SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

DEAN G. SKELOS and PEDRO ESPADA, JR., as duly elected members of the New York State Senate, Plaintiffs-Respondents, v. 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-VAZQUES, as Secretary of State of the State of New York, Defendants-Appellants.	Index No.: Active App Div. No. 2009-06673 (Nassau County Clerk's Index No. 13426-2009)

BRIEF OF *AMICI CURIAE* CITIZENS UNION OF THE CITY OF NEW YORK AND COMMON CAUSE/NY IN SUPPORT OF DEFENDANTS-APPELLANTS

Caitlin J. Halligan
Gregory Silbert
Dotan Weinman
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Tel. (212) 310-8000
Fax (212) 310-8007

Richard Briffault
Of Counsel
Jerome Greene Hall
435 West 116th Street
New York, New York 10027

Attorneys for Amici Curiae

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PRELIMINARY STATEMENT

Over the past eighteen months, New York State has faced an urgent financial crisis, with an unemployment rate nearing 9% and a budget gap of approximately $20.1 billion.[1] At the same time, New York State's government has been paralyzed by a political crisis of unimaginable and unprecedented magnitude. In June of 2009, a series of partisan moves by several members of the State Senate resulted in an even split between the Senate Democratic and Republican conferences. With no Lieutenant Governor to serve as a presiding officer, state government ground to a halt. Despite repeated efforts by the Governor to convene the Senate in extraordinary session, the two conferences held separate sessions for eighteen days in a row, gaveling in and minutes later gaveling out without conducting any meaningful legislative business. During the nearly six-week long stalemate, key legislation languished in the Senate, including fiscal items of pressing importance for local governments across the State. The gridlock in the Senate created another dilemma as well: given the heated – yet apparently nonjusticiable – dispute over who was authorized to act as

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[1] Nicholas Confessore, *Plunge in Tax Revenue Widens State Deficit*, N.Y. Times, July 30, 2009; Patrick McGeehan, *City's Unemployment Rate Matches the Nation's*, N.Y. Times, July 16, 2009.

Temporary President of the Senate, there was grave uncertainty regarding the proper line of succession in the Executive Branch.

In the face of these financial, political, and constitutional crises, Governor Paterson exercised his authority pursuant to Section 43 of the Public Officers Law ("POL") to appoint Richard Ravitch as Lieutenant Governor. Mr. Ravitch brings to the job decades of experience in State government and unique expertise in handling financial crises.

Governor Paterson's action facilitated immediate resolution of the stalemate in the Senate, brought clarity to the line of succession, and provided the Governor with a strong partner to help guide the State through these difficult times. As explained below, Governor Paterson's action was fully within the powers conferred upon him by the New York State Constitution and the POL and Respondents therefore cannot prevail on their challenge to the Governor's appointment. Additionally, the appointment allows the orderly and effective administration of the Executive and Legislative Branches, and provides essential clarity regarding the line of succession in the Executive Branch. This Court should, therefore, reverse Supreme Court's decision of and vacate the preliminary injunction.

INTEREST OF *AMICI CURIAE*

As civic organizations that represent the public interest and work to promote good governance, Amici have a special interest in ensuring that the Governor has an effective and compatible partner with which to lead the State; that there is clarity in the line of succession in the Executive Branch; and that the crippling stalemate which preceded the Lieutenant Governor's appointment cannot recur.

Amicus Citizens Union of the City of New York ("Citizens Union") is an independent, nonpartisan organization whose mission is to promote good government and political reform in the State and City of New York. Founded in 1897, Citizens Union has served as a watchdog for the public interest and an advocate for fair elections, clean campaigns, and open, effective government that is accountable to the citizens of New York.

Citizens Union representatives have testified at numerous public hearings in Albany and City Hall on subjects such as voting and elections, state government ethics reforms, and selection and appointment of state and city officials. Citizens Union has filed numerous *amicus curiae* briefs on matters related to its core mission, including compliance with voting rights laws, selection of New York State Supreme Court justices, and campaign finance restrictions. Citizens Union has special knowledge and expertise in

matters relating to the election and appointment of state officials, having most recently written several issue briefs and policy statements on filling vacancies in elected offices.

Amicus Common Cause/New York is a nonpartisan, nonprofit advocacy organization founded in 1970 as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. With nearly 20,000 members and supporters throughout New York State, Common Cause/New York is one of the most active state Common Cause chapters in the country. Common Cause/New York serves as a vocal advocate for the public interest to mitigate the impact of money in election campaigns and public policy, safeguard elections, and discourage corruption, unethical conduct and conflicts of interest by elected and appointed officials. In addition to issuing reports and analyses, suggesting changes to New York law, and testifying before committees and governmental bodies at all levels of government, Common Cause/New York has participated in litigation, when appropriate, to further its mission and its members' interest in effective, open and responsive government. For example, Common Cause/New York is currently participating as *amicus curiae* in *Chief Judge of the State of New York v. Governor of the State of New York*, Index No. 40076/08 (Sup. Ct.

