

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

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# 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.*

**Case No.**  
**2009-06673**

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## BRIEF FOR DEFENDANTS-APPELLANTS

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## STATEMENT OF QUESTIONS PRESENTED

1. Should this case be dismissed because two individual Senators lack standing to challenge the Governor's appointment of a lieutenant governor where:

a. those Senators fail to plead any personal injury from such an appointment; and

b. the Attorney General has exclusive authority to challenge title to office in a *quo warranto* proceeding under Executive Law § 63-b?

Answer of Supreme Court: Supreme Court erroneously held that Plaintiffs have standing.

2. Should the preliminary injunction issued by the Supreme Court against the Lieutenant Governor's exercise of his duties be vacated because:

a. The Governor has statutory and constitutional authority to fill a vacancy in the lieutenant governorship, and thus Plaintiffs cannot show by clear and convincing evidence that they are likely to succeed on the merits of their challenge to the appointment;

b. Plaintiffs allege no nullification of their vote or inability to govern in the Senate, and thus cannot show they will suffer any irreparable harm; and

c. The State will suffer grave injury if it lacks clarity and stability in the line of succession and the Governor lacks a Lieutenant Governor to assist him in

addressing the State's urgent financial crisis, and thus the balance of the equities tips strongly against any preliminary injunction?

Answer of Supreme Court: Supreme Court erroneously found the requirements for a preliminary injunction satisfied.

3. Does CPLR § 6311 bar a trial court in Nassau County from issuing a preliminary injunction against a public officer's performance of his statutory duties when that officer is located in and performs his statutory duties in Albany County?

Answer of Supreme Court: Supreme Court erroneously held CPLR § 6311 inapplicable.

### **PRELIMINARY STATEMENT**

In this lawsuit, two lone Senators—Republican Minority Leader Dean G. Skelos and Democratic Majority Leader Pedro Espada, Jr.—seek to block Governor David A. Paterson's appointment of Richard Ravitch as Lieutenant Governor. Governor Paterson made that appointment lawfully, however, pursuant to his express powers under Public Officers Law § 43. He did so in order to break a crippling stalemate in the Senate, to clarify the line of succession when two Senators (including Plaintiff Espada) both laid simultaneous claim to be the Temporary President of the Senate, and to obtain the advice and assistance of a loyal and trusted executive second-in-command at a time when the State faces the direst economic crisis since the Great Depression.

Plaintiffs-Respondents (“Respondents”) suggest that the Governor’s lawful action is unconstitutional because it has never been done before. But it has never been done before only because the urgent need to do so has never arisen. No Governor ever before faced the situation that Governor Paterson faced this summer: a financial crisis of unprecedented magnitude, a political crisis involving a partisan coup resulting in a 31-31 Senate stalemate that shut down the legislative process, and a constitutional crisis in which the State lacked clarity about the line of succession and the Governor faced the prospect of having an acting second-in-command who did not share his party allegiances, loyalties and outlook as the Constitution envisions. Just because this confluence of crises was historically unprecedented does not mean that the power Governor Paterson relied upon in acting to resolve it did not exist. *See, e.g., In re Advisory Op. to the Governor*, 688 A.2d 288, 291 (R.I. 1997) (holding that the governor may appoint a lieutenant governor, observing that “the mere fact that a constitutional power has not been exercised does not prove the power does not exist”).

Rather than accepting the Governor’s appointment of Lieutenant Governor Ravitch as a lawful measure to get the State’s government functioning again, Respondents drove all night from Albany to Nassau County, Senator Skelos’s home turf, to try to stop it. When this Court properly vacated the temporary restraining order they obtained after the Lieutenant Governor had already been

sworn into office, Respondents persisted in seeking a preliminary injunction that would have stopped Lieutenant Governor Ravitch from working with the Governor to help address the fiscal crisis while they went off on recess, taking a break from the State's financial woes. While the Supreme Court granted the preliminary injunction, this Court properly stayed it pending appeal.

For the reasons that follow, this Court should now reverse the Supreme Court, vacate the preliminary injunction and dismiss the Complaint.

### **STATEMENT OF THE CASE**

On July 8, 2009, Governor Paterson appointed Richard Ravitch Lieutenant Governor of the State of New York pursuant to the Governor's legislative and constitutional authority to fill vacancies in elective office. On July 9, 2009, Respondents commenced this lawsuit challenging the constitutionality of the Governor's action and seeking to enjoin Lieutenant Governor Ravitch from performing his executive duties. On July 22, 2009, the Supreme Court sitting in Nassau County issued an order granting Respondents' request for a preliminary injunction and denied Defendants-Appellants' motion to dismiss the complaint. This appeal followed. This Court has stayed the preliminary injunction and further proceedings in the Supreme Court pending resolution of this appeal.

## **STATEMENT OF FACTS**

### **A. The Vacancy Created By David Paterson's Elevation To Governor**

On November 7, 2006, Eliot Spitzer and David A. Paterson were elected respectively to the offices of Governor and Lieutenant Governor with a landslide 69% of the statewide vote. On March 17, 2008, Governor Spitzer resigned, and, pursuant to Article IV, § 5 of the New York State Constitution (“the Constitution”), Paterson became Governor. Respondents do not contest that Governor Paterson holds all of the powers of the Governor’s office or that his ascension created a vacancy in the office of Lieutenant Governor.

### **B. The Crisis In The Senate**

In June 2009, partisan defections and redefections among Senators led the Senate from a 32-30 Democratic majority to a short-lived 32-30 Republican majority and then an equal division, 31-31. This in turn led to a protracted dispute and a constitutional crisis over who was authorized to serve as the Temporary President of the Senate, the position next after the Lieutenant Governor in the line of succession to the Governor under Article IV, §6 of the Constitution.

On January 7, 2009, when the Senate convened for the most recent legislative session, a majority of Senators elected Democratic Senator Malcolm Smith Temporary President of the Senate. Affirmation of Kathleen Sullivan dated July 9, 2009 in Support of Defendants’ Memorandum of Law in Opposition to

Plaintiffs' Order to Show Cause for a Preliminary Injunction and Temporary Restraining Order, and in Support of Defendants' Cross Motion to Dismiss the Complaint ("Sullivan Aff."), attached to Defendants' Memorandum of Law dated July 9, 2009, at ¶3. On June 8, 2009, Respondent Senator Espada and Senator Hiram Monseratte joined 30 Republican Senators who claimed to have removed Smith as Temporary President and to have elected Espada to that position. *Id.*; Affidavit of David A. Paterson dated July 27, 2009 ("Paterson Aff.") attached to Defendants' Reply Memorandum of Law in Support of Motion for Interim Stay and Expedited Appeal dated July 27, 2009 ("Def. July 27 Mem."), at ¶ 4. Other Senators declined to recognize this "coup," and filed an action in the Supreme Court, Albany County to compel recognition of Senator Smith as Temporary President of the Senate. Sullivan Aff. at ¶3. On June 16, 2009, the Supreme Court dismissed the suit, holding that it would be an "improvident intrusion" into the affairs of the Senate for the courts to decide that question. Order Entered July 16, 2009, *In the Matter of Smith v. Espada*, No. 49120-09 (Sup. Ct. Albany Co.), at 2.

On June 15, 2009, Senator Monseratte announced that he would again vote with the 30 senators recognizing Senator Smith as Temporary President of the Senate. From that date until July 9, 2009, each coalition of 31 senators claimed that only the Temporary President of the Senate it supported had the right to

preside over Senate sessions, and the Senate failed to convene a quorum or vote on any legislation. Paterson Aff., at ¶ 4; Sullivan Aff. at ¶ 4.

### **C. The Governor's Appointment Of The Lieutenant Governor**

Governor Paterson took numerous steps to resolve the Senate crisis and reestablish a clear line of succession before appointing Lieutenant Governor Ravitch on July 8, 2009. He sought to mediate the dispute between the rival Senate factions and called extraordinary sessions pursuant to his powers under Article IV, § 3 of the Constitution. Paterson Aff., at ¶ 5. When the warring camps met in separate sessions without a quorum present, the Governor filed a petition for mandamus to order the Senators to attend extraordinary sessions as one body. Sullivan Aff., at ¶ 7. Although the Supreme Court, Albany County, granted the petition, finding that the Senators' conduct of the sessions constituted an "illusion" and a "fiction," the Senators' partisan impasse persisted. Order Entered June 29, 2009, *Paterson v. Adams*, No. 5435-09 (Sup. Ct. Albany Co.), at 3; Sullivan Aff. at ¶¶ 7-8.

On the evening of July 8, 2009, having exhausted all other options to break the legislative stalemate and ensure that there was a proper line of succession in the Executive Branch, the Governor appointed Richard Ravitch as Lieutenant Governor of the State of New York. Paterson Aff., at ¶¶ 2, 4. He did so under the authority expressly set forth in Public Officers Law ("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.” As a citizen of the United States over 30 years of age and resident in New York for more than five years, Mr. Ravitch undisputedly meets the qualifications for the office of Lieutenant Governor set forth in Article IV, § 2 of the Constitution.

