

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

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

Plaintiffs, :

Active App. Div. No.
2009-06673

-against- :

DAVID PATERSON, as Governor of the State of :
New York and RICHARD RAVITCH, as putative :
Nominee for Lieutenant Governor of the State of :
New York and LORRAINE CORTES-VASQUEZ, :
as Secretary of State of the State of New York, :

Defendants. :
-----X

BRIEF *AMICUS CURIAE* SUBMITTED ON BEHALF OF THE
NEW YORK CIVIL LIBERTIES UNION

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Dated: New York, New York
August 7, 2009

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INTRODUCTION AND INTEREST OF *AMICUS*

A central issue before this Court is whether the authority to fill vacancies conferred upon the Governor by Section 43 of the Public Officers Law allows the Governor to appoint a Lieutenant Governor when a vacancy arises in that office. By its terms, Section 43 of the Public Officers Law provides that “if a vacancy shall occur ... with no provision of law for filling 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 Governor argues that there is no other law that provides for the filling of the vacancy in the position of Lieutenant Governor and that, therefore, he was authorized to appoint Richard Ravitch to fill the vacancy.

The plaintiffs in this lawsuit contend, however, that there is another provision of law that addresses the circumstances of a vacancy respecting the position of Lieutenant Governor. That provision, according to plaintiffs, is set forth in Article IV §6 of the New York Constitution which reads that “the temporary president of the senate shall perform all the duties of the Lieutenant Governor during the vacancy.” But, Article IV §6 of the Constitution does not state that the temporary president of the Senate shall become the Lieutenant Governor and it does not address the authority of the Governor to fill a vacancy in the office of Lieutenant Governor.

By its terms, Article IV §6 of the Constitution only applies “during the vacancy” in the office of Lieutenant Governor. It speaks only to the question of who shall perform the duties of the Lieutenant Governor when a vacancy exists in the office of Lieutenant Governor. But, once that office is no longer vacant because, as here, the Governor has filled the vacancy by appointing a new Lieutenant Governor, Article IV §6 of the Constitution no longer applies.

Well accepted canons of construction further support the Governor’s position. Where, as here, two provisions of law are capable of being read either in harmony with one another or in conflict, it is the obligation of the courts to provide a reading of the provisions that reconciles the two and avoids a conflict. *Ricci v. DeStefano*, 557 U.S. ___ (June 29, 2009) (Slip. Op. at 21); *Foley v. Bratton*, 92 N.Y.2d 781, 787 (1999); *Andrus v. Glover Construct.*, 446 U.S. 608, 618-19 (1980), *quoting Morton v. Mancari*, 417 U.S. 535, 551 (1974). The interpretation of the two provisions at issue offered by the Governor allows both provisions to co-exist. That offered by plaintiffs places the two provisions in conflict.

Moreover, the Governor’s reading of the text is further supported by the precedent provided by a 1966 opinion of the Attorney General in connection with a vacancy in the office of the Mayor of the City of Yonkers. The Yonkers City Charter provided that upon the death, removal or resignation of the Mayor, the Vice Mayor “shall perform the duties of the Mayor until the vacancy is filled

according to law.” This provision was held only to authorize the Vice Mayor to perform the functions of the Mayor but not to assume the office of the Mayor. Accordingly, notwithstanding the City Charter provision, the vacancy in the position of Mayor continued to exist and the Governor was authorized to fill that vacancy by appointment under Public Officers Law, Section 43. 1966 N.Y. Op. Atty. Gen. 171.

Despite these arguments, Justice William R. LaMarca of the Supreme Court, Nassau County concluded that Section 43 of the Public Officers Law cannot constitutionally apply to the Office of Lieutenant Governor (Decision of Justice LaMarca, dated July 21, 2009 at 17) and that, therefore, “plaintiffs ... established a likelihood of success on the merits of the claim” that the Governor was without authority to appoint Mr. Ravitch as Lieutenant Governor. *Id.* In reaching this conclusion, Justice LaMarca relied prominently upon Article XIII §3 and upon Article IV §1 of the State Constitution.

