SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

Plaintiffs,

- v. -

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

Defendants.

Index No.: 13426/09

Hon. William R. Lamarca

DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS AND MOTION SEEKING CHANGE OF VENUE

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Since Plaintiffs drove from Albany to Nassau in the middle of the night of July 8, 2009 to file their extraordinary complaint and motion challenging Governor Paterson's appointment of Lieutenant Governor Ravitch, a great deal has happened. A sea change in the political setting has dramatically altered the facts that materially bear on the justiciability of this case before this Court.

As before, this case belongs in Albany County, not Nassau County, and this Court should order it transferred forthwith, before this Court is subject to any more expenditure of time and energy occasioned by plaintiffs' improperly venued filing. As before, most of Plaintiffs' request for relief is moot because Lieutenant Governor Ravitch was lawfully sworn into office before this case was filed. And as before, the remainder of Plaintiffs' request for relief is properly the province of the Attorney General in a quo warranto action, not an action by individuals for declaratory and injunctive relief.

But the dramatic events of this week make the grounds for dismissing this action and denying preliminary injunctive relief even clearer. The Senate is no longer in stalemate, Plaintiff Espada no longer lays claim to the title of Temporary President of the Senate, and once the Senate at last went back to work in the evening of July 9, 2009, the Plaintiffs participated in voting over 130 unanimous bills into law. In light of these new facts, it is now clear that neither Plaintiff has any personal injury giving him standing to bring this action, furnishing a new and additional ground to grant Defendants' Cross-Motion to Dismiss. And in light of these new facts, it is now clear that neither Plaintiff is suffering any possible irreparable harm. The case should be transferred to Albany or alternatively dismissed, and Plaintiffs' request for preliminary injunctive relief should be denied.

STATEMENT OF FACTS

The facts are fully set forth in Defendants' previous papers in this matter but the following new facts merit brief mention. On the evening of July 8, 2009, Governor Paterson appointed Richard Ravitch Lieutenant Governor. Lieutenant Governor Ravitch signed the Oath of Office that evening and the Deputy Secretary of State accepted and filed that oath at the Office of the Secretary of State in Albany at 11:47 p.m. in the evening of July 8, 2009, consistent with the policies and procedures of the New York Department of State. *See* Attached Affidavit of Daniel Shapiro dated July 13, 2009 ("Shapiro Aff.").

Later that evening, in the early hours of July 9, 2009, Justice Lally of this Court issued an Order to Show Cause and *ex parte* temporary restraining order purporting to bar the Lieutenant Governor's appointment and his execution of any of the duties of his office. Justice Lally granted Plaintiffs delayed filing of their papers and purchase of an index number because "the Court Clerk's Office [was] closed" and "th[e] application [was] made after business hours."

On July 9, 2009, Defendants filed and served on Plaintiffs an opposition to their Order to Show Cause for a Preliminary Injunction and Temporary Restraining Order and a Notice of Cross Motion to dismiss the complaint for mootness, improper venue and lack of standing in the absence of a quo warranto action by the Attorney General. Defendants also, that same day, served Plaintiffs with a demand, pursuant to CPLR 511(b), to consent to a change of venue from Nassau County to Albany County; Plaintiffs represented to Defendants' counsel the following day that the declined to so consent.

On July 9, 2009, Defendants also filed an emergency application in the Appellate Division for the Second Judicial Department pursuant to CPLR 5704 seeking vacatur of the temporary restraining order. Late that afternoon, the Appellate Division (Hon. Leonard B.

Austin) issued an Order granting the application and vacating the operative paragraphs of the Temporary Restraining Order.

Meanwhile, in Albany, a political realignment occurred that enabled the Senate to break a crippling stalemate and resume its functions as a lawmaking body. The stalemate in the Senate had occurred because, on January 7, 2009, a majority of senators had elected Senator Malcolm Smith as the Temporary President of the Senate, but on June 8, 2009, Democratic Senators Hiram Monseratte and Plaintiff Senator Pedro Espada had joined the 30 Republican Senators, and elected Espada as the putative Temporary Senate President. On June 15th, Senator Monseratte returned to the Democratic conference, and from that date until July 9, 2009, the Senate repeatedly split 31-31 in recognizing either Espada or Smith as Temporary President of the Senate.

On the afternoon of July 9, 2009, however, Plaintiff Espada announced that he would return to voting with the Democratic Senators, restoring majority control of the Senate to the Democratic Conference. Plaintiff Espada, as part of his return to the Democratic Party, accepted the position of Majority Leader, and, as Plaintiffs concede in their filings with this Court, "abandoned any and all claims to be the Temporary President," such that, "[b]y the evening of the 9th of July , Malcolm Smith was the sole occupant of the office of Temporary President." Affirmation of David L. Lewis dated July 13, 2009, at ¶¶ 16-17. In light of these developments, Senator Espada no longer lays any claim to the title of Temporary Senate President nor a place in the line of succession. Plaintiff Dean Skelos, as Minority Leader, does not occupy and never has occupied any position in the line of succession, nor laid any claim to presidency of the Senate.

Once these developments took place, "the Senate had begun the process of passing over one hundred bills" and, in the words of Plaintiffs' own counsel, *"[f]or all intents and purposes*

the 'crisis' was over." *Id.* at ¶ 17 (emphasis added); see also Affirmation of John Ciampoli dated July 13, 2009, at ¶¶ 16-17 (stating same).

On July 10, 2009, all parties appeared before this Court as required by the Order to Show Cause, but Plaintiffs moved for adjournment because they represented that they were not prepared to defend the merits of their complaint and motion for preliminary relief or to respond to Defendants's cross-motion for dismissal. This Court granted the adjournment untile Juley 15, 2009 at 2 p.m. On July 10, 2009, Defendants served upon Plaintiffs a request for an Order to Show Cause why the case should not be transferred to Albany. This Court signed that order on the morning of July 13, 2009 and ordered it returnable at the July 15th hearing.

ARGUMENT

I. THIS CASE SHOULD BE TRANSFERRED TO ALBANY COUNTY BECAUSE NASSAU COUNTY IS AN IMPROPER VENUE

As Plaintiffs' attempt to enjoin Lieutenant Governor Ravitch's appointment is moot (see Point III *infra*), the only possible relief now sought by Plaintiffs is an injunction to restrain all the Defendants from "acting with regard to or exercising any of the powers accorded to the Lieutenant Governor." Order to Show Cause dated July 9, 2009, at 3. But this is relief that is sought against public officials acting in their official capacities. Under the provisions of NY CPLR 506(b) and 6311(1), Nassau County is an improper venue for this action and request for relief, as it is properly sought only in the judicial district or judicial department in which the relevant official acts transpired or the relevant officials are located. Therefore, this Court, if it does not dismiss the case outright, should transfer the case to Albany County.

A. CPLR 506 (b) Requires That This Case Be Venued in Albany County

Because Plaintiffs seek relief "enjoining Defendants or any other person acting in concert with them from exercising any of the powers of the office of Lieutenant Governor of the State of

New York," (July 9 OSC, at p. 1 ¶ 1), they are requesting relief against a "body or officer" that allegedly "is proceeding or is about to proceed without or in excess of jurisdiction" (*see* CPLR 7803 [2]). Such a proceeding, however, may be brought only in the county where all relevant acts of the defendants allegedly occurred—here, Albany County.

