
New York Supreme Court
Appellate Division Second Department

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

Plaintiffs-Respondents,

-against-

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-Appellants.

BRIEF OF AMICI CURIAE
UNITED FEDERATION OF TEACHERS,
UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831 IBT, and
CITY EMPLOYEES UNION, LOCAL 237 IBT

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**MEMORANDUM OF AMICI CURIAE UNITED FEDERATION OF
TEACHERS, UNIFORMED SANITATIONMEN'S ASSOCIATION AND
CITY EMPLOYEES UNION**

PRELIMINARY STATEMENT

The indisputable facts are set forth in the Appellants' Brief, which we adopt, along with each of the sound constitutional and statutory arguments advanced therein.

The substantive issue before the Court is whether Governor David A. Paterson validly appointed Richard Ravitch as Lieutenant Governor at a time when the State of New York was reeling from the effects of the fiscal crisis and protracted turmoil in the State Senate was shaking the stability of State government to its core.

The validity of the Governor's actions should be judged as of July 8, 2009, the date of appointment, without reference to subsequent events.¹

¹ "A wisdom developed after an event and having it and its consequences as a source is a standard no man should be judged by." *Costello v. Costello*, 209 N.Y. 252, 262 (1913). See *LNC Investments, Inc. v. First Fidelity Bank*, No. 92 CIV 7584 (MBM), 1997 WL 528283, at * 14 (S.D.N.Y. Aug. 27, 1997) and cases cited therein. See also *In re Clark's Will*, 257 N.Y. 132, 136 (1931). While, for purposes of the stay application before this Court, it was arguably relevant for the Motion Panel to explore the current uneasy truce in the Senate, such post-July 8 facts are of no moment here.

On July 8, 2009, as a result of the unparalleled turmoil in the State Senate, the operation of New York City's schools and the City's budget were in jeopardy, and the tax structures and budget of towns and cities across the state were in shambles, including those of the City of Yonkers, as well as Westchester, Putnam and Rockland Counties; in fact, talk of insolvency began to surface.² The cause, as every commentator observed, was the legislative crisis triggered by the gyrations in the State Senate; all agreed that, in this emergency, decisive and definitive action was desperately needed.³ Governor Paterson responded and took such action. By appointing as Lieutenant Governor a seasoned and universally respected businessman and public servant, Governor Paterson removed the perilous ambiguity of succession. At the same time, he restored a needed measure of stability to State government. That reasoned response to the crisis is now being challenged by its precipitators.

² E.g., Editorial, *New York's Defective Legislators*, N.Y. TIMES, July 2, 2009, at 22; Susan Elan, *Senate Stalemate Threatens Local Tax Revenue*, THE JOURNAL NEWS (Westchester County), July 1, 2009, at 1A; Nicholas Confessore, *Senate Inaction is Hurting Many Towns Across State*, N.Y. TIMES, July 2, 2009, at A17; Cara Matthews and Heather Senison, *Senate Imperils Municipalities*, ROCHESTER DEMOCRAT AND CHRONICLE, June 30, 2009; Len Maniace, *Political Impasse in State Senate means Yonkers City Hall Will be Late in Mailing Out Property Tax Bills*, THE JOURNAL NEWS (Westchester County), July 1, 2009, at 1AS.

³ See *Id.*

Amici curiae the United Federation of Teachers, the Uniformed Sanitationmen's Association, Local 831 IBT, and the City Employees Union, Local 237 IBT submit that the Governor's response on July 8, 2009 was valid and, indeed, explicitly called for under the applicable law. Undeniably, the working men and women upon whom the government and public of New York City depend – the Amici Union membership – can serve most effectively in an environment of stable and steady State leadership. Only in such an environment can they constructively address the stake they have in a functioning government that is poised at all times to resolve critical issues. Throughout their proud histories, the Amici Unions have collaborated and cooperated with government in times of crisis. They recognize that government in disarray is no government at all. That is what is at stake here and why Amici submit this Memorandum, pursuant to leave of Court.

