SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

In the matter of
Hon. David A. Paterson, 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 Malave 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., Senator Catharine Young.

Respondents.

AFFIRMATION IN SUPPORT OF A MOTION FOR A STAY AND LEAVE TO APPEAL
Index No. 5435/09

JOHN CIAMPOLI, an attorney duly admitted to the practice of Law before the Courts of the State of New York, does hereby affirm under the penalties of perjury as follows:

1. Affirmant is the attorney for Senator Pedro Espada, Jr.
2. The Senator is, pursuant to C.P.L.R. 5519 (a)(1) an appellant who is an officer of the state and an elected representative from the 33rd Senatorial district.
3. Senator Espada has filed a notice of appeal from the order and judgment of Honorable Joseph C. Teresi issued by the Court on June 29, 2009 and entered with the Clerk on June 30, 2009, ordering the Senate of the State of New York to to "convene into session as one group, consistent with the Senate Rules on June 30, 2009 [at] 10 AM."
4. The Petitioner appeared in a press conference at about 6 P.M. He thereafter issued a Proclamation calling the Senate into Extraordinary Session at 10 AM to retroactively match the order of the Court.
5. The Petitioner in his press conference asserted that there is no automatic stay of the order of the court.
6. Petitioner then issued a threat to appellant Espada and to those Senators who relied on the such a stay and thereupon chose to not attend the stayed Session at 10 AM., that they would face "consequences."
7. Senator Espada moves for permission to appeal the order and judgment of Honorable Joseph C. Teresi issued by the Court on June 29, 2009 at 4:50 PM, ordering the Senate of the State of New York to "convene into session as one group, consistent with the Senate Rules on June 30, 2009 [at] 10 AM."
8. Appellant fully believes that he is entitled to an automatic stay by operation of law on the basis that he is an officer of the state, having been elected a state senator from the 33rd senatorial district and having been elected Temporary President of the Senate on June 8, 2009. C.P.L.R. 5519 (a)(1)

provides that an automatic stay can be had where "the appellant or moving party is the state or …any officer or agency of the state."

9. This motion is made to insure that a stay goes into effect and that an appeal may be taken.
10. An order of a court ordering Senators to act in a certain manner in their legislative capacity is an unconstitutional intrusion into the prerogatives of the members of the Senate.
11. The petition sought to expand the Governor's limited grant of authority under Article IV, § 3 to graft on to it the additional requirement that the Legislature must act substantively (or at least be able to act) on his agenda.
12. The Governor's power has been limited by case law. The legislature may take other action during an Extraordinary Session, such that even the Governor's ability to restrict the agenda is limited. (*See*, 201 A.G. Op. 1953 (change Rules of the Body); People ex rel. Robin v. Hayes, 82 Misc. 165 (impeach the Governor); Petition of Orans, 45 Misc.2d 616 (1965) (act upon a plan of reapportionment)). It does so in the exercise of its own prerogative.
13. Each branch of the government-- Executive, Judicial and Legislative-- are bound by the doctrine of separation of powers. *See* Jones v. Beame, 45 N.Y.2d 402, 408 (1978).
14. Justice Teresi's order injects the Judiciary (a co-equal branch of Government) into the dispute by imputing the requirement into the Constitution that a quorum meet into the clear wording of Article IV, § 3.
15. While the Governor has admitted that he lacks the ability to require a vote on any measure placed before the legislature, he nevertheless may now compel the presence of all Senators forcing the Senate to conduct business.
16. The Order of Justice Teresi went further than the plain meaning of Article IV, § 3, contravening the separately held powers of the legislature. Where the Senate has met, even without a quorum, it has

still convened. No constitutional language or inference requires more in order to “convene.” The Senate, meeting under the Bipartisan Reform Coalition, of which appellant is a member, called up the Governor’s agenda and subsequently laid it aside, thereby doing more than simply convening.

17. The judicial order issued by Justice Teresi also violates the separation of powers doctrine.
18. It is a fundamental principle of common law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others. People ex rel. Burby v. Howland, 155 N.Y. 270, 282; Saxton v. Carey, 44 N.Y. 2d 545, 549. The Court, by this order, has interjected itself into the legislative process.
19. Justice Teresi’s order also runs afoul of Article III § 11 “The Speech or Debate Clause” of the State Constitution, in that it forces the members of the Senate to “answer in another place” for purely legislative activity.
20. A legislator is afforded immunity from any proceeding challenging lawful action taken in his or her official capacity. People v. Ohrenstein, 77 N.Y.2d 38, 53-54 (1990).
21. The Speech or Debate Clause's "fundamental purpose," is to free "the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." Gravel v. United States, 408 U.S. 606, 618 (1972). It is further to insure that the legislative function may be performed independently. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975).
22. The Clause not only shields legislators from the consequences of litigation, but also protects them from the burden of defending themselves in court. Straniere v. Silver, 218 A.D.2d 80 (3d Dept 1996).
23. Protected legislative activities include those acts that are: "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other

matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, *Id.* at 625, *see, also*, People v. Ohrenstein, 77 N.Y.2d 38, 54.