Specifically, CPLR 506 (b) provides:

> A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located . . . .

In other cases involving claims against state officials as here, the Second Department has held that "[p]ursuant to CPLR 506(b), the proper venue. . . is Albany County where the governmental unit which made the determination is located and where the material events took place." *County of Nassau v. State*, 670 N.Y.S2d 775, 775 (2nd Dep't 1998) (affirming a change of venue). And it is clear that a "material event" is the place where the challenged determination or decision was made, not the place where its effects are felt. *See Ward v. Sise*, 485 N.Y.S.2d 161, 161 (Sup. Ct. N.Y. Co. 1984) (cited with approval in *New York Republican State Committee v. New York State Com'n on Government Integrity*, 526 N.Y.S.2d 264, 265 (3d Dep't 1988)).

Plaintiffs argue that the provisions of CPLR 506(b) do not apply here because their action is one for declaratory judgment that the Governor's appointment of Lieutenant Governor Ravitch, made pursuant to Public Officers Law § 43 ("POL"), is unconstitutional, and thus is allegedly not an Article 78 proceeding to which the requirements of CPLR 506(b) apply. See Memorandum of Law In Opposition To Cross Motion To Dismiss and Motion Seeking Change of Venue dated July 13 ("Opp. Memo."), at 35-43. That argument is incorrect. An Article 78 proceeding is the proper vehicle to determine, as sought here, whether a statute, regulation or

ordinance has been applied in an unconstitutional manner. 6 N.Y. Jur. 2d Article 78 § 312 (2009) (citing *Kovarsky v. Housing and Development Administration*, 31 N.Y.2d 184, 191 (N.Y. 1972)). Indeed, "a declaratory judgment action will be converted to an Article 78 proceeding where the challenge is actually directed to a body or officer's determination rather than the constitutionality of a statute." 6 N.Y. Jur. 2d Article 78 § 303 (2009) (citing *DiMiero v Livingston-Steuben-Wyoming County Bd. of Coop. Educ. Servs.*, 606 N.Y.S.2d 92, 94 *app. den.* 83 NY2d 756, 613 (3rd. Dep't 1993)); *see also Sutherland v Glennon*, 634 N.Y.S.2d 259, 260 (3rd Dep't 1995). Here, Plaintiffs do not challenge the constitutionality of POL § 43 or any other statute. Instead, they seek a determination that Defendants' application of the statute is unconstitutional. Such relief must be sought in an Article 78 proceeding, which in this case must be venued in the county where the relevant acts took place.

Thus, if Plaintiffs may bring the instant action at all, they must do so in Albany County, where all of the material events they challenge transpired. Governor Patterson's appointment was made in Albany County. Lieutenant Governor Ravitch's Oath of Office was accepted and filed in Albany County. Lieutenant Governor Ravitch is serving and will continue to serve as Lieutenant Governor in Albany County. If he takes action as President Pro Tem of the Senate, those actions will be taken in Albany County. The material acts and events have no connection to Nassau County.

B. CPLR 510(3) Provides for Transfer Of This Case To Albany County.

Alternatively, the court should exercise its discretion to change the venue to Albany in the interests of justice and for the convenience of the relevant witnesses. This discretion is provided by CPLR 510(3), which states that "[t]he court, upon motion, may change the place of trial of an action where. . . the convenience of material witnesses and the ends of justice will be promoted by the change." It is difficult to imagine a case in which a discretionary change of

venue would be more appropriate. Governor Paterson acted in Albany when he made the appointment at issue. Lieutenant Governor Ravitch serves as and discharges the duties of the Lieutenant Governor, including presiding over the Senate, in Albany. Secretary of State Cortes-Vasquez accepted the Lieutenant Governor's Oath of Office in Albany. All of the other witnesses and evidence is located in Albany. Nassau County presents a highly inconvenient venue. And indeed, Plaintiffs' attorneys have already been inconvenienced — traveling many hours through the night from Albany to Mineola to file this action, and again to make their belated appearance in this Court on July 10, 2009.

By contrast, *nothing* of relevance — not a single act, event, witness, or document — is located in Nassau County, other than the happenstance of Plaintiff Skelos's residence here. But even Senator Skelos is suing "as [a] duly elected member of the New York State Senate." Senator Skelos, that is, has appeared in this action solely in connection with his acts, duties, and purported rights as a member of the legislature sitting in Albany. This action should be transferred to Albany County, which is the only logical, appropriate, and convenient venue.

C. CPLR 6311(1) Provides That Any Injunctive Relief Against Defendants Must Be Sought In Albany County

Even if venue otherwise lay in Nassau County, the only issue currently before the Court is the issue of injunctive relief, and injunctive relief may not be granted in this case in Nassau County. Preliminary injunctions are governed by article 63 of the CPLR, and CPLR 6301 requires that a request for an injunction against a public official be made in the Judicial Department in which the restraint is to be made applicable. CPLR 6311(1) provides in pertinent part as follows:

> 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.

CPLR 6311(1). Thus the only relief presently before the Court cannot be granted within the Second Judicial Department, but may be granted only at a Supreme Court in the Third Department, where all relevant public officials in this action are "located."

Plaintiffs argue that they are not seeking to enjoin exercise of a statutory duty under CPLR 6311(1) because, they contend, Lieutenant Governor Ravitch is improperly serving and rightfully has no duties. Opp. Memo. at 39-41. This is mistaken as a matter of fact. Even if it were true, it would merely mean that this action must proceed as a *quo warranto* action which, as discussed below, may only be pursued by the Attorney General. *See, e.g., Delgado v. Sunderland*, 97 N.Y. 2d 420, 424 (2002); Emergency Affirmation of John Ciampoli, dated July 8, 2009, ¶ 11 ("a *quo warranto* proceeding. . . may only be brought in the name of the people of the state by the Attorney General.").

D. Plaintiffs Cannot Evade These Venue Restrictions By Claiming They Seek Declaratory Relief

Plaintiffs seek to avoid these clearly applicable restriction by contending that the instant matter was brought to seek a declaratory judgment under CPLR 3001. But taking them at their word, this dooms their entire request for preliminary relief. There is no provision in the CPLR permitting Plaintiffs to obtain declaratory relief at the outset of a lawsuit through a motion for interim relief (See Point V.D *infra*).

Indeed, to the contrary, CPLR 3212 specifically restricts the availability of summary judgment prior to joinder of issue, which has not yet occurred and cannot occur when no answer has been filed. Nor is there any provision in the CPLR for "temporary summary judgment" pending a final resolution on the merits of a declaratory relief claim.

Plaintiffs could have filed a combined article 78 proceeding/declaratory judgment action to address this procedural impediment, as is common. S*ee, e.g. Walton v. NewYork State Dept.*

of Correctional Services, 57 A.D.3d 1180, 871 N.Y.S.2d 497 (3d Dep't 2008). It is clear that the Plaintiffs have elected not to do so in order to avoid the clearly applicable venue provision of CPLR 506. Having made their choice, the Plaintiffs have foreclosed any declaratory relief except on a duly filed motion for summary judgment which is not permissible on the current status of the record.

