the IAS Court and from this Court under CPLR 5704(a);¹⁰

(c) When such relief was denied, Respondents-Appellants participated before the Referee as directed on 26 May 2004.

In this context, the Court wrote:

“The respondents’ clear intent to avoid complying with the lawful mandates of this Court, as well as those of the Appellate Division, can no longer be countenanced.

The only indisputable fact in this long and protracted case is that the present Board of Directors [sic] of the subject Hindu Temple is illegitimate, and remains in place only as a ‘caretaker’ regime until a new board can be elected by the voting members. Unfortunately, there seems to be no list of voting members due to the extreme hubris of the existing board, who have asserted that there are no members entitled to vote.

⁹ Neither docket no. 2004-4652 nor docket no. 2004-6466 is involved in this appeal.

¹⁰ Docket no. 2002-4457.

Indeed, according to the current Board, there are no members at all, only individual contributors who have attained the appellation of ‘devotee’.”

(RA 5-7.)

The court had no basis in the record for its characterizations of the “respondents’ clear intent” or their supposed “extreme hubris[.]” The court appeared to misunderstand or ignore the core of the Respondents-Appellants’ argument: that the Temple, as a religious organization may choose not to have elected leaders, just as religious organizations like, for example, the Catholic Church, do not have elected leaders. This misunderstanding is apparent from the court’s assertion that the absence of a membership list indicated “hubris.” The opinion continued to characterize the Respondents-Appellants’ motives without any basis in the record before it:

The obstructionists’ [sic] actions of this oligarchy who steadfastly refuses to comply with the mandates of this Court, as well as the Appellate Division, can no longer be tolerated. Continued refusal shall result in severe sanctions.

* * *

Everyone shall adhere to the Order of the Appellate Division, and if any of the parties refuse to comply, then the solution is a finding of contempt.”

(RA 6.) The court then implied, again without any basis in the record, that

the Respondents-Appellants had improper motives:

“Given this extended and steadfast refusal to comply with any of my directives, creates the impression that the respondents have more at stake than the merits of their case, and if so, whether a referral to the District Attorney, to investigate the financial circumstances and any possibility of self dealing or improper disbursements, is warranted.”

(Id.)

As noted above, Respondents-Appellants disobeyed none of the orders of the IAS Court. While there were directives from the Referee, his power to make them was promptly challenged before the court, and this jurisdictional issue was awaiting disposition when the IAS Court issued its ruling. This simple assertion of Respondents-Appellants’ constitutional rights cannot be called defiance.

On 23 July 2004, this Court denied the motion of Respondents-Appellants to stay enforcement of the IAS Court’s 10 June 2004 order. In docket no. 2004-5595, all Respondents-Appellants appeal from that Order. There has been no cross-appeal.

5. Relation of facts to Questions Presented (“QP”)

There is no doubt that significant constitutional issues have arisen under the Referee’s intrusive conception of his duties. There is no doubt of what he has done, as an officer of New York State. (RA 51-56.) The issue

is whether those acts, as confirmed by the IAS Court, violate the constitutional rights of the members of the Hindu Temple Society. (QP 4.)

There is also no doubt that major issues of interpretation and constitutionality of the RCL have been presented. Historically, the “free church” article of the RCL, Article 9, was enacted to protect churches with a self-perpetuating Board of Trustees and no “members.” The plain meaning of Article 9 is supported by case law and the statutory context, and the Hindu Temple Society simply requests equal treatment. (QP 3.)

However, the court need not every address these significant issues. Upon a complete record, before it for the first time, this Court may revisit its prior determination; hold that either as a matter of state law the relevant statutes prohibit the application of the so-called “1970 By-laws” or a material issue of fact is presented over the adoption of the “1970 By-laws”, and remand for further proceedings. (QP 1-2.) If there are no “1970 By-laws”, then there are no members; no elections, and no Referee.

Even if this Court adheres to its prior ruling, other statutory grounds mandate reversal. The Referee far exceeded his powers by considering the ecclesiastical issue of “membership.” No such power was granted by this Court’s reference; by RCL Article 9, or can be countenanced by the First Amendment. (QP 5.)

SUMMARY OF ARGUMENT

The IAS Court's order appealed here was an attempt to enforce this Court's decision and order on a prior appeal. That decision found that the entire history of governance of the Hindu Temple Society was illegal because it was not in conformity with the so-called (never adopted and never observed) "1970 Bylaws" and ordered the trial court to completely reorganize the Temple's governance in conformity with them. In deciding that prior appeal, this Court made two substantial errors. First, it neglected to consider that those alleged "1970 By-laws" were directly in conflict with the Religious Corporations Law, and therefore invalid on their face. Second, it reached and decided a disputed material issue of fact that was not properly before it and that had not been decided by the trial court: whether the so-called "1970 By-laws" had ever been adopted by the Hindu Temple Society. As a result of these errors, this Court ordered the trial court to appoint a referee who has interpreted his duty under this Court's decision as authorizing him to offer to anyone in the world over the age of eighteen, whether Hindu or not, the right, upon payment of a nominal fee, to have a vote in selecting the governing body of the Hindu Temple Society of North America, the oldest traditional Hindu temple in the United States. In furtherance of this goal, he has also forbidden the Temple from taking

actions which are directly related to the religious activities and worship of the Temple. His actions, which were confirmed by the trial court in the order appealed from here, are violations of both the RCL and the United States and New York Constitutions.

This Court may avoid, as it should, deciding any constitutional issues by holding that the RCL and the Temple's certificate of incorporation do not allow elections to be held for the Temple. This Court could alternatively rule that a material question of fact exists as to whether the "1970 By-laws" were ever adopted by the Temple and simply remand that question to the trial court for determination.

If this Court holds that membership and elections do not violate the RCL or the Temple's certificate of incorporation, then it must determine whether the RCL is constitutional, both as applied to the Temple and facially. The entire proceeding before the Referee violates the Temple's and its devotees' rights to church autonomy under the First Amendment, the free exercise of religion, freedom of association, and under the Establishment Clause, because an agent of the State of New York is deciding how the Temple should be structured, who the leaders of the Temple should be and how it shall be led, and who should be allowed to vote for those leaders.

Each of these questions goes to the heart of the Temple's ecclesiastical polity—the State of New York simply may not decide them.

Because of the posture in which this case reached this Court on the prior appeal¹¹, not all of these issues were before the Court for its consideration. We respectfully submit that whenever the Court becomes aware that its prior decision has given rise to such constitutional violations, it is obliged to stop those violations which are taking place in its name.

