

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

HON. DAVID A. PATERSON, As Governor of the State of New York,

Petitioner,

- against -

SENATOR ERIC ADAMS; SENATOR JOSEPH P. ADDABBO, JR.; SENATOR JAMES S. ALESI; SENATOR DARREL J. AUBERTINE; SENATOR JOHN J. BONACIC; SENATOR NEIL D. BRESLIN; SENATOR JOHN A. DeFRANCISCO; SENATOR RUBEN DIAZ, SR.; SENATOR MARTIN MALAVÉ DILAN; SENATOR THOMAS DUANE; SENATOR PEDRO ESPADA, JR.; SENATOR HUGH T. FARLEY; SENATOR JOHN J. FLANAGAN; SENATOR BRIAN X. FOLEY; SENATOR CHARLES J. FUSCHILLO, JR.; SENATOR MARTIN J. GOLDEN; SENATOR JOSEPH A. GRIFFO; SENATOR KEMP HANNON; SENATOR RUTH HASSELL-THOMPSON; SENATOR SHIRLEY L. HUNTLEY; SENATOR CRAIG M. JOHNSON; SENATOR OWEN H. JOHNSON; SENATOR JEFFREY D. KLEIN; SENATOR LIZ KRUEGER; SENATOR CARL KRUGER; SENATOR ANDREW J. LANZA; SENATOR WILLIAM J. LARKIN, JR.; SENATOR KENNETH P. LaVALLE; SENATOR VINCENT L. LEIBELL; SENATOR THOMAS LIBOUS; SENATOR ELIZABETH LITTLE; SENATOR CARL L. MARCELLINO; SENATOR GEORGE D. MAZIARZ; SENATOR ROY J. McDONALD; SENATOR HIRAM MONSERRATE; SENATOR VELMANETTE MONTGOMERY; SENATOR THOMAS P. MORAHAN; SENATOR MICHAEL F. NOZZOLIO; SENATOR GEORGE ONORATO; SENATOR SUZI OPPENHEIMER; SENATOR FRANK PADAVAN; SENATOR KEVIN S. PARKER; SENATOR BILL PERKINS; SENATOR MICHAEL H. RANZENHOFER; SENATOR JOSEPH E. ROBACH; SENATOR STEPHEN M. SALAND; SENATOR JOHN L. SAMPSON; SENATOR DIANE J. SAVINO; SENATOR ERIC T. SCHNEIDERMAN; SENATOR JOSE M. SERRANO; SENATOR JAMES L. SEWARD; SENATOR DEAN G. SKELOS; SENATOR MALCOLM A. SMITH; SENATOR DANIEL L. SQUADRON; SENATOR WILLIAM T. STACHOWSKI; SENATOR TOBY ANN STAVISKY; SENATOR ANDREA STEWART-COUSINS; SENATOR ANTOINE M. THOMPSON; SENATOR DAVID J. VALESKY; SENATOR DALE M. VOLKER; SENATOR GEORGE H. WINNER, JR.; and SENATOR CATHARINE YOUNG,

Respondents.

FOR A JUDGMENT OF *MANDAMUS* PURSUANT TO CPLR ARTICLE 78

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF
HIS VERIFIED PETITION FOR A JUDGMENT OF *MANDAMUS*
Index No. 5435-09

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PRELIMINARY STATEMENT

Petitioner, the Hon. David A. Paterson (hereinafter "Petitioner"), submits this Memorandum of Law in support of his Verified Petition for a Judgment of *Mandamus* to compel pursuant to Article 78 of the Civil Practice Law and Rules. Petitioner seeks in the within application to compel Respondents, each of whom is a state senator of the State of New York, to convene at extraordinary sessions of the New York State Senate (the "Senate") called by the Governor, pursuant to Article 4, Section 3 of the Constitution, in simultaneous full assembly. No relief with respect to the internal workings of the Senate is sought.

PARTIES

Petitioner is the Governor of the State of New York, and as such is responsible for all of the duties and responsibilities of the Governor under the Constitution and laws of the State of New York. Respondents are state senators of the State of New York, and as such each has all of the duties and responsibilities of a state senator pursuant to the Constitution and laws of the State of New York.

