

COURT OF APPEALS OF THE STATE OF NEW YORK

Silver v. Pataki

96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482 (2001) · Decided July 10, 2001

SUMMARY

The New York Court of Appeals considered whether Sheldon Silver, as a member and Speaker of the New York State Assembly, had capacity and standing to challenge the Governor's line-item vetoes of provisions in non-appropriation budget bills. The court held that Silver had capacity and standing to sue as an Assembly member because the alleged vetoes nullified the effectiveness of his legislative vote, but lacked special authority to sue as Speaker on behalf of the Assembly. The court modified the Appellate Division's order to permit the action insofar as it was brought in Silver's capacity as an Assembly member.

OPINION

PER CURIAM.

96 N.Y.2d 532 (2001) 755 N.E.2d 842 730 N.Y.S.2d 482 SHELTON SILVER, as Member and Speaker of the New York State Assembly, Appellant, v. GEORGE E. PATAKI, as Governor of the State of New York, Respondent. Court of Appeals of the State of New York. Argued May 3, 2001. Decided July 10, 2001. *533 Weil, Gotshal & Manges, L. L. P., New York City (Steven Alan Reiss, Eric Ordway, Kerry C. Foley and Ronald R. Rossi of counsel), for appellant. *534 Cravath, Swaine & Moore, New York City (Max R. Shulman of counsel), for respondent.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, WESLEY and ROSENBLATT concur in Per Curiam opinion; Judge GRAFFEO dissents and votes to affirm in a separate opinion. *535 OPINION OF THE COURT Per Curiam. In January 1998, defendant Governor George E. Pataki submitted his Executive budget to the houses of the New York State Legislature, along with several budget bills.

Some of the bills submitted appropriated monies while others detailed the utilization of appropriated funds or proposed changes in the operation of certain programs. After public hearings and internal negotiations between houses, the Legislature passed and transmitted to the Governor six appropriation bills and three "non-appropriation" bills,[1] which struck out or reduced certain appropriations proposed by the Governor, while adding new appropriations and directives.

In addition to vetoing several provisions in the appropriation bills, the Governor exercised his line-item veto power 55 times to remove provisions from the "non-appropriation" bills. Plaintiffs

"Member and Speaker, New York State Assembly" [2]commenced this action, asserting that while the Governor has the constitutional right to veto line items in an appropriation bill, he has no similar right to veto items in "non-appropriation" bills, which must be approved or rejected in their entirety.

The Speaker seeks a declaration that the 55 vetoes violated article IV, § 7 of the New York Constitution, and that legislation relating to the budget that does not appropriate money is not subject to the line-item veto power.

The Governor contends that the bills in question were part of the budget process and contained items of appropriation subject to his line-item veto. Supreme Court denied the Governor's motion to dismiss, rejecting his claim that plaintiff lacks standing and legal capacity to bring the action. A majority at the Appellate Division reversed, *536 concluding that plaintiff lacks capacity to sue because he has no express or inherent authority to bring the action and that he has no standing because he failed to allege personal harm beyond mere institutional injury.[3] The dissenting Justices' contrary view focused on the necessary implication that a legislatorwho has the power and responsibility to consider and vote on legislationhas the capacity to bring an action to vindicate the effectiveness of his or her vote.

Under the circumstances presented here, we agree, in part, with the dissenters: plaintiffas a Member of the Assemblycan maintain an action "to vindicate the effectiveness of his vote where he is alleging that the Governor has acted improperly so as to usurp or nullify that vote" (274 AD2d 57, 67). Our current Executive budget system is embodied in article VII of the New York Constitution.

Each Executive department must initially furnish the Governor with financial estimates, that are also supplied to relevant legislative committees, and upon which budget hearings are then held (see, NY Const, art VII, § 1). Itemized estimates of the financial needs of the Legislature and Judiciary are also transmitted to the Governor. Thereafter, the Governor must submit, along with the budget, a bill or bills containing all of the proposed appropriations and related legislation (see, id., §§ 2, 3).

The action that the Legislature can take on the Governor's budget bills is limited to striking out or reducing "items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose" (id., § 4).

However, any separate items of appropriation added to the Governor's bills by the Legislature are subject to the line-item veto power of article IV, § 7 (see, id.). The budget process has been the subject of prior legal skirmishes between the Governor and the Legislature (see, e.g., New York

State Bankers Assn. v Wetzler, 81 NY2d 98; People v Tremaine, 281 NY 1 [Tremaine II]; People v Tremaine, 252 NY 27 [Tremaine I]).

The present appeal calls upon us to determine only a limited threshold issue: does Mr. Silver, as a Member or Speaker of the Assembly, have capacity and standing to bring this action? *537 Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.

As a general matter, capacity "concerns a litigant's power to appear and bring its grievance before the court" (Community Bd. 7 v Schaffer, 84 NY2d 148, 155). Capacity may depend on a litigant's status or, as here, on authority to sue or be sued.

In Community Bd. 7, we noted that capacity may be expressly conferred or "inferred as a `necessary implication from [the agency's] power[s] and responsibilit[ies],' provided, of course, that `there is no clear legislative intent negating review'" (id. at 156 [quoting Matter of City of New York v City Civ. Serv. Commn., 60 NY2d 436, 443-444, rearg denied 61 NY2d 759]).