On the evening of July 8, 2009, following the Governor’s announcement, Lieutenant Governor Ravitch signed the Oath of Office and the Deputy Secretary of State accepted and filed that oath at the Office of the Secretary of State in Albany, consistent with the policies and procedures of the New York Department of State. *See* Affidavit of Daniel Shapiro dated July 14, 2009, at ¶¶ 3-4, attached to Reply to Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Cross-Motion to Dismiss and Motion Seeking Change of Venue dated July 14, 2009.

**D. The Respondents’ Complaint And Ex Parte Motion For Temporary Restraining Order**

In the middle of the night on July 8, 2009, Respondents’ counsel drove the five hours from Albany to Nassau County to file this lawsuit and seek an *ex parte* temporary restraining order. Their complaint challenged the constitutionality of Lieutenant Governor Ravitch’s appointment, claiming that Article IV, § 6 of the Constitution precludes the Governor from filling any vacancy in the office of

Lieutenant Governor. Complaint, ¶¶ 18, 45. Respondents sought *ex parte* injunctive relief even though the only harms described in their complaint were a prospective and undifferentiated “violation of their office” if they participated in a legislative session “conducted under the aegis of an interloper,” and the possibility that any legislation passed under such aegis would supposedly be “void *ab initio*.” Complaint, ¶ 41.

At 12:23 a.m., in response to Respondents’ *ex parte* motion, Justice Ute Lally of the Supreme Court, Nassau County issued a temporary restraining order purporting to bar the Lieutenant Governor’s appointment and his execution of any of the duties of his office. Order Entered July 9, 2009, *Skelos v. Espada*, No. 13426/09 (Sup. Ct. Nassau Co.). On the afternoon of July 9, 2009, this Court (per Associate Justice Leonard B. Austin) granted Defendants-Appellants’ application under CPLR 5704, vacating the temporary restraining order. Order Entered July 9, 2009, *Skelos v. Espada*, No. 13426/09 (App. Div. 2d Dep’t). That same day, Appellants filed a cross-motion to dismiss the Complaint for mootness, improper venue and lack of standing, and the matter was scheduled for expedited hearing before Justice William H. LaMarca of the Supreme Court in Nassau County.

#### **E. The End Of The Senate Impasse**

Meanwhile, in Albany, the Governor’s July 8, 2009, appointment of Lieutenant Governor Ravitch immediately precipitated a political realignment that

enabled the Senate to resume functioning as a lawmaking body. *See Paterson Aff.*, at ¶ 6. On the afternoon of July 9, 2009, Respondent Espada announced that he would return to voting with the Democratic Senators, restoring majority control of the Senate to the Democratic Conference. Respondent Espada, as part of his return to the Democratic Party, accepted the position of Majority Leader, and, as Respondents concede, “abandoned any and all claims to be the Temporary President.” Affirmation of David L. Lewis dated July 13, 2009, in Opposition to Cross Motions and Motion Seeking Change of Venue (“Lewis July 13 Aff.”), attached to Respondents’ Memorandum of Law in Opposition to Cross Motion to Dismiss and Motion Seeking Change of Venue dated July 13, 2009 (“Resp. July 13 Mem.”), at ¶¶ 16. In light of these developments, Respondent Senator Espada no longer claims any place in the line of succession. Respondent Senator Skelos has not laid claim to presidency of the Senate during the pendency of this litigation.

“By the evening of the 9<sup>th</sup> of July, Malcolm Smith was the sole occupant of the office of Temporary President and the Senate had begun the process of passing over one hundred bills.” Lewis July 13 Aff., at ¶ 17. Temporary Senate President Smith, the only Senator in the line of succession, has joined with other State Senators to appear in this action as an *amicus curie in support* of the constitutionality of the Governor’s appointment of Lieutenant Governor Ravitch. *See* Affirmation of Victor A. Kovner in Support of Motion for Leave to File *Amici*

*Curiae* Brief dated July 30, 2009, at ¶ 1. By contrast, no other Senator has joined with the two lone Respondents, nor has the Attorney General commenced any challenge to the legitimacy of Lieutenant Governor Ravitch's title to office.

**F. The Supreme Court's Preliminary Injunction Barring Lieutenant Governor Ravitch From Performing The Duties Of His Office**

Despite questioning the viability of Respondents' claims after the Senate resumed functioning on July 9th, Justice LaMarca issued an order on July 21, 2009, granting Respondents' request that Appellant Ravitch be "preliminarily enjoined from exercising any of the powers of the office of the Lieutenant-Governor of the State of New York" and denied Appellants' motion to dismiss Respondents' complaint. Order Entered July 22, 2009, *Skelos v. Paterson*, No. 13426/09 (Sup. Ct. Nassau Co.) ("Order"), at 18 .

In granting the preliminary injunction, Justice LaMarca concluded that the two Respondent Senators had standing because "Plaintiffs allege that the governor has interfered with their power to elect a temporary president by appointing a lieutenant-governor to act in place of a duly elected member of the senate." Order at 15. Respondents' complaint, memoranda of law and affidavits, however, alleged no such harm. See Complaint, ¶ 41; Resp. July 13 Mem. at pp. 34-35, 50; Lewis July 13 Aff., at ¶ 34.

Justice LaMarca rejected Appellants' related argument that an attack on Lieutenant Governor Ravitch's right to hold office could be made only by a *quo*

*warranto* writ filed by the Attorney General. The trial court held that *quo warranto* is limited to circumstances where there is a “contested election.” Order at 13.

Justice LaMarca similarly rejected Appellants’ argument that CPLR § 6311, which provides that “[a] preliminary injunction to restrain a public officer...from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer...is located or in which the duty is required to be performed,” prohibits entry of a preliminary injunction in the Second Department restraining Lieutenant Governor Ravitch from performing the duties of his office. Order at 9-10. The trial court reasoned that, because Governor Paterson “has indicated a willingness to abide by a declaration from the courts,” Respondents’ request for a preliminary injunction was “incidental to their request for a declaratory judgment” (Order at 10) and thus that the constraint in CPLR 6311 preventing a preliminary injunction from issuing outside the Third Department did not apply.

Justice LaMarca also addressed the merits of Respondents’ argument that the Governor’s appointment of Lieutenant Governor Ravitch was unconstitutional. The trial court held that “the simple answer” to Appellants’ argument that POL § 43 authorizes the Governor to appoint a Lieutenant Governor in the event of a vacancy is that “Article XIII § 3 [authorizing the legislature to fill vacancies]

cannot apply to the office of lieutenant governor.” Order at 16. Justice LaMarca reasoned that because Article XIII, § 3 does not permit appointees to serve longer than the next “political year,” this “in effect means that the appointee must run at the next election.” (Order at 16). Without citation to authority, Justice LaMarca found this to be inconsistent with Article IV, [§ 1], which provides that the Governor and Lieutenant Governor are elected at the same time. Order at 16. This led Justice LaMarca to conclude that Article XIII, § 3, which applies to vacancies for “elective officers” does not apply to the office of Lieutenant Governor and that POL § 43 “would not be constitutional” if it applied to the office of Lieutenant Governor. Justice LaMarca therefore stated that he was compelled to find that “the office of lieutenant-governor is not an ‘elective office’” within the meaning of POL §43. Order at 16-17.

Justice LaMarca then turned to the question of irreparable harm, observing that that “the timing of a legislator’s speech is even more critical than [the speech] of a private citizen” and finding, without citation, that Lieutenant Governor Ravitch might “refuse to yield plaintiffs the floor, or otherwise deprive them of the right to speak through application of a senate rule” and that Governor Paterson might die, resign or be removed from office, thereby resulting in Lieutenant Governor Ravitch succeeding Governor Paterson. Order at 17.

Finally, the court balanced the equities in favor of Respondents, finding, without noting that Governor Paterson had made clear that Lieutenant Governor Ravitch had not and would not preside over the Senate until the issues raised by Respondents were resolved by the courts,<sup>1</sup> that if a preliminary injunction was granted, “the duties of lieutenant-governor [would] be performed by Senator Smith, the temporary president,” but without a preliminary injunction, “the workings of an entire branch of government [*i.e.*, the Legislature] [would] be affected.” Order at 17-18.

#### **G. This Court’s Stay Of The Preliminary Injunction**

Less than 24 hours after Justice LaMarca enjoined Lieutenant Governor Ravitch from performing the duties of his office, Associate Justice L. Priscilla Hall of this Court granted Appellants’ Order to Show Cause why the preliminary injunction should not be stayed pending review by this Court. Order Entered July 22, 2009, *Skelos v. Paterson*, No. 2009-0667 (App. Div. 2d Dep’t). In support of the Order to Show Cause, Governor Paterson submitted an affidavit reiterating his public statements that “I wish to make emphatically clear that during the pendency of this litigation and appeals, Lieutenant Governor Ravitch will not preside over the Senate.” Paterson Aff., at ¶ 11. Governor Paterson also explained the he had appointed Richard Ravitch as Lieutenant Governor to assist him in the Executive

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<sup>1</sup> See, e.g., Elizabeth Benjamin, *Gov: Ravitch is Legal But Won’t Preside*, N.Y. DAILY NEWS, June 9, 2009.

