DOCKET NO.: FST-CV18-6080798S	**:**	**SUPERIOR COURT**
FEEHAN, JIM	**:**	**J.D. OF BRIDGEPORT**
VS.	**:**	**AT BRIDGEPORT**
MARCONE, RICK ET AL	**:**	**NOV. 23, 2018**

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Connecticut Constitution is crystal clear: each House of the General Assembly has the exclusive authority to review election returns and to decide whether a candidate was validly elected. Plaintiff seeks relief in the wrong place from the wrong branch of government. By seeking relief here, plaintiff seeks an order plainly barred by the Constitution. This Court lacks jurisdiction. Accordingly, Philip Young III moves to dismiss.

Background

Plaintiff's complaint asserts that a mistake was made by poll workers in one precinct of a polling place for the 120th House District. Plaintiff Jim Feehan and intervening defendant Philip Young III were the opposing candidates in that race. The moderator's report submitted to the Secretary of the State ("SOTS") reported that Young has 13 more votes district-wide than Feehan. Feehan alleges that some number of voters in the 120th House District were given ballots for the 122nd House District and some number voted using those ballots before the mistake was brought to the attention of election officials. The complaint alleges that as a result of "neglect" by certain election officials and "errors," this Court should order a new election since "the winner of the election for the position of State Representative of the 120th Assembly District cannot be known." (Complaint ¶¶ 34, 37, 39). This Court cannot do so; whatever remedy plaintiff may have over a contested election is within the control of the House.

The Connecticut Constitution Provides that the House Has Exclusive Jurisdiction

For the past 200 years, the Connecticut Constitution has clearly and unequivocally provided that General Assembly election contests must be determined by the House or Senate. Article Third, section 7 of the Connecticut Constitution currently provides, with emphasis added:

> SEC. 7. The treasurer, secretary of the state, and comptroller shall canvass publicly the votes for senators and representatives. The person in each senatorial district having the greatest number of votes for senator shall be declared to be duly elected for such district, and the person in each assembly district having the greatest number of votes for representative shall be declared to be duly elected for such district. The general assembly shall provide by law the manner in which an equal and the greatest number of votes for two or more persons so voted for senator or representative shall be resolved. The return of votes, and the result of the canvass, shall be submitted to the house of representatives and to the senate on the first day of the session of the general assembly. *Each house shall be the final judge of the election returns and qualifications of its own members.*

This language is clear and emphatic: the House is not "a" judge of the results, it is "the" judge. Its decision is "final." The plain language rule surely applies to reading our state constitution. *Figueroa v, Commissioner of Correction,* 123 Conn. App. 862, 869 (2010). From 1903 through 1994 the General Assembly has appointed a Committee to resolve 28 election contests. (Exhibit A).[1] Probably because of this, Article Third, section 7 has been infrequently cited in court proceedings.

In one case involving a General Assembly election, the court declined jurisdiction. In *Application of Mylchreest,* plaintiff sought a recount of ballots cast in a State Senate race and

[1]The undersigned has contemporaneous records, including resolutions, transcripts or reports as to several of these contested elections. The records are somewhat voluminous and only provide examples of the processes that the General Assembly has adopted in other cases (most challenges were withdrawn), but they will be provided to the Court and/or the parties upon request. Since at least 1903, the authority of these committees has been broad (Exhibit B). Among the issues that these committees heard was a 1947 challenge where one candidate alleged that voting machine labels were misaligned so that votes were improperly counted for one candidate, arguably a similar issue to the issue raised here albeit with the then-existing technology. (Exhibit C).

other relief. The Superior Court held it did not have jurisdiction to enter any relief based on the Constitutional provision:

> In so far as the application prays for a declaration that the named applicant be declared elected senator and that a certificate issue to that effect, it clearly is outside of the jurisdiction of a judge of the of the Superior Court or, indeed, of any court to grant it. Section 6, article III [now Section 7, article III] of the State Constitution provides that "each house [of the General Assembly] shall be the final judge of the election returns and qualifications of its own members." *Similar provisions have uniformly been held to give the Legislature exclusive jurisdiction to decide who has been elected to membership therein so that no court has jurisdiction to pass upon such a question*. . . .
>
> [U]nder the Constitution it is . . . not proper for any court to be given power to pass upon the question as to who has been elected state senator or representative.

Application of Mylchreest, 6 Conn. Sup. 435, 436 (1938) (emphasis added). The court concluded that "a judge of the Superior Court has no jurisdiction to declare Mr. Mylchreest elected as senator nor to issue a certificate to that effect, *nor has a judge of the Superior Court jurisdiction to grant any other ultimate relief on this application*." *Id.* at 437 (emphasis added).[2]

The Connecticut Supreme Court had previously interpreted the same language in an amendment to a city charter which stated that "the board of councilmen shall be the final judges of the election returns, and of the validity of elections and qualifications of its own members" as divesting the courts of jurisdiction:

> [T]he statute in question was clearly intended to apply to cases of this kind. It makes the common council of the city final judges of the election returns and qualifications of its members. *By the use of the word "final" the legislature intended to divest the Superior Court of jurisdiction in such cases* and make the common council the sole tribunal to determine the legality of the election of its members.

