To be argued by
KATHLEEN M. SULLIVAN, ESQ.
(*Time Requested:* 30 MINUTES)

STATE OF NEW YORK
COURT OF APPEALS

ORIGINAL

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-VASQUEZ, as Secretary of State of the State of New York,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS
Nassau Co. Index No. 13426-2009
App. Div., 2nd Dept. Case No. 2009-06673

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STATEMENT OF QUESTIONS PRESENTED

1. Was the opinion and order of the Appellate Division properly made?

PRELIMINARY STATEMENT

This appeal presents the question whether the Governor of New York has authority to appoint a Lieutenant Governor to fill a vacancy in that office. Governor David A. Paterson deliberately and carefully reviewed all relevant statutory and constitutional authorities, correctly concluded that he did have such authority, and appointed Richard Ravitch Lieutenant Governor. The plain text of the relevant authorities provides a sequential and efficient solution to the problem of a vacancy in the office of Lieutenant Governor. The temporary president of the Senate may "perform all the duties" of the Lieutenant Governor "*during* such vacancy" under Article IV, § 6 of the Constitution. But the Legislature has authorized the Governor to "*fill*" such vacancy by appointment under Public Officers Law ("POL") § 43. When such an appointment is made, it ends the vacancy and relieves the temporary president of the Senate of his interim caretaker role.

The Governor's interpretation not only best harmonizes the relevant statutory and constitutional provisions but also makes eminent practical sense. This interpretation ensures that, even in the interim pending appointment of a new Lieutenant Governor, it will always be clear who presides over the Senate and who

will succeed the Governor if he is incapacitated. This interpretation ensures that the office of Lieutenant Governor may be filled by a single person of the same political party and vision as the Governor, just as it is when those two officers are elected together on a single ticket as the Constitution requires. And it ensures that the office of Lieutenant Governor—and thus the line of succession—is not left to volatile and shifting political battles in the Senate that create uncertainty, unpredictability, and the possibility that the Governor may face a deputy and successor from the opposite political party.

The Appellate Division, however, rejected the Governor's proper and sensible interpretation, ruling that "Public Officers Law § 43 cannot be constitutionally applied with respect to a vacancy in the office of lieutenant-governor." A-8. As the Appellate Division would have it, "*no* provision of the Constitution or of any statute provides for the filling of a vacancy in the office of lieutenant-governor other than by election." A-8.

The Appellate Division's interpretation of POL § 43 and Article IV, § 6 is clearly erroneous and should be reversed. *First*, the decision below ignores the plain language of POL § 43, holding that a provision entitled "Filling Other Vacancies" somehow does not provide for filling vacancies. The many persons appointed to fill vacancies under POL § 43 surely would be surprised to learn that, under the Appellate Division's ruling, they do not hold their offices after all.

Second, the decision below ignores the legislative history and prior judicial construction of the Public Officers' Law, which was amended in the aftermath of controversy that arose when Governor Thomas E. Dewey's lieutenant governor died in office. That history and case law, which the Appellate Division omits even to mention, strongly supports the Governor's interpretation.

Third, the decision below ignores the text and structure of related provisions of the Constitution that support the Governor's interpretation. Article IV, §§ 1 and 6 require the Governor and Lieutenant Governor to run together on a single ticket at the quadrennial election only. They thus contemplate a lieutenant governor of the same political party as the governor. And Article XIII, § 3, *requires* the Legislature to make laws for filling vacancies. The Governor's interpretation reads the relevant constitutional provisions harmoniously, while the Respondent's interpretation distorts the Constitution and assumes that the Legislature has shirked its duty.

The Appellate Division opinion erred in an additional respect by declining to dismiss the complaint altogether for lack of standing. This Court held in *Silver v. Pataki*, 96 N.Y.2d 532 (2001), that a legislator has no standing to contest an executive action unless he alleges personal injury rather than undifferentiated injury to the legislative body as a whole. The Appellate Division erred under *Silver* in holding that standing could rest on the speculative possibility that, "as

President of the Senate, Mr. Ravitch *may* rule the Senators' remarks on the floor of the Senate not germane, or *may* nullify their votes on important matters by exercising casting votes to break ties." A-5 (emphasis added). This Court has never held that such speculative and inchoate harms can be the basis for legislator standing, and even if they could, this would merely replace a standing problem with a ripeness problem. If upheld, the Appellate Division's standing rule would open the courts to a flood of lawsuits by legislators lacking any basis for claiming personal injury or imminent harm. Finally, the Appellate Division would blithely circumvent the Attorney General's exclusive standing to contest title to office in a *quo warranto* action merely because in its view the "public interest" requires it. A-4. This Court has never approved such frank disregard for the separation of powers.

For these reasons,[1] this Court should reverse the opinion and order of the Appellate Division, vacate the preliminary injunction and order dismissal of the complaint.

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[1] The Appellate Division committed numerous other errors in its opinion and order as well. Appellants focus here on the Appellate Division's core errors in finding likelihood of success on the merits and standing, but note that the following errors provide additional and independent grounds for reversal:

(1) The decision below erroneously ignored Respondent's lack of any irreparable harm, a necessary prerequisite for a preliminary injunction. *See Gluck v. Hoary*, 55 A.D.3d 668, 668 (2d Dep't 2008). Respondent's fears that Lieutenant Governor Ravitch might suppress his speech or cast a tie-breaking vote against his position are "wholly speculative and conclusory, and, therefore, are insufficient to

STATEMENT OF THE CASE

This is a suit by a single individual senator—Senator Dean G. Skelos, elected from the 9th Senatorial District—challenging the constitutionality of the Governor Paterson's appointment of Richard Ravitch to the office of Lieutenant

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satisfy the burden of demonstrating irreparable injury." *Khan v. State University of New York Health Science Center at Brooklyn*, 217 A.D.2d 656, 657 (2d Dep't 2000); *see Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep't 1995) ("irreparable harm must be shown by the moving party to be imminent, not remote or speculative"). Respondent likewise lacks any basis to fear that legislation enacted while Lieutenant Governor Ravitch presides over the Senate might be void *ab initio*, for the well-established *de facto* officers' doctrine 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., In re Sherill*, 26 Bedell 185, 212-213, 81 N.E. 124 (N.Y. 1907); *Matter of County of Ontario v. Western Finger Lakes Solid Waste Mgt. Auth.*, 167 A.D.2d 848, 848-49 (4th Dep't 1990) ; *People ex rel. Devine v. Scully*, 110 A.D.2d 733, 734 (2d Dep't 1985); *Kessel v. Dodd*, 46 A.D.2d 645, 646 (2d Dep't 1974); *People ex rel. Griffing v. Lister*, 106 A.D. 61, 61 (2d Dep't 1905).