N.Y. County), a lawsuit challenging the constitutionality of the State's refusal to raise judicial salaries, and served as a named plaintiff in *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006). As its involvement in the *Lopez Torres* case indicates, Common Cause/NY and its members have a special interest in the manner in which elected and appointed offices in New York State are filled.

In a July 30, 2009 Order, this Court granted Amici leave to file this brief.

ARGUMENT

Just hours after Richard Ravitch took the oath of office as Lieutenant Governor, Respondents Skelos and Espada obtained a temporary restraining order barring Ravitch from exercising his duties. Although this Court promptly vacated that order, Justice LaMarca entered an injunction to the same effect shortly thereafter. On July 30, 2009, this Court stayed the injunction as it applied to Ravitch's exercise of his Executive Branch duties as Lieutenant Governor.

This Court should now reverse Supreme Court's order and vacate the injunction in its entirety. A preliminary injunction is extraordinary relief, and may only be granted where a movant demonstrates by clear and

convincing evidence: (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent issuance of the preliminary injunction; and (3) a balancing of equities that favors the movant's position. *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (N.Y. 2005); *Dana-Distributors, Inc. v. Crown Imports*, LLC, 48 A.D.3d 613, 853 N.Y.S.2d 11 (App. Div. 3d Dep't 2008).

Respondents fail to meet this burden in several key respects. First, because Governor Paterson was duly authorized to fill a vacancy in the Lieutenant Governor's Office pursuant to Section 43 of the POL, Respondents cannot succeed on the merits of their challenge to his appointment of Ravitch to serve as Lieutenant Governor. Second, because the administration of the State government would be compromised if Governor Paterson is barred from appointing a Lieutenant Governor, the balance of equities weighs strongly against a preliminary injunction.

I. GOVERNOR PATERSON'S APPOINTMENT OF RICHARD RAVITCH TO FILL THE VACANCY IN THE OFFICE OF LIEUTENANT GOVERNOR WAS LAWFUL

A court cannot grant a petition for preliminary injunction when, as here, the party seeking injunction have little chance of ultimate success on the merits. Because Governor Paterson acted within the power granted to

him by the Constitution and POL in appointing Mr. Ravitch as Lieutenant Governor, Respondents cannot succeed on the merits. The Court must, therefore, deny Respondents' petition for a preliminary injunction.

Supreme Court held that Article IV, § 6 of the State Constitution prohibits the Governor from exercising his statutory authority to fill a vacancy in the Lieutenant Governor's Office. Order Entered July 22, 2009, *Skelos v. Paterson*, No. 13426/09 (Sup. Ct. Nassau County) ("Supreme Court Order"), at 16. Notably, unlike the U.S. Congress, which may enact legislation only as authorized by the specific enumerated powers granted to it by the federal Constitution, a state legislature has plenary authority to make laws unless specifically constrained by a state constitution. S*ee, e.g.*, R. Briffault & L. Reynolds, *Cases and Materials on State and Local Government Law* 52-56 (9th ed.) (Thomson/Reuters 2009); R.F. Williams, *State Constitutional Law: Cases and Materials* 482-85 (2d. ed) (Michie Co. 1993).[2] Contrary to Supreme Court's ruling, no such limitation constrained the New York State Legislature from extending POL § 43 to cover appointment of a Lieutenant Governor. Rather, as explained below, *infra*

[2] This distinction between a "grant" of legislative power, which marks the federal Constitution, and a "limitation" upon legislative power, for which we look in state constitutions, is of long-standing vintage. *See* Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations: Which Rest Upon the Legislative Power of the States of the American Union* (8th ed) (Boston: Little Brown & Co. 1927).

Point I.A, the most natural reading of POL § 43 is that is authorized the appointment of Lieutenant Governor Ravitch, and the Constitution in no way precludes this result.

A. Public Officers Law § 43 Empowers the Governor to Fill A Vacancy in the Office of Lieutenant Governor

Article XIII, Section 3 of the New York Constitution directs the Legislature to "provide for filling vacancies in [public] offices." Pursuant to this mandate, the Legislature enacted Chapter 3 of the POL, which deals broadly with the creation and filling of vacancies. Various provisions of the POL explain how vacancies in specific offices should be filled. *See, e.g.*, POL §§ 41 (office of the Attorney General and Comptroller), 42 (U.S. Senate and House of Representatives).

POL § 43 is a general provision that governs the filling of vacancies in elective offices for which no other specific provision has been made. It sets forth two criteria that must be satisfied before the Governor may appoint someone to fill a vacant public office:

> If a vacancy shall occur, otherwise than by expiration of term, *with no provision of law for filling same*, if the office be *elective*, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by election.

POL § 43 (emphasis added).

Because both of these criteria are satisfied here, Governor Paterson's appointment of Richard Ravitch as Lieutenant Governor was lawful. First, Article IV, § 1 of the State Constitution leaves no room for doubt that the office of Lieutenant Governor is "elective." Section 1 expressly provides that the Lieutenant Governor is elected "by each voter," and that the "persons having the highest number of votes cast jointly for them for governor and lieutenant governor respectively shall be elected." N.Y. Const. art. IV, § 1.

