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***Elena Ruth Sassower, Director***


BY PRIORITY MAIL

August 9, 2019

New York Court of Appeals
Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

ATT: Chief Clerk/Legal Counsel to the Court John P. Asiello, Esq.

RE: AGAIN – Aiding the Court in Protecting Itself & Appellants…from the Litigation Fraud of the New York State Attorney General, NOW by its Memorandum in Opposition to Appellants' May 31, 2019 and June 6, 2019 Motions (#2019-645/#2019-646) – & FURTHER NOTICE TO ATTORNEY GENERAL LETITIA JAMES
*Center for Judicial Accountability v. Cuomo, ...DiFiore* – Citizen-Taxpayer Action

Dear Chief Clerk/Counsel Asiello:

This follows my phone conversation, on July 3, 2019, with the Court's motion clerk, Rachel MacVean, Esq., concerning the June 27, 2019 memorandum in opposition that I had just received from the Attorney General, urging (at p. 20) that the Court deny "in all respects":

(1) appellants' May 31, 2019 motion for reargument/renewal & vacatur (of the Court's May 2, 2019 Order), determination/certification of threshold issues, disclosure/disqualification & other relief; and

(2) appellants' June 6, 2019 motion for leave to appeal pursuant to Article VI, §3(b)(6) of the New York State Constitution.

I apprised Ms. MacVean that the Attorney General's memorandum in opposition was fraudulent and that absent its withdrawal by the Attorney General, I would be moving to strike it.

On August 6, 2019, I phoned Ms. MacVean again, this time to apprise her of what had happened since. The Attorney General had refused to withdraw the memorandum in opposition – and, as a consequence, I had drafted a motion to strike it as "a fraud on the court", substantiating same with a

30-plus-page analysis of the memorandum. I further stated that I would be sending you a letter, enclosing a separate original of the analysis and requesting that you furnish it to the associate judges as immediately as possible, so that they are not misled by the Attorney General's opposition to appellants' two pending motions which, presumably, they are currently reviewing. Appellants' motion to strike, which I completed yesterday and am mailing today, together with this letter, is returnable on August 26, 2019.

Ms. MacVean identified that Court Rule 500.7 "Post-Briefing, Post-Submission and Post-Argument Communications" governs this letter request. Doubtless Rule 500.7 also governed my April 11, 2019 letter to you entitled "Aiding the Court in Protecting Itself & Appellants' Appeal of Right from the Litigation Fraud of the New York State Attorney General", constituting an analysis of her March 26, 2019 letter opposing appellants' appeal of right. Appellants' motion to strike is to strike BOTH the Attorney General's June 27, 2019 memorandum AND her March 26, 2019 letter.

I note that an additional Court rule, Rule 500.6, is entitled "Developments Affecting Appeals, Certified Questions, Motions and Criminal Leave Applications". Such would appear to govern the separate letter I advised Ms. MacVean I would be sending to furnish the Court with information as to:

- the status of the four lawsuits discussed by my March 26, 2019 letter in support of appellants' appeal of right (at pp. 15-19), and by my reinforcing April 11, 2019 letter (at pp. 13-15), and by appellants' June 6, 2019 motion (at pp. 19-20) as arising from Chapter 59, Part HHH, of the Laws of 2018,[1] establishing a "force of law" Committee on Legislative and Executive Compensation. These four lawsuits are:

    1. *Delgado, et al. v. State of New York, et al.* (Albany County #907537-18);

    2. *Schulz, et ano. v. State of New York, et al.* (NDNY #1:19-cv-56);

    3. *Barclay, et al. v. New York State Committee on Legislative and Executive Compensation, et al.* (Albany County #901837-19);

    4. *Steck, et al, v. DiNapoli, et al.*, (SDNY #1:19-cv-05015).

- two newly-commenced lawsuits arising from Chapter 59, Part XXX, of the Laws of 2019,[2] establishing a "force of law" Public Campaign Financing and Election Commission – lawsuits predicted by my April 11, 2019 letter (at p. 14) as "foreseeable" and by appellants'

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1 Part HHH of 2018 Revenue Budget Bill #S.7509-C/A.9509-C.

2 Part XXX of 2019 Revenue Budget Bill #S.1509-C/A.2009-C.

June 6, 2019 motion (at p. 20) as "inevitable", noting that its report is due by December 2019. These two further lawsuits are:

1. *Jastrzemski v. Public Campaign Financing Commission* (Niagara County #E169561/2019), commenced July 23, 2019;

2. *Linda Hurley v. Public Campaign Financing Commission* (Niagara County #E169547/2019), commenced July 23, 2019.

The Court must rightfully expect the Attorney General to apprise it of these "developments", as likewise to advise it of the status of the "force of law" (second) Commission on Legislative, Judicial and Executive Compensation which, as my March 26, 2019 letter noted (at p. 15), was to be established on June 1, 2019, pursuant to Chapter 60, Part E, of the Laws of 2015[3], with its report due by December 2019, as noted by appellants' June 6, 2019 motion (at p. 20).