Plaintiffs' reliance (Plaintiffs' Memo. at 37-38), on *Silver v. Pataki*, 179 Misc. 2d 315 (Sup. Ct., N.Y. Co., 1999), is misplaced. In that case, the Speaker of the House sought declaratory judgment that certain line-item vetoes by the Governor were unconstitutional. No injunction was sought against the Governor or other public officers. Since the issue in *Silver v. Pataki* was whether the line-item vetoes were constitutional, no injunction was sought, and since both the Speaker and the Governor had principal offices in New York County, the action was properly venued in New York County. Here, Plaintiffs do not seek a declaration that any statute is unconstitutional. Instead, they allege that the Governor's application of POL § 43 is unconstitutional, and seek to enjoin the Governor and other public officers. Such a claim may be made only in an Article 78 action, and such an action must be venued in Albany County under CPLR 506(b).

II. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF STANDING

A. Standing is Required to Prosecute an Action in New York.

New York courts have long recognized the principle that a party must have standing—i.e., a concrete and individualized personal stake—in order to bring an action. Although the federal constitutional requirement of a "case or controversy" has "no analogue in the [New York] State Constitution ...[,] the principle that only proper parties will be allowed to maintain claims [in New York] is an ancient one, long predating the Federal Constitution." *Society of the*

Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 772 (N.Y. 1991) (citing *Schelsinger v. Reservists to Stop the War*, 418 U.S. 208, 220-221 (1974)).

To determine whether a plaintiff has standing to maintain an action, New York courts apply the "injury in fact" test . *See Silver v. Pataki*, 96 N.Y.2d 532, 539 (N.Y. 2001); *Society of the Plastics*, 77 N.Y.2d at 772 ("'injury in fact' has become the touchstone" of the "core requirement that a court can act only when the rights of the party requesting relief are affected."). As the Court of Appeals described in *Silver*:

> The test for determining a litigant's standing is well settled. A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. 'The existence of an injury in fact – an actual legal stake in the matter being adjudicated – ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in form traditionally capable of judicial resolution.'

96 N.Y.2d at 539, *citing Society of the Plastics,* 77 N.Y.2d at 772.

When applied in the context of a challenge to the validity of governmental action, the "injury in fact" test requires that the plaintiff show that it would suffer harm that is different in kind or degree from the public at large. *See Society of the Plastics*, 77 N.Y.2d at 281 (denying trade organization standing to challenge administrative action of county legislature where organization failed to allege any threat of cognizable injury different from that of the public at large); *Colella v. Board of Assessors of County of Nassau*, 95 N.Y.2d 401 (N.Y. 2000) (denying property owner taxpayers standing to challenge grant of property tax exemption to religious organization where taxpayer plaintiffs did not suffer special harm distinguishable from the community in general).

B. Legislators Do Not Have Standing In Respect Of Abstract Injury "Suffered By The Legislature As A Whole"

The Plaintiffs in this action lack standing to pursue the instant lawsuit since they cannot show they would suffer any particularized injury from the appointment of a Lieutenant

Governor. A member of the legislature does not have standing to challenge the validity of legislation or other governmental action, absent some sort of direct personal harm. *See Posner v. Rockefeller*, 26 N.Y.2d 970 (N.Y. 1970) (Plaintiff Assemblymen do not have standing, whether as taxpayers, citizens or Assemblymen, to challenge validity of appropriation bills enacted into law and submitted by the Governor), *cited* in *Silver*, 96 N.Y.2d at 540. Rather, an injury premised on the purported invalidity of legislation is considered to fall within the category of "a lost political battle," which is insufficient to confer standing. *Silver*, 96 N.Y.2d at 540.

As the Court of Appeals explained in *Silver*, "[c]ases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power. Only circumstances presented by the later two categories confer legislator standing." 96 N.Y.2d at 539 (citations omitted). In *Silver*, Plaintiff, who was Speaker of the Assembly, challenged the constitutionality of the Governor's exercise of his line-item veto power with respect to non-appropriation bills. In deciding the standing question, the Court identified two types of injury allegedly suffered by the Plaintiff: "one suffered by the Legislature as a whole and the other involving the nullification of his vote." *Id.* Only the second type of injury, nullification of Plaintiff's vote, was sufficient to confer standing. In respect of the first type of injury, the Court held that the "plaintiff's allegation of injury to the Assembly as a whole, characterized as interference with his ability 'to negotiate the Assembly's priorities and interest in the budget process' ... at best reflects a political dispute. This type of political harm is no more than an abstract institutional injury that fails to rise to the level of cognizable injury in fact." *Id.* 539, fn 5. *See also*, *id.* at 540 (a "lost political battle" does not confer standing where plaintiffs "suffered no direct personal injury beyond an abstract institutional harm."). Similarly, in *Posner*, the Court of Appeals held that Plaintiff Assemblymen did not have standing to

challenge the validity of appropriation bills submitted by the Governor, whether or not the bills had been passed by the Legislature or were still pending before that body at the time the proceeding was instituted. *Posner*, 26 N.Y.2d at 971.

Silver and *Posner* therefore stand for the proposition that a plaintiff must do more than allege that the Governor has committed an unconstitutional act which is affecting the institution or legislature as a whole. He or she must show some specific and direct personal injury. *See Silver*, 96 N.Y.2d at 540; *Posner* , 26 N.Y.2d at 971 (N.Y. 1970) ; *see also Urban Justice Center v. Pataki*, 828 N.Y.S.2d 12, 38 A.D.3d 20, 25 (1st Dep't 2000), *lv. denied* 8 N.Y.3d 958 (N.Y. 2007) (minority legislators do not have standing to challenge rules governing the discharge of bills from committee or secret majority party conference because these rules "involve[d] only a type of institutional injury (the diminution of legislative power)").

Here, Plaintiffs' allegation is that the Governor has committed an unconstitutional act, but one that does not affect Plaintiffs in any more specific way than it affects the legislature as a whole. The only harms that Plaintiffs describe in their pleadings are that "they will be in direct violation of their office" if they participate in a legislative session "conducted under the aegis of an interloper;" that "any legislation passed [under the auspices of such an appointment]... is void *ab initio*;" and that "he [Skelos] 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." (Complaint, ¶ 41, Opp. Memo. at p. 33.) But these alleged harms, even if legitimate, are harms that would be equally suffered by every single member of the Senate. In this respect, Plaintiff Skelos' own description of his "direct interest" in the matter "as effective representative of his constituency and his Conference in the discharge of his responsibilities" is telling. (Opp. Memo. at p. 33.) It is clear that this purported "direct interest" is one shared by all Senators. Plaintiffs have not, and cannot, identify

any unique injury that they personally would suffer that would not equally affect the entire legislature.

Moreover, Plaintiffs' reliance on *Coleman* is inapposite. (See Opp. Memo. at p. 33.) *Coleman* involved a direct challenge to the validity of a vote in which the Senator plaintiffs actually participated. *See Coleman v. Miller*, 307 U.S. 433 (1939). Here, Plaintiffs have not identified any actual vote cast by either Plaintiff that has been "nullified" or "affected" by the appointment of the Lieutenant Governor. Furthermore, the United States Supreme Court in *Raines* cautioned against extending its decision in *Coleman*, holding that even members of Congress who had actually voted against an Act did not have standing to challenge the constitutionality of that Act. *Raines v. Byrd*, 521 U.S. 811, 829 (1997). The Court stated:

> "Even taking appellees at their word about the change in the "meaning" and 'effectiveness' of their vote ... we think their argument pulls *Coleman* too far from its moorings. Appellees' use of the word "effectiveness" to link their argument to *Coleman* stretches the word far beyond the sense in which the *Coleman* opinion used it. ***There is a vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power that is alleged here.*** To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step."