ARGUMENT

(1) The Governor's Appointment Of A Lieutenant Governor Was A Valid Exercise Of His Power To Act In The Public Interest In Times Of Emergency

In *Home Building & Loan Ass'n v Blaisdell*, the United States Supreme Court presciently wrote

While emergency does not create power, emergency may furnish the occasion for the exercise of power.⁴

The Appellate Division, First Department, echoed that view when, in the midst of the fiscal crisis of 1975, it disregarded labor contracts and elementary collective bargaining precepts, noting

... the rule “salus populi est suprema lex” (the welfare of the people is the highest law) involves a principle of police power that “amounts to a recognition that society has a right which corresponds to the right of self-preservation in the individual, *and it rests upon necessity because there can be no effective government without it.*”⁵

The *DeLury* Court added, citing to this Court’s opinion in *Schwab v. Bowen* (where explicit job security agreements were cast aside because of the fiscal crisis);

“Regardless of fault, the fact remains that the fiscal crisis facing the City of Long Beach threatens its very ability to govern and to provide essential services for its citizens. The city must not be stripped of its means of survival.” Clearly the dire financial circumstances facing the City of New York ... arise to the de facto status of an emergency. To hold otherwise would be to avoid reality.⁶

⁴ 290 U.S. 398, 426 (1934).

⁵ *DeLury v. The City of New York*, 51 A.D. 2d 288, 293-294 (1st Dept. 1976) (emphasis added). *See also Matter of Cheeseborough*, 78 N.Y. 232, 237 (1879)

⁶ *DeLury*, 51 A.D. 2d at 294-95, quoting *Schwab v. Bowen*, 51 A.D. 2d 574, 575 (2d Dept. 1976) and citing, e.g., *Yonkers School Crossing Guard Union of Westchester Chapter v. City of Yonkers*, 51 A.D. 2d 594 (2d Dept. 1976). *See also Patrolmen’s Benevolent Ass’n of the City of N.Y. v. City of N.Y.*, 59 Misc. 2d 556 (Sup. Ct. N.Y. Co. 1969).

Decisions like *Schwab* and *DeLury* demonstrate that exigent circumstances justify extraordinary action.

Time and again, courts have reiterated their approval of an exercise of power (albeit not an unfettered power) in each of the three branches of government to stem a crisis, provided only that no explicit statutory bar exists and that the action taken can be viewed as reasonable and necessary to serve an important public purpose.⁷ This acceptance of reserved powers has not just been limited to issues involving labor. It has ranged from elections⁸ to property

⁷ See, e.g., *supra* notes 5 and 6. See also *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, *supra*; *Subway-Surface Sup'rs Ass'n v. City Transit Auth.*, 44 N.Y. 2d 101 (1978). Cf. *Clark v. Cuomo*, 66 N.Y. 2d 185, 189 (1985) (holding voter registration program established by executive order was constitutional and noting that “[i]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated.”).

⁸ One illustration of the precept that extraordinary circumstances warrant reasonable and extraordinary action in the public interest – although we hasten to add that it finds no parallel here—was the obviously correct but wholly unauthorized determination by Justice Steven W. Fisher, who (while sitting by designation of the Chief Administrative Judge to hear citywide election disputes in the September 11, 2001 primary elections) cancelled those primaries in the city. See *Primary Elections Are Cancelled*, N.Y. LAW JOURNAL, September 12, 2001, at 3, col 2. The Governor later followed suit to direct cancellation statewide. Executive Order 113.1, N.Y. COMP. CODES R. & REGS. Tit. 9 § 5.113 (2001) (notwithstanding procedures contemplated by Section 3-108 of the Election Law).

interests,⁹ to other extraordinary circumstances.¹⁰ For example, in *People v. Haneiph*, the constitutionality of the Governor's suspension of the "speedy trial" provision of the Criminal Procedure Law after the September 11 terrorist attacks was upheld.¹¹ In addition, the Court of Appeals has deferred to the Governor taking action based upon plenary power.¹²

Our State's highest Court has also repeatedly invoked the Rule of Necessity -- as this principle has been termed by that Court -- in the absence of any explicit constitutional or legislative authority, to warrant its own exercise of jurisdiction in cases where evident and disabling conflicts would otherwise

⁹ See, *Matter of Cheeseborough, supra*, 78 N.Y. at 237 ("In cases of actual necessity ... the private property of any individual may be lawfully taken, used or destroyed for the general good . . . In such cases, the rights of private property must be made subservient to the public welfare; and it is the imminent danger and the actual necessity which furnish the justification. *Salus populi suprema lex.*")

¹⁰ See, e.g., *Twentieth Century Assocs. v. Waldman*, 294 N.Y. 571 (1945) (commercial leases subjected to rent control); *Freeport Randall Co. v. Herman*, 83 A.D. 2d 812 (1st Dept. 1981) (housing); See also Executive Orders 113.7 and 113.28, N.Y. COMP. CODES R. & REGS. Tit. 9 § 5.113 (2001)(suspending "speedy trial" provision of the Criminal Procedure Law). *Accord Worthington v. Fauver*, 88 N.J. 183 (1982) (holding that governor was empowered to address prisoner crisis to suspend the normal operation of statutes.)