By copy of this letter to Attorney General Letitia James, I hereby give her NOTICE of her duty to apprise the Court of all the foregoing by an appropriate status report. Indeed, her June 27, 2019 memorandum reinforces that duty as it fraudulently identifies (at pp. 4-8) only a single constitutional issue presented by appellants' appeal, *to wit*, the delegation of legislative power by Chapter 60, Part E, of the Laws of 2015 to the Commission on Legislative, Judicial and Executive Compensation – without revealing, or contesting, appellants' showing:

(1) that the unconstitutionality of Part E's "force of law" delegation of legislative power is established by the record before the Court on appellants' sixth cause of action (sub-causes A and B) [R.109-111 (R.187-193)], challenging the statute, *as written* – and that this is highlighted by my March 26, 2019 letter (at pp. 9-14) and further detailed by its incorporated "legal autopsy"/analysis of the Appellate Division's affirmance of constitutionality by its December 27, 2018 Memorandum and Order (at pp. 13-17) – the accuracy of which she has not contested;

(2) that the Court's determination of that single constitutional issue will terminate all the lawsuits, *as a matter of law*[4] – as so-indicated by my April 11, 2019 letter (at p. 15);

(3) that the lawsuits will also terminate, as a *matter of law*, upon the Court's determination of the additional aspects of Part E's unconstitutionality presented by appellants' appeal, concealed by the Attorney General's June 27, 2019 memorandum, *to wit*, the unconstitutionality of Part E by its enactment

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3 Part E of 2015 Budget Bill #S.4610-A/A.6721-A.

4 *Schulz v. New York State* would not be wholly terminated as it has other unrelated claims.

> and *as applied* – and the reason is because the budget statutes they challenge suffer from comparable infirmities, by their enactment and *as applied*, to those particularized by appellants' sixth cause of action (sub-causes D and E), fourth, fifth, and ninth causes of action (challenging the constitutionality of enactment) and by appellants' seventh and eighth causes of action (challenging constitutionality, *as applied*) – and so-reflected by my March 26, 2019 letter (at pp. 19-21).

For the Attorney General's convenience, and the Court's, CJA's webpage for this letter-NOTICE posts links for the above six lawsuits – and for the already statute-violating Public Campaign Financing and Election Commission and the already-statute-violating (second) Commission on Legislative, Judicial and Executive Compensation. The direct link is here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/8-9-19-ltr-notice.htm.

As required by Rule 500.7, attached is an affidavit of service attesting that I have furnished this letter to the Attorney General. This includes the letter's "proposed submission", which is appellants' 37-page "legal autopsy"/analysis of the Attorney General's June 27, 2019 memorandum in opposition.

Thank you.

Respectfully submitted,

Elena Ruth Sassower, unrepresented plaintiff-appellant, individually
& as Director of the Center for Judicial Accountability, Inc.,
and on behalf of the People of the State of New York
& the Public Interest

Enclosures

cc: Attorney General Letitia James
Solicitor General Barbara Underwood
Assistant Solicitor General Victor Paladino
Assistant Solicitor General Frederick Brodie

***Center for Judicial Accountability, et al. v. Cuomo…DiFiore – Citizen-Taxpayer Action***

# "LEGAL AUTOPSY"/Analysis

**The Attorney General's June 27, 2019 "Memorandum in Opposition to Motions for (i) Leave to Appeal, and (ii) Reargument/Renewal and Other Relief"**
(NY Court of Appeals: Mo. #2019-646 & Mo. #2019-645)

**– Furnished as an aid to the New York Court of Appeals –**

This analysis constitutes a "legal autopsy"[1] of the June 27, 2019 "Memorandum in Opposition to Motions for (i) Leave to Appeal; and (ii) Reargument/Renewal and Other Relief" of Attorney General Letitia James, signed by Assistant Solicitor General Frederick Brodie and additionally bearing the names of Solicitor General Barbara Underwood and Assistant Solicitor General Victor Paladino [hereinafter 'memorandum'].

Such memorandum is, from beginning to end, and in virtually every line, a "fraud on the court" – and easily verified as such. It requires nothing more than comparing the memorandum to the record that is before the Court,[2] starting with the two motions to which it purports to respond:

(1) Appellants' May 31, 2019 motion for reargument/renewal & vacatur (of the Court's May 2, 2019 Order), determination/certification of threshold issues, disclosure/disqualification & other relief (Mo. #2019-645); and

(2) Appellants' June 6, 2019 motion for leave to appeal pursuant to Article VI, §3(b)(6) of the New York State Constitution (Mo. #2019-646).

Indeed, immediately obvious from these motions, whose dates the memorandum conceals, is that by its title and content, the Attorney General has reversed the order of the motions – placing appellants' second motion, for leave to appeal, before their first motion, for reargument/renewal of their appeal of right. The memorandum gives no explanation for this reversal – and such cannot be defended. Apart from the fact that leave to appeal does NOT arise unless appellants do not have an appeal of

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[1] The term "legal autopsy" is taken from the law review article "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 Albany Law Review 1 (2009), by Gerald Caplan, recognizing "…Performance assessment cannot occur without close examination of the trial record, briefs, oral argument and the like…" (p. 53).

[2] The record of this citizen-taxpayer action and its predecessor are accessible from appellant CJA's website, www.judgdewatch.org, *via* the prominent homepage link: "CJA's Citizen-Taxpayer Actions to End NYS' Corrupt Budget 'Process' and Unconstitutional 'Three-Men-in-a-Room' Governance". The direct link to the webpage for appellants' accompanying August 8, 2019 motion to strike the Attorney General's June 27, 2019 memorandum, from which everything is accessible, is here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/8-8-19-strike.htm.

right,[3] appellants' motion for leave to appeal itself identifies (at p. 2, fn. 1) that ALL the threshold issues presented by their reargument/renewal motion are threshold to it, beginning with determination of:

> "whether the Court's associate judges can constitutionally 'sit' and 'take any part' in this case, absent their invocation of 'Rule of Necessity' and whether the jurisdictional bar of Judiciary Law §14 precludes them from invoking such judge-made rule to give to themselves the jurisdiction the statute removes from them."