11 In particular because the trial court had *not* ruled that the 1970 By-laws had been adopted or controlled, and because the trial court and this Court rejected the Temple's efforts to have the evidence that it had presented to the trial court on the 1970 By-laws and which Petitioners-Appellees had excluded from the allegedly complete record that they used on appeal, the questions of the illegality of the 1970 By-laws and the evidence that they had never been adopted was not put before this Court or considered by it.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE IAS COURT’S ORDER BECAUSE THE “1970 BY-LAWS” ARE ILLEGAL UNDER THE RELIGIOUS CORPORATIONS LAW, WHICH MANDATES THAT TEMPLE OPERATE UNDER THE STATUTORY SCHEME OF A SELF-PERPETUATING BOARD OF TRUSTEES

It is undisputed that the Temple has been incorporated pursuant to Article 9, Sections 180-83, of the RCL as a “Hindu Free Church.” Free churches incorporated under Article 9 are governed by self-perpetuating boards of trustees, not by elective memberships. 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. Because the “1970 By-laws” provide for a voting membership of anyone in the world over the age of eighteen who pays a nominal fee, they contravene both state law and the Temple’s Certificate of Incorporation, and cannot be applied to the Temple.

A. Article 9 Free Churches Are Governed By Self-Perpetuating Boards of Trustees, Not Elective Memberships.

At issue on this appeal is whether Article 9 of the RCL requires that “free churches” be governed solely by self-perpetuating boards of trustees. As explained below, the answer to this question must be “yes.”

The Court of Appeals has held that

“The primary consideration of courts in interpreting a statute is to “ascertain and give effect to the intention of the Legislature.” Of course, the words of the statute are the best evidence of the Legislature’s intent. As a general rule, unambiguous language of a statute is alone determinative. Nevertheless, the legislative history of an enactment may also be relevant and “is not to be ignored, even if words be clear.” “When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no “rule of law” which forbids its use, however clear the words may appear on “superficial examination”” Pertinent also are “the history of the times, the circumstances surrounding the statute’s passage, and * * * attempted amendments.”

Riley v. County of Broome, 719 N.Y.S.2d 623, 627 (N.Y. 2000) (citations omitted) (alterations in original). Moreover, “[i]t is an elementary rule of interpretation that all parts of an act are to be read and construed together to determine the legislative intent, and that all should be harmonized with one another.” *Levine v. Bornstein*, 173 N.Y.S.2d 599, 601 (N.Y. 1958).

Each of these canons of interpretation—plain meaning, history of the statute, and harmonization of the statute—demonstrate conclusively that free churches have self-perpetuating boards of trustees rather than elective memberships.¹²

1. *The plain meaning of the RCL is that trustees of free*

¹² This Court should also note that because it is undisputed that none of the Petitioners-Appellees are Trustees of the Temple, none of the Petitioners-Appellees has standing to bring or maintain the special proceeding. *See Stokes v. Phelps Mission, infra*.

churches choose the new trustees.

Section 182 of Article 9 of the RCL, entitled “Vacancies in boards of trustees” is the central provision concerning ongoing corporate governance in free churches. The entire text of the section is:

“Any vacancies occurring in the said board of trustees shall be supplied by the remaining trustees at any legal meeting of the members; but there shall always be at least five members of the board who are not ministers of the gospel or priests of any denomination.”

N.Y. RELIG. CORP. L. § 182. The plain meaning of the mandatory and comprehensive language of this section is that any time a position on the board of trustees is vacant, the new trustee must be chosen by the remaining trustees at any legal meeting of the members of the board of trustees.¹³ Neither in this section nor in the other sections of Article 9 is there any role whatsoever for anyone else connected with the free church. Section 182-a, for example, provides in part that “[t]he number of trustees may be increased to not exceeding eleven by said board of trustees” N.Y. RELIG. CORP. L. § 182-a. The only body with any power to increase the number trustees is

¹³ Appellees have argued elsewhere that the word “members” does not refer to the members of the board of trustees. This argument is specious. The very next sentence of the section refers to the “members of the board.” Nor does any part of Article 9 ever refer to any category of persons other than the Trustees as members of anything. The entire structure of the free church article is intended to create religious entities which are not run by those who attend or support them, but rather by a self-perpetuating group which makes the worship available to all without regard to their contribution to the church. (See the next footnote and the two succeeding sections of this Point.)

the board of trustees itself. Again the only formality necessary for recognition of board action is that the trustees reach this decision at a “legal meeting” of the members of the board of trustees.

The text of Article 9 quite simply cannot be fairly read to allow trustees to be elected by those who attend a free church.

2. *Case law and history of the free church in New York demonstrates that free churches are governed by self-perpetuating boards of trustees, not elective memberships.*

The only reported case on the governance of free churches in New York demonstrates that members have no voice in the management of a free church. Its affairs are instead to be managed by a self-perpetuating board of trustees. In *Stokes v. Phelps Mission*, 47 Hun 570, 4 N.Y.St.R. 901 (N.Y. Sup. Ct. 1888), the court wrote that:

Phelps Mission, [a corporation organized under the predecessor to Article 9, first enacted as Chapter 218 of the Laws of 1854] as organized has not and cannot have any members who have voice in the management of its property and affairs ... its affairs must be managed by its board of trustees, which is self-perpetuating...

47 Hun at 572 (emphasis added).

The statute at issue in *Stokes* was the first law to deal with free churches. Similarly, the other enactment concerning free churches, Chapter 657 of the Laws of 1867—like Section 183 of today’s RCL—provided that

pew rent could not be charged.¹⁴ Section 3 made it clear that those attending a free church had no voting rights:

Persons attending public worship in such churches or chapels, or otherwise claiming in any manner to be connected therewith, shall not, by reason of such attendance, or claim of any kind, be entitled to vote at the annual elections for church wardens and vestrymen, or trustees, of the religious corporation by which such churches or chapels shall have been erected and maintained, and shall not have any right, claim or demand as corporators in said parent church.

Id..

As none of its statutory predecessors gave any voting rights to those who attended free churches, this Court cannot now read into Article 9 such voting rights. Case law and history both demonstrate that only the board of trustees of a free church has voting rights.

3. *Harmonizing Article 9 with the rest of the RCL demonstrates that free churches are governed by self-perpetuating boards of trustees, not elective memberships.*

This Court can harmonize Article 9 with the rest of the RCL only by interpreting it to require self-perpetuating boards of trustees. There are two

¹⁴ In fact, pew rent was the reason free churches were first organized. The free church movement of the mid-19th century was meant to remedy the exclusion of the poor from church because they could not afford the annual pew rent that most churches required for attendance at the time.

Article 9 does not require any particular confessional identity and it has been applied to many different kinds of religious bodies in addition to the Hindu Temple. *See, e.g., In re Long Island Church of Aphrodite*, 14 N.Y.S.2d 762 (Sup. Ct., Queens County, 1939) (church organized to promote “a religious conception of love, beauty and harmony”).

main reasons for this.

First, each Article of the RCL provides detailed rules for the incorporation and governance of churches incorporated under it; indeed, it contains most of the necessary provisions often found in the by-laws of other types of corporations. Each article contains the requirements for calling a meeting for incorporation, what qualifies persons to be voting members at that meeting, how trustees (sometimes referred to by other denomination-specific titles such as churchwardens or vestrymen) are to be chosen, how long their terms of office are, when meetings for election and other purposes are to be held, and very specifically who may vote for trustees or has the power to appoint them. For example, among the Articles that provide for voting rights for congregation members, Article 3, which governs Protestant Episcopal Churches (enacted in 1795) defines precisely who gets to vote at the meeting of incorporation, RCL § 40, and sets out exactly what they must vote on, including the terms of office of “churchwardens and vestrymen.” *Id.* For other examples of Articles setting forth explicit voting rights for congregation members see also Articles 6, Reformed Dutch, Reformed Presbyterian and Lutheran Churches and Article 10, Other Denominations.