The "power to bring a particular claim may be inferred when the agency in question has `functional responsibility within the zone of interest to be protected'" (id. [quoting Matter of City of New York, supra, at 445]). This test is related, but not identical to, the traditional "zone of interest" analysis employed in determining standing.

As a Member of the Assembly, plaintiff is entrusted by the Constitution to exercise legislative power (see, NY Const, art III, §§ 1, 2). "[E]xcept as restrained by the constitution, the legislative power is untrammelled and supreme * * *. Nothing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn" (Matter of Thirty-Fourth St. Ry.

Co., 102 NY 343, 350-351). Plaintiff has the broad power and functional responsibility to consider and vote on legislation. That responsibility necessarily includes continuing concern for protecting the integrity of one's votes and implies the power to challenge in court the effectiveness of a vote that has allegedly been unconstitutionally nullified. Individual legislators have several times in the past challenged the frustration of their authority (see, e.g., Anderson v Regan, 53 NY2d 356 [two Senators brought action against State Comptroller over dispute whether Federal funds must be appropriated by the Legislature prior to disbursement by the Executive department]; Winner v Cuomo, 176 AD2d 60 [three Assembly Members challenged Governor's untimely submission of budget bills to Legislature]; Matter of Sullivan v Seibert, 70 AD2d 975 [Assembly Member commenced action to compel heads of Executive departments to make timely annual reports to the Legislature as required by statute]).

Indeed, legislators and the districts they represent could be disenfranchised from the constitutionally mandated budget process if *538 stripped of the capacity to sue when confronted

with allegedly unlawful or unconstitutional conduct of others that directly affects their official responsibilities.[4] We reject the notion that plaintiff's functional responsibilities as a legislator are at an end once a bill is voted upon and leaves the Assembly.

Such a narrow view could render a legislator's vote meaningless and unnecessarily dilute one's legislative responsibilities. A legislator surely would have the capacity to sue if prevented from casting a meaningful vote on legislation at the outset (see, e.g., *Winner v Cuomo*, supra).

We see no principled basis for distinguishing between a legislator's pre-vote and post-vote interests in the validity and effectiveness of that vote. A procedure that nullifies a legislator's vote is as harmful as one that precludes it.

In each case, the legislator and the thousands of New Yorkers he or she represents are unlawfully precluded from participating in the governmental process. Thus, Mr. Silver does have capacity to sue as a Member of the Assembly.

The Speaker also asserts that as leader of the Assembly, he has the inherent capacity to sue on its behalf. The Constitution, however, does not give the Speaker representative authority for the body over which he presides. Nor has the Assembly passed a resolution expressing its will that the Speaker engage in this litigation.

The Assembly Speaker is nominally a constitutional officer (NY Const, art III, § 9), but his express statutory powers are circumscribed (see, e.g., Legislative Law §§ 7, 12 [appointment of employees and expenditure authorizations]). Other duties are merely administrative, and include preserving order and decorum, appointing committee members and chairpersons, allocating staff, administering internal rules, and promulgating a budget adoption schedule (see, Rules of Assembly of State of NY, 1997-1998, rule I).

None of these specific responsibilities are broad enough to confer on the Speaker any special implied authority to seek judicial review on behalf of the interests of the Assembly in general. Accordingly, as Speaker, plaintiff has no special authority to maintain this action.

Having concluded that plaintiff has capacity to bring this action as a Member of the Assembly, we next address the related question whether plaintiff has suffered an injury in fact sufficient to confer standing on him.

We conclude that he has. *539 The test for determining a litigant's standing is well settled. A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. "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 prosecuting the action which casts the dispute `in a form traditionally capable of judicial resolution' " (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [citation omitted]).

Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power. Only circumstances presented by the latter two categories confer legislator standing (see, e.g., *Coleman v Miller*, 307 U.S. 433 [vote nullification]; *Dodak v State Admin. Bd.*, 441 Mich. 547, 495 NW2d 539 [usurpation of power belonging to legislative body]; cf., *Raines v Byrd*, 521 U.S. 811 [no standing to challenge lost vote]; *Matter of Posner v Rockefeller*, 26 NY2d 970 [same]).

Plaintiff identifies two types of injury one suffered by the Legislature as a whole and the other involving the nullification of his vote.[5] As a Member of the Assembly who voted with the majority in favor of the budget legislation, plaintiff undoubtedly has suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote sufficient to confer standing.

The circumstances here are analogous to those present in *Coleman v Miller* (307 U.S. 433, *supra*). In *Coleman*, the United States Supreme Court recognized the standing of 20 members of the Kansas State Senate challenging that body's ratification of an amendment to the Federal Constitution when a 20-20 deadlock was broken by the vote of the State's Lieutenant Governor.

The Supreme Court determined that the Senators had "a plain, direct and adequate interest in maintaining the effectiveness of their votes" (*id.*, at 438; see also, *Kennedy v Sampson*, 511 F2d 430, 436 [DC Cir] [no more essential interest could be asserted by a legislator than to vindicate the effectiveness *540 of his vote]).[6] The Court explained that the Senators' votes had been held for naught because, if their allegations were correct, the amendment would not have been ratified.