Second, there is no specific provision of law that provides for filling a vacancy in the Lieutenant Governor's Office. POL § 31 describes how certain public officers, including the Lieutenant Governor, may resign their offices, but makes no mention of how that office is to be filled. POL § 41 provides that a vacancy in the office of Attorney General or Comptroller is to be filled by joint legislative resolution, but does not mention the Lieutenant Governor's Office. POL § 42 provides that a vacancy in a U.S. Senate or House seat is to be filled by special election, but expressly excludes the Lieutenant Governor's Office.[3] Finally, Article IV § 6 directs

[3] That the Legislative found it necessary to expressly exempt the Lieutenant Governor's Office from POL § 42 sheds light on the issue here. If the vacancy-filling provisions of

that the Temporary President of the Senate "shall perform all the duties of the Lieutenant Governor during [a] vacancy" in that office, but as explained below, this provision does not establish any mechanism for *filling* such a vacancy.

The leading case regarding the filling of vacancies under the POL confirms that POL § 43's general appointment power applies to a vacancy in the Lieutenant General's Office. *Ward v. Curran* addressed whether a prior version of POL § 42 applied to a vacancy in the Lieutenant Governor's Office. 266 A.D. 524, 44 N.Y.S.2d 240 (3d Dep't 1943), *aff'd*, 291 N.Y. 642, 50 N.E.2d 1023 (1943) ("*Ward*"). That predecessor provision required that a vacancy in an elective office be filled at the next general election even if the term of office exceeded two years, rather than waiting for the next quadrennial election cycle. *Ward*, 266 A.D at 525, 44 N.Y.S.2d 241. As then drafted, § 42 did not specifically address the Lieutenant Governor's Office, but, like § 43 today, was written broadly to apply to "any office authorized to be filled at a general election." The Appellate Division construed this general language as covering the Lieutenant Governor's Office, and ordered a special election to fill a vacancy in that office. The

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the POL did not generally apply to the Lieutenant Governor's Office, there would be no need to specifically exempt that office from the requirements of POL § 42.

Court of Appeals affirmed.

The import of *Ward* is plain. In the absence of a specific exclusion of the Lieutenant Governor's Office from the POL's vacancy-filling provisions, it is covered by the general provision dealing with the filling of vacancies in elective offices (*i.e.*, POL § 43) – even if that provision does not expressly reference the Lieutenant Governor's Office. Other courts have reached exactly the same conclusion in addressing similar provisions. *See State ex rel. Martin v. Ekern*, 280 N.W. 393 (Wis. 1938); *see also In re Advisory Opinion to the Governor*, 688 A.2d 288 (R.I. 1997): *Advisory Opinion to the Governor*, 217 So.2d 289 (Fla. 1968); *State ex rel. Trauger v. Nash*, 64 N.E. 558 (Ohio 1902); *People v. Budd*, 45 P. 1060 (Cal. 1896).

B. Neither Article IV, § 6, Nor Any Other Provision of the State Constitution, Bars the Governor From Appointing A Lieutenant Governor

Article IV, § 6 explains how the duties of the Governor and Lieutenant Governor shall be handled in the event of a vacancy. It provides that:

> 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 the lieutenant-governor during such vacancy or inability.

N.Y. Const. art. IV, § 6.

Respondents contend that this grant of authority to the Temporary President of the Senate's to "perform all the duties of lieutenant-governor" means that there is no vacancy in the office for the Legislature to fill. But Article IV, § 6 does not provide a mechanism to *fill* a vacancy. It is simply a stop-gap measure that provides for temporary coverage needed to fulfill the office's duties until the vacancy can be filled.

That this clause of § 6 merely allows the Temporary President of the Senate to assume a caretaker role until a vacancy in the Lieutenant Governor's Office is filled becomes apparent when compared to Article IV, § 5. Section 5 addresses both a possible vacancy in the Governor's Office and the inability of the Governor to perform his duties. It directs that if the Governor leaves office, "the lieutenant-governor shall *become* governor for the remainder of the term." N.Y. Const. art. IV, § 5 (emphasis added). But if the Governor is merely absent from the State, impeached but not yet convicted, or "unable to discharge the powers and duties" of his office, the Lieutenant Governor does not become Governor but "*shall act as* governor"

only during the period of gubernatorial inability. *Id.* (emphasis added).

The Temporary President of the Senate's authority to "perform" the duties of the Lieutenant Governor, *see* N.Y. Const. art. IV, § 6, resembles, though is perhaps weaker than, the Lieutenant Governor's power to "act as" Governor on a temporary basis, *see* N.Y. Const. art. IV, § 5. These limited grants of authority are distinct from the clause instructing that the Lieutenant Governor "shall become" Governor in the event of a gubernatorial vacancy. *See* N.Y. Const. art. IV, § 5. Indeed, that the Temporary President of the Senate's function to "perform" applies to both a Lieutenant Governor's short-term inability and departure from office underscores the fact that Temporary President's role was intended to last only for a short term.