(2) The Appellate Division erred in performing no separate analysis of the balance of equities as required for issuance of a preliminary injunction, *Gluck*, 55 A.D.3d at 668, and thus overlooked the fact that the equities in this case weigh strongly in favor of permitting Lieutenant Governor Ravitch to continue in office.

(3) The Appellate Division erred failing to hold the preliminary injunction illegal under CPLR § 6311(1), which expressly prohibits a trial court from issuing "[a] preliminary injunction to restrain a public officer ... from performing a statutory duty," outside "the department in which the officer or board is located or in which the duty is required to be performed"—here, the Third Department. The Appellate Division suggests it may ignore this provision because "either Mr. Ravitch is the lawfully appointed Lieutenant-Governor or he is not." A-6. But such a tautology, while obvious, cannot justify ignoring CPLR § 6311, which applies even where it is alleged that the Governor has exceeded his constitutional authority, *Donnelly v. Roosevelt*, 259 N.Y.S. 355 (N.Y. Sup. 1932) (applying predecessor statute), and bars jurisdiction to issue preliminary relief whether or not the public officer will necessarily prevail on the ultimate merits.

Governor of the State of New York. On July 9, 2009, Respondent commenced this lawsuit by filing a complaint and ex parte request for a temporary restraining order and preliminary injunctive relief in the Supreme Court, Nassau County, Senator Skelos's home county. A-40. He was initially joined in the suit by Senator Pedro Espada, Jr., elected from the 33rd Senatorial district. On July 22, 2009, the Supreme Court sitting in Nassau County (LaMarca, J.) issued an order granting Respondent's request for a preliminary injunction and denied Defendants-Appellants' motion to dismiss the complaint. A-27.

An appeal to the Second Department of the Appellate Division followed, with Senator Espada informing the court he was no longer participating in the appeal. B-45. On July 30, 2009, the Appellate Division ordered a partial stay of the preliminary injunction pending appeal. A-29. On August 20, 2009, the Appellate Division issued an opinion and order affirming the order of the Supreme Court and vacated the partial stay. A-8. On its own motion, the Appellate Division granted the parties leave to appeal to this Court pursuant to CPLR § 5602(b)(1) and certified the question of the propriety of its order and opinion. A-9.

STATEMENT OF FACTS

A. Constitutional And Statutory Background[2]

This case involves the filling of a vacancy in the office of Lieutenant Governor. Article XIII, § 3 of the Constitution of the State of New York ("the Constitution") states:

> The legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his or her office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy ... .

This provision speaks in mandatory terms. To fulfill this constitutional mandate, the Legislature enacted three provisions of the Public Officers Law ("POL").

First, POL § 41 provides for filling vacancies in the offices of Comptroller or Attorney General by legislative resolution:

> § 41. Vacancies filled by legislature
>
> When a vacancy occurs or exists, other than by removal, in the office of comptroller or attorney-general, or a resignation of either such officer to take effect at any future day shall have been made while the legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such actual or prospective vacancy.

Second, POL § 42 provides for the filling of vacancies in elective offices such as U.S. House or Senate seats, but expressly excludes the offices of Governor and Lieutenant Governor. POL § 42(1) provides:

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[2] For this Court's convenience, copies of the key provisions at issue in this case are included in the Addendum attached hereto at B-1.

§ 42. Filling vacancies in elective offices

> 1. A vacancy occurring before September twentieth of any year in any office authorized to be filled at a general election, except in the offices of governor or lieutenant-governor, shall be filled at the general election held next thereafter, unless otherwise provided by the constitution, or unless previously filled at a special election.

The offices of Governor and Lieutenant Governor were expressly excluded from this subsection in 1944 in response to the decision in *Ward v Curran*, 266 A.D. 524 (3d Dep't 1943), *aff'd*, 291 N.Y. 642 (1943), which held that, pursuant to the then-existing version of POL § 42(1), an election for the office of Lieutenant Governor was required to be held at that upcoming general election following the death of Lieutenant Governor Thomas W. Wallace during the administration of Governor Thomas E. Dewey.[3]

POL §§ 42(4) and 42(4-a) further provide for the filling of vacancies in U.S. House and Senate seats. Section 42(4) provides that a vacancy in the office of a representative in Congress shall be filled either by special election or at the next general election, depending on the timing of the vacancy. Section 42(4-a) authorizes the governor to "make a temporary appointment to fill [a] vacancy" in the office of a U.S. Senator. The term of that appointment depends on when the vacancy occurs. For instance, if a vacancy in a senate seat occurs "in any odd

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[3] The Governor and Lieutenant Governor have been expressly excluded for over 100 years from POL § 42(3), which authorizes the governor "in his discretion" to "make proclamation of a special election" on the failure to elect to any office "except that of governor or lieutenant-governor."

numbered calendar year" the appointment lasts "until the third day of January in the next odd numbered calendar year."

Third, POL § 43 addresses the filling of all vacancies not otherwise provided for by POL § 41 or § 42. POL § 43 provides, without limitation by office and without any exclusion of the office of Lieutenant Governor such as in POL § 42:

> § 43. Filling other vacancies
>
> 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. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term.

Article IV, §§ 1, 5 and 6 of the Constitution provide for election and succession to the offices of Governor and Lieutenant Governor. Article IV, § 6 provides:

> The lieutenant-governor shall possess the same qualification of eligibility for office as the governor. The lieutenant-governor shall be the president of the senate but shall have only a casting vote therein . . . .
>
> In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the duties of office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.

In 1945, Art. IV, § 6 was amended to provide that "No election of a lieutenant-governor shall be had in any event except at the time of electing a governor." This amendment was adopted in response to the court's decision in *Ward* in order to

ensure that the office of Lieutenant Governor could not be filled on its own by special or general election. At the same time, Art. IV, § 6 was also amended to provide that, upon a vacancy in the office of the lieutenant governor, the temporary president of the senate "shall perform all the duties of lieutenant- governor during such vacancy." Prior to this amendment, upon the absence of the lieutenant governor, the temporary president of the senate was empowered only to preside over the senate.

Nine years later, in 1953, Article IV, § 1 was amended to provide that the "governor and the lieutenant governor ... shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices." This amendment was supported by then-Governor Dewey.

B. The Governor's Appointment of the Lieutenant 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. Pursuant to Article IV, § 5 of the Constitution, which provides that, "In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term," Paterson became Governor. Respondent does 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.

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. A-55. 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. A-309; A-56. 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, but that action was dismissed as "improvident" for the courts to decide. A-68. 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. A-309 – A-310; A-56.

Governor Paterson took numerous careful and deliberate steps to resolve the Senate crisis, seeking to mediate the dispute between the rival Senate factions and calling extraordinary sessions pursuant to his powers under Article IV, § 3 of the Constitution. A-310. When the warring camps met in separate sessions without a quorum present, the Governor filed a successful petition for mandamus in the Supreme Court, Albany County, ordering the Senators to attend extraordinary sessions as one body, but the legislative impasse persisted. A-57.