Thus, the legislators were sufficiently aggrieved suffering an injury in fact to allow them to maintain the action. Here, plaintiff as a Member of the Assembly won the legislative battle and now seeks to uphold that legislative victory against a claimed unconstitutional use of the veto power nullifying his vote. If plaintiff's allegations are correct, and at this point in the litigation we must assume they are, the vetoed provisions were improperly invalidated and should be in effect.

Such a direct and personal injury is clearly within a legislator's zone of interest and unquestionably represents a "concrete and particularized" harm (*Raines*, *supra*, 521 US, at 819 [citation omitted]; accord, *Dennis v Luis*, 741 F2d 628, 630-631 [3d Cir]; *Fordice v Bryan*, 651 So 2d 998, 1003 [Miss]; *Hendrick v Walters*, 865 P2d 1232, 1236-1238 [Okla]).

As Supreme Court noted, plaintiff is not "seeking to obtain a result in a courtroom which he failed to gain in the halls of the Legislature" (179 Misc. 2d 315, 322). *Matter of Posner v Rockefeller* (26 NY2d 970, *supra*) and *Raines v Byrd* (521 U.S. 811, *supra*) do not require a different result.

In each case, the plaintiff-legislators lost their political battles when legislation was validly enacted over their opposition. No vote nullification was alleged; they suffered no direct, personal injury beyond an abstract institutional harm.

Thus, each lacked standing to sue. Indeed, in *Raines* the United States Supreme Court recognized the continuing vitality of *Coleman* and acknowledged that the injury suffered by a legislator voting with the majority whose vote is nullified is cognizable by the courts, explaining that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified" (521 US, at 823).

Nor is a controlling bloc of legislators (a number sufficient to enact or defeat legislation) a prerequisite to plaintiff's standing as a Member of the Assembly. The *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action (see, *Kennedy v Sampson*, *541 *supra*, 511 F2d, at 435 ["In light of the purpose of the standing requirement * * * we think the better reasoned view * * * is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority"]).

Moreover, plaintiff's injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.[7] The dissent contends that plaintiff did not establish vote nullification because he still had a remedy within the political process seeking to override the vetoes by a two-thirds supermajority (see, dissenting opn, at 546; NY Const, art IV, § 7).

The existence of other possible political remedies, however, does not negate the injury in fact (see, *Campbell v Clinton*, 52 F Supp 2d 34, 45 n 11 ["The mere availability of a legislative alternative is not sufficient to defeat standing; if it were, a legislator would never have standing since Congress always has the option of impeaching and removing the President" (emphasis in original)], *affd* 203 F3d 19, cert denied 531 U.S. 815).

The supermajority override is a political remedy for validly imposed vetoes. This case, contrary to the dissent's view, is not about a general dispute over legislative authority or its limitations. It focuses on a discrete and defined event implicating a constitutional restriction on use of the line-item veto power. It does not call upon this Court to enter a political debate; it presents only a straightforward legal question.

Lastly, that other parties may also be aggrieved by some of the Governor's contested vetoes does not diminish the direct injury suffered by plaintiff, as a Member of the Legislature (see, *Clinton v City of New York*, 524 U.S. 417, 434 [it is "self-evident" that "more than one party may have standing to challenge a particular action or inaction"])). Indeed, a contrary conclusion could insulate unconstitutional conduct from judicial review. *542 This Court has repeatedly emphasized that "the budgetary process is not always beyond the realm of judicial consideration and that the `courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government'" (*New*

York State Bankers Assn. v Wetzler, 81 NY2d 98, 102 [emphasis in original], supra [quoting Saxton v Carey, 44 NY2d 545, 551]; see also, Matter of King v Cuomo, 81 NY2d 247, 251).

The capacity and standing of an individual legislator to seek judicial redress in these circumstances is essential to protect the separation of powers and rights of the Legislative branch. Contrary to the Appellate Division majority view, our decision today will not open the possibility of countless legislator lawsuits that would impair the legislative process.

That has not been the case only a handful of legislator lawsuits have arisen in this State to date. We announce nothing new today. We only confirm what was assumed before: in limited circumstances, legislators do have capacity and standing to sue when conduct unlawfully interferes with or usurps their duties as legislators.

The parties' remaining arguments are without merit. Accordingly, the order of the Appellate Division should be modified, without costs, by denying defendant's motion to dismiss the complaint insofar as it is brought by plaintiff as a Member of the New York State Assembly and, as so modified, affirmed. GRAFFEO, J. (dissenting). While I recognize the significance of the constitutional question raised in this action, the procedural issues before this Court must first be addressed, that is: whether plaintiff Sheldon Silver, as Speaker of the New York Assembly or as a Member of the Assembly, has the legal capacity or standing to bring an action challenging the Governor's use of line-item vetoes in connection with certain budget bills passed by the Legislature.