Likewise, Article IV § 5 instructs that, in the event of removal, failure to serve, or death of the Governor, the Lieutenant Governor becomes Governor "for the remainder of the term" or "for the full term." By comparison, the provisions of § 5 that authorize the Lieutenant Governor to "act as governor" during the inability" of the Governor or his failure to take the oath of office, as well as the provision of § 6 authorizing the Temporary President to "perform all the duties of lieutenant governor" in the case of a vacancy or inability, are limited in duration. *Compare* N.Y. Const. art. IV, § 5 (Lieutenant Governor acts as Governor "until the inability shall cease or

the term shall expire"; Lieutenant-Governor-elect acts as Governor "until the governor shall take his oath") *with* N.Y. Const. art. IV, § 6 (Temporary President of the Senate performs duties of Lieutenant Governor "during such vacancy or inability").

Moreover, the Temporary President of the Senate does not give up his position as a member of the Senate while "perform[ing] the duties" of Lieutenant-Governor. N.Y. Const. art. IV, § 6. He holds both offices simultaneously and might even attempt to assert the right to vote twice, once as a senator and once to exercise the Lieutenant Governor's power to have a "casting vote" – that is, a tie-breaking vote – in the Senate. Given the inherent anomaly of dual office-holding and double-voting, the better reading of Article IV, § 6, which harmonizes it with POL § 43 and does not limit the Legislature's power, is that the Temporary President shall perform the duties of the Lieutenant Governor until the vacancy is filled by a gubernatorial appointment.

This reading of Article IV, § 6 is directly supported by *Ward*. In *Ward*, not only did the Appellate Division and the Court of Appeals uphold the application of a general POL provision to the Lieutenant Governor's Office, but both courts also rejected the argument that Article III, § 9, which (then) authorized the Temporary President of the Senate to perform the

Lieutenant Governor's function of presiding over the Senate (and operated as a predecessor to Article IV, § 6),[4] meant there could be no vacancy in the Lieutenant Governor's Office. *See Ward*, 266 A.D. at 526, 44 N.Y.S.2d at 241-42. To be sure, the Appellate Division noted that Article III, § 9 referred only to the Lieutenant Governor's role in the Senate, whereas current Article IV, § 6 enables the Temporary President of the Senate to "perform all the duties" of the Lieutenant Governor. But that point only underscores the wisdom of the Legislature's decision to enable the Governor to appoint a permanent replacement.

As the Appellate Division observed in sustaining the Legislature's requirement that a special election be held to fill a vacancy, the Lieutenant Governor "has state-wide duties other than to preside over the senate and, when necessary, to act as Governor, which should be performed by an official elected in the state at large and not one elected by the voters of a single senatorial district, as is the case of the temporary president of the senate." *Ward*, 266 A.D. at 526, 44 N.Y.S.2d 241-42 (emphasis added). Although the Constitution and the POL no longer mandate a special election to fill a vacancy in the Lieutenant Governor's Office, the Appellate

[4] As part of a 1963 constitutional amendment, the relevant language was moved from Article III, § 9 to Article IV, § 6.

Division's conclusion that someone who fills the vacancy in a statewide office like Lieutenant Governor ought to be accountable, at least through gubernatorial appointment, to a statewide constituency rather than the voters of a single senatorial district, remains sound.

Supreme Court's remaining constitutional objections to Governor Paterson's appointment are both meritless. First, Supreme Court held that the application of POL § 43 to the Lieutenant Governor's Office was inconsistent with Article XIII, § 3 of the Constitution. Supreme Court Order at 16-17. That provision states that when the Legislature provides for the filling of vacancies in office, "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." N.Y. Const. art. XIII, § 3.

Obviously, this provision does not bar POL § 43 or preclude Governor Paterson's appointment of Lieutenant Governor Ravitch. At most, it might limit the Lieutenant Governor's term to the next annual election. *See Radich v. Council of the City of Lackawanna*, 93 A.D.2d 559, 567; 462 N.Y.S.2d 928, 933 (4th Dep't 1983), *aff'd*, 61 N.Y.2d 652, 460 N.E.2d 223 (1983). It is very doubtful, however, that § 3 has even that limited effect, given the

highly uncertain meaning of "political year." The Constitution does not define "political year," but says only that "the political year and the legislative term shall begin on the first day of January." N.Y. Const. art. XIII, § 4. That provision gives no clear sense of when one "political year" ends and the next one begins, and whether, given § 4's focus on the legislative term, the concept of "political year" is the same for all offices.

Importantly, there is no general rule that appointments to fill vacancies in elective office are valid only until the first of January in the year after the appointment is made. Indeed, that is not the case with respect to the filling of vacancies in other statewide offices. For example:

- POL § 42 (4-a) provides that if a vacancy occurs in the elective office of United States Senator in an even-numbered year within 60 days before the annual primary day (which is usually in September), the Governor can appoint someone who will serve until "the third day of January in the year following the next even numbered calendar year." Thus, someone appointed, for example, in late August 2010 would serve until January 2013, or nearly two and a half years. Similarly, someone appointed in an odd-numbered year would hold office until "the third day of January in the next odd numbered calendar year." As is the case with Senator Kirsten Gillibrand, this could be for nearly two years.
- POL § 41 goes even further. It authorizes the Legislature to fill vacancies in the elective offices of Attorney General and Comptroller for the duration of the vacant term. As a result, Comptroller DiNapoli was appointed in early 2007 to serve a term that will not expire until January 2011, or nearly four years.