Selleck v. Common Council of City of S. Norwalk, 40 Conn. 359, 361–62 (1873) (emphasis added); *cf. State ex rel. Andrew v. Lewis*, 51 Conn. 113, 126 (1883) ("We think it is clear that the

[2] Mr. Mylchreest did thereafter file a challenge in the Senate, seeking a recount. (Exhibit D). Available records state that the challenge was withdrawn. (*Id.*).

legislative department of the government of this state may appoint a tribunal vested with exclusive power to hear and determine questions of contested elections, without a trial by jury, when such contests originate between claimants to an office under a municipal corporation which the legislature alone has created."); *United States ex rel. Fink v. Tod*, 1 F.2d 246, 252 (2d Cir. 1924) ("When a legislative act creates a tribunal and provides that its decision shall be 'final' on a given matter, the courts have held that the legislative intent was that its decision was not subject to review or appeal, but was conclusive of the question decided."). Of course, in this case the issue is not a legislative or *statutory* restriction on the court's power, it is more important and implicates more fundamental issues – it is a *constitutional* restriction (or, more accurately, a constitutional direction approved by the people of the state, that another branch of government must decide). If the Court were to order a new election, it would by necessity have to find that the election was not reliable; but according to authority granted by our citizens within the Constitution, that decision belongs to the House.

The Political Question Exception

This case also falls squarely within the political question exception to subject matter jurisdiction. "It is well settled that certain political questions cannot be resolved by judicial authority without violating the constitutional principle of separation of powers." *Nielsen v. Kezer*, 232 Conn. 65, 74 (1995). "[T]he characterization of such issues as political is a convenient shorthand for declaring that some other branch of government has constitutional authority over the subject matter superior to that of the courts." *Id.* "In deciding whether an action is nonjusticiable under the political question doctrine, we are to be guided by 'several formulations which vary slightly according to the settings in which the [question] arise[s] . . . . *Prominent on the surface of any case held to involve a political question is found a textually*

demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already.'" *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (emphasis added). *See also Fonfara v. Reapportionment Commission,* 222 Conn. 166, 185 (1992) (case is nonjusticiable "if the court finds, 'purely as a matter of constitutional interpretation, that the Constitution itself has committed the determination of the issue to the autonomous decision of another agency of government,' or in light of 'the wider responsibilities of the other branches of government'"). The Constitution commits this issue to the House of Representatives. Another branch of government, no less important than the judiciary, has responsibility. There is no exception, and this Court can proceed no further.

Historical Basis and Rationale for Election Clauses in Constitutions

Connecticut's Constitution is not alone in having the legislature itself decide issues of contested elections. Nearly all states as well as the United States have similar provisions. A historical review of the rationale for these provisions was authored by then-Judge Scalia in *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986). Article I, § 5, clause 1 of the United States Constitution provides that "each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." After a close election for a House seat, the House appointed a "task force" of the House Administration Committee "to investigate the election." The task force recounted the votes and found that the Democrat won by four votes out of 230,000 cast. Based on the recommendation of the task force, the House voted to seat the

Democrat. That decision then became the subject of a lawsuit by several electors and others alleging that the House's action violated first amendment rights to free speech, association, and to petition the government for redress of their grievances, and due process rights. *Id.* at 446. On appeal, the circuit court held that "[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." *Id.* at 447. Judge Scalia offered an extensive review of the inclusion of the provision, quoted here at length as the historical basis for the similar provision in our Constitution of 1818:

> The history of the Elections Clause is entirely consistent with its plain exclusion of judicial jurisdiction. In the formative years of the American republic, it was "the uniform practice of England and America" for legislatures to be the final judges of the elections and qualifications of their members. I J. STORY, COMMENTARIES ON THE CONSTITUTION § 833, at 605 (5th ed. 1905) (hereinafter "J. STORY"). *See also* M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 145 (Da Capo Press reprint ed. 1971); C. WARREN, THE MAKING OF THE CONSTITUTION 423-24 (2d ed. 1937). There was no opposition to the Elections Clause in the Federal Constitutional Convention, *see* I G. CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 483 (Da Capo Press reprint ed. 1974); C. WARREN, *supra*, at 419, and the minor opposition in the ratification debates focused upon the clause's removal of final authority not from the *courts*, but from the state legislatures, where the Articles of Confederation had vested an analogous power. *See* Articles of Confederation, Article V, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H. DOC. No. 398, 69th Cong., 1st Sess. 28-29 (1927). *See also* II M. JENSEN, DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 426-28 (Statement of Robert Whitehill in Pennsylvania Convention), 446 (Statement of William Findley in Pennsylvania Convention) (1976) (hereinafter " DOCUMENTARY HISTORY"). It is noteworthy that none of the responses to the opposition mentions the safeguard of judicial review. Such a safeguard was evidently unthinkable, since the determination of the legislative House was *itself* deemed to be a *judicial* one. As Chancellor Kent expressed it:
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> > As each house acts in these cases [of judging the election return and qualification of its members] *in a judicial character*, its decisions, *like the decisions of any other court of justice*, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty.

