

TO BE ARGUED BY:
DAVID L. LEWIS, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: Second Department

DEAN G. SKELOS and PEDRO ESPADA, JR.,
as duly elected members of the New York State Senate,
Plaintiffs-Respondents,

-against-

**Appellate
Division
Case No.
2009-00678**

DAVID PATERSON, As Governor of the State of New York, and
RICHARD RAVITCH, as Lieutenant Governor of the State of New York,
and LORRAINE CORTES-VAZQUEZ,
as Secretary of the State of New York,
Defendants-Appellants.

**BRIEF FOR PLAINTIFF-RESPONDENT
DEAN G. SKELOS**

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Supreme Court, Nassau County, Index No. 13426/09

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PRELIMINARY STATEMENT

Appellants seek to overturn the decision of Supreme Court, Nassau County, (LaMarca, William, JSC), issuing a preliminary injunction against defendant Richard Ravitch (“Ravitch”) taking office as Lieutenant Governor and denying Appellants’ motions seeking to dismiss the complaint.

Respondents brought an action seeking a declaratory judgment that the Governor of the State of New York, David Paterson, cannot under the Constitution and laws of the State make an appointment, of an otherwise qualified private citizen, to the office of Lieutenant Governor. Ancillary to the declaratory judgment, Respondents also requested a permanent injunction prohibiting Ravitch or any other individual from filling that office.

The Governor has violated the Constitution. Claiming both a newly discovered gap in the law and, the eternal excuse for illegal exercise of executive power, necessity, the Governor declared his unprecedented act created order and stability in a time of fiscal crisis. The issue before the Court is whether a Governor can appoint a Lieutenant Governor, undermine the elective principle that animates the Constitution, and install a potential unelected successor.

No Governor has ever sought to seize such power. Where there is no power to appoint granted by the Constitution and the law, there can be no impairment of

power. This Court should affirm the lower court which has moved swiftly, wisely and properly.

QUESTIONS PRESENTED

QUESTION I.

Was the lower court correct in finding a likelihood of ultimate success on the merits, irreparable harm, and a balance of the equities so as to issue a preliminary injunction against Ravitch exercising the powers of the office of Lieutenant Governor because the Governor had no right of appointment to that office under the State Constitution?

QUESTION II.

Was the lower court correct in ruling that venue was proper in Nassau County?

QUESTION III.

Was the lower court correct in denying Appellants' motions to dismiss the Respondent's complaint on a variety of procedural grounds including the purported exclusivity of *quo warranto*?

The Supreme Court Answered Each Question In The Affirmative.

COUNTER-STATEMENT OF FACTS

On March 17, 2008, Eliot Spitzer resigned the office of Governor of the State of New York. By operation of law, under New York State Constitution Article IV Section 5, David A. Paterson, Lieutenant Governor, became Governor for the remainder of the term.

The office of Lieutenant Governor became vacant on that day. For the next 400 days the office sat unfilled. The duties of the Lieutenant Governor were filled by successive Temporary Presidents of the Senate, Senators Joseph L. Bruno and Dean G. Skelos. In January of 2009, a new majority elected Malcolm Smith as Temporary President. He fulfilled the duties of the Lieutenant Governor. All the while Governor Paterson presided over a growing fiscal crisis.

On June 8, 2009, a bi-partisan coalition of thirty two senators, challenged the existing leadership by electing a new Temporary President, Pedro Espada, Jr. by a vote of 32-30. Smith and the remaining Democrats refused to recognize the vote. Within days, one of the disaffected senators returned to Smith's camp.

Smith maintained that he remained the duly elected Temporary President. Smith sued Espada in Albany County, Supreme Court for a declaratory judgment. The suit was dismissed as non-justiciable, as the Constitution, Article III Section 9, exclusively commits to the Senate the election of its officers. Smith v. Espada,

At [http://www.courts.state.ny.us/whatsnew/pdf/Smith v. Espada Revised.last.pdf](http://www.courts.state.ny.us/whatsnew/pdf/Smith_v._Espada_Revised.last.pdf).

On appeal, Smith obtained a stay pending appeal, against Espada from taking exercising certain powers of the Temporary President. He raised the issue of the line of succession in securing a stay from Justice Peters of the Third Department. The injunction prevented Espada from succeeding to the Governorship. Smith later withdrew the appeal.

After weeks of little or no action on the part of the Governor, he issued a series of proclamations forcing the Senate to convene in extraordinary sessions. He obtained a court order against each individual Senator to convene as a body. Each day thereafter, the Senate convened and laid aside the agenda proclaimed by Governor. At court-ordered extraordinary sessions, presided over by a Democratic senator, Senator Skelos was recognized, but his motions to lay aside the calendar and to adjourn were ignored by the presiding officer. Only motions by either Senator Smith or his deputy Senator Klein were entertained and granted by the presiding officer, demonstrating the power of the presiding officer to recognize and determine who shall be "heard." The Governor next ordered the Comptroller to withhold pay checks and allowances from Senators. The stalemate continued.

On July 8, 2009 the Governor's Office asked for television time after 5:00 PM, disclosing only that a major statement would be forthcoming. On television

the Governor announced the appointment of a Lieutenant Governor, Ravitch, to break the stalemate in Albany. He stated, "The appointment of a new Lieutenant Governor will resolve the issue of succession and may provide a means to help break the stalemate in the Senate".¹ The Governor stated that his counsel and others provided legal advice supporting his actions.

At the time of the announcement the Governor had already been informed that Attorney General Andrew Cuomo believed that the action was not legally authorized and would be unconstitutional.² The lower court found that a primary

1 <http://www.ny.gov/governor/press/pdf/7809LettertoNYers.pdf>

2 The Governor had already been publicly informed by the Attorney General of the State that in his opinion the appointment of Lieutenant Governor would be illegal and unconstitutional. The Attorney General made the following statement on July 6, 2009

:

The State Constitution explicitly prescribes what occurs when there is a vacancy in the Office of Lieutenant Governor. In such circumstance, article 4, § 6 states that "the Temporary President of the senate shall perform all the duties of the lieutenant-governor during such vacancy" Article 4, § 1 of the Constitution expressly provides that "the lieutenant-governor shall be chosen at the same time, and for the same term" as the Governor. The Legislature did not authorize a Governor to bypass this provision of the Constitution and fill a vacancy in the Office of Lieutenant Governor pursuant to Public Officers Law § 43. That statute, which provides for Gubernatorial appointment to fill certain vacancies, applies only when there is "no provision of law for filling the same". With respect to the Lieutenant Governor, however, the Constitution leaves no gap concerning a vacancy in that office - article 4, § 6 expressly addresses that circumstance. In sum, we understand the apparent political convenience of the proponents' theory due to the current Senate circumstances. In our view, however, it is not constitutional. In addition, contrary to the proponents' goal, we believe it would not provide long term political stability but rather the opposite, by involving the Governor in a political ploy that would wind through the courts for many months."

purpose of the Governor in appointing Ravitch was to break the procedural deadlock in the Senate.³

Within hours of the announcement, even before Ravitch signed his oath of office, the Governor's Reelection Committee, Paterson 2010, had robotic calls made to enrolled Democratic voters throughout the State announcing the appointment.

Continuing the pattern of public deception, the Governor's office announced that Ravitch would be sworn in the following day at the Capitol. The Governor intentionally concealed the fact that there was a plan to have Ravitch secretly sworn in. This occurred at a Brooklyn steakhouse, a signed an oath of was secretly couriered to Albany and purportedly filed in the office of the Secretary of State in the middle of the night. The Governor sought to deceive anyone seeking to challenge the legality of his acts. The Governor's office made deliberate misrepresentations to the press and to the public solely to foil the legal challenge that it knew was coming. Instead of transparency, and acting in open manner; secrecy and attempts erect a legal barrier to any legal challenge by false public statements and misdirection characterized the Appellants' actions. They sought to

³ Article 4, § 6 of the Constitution provides that, "[t]he lieutenant-governor shall be the president of the senate but shall have only a casting vote therein." A "casting vote" is confined to procedural matters.

assure that anyone seeking to challenge the unconstitutional act would be met by a fait accompli.⁴

Given the suddenness, secrecy, and timing surrounding the substance of the announcement, Respondents moved expeditiously to block the action of the Governor, upon their belief, proven to be fully accurate, that waiting until the next morning would result in the presentation of a claimed fait accompli. Senator Skelos, domiciled in Nassau County for venue purposes, sought relief from the assigned emergency judge. The complaint sought a judgment declaring in pertinent part as to this appeal, as follows:

1. the acts of the Defendant Paterson are unconstitutional
2. the “appointment” of defendant Ravitch is in all respects unconstitutional
- * * *
4. enjoining the Appellants from taking any acts to fill the office of lieutenant Governor and
5. Granting such other and further relief as may be just and proper. (Complaint)

The Emergency Judge, Hon. Ute Wolff Lally, issued a temporary restraining order.

