

To Be Argued By:
Kathleen M. Sullivan
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT



DEAN G. SKELOS, as a duly elected member
of the New York State Senate,

Plaintiff-Respondent,

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.

Case No.
2009-06673

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
212-849-7000

and

JASPAN SCHLESINGER HOFFMAN LLP
300 Garden City Plaza
Garden City, New York 11530
516-746-8000

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. RESPONDENT HAS NOT DEMONSTRATED HIS STANDING TO BRING THIS ACTION.....	2
A. Respondent Fails To Allege Any Direct Or Personal Injury	2
B. Respondent Fails to Refute The Attorney General’s Exclusive Standing To Challenge Title To Public Office By Way Of A <i>Quo Warranto</i> Proceeding	5
II. THE PRELIMINARY INJUNCTION SHOULD BE VACATED.....	8
A. Respondent Has Not Shown Likelihood Of Ultimate Success On The Merits	9
1. The Constitution Does Not Mandate That Vacancies In the Office of Lieutenant Governor Be Permanent.....	9
2. Respondent Misstates The Meaning Of <i>Ward v. Curran</i>	13
3. Article XIII, § 3 Does Not Prevent The Governor From Appointing A Lieutenant Governor Pursuant To POL § 43.....	15
4. Respondent’s Additional Statutory And Policy Arguments Are Unavailing	17
5. Neither The Failure By Prior Governors To Assert Their Authority Nor Historical Law Reform Discussions Can Decide The Questions Presented By This Appeal.....	19
B. Respondent Has Failed To Demonstrate Irreparable Harm	23
C. Respondent Has Not Shown The Balance Of The Equities Clearly Favors Injunctive Relief	24

III. THE PRELIMINARY INJUNCTION IS ILLEGAL UNDER CPLR
§ 631127

CONCLUSION29

PRINTING SPECIFICATIONS STATEMENT30

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Boryzewski v. Brydges</i> , 37 N.Y.2d 361 (1975)	2
<i>Colella v. Board of Assessors of the County of Nassau</i> , 95 N.Y.2d 401 (N.Y. 2000)	3
<i>Coleman v. Miller</i> , 307 U.S. 433 (1939)	3, 4
<i>Cullam v. O'Mara</i> , 43 A.D.2d 140 (2d Dep't 1973)	7
<i>Delgado v. Sutherland</i> , 97 N.Y.2d 420 (N.Y. 2002)	6, 8
<i>Donnelly v. Roosevelt</i> , 259 N.Y.S. 355 (N.Y. Sup 1932)	29
<i>Dykeman v. Symonds</i> , 54 A.D.2d 159 (4th Dep't 1976)	6
<i>Felice v. Berger</i> , 582 N.Y.S.2d 502 (2d Dep't 1992)	8
<i>Felice v. Swezey</i> , 278 A.D. 958 (2d Dep't 1951)	7
<i>LaPolla v. DeSalvatore</i> , 490 N.Y.S.2d 396 (4th Dep't 1985)	7, 8
<i>MacAdams v. Cohen</i> , 246 A.D. 361 (1st Dep't 1932)	19
<i>In Re Mitchell</i> , 178 A.D. 690 (2d Dep't 1917)	16, 19
<i>Morris v. Cahill</i> , 469 N.Y.S.2d 231 (3d Dep't 1983)	6
<i>Mtr. of Mitchell v. Boyle</i> , 219 N.Y. 242 (1916)	16
<i>New York Central Railway Co. v. Lefkowitz</i> , 12 N.Y.2d 305 (N.Y. 1963)	29, 30
<i>O'Connell v. Corscadden</i> , 243 N.Y. 86 (N.Y. 1926)	19

<i>People ex rel. Derby v. Board of State Canvassers</i> , 84 Sickels 461 (N.Y. 1891)	30
<i>People ex rel. Earwicker v. Dillon</i> , 38 A.D. 539 (2d Dep't 1899)	18
<i>People ex rel. Lynch v. Budd</i> , 114 Cal. 168 (Cal. 1896)	17
<i>People ex rel. Requa v. Noubrand</i> , 32 A.D. 49 (2d Dep't 1998)	6
<i>People v. Delgado</i> , 767 N.Y.S.2d 124 (2d Dep't 2003)	7
<i>People v. Pizzaro</i> , 552 N.Y.S.2d 816 (N.Y. Sup. Ct. 1990)	6
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	3, 4
<i>Rohrer v. Dinkins</i> , 32 N.Y.2d 180 (N.Y. 1973)	17
<i>Schlobohm v. Municipal Housing Authority for City of Yonkers</i> , 270 A.D. 1022 (2d Dep't 1956)	7
<i>Silver v. Pataki</i> , 96 N.Y.2d 532 (N.Y. 2001)	2, 3, 4, 5
<i>Smith v. Dillon</i> , 44 N.Y.S.2d 719 (3d Dep't 1943)	18
<i>State ex rel. Trauger v. Nash</i> , 66 Ohio St. 612 (Oh. 1902)	17
<i>Sulli v. Board of Sup'rs of Monroe County</i> , 24 Misc. 310 (N.Y. Sup. Ct. 1960)	19
<i>Trounstine v. Britt</i> , 163 A.D. 166 (1st Dep't 1914)	16
<i>Urban Justice Center v. Pataki</i> , 38 A.D.3d 20 (1st Dep't 2000)	4, 5
<i>Ward v. Curran</i> , 44 N.Y.S.2d 240 (3rd Dep't), aff'd, 291 N.Y. 642 (1943)	<i>passim</i>
<i>Wein v. Comptroller</i> , 413 N.Y. 633 (N.Y. 1979)	2
<i>Wilson v. Cheshire</i> , 254 N.Y. 640 (N.Y. 1930)	16