As hereinbelow demonstrated, the memorandum falsifies, where it does not conceal, virtually the entire content of appellants' two motions, including the relief requested by each. As such, the memorandum in opposition, despite its name, is NO opposition, *as a matter of law*. To the contrary, under controlling adjudicative principles, the Attorney General's memorandum reinforces appellants' entitlement to the granting of ALL their requested relief:

> "The law is clear that 'failing to respond to a fact attested to in the moving papers...will be deemed to admit it', Siegel, New York Practice, 281 (4th ed. 2005, p. 464), citing *Kuehne v. Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975), itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. 'If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it'." [R.476, R.557-8; R.929-31][4]
>
> ""when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party.' Corpus Juris Secondum, Vol 31A, 166 (1996 ed., p. 339);
>
> 'It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.' II John Henry Wigmore, Evidence §278 at 133 (1979)." [R.477, R.558-9, R.928, R.1127, R.1298].

Throughout the course of this citizen-taxpayer action and its predecessor, appellants brought these basic adjudicative principles to the Attorney General's attention, over and over again, as likewise the

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[3] So-reflected by this Court's summary order in *General Motors Corporation v. Rosa*, 81 NY2d 1004 (1993), stating "Motion for leave to appeal denied upon the ground that an appeal lies as of right" – cited by appellants' March 26, 2019 letter in support of their appeal of right (at p. 8).

[4] This and other evidentiary principles, routinely articulated in the context of motions for summary judgment [R.929-931], are relevant to other motions, as well.

Court's own definition of "fraud on the court" from its May 8, 2014 decision in *CDR Creances S.A.S. v. Cohen, et al.*, 23 N.Y.3d 307:

> "Fraud on the court involves willful conduct that is deceitful and obstructionist, which injects misrepresentations and false information into the judicial process 'so serious that it undermines . . . the integrity of the proceeding' (*Baba-Ali v State*, 19 NY3d 627, 634, 975 N.E.2d 475, 951 N.Y.S.2d 94 [2012] [citation and quotations omitted]). It strikes a discordant chord and threatens the integrity of the legal system as a whole, constituting 'a wrong against the institutions set up to protect and safeguard the public' (*Hazel-Atlas Glass Co. v. Hartford-Empire,* 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 [1944]; *see also Koschak v Gates Const. Corp.*, 225 AD2d 315, 316, 639 N.Y.S.2d 10 [1st Dept 1996]['The paramount concern of this Court is the preservation of the integrity of the judicial process']). [R.1126, R.474-475, R.925-26, R.1331].

Appellants did so, most recently, by their April 11, 2019 letter entitled "Aiding the Court in Protecting Itself & Appellants' Appeal of Right from the Litigation Fraud of the New York State Attorney General" (at p. 2, fn. 1).

For the convenience of all, a Table of Contents follows:

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## The Attorney General's "PRELIMINARY STATEMENT" (at p. 1)

The Attorney General's "Preliminary Statement" consists of two sentences. The first sentence inverts the order of appellants' two motions, conceals their dates, and abridges their titles. The second sentence reads:

> "For the reasons set forth [by the memorandum], both motions should be denied".

This is fraudulent. The "reasons set forth" by the memorandum are non-responsive to appellants' two motions, falsifying and concealing their content, including their requested relief.

With respect to the requested relief, the most bedrock is that requested by the second branch of appellants' reargument/renewal motion:

> "Determining the threshold issues which the May 2, 2019 Order neither identifies nor determines – or certifying same to the United States Supreme Court, *to wit*:
>
> a) Whether Judiciary Law §14 and *Oakley v. Aspinwall* bar New York State judges from 'sit[ting]…or tak[ing] any part in' this citizen-taxpayer action in which they have huge financial and other interests – and, if so, can it be transferred to the federal courts, including pursuant to Article IV, §4 of the United States Constitution: 'The United States shall guarantee to every State in this Union a Republican Form of Government'?;
>
> b) If this citizen-taxpayer action cannot be transferred to the federal courts, whether this Court's judges can invoke the 'Rule of Necessity' to give themselves the jurisdiction that Judiciary Law §14 removes from them – and, if so, are there safeguarding prerequisites to prevent their using it to act on their biases born of interest, as, for instance, the 'remittal of disqualification' procedure specified by §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, where the judge states he believes he can be fair and impartial notwithstanding the existence of grounds for his disqualification pursuant to §100.3E?;
>
> c) Is this Court's substitution of the language of Article VI, §3(b)(1) of the New York State Constitution and CPLR §5601(b)(1), granting appeals of right 'wherein is directly involved the construction of the constitution of the state or of the United States', with a *sua sponte* ground to dismiss because 'no substantial constitutional question is directly involved' unconstitutional, *as written, as unwritten, and as applied*?;

d) Whether the Attorney General can lawfully and constitutionally represent defendant-respondents before this Court where she has financial and other interests in the outcome of the appeal? – and manifested same by a fraudulent submission opposing plaintiff-appellants' appeal of right, because she had NO legitimate grounds for opposition;

e) Whether, pursuant to Executive Law §63.1 and State Finance Law Article 7-A, the unrepresented plaintiff-appellants are entitled to the Attorney General's representation and/or intervention before this Court – including *via* appointment of special counsel? – because it is they who are upholding the 'interest of the state' and the Attorney General has NO legitimate opposition to their appeal of right, nor defense of the course of the proceedings below, obliterating all semblance of the Rule of Law" (italics, underlining, and capitalization in the original).