> I KENT'S COMMENTARIES 248 (8th ed. 1854) (1st ed. N.Y. 1826) (emphasis added). As far as we are aware, in none of the discussions of the clause did there appear a trace of suggestion that the power it conferred was not exclusive and final. The fragments of recorded discussion imply that many took for granted the legislative "right of judging of the return of their members," II M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 241 (rev. ed. 1966) (Statement of Rufus King in Federal Convention), and viewed it as necessarily and naturally exclusive. *See* II DOCUMENTARY HISTORY 448 (Statement of William Findley in Pennsylvania Convention), 537 (Statement of Thomas McKean in Pennsylvania Convention), 565-66 (Statement of James Wilson in Pennsylvania Convention).

Morgan, 801 F.2d at 447. Judge Scalia noted Justice Story's rationale for these provisions:

> If [the power to judge elections is] lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger. No other body but itself can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights and sustain the free choice of its constituents. I J. STORY § 833, at 604-05.

Morgan, 801 F.2d at 450. A more recent report on the authority of the U.S. Senate seating its own members noted that "the final and exclusive right to determine membership in a democratically elected legislature 'is so essential to the free election and independent existence of a legislative assembly, that it may be regarded as a necessary incident to every body of that description, which emanates directly from the people.'" Congressional Research Service, *Authority of the Senate Over Seating Its Own Members: Exclusion of a Senator-Elect or Senator-Designate*, at 1 (Apr. 16, 2009) (quoting L. Cushing, *Law and Practice of Legislative Assemblies in the United States*, at 54-55 (1856)) (Exhibit E).[3]

[3] That report also describes that these provisions "are usual in all legislative bodies under free governments." *Id.* at 5. They date from the 1500s when England's Parliament "wrested away from the King and the chancery" the authority "to seat their own members." (*Id.*). "The right of the House, as a body, to determine upon the right of each member to a place in that body is so obvious that it needs no comment." *Id.* (quoting J. Tucker, *The Constitution of the United States:*

House Rules Provide a Forum to Review Contested Elections

Plaintiff has a forum to bring his complaint: the House acting in a judicial capacity. *See Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929) (Congressional powers to review elections "are not legislative but judicial in character"). In fact, current Connecticut House Rule 19 provides:

> At the opening of each session a committee on contested elections, consisting of four members, at least two of whom shall be members of the minority party in the House, shall be appointed by the speaker to take into consideration all contested elections of the members of the House and to report the facts, with their opinion thereon in a manner that may be directed by House resolution.

(Exhibit B). Although it will be up to the new House to adopt its rules for the 2019-20 session, Rule 19 has not changed since 1987.

One of the most recent examples of the invocation of House Rule 19 was the 1984 election of Joan Hartley (now a state senator) to a House seat in Waterbury. Hartley, a Democrat, won by two votes, and her Republican opponent contested the election in the House largely on the ground of irregularities in absentee ballots. At that time, a Republican staff attorney was quoted as saying that in light of the separation of powers doctrine, "you don't want the judicial branch deciding who should be elected to the legislature." Jacklin, "House Battle Looms," Hartford Courant, Nov. 30, 1984 (Exhibit G).[4] In raising the challenge, "GOP researchers have focused their attention on a passage in the state constitution that says, 'Each House shall be the final judge of the election returns and the qualifications of its own members.'" *Id.* The Republican speaker of the House was quoted as saying "[i]t's got to be the new General Assembly that decides it. That's been the protocol in the past." *Id.*

A Critical Discussion of its Genesis, Development, and Interpretation, volume I, at 426-27 (1899).

[4] At that time Republicans were the majority in the House.

The House rule in effect in 1984 required appointment of a three-person committee (Exhibit H), and the Republican speaker appointed two Republicans and one Democrat. (When Democrats reached the majority in the House in 1987, they amended the rule to require equal representation on such committees, and it has remained so through 2018.) As the transcript of debate to resolve that the committee file its report within three weeks makes clear, the committee was given power to subpoena witnesses, take testimony, and make a recommendation to the House. (Exhibit I).

During that debate, Rep. Frankel outlined the reason for appointment of a committee, namely that "the Constitution of the State of Connecticut indicates that each House of the General Assembly shall be the final judge of the election returns and qualifications of its members. That is the Constitution. That is the highest law of our state within our state." J. House Proc., at 230 (Jan. 9, 1985) (Exhibit I). Rep. Jaekle noted that "courts have affirmed and directed that our constitutional responsibilities are as they are, and that maybe that is this Chamber, this General Assembly is the place to have those constitutional responsibilities exercised. . . .The courts say, hands off, go to the General Assembly. I don't know what else somebody can do." (*Id.* at 242-43). Contemporary news reports indicated that Hartley's opponent first filed suit seeking a recount but a Superior Court judge dismissed the case for lack of jurisdiction.[5]

[5] A newspaper article dated January 12, 1985, stated that the case was in the Appellate Court on appeal. (Exhibit K). There is no published Supreme or Appellate Court opinion involving that case, which suggests that either the case was withdrawn or summarily dismissed. An earlier article dated November 30, 1984, stated that the case was dismissed by Superior Court Judge Francis J. O'Brien "saying the courts did not have jurisdiction." (Exhibit G). A Republican staff attorney was quoted in that article as saying "he believes" Article Third, § 7 "was the basis for the judge's decision dismissing Bogen's appeal." (*Id.*). *See also* J. House Proc. at 491 (Jan. 24, 1985) (The challenger "tried to make their disagreement with the election officials and bring it to court. The court informed the contestant it had no jurisdiction in this instance, and only the