FACTUAL BACKGROUND

As reflected in Petitioner's Verified Petition dated June 26, 2009 (hereinafter "Verified Petition"), a dispute remains extant among members of the Senate concerning the powers of leadership in that legislative body. Because of that dispute, the Senate has failed to convene in full assembly and take substantive actions with respect to certain urgent business of the people of the State of New York (the "Dispute"). The Dispute has been ongoing since June 8, 2009.

Petitioner asserts that the Dispute constitutes an "extraordinary occasion" within the meaning of Article 4, Section 3 of the Constitution. On June 24, 25 and 26 2009, Petitioner

duly called an extraordinary session of the Senate pursuant to his powers under Article 4, Section 3 of the Constitution.

On information and belief, there is no dispute that Respondents received notice of the extraordinary sessions called by Petitioner. Nevertheless, on June 24, 25 and 26, 2009, less than a majority of Respondents assembled in the Senate Chamber. (Article 3, Section 9 of the Constitution determines the quorum). Instead, The Respondents appeared sequentially on each occasion in two wholly separate groups.

Petitioner has alleged “[o]n information and belief, the separate gatherings of Respondent Senators described in the preceding paragraph occurred as a result of an agreement among some or all Respondents not to appear in full assembly on June 25, 2009.” (See, Verified Petition, ¶16). The Moving Respondents did not deny this allegation or answer, however, the Democratic Conference Respondent answered this allegation by admitting as follows:

Deny the allegations specified in Paragraph 16, except admit that when members of the Republican Conference indicated their refusal to attend timely the Extraordinary Session on June 25, 2009, Democratic Conference Respondents agreed not to object if members of the Republican Conference would enter the Senate Chamber after members of the Democratic Conference adjourned.

(See, Democratic Conference Respondents’ Answer dated June 29, 2009, ¶5).

As a result of the manner in which the Respondents appeared, no Senate business was—or could have been—conducted. Thus, Petitioner takes the position that the Respondents did not answer the Governor’s proclamation requiring them to “convene” within the meaning of Article 4, Section 3 of the Constitution.

Based on the above, Petitioner commenced the within Article 78 proceeding seeking a judgment of *mandamus* against Respondents compelling their personal simultaneous attendance, in full assembly, at extraordinary sessions of the Senate called by Petitioner

pursuant to Article 4, Section 3 of the Constitution. For the reasons set fourth below, Petitioner submits that Respondents have failed to perform duties enjoined upon them by law.

ARGUMENT

POINT I

THIS COURT HAS THE AUTHORITY TO ISSUE A JUDGMENT OF *MANDAMUS* COMPELLING RESPONDENT'S PERSONAL ATTENDANCE AT EXTRAORDINARY SESSIONS OF THE SENATE CALLED BY PETITIONER PURSUANT TO ARTICLE 4, SECTION 3 OF THE CONSTITUTION

Article 4, Section 3 of the New York State Constitution provides in pertinent part as follows:

The governor shall have power to convene the legislature, or the senate only, on extraordinary occasions.

(Emphasis added).

This Constitutional provision—as well as Respondents' Constitutional oath to “support the Constitution” and “faithfully discharge the duties of the office” of state senator—unambiguously impose on Respondents, individually and collectively, a non-discretionary responsibility and duty to assemble at extraordinary sessions convened by the Governor.

Nevertheless, as detailed above, Respondents have repeatedly refused assemble together at extraordinary sessions with the quorum necessary “to do business.” (Art. 3, §9 of the Constitution provides “a majority of each house shall constitute a quorum to do business.” See also, §123 of the State Law which indicates that “the senate shall consist of sixty-two members... .”). Instead, as a result of the agreement among Respondents, Respondents have assembled repeatedly in two wholly separate contingents, in a manner that has prevented any business from being accomplished.