The memorandum cites to this second branch at page 5 (citing "2[d]-[e])", at page 10 (citing to "¶2"), at page 15 (citing "2[a]"), at page 17 (citing "2[a]", "2[b]"), and at page 18 (citing "2[c]") – always concealing that the referred-to relief is for determination/certification of questions – and what they are. As a consequence, the Attorney General does not, in fact, oppose this relief.

Also materially concealed – and not opposed, *as a matter of law* – is the first branch of appellants' reargument/renewal motion, inasmuch as its requested relief of reargument/renewal of the Court's May 2, 2019 Order and vacatur thereof explicitly rests on:

> "...first determining whether the Court's six associate judges have jurisdiction to do so and, if they have no jurisdiction by reason of Judiciary Law §14 and the Court's interpretive decision in *Oakley v. Aspinwall*, 3 NY 547 (1850), taking emergency steps to ensure a forum in the federal courts to vacate it and the underlying lower state court orders, likewise void, *ab initio*, by reason of Judiciary Law §14 violations, and to determine plaintiff-appellants' entitlement to summary judgment on their ten causes of action" (underling added).

The memorandum does not contest that such must first be determined.

As for the third branch of appellants' reargument/renewal motion:

> "For disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct and consistent with *Oakley v. Aspinwall*, by the Court's six associate judges of their financial and other interests in the appeal and for their disqualification, pursuant to §100.3E of the Chief Administrator's Rules and Judiciary Law §14 by reason thereof and for the actual bias, born of interest and relationships, demonstrated by their May 2, 2019 Order, if in fact they rendered it" (underlining in the original),

the memorandum's opposition (at pp. 17, 12-13) is without contesting appellants' assertion (at ¶7) as to how the Court must address the judicial disqualification issues pertaining to itself, *to wit*, by:

> "a reasoned decision...comparable to its decision in *Criminal Defense Lawyers v. Kaye*[fn3] – one additionally addressed to the fact that the Court could not constitutionally dismiss appellants' appeal without invoking 'Rule of Necessity', as it is the 'narrow exception, *General Motors Corp. v. Rosa*, 82 N.Y.2d 183, 188 (1993), *Maron v. Silver*, 14 N.Y.3d 230, 249 (2010),[fn4] to the unconstitutionality that exists when judges have 'direct, personal, substantial pecuniary interest[s]', *Caperton v. Massey Coal*, 556 U.S. 868 (2009), quoting *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927) – as at bar."

Such "reasoned decision" would also apply to the fourth branch of appellants' reargument/renewal motion pertaining to disclosure by, and disqualification of, Associate Judge Michael Garcia.

As for the fifth branch of appellants' reargument/renewal motion:

> "Pursuant to §100.3D(2) of the Chief Administrators Rules Governing Judicial Conduct, issuing a show cause order requiring Attorney General Letitia James, Solicitor General Barbara Underwood, Assistant Solicitor General Victor Paladino, and Assistant Solicitor General Frederick Brodie to respond to appellants' April 11, 2019 letter, as expressly sought in its concluding paragraph:
>
> > 'if the Attorney General [did] not promptly withdraw her fraudulent March 26, 2019 letter [urging the Court's *sua sponte* dismissal of the appeal of right] and take steps to secure independent counsel 'to represent the interest of the state' pursuant to Executive Law §63.1 and to disqualify herself based on her direct financial and other interests in the appeal'. (at pp. 15-16, underlining in the original).",

Such is unopposed, *as a matter of law*, as the memorandum, in addition to not citing to this branch, only refers to the April 11, 2019 letter once (at p. 9), without denying or disputing its accuracy.

With respect to appellants' motion for leave to appeal pursuant to Article §3(b)(6) of the New York State Constitution, its requested relief – for an order based on Article §3(b)(6) – is unopposed, *as a matter of law*, as the Attorney General's memorandum does not even reference Article §3(b)(6), let alone discuss it.

## The Attorney General's "STATEMENT OF THE FACTS" (at p. 1)

The Attorney General's single-sentence "Statement of the Facts" reads:

> "For the facts and legal issues underlying this case, respondents respectfully refer the Court to their brief filed in the Appellate Division, Third Department, September 21, 2018 ('R.Br.') and, where appropriate, to the Record on Appeal ('R')."

This is fraudulent in referring the Court to the September 21, 2018 respondents' brief "[f]or the facts and legal issues underlying this case". That brief –which Assistant Solicitor General Brodie signed on behalf of then interim Attorney General Underwood and which also bears Assistant Solicitor General Paladino's name – is "from beginning to end, 'a fraud on the court". This was so-stated by the very first sentence of appellants' October 4, 2018 reply brief and proven by its 55-page balance. Based thereon – and an additional five pages of substantiating facts – appellants presented the Appellate Division with an October 18, 2018 order to show cause to strike the respondents' brief and disqualify the Attorney General – which, *without reasons*, the associate justice to whom it was given declined to sign.[5] As a result, appellants moved, by an October 23, 2018 notice of motion, for the identical relief. This, the four-judge appeal panel denied, *without reasons*, by a November 13, 2018 order. Thereafter, by a December 19, 2018 order, the appeal panel denied, also *without reasons*, appellants' November 27, 2018 order to show cause for reargument, whose additional relief included disqualifying the appeal panel for "demonstrated actual bias", "enjoining the appeal panel from rendering any decision on the appeal until its justices [] ruled on the threshold issue that Judiciary Law §14 bars them from sitting and rendering any decision herein because they are 'interested'", and:

> "pursuant to Article VI, §3b(4) of the New York State Constitution, certifying to the New York Court of Appeals the following or comparable questions:
>
> (a) Inasmuch as Judiciary Law §14 bars judges from adjudicating matters in which they are 'interested', are there any state judges who, pursuant to Judiciary Law §14, would not be barred by HUGE financial interest from adjudicating this citizen-taxpayer action, challenging the constitutionality and lawfulness of commission-based judicial salary increases, the judiciary budget, and the state budget 'process'?
>
> (b) Can retired judges, not benefiting from the commission-based judicial salary increases, be vouched in? Or can the case be transferred/removed to the federal courts, including pursuant to Article IV, §4 of the United States Constitution: 'The United States shall guarantee to every State in this Union a Republican Form of Government…'?

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[5] This was the third of appellants' four motions before the Appellate Division, all brought on by orders to show cause – and the only one not to be signed.

(c) Can 'interested' judges who Judiciary Law §14 divests of jurisdiction nonetheless invoke the judge-made 'rule of necessity' to give themselves the jurisdiction the statute removes from them?

(d) What are the safeguarding prerequisites to ensure that a judge invoking the 'rule of necessity' will not use it for purposes of acting on bias born of interest? Would the 'remittal of disqualification' procedures specified by §100.3F of the Chief Administrator's Rules Governing Judicial Conduct be applicable – starting with a statement by the judge that he believes he can be fair and impartial notwithstanding the existence of grounds for his disqualification pursuant to §100.3E.

(e) As Executive Law §63.1 predicates the attorney general's litigation posture on 'the interest of the state', does his representation of defendants-respondents by litigation fraud, because he has no legitimate defense, establish that his representation of them is unlawful and that his duty is to be representing plaintiffs-appellants, or intervening on their behalf, in upholding public rights?" (capitalization in the original).

The appeal panel's November 13, 2018 and December 19, 2018 orders are two of the four *without reasons* orders brought up for review with the appeal panel's December 27, 2018 Memorandum and Order as they necessarily affect it, establishing appellants' *prima facie* entitlement to the striking of the September 21, 2018 respondents' brief, to the Attorney General's disqualification, and to their other requested relief.

Appellants' March 26, 2019 letter in support of their appeal of right (at pp. 1, 4, 7) and their "legal autopsy"/analysis of the December 27, 2018 Memorandum and Order accompanying it (at pp. 1-3)[6] furnish the summarizing particulars – and their accuracy is completely uncontested by the Attorney General's June 27, 2019 memorandum.

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[6] Appellants' "legal autopsy"/analysis of the Appellate Division's December 27, 2018 Memorandum and Order annexes, as Exhibit B, their November 27, 2018 order to show cause – which it expressly incorporates by reference (at p. 2).

## The Attorney General's "ARGUMENT" (at pp. 1-19)

## The Attorney General's POINT I (at pp. 1-8): "LEAVE TO APPEAL SHOULD BE DENIED"

The Attorney General divides her Point I into two sections, A and B, as follows:

### The Attorney General's Point I-A (at pp. 1-4) "Leave to Appeal Should Be Denied Because Plaintiffs' Procedural Defaults and Errors Would Prevent the Court from Reaching the Merits"

The Attorney General's Point I-A begins with a single introductory paragraph:

> "The procedural defects that supported dismissal of plaintiffs' purported appeal as of right (*see* Respondents' 3/26/19 Letter) continue to exist, have not been cured, and cannot be removed. Thus, if leave were granted, this Court could not reach the 'many, many' questions of law referenced by plaintiffs (Leave Mtn. at 4; *accord id.* at 14-16). Because procedural defects would bar this Court from addressing the merits of plaintiffs' main arguments, leave to appeal should be denied."

This is fraudulent. The referred-to "respondents' 3/26/19 Letter", signed by Assistant Solicitor General Brodie on behalf of Attorney General James and also bearing the names of Solicitor General Underwood and Assistant Solicitor General Paladino, was demonstrated to be "a fraud on the court", by appellants' rebutting April 11, 2019 letter. The Attorney General's memorandum refers to the April 11, 2019 letter only once, in passing (at p. 9)– and without denying or disputing its accuracy, including its rebuttal (at pp. 10-15) to the section of the Attorney General's March 26, 2019 letter purporting that "Plaintiffs' Appeal is Procedurally Barred" (at p. 4).

Instead, the memorandum regurgitates, with slight reformatting, the four paragraphs of "procedural defects" claimed by that March 26, 2019 letter (at p. 4) – all lifted from the Attorney General's September 21, 2018 respondents' brief (at pp. 13-19) – and so-identified by appellants' April 11, 2019 letter (at pp. 10-15). The memorandum reformats these four paragraphs into five, placing each under a title heading. All are fraudulent and the substantiating record references are, as follows:

**"1. CJA cannot appear without counsel"** (at p. 2).

This is the first "procedural defect" claimed by the Attorney General's respondents' brief (at pp. 13-14), then repeated by the Attorney General's March 26, 2019 letter, notwithstanding it had been rebutted by appellants' reply brief (at p. 12). Appellants' April 11, 2019 letter furnishes the particulars at page 10.