Having exhausted other options, the Governor exercised his power under POL § 43 to appoint Richard Ravitch as Lieutenant Governor on the evening of July 8, 2009. A-309. There is no dispute that Mr. Ravitch meets the age and residency qualifications for the office of Lieutenant Governor set forth in Article IV, § 2 of the Constitution. 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 that office's policies and procedures. A-177.

C. Proceedings In The Supreme Court

In the middle of the night on July 8, 2009, Respondent's counsel (along with counsel for Senator Espada)[4] drove the five hours from Albany to Nassau County, Senator Skelos's home county, to file this lawsuit and seek an *ex parte* temporary restraining order. Respondent's 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. A-43; A-46. The only harms described in the complaint were "violation of their office" if the senators participated in a legislative session "conducted under the aegis of an interloper," and the possibility that any legislation passed under such aegis would be "void *ab initio*." A-46.

The Supreme Court, Nassau County (Lally, J.), initially issued a temporary restraining order barring the Lieutenant Governor's appointment and execution of any of the duties of his office, A-36 [Order Entered July 9, 2009, *Skelos v. Espada*, No. 13426/09 (Sup. Ct. Nassau Co.)], but that order was vacated on the afternoon of July 9, 2009, by the Appellate Division, Second Department (Austin, J.), A-35. That same day, Appellants filed a cross-motion to dismiss the Complaint under CPLR § 3211 on grounds including lack of standing and failure to state a claim. A-223.

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[4] In light of the withdrawal of Respondent Senator Espada from this Appeal, Appellants refer to the Respondent as singular throughout this brief.

After briefing and oral argument, the Supreme Court, Nassau County (LaMarca, J.) issued an order entered July 22, 2009, granting a preliminary injunction barring Mr. Ravitch "from exercising any of the powers of the office of the Lieutenant-Governor of the State of New York" and denying Appellants' cross-motion to dismiss Respondent's complaint. A-27. Justice LaMarca found that the Respondent 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," A-24, a harm not alleged in the complaint, and rejected the argument that the Attorney General has exclusive standing to challenge title to office in a writ of *quo warranto*, holding that *quo warranto* is limited to circumstances where there is a "contested election," A-22. Justice LaMarca also found no bar to issuance of the preliminary injunction in Nassau County despite 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." A-18 – A-19.

Turning to the merits, Justice LaMarca held that POL § 43 does not authorize the Governor to appoint a Lieutenant Governor because "Article XIII § 3 cannot apply to the office of lieutenant governor." A-25. 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," which conflicts with the requirement in Article IV, § 6 that the Governor and Lieutenant Governor be elected at the same time. A-25. To reconcile POL § 43 with Article XIII, § 3, Justice LaMarca ruled that "the office of lieutenant-governor is not an 'elective office'" under POL § 43. A-26.

During the pendency of the Supreme Court proceedings, Senator Espada announced that he would return to voting with the Democratic conference, accepting the position of Majority Leader and "abandon[ing] any and all claims to be the Temporary President." A-158. While the Senate resumed legislative function on July 9, 2009, political infighting continued. A-310.

D. Proceedings In The Appellate Division

Appellants sought expedited appeal in the Appellate Division, Second Department, which issued a stay (per Hall, J.) of the Supreme Court's order pending full review. A-30. In support of extending the stay throughout the appeal, Governor Paterson submitted an affidavit and Former Governor Hugh L. Carey submitted an affirmation, each attesting that the appointment was vital to solving the dire financial crisis facing the State and ensuring a stable line of succession. A-310 – A-312; A-313. On July 30, 2009, after briefing and argument, the Appellate Division stayed the injunction except that Lieutenant Governor Ravitch

would not preside over the Senate, a condition suggested by the Governor himself. A-13; *see* A-311.

On August 11, 2009, counsel for Respondent Espada notified the Appellate Division by letter that Senator Espada "would not be filing a brief on appeal and that he did not wish to participate in the appeal at this juncture." B-45. Consistent with this letter, Senator Espada took no part in the appeal process.

E. The Appellate Division's Opinion And Order

After briefing and oral argument, the Appellate Division, Second Department, issued an opinion and order on August 20, 2009 (per Fisher, J.P., Angiolillo, Dickerson and Eng, JJ.), affirming the Supreme Court's order, vacating the stay, and granting Appellants leave to appeal to this Court pursuant to CPLR 5602(b)(1). A-9 – A-10.

The Appellate Division first rejected Appellants' jurisdictional challenges. It acknowledged that the Attorney General, after posting on a website an unofficial statement on July 6, 2009, that questioned the constitutionality of the Governor's appointment of the Lieutenant Governor, had failed to file to take any role in the resolution of this dispute. But the court held that the exclusivity of the Attorney General's standing to challenge title to office through a *quo warranto* proceeding did not preclude Respondent's suit, stating that "we believe that the public interest requires that we address the issues now rather than await a quo warranto

proceeding brought by the Attorney-General." A-4. The court further held that, "[i]nasmuch as there are no disputed issues of fact to be tried here ... we hold that the instant action for declaratory judgment and injunctive relief is a permissible way to challenge the Ravitch appointment." A-4.

The Appellate Division next held that the Respondent has standing to bring this action, despite the fact that he is a lone senator not speaking for the body nor himself in the line of succession to the governorship, "because, acting as president of the Senate, Mr. Ravitch may rule the Senators' remarks on the floor of the Senate not germane, or may nullify their votes ... by exercising a casting vote to break ties." A-5. The court further held that CPLR 6311(1) did not present a "jurisdictional bar" to the Supreme Court's issuance of injunctive relief. A-6. The Appellate Division did not consider the element of irreparable harm, nor did it make a finding as to the balance of the equities.

Turning to the merits in a brief four paragraphs, the Appellate Division held that POL § 43, despite its title ("Filling other vacancies"), "does not authorize the Governor to fill a vacancy but only to appoint a person to execute the duties of the vacant office until the vacancy is filled by election." A-7. The Court further held that "the statute cannot be constitutionally applied ... to support an appointment of Mr. Ravitch to execute the duties of the office of lieutenant-governor." A-8. Noting that Article IV, § 6 provides that the temporary president of the senate shall

"perform all the duties" of the Lieutenant Governor during a vacancy, the Court held that "'[e]xecuting' the duties of lieutenant-governor ... cannot mean something different from 'performing' the duties of lieutenant-governor ... ." A-8. The court thus held POL § 403 "cannot be constitutionally applied with respect to a vacancy in the office of lieutenant governor because it does not authorize the Governor to fill the vacancy and it would permit an appointee of the Governor to do what the Constitution mandates be done by the temporary president of the Senate." *Id.* The Appellate Division thus affirmed the Supreme Court order granting the preliminary injunction.