Two facts are abundantly clear: the first is that the Governor has duly convened the Senate, and the second is the Senate has not fully “assembled.” It is elemental that to “convene” is “[t]o call together; to cause to assemble” (Black’s Law Dictionary, [7th Ed.]). Instead of “assembling,” the Senate has purported to countermand the Governor’s Constitutional mandate by agreeing to appear, or “not to object” to Respondents appearing sequentially, in a manner that destroyed the assembly that is the essence of a convened deliberative body.

The Respondents’ essential argument is that the power of the Governor under Article 4, Section 3 is wholly ineffectual, because “to convene” may be construed as having been met by an agreement “not to object” when the Senators do not assemble together. This construction of the Constitution is as illogical as it is unsupported by constitutional text.

The Respondents’ construction would make the Governor’s power to convene the Senate wholly ineffective in direct contravention of a fundamental rule of statutory construction—that a construction that results in ineffectiveness is never to be presumed. This rule perforce applies even more directly to the constitution. (See, McKinney’s Book 1, Statutes §144 [“Statutes will not be construed as to render them ineffective.”]).

The instant case presents separation of powers issues, but not in the manner Respondents suggest, because the question presented is whether senators, by sequential appearance tactics, may refuse to at a session called by the Governor pursuant to the Constitution.

Regardless of the matters internal to the Senate that affect the Dispute, the obligation to assemble is absolute and unqualified—the duty is neither internal to the Senate nor separated from the Respondents’ constitutional obligations. In that context, the courts of this state will not shrink from determining whether the legislature has complied with “... constitutional prescriptions as to legislative procedures.” (Matter of Board of Education of the City School

District of the City of New York v. City of New York, 41 NY2d 535, 538 [1977]; see also, Heinbach v. State, 89 AD2d 138 at 140 [2d Dept 1982]).

POINT II

THE PETITIONER DOES NOT SEEK TO COMPEL PARTICULAR SUBSTANTIVE ACTION

Contrary to Respondents' assertions, Petitioner does not seek to compel the exercise of any particular discretion by Respondents once they have actually convened in simultaneous assembly pursuant to the dictates of Article 4, Section 3 of the Constitution. Nor does Petitioner seek to question in this proceeding the judgment, or lack of judgment, that Respondents may individually or collectively demonstrate after they comply with this constitutional directive. This case is not about what the Respondents are required to do once they have assembled, but rather whether the active frustration of an assembly capable of doing business meets the constitutional requirement of Article 4, Section 3.

The Respondents argue that the Senate rules supposedly allow senators to assemble without a quorum, which apparently makes Article 4, Section 3 of the Constitution meaningless. Republican Respondents also argue that the provision of the Senate rules that allows less than a quorum of senators to send the sergeant at arms for the absent senators, implies that the Respondents may fulfill their constitutional obligation to convene by doing so without a quorum. (See, Senate Rule X, §2a, cited at Republican Respondents' brief, p. 5).

There are two answers to these assertion. The first is that no Senate Rule can qualify or limit a state constitutional requirement, because the constitution is the supreme law of the state. The second problem with Republican Respondents' reliance on Senate Rule X is that even by its terms this rule does not provide that when "less than a quorum of the Senate shall convene," that the entirety of the Senate shall have convened, either within the meaning of Article 4, Section 3

of the Constitution, or otherwise. It is fundamentally illogical to construe the word “convene,” when applied to a group of senators with no capacity to act, as meaning that the full body of the Senate has “convened.”

Republican Respondents also assert:

[i]t is of no consequence that less than a quorum attended the session; while the body could not have conducted business, the Court cannot declare the convening of 31 members of the Senate a nullity.

(See, Republican Respondents Memorandum of Law dated June 28, 2009, p. 5).

Petitioner does not seek a declaration that the Republican Respondents assembly is a “nullity,” but rather that it is not in compliance with the Constitution. This is not a case in which the absence of quorum was accidental, or the result of unanticipated circumstances and none of the Respondents contend otherwise.

Petitioner does not seek a remedy with respect to the Respondents’ inaction at a duly convened session of the Senate as the Respondents suggest. The Petitioner does not seek to make the Respondents answer for their judgment in Senate session. On the contrary, Petitioner seeks very limited relief: that the Respondents be directed to appear in simultaneous full assembly in accordance with their responsibility under the Constitution.