Because I disagree with the majority's conclusion that plaintiff has such capacity or standing, I respectfully dissent and would affirm the dismissal of plaintiff's complaint. The sole cause of action asserted in the complaint is that, "[i]n complete contravention of the limitations on the Governor's line-item veto authority as set forth in Article IV, § 7 of the Constitution, the Governor has unconstitutionally asserted a line-item veto to eliminate provisions in Non-Appropriation *543 Bills submitted and approved by both houses of the Legislature."

This contention is anchored in the constitutional tension which arises from the allocation of law-making and budgetary power between the Legislature and the Executive a conflict involving two branches of State government.

The complaint alleges no injury personal to plaintiff. Indeed, in his affidavit submitted in Supreme Court, plaintiff emphasized the institutional nature of his challenge. He asserted that, "[t]o allow legislative enactments that provide for the programming of executive appropriations to be dismantled piecemeal through the Governor's exercise of the line-item veto would deprive the Legislature of that role," complaining that "[t]he Governor's exercise of the line-item veto has injected highly disruptive uncertainty into the Assembly's decisions."

Additionally, plaintiff argued that the effect of the challenged vetoes was to diminish his political power as Speaker of the Assembly, indicating "the Governor's exercise of the line-item veto with respect to non-appropriation bills has interfered with my authority as Speaker to negotiate the Assembly's priorities and interests in the budget process."

Thus, although the majority has treated this controversy as one involving an individual legislator's allegation of vote nullification, plaintiff's claim is actually predicated on these alleged institutional injuries.

In determining capacity to sue under these circumstances, the requisite inquiry is whether an elected representative serving in one house of the Legislature possesses express or inherent authority to commence an action of this nature. An analysis of capacity to sue involves a litigant's ability to initiate judicial review of a grievance.

In *Community Bd. 7 v Schaffer* (84 NY2d 148, 155), this Court explained that capacity, a legal concept distinct from standing or justiciability, "concerns a litigant's power to appear and bring its grievance before the court" which "sometimes depends purely upon a litigant's status." Capacity ensures that rights sought to be vindicated in court will be asserted by a party legally entitled to enforce such rights.

Here, I find that this dispute essentially involves the extent to which powers are to be shared by the two branches of government in the development of the State budget and whether the Governor unlawfully disturbed the constitutional balance of power by exceeding his line-item veto authority with respect to particular budget legislation. I therefore conclude this is clearly an institutional claim.

There is no question that the State Legislature, the representative branch of government, can exercise only those powers *544 granted under the State Constitution, as further defined or implemented by statute. Indisputably, the scope of the Legislature's powers is broad with respect to State legislative affairs (see, NY Const, art III, § 1), but neither the State Legislature, nor even the Assembly as an institution, is seeking redress here.

The majority's discussion of capacity is focused on whether an individual legislator is vested with authority to challenge Executive action after passage of budget legislation. Certainly, there is no explicit constitutional pronouncement authorizing a legislator to commence such a lawsuit. Similarly, the Legislative Law, enacted to govern the affairs of the legislative branch (see, L 1909, ch 37), also provides no guidance since it primarily addresses the organization and administrative structure of the Legislature.

And although article III, § 9 of the State Constitution permits each house to "determine the rules of its own proceedings," the Rules of the Assembly for 1997-1998 contain no reference to the legal authority of a legislator to initiate litigation related to the performance of official duties or

the protection of law-making functions. Where, as here, there is no explicit authority to sue, the next step in capacity analysis is whether an inherent right has been or should be recognized which vests New York's 211 State legislators with the authority to individually redress this type of institutional grievance.

The majority finds such implied authority arising from the official's general legislative duties and holds that a legislator's vote on behalf of constituents would be rendered "meaningless" unless each legislator is vested with the capacity to prevent the nullification of his or her vote cast in support of the passage of a bill.

Because plaintiff's claim is premised on an allegation that a "wrong" was committed against the collective will of the Assembly, I cannot adopt the majority's viewpoint. In the absence of some collective authorization—either by statute, Assembly resolution or otherwise—there is no legal basis to find an individual legislator has the capacity to seek vindication for such alleged institutional harm.

Additionally, I conclude that plaintiff lacks standing as a Member of the Assembly to bring this action. In *Matter of Posner v Rockefeller* (26 NY2d 970), this Court held that three Members of the Assembly lacked standing to bring a suit challenging, on constitutional grounds, the validity of portions of appropriation bills.

In addition to determining that plaintiffs lacked citizen-taxpayer standing (a ground not asserted in this *545 action), the Court held that their status as Members of the Assembly did not "give them the requisite standing to challenge in the judicial branch the validity of appropriation bills submitted by the Governor, and it matters not whether such bills have been passed by the Legislature or were still pending before that body at the time the proceeding was instituted" (*id.*, at 971-972).

Although the citizen-taxpayer standing analysis in *Posner* is no longer binding given the subsequent enactment of section 123-b of the State Finance Law, there is no reason to depart from that aspect of *Posner* most relevant to the issue before us—that a legislator lacks standing to commence litigation to resolve such a dispute. I rely on the discussion of standing considerations in *Society of Plastics Indus. v County of Suffolk* (77 NY2d 761, 771-775) where this Court emphasized that the focus of a standing inquiry is whether the party bringing suit is the proper party to request the adjudication of a particular dispute.