24. A range of protected activities therefore, includes voting, action on the floor, and even the decision as to whether to provide a presence to constitute a quorum.

25. "The Clause serves to preserve the integrity of the legislature by preventing other branches of government from interfering with legislators in the performance of their duties. The Clause encompasses all legislative activity, i.e., acts that are an integral part of the legislative process, including votes and speeches on the floor of the house as well as the underlying motivations for these activities, along with preparing committee reports and conducting committee hearings that do not occur on the floor of the house." *See,* Maron v. Silver, 58 A.D.3d 102 (3d Dept. 2008).

26. The Speech or Debate Clause protects inaction by the Legislature as well. *Id.*

27. Justice Teresi's order and judgment additionally calls into question the validity of the sessions which have been attended by appellant since the first Proclamation was issued by the Governor.

28. Appellant has "convened" within the meaning of the Constitution each time the Governor issued a Proclamation.

29. The Senate's own Rules allow for less than a majority of the members elected to meet and declare that to be a "convened" body.

30. The Rules provide for the Senate, once convened, to call for the presence of additional members so that a quorum may be achieved, and business may be transacted. *See* Senate Rule X, § 2 (a). "In case a less number than a quorum of the Senate shall convene, those present are authorized to send the Sergeant at Arms, or any other person, for the absent Senators."

31. The provision in the Senate Rules authorizing the Senate to call for the attendance of more members to achieve a quorum is clear, irrefutable evidence that fewer than a quorum can "convene" the Senate.
32. The Senate is permitted by Constitution (Article III, § 9) to set the Rules of its own proceedings.
33. The Rules state that less than a quorum constitutes a "convened" Senate and therefore, that is what controls this Court.
34. The word "convene" is defined in Black's Law Dictionary (6th Ed.) as "to call together; to cause to assemble; to convoke." By no definition does "convene" require a quorum. The body assembles when any portion of its members come together.
35. The notion of a quorum applies to the body only when it must transact business by majority vote—for no action requiring the vote of a majority of the members elected can be valid without a quorum. *See,* Masons' Manual of Legislative Procedure, § 500 et. seq. NCSL (2000 ed.). No quorum is required to convene, to call up bills, to lay aside bills, to table bills, or to adjourn.
36. Justice Teresi's order and judgment did not give effect to this rule, and instead granted additional authority to the Governor's power in the Constitution which are not warranted by its plain meaning. The inability to vote on legislation is irrelevant to its legal obligation to convene and the fulfillment of that obligation by appellants' actions.
37. Case law has deemed the legislature "convened in a joint session" even in the absence of attendance by a majority of the Senate. *See, Marino v. Weprin,* 155 Misc.2d 276 (1993).
38. Justice Teresi's order and judgment separately raises issues of justiciability and the allocations of power in a tri-partite government under a written Constitution and its explicit provisions.
39. The order and judgment of Justice Teresi constitutes an express *ultra vires* executory directive, violating the State Constitution by judicially ordering that the Senate meet at a specific time, place

and manner. Thus, it must be automatically stayed or else the matter is rendered academic without the appeal being heard, with the possibility of substantial irreparable harm having occurred.

40. Even if the notice of appeal is not sufficient to trigger a stay, as the Governor asserts, The notice of intent to appeal filed by Respondent Republican Senators on the Governor, and his counsel (via facsimile) must be declared sufficient to invoke the automatic stay provision. C.P.L.R. 5519(a)(1).
41. Accordingly, to ensure protection of his rights, appellant moves for permission to appeal.
42. Service of the notice of appeal by the officers of the state automatically stays all proceedings to enforce executory directives in the order appealed from. The automatic stay provided by C.P.L.R. 5519(a)(1) is provided in law to maintain the status quo pending the appeal.
43. In the alternative, to assure that appellant's rights as an independent legislator are not trampled, this court is asked to order a stay pending appeal.

WHEREFORE the appellant moves that the instant judgment and order of Justice Teresi of June 29, 2009 be stayed in all respects and further, that if required, leave to appeal be granted in order this matter may be heard by the Court that the action is barred by the Separation of Powers doctrine and the Speech or Debate clause.

DATED: June 30, 2009
Albany, NY

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Respondents.

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ORDER TO SHOW CAUSE AND
AFFIRMATION IN SUPPORT OF A MOTION FOR A STAY AND LEAVE TO APPEAL

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