Branch's efforts to combat the State's "staggering financial crisis ... because it is ... essential that there be a Lieutenant Governor to assist me in addressing [this crisis]." Patterson Aff., at ¶¶ 7-8. Also in support of Appellants' Order to Show Cause, Former Governor Hugh L. Carey submitted an affirmation attesting that Lieutenant Governor Ravitch was the "ideal person" to aid the Governor "and the State in confronting a dire threat [*i.e.*, the financial crisis]." Affirmation of Hugh L. Carey dated July 26, 2009, attached to Def. July 27 Mem., at ¶ 11.

On July 30, 2009, after argument on the Order to Show Cause, this Court agreed with Appellants, ordering that "the preliminary injunction granted in the order appealed from entered July 22, 2009, is limited so as to enjoin the Appellant Richard Ravitch only from presiding over the New York State Senate or exercising a casting vote therein, and (2) all further proceedings in the Supreme Court, Nassau County, in the above-entitled action are stayed." Order Entered July 30, 2009, *Skelos v. Paterson*, No. 2009-0667 (App. Div. 2d Dep't). Appellants have abided and will abide strictly by this order, which permits Lieutenant Governor Ravitch to fulfill his executive duties, including assisting the Governor in addressing the State's grave fiscal crisis, while deferring any role in the Senate until resolution of this litigation.

## ARGUMENT

This Court should reverse the Supreme Court and order the action dismissed because Respondents lack standing to bring this action. Neither Senator Skelos nor Senator Espada alleges any injury from the appointment of Lieutenant Governor Ravitch that is personal to him, as opposed to an abstract institutional injury to the Senate. Even if Respondents otherwise had alleged injury, they would be foreclosed from suit here because the Attorney General has exclusive authority to challenge the legitimacy of title to public office in a *quo warranto* action under Executive Law § 63-b. *See* Part I below.

Even if this Court does not order this action dismissed in its entirety, this Court should vacate the preliminary injunction because Respondents have fallen far short of the demanding showing required to obtain such extraordinary relief—especially against the highest-ranking Executive officers of the State. Respondents cannot show likelihood of success on the merits. In appointing Lieutenant Governor Ravitch, Governor Paterson acted properly under POL § 43, which was itself enacted under the clear mandate of Article XIII, § 3 of the Constitution. Article IV, § 6 of the Constitution does not speak to or forbid this result, and Governor Paterson’s reading of the Constitution is the only one that harmonizes Article XIII, § 3 with Article IV, § 1. Nor is the Governor’s action unusual, as

sister state courts have found that their Governors had authority to appoint lieutenant governors under similar provisions. *See* Part II.A below.

Nor can Respondents show any irreparable harm from Lieutenant Governor Ravitch's performance of his duties. Their fears that he might nullify their votes or interfere with their speech on the Senate floor are entirely speculative. The long-established *de facto* officers' doctrine makes clear that all laws passed or actions taken while he holds office will be unassailable even if he is later found to have been improperly appointed. And Respondents suffer no cognizable injury as Senators from the Lieutenant Governor's activities within the Executive branch. *See* Part II.B below. In light of the non-existent harm to Respondents, the balance of equities tips strongly against preliminary relief, for it is clearly in Appellants' and the public's interest for the State to have a clear line of succession that is not contingent on a volatile and shifting balance of power in the Senate, and a deputy to the Governor who is fully able to serve as the Governor's second-in-command in helping the State to resolve the worst fiscal crisis since the Great Depression. *See* Part II.C below.

Finally, the preliminary injunction should be dissolved for the independent reason that it violates CPLR § 6311. Even if venue is otherwise proper in Nassau County, an executive officer is subject to a *preliminary injunction* only by a

Supreme Court in the Judicial Department where the officer located or performs duties—here, the Third Department, not the Second. *See* Point III below.

**I. THIS CASE SHOULD BE DISMISSED FOR LACK OF STANDING**

**A. Respondents Have Failed To Allege Any Direct Or Personal Injury Distinct From Effects Upon The Legislature “As A Whole”**

This Court should reverse the Supreme Court and order the case dismissed because the Respondents, two lone individual Senators, lack standing to pursue this lawsuit. New York law provides well-settled standards for legislator standing. In *Silver v. Pataki*, 96 N.Y.2d 532 (N.Y. 2001), the Court of Appeals held that individual legislators lack standing to challenge the constitutionality of executive action where they have “suffered no direct personal injury beyond an abstract institutional harm.” *Id.* at 540. In *Silver*, Speaker of the Assembly Sheldon Silver challenged the constitutionality of Governor Pataki’s exercise of his line-item veto power with respect to non-appropriation bills. In deciding the standing question, the Court of Appeals held that the “plaintiff’s allegation of injury *to the Assembly as a whole*” is merely “an abstract institutional injury that fails to rise to the level of cognizable injury in fact.” *Id.* 539, fn 5 (emphasis added).

Other precedents likewise hold that alleged injury to a legislative body “as a whole” is insufficient to confer standing on individual legislators. In *Posner v. Rockefeller*, 26 N.Y.2d 970 (N.Y. 1970), the Court of Appeals held that plaintiff Assemblymen did not have standing to challenge the validity of appropriations

bills enacted and submitted to Governor Rockefeller, whether or not the bills had been passed by the Legislature or were still pending before that body at the time the proceeding was instituted. *Id.* at 971. *See also Urban Justice Center v. Pataki*, 38 A.D.3d 20, 25 (1st Dep’t 2000), *lv. denied*, 8 N.Y.3d 958 (N.Y. 2007) (minority legislators lack standing where they allege harms “involving only a type of institutional injury (the diminution of legislative power)”; *cf.*, *Society of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 781 (N.Y. 1991) (a trade organization does not have standing to challenge action of county legislature where organization failed to allege any threat of cognizable injury different from that of the public at large).

Here, Respondents allege in their complaint only classic claims of abstract institutional injury, not personal harm. They allege that “they will be in direct violation of their office” if they participate in a legislative session “conducted under the aegis of an interloper,” and that “any legislation passed” under the auspices of such an appointment supposedly “is void *ab initio*.” Complaint, at ¶41. But fears that the Senate will be presided over by an “interloper” or that the Senate would enact void legislation do not affect the individual Respondent Senators in any more personal way than they affect the Senate as a whole, and thus are an insufficient basis to confer standing.

The Court in *Silver* did hold that individual legislators may have standing if they allege individual injuries from “nullification of votes.” 96 N.Y.2d at 539. Thus, Speaker Silver had standing to challenge an actual veto by Governor Pataki nullifying his favorable vote. Similarly, *Coleman v. Miller*, 307 U.S. 433 (1939), recognized that twenty state Senators had standing to challenge the constitutionality of a tie-breaking vote cast by a lieutenant governor that nullified the effect of their vote, which otherwise would have been decisive in preventing state ratification of the Child Labor Amendment. *Id.* at 438.

But this case does not involve any vote nullification. Respondents have failed to point to any vote they have actually cast, let alone explained how such individual vote might be nullified. As the United States Supreme Court has cautioned, “[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power” such as that alleged here. *Raines v. Byrd*, 521 U.S. 811, 825-826 (1997); *see id.* at 829 (holding that even members of Congress who had voted against a federal line-item veto act did not have standing to challenge the constitutionality of that act).

The Court in *Silver* also noted that individual legislators may have standing if they allege individual injuries from “usurpation of power.” 96 N.Y.2d at 539. But neither Senator Skelos nor Senator Espada alleges that Lieutenant Governor Ravitch has usurped his power. Neither Senator Skelos nor Senator Espada now

claims title to the Temporary Presidency of the Senate. Senator Smith, who as Temporary President of the Senate might object that the new Lieutenant Governor has “usurped” his place in the line of succession, has not only failed to join the Respondents in this challenge, but seeks to file an *amicus curiae* brief in support of Appellants.

The trial court suggested Respondents might have “usurpation” standing based on the appointment’s interference with the power of the Senate to appoint and be presided over by its own chosen Temporary President of the Senate. Order at 14-15. But this is not correct. The appointment has not interfered with the Senate’s power to appoint the Temporary President of the Senate, who all factions now agree is Senator Smith. Moreover, even if there were some right to have the Temporary President of the Senate become the permanent Senate President after a vacancy in the Lieutenant Governorship, this right would not belong to either of the individual Respondents; it would belong to the entire Senate Chamber, and Respondents may not speak for, or bring an action on behalf of, the Senate as a whole or their fellow legislators. *Society of the Plastics*, 77 N.Y.2d at 773 (stating that there is a “general prohibition on one litigant raising the legal rights of another”); *see also Urban Justice Center*, 38 A.D.3d at 27 (“legislator plaintiffs may not raise legal grievances on behalf of others”).

*Dodak v. State Admin. Bd.*, 441 Mich. 547 (1993), relied on by the trial court (Order at 14), is of no avail to Respondents. In that case, the Michigan court *denied* the House Speaker and Minority Leader standing to challenge allegedly improper transfers of appropriated funds from one governmental department. The court rejected the argument that these plaintiffs had standing on a theory of usurpation of power or any other theory that their ability as legislators to override a gubernatorial veto in respect of such appropriations had been affected by the challenged transfers or their power to appoint leaders to the appropriations committee somehow had been diminished. *Id.* at 561 (holding that assemblyman who was member of appropriations committee with the power to allocate funds was the only plaintiff legislator with standing to challenge alleged invalid transfer of such funds). Similarly, Respondent Senators cannot point to any way in which their individual power has been “usurped” by the Governor’s appointment of Lieutenant Governor Ravitch.