**"2. The first four causes of action are barred by collateral estoppel"** (at pp. 2-3).

This is part of the second "procedural defect" claimed by the Attorney General's respondents' brief (at pp. 14-16), then repeated by the Attorney General's March 26, 2019 letter, notwithstanding it had been rebutted by appellants' reply brief (at pp. 15-17). Appellants' April 11, 2019 letter sets forth the particulars at pages 10-11.

**"3. Plaintiffs' claims as to budget years 2014-2015 and 2015-2016 are barred by collateral estoppel and res judicata"** (at p. 3).
This is part of the second "procedural defect" claimed by the Attorney General's respondents' brief (at pp. 16-17), then repeated by the Attorney General's March 26, 2019 letter, notwithstanding rebutted by appellants' reply brief (at pp. 15-17). Appellants' April 11, 2019 letter sets forth the particulars at pages 10-11.

**"4. Plaintiffs' claims as to the 2017-2018 budget year are limited to whether Supreme Court abused its discretion in denying their motion to supplement the complaint."** (at pp. 3-4).
This is the third "procedural defect" claimed by the Attorney General's respondents' brief (at pp. 16-18), then repeated by the Attorney General's March 26, 2019 letter, notwithstanding rebutted by appellants' reply brief (at pp. 47-48). Appellants' April 11, 2019 letter sets forth the particulars at page 12.

**"5. Plaintiffs' claims as to the 2016-2017 budget year are moot."** (at p. 4).
This is the fourth "procedural defect" claimed by the Attorney General's respondents' brief (at pp. 18-19), then repeated by the Attorney General's March 26, 2019 letter, notwithstanding rebutted by appellants' reply brief (at pp. 51-52). Appellants' April 11, 2019 letter sets forth the particulars at pages 12-15.

**The Attorney General's Point I-B (at pp. 4-8)**
**"The Factors Set Forth in 22 N.Y.C.R.R. §500.22(b)(4) Show that Leave to Appeal Should Be Denied"**

The Attorney General's Point I-B is divided into three sections, prefaced by a single sentence stating:

> "Procedural defects aside, the proposed appeal does not satisfy this Court's leave-grant criteria."

This is fraudulent – and in two respects.

First, appellants' appeal overwhelmingly satisfies the Court's "leave-grant criteria" – and establishing this are pages 4-20 of appellants' motion, ALL under the title heading: "Why the Questions Presented Merit Review (22 NYCRR §500.22(b)(4))". The three sections of the Attorney General's Point I-B address NONE of it, concealing the ENTIRE content of these 17 pages.

Second, the Court's "leave-grant criteria" extends beyond "The Factors Set Forth in 22 N.Y.C.R.R. §500.22(b)(4)", *to wit*, "that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division" – and this is manifest from the very language of 22 NYCR §500.22(b)(4), prefacing the "Factors" with the words "such as". Indeed, appellants' motion highlights (at pp. 5-11) that leave to appeal is NOT limited to the enunciated "Factors", especially as they do not encompass "the mandatory leave to appeal that Article VI, §3(b)(6) of the New York State Constitution commands 'when required in the interest of substantial justice." (at p. 5, underlining in the original). The three sections of the Attorney

General's Point I-B do NOT address this constitutionally-specified ground for leave to appeal, concealing it ENTIRELY.

**The Attorney General's Point I-B(1) (at pp. 4-5)**
**"The issues plaintiffs would raise lack public importance"**

The Attorney General's Point I-B(1) offers up a single paragraph reading:

> "The issues the Court would hear are not ones of public importance. As shown in Point I(A), procedural defects would preclude the Court from addressing the constitutional issues identified by plaintiffs. The appeal would devolve into a litany of idiosyncratic complaints by plaintiffs about the way the courts handled this litigation. Those complaints are meritless: they reflect the mistaken view that plaintiffs' papers are self-evidently correct, and that any disagreement with them is frivolous or fraudulent. (*See, e.g.*, Notice of Rearg. Mtn. ¶2[d]-[e]; Rearg. Mtn. Ex. D.)"

This is fraudulent – and in multiple respects.

First, there are no "procedural defects [that] would preclude the Court from addressing the constitutional issues identified by plaintiffs" – and this is particularized by appellants' April 11, 2019 letter (at pp. 10-15) and, prior thereto, by their October 4, 2018 reply brief (at pp. 12, 15-17, 47-48, 51-53) – and the memorandum does not contest the accuracy of either presentation, including by its Point I-A, as hereinabove shown (at pp. 9-10, *supra*).

Second, "constitutional issues" are NOT the basis for a grant of leave to appeal pursuant to Article VI, §3(b)(6) of the New York State Constitution – and such is clear from its language, quoted and discussed by appellants' notice of motion and motion (at pp. 1, 3-10). However, neither here nor elsewhere does the Attorney General's memorandum quote or discuss Article VI, §3(b)(6) – to which it also makes NO mention.

Third, the record citations in this Point I-B(1) are NOT to appellants' motion for leave to appeal, but to appellants' reargument/renewal motion.

Fourth, the record citations themselves put the lie to the pretense that appellants' appeal consists of "meritless", "idiosyncratic complaints... about the way the courts handled this litigation"[7] – and echo the Attorney General's March 26, 2019 letter (at p. 7) "idiosyncratic complaints of an unsatisfied litigant that the Appellate Division properly rejected", whose fraudulence is established by appellants' "legal autopsy"/analysis of the Appellate Division's December 27, 2018 Memorandum, accompanying their March 26, 2019 letter.