That committee met several times, took evidence and ordered a recount of the ballots. J. House Proc. 486-88, 493 (Jan. 24, 1985) (Exhibit L). After its review, it unanimously recommended to the full House that Hartley be seated, and the House approved its recommendation. (*Id*. at 523). As part of the debate on the recommendation, a member of the committee noted that "in the State of Connecticut, *in any election except an election for the General Assembly*, an individual participating in that election, has a result [sic?] to petition the court for a review of that election. . . . Unfortunately, our statutes don't permit that same remedy for someone who is a candidate for the General Assembly." (*Id*. at 505) (emphasis added). Perhaps in response to the claim that it was "unfortunate" that statutes did not allow a judicial challenge to General Assembly elections, Republican Speaker R.E. Van Norstrand reminded members of the constitutional source of their authority:

> [T]here have been changes in the election laws. There have been some new phenomena. The Constitution is not one of them and it provides for us to be the judge of our members and what was followed here dates back to [precedents] established 82 years ago, although not used in the last 46.

(*Id*. at 524) (Exhibit L).

Following the contested election of 1984, the General Assembly adopted Public Act 86-121, which intended to adopt statutory procedures for contested elections for House and Senate seats (although still keeping the General Assembly as the proper forum). However, Governor O'Neill vetoed the Act, noting that it was inconsistent with the state constitution:

> [T]he bill would statutorily intrude on the authority of the General Assembly as to election returns. The Constitution of Connecticut mandates that "each house shall be the final judge of the election returns and qualifications of its own members." Any procedure governing contested elections, therefore, should be incorporated into the House and Senate Rules.

General Assembly could settle disputes involving its own members.") (remarks of Rep. Schmidle) (Exhibit I).

(Exhibit M). The Connecticut Constitution further provides that "[e]ach house shall determine the rules of its own proceedings." Article Third, section 13. The veto was sustained.[6]

Another recent example involved a 1994 House election. A voting machine was delivered to the wrong precinct and some number of voters, apparently 15, voted for candidates they were not eligible to vote for and could not vote for candidates they were eligible to vote for. The winning candidate, Allen Hoffman, won by 13 votes, and the challenging candidate, Richard Mulready, considered asking the House to order a new election. From what is available publicly, it appears that a committee on contested elections was never formed and Hoffman was seated. (Exhibit O). An attorney from the Secretary of the State's office, Mary Young, was paraphrased in the Hartford Courant as saying "Under the state constitution, each house in the General Assembly is the final judge of the election returns and the qualifications of its own members. . . . That decision has fallen on the legislature from time to time, although not after every election." Further, the West Hartford Republican leader was quoted: ""It's the new legislature that decides its own membership," said Peter Zarella, West Hartford Republican Town Committee chairman. "It's not the old legislature deciding the makeup of the new legislature." (Exhibit O).

Plaintiff's Arguments in Favor of Jurisdiction

Plaintiff cites a series of election statutes in support of jurisdiction (Complaint ¶ 1); none has any applicability to General Assembly elections, and plainly a statute could not overcome a constitutional directive (which he does not cite) in any event. He cites Conn. Gen. Stat. § 9-323 (President, U.S. Senate, U.S. House); § 9-324 (statewide officials and probate judges); § 9-328 (municipal officials); § 9-329a (primaries), but they have no application here. Plaintiff tries to

[6] In 1996, the Office of Legislative Research identified General Assembly election results as a matter "exclusively reserved to the legislature." (Exhibit N).

claim that a state representative in a single-town district is a "municipal officer" for purposes of § 9-328, hoping to incorporate the definition of municipal officer in § 9-372(7) into § 9-328 (Complaint ¶ 13). But § 9-372(7) expressly applies *only* to Chapter 157 of our statutes and a handful of other specific statutes, and § 9-328 is in Chapter 149. Plaintiff's interpretation would also be unconstitutional under Article Third, § 7, and it would present the nonsensical situation that judicial review of single-town House elections would be allowed (like the 120th) but not for multi-town House elections (like the 122nd). There is no principled way to sustain that argument. (Incidentally, Rep. Hartley's House district in the 1984 challenge was, we are informed, a single-town district.)

In short, unambiguous Connecticut authority, most notably the Constitution, establishes that this Court does not have jurisdiction to order any relief that might affect the result of an election for Connecticut House or Senate members.

Similar Constitutional Provisions in Other States Have Been Interpreted as Divesting Courts of Jurisdiction

Connecticut's constitutional provision reserving to the legislature contests of legislative elections is not unusual. Any order here upholding jurisdiction would necessarily run counter to an overwhelming number of cases holding that courts lack jurisdiction where state constitutions include similar election clauses:

> The constitutions of most if not all, of the states contain provisions similar to Art. 1, § 5, of the Federal Constitution, to the effect that each house of the state legislature shall be the judge of the election and qualifications of its own members. And *it is well settled that such a provision vests the legislature with sole and exclusive power in this regard, and deprives the courts of jurisdiction of those matters.*

107 A.L.R. 205 (originally published in 1937) (emphasis added). A decision by this Court that it has jurisdiction would necessarily be at odds not only with cases in this state, but also an

impressive number of decisions of the highest courts of other states as well as the U.S. Supreme Court. Connecticut simply is not an outlier on this point.

