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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

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CLAUDIA TENNEY, :

Petitioner, :

-against- : INDEX NO. EFC-2020-1376
(Justice DelConte)

OSWEGO COUNTY BOARD OF ELECTIONS, et al., :

Respondents. :

For an Order, etc. :
--------------------------------------- X

BRIEF OF RESPONDENT ANTHONY BRINDISI IN RESPONSE TO ORDERS TO SHOW CAUSE

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INTRODUCTION

Without a stay of the certification of the election results for the race to represent New York's 22nd congressional district (the "District"), the State will issue a certificate of election declaring the Petitioner, Claudia Tenney, the winner of the election. That certificate will promptly be transmitted to the Congress and, in short turn, Tenney will be sworn in as the Member representing the people of the District in the U.S. House of Representatives.

It is irrefutable, black letter law that no court—neither federal nor state—has jurisdiction to hear the contest beyond that point, and Respondent Brindisi will be deprived of both his right to appeal and any further ability to adjudicate his right to represent the District in the New York state courts. His only remaining means of redress to vindicate his proper claim to the seat would be to file a notice of contest in the U.S. House of Representatives itself. In the meantime, the people of the District will be represented by Tenney as a voting Member of Congress, despite there being ample evidence that, if Brindisi prevails on appeal, the final tally would show that the people chose Brindisi, not Tenney, to represent them.

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The only way to avoid this severe and irreparable harm is to maintain the stay, so that the rulings of this Court may be appealed and subject to scrutiny of the appellate courts on an expedited basis. Respondent Brindisi respectfully requests that the Court decline to lift the stay.

BACKGROUND

Under New York and federal law, if this Court lifts its stay of the Oneida County certification, the certified winner is likely to be swiftly seated in Congress. Once each county certifies, the certified statement of the canvassing board is transmitted to the New York State Board of Elections (the "State Board"). Election Law §§ 9-204, 9-206, 9-214. After the State Board receives the certified copies of statements from the county board of canvassers for each county, the State Board then canvasses the results. Election Law § 9-216. The State Board then sends a

certified copy of the results to the declared winner of the election. *Id.* The State Board also prepares "a general certificate under the seal of the state and attested by the members of the [State Board], addressed to the house of representatives of the United States, of the due election" of the winning candidate for each congressional district "and shall transmit the same to the house of representatives." *Id.*

The issuance of this general certificate of election all but guarantees that the certified winner will be seated in Congress. *See* 2 U.S.C. § 26 (instructing congressional clerk to place those on the official rolls "whose credentials show that they were regularly elected in accordance with the laws of their States respectively"). A member-elect then officially becomes a member of congress upon "oath or affirmation, to support [the United States] Constitution." US Const art § VI, cl 3. Crucially, once a member is seated, the U.S. House becomes the only proper arbiter of whether the member is entitled to the seat, and no court retains any power to remove the member from that congressional body.

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A candidate who maintains that the candidate, and not the seated member, is entitled to the seat, has only one avenue of redress: the candidate must file a notice of contest with the U.S. House itself that: (1) states the grounds for the election contest, 2 USC § 382(b), and (2) claims "a right to the office" with "specific credible allegations of irregularity or fraud that, if proven true, would entitle the Contestant to the office," Ex. 1, *Project Hurt v Waters*, H.R. Rep. No. 113-133, at 3 [2013]. A state's official, certified results are treated as "are prima facie evidence of the regularity and correctness" of an election, Ex. 2, *Gormley v Goss*, H. Rept. 73-893, at 2 [1934], effectively establishing a presumption of regularity that can be overcome with sufficient evidence to establish the contestant's right to the seat.

LEGAL STANDARD

Under CPLR § 5519(c), a court is authorized to stay an order or judgment pending appeal. "The granting of a stay pending an appeal rests in the sound discretion of the court," *Application of Mott*, 123 NYS2d 603, 608 [Sup Ct, Oswego County 1953], meaning "[t]here is no single factor in determining whether to grant a stay." *Schaffer v VSB Bancorp, Inc*., 129 NYS3d 252, 257 [Sup Ct, Richmond County 2020]. A court may consider "any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party" if a stay is denied. *Id.* at 257. A stay pending appeal may be particularly appropriate where "[a] legal question of considerable importance [is] involved," *Reddish v Glavin*, 62 NYS 261, 263 [App Div 1900], or where an appeal would be moot if the stay is denied, *see Van Amburgh v Curran*, 344 NYS2d 966, 967 [Sup Ct, Albany County 1973].