POINT III

THE INSTANT PROCEEDING IS NOT MOOT

Conspicuously absent from the Respondents’ papers is any statement of intent to change their tactical approach, which has been to purport to comply with the Governor’s proclamations by assembling in a manner that ensures, in advance, that no action of the Senate is even possible. On the contrary, the only reasonable conclusion that can be drawn from Respondents’ papers is that their separate, sequential and forum-destroying attendance will continue, and that

Respondents consider themselves beyond any judicial power to compel them to act otherwise. This is a concrete and immediate legal dispute respecting Respondents' obligations under the Constitution. This Court may take judicial notice that there is another extraordinary session for today, and another for tomorrow.

There also is no indication in Respondents' papers of any resolution of the Dispute between and among the Respondents. It therefore is clear that the instant legal dispute is highly likely to reoccur for further extraordinary sessions. As the Court of Appeals held in Matter Hearst Corp. v. Clyne, (50 NY2d 707), the question of mootness, even assuming it exists, does not destroy the jurisdiction of the court in matters that would otherwise evade review, and which are likely of repletion. The Court of Appeals described the exception to the mootness doctrine as follows:

However, examination of the cases in which our court has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues. After careful review we are persuaded that the case before us presents no questions the fundamental underlying principles of which have not already been declared by this court, and that this case is, therefore, not of the class that should be preserved as an exception to the mootness doctrine.

(Hearst Corp. v. Clyne, 50 NY2d 707 at 714-715; In re M.B., 6 NY3d 437, 447 [NY Ct. of Appeals 2006]).

Each of these factors is present at bar. There is a likelihood of repetition, an extremely important, novel issue, and a controversy that would evade review if Petitioner were able to seek relief only after each occasion on which the Respondents.

The Respondents claim that a separate remedy would lie only after each extraordinary session has been effectively countermanded through the sequential appearances. In effect,

Respondents claim that the supposed mootness of this application makes judicial review as a practical matter forever impossible. The Constitution does not so tie the court's hands, nor does the doctrine of mootness as applied by the Court of Appeals require such judicial impotence. (Matter of Hearst v. Clyne, supra).

POINT IV

RESPONDENTS SHOULD BE DEEMED TO HAVE ANSWERED AND FAILED TO DENY ESSENTIAL ALLEGATIONS OF THE PETITION

As noted above, conspicuously absent from the Respondents' motion to dismiss is any refutation of Petitioner's allegation that there was an arrangement between and among Respondents that they would appear only sequentially in the Senate Chamber in a manner that would avoid the creation of a quorum and the capacity to do business. (See, Verified Petition, ¶¶ 16 and 21). Indeed, the Democratic Conference Respondents admit an agreement that there would not be an objection to sequential meetings.

In their motion, Respondents seek to defer in these extraordinary emergency circumstances the service of an answer and further seek a factual hearing. It is submitted that in the absence of a denial of the allegations of arranged avoidance of full assembly—which is the state of this record—there is no basis to hold a hearing and the Respondents' answer should be deemed made in accordance with the Order to Show Cause by which this Court required service by 12:00 noon, this date, June 29, 2009. (Graziano v. County of Albany, 2003 WL 21497332 [N.Y. Sup.], 2003 N.Y. Slip Op. 51035[U]).

CONCLUSION

**PETITIONER SHOULD BE GRANTED A JUDGMENT OF
MANDAMUS AGAINST RESPONDENTS COMPELLING
RESPONDENTS' PERSONAL SIMULTANEOUS
ATTENDANCE IN FULL ASSEMBLY AT
EXTRAORDINARY SESSIONS OF THE SENATE CALLED
BY PETITIONER PURSUANT TO ARTICLE 4, SECTION 3
OF THE CONSTITUTION**

Dated: Albany, New York
June 29, 2009

Yours, etc.

GLEASON, DUNN, WALSH & O'SHEA

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