ARGUMENT

This Court should reverse the decision of the Appellate Division below because it is based upon an erroneous interpretation of the Constitution and POL § 43. In appointing Lieutenant Governor Ravitch, Governor Paterson acted properly under POL § 43, which itself was 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 and 6. The Appellate Division erred in concluding, despite the plain text of the applicable law and the relevant legislative history, that Governor Paterson was not authorized to fill the vacancy in the office of Lieutenant Governor by appointment.

This Court also should reverse the Appellate Division and order the action dismissed because Respondent lacks standing to bring this action. Senator Skelos does not allege any personal injury from the appointment of Lieutenant Governor Ravitch, as opposed to abstract institutional injuries common to members of the Senate as a whole, and his alleged harms are entirely conjectural rather than imminent. He thus lacks standing under this Court's decision in *Silver v. Pataki*, 96 N.Y.2d 532 (2001), which definitively set forth the governing limits on standing by individual legislators to challenge prospective executive action. The Appellate Division's newly expansive standing decision will, if upheld, open the courts of this state to an unwanted flood of political battles based on pure speculation rather than ripe legal disputes. In any event, Respondent is 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. The Attorney General has not filed any *quo warranto* action and is not a party to this suit, and the Appellate Division erred in disregarding this deficiency.

I. THE GOVERNOR HAS CLEAR STATUTORY AUTHORITY TO FILL A VACANCY IN THE OFFICE OF LIEUTENANT GOVERNOR BY APPOINTMENT, AND EXERCISE OF THAT AUTHORITY IS ENTIRELY CONSISTENT WITH THE CONSTITUTION

The Appellate Division erred in upholding the preliminary injunction, misreading POL § 43, its legislative history, and the relevant provisions of the

Constitution. As the Appellate Division recognized (A-7), Article XIII, § 3 mandates that "[t]he legislature shall provide for filling vacancies in office."[5] POL §§ 41-43 were enacted specifically pursuant to the authority granted by Article XIII, § 3, and together, these provisions provide a comprehensive mechanism for dealing with vacancies in office. The only way the Legislature can be read to have lived up to the mandate of Article XIII, § 3 is if POL § 43 is understood to apply to the office of Lieutenant Governor.[6] The plain text and legislative history of POL § 43 support such an interpretation, and neither Article IV, § 6 nor Article XIII, § 3 of the Constitution negates it.

Moreover, interpreting POL § 43 to allow the Governor to fill vacancies in the office of Lieutenant Governor is the only way to harmonize Articles XIII.3 with Article IV, §§ 1, 5 and 6. "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." *Social Investigator*

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[5] *See Conover v. Devlin*, 14 How. Pr. 315 (N.Y. 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 . . .").

[6] 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.

Eligibles Ass'n v. Taylor, 268 N.Y. 233, 237 (N.Y. 1935); *see In re M.B.*, 6 N.Y.3d 437, 447 (2006).

Thus, 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, and the Appellate Division's ruling to the contrary should be reversed.

A. Public Officers Law § 43 Authorizes The Governor To Fill A Vacancy In The Office Of Lieutenant Governor

1. The Plain Language Of The Public Officers Law

POL § 41, entitled "*Vacancies filled by legislature*," provides for filling vacancies in the offices of Comptroller or Attorney General. POL § 42, entitled "*Filling vacancies in elective offices*," 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, entitled "*Filling other vacancies*," 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.[7]

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[7] 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

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 (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 Constitutional 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 Appellate Division tellingly declined to agree with the trial court's contorted construction of POL §43 to exclude the office of Lieutenant Governor as somehow not an "elective" office.

Second, there is no other provision of law for filling a vacancy in the Lieutenant Governorship. POL § 41 provides for filling by joint legislative resolution only vacancies in the offices of Attorney General and Comptroller. POL § 42 now expressly carves out the Lieutenant Governor from its provisions for special elections or interim gubernatorial appointments. And as the Appellate Division itself held (A-7), Article IV, § 6 does *not* provide for "filling a vacancy" in the office of Lieutenant Governor, but rather provides only that, in the case of a "vacancy in the office of lieutenant-governor, the temporary president of the senate

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appointment of secretary of state, comptroller, treasurer and other State positions).

shall *perform all the duties* of the Lieutenant Governor *during the vacancy*" (emphasis added).

The Appellate Division's opinion is based on either of two mistaken premises never raised by Respondent or the trial court. On the one hand, the Appellate Division suggests that, despite the plain language of POL § 43, and the fact that the statute was specifically enacted pursuant to the express mandate of Article XIII, § 3 that the legislature provide for the "filling of vacancies," POL § 43 nonetheless does not actually provide for the filling of vacancies. Alternatively, the Appellate Division suggests that POL § 43 is mere surplusage that uselessly provides for the filling of vacancies only by the next election—a result that would occur in any event without the existence of POL §43. A-7.

The Appellate Division's reading of POL § 43 is untenable and fails for several reasons. *First*, it ignores the plain language of the provision. POL § 43 is entitled "Filling other vacancies." It defies logic to assume that the legislature would intend a statutory provision entitled "Filling other vacancies," in a sequence preceded by provisions entitled "Vacancies filled by legislature" (POL § 41) and "Filling vacancies in elective offices" (POL § 42), to relate to anything other than the "filling" of "vacancies." Moreover, it is well settled under New York law that the heading of a provision should be used to construe the meaning of a provision. *See People v. Ecrole*, 308 N.Y. 425, 432 (1955) ("Those [section] headings are not

titles of acts, but are parts of the statute, limiting and defining their effect"); *Yearke v Zarcone*, 57 A.D.2d 457, 460 (4th Dep't 1977) (same); *Suffolk Regional Off-Track Betting Corp. v. New York State Racing and Wagering Board*, 47 A.D.3d 133, 138 (3d Dep't 2007) ("Yet, when a heading has been 'inserted by the Legislature as part of the ... statute, it limits and defines its effect, and is construed accordingly").

Nor can the Appellate Division's reading be reconciled with the plain language of the second sentence of POL § 43, which states that, "if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term." The reference to "such officer" means that the person appointed pursuant to the first sentence of POL § 43 is an "officer" and the reference to "shall hold" has meaning only if it refers to the act of "holding" an office. Thus the second sentence informs the meaning of the first sentence, confirming that an appointment under POL § 43 "fills" a vacancy.