<i>Wing v. Ryan</i> , 255 A.D. 163 (3d Dep’t 1938).....	19
--	----

Rules/Statutes

CPLR Article 5.....	31
CPLR § 6311	<i>passim</i>
CPLR Article 7.....	13
N.Y. Const. Article IV § 1	10, 16
N.Y. Const. Article IV § 5	11, 19
N.Y. Const. Article IV § 6	10, 11, 12
N.Y. Const. Article VI § 24	19
N.Y. Const. Article XIII § 3	<i>passim</i>

Other Authorities

The Nelson A. Rockefeller Institute of Government, <i>Gubernatorial Succession and the Powers of the Lieutenant Governor: A Public Forum</i> , (May 29, 2008) ..	28
Robert A. Carter, <i>New York State Constitution: Sources of Legislative Intent</i> Article XIII (2d ed. 2001)	17

PRELIMINARY STATEMENT

Since Respondent Senator Pedro Espada has informed the Court of his withdrawal from this appeal, Respondent Senator Dean Skelos now stands alone in pursuing this extraordinary action. For four weeks, this lawsuit has distracted the Governor, Lieutenant Governor and the Senate at a key point in the fight to assure New York State's economic viability. In those four weeks, no other Senator, Republican or Democrat, has joined Senator Skelos in support of his action. Nor has the Attorney General, the only individual entitled to bring this suit. Because Senator Skelos has still failed to explain in his brief ("Resp. Br.") why he has standing to bring this case, this Court should order the case dismissed, allowing the Governor and Lieutenant Governor to focus on the People's urgent business.

Respondent's Brief and the brief of Respondent's Amici Benjamin, Galie, Hutter and Lundine ("Hutter Br."), likewise fall far short of demonstrating by clear and convincing evidence the likelihood of success or the irreparable harm needed to support the preliminary injunction. And while Respondent spends many pages arguing that venue is proper in his home turf of Nassau County, even though Appellants do not dispute venue in this appeal, he offers no answer to CPLR § 6311's plain language precluding the trial court from issuing a preliminary injunction against a state officer. For any or all these reasons, the Supreme Court's Order of July 22, 2009 ("Order") should be vacated.

ARGUMENT

I. RESPONDENT HAS NOT DEMONSTRATED HIS STANDING TO BRING THIS ACTION

A. Respondent Fails To Allege Any Direct Or Personal Injury

As demonstrated in Appellants' opening brief (App. Br., 18-21), Respondent, a single Senator, has alleged no direct or personal injury but merely purported harms to the Senate "as a whole." Under controlling New York law, such "abstract institutional injury" cannot "rise to the level of cognizable injury in fact" required to establish standing. *Silver v. Pataki*, 96 N.Y.2d 532, 539, n. 5 (N.Y. 2001).

Respondent does not dispute that *Silver* controls the standing issue, nor that his alleged injury from participating in a legislative session "presided over by an interloper" (Resp. Br., 12) is "common to all the Senators" (Resp. Br., 16) or even more broadly, to "the public at large" (Resp. Br., 15). Respondent merely contends that such generalized injury should be sufficient to confer standing, lest "an important constitutional issue . . . be effectively insulated from judicial review." Resp. Br, 18 (quoting *Boryzewski v. Brydges*, 37 N.Y.2d 361, 364 (1975)).¹ This argument, however, ignores the purpose of the standing requirement

¹ *Boryzewski* involved *taxpayer*, not *legislator* standing. Moreover, the limitations of *Boryzewski* have been noted multiple times. *See, e.g., Wein v. Comptroller*, 413 N.Y. 633, 397 (N.Y. 1979) (*Boryzewski* "was not based on any . . . constitutional principle" and taxpayers do not have standing to challenge State issuance of bonds); *Colella v. Board of Assessors of the County of Nassau*, 95

and is directly contrary to the central holding of *Silver*. Constitutional issues, no matter how important, may not be litigated by parties, including legislators, who lack any distinct and personal injury.

Respondent fares no better in seeking to avoid *Silver*'s more specific holdings. In response to *Silver*'s ruling that a legislator may have standing if an *actual* vote has been *actually* nullified, *Silver*, 96 N.Y.2d at 539 (holding that the Speaker had standing to challenge an actual veto by Governor Pataki that nullified his vote in favor of the vetoed line-items), Respondent claims that he need not “simply stand and wait for the interloper to act.” Resp. Br., 17. But that is exactly what *Silver* requires. Under analogous federal standing principles, the United States Supreme Court held in *Raines v. Byrd*, 521 U.S. 811 (1997), that legislator standing based on “vote nullification” cannot exist unless a legislator alleges that he “voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless defeated.” *Id.*, 824. *Raines* thus rejected legislator standing based on anticipated future possible “nullification of votes” by the President under a line-item veto act. *Raines* expressly distinguished *Coleman v. Miller*, 307 U.S. 433, 438 (1939), in which state Senators had standing to challenge the constitutionality of a tie-breaking vote *actually cast* by a lieutenant governor

N.Y.2d 401, 410-411 (N.Y. 2000) (distinguishing *Boryzewski* and holding that taxpayer plaintiffs do not have standing where they failed to allege injury different from “the public at large.”).

that had *actually nullified* the effect of their combined vote. Here, like the plaintiffs in *Raines* and unlike the plaintiffs in *Silver* and *Coleman*, Respondent has not alleged any vote actually nullified by the appointment of Lieutenant Governor Ravitch.