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ARGUMENT

I. A stay is warranted to preserve Respondent Brindisi's appellate rights.

Absent a stay pending appeal, Respondent Brindisi will be denied an opportunity to have his arguments considered by an appellate court in a case which presents questions of considerable legal importance. In adjudicating whether more than 1,000 ballots should be counted, this Court faced novel and difficult questions of law, chief among them: what to do where election workers induced voters into submitting their absentee ballots to the wrong county; how to appropriately address a breakdown of the voter registration system; how to address affidavit ballots cast by voters who, contrary to New York law, were never instructed they were in the wrong polling place; and—perhaps most importantly—once evidence of all of these irregularities was unearthed and continued to mount, whether to order a full audit of the race to ensure that the candidate who was in fact the choice of the people of the District is certified as the winner of the race. Respondent Brindisi respectfully maintains that the Court's decision on these issues amounted to reversible

error. And if Respondent Brindisi is right on these issues, a reversal would likely change the results of the election because the current margin of votes that separates Petitioner Tenney and Respondent Brindisi is just 0.04 percent of the votes cast. But unless the Court mandates that certification of the election remains stayed while an appeal is pending, Respondent Brindisi will be denied his right to appellate review, because once Tenney is seated in Congress, the New York courts will lose any power to remove her from that body. Under such circumstances, the issuance of a stay pending appeal is appropriate. *Van Amburgh*, 344 NYS2d at 967 (granting stay because otherwise appeal would be "rendered academic").

II. The seating of Petitioner as a member of the U.S. House of Representatives would deprive the New York state courts of jurisdiction.

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"The decision of the House of Representatives to seat a candidate from that District renders it impossible for a court … to provide [a litigant] with any meaningful relief." *McIntyre v O'Neill*, 766 F2d 535, 535 [DC Cir 1985]; *see also McIntyre v Fallahay*, 766 F2d 1078, 1081 [7th Cir 1985] (noting that once member is seated, "[n]othing we say or do, nothing the state court says or does, could affect the outcome of this election"); *cf. Reed v Cnty. Comm'rs of Del. Cnty.,* 277 US 376, 388 [1928] (holding that Senate "is the judge of the elections, returns, and qualifications of its members" and "may determine such matters without the aid of the House of Representatives or the executive or judicial department") (citing US Const art I, § 5). Thus, if the State Board of Election issues the certificate of election and Petitioner Tenney is seated in Congress, the New York state courts will be without power to overturn that result.

Article I, Section 5, clause 1 of the U.S. Constitution provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." In other words, Congress is the final arbiter of its membership. State and federal courts alike have acknowledged that, once a person is seated as a United States senator or representative, the courts simply lack

jurisdiction to adjudicate whether the member should be removed from office: only the U.S. Congress can do that. *See, e.g.*, *Roudebush v Hartke*, 405 US 15, 25 [1972]; *Morgan v United States*, 801 F2d 445, 447 [DC Cir 1986]; *Feehan v Marcone*, 331 Conn 436, 458, *cert denied*, 140 S Ct 144 [2019] (Connecticut Supreme Court recognizing that "the vast majority of our sister states hold that courts lack jurisdiction to entertain a contest pertaining to a legislative election, particularly in the absence of statutory authorization to do so").[1] Similarly, courts have held they lack authority to review if and how the House conducts its own election contest proceedings. *See, e.g.*, *Barkley v O'Neill*, 624 F Supp 664, 668 [SD Ind 1985] ("[T]he Court finds that the issues which plaintiff seeks to have this Court resolve fall squarely within a 'textually demonstrable constitutional commitment of the issue' to the House and thus is a nonjusticiable political question."); *Morgan*, 801 F2d at 447 (noting "[i]t is difficult to imagine a clearer case of 'textually demonstrable constitutional commitment' of an issue to another branch of government to the exclusion of the courts" than Article I, Section 5) (Scalia, J.). New York courts, including the Court of Appeals, are in agreement. *See People ex rel. Fitzgerald v Voorhis*, 222 NY 494, 499 [1918] ("In this connection it is suggested that if a member be elected from the new district, he may not be permitted to take his seat in Congress. That is a matter solely for the determination of Congress itself. It is the sole judge of the qualification of its members, and its action can in no way be controlled by this court."); *People ex rel. Hatzel v Hall*, 80 NY 117, 121 [1880] ("It is conceded

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[1] Under the same principle, courts have repeatedly held that they lack jurisdiction to adjudicate whether a member is qualified to be seated in the first place. *Roudebush*, 405 US at 25 (holding that nothing may "frustrate[] the Senate's ability to make an independent and final judgment" on who it may seat); *Barry v U.S. ex rel. Cunningham*, 279 US 597, 614–15 [1929] ("Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate. This has been the practical construction of the power by both houses of Congress; and we perceive no reason why we should reach a different conclusion.").

by the text writers, that each of those houses has the sole power to judge thereof, exclusive of every other tribunal.") (citing Article I, Section 5).