It is quite evident that the Legislature was perfectly capable of explicitly providing for congregational voting rights in denominations in

which they wanted such right to exist. Article 6, originally enacted in 1813 (forty-one years before the Free Church Article), demonstrates that the Legislature also knew how to make the forms of selection of trustees optional, so that churches of a particular type would be able to either have trustees elected by the congregation or be governed by its ministers elders and other non-elected officers.

However, the Legislature did not create any such right for members of the congregation in Article 9 Free Churches, nor did it make the method of selecting trustees in such churches optional. If the Legislature had wanted to have congregational voting for “free churches” it would have included such language in Article 9. It simply did not.

Second, another section of the RCL would not make any sense unless the trustees were the only ones in authority within a free church. Section 47 of the RCL provides for the conversion of a free church into a Protestant Episcopal Church under the statute. N.Y. RELIG. CORP. L. § 47. Throughout the process only the trustees make decisions – they vote to decide whether the conversion will take place, who will be the vestry of the new church, and on what date the annual election for the new church will take place. *Id.* Except for the local Episcopal diocese’s consent for the free church to become an Episcopal parish, no other persons associated with the

free church have any say whatsoever in the conversion process.

If congregational voting had been contemplated for Article 9 churches, one would expect the Legislature to have provided that the “members” have some say in the arguably most important decision a church ever faces – whether to change its denominational affiliation. Of course the Legislature did not intend for there to be “members” in free churches, so the trustees, and the trustees alone, vote on this crucial decision.

4. *The Attorney General Has Also Argued That Article 9 Requires a Self-Perpetuating Board Of Trustees.*

The New York Attorney General’s Office—which, under New York law, is responsible for the oversight of religious corporations—also argues that RCL Article 9 Free Churches have self-perpetuating boards of trustees, rather than elective congregational membership. In his brief to the Eastern District of New York in a related case, *Hindu Temple Society of North America v. Supreme Court of the State of New York*, 335 F.Supp.2d 369 (E.D.N.Y. 2004), the Attorney General based his defense of the constitutionality of the RCL on the argument that Article 9 provides for self-perpetuating boards of trustees:

It cannot be disputed that religious groups incorporated under Articles 9 and 10 are entitled to all the privileges and immunity given to any other religious corporation. As a practical matter, it is impossible to have a

denomination-specific article for every existing or future religious group in New York and elsewhere in the world that may wish to be incorporated in New York. Moreover, the Legislature's provision of two separate categories, instead of having one catch-all category, actually reflects an attempt to tailor the statutory scheme to address one of the most significant potential differences between religious groups: the fact that some religious groups are congregational in form and some are not. Article 9 thus provides a vehicle for religious groups that wish to have self-perpetuating boards of trustees with no voting members, while Article 10 seeks to accommodate religious groups that may have congregational forms of governance with voting members who pay dues.

Hindu Temple Society, 335 F.Supp.2d 369 (Attorney General's Mem. of Law 62-63).

It is clear, therefore, that not only does the Attorney General interpret the RCL as requiring a self-perpetuating board of trustees in Article 9 corporations, but even relies upon that fact as a basis for claiming that the entire RCL is constitutional. Although Appellants do not have any knowledge of specific instances, it may be assumed that the Attorney General has applied this understanding of Article 9 to other religious corporations.

5. *Any ambiguity in interpretation should be resolved in favor of the RCL's constitutionality.*

The Court of Appeals has commanded that New York "courts must avoid, if possible, interpreting a presumptively valid statute in a way that

will needlessly render it unconstitutional.” *LaValle v. Hayden*, 746 N.Y.S.2d 125, 129 (N.Y. 2002) (citing *Alliance of Am. Insurers v. Chu*, 569 N.Y.S.2d 364 (N.Y. 1991)). This has also been the case in the religious context. *See Rector, Churchwardens & Vestrymen of the Church of the Holy Trinity v. Melish*, 164 N.Y.S.2d 843 (N.Y. App. Div., 2d Dept. 1957) (in construing statute reasonably susceptible of two constructions, one of which would render statute unconstitutional, and the other valid, court should adopt that construction which saves statute’s constitutionality).

It is clear—especially given the argument under Point IV *infra* and the Attorney General’s argument set forth *supra*—that the RCL will have needless constitutionality problems unless this Court interprets it to allow for free churches like the Temple that do not wish to have congregational voting for trustees. Like the other canons of interpretation, this principle clearly indicates that free churches are to have self-perpetuating boards of trustees.

B. The “1970 By-laws” Are Invalid Because They Are Inconsistent With the Temple’s Certificate of Incorporation

It is well settled that by-laws which conflict with state law or the certificate of incorporation are a nullity and may not be enforced. The Non-Profit Corporations Law provides at § 602(f) that:

The by-laws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its members, directors or officers, not

inconsistent with this chapter or any other statute of this state or the certificate of incorporation.

Id. See also *Christal v. Petry*, 275 A.D. 550, 558 (1st Dept, 1949), *aff'd*, 301 N.Y. 562 (1950) (“As between the certificate of incorporation and the by-laws, the certificate must control.”).

The Temple’s certificate of incorporation reads:

Pursuant to Article 9 of the Religious Corporations Law.

1. The name or title by which the society shall be known shall be THE HINDU TEMPLE SOCIETY OF NORTH AMERICA.

2. The purpose of its organization is to found and continue a Hindu Free Church in the City of New York .

...

The “1970 By-laws,” by contrast, provide that “All persons who have attained the age of 18 years or more may be admitted to membership, irrespective of colour, race, religion, sex or nationality.” (Article III Section 1, emphasis added.) and that “The members . . . shall elect members of the Board of Trustees” (Article IV, Section 2, RA 63.)

Because Article 9 free churches do not and cannot have voting members or elections for the board of trustees, the “1970 By-laws” cannot be applied to or adopted by the Temple. In addition, the requirement in the

“1970 By-laws” that membership in the Temple be open to any person “irrespective of ... religion” is in conflict with the certificate of incorporation’s command of a “Hindu Free Church.”

This Court should reverse the IAS Court’s order and vacate its own order directing that elections be held.

C. The 1978 By-laws, As Amended, Are the Temple’s By-laws

Unlike Business Corporations (Business Corporations Law Section 404) or other types of Not-for Profit Corporations (Not-for-Profit Corporations Law Section 405), both of which are required to adopt by-laws, Religious Corporations are not strictly required to adopt by-laws. (RCL Section 5.) Therefore the operation of the Temple without by-laws prior to 1978 was entirely permissible and in conformity with the statutes and the certificate of incorporation. There is therefore no reason to assume or require that the “1970 By-laws” were necessary to the operation of the Temple under New York law.