Respondent does no better by alluding to a *potential* “chilling effect” (Resp. Br., 13) on minority members’ political speech *if* Lieutenant Governor Ravitch were to “pursue a wholly partisan agenda” (Resp. Br., 13-14). Such speculative concerns are baseless, as Lieutenant Governor Ravitch has a long record of public service to bipartisan acclaim. But even if such fears were legitimate, New York courts have rejected claims of standing based on minority legislators’ alleged injuries from practices of presiding officers that supposedly diminish their “meaningful participation in the legislative process.” In *Urban Justice Center v. Pataki*, 38 A.D.3d 20 (1st Dep’t 2000), for example, the First Department, applying *Silver* and *Raines*, denied plaintiffs standing to challenge procedural rules and practices of both chambers (*e.g.*, rules requiring the consent of the Majority Leader or the Speaker to discharge bills from committee and practices permitting the Governor to force votes on proposed bills before legislative debate), holding that such claims “involve only ‘a type of institutional injury (the diminution of legislative power)’ which “does not provide standing.” *Id.*, 26 (citations omitted).

Now that Senator Espada has withdrawn, Respondent’s lack of standing is even clearer. Respondent does not claim the title of Temporary President—as Senator Espada did when the complaint was filed—and therefore has no basis to claim any injury not also suffered in equal measure by every other Senator. Moreover, Respondent has no authority to speak for the Senate or bring an action on behalf of other legislators. *See Silver*, 96 N.Y.2d at 538 (“[t]he Constitution ... does not give the Speaker representative authority for the body over which he presides.”); *Urban Justice Center*, 38 A.D.3d at 27 (“legislator plaintiffs may not raise legal grievances on behalf of others”).

Respondent clearly lacks standing to bring this lawsuit under *Silver* and related cases. This Court should reverse the Supreme Court’s order and order dismissal of the action.

B. Respondent Fails to Refute The Attorney General’s Exclusive Standing To Challenge Title To Public Office By Way Of A *Quo Warranto* Proceeding

As Appellants demonstrated in the opening brief and as Respondent’s co-counsel initially admitted (*see* App. Br., 22-23), an action by the Attorney General 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. Sutherland*, 97 N.Y.2d 420, 424 (N.Y. 2002).

In response, Respondent repeats the trial court's erroneous conclusion that *quo warranto* actions are limited to "contested elections" and asserts that "for *quo warranto* to apply there has to be more than one person contending for the position." Resp. Br., 51. This argument is without support. Respondent erroneously cites *Morris v. Cahill*, 469 N.Y.S.2d 231 (3d Dep't 1983), for this proposition, but *Morris* in fact involved only a single claimant, and held *quo warranto* the exclusive remedy for challenging *an appointment* to fill a vacancy where *no contest* existed over the title to office. *Id.*, 233. *See also People ex rel. Requa v. Noubrand*, 32 A.D. 49 (2d Dep't 1998) (*quo warranto* the exclusive remedy to challenge appointment to fill vacancy even where there were no rival claimants).

Respondent further contends that a *quo warranto* proceeding is not the exclusive remedy where the only issue raised is one of law. Resp. Br., 52-53. As the cases relied upon by Respondent make clear, however, this limited exception is available *only via an Article 78 proceeding*. *Dykeman v. Symonds*, 54 A.D.2d 159, 161-162 (4th Dep't 1976) ("where the question is one of law and does not require a determination of fact ... this article 78 proceeding is appropriate"); *Cullam v. O'Mara*, 43 A.D.2d 140, 145 (2d Dep't 1973) (same); *Felice v. Swezey*, 278 A.D. 958, 958 (2d Dep't 1951) (same); *Schlobohm v. Municipal Housing Authority for City of Yonkers*, 270 A.D. 1022, 1022 (2d Dep't 1956) (same); *see also People v.*

Delgado, 767 N.Y.S.2d 124, 127 (2d Dep’t 2003) (“Under certain circumstances, where only a question of law is involved, title to public office may be determined *in a proceeding pursuant to CPLR article 78.*”) (emphasis added). Respondent has expressly disavowed the option of proceeding under Article 78, including before this Court. Resp. Br., 46-47.² He cannot have it both ways. Either the appropriate procedure is under Article 78 (in which case the venue restrictions in CPLR 506 apply and the case may only be brought in Albany County) or Article 78 does not apply and Respondent’s challenge may be brought only by the Attorney General in a *quo warranto* proceeding.

Finally, *LaPolla v. DeSalvatore*, 490 N.Y.S.2d 396 (4th Dep’t 1985) is of no avail to Respondent (*see* Resp. Br., 53) because the Court of Appeals has *expressly overruled* the very proposition on which Respondent seeks to rely. In *LaPolla*, the Court held that petitioner could bring a declaratory judgment action to challenge title to office in the limited situation where no appointment had yet been made to the contested office. *Id.*, 7.³ This holding was relied upon in *Felice v. Berger*, 582

² Indeed, Respondent vigorously argued before the trial court that an Article 78 proceeding was not the proper form of action given the nature of his challenge and the relief sought. *See* Respondents’ Memorandum of Law dated July 15, 2009, 10-13. *See also* Order, 8-9 (holding that Article 78 proceeding is not available to Respondent).

³ Thus, even if *LaPolla* were still good law, it would be distinguishable because the case is limited to situations where the relevant official has not yet assumed office.

N.Y.S.2d 502, 504 (2d Dep't 1992), where the Appellate Division again held that a declaratory judgment action, rather than a *quo warranto* proceeding, was permitted to contest election results where the purportedly successful candidate had not yet assumed office. *Id.*, 504. However, the Court of Appeal later *expressly overruled Felice*, holding that “[o]ur cases do not support the conclusion of the courts below that a declaratory judgment action is available to challenge title to public office.” *Delgado v. Sutherland*, 97 N.Y.2d 420, 424 (N.Y. 2002). *La Polla* and its sister cases thus are no longer good law, and Respondent’s attempts to rely on the narrow exception set forth in those decisions must be rejected.

Therefore, any challenge to the appointment of the Lieutenant Governor may be brought only by the Attorney General in a *quo warranto* proceeding. The Attorney General is not a party to this action. On this ground alone, this Court should reverse the trial court’s decision and dismiss Respondent’s action.