Courts in states with similar provisions uniformly hold that courts lack jurisdiction to hear state legislative challenges. *See, e.g., State ex rel. Evans v. Wheatley*, 197 Ark. 997, 1000 (1939) ("Article V, Section 11 of the Constitution of the State of Arkansas provides as follows: 'Each house shall appoint its own officers, and shall be sole judge of the qualifications, returns and elections of its own members.' We are of the opinion that this section of the Constitution is decisive of this case and that the Senate is the sole judge of the qualifications of its members. The above language is clear and unambiguous."); *In re McGee*, 36 Cal. 2d 592, 594–95 (1951) ("Article 4 section 7 of the California Constitution states 'Each house shall choose its officers, and judge of the qualifications, elections, and returns of its members.' [W]e think that § 7 of Article IV, supra, confers exclusive jurisdiction on the legislature
to judge the qualifications and elections of its members. The powers of the government of the state are divided into the legislative, executive and judicial, and neither shall exercise the powers of the other 'except as in this Constitution expressly directed or permitted.' Cal. Const., Art. III, § 1. And there is expressly vested in the legislature, the power to judge the matters here involved, Cal. Const. Art. IV, § 7, supra, a power which is judicial in character. Barry v. United States, 279 U.S. 597, 49 S. Ct. 452, 73 L. Ed. 867. Hence we conclude that it was intended to be exclusive in the legislature . . . . The overwhelming weight of authority under identical federal and state constitutional provisions is in accord."); *Hughes v. Felton*, 11 Colo. 489, 490 (1888) ("Article 5, § 10, of the state constitution, referring to the legislature, provides that each house 'shall judge of the election and qualification of its members.' The power thus vested and conferred is exclusive. The courts cannot interfere with its exercise, or review the decision of either house, acting under

and in pursuance of said power. Such decision is conclusive."); *Harden v. Garrett*, 483 So. 2d 409, 410–11 (Fla. 1985) ("An analysis of Florida's constitution and its caselaw makes clear that any exercise of judicial power in this situation would to that extent invade the legislative domain and usurp that power which has been constitutionally invested in that branch. Section 2 of article III, as a starting point, indicates that each house of Florida's legislature is to be the 'sole judge of the qualifications, elections, and returns of its members.' . . . The present provision that each house be the *sole* judge of its members' elections indicates beyond doubt that the framers of the present constitution intended the courts to defer to legislative resolution of the problems within that branch."); *Beatty v. Myrick*, 218 Ga. 629, 629 (1963) ("This is an equitable action in which the plaintiffs seek to have adjudicated which of two named candidates was legally elected to represent the Third Senatorial District in the State Senate. Art. III, Sec. VII, Par. I of the Constitution of Georgia (Code Ann. § 2-1901) provides: 'Each House shall be the judge of the election, returns, and qualifications of its members . . .'; The State Senate being vested by the Constitution with exclusive power to adjudge the qualifications of its own members, the trial court had no jurisdiction to entertain the case and properly sustained the general demurrers to the petition."); *Reif v. Barrett*, 355 Ill. 104, 126 (1933), *overruled in part on other grounds by Thorpe v. Mahin*, 43 Ill. 2d 36 (1969) ("Section 9 of article 4 of the Constitution provides as follows: 'Each house shall determine the rules of its proceedings, and be the judge of the election, returns and qualifications of its members.' Most of the states of the Union, if not all of them, have similar constitutional provisions, and, so far as we have been able to find in the research made on this phase of the case, the courts of last resort of the states having similar constitutional provisions have steadfastly held that each House of the General Assembly has sole jurisdiction to determine the question of the qualifications of its members, and that its decision

upon that subject is final."); *Luse v. Wray*, 254 N.W.2d 324, 326–27 (Iowa 1977) ("[B]y constitution and statute, the power of the respective legislative bodies over election contests for legislative seats is clearly spelled out, and under the additional constitutional clause on the distribution of powers the courts cannot entertain election contests regarding such seats: 'The powers of the government of Iowa shall be divided into three separate departments the Legislative, the Executive, and the Judicial: and no person charged with the exercise of the powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.'"); *State ex rel. Attorney Gen. v. Tomlinson*, 20 Kan. 692, 702-03 (1878) ("The attempt to determine the title of the defendant as a member of the legislature in this manner, must necessarily fail, for the simple reason that we cannot and ought not take jurisdiction of the case. We are powerless to enforce any judgment of ouster against a member of the legislature. While the constitution has conferred the general judicial power of the state upon the courts and certain officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers, and among them is the power to judge of the elections, returns, and qualifications of members of the legislature. This power is exclusively vested in each house, and cannot by its own consent, or by legislative action, be vested in any other tribunal or officer."); *State v. Houston*, 40 La. Ann. 598, 601 (1888) ("The provision quoted from the present constitution, 'that each house shall judge of the qualification, election, and return of its members,' appears in every state constitution that precedes the present one; but in these preceding constitutions this provision is followed by these words, (quoting:) 'But a contested election shall be determined in such manner as shall be directed by law.' The suppression of these words in the present constitution is not without meaning and significance. What is the