In light of the uncertain meaning of "political year" in the context of filling vacancies in statewide offices that may have a term of four or six years, coupled with the inclusion of the "same time, same term" provision in Article IV, § 1, the most natural reading of the term "political year" for purposes of the Lieutenant Governor's Office is a term that runs with the Governor's and Lieutenant Governor's constitutional four-year term of office. That would be consistent with the Legislature's power to appoint an Attorney General or Comptroller for the duration of those offices' four-year terms, as well as with Article IV's evident desire to treat the Governor and Lieutenant Governor as a team (as further discussed in Section II.A below). In any event, given the existence of terms for appointees to vacancies, that exceed a single calendar year, it is rather unlikely that Article XIII, § 3's "political year" provision limits the Legislature's ability to authorize the Governor to appoint a replacement Lieutenant Governor for the duration of the Governor's and Lieutenant Governor's joint term of office.

Finally, the court below held that Article IV, § 1, which states that the "lieutenant-governor shall be chosen at the same time, and for the same term" as the Governor, prohibits the Legislature from extending POL § 43 to

the Lieutenant Governor's Office. Supreme Court Order at 16.[5] But § 1 deals only with the election of a Lieutenant Governor, not the filling of vacancies. Article V, § 1 likewise provides that the Comptroller and the Attorney General "shall be chosen at the same general election as the governor and hold office for the same term." N.Y. Const. art. IV, § 1. But that does not mean that when there is a vacancy in one of those offices it cannot be filled by the Legislature through a new appointee – Comptroller DiNapoli, for example, was not chosen "at the same general election as the governor." *Id.* The same holds true for Article IV, § 1.[6]

In sum, given the plain linguistic differences in Article IV, § 5 and Article IV, § 6, coupled with *Ward*'s view that the temporary performance of duties does not fill a vacancy, Respondents cannot succeed in their claim that Governor Paterson lacked authority to appoint Richard Ravitch to serve as Lieutenant Governor. Accordingly, Respondents have no likelihood of success on the merits of their claim.

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[5] The court below mistakenly cited to Article IV, § 6 instead of Article IV, § 1.

[6] Indeed, the first half of the "same time, same term" sentence in Article IV, § 1 provides that the "governor shall hold office for four years." Based on the trial court's reading of § 1 , that ought to preclude the Lieutenant Governor from succeeding a Governor who dies in office or resigns, since the new Governor, by definition, would not be allowed to serve a full four years.

II. BECAUSE THE ADMINISTRATION OF STATE GOVERNMENT WOULD BE COMPROMISED IF A VACANCY IN THE OFFICE OF LIEUTENANT GOVERNOR COULD NOT BE FILLED, THE BALANCE OF EQUITIES WEIGHS AGAINST INJUNCTIVE RELIEF.

When determining whether the balance of equities favors an injunction, the Court must give due consideration to the deleterious effects on the administration of government that would result from granting such relief. Without a power to fill a vacancy in the Lieutenant Governor's Office, the Governor could be deprived of a second-in-command to oversee the Executive Branch. Worse, he could see the duties of the Lieutenant Governor devolve to a member of the Senate with views of government and policy that are incompatible with his own. And the harmful effects of Respondents' position are not confined to the Executive Branch. As recent events show, the power to appoint a Lieutenant Governor may also be needed to avoid paralysis in the Senate, which, until the appointment challenged here, was unable to pass critically needed legislation and, for that matter, even routine acts. Moreover, the Governor's appointment power is necessary to maintain a clear line of succession, should the Governor die or become incapacitated. All of these factors must be considered when weighing the equities of the injunctive relief sought by Respondents.

A. The Power to Fill a Vacancy in the Office of Lieutenant Governor Is Essential to Allow the Orderly and Effective Administration of the Executive Branch

The Constitution contemplates that the Governor and Lieutenant Governor will be members of the same political party and will have compatible views of government and policy. The close ties between the two highest ranking state officers are reflected in Article IV, § 1, which requires not only that both be chosen at the same time and for the same term but also that both be "chosen jointly, by the casting by each voter of a single vote applicable to both offices." The importance of the relationship between these officers is also evident in Article IV, § 6, which provides that "[n]o election of lieutenant-governor shall be had in any event except at the time of electing a governor." This provision, as Respondents themselves observe, is "designed to prevent opposition parties from holding the two highest positions in the government." Mem. of Law in Opp. to Motion for Interim Stay 9-10 (Jul. 27, 2009).