In addition, the Petitioners-Appellees should be equitably estopped from raising the claim that the 1978 By-laws are invalid because the undisputed custom and tradition of the Temple has been to treat those By-laws as the valid By-laws of the Temple. *See, e.g., Davie v. Heal*, 86 A.D. 517 (2. Dept. 1903) (challengers to voting rule were equitably estopped from

raising claim where religious corporation has “acted in good faith upon the strength of a custom which appears to have been developed during more than a quarter of a century”). Imposing a set of by-laws never used by the Temple during the whole of its existence works is inequitable.

D. Conclusions

The plain language of Article 9 of the RCL, the case law, the structure and history of the entire RCL, the views of the Attorney General, and the need to interpret the statute in a constitutional manner all lead to the conclusion that an Article 9 church like the Temple must be governed by a self-perpetuating board of trustees. And since the “1970 By-laws” conflict with that statute and the Temple’s Certificate of Incorporation, they never could have legally governed the Temple and may not legally be imposed on it now. Nor did the absence of by-laws prior to 1978 create any legal infirmity in the Temple. Imposition of the so-called “1970 by-laws” on the Temple is a direct violation of state law.

II. THIS COURT SHOULD REVERSE THE IAS COURT’S ORDER BECAUSE THERE IS A DISPUTED MATERIAL ISSUE OF FACT AS TO WHETHER THE TEMPLE EVER EVEN ATTEMPTED TO ADOPT THE “1970 BY-LAWS”

On the prior appeal, Petitioners-Appellees (then Appellants) advised this Court:

“The appendix method is not being used. The appeal is upon the fully reproduced record.”

CPLR 5531 Statement, ¶ 7; PR 1. Petitioners-Appellees materially misled this Court by omitting the most significant part of the record below, in violation of CPLR 5526.

A. Portions of the Record Were Improperly Omitted in the Prior Appeal

In a massive September 2001 filing (PR 227-536), Petitioners-Appellees introduced as Exhibit 18 an unidentified document filed with the IRS in 1970, which they called the “1970 By-Laws.” (PR 233, ¶ 18; PR 446-465.) From that document alone, Petitioners-Appellees argued that there were “members” in the Hindu Temple Society, and that those “members” had the right to vote. (PR 233-4.)

In an October 2001 reply submission, Respondents-Appellants offered three affidavits and a marshalling affirmation in further opposition, all to the effect that the “1970 By-Laws” were never enacted, and that the Hindu Temple Society was organized as a nonmember corporation under Article 9 of the RCL, with voting rights reserved to the Trustees. (RA 231- 242.) A clear material issue of fact was thereby created.

Petitioners-Appellees’ counsel responded with a sur-reply affirmation dated November 13, 2001, that expressed amazement without adducing evidence (PR 537-543):

It is incredible that counsel for the Respondents should claim that the [1970] by-laws that were submitted to the IRS in order to obtain tax-exempt status were never adopted. See paragraph 4 of the affirmation in further opposition.” (PR 538, ¶ 2; PR 539, ¶ 4.)

Petitioners-Appellees’ counsel also referred to “the individuals who provided affidavits on behalf of the Respondents”, and “the affidavits submitted in support”. (PR 539, ¶¶ 4, 6.) Recognizing the material issue of fact, counsel went on:

Petitioners [have] served a notice to take the deposition of Mr. Alagappan, which deposition is presently pending.
(PR 543, ¶ 19.)¹⁵

Petitioners-Appellees’ September 2001 filing ends at PR 536. Their November sur-reply begins at PR 537. Respondents-Appellants’ October 2001 submission, which created the material issue of fact, was completely excluded from the prior record on appeal. When this Court was presented with the omitted documentation by motion, well prior to briefing and argument, it declined to act. (RA 12.)

Procedural due process was thus lacking on the prior appeal. This Court refused to review Respondents-Appellants’ evidence submitted below.

As Professor Siegel notes:

¹⁵ Petitioners-Appellees never took the deposition of Mr. Alagappan, an initial respondent, despite a strong hint from the IAS Court. He is no longer a party. (R 31.)

“The appellant may not put the record together selectively, including only materials favorable to his own side while omitting matter favorable to the other.”

SIEGEL, NEW YORK PRACTICE § 538 (3 Ed.) .

B. This Court Has the Power to Provide Relief.

Upon this record, two propositions are indisputable:

(a) The existence of a material issue of fact in a special proceeding precludes this Court from resolving it. (CPLR 409[b], 3211[b]; *see, e.g. Martin v. Chase Manhattan Bank*, 10 AD 3d 447, at 449 (2 Dept.; Aug. 23, 2004).)

(b) This Court is free to correct its error on this appeal, especially when the omitted portions of the prior record are presented to the Court. *See People v. Evans*, 94 N.Y.2d 499 (2000), and *Brown v. State*, 9 A.D.3d 23 (3 Dept. May 13, 2004). We now turn to this latter question.

III. THIS COURT IS FREE TO REVISIT ITS PRIOR HOLDING IN THIS MATTER BECAUSE ITS PRIOR HOLDING WAS PLAIN ERROR

It has long been established that the appellate courts of New York State must correct their prior errors in a subsequent appeal in the same case if:

there was a plain error committed by this court in declaring or applying the rules of law applicable to the case, or ... the point

determined was not involved in the case before it, or ... there are new facts which subvert the ground of the former judgment and change the character or measure of relief to which the plaintiff is entitled.

Worrall v. Munn, 53 N.Y. 185, 187 (1873) (emphasis added).

The Court may revisit both its improper (and quite possibly inadvertent) error of law in overlooking the controlling statute and ordering that By-laws which contravene statute be applied and also the factual finding that the “1970 By-laws” had been adopted which was made without benefit of the full record, which the Petitioners-Appellees claimed they had submitted.

A. The Court Can Correct its Prior Error of Law

In this case this Court overlooked the clearly controlling statutory provisions. The Court’s decision does not refer at all to Article 9 of the RCL. There is no reference to it.¹⁶ The Court therefore neglected to apply the clearly controlling law. *See Aridas v. Caserta*, 41 N.Y.2d 1059 at 1061, 364 N.E.2d 835, 836, 396 N.Y.S.2d 170, 172 (1977); *State v. Speonk Fuel*

¹⁶ The only reference to any part of the RCL is Section 2b, in reference to the applicability of Section 706 of the Not-for-Profit Corporations Law, which provides that non profit trustees may be removed, *for cause*. Appellants do not question that in proper circumstances trustees of an Article 9 corporation may be removed. However, in this case the “cause” that Petitioners-Appellees urge for that removal is that the Appellants have been chosen by a self perpetuating Board of Trustees! In effect they are being removed precisely for complying with Article 9 of the RCL.

Co., 307 A.D.2d 59 (3 Dept. 2003)¹⁷; *Welch Foods, Inc. v. Wilson*, 692 N.Y.S.2d 873, 875 (N.Y. App. Div. 4th Dept. 1999).