inference to be drawn from it? Evidently it was to give emphasis to the declaration that each house was to judge of the qualifications, elections, and returns of its members by stripping it of any restriction or condition that could limit its scope or impair its full force, and to make each house in truth and in fact, in all cases and under all circumstances, the judge, and the sole judge, of all matters pertaining to the election of its members."); *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 560 (Me. 1973) ("The Constitution of Maine declares (Article IV, Part Third, Section 3) that 'each House shall be the judge of the elections and qualifications of its own members.' This power is exclusive and plenary."); *Covington v. Buffett*, 90 Md. 569, 577 (1900) ("It is too clear, we think, for serious controversy, that section 19, art. 3, of the constitution names the only tribunal which has the power to decide the question, and that is the senate of Maryland itself. It provides that 'each house shall be judge of the qualifications and elections of its members,' and we are all of the opinion that until that tribunal, which is intrusted with the exclusive authority, decides whether a vacancy exists, the courts are without jurisdiction to interfere."); *Greenwood v. Registrars of Voters of City of Fitchburg*, 282 Mass. 74, 79 (1933) ("It is provided by the Constitution of the commonwealth, part 2, c. 1, § 3, art. 10: 'The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution. * * * Jurisdiction to pass upon the election and qualification of its own members is thus vested exclusively in the House of Representatives. 'No other department of the government has any authority under the Constitution to adjudicate upon that subject. The grant of power is comprehensive, full and complete. It is necessarily exclusive, for the Constitution contains no words permitting either branch of the Legislature to delegate or share that power. It must remain where the sovereign authority of the state has placed it.' Dinan v. Swig, 223 Mass. 516, 517, 112 N. E. 91, 92. The House of Representatives is 'thus made the final and exclusive judge of all

questions, whether of law or of fact, respecting such elections, returns or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof.' Peabody v. School Committee of Boston, 115 Mass. 383, 384."); *People ex rel. Drake v. Mahaney*, 13 Mich. 481, 493 (1865) ("[W]hile the constitution has conferred the general judicial power of the state upon the courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers; and among them is the power to judge of the qualifications, elections and returns of members of the legislature. The terms employed clearly show that each house, in deciding, acts in a judicial capacity, and there is no clause in the constitution which empowers this, or any other court, to review their action."); *State v. Peers*, 33 Minn. 81, 82 (1885) ("The constitution (section 3, art. 4) makes each house judge 'of the election returns and eligibility of its own members.' Under this, not only must each house determine, in case of a contest, who is elected to be a member, but must determine upon what evidence it will decide the question, and how it will procure such evidence. Over the proceedings the judiciary has no control, and could not have without trenching on the independence of the house."); *State v. Dist. Court of the Fourteenth Judicial Dist. in & for Broadwater Cty.*, 50 Mont. 134, 138 (1914) ("Section 9, art. 5, of our state Constitution provides: 'Each house (of the Legislative Assembly) shall * * * judge of the elections, returns, and qualifications of its members.' A like provision is found in the Constitution of the United States and in the Constitution of every state in the Union, so far as we know. Speaking generally, our state Constitution is a limitation of powers, but the provision in section 9 above is an exception to that rule. This is a distinct grant of power by the people to each branch of the Legislative Assembly, a power necessary to the existence and independence of each house as an instrumentality of government. This power, emanating from the sovereign

people, cannot be delegated by either house or both acting together; and likewise neither house possesses the power to divest itself of the authority thus conferred upon it. So long as our Constitution stands as it is now written, no officer, individual, court, or other tribunal can infringe upon the exclusive prerogative of each house to determine for itself whether one who presents himself for membership is entitled to a seat."); *Bingham v. Jewett*, 66 N.H. 382, 383 (1891) ("'The house of representatives * * * shall be judge of the returns, elections, and qualifications of its members.' Const. art. 22. Attested copies of the town clerk's records of the votes declared by moderators in the election of representatives (sometimes called credentials, or certificates of election. Gen. Laws, c. 35, §§ 2, 19) are returns. Const. arts. 32, 42. If the word 'returns' had not been used in article 22, the house, as judge of the election of its members, would have been judge of the returns of their election. Being judge of the whole electoral question, it is judge of all evidence bearing on that question, including the returns, which are evidence of the votes officially declared in town meeting. The power of the 'judge of the returns,' which the constitution has vested in the house, cannot be transferred to the court by the house or the legislature. . . . The court's decision of the question whether, upon the returns, certain persons were or were not legally elected, and should or should not be on a roll of the house, would be a usurpation of the power of the house, which, as 'judge of the returns, elections, and qualifications of its members,' is judge of all questions of law and fact presented by the returns."); *Matter of Sherrill v. O'Brien)*, 188 N.Y. 185, 214 (1907) ("[U]nder the Constitution, each house of the Legislature is the exclusive judge of the election and qualification of members. The courts have no jurisdiction to determine the title of any member. . . . [E]ach house has, under the Consitution, not only the exclusive power, but the exclusive right, to judge of the title of any of its members to a seat therein. Whoever either house receives as its