The pivotal concerns in a standing controversy are what type of injury is being asserted and by whom. Here, I find no basis for empowering plaintiff to redress what resonates as an institutional injury, particularly where he has not pursued this litigation under the color of a resolution authorizing him as Speaker of the Assembly to commence this action on behalf of that legislative body.

While this Court has recognized that the judiciary may "resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government" (Matter of King v Cuomo, 81 NY2d 247, 251, quoting Saxton v Carey, 44 NY2d 545, 551), to date, this power has been exercised only when a legislator has been deprived of the ability to perform a legislative function or to enforce a constitutional obligation integral to his or her legislative duties (see, e.g., Anderson v Regan, 53 NY2d 356 [whether Legislature entitled to appropriate certain federal funds before disbursement]; Winner v Cuomo, 176 AD2d 60 [Governor's failure to submit budget bills to Legislature within constitutionally prescribed time period]; Matter of Sullivan v Seibert, 70 AD2d 975 [failure of Executive agencies to comply with statutory requirement for the filing of annual reports with the Legislature]).

There is no allegation in this case that the Executive took any action which prevented plaintiff from discharging his legislative duties as a Member of the Assembly. Insofar as an allegation of vote nullification can be gleaned from this record, plaintiff's vote was no more "nullified" than it would be if a *546 majority of his Assembly colleagues had declined to vote with him, or if the Senate had not passed legislation for which he voted.

What plaintiff has alleged is that the Governor improperly counteracted the cumulative actions of a majority of legislators by improperly vetoing legislation. The State Constitution, of course, provides a legislative means to address budgetary disagreements, granting the Legislature authority to override a gubernatorial veto (NY Const, art IV, § 7).

In the same way a cumulative response is required for an override, any judicial challenge should involve the concurrent actions of legislators with the strength of a majority. To vest a sole member of a legislative house with the implied authority to initiate a challenge to redress an institutional injury suffered by the legislative body that passed particular legislation (and to conceivably allow the member to pursue that litigation at public expense), is to overlook fundamental principles of capacity and standing.

Coleman v Miller (307 U.S. 433) does not direct otherwise. In 1925, the Kansas Senate adopted a resolution to ratify an amendment to the Federal Constitution by a 20-20 vote, with the Lieutenant Governor casting the deciding vote in favor of passage. Twenty State Senators commenced an action seeking a ruling prohibiting the Kansas Secretary of State from authenticating the resolution.

The Supreme Court of Kansas denied the relief and the United States Supreme Court granted certiorari. On the issue of whether the state officials had a sufficient legal interest to establish standing, the Court concluded "that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a

basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision" (id., at 446).

Those 20 Senators constituted a voting bloc; the action was not brought by one Senator purporting to vindicate the interests of the entire voting bloc. More recently, the United States Supreme Court held in *Raines v Byrd* (521 U.S. 811, 816) that six Members of Congress who voted against the Line Item Veto Act lacked standing to pursue a complaint alleging, in part, that the Act was unconstitutional because it "alter[ed] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items."

In rejecting the claim of standing, the Court stated: *547 "First, appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. * * * Second, appellees do not claim that they have been deprived of something to which they personally are entitled such as their seats as Members of Congress after their constituents had elected them.

Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete" (id., at 821 [emphasis in original]; see also, *Clinton v City of New York*, 524 U.S. 417, 430).

The Court noted that the *Coleman* Court had "repeatedly emphasized that if these legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity" (*Raines v Byrd*, 521 US, at 822), and indicated *Coleman* stood "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified" (id., at 823).

Here, plaintiff is a single legislator and he seeks to proceed in the absence of authorization from the Assembly to act on behalf of the voting bloc in that body. I would adopt a rationale similar to that of *Raines*: the usurpation of legislative authority alleged in the complaint represents an institutional harm and any vote nullification claim must be asserted by a sufficient voting bloc or by the institution itself.

Concluding plaintiff lacks capacity or standing as a Member of the Assembly, I would affirm the judgment dismissing the complaint. Order modified, etc. NOTES [1] The term "non-appropriation" bill is not found in the Constitution. These bills contain programmatic provisions and commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment.

[2] Plaintiff brought this action in his official capacities only, not as a taxpayer under article 7-A of the State Finance Law. [3] Although the Appellate Division based part of its analysis on the absence of any express authorization for the reimbursement of legal fees incurred in such an action (274 AD2d 57, 62-63), the propriety of those expenditures is not before us.

[4] No other jurisdiction in the nation has held that an individual legislator lacks capacity to sue.

[5] We agree with our dissenting colleague that plaintiff's allegation of injury to the Assembly as a whole, characterized as interference with his ability "to negotiate the Assembly's priorities and interests in the budget process" (dissenting opn, at 543), at best reflects a political dispute.

This type of political harm is no more than an abstract institutional injury that fails to rise to the level of a cognizable injury in fact (see, *Raines v Byrd*, supra, 521 US, at 821, 829). [6] Federal courts continue to recognize *Kennedy* as an application of the narrow rule announced in *Coleman* (see, *Chenoweth v Clinton*, 181 F3d 112, 115 [DC Cir]).