Article XIII §3 authorizes the Legislature to determine how vacancies should be filled and Section 43 of the Public Officers Law is an exercise of legislative authority under that constitutional provision. But Article XIII §3 also provides that, when an appointee fills a vacancy for an elective office, an electoral contest must subsequently be held with regard to that vacancy which must take place at the “first annual election.” Article IV §1 of the Constitution provides,

however, that the Governor and Lieutenant Governor must be elected in the same election and that they are to be elected together every four years.¹ Justice LaMarca, therefore, concluded that these two provisions create potentially conflicting requirements. He reasoned that Article XIII §3 suggests that appointees who fill vacancies in elective offices must run in the next general election and if they are not elected must relinquish office at the close of the political year following the election. And, as noted, Article IV §1 provides that candidates for Lieutenant Governor run only with gubernatorial candidates and only once every four years. For this reason, Justice LaMarca held that Article XIII §3 should be interpreted as inapplicable to the appointment of Lieutenant Governor.

In reaching this conclusion, Justice LaMarca did not address and effectively ignored the canon of construction that urges an interpretation in which two constitutional provisions can be found compatible. Indeed, counsel for Governor Paterson in their brief to this Court, have provided such an interpretation. Looking at the precedent of *Trounstine v. Britt*, 163 A.D.166, 147 N.Y.S. 875 (1st 1914), *rev'd on other grounds*, 212 N.Y. 421 (1914), the Governor asserts that “where the Constitution does not permit an election to be held immediately for a vacancy

¹ Justice LaMarca’s decision mistakenly refers to Article IV §6 as imposing this requirement. See Justice LaMarca’s opinion at 17. But, *amicus* believes the reference to Article IV §6 is a typographical error and that Justice LaMarca intended to refer to Article IV §1.

filled by appointment, such election must be held at the earliest legally permissible date.” Appellants’ Br. at 38. The Governor, therefore, argues that the term “first annual election” can be reconciled with Article IV §1 by reading that term as the “first annual election” that is lawful under Article IV §1 of the New York Constitution. The Governor’s brief further observes that “other states with constitutional or statutory provisions” that are similar to Article XIII §3 have held, in the context of the appointment of Lieutenant Governor, that “the phrase ‘next annual election’ (or similar phrase[]) means ‘the next election where the Lieutenant Governor may be elected’, i.e., the next gubernatorial election.” Appellants’ Br. at 39. The Governor cites *Lynch v. Budd*, 114 Cal. 168, 171 (1896) and *Trauger v. Nash*, 66 Ohio St. 612, 620-621 (1902) in support of this proposition. The Governor has thus offered a reasonable interpretation of Article XIII §3, supported by precedent, that avoids a conflict between that provision and Article IV §1 of the Constitution.

The reach of Article XIII §3 and of Public Officers Law Section 43 is not the principal focus of this *amicus* brief, however. Indeed, we leave to counsel for the parties any further discussion of the respective merits with regard to this issue. The burden of this *amicus* brief is directed at a different matter. For the dispute over the propriety and legality of the Governor’s appointment of Richard Ravitch as Lieutenant Governor must be also understood in the broader factual and political

context in which the appointment took place. That broader context implicates the constitutional concept of a “republican form of government” and the right of the voters of this State to representation by a functioning legislative body. As discussed more fully below, the Governor’s decision to fill the vacancy of Lieutenant Governor appears to have ended a severe legislative impasse and, in so doing, the Governor’s decision restored to the citizenry of New York a republican form of government. This interest of New York’s voters and taxpayers should be considered as this Court balances the equities presented by this appeal.

The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union and a membership organization consisting of voters, citizens and taxpayers who are residents of New York. The NYCLU is deeply devoted to the concept of representative democracy and to the protection of fundamental constitutional rights within that democracy. The concept of a “republican form of government” is a vital element of our constitutional democracy. As suggested above and as discussed more fully below, that principle is very much implicated by this controversy. Accordingly, the NYCLU respectfully seeks to file this *amicus* brief to advance the claim that a primary purpose of the Governor’s conduct, in appointing a Lieutenant Governor, was to end the dysfunction of the New York State Senate and restore the constitutional promise of a republican form of government and that this goal

appears to have been achieved; and that the constitutional commitment to a republican form of government should be considered as this Court attempts to balance the equities in this case; and that, when so considered, the balance of equities tips decidedly in favor of the Governor's position in this case. These matters will be addressed in the argument below.