legally elected member and entitled to a seat becomes thereby a de jure member of that house, even though the courts, were such a question triable before them, might be of a different opinion."); *Dalton v. State ex rel. Richardson*, 43 Ohio St. 652, 680 (1885) ("Ohio Constitution article 2, § 6 provides: that 'each house shall be judge of the *election, returns*, and qualification of its own members,' and in the statutes enacted to effectuate its salutary provisions, by which (section 3003, Rev. St.) 'the right of a person declared duly elected to the office of senator or representative in the general assembly may be contested by an elector of the district or county by appeal to that branch of the general assembly to which such person is declared elected,' etc. The jurisdiction of each house to decide upon the election, returns, and qualification of its own members is supreme and exclusive. No court of the state has, nor is it possible under our present constitution to clothe any court of the state with, the power to decide upon the validity of the returns of the election of any candidate for either house, or to decide him elected or defeated."); *Daniel v. Bound*, 184 Okla. 161, 162 (1938) ("Okl.St.Ann. section 30, art. 5, Const. . . . provides that each House of the Legislature 'shall be the judge of the elections, returns, and qualifications of its own members.' This court has not heretofore construed this section in connection with general elections, but the universal rule is that neither the Election Board nor the courts may interfere with or assume jurisdiction of such contests in the face of like constitutional provisions. 20 C.J. 214, sec. 272. Were we to entertain the appeal and grant the relief sought, our decision would be in direct conflict with said section 30. It would constitute a mandate to the Election Board to assume jurisdiction and hear and determine a challenge of the correctness of the election. This the Board is without power to do. Only the House of Representatives may examine into the correctness of the ballots. We hold, therefore, that a challenge of the correctness of the returns of an election constitutes a challenge of the title to the office, and that by reason of

section 30, art. 5, Const., the House of Representatives has exclusive jurisdiction in such cases affecting candidates for membership therein, and neither the State Election Board nor the courts may interfere in such matters."); *Combs v. Groener*, 256 Ore. 336, 338 (1970) ("Article IV, s 11, of the Oregon Constitution requires: 'Each house when assembled, shall choose its own officers, judge of the election, qualifications, and returns of its own members; * * *.' The courts have uniformly held, with little exception, that statutes which purport to empower the judicial branch of a state government to try and decide the 'election, qualifications and returns' of the members of a legislature is in violation of similar constitutional requirements. . . .[T]he constitution does vest the sole jurisdiction of this contest to be within the House of Representatives of the Legislative Assembly."); *Corbett v. Naylor*, 25 R.I. 520, 521 (1904) ("[U]nder the Constitution (article 4, § 6), 'each house shall be the judge of the elections and qualifications of its members. ***' The petitioner suggests that the Constitution does not provide that either house shall be the sole judge of the election of its members. It may be observed that neither does the Constitution of the United States. The provision is that each house shall be the judge-not a judge or one of the judges-of such elections and qualifications, and hence logically it follows that each house is the sole judge thereof."); *Andersen v. Blackwell*, 168 S.C. 137, 139 (1932) ("The Constitution 1895, art. 3, § 11, provides: "Each house shall judge of the election returns and qualifications of its own members." The power vested in the state board of canvassers to decide as judicial officers who, in a given case, has received the largest number of votes for the office of state Senator, is, of course, subject to the power vested in the Senate by the Constitution to judge of the election returns and qualifications of its own members. Ex parte Scarborough, 34 S.C. 13, 16, 12 S. E. 666. The merits of a contested election case in the Senate cannot be taken from the constitutional tribunal, and brought on for adjudication in a court of either law or equity."); *State ex rel. Ingles*

v. Circuit Court of Spink Cty., 63 S.D. 313, 319 (1934) ("Section 9 of article 3 of the Constitution of this state reads in part as follows: 'Each house shall be the judge of the election returns and qualifications of its own members.' The power of each house of the Legislature to determine the election and qualification of its own members is therefore plenary. When the Twenty-Fourth Legislature shall assemble at the capitol on January 8 next, any person whomsoever may appear before either house and assert his right and title to any seat therein. It may be admitted, so far as the present issues are concerned, that, if such a claim is so asserted, then whether or not the house will listen at all to the claimant, what proof it will require of him, what investigation it will make of his claim, and what decision it will finally come to concerning such claim, are matters entirely and exclusively for that house to determine."); *Ellison v. Barnes*, 23 Utah 183, 185 (1901) ("[U]nder the provisions of the constitution the state senate has the exclusive jurisdiction to determine which of the parties was elected and entitled to a seat in that body. Const. art. 6, § 10, provides that 'each house shall be the judge of the election and qualifications of its members.' Article 5, § 1, provides that 'the powers of the government of the state of Utah shall be divided into three distinct departments, the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.' Article 1, § 26, provides that 'the provisions of the constitution are mandatory and prohibitory, unless by express words they are declared otherwise.' The powers conferred upon each house of the legislature under section 10, art. 6, are forbidden to be exercised, by article 5, § 1, by any person in the exercise of powers belonging to a different department of the government. Neither is it anywhere declared in the constitution that the power conferred upon each house to judge of the election and the qualifications of its