Therefore, under *Silver*, *Posner*, *Urban Justice Center*, *Dodak*, and *Raines*, Respondents have failed to allege any harm sufficient to confer standing to bring this lawsuit and this Court should order dismissal of this action.

**B. Only The Attorney General, By Way Of A *Quo Warranto* Proceeding, Has Standing To Challenge Title To Public Office**

Even if the individual Respondent Senators had suffered some personal injury, they still would not have standing to bring this action because 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); *Hart v. State Bd. of Canvassers*, 161 N.Y. 507, 510 (N.Y. 1900); *Morris v. Cahill*, 469 N.Y.S.2d 231, 233 (3d Dep’t 1983); *People v. Pizzaro*, 552 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 1990). Executive Law § 63-b states:

The attorney-general may maintain an action, upon his own information or upon the complaint of a private person, against a person who usurps, intrudes into, or unlawfully holds or exercises within the state a ... public office ... .

Respondents themselves have conceded that, “were the Defendant [Ravitch] to occupy the office ... the exclusive remedy is a *quo warranto* proceeding which may only be brought in the name of the people of the state by the Attorney General.” Emergency Affirmation of John Ciampoli dated July 8, 2009, attached to Plaintiffs’ Order to Show Cause and Temporary Restraining Order, at ¶11. That concession was correct and warrants dismissal of the case here.

Moreover, contrary to the suggestion of the trial court (Order at 13), the exclusive remedy of *quo warranto* is not limited to “contested elections” but extends also to actions challenging the purported validity of an appointment to office. Numerous cases, having nothing to do with contested elections, have held that *quo warranto* is the exclusive remedy for challenging appointments to fill a vacancy. For instance, in *Morris v. Cahill*, the Court held that plaintiffs, including

the minority leader of the County legislature, were precluded from challenging the appointment of a replacement County legislator because this claim was “barred under the traditional and long-prevailing rule that an action in the nature of *quo warranto* by the Attorney General ... is the exclusive means of trying title to public office.” 469 N.Y.S.2d at 233; *see also People ex rel. Lazarus v. Sheehan*, 128 A.D. 743 (3d Dep’t 1908) (where party is wrongfully removed from office, and the office was filled by appointment, *quo warranto* is the proper remedy); *People ex rel. Requa v. Noubrand*, 32 A.D. 49 (2d Dep’t 1898) (where party claims to fill vacancy which the law deems nonexistent, *quo warranto* is applicable remedy); *People ex rel. Baldwin v. McAdoo*, 110 A.D. 432, 435 (2d Dep’t 1905) (plaintiff’s remedy is *quo warranto* and not mandamus where two policemen appointed to fill one vacancy in inspector’s office).

Thus, the appointment of Lieutenant Governor Ravitch may be properly challenged only via a *quo warranto* proceeding brought by the Attorney General. The instant action is not a *quo warranto* proceeding and the Attorney General is not a party. Accordingly, the trial court erred in granting the preliminary injunction and failing to dismiss the Complaint.

## **II. THE PRELIMINARY INJUNCTION SHOULD BE VACATED**

Even if this Court finds some basis for standing and declines to dismiss the complaint in its entirety, this Court should reverse for the additional and

independent reason that the trial court erred in granting the preliminary injunction. Respondents failed to meet the demanding standards applicable to a request for such extraordinary relief: “In order ‘to prevail on a motion for a preliminary injunction, the movant must demonstrate *by clear and convincing evidence* (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant’s position.” *Gluck v. Hoary*, 865 N.Y.S.2d 356, 357 (2d Dep’t 2008) (quoting *Apa Sec., Inc. v. Apa*, 37 A.D.3d 502, 503, 831 N.Y.S.2d 201 (2d Dep’t 2007)) (emphasis added). Each aspect of this test favors Appellants, not Respondents.

**A. Respondents Cannot Show Likelihood Of Ultimate Success On The Merits Because The Governor’s Appointment Of The Lieutenant Governor Was Lawful And Constitutional**

Contrary to the trial court’s conclusion, the Governor’s appointment of Lieutenant Governor Ravitch was an entirely valid exercise of the Governor’s power under both the Constitution and POL § 43. The trial court thus erred in finding that Respondents had shown any likelihood of success, let alone clear and convincing evidence of likelihood of success, as required in this Department. *See Gluck v. Hoary*, 865 N.Y.S.2d at 357.

As explained further below, Article XIII, § 3 mandates that “[t]he legislature shall provide for filling vacancies in office.” POL §§ 41-43 fulfill that mandate.

POL § 43 provides, without limitation, that the Governor has the power to fill all vacancies in elective offices if there is “no provision of law for filling the same.”

POL § 43 clearly applies to the office of Lieutenant Governor as that office is clearly elective and there is no law other than POL § 43 that provides for filling a vacancy in the Lieutenant Governorship. Contrary to Respondents’ and the trial court’s contentions (Order at 3-4), Article IV, § 6 does not provide for the *filling of a vacancy* in the office of Lieutenant Governor or require that such a vacancy can never be filled. It provides only that, in the case of a “vacancy in the office of lieutenant-governor, the temporary president of the senate shall *perform all the duties* of the Lieutenant Governor *during the vacancy*” (emphasis added). Because neither POL § 41 nor § 42 pertains to the Lieutenant Governor, the only way the Legislature can be held to have fulfilled its mandate under Article XIII, § 3 with respect to the Lieutenant Governorship is through enacting POL § 43.<sup>2</sup>

Contrary to the trial court’s contention (Order at 16-17), Article XIII, § 3’s provision that an appointee shall hold office “no longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy,” does not negate the Governor’s power to appoint a Lieutenant Governor under POL § 43. Harmonizing this provision with other provisions of

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<sup>2</sup> Article XIII, § 5 also requires the Legislature to establish provisions for removal of “all officers” for misconduct, subject to certain exceptions, and “for supplying vacancies created by such removal.” Unless POL § 43 is read to apply to the office of Lieutenant Governor, then the Legislature has failed to comply with the mandate of Article XIII, § 5 as well.

the Constitution, such as Article IV, § 1, is not difficult and requires only the same logical resolution that New York courts (as well as the highest courts in numerous other states) have historically reached.

1. Public Officers Law § 43 Plainly Provides The Governor Authority To Fill A Vacancy In The Office Of Lieutenant Governor

The only statutes that the Legislature has enacted pursuant to the mandate of Article XIII, § 3, are sections 41 through 43 of the POL. Together, these provisions provide a comprehensive mechanism for dealing with any conceivable vacancies in office. POL § 41 addresses vacancies in the offices of Comptroller or Attorney General. POL § 42 provides for filling vacancies in other enumerated elective offices such as U.S. House or Senate seats, but expressly excludes the offices of Governor and Lieutenant Governor. POL § 43 addresses the filling of all other vacancies. POL § 43 provides without limitation 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.<sup>3</sup>

The only criteria that must be met for a position to be subject to gubernatorial appointment under POL § 43 are that (1) the office is elective; and

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<sup>3</sup> Section 43 clearly covers both State and local offices; indeed, earlier versions thereof explicitly excluded certain State positions (but not the Lieutenant Governorship), which makes sense only if statewide offices are covered by its terms. *See* Chapter 28 of the Laws of 1849 (setting different terms for appointment of secretary of state, comptroller, treasurer and other State positions).

(2) there is “no provision of law for filling the same.” In this case, both criteria are clearly satisfied. *First*, the office of Lieutenant Governor is undoubtedly an elective office. Article IV, § 1 of the Constitution states that the Lieutenant Governor is elected “by each voter” and the “respective persons having the highest number of votes cast jointly for them for governor and lieutenant governor respectively shall be elected.” The trial court cited no authority for its assertion (Order at 17) that the Lieutenant Governor is not an elective office merely because the election for Lieutenant Governor occurs at the same time as the election of Governor. Moreover, if that argument were correct, the office of Governor would also not be an elective office—an absurd result.

*Second*, there is no other provision of law for filling a vacancy in the Lieutenant Governorship. POL § 41 provides for filling vacancies in the offices of Attorney General or Comptroller by joint legislative resolution; under the canon *expressio unius exclusio alterius*, this provision plainly implies that the Lieutenant Governorship may not be filled by legislative resolution. POL § 42 provides for filling a vacancy in a U.S. Senate or House seat by means such as special elections, but carves out the Lieutenant Governor expressly from this possible method of filling a vacancy. Likewise, contrary to the trial court’s ruling (Order at 3-4), Article IV, § 6, which provides only that, in the case of a “vacancy in the office of lieutenant-governor, the temporary president of the senate shall *perform all the*

*duties* of the Lieutenant Governor *during the vacancy*” (emphasis added), does not constitute a “provision of law for filling” the office of Lieutenant Governor under POL § 43. *See* Point II.A.2 below.