II. THE PRELIMINARY INJUNCTION SHOULD BE VACATED

Because Respondent lacks standing, this Court need not reach or address the the likelihood of success on the merits or the propriety of the preliminary injunction granted by the Supreme Court. If those arguments are reached, however, Respondent continues to fall far short of the demanding standards applicable to a request for a preliminary injunction in this Department. *See App. Br.*, 24-53.

A. Respondent Has Not Shown Likelihood Of Ultimate Success On The Merits

As Appellants and the multiple Amici Curiae supporting Appellants have demonstrated, the Governor's appointment was an entirely valid exercise of the Governor's power under both the Constitution and POL § 43, and the trial court erred in finding that Respondents had shown any likelihood of success, let alone clear and convincing evidence of likelihood of success.

As discussed in Appellant's brief (App. Br., 25-32), the basis for the Governor's power is the plain text of the Constitution and POL § 43. Nothing Respondent or the Hutter Amici argue in their briefs can overcome these basic texts.

1. The Constitution Does Not Mandate That Vacancies In the Office of Lieutenant Governor Be Permanent

Respondent's argument rests on the premise that Article IV, § 6 expresses the Framers' supposed intent that a vacancy in the Office of Lieutenant Governor should never be filled. Respondent argues that, because the Temporary President of the Senate performs the duties of the Lieutenant Governor during such a vacancy, the office must stay vacant. Resp. Br., 21-27. Article IV, § 6, however,

says nothing of the kind, and Respondent's and the Hutter Amici's attempt to overcome this deficiency is unavailing.⁴

First, Respondent cites no legislative history to support his premise, which presumably would have been expressed by at least one of the Framers during the post-*Ward* amendments to the Constitution. Indeed, Respondent provides no explanation why, if the Framers truly intended to bar lieutenant gubernatorial appointments, POL § 43 was not revised to specifically exclude the Lieutenant Governor from its scope, as POL § 42 was amended.

Nor can this premise be squared with the plain text of Article IV, § 6, which states that the “temporary president of the Senate shall perform all the duties of Lieutenant Governor *during such vacancy*” (emphasis added). If it was intended that the Temporary President would permanently perform the duties of the Lieutenant Governor, then there would be no need to specify that this performance was to be “during the vacancy.” Indeed, if the Framers had that intent, they could have stated that the Temporary President “shall become” Lieutenant Governor, as they did when describing the Lieutenant Governor's ascension to Governor in

⁴ The Hutter Amici mistakenly rely on Article IV, § 1, arguing that the Lieutenant Governor is to be “chosen” only at the quadrennial election. (Hutter Amici Br., 14). This confuses the two distinct concepts of “election” and “filling a vacancy.” Because Article IV, § 1 applies equally to the office of Governor, if the Hutter Amici were correct, Governor Paterson could not have become Governor on March 17, 2008, because that occurred without an election.

Article IV, § 5. This difference in language is consistent with Appellant’s interpretation, but is inexplicable under Respondent’s.

Respondent also has no response to Appellants’ showing that Article IV, § 6 does not even purport to “fill a vacancy.” Indeed, because Respondent’s argument is that the Framers did not want to fill a vacancy in the Lieutenant Governorship, Respondent must concede that Article IV, § 6 does not provide for the filling of any vacancies.⁵

Moreover, Respondent’s contention that the Constitution mandates a permanent vacancy in the office of Lieutenant Governor cannot be squared with the fact that the Lieutenant Governor is frequently tasked by both the Governor and the Legislature with substantive executive duties that cannot be performed by a Temporary President who still acts as a legislator. As Lieutenant Governor, David Paterson served as a strong policy advisor to Governor Spitzer, taking responsibility for a renewable energy task force, an anti-domestic violence campaign, a minority-owned and woman-owned business enterprise initiative, and priority funding for stem cell research. As Former Lieutenant Governor Stan Lundine has written, Governor Cuomo asked him to be his lieutenant governor because “he wanted a junior partner to help him run state government,” to

⁵ Respondent does not attempt to distinguish the Comptroller and Attorney General opinions demonstrating that carrying out the duties of an office does not constitute the filling of a vacancy in that office. (App. Br., 35-36.)

“function as a deputy and top adviser,” and “to help him run a state government that is larger and more complex than many of the nation’s biggest corporations.” Stan Lundine, *The Role of the Lieutenant Governor*, in *New York State Today: Politics, Government, Public Policy* 157, 158 (2d ed. 1989). In his 1953 Annual Message, Governor Dewey stated: “In our State the executive duties are so exceedingly heavy that an able Lieutenant Governor, holding the full confidence of his associates, is essential to the proper conduct of the people’s business.” Paterson Aff., ¶10 (quoting Governor Dewey).

In addition to the duties of presiding over the State Senate and succeeding the Governor, the Lieutenant Governor has several assigned responsibilities State law.

- The Lieutenant Governor is specifically authorized to visit all correctional facilities (Correction Law § 146); county jails and workhouses (Correction Law § 500-j); and facilities operated by the Office of Children and Family Services (Executive Law § 519).
- The Lieutenant Governor is an ex officio member of the board of trustees of the State University of New York College of Environmental Science and Forestry (Education Law § 6003).
- The Lieutenant Governor is an ex officio member of the New York State Committee on Open Government (POL § 89) which is responsible for advising public entities regarding their responsibilities under the Open Meetings Law (POL Article 7); for adopting guidelines and regulations pursuant to the Freedom of Information Law (POL Article 6); and adopting guidelines and regulations pursuant to the Personal Privacy Protection Law (POL Article 6-A).

- Pursuant to Governor Spitzer’s Executive Order No. 8, which was continued by Governor Paterson’s Executive Order No. 9, the Lieutenant Governor is the chair of the Minority Woman Owned Business Enterprises (“MWBE”) Executive Leadership Council and the MWBE Corporate Roundtable.
- The Lieutenant Governor is an ex officio member of the New York State Financial Control Board, pursuant to the New York State Financial Emergency Act for The City of New York (Unconsolidated Laws).
- The Lieutenant Governor is an ex officio member of the New York State Defense Council (Unconsolidated Laws § 9111).