Id. 825-826 (emphasis added). Similarly, Plaintiff Skelos' speculative concern in relation to "protecting the integrity" of his vote from the "chilling effect" that the *potential* existence of a tie vote might have on Plaintiff in his role as Senator amounts to, at best, a complaint about "the abstract dilution of institutional legislative power." (Opp. Memo. at p. 34) This alleged "harm" is insufficient to confer standing, whether under *Coleman* or otherwise.

C. Because Senator Espada No Longer Claims Title To The Presidency Pro Tempore of the Senate, He Lacks Standing To Bring This Action

Article IV, § 6 of the Constitution provides that in the event of a vacancy in the position of Lieutenant Governor, the Temporary President of the Senate is to perform the duties of Lieutenant Governor during the period of the vacancy. Thus, the Temporary President would

arguably have standing to contest the appointment of a Lieutenant Governor, as the Governor's appointment of a Lieutenant Governor arguably would have an effect on the Temporary Senate President distinct from the effect on senators generally. However, neither of the Plaintiffs is the Temporary President of the Senate. That position belongs to Senator Smith, and he is not a party to this action.

Moreover, while Senator Smith would conceivably have standing to bring the instant action, neither Plaintiff Skelos or Plaintiff Espada is entitled to bring this action on his behalf. *Society of the Plastics,* 77 N.Y.2d at 773 (stating that there is a "general prohibition on one litigant raising the legal rights of another") (cited in *Urban Justice Center*, 828 N.Y.S.2d at 17, 38 A.D.3d at 27 ("legislator plaintiffs may not raise legal grievances on behalf of others").) Plaintiffs' action should therefore be dismissed for lack of standing.

III. THE REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF IS MOOT AS TO THE APPOINTMENT OF THE LIEUTENANT GOVERNOR

A. The Request To Enjoin The Lieutenant Governor's Appointment Is Moot

The Plaintiffs request for a preliminary injunction seeks in large part to enjoin action—the swearing in of Lieutenant Governor Ravitch—that has already occurred. As such, it is moot. *See e.g.*, *City of New York v. 365 Canal Corp.*, 17 A.D.3d 246, 246-247, 793 N.Y.S.2d 400, 401 (1st Dep't 2005) (dismissing plaintiff's request for preliminary injunction restraining defendants from operating certain booths in a flea market as moot when offending tenants had vacated flea market and the booths had been removed); *Independent Media Corp. (pvt.) Ltd. v. Pakistan Independence Day Parade and Fair*, 23 Misc.3d 1114(A) (N.Y. Sup. 2009) (plaintiffs request for an injunction to enjoin defendants from broadcasting a parade was moot once parade had occurred).

Moreover, contrary to Plaintiffs' arguments (Opp. Memo. at pp. 44-45), none of the exceptions identified in *Hearst* applies here. *Hearst Corp. v. Clyne*, 50 N.Y.2d 707 at 714-725 (N.Y. 1980). The appointment of the Lieutenant Governor occurred in emergency circumstances, and is not likely to occur again. Furthermore, Plaintiffs are incorrect to state that the Governor's power of appointment would never be subject to review on the principle that "the appointment ends all litigation." (Opp. Memo. at p. 45). To the contrary, assuming that a plaintiff has standing, he or she could always later challenge the validity of a gubernatorial appointment in the proper forum. The long line of cases challenging appointments made pursuant to the Public Officer Law demonstrates that this power is not one that "typically evade[s] review." Rather, it is the form of relief sought by the Plaintiffs in the instant action – preliminary and emergency relief to enjoin an event that has already occurred – that renders this proceeding moot.

B. The Oath of Office Was Properly Filed

The Oath was properly filed on the evening of July 8, 2009. The fact that the Lieutenant Governor signed the Oath of Office and the Deputy Secretary of State accepted the document for filing and stamped it as filed (see Shapiro Aff. ¶¶ 3-4), means that the Oath was properly filed at that time. *See Entwistle v. Murtaugh*, 17 N.Y.2d 6, 8 (N.Y. 1966). Plaintiffs' assertion that "acceptance for filing in the office of the Secretary of State is not actual filing" (Opp. Memo. at p. 6) is incorrect as a matter of law. In *Entwisle*, the Court of Appeals rejected a similar argument and held that, so long as the signed oath is delivered into the possession of an officer authorized to accept it, this will constitute a valid and effective filing for the purpose of Public Officers Law § 10. 17 N.Y.2d at 8. As the Court explained, "Appellants' oaths of office were taken ... before the Town Clerk who was authorized by law to take them and his signature to the

jurat completed the necessary procedure in taking these oaths. They were in the possession of the Town Clerk at that time, and this, in law, was sufficient to constitute filing with him." *Id.*

Moreover, the filing of the Oath of Office of the Lieutenant Governor was fully consistent with the practices and procedures followed by the Department of State. (Shapiro Aff. ¶ 2). Filing with the Secretary of State takes place when a document is accepted by the agent of the Secretary and is stamped as filed with the official department stamp. *Id.* ¶ 4. There is no requirement in any law or regulation that filing take place during official business hours. *Id.* ¶ 3. Therefore, the Lieutenant Governor's Oath of Office was properly filed on the evening of July 8, 2009 when it was accepted by the First Deputy Secretary of State at the executive chamber and stamped as filed with the official department stamp.

C. Even If The Oath Was Not Properly Filed July 6, 2009, It Is Considered Properly Filed Nunc Pro Tunc

Moreover, even if the Oath was not properly filed at the time the Lieutenant Governor was appointed, the law is clear that, assuming an oath is filed within the prescribed time period, it should be considered filed *nunc pro tunc* as of the date of appointment. *See People v. Rossney*, 178 A.D.2d 765, 765, 577 N.Y.S.2d 683, 684 (1st Dep't 1991), *citing People v. Williams*, 139 A.D.2d 138, 143, 531 N.Y.S 371, 374 (3d Dep't 1988). In *Rossney*, the Court held that the Special District Attorney was not disqualified from prosecuting the defendant because she had failed to file her oath at the time of the prosecution, holding "[w]hile the law [*i.e.*, Public Officers Law § 10] provides that a Special District Attorney shall not perform duties of the office until an oath is filed, any duties so performed are performed as a de facto officer and are enforceable and valid. ***Additionally, it has been held that upon the filing of the oath, it shall be considered filed nunc pro tunc as of the date of appointment.***" *Rossney*, 178 A.D.2d at 765, 577 N.Y.S.2d at 684 (citations omitted) (emphasis added). Therefore, even assuming that the

Oath was not properly filed until July 9, 2009 it is nevertheless deemed effective and valid *nunc pro tunc*, or as of 11:47pm on July 8, 2009.