By the following day, unconnected to the Ravitch appointment, the Senate stalemate was broken when Espada defected back to the Democrats. Smith was

⁴ Appellants below claimed that the complaint should be dismissed for mootness because Ravitch had been sworn into office. Justice LaMarca denied the motion. Appellants wisely abandoned the point before this court.

again the exclusive Temporary President. The stalemate ended, eliminating any question of succession.

Appellants convinced a Justice of this Court to dissolve the temporary restraining order that afternoon. Meanwhile, in Albany, the Senate proceeded to pass hundreds of bills.

In Nassau County, this matter was assigned to Justice William LaMarca. Counsel for Appellants cross moved for dismissal and other forms of relief. In Albany, the Senate held sessions on July 15th and 16th, which went into the early hours of July 17th. At no time did Ravitch preside over the Senate.

On July 15, 2009, the matter was heard by Justice LaMarca on papers and extensive oral argument. Justice LaMarca probed both sides' positions. Six days later, Justice LaMarca handed down a 19 page decision, denying all relief to Appellants and issuing a preliminary injunction against Ravitch taking office as Lieutenant Governor.

The following day, a Justice of this Court stayed the preliminary injunction. Thereafter, a full bench heard oral argument and granted the stay in part and denied it in part, barring Ravitch from presiding over the Senate or exercising a casting vote in the Senate.

Appellants have not yet answered the complaint in the instant action. They moved for a variety of relief against the complaint under various sections of CPLR 3211(a). The Respondent's pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true, and accorded the benefit of every possible favorable inference to determine whether the facts as alleged fit within any cognizable legal theory. See, e.g. Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); Leon v Martinez, 84 N.Y.2d 83 (1994); Grazioli v. Encompass Ins. Co., 40 A.D.3d 696 (2d Dept. 2007); Kempf v. Magida, 37 A.D.3d 763 (2d Dept. 2007).

At the present time and for the foreseeable future, any crisis necessitating a Lieutenant Governor is over. Should the Governor die, without Ravitch in office, Article IV Section 6 elevates Senator Smith to become the acting Governor or, in his absence or failure, Speaker Silver becomes acting Governor until an election can be held in November 2009. The Constitution provides for wholly integrated line of succession without the need for an appointed Lieutenant Governor.

The Governor retains the power to appoint Ravitch to any position in the Executive Branch to aid in the solving of the fiscal crisis, except that of Lieutenant Governor. Nonetheless, the Governor has refused to withdraw the appointment and thus has precipitated this constitutional crisis.

POINT I

RESPONDENT HAS STANDING TO BRING THE ACTION

A respondent has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. Silver v. Pataki, 96 N.Y.2d 532 (2001). Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution. Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004).

Appellants claim that Respondent has no injury in fact. The existence of an injury in fact – an actual legal stake in the matter being adjudicated -- ensures that the party seeking review has some concrete interest in prosecuting the action. The injury casts the dispute in a form traditionally capable of judicial resolution, not an advisory opinion. Respondents are threatened with a concrete injury imminently created by Ravitch taking office. The claim that an interloper may not preside over the Senate should be sufficient to adequately allege injury in fact sufficient to survive the motion to dismiss on the basis of standing.

Respondent has a direct personal interest in who presides over the house of which he is a member. Only the elected Lieutenant Governor may preside over the

Senate. N.Y. Const. Art. IV § 7. The appointment does not make Ravitch the proper constitutional officer to preside over the Senate.

Respondent has taken an oath of office swearing to uphold the Constitution of the State and to defend it. Consistent with the oath, he should not and cannot allow the Senate to be presided over by an interloper, placed there by the illegal exercise of power by the Executive. Accepting the interloper would ratify an unconstitutional act. As a member of the Senate, Respondent must either accept an unconstitutionally installed presiding officer at the rostrum or forego the representation of his constituents. Senator Skelos as the Minority Leader also represents his Conference.

Respondent is injured in fact by being obligated to either violate their oath of office or betray their constituency by refusing to participate under an interloper. Respondent's claim for relief is based upon a tangible injury and not one that is abstract or speculative.

Respondent is accorded standing by virtue of the zone of interest impacted by the Ravitch appointment. He has an immediate stake in the outcome of the case in that he has a right not to be subject to the rulings or acts of a presiding officer who is not legally or constitutionally entitled to that role, or to the exercise of power over him as a sitting Senator. As a Senator, Respondent is entrusted by the

Constitution to exercise legislative power, N.Y. Const., Art. III, §§ 1, 2. Respondent has the broad power and functional responsibility to consider and vote on legislation. His standing is enhanced by the fact that private persons have a far lesser stake in the outcome of disputes between and by the executive and legislative branches of government.

First, at the time of the “appointment” Governor Paterson stated that it was in part to vote to break ties in the Senate. Given the close division of the Senate, the objective reality exists that there would be tie votes. Therefore, Senator Skelos in particular as leader of the legislative party opposing the Governor, faces the real possibility that the appointment of the putative Lieutenant Governor is designed to nullify his vote. Such an appointment and the purpose therein exercises a chilling effect on a member aware that the existence of a tie vote on any issue could bring out the unelected and improperly designated putative Lieutenant Governor to nullify Senator Skelos’ and every member of his conference’s vote.

Second, as was demonstrated during the forcibly convened sessions, a member may be silenced by the presiding officer who is free to ignore or not recognize a member. The Lieutenant Governor, as presiding officer, has sole discretion to determine who will be recognized, and therefore address the body. The power to “recognize” a member is absolute. A member seeking to raise a point

of personal privilege or point of order for being ignored must also be recognized. No parliamentary maneuver can overcome it. The presiding officer wields the power of speech for each and every member. Thus, should Senator Skelos seek to challenge in the Chamber the right of Ravitch to preside; it is at the sufferance of Ravitch himself. Ravitch would, as a private citizen, have the power to control the political speech of the elected members of the Senate in the Senate chamber.

Third, political speech can be silenced by rulings that literally stifle debate. Rulings on germaneness allow the presiding officers to determine what shall be said and what shall be heard. This further casts a pall on the free speech of members of the minority conference who are bound to the will of the majority, fair or not. Any attacks on the Governor, his administration, revelation about corruption and other matters all depend upon parliamentary permission of the presiding officer.

The Lieutenant Governor, when properly elected, is provided with what the Constitution calls a "casting vote". Article IV Sec 6. The vote is one usually of deciding ties and limited to procedural issues. A presiding officer makes rulings. To overturn such rulings requires a majority vote to overrule the ruling of the chair. The presiding officer may exercise the casting vote to defeat political speech on the floor of the Senate.

No political counterweight exists for Ravitch. He would ordinarily be accountable to the electorate. While the Governor is running again in 2010, Ravitch will not and has not faced the electorate. Thus Ravitch is free to pursue a wholly partisan agenda, solely obligated to the Governor, to the detriment of the minority members of the Senate including their Minority Leader, Senator Skelos, without fear of political repercussions that elected officials face.

Standing has been established here by showing that the injury to individual legislators is that of the public at large. The injury falls within the zone of interests or concerns sought to be promoted by the provision at issue. Society of Plastics v. Suffolk, 77 N.Y.2d 761 (1991). Respondent Senators Skelos and Espada sued regarding who has the constitutional power and duty to preside over them in their chamber.

Justice LaMarca, relying on Silver v. Pataki, Id., ruled that Respondents had standing. First, the lower court found that the individual legislators had standing when he or she alleges that the action by the Executive has resulted in the nullification of the member's vote he has alleged a sufficient injury in fact to confer standing. Similarly standing is found when a legislator brings suit alleging that there has been a usurpation of power belonging to the legislative body. The lower court found the appointment of Ravitch by the Governor was designed to

replace a duly elected member of the Senate, Senator Smith, to whom the responsibility had fallen under the Constitution's law of succession. (Article IV, § 6). The appointment was a usurpation of Senate power, and is therefore a sufficient injury within the zone of interest.

Appellants make a number of contentions to support their argument that Respondent is without standing. Appellants contend only the Temporary President Malcolm Smith has standing. Under their analysis only he is usurped from the line of succession and thus is the only person who would be affected. Such an interpretation would reduce the concept of zone of interest to a direct interest. This narrows standing too much to be tolerated. The issue of standing regarding the illegal appointment of a Lieutenant Governor is not divisible. Respondent has standing for all purposes if he has it for one purpose relative to an illegal appointee.