ARGUMENT

THE PROMOTION OF A FUNCTIONING LEGISLATIVE BODY
AND THE RESTORATION OF THE CONSTITUTIONAL
PROMISE OF A REPUBLICAN FORM OF GOVERNMENT
WEIGH HEAVILY, IN THE BALANCE OF EQUITIES, IN FAVOR
OF THE GOVERNOR'S POSITION IN THIS CASE

1. A Functioning Legislative Body is an Essential Element of a
Republican Form of Government.

Article IV, §4 of the federal Constitution promises “to every State in the Union a Republican Form of Government.” This constitutional provision is generally attributed to James Madison. *See* W. Wiecek, *The Guarantee Clause of the United States Constitution* (1972). In its content, the provision contemplated government lawmaking through an elected representative body. Thus, in Federalist 10, Madison wrote

that through representative government, public views would be refined by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.²

Passing public views through “the medium of a chosen body of citizens,” Madison believed, imposed a deliberative filter that would guard against impetuous decisionmaking and the excesses of a transient majority. Accordingly, Madison’s

² The Federalist No. 10; *see also* The Federalist No. 70 (“The differences of opinion and the jarring of parties in the legislative department of government ... often promote deliberation and circumspection ... and serve to check excesses in the majority.”).

vision “contemplated decision makers who would engage in a deliberative process of identifying and pursuing policies that serve the common good.”³ See *In Re Duncan*, 139 U.S. 449, 461 (1891) (“the distinguishing feature of [the republican] form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in representative bodies.”). Thus, a republican form of government is directed, first and foremost, at the mediating role of the legislature. As such, a functioning legislative body is an essential element of republican democracy.

But, during the month preceding Governor Paterson’s appointment of Richard Ravitch, the New York State Senate ceased to function. The legislative deadlock in Albany resulted in dual legislative sessions held by two groups of 31 legislators, each claiming majority control of the Senate. While the senators were unable to negotiate a power-sharing arrangement, the legislative process ground to a standstill with the Senate unable even to convene as a legislative body. As the Court below found: “With the two coalitions vying for control, the senate was unable to take any action on pending bills or even to conduct debate”. (Opinion of Justice LaMarca at 5).

³ Thomas Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. Chi. L. Rev. 208, 229-231 (1987); see also Cass Sunstein, *Interest Groups in American Public Law* 38 Stan. L. Rev. 29 (1985) (“Politics rightly consisted of deliberation and discussion about the public good ... the mechanism of representation would prevent representatives from acquiring interests distinct from those of their constituents.”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1403, 1527 (1990).

Thus, the legislative process stalled. Important government measures went unaddressed. Legislative duties were not performed. New York City lost \$60 million in tax revenue because the Senate did not pass a planned authorization for a sales tax increase.⁴ Mayor Michael Bloomberg initiated a hiring freeze on city jobs, a move that kept 250 new police recruits from entering the Police Academy and deferred the employment of 90 more emergency medical technicians, 150 firefighters, 175 school safety agents and 150 crossing guards.⁵

State legislation authorizing mayoral control over New York City's school system expired without renewal and without legislative direction for the future. The City of Yonkers faced a budget crisis because the legislative impasse held up revenue bills critical to the certification of its budget.⁶ The suspension of a functioning state legislature disrupted the operation of local governments statewide -- from budget planning to tax collection -- during a time of unprecedented fiscal difficulty in the State related to the ongoing national recession.⁷

⁴ Danny Hakim, "Albany Impasse Ends as Defector Rejoins Caucus," *New York Times*, July 9, 2009, at A1.

⁵ Adam Lisberg, "Senate Debacle Yields Hiring Freeze on Police, Firefighter Jobs: Bloomberg," *New York Daily News*, July 7, 2009 at A1.
http://www.nydailynews.com/news/2009/07/07/2009-07-07_senate_debacle_yields_hiring_freeze_on_police_firefighter_jobs_bloomberg.html.

⁶ Danny Hakim, "Albany Impasse Ends as Defector Rejoins Caucus," *New York Times*, July 9, 2009, at A1.