IV. THE CASE SHOULD BE DISMISSED BECAUSE THE EXCLUSIVE REMEDY IS A *QUO WARRANTO* PROCEEDING BY THE ATTORNEY GENERAL

Once the nonjusticiable claims for injunctive relief are removed, all that remains of the complaint is a request for a declaration that Defendant-Appellant Ravitch may not constitutionally hold the office of Lieutenant Governor. But an action in the nature of *quo warranto,* statutorily codified under New York Executive Law § 63-b, is the exclusive means to adjudicate title to public office. *See, e.g., Delgado v. Sunderland*, 97 N.Y.2d 420, 424 (N.Y. 2002); *Dekdebrun v. Hardt*, 68 A.D.2d 241 (4th Dep't 1979); *Morris v. Cahill*, 469 N.Y.S.2d 231, 233 (3d Dep't 1983); *People v. Pizzaro*, 552 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 1990). Plaintiffs themselves conceded last week that, "were the Defendant [Ravitch] to occupy the office . . . the exclusive remedy is a *quo warranto* proceeding which may only be brought in the name of the people of the state by the Attorney General." Emergency Affirmation of John Ciampoli, ¶11, dated July 8, 2009. That concession was correct and warrants dismissal of the case here.

As early as 1900, the Court of Appeals determined that *quo warranto* is the appropriate remedy in a dispute over filling a vacancy in office. In *Hart v. State Board of Canvassers*, 161 N.Y. 507 (1900), the Court faced a dispute over whether a court seat was properly vacant, and whether the Board of Canvassers had the power to fill it. The Court of Appeals dismissed the mandamus proceeding sought by the plaintiff, holding that *quo warranto* rather than mandamus is the appropriate remedy. *See Hart*, 161 N.Y. at 510.

Executive Law § 63-b grants the Attorney General the sole authority to "maintain an action, upon his own information or upon the complaint of a private person, against a person who

usurps, intrudes into, or unlawfully holds or exercises within the state [a public office]." N.Y. Exec. Law § 63-b (2009). Only the Attorney General is authorized to bring a *quo warranto* action, and the action can be brought only *after* the alleged usurper has taken office. *See Shannon v. Jacobowitz*, 301 F.Supp.2d 249, 254 (N.D.N.Y. 2003). Furthermore, to bring the action in the nature of *quo warranto*, another person must claim to hold the position in dispute. *See Smith v. Dillon*, 267 A.D. 39, 42 (3d Dept 1943). Neither Senator Skelos nor Senator Espada claims to be the rightful Lieutenant Governor, and so both lack standing to make such a claim.

The case law is abundant that mandamus is generally not an available remedy to challenge title to office. *See Smith v. Dillon*, 267 A.D. at 42; *In re Hart*, 159 N.Y. 278 (1899); *People ex rel. Lewis v. Brush*, 146 N.Y. 60 (1895). The exceptions are narrow, and narrower still where extended to declaratory judgment actions, limited only to those situations where a mandamus action would otherwise lie, there are no facts in dispute, and where there is no conflict with the policy of restricting challenges to public office to *quo warranto* actions. These exceptions cannot be met here, as Plaintiffs have not and cannot bring an Article 78 proceeding; allege disputed facts; and are attempting to expand a declaratory judgment action into areas specifically limited to *quo warranto* proceedings for policy reasons.

First, so long as there are *any* facts in dispute, as Plaintiffs themselves suggest there are, *quo warranto* is the exclusive procedural remedy. Second, even if the right to office may be determined in an Article 78 rather than *quo warranto* proceeding in some limited cases, this exception does not extend to declaratory judgment actions where the requirements for a mandamus proceeding have not already been met. Plaintiffs cite *LaPolla v. DeSalvatore* for the proposition that mandamus and declaratory judgment actions may be used interchangeably to challenge title to public office, but the holding of the case is much more limited. 112 A.D.2d. 6

(4th Dept 1985) (See Opp. Memo at p. 47). In *LaPolla*, the petitioner instituted an Article 78 mandamus proceeding to declare a previous city-level appointment null. The lower court converted the action to one of declaratory judgment. On review, the Appellate Division held that the petitioner was not required to go through the formality of re-filing the case as a mandamus proceeding where there were no facts in dispute and doing so "does not thwart the policies underlying the restriction of the remedy of *quo warranto* to actions brought by the Attorney-General." *LaPolla*, 112 A.D.2d at 7-8. But the court emphatically did *not* say, as Plaintiffs incorrectly assert, that a declaratory judgment could be used as an alternative to mandamus – already serving as an alternative to *quo warranto* – where a mandamus proceeding would not lie.

Third, allowing a declaratory judgment in this case *does* thwart the policy goals of *quo warranto*. "The exclusivity of *quo warranto* . . . 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*, 97 N.Y.2d at 424. The policy behind restricting challenges to office to *quo warranto* actions is precisely to avoid the kind of problem that the Governor's action was intended to solve.

Plaintiffs seek to circumvent the plain statutory requirements of Execuitve Law 63-B and to usurp the unique power of the Attorney General by casting their case as an action for declaratory judgment rather than a *quo warranto* proceeding, even though their desired remedy is *exactly the same* as that which would come from a *quo warranto* proceeding. This attempt is unavailing and should be rejected.

V. PLAINTIFFS' OPPOSITION DEMONSTRATES THE ABSENCE OF ANY CASE FOR A PRELIMINARY INJUNCTION, AND THERE IS NO OTHER BASIS FOR TEMPORARY RELIEF

The Plaintiffs seek only two remedies: injunctive relief and declaratory relief. The first type of relief is precluded due to mootness, lack of standing and as discussed in this section, a

complete failure to demonstrate any harm, much less irreparable harm, or to demonstrate that the balance of the equities favors them. The second type of relief, a substantive declaration that would effectively resolve the entire declaratory claim, is simply unavailable at this stage of the litigation. The CPLR contains no procedure for a "temporary declaratory judgment" before the Defendants have even answered, and CPLR 3212 (a) precludes a motion for summary judgment until after Issue has been joined.

A. The Plaintiffs Fail To Demonstrate Any Likelihood of Success On The Merits

Although Plaintiffs style their filing an "opposition to cross-motion to dismiss [brought on the basis of standing] and motion seeking change of venue," they devote over thirty pages to discussing the Governor's ultimate right to appoint a Lieutenant Governor in the first instance, an issue not addressed in the present motion. In any case, Plaintiffs' claims are replete with unsourced and inaccurate factual assertions, contradictory theories and unsupported legal arguments. To answer just a few of their baseless assertions:

- Plaintiffs make the unsupported claim that "[n]o state appears to use the method selected by Defendant [i.e., direct appointment of the Lieutenant Governor] since it obviously violates the elective principle . . . ." (Opp. Mem.at 23). That is not so. Rather, numerous State courts – relying on catchall appointment provisions much like POL § 43 and apparently seeing no "obvious" violation of *any* constitutional principle – have found that Governors possess the right to take precisely the step taken by Governor Paterson. *See In re Advisory Opinion to the Governor*, 688 A.2d 288, 291 (R.I. 1997) (Governor may appoint Lieutenant Governor under catchall provision allowing him or her to "'fill vacancies in office not otherwise provided for," notwithstanding Constitutional provision for "performance of functions" of the Lieutenant Governor by others). *See also In re Advisory Opinion to the Governor*, 217 So.2d 289, 291-92 (Fla. 1968) (Governor may appoint Lieutenant Governor under catchall provision for filling vacancies); *State ex rel. Martin v. Ekern,* 280 N.W. 393, 398-400 (Wis. 1938) (same); *State ex rel. Trauger v. Nash*, 64 N.E. 558, 619-21 (Ohio 1902 (same); *People ex rel. Lynch v. Budd*, 45 P. 1060, 1060 (Cal. 1896) (same).