[7] In the dissent's view, only "a sufficient voting bloc" of legislators who voted for the bills in question could act as plaintiffs in the absence of a Resolution of the Assembly authorizing a lawsuit (dissenting opn, at 547).

Under that analysis, it would seem that all who voted for the bills in question would need to join. Thus, a suit could be blocked by one legislator who chose, for whatever reason, not to join in the litigation. Such a result would place too high a bar on judicial resolution of constitutional claims.

However, if a "sufficient voting bloc" is less than all legislators who voted for the bill, the injury cannot be characterized as institutional and must be viewed as personal to those who assert the claim.

PER CURIAM.

OPINION OF THE COURT Per Curiam. In January 1998, defendant Governor George E. Pataki submitted his Executive budget to the houses of the New York State Legislature, along with several budget bills. Some of the bills submitted appropriated monies while others detailed the utilization of appropriated funds or proposed changes in the operation of certain programs.

After public hearings and internal negotiations between houses, the Legislature passed and transmitted to the Governor six appropriation bills and three "non-appropriation" bills,¹ which struck out or reduced certain appropriations proposed by the Governor, while adding new appropriations and directives.

In addition to vetoing several provisions in the appropriation bills, the Governor exercised his line-item veto power 55 times to remove provisions from the "non-appropriation" bills. Plaintiff — as "Member and Speaker, New York State Assembly"² — commenced this action, asserting that while the Governor has the constitutional right to veto line items in an appropriation bill, he

has no similar right to veto items in “non-appropriation” bills, which must be approved or rejected in their entirety.

The Speaker seeks a declaration that the 55 vetoes violated article IV, § 7 of the New York Constitution, and that legislation relating to the budget that does not appropriate money is not subject to the line-item veto power.

The Governor contends that the bills in question were part of the budget process and contained items of appropriation subject to his line-item veto. Supreme Court denied the Governor’s motion to dismiss, rejecting his claim that plaintiff lacks standing and legal capacity to bring the action. A majority at the Appellate Division reversed, concluding that plaintiff lacks capacity to sue because he has no express or inherent authority to bring the action and that he has no standing because he failed to allege personal harm beyond mere institutional injury.³ The dissenting Justices’ contrary view focused on the necessary implication that a legislator — who has the power and responsibility to consider and vote on legislation — has the capacity to bring an action to vindicate the effectiveness of his or her vote.

Under the circumstances presented here, we agree, in part, with the dissenters: plaintiff — as a Member of the Assembly — can maintain an action “to vindicate the effectiveness of his vote where he is alleging that the Governor has acted improperly so as to usurp or nullify that vote” (274 AD2d 57, 67). Our current Executive budget system is embodied in article VII of the New York Constitution.

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The action that the Legislature can take on the Governor’s budget bills is limited to striking out or reducing “items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose” (*id.*, §4).

However, any separate items of appropriation added to the Governor’s bills by the Legislature are subject to the line-item veto power of article IV, § 7 (see, *id.*). The budget process has been the subject of prior legal skirmishes between the Governor and the Legislature (see, e.g., *New York State Bankers Assn. v Wetzler*, 81 NY2d 98; *People v Tremaine*, 281 NY 1 [Tremaine II]; *People v Tremaine*, 252 NY 27 [Tremaine I]).

The present appeal calls upon us to determine only a limited threshold issue: does Mr. Silver, as a Member or Speaker of the Assembly, have capacity and standing to bring this action? *537Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.

As a general matter, capacity “concerns a litigant’s power to appear and bring its grievance before the court” (Community Bd. 7 v Schaffer, 84 NY2d 148, 155). Capacity may depend on a litigant’s status or, as here, on authority to sue or be sued.

In Community Bd. 7, we noted that capacity may be expressly conferred or “inferred as a ‘necessary implication from [the agency’s] power[s] and responsibilities,’ provided, of course, that ‘there is no clear legislative intent negating review’ ” (id. at 156 [quoting Matter of City of New York v City Civ. Serv. Commn., 60 NY2d 436, 443-444, rearg denied 61 NY2d 759]).

The “power to bring a particular claim may be inferred when the agency in question has ‘functional responsibility within the zone of interest to be protected’ ” (id. [quoting Matter of City of New York, supra, at 445]). This test is related, but not identical to, the traditional “zone of interest” analysis employed in determining standing.

As a Member of the Assembly, plaintiff is entrusted by the Constitution to exercise legislative power (see, NY Const, art III, §§ 1, 2). “[E]xcept as restrained by the constitution, the legislative power is untrammelled and supreme * * *. Nothing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn” (Matter of Thirty-Fourth St. Ry.