Appellants misrepresent the doctrine of zone of interest in asserting their claim that the appointment of a Lieutenant Governor is a generalized grievance common to all the Senators, and, therefore, no one has standing. The injury, even if common to all the Senators, is not an injury of such a nature so as to preclude standing. Where unconstitutional action affects a narrow identifiable class of people, such as the members of the Senate, some of whom will not object, the

remainder still are accorded standing within their zone of interest. In Silver, supra, a single Assemblyman was found to have standing, even though other Assembly Members did not object to the Governor's actions.

Appellants erroneously claim that Respondent must demonstrate a direct harm to the individual member's actual vote. They believe that the absence of an actual vote eliminates standing because no vote is nullified. They expect Senators to simply stand and wait for the interloper to act. At which time they would no doubt interpose a defense that the complaining legislators had accepted Ravitch, and waived their right to proceed. Appellants also reject Respondent's position, adopted by the Supreme Court, that the power of an appointed Lieutenant Governor who will never face the electorate to decide who may speak and who may not when he or she presides over the Senate is sufficient to provide both standing and harm.

The constricted reading of Silver v. Pataki by Appellants is not consistent with the text of the case itself. The Court of Appeals did not foreclose the possibility of additional categories of standing for legislators. In Silver, the Court held that "cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power."(Emphasis added) These are broad areas of legislator standing, suggesting,

by the use of the term “generally,” more than these three listed areas, and allowing standing to sue for a member of the Senate to prevent a hand-selected gubernatorial interloper from presiding over the body.

Were Appellants’ position to prevail, denying standing to Respondents, “an important constitutional issue would be effectively insulated from judicial review.” See, Boryszewski v. Brydges 37 N.Y.2d 361, 364 (1975) cited in Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 815 (2003). The Saratoga Court noted, in disputes such as this “there will ordinarily be few who can claim concrete injury resulting from a breach of the constitutional division of authority.” Id. at 815.

Appellants’ claim that any harm done is only to an institution, and not its members does not deprive the Respondent of standing. The claim is belied by both the facts and the law. Adopting Appellants’ position on standing prevail, issues of fundamental and immense public significance would be sealed off from examination and redress.

Justice LaMarca properly determined that Respondents had standing. The decision below should not be disturbed. To use the language of the Court in Saratoga, supra., the duty is to open the doors to the courthouse rather than close them. “Standing is properly satisfied here lest procedural hurdles forever foreclose

adjudication of the underlying constitutional issue.” Saratoga, 100 N.Y.2d at 815.

The Supreme Court’s ruling on standing should be affirmed.

POINT II

THE GOVERNOR HAS ACTED CONTRARY TO THE STATE CONSTITUTION AND VIOLATED THE ELECTIVE PRINCIPLE BY “APPOINTING” A LIEUTENANT GOVERNOR, WHICH IS NOT JUSTIFIED BY A CATCH ALL SECTION OF THE PUBLIC OFFICERS LAW

From 1777 there has been an elected Lieutenant Governor. During that period, at various times due to death or resignation of the Governor or by operation of law, the office has become vacant. No prior Governor has ever claimed the right to fill the office by an “appointment” even in the time of war. This Governor has claimed such a right of appointment. The lower court held there was no right of appointment either in the Constitution or by statute. As a consequence, the lower court granted the application for a preliminary injunction against the taking of office by Ravitch on the basis that Respondents had demonstrated a likelihood of success on the merits, irreparable harm and that the balance of the equities favored issuance of the injunction.

If David Paterson has the right to do so, then the case of Respondents is without merit. If he is without the legal right to do, the injunction must stand and the judgment below should be affirmed in all respects.

A. The Constitution in Article IV Section 3 and Article XIII Section 3 Mandate That the Office of Lieutenant Governor Is to Remain Empty Upon Death, Resignation, Or Removal of the Occupant and Makes No Room For An Appointment That Extends Beyond the Calendar Year of the Vacancy.

The Constitution provides for a line of succession. Appellants concede, as they must, that the Constitution nowhere specifically accords the power to the Governor to “appoint” a Lieutenant Governor. Article IV, Section 5 makes the Lieutenant Governor the Governor upon a vacancy in that office, whether by death, removal or resignation. He serves for the remainder of the Governor’s elected term. The office of the Lieutenant Governor is vacant.

Article IV §6, provides in relevant part as follows:

§6. The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. The lieutenant-governor shall be the president of the senate but shall have only a casting vote therein. ...

In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the Temporary President of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the duties of office, the Temporary

President of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.

The duties of the Lieutenant Governor, principally to preside over the Senate are to be performed by the Temporary President until the vacancy or the inability is ended. The Constitution is designed to permit each branch to continue to function. In case there is no Temporary President, then the Speaker of the Assembly becomes, not the caretaker replacement for the Lieutenant Governor, but the acting Governor. This demonstrates the careful structure of succession. The Speaker never rises to Lieutenant Governor or to the duties because it is obviously improvident for the Speaker to also preside over the Senate.

The Constitution also distinguishes between the temporality of inability and the permanent nature of a vacancy. In the case of a vacancy, the Temporary President is to fulfill the duties during that vacancy or inability. By the text of Article IV Section 6, an inability may end by the acquittal in an impeachment or a return from without the state or recovery from an inability, a vacancy is for the remaining portion of the term.

The Constitution is an integrated system of succession carefully determined. The text creates contingencies for two events, restoration after legal or physical or mental inability and vacancy until the next election. Were it otherwise, the

Governor could have appointed a Lieutenant Governor the day he became Governor, instead of waiting 400 days.

Appellants claim that the authority to appoint the Lieutenant Governor is derived from Public Officers Law ("POL") § 43, itself derived from an earlier section of law. The claim is unavailing. POL § 43, enacted in 1909, only allows the Governor to make an appointment of a person to "execute the duties" of a vacant office when no other provision of law provides for the filling of the vacancy. The section relied upon by Appellants is not availing and demonstrates the wrongfulness of the Governor's action. It provides:

§ 43. Filling other vacancies. If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term.

POL § 43 must be read in conjunction with Article XIII Section 3 of the Constitution. This makes it clear that there is no right to appoint a Lieutenant Governor. Article XIII Section 3 provides in pertinent part: "The legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his or her office by virtue of such

appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy.”⁵

The vacancy in the office of Lieutenant Governor occurred by operation of law upon Paterson’s ascendance to the office of Governor after the resignation of Governor Spitzer. Under the terms of Article XIII Section 3, and POL Section 43, the vacancy occurred on March 17, 2008. The mandate of the Constitution, is that an appointment of Lieutenant Governor would have to expire on January 1, 2009.

The limitation that the vacancy cannot be filled by appointment longer than the stated period points up the fact that the office of the Lieutenant Governor is not an office subject to be filled by an appointment.⁶ Because the Constitution bars the Lieutenant Governor from running for office separate from the Governor and similarly bars an election in a non-quadrennial year, Article XIII Section 3 by its terms precludes an appointment.

Appellants brush off the constitutional text limitations, claiming that case law allows for appointed officers to remain in office for a period longer than the

⁵ Appellants in the memorandum of law to this court urge that a distinction be found between the language of this section and Article XIII in using “execute” and the language of Article IV, which uses “perform” to describe the action taken with respect to the vacant office. Roget’s Thesaurus (3d Ed.) lists “perform” as a synonym of “execute.” The implication sought to be made that only an executive branch official can “execute” duties is simply false and has no basis in language or intent.

⁶ Contrary to the interpretation placed upon POL 43, by Appellants, POL 37 provides for offices where the governor is not authorized to fill [a] vacancy of which he has notice. ...” Thus POL 43 is not a catch all.

constitutional limitation, citing Rohrer v. Dinkins, 32 N.Y.2d 180 (1973). Rohrer concerns school board elections. After Rohrer, Article XIII Section 3 was amended to overrule it. Appellants claim that the limitation on appointment term in Article XIII Section 3 does not apply to the Lieutenant Governor, but no exception exists. Consistent with Article XIII Sec 3, POL 43 could not and would not apply to the office of Lieutenant Governor without otherwise violating the Constitutional text and its preference that officers of the state be elected.

The basic reason why no exception exists in Article XIII to support Appellants' claim is that the interpretation imposed upon it by the Governor violates a fundamental principle of government in this State, the elective principle. The elective principle is the hallmark of republican governments acting under democratic principles. Ward v. Curran, 266 A.D. 524 aff'd 291 N.Y. 642 (1943) is a demonstrable example of the preference for election over appointment of public officers. Ward decided solely that the office of Lieutenant Governor was vacant because the holder of the office died. By the terms of the Public Officers Law, a vacancy is created by death.