- Plaintiffs assert that § 43 applies only to "the least of offices" (28-29), a limitation for which they provide no definition and fail to back up with any legal authority. In fact, POL § 43 has been used previously to allow for statewide and significant appointments.

See 1941 Op.Atty.Gen. 250 (prior to current Constitutional provisions concerning appointment of Comptroller, that office was subject to appointment under § 43).

- Plaintiffs argue that Article IV, § 6 "makes it clear that there is no vacancy" in the office for Lieutenant Governor. (Opp. Mem.at 25) . *See also* Opp. Mem.at 30 ("With the constitution providing that the duties of the lieutenant Governor fall to the Temporary President of the Senate, then the office is not vacant"). But that Article does no such thing, for at least two reasons. *First*, the plain language of the Article states that the temporary president of the senate "shall perform all the duties of lieutenant- governor during such *vacancy* . . . ," the final phrase neatly defeating plaintiffs' contention. *Second*, it has long been recognized under New York Law that the mere "performance" of duties does not constitute the filling of a vacancy. *People, ex rel. Henderson v. Snedeker*, 14 N.Y. 52, 59 (1856); 1966 N.Y. Op. (Inf.) Att'y Gen. 171; Comp. Op. 64-861; a reading entirely consistent with caselaw throughout the United States. *See e.g., In re Advisory Op. to the Governor*, 688 A.2d at 291 (provision allowing for performance of the functions of the office of Lieutenant Governor by others does not fill vacancy in that position); *State ex rel. Ayres v. Gray*, 69 So.2d 187 (Fla. 1953) (office of Governor is vacant although "powers and duties" thereof "devolve on the President of the Senate"); *State ex re. Martin v. Ekern*, 280 N.W. 393, 399 (Wis. 1938) (where powers and duties of Governor devolve on Lieutenant Governor and Secretary of State, office of Governor remains vacant); *Futrell v. Oldham*, 155 S.W.2d 502, 504 (Ark. 1913) (where the Senate President exercises "performs the duties of the office" of Governor, there remains a vacancy in that office).

- Plaintiffs variously state that the succession provisions in Article IV, § 6 somehow bar the present appointment. In particular, Plaintiffs contend that "the Constitution and only the Constitution provides for the devolution of power." (Plaintiffs' Br. at 30). They thereby read out of the document the provision allowing the Legislature to fill of vacancies in Article XIII § 3, or the Legislature's specific implementation of that provision in either general, broadly applicable appointment provisions (POL § 43), or others that are more specific (Unconsol. Ch 131, § 5). In the latter provision, the Legislature provided for gubernatorial succession in the event of various disasters – and chose to include numerous unelected officials in the line of succession. The existence of such legislative rules for succession refute Plaintiffs' assertions.

- Plaintiffs themselves cannot make up their minds as to whether or not the office of Lieutenant Governor is vacant (and thereby open for appointment under § 43). Thus, while contending with one hand that there is "no vacancy" in the Office of Lieutenant Governor (Opp. Mem.at 25), Plaintiffs concede with the other that "the office sat empty while the Temporary President Performed all the duties of Lieutenant Governor" (Opp. Mem.at 12). They even seek relief "[d]eclaring that *the Office of Lieutenant Governor is vacant* according to the rules of succession under the Constitution of the Laws of New York" (Order to Show Cause & Temporary Restraining Order ¶ 2), the very thing that, in their memorandum of law, they now contend it is not.

- Plaintiffs misstate the importance of *Ward* to the present action. At the time of *Ward*, POL § 42 provided a specific process for filling a vacancy in the Lieutenant Governorship – via interim election. Since another statute allowed for filling of vacancies in the Lieutenant Governor's office,§ 43 was then inapplicable. The *Ward* case found that a vacancy in the Lieutenant Governor's office could be filled by a statute of general application, provided for by the Legislature under its broad grant to allow for the filling of vacancies. Plaintiffs are incorrect to suggest that the court "sub silentio" (p.26) rejected the right of a Governor to make an interim appointment of a Lieutenant Governor or that it "requires elections over appointments." *Ward* concerned an effort to mandate an election, and the decision neither mentions nor addresses appointment as an alternative, much less rejects it. Only the Attorney General's opinion that preceded the case specifically noted that the same logic that allowed § 42 to apply to the Lieutenant Governor *compelled* application of § 43 as well. Subsequently, § 42 (the only provision the decision specifically addressed) was amended to carve out the Lieutenant Governor; § 43, however, remained as it was prior to the Attorney General's examination.

- Plaintiffs' contention that Lieutenant Governor Ravitch did not file his affidavit properly in accordance with Executive Law § 10 is similarly baseless. (Opp. Mem.at 5-7). After Lt. Gov. Ravitch was sworn in on June 8 in the evening, his oath was filed with an agent of the Secretary of State, who time-stamped it with a file stamp. See Shapiro Aff. This was fully consistent with Department of State practice, and there is nothing in the law that imposes any additional requirement. Plaintiffs have cited no case for the proposition that such filing must be in a certain physical location, or take place during certain hours.

- Plaintiffs' assertion that the Lieutenant Governor is not "elective" because he or she is "chosen by the Governor as his running mate" (p.28) is baseless. There is no such process for choosing a running mate in either the Democratic or Republic Parties in New York; both hold Lieutenant Governor primary elections with ballot entries separate from those who compete for the gubernatorial nomination.

Plaintiffs' assertions, in sum, fail to refute the application of the broad, clear language of POL § 43 to the Governor's appointment of the Lieutenant Governor.

B. The Changed Circumstances, By Plaintiffs' Own Admission, Negate Any Irreparable Harm

Plaintiffs do not dispute that the law imposes a very high burden on parties seeking preliminary injunctive relief. Nor do they dispute that one of the preconditions to such relief is demonstrating, by clear and convincing evidence, they they will suffer "irreparable injury absent the granting of the preliminary injunction" *Gluck v. Hoary*, 865 N.Y.S.2d 356, 357 (2d Dep't 2008) (citations omitted). As discussed in defendants' initial papers, and also undisputed by

plaintiffs, "the movant [must]. . . establish not a mere possibility of irreparable harm, but that it is likely to suffer irreparable harm if equitable relief is denied. The injury or harm must be immediate; not remote or speculative." *Greystone Staffing, Inc. v. Goehringer,* No. 13906-06, 2006 WL 3802202 (Sup. Ct. Nassau Co. Nov. 27, 2006) (citing *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440 (2nd Dep't 1995)).

Plaintiffs' opposition papers do not identify any supposed harms for the Court to consider beyond those alleged in the Complaint. Indeed, in the course of a 50-plus page brief, Plaintiffs muster a single sentence on the subject of irreparable harm: "Plaintiffs have demonstrated irreparable harm occasioned by an unconstitutional and illegal officer presiding over the Senate of which they are members." Opp. Mem.at 50. The Complaint itself mentions only two grounds for alleged harm: first, that Plaintiffs would stand in "direct violation of their office" if they were made to participate in a legislative session overseen by an "interloper," and, second, that "any legislation passed by the body while presided over by a person not constitutionally authorized is void *ab initio*." (¶ 41.)