None of these functions has ever been performed by a Temporary President, and it defies common sense that the Legislature would intend all of these functions to be ignored permanently in the event of a vacancy in the office of Lieutenant Governor.

2. Respondent Misstates The Meaning Of *Ward v. Curran*

In their opening brief (App. Br., 30-32), Appellants demonstrated that the Constitution and law on this issue was influenced by the events surrounding *Ward v. Curran*, 44 N.Y.S.2d 240 (3rd Dep’t), *aff’d*, 291 N.Y. 642 (1943). Contrary to Respondent’s suggestion, Appellants do not rely on *Ward* because it controls the outcome of this case, but rather as an integral component of the relevant legislative history, which shows that the Legislature intended to leave the Governor with the power to appoint a Lieutenant Governor under POL § 43. In disputing as much (Resp. Br., 31-36), Respondent greatly distorts the meaning and relevance of the case.

To begin with, Respondent misleadingly notes that *Ward* holds “that an election was required” to fill a vacancy in the lieutenant governorship (Resp. Br., 32) without noting that the basis for the Court’s decision was the then-existing version of POL § 42, which the court held applied to the office of Lieutenant Governor. Nothing in *Ward* supports the view that an election is always required to fill a vacancy in that office.

Respondent argues that *Ward* should be considered overruled by the constitutional amendment that mandated simultaneous election of Governor and Lieutenant Governor (Resp. Br., 33), but Respondent ignores that there was a much more direct overruling of *Ward* at the same time. In response to *Ward*, POL § 42 was specifically amended to exclude the Lieutenant Governor from its scope, *but no such changes was made to POL § 43*, despite the then-Attorney General’s opinion that “there is no distinction in language between [section 43] and section 42 of the Public Officers Law.” *See* 1943 N.Y. Op.Atty.Gen. 378 at 382. Respondent still offers no explanation for why the Legislature, with knowledge of *Ward*’s implicit holding that the Lieutenant Governor was within the scope of POL § 43, failed to expressly exclude the Lieutenant Governor from the language of POL § 43.

3. Article XIII, § 3 Does Not Prevent The Governor From Appointing A Lieutenant Governor Pursuant To POL § 43

Respondent argues that Article XIII, § 3 “makes clear there is no right to appoint a Lieutenant Governor.” Resp. Br., 23. This is incorrect. As demonstrated in Appellants’ opening brief (App. Br., 37-41), there is no contradiction between POL § 43 and the time periods specified by Article XIII, § 3, because the historical construction of Article XIII, § 3 by the courts of this State has been to allow appointments to extend beyond the time period specified in that section when necessary. *See, e.g., Wilson v. Cheshire*, 254 N.Y. 640, 640 (N.Y. 1930) (per curiam, under Cardozo C.J.).

Respondent has no response to Appellants’ showing in this regard.⁶ Respondent makes no attempt to distinguish *Trounstone v. Britt*, 163 A.D. 166 (1st Dep’t 1914), which is directly on point and holds that where the Constitution does not permit an election to be held immediately for a vacancy filled by appointment, such election must be held at the earliest legally permissible date. Respondent’s assertion (Resp. Br., 25) that *Rohrer v. Dinkins*, 32 N.Y.2d 180 (N.Y. 1973) was

⁶ Indeed, Respondent cites *Mtr. of Mitchell v. Boyle*, 219 N.Y. 242 (1916) (Resp. Br., 34) which supports Appellants’ position. In *Mitchell*, the Court of Appeals rejected the notion that an election needed to be held two weeks after the vacancy occurred and held that a later election, to provide adequate notice to the voters, was necessary, and that the Governor could appoint someone to fill the vacancy in the interim. *Id.*, 249. Here, because Article IV, § 1 precludes a special election for the Lieutenant Governorship, the “earliest practicable date” is the next quadrennial election.

“overruled” by amendments to Article XIII, § 3 is simply false. In *Rohrer*, an election for school board elections could not be carried out consistent with Article XIII, § 3’s literal terms, and the Court held that the election be held on the “earliest practicable date.” Article XIII, § 3 was later amended, not to overrule *Rohrer*, but to codify it, by carving out boards of education. At the time of the Amendment, the sponsor, Assemblyman Stavisky, stated that “[t]he term ‘political year’ was never meant to refer to the State school system.” Robert A. Carter, *New York State Constitution*: Article XIII at 156 (2d ed. 2001). Similarly, the term “political year” was never meant to apply to a Lieutenant Governor, who can only be elected quadrennially.

Respondent also fails to distinguish the cases from sister states (App. Br., 59-40), holding that, under constitutional or statutory provisions akin to Article XIII, § 3, phrases like “next annual election” mean “the next election where the Lieutenant Governor may be elected.”⁷ Nor does Respondent cite any case in which Article XIII, § 3, or any similar provision, was held to deprive a Governor of the ability to make an appointment to a vacant office merely because of the timing of the next election.

⁷ While the Hutter Amici try to distinguish these cases because the provisions at issue are “substantially different” from New York’s (Hutter Br., 19-20), they provide no analysis to support this assertion. In fact, the provisions at issue in these cases were *directly* analogous to Article XIII, § 3. That the law in other states has since been changed does not support Respondent here; the New York Constitution has not been so amended.