Second, the Appellate Division misreads the phrase in POL § 43 providing that "the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election." The Appellate Division draws a false distinction between "execut[ing] the duties" of an office and "filling a vacancy" in an office. The two are in fact synonymous. Executing the duties of office is the

essence of filling an office. *See In re Davies*, 168 N.Y. 89 (1901) ("The legislative department makes the laws, while the executive executes, and the judiciary construes and applies, them. Each department is confined to its own functions, and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principle of a republican form of government.").

Nor does the phrase "until the vacancy shall be filled by an election" mean that a vacancy may be filled only by an election. To the contrary, it is already the case, even without POL § 43, that a vacancy will be filled by a new occupant at the next election for a vacant office. The legislature cannot have intended POL § 43 to be mere surplusage, incapable of actually accomplishing the purpose set out in its heading. To the contrary, POL § 43 plainly contemplates filling a vacancy in elective office by appointment, and the phrase "until the vacancy shall be filled by an election" merely limits the term of an appointment to fill a vacancy until the next election for the applicable office.

Third, the Appellate Division's reading of POL § 43, which does not cite a single judicial precedent, ignores the fact that the New York courts have long recognized that POL § 43 empowers the Governor to "fill vacancies." *See, e.g., Mercado v. Scribner*, 38 A.D.2d 444, 446 (2d Dep't 1972) (observing that POL § 43 "provides for the temporary filling of vacancies by the Governor until it is filled by an election".); *In re Hamlin*, 196 A.D. 714, 717 (4th Dep't 1921) (interpreting

POL § 43 (then numbered POL § 42) and holding that "the Governor had power to fill that vacancy"). In *Newman v. Beckwith*, 16 Sickels 205, 61 N.Y. 205 (1874), for example, this Court interpreted a statute providing that, "whenever a vacancy shall occur in the office of the sheriff of any county, the under sheriff of such county shall, in all things, execute the duties of sheriff of the county until a sheriff shall be elected or appointed," so that he "becomes sheriff" and "assumes all his duties and liabilities in respect to such unfinished business." Thus, contrary to the Appellate Division's interpretation of the language "execute duties" in POL § 43, this Court in *Newman* interpreted a statutory provision providing for an officer to "execute the duties" to mean that the officer "fills the vacancy" left by his predecessor's death.

Indeed, the Appellate Division's ruling that an appointment under POL § 43 does not fill a vacancy would come as a great surprise to the many gubernatorial appointees to office under POL § 43 who have long been treated under the laws of this State as actual office holders, not mere caretakers. Examples include the Supervisor of the City of Beacon, *see* 1947 N.Y. Op. Att'y Gen. 78 (B-12);[8] a Mayor and four Councilmen for the City of Lackawanna, *see* 1941 N.Y. Op. Att'y Gen. 123 (B-5); the Mayor of the City of Yonkers, *see* 1966 N.Y. Op. Att'y Gen.

[8] Appellants have included in an addendum to this Brief copies of this and other authorities not easily found, with references thereto denominated by page numbers B-1, B-2 etc., and respectfully asks that this Court takes judicial notice of these sources.

(Inf.) 171 (B-22); and the Mayor of the City of Fulton, *see* 20 N.Y. - CPTR 415 (1964) (B-28). The example of the Mayor of Fulton is especially significant, because the Comptroller's opinion said that the person appointed mayor could not simultaneously hold any other city office, demonstrating that the appointee became the mayor, and was not merely performing the duties of the mayor.

Thus, if the Appellate Division's interpretation of POL § 43 is allowed to stand, it would nullify numerous past appointments and effectively preclude such appointments in the future, resulting in confusion and uncertainty in the operation of the government. Moreover, it would have the anomalous result of making the Lieutenant Governor the one government official in the entire State of New York, from the Governor down to a county clerk, who cannot be replaced, even for a period as long as four years. There is no reason in text or logic for such a result.

2. The Legislative History Of The Public Officers Law

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. The Appellate Division never mentions, much less distinguishes, the key judicial decision in that dispute, *Ward v. Curran*, 266 A.D. 524 (3d Dep't 1943), *aff'd*, 291 N.Y. 642 (1943). In *Ward*, the Appellate Division addressed the consequences of a vacancy caused by the death of Lieutenant Governor Thomas Wallace during the administration of Governor Thomas E. Dewey. At that time, POL § 42 contained

no exclusion for the office of Lieutenant Governor as it does today. The question before the court was whether the then-existing provisions of POL § 42 permitted a new Lieutenant Governor to be voted for in the next general election, without waiting for the next quadrennial election.

In an opinion issued prior to the Appellate Division's decision in *Ward*, then-Attorney General Nathanial L. Goldstein had argued that an election was unnecessary because there was no vacancy in the Lieutenant Governorship because the Temporary President of the Senate was carrying out his duties, and was impermissible because POL § 42 made no specific mention of the Lieutenant Governor. 1943 N.Y. Op. Atty. Gen. No. 378 (B-7). *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 come out of *Ward*, and each supports the Governor's appointment of a Lieutenant Governor in this case. *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. If this was true of POL § 42 as it existed then, it is equally true of POL § 43 today.[9]

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

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[9] 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 N.Y. Op.Atty.Gen. at 382 (B-7). In the words of the Attorney General, "there is no distinction in language between [section 43] and section 42 of the Public Officers Law."

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 amended 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 (A-25) 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. And by ignoring *Ward* altogether, the Appellate Division ignores the leading judicial precedent supporting Governor Paterson's correct and sensible construction of POL § 43.

B. The Governor's Appointment Of A Lieutenant Governor Under POL § 43 Not Only Comports With But Harmonizes The Relevant Provisions Of The New York Constitution

In addition to misreading POL §43, the Appellate Division as well as the trial court misreads the relevant provisions of the New York Constitution. The Appellate Division errs in holding that Article IV, § 6 bars the Governor from appointing someone to "execute the duties" of the Lieutenant Governor under POL § 43. And the trial court erred in holding that Article XIII, § 3 bars the Governor from filling a vacancy under POL § 43.

Unlike the decisions below, the Governor's interpretation of POL § 43 harmonizes these provisions of the Constitution with each other and with Article IV, §§ 1 and 5, in keeping with the canon that "[t]he 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." *Social Investigator Eligibles Ass'n v. Taylor*, 268 N.Y. 233, 237 (N.Y. 1935); *see In re M.B.*, 6 N.Y.3d 437, 447 (2006).

1. Appointment Of A Lieutenant Governor Under POL § 43 Is Easily Harmonized With Article IV, § 6

The Appellate Division holds that "'executing' the duties of the lieutenant-governor" under POL § 43 "cannot mean something different from 'performing' the duties of lieutenant governor," as the Temporary Senate President does under Article IV, § 6. It further holds that "[i]t could not have been within the

contemplation of the drafters of the Constitution and the statute that, upon a vacancy in the office of the lieutenant-governor, there would be two caretakers—one the temporary president of the Senate, who would 'perform' the duties of the office, the other, and appointee of the Governor, who would 'execute' the duties of the office." A-8.