members is otherwise than prohibitory in respect to the other departments. Chief Justice Bartch, in the opinion in the case of *Kimball v. City of Grantsville*, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628, said, 'The apportionment of distinct power to one department of itself implies an inhibition against its exercise by either of the other departments.' It therefore follows that that power is exclusively lodged in each house of the legislature, and the courts have no jurisdiction to try and determine contests for seats in the legislature."); *State ex rel. Elfers v. Olson*, 26 Wisc. 2d 422, 429–30 (1965) ("By section 7 of article 4, it is provided: 'Each house shall be the judge of the elections, returns and qualifications of its own members'-thus committing jurisdiction to determine the validity of the election of a member of either house to that house. No similar provisions respecting other officers is to be found in the Constitution. . . . [T]he courts do not have jurisdiction to review the assembly's action in resolving the Elfers-Olson contest. Under our system of government this is one decision which the constitution leaves to the legislature alone to make."); *State ex rel. Sullivan v. Schnitger*, 16 Wyo. 479, 514-15 (1908) ("It may be conceded for the purposes of this discussion that the present Legislature was elected under an inequitable apportionment act, it may be further conceded that there has not been a fair apportionment act passed since the Constitution went into effect, but that does not render the Legislature so elected under such apportionment act illegal, nor authorize or empower this court to inquire into the qualification or right of any one to his seat therein. Such right cannot be questioned in the courts. The last and final arbiter of such question is the Legislature itself, and each house is the sole and exclusive judge of the election and qualification of its own members.").

Possibility of Reservation of a Question of Law

The Court has entered an order asking for briefing on the possibility of reservation of a question of law – presumably whether the claims alleged would permit the exercise of subject matter jurisdiction – pursuant to P.B. § 73-1. Section 73-1 provides, in part: "(a) Counsel may jointly file with the superior court a request to reserve questions of law for consideration by the supreme court or appellate court." *See also* Conn. Gen. Stat. § 52-235.

Under the circumstances of this case, where the constitutional text is so clear, there would not seem to be any significant advantage to seeking advice from the Supreme Court on whether this Court has subject matter jurisdiction. If the Court grants the motion to dismiss, then the plaintiff would have the ordinary remedy by means of a direct appeal, and that appeal could be heard on an expedited basis and decided well before the first day of General Assembly's next session.

It should be noted that challenges of certain elections, those under Conn. Gen. Stat. § 9-323 (federal elections) and § 9-324 (statewide officials and probate judges), by statute specifically allow a direct certification of questions of law to the Supreme Court. Conn. Gen. Stat. § 9-325 ("If, upon any such hearing by a judge of the Superior Court, any question of law is raised which any party to the complaint claims should be reviewed by the Supreme Court, such judge, instead of filing the certificate of his finding or decision with the Secretary of the State, shall transmit the same, including therein such questions of law, together with a proper finding of facts, to the Chief Justice of the Supreme Court, who shall thereupon call a special session of said court for the purpose of an immediate hearing upon the questions of law so certified."). There is no analogous provision for challenges of General Assembly elections, of course, as there is no statutory basis for challenging General Assembly elections.

Having said that, if the Court has any doubt about whether to dismiss the case then the question of jurisdiction should be certified to the Supreme Court for a simple reason: no findings should be entered and no relief should be ordered until the question of jurisdiction is finally determined. If this Court ordered any kind of relief (other than perhaps a second recount, which plaintiff does not seek), then it would plainly implicate the political question doctrine. Relief ordered by a court might or might not be consistent with what the House might order.

The issue plainly falls within the House's authority. Accordingly, the political question doctrine counsels restraint by the Court. In other words, any relief cannot properly be ordered here which might call into question whatever relief, if any, the House eventually orders. *Nielsen*, 232 Conn. at 75 (courts lack jurisdiction over political questions due to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. . . or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"). Suffice it to say that the House will need to act fairly and reasonably among several alternatives, and its choice will be final. This Court should do nothing that might call its eventual choice into any doubt. This Court has no power to make any findings or order any relief, for the reasons stated above. But it certainly should not proceed further without final appellate resolution of the jurisdictional issue. That can be accomplished most expeditiously (and consistent with constitutional requirements) by granting the motion to dismiss, which would allow for an immediate appeal.

THE DEFENDANT,
PHILIP L. YOUNG III

By /s/William M. Bloss

William M. Bloss
Emily Rock
Koskoff Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
Juris No. 32250
Tel: 203-336-4421

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, postage prepaid, on this 23rd day of November, 2018, to all counsel and pro se parties of record, as follows:

Proloy Das
Murtha Cullina LLP
CityPlace One
185 Asylum Street
Hartford, CT 06103

Michael Kenneth Skold
AG-Special Lit 2nd Fl
55 Elm St PO Box 120
Hartford, CT 06141

Lawrence C Sgrignari
Gesmonde Pietrosimone & Sgrignari LLC
3127 Whitney Avenue
Hamden, CT 06518

__/s/William M. Bloss_____
William M. Bloss