A different provision of the Constitution, Article XIII, § 3, is the provision that specifies how vacancies in office will be filled, and that provision of the Constitution expressly assigns that task to the Legislature: “The legislature *shall* provide for filling vacancies in office . . . .” *See Conover v. Devlin*, 14 How. Pr. 315 (N.Y.Cty. Sup. Ct. 1857) (predecessor statute to POL § 43 “was passed to carry out a provision of the constitution . . . which directs, in most general terms, that ‘the legislature shall provide for filling vacancies in office’”); *People v. Snedeker*, 14 N.Y. 52 (1856) (earlier incarnation of POL § 43 was enacted pursuant to constitutional declaration “that the legislature shall provide for filling vacancies in office . . .”). Article XIII, § 3’s mandate, unlike that of Article IV, § 6, is to actually fill vacancies, not just to provide for a caretaker to perform the functions of the office while such vacancies remain open. POL § 43 is one of the comprehensive set of legislative enactments that fulfills the Legislature’s obligations under Article XIII, § 3. And nothing in the Constitution excludes the Lieutenant Governor from the broad reach of POL § 43.

The legislative history demonstrates the legislature’s intent that POL § 43 would apply to filling vacancies in the office of Lieutenant Governor. POL §§ 41-

43 exist in their current form as a consequence of an earlier dispute that arose regarding filling a vacancy in the office of Lieutenant Governor. In *Ward v. Curran*, 44 N.Y.S.2d 240 (App. Div. 3rd Dept.), *aff'd*, 291 N.Y. 642 (1943), the Appellate Division addressed the consequences of a vacancy caused by the death of Lieutenant Governor Thomas Wallace. At that time, POL § 42 contained no exclusion for the office Lieutenant Governor. The question before the court was whether POL § 42's provisions permitted a new Lieutenant Governor to be voted for in the next general election, rather than waiting for the next quadrennial election.

In an opinion issued prior to the Appellate Division's decision, then-Attorney General Nathaniel L. Goldstein had argued that an election was unnecessary because (1) there was no vacancy in the Lieutenant Governorship because the Temporary President of the Senate was carrying out his duties; and (2) POL § 42 made no specific mention of the Lieutenant Governor. 1943 N.Y. Op. Atty. Gen. No. 378. *Ward* rejected these arguments, holding that POL § 42 at that time was applicable to the office of Lieutenant Governor and required a mid-term election.

There are four points of crucial significance that *Ward* makes clear, and they demonstrate why the Governor's appointment of Lieutenant Governor Ravitch was authorized. *First*, the *Ward* decision would have been impossible if, as the

Attorney General argued at the time, there was “no vacancy” in the office of Lieutenant Governor. Thus, *Ward* clearly stands for the proposition that the performance of duties by the temporary president of the Senate is not the same as filling a vacancy in the Lieutenant Governor’s Office.

*Second*, *Ward* found that the then-existing version of POL § 42 applied to the office of Lieutenant Governor despite the lack of a specific reference to that office. In other words, *Ward* found that an open-ended, “catch-all” provision for filling vacancies in elected offices, enacted by the Legislature pursuant to its constitutional authority to provide for filling of vacancies, authorized the filling of the position of Lieutenant Governor, even though the office of Lieutenant Governor was not expressly mentioned in the statute at the time.<sup>4</sup>

*Third*, *Ward* ordered a special election despite the fact that the Constitution at the time provided, as it does today, that the Lieutenant Governor was to be elected every four years at the same time as the Governor. Thus, *Ward* clearly held that the presence of a constitutional provision for simultaneous election of Lieutenant Governor and Governor was no obstacle to the filling of vacancies in the office of Lieutenant Governor through whatever method the Legislature had

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<sup>4</sup> Significantly, in his pre-*Ward* opinion, the Attorney General contended that the same arguments against application of POL § 42 applied directly to POL § 43 as well. *See* 1943 Op.Atty.Gen. at 382. In the words of the Attorney General, “there is no distinction in language between [section 43] and section 42 of the Public Officers Law.”

provided for in the POL, even if that meant filling a vacancy during the period between quadrennial elections.

*Fourth*, and most important, the Legislature was fully aware of the *Ward* decision when it amended the POL into its current form. In response to *Ward*, the Legislature excluded the offices of Lieutenant Governor and Governor from POL § 42, but made no change to POL § 43, which remained as a catch-all provision that, pursuant to *Ward*, would immediately and clearly apply to the office of Lieutenant Governor. Nor did the Legislature say anything at the time to suggest that the Lieutenant Governor was excluded from the ambit of POL § 43 because some other provision of the Constitution (such as Article IV, § 6, which was also enacted post-*Ward*) addressed filling such vacancies. In light of *Ward*, the Legislature's silence cannot be read as an intention to exclude the Lieutenant Governor from the scope of POL § 43. Respondents and the trial court (Order at 16) pervert *Ward* by suggesting that the Legislature, aware that POL § 43 literally applies to vacancies in the office of Lieutenant Governor, intended that POL § 43 would not so apply, yet remained completely silent about this intent during all the debates leading up to the post-*Ward* amendments.

2. Article IV, § 6 Does Not Bar The Governor From Appointing A Lieutenant Governor Pursuant To POL § 43

Contrary to Respondents' contention and the trial court's conclusion (Order at 3-4), Article IV, § 6 of the Constitution does not bar the Governor from filling a

vacancy in the office of Lieutenant Governor under the authority conferred upon him by POL § 43, nor require that such vacancy go unfilled. Article IV, § 6 provides that, when only the office of Lieutenant Governor is vacant, “the temporary president of the senate shall *perform all the duties of the Lieutenant Governor during the vacancy*” (emphasis added). This section, however, does not constitute a “provision of law for filling [a vacancy]” in the office of Lieutenant Governor.

To begin with, the plain language of Article IV, § 6 does not purport to govern the “filling” of a vacancy; it merely addresses the performance of duties during the vacancy. Section 43 expressly requires the Governor to appoint someone to “execute” the duties of the vacant position, not merely perform them. The distinction is significant. The responsibility to take care that the laws are faithfully executed is vested in the Governor, and only a member of the executive branch can “execute.” The Temporary President of the Senate, while authorized by the Constitution to “perform” certain duties as a caretaker, does not cease to be a senator under Article IV, § 6 and cannot *become* Lieutenant Governor consistent with separation of powers while remaining a sitting senator.

Moreover, the substitute performance contemplated by Article IV, § 6 is solely applicable “during the vacancy”—which necessarily implies that the vacancy will end at some point. Article IV, § 6 does not purport to define when or

how that vacancy will end. There is nothing inconsistent with Article IV, § 6 providing a “caretaker” role for a limited interim period while POL § 43 (implementing the mandate of Article XIII, § 3) provides for the actual filling of the vacancy. Indeed, this reading is the only way to harmonize Article IV, § 6 with Article XIII, § 3’s requirement that the legislature provide for the filling of vacancies. *See, e.g., Social Investigator Eligibles Ass’n v. Taylor*, 268 N.Y. 233, 237 (N.Y. 1935) (“The fundamental law [i.e. the Constitution] is to be read as a whole, and every relevant provision of statute is to be construed, if possible, so as to give effect to every other provision.”); *Beach v. Shanley*, 62 N.Y.2d 241, 257 (N.Y. 1984) (competing constitutional “provisions are to be so construed as to render them capable of operating harmoniously”). Article IV, § 6 was enacted after *Ward’s* holding that merely performing the duties of Lieutenant Governor was not the same as filling a vacancy in that office. If the Legislature had intended Article IV, § 6 to cover the filling of a vacancy, it could easily have done so, overruling *Ward*.<sup>5</sup>

Indeed, when the drafters of the Constitution wished to make clear that a vacancy is being filled, they said so in very specific terms. Article IV, § 5 states specifically that when there is a vacancy in the position of Governor, the

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<sup>5</sup> If Respondents and the trial court were correct in their interpretation of Article IV, § 6, then as soon as a Lieutenant Governor resigned or were removed, the Temporary President of the Senate would instantly become the Lieutenant Governor and there never be a vacancy. Yet Article IV, § 6 clearly contemplates that there can and will be vacancies in that office.

Lieutenant Governor “shall become governor.” Neither Article IV, § 6, nor any other provision of the Constitution, speaks of the temporary president “becoming” the Lieutenant Governor. Similarly, Article IV, § 6, provides that the Speaker shall “shall act as the governor” if the Governor’s role has devolved on to the Senate Temporary President of the Senate but the that office is vacant or the Temporary President of the Senate is otherwise absent or unable to perform the Governor’s duties. Again, providing that the Speaker “shall act as” the Governor is different from providing, in an adjacent clause, that the Temporary President shall merely “perform the duties” of the Lieutenant Governor.

Neither the Respondents nor the trial court cite any legislative history suggesting that the legislature intended that Article IV, § 6 was intended to partially negate Article XIII, § 3, revoke POL § 43, or in any way alter New York law regarding the filling of vacancies. One provision of the Constitution should not lightly be read to negate another.