¹¹ 191 Misc. 2d 738 (Crim. Ct. Kings County 2002), cited with approval in *People v. Bey*, 844 N.Y.S.2d 406, 407 (2d Dept. 2007).

¹² See generally *Johnson v. Pataki*, 91 N.Y. 2d 214 (1997) and cases cited therein at 223- 227 and n. 2. Of course, where Executive action is explicitly proscribed or it is excessive or unreasonable, the courts will not countenance it. *Id.* at 225-226 (where an Executive Order encroached on legislative authority and contravened a statute it purported to implement, it could not stand). By no stretch of the imagination can that limitation be said to apply here.

preclude the Court’s action.¹³ Indeed, former Chief Judge Judith S. Kaye noted, prior to her retirement, that while she would recuse herself in the judicial pay cases (because she was a plaintiff), the rest of the Court could act under the Rule of Necessity.¹⁴

In times of crisis, the State’s Legislature also has exercised reserved powers with respect to emergencies.¹⁵ Thus, there is consistent and varied legal authority supporting the Governor’s power to act decisively in times of crisis or emergency in order to protect the public interest. Given the absence of a clear and explicit bar to such appointment, its validity must be sustained.

¹³ *Maresca v Cuomo*, 64 N.Y. 2d 242 (1984); *Morgenthau v. Cooke*, 56 N.Y.2d 24 (1982). We acknowledge that the inherent or reserved powers necessarily invoked to deal with crisis cannot blatantly override explicit prohibitions. See, e.g., *Flushing Nat. Bank v. Municipal Assistance Corp. for City of New York*, 40 N.Y. 2d 731 (1976); see also *Youngstown Sheet & Tube v. Sawyer* 343 U.S. 579 (1952).

¹⁴ It appears that Chief Judge Lippman and the current Court will act similarly. See Joel Stashenko, “Rule of Necessity” Could Be Invoked in Judicial Pay Suits, N.Y. LAW JOURNAL, July 21, 2009, at 1, col 3.

¹⁵ *Bd. of Education, Yonkers City Sch. Dist. v. Cassidy*, 59 A.D. 2d 180, 195 (2d Dept. 1977) (holding Financial Emergency Act, which suspended all increases in salary or wages of city employees and covered organizations, was constitutional exercise of legislature’s emergency power); *People v. Moynihan*, 121 Misc. 34, 38-39 (Chatauqua County Ct. 1923) (“It is not to be denied that acts may be enacted in the exercise of lawful power and appropriate to it in seasons of emergency which would be inappropriate at other times.”) See also *Subway-Surface Sup’rs Ass’n v. City Transit Auth.*, 44 N.Y. 2d at 112, *supra* (“While ‘complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake’ when legislation impairing public contracts is at issue (*U.S. Trust Co. v New Jersey*, 431 U.S. 1, 26 (1977)), the statement of the principle itself implies that some deference at least is appropriate.”) (upholding Financial Emergency Act) (internal citation omitted).

**(2) Article XIII, § 3 Of The Constitution And Public Officers Law § 43
Authorized The Governor’s Action, Especially Under The Circumstances
Existing On July 8**

Article XIII, § 3 of the New York Constitution mandates the Legislature to enact laws to fill vacancies in office. The Legislature discharged its constitutional obligation by adoption of Public Officers Law (“POL”) §§ 41-43.

Apt here is POL § 43, which provides that:

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.¹⁶

Unquestionably, once David A. Paterson succeeded Eliot Spitzer to the office of Governor, a vacancy was created in his former elected office of Lieutenant Governor. It was a vacancy that clearly occurred “other than by expiration of [its] term” and a review of the Public Officers Law reveals that “no provision of law” exists for filling the Lieutenant Governor vacancy. Thus, on its face (and without

¹⁶ PUBLIC OFFICERS LAW § 43 (2009). The limitations on the scope of Section 43 are explicit and few. For example, Article IV, §§ 5-6 of the Constitution provides for the filling of a vacancy in the office of Governor; Article VI § 2 provides for the filling of Court of Appeals vacancies, and POL § 42 provides for the filling of Congressional vacancies.

need to invoke the Governor’s power to act in the public interest in times of crisis), the Governor’s action on July 8 was clearly authorized by Section 43.