Co., 102 NY 343, 350-351). Plaintiff has the broad power and functional responsibility to consider and vote on legislation. That responsibility necessarily includes continuing concern for protecting the integrity of one’s votes and implies the power to challenge in court the effectiveness of a vote that has allegedly been unconstitutionally nullified. Individual legislators have several times in the past challenged the frustration of their authority (see, e.g., Anderson v Regan, 53 NY2d 356 [two Senators brought action against State Comptroller over dispute whether Federal funds must be appropriated by the Legislature prior to disbursement by the Executive department]; Winner v Cuomo, 176 AD2d 60 [three Assembly Members challenged Governor’s untimely submission of budget bills to Legislature]; Matter of Sullivan v Seibert, 70 AD2d 975 [Assembly Member commenced action to compel heads of Executive departments to make timely annual reports to the Legislature as required by statute]).

Indeed, legislators and the districts they represent could be disenfranchised from the constitutionally mandated budget process if *538stripped of the capacity to sue when confronted with allegedly unlawful or unconstitutional conduct of others that directly affects their official

responsibilities.⁴ We reject the notion that plaintiffs functional responsibilities as a legislator are at an end once a bill is voted upon and leaves the Assembly.

Such a narrow view could render a legislator's vote meaningless and unnecessarily dilute one's legislative responsibilities. A legislator surely would have the capacity to sue if prevented from casting a meaningful vote on legislation at the outset (see, e.g., *Winner v Cuomo*, supra).

We see no principled basis for distinguishing between a legislator's pre-vote and post-vote interests in the validity and effectiveness of that vote. A procedure that nullifies a legislator's vote is as harmful as one that precludes it.

In each case, the legislator and the thousands of New Yorkers he or she represents are unlawfully precluded from participating in the governmental process. Thus, Mr. Silver does have capacity to sue as a Member of the Assembly.

The Speaker also asserts that as leader of the Assembly, he has the inherent capacity to sue on its behalf. The Constitution, however, does not give the Speaker representative authority for the body over which he presides. Nor has the Assembly passed a resolution expressing its will that the Speaker engage in this litigation.

The Assembly Speaker is nominally a constitutional officer (NY Const, art III, § 9), but his express statutory powers are circumscribed (see, e.g., Legislative Law §§ 7, 12 [appointment of employees and expenditure authorizations]). Other duties are merely administrative, and include preserving order and decorum, appointing committee members and chairpersons, allocating staff, administering internal rules, and promulgating a budget adoption schedule (see, Rules of Assembly of State of NY, 1997-1998, rule I).

None of these specific responsibilities are broad enough to confer on the Speaker any special implied authority to seek judicial review on behalf of the interests of the Assembly in general. Accordingly, as Speaker, plaintiff has no special authority to maintain this action.

Having concluded that plaintiff has capacity to bring this action as a Member of the Assembly, we next address the related question whether plaintiff has suffered an injury in fact sufficient to confer standing on him.

We conclude that he has. ⁵³⁹The test for determining a litigant's standing is well settled. A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. "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 prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution' " (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [citation omitted]).

Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power. Only circumstances presented by the latter two categories confer legislator standing (see, e.g., *Coleman v Miller*, 307 US 433 [vote nullification]; *Dodak v State Admin. Bd.*, 441 Mich 547, 495 NW2d 539 [usurpation of power belonging to legislative body]; cf., *Raines v Byrd*, 521 US 811 [no standing to challenge lost vote]; *Matter of Posner v Rockefeller*, 26 NY2d 970 [same]).

Plaintiff identifies two types of injury — one suffered by the Legislature as a whole and the other involving the nullification of his vote.⁵ As a Member of the Assembly who voted with the majority in favor of the budget legislation, plaintiff undoubtedly has suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote sufficient to confer standing.

The circumstances here are analogous to those present in *Coleman v Miller* (307 US 433, *supra*). In *Coleman*, the United States Supreme Court recognized the standing of 20 members of the Kansas State Senate challenging that body's ratification of an amendment to the Federal Constitution when a 20-20 deadlock was broken by the vote of the State's Lieutenant Governor.

The Supreme Court determined that the Senators had “a plain, direct and adequate interest in maintaining the effectiveness of their votes” (*id.*, at 438; see also, *Kennedy v Sampson*, 511 F2d 430, 436 [DC Cir] [no more essential interest could be asserted by a legislator than to vindicate the effectiveness of his vote]).⁶ The Court explained that the Senators' votes had been held for naught because, if their allegations were correct, the amendment would not have been ratified.

Thus, the legislators were sufficiently aggrieved — suffering an injury in fact — to allow them to maintain the action. Here, plaintiff as a Member of the Assembly won the legislative battle and now seeks to uphold that legislative victory against a claimed unconstitutional use of the veto power nullifying his vote. If plaintiff's allegations are correct, and at this point in the litigation we must assume they are, the vetoed provisions were improperly invalidated and should be in effect.

Such a direct and personal injury is clearly within a legislator's zone of interest and unquestionably represents a “‘concrete and particularized’” harm (*Raines*, *supra*, 521 US, at 819 [citation omitted]; accord, *Dennis v Luis*, 741 F2d 628, 630-631 [3d Cir]; *Fordice v Bryan*, 651 So 2d 998, 1003 [Miss]; *Hendrick v Walters*, 865 P2d 1232, 1236-1238 [Okla]).