POL § 43 gives effect to these constitutional purposes. It ensures that in the event of a vacancy, the Lieutenant Governor's Office may be filled by a person who will work closely with the Governor to advance shared goals and policy objectives. This permits the Governor to delegate important State business to a second-in-command whom he trusts. It also ensures that, in the

event of a vacancy or inability on the part of the Governor, the Executive Branch will, until the next election, continue to run by a person with a similar agenda.

Respondents' position, in contrast, would undermine these constitutional purposes, leaving a permanent vacancy in the Lieutenant Governor's Office until the next quadrennial election. This would do more than deprive the Chief Executive of a trusted partner in government. It would also mean that the Temporary President of the Senate—who performs all of the Lieutenant Governor's duties "during [a] vacancy," N.Y. Const. art. IV, § 6—would fill that role for the duration of the Governor's term. But unlike with the Lieutenant Governor's Office, there is no constitutional device to ensure that the Temporary President of the Senate and the Governor hold compatible views. Thus, the consequence of Respondents' position is that the Governor's staunchest political rival could for years take over the duties that were intended for his closest ally.

As Respondents correctly note, it was precisely to avoid such conflict that the Constitution was amended in 1953, in the aftermath of *Ward*, to prevent the Lieutenant Governor from being chosen in a special election, instead requiring that the Governor and Lieutenant Governor be elected together. This amendment was necessary, as Governor Dewey explained in

a February 9, 1953 letter to the Senate,[7] because "good government requires responsible cohesive administration in closely knit [Governor and Lieutenant Governor] offices."

As Governor Dewey elaborated:

> Executive responsibilities in our government are so interwoven that the election of a Governor and Lieutenant Governor politically opposed to each other involves serious problems. As a practical matter the Governor must encounter difficulty in leaving the State even for a short period and on pressing public business. This has created the greatest embarrassment in other states, to the damage of public confidence in government and the injury of the public interest ... [T]here is a great advantage in being able to entrust many of the complex administrative tasks of the Governor to an able Lieutenant Governor ... This would not have been possible if the Lieutenant Governor was required, as a matter of party loyalty, to lead the minority party.

Governor Dewey concluded his letter by pleading with the Senate that the State "*should no longer risk the confusion and maladministration which*

[7] Governor Thomas E. Dewey, *Message of the Governor in relation to the Proposed Amendment for Joint Election of Governor and Lieutenant Governor*, Feb. 9, 1953.

might result from having the Governor of one party while the Lieutenant Governor leads the opposition." (emphasis added).

That same risk of confusion and maladministration would again exist if Respondents prevailed here. And Respondents' position, if adopted, would contravene sound principles of democratic government in a further respect: It would permit the Temporary President of the Senate to effectively *become* the Lieutenant Governor, instead of serving as a short-term gap filler, and undermine the operation of the Executive Branch, despite never having won a statewide election.

Ward held that a vacancy in the Lieutenant Governor's Office was to be filled by a statute providing for a special election to be held throughout the State. *Ward*, 266 A.D at 525, 44 N.Y.S.2d 241. Even this manner of filling the position was deemed to involve too great a risk of interference with the orderly administration of the Executive Branch, necessitating the 1953 constitutional amendment. Respondents would recreate that risk, but place the power of interference in a person—the Temporary President of the Senate—who has not won statewide approval.

B. The Effective Administration of the Legislative Branch Also Depends Upon the Power to Fill a Vacancy in the Office of Lieutenant Governor.

As recent events demonstrate, the Lieutenant Governor may play a crucial role in the functioning of the Legislative Branch as well. Because the Lieutenant Governor is not a member of the Senate, and his presiding role is not dependent on its shifting alliances and struggles for power, he can sit above the fray and act as a non-biased referee. Indeed, the appointment challenged here facilitated resolution of one of the most severe crises in the history of the New York Senate.

The crisis in the Senate began on June 8, 2009, when Republican Senator Thomas Libous introduced a motion that proposed the elevation of Respondent Espada to the position of Temporary President of the Senate and Respondent Skelos to majority leader. The motion was part of a broader agreement, under which Senator Espada and his Democratic colleague Senator, Hiram Monserrate, agreed to conference with the Senate Republicans to achieve a 32-30 Senate majority. The Senate Democrats denounced the motion, which they believed was illegally introduced after the session was already gaveled shut. The Senate Democrats filed a lawsuit, asking the court to determine the legality of the alleged new leadership, but Supreme Court dismissed the case, explicitly declining to rule on the validity

of either party's claim to Senate leadership (on the grounds that it was a non-justiciable political question). *Smith v. Espada*, No. 4912-09; RJI No. 01-09-096982 (Sup. Ct. Albany County) (J. McNamara). By June 15th, Senator Monserrate had returned to the Democratic caucus, and the operation of the Senate ground to a halt with the number of Republicans and Democrats evenly split (31-31), and no Lieutenant Governor to serve as presiding officer and break a tie.