Notably, the Appellate Division cites no authority to support this argument that "executing duties" and "performing duties" are synonymous. And in fact, this very argument has been considered and rejected by this Court. In *The People ex rel. Henderson v. Snedeker*, 14 N.Y. 52 (1856), this Court was called on to decide whether a statute requiring that a deputy clerk "perform the duties" of clerk during a vacancy in that office limited the Governor's authority to appoint someone to "execute the duties" in the event of a vacancy under the power conferred by the historical predecessor to POL § 43. *Snedeker*, 14 N.Y. at 53-54. Significantly, this Court upheld the Governor's power to appoint a replacement clerk to "execute the duties" of that office upon the death of the incumbent clerk *notwithstanding* that another statute provided that the deputy clerk should "perform all the duties of the office" upon a vacancy. *Id.* (interpreting Laws 1849, § 26, which then provided that, "whenever vacancies exist or shall occur in any of the offices of the state … where no provision is now made by law for the filling of the same, the governor shall appoint some suitable person, who may be eligible to the office so vacant or

to become vacant to execute the duties thereof until the commencement of the political year next succeeding the next annual election after the happening of the vacancy.")

This Court explained:

> The system thus provided for is intelligible and harmonious. If a county clerk dies in office his deputy is immediately authorized to *perform the all the duties* of situation, and if no appointment is made by the governor he continues for all substantial purposes the incumbent until the next general election. But the governor is required to make an appointment, and, when he does so his appointee instead of the deputy is thenceforth to *execute the office* until the next general election.

Id. (emphasis added). In so concluding, this Court relied on its earlier decision in *The People ex rel. Smith v. Fisher*, 24 Wend. 215 (N.Y. 1840), in which this Court had also upheld power of Governor to appoint a replacement clerk to "execute the duties" of the office "whenever a vacancy shall occur" notwithstanding that another statute provided that that deputy clerk should "perform all duties appertaining to the office [of clerk]" in the event of a vacancy. In *Smith*, this Court observed: "The provisions are entirely harmonious. ... The governor is to appoint someone to *fill the vacancy*; but until that is done, the ... deputy clerk is to discharge the duties of that office." *Id.* (emphasis added).

Thus both *Snedeker* and *Smith* confirm that POL § 43 authorizes the Governor to appoint a replacement to *fill a vacancy* in public office even though another provision of law provides for someone to "perform the duties" of that

office prior to that appointment. Analogously, the fact that Art. IV, § 6 provides for the Temporary Senate President to "perform the duties" of the Lieutenant Governor during a vacancy in that office is no bar to the Governor's power to appoint a replacement to "fill the vacancy" and "execute the duties" of that office pursuant to the power conferred on him under POL § 43. The Appellate Division's interpretation of POL § 43 as displaced by Article IV, §6 is directly contrary to this Court's clear authority and must be rejected.

Other lines of precedent likewise confirm that, contrary to the Appellate Division's ruling, the distinction between "performing the duties" and "executing the duties" of public office is crucially significant. For example, while a public officer may hold one office and simultaneously "perform the duties" of another office, a public officer may not hold one office while also "executing the duties" of a second office. This would be contrary to the incompatible offices doctrine.

In *Smith v Dillon*, 44 N.Y.S2d 719 (3d Dep't 1943) the court observed:

> It is a well settled rule of the common law that a public officer cannot hold two incompatible offices at the same time. The rule is founded upon the plainest principles of public policy. It is embedded in the common law and has obtained from very early times. At common law and under constitutional and statutory prohibitions against the holding of incompatible offices, a person who accepts and qualifies for a second and incompatible office is generally held to vacate, or by implication resign, the first office.

Id. at 723. If upheld, the Appellate Division's conclusion that "performs the duties" is synonymous with "execute the duties" would mean either that every officer authorized to "perform duties" in the event of a vacancy is violating the incompatible officers doctrine, and must be held to have resigned his or her first office, or the Governor could effectively appoint a sitting officer to a second office under POL § 43 to "execute the duties" of that office without requiring that the appointee resign from his or her original office at all. For instance, the Governor could appoint the Mayor of Fulton to "execute the duties" of the office of Mayor of Yonkers and, because this is akin to "performing the duties" per the Appellate Division, the Mayor could perform both roles without violating the incompatible offices doctrine and would not need to resign from either. This would be an absurd result and cannot have been the intention of the legislature or the drafters of the Constitution in enacting POL § 43 and Article IV, § 6.

The Appellate Division's interpretation errs further in ignoring the plain language of Article IV, § 6. The role of the Temporary President of the Senate is applicable solely "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 in 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. This reading is consistent with this Court's decision in *Snedeker* and *Smith*, provides a sequential and efficient way to ensure that the duties of the office (and here the line of succession) remain continuously intact, and is the only way to harmonize Article IV, § 6 with Article XIII, § 3's requirement that the legislature provide for the filling of vacancies. The Appellate Division did not cite any legislative history suggesting that the legislature intended Article IV, § 6 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. And the legislature knew well how to exclude the Lieutenant Governor from POL §43 if it had wanted to, as it did just that expressly in the post-*Ward* amendment to POL § 42; its failure to do the same for POL § 43 supports the Governor's harmonious construction.

2. Appointment Of A Lieutenant Governor Harmonizes Article IV, § 6 With Article IV, § 1

The Appellate Division's interpretation is contrary not only to the text but also to the other relevant provisions of the New York Constitution and the structure they create for the Executive Branch. Article IV, § 6 provides that "No election for a lieutenant-governor shall be had in any event except at the time of electing a governor," and Article IV, § 1 provides that the Governor and Lieutenant Governor shall run on the same ticket: "They shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices … ."

These provisions contemplate 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 under POL § 43, would frustrate both the operation of Article IV, §§ 1 and 6 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) (B-18).

The Appellate Division's logic also would have the anomalous result that the *de facto* deputy 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 a majority of the entire State's electorate 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." 266 A.D. at 526.

It was exactly this concern that led the legislature to amend Article IV, § 6, after the *Ward* decision to ensure that the Lieutenant Governor cannot be elected separately from the Governor.[10] The possibility of such separate election was eliminated in part to avoid the specter that the Governor and Lieutenant Governor could be from different political parties, which could result, as Governor Dewey warned, in "confusion and maladministration." B-18. Significantly, these amendments ended the possibility of filling of the Lieutenant Governorship by non-quadrennial election but 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

[10] 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.

the Lieutenant Governorship between the general elections in which the Governor is a candidate.") (emphasis added) (B-43).