The effect of this error is grave, and in fact creates constitutional violations. The Court, in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional, and the other valid, should adopt that construction which saves its constitutionality. *Rector, Churchwardens and Vestrymen of the Church of the Holy Trinity v. Melish*, 164 N.Y.S.2d 843 (2nd Dept, 1957).

B. This Court May Revisit its Factual Finding

The lower court’s decision to determine “membership” violated both this Court’s order of reference and the member-free structure of the “free church” article of the RCL. (Point I, *supra*.) This Court is free to correct its error on this appeal, especially when the omitted portions of the prior record are presented to the Court. *See People v. Evans*, 94 N.Y.2d 499 (2000); *Brown v. State*, 9 A.D.3d 23 (3 Dept., May 13, 2004).

An overview of the issue appears in *People v. Evans, supra*. A unanimous Court of Appeals held that the doctrine of “law of the case” would not apply to a pre-judgment, discretionary ruling of an “evidentiary”

¹⁷ Subsequently affirmed on other grounds, -- NY 2d --, 2004 NY LEXIS 2438 (Oct. 19, 2004).

nature. 94 N.Y.2d at 502-4. The doctrine “directs a court’s discretion, but does not restrict its authority”. 94 N.Y.2d at 503 (citation and internal quotation omitted.)

Brown v. State, like this Appeal, involved significant constitutional issues. Based on a description of an “elderly victim” at a home near the campus of SUNY Oneonta, police detained and physically inspected individual males of color in the area. *Brown v. State*, 89 N.Y.2d 172 (“*Brown I*”); *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000); *cert. denied*, 534 U.S. 816 (2001). In subsequent state court proceedings, the Court of Claims imposed upon plaintiffs a severe burden of proof. Finding that “the State has admitted” that race alone was the basis for the stop, the Appellate Division unanimously imposed a lesser test. *Brown v. State*, 250 A.D.2d 314, 321 (3 Dept. 1998; “*Brown II*”).

On a later appeal (*Brown v. State*, 9 A.D.3d 23, *supra* (“*Brown III*”)), the Appellate Division explained its finding of “admission” “based upon the conclusion that [defendant] had failed . . .to expressly deny the equal protection allegations contained in the verified claim.” 9 A.D.3d at 28. In *Brown III*, the Appellate Division acknowledged error in its prior ruling and reversed the Court of Claims order denying leave to amend the answer to deny the “admission.” (9 A.D.3d at 25, 28-29.) The Appellate Division,

again unanimously, concluded:

“[W]e decline to give law of the case effect to this aspect of our decision. We believe that affording [defendant] the right to file and serve its amended verified answer, for the purpose of clarifying its denials related to the equal protection allegations of all the claimants, is the judicious course.”

9 A.D.3d at 29 (punctuation added; citation omitted).

As authority, the Appellate Division, Third Department, cited *State v. Speonk Fuel Co.*, 307 A.D.2d 59 (3 Dept. 2003). As pertinent here, *Speonk Fuel* is a statute of limitations opinion. In its first opinion, 273 A.D.2d 681 (3 Dept. 2000) (“*Speonk I*”), the Appellate Division held that the pertinent statute began to run from plaintiff’s last cleanup expenditure. 273 A.D.2d at 681-2.

A year later, in *State v. Ackley*, 289 A.D.2d 812 (3 Dept. 2001), the Appellate Division held that the statute started running with each cleanup expenditure. 289 A.D.2d at 814-5.¹⁸ When *Speonk Fuel* returned to the Appellate Division after remand, 307 A.D.2d 59, *supra*; “*Speonk II*,” the Appellate Division followed *Ackley* rather than *Speonk I*. It concluded:

“While cognizant that this Court’s misapplication of [precedent] on the accrual issue in our prior

¹⁸ The *Ackley* panel unanimously noted, “To the extent that this decision is inconsistent with [*Speonk I*], we decline to follow it.” (289 AD 2d at 813, n. *.) Two members of the *Ackley* panel were also members of the *Speonk I* panel. One member of the *Ackley* panel served on the *Speonk II* panel.

decision in this action represents the law of the case, as a matter of discretion, we concur . . . that [Ackley] is supervening authority which correctly states the law and should be followed in this case.”

307 A.D.2d at 62-63 (citations omitted). In short, an Appellate Division is free to correct its own error on a later appeal in the same case (*Brown III, supra; Speonk II, supra*), or even in an unrelated appeal (*Ackley, supra*). It is free, “as a matter of discretion” (*Speonk II, supra*), to choose “the judicious course” (*Brown III, supra*). See also *Gilligan v. Reers*, 255 A.D.2d 486 (2 Dept. 1998).

This case epitomizes the kind of extraordinary circumstances that warrant reconsideration. Especially since the issue was not fully briefed on the original appeal, this Court should not view “law of the case” as a bar to revisiting the issue.

IV. THIS COURT SHOULD REVERSE THE IAS COURT’S ORDER BECAUSE IT VIOLATES THE FREE EXERCISE AND FREE ASSOCIATION RIGHTS OF APPELLANTS UNDER THE UNITED STATES AND NEW YORK CONSTITUTIONS

A. The State’s Interference with the Hindu Temple Society is a Classic Violation of the “Church Autonomy” Doctrine.

The trial 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 clearly regulates and interferes with issues of membership, leadership, and doctrine of the Temple in an unprecedented manner that not only ignores, but willfully and dramatically violates the constraints of the United States Constitution:

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) (C)lause.’

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)).

1. *The Trial Court and the Referee have interfered with all central “matters of Temple governance.”*

The IAS Court and Referee are barred by the United States Constitution from involving themselves in religious disputes that arise within the Temple: “State governments, like the Federal Government, have been required to refrain from . . . insinuating themselves in ecclesiastical affairs or disputes” *McDaniel v. Paty*, 435 U.S. 618, 638 (1979) (citing *Serbian Eastern Orthodox Diocese*, 426 U.S. 696; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff*, 344 U.S. 94; *United States v. Ballard*, 322 U.S. 78 (1944); *Watson v. Jones*, 13 Wall. 679, 727 (1872)). Despite this clear command, the trial court and Referee have intruded into the religious sphere in several ways: (1) they have attempted to decide how the Temple should govern itself as a religious polity *i.e.*, how the Temple structures and governs itself; (2) they have attempted to impose a concept of “membership” on a religious group for whom that concept is foreign; (3) they are granting these newly created members rights in determining who shall hold ultimate authority over all secular and religious affairs of the Temple; and (4) they have intruded upon the daily workings of the Temple. Had this Court not issued its order to reorganize the Temple pursuant to the “1970 By-laws,” and the IAS Court and Referee not subsequently acted upon it, there would be no religious dispute.

The U.S. Supreme Court has consistently held that courts may not decide questions of church government or religious polity. As early as 1872, the Court held that “[c]ivil courts exercise no jurisdiction over matters “which concern[] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them” *Watson v. Jones*, 13 Wall. at 733).