4. Respondent's Additional Statutory And Policy Arguments Are Unavailing

Respondent offers four additional arguments, each incorrect. *First*, he argues that POL § 43 does not apply because the vacancy created in the office of Lieutenant Governor upon Appellant Paterson's elevation to Governor is not a "vacancy" within the meaning of POL § 30. Resp. Br., 36-37. This contention is contrary to authority clearly holding that "a person who accepts and qualifies for a second office and incompatible office is generally held to vacate, or by implication resign, the first office." *Smith v. Dillon*, 44 N.Y.S.2d 719, 723 (3d Dep't 1943); *see also People ex. rel. Earwicker v. Dillon*, 38 A.D. 539, 540 (2d Dep't 1899) ("the acceptance of a second office, incompatible with the first, operates to produce a vacancy in the latter"); *Sulli v. Board of Sup'rs of Monroe County*, 24 Misc. 310, 314 (N.Y. Sup. Ct. 1960) (observing that "the acceptance of a second public office renders the first office vacant").

Second, Respondent argues that Appellants' reading of POL § 43 is foreclosed by POL §33(1) because the Lieutenant Governor can only be removed by impeachment. Resp. Br., 37. This argument is similarly unavailing because it confuses two distinct concepts. POL § 33(1) relates to the removal power of the Governor over members of his own executive branch; it has nothing to do with the Legislature's power to impeach a member of the executive branch. *Compare* Article VI, § 24 *with* Article IV, § 5. In any event, POL § 33(1) expressly limits

the Governor’s power of removal to those circumstances not covered by some other “*special provisions of law.*” POL § 33(1). Accordingly, even if Article VI, § 24 applies to the removal (rather than impeachment) of a Lieutenant Governor, there is no inconsistency between POL § 33(1) and Article VI, § 24 because POL § 33(1) would expressly defer to the Constitutional provision.

Third, Respondent relies heavily on a supposed “elective principle,” arguing that “the policy of the State with respect of elective offices is to fill them by election when a vacancy occurs.” Resp. Br., 26-27.⁸ But any such default policy is irrelevant here, as both Art. XIII, § 3 and POL § 43 expressly provide for appointments to elective office. This does not reflect some preference for appointments over elections, but rather reflects the necessity of ensuring that the performance of public duties not be interrupted as a result of vacancies. No vague elective principle can overcome the plain text of the governing instruments. Moreover, POL § 43 embodies the principle the Hutter Amici themselves acknowledge (Hutter Br., 18), that having a Lieutenant Governor and Governor of the same party is central to the post- Dewey New York Constitution.

⁸ None of the cases cited by Respondent for this principle is relevant. *See In Re Mitchell*, 178 A.D. 690, 692 (2d Dep’t 1917) (term of officer elected by special election following vacancy); *O’Connell v. Corscadden*, 243 N.Y. 86, 90 (N.Y. 1926) (when election for office of mayor should be held following death of predecessor); *MacAdams v. Cohen*, 246 A.D. 361, 364 (1st Dep’t 1932) (same, following resignation); *Wing v. Ryan*, 255 A.D. 163, 167 (3d Dep’t 1938) (when election to fill vacancy should be held).

Finally, Respondent repeats the trial court’s erroneous assertion that the Lieutenant Governor is not an “elective office” for purposes of POL § 43. Resp. Br., 38-39. As set forth in Appellant’s opening brief (App. Br., 28), this is incorrect. Moreover, if the Lieutenant Governor is not an “elective office” for purposes of the POL, there would be no reason for the Legislature to have specifically excluded the Lieutenant Governor from the reach of POL § 42, entitled “Filling vacancies in elective offices,” which it did precisely because *Ward* held the Lieutenant Governor an elective office under the POL.

5. Neither The Failure By Prior Governors To Assert Their Authority Nor Historical Law Reform Discussions Can Decide The Questions Presented By This Appeal

Respondent notes at length that prior Governors have not filled vacancies in the office of Lieutenant Governor by appointment. Resp. Br., 27-34. No one disputes this fact, but it is irrelevant to the question whether a Governor has the power under the current Constitution and laws to fill such a vacancy by appointment. Respondent purports to read Governor Dewey’s mind, arguing that “[i]t never occurred to [Governor] Dewey or his advisors to ‘appoint’ a Lieutenant Governor.” Resp. Br., 31. There is no such evidence, and Respondent’s own Amici assert that Governor Dewey opposed an election because he wanted to keep

the office vacant for “various political reasons” (Hutter Br., 6).⁹ In any event, failure to exercise a power does not mean that it does not exist. Prior governors simply did not face the situation Governor Paterson faced after the Senate deadlock threatened the survival of the State, necessitating the appointment.

Nor is the question here answered by the proceedings of numerous organizations and commissions referred to by both Respondent and the Hutter Amici (*see* Hutter Br., 7-12). None of these extrajudicial bodies is a court of law, and this Court must make a determination based on the Constitution and law as they currently exist, not based on the unadopted proposals of law reform commissions. In any event, Respondent’s and the Hutter Amici’s lengthy historical exegeses fail to cite any evidence that any Governor ever considered whether POL § 43 provided the authority to appoint a Lieutenant Governor, let alone concluded that such power did not exist. Nor do they cite any evidence that such commissions discussed the legal theory that is being asserted by the Governor in this case. Respondent fails to cite a single pronouncement from any of these entities to the effect that the Governor lacks the power to appoint a Lieutenant Governor under POL § 43. Instead, Respondent and Amici Hutter quote selected passages from the proceedings in order to *infer* that those entities did not believe

⁹ Governor Dewey was Republican and the Senate was controlled by Republicans at the time.

that such a power exists. But this evidence is equally susceptible to the opposite conclusions.

For example, the Hutter Amici cite proposition No. 923 from the 1967 Constitutional Convention in which Richard Kuhnen moved that the “Senate, upon recommendation of the Governor, shall advise and consent to the appointment of a person to fill the vacancy of the remaining term of the Lieutenant Governor” (Hutter Br., 8), suggesting that if the Governor had appointment power, the proposition would never have been introduced (*id.*, 9). But proposition No. 923 is equally susceptible of the opposite conclusion: that the Governor had such power under POL § 43 and Mr. Kuhnen (who cannot speak for New York in any event) wished to constrain that power by requiring Senate advice and consent.