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[7] ¶2[d]-[e] of appellants' reargument/renewal notice of motion identify the serious and substantial threshold issues before this Court, as relates to the Attorney General. The motion's Exhibit D is their "legal autopsy"/analysis of the Court's May 2, 2019 Order, demonstrating it to be "so utterly devoid of legal and evidentiary support as to be unconstitutional" and "a judicial fraud".

Fifth, the "issues of public importance" compelling the Court's granting of an appeal by leave are highlighted at pages 11-21 of appellants' motion – to which the memorandum does not cite and whose content it conceals.

**The Attorney General's Point I-B(2) (at pp. 5-6)**
**"Plaintiffs' claims on the merits are not novel"**

The Attorney General's Point I-B(2) offers up three paragraphs, each fraudulent – and in multiple respects.

First, notwithstanding the title – and the first sentence beneath it, "The constitutional issues that plaintiffs wish to raise are not novel in any event" – the memorandum's three paragraphs do not identify "constitutional issues", but only a single "constitutional issue": the constitutionality of the delegation of legislative power to the Commission on Legislative, Judicial and Executive Compensation.

Second, the three paragraphs pertaining to this single "constitutional issue" are a *verbatim* repeat of three paragraphs of the Attorney General's March 26, 2019 letter (at p. 5) – whose assertions that it is "settled law" of "more than 40 years" that the "delegation of power" here challenged is constitutional was highlighted as fraud by appellants' April 11, 2019 letter (at p. 6) – the accuracy of which the memorandum does not contest.

Third, "constitutional issues" are not a predicate for an appeal by leave, including pursuant to this Court's 22 NYCRR §500.22(b)(4).

Fourth, appellants' motion for leave (at pp. 15-16) states, as follows, with respect to issues both "novel" and of "public importance" – under the title heading: "Why the Questions Presented Merit Review (22 NYCRR §500.22(b)(4))":

> "As the most cursory examination of appellants' ten causes of action reveal [R.99-130 (R.159-224); R-731-741], ALL are of statewide significance, involving government accountability and vast sums of taxpayer money. They particularize tens of 'novel' issues never previously addressed by this Court, presented on a fully-developed, perfectly-preserved record, in a posture of summary judgment for appellants for the declarations of unconstitutionality and unlawfulness they seek pertaining to:
>
> - the Legislature's proposed budget;
> - the Judiciary proposed budget;
> - the Governor's legislative/judiciary budget bill combining them;
> - The start-to-finish budget 'process' of the Legislature, which, over and beyond its flagrant unconstitutionality, is permeated with fraud, including its

purported 'amending' of budget bills, done by staff, operating behind-closed-doors, without a single legislator voting to amend, either at legislative committee meetings or on the Senate or Assembly floor;

- the legislature's behind-closed-doors political conferences that substitute for open legislative committee action;

- the three men-in-a-room, behind-closed-doors budget-deal-making, including their amending of budget bills and introduction of new budget bills;

- the policy inserted into budget bills by the Governor and, thereafter, by the 'three-men-in-a-room';

- the unconstitutionality and unlawfulness of Part E, Chapter 60 of the Laws of 2015 (establishing the Commission on Legislative, Judicial and Executive Compensation), *as written and by its enactment*, that was inserted by the 'three-men-in-a-room' into a new budget bill and then rushed through the Legislature on a 'message of necessity' having no applicability to it;

- the unconstitutionality and unlawfulness of Part E, Chapter 60 of the Laws of 2015, *as applied* – including its December 24, 2015 Report with its judicial salary increase recommendations;

- the Governor's aid to localities budget bill – and its items pertaining to district attorney salary reimbursement to the counties." (capitalization and italics in the original).

Excepting as relates to the constitutionality of Part E, Chapter 60 of the Laws of 2015, establishing the Commission on Legislative, Judicial and Executive Compensation, the memorandum conceals EVERY issue.

Fifth, appellants' motion for leave presents additional "novel" issues, never previously determined by the Court, identifying them as:

- interpretation of the "mandatory leave to appeal, contained within the last sentence of Article VI, §3(b)(1)" (at p. 5, underlining in the original)

- "the 'interest of the state' predicate for the Attorney General's litigation posture pursuant to Executive Law §63.1" (at p. 12) – also presented for determination/certification by appellants' incorporated reargument/renewal motion (at p. 2), whose other "novel" issues pertain to the interface of Judiciary Law §14 and "Rule of Necessity" (at p. 2, fn. 1) and the constitutionality of the Court's rewrite of the appeal of right guaranteed by Article VI, §3(b)(1) and CPLR §5601(b)(1) "wherein is directly involved the construction of the constitution of the state or of the United States".

**The Attorney General's Point I-B(3) (at pp. 6-8)**
**"The Third Department's order did not conflict with prior law"**

The Attorney General's Point I-B(3) offers up five paragraphs – each fraudulent.

Mr. Brodie's two-sentence first paragraph (at p. 6) states, in its first sentence:

> "The Third Department's order did not conflict with this Court's decisions…".