As noted above, these two alleged harms are insufficient to confer standing on Plaintiffs because even if they were legitimate, they would be equally suffered by all other legislators. But just as important, Plaintiffs' own papers make clear that the recent events have eliminated any possibility that Plaintiffs will suffer any harm, let alone irreparable harm, absent injunctive relief.

The only true threat to Plaintiffs' ability to fulfill their oaths was the stalemate in which the Senate was not assembling for productive legislative sessions. It was that stalemate that nullified Plaintiffs' voting power, and rendered it impossible for Plaintiffs, as well as all other state legislators, to fulfill their constitutional duties. That is exactly why the Governor deemed it necessary and appropriate to exercise his authority to appoint a new Lieutenant Governor

capable of presiding over the Senate if necessary. Plaintiffs concede that the stalemate has been resolved, and there is now a Democratic majority in the Senate. Opp. Mem.at 7. There is therefore absolutely no basis for Plaintiffs to anticipate that Lieutenant Governor Ravitch will vote on any issues or that the appointment will itself result in the passage of any legislation. Indeed, Plaintiffs concede that the Senate passed over one hundred bills on the night of July 9, 2009 without Lieutenant Governor Ravitch presiding. Opp. Mem.at 50.

Despite these changed circumstances, Plaintiffs nevertheless complain of the "harm" they will suffer from the mere fact that Lieutenant Governor Ravitch has been appointed. Yet Plaintiffs' do not dispute – and therefore tacitly concede – Defendants' demonstration in their moving papers that the alleged harms are entirely illusory. For example, Plaintiffs offer no response to Defendants' showing that the Lieutenant Governor possesses only a "casting vote," Art. IV, § 6, and the Constitution provides that no bill can be passed or become law "except by the assent of a majority of the members elected to each branch of the legislature," Art. III, § 14. Because no case has ever held that the Lieutenant Governor's "casting vote" can break a tie on a substantive legislative vote, plaintiffs' supposed irreparable injury is purely speculative. At a minimum, it is not "imminent" or "immediate" and does not warrant injunctive relief. *See Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep't 1995) ("irreparable harm must be shown by the moving party to be imminent, not remote or speculative.").

Plaintiffs also provide no response to Defendants' showing that, even assuming Lieutenant Governor Ravitch's appointment were in some way defective, that appointment is not permanent and can plainly be remedied, if warranted, without the extraordinary expedited relief that plaintiffs seek here. *See Cowan v. Wilkinson*, 828 S.W.2d 610 (Ky. 1992) ("The assertion by the Attorney General that any action taken by Wilkinson as a Trustee will be irreversible is

not supported by any evidence. To support an extraordinary remedy of injunction, there must be shown a practically certain injury. . . . The removal of Wilkinson as a Trustee can occur at any time within his term . . .").

Finally, Plaintiffs provide no response to Defendants' showing that there is no threat that any legislation passed subsequent to Lieutenant Governor Ravitch's appointment will be "void ab initio" because acts performed by *de facto* public officials, even if not properly appointed, are binding. *See Valentin v. Simon*, 98 Misc.2d 5, 9 (Sup. Ct. N.Y. Co. 1979); *Schick v. Impellitteri*, 122 N.Y.S.2d 729, 731 (Sup. Ct. N.Y. Co. 1953) ("[i]f the Commissioner's acts, as such, were to be invalidated, government in Richmond County could not operate, since there is no provision in law for a successor to a Commissioner of Borough Works."); *Morris v. Cahill*, 96 A.D.2d 88 (3d Dep't 1983) (legislation passed during tenure of disputed replacement legislator held valid and binding) ; *see also County of Ontario v. W. Finger Lakes Solid Waste Mgmt. Auth.*, 167 A.D.2d 848 (4th Dep't 1990) ("the acts of one who carries out the functions of a public office under color of authority are generally valid as to third persons and the public . . . notwithstanding irregularities in the manner in which the officer was appointed."); N.Y. Jur. CIVILSERV § 44 ("The general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he or she will be an officer de facto, notwithstanding there was want of power to appoint in the body or person who professed to do so, or the power was exercised in an irregular manner."). Plaintiffs' speculative assumption that Lieutenant Governor Ravitch's appointment will result in a tie-breaking vote, and the further speculative assumption that this vote will lead to the passage of specific legislation, combined with the simply false

assumption that such legislation would be void, falls far short of demonstrating the kind of irreparable injury that would warrant the extraordinary relief being requested.

C. The Balance of the Equities Clearly Favors Denial of Injunctive Relief

While Plaintiffs can demonstrate no irreparable harm that would arise from the Governor's appointment of Lieutenant Governor Ravitch, the harm that will arise from delaying the appointment is manifest and irreparable. While the stalemate has passed, an injunction pending final resolution of this matter would itself create the same kind of uncertainty as to the true presiding officer of the Senate and would thereby "prevent public business from being effectively carried on." *Valentin v. Simon*, 98 Misc.2d 5, 10 (Sup. Ct. N.Y. Co. 1979); *see Chatham Towers, Inc. v. Bloomberg*, 6 Misc.3d 814 (Sup. Ct. N.Y. Co. 2004) ("Whenever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief."); *Cowan v. Wilkinson*, 828 S.W.2d 610, 616 (Ky. 1992) ("In the absence of extraordinary circumstances, an officer should not be enjoined from the performance of the business of the public pending the outcome of an ouster proceeding.").

This concern is especially acute given the current dire economic situation facing the State. As the Governor himself made clear in his address to the People of New York on July 8, 2009, New York is in the worst fiscal and economic crisis since the Great Depression. It is a time when government action is essential to stabilizing the State's economy and avoiding dire consequences. At this crucial time, a preliminary injunction issued by this Court would create grave uncertainty about succession. If the Governor were to die or suffer an illness or accident that incapacitated him, while such an injunction were in effect, the well-being of the State would

be imperiled because it would not be immediately clear who is legally authorized to perform his duties or who would be next in the line of succession.

Because of past uncertainty as to who holds the office of Temporary President, the Governor has not traveled outside the State's borders since the stalemate arose on June 8, 2009. Such travel is often essential for the Governor to carry out his duties. The issuance of a preliminary injunction that casts doubt on the succession process would similarly compel the Governor not to travel outside the State. This is not an equitable resolution for the people of New York.

The equities in this case thus weigh heavily in favor of permitting Lieutenant Governor Ravitch to serve unless and until a final judicial determination to the contrary is made. The People of New York are entitled to know that there is a Lieutenant Governor in place and able to act as the President of the Senate with the ability to make a casting vote if that becomes necessary. They likewise deserve assurance that if misfortune befell the Governor, there would be a known individual ready to assume his executive responsibilities. A preliminary injunction would deny them these things.

D. No Temporary Relief is Available On A Declaratory Relief Claim

Plaintiffs, finally, seek declaratory relief to which they have no entitlement, and which is procedurally impossible at this juncture of the case, where there has not yet even been an answer. Plaintiffs do not dispute that this declaratory relief is the same as the ultimate relief that could be available only upon the final judgment, if it is available at all. Plaintiffs cannot thus avoid the clearly applicable venue provisions for article 78 proceedings (See CPLR 506 [b]).