The upshot of Article I, Section 5 is this: neither this Court, nor the Appellate Division, nor the New York Court of Appeals can require the House of Representatives to provisionally seat Petitioner Tenney or to unseat her once she is seated. The *only* way that the New York courts can ensure that Respondent Brindisi's right to appellate review is maintained (and that the people of the District are not even temporarily represented by a voting member who they did not actually choose to represent them in the U.S. Congress) is to stay the Court's order until the appellate courts have an opportunity to act.

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III. The seating of Petitioner Tenney would also moot the appeal, depriving the New York state courts of jurisdiction.

The limits on the courts' jurisdiction once Petitioner Tenney is seated would also deprive the Appellate Division of jurisdiction under the mootness doctrine. New York courts are forbidden to pass on "academic, hypothetical, moot, or otherwise abstract questions." *Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]. This principle—that a court can adjudicate only live controversies—"is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary." *Id.* at 713–14. It extends to cases that "although once live, have become moot by passage of time or change in circumstances." *Id.* at 714.

"In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." *Id.*; *see also Pillmerier Produce Farms v Comm'r of Agric. & Mkts.*, 38 AD3d 1092, 1093 [3d Dept 2007] (holding appeal was moot where the "relief sought was 'either impossible to grant or wholly untenable'"). Such is the case here. Once Petitioner

Tenney is seated, the State of New York will be powerless to change it even if the Appellate Division or Court of Appeals issues rulings that result in Respondent Brindisi being declared the rightful winner of the election to represent the District under New York's election laws. *See supra* at II. Although Congress *could* take action to change who held the seat at that point, such a result would not be an "immediate consequence of the judgment," *Hearst Corp.*, 50 NY2d at 714, and it would be "impossible" for the New York court to direct Congress to do so, *Pillmerier Produce Farms*, 38 AD3d at 1093. Accordingly, once Petitioner Tenney is seated the appeal would be moot. *See Reed v Walsh*, 101 A.D.3d 1661, 1662 [4th Dept. 2012] (finding appeal moot where candidate sought to get on the ballot but general election already occurred and the court "in contrast to [its] authority to order a new primary election, … lack[ed] authority to 'remove the successful candidate from office or order a new general election'") (quoting *Harrington v Coveney*, 62 NY2d 640, 641 [1984]); *Uciechowski v Hill*, 205 AD2d 825, 825 [3d Dept 1994] (finding appeal moot where litigant sought to remove candidate from ballot after the election occurred because the court lacked jurisdiction "to order a new election or to remove the successful candidate from office"); *Roberts v Allen*, 19 AD2d 690, 690 [3d Dept 1963] (similar); *see also Cepeda v Salgado*, 142 AD3d 911, 911 [1st Dept 2016] (dismissing appeal as moot because at the time it was "heard it was too late to grant relief under the Election Law").

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In her affirmation in support of her order to show cause, Petitioner Tenney argues that this Court should not issue a stay because the State Board of Elections could issue an amended certificate of election. But Petitioner Tenney points to no authority that would give an amended certificate of election any operative effect in a race for the United States House of Representatives after she is seated. Instead, she cites a single case, *Amedore v Peterson*, 102 AD3d 995, 998 [3d Dept 2013], involving a candidate to in the *New York State* Senate. Because *Amedore* does not

involve the U.S. Congress, it is inapplicable here. Instead, the U.S. Constitution clearly provides that only Congress can adjudicate the qualifications of a sitting member, including whether she was properly elected. Far from speculative, then, it is a foregone conclusion that an appeal would be mooted absent a stay of the certification of election results.

CONCLUSION

Although Respondent Brindisi agrees that this case must be resolved expeditiously, the public interest weighs strongly in favor of certifying the *correct* winner of this election. As New York courts have counseled, the "fundamental rights to which a litigant is entitled, including the opportunity for appellate review of certain orders, cannot be ignored, no matter how pressing the need for the expedition of cases." *Grisi v Shainswit*, 119 AD2d 418, 421 [1986].

For all of these reasons, Respondent's request to maintain the stay should be granted and Petitioner Tenney's request for an order certifying the election denied.

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Dated: February 4, 2021
Washington, DC

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