The issue in Ward was whether or not the office of Lieutenant Governor is to be filled after the death of the officeholder at the next General Election. In 1943 the Lieutenant Governor ran separately for public office. The Constitution was

later amended to bar an independent election of the Lieutenant Governor and to require a vote for the Governor to be counted for the Lieutenant Governor at the General Election.

The policy of the state with respect to elective offices is to fill them by election when a vacancy occurs. Mitchell v. Prendergast, 178 A.D. 690, 692 (2d Dept. 1917) aff'd 222 N.Y. 543 (1917); Mtr. of O'Connell v. Corscadden, 243 N.Y. 86 (1926). The entire scope and theory of the state constitution requires that elective offices when vacant be filled when it is possible to do so. People ex rel Weller v. Townsend, 102 N.Y. 460, 439 (1886). Since the Constitution of 1846, the provision of Article XIII Section 3 and its predecessor Article XIII Section 8 and its predecessor, Article X Section 5, require that in the case of elective officers no person appointed to a vacancy shall hold office by virtue of an appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy. This is to insure that the voters elect their own officers and they not be selected by appointment.

Appellants claim that the provision can be varied and thus the vacancy can be filled. But in Mtr. of MacAdams v. Cohen, 236 A.D. 361 (1st Dept. 1932) aff'd 265 N.Y. 210 (1934), the First Department stated that even though the Constitution failed to require the election to be held at the next succeeding annual election after

the happening of the vacancy, “we conclude that the general policy of the State, as enacted in its statutes making provision for the holding of election in the case of vacancies, in elective officers makes an election imperative.” In Mtr. of Wing v. Ryan, 255 A.D. 163 (3d Dept. 1938) aff’d 278 N.Y. 710 (1938), the Third Department stated that a fundamental principle of our form of government is that a vacancy in an elective office should be filled by election as soon as practicable after the vacancy occurs. Filling of vacancies by election, not appointment is supported by sound and cogent reasons. If it were not for the principle of election, vacancies might be filled by individuals not of the caliber of Ravitch, but instead, problematic individuals could be foisted upon the public, outside the remote contemplation of the voters and without the opportunity for the appointee to be rejected by them.

B. Prior Governors Did Not Assert This Power of Appointment Demonstrating That the Novel Interpretation Has Been Considered and Rejected.

The issue of filling the office of Lieutenant Governor did not begin and end with Governor Paterson’s “appointment” of Richard Ravitch. Contrary to the impression sought to be left by Appellants, the matter has repeatedly been the subject of study and scholarship. Not a single person or entity that has examined the issue in the entire time has found in Public Officers Law § 43 that which

Paterson and counsel claim to have found. To the extreme contrary, the possibility of gubernatorial appointment of the Lieutenant Governor has been uniformly rejected.

The State of New York has frequently been faced with the resignation of Governors successfully obtaining higher office, or leaving the Governorship. Spitzer's resignation in 2008 was preceded in 1973 by Rockefeller's resignation to assume the office of Vice President. Malcolm Wilson became the Governor. The Office of Lieutenant Governor remained unfilled for the remainder of his term. In each instance, no vacancy was sought to be declared or filled. Temporary Presidents of the Senate have filled the office of Lieutenant Governor without any move to create a right of appointment as many as fourteen times beginning in 1811 and as recently as the past two years. The position was not filled. The Temporary President performed all the duties of Lieutenant Governor.

The Office of the Lieutenant Governor was established in the Constitution of 1777 for the purpose of exercising the authority of the Governor if the Governor were impeached, died, resigned, or was absent from the state. The Lieutenant Governors' authority is no longer needed when another Governor was chosen or the absent Governor returned or the impeached Governor was acquitted. The Constitution further provided that at every election of a Governor, a Lieutenant

Governor be elected separately but in the same manner as the Governor and continue in office. The provision was read to require a special election of Lieutenant Governor whenever there was a vacancy in the office. In 1811, DeWitt Clinton was elected Lieutenant Governor upon the death of Lieutenant Governor John Broome.

The Constitution of 1821 eliminated the provision for special election. Instead it provided that the Senate shall choose a Temporary President when the Lieutenant Governor shall not attend as president or shall act as Governor. 1821 Const. Article I § 3. The 1821 Constitution also provided that if during the vacancy in the office of the Governor, the Lieutenant Governor shall be impeached, displaced, resign, die, or be absent from the state, the Temporary President of the Senate shall act as Governor until the vacancy shall be filled or the disability cease. 1821 Const. Article III § 7.

In 1846 the State held a Constitutional Convention. An attempt to abolish the office of Lieutenant Governor was defeated. 11 Lincoln 135. It continued the office and the provisions related to it, it added gubernatorial inability to serve as a basis for the Lieutenant Governor to serve and it provided in Article X Section 5 that the legislature shall provide for the filling of vacancies in office. Tested in 1847 when Lieutenant Governor Addison Gardiner was elected to the Court of

Appeals, Hamilton Fish was elected Lieutenant Governor to fill the vacancy under a special act passed in September. The view was that the Temporary President of the Senate did not succeed to the office of Lieutenant Governor and, thus, an election was required under the 1846 Constitution. In 1894 the Constitution added the Speaker of the Assembly to the line of succession after the Temporary President.

New York held another constitutional convention in 1915. Two proposals were made of significance and neither was adopted. The first provided that if a vacancy in the office of Lieutenant Governor occurred three months or more before a general election, the office would be filled at the general election. The second proposal provided that if the Lieutenant Governor becomes the Governor then the Temporary President becomes the Lieutenant Governor for the residue of the term. If the Lieutenant Governor be impeached or unable to perform his duties or be acting Governor then the Temporary President shall act as Lieutenant Governor during such impeachment or inability while the Lieutenant Governor acts as Governor. Revised Record of 1915 Convention p. 3736. Twenty three years later, at the Constitutional Convention in 1938, after unsuccessful attempts to abolish the office were made, the convention proposed that the president of the

senate would be first in the line of succession and would act as Governor until the new Governor took office.

In 1943 in the middle of a world war, the Lieutenant Governor, Thomas Wallace, died. The predecessor to POL § 43 existed. Governor Thomas Dewey did not seek to appoint a successor. It never occurred to Dewey or his advisors to “appoint” a Lieutenant Governor. After Wallace died, a dispute arose as to whether the election of his successor was required at the next election.

Dewey was considering running for President in 1944 against Franklin D. Roosevelt. The issue was not so much succession. The issue was whether an election for just the post of Lieutenant Governor was required to fill the vacancy. It was of particular concern to Dewey that he not end up with a Lieutenant Governor of the opposite party. The State Attorney General ruled that no election need be held.⁷ No claim was made that the Governor could appoint a Lieutenant Governor. The Secretary of the Democratic Party, Albert Ward, brought suit against the Secretary of State, Thomas J. Curran (then the state’s chief election official), to force an election. The question of law presented to the appellate courts was “Did the death of Lieutenant Governor Wallace create a vacancy in the office

⁷ In the brief to the Court of Appeals the losing side, the Attorney General stated that there was no basis to claim that the position can be filled by appointment.

of Lieutenant Governor which required it to be filled at the general election of the instant year?" The answer was yes.

The Courts ruled that an election was required. "A Vacancy in such an elective office should be filled at a general election as soon as possible. No other view is thoroughly consistent with the Democratic process". Ward v. Curran, unreported, aff'd 266 A.D. 524 (3d Dept.); aff'd 291 N.Y. 642 (1943).

Governor Dewey protested that with the administration less than one year old, the nation at war, and there being no other major contested candidacies or state issues, it became necessary for the people of the state to choose a successor to their Lieutenant Governor. As a result of the election, the Republican Temporary President of the Senate, Joe R. Hanley, was elected Lieutenant Governor.

Governor Dewey then recommended to the Legislature that the Constitution be amended to remove the ambiguity. He recommended in his annual message in 1944 that the public officers law be amended to dispense with an election prior to the expiration of the term in the event of as vacancy in the office of Lieutenant Governor between the quadrennial state wide election. see, 18 Message of Governor Thomas E. Dewey to the Legislature January 5, 1944 pp. 17-18, at 18. Following Ward, Article IV, Section 6 was amended in 1945 to require that the Governor and Lieutenant-Governor be elected at the same time (See historical

notes to Article IV, § 6). Thus, *Ward* should be considered legislatively overruled by the constitutional amendment which prohibited any election for Lieutenant Governor being held in any event except at the time of the electing of a Governor. N.Y. Const. Article IV § 6. Clearly the amendment, rejecting Ward v. Curran contemplated that the Temporary President would perform the duties of the Lieutenant Governor between the time of the vacancy and the next election of a Governor.

A proposed constitutional amendment, previously rejected by the voters, was reintroduced after Governor Dewey's February 1952 annual message to the Legislature urging the joint election of Governor and Lieutenant Governor. It was ratified in 1953 by the voters, eliminating special elections to fill a vacancy in the office of Governor or Lieutenant Governor alone. The amendment bracketed the two so that a vote for one gubernatorial candidate was automatically a vote for his running mate. The amendment provided that the Governor and the Lieutenant Governor shall be chosen jointly, by the casting vote of each voter of a single vote, applicable to both offices.

The Constitutional text destroys the Appellant's argument that he has the authority to appoint an officer. At the time of the absence of a Lieutenant Governor the Temporary President "shall perform all the duties of the lieutenant Governor

during such vacancy or inability.” It makes no provision for when the vacancy or the inability shall cease as it does in the prior paragraph i.e. “until a governor shall be elected.” The last modification to the succession provision occurred in 1963. It set the line of succession for the Governor from the Lieutenant Governor to the Temporary President of the Senate to the Speaker. Repeated legislative attempts to amend this provision of the Constitution have been unsuccessful principally because the Senate with fewer members wanted the right of advice and consent to itself, rather than the convening of joint session in which it would be outvoted by the more numerous members of the Assembly.

C. Read In Context, Ward v. Curran Provides No Legitimate Basis For the Actions of the Governor and Is Wholly Misplaced As Authority When Properly Read and Understood.

Power to fill vacancies by appointment is an emergency power authorized because of the necessity for providing uninterrupted governmental service. Mtr. of Mitchell v. Boyle, 219 N.Y. 242 (1916). But if there is no interrupted governmental service, by virtue of the constitutional succession embodied in Article IV, there is no emergency at law and no basis to make an appointment.

Ward v. Curran, *supra*, mandated under the then-existing Constitution, that the vacancy in the office of the Lieutenant Governor can at the time of the case be filled only by an election. Since that time, the Constitution was amended to

specifically overrule Ward, supra. Despite the claim of its authority by Appellants it is of no significance. To the extent that it survives, it stands solely for the proposition that in order to fill the office of the Lieutenant Governor, a state-wide election has to be held under Public Officers Law Section 42 and what is now Article XIII Section 3 (then Section 8). It has no other precedential value. Appellants have seized upon certain dicta in the case to build their argument which is not borne out by the text of the case and the appellate briefs. Ward, supra, would never tolerate the appointment of a non-elected person to a state-wide office. Unlike a Senator, Ravitch is unelected. While an individual Senator is elected only by the people of a single Senate District, the Temporary President is elected to that position by a majority of the elected members of the Senate. Ward would reject the appointment of a Lieutenant Governor by its own terms.

The Appellate Division, in the majority opinion, made it clear that the Constitution embodies a preference for filling of state-wide positions by state-wide election. It made no mention of and did not consider the issue of appointment as a viable answer to the vacancy in the office of Lieutenant Governor. The fundamental principle is that offices should be filled by election, as soon as possible. The Court rejected *sub silentio* any right to make appointment to the office.

The Appellants claim that now POL Section 43 governs the matter is belied by the fact that in the briefs to the courts, the Attorney General raised the issue of the prior rendition of POL Section 43 (i.e., POL Section 42) with regard to the issue of appointment. In the briefs, the Attorney General specifically raised the issue and stated that no Governor had the right under POL to appoint a Lieutenant Governor.

POL 43 has been considered by the courts. No court has even suggested that there is a power to appoint the second highest officer in the state without advice or consent or confirmation by the Legislature or input from the electorate.

In light of the historical experience that the office stays vacant, once it is vacant, this Governor's unprecedented seizure of power is rejected by a long line of Governors, Governor's counsels, scholars and others.

D. Public Officer's Law Section 43 Does Not Apply Because There Is No Vacancy As Defined By POL Section 30(1)(a-h)

The vacancy created by operation of law upon the resignation of Governor Spitzer is not a "vacancy" as defined by the POL §30. Because it is not a qualifying vacancy under POL §30(1)(a-h), the office of Lieutenant Governor is not subject to be filled by virtue of POL §43.

The office of the Lieutenant Governor became vacant by operation of law. POL Section 30 defines what constitutes a vacancy. POL Section 30(1)(a-h) fails

to include the circumstances in which the office of the Lieutenant Governor became “vacant” so as to create a vacancy under the POL subject to appointment under POL Section 43. Paterson did not die, resign, be removed, move out of state, be convicted of a felony, be declared incompetent, have his office adjudged forfeited or vacant, nor did he refuse to file an oath of office. Thus POL Section 43 cannot apply to the Lieutenant Governor because there has not been a vacancy as defined by the Public Officers Law.

E. Because POL Permits the Governor to Remove Appointed Officers, POL 43 Cannot Apply to the Office of the Lieutenant Governor

POL Section 33 (1) further demonstrates that Section 43 was not intended to apply to the office of the Lieutenant Governor. Under POL Section 33 (1) the Governor can remove an officer appointed by the Governor to fill a vacancy, if the appointment is not required by law to be made upon advice and consent of the senate. This provision conflicts with the constitutional provisions that the Lieutenant Governor can only be removed by impeachment. See Article VI § 24. The POL by its terms demonstrates that POL Section 43 was not designed to apply to the office of Lieutenant Governor.

F. Public Officers Law Section 43 Does Not Apply Because the Office of the Lieutenant Governor Is Not An Elective Office.

Appellants assert that POL Section 43 applies because the office of the Lieutenant Governor is elective. The lower court held to the contrary, stating that by its terms POL Section 43 does not apply because the office is not elective, given the constitutional restrictions on the mode of running for office. The construction of POL Section 43 by Appellants is one which is not to be favored, given the consequences that ensue when an unelected Governor selects an unelected Lieutenant Governor, without advice or consent of the Senate. By the Constitution, the office of the Lieutenant Governor has no separate or independent elective status. Article IV Section 6 provides that “No election of a Lieutenant Governor shall be had in any event except at the time the electing of a Governor.” The Lieutenant Governor is not actually elected but having been chosen by the Governor as his running mate, voters are faced with a take it or leave it proposition. This is not an elective office. But rather it is a hybrid phenomenon designed to prevent opposition parties from holding the two highest positions in the government.

In Mtr. of Schwab v. Boyle, 174 A.D. 442 (1st Dept.) aff'd 219 N.Y. 561 (1916) the Court held that the words “elective officers” as used in the Constitution relate to officers selected by the qualified voters of the state as distinguished from

officers selected other ways. The voters select the Governor. The Lieutenant Governor does not get a single vote on his own in a General Election. The only means by which any qualified person can become the Lieutenant Governor is with the election of the Governor. Thus, the office is not elective or appointive. Framers of POL Section 43 did not envision that the provision for the least of offices would be applicable to the second highest office in the state.

Appellants seek to read the provisions of the POL that exempt the position of Governor and Lieutenant Governor from the provisions of succession of office or the need for a special election, as affirmative proof that the catch all of POL Section 43 applies uniquely to the office of the Lieutenant Governor. In the face of a long line of historical precedent to the contrary, Appellants insist that the combined readings of Section 40, 41, 42, and 43 dictate the appointing authority to a Governor to select his own Lieutenant Governor.

Unlike any of the other offices that are covered by POL Section 43, the office of Governor and Lieutenant Governor are dealt with exclusively by the Constitutional provisions. POL 43 is inapplicable to the offices of Governor and Lieutenant Governor because the Constitution alone provides for the line of succession and the devolution of power. No statute can overtly or impliedly trump the Constitution.

Gubernatorial appointment to fill vacancies applies to certain officers specially provided for by statute or capable of inclusion in the POL Section 43 catch all. This statute, enacted in 1909, only allows the Governor to make an appointment of a person to "execute the duties" of a vacant office when there is no provision of law elsewhere that provides for the filling of the vacancy. Nothing in the legislative history of Section 43 suggests that the Legislature wanted its provisions to be applicable to the vacant office of Lieutenant Governor. For that result, the Constitution would have to amended.

The authors of the Constitution and the people who ratified it did not want the right of appointment to go to a Governor, who could in effect appoint anyone and resign leaving them an unelected Governor. 1943 Att'y. Gen. Op. 378. It is contrary to the organization of government to create a means by which office can be passed from hand to hand without election. The Constitution provides for a line of succession, denying the Governor explicit or implicit power to appoint a Lieutenant Governor. The text of the Constitution is unqualified, preemptory language and it is not accompanied by or surrounded by words supportive of a permissive or contrary interpretation. See Mtr. of State of New York, 207 N.Y. 582 (1913).

Appellants' positions must be rejected and the decision and order of the Supreme Court affirmed.

POINT III

VENUE IS PROPER IN NASSAU COUNTY

Appellants urge dismissal on the basis that this declaratory judgment action has been commenced in Nassau County. Appellants ignore the applicable case law and attempt to miscast this declaratory judgment action as a CPLR Article 78 Proceeding.

Appellants claim that the Respondent's request for the preliminary injunction was the sole remedy before the court. The complaint sought a preliminary injunction and a declaratory judgment. The lower court held that based upon the complaint's requests for relief, the relief sought was a declaratory judgment under CPLR 3001 and the application for a preliminary injunction was incident to the principal relief sought. The trial court set a date, now stayed, for discovery and further proceedings. There is more to the case than the preliminary injunction.

Appellants rely upon a contorted reading of CPLR 6311 (1) in an attempt to claim that an action for a declaratory judgment is the same as an Article 78 proceeding. Appellants' arguments fail. The decision below that venue is proper in Nassau County should be affirmed in all respects.

A. Senator Skelos Resides in Nassau County

Senator Skelos is a resident of Nassau County. Venue may be set in his County of residence if not otherwise barred by law. CPLR 503.

In order to justify a transfer based on venue, the court has to resolve the threshold issue of whether or not the acts to be enjoined were done pursuant to a statutory duty. Venue properly lies in the county in which an elected legislator, suing in that capacity for declaratory judgment on Constitutional grounds, resides. In Silver v. Pataki, 179 Misc.2d 315,322 (Sup. Ct., N.Y. Co., 1999), rev'd. on other grounds, 274 A.D.2d 57 (1st Dept. 2000); mod., 96 N.Y.2d 532 (2001), the Speaker of the Assembly in his capacity as a member of the Assembly, and as Speaker, brought a challenge to the Governor's use of line item vetoes seeking a declaratory judgment of unconstitutionality. The trial court held, "Finally, defendant fails to set forth a valid basis to transfer venue to Albany County. It is undisputed that the action was appropriately commenced in New York County as the County in which Respondent resides." The Silver court wrote that "...there is no specific CPLR venue provision applicable to the Governor...". Silver, supra, at 322. In Mtr. of Posner v. Rockefeller, 33 A.D.2d 683 (1st Dept., 1969), aff'd, 25 N.Y.2d 720 (1969), the action against the Governor and others was transferred to Albany County only because the State Comptroller was a party defendant and any action

against that official is required, under CPLR 506 (b) (2), to be commenced in that County.” Id. The determination as to venue in Silver was not altered on appeal.

No CPLR provision compels the action for a declaratory judgment as to an unconstitutional and *ultra vires* appointment by the Governor to be brought in Albany County.

B. Respondents Do Not Seek to Restrain the Governor In Exercise of Statutory Duty But to Enjoin an Unconstitutional and Illegal Act, Thus Venue Rule of CPLR 6311 (1) Is Inapplicable.

CPLR 6311 bars the issuance of an injunction outside Albany County if the injunction is directed at a state officer performing a statutory duty. It provides in pertinent part:

A preliminary injunction to restrain a public officer, board or municipal corporation of the state *from performing a statutory duty* may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed. (Emphasis added)

Appellants claim that the injunction cannot be directed at Ravitch because he is a public officer. To accept their argument one must accept their major proposition that the appointment is proper, making him a public officer for purposes of CPLR 6311 (1). If the appointment is not proper then he is a private citizen and the statute does not apply to him. Appellants claim that the court enjoined the Governor and Ravitch in the performance of “executive function,”

which they equate to performance of a “statutory duty.” The lower court rejected their interpretation of the plain text of the statute. The lower court properly read CPLR 6311 (1) as inapplicable to an action for declaratory judgment and a preliminary injunction when it seeks relief based upon the Governor’s illegal and unconstitutional action. Appellants claim that they are acting under statute, thus seeking to shoehorn a statutory duty into the matter by asserting appointment power under POL Section 43. The Governor has no statutory duty to appoint a Lieutenant Governor. The Governor has acted outside of his constitutional authority in making an appointment. A Governor acting in derogation of the Constitution is not acting under a statutory duty. Similarly Ravitch, seeking to occupy an office to which he is not constitutionally entitled to assume, is not fulfilling a statutory duty. Bull v. Stichman 189 Misc. 590 (Sup. Ct. Erie County 1947) aff’d 273 A.D. 311 (3d Dept. 1948) aff’d 298 N.Y. 516 (1948) is not to the contrary. The making of an appointment to public office is not a statutory duty. Where there is no statutory duty, CPLR 6311 (1) does not by its terms apply and the court is free to fashion a provisional remedy to restrain unconstitutional action.

Where the actions complained of violate the Constitution, Appellants’ acts could not be a lawful discretionary determination pursuant to statutory duty. No statutory duty is implicated. A court will restrain a public officer from the

performance of duties enjoined upon him by statute only in the most extraordinary circumstances such as when he acts illegally and without authority, See, Matter of Village of Purchase, 80 Misc.2d 541 (Sup. Ct. Westchester County 1974). Both those circumstances are present in the case at bar. The lower court found that the appointment of Ravitch was illegal and without authority and, under concededly extraordinary circumstances, issued the preliminary injunction.

C. CPLR 506 (b) Provides No Basis For Change of Venue.

Respondents brought an action for a declaratory judgment, CPLR 3001. CPLR 103 (b) provides that all civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. In the instant action, Respondents seek a declaratory judgment of unconstitutional action by the Governor and other Appellants.

Appellants assert that the venue provisions mandate that the matter must be transferred to Albany County citing CPLR 506 (b). It provides in pertinent part as follows:

(b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the

material events otherwise took place, or where the principal office of the respondent is located

Appellants are incorrect. The complaint is not an action against a body or an officer as the Article 78 statute is entitled. An action against a body or an officer is a term of art, specific to acts demanding relief under Article 78. The venue provision cited relates solely to a CPLR Article 78 proceeding. The Complaint is an action for a declaratory judgment, with an application for ancillary provisional relief, not an Article 78 proceeding.

Had Respondent sought Article 78 relief exclusively then he would have set venue in Albany County. So clear is the limitation of CPLR 506 (b) to Article 78 proceedings that CPLR 7804(b), the venue statute for Article 78 proceedings refers directly back to CPLR 506 (b). When a party commences a special proceeding under Article 78, CPLR 506 (b) does apply because the act relates to a statutory duty. As was the case regarding CPLR 6311, the actions of Appellants are not the performance of a “statutory duty.” CPLR 506 (b).

D. Venue Is Not Jurisdictional and Thus the Remedy Is Transfer, Not Dismissal.

The lower court was correct in denying Appellants theory that a venue claim requires dismissal of this proceeding. Appellants cite case law, such as People ex rel. Derby v. Rice, 129 N.Y. 461 (1891) which reflects older case law that the issue

as to enjoining of a statutory duty is jurisdictional citing prior statutory enactments superseded by the CPLR, and obviously not continued in the law.

Even in older cases, the question under the prior law turned upon whether or not a statutory duty was being enjoined. Case law in the modern age or in the last hundred years does not support the fiction of Appellants that executive action can only be enjoined in Albany County or the Third Department.

Controlling precedent, New York Cent. R.R. Co. v. Lefkowitz, 12 N.Y.2d 305, 309-310 (1963), under the predecessor section to CPLR 6311, reflecting upon the incipient application of CPLR 6311, applies to the granting of temporary injunctions only and not to final injunctions incidental to other relief. The Lefkowitz Court paralleled the Respondent's position and supported the decision of the lower court to retain jurisdiction. It wrote the prayer for an injunction is incidental only to the major relief demanded and comes into play only if the plaintiff is awarded the declaratory judgment. Appellants claim that the real relief is the injunction and ignores the Respondent's prayer for a declaratory judgment. The motion for change of venue does not involve subject matter jurisdiction and therefore the matter cannot be dismissed. See Matter of Nolan v. Lungen, 61 N.Y.2d 788 (1984).

The lower court determination should be affirmed.

POINT IV

***QUO WARRANTO* IS NOT THE EXCLUSIVE REMEDY WHEN THE MATTER IS SOLELY ONE OF LAW**

Under New York law, *quo warranto* is not the exclusive remedy to try Ravitch's title to his office as Appellants claim.

The lower court was correct in denying the motion to dismiss the complaint on that basis. *Quo warranto* is the proper and appropriate remedy for trying and determining the title to a public office, and of ascertaining who, between two contenders, is entitled to hold it by legal election and due qualification, and also of removing an incumbent who has usurped it, or who claims it by an invalid election, or who illegally continues to hold it after the expiration of his term. People ex rel. McLaughlin v. Police Commissioners, 174 N.Y. 450 (1903). Clearly the appointment of a person to an office where there can be no appointment because the Constitution demands that the office remain open does not give rise to a *quo warranto* action. See Greene v. Knox, 175 N.Y. 432, 437-438 (1903).

Quo warranto is means by which the actual trying of title to office and is the remedy for contesting an election and determining the right of title to public office. Mtr. of Smith v. Wenzel, 171 A.D. 123, 125 (4th Dept. 1915); Mtr. of Ginsberg v. Heffernan, 186 Misc. 1029, 1036 (Sup. Ct. Bronx County 1945); Mtr. of Jones v. Town Bd. of Town of Petersburg, 35 Misc.2d 688 (Sup. Ct. Rensselaer County

1962). See Sellers v. LaPietra, 23 Misc.3d 358 (Sup. Ct. Schoharie County 2009). An Article 78 proceeding is not proper in lieu of *quo warranto* if the public office is occupied. Mtr. of Brescia v. Mugridge, 52 Misc.2d 859 (Sup. Ct. Suffolk County 1967); Mtr. of Smith v. Dillon, 267 A.D. 39 (3d Dept. 1943).

Here, the case raises only a question of law. Judicial review in this case is limited to whether the State Constitution or the Legislature has empowered the Governor to act to fill the role of Lieutenant Governor, Mtr. of Johnson v. Pataki, 91 N.Y.2d 214, 223 (1997). The case at bar is not a trial between persons to a title to office.

Executive Law § 63-b provides that the “Attorney General may maintain an action, upon his own initiative or upon the complaint of a private person, against a person who usurps, intrudes into, or unlawfully holds or exercises within the state a franchise or a public office....” This statute codifies the common law *quo warranto* action by the Attorney General to challenge the results of an election Delgado v. Sutherland, 97 N.Y.2d 420 (2002).⁸

⁸ The statute also permits him, in his discretion, to set forth the name of the person rightfully entitled to the office, including the facts supporting that right (Executive Law, § 63-b, subd 1). In *quo warranto*, the Attorney General performs both an investigative and a screening function (Id.). In the case at bar, the Attorney General has already opined an appointment to the office of Lieutenant Governor is unconstitutional.

Contrary to Appellants' assertions, Delgado does not compel a different result. Expressly referring to a contest between two claimants to a single seat, the Court properly held that the only means of resolution is *quo warranto*. Delgado turned on the contesting of title to the public office between the winner and loser of a disputed election and thus a *quo warranto* action lied under Executive Law § 63-b. Id. at 423-24.

As Justice LaMarca properly opined, such challenges are ordinarily based on voting machine malfunctions or occasionally voter fraud. A dispute over whether an office holder retained the office and whether or not he resigned thereby justifying the appointment of a new office holder is a trial of title to the office between two claimants, even if one is missing. Morris v. Cahill, 96 A.D.2d 88 (3d Dept. 1983). For *quo warranto* to apply there has to be more than one person contending for the position. Two must claim title to the same office. See, People ex rel Lazarus v. Sheehan, 128 A.D. 743 (3d Dept. 1908) [two claimants to the office]. No basis exists for a trial as to title to presiding officer of the Senate between Senator Smith and Ravitch since there is no claim that either holds the other's office.

The exclusivity of *quo warranto* in these circumstances avoids the risk of leaving the contested office vacant for possibly a protracted period while the

election result is being litigated through the courts to a final conclusion. Delgado at 425, citing Matter of Hearst v. Woelper, 183 N.Y. 274, 284 (1905) and Seavey v. Van Hatten, 276 A.D. 260, 262 (1949).

In the case at bar, the Constitution at Article IV Section 6 presumes and demands an extended vacancy. Here, an illegal appointment and a vacancy until the next gubernatorial election do not give rise to *quo warranto*. The present action challenges the Governor's power to appoint a Lieutenant Governor. It does not involve a claim to the same office by two people over possessory title to one office. Whether the Governor may constitutionally fill an office with someone when it is not to be filled by anyone cannot be solved by an action in *quo warranto*.

Appellants are also incorrect and the lower court was correct in holding that *quo warranto* is not the exclusive remedy. There is a long-recognized exception which permits title to a public office between officeholders to be tested by mandamus in an article 78 proceeding where the issue is solely one of law and questions of fact need not be determined. Mtr. of Dykeman v. Symonds, 54 A.D.2d 159, 161 (4th Dept 1976); Mtr. of Cullum v. O'Mara, 43 A.D.2d 140, 145 (2d Dept 1973); Mtr. of Felice v. Swezey, 278 A.D. 958 (2d Dept 1951); Mtr. of

Schlobohm v. Municipal Housing Auth. for City of Yonkers, 270 A.D. 1022 (2d Dept 1946) aff'd, 297 N.Y. 911 (1948);

In LaPolla v. De Salvatore, 112 A.D.2d 6 (4th Dept. 1985) the Court wrote title to public office may be tried either through a *quo warranto* proceeding or, where questions of fact need not be determined, in an Article 78 proceeding in the nature of mandamus.

Appellants are likewise in error when they claim that a declaratory judgment can never be the appropriate vehicle in the instant action. LaPolla holds that a declaratory judgment action, limited to resolving a question of law, is an appropriate alternative to an Article 78 proceeding, and does not thwart the policies underlying the restriction of the remedy of *quo warranto* to Attorney-General initiated actions. The lower court correctly ruled that the instant action for a declaratory judgment and preliminary injunction application do not thwart policies underlying the restriction of the remedy of *quo warranto* to the Attorney General and it should be affirmed in all respects.

POINT V

THE PRELIMINARY INJUNCTION WAS PROPERLY ISSUED

A preliminary injunction may issue only if the moving party can demonstrate by clear and convincing evidence the likelihood of success on the merits, irreparable injury if the preliminary injunction is not granted, and a balancing of equities tipping in favor of the party seeking the injunction. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990). Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); See Montauk Star Is. Reality Group v. Deep Sea Yacht and Racquet Club, 111 A.D.2d 909 (2d Dept.1985).

Preliminary injunctive relief is a drastic remedy, as the lower court acknowledged, that will not be granted unless a clear right to it is established under the law and the burden of showing an undisputed right to it rests upon the moving party. The purpose of a preliminary injunction is to maintain the status quo pending determination of the action. The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court. Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc., 50 A.D.3d 1072, 1073 (2d Dept. 2008); Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604 (2d Dept. 2004).

Justice LaMarca, after hearing hours of argument, questioning the parties, and reviewing extensive submissions, weighed the various factors now challenged

by Appellants. He exercised his sound discretion and granted the preliminary injunction finding that Respondents met the burden sufficient to obtain an admittedly extraordinary remedy in, what must be conceded by Appellants as, a rare case, and found that the injunction should be issued.

On appeal, the decision to issue a preliminary injunction may be overturned only if the lower court exceeded its powers or abused its discretion. Nobu Next Door LLC v. Fine Arts Housing Inc, 4 N.Y.3d 839, 840 (2005). Neither situation is present in the case at bar. The lower court should be affirmed in all respects, any stay dissolved and the preliminary injunction should be issued. It cannot be said on this record that the lower court improvidently exercised its discretion by issuing an order that temporarily restrains appellants.

Where a case turns upon substantial principles of constitutional law and involve novel issues of first impression, it is “precisely the situation in which a preliminary injunction should be granted to hold the parties in status quo while the legal issues are determined in a deliberate and judicious matter.” Mtr. of Merscorp v. Romaine, 295 A.D.2d 431 (2d Dept. 2002) (Goldstein, J. concurring). See, also, State v. City of New York, 275 A.D.2d 740 (2d Dept. 2000) (“Although the State may not ultimately prevail on the merits, the equities lie in favor of preserving the

status quo while the legal issues are determined in a deliberate and judicious manner” citing Tucker v. Toia, 54 A.D.2d 322, 326 (4th Dept. 1976).