As Supreme Court noted, plaintiff is not “seeking to obtain a result in a courtroom which he failed to gain in the halls of the Legislature” (179 Misc 2d 315, 322). *Matter of Posner v Rockefeller* (26 NY2d 970, *supra*) and *Raines v Byrd* (521 US 811, *supra*) do not require a different result.

In each case, the plaintiff-legislators lost their political battles when legislation was validly enacted over their opposition. No vote nullification was alleged; they suffered no direct, personal injury beyond an abstract institutional harm.

Thus, each lacked standing to sue. Indeed, in *Raines* the United States Supreme Court recognized the continuing vitality of *Coleman* and acknowledged that the injury suffered by a legislator voting with the majority whose vote is nullified is cognizable by the courts, explaining that “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified” (521 US, at 823).

Nor is a controlling bloc of legislators (a number sufficient to enact or defeat legislation) a prerequisite to plaintiff’s standing as a Member of the Assembly. The *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action (see, *Kennedy v Sampson*, *541supra, 511 F2d, at 435 [“In light of the purpose of the standing requirement * * * we think the better reasoned view * * * is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority”]).

Moreover, plaintiff’s injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.⁷ The dissent contends that plaintiff did not establish vote nullification because he still had a remedy within the political process — seeking to override the vetoes by a two-thirds supermajority (see, dissenting opn, at 546; NY Const, art IV, § 7).

The existence of other possible political remedies, however, does not negate the injury in fact (see, *Campbell v Clinton*, 52 F Supp 2d 34, 45 n 11 [“The mere availability of a legislative alternative is not sufficient to defeat standing; if it were, a legislator would never have standing since Congress always has the option of impeaching and removing the President” (emphasis in original)], affd 203 F3d 19, cert denied 531 US 815).

The supermajority override is a political remedy for validly imposed vetoes. This case, contrary to the dissent’s view, is not about a general dispute over legislative authority or its limitations. It focuses on a discrete and defined event implicating a constitutional restriction on use of the line-item veto power. It does not call upon this Court to enter a political debate — it presents only a straightforward legal question.

Lastly, that other parties may also be aggrieved by some of the Governor’s contested vetoes does not diminish the direct injury suffered by plaintiff, as a Member of the Legislature (see, *Clinton v City of New York*, 524 US 417, 434 [it is “self-evident” that “more than one party may have standing to challenge a particular action or inaction”]). Indeed, a contrary conclusion could insulate unconstitutional conduct from judicial review. *542This Court has repeatedly emphasized that “the budgetary process is not always beyond the realm of judicial consideration and that the ‘courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government’ ” (New York State

Bankers Assn. v Wetzler, 81 NY2d 98, 102 [emphasis in original], supra [quoting Saxton v Carey, 44 NY2d 545, 551]; see also, Matter of King v Cuomo, 81 NY2d 247, 251).

The capacity and standing of an individual legislator to seek judicial redress in these circumstances is essential to protect the separation of powers and rights of the Legislative branch. Contrary to the Appellate Division majority view, our decision today will not open the possibility of countless legislator lawsuits that would impair the legislative process.

That has not been the case — only a handful of legislator lawsuits have arisen in this State to date. We announce nothing new today. We only confirm what was assumed before: in limited circumstances, legislators do have capacity and standing to sue when conduct unlawfully interferes with or usurps their duties as legislators.

The parties' remaining arguments are without merit. Accordingly, the order of the Appellate Division should be modified, without costs, by denying defendant's motion to dismiss the complaint insofar as it is brought by plaintiff as a Member of the New York State Assembly and, as so modified, affirmed..

The term “non-appropriation” bill is not found in the Constitution. These bills contain programmatic provisions and commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment.. Plaintiff brought this action in his official capacities only, not as a taxpayer under article 7-A of the State Finance Law..

Although the Appellate Division based part of its analysis on the absence of any express authorization for the reimbursement of legal fees incurred in such an action (274 AD2d 57, 62-63), the propriety of those expenditures is not before us.. No other jurisdiction in the nation has held that an individual legislator lacks capacity to sue..

We agree with our dissenting colleague that plaintiffs allegation of injury to the Assembly as a whole, characterized as interference with his ability “to negotiate the Assembly’s priorities and interests in the budget process” (dissenting opn, at 543), at best reflects a political dispute. This type of political harm is no more than an abstract institutional injury that fails to rise to the level of a cognizable injury in fact (see, Raines v Byrd, supra, 521 US, at 821, 829)..

Federal courts continue to recognize Kennedy as an application of the narrow rule announced in Coleman (see, Chenoweth v Clinton, 181 F3d 112, 115 [DC Cir]).. In the dissent’s view, only “a sufficient voting bloc” of legislators who voted for the bills in question could act as plaintiffs in the absence of a Resolution of the Assembly authorizing a lawsuit (dissenting opn, at 547).

Under that analysis, it would seem that all who voted for the bills in question would need to join. Thus, a suit could be blocked by one legislator who chose, for whatever reason, not to join in the

litigation. Such a result would place too high a bar on judicial resolution of constitutional claims.

However, if a “sufficient voting bloc” is less than all legislators who voted for the bill, the injury cannot be characterized as institutional and must be viewed as personal to those who assert the claim.

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