This is fraudulent. Appellants' motion for leave specifies (at pp. 12-14) a long list of "diametric conflict[s]" with this Court's decisions – including (at p. 14):

> "*King v. Cuomo*, 81 NY2d 247 (1993) [R.215-217], and *Campaign for Fiscal Equity, Inc. v. Marino*, 87 NY.2d 235 (1995) [R.217-218], articulating that the standard for determining whether a practice is unconstitutional is NOT whether it is prohibited, but whether it unbalances the constitutional design, **repudiated** by the Appellate Division's affirmance of Judge Hartman's dismissal of appellants' ninth cause of action as failing to state a cause of action because ''three-men-in-a-room' budget negotiations between the Governor and the Legislature' is not prohibited by the New York Constitution – thereby ALSO replicating Judge Hartman's falsification of the cause of action itself, identified by appellants' ninth cause of action as 'three-men-in-a-room budget deal-making', including 'amending of budget bills' [R.214, R.219];[fn15]
>
> *Pataki v. NYS Assembly/Silver v. Pataki*, 4 NY3d 75, 96 (2006) [R.196], and *New York State Bankers Association v. Wetzler*, 81 NY2d 98 (1993) [R.792], reiterating and reinforcing the UNEQUIVOCAL restrictions that Article VII, §4 of the New York State Constitution places on the Legislature's alterations of 'an appropriation bill submitted by the governor' – previously articulated by the Court in *People v. Tremaine*, 252 NY 27 (1929), and *People v. Tremaine*, 281 NY 1 (1939) – **repudiated** by the Appellate Division's 'affirmance' of Judge Hartman's dismissal of appellants' fifth cause of action — which it accomplished by *sub silentio* modifying the grounds upon which Judge Hartman had dismissed it, concealing that the fifth cause of action challenged the Legislature's alterations of the Governor's 'appropriation bills', and misrepresenting that 'Article VII, §4 does not apply to appropriations for the Judiciary';[fn16]" (underlining, italics, capitalization, and bold in the original).

The memorandum does not deny or dispute the accuracy of the conflicts specified by appellants' listed cases – nor appellants' assertion (at p. 12) that such is "illustrative of an endless list".

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[fn15] "Appellants' 'legal autopsy'/analysis of the Appellate Division Memorandum (at pp. 27-28)."

[fn16] "Appellants' 'legal autopsy'/analysis of the Appellate Division Memorandum (at pp. 23-24)."

The second sentence of that same first paragraph (at p. 6) states:

> "the Legislature's limited delegation of authority to the Commission was permitted under a uniform line of judicial decisions."

This is fraudulent. No decision of this Court – or any other – has held that the legislative "delegation of authority" to a commission of the nature and configuration challenged by sub-causes A and B of appellants' sixth cause of action to be constitutional [R.109-111 (R.188-193)] – and such is particularized by appellants' March 26, 2019 letter (at pp. 9-15), the accuracy of which the memorandum does not contest.

The second paragraph states (at p. 7):

> "A similarly structured commission, created to address excess hospital capacity, was held constitutional by two Departments of the Appellate Division. *See McKinney's Comm'r, N.Y. State Dep't of Health*, 41 A.D.3d 252, 253 (1st Dep't), *lv. denied*, 9 N.Y.3d 815 (2007); *St. Joseph Hosp. v. Novello*, 43 A.D. 3d 139 (4th Dep't), *app. dismissed*, 9 N.Y.3d 988 (2007), *lv. denied*, 10 N.Y.3d 702 (2008)." (underlining added).

This is fraudulent – and regurgitates an identical sentence in the Attorney General's March 26, 2019 letter (at pp. 5-6), whose falsity was pointed out by appellants' April 11, 2019 letter (at p. 6), identifying that the Commission on Legislative, Judicial and Executive Compensation was NOT "similarly-structured" and that its "structural differences" were the basis of "appellants' sub-cause B of their sixth causes of action, challenging its constitutionality [R.192-193, R.111/¶65]".

The third paragraph states (at p. 7):

> "Supreme Court, Nassau County, in 2016 upheld the constitutionality of this very Commission. *Coll v. N.Y.S. Commission on Legislative, Judicial and Executive Compensation*, Index No. 2598-2016 (Sup. Ct. Nassau Cty. Sept. 1, 2016) (reproduced at R428)."

This is fraudulent – and regurgitates an identical sentence in the Attorney General's March 26, 2019 letter (at p. 6), whose falsity was pointed out by appellants' April 11, 2019 letter (at pp. 6-7), identifying that:

> "that decision [R.428], on its face, purports that the challenge being decided is whether 'the Commission on Legislative, Judicial and (sic) Compensation acted in an unconstitutional manner", in other words, not a challenge to the statute, *as written* – which is what sub-causes A and B of appellants' sixth cause of action are [R.109-111 (R.187-193)] – and when, as known to the Attorney General, the *Coll* decision is a flagrant fraud because, in fact, the lawsuit challenged the statute, *as written* [R.459-462, R.504]".

The fourth paragraph states (at p. 7):

> "Most recently, Supreme Court, Albany County, adhered to the Appellate Division's decision in this case and upheld legislative pay raises for 2019 that resulted from a 'nearly identical' process, *Delgado v. State*, Index No. 907537-18, slip op. at 10, 15, 17 (Sup. Ct. Albany Cty. June 7, 2019) (copy attached).[fn]"

This is fraudulent – implying that the *Delgado* decision is some kind of independent validation of the "Appellate Division's decision in this case" when – as highlighted by appellants' March 26, 2019 letter (at pp. 15-19) and May 31, 2019 reargument motion (at ¶¶27-28) – it is the result of the Attorney General's fraudulent advocacy in that case, purporting that the Appellate Division's December 27, 2018 decision herein is dispositive of the constitutionality of the legislative delