TO BE ARGUED BY:
DAVID L. LEWIS, ESQ.
TIME: 30 MINUTES

State of New York
Court of Appeals

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

Plaintiffs-Respondents,

-against-

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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STATEMENT OF THE QUESTION PRESENTED

Was the opinion and order of the Appellate Division correct as a matter of law that the Governor is without constitutional authority or statutory authority to appoint a private citizen to serve as Lieutenant Governor, 400 days after the office was vacated by operation of law?

PRELIMINARY STATEMENT

Two lower courts have held as a matter of law that the Governor is without power to appoint a Lieutenant Governor. Under New York State Constitution Article IV Section 6, once that particular office is made vacant, the Constitution in designing succession maintains the office itself empty until the next quadrennial gubernatorial election, with the duties specifically to be performed by the Temporary President of the Senate. For the first time in the history of the state, the Governor claims the legal right to appoint a Lieutenant Governor. The lower courts have, in response to that claim of right, enjoined the putative nominee from taking office on the basis that Senator Skelos, the Respondent has demonstrated a likelihood of success on the merits, irreparable harm, and that the balance of equities favors the injunction. No court has found the power of appointment to exist.

In seeking to overturn the order of the Supreme Court and now the Appellate Division, Appellants have manufactured a vast structure of interpretation

and selective editing in order to circumvent the text of Article IV Section 6 of the Constitution. The Governor has violated the Constitution. He has claimed to be the first to discover a hidden power in long enacted laws. He has invoked the perennial excuse for the illegal exercise of Executive power, necessity. Before this Court, the Governor now seeks "harmonization" in the interest of a stability and order that he himself has destabilized and disordered, at the direct cost of the text and the spirit of the Constitution.

The legal issue before this Court is whether a Governor of the State of New York can appoint a Lieutenant Governor, thereby defying the text of the Constitution, undermining the elective principle that animates the Constitution and permitting the installation of his own potential unelected successor. No Governor has sought this power to appoint the second highest office in the state because such power has not been granted to the Governor. Appellants claim that the courts below and the Respondent have all sought to impair the power of the Governor. Where there is no power, there can be no impairment of power.

The Constitution provides for a wholly integrated line of succession without the need for an appointed Lieutenant Governor. At the present time and for the foreseeable future, any crisis that the Governor believed necessitated a Lieutenant Governor is over. Should the Governor die, without Mr. Ravitch in office, Article IV Section 6 would elevate Senator Smith, the Temporary President

to become the acting Governor or, in his absence or failure, Speaker Silver would become acting Governor until an election be held within three months. Article IV Section 6.

The Governor retains the power to appoint Mr. 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 presses the legal issues and thus having precipitated, he now continues, this constitutional crisis.

Having sought to justify the appointment initially under rubrics of crisis and emergency predicated upon the uniqueness of the putative nominee, Appellants now turn to "harmony" and "practicality", as "reasons" to in effect attack the state constitution's fundamental architectural principles by incremental constitutional transgressions.

The absence of a specific grant of authority to appoint a Lieutenant Governor in the Constitutional provision concerning succession, Article IV Sec 6, and the specific limitation on appointments for only a political year, Article XIII Sec 3 on their face resolve the matter. Appellants resort to Public Officers Law 43, but are precluded by the terms of the statute itself and its conflict with the Constitutional structure is unavailing, whether this Court adopts the reasoning of the Supreme Court of the Appellate Division or both. Rejecting years of practice

and scholarship, Appellants invite this Court to do the same, so as to find an appointment power where none exists.

The absence of appointment power for this office from the text of the Constitution and the history rests primarily on the unique nature of the office. Article IV Sec 6 requires a line of uninterrupted continuity in the highest office but by its text does not require continuity in the second highest office. The Constitution does bar the filling of the state's second highest office by a person who is neither confirmed by the Senate under advice or consent nor elected by the Legislature, sitting in the place of the electorate, as it does in filling vacancies for positions such as the Comptroller, Attorney General and the United States Senate. It does so by placing the performance of the duties of the office with the Temporary President of the Senate. It bars an elected or unelected Governor from being able to resign and turn the state over to whomever he or she chooses, wholly unanswerable to the electorate for, according to Appellants the remainder of the four year term.

Unlike all other offices within the political structure of the state and its political subdivisions, the office of the Lieutenant Governor is unique in its construction under the state constitutional scheme. It is the sole office that bestrides two branches of the government. As deputy to the Governor he or she serves in the executive branch. As designated by the Constitution, he or she serves

as part of the Legislative Branch by presiding over the Senate and in the case of a tie in procedural matters has a casting vote. [1]

The office is anomalous in regard to the method of selection. A Lieutenant Governor never independently faces the general electorate yet is still installed in office by virtue of the election of the Governor. No Lieutenant Governor may run for office in the general election on his or her own. The candidate is wholly dependent upon the votes for the Governor. In part, this is to protect the Governor from being saddled with a member of an adverse political party. In effect, the Lieutenant Governor is neither directly elected on his or her own merits nor appointed by another, although paired with the gubernatorial candidate. No other state officer holds its power in the state structure in this fashion.

Another anomaly in the office is unlike any other office, the drafters of the Constitution and the ratifying electorate created the deliberate constitutional design prohibiting a non-quadrennial election, the obvious intent of the constitution was to leave the office unfilled until the next election for governor. The duties of the office would be performed by the Temporary President without regard to party affiliation. For decades this has been the stated and understood constitutional

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[1] 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.

scheme for succession as to this peculiar office. Thus when Lieutenant Governor DelBello resigned, Governor Cuomo did not seek to fill the office, even though the Temporary President was of a different political party. Before him, when Malcolm Wilson was made Governor by operation of law upon Nelson Rockefeller being confirmed as Vice-President, Wilson did not seek to fill the office.

Until this Governor, no governor ever considered rejection of the elective principle, the backbone of the legitimacy of the state and ratification of the constitution, in exchange for expediency. Every other Governor, bereft of a Lieutenant Governor, has been able to cope with the exigencies of politics, Depression, and war, without resort to violation of the Constitution.

STATEMENT OF THE CASE

Both the Appellate Division and the Supreme Court were correct in ruling that the Governor had no right of appointment to fill the office of Lieutenant Governor. The initial ruling and the affirmance were both correct. The issuance of the injunction against Richard Ravitch exercising the powers of the Office of Lieutenant Governor is proper because the courts found the putative appointment of the Governor to be unconstitutional and thus, illegal.[2] If the power of

[2] Appellants set out a list of purported errors or failures of the Appellate Division making the same charges against the four appellate justices as it did against the Supreme Court justice. The injunction against Mr. Ravitch was properly issued. Both courts all considered all three aspects, likelihood of success on the merits, irreparable harm and balance of the equities. Each court rejected the appellants' point of view on the basis of the exercise of discretion that was

appointment does exist, then Senator Skelos should lose, but if the power of appointment does not exist, then this Court should affirm the lower court and answer the certified question in the affirmative.

Appellants also resurrect the procedural bars that have been repeatedly invoked to prevent a determination on the merits. Both courts below have found first, Senator Skelos has standing to raise the issue in the context of this case and second, *quo warranto* is not the exclusive remedy in the case at bar because the vehicle of the declaratory judgment is sufficiently proper to present this particular wholly legal issue, especially where no other person claimed right or title to the office.

Appellants have injected into the argument for the first time before this Court the issue of ripeness. For the Appellants' position to prevail, this Court would have to require standing to be the equivalent of a direct, present and immediate personal injury to have been fully accomplished. This is not the law of standing or of ripeness. Appellants attempted a similar argument in Supreme Court asserting that the ploy of the private taking of the oath of office and

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complete, thorough and extensive. Neither court abused its discretion. The Appellate Division by certifying the legal issue to this Court under CPLR 5713 presents to this court the sole contested legal issue that would otherwise permit the entry of a final judgment. See CPLR 5614. The lower courts well reasoned opinion affirmed by the Appellate Division belies the Appellants' claim that their claims were not considered by Appellate Division. They were considered and rejected when the Appellate Division wrote "We hold therefore, that the Supreme Court properly granted the Senators' motion for a preliminary injunction.".

suspicious early morning delivery of the oath for filing required dismissal on the basis of mootness. Wisely, that argument was left behind in Nassau Supreme Court.

Senator Skelos has standing because the injury alleged is within his zone of interest and imminent. If Senator Skelos is prevented from bringing the action, then the courthouse doors are otherwise closed to the violation of the Constitution. Appellants seek to require that a litigant first suffer the actual injury in order to bring a declaratory judgment and only then earn access to the courthouse. But because of the nature of the office itself, the claim of a right to appointment, the deliberate secrecy surrounding it and the harm occasioned by it, Senator Skelos has standing to bring a declaratory judgment action.

The Appellant's insistence on *quo warranto* as the exclusive remedy is misplaced. In the instant matter where there are no two claimants to the position, no *quo warranto* applies. Put simply the Office of Lieutenant Governor is either empty or it is Mr. Ravitch's. Where there is no contest between two candidates or two office holders to be resolved by a factual inquiry, the matter is a pure question of law and thus, *quo warranto* is not the exclusive remedy. Procedurally, a declaratory judgment is a proper vehicle for the resolution of this unique matter given that there are no other claimants to office and the matter is one of significant public interest that both sides wish to resolve expeditiously.

COUNTER STATEMENT OF FACTS

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.

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, both Republicans. In January of 2009, a new majority elected Democrat 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 that he, not Espada, was still the Temporary President. 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.

On appeal, Smith obtained a stay pending appeal against Espada from taking or exercising certain powers of succession relative to the Temporary President from the Third Department. The injunction prevented Espada from succeeding to the Governorship. Smith later withdrew the appeal. The stay was dissolved.

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".[3] 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 publicly informed that Attorney General Andrew Cuomo believed that the action was not legally authorized and would be unconstitutional.[4]

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[3] http://www.ny.gov/governor/press/pdf/7809LettertoNYers.pdf

[4] 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

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.

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. Continuing the pattern of public deception, the Governor's office announced that Ravitch would be sworn in the following morning in a ceremony in the Red Room at the Capitol. The Governor intentionally concealed the fact that there was a plan to have Ravitch secretly sworn in at a Brooklyn steakhouse. Thereafter, a signed an oath of office was secretly couriered to Albany and

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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."

delivered in the middle of the night to a deputy secretary of state for filing. Instead of transparency, and acting in open manner, the Governor resorted to secrecy, false public statements and misdirection so as to assure that anyone seeking to challenge the unconstitutional act would be met by a fait accompli.

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 and a legal claim of mootness. 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.

The following day, unconnected to the Ravitch appointment, the Senate stalemate was broken when Espada defected back to the Democrats. Smith was again the exclusive Temporary President. The stalemate ended. Any question of succession was resolved.

Appellants convinced a Justice of the Appellate Division to dissolve the temporary restraining order that afternoon. Meanwhile, in Albany, the stalemate over, 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.[5]

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

The Appellate Division heard the matter expeditiously and ruled against Appellants in all respects. The Court identified the core issue as to the power of appointment, but first considered the procedural obstacles. It held that *quo warranto* is not the exclusive method by which "the lawfulness of the Ravitch appointment may be challenged." Citing Executive Law 63-b and this Court's decision in Delgado v. Sunderland, 97 N.Y.2d 420 (2002), in weighing whether or not the action usurps the Attorney General's power the Court cited the Attorney General's opinion that if the governor so acted, it would be unconstitutional.[6] The Appellate Division held that the public interest required an immediate answer and

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[5] Although Justice LaMarca's interpretation regarding the legal bases for his decision that the Governor was without constitutional authority to appoint a Lieutenant Governor differ in some respects from those of the Appellate Division, collectively they provide grounds for affirming the judgment below and the answering of the certified question in the affirmative.

[6] The Appellate Division referenced this Court's statement in Delgado, supra: "We need not determine at this time whether a declaratory judgment action might lie as an alternative remedy where *quo warranto* has ceased to be available to the aggrieved candidate because the Attorney General has declined to act (*see* Matter of Dekdebrun v. Hardt, 68 A.D.2d 241, 248 (Cardamone and Simons, JJ., dissenting), *lv dismissed* , 48 N.Y.2d 608 (1979); Antisdel v. Tioga County Bd. of Elections, 85 Misc.2d 174, 176 (1976))" Delgado, supra.

not to await the Attorney General.[7] The Appellate Division found that in the absence of disputed issues of fact and the controversy turns on a particular point of law, an action for declaratory judgment and injunctive relief is a permissible way to challenge this appointment.

The Second Department found that where only an issue of law is present, entitlement to the office is not subject to *quo warranto*. The Appellate Division rejected the argument, pressed here, that Delgado prevents Senator Skelos from proceeding by a declaratory judgment and confines him to an Article 78. Where the matter does not concern two claimants to the same office which requires investigation and prosecution by the Attorney General, Delgado does not control.

The Second Department likewise rejected the claim that Senator Skelos was without standing to bring the action.[8] The Appellate Division rejected the version of standing posited by the Appellants. Standing requires that a legislator has to plead and assert an injury in fact that falls within his zone of interest and must demonstrate by showing "for example" a nullification of his or her vote or a usurpation of power, and not merely a lost political battle.

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[7] Appellants themselves publicly in the media and in papers uniformly claimed to wish that there be an immediate resolution of this matter on the merits.

[8] 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). Senator Skelos' 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).

The Court noted that Mr. Ravitch has been barred from entering the Senate chamber and therefore by court order no usurpation or nullification could have occurred. Senator Skelos has standing by virtue of the fact that a declaratory judgment is designed to adjudicate the rights of the parties before a wrong actually occurs, in the hope that later litigation would not be necessary. Appellants seek to bar the courthouse door to a litigant who in the course of the litigation has been able to rely upon restraining orders in preventing direct harm from occurring. The Appellate Division held that by virtue of the form of the action being a declaratory judgment, Senator Skelos has made an adequate allegation of an injury in fact which is within the zone of interest of the Senator, demonstrating that he has an actual legal stake in the matter sufficient to establish standing. The issue involved clearly is not seeking an advisory opinion.

Finally, as a last procedural matter, Appellants assert that CPLR 6311 (1) presents a jurisdictional bar to the obtaining injunctive relief in Nassau County. They claim that the action should be brought in Albany County. Citing the statute, the Appellate Division disagreed with the contention that the matter could only be brought in Albany County: "Either Mr. Ravitch is the lawfully appointed Lieutenant Governor or he is not. If he is not then CPLR 6311(1) does not apply because he is not a public officer." If he is then there is no basis to restrain his actions.

Having disposed of the procedural barriers erected by the Appellants, the Court then turned to the merits. Taking into account of the requisites for the issuance of a preliminary injunction, the Appellate Division found:

> We conclude, however, that the Governor simply does not have the authority to appoint a lieutenant-governor, that his purported appointment of Mr. Ravitch cannot be reconciled with an unambiguous and contrary provision in the State Constitution, and that no considerations of the State's financial difficulties or of political strife in the Senate allow us to find authority for Mr. Ravitch's appointment where none exists.

The Court set out its analysis in great depth. It first examined Section 3 of article XIII of the State Constitution provides in pertinent part that "[t]he legislature shall provide for filling vacancies in office." The Governor, wrote the Court "relies entirely on Public Officers Law § 43", which, as a catch-all provision, reads in pertinent part: "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."

The Court analyzed the relevant sections and the argument propounded by Appellants and concluded:

> The plain language of this statute indicates that the vacancy in the elective office in question is to be "filled," not by a gubernatorial appointment, but "by an election," and that the Governor's appointee merely "execute[s] the duties [of the vacant office] . . . until the vacancy [is] . . . filled." Thus, Public Officers Law § 43 does not

authorize the Governor to fill a vacancy, but only to appoint a person to execute the duties of the vacant office until the vacancy is filled by election. Public Officers Law § 43, therefore, provides no authority for the Governor's purported appointment of Mr. Ravitch to fill the office of lieutenant-governor. Moreover, the statute cannot be constitutionally applied even to support an appointment of Mr. Ravitch to execute the duties of the office of lieutenant-governor.

Article IV, section 6, of the Constitution provides that, where a vacancy occurs in the office of lieutenant-governor, "the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy." Thus, under the Constitution, until the vacancy in the office of the lieutenant-governor is filled, the temporary president of the Senate is charged with the responsibility of "perform[ing] all the duties of lieutenant-governor" (NY Const, art IV, § 6). "Executing" the duties of the lieutenant-governor, as provided in the statute, cannot mean something different from "performing" the duties of the lieutenant-governor, as provided in the Constitution. It could not have been within the contemplation of the drafters of the Constitution and the statute that, upon a vacancy in the office of the lieutenant-governor, there would be two caretakers — one, the temporary president of the Senate, who would "perform" the duties of the office, the other, an appointee of the Governor, who would "execute" the duties of the office.

In our view, therefore, Public Officers Law § 43 cannot be constitutionally applied with respect to a vacancy in the office of lieutenant-governor because it does not authorize the Governor to fill the vacancy and it would permit an appointee of the Governor to do what the Constitution mandates be done by the temporary president of the Senate. Inasmuch as the statute as applied to the office of lieutenant-governor cannot be reconciled with the Constitution (cf. Matter of Wolpoff v Cuomo, 80 NY2d 70, 78), it must yield (see People v Allen, 301 NY 287, 290). Thus, the Governor's purported appointment of Mr. Ravitch was unlawful because no provision of the Constitution or of any statute provides for the filling of a vacancy in the office of lieutenant-governor other than by election, and only the temporary president of the Senate is authorized to perform the duties of that office during the period of the vacancy. We hold, therefore, that the Supreme Court properly granted the Senators' motion for a preliminary injunction.

The Appellate Division, recognizing the great public import of the merits of the issue, certified the merits questions to this Court.

POINT I

SENATOR SKELOS 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, and not as an advisory opinion. Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004). The party prosecuting the case has to have a concrete interest, a legal stake, in prosecuting the matter thus providing evidence of an injury in fact. The purpose of standing is to ensure that the person suing is the proper party to challenge the unconstitutional act and not to eliminate any possibility of there being anyone who is able or is willing to bring the action.[9]

Appellants claim that Senator Skelos has no injury in fact. The standard that they set demands more than any court has set as a requirement for standing. The existence of an injury in fact – an actual legal stake in the matter

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[9] In assessing standing the courts must accept the truth of the allegations in the complaint for a declaratory judgment as pleaded, Graziano, 3 N.Y.3d at 481, 511 W 232nd Owners Corp. v. Jennifer Reality Co, 98 N.Y.2d 144, 151-152 (2002), and thus Appellants vouching for the beneficence of Mr. Ravitch is irrelevant to the claim of standing.

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. Senator Skelos is proximately injured given that he is 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.

Senator Skelos 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. Separately Senator Skelos as the Minority Leader also represents his Conference, and would also have to forego representing his Conference. Senator Skelos has demonstrated that he will actually be harmed

by the challenged action. The Senator is injured in fact by being obligated to either violate his oath of office or betray his constituency and his Conference 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.

Senator Skelos 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. Senate rules do not permit Mr. Ravitch as a private citizen to participate in the business of the Senate with regard to speaking, presiding or voting in the chamber. Similarly Senator Skelos' standing claim 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, referring to the power of the casting vote. Article IV Section 6. The vote is one usually of deciding ties and limited to procedural issues. 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.[10] 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. 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.

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

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[10] It is for such a reason that the Governor needs a particular member of his own party beholden solely to him as presiding officer of the Senate, rather than the independently elected Temporary President.

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, Senator Skelos has a legally protected interest in the right to vote on legislation as well as to speak freely on the floor of the Senate, a matter uniquely committed to the legislature and thus the right not to suffer being usurped in participation on the floor is sufficiently personal to constitute an injury in fact. See e.g. Dennis v. Luis, 741 F.2d 628 (3d Cir. 1984). 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.

No political counterweight exists for Mr. Ravitch. He would ordinarily be accountable to the electorate. While the Governor is running again in 2010, Mr. Ravitch will not and has not faced the electorate. Thus Mr. 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 not 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). Senator Skelos sued regarding who has the constitutional power and duty to preside over him in the Senate chamber. This is not an issue of a lost political battle, when legislation was validly enacted over their opposition. Matter of Posner v. Rockefeller, 26 N.Y.2d 970 (1970) and Raines v. Byrd, 21 U.S. 811 (1997) do not require a different result.

The Supreme Court relying on Silver v. Pataki, Id., ruled that Respondent had standing. First, the lower court found that the individual legislators had standing when they alleges that the action by the Executive has resulted in the nullification of the member's vote, he or she 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. Silver, supra. The lower court found the appointment of Mr. 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).

Appellants make a number of contentions to support their argument that Senator Skelos 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.

The Senate's right to select its own officers, a right to vote possessed individually, is usurped when the Governor, not the electorate and not the body itself picks a presiding officer. Article III Sec. 9. Appellant's interpretation would limit the concept of zone of interest to a direct interest. This narrows standing interpretation has not been the law of this state. The issue of standing regarding the illegal appointment of a Lieutenant Governor is a unitary claim and is not divisible. Respondent has standing for all purposes if he has it for one purpose relative to an illegal appointee.

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, Appellants misrepresent the doctrine of the zone of interest. The injury, even if common to all 62 Senators, is not a generalized public grievance. It is not an injury so general 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. The repeated assertion that Senator Skelos stands "alone" is belied by the fact that his Conference, the other 29 Senators stand behind him. But whether they do or not is irrelevant for standing purposes. Appellants address it as if it were a plebiscite. It is not. A single person may properly have standing. Senator Skelos has standing to bring an action for a declaratory judgment.

Appellants erroneously claim that Respondent must demonstrate a direct harm or voiding of an individual member's actual vote. They believe that the absence of an actual vote eliminates standing because no vote is nullified. Standing does not require a Senator to simply stand and wait for the interloper to act. In a declaratory judgment action, the entire purpose is to proceed prior to direct and personal harm being inflicted. In the case at bar, the law does not require for standing purposes that the party be wounded before he may act to obtain a declaration of rights. To do so requires more than standing; it imposes a duty to be harmed.

The constricted reading of Silver v. Pataki by Appellants is not consistent with the text of the case itself.

First, the court stated that the courts are available to resolve disputes concerning the scope of authority which is granted to the other branches by the Constitution. Silver, 96 N.Y.2d at 542. Clearly this is a dispute concerning the power of the Governor to appoint a person whose principle duty is to preside over the Senate, thus initiating an issue as to the scope of authority of the governor. While Senator Skelos is not a branch of the government, neither was Speaker Silver.

Second, the essence of standing is not to slam closed the courthouse doors so that crucial constitutional issues are not adjudicated. There can be no doubt that the putative appointment raises such issues. Appellants concede the point when they claim that the Governor had so carefully and considerately consulted "experts". This Court in Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801 (2003), made it clear that standing is more nuanced than Appellants' reading would allow. Where there is a breach of the Constitution in terms of the scope of authority of an actor, there will ordinarily be few who can claim a concrete injury resulting from the breach of constitutional division of authority and consequently an important constitutional issue will be effectively insulated from review. Saratoga, supra., 100 N.Y.2d at 815. See also Boryszewski v. Brydges, 37 N.Y.2d 361, 364 (1975). Standing is not properly a barrier to prevent review of an important constitutional issue. While Boryszewski expanded

the right of taxpayers to bring suit, its articulation of the purposes of standing and the reasons to expand standing are equally relevant to the case at bar. The nature of the claim, the unprecedented act and the limited number of persons directly affected all provide a basis for standing.

Third, this Court did not foreclose the possibility of additional categories of standing for legislators as Appellants claim. 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 for which a Senator had no effective remedies within the political process. See e.g. Russell v. DeJongh, 491 F.3d 130, 135-136 (3d Cir. 2007) (denying Russell standing but discussing Silver, supra.).

Appellants' claim that any harm done is only to an institution, and not its members is belied by both the facts and the law. Of crucial significance is the fact that Ravitch will not face the electorate. Ordinarily where the claims are no more than generalized grievances, it is for the political process to provide its resolution. In the case at bar, there is no means for the political process to provide

an appropriate remedy to adjust the grievance. See e.g. F.E.C. v. Akins, 524 U.S. 11, 23 (1998).

Appellants claim that the harm to Senator Skelos is too abstract. But the abstraction of harm concept in the case at bar is defeated by the pleading of actual imminence regarding actual practices on the floor of the Senate uniquely available to a presiding officer. This is not a generalized interest in ensuring that the law is complied with or is not being followed or is being violated after its enactment or similar abstractions.

Contrary to Appellants' claim there will no flood of lawsuits from legislators given that only one Governor has ever sought to install his own Lieutenant Governor. This Court need not expand the doctrine of standing in order to affirm the lower courts. An authentic dispute exists. There is no search for an advisory opinion. Senator Skelos' presentation of imminent harm in the chamber, concerning his First Amendment rights individually and as a legislative representative are concrete injuries lying in wait. Appellants would predicate standing on the issue of whether Mr. Ravitch himself is a good and fair man. Similar to their other arguments, the issue is not Mr. Ravitch but the fact that the appointee unchecked by any legal or political process has the power to silence a member of the opposition party in the legislative body despite the fact that the Senator is elected and the appointee is not. In the absence of political

accountability of the appointee, the issue of standing should be resolved in favor of the Senator or else the issue will never be adjudicated due to the procedural hurdles that cannot be allowed to stand guard over unconstitutional action.

Both the Appellate Division and the lower court properly determined that Respondents had standing. The decisions 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. In contrast to Appellants' position this Court has held in Saratoga, "Standing is properly satisfied here lest procedural hurdles forever foreclose adjudication of the underlying constitutional issue." Saratoga, 100 N.Y.2d at 815.

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

The entirety of the matter rests upon the issue of whether or not the Constitution of the State of New York authorizes the filling of the Office of the Lieutenant Governor by appointment of the Governor. The lower courts have both held that no right of appointment is accorded to the Governor to fill this particular office of the Lieutenant Governor wither by the Constitution or by statute. As a consequence, each court has granted the preliminary injunction on the basis that

Respondent has demonstrated a likelihood of success on the merits, irreparable harm and the favorable balance of the equities.

For the entire life of the State from 1777 at the founding of the state and through revolution, war, crisis and financial panics, there has been an elected Lieutenant Governor. But during these same periods, 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. For the first time an Executive defined his own constitutional authority as unlimited because he could find no specific constitutional limitation. Appellants claim the law supports their position and that they alone and for the very first time have found this power lurking in the Public Officers Law and no one ever noticed it. By this assertion of power every other Governor, every Governor's counsel and everyone else has failed to find it. He himself for more than a year since he ascended to the Office of Governor, he and his legal team failed to find it.

The historical record, of course, demonstrates that several entities from the present Attorney General, prior legislatures, prior governors, the Law Revision Commission, and other governmental and constitutional scholars at

various times, have looked directly at Article IV's structure and system of succession and have found them to be clear. No right of appointment exists.

The claim of the right to appoint a Lieutenant Governor rests upon what Appellants claim is constitutional silence and the caption of a catch all statute. The lower courts uniformly have held no right of appointment exists either in the Constitution or by statute. As a consequence, the lower court granted, and the appellate court affirmed, a preliminary injunction against Mr. Ravitch from taking office. Each court has held that on the facts presented Senator Skelos has demonstrated a likelihood of success on the merits, irreparable harm and that the balance of the equities favored issuance of the injunction.

The sole issue certified to this Court is whether or not the Governor has the right under the Constitution to appoint a Lieutenant Governor. If David Paterson has the right to do so, then the case of Senator Skelos is without merit. If The Governor is without the legal right to do, the injunction stands, the judgment below should be affirmed in all respects and the certified question be answered in the affirmative.

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 is a grant of power to the branches of government from the People of the State by the process of ratification. The powers of the Governor are set out principally in Article IV. 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. Where there is no Governor and then 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. Appellants in manipulating the text of the document omit the distinction between an inability which is curable and the vacancy which is permanent for the term. The Temporary President performs the duty for the remainder of the term is there is a vacancy and if the inability is cured then the Temporary President stands aside for the returning Lieutenant Governor. 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.

Appellants pour a great deal of effort into trying to prove that the title "Filling other vacancies" is a part of the law and thus they include as part of their claim of "plain language" in support of appointment by the Governor. They rely heavily on their claim that the title of the section is part of the law. But McKinney's Statutes §123 makes it clear that they have principally confused titles and headings of POL § 43 with headings of chapters or sections of a code, which are sometimes treated as part of the act. Id. 123 (a). The title of a statute is a preliminary statement in the nature of a label which defines the scope of the enactment it is not part of the act and is not necessary. A heading may not alter, expand or limit the effect of unambiguous language in the statute itself. In short, the enumeration above the statute may not serve to be the tail that wags the statute. Given the clarity with which the Appellate Division read POL § 43, there is no basis to resort to the title or heading for "clarification of a imprecise or dubious provision. Id. The text of the statute takes precedence. See In the Matter of Suffolk Regional, 11 N.Y.3d 559, 570-571 (2008). The textual exegesis by the Appellants did not survive judicial scrutiny below and is without merit.

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."[11] Appellants claim that the meaning of political year next succeeding the first annual election year

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[11] Appellants in the memorandum of law below urged 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. The Appellate Division accepted the challenge to parse this distinction and found the plain language of this statute indicates that the vacancy in the elective office in question is to be "filled," not by a gubernatorial appointment, but "by an election," and that the Governor's appointee merely "execute[s] the duties [of the vacant office] . . . until the vacancy [is] . . . filled." Thus, Public Officers Law § 43 does not authorize the Governor to fill a vacancy, but only to appoint a person to execute the duties of the vacant office until the vacancy is filled by election. Public Officers Law § 43, therefore, provides no authority for the Governor's purported appointment of Mr. Ravitch to fill the office of lieutenant-governor. Under the Constitution, until the vacancy in the office of the lieutenant-governor is filled, the temporary president of the Senate is charged with the responsibility of "perform[ing] all the duties of lieutenant-governor" (NY Const, art IV, § 6). "Executing" the duties of the lieutenant-governor, as provided in the statute, cannot mean something different from "performing" the duties of the lieutenant-governor, as provided in the Constitution. It could not have been within the contemplation of the drafters of the Constitution and the statute that, upon a vacancy in the office of the lieutenant-governor, there would be two caretakers — one, the temporary president of the Senate, who would "perform" the duties of the office, the other, an appointee of the Governor, who would "execute" the duties of the office. Skelos v. Paterson, Id. Appellants abandon their argument so as to find fault with the analysis of the Second Department despite the fact that they implored the court to do what they are asking this Court to do, harmonize. When one tries to harmonize as they suggest, the text of the Constitution directs that the task is complete by reference. Article IV Sec 6.

does not mean the political year but the year that the office is presented to the electorate, in a quadrennial election.[12]

In so claiming, they seek to avoid the ineluctable fact that the Governor is attempting to fill what they claim is a vacancy which occurred in March of 2008, and would by the terms of the law expire in January 2009, almost seven months before the putative appointment was made.[13] In response to this explication of the core elective principle, appellants claim that political year does not mean an actual year but rather that we merely erase that restriction because the Lieutenant Governor runs every four years. Thus to them, an appointment can be an almost four year appointment.

Appellant's interpretation does not square with the emphasis on elections regarding the filling of vacancies. More to the point, under this construct or even presently, the Governor is free to resign his office after an appointment and

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[12] Article XIII Sec 4 provides that "The political year and legislative term shall begin on the first day of January; and the legislature shall, every year, assemble on the first Wednesday after the first Monday in January." A legislative term is a two year term. Nothing supports the claim that the term political year is a sliding scale, dependent on when one is elected. Case law presented by the Appellants fails to shed light on the particular issue of this office.

[13] It is worth noting that the Constitution in terms of succession is capable of providing for a shortened time for elections to fill the office of Governor. As part of Article IV Sec 6 it states that if there is no Governor or Lieutenant Governor, there must be an election within three months. During that period to insure continuity in the chief executive, the Speaker of the Assembly serves as Governor. According to the Appellants the Speaker would have the power to appoint a Lieutenant Governor for the three remaining months and in effect must be allowed to hold office, under their interpretation possibly until the end of a four year term. The appointment of a Lieutenant Governor in that instance would run contrary to the succession scheme in Article IV Section 6.

turn over the state to an unelected person who in turn appoints his or her own lieutenant governor and according to the appellants, it comports with the law and would tolerate for example two persons running the state without being elected by anyone, possibly even for a full four year term. This interpretation is not harmonizing. The purpose of statutory interpretation is to avoid absurd results. Appellants' claim demands an absurd result.

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 § 43, the vacancy occurred on March 17, 2008. Assuming *arguendo* that Appellants' argument could be correct, then the mandate of the Constitution, is that an appointment of Lieutenant Governor, if legal, 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.[14] 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

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[14] 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.

its terms precludes an appointment. The use of the term political year is to be distinguished from language that would state for the remainder of the term. Because no such language is used, a political year should be considered the calendar year and not the residue of the term of office.

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 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 confine the issue to school board elections. 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 fact that POL § 43 makes no specific exception for the Office of Lieutenant Governor is of no moment when the Constitution provides that the office is to remain unfilled. Unlike other offices demanding of continuity, the Office of the Lieutenant Governor is not required for the continuity of any state action.[15]

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[15] The reason that the Temporary President fulfills the duties of the office of the Lieutenant Governor is predicated upon the fact that the principal duty of the Lieutenant Governor is to

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 sole 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.

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preside over the Senate. The constitutional construct is designed to allow both branches to function. The Senate does not lose its Temporary President and the duties get fulfilled. The structure is designed to preserve the separation of powers. For example, at no point does the Speaker of the Assembly become the Lieutenant Governor because it would be improvident for him to preside over the Senate. Therefore, in the absence of a Temporary President, no one is authorized to fulfill the duties of the Lieutenant Governor and the Constitution does not even give the Governor a power of appointment in that instance.

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.

Appellants below and again before this Court place great faith in a series of cases that relate to appointment and election of judges such as Trounstine v. Britt, 163 A.D. 166 (1st Dept. 1914), or the replacement of deputy clerks and sheriffs with appointed clerks and sheriffs and the like. These are two classes of cases wholly inappropriate to the issue at bar. The cases principally turn on circumstances where a new court or a revised judicial system has overlapped in time with existing systems, or an office that mandated to be continuously filled is filled without a gap. Those judges ran for office not at the end of their terms because most often the courts for which they were elected no longer were constituted in the same fashion. Thus reliance upon Trounstine v. Britt, is misplaced given that it interprets vacancies on an inferior court of limited jurisdiction whose offices are established by the Legislature as opposed to a constitutionally created position. Similarly replacement of a deputy who ascends to the office by a new officeholder occurs because the ascension is temporary and not a replacement by operation of law. Finally, Appellants seek to claim that there is an incompatible officeholder problem that lies in the heart of the Appellate Division's determination that there is a constitutional distinction between fulfilling

the duties and filling the vacancy. This claim misapprehends the nature of incompatible office holding. The temporary president who fulfills the duties of the Lieutenant Governor does not hold the office. He is the caretaker, not until an appointee is named, but until the term ends or the inability ceases. The Appellate Division drew appropriate distinctions principally from the parameters insisted upon by the Appellants' interpretation.

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 Mr. 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. Appellants answer that the remedy would lie in the quadrennial process. The Constitution, however, properly interpreted avoids the danger completely.

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 within Public Officers Law § 43 that power 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 mandating an election, 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, which he eventually did and lost. The issue was not so much succession. While Dewey did not seek a new Lieutenant Governor, Democrats wanted an election in order to try to retake the position. 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. No claim was made that the Governor could appoint a Lieutenant Governor. [16] 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

[16] 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.

vacancy in the office 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).[17]

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 a 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

[17] Appellants find that the decision demanding that a vacancy exist is controlling that there is a vacancy that is to be filled in this case. Unlike the law at the time, the present law provides for no election. By eliminating election in a non quadrennial year, the courts did not authorize an appointment as the remedy.

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). Mitchell held that the election could not be held in the two weeks between the creation of the vacancy and the November election, so that it would have to be held the immediate year following. Appellants seek to use this fact to claim the legitimacy of a possible four year lag time. Cases relied upon by Appellants all turn on insuring that as to that office, no lag occur. In each instance that office holder is replaced by someone in the vacant office. Unlike other offices including those cited in various

Opinions of the Attorney General and the Comptroller, the Office of the Lieutenant Governor is governed by a constitutional provision that provides for fulfillment of the duties without maintaining the continuity of office. But if there is no interrupted governmental service, by virtue of the constitutional succession embodied in Article IV Section 6, 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.[18] Unlike a Senator, Mr. Ravitch is unelected. While an individual Senator

[18] Appellants again raise the issue that the Temporary President is only elected by a tiny percentage of the populace. They assert this in support of an appointment that constitutes an

is elected only by the people of a single Senate District, the Temporary President is elected through the process of representative government 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.

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 iteration 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

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election by one vote, the Governor's, cast without constitutional authority. Further they ignore the fact that the Third Department ignored in Ward, while the Temporary President is elected from a single District, he is then elected by his peers by a majority of the Senate representing a large percentage of the state by a process at the heart of representative government. It is a specious argument because the Temporary President does not hold office by virtue of election from a single Senatorial District. That it was asserted in 1944 by the Third Department does not make it more grounded.

issue and stated that no Governor had the right under POL to appoint a Lieutenant Governor.

Additionally the fact that no other Governor has ever asserted this power despite previous Lieutenant Governors dying, resigning or otherwise leaving office, the historical facts provide an avenue to affirmance and an affirmative answer to the certified question. In the construction of POL 43 and the Constitutional provisions, the Court may look to the historical understanding of the law and the exercise or non exercise of that power in the history of the times in which the statute has been part of the law.

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).

Although the argument was rejected by the Appellate Division, the text of the POL does not list a vacancy created by operation of law upon the

resignation of Governor Spitzer as one defined by or under the aegis of POL. POL § 30. Because it is not a qualifying vacancy under POL § 30(1)(a-h), the Office of Lieutenant Governor should not be subject to being 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 be "harmonized" to 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.

Appellants cite to the reference in the statute to special provision of law as referring to impeachment in the Constitution, even though it is not explicitly cited. Similarly POL 43 only applies if there is "no provision of law for filling the same." Appellants do not recognize Article IV Sec 6 which is the provision of law that provides "for filling the same" given that the Temporary President fulfills the duties and thus fills the office.

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 that the office was not elective. The Appellate Division appears not to accept it. Respondent presses the argument to this Court. 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 change in the Constitution that mandated that the Lieutenant Governor may not run for office independent of the Governor in the general election renders the office not elective. It is the only such position in this state. While the Lieutenant Governor is elected, the vast majority of voters decide which ticket they will support based upon the person heading the ticket, rather than the

number two person. Without ticket splitting the Lieutenant Governor has no claim to an "elective" office. While then Governor Spitzer achieved a greater than 70 % popular vote, it would be disingenuous to claim the same for the Lieutenant Governor.

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 Sections 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 be amended.

G. CONCLUSION

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.

POINT III

CPLR 6311 (1) IS INAPPLICABLE TO THE CASE AT BAR

Appellants urge dismissal on the basis that this declaratory judgment action has been commenced in Nassau County.[19] Appellants mistakenly 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 Appellate Division set the matter at its starkest. If Ravitch is not properly appointed then CPLR 6311 (1) is inapplicable because he is not a public officer covered by the statute. If he is properly appointed, Senator Skelos has no claim and its locus of suit is immaterial Appellants wish the Court to assume Ravitch's appointment proper and then apply CPLR 6311 (1).

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.

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[19] The action was brought in Nassau County on the basis that Senator Skelos is a resident of the county. CPLR 503.

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. The Injunction did not seek to restrain the governor in the exercise of a statutory duty but to enjoin an act that was unconstitutional and illegal by an actor who was not a public officer and still is not. 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 maintain their claim that the injunction cannot be directed at Ravitch because he is a public officer. But he could only be a public officer if the power to appointment a Lieutenant Governor is deemed proper. They fault the Appellate Division for a tautology but in fact it is their error in logic that leads them astray. To accept their argument one must accept in logic as a major proposition that the governor has the power to make such an appointment and the minor proposition that the appointment is proper, making him a public officer for purposes of CPLR 6311 (1). If the governor is without the power then the major logical proposition by Appellants fails and thus the minor proposition, likewise fails. If the appointment is not proper Ravitch is a private citizen, not a public

officer and the statute cannot apply to him. Appellants seek dismissal of the action based on the claim that CPLR 6311 (1) is jurisdictional citing cases from over hundred years ago under different rules of pleading and practice. The lower courts are uniformly correct in denying dismissal of this proceeding. People ex rel. Derby v. Rice, 129 N.Y. 461 (1891) 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. [20]

POINT IV

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

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).[21]

Under New York law, *quo warranto* is not the exclusive remedy to determine whether the Governor has acted constitutionally or not. Contrary to Appellants repeated assertion, Respondent does not seek to try Mr. Ravitch's title

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[20] It seems anomalous that the Appellants seek a ruling to require Respondents to start all over again in Albany County given the judicial resources expended, and their claim to seek a quick resolution on the merits. At this juncture, existing precedent on the merits has demonstrated that their position has no merit. The merits decision of the Appellate Division would be persuasive if not controlling in Supreme Court Albany County.

[21] 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.

to his office as Appellants claim. Senator Skelos is not vying with Mr. Ravitch for the same office. This is not an action for determining who was properly elected.

Plaintiffs before the Supreme Court 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. 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 Complaint is an action for a declaratory judgment, with an application for ancillary provisional relief, not an Article 78 proceeding. A declaratory judgment is an appropriate vehicle to establish and promulgate the rights of parties on a particular subject matter. See Matter of Peluso v. Erie County Independence Party, N.Y.3d No. 182 decided August 26, 2009.

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).

The power to commence a *quo warranto* action is vested in the Attorney General, to be used only after the alleged "usurper" has taken office. Executive Law § 63-b. In exercising this power, the Attorney General performs an investigative and screening function on such challenges by another seeking to hold or claim that particular office for themselves. See Morris v Cahill, 96 A.D.2d 88, 91 (4th Dept. 1983). The purpose is to afford a claimant a full opportunity to assert a legal right, if any exists. See Matter of Gardner, 68 N.Y. 467, 470 (1877). In the case at bar, there is no claimant to the office. The nature of the writ explains itself it is a trial of title to the office between two contenders one represented by the Attorney General and the other not. In the case at bar there is no second contender. The appointment is not one that someone else is entitled to hold.

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).

Appellants are unable to cite a single case in which there was not a contest between two persons for the same office. In Morris v. Cahill, supra., the officeholder had disappeared but was still an office holder.

Unique in its establishment and role, the Office of the Lieutenant Governor as created by the Constitution and by virtue of the established line of succession uniquely requires that there be a permanent vacancy until the next quadrennial election. The case at bar cannot be a trial between two persons to a title to one office.

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).

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. The action is only available to a claimant when the office is held by another under color of right. Smith v. Dillon, 267 App.Div. 39, 42 (3d Dept. 1943).

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 courts were both 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 take issue with the Appellate Court's determination that the declaratory judgment is an appropriate vehicle to bring an issue solely of law regarding the constitutionality of a gubernatorial appointment to a position where no one was properly elected or even in office at the time of the unconstitutional act. Under these unique circumstances testing only the constitutional power of the governor to appoint to this particular office, *quo warranto* is not the exclusive remedy.

Appellants read Delgado, supra. as precluding the use of the declaratory judgment to resolve the issue in the case at bar. This is a function of selective editing and not analysis. Delgado states that certain dicta "should not be read as supporting the availability of a declaratory judgment action, commenced before the declared winner has taken office, to resolve a challenge such as the one raised here." Id. Emphasis added. Delgado and the cases cited by Appellants all relate to failure of voting machines that set one candidate against the other.

Appellants are likewise in error when they claim that a declaratory judgment can never be the appropriate vehicle in the instant action. They claim that LaPolla is no longer good law, but Delgado is clearly limited to its facts, a

broken voting machine in a general election such that both candidates can claim title to an office that one holds and the other is contesting, as the decision makes clear. 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.

In Delgado, the Court wrote "We need not determine at this time whether a declaratory judgment action might lie as an alternative remedy where *quo warranto* has ceased to be available to the aggrieved candidate because the Attorney General has declined to act (see Matter of Dekdebrun v. Hardt, 68 A.D.2d 241, 248 [Cardamone and Simons, JJ., dissenting], lv dismissed , 48 N.Y.2d 608 (1979); Antisdel v. Tioga County Bd. of Elections, 85 Misc.2d 174, 176 (1976))." This demonstrates the case law relates only when there is an aggrieved candidate and that the remedy even when there is an aggrieved candidate is not exclusive to the Attorney General. While the Attorney General may act, Executive Law 63-b, there is no requirement that he must. In the instant case where the Attorney General expressed his opinion in advance of the Governor's action and is not

representing the Governor, it would be likewise inappropriate for him to bring an action in *quo warranto* against Mr. Ravitch, a co-member of the Executive Branch.[22]

Appellants take issue with the Appellate Division determination that Senator Skelos can proceed by declaratory judgment claiming that it foreclosed by Delgado. Even if one were to assume that the question was left open in Delgado, the question is open in those matters involving election issues. Appellants in contending that the entire process must wait for the Attorney General to bring an action while Mr. Ravitch can serve ignore two crucial facts. The Attorney General has already twice *sub silentio* signaled that there would be no action on his part. First he stated publicly that in his opinion the appointment of anyone would be unconstitutional, thus there is no reason for him to step into a *quo warranto* litigation which may not be appropriate for resolution of this unique question. Secondly, he obviously has not appeared for the Governor in this matter, as is the usual responsibility of the Attorney General further signaling that this was not the conventional matter as to who should be the Lieutenant Governor.

Finally the public interest so belittled by the Appellants in this context requires a swift resolution to the constitutional question. The Attorney General

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[22] Equally problematic is lack of speed that animates the *quo warranto* process. See e.g. People v. Delgado, 1 A.D.3d 72 (2nd Dept. 2003) (six year statute of limitations).

even in *quo warranto* would not necessarily be able in the limited process available under Executive Law be able to challenge the constitutionality of the appointment. Indeed without a second claimant to the office, he would not have standing or a relator for whom to sue. Appellants demand that only *quo warranto* is available for this constitutional challenge does not comport with the law of that writ and would merely delay resolution of this issue that Governor Paterson sees as a matter of urgency and crisis such that even this Court had to hear the matter on their application of an expedited basis. The Appellate Division's determination that the public interest permitted the matter to be adjudicated in the form of a declaratory judgment in this limited context should be affirmed.

POINT V

THE PRELIMINARY INJUNCTION WAS PROPERLY ISSUED

Appellants press this Court that the Appellate Division was wrong in sustaining the issuance of the preliminary injunction. 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). The Appellate Division in both the stay argument and the merits arguments determined that neither situation is present in the case at bar. It cannot be said on this record

that the lower court improvidently exercised its discretion by issuing an order that restrains a private citizen from exercising power in an unconstitutional manner.

A. Likelihood of Success on the Merits.

As demonstrated both the Appellate Division and the lower court have found that Senator Skelos has demonstrated by clear and convincing evidence entitlement to the injunction. 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.

Senator Skelos is 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 Senator Skelos is set upon a powerful legal foundation. The Appellate Division and the lower court adopted it in full, determining basically 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." The Appellate Division affirmed the determination and thus adopted it. 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.

Senator Skelos has demonstrated to the satisfaction of both the Appellate Division and the 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. Given that the Constitution provides that the Lieutenant Governor shall preside over the Senate and given that experience has taught that Governors often are unable to control their Lieutenant Governors, this Governor's agreement is of no practical or actual value. 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 Senator Skelos. 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.[23]

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

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[23] 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".

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. Further, nothing prevents David Paterson from resigning the office, thus elevating Ravitch by operation of law who would in turn be free to appoint his own Lieutenant Governor.[24]

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

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[24] Appellants seek to impose the jurisprudence of other states on this state. Appellants cite this Court to People ex rel Lynch v. Budd, 114 Cal. 168 (1896). Appellants omit to tell this Court that the California case begins with the concession from both sides that the vacancy is one "which the governor has the power to fill." Budd at 168. Clearly that concession would resolve this matter as it did Budd. But the Constitution of California provides specifically for the filling of all vacancies in office for any cause. Id. at 170. The text of the Clause and its placement in the Constitution is different and of a different order than the claims made for POL § 43. Similarly the California Constitution had no provision comparable to the political year restriction in Article XIII. The California Court considering the meaning of the case wrote as follows: In People v. Budd, 114 Cal. 168, the office of lieutenant governor having become vacant by the death of the incumbent, this court was called upon to construe the language of section 8, article V, of the constitution relative to the filling of the vacancy. Section 8, Article V, which reads as follows: "When any office shall from any cause become vacant, and no mode is provided by the constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature, or at the next election by the people." There is no reference to the calendar year. It was decided that the phrase "the next election by the people," as employed in the constitution, did not mean the next general election, or the next election held by the people, but that the section, taken as a whole, simply provided for the filling of vacancies by appointment; that the appointee held until the office was filled in the manner provided by law, and that the section itself did not provide the manner nor contain any provision for the holding of such an election; therefore, and under all these facts, it was determined that the appointee held until the next election at which a lieutenant governor was to be regularly elected, or, in other words, until the next gubernatorial election. In State ex rel. De Concini v . Garvey, 67 Ariz. 304, 195 P.2d 153 (1948). Arizona's highest court read Budd to hold "Nor can the lieutenant governor in such an event appoint a successor to himself as lieutenant governor." People v. Budd, 114 Cal. 168, 45 P. 1060.

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 Courts below each 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.

CONCLUSION

The Constitution and the law require that the decision of the lower courts be in all respects affirmed and the certified question answered in the affirmative.

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Respectfully submitted,

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