The Hutter Amici also cite the 1984 Law Revision Commission for its finding that the provisions in the Constitution regarding a vacancy in the office of Lieutenant Governor were “adequate” and that there was “no need ... for a new system for filling the office of Lieutenant Governor should a vacancy exist.” Hutter Br., 10. But there is no citation to any statement from the 1984 Law Revision Commission regarding whether gubernatorial appointment of a Lieutenant Governor under POL § 43 was a part of the system that it found “adequate.” Indeed, Amici note only that the Commission had commented that several states had provided for gubernatorial appointment *subject to legislative*

confirmation. Id., 10. Thus, all that can be divined from the Commission’s reference to “adequate” is that the Commission did not believe that gubernatorial appointment *subject to legislative confirmation* was part of New York’s system for filling a vacancy in the office of Lieutenant Governor.

Similarly, the fact that in 1985, the Commission submitted a proposal for filling the vacancy in the office of Lieutenant Governor through gubernatorial nomination *and confirmation by the Legislature* (Hutter Br., 10-11), proves nothing more than that in 1985, the Commission did not believe there was currently a procedure in place for filling a vacancy in the office of Lieutenant Governor through gubernatorial nomination *and confirmation by the Legislature*.

If anything, the historical evidence demonstrates that the scope of the Governor’s power to appoint a Lieutenant Governor has been a subject of continuing debate since the events of *Ward v. Curran*, and that every twenty years or so a new generation struggles for clarity on the issue. The fact that law reformers sought, but failed, to introduce new provisions constraining the Governor’s appointment power only underscores that such power was already in existence under Article XIII, § 3 and POL § 43.

Respondent’s and the Hutter Amici’s arguments boil down to the premise that if POL § 43 applies to the office of Lieutenant Governor, then surely someone would have done it before. But “it has never been done before” is not a theory of

constitutional interpretation. The situation faced by Governor Paterson was unprecedented; so was his response. But that has nothing to do with the question of whether the Constitution and laws provide the power he relied upon in acting to resolve the multiple crises confronting the State. As discussed above, and in Appellant's opening brief, they do.

B. Respondent Has Failed To Demonstrate Irreparable Harm

In addition to failing to show likelihood of success on the merits, Respondent has failed to show clear and convincing evidence that he would suffer irreparable harm in the absence of preliminary relief. In their opening brief, Appellants demonstrated that the scenarios envisioned by the trial court and by Respondent cannot constitute irreparable harm because they are wholly speculative. App. Br., 46-50.

Respondent simply repeats such speculation, conjuring the "potential" for deprivation of political speech (Resp. Br., 57-59), and asserting that "Ravitch's absence from the Senate chamber at present does not mean that there is no imminent harm" (*id.*, 58). But since the only actual interference Respondent cites with respect to his political speech was supposedly by "the presiding Senator" who, during litigation between two factions, supposedly "ignored his motions to set aside the calendar and to adjourn" during the extraordinary Senate sessions this summer (Resp. Br., 57), Respondent has failed to demonstrate that Lieutenant

Governor Ravitch would silence him any more than a Temporary Senate President of the opposing party.

Respondent also fails to cite a single case refuting Appellants' showing that the *de facto* officers' doctrine precludes any finding that legislation passed by the Legislature could ever be invalidated on the basis that Mr. Ravitch's appointment was improper. App. Br., 47-49.

Respondent also asserts, without citation, that the elevation of an "illegally appointed" Lieutenant Governor to the position of Governor would be irreparable harm. Resp. Br., 59. But this argument assumes that Respondent is correct on the ultimate issue in this case. If Appellants are correct on the law, then it would be equally harmful for the Temporary President of the Senate to become Governor when there is a lawfully appointed Lieutenant Governor who is supposed to fill that role.

C. Respondent Has Not Shown The Balance Of The Equities Clearly Favors Injunctive Relief

With the withdrawal of Senator Espada from the case, Respondent's claim that the equities favor an injunction ring exceedingly hollow. This matter is now a dispute by a lone Senator seeking to disrupt the effective functioning of the State's Executive branch at a time of severe State financial crisis, based on unspecified and speculative harms he will purportedly suffer as an individual Senator. As detailed in Appellant's opening brief, Respondent will not suffer any cognizable

harm if the preliminary injunction is vacated. App. Br., 46-49. But as discussed by Appellants and several Amici representing large portions of the citizens of New York, if the preliminary injunction is allowed to stand, the State of New York will suffer grave harm.

Respondent asks why “it took so long” for the Governor to fill the vacancy. Resp. Br., 60. The answer is simple: just because a power exists does not mean it has to be exercised. That is the very definition of restraint. The Governor has made clear that he acted when he did because of the constitutional and political crisis caused, in part, by Respondent himself. Respondent does the Governor a disservice by suggesting (Resp. Br., 60-63) that the Governor is rewriting the Constitution because of the exigencies of the moment. The crisis led the Governor to exercise his power, but the Governor does not and has never suggested that the crisis is the source of his power.

Respondent asks why Lieutenant Governor Ravitch cannot serve in some other capacity (Resp. Br. 60), but offers no rebuttal to Appellant’s demonstration that there is unique power and functionality to the office of Lieutenant Governor that ordinary citizens do not share.