Numerous opinions and decisions establish in parallel contexts that allowing an individual to carry out the duties of an office does not constitute the filling of a vacancy in that office. For example, in a 1965 case involving the filling of a vacancy in the office of Mayor of Fulton, the State Comptroller concluded that a City Charter provision providing for the president of the common council to “have all the powers and duties of mayor” did not prevent the Governor’s appointment of

a new mayor pursuant to POL § 43, in the absence of any other provision for filling the vacancy. The Comptroller reasoned:

This section authorizes the president of the common council to act as mayor during the absence or disability to act of the mayor. It assumes that there is a person who actually holds the office of mayor who is absent or unable to perform his duties, rather than a vacancy in the office of mayor. If a mayor resigns or dies there is no person who is mayor, and an acting mayor is insufficient to fill this vacancy.

Comp. Op. 64-861. Similarly, in 1966, then-Attorney General Louis J. Lefkowitz concluded that a provision of the Yonkers City Charter providing 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 by according to law,” did not provide for “filling” the vacant position of mayor, and that the only method for filling the position before the election was by Gubernatorial appointment under POL § 43. 1966 N.Y. Op. (Inf.) Att’y Gen. 171. *See also* 1947 Op. Atty. Gen. 78 (Governor may fill a vacancy in the office of supervisor in the city of Beacon because no law provides for such position to be filled).

The highest courts of several sister states, construing comparable language, have reached precisely the same conclusion. *See, e.g., In re Advisory Op. to the Governor*, 688 A.2d 288, 291 (R.I. 1997) (provision allowing for performance of the functions of the office of Lieutenant Governor by others does not fill vacancy in that position); *State ex rel. Ayres v. Gray*, 69 So.2d 187 (Fla. 1953) (office of Governor is vacant although “powers and duties” thereof “devolve on the President

of the Senate”); *State ex re. Martin v. Ekern*, 280 N.W. 393, 399 (Wis. 1938) (where powers and duties of Governor devolve on Lieutenant Governor and Secretary of State, office of Governor remains vacant); *Futrell v. Oldham*, 155 S.W.2d 502, 504 (Ark. 1913) (where the Senate President “performs the duties of the office” of Governor, there remains a vacancy in that office).

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

The trial court found the plain language of § 43 inapplicable because of an ostensible “contradiction” between Article XIII § 3’s provision that an appointment lapses at the “commencement of the political year next succeeding the first annual election after the happening of the vacancy,” and the requirement that a Lieutenant Governor be elected only at the same time as the Governor. Order at 16. This conclusion—on a theory not raised or addressed by the parties before the Court’s ruling—defies logic and ignores the historical construction of Article XIII, § 3 by the courts of this State, which have allowed appointments to extend beyond the time period specified in that section. *See, e.g., Wilson v Cheshire*, 254 N.Y. 640, 640 (N.Y. 1930) (per curiam, under Cardozo C.J.) (rejecting petitioner’s contention “that the board exceeded its power under the Constitution (article 10 § 5) [later renumbered as Art. XII, § 3] in attempting to fill the office [of County assessor] by appointment for a period beyond the present political year”).

Where “practical difficulties” preclude the holding of an election or the filling of a vacancy within the periods required by Article XIII, § 3, New York courts have construed that section to require that an election be held only in the shortest time “reasonably possible.” *See Roher v. Dinkins*, 32 N.Y.2d 180, 188 (1973); *see also In re Mitchell*, 219 N.Y. 242 (1916) (where election in accordance with timetable of Article XIII, § 3 cannot be carried out, it should be held on the “earliest practicable date”).

The Constitution’s provision for quadrennial election of both Governor and Lieutenant Governor similarly requires an election at the earliest time possible—in this case, the time at which such an election is legally permitted. Contrary to the trial court’s conclusion (Order at 16-17), Article XIII, § 3’s time limits do not somehow *sub silentio* remove entirely the Legislature’s specific power to provide for methods for filling a vacancy.

The Appellate Division avoided a similarly absurd result in *Trounstine v. Britt*, 163 A.D. 166 (1<sup>st</sup> Dep’t 1914). In *Trounstine*, the Appellate Division construed the Constitution as allowing for election of certain New York City judges in even-numbered years only. The Court found therefore that, where the “next political year” was an odd-numbered year, the Constitution required that, after the vacancy was filled by the Governor, “the appointee [would] hold office until the commencement of the political year next succeeding the first annual

election after the happening of the vacancy at which such officer *could by law be elected . . .*” *Id.* at 171 (emphasis added). While the Court of Appeals ultimately overturned this decision on other grounds—finding that even-numbered year elections were, after all, permissible for such judges, 212 N.Y. 421 (1914)—it did not undo the lower court’s conclusion 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. In the context of the judges at issue in *Trounstine*, that was the next even-numbered year. In the context of the Lieutenant Governor, it means the next quadrennial election. Thus, there is nothing incongruous about appointing a Lieutenant Governor to serve until that election.

Indeed, other states with constitutional or statutory provisions akin to Article XIII, § 3 have held likewise. Those states facing the issue have uniformly held that, in the context of the Lieutenant Governor, the phrase “next annual election” (or similar phrases) means “the next election where the Lieutenant Governor may be elected,” *i.e.*, the next gubernatorial election. For instance, the Supreme Court of California, upholding the constitutional authority of its governor to appoint a lieutenant governor, held that the constitutional provision requiring that that an appointment by the governor to elective office “expire at the end of the next legislature or at the next election by the people” meant the “next election . . . *which*

*the constitution has provided for a filling in that particular office; that is, the next gubernatorial election.”* *People ex rel. Lynch v. Budd*, 114 Cal. 168, 171 (Cal. 1896) (upholding power to of governor to appoint lieutenant governor under equivalent provision to Article XIII, § 3 and holding that the term “next election” means “*the next election for lieutenant governor*”) (emphasis added). Similarly, the Supreme Court of Ohio, interpreting Ohio’s statutory equivalent to POL § 43, which provides that an appointee to a vacancy in elective office “shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy,” observed that “the phrase ‘the first proper election’ [means] *the first election appropriate to the office; that is, the election at which such officers are regularly and properly elected*” and further held “[t]he appointee [to the office of Lieutenant Governor] ... should hold [office] until his successor is elected and qualified ... and that the first proper election for his successor is *the first election at which a lieutenant governor would have been chosen had no such vacancy occurred.*” *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 620-621 (Oh. 1902) (upholding authority of governor to appoint lieutenant governor) (emphasis added). Indeed, Appellants have found no case where a State permitted a provision like Article XIII, § 3 to stand in the way of the Governor’s power to appoint a lieutenant governor in the event of a vacancy.

In short, there is nothing in Article XIII, § 3 that requires construing POL § 43, as the trial court did, to exclude the Governor’s appointment of Lieutenant Governor Ravitch.

4. Gubernatorial Appointment To Fill A Vacancy In The Office Of Lieutenant Governor Is Consistent With New York’s Constitutional And Statutory Structure

The trial court’s interpretation is contrary not only to the text but also to the structure of the New York Constitution. Article IV, § 1 provides for both the Governor and Lieutenant Governor to run on the same ticket: “They shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices . . . .” This section contemplates that the Governor and Lieutenant Governor will both be from the same political party. But the Temporary President of the Senate might well not be from the same political party as the sitting Governor—as would have been the case had Senator Espada continued to claim, as he did in June, that he was aligned with the Republicans and the rightful claimant to the Senate presidency. Thus, construing Article IV, §6 to require the Temporary President of the Senate to perform the duties of Lieutenant Governor for the duration of a gubernatorial term, while barring the Governor from filling that vacancy, would frustrate both the operation of Article IV, § 1 and the will of the statewide electorate that originally chose the Governor and also chose a member of the Governor’s political party to be Lieutenant Governor. As Governor Dewey

noted, “there is a great advantage in being able to entrust many of the complex administrative tasks of the Governor to an able Lieutenant Governor,” but this would not be possible “if the Lieutenant Governor was required, as a matter of party loyalty, to lead the minority party.” Gov. Thomas E. Dewey, *Message of the Governor in Relation to Proposed Constitutional Amendment for Joint Election of Governor and Lieutenant Governor*, at 3 (1953) (“Dewey Message”).

Respondents’ position also would have the anomalous result that the substitute for the Lieutenant Governor and successor to the Governor could be a Senator elected by the citizens of a single county, representing merely 1.6 % of the State’s electorate, without any connection to the executive policies that the entire State’s voters chose at the last quadrennial election. In *Ward v. Curran*, the Court observed that the Lieutenant Governor “has state-wide duties . . . which should be performed by an elected official in the state at large *and not by one elected by the voters of a single senatorial district, as is the case of the temporary president of the senate.*” 44 N.Y.S. at 241-242 (emphasis added).

It was exactly this concern that led the legislature to amend the Constitution after the *Ward* decision. Article IV, § 1, providing that the Lieutenant Governor shall be chosen at the same time, and for the same term as the Governor, was added in 1953, to make clear that the Constitution does not provide for separate election of the Lieutenant Governor. Prior to this 1953 amendment, and a parallel

amendment to POL § 42 in 1944 (Chapter 3 of the Laws of 1944), a vacancy in the Lieutenant Governor’s office was filled by special election.<sup>6</sup> This special election process was eliminated, in part, on the ground that a separate, mid-term election for Lieutenant Governor raised the specter that the Governor and Lieutenant Governor would be from different political parties, which could result in “confusion and maladministration.” Dewey Message, at 4.