(3) **The Contrary Arguments Advanced By Respondents Lack Merit**

Respondents maintain that the Ravitch appointment was invalid because the President *Pro Tem* of the Senate was constitutionally vested with the office of Lieutenant Governor upon the occurrence of a vacancy in that position, citing Article IV, § 6 of the State Constitution. They are wrong. First, Article IV, § 6 does not support the Respondents’ claim. Unlike other explicit provisions for the filling of vacancies, Article IV, § 6 does not fill the *vacancy*; it simply provides that the President *Pro Tem* is to act as a kind of interim caretaker in discharging a portion of the *duties* of the Lieutenant Governor’s office.¹⁷ Indeed, the Third Department in *Ward v. Curran* specifically noted that critical distinction, writing that “the temporary president of the Senate has not become Lieutenant Governor” in the vacancy of that office.¹⁸ Thus, while Article IV, § 6 does provide that “... the temporary president of the senate shall *perform all the*

¹⁷ *Ward v. Curran*, 266 A.D. 524, 524-525 (3d Dept. 1943), *aff’d* 291 N.Y. 642 (1943). *Cf. State ex rel. Ayres v. Gray*, 69 So. 2d 187, 195 (Fla. 1953); *Futrell v. Oldham*, 155 S.W. 502, 504 (Ark. 1913).

¹⁸ *Ward v. Curran*, 266 A.D. at 524.

duties of lieutenant governor during such vacancy or inability”¹⁹ (as distinct from Article III, §13, pursuant to which the Lieutenant Governor “shall *become governor*” in assuming the office or, even “shall *act as Governor*” in a temporary vacancy for reasons of absence or disability), it affirmatively declines to accord the Temporary President of the Senate the “powers” in addition to the duties of the office of Lieutenant Governor.²⁰

Second, Respondents’ notion of a member of the Senate serving as both the Temporary President of the Senate and in the office of Lieutenant Governor would violate the spirit of Article III, § 7 of the State Constitution. To wit (though in the analogous instance of an appointment), that section directs that:

If a member of the legislature be ... appointed to *any* office ...of the state of New York, ... his or her acceptance thereof shall vacate his or her seat in the legislature....”²¹

The rationale is simple: separation of powers. The Lieutenant Governor as the constitutionally mandated successor and second-in-command has executive responsibility (including the obligation to function as Governor in the latter’s

¹⁹ (emphasis added)

²⁰ N.Y. Constitution Art. III, § 13; Art. IV, § 6.

²¹ *Id* at Article III, § 7. The separation of powers is also ensured by Article III, § 1 and Article IV, § 1 of the Constitution.

absence) and in this State one cannot function both in the office of legislator (promoting a measure) and simultaneously in the office of the executive (enacting or implementing it). Indeed, the Court of Appeals has expressly noted that Article III, § 7 was to “provide that the Legislature must be made independent, not only of the temptation to seek appointments from the executive, but also of the allurements to encroach upon the power of the executive by appointing its own members to office.”²²

²² *People v. Tremaine*, 252 N.Y. 27, 38-40 (1929). On oral argument before the Motion Panel of this Court, Justice Fisher inquired: what is there to stop a Governor from appointing Bernie Madoff as Lieutenant Governor? If the intended inference was that there is some inherent wisdom in elevating an elected Senator, a counter-question occurs. What if that Senator or a colleague were facing criminal charges? What would prevent the potentially elevated Senator from issuing a pardon to himself or his colleague in the Governor’s fleeting absence from the State? Also at oral argument, a point was made as to the benefit in having an elected Senator (versus an appointee) serve. The 1867-1868 Constitutional Convention was disabused of that “advantage:”

As to the Lieutenant-Governor, it was suggested to us by a few members of the Convention, to consider the propriety of abolishing the office, and devolving the duties upon the President of the Senate. A few of the States have such a provision in their Constitution, but they are mostly of the smaller States in point of territory and population. In most of the States that officer is retained. With us it was thought advisable not to make an alteration in that particular. The Governor is elected by the whole people, and represents and takes care of the interests of the whole State; so should the Lieutenant-Governor, who in case of the resignation or death of the Governor, is to fill his place and discharge his duties. The President of the Senate is a Senator elected by a district, and represents the immediate interests of his own constituency In such capacity he would not be a State officer elected by the whole people, and not a proper representative of their interests.