Plaintiffs knew when they commenced this action that the commencement of an article 78 proceeding would have required them to bring the matter in Albany, a forum which Plaintiffs apparently find less friendly than Plaintiff Skelos' home County of Nassau. To avoid this clearly

applicable venue provision, the Plaintiffs have made the false assertion that "...the [instant] action is not against a body or an officer... ." (Opp. Mem. at p. 41). Plaintiffs also argue that they are solely pursuing a declaratory judgment under CPLR 3001. This assertion is contradicted not only by Plaintiffs' own Memorandum of Law (Opp. Mem. at 47), and by the nature of the injunctions the Plaintiffs seek, but also by the very nature of a declaratory judgment action. As Professor Siegel has explained, the declaratory judgment action "contemplates a judgment that will merely declare the rights of the parties in respect of the matter in controversy and let things go at that." . (Siegel, NY Practice [4th Ed.] section 436, p705). In this case, however, Plaintiffs seek on this motion and in the complaint a judgment that the court enforce particular prohibitions on the Defendants as public officials.

What Plaintiffs are seeking, without a shred of support from the CPLR, is in effect a preemptive declaratory summary judgment, before the Defendants even answer. But there is no provisional remedy for declaratory relief in the CPLR, nor any basis for obtaining ultimate declaratory relief on a motion that is supposed to be for a provisional remedy. CPLR 3212, which governs summary judgments, expressly precludes such a motion until after issue is joined (CPLR 3212 [a]). As Plaintiff commenced this action with a summons and complaint only last Thursday, that time to answer still has not arrived, and so such a motion on this state of the record is expressly precluded. Professor Siegel has noted that this timing restriction has existed since the enactment of the CPLR, and as a result:

> The soonest a motion for summary judgment may be made is after the joinder of issue, which occurs when the answer is served in respect of the main claim and when a reply is served in respect of a counterclaim.
> (Siegel, NY Practice [4th Ed.] section 239, p439).

In apparent acknowledgment of this procedural dilemma, the affirmation of Mr. Ciampoli states that "Pursuant to CPLR 3211(c), it is suggested that this matter be converted to a motion

for summary judgment on the law." (Ciampoli Aff., ¶ 38). However, this suggestion finds no support in CPLR 3211 or elsewhere, and in any event it is fundamentally illogical.

Although CPLR 3211 (c) permits the court, after "adequate" notice to the parties, to treat a party's motion to dismiss as a motion for summary judgment, Plaintiffs here are seeking merely a preliminary injunction. At this late stage of the submissions on this motion, there is no way to recast all the papers to change the character of the motion Plaintiffs made, or for this Court to provide "adequate" notice of such a change in approach. This late stage conversion, in addition to requiring the motion to effectively start from scratch, also would be grossly unfair to Defendants. It was the Plaintiffs that brought on the instant motion for a preliminary injunction on an abbreviated notice schedule, so that they could obtain *ex parte relief* against the Governor, and so only the issues Plaintiff sought to have addressed would be entertained. Now, having found that there is no procedural basis to even consider a fundamental aspect of its motion, Plaintiffs want to re-characterize a motion that Plaintiffs did not make (and which they seek to have denied), into a motion of a completely different character. To say the least, this argument stretches the language of both CPLR 3211, and CPLR 3212 beyond the breaking point.

Such a recasting of the instant motion is even more unjust in light of the simple procedural vehicle that was available to Plaintiffs: a combined Article 78/declaratory judgment action/proceeding, which is commonly done by petitioners whose claims include relief of a partly declaratory character (*see, e.g., New York Charter Schools Ass'n Inc. v. DiNapoli*, 60 A.D. 3d 119*; Walton v. New York state Dept. of Correctional Services*, 57 A.D. 3d 1180). However, the Plaintiffs did not choose this procedural course, and instead sought to convince this court that they could venue the action in Nassau County supposedly because the relief they seek is

essentially declaratory under CPLR 3001. For all the above reasons, all declaratory and injunctive relief should be denied motion as a matter of law.

CONCLUSION

The complaint should be dismissed or transferred to Albany County; and all preliminary injunctive relief should be denied.

Respectfully submitted,

QUINN, EMANUEL, URQUHART, OLIVER & HEDGES, LLP

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Counsel for Defendants

Date: July 9, 2009

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

Plaintiffs,

-against-

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

Defendants.

Index No. 13426/09

Hon. William R. Lamarca

AFFIRMATION OF SERVICE

I, Brad Evan Rosen, hereby affirm under penalty of perjury and say:

1. I am a member of the bar of the State of New York. I am associated with the law firm of Quinn Emanuel Urquhart Oliver & Hedges LLP, counsel to Defendants David Paterson, Richard Ravitch, and Lorraine Cortes-Vazquez in this action, and am not a party to this action.

2. That on July 13, 2009, I served true and correct copies of: 1) DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S CROSS-MOTION TO DISMISS AND MOTION SEEKING CHANGE OF VENUE; and 2) AFFIDAVIT OF DAVID SHAPIRO DATED JULY 14 2009;

3. via electronic mail to counsel for plaintiffs listed below:

DAVID L. LEWIS, Esq.

Attorney for Plaintiff Skelos

dlewis@lewisandfiore.com

JOHN CIAMPOLI, Esq.

Attorney for Plaintiff Espada

padronejc@yahoo.com

Dated: July 14, 2008

Brad Evan Rosen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

Plaintiffs,

- against -

DAVID PATERSON, as Governor of the State of New York, and RICHARD RAVITCH, putative nominee for Lieutenant Governor Of the State of New York, and LORRAINE CORTES-VAZQUEZ, as Secretary of State of New York.

Defendants.

AFFIDAVIT OF DANIEL SHAPIRO

Index No.:

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

DANIEL SHAPIRO, being duly sworn, hereby deposes and says:

1. I am employed by the New York State Department of State (DOS), located at One Commerce Plaza, 99 Washington Avenue, Albany, New York, as First Deputy Secretary of State. I have worked for DOS for 17 years, over which time I have served as litigation attorney for the Division of Licensing Services, Assistant Director of Licensing Services, and Director of the Division of Corporations, State Records and Uniform Commercial Code. In April 2007, I was appointed First Deputy Secretary of State, the second highest position in the DOS. As a result of the experience outlined above, I am intimately familiar with the standard practices and procedures of DOS.

2. Article XIII of the Constitution requires public officers to take and subscribe the oath of office, but does not require filing of the oath of office. Under POL § 30(1)(h), an officer has 30 days to file the oath. Under POL § 15, a public officer's acts are valid before filing.

3. As to the act of filing, there is no requirement in any law or regulation that such filing take place during business hours. Agents of the DOS, including myself, have accepted numerous documents for filing outside regular business hours. This is an acceptable practice fully consistent with the laws and regulations that govern the DOS.

4. On the evening of July 8, I learned from the Secretary of State that I was needed to receive the Oath of Office of Richard Ravitch for filing. I drove to the State Capitol in Albany, New York, and physically received, acknowledged and stamped the filing in the executive chamber, as an agent of the Secretary of State.

5. I have reviewed Plaintiffs' memorandum of law, in which they state "acceptance for filing in the office of the Secretary of State's office [sic] is not actual filing." I do not understand what this assertion means, or on what authority it is based.

DANIEL SHAPIRO

Sworn to before me this
14th day of July, 2009

Notary Public

AMANDA HILLER
Notary Public, State Of New York
No. 02HI6090021
Qualified In Saratoga County
Commission Expires 03/31/20 11