The Supreme Court originated the modern form of what came to be called the “church autonomy doctrine” in *Kedroff*, where it referred to “a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, *matters of church government* as well as those of faith and doctrine.” *Kedroff*, at 344 U.S. at 116 (emphasis added). *See also Jones v. Wolf* at 608 (court proceedings “involv[ing] considerations of religious doctrine *and polity*” unacceptable). The IAS Court and Referee have violated this command in several ways.

2. *The Trial Court has installed the Referee as the formal and practical head of the Temple’s religious polity.*

The most obvious way the trial court has interfered with the Temple’s polity is by deciding that they will decide every major point of how the Temple will be run, with little or no effective input from the Temple and its

adherents. The Referee has taken (with the trial court's approval) all power upon himself:

- “the only . . . procedure for me to follow in order to determine who is a voting member of the Society” (RA 52);
- “procedures are to be implemented by me to determine who should be a voting member of the Society.” (RA 52);
- “a Managing Committee will have to be selected by me, as Referee, to decide who is to be accepted into membership.” (RA 53);
- “with me as Referee, casting any necessary tie-breaking vote.” (RA 54);
- “a membership application which is to be drafted by me with input from the Managing Committee, will be sent to each member listed.” (RA 54);
- “The mailing of the application for membership to those listed on the Society's membership list shall be under my direction and supervision.” (RA 54).

In fact, nearly everything the trial court and the Referee have ordered the Temple to do intrudes upon the realm of how the Temple functions as a religious polity and not just as a legal entity under State law, “impermissibly substitut[ing] [their] own inquiry into [Temple] polity” for the Temple's own religious decisionmaking. *Serbian Eastern Orthodox Diocese*, 426 U.S. at 708. And there is no question in this case as to who the religious

authorities, as opposed to the legal authorities,¹⁹ of the Temple are: the Respondents-Appellants. The Trustees have always exercised ultimate control over not only the Temple's temporal affairs but also the kinds of ceremonies performed, the priests allowed to perform them and even the deities enshrined or not enshrined there. Under the U.S. Constitution, the IAS Court and Referee must defer to the Respondents-Appellants as to the religious questions of polity implicated by this litigation.

Moreover, the kind of detailed review of Temple government that the IAS Court and Referee have already undertaken itself violates the Constitution. In *Serbian Eastern Orthodox Diocese*, the Court described a "detailed review" of internal church procedures as "impermissible under the First and Fourteenth Amendments" and venturing further into a "religious thicket" by evaluating "conflicting testimony concerning internal church procedures" *Serbian Eastern Orthodox Diocese*, 426 U.S. at 718-19.

But perhaps the greatest danger to the Hindu Temple Society's religious freedom is the complete failure by the IAS Court to recognize such rights. Each time the Temple raised these constitutional issues before the

¹⁹ Although the Appellate Division has declared that the current Trustees were not elected in accordance with the 1970 By-laws, their status as the religious authorities of the Temple is unaffected by the Appellate Division's order: since the Temple was begun, they have decided on the design of the Temple, what priests to hire, the religious calendar, and thousands of other questions pertaining to religious doctrine, practice, liturgy, and polity.

IAS Court or requested it to stay the proceedings based on the existence of constitutional issues, the IAS Court simply refused to acknowledge that there were any issues at all. (RA 33-34.)

3. *Forcing the concept of a voting membership on the Temple is unconstitutional and contravenes its religious beliefs.*

The membership question is one that has been imposed on the Temple and its adherents by the State. But for this case, the Temple adherents would never have addressed the question of who was a voting member and who not, because the concept is a wholly foreign, Western idea that the State has attempted to impose upon the Temple and its adherents. In Hinduism, it makes more sense to speak of “devotees” than it does to speak of “members” because believers do not typically “belong” to a particular temple, although they may have a temple they habitually visit. In Hinduism—and in the Hinduism practiced at the Temple in particular—there is no agreed-upon body of religious law that defines what a temple is. Hinduism tends to encourage each believer to seek their own method of approach towards the Divine, and therefore does not have a rule as to the concept of the body of Hindu believers. Thus, when the trial court and Referee attempts to define the “members” of the Temple, they are attempting to make clear what must remain mysterious under Hinduism.

Whatever the basis of the Temple's concept of the relationship with persons who attend it, the Supreme Court has held that this is not something that civil courts have jurisdiction to decide: "Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We cannot decide who ought to be members of the church" *Watson v. Jones*, 13 Wall. at 730 (quoting *Shannon v. Frost*, 3 B. Monro, 253 (Ky. 1842), in rejecting English chancery's traditional practice of inquiring into church governance and doctrine. In *Bouldin v. Alexander*, the Supreme Court stated that it could only reach its holding because church membership was not an issue before it: "This is not a question of membership of the church, nor the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline or excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Bouldin v. Alexander*, 82 U.S. 131, 139-40 (1872). Likewise, in *Jones v. Wolf*, the court held that it could only reach its holding because membership was not at issue. *See id.* at 607.

Other courts agree. In *Solid Rock Baptist Church v. Carlton*, 789 A.2d 149 (N.J. Super. App. Div. 2002), a court ruled in a strikingly similar case that a democratic system of elections could not be imposed on a church:

“[T]he [lower] court’s ruling set the stage for the court-monitored election at which the candidate slate proposed by the opposition faction loyal to the ousted pastor, and not pre-screened for eligibility by the nominating committee, won by majority vote. ... the court’s decision on the nominating process and procedure proved determinative of the underlying issues of church governance, polity, and ultimately doctrine.

Id. at 158. The South Carolina Supreme Court reversed efforts similar to those in this case in dealing with a church power struggle:

“Here, the parties to this litigation asked the trial judge to determine what percentage of no-confidence votes was required to remove Williams and which members were eligible to participate in the vote. In a well meaning attempt to bring about an arbitrated settlement of this tragic church division, the trial judge agreed to make this determination. It is not the function of courts, however, to dictate procedure for a church to follow.

Knotts v. Williams, 462 S.E.2d 288, 290-91 (S.C. 1995) (footnote omitted).

Definition of “membership” of a religious organization is treated the same. *See Waller v. Howell*, 45 N.Y.S. 790 (S. Ct. Spec. Term 1897) (“It is apparent, therefore, that the question of church membership is purely ecclesiastical, and that no civil right is involved in the plaintiffs’ claim to be regarded as communicants in the St. John’s Episcopal Church of Monticello.”). Resolving issues of elections and membership are clearly within the purview of the religious institution, and not the State.

4. *The IAS Court and Referee have usurped powers properly entrusted to the Temple's current Board of Trustees.*

The IAS Court, by appointing a Managing Committee composed of three Petitioners-Appellees and three Trustees, with the Referee casting the tie-breaking vote, has accorded the Petitioners-Appellees the same rights as Respondents-Appellants in overseeing the election of a new Board of Trustees. This constitutes an unconstitutional transfer of power from one group within a religious polity to another. The Court in *Kedroff* rejected just such a transfer under the New York RCL: “Here there is a transfer by statute of control over churches. This violates our rule of separation between church and state.” *Kedroff*, at 344 U.S. at 110. The Court went on to say that the State could not “intrude[e] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.” *Kedroff*, 344 U.S. at 119. Here the Referee and IAS Court intends to administer the election through a board of their own making: the Managing Committee appointed by the Referee. Like the Legislature in *Kedroff*, which hoped to prevent Soviet control of the Russian Orthodox Cathedral in New York, the IAS Court and Referee are imposing their version of congregationalism on a religious group. If the Court in *Kedroff* rejected the Legislature’s attempt to keep an American

church free from external control, this Court should reject the attempt to take control away from the Respondents-Appellants.