Respondent’s pleas for stability are ironic coming from one of the engineers of the stalemate that brought the Senate, and the State, to its knees. And Respondent is simply wrong to suggest that the appointment of Lieutenant

Governor Ravitch would cause instability when exactly the opposite is true. It is clear that the existence of a Lieutenant Governor *reduces* uncertainty regarding the line of succession, especially in a time of turmoil in the Senate. As one commentator has noted, even without a crisis, the Temporary President can shift after an election:

You also have the possibility that the acting lieutenant governor would change if there's a change in the majority in the Senate, which could happen before the next gubernatorial election. You could have one acting lieutenant governor on December 31st and a different acting lieutenant governor on January 2nd. If that should be during the period of time when the acting lieutenant governor is acting as a governor, I don't know what would happen.¹⁰

As Hutter Amicus Professor Galie presciently noted over a year ago, ties can and do occur in the Senate, and if a November election results in a tie in the Senate, the State could go from having a Temporary Senate President to having no one to perform the duties of the Lieutenant Governor at all.¹¹

¹⁰ Richard Briffault, speaking at The Nelson A. Rockefeller Institute of Government, *Gubernatorial Succession and the Powers of the Lieutenant Governor: A Public Forum*, (May 29, 2008) ("Rockefeller Forum"), 33.

¹¹ "Now, let's suppose as a result of a November election the Senate splits 31-31. Now comes time to elect a majority leader. There is none. If there is none, then there's no acting lieutenant governor, and there's no way to resolve that, unless somebody in the Senate agrees by some compromise to resolve that problem. . . . I don't think Bruno would lose his seat, but I would have asked him, 'What happens if you are tied? You disappear like the Cheshire cat in Alice in Wonderland.'" Rockefeller Forum, 40-41.

In sum, the equities in this case weigh heavily in favor of permitting Lieutenant Governor Ravitch to serve in office.

III. THE PRELIMINARY INJUNCTION IS ILLEGAL UNDER CPLR § 6311

Appellants have demonstrated (App. Br., 53) that the clear language of CPLR § 6311 precluded the trial court, located in Nassau County in the Second Department, from issuing a preliminary injunction that purported to enjoin Appellant Ravitch “from exercising any of the powers of the office of the Lieutenant-Governor of the State of New York.” Order at 18.

Respondent cannot dispute the clear language of CPLR § 6311 and so he repeats the same circular argument adopted by the trial court. Respondent’s argument is essentially that because he is claiming that Lieutenant’s Governor Ravitch’s appointment was improper, CPLR § 6311 does not apply to his claim. Resp. Br., 44-45. But Respondent fails to address Appellants’ citation of *Donnelly v. Roosevelt*, 259 N.Y.S. 355 (N.Y. Sup. 1932) (App Br., 55), where the court applied the predecessor to CPLR § 6311 to reject plaintiff’s challenge to the Governor’s exercise of removal power, even though plaintiff argued that the relevant statute was unconstitutional. *Id.*, 356. As that decision clearly demonstrates, Respondent’s argument must be rejected.

Similarly, Respondent argues that Appellant Ravitch is not a state officer and therefore CPLR § 6311 does not apply. (Resp. Br., 44.) But that is the issue to

be determined at the end of the case; it cannot be assumed at the outset for purposes of avoiding CPLR § 6311.

Moreover, Respondent seek to defend the trial court’s erroneous holding that CPLR § 6311 was inapplicable on the theory that the requested injunction was “incidental” to the declaratory relief sought in this matter, referring to *New York Central Railway Co. v. Lefkowitz*, 12 N.Y.2d 305 (N.Y. 1963). Resp. Br., 48. But Respondent provides no answer to Appellants’ showing (App. Br., 55) that the trial judge’s reliance on *Lefkowitz*—the sole authority cited in its order (Order at 9)—was misplaced because the plaintiffs in *Lefkowitz* were not seeking a preliminary injunction.

Finally, Respondent ignores the express language of CPLR § 6311, as well as clear precedent, and argues that even if CPLR § 6311 applies, it does not require dismissal of his action. Resp. Br. , 47-48. But as demonstrated in Appellants opening brief (App Br., 53), this argument is incorrect. The law is clear that CPLR § 6311 is jurisdictional. Respondent attempts to distinguish the clear holding of *People ex rel. Derby v. Board of State Canvassers*, 84 Sickels 461 (N.Y. 1891) that the “inhibition” in CPLR § 6311 “is jurisdictional” by arguing that it was superseded by the CPLR. Resp. Br., 47-48. But, as is clear from the text of the decision itself, the statutory provision at issue was in all relevant respects *identical* to CPLR § 6311. *See* 84 Sickels at 465 (“[S]ection 605 of the Code of Civil

Procedure ... reads that ‘where a duty is imposed by statute upon a state officer ... an injunction order to restrain him ... from the performance of that duty shall not be granted, except by the Supreme Court at a General Term thereof, sitting in the department in which the officer is located, or the duty required to be performed.’). CPLR § 6311 thus compels vacatur of the preliminary injunction irrespective of the venue provisions Article 5 of the CPLR (*see* Resp. Br., 42-48), which Appellants do not invoke in this appeal.

CONCLUSION

For the foregoing reasons, and for the reasons discussed in Appellant’s opening brief, the trial court’s order should be reversed, the preliminary injunction should be vacated, and the case should be remanded with an order to dismiss.

Respectfully submitted,

QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP

Kathleen M. Sullivan
Faith E. Gay
Robert C. Juman

51 Madison Avenue, 22nd Floor,
New York, New York 10010-1601
(212) 849-7000

Counsel for Defendants-Appellants

Date: August 12, 2009

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y.C.R.R. § 670.10.3 (f) that the foregoing brief was prepared on a computer using Microsoft Word.

Type: A proportionally spaced typeface was used, as follows:

- (i) Name of Typeface: Times New Roman
- (ii) Point Size: 14
- (iii) Line Spacing: Double

Word Count: The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service and this Statement, is 6,972.

Respectfully submitted,

QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP

Kathleen M. Sullivan
Faith E. Gay
Robert C. Juman

51 Madison Avenue, 22nd Floor,
New York, New York 10010-1601
(212) 849-7000

Counsel for Defendants-Appellants

Date: August 3, 2009