Appellants omit the body of law standing for the principal that where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the likelihood of success on the merits should be accordingly reduced. See, Schlosser, supra. See, also, Republic of Lebanon v. Sotheby's, 167 A.D.2d 142, 145 (1st Dept. 1990);

A. Likelihood of Success on the Merits

As demonstrated in Point II of this brief, and, as found by the lower court, Respondents have demonstrated by clear and convincing evidence and upon the law that there is a likelihood of success on the merits. Appellants have crafted a clever argument, but it remains unsupported by the Constitution and requires deliberate elision of parts of the document and the law in order to stand. The appointing of Ravitch is unconstitutional. The preliminary injunction maintains the *status quo* of no appointment.

Respondents are not required to prove with certainty that they would prevail at trial. They are required to put forward a prima facie showing of a clear right to relief. Respondents have made such a showing. As the Court wrote in Toia, supra, in the context of a constitutional challenge to a state officer's actions, the

requirement of showing a likelihood of success, then, should be seen as a protection against the exercise of the court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation. Clearly the position of Respondents in the instant case is with legal foundation. The lower court adopted it in full and properly found it likely that Respondents would prevail on the merits of the action.

B. Irreparable Harm

The lower court found that Respondents suffered irreparable harm because “an unconstitutional and illegal officer [is] presiding over the Senate of which they are members.” As demonstrated in Point I as to standing, irreparable harm for a legislator takes many forms. Most particular is the power of the presiding officer to stifle debate, silence members of the opposition and deprive them of recourse by resorting to majoritarian tactics and rulings. Such was the experience of Senator Skelos during the Extraordinary Sessions when the presiding Senator ignored his motions to set aside the calendar and to adjourn. Challenges to the authority of the unelected Lieutenant Governor in the chamber would have to be permitted by that officer and attacks or inquires as to gubernatorial mis- or malfeasance can be silenced by the non-elected presiding officer, unaccountable to anyone but his appointing patron.

Respondents demonstrated to the satisfaction Supreme Court that the irreparable harm was imminent. Golden v. Steam Heat, 216 A.D.2d 440 (2d Dept. 1995). Contrary to the Appellant's interpretation, the harm need not be presently occurring as long as it can be shown to be imminent. It cannot be remote or speculative. The fact that the Senate is not sitting at a particular moment or that the Governor has agreed not to send Ravitch into the Senate chamber does not alter the calculus of imminent harm. Ravitch's absence from the Senate chamber at present does not mean that there is no imminent harm.

The incipient deprivation and potential for deprivation of the freedom of political speech on the floor of the Senate for even a minimal period of time is sufficient irreparable harm. Appellants attempt to distinguish Elrod v Burns, 427 U.S. 347 (1976) as relating to a different kind of political speech, but the right of the members to speak in their chamber on behalf of their constituents consistent with their oath of office is protected political speech, such that potential direct deprivation gives rise to irreparable harm.

In the heat of political debate, the timing of a legislator's speech is even more critical than that of a private citizen. A refusal to yield Respondent the floor, or otherwise deprive him of the right to speak through application of a Senate rules, will be irreparable harm.

The lower court found irreparable harm also regarding gubernatorial succession. Were the Governor to die, resign, or be removed from office, Ravitch, if allowed to remain in office, is next in the line of succession. For an illegally appointed Lieutenant Governor to act as Governor of the state would clearly constitute irreparable harm. The power of appointment would lead to the anomalous result that the Governor can appoint a Lieutenant Governor and then resign, thereby imposing his choice of Governor and successor whose sole claim to the office is that of a single person's vote, that of the outgoing Governor.

C. Balancing of the Equities

The equities favor Respondents. The Governor has plunged the state into a constitutional crisis to match the fiscal crisis. There is no internal crisis in the Senate. The quelling of that crisis was the purported reason for appointing Mr. Ravitch. There is no bar whatsoever to Ravitch assisting the Governor with fiscal matters.

The Governor has argued his Executive prerogatives are damaged by the continued inability of his appointee to serve. However, the Court should not be compelled to give immediate effect to an act which is likely unconstitutional. See Howard v. Ill. Cent. R.R., 207 U.S. 463, 522 (1908). The Governor's plea is the need for Ravitch, a plea of necessity. Emergencies do not create power. Pleas of

necessity have the outward appearance of necessity and efficiency. But it does not permit expansion of the power of the executive beyond the confines of the Constitution. The Governor seeks a re-writing of the Constitution to suit his political conveniences or needs predicated upon an assertion of an emergency.

If the Governor desperately needs Ravitch's help with the fiscal crisis, why it took so long for him to turn to Ravitch is unexplained. Further, why, only as Lieutenant Governor, can Ravitch rescue the economic fortunes of the state and the political fortunes of the Governor is likewise unclear. With the end of the threat to Smith's title as Temporary President in place, coupled with the fact that the Senate passed over one hundred bills on the night of July 9, 2009, and continues to enact legislation without Ravitch presiding, the Supreme Court correctly held that the balance of equities weighs in favor of Senators Skelos and Espada.

Ravitch's appointment as Lieutenant Governor is not vital for the conduct of public business. He may serve in any capacity, may even be confirmed in any capacity by the Senate. He is constitutionally barred from only one office.⁹

Appellants make a dangerous argument relating to the possibility that David Paterson dies in office. To put it bluntly, Ravitch asserting that he is the Governor

⁹ Ravitch himself seems unsure if the title is necessary. He told New York magazine: "I'm here to help him [Paterson] in a public as well as a private way. That's probably true whether I'm lieutenant governor or not. It's a hell of a lot easier, and I could be a lot more helpful, if I have the title." New York magazine August 2, 2009 "65 Minutes With Richard Ravitch".

creates far more instability. An unelected Governor acting unilaterally, without advice or consent, names the second highest officer of the state, upon a shaky constitutional claim to the office would create grave and irresolvable uncertainty about succession thereby actually imperiling the well-being of the state because it would not be clear at all long term or short term who is legally authorized to perform the duties or whether he is constitutionally proper in line for succession.

Open public questioning of the validity of the appointment can not be answered by the de facto officer's doctrine. It will undermine the confidence of the people in their government long before any Court could address whether that doctrine applied.

Executive power as exercised herein upon a claim of emergency is grounded in a determination that the Constitution is silent and thus the Executive can "fill in the blanks." The Constitution has consciously withheld the power asserted by the Governor, but he elected to disregard the restrictions on his power. Within a deprivation of power, he has found a grant of power undermining the constitutional division of authority and limitations in the document as well as the authority of history. A "systematic unbroken, executive practice long pursued to the knowledge of [the legislature] and never before questioned, engaged in by [Executives] who have sworn to uphold the Constitution making as it were such exercise of power

part of the structure of our government may be treated as a gloss on “executive power”.” Youngstown Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

Constitutional authority is not re-written by the exigencies of the moment in the absence of amendment by the People. Were the Senate again to dispute who, if anyone, holds the office of Temporary President, it is a risk inherent in the system. Justice Douglas in Youngstown v. Sawyer Id., put it squarely: “Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another president might use the same power to prevent a wage increase, curb trade unions, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.” Id. at 633-634. The Constitution of the State prevents the appointment of a hero to save us as Lieutenant Governor in order to protect us from the appointment of a villain to harm us as Lieutenant Governor.

Emergencies do not justify constitutional abnegation. Emergency power issues are fraught with peril. Speaking of the authors of the federal Constitution, it is true for those who amended the Constitution to set up a system of succession to whether death, war and the other issues that plague orderly governments. Justice Jackson wrote the Framers “knew what emergencies were, knew the pressures they

engender for authoritative action, knew too how they afford a ready pretext for usurpation” and concluded that the Constitution made no express provision for exercise of extraordinary authority because of a crisis. Id. at 649.

The Court below determined that the balance of equities favored the Respondent. Restrictions upon executive power to the framework agreed upon and ratified by the People at the ballot requires the balance of the equities to be found with Respondent, as the lower court did.

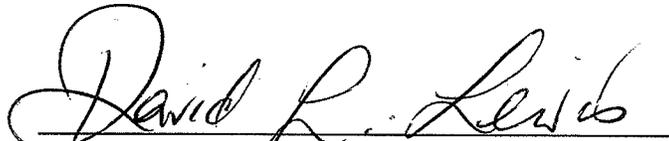
The lower court did not exceed or abuse its authority. It issued a preliminary injunction in this rare case in order to preserve the status quo after Respondent met his legal burden to demonstrate that he had a likelihood of prevailing on the merits, imminent irreparable harm and a balancing of the equities.

CONCLUSION

The Constitution and the law require that the decision of the lower court be in all respects affirmed.

DATED: New York, New York
August 9, 2009

Respectfully submitted,

A handwritten signature in cursive script that reads "David L. Lewis". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF COMPLIANCE

PURSUANT TO 22 NYCRR § 670.10.3(F)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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