Significantly, these constitutional and statutory amendments ended the possibility of filling of the Lieutenant Governorship by non-quadrennial election when only that office is vacant, but specifically did not prohibit filling the position of Lieutenant Governor by appointment as provided for by the version of POL § 43 that existed at the time. *See Memorandum Regarding Chapter 3 of the Laws of 1944* (“The purpose of this bill is to dispense with the need *for an election* to fill the vacancy in the Lieutenant Governorship between the general elections in which the Governor is a candidate.”) (emphasis added).

Allowing the Governor to appoint a Lieutenant Governor is also entirely consistent with the Legislature’s provisions in POL § 41 for filling vacancies in the offices of Comptroller and Attorney General. These two offices occupy “watchdog” roles over the executive branch. The Attorney General is independent of the Governor’s office, and has the authority to investigate and prosecute

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<sup>6</sup> Such an election appears to have occurred twice: in 1847 and again in the 1943 election that followed and was enabled by the *Ward* decision.

misconduct within the executive branch. The Comptroller is the chief fiscal officer for the State, responsible for, among other things, auditing the spending practices of all State agencies and local governments and reviewing the New York State and City budgets. It is understandable that the Legislature, in effectuating Article XIII, § 3, would have specified that the Legislature, and not the executive, would fill vacancies in these offices. By contrast, because the Lieutenant Governor runs on a joint ticket with the Governor, and is meant to be in accord with the Governor and his policies, it makes sense that the Legislature would have chosen to allow the Governor, through POL § 43, to fill a vacancy in that office by appointment.

Nor is there any reason to suppose that the Governor should have obtained Senate advice and consent for such a gubernatorial appointment. Where the drafters of the Constitution intended to require the advice and consent of the Senate for a gubernatorial appointment, they did so explicitly. *See, e.g.* Article VI, § 4(e) (“the governor shall appoint, with advice and consent of the senate, [a judge] ... “whenever a vacancy occurs in the court of appeals.”); Article VI, § 21 (a vacancy in office of the supreme court or county court shall be filled at the next general election but until such time the vacancy shall be filled by “the governor by and with the advice and consent of the senate if the Senate shall be in session”). Notably, these constitutional provisions further provide that, should the Senate not be in session at the time the vacancy occurs, the Governor will make an

appointment to fill the vacancy in the interim. *See, e.g.*, Article VI, § 2(f) (when a vacancy occurs in the court of appeals while the senate is not in session, “the governor shall fill the vacancy by interim appointment upon the recommendation of a commission on judicial nomination”); Article VI, § 21 (“if the senate shall not be in session, the governor may fill such vacancy by an appointment”). The constitutional framers thus were acutely aware of each of the available options for filling vacancies in public office, and gave careful consideration to the “next best case” scenarios in the event that their first preference for filling a vacancy was unavailable. The framers chose not to provide for advice and consent of the Senate in the case of the Lieutenant Governor, and that choice must be respected. The People of New York are free at any time to amend their Constitution to provide for a different method of filling a vacancy in the office of Lieutenant Governor. Indeed, the Legislature can do so without the need for constitutional amendment merely by a majority vote to modify POL § 43. But unless and until they do so, the clear language and structure of the Constitution and the laws created pursuant to that Constitution must control.

The Governor’s action thus was lawful and constitutional; at a minimum, Respondents have failed to meet their heavy burden to show, by clear and convincing evidence, that their challenge is likely to succeed on the merits. For

this reason alone, the trial court’s grant of a preliminary injunction should be reversed.<sup>7</sup>

**B. Respondents Fail To Demonstrate Irreparable Harm**

In addition to failing to show likelihood of success on the merits, Respondents failed to show clear and convincing evidence of irreparable harm in the absence of preliminary relief. The Respondent Senators will not suffer any harm, let alone any irreparable harm, if the Lieutenant Governor is permitted to continue to perform his duties pending final resolution of this action.

In finding irreparable harm, the trial judge accepted the Respondents’ concocted scenarios suggesting they will somehow be deprived of their “freedom of political speech” if Lieutenant Governor Ravitch were to preside over the Senate, because he supposedly might “refuse to yield to [Respondents] on the floor of the Senate” or “worse rule [one of them] out of order,” might deliver a “casting vote” in the case of a tie, or might “preclude a substantive matter from being addressed on the floor.” Lewis July 22 Aff., at ¶¶39-42; Order at 17. Such scenarios cannot constitute irreparable harm because they are wholly speculative and conjectural. *See. e.g., Khan v. State University of New York Health Science Center at Brooklyn*, 706 N.Y.S.2d 192, 194 (2d Dep’t 2000) (“plaintiff’s

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<sup>7</sup> Appellants also request that this Court exercise its power under CPLR 5522 and dismiss the Respondents’ action for failure to state a claim under CPLR 3211(a)(7) because Respondent have not shown any likelihood of success on the merits.

contentions are wholly speculative and conclusory, and, therefore, are insufficient to satisfy the burden of demonstrating irreparable injury”); *Golden v. Steam Heat, Inc.*, 628 N.Y.S.2d 375, 377 (2d Dep’t 1995) (“irreparable harm must be shown by the moving party to be imminent, not remote or speculative”).

These speculations are also constitutionally dubious. *Elrod v. Burns*, 427 U.S. 347 (1976), the only authority relied upon by the trial court for its finding of irreparable harm from deprivation of freedom of speech (Order at 17), is of no assistance to Respondents. That case involved claims by civil service employees who were fired because they did not belong to the same political party as the presiding county sheriff. It does not suggest that a Senator has a free speech right to defy the procedural rules of the Senate or any other body where, as in court, speech is necessarily regulated. Respondents’ speculations are in any event beside the point, for the Governor has made clear that Lieutenant Governor Ravitch *will not preside* over the Senate pending the final resolution of the issues raised in this case. Paterson Aff., at ¶ 11. Such scenarios thus provide no basis for a preliminary injunction.

Respondents are similarly incorrect in suggesting that they will suffer irreparable harm because any legislation passed under the auspices of the appointment would be void *ab initio*. Contrary to Respondents’ suggestion, the *de facto* officers’ doctrine, which is well established under New York law, clearly

provides that acts performed by public officials are binding, even if those officials are later found not to have been properly appointed. *See, e.g., Matter of County of Ontario v. Western Finger Lakes Solid Waste Mgt. Auth.*, 167 A.D.2d 848, 848-49 (4th Dep't 1990) (upholding the validity of actions by a County Authority under the *de facto* officers' doctrine, notwithstanding alleged irregularities in the manner in which a member officer was appointed); *People ex rel. Devine v. Scully*, 110 A.D.2d 733, 734 (2d Dep't 1985) ("Under a long and unbroken line of authority, the official acts of a *de facto* judge are valid and binding on the public and interested third persons, including petitioner."); *Kessel v. Dodd*, 46 A.D.2d 645, 646 (2d Dep't 1974) (holding that the actions of an executive committee were authorized under doctrine of *de facto* officers, notwithstanding challenge to three members on committee, where members all possessed color of title); *People ex rel. Griffing v. Lister*, 106 A.D. 61, 61 (2d Dep't 1905) (holding that a contract entered into by a town board was valid and binding because board members were *de facto* officers, despite a dispute over the legitimacy of their title to office).

Moreover, the *de facto* officers' doctrine plainly applies as much to statewide executive officials as it does to judges and county and state boards. *See, e.g., State ex rel. Knowlton v. Williams*, 5 Wis. 308, 1856 WL 2062, at \*4-5 (1856) (holding that legislation approved by Governor who was in unlawful possession of his office was nonetheless valid and effective under *de facto* officers' doctrine)

(cited with approval in *In re Sherill*, 26 Bedell 185, 212-213, 81 N.E. 124 (N.Y. 1907) (“But, though the appointment or election of a public officer may be illegal, it is elementary law that his official acts while he is an actual incumbent of the office are valid and binding on the public and on third parties.”)). Thus, no legislation passed by the Legislature could ever be invalidated on the basis that Mr. Ravitch’s appointment was improper.

Finally, contrary to the trial court’s contentions (Order at 17), the fact that the Lieutenant Governor is next in the gubernatorial line of succession does not assist the Respondents in demonstrating irreparable harm. Indeed, the imperative for clarity in the line of succession is a factor that weighs *against* the issuance of a preliminary injunction. If the preliminary injunction is vacated, certainty about the line of succession is preserved in keeping with the text and structure of the Constitution, which make the Governor and Lieutenant Governor a single electoral unit and ensures compatibility between their visions and loyalties. If the preliminary injunction is upheld, by contrast, the succession would once again be thrown into doubt, inviting further power struggles, uncertainty and crisis in the Senate as the stakes are raised once more in the fight for the mantle of Temporary President of the Senate.

For all these reasons, the trial court erred in finding that Respondents had demonstrated irreparable harm and issuing the preliminary injunction, and this Court should vacate the order.