Each party denied the legitimacy of the other's claim to leadership over the Senate, leading to a stalemate that paralyzed the Legislative Branch. As a result, many pieces of critical legislation and other key policy initiatives languished in the Senate. Local governments and the citizens of New York suffered lasting injuries because they were dependent on a Senate that was unable to perform even routine legislative business. The critical pieces of legislation that the Senate failed to pass during the leadership struggle included the following:

- Failure to reauthorize Yonkers' mortgage-recording tax and income tax surcharge resulting in the City of Yonkers facing bankruptcy and the possible denial of certification by the State Comptroller.
- Failure to pass legislation authorizing the City of New York to raise its sales tax by half of a percent causing the City to sustain an estimated loss of revenue of at least $60 million. As the

stalemate in the Senate resulted in the withholding of new revenue, Mayor Bloomberg was forced to enact a hiring freeze for "150 firefighters, 151 traffic agents, 34 emergency 9-1-1 operators, 175 school safety agents, 150 school crossing guards, 90 emergency medical technicians and 20 operators for the non-emergency services 3-1-1 hotline." Jeremy Cooke, *NYC Orders Hiring Freeze, Review of City Contracts*, Bloomberg News, July 6, 2009.

- Failure to extend Mayor Bloomberg's control of New York City public schools, which, until the needed legislation was finally enacted after the stalemate ended, "left the school system in an administrative limbo." Jennifer Medina, *Bloomberg Regains Control of Schools*, N.Y. Times, Aug. 6, 2009. Indeed, the failure to renew the seven-year old mayoral control of New York City schools resulted in the feared return on July 1 of the old Board of Education model. What prevented mischief and chaos was the civil and public-minded actions of the city's borough presidents, who pledged to have the newly reconstituted Board of Education delegate its authority to an all-powerful Schools Chancellor. *See* Javier C. Hernandez, *Sentate Impasse Forces City to Revive Old School Board, in Name*, N.Y. Times, July 2, 2009.

- A popular Power for Jobs program, providing $125 million in benefits to local businesses, supporting approximately 300,000 jobs, was endangered due to the Senate's failure to vote on extending the program.

Faced with these mounting difficulties, the Governor called upon senators from both parties to pass non-partisan bills addressing, for example, the renewal of critical funding for local governments. Failing to convince the senators to voluntarily assemble as one body, the Governor called for extraordinary session seventeen days in a row, utilizing a device available to

him under art. IV, § 3 of the Constitution, which has been employed only in times of severe crisis.[8] In addition, the Governor filed a petition for mandamus with Supreme Court to compel all senators to attend the extraordinary sessions as one body. Although the court granted the petition,[9] the senators failed to conduct any business in the mandatory sessions.

Finally, on July 8th, with the Senate paralyzed for over five weeks and no end in sight, the Governor appointed Richard Ravitch as Lieutenant Governor, exercising the authority conferred upon him by POL § 43.[10] Immediately thereafter, Respondent Espada rejoined the Democratic conference, ending the deadlock. In a flurry of legislative activity, the Senate passed 135 bills, including the critical extension of the Power for Jobs program; increase of the sales tax rate for the City of New York; extension of local taxes in Albany, Schoharie, and Washington counties; and sales tax extensions for seven counties: Columbia, Fulton, Greene, Montgomery, Rensselaer, Schenectady and Schoharie. *See* Adam Sichko, *Senate Pulls All-Nighter, Passes 135 Bills*, The Bus. Rev.-Albany (Online),

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[8] Danny Hakim, *Albany Impasse Ends as Defector Rejoins Caucus*, N.Y. Times, July 9, 2009.

[9] *Paterson v. Adams*, No. 5435-09/RJI No. 01-09-097124 (Sup. Ct. Albany County) (J. Teresi).

[10] Two days earlier, Amici, in a joint letter with Assembly-member Gianaris, had issued a public letter to the Governor, calling on him to appoint a Lieutenant Governor to help bring an end to the deadlock in the Senate

July 10, 2009.[11] In addition, prior to the commencement of this lawsuit, a group of Senators from both parties indicated their rare willingness to tackle key reform measures, such as ethics and campaign finance reform, but such uncommon momentum was stopped dead in its tracks. *Id.*

The five-week stalemate vividly demonstrates the dangers associated with having no presiding officer for the Senate. As the Appellate Division noted, "[t]he chief duty of the Lieutenant Governor is to preside over the Senate," and this power—the Lieutenant Governor's obligation to preside over the Senate and act as a neutral referee—played a critical role in the resolution of the Senate crisis immediately following the appointment. *Ward*, 66 A.D. at 526, 44 N.Y.S.2d at 242.

While the immediate crisis has subsided, the political climate surrounding the Senate remains uncertain.[12] Moreover, after the crisis, as before, there remains an even number of senators (sixty-two) in the chamber. Thus, there is nothing to prevent a recurrence of two, evenly divided Senate

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[11] *Available at* http://www.bizjournals.com/albany/stories/2009/07/06/daily42.html.