This principle has been repeatedly enforced by courts, including this Court refusing to inject themselves in such matters. *See generally Ebenezer Mar Thoma Church v. Alexander*, 279 A.D.2d 548, 549, 719 N.Y.S.2d 297, 297 (2d Dept. 2001) (citing *Milivojevich, Watson*); *Fussell v. Hail*, 84 N.E. 42 (Ill. 1908.).

Even if, as this Court has declared the 1978 Bylaws (as amended over the course of the years) legally infirm,²⁰ the religious intent of the document must serve as a guide to determining who the religious leaders of the Temple are. *See, e.g. Congregation Yetev Lev D'Satmar, Inc. v. Kahan*, -- Misc. 3d -, N.Y.L.J., p. 23, col. 3 (Sup. Kings 2004, Oct. 28, 2004) (interpreting religious corporation's bylaws as a spiritual document). This Court must reject the IAS Court and Referee' attempt to review and overrule the Temple's many years of decisions about such religious questions.

5. *The State's Egregious Interference with the Hindu Temple Society Significantly Interferes With its Religious Exercise.*

²⁰ This Court's sole basis for holding that the 1978 and subsequent By-laws infirm is that they did not conform to the amendment procedures found in the 1970 Bylaws. As has been demonstrated in Points I and II above, those 1970 B-laws were both illegal and never actually adopted. Thus, Appellants contend that the 1978 and subsequent By-laws which acknowledge the Trustees power to govern the Temple in conformity with RCL Article 9, and which, pursuant to Article 9 were properly adopted by the Trustees, should continue to govern the Temple.

- a. The State's actions significantly interfere with the Temple's religious exercise.

Here, there can be no doubt that the trial court and Referee have “significantly interfered with [the Temple's] religious beliefs,” and thus violated the Constitution. *McEachin v. McGuinnis*, 357 F.3d 197, 203 (2d Cir. 2004). There are two major ways in which the lower court has interfered with the Temple's and its devotees' religious beliefs: by imposing governance and by restricting religious practice.

The IAS Court and Referee have arrogated to themselves all decisions about the form of the polity the Temple adherents will be saddled with. They have made no effort to take into account the fact that they are forming a religious polity or that their rulings implicate the religious beliefs of the Temple adherents. No one but the IAS Court and the Referee—not the Trustees—has any say in whether and how the members of the Temple will be chosen. As noted *supra*, Hindu devotees simply do not possess the Western concept of “membership” that the trial court and Referee are attempting to impose upon the Temple. The Temple has the right to be free from such an outside imposition.

- b. The Order appealed from prevents the Temple and its adherents from engaging in religious practices.

Another major area in which the Order of the Court adopting the Referee's Interim Report interferes significantly with Plaintiffs' exercise of their religion is in their worship practices. For example, because the Interim Report has forbidden the Trustees from entering into contracts that would allow them to expend Temple fund for anything other than day to day operations. (Record p 56.) The Temple has long had plans to expand to allow adequate space to worship deities such as Devi Kodiarmata. Yet these plans have been thwarted by the orders of the Interim Report and the IAS Court's approval of it.

Compliance with the order of the Appellate Division is not a sufficient answer to the Trustees' constitutional claims—if this Court's 2003 order is unconstitutional, this Court is bound by the Supremacy Clause of the United States Constitution and the oath of office to reverse that unconstitutional decision.

B. The Current Egregious Interference with the Hindu Temple Society Violates Its Right to Freely Associate for Expressive Purposes.

The IAS Court and Referee have also violated the right of the Temple and its adherents to expressive association, in violation of the First Amendment. There is “implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in

pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909, 932-933 (1982); *Larson v. Valente*, 456 U.S. 228, 244-246 (1982); *In re Primus*, 436 U.S.412, 426 (1978); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)) (emphasis added). The right to expressive association “is an instrumental one: expressive association is protected ‘as an indispensable means of preserving other individual liberties.’ The right to associate also includes the right not to associate.” *Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 858 (2d Cir. 1996) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) and citing *Roberts* at 623).

The trial court and Referee have attempted to force the Temple to become a membership organization, creating rights among, and bonds between, people who wish to be devotees of the Temple and its deities, not part of a group of fellow believers. The relationships at the Temple are vertical, from the devotees towards the deities and the Temple that houses them, and not horizontal, among the devotees. This is one of the purest examples imaginable of the State attempting to force someone to associate with someone they simply do not want to associate with. Hindu believers

should not have to associate with other devotees as fellow members of a Temple congregation if they do not desire to. The devotees certainly should not be required to associate with non-Hindus in acts of worship and in their interactions with each other as parts of the same religious polity. Clearly the IAS Court and Referee's ill-considered orders and directives vitiate the Temples' (and its adherents') right to association with whom they wish.

These same orders and directives also destroy the Temple devotees' right to associate with others how they wish. The State's egregious intrusions into the governance of the Temple, end any semblance of freely-chosen and -exercised rights of association. Such restrictions on expressive association can only "pass constitutional muster if they serve compelling government interests unrelated to the suppression of ideas and those interests cannot be achieved through less restrictive means." *Sanitation & Recycling Ind., Inc. v. City of New York*, 107 F.3d 985, 997 (2d Cir. 1997). The State's interest here, at best, is in maintaining the niceties of the corporate formalities set forth in the RCL—hardly a "compelling" government interest. Indeed, to the extent that the strictures of the RCL inhibit expressive association more than the provisions of the Non-Profit Corporations Law, it is impossible to see the State's interest as "unrelated to

the suppression of ideas.” *Id.* The IAS Court’s actions do not survive strict scrutiny and should be rejected by this Court.

C. The RCL Is Also Facially Invalid Under the United States Constitution.

The RCL is also a facially unconstitutional statute because “it is unconstitutional in every conceivable application” insofar as it provides denomination-specific legal benefits to certain denominations but not others, and it requires minority faiths that do not enjoy such denomination-specific benefits to distort their religious structures to conform with the remaining available legal categories. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). This is because the system of categorization the RCL uses to sort religious groups is itself unconstitutional in two different respects.

First, the RCL violates the Free Exercise Clause and the Equal Protection Clause because it makes a distinction between the 30-odd sorts of religious groups, e.g., Roman Catholic, Spiritualist, Baptist, and Coptic Orthodox, and all other religious groups, including Hindu, Muslim, and numerous smaller Christian groups. Each of the “pre-approved” faiths has sections of the RCL that have been custom-tailored to fit its particular form of religious polity. The other groups must make do with the two categories of “Free Churches,” RCL §§ 180-3, and “Other Denominations,” RCL §§

190-211. The other groups often have problems similar to those that the Temple has had in this litigation because, for example, the “Free Church” category is not custom-tailored for Hindu temples. At the very least, the RCL must be held to be facially unconstitutional with respect to those religious groups that belong to the “Other” category.