⁷ Nicholas Confessore, "Senate Inaction is Hurting Many Towns Across State", *New York Times*, July 2, 2009, at A17.

The appointment of Richard Ravitch to the position of Lieutenant Governor was intended, in significant part, to end this legislative dysfunction. This was recognized by the Court below which found, “a primary purpose of the Governor in appointing Ravitch was to break the procedural deadlock.” (Opinion of Justice LaMarca). And the appointment was reportedly an important factor in resolving the contest over leadership in the Senate.⁸ The legislative impasse that had so paralyzed the Senate ended shortly after the Governor’s announcement of his decision. Thus, the appointment had the apparent effect of restoring a republican form of government to the voters and taxpayers of this State.

2. The Governor’s Promotion of a Republican Form of Government Weighs Heavily and Tips the Balance of Equities Decidedly In Support of the Governor’s Position.

Early in our country’s history, the Supreme Court was called upon to address Article IV, Section 4 and its guarantee to each State of a republican form of government. A dispute arose in the 1840s between two political factions in Rhode Island, each claiming to be the legitimately-elected government. A suit to resolve the controversy ultimately reached the Supreme Court which concluded, in *Luther v. Borden*, 48 U.S. 1 (1849), that the provision was not judicially enforceable

⁸ Editorial, “Now What in Albany”? *New York Times*, July 10, 2009, at A18; Elizabeth Benjamin, “Deadlock-Ending Deal Near? Espada To Return to the Democrats,” *New York Daily News*, July 9, 2009.
<http://www.nydailynews.com/blogs/dailypolitics/2009/07/deadlock-ending-deal-near.html>.

because “it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.” *Id.* at 35.

Luther has occasionally been read as holding that Article IV, Section 4 is unenforceable as a judicial matter because it raises a “political question.” But, such a reading overstates the precedential force of *Luther*. And *Luther* is no bar to the application of principles respecting a republican form of government to the facts of this case. This is so for two reasons. First, subsequent precedent has weakened the force of *Luther*’s narrow holding that Article IV, Section 4 is not justiciable by addressing the merits of claims under that provision and by acknowledging that in some extreme cases the provision may, indeed, be enforceable. Second, in this case *amicus* is not contending that Article IV, Section 4 gives rise to a free-standing claim for mandatory relief. It simply argues that it was appropriate for the Governor to seek to restore the legislative process and that the concept of a functioning legislature as promised by Article IV, Section 4 should, therefore, be considered as the Court balances equities in resolving plaintiff’s application for injunctive relief.

In these respects, the Supreme Court has, on numerous occasions, considered the merits of “republican form of government” claims notwithstanding

the suggestion in *Luther* that such claims are not justiciable. See *Minor v. Happersett*, 88 U.S. 162, 175-176 (1875) (women’s suffrage not necessary element of republican government); *In re Duncan*, 139 U.S. 449, 461-462 (1891) (upholding murder conviction against claim that criminal law had been enacted in violation of republican form of government; distinguishing feature of republican government is the right of the people to choose their own legislators who will enact laws); *Kies v. Lowrey*, 199 U.S. 233, 239 (1905) (legislature creating new school district complied with republican government); *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (state authority to determine qualifications of state government officials reserved under Tenth Amendment and guaranteed by Article IV §4). State Courts have similarly applied Article IV Section 4 unconstrained by the “justiciability” holding in *Luther*. See *Van Sickle v. Shanahan*, 511 P.2d 223, 234, 241 (Kan. 1973) (“[t]he contention that all cases arising under the guaranty clause are non-justiciable has no historical precedent”; separation of powers necessary element of republican government); *Agua Caliente Band v. Superior Court*, 148 P.3d 1126, 1138 (Cal. 2006) (abrogating tribal immunity from election law enforcement necessary to protect a republican government).

Moreover, in *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court invalidated Tennessee’s state legislative districting arrangement as a violation of the equal protection clause and principles of “one person, one vote.” In doing so,

the Court declined to rest its decision upon the requirement of a republican form of government even as it acknowledged that the “political question barrier was not absolute” and that, in some circumstances, the failure of representative democracy might be so great that the lack of manageable standards for deciding on the meaning of a “republican form” might “fall away.” *Id.* at 222 n.48.