3. Appointment Of A Lieutenant Governor Satisfies Article XIII, § 3, Including Its Temporal Provisions

While it played no part in the Appellate Division's decision to affirm, the trial court found the plain language of POL § 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. A-25. This conclusion 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 (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 then-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, 248 (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 (A25-26), 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 (1st 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 be by law 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.

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 filling 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. For all the above reasons, the Governor's appointment of the

Lieutenant Governor thus was lawful and constitutional and the Appellate Division's Order should be reversed.[11]

II. THE COMPLAINT SHOULD BE DISMISSED AS NON-JUSTICIABLE FOR LACK OF STANDING OR RIPENESS

While the Governor has clear authority to appoint the Lieutenant Governor under POL § 43 and nothing in Article IV, § 6 negates that authority, that issue never need have been reached in this case because Senator Skelos, as a lone Senator who is not in the line of succession and does not speak for the Senate as a whole, lacks standing to bring this action. In trying to circumvent the standing problem, the Appellate Division also relied upon inchoate and speculative harms that raise insuperable problems of ripeness. And the Appellate Division offers no legitimate way around the Attorney General's exclusive standing to contest title to public office by way of a *quo warranto* action under Executive Law § 63-b. For any or all these reasons, the case should be ordered dismissed.

A. Respondent Does Not Allege Any Personal Injury As Required For Legislator Standing Under *Silver v. Pataki*

Until the Appellate Division's Order, New York law provided well-settled standards for legislator standing. In *Silver v. Pataki*, 96 N.Y.2d 532 (2001), this Court held that individual legislators lack standing to challenge the

[11] 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.

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* ... in no more than 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, Respondent alleges in his complaint only classic claims of abstract institutional injury, not personal harm. He alleges he will be in direct violation of his office if he participates 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*." A-46. But fears that the Senate will be presided over by an "interloper" or that the Senate would enact void legislation do not affect Respondent any more personally than they affect other senators or the Senate as a whole.

This Court did hold in *Silver* 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. Respondent fails to point to any vote he 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 Senator Skelos does not allege that Lieutenant Governor Ravitch has usurped his power. 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 joined Respondent in this challenge and indeed offered to file an *amicus curiae* brief in support of Appellants prior to Senator Espada's withdrawal from the appeal process. Senator Skelos has not claimed the title temporary president of the Senate during this litigation 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, even if there were some claim of usurpation of power, this claim would not belong to Respondent; it would belong to the entire Senate Chamber, and Respondent may not speak for, or bring an action on behalf of, the Senate as a

whole or his 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").

The Appellate Division did not address these points, and simply conceded that because Lieutenant Governor Ravitch has been preliminarily enjoined from presiding over the Senate, "no usurpation of power affecting the Senators and no nullification of their votes could yet have occurred." A-5. The Appellate Division asserted that a declaratory judgment action was appropriate to resolve this dispute even before any actual vote had been actually nullified, relying on *Silver* and *Coleman*. But nothing in either case supports the view that constitutional issues may not be litigated legislators, who lack any distinct, personal and imminent injury.

The Appellate Division's decision cannot be squared with *Silver*, which held 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), but did not permit declaratory relief in the absence of any actual, or even threatened, vote nullification. Nor can the decision below be squared with *Coleman*, which held that state Senators had standing to challenge the

constitutionality of a tie-breaking vote *actually cast* by a lieutenant governor that had *actually nullified* the effect of their combined vote. As the U.S. Supreme Court held in *Raines v. Byrd*, 521 U.S. 811 (1997), specifically distinguishing *Coleman*, a legislator has standing based on "vote nullification" only where he 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. It was thus clearly improper for the Appellate Division to rely on *Silver* and *Coleman* to provide Respondent with standing based on the mere possibility of vote nullification in the future, especially now that Senator Espada himself has broken the 31-31 partisan deadlock by returning to the Democratic fold, making that prospect even more remote.

Similarly, the Appellant Division's conjecture that Lieutenant Governor Ravitch might preside over the Senate and "rule the [Respondent's] remarks on the floor of the Senate not germane" cannot constitute the type of injury-in-fact required to confer legislator standing. A-5. Such alleged harm is purely speculative and thus "lacks the concreteness required ... to supply the missing ingredient of in-fact-injury." *New York State Assoc. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 213-214 (2004). In any event, the Appellate Division failed to explain how a ruling by the senate president that a debate is "not

germane" would amount to an usurpation of power rightfully belonging Senator Skelos. The power to "ensure that debate is germane to the question under discussion" is a power conferred on the Senate's presiding officer, not on Senator Skelos, or on any other Senator (other than the temporary president, Senator Smith). *See* Rules of the Senate of the State of New York 2009, Rule III, § 1, cited in A-5.

And the 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.* at 26 (citations omitted).

Therefore, under *Silver, Posner*, *Urban Justice Center,* and *Raines*, Respondents have failed to allege any harm sufficient to confer standing to bring

this lawsuit. The law of standing has been carefully developed by this Court over many years and should not lightly be disregarded. As this Court has emphasized:

> [T]the principle that only proper parties will be allowed to maintain actions is an ancient one ... The existence of an injury in fact – an actual legal stake in the matter being adjudicated – ensures that the party seeking review has some concrete interest in the dispute 'in a form traditionally capable of judicial resolution. The requirement of injury in fact is closely aligned with our policy not to render advisory opinions.
>
> Injury in fact thus serves to define the proper role of the judiciary, and is based on "sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining, yet enlarging context of a real controversy leads to sounds and more enduring judgments.

Society of the Plastics, 77 N.Y.2d at 772-773, cited in *Silver*, 96 N.Y.2d at 539. Were this Court to permit Respondent Skelos to bring this action despite the lack of any identifiable injury in fact, this would substantially expand the doctrine of legislator standing and would "open the possibility of countless legislator lawsuits that would impair the legislative process." *Silver*, 96 N.Y.2d at 542. The Appellate Division's order should therefore be reversed and Respondent's action dismissed.

B. The Injuries The Appellate Division Found Sufficient For Standing Are Not Ripe For Adjudication

The Appellate Division compounded its standing error by relying on merely conjectural "events which may not come to pass." *New York State Inspection, Security and Law Enforcement Employees, District Council 82, AFCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 240 (N.Y. 1984). The Appellate Court relied exclusively on the alleged harm to Respondent that "Mr. Ravitch *may* rule the

Senator's remarks on the floor of the Senate germane, or *may* nullify their [sic] votes ... by exercising a casting vote to break ties." A-5 (emphasis added). Such a wholly speculative holding not only fails to cure the standing problem but creates a lack of ripeness that independently warrants dismissal of the complaint.[12]

This Court has emphasized that claims based on harms that are speculative or contingent fail the test of ripeness and are not justiciable:

> Where the harm sought to be enjoined is contingent on events that may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract. ... [C]onsideration of a matter that is barred by the doctrine of ripeness ... would "require this court to render an advisory opinion, a practice not in accordance with the well settled policy of this state."