Second, the other aspect of the RCL that renders it unconstitutional in every conceivable application is the fact that custom-tailoring can never be done so well that it does not, in Justice Brennan’s phrase, “inhibit[] the free development of religious doctrine” *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. at 370 (Brennan, J., concurring) (quoting *Presbyterian Church v. Hull Church*, 393 U.S. at 449). The problem with creating categories for specific religious bodies is that doctrine, especially about church polity, changes over time. This doctrinal drift will eventually mean that the polity will no longer fit its custom-designed RCL category. The RCL, however, will remain the same, reflecting a former state of affairs that may now be very different or even the opposite of current practice. However, it is safe to say that some drag on doctrine would occur. Justice Brennan in fact predicted this development when, in comparing it to other states’ systems for providing religious groups with legal personality, he said of the RCL: “Such statutes must be carefully drawn to leave control of

ecclesiastical policy, as well as doctrine, to church governing bodies.” *Maryland & Va. Churches*, 396 U.S. at 370. In fact, the RCL has been the source of many of the seminal church autonomy cases—*e.g.*, *Kedroff*, *Kreshik*—precisely because it is not flexible enough to track the multiplicity of ways that the religious spirit can see fit to organize itself.

Since the RCL will never be able to keep up with the “free development of religious doctrine,” it will in every instance burden those developments, thereby violating the Free Exercise Clause.²¹ Like the blue laws at issue in *People v. Abrahams*, 386 N.Y.S.2d 661, 669 (N.Y. 1976) (Fuchsberg, J., concurring).

history ... proves that the statute is not the product of a single, conceptually cohesive legislative plan, but, instead, the consequence of 290 years of patching and filling by the Legislature as it attempted to keep up with rapidly changing societal patterns and needs. Under such circumstances, it was almost inevitable that a time would come when the patchwork no longer made any sense.”

Id. Like the statute at issue in *Abrahams*, the RCL’s patchwork quilt of provisions no longer makes constitutional sense.

D. Article I, Section 3 of New York State’s Constitution also Prohibits the State from Intervening in the Governance of the Temple.

²¹ Pursuant to CPLR § 1012(b), the New York State Attorney General is entitled to notice by the Court of a challenge to the constitutionality of a state statute and an opportunity to intervene.

The New York Constitution, article I, section 3, reads:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief ...

This Article provides an independent basis for determining that court interference in the method of church governance chosen by the Temple is impermissible. Indeed, the Court of Appeals and this Court have repeatedly held that matters relating to the internal governance of a church are to be determined by the church and that their determination is binding on the courts: “It has long been the rule that a church has the right to determine the qualifications of membership; whether one is a member in good standing is a matter of an ecclesiastical nature, relating to the government and discipline of the church; and the church’s decisions as to such a matter is binding on the courts.” *In the Matter of Kissel v. Russian Orthodox Greek Catholic Holy Trinity Church*, 103 A.D. 2d 830, 831(App. Div., 2d Dept. 1984) (citing *People ex rel. Dilcher v. German United Evangelical St. Stephen Church*, 53 N.Y. 103; *Matter of Kaminsky*, 251 A.D. 132, *aff’d*, 277 N.Y. 524; *Rodyk v. Ukranian Autocephalic Orthodox Church*, 31 A.D. 2d 659 .

V. THIS COURT SHOULD ALSO REVERSE THE IAS COURT’S ORDER BECAUSE THE REFEREE’S REPORT EXCEEDS THE SCOPE OF THIS COURT’S REFERENCE

Alternatively, this Court could find that the Referee and the IAS Court, in ignoring the constitutional precedents binding upon all judicial officers, the controlling law and a citation in this Court's prior opinion, misunderstood this Court's order and far exceeded the terms of the reference.

This Court's order of referral contained a citation to *Matter of Kaminsky*, 251 App. Div. 132 (4 Dept. 1937), *aff'd*, 277 N.Y. 524 (1938). (R 10.) *Matter of Kaminsky* expressly held that questions of church membership are ecclesiastical in nature (251 App. Div. at 137), far beyond the decision-making power of this Court or its delegate, the Referee. *See also Taylor v. New York Annual Conference of African Methodist Episcopal Church*, 115 N.Y.S.2d 62 (Sup. Queens 1952); *Congregation Yetev Lev D'Satmar, Inc. v. Kahan*, -- Misc. 3d --, NYLJ 10/28/04, p. 23, col. 3 (Sup. Kings 2004), and *Kraft v. Rector, Churchwardens and Vestry of Grace Church*, -- F. Supp. 3d --, 2004 U.S. Dist. LEXIS 4234 (S.D.N.Y. Mar. 15, 2004). Additionally the Referee, as are all judicial officers, is bound to obey the United States and New York Constitutions.

Nevertheless, this Referee has taken it upon himself to determine ecclesiastical issues, including the delicate question of membership (who will choose the Temple's leadership). (R 51-56.) In threatening terms, the

lower court upheld this conduct. (R 5-7; see R 31, 33-36.) The order under appeal in no. 2004-5595 (R 5-7) could thus be reversed, because it is in violation of this Court's order of reference.²² As this Court noted in *L.H. Feder Corp. v. Bozkurtian*, 48 A.D.2d 701 (2 Dept. 1975):

“A referee has no power beyond that limited in the order of reference; he does not have the general jurisdiction in law and equity of the Supreme Court.” (48 A.D.2d at 701; citations omitted.)

CONCLUSION

For the reasons advanced above, Respondents-Appellants request that this Court vacate its order dated April 3, 2003 and the lower court's order of June 10, 2004 on the basis that:

- (a) it conflicts with Article 9 of the RCL and dismiss the Petition;
- (b) there is a material issue of fact concerning the adoption of the 1970 By-laws which was never resolved, and remand the case to the lower court for a hearing on that issue;
- (c) the orders violate the United States and New York State Constitutions, and dismiss the Petition;
- (d) the RCL violates the United States and New York State

²² We argue here that this Court did not in fact grant the Referee the power to determine ecclesiastical issues. We elsewhere argue that this Court could not grant such power even if it wanted to. (Points I, III, *supra*.)

Constitutions, and dismiss the Petition; and/or

- (e) the Referee's Interim Report exceeded the authority of this Court's reference in that it violated the United States and New York State Constitutions, and the RCL.

The costs and disbursements of the appeal should be awarded to Respondents-Appellants.

Dated: New York, New York
November , 2004

Respectfully submitted,

THE BECKET FUND FOR
RELIGIOUS LIBERTY

By: _____
ROBERT L. GREENE, ESQ.,
ROMAN P. STORZER, ESQ.,
(*admitted pro hac vice*)
Co-counsel to respondents-
appellants
1350 Connecticut Avenue, NW
Washington, DC 20036-1735
(202) 955-0098

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Robert L. Greene
Co-counsel for Respondents-Appellants.