[12] *See, e.g.*, Jeremy W. Peters, *In the New York Senate, Order Is Restored, but Decorum Isn't*, N.Y. Times, July 17, 2009 ("[T]he skirmish for control has eroded the sense of decorum in the tradition-bound upper house."). Indeed, Senator Skelos is on record, the day after the Lieutenant Governor was sworn in, as having predicted a rough road ahead. *See* Jeremy W. Peters, *Albany Impasse Ends as Defector Rejoins Caucus*, N.Y. Times, July 9, 2009 ("Within a few months, maybe six months, there is going to be so much discord within that [the Democrats'] conference that we're [the Republicans] going to be running the Senate. . .").

conferences in the future.[13] Without a Lieutenant Governor presiding over the fray, the Senate may, once again, become paralyzed. The citizens of New York cannot afford such a risk, especially considering the severe financial crisis that we face today.

C. The Power to Fill a Vacancy in the Office of Lieutenant Governor Is Necessary to Ensure a Clear Line of Succession

The Governor's power to appoint a Lieutenant Governor has still another critical function, also illustrated by recent events: It makes clear who would assume the Governor's powers and responsibilities if the Governor should die or become temporarily incapacitated, such as by leaving the State. For a period of nearly six weeks, it was unknown who would control the Executive Branch if the Governor left the State, became incapacitated or died. *See* Aff. of David A. Paterson ¶ 4.[14]

Under Article IV, §6 of the Constitution, the line of succession to the Governor's Office runs from the Lieutenant Governor, to the Temporary President of the Senate, to the Speaker of the Assembly. During the recent

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[13] The number of State Senators is not fixed under New York law. There has been an even number since 2002. *See* http://www.nysenate.gov/timeline.

[14] *See also* Brendan Scott, *Paterson Won't Leave NY Amid Senate Revolt*, N.Y. Post, June 9, 2009, *available at* http://www.nypost.com/seven/06092009/news/regionalnews/paterson__plans_to_stay_in_ny_while_sena_173373.

stalemate in the Senate, there was a dispute as to who was the legitimate Temporary President of the Senate, with each party claiming to have elected one of its own to the position. With the Lieutenant Governor's Office vacant and the Temporary President's position in dispute, the line of succession was left unclear. Had there been a vacancy in the office of Governor, a new level of chaos would have resulted, with two different people claiming the right to serve as the State's highest officer—and the dispute might well be a political question outside the competence of the courts. Plainly, a clear line of succession is needed to ensure the orderly transfer of power in the event of death or incapacity by the Governor.

The Governor's appointment of Lieutenant Governor Ravitch has cured the uncertainty with respect to the line of succession to New York's most important public office and restored stability and order in the State's government. Public policy requires that the Court sustain the clarity and stability obtained by the appointment.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the decision below, vacate the preliminary injunction, and dismiss the Respondents' case in its entirety.

Dated: New York, New York
August 7, 2009

Respectfully submitted,

Caitlin J. Halligan /D.W.

Caitlin J. Halligan
Gregory Silbert
Dotan Weinman
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify the following in compliance with Section 670.10.3(f) of the Rules of this Court:

1. The foregoing brief was prepared on a computer using Microsoft Word.

2. The typeface used is Times New Roman.

3. The size of the text is 14 points.

4. The brief is double spaced, except for the point headings, footnotes, block quotes, Table of Contents, Table of Authorities, Proof of Service and the Certificate of Compliance

5. The brief contains 7000 words, excluding the Table of Contents, Table of Authorities, Proof of Service and the Certificate of Compliance.

Dated: August 7, 2009
New York, New York

Dotan Weinman, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

DEAN G. SKELOS and PEDRO ESPADA, JR., as duly elected members of the New York State Senate, Plaintiffs-Respondents, v. 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-VAZQUES, as Secretary of State of the State of New York, Defendants-Appellants.	Index No.: Active App Div. No. 2009-06673 (Nassau County Clerk's Index No. 13426-2009) **AFFIRMATION OF SERVICE**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

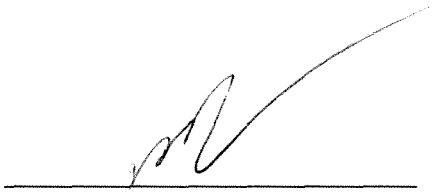
I, DOTAN WEINMAN, hereby affirm under penalty of perjury and say:

1. I am a member of the Bar of the State of New York and associated with the law firm of Weil, Gotshal & Manges LLP, counsel to *amici curiae* the Citizens Union of the City of New York and Common Cause/New York.
2. I am not a party to this action.
3. On August 7, 2009, I served true and correct copies of the Brief of *Amici Curiae* Citizens Union of the City of New York and Common Cause/NY in Support of Defendants-Appellants,
4. as agreed by counsel, via electronic mail to JOHN CIAMPOLI, Esq., Attorney for Plaintiff-Respondent Espada at the following address: padronejc@yahoo.com; DAVID LEWIS, Esq., Attorney for Plaintiff-

Respondent Skelos at the following address: dlewis@lewisandfiore.com; and FAITH GAY, Esq., Attorney for Defendant-Appellants Paterson, Ravitch and Lorraine Cortes-Vazques;

5. and also provided an electronic copy of the same to the Court.

Dated: August 7, 2009
New York, New York



Dotan Weinman, Esq.