New York State Inspection, 64 N.Y.2d at 240; *see also New York State Assoc. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214 (N.Y. 2004) ("Plaintiff's speculation about the future course [of events] cannot, under our precedents, supply the missing ingredient of in-fact injury.").

Thus in *New York State Inspection*, petitioners complained that the decision by Governor Cuomo to close the Long Island Correctional Facility ("LICF") would exacerbate the risk of serious bodily injury to persons employed at State prison facilities. *Id.* at 238. This Court held, however, that petitioners' claim was "barred

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[12] Lack of ripeness may be raised at any time given that it goes to subject matter jurisdiction. *See Prospect v. Cohalan*, 65 N.Y.2d 867, 870 (N.Y. 1985) ("Although the parties have not urged nonjusticiability, since the issue implicates subject matter jurisdiction, we raise the issue on our own motion") (citations omitted).

by the doctrine of ripeness" because there was no evidence indicating where the current inmate population of LICF would be transferred, or whether the current employees of LICF would in fact be transferred to the same facilities as the inmates. *Id.*, at 240. Such "contingent" and "wholly speculative" harms failed to establish any "realistic danger" of injury. *Id.*

The same result is compelled here. In pointing to the *possibility* that the lieutenant governor "*may*" cast a tie breaking vote or rule Senator Skelos's remarks as not germane, the Appellate Division similarly relied on claims of harm that are "wholly speculative" and "contingent on events that may not come to pass." There is no current deadlock in the Senate as the partisan vote is split 32-30. There is no evidence that Mr. Ravitch will seek to or be called on to cast a tie-breaking vote. Nor is there the slightest reason to suppose that Lieutenant Governor Ravitch would rule any remark by Respondent Skelos (or any senator) "not germane."

Therefore, the Appellate Division erred in relying on harms that are not yet ripe for adjudication and are based on contingencies and speculation. This Court should apply well-settled carefully developed principles of standing and ripeness here and reverse the Appellate Division and order Respondent's action dismissed.

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

Even if the above standing and ripeness problems were not fatal, the complaint should be dismissed because the Appellate Division erred in permitting

Senator Skelos to invade the prerogative of the Attorney General, who is vested by Executive Law § 63-b with the sole authority to challenge title to public office, and who has chosen not to act in connection with the appointment of Lieutenant Governor Ravitch. *See, e.g., Delgado v. Sutherland*, 97 N.Y.2d 420, 424 (2002); *Hart v. State Bd. of Canvassers*, 161 N.Y. 507, 510 (N.Y. 1900); *Morris v. Cahill*, 96 A.D.2d 88, 91-92 (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 ... .

Respondent's and Senator Espada's counsel drove through the night to Nassau County in an effort to forestall the applicability of this provision. As Respondent's co-counsel stated at the time, the two senators sought immediate injunctive relief in order to prevent Lieutenant Governor from assuming office because, "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." A-53. While their effort proved futile, their concession was correct and warrants dismissal of the case.

In evading the clear requirements of the "ancient remedy" of *quo warranto*, as codified in Executive Law, § 63-b, the Appellate Division made several errors.

First, the Appellate Division incorrectly employed the narrow exception to the exclusivity of a *quo warranto* proceeding that applies where the only issue raised is one of law. A-4. As the cases cited by the Appellate Division make clear, 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 issue is one of law and does not require a determination of fact ... [an] 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, 959 (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*, 1 A.D.3d 72, 76 (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). But Respondent has expressly disavowed the option of proceeding under Article 78 (B-35-B-36; A-17) no doubt because if this action were an Article 78 proceeding, the venue restrictions of CPLR 506 would have applied, and the case would have been dismissed at the outset as improperly venued in Nassau rather than Albany County. Thus the Appellate Division erred in permitting Respondent's action under the exception set forth in *Dykeman* and its progeny for challenges to office brought by way of Article 78 proceedings.

Second, the Appellate Division erred by relying on *LaPolla v. DeSalvatore*, 112 A.D.2d 6 (4th Dep't 1985), for a proposition that is no longer good law. The court cited *LaPolla* for the proposition that a declaratory judgment action, rather than an Article 78 proceeding, may be used to challenge a public officer's title to office where the challenge involves questions of law only. A-4. 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. A-7. This holding was relied upon in *Felice v. Berger*, 182 A.D.2d 795, 797 (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.* But this Court 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*, 97 N.Y.2d at 424 (overruling *Felice* and denying plaintiff's attempt to challenge respondent's title via declaratory judgment action prior to respondent assuming office). *La Polla* and its sister cases thus are no longer good law, and the Appellate Division's attempt to rely on the narrow exception set forth in those decisions should be rejected.

Finally, the Appellate Division improperly relied on *Matter of Dekdebrun v. Hardt*, 68 A.D.2d 241 (4th Dep't 1979), for the proposition that, where the Attorney General has failed to act, a plaintiff may challenge title to office via a declaratory judgment action. In fact, in *Delgado*, this Court expressly *reserved* the question of whether "a declaratory judgment might lie as an alternative remedy where quo warranto has ceased to be available to the aggrieved candidate because the Attorney General has declined to act." *Delgado*, 97 N.Y.2d at 425. This is not the case in which to reach that question and answer it in the affirmative. In *Delgado*, this Court left that question open even where the Attorney General had considered *quo warranto* and declined to act. Here, a lone senator who lacked standing in the first place and now stands before this Court without a single other ally from the Senate, had his counsel drive through the night from Albany to Nassau to try to ensure that the Attorney General would have no such opportunity. This affront to the separation of powers, *see Dekdebrun*, 68 A.D.2d at 247-248 (Cardamone, J., dissenting) (emphasizing the "screening" function performed by the Attorney General and the "protective buffer" it provides to prevent "unmerited attacks on incumbents"), should be rejected, and this Court should reverse the Appellate Division's ruling and make clear that any challenge to the appointment of the Lieutenant Governor may be brought only by the Attorney General in a *quo warranto* proceeding.

CONCLUSION

For the foregoing reasons, the Appellate Division'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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AFFIDAVIT OF SERVICE BY FED EX & ELECTRONIC TRANSFER VIA EMAIL

STATE OF NEW YORK COURT OF APPEALS

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.

The undersigned being duly sworn deposes and says: John D. Van der Veer, is not a party of the within action and is over 18 years of age. That on August 28, 2009, I Federal Expressed three (3) copies of the Brief of Defendants-Appellant's and one (1) copy electronic transfer via email on the following parties:

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John D. Van der Veer
Printed Name

Sworn to before me this 28th
Day of Aug, 2009

Barbara A. Elcox
Notary Public

BARBARA A. ELCOX
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Commission Expires October 25, 2009