But, at bottom, the *Luther* decision has left Article IV Section 4 of the federal Constitution underutilized and as an example of what Professor Lawrence Sager has described, in a pathbreaking law review article, as an “underenforced constitutional norm.” Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*” 91 Harv. L. Rev. 1212 (1978). According to Professor Sager, there are some circumstances “in which the [Supreme] Court, because of institutional concerns [such as the political question doctrine or principles of federalism] has failed to enforce a provision of the Constitution to its full conceptual boundaries.” *Id.* at 1213. In such circumstances, Professor Sager asserts, it is a mistake to treat the legal scope of the provision as “coterminous with the scope of federal judicial enforcement.” *Id.* Instead, Professor Sager argues that “we should treat these ‘underenforced’ constitutional norms as valid to their conceptual limits, and understand the contours of federal judicial doctrine regarding these norms to mark only the boundaries of the federal courts’ role of enforcement.” Professor Sager further urges that in circumstances involving

“underenforced constitutional norms” executive and legislative officials should remain free, and in some situations are obligated, to promote such constitutional norms to their full potential and that state courts remain free to apply such provisions in a manner consistent with their conceptual promise. *Id.* at 1223, 1228, 1248-1264.

The federal constitutional promise of a republican form of government fits neatly into Professor Sager’s analysis of “underenforced constitutional norms.” The Supreme Court in *Luther* declined to enforce Article IV Section 4 of the federal Constitution out of institutional concerns and not out of any sense that the constitutional concept was substantively inadequate to reach the legislative deadlock that existed in Rhode Island in the 1840s. *Luther* did not diminish the content of the constitutional commitment to a republican form of government. The provision remains in the federal Constitution. And, the provision continues to hold, as a normative principle, that state governments should engage in lawmaking through a deliberative process undertaken by a functioning legislature.

In this case, Governor Paterson’s actions promoted the principle of a republican form of government in keeping with its broad conceptual promise. The dysfunction of the State Senate was so great as to constitute a breakdown in representative democracy. Accordingly, as it balances equities in deciding whether to affirm the injunctive relief granted in this case, this Court can and should consider

the legislative dysfunction and the erosion of representative democracy occasioned by that dysfunction.

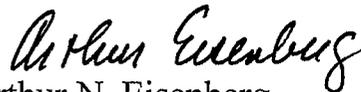
In sum, a court that is called upon to issue preliminary injunctive relief must carefully balance the equities presented by the circumstances of the case. *Nobu Next Door v. Fine Arts Housing*, 4 N.Y.3d 839, 840 (2005); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Klein, Wagner & Morris v. Lawrence A. Klein*, 186 A.D.2d 631, 633 (2nd Dept. 1992). One of the equities that should be considered, in this case, involves the failure of the State Senate to function as a legislative body and the degree to which this failure deprived New York State voters and taxpayers of their constitutional entitlement to a republican form of government. This failure, on the part of the Senate, was significant and the erosion of representative democracy was severe. The Governor's effort to cure this constitutional deprivation points decidedly in his favor as this Court balances the equities presented by this case.

CONCLUSION

For these reasons, the decision and judgment of the IAS Court should be reversed, plaintiff's motion for preliminary injunctive relief should be denied and the Governor's motion to dismiss should be granted.

Dated: New York, New York
August 7, 2009

Respectfully submitted,



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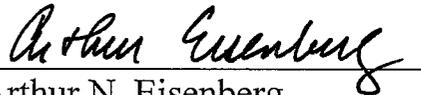
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

-----X

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

Plaintiffs,

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DAVID PATERSON, as Governor of the State of :
New York and RICHARD RAVITCH, as putative :
Nominee for Lieutenant Governor of the State of :
New York and LORRAINE CORTES-VASQUEZ, :
as Secretary of State of the State of New York, :

Defendants.

-----X

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BRIEF *AMICUS CURIAE* SUBMITTED ON BEHALF OF THE
NEW YORK CIVIL LIBERTIES UNION

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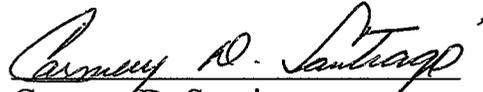
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