**C. The Balance Of The Equities Clearly Favors Denial Of Injunctive Relief**

The trial court further erred in determining that “the balance of equities is decidedly in plaintiffs’ favor.” Order at 18. Two isolated senators seek to enjoin the Lieutenant Governor from carrying out his functions as a key member of the executive branch, even though they rely solely on unspecified and speculative harms they will purportedly suffer as individual Senators. As detailed in Part I.A above, they will not suffer any cognizable harm as Senators if the preliminary injunction is vacated. But if the preliminary injunction is allowed to stand, the State of New York will suffer grave harm. Every day lost in using every available tool to address the State’s economic crisis is critical. The State and its People thus would suffer grave harm if Lieutenant Governor Ravitch, with his deep economic crisis management skills (*see* Carey Aff., at ¶¶ 5-6, 11), were not permitted to help execute and implement the Governor’s recovery strategy and to provide clarity in the line of succession. Now, as in past fiscal crises, the Governor needs a capable and trusted Lieutenant Governor who can assist him and who cannot be displaced, as a Temporary Senate President might be, by unstable and shifting political coalitions in the Senate.

The public interest likewise favors lifting the preliminary injunction.

“Whenever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff’s threatened irreparable injury and probability of success on the merits warrants injunctive relief.” *Chatham Towers, Inc. v. Bloomberg*, 6 Misc.3d 814 (Sup. Ct. N.Y. Co. 2004). Here, continuance of the preliminary injunction would “prevent public business from being effectively carried on.” *Valentin v. Simon*, 98 Misc.2d 5, 10 (Sup. Ct. N.Y. Co. 1979). And “[i]n the absence of extraordinary circumstances, an officer should not be enjoined from the performance of the business of the public pending the outcome of an ouster proceeding.” *Cowan v. Wilkinson*, 828 S.W.2d 610, 616 (Ky. 1992).

Moreover, it is imperative that the State have a clear line of gubernatorial succession, and reinstating the preliminary injunction would create renewed uncertainty as to the true presiding officer of the Senate. *See Paterson Aff.*, at ¶ 3. While clarity is especially crucial during a time of great crisis such as this, it is even more important given the current volatility of the State Senate. *See Paterson Aff.*, at ¶ 6. At the time Governor Paterson decided to act to end the Senate stalemate by appointing Lieutenant Governor Ravitch, there were two Senators claiming to be the temporary president of the Senate, each of whom claimed to in the line of the succession to the Governor. Although the Senate stalemate

appeared as of July 9 to be resolved for the time being, the Senate continues to be unstable and the struggle for power persists. *Paterson Aff.*, at ¶ 6.

Nor is there is anything undemocratic about the Governor ensuring an orderly succession through appointment of the Lieutenant Governor. The Governor has unilateral authority to appoint many state and regional officers. And the Governor has the mandate of the entire State, unlike the temporary president of the Senate, who is elected from a single district. *See Ward v. Curran*, 44 N.Y.S. at 241-242 (noting that lieutenant governor's "state-wide duties" are properly "performed by an elected official in the state at large," and not by one elected, as the Temporary Senate President is, "by the voters of a single senatorial district"). Moreover, Article IV, § 1 of the Constitution, which was amended to ensure that the Governor and Lieutenant Governor are elected together on a single ballot, makes it altogether appropriate that the Governor should select a successor who shares his outlook and loyalties. *Carey Aff.*, at ¶ 10.

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

injunction here invites uncertainty and havoc. The balance of equities requires this Court to vacate the preliminary injunction.

### **III. THE PRELIMINARY INJUNCTION IS ILLEGAL UNDER CPLR § 6311**

The trial court, located in Nassau County in the Second Department, issued a preliminary injunction ordering that Appellant Ravitch be “preliminary enjoined from exercising any of the powers of the office of the Lieutenant-Governor of the State of New York.” (Order at 18). This injunction, however, is illegal. CPLR § 6311 expressly forbids any court outside the Third Department from granting such relief:

A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

CPLR § 6311(1).

Contrary to the trial court’s assertion (Order at 9), CPLR § 6311 is not merely a venue provision. Rather, the “inhibition of the statute is jurisdictional and an order not granted as prescribed is a nullity.” *People ex rel. Derby v. Board of State Canvassers*, 84 Sickels 461, 29 N.E. 358 (N.Y. 1891) (“We think that [the historical predecessor to CPLR § 6311] is applicable to all cases where the object of the proceeding is to restrain state officers or boards, while engaged in the performance of a legal or statutory duty.”).

In *Bull v. Stichman*, 72 N.Y.S.2d 202(Sup. Ct. 1947), *aff'd* 273 A.D. 311, 298 N.Y. 516 (N.Y. 1948) (cited with approval in *New York Central Railway Co. v. Lefkowitz*, 12 N.Y.2d 305 (N.Y. 1963)), the Court held that the plaintiff's application for a preliminary injunction restraining defendant state officials from making disbursements of funds could not be issued in Erie County (where the action was commenced), because any such application was required to be made in the Third Judicial Department, where the officials were located and where the relevant duty was performed. *Id.* at 206 (referring to predecessor to CPLR 6311(1)). The Court stated:

In this case, the defendants, public officers and public board, are located at the seat of government in the City of Albany, New York, which is in the Third Judicial Department, and accordingly an order for a temporary injunction is properly made at a Special Term in the Third Judicial District, which is in the Third Judicial Department. *Indeed, it cannot be made elsewhere.*

*Bull*, 72 N.Y.S.2d at 206 (emphasis added); *see also Queens-Nassau Transit Lines v. Maltbie*, 51 N.Y.S.2d 841, 849 (N.Y. Sup. 1944) (applying predecessor to CPLR § 6311 and holding that “[t]he principal office of the respondent is in the City of Albany and this proceeding in the nature of prohibition, which seeks to restrain and enjoin state officers, must be brought in the Third Judicial Department which embraces the City of Albany”).

Here, the trial court, located in the Second Judicial Department, erred in granting Respondents' request for a preliminary injunction prohibiting Lieutenant

Governor Ravitch from performing his duties. A preliminary injunction restraining Lieutenant Governor Ravitch may be granted only at a Supreme Court in the Third Department, where his office is “located” and his duties are to be performed.

The trial court argued that CPLR § 6311 was inapplicable on the theory that the requested injunction was “incidental” to the declaratory relief sought in this matter. Order at 9. To the contrary, Respondent’s request for a preliminary injunction was the only remedy before the trial court, and the only relief granted by the trial court in its Order. The trial judge’s reliance (Order at 9) on *New York Central Railway Co. v. Lefkowitz*, 12 N.Y.2d 305, is thus misplaced. In *Lefkowitz*, plaintiffs brought an action for a declaration that certain sections of the Railway Laws were unconstitutional and for a permanent injunction restraining the further enforcement of those statutes. *Id.* at 309. They did not seek any preliminary injunctive relief. The Court of Appeals relied on this important distinction and held that because plaintiffs sought only a declaratory judgment and a permanent injunction, the restriction in section 879 of the Civil Practice Act (the predecessor to § 6311), which applied only to preliminary relief, did not apply to the plaintiffs’ action.

Likewise, the trial court erred in concluding that Respondents may avoid the clear language of § 6311 because, “[i]f Mr. [sic] Paterson is not authorized by the constitution to appoint a lieutenant-governor, *a fortiori* he was not under a

statutory duty to make the appointment.” Order at 10. If CPLR § 6311 were read not to apply any time an executive officer’s authority is challenged as unconstitutional, any plaintiff seeking to enjoin public officials from exercising their duties could avoid its constraints simply by pleading that the officer was acting *ultra vires*. This is not the law. *Donnelly v. Roosevelt*, 259 N.Y.S. 355, (N.Y. Sup 1932), for example, applied the notice provision of section 879 of the Civil Practice Act (the predecessor to CPLR § 6311) to an attempt to restrain Governor Franklin D. Roosevelt from removing Jimmy Walker as the mayor of New York City, even though the plaintiff there claimed that the statute authorizing the Governor to remove the mayor was constitutionally invalid as a result of a recent constitutional amendment that had empowered the City to make laws for the removal of its own officers. *Id.* at 356.

Moreover, the trial court’s reasoning confuses the Governor’s statutory duty with that of Lieutenant Governor Ravitch. *See* Order at 9, 10. The preliminary injunction challenged here does not enjoin Governor Paterson from doing anything; it enjoins Lieutenant Governor Ravitch from performing *his* statutory and constitutional duties. Thus, contrary to the trial court’s contention, the question of whether Governor Paterson had the power to fill the lieutenant gubernatorial vacancy is irrelevant to the CPLR § 6311 analysis. The question is whether Lieutenant Governor Ravitch may be enjoined by a court outside the Third

Department from performing his own statutory duties. CPLR § 6311 makes clear the answer is No.

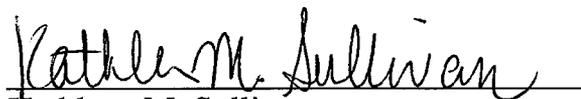
For all these reasons, the trial court was without power to grant the preliminary injunction, and for this reason alone, apart from or in addition to the reasons given above, this Court should vacate the preliminary injunction.

### CONCLUSION

For the foregoing reasons, 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,

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Date: August 3, 2009

## **CERTIFICATE OF COMPLIANCE**

### **Pursuant to 22 NYCRR § 670.10.3(f)**

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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