New York (State) Constitutional Convention (1867- 1869), Proceedings and Debates, vol. II, 885, 1363-1365. See also, *Ward v. Curran*, *supra*, 266 A.D. 524. (footnote continued on next page)

As the foregoing analysis demonstrates, the President *Pro Tem* simply becomes a limited interim caretaker, authorized to perform “*duties*,” but not the “*powers*,” e.g., succession, of the Lieutenant Governor. Hence, absent the granting of those “*powers*,” the vacancy in the office of Lieutenant Governor continued (as did the Governor’s option to invoke POL § 43).

Finally, Respondents argue that an appointment under POL § 43 is precluded by Article IV, §1, which requires that the Lieutenant Governor be elected at the same time and on the same slate as the Governor. They err on this as well. New York Constitution Article XIII, § 3 provides that an appointee holds office until the political year after the next annual election. If the two provisions of the Constitution are to be reconciled, as this Court has held they must be,²³ the limitation on an appointed Lieutenant Governor until the next political year after the general election must be understood in context to mean the year after the

Indeed, of the fifty states, only 8 lack the office of Lieutenant Governor. That number will soon shrink to 7, when New Jersey, which for many years permitted its Senate President Pro Tem to become Acting Governor (while remaining a State Senator) recently amended its constitution to create the office of Lieutenant Governor. N.J. Const. Art. V, § I, para. 6; Robert Schwaneberg, *No more acting: We’ll have a lieutenant governor*, The Star Ledger (Newark), Nov. 9, 2005 at 18.

²³ *McMahon v. Michaelian*, 38 A.D.2d 60, 62 (2d Dept. 1971).

quadrennial general election for Governor and Lieutenant Governor.²⁴ As a practical matter now, the next general election is in the quadrennial year of 2010.

(4) Reality And Common Sense Echo The Cited Constitutional And Statutory Strictures That Validate The Governor's Sound Exercise Of His Powers At A Time Of Extraordinary Turmoil In The Affairs Of The State Of New York

We noted at the outset that Governor Paterson's exercise of his POL § 43 power of appointment should be sustained since, in the words of the *DeLury* Court, "[t]o hold otherwise would be to avoid reality."²⁵ The realities here are twofold. First, on any given day, neither our elected officials nor the public servants here appearing *amicus* are able to discharge their critical responsibilities to New York State in an atmosphere of instability and chaos. Where there is uncertainty, there is hesitancy to govern. Historically, the Amici Unions have been proactive in assisting government to confront major problems. There never is an appropriate time to sanction an uncertainty.

Finally, (a) the simultaneous fiscal crisis and Senate chaos on and before July 8, 2009 generated extraordinary turmoil that only firm and effective action could stem, and all prior efforts to end the mischief had been ignored; (b)

²⁴ See *People ex rel. Lynch v. Budd*, 114 Cal. 168 (1896).

²⁵ *DeLury v. The City of New York*, *supra* 51 A.D. 2d at 295.

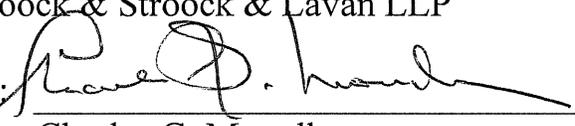
the widely applauded action taken had a sound legal foundation; (c) the courts of this State have consistently ruled that in such instances the broadest possible deference should be accorded governmental exercise of power; and (d) the statutes relied upon should be broadly construed to support the validity of the action taken. Thus, this Court should conclude that Governor Paterson's action in appointing Richard Ravitch as Lieutenant Governor was and is in all respects valid and binding. To hold otherwise places a premium on disruption and instability, would incentivize repetition, and foster apprehension by New Yorkers regarding the effectiveness of their government.

CONCLUSION

Accordingly, the Order below should be reversed, the Preliminary Injunction should be vacated and the proceedings remanded with a direction that the action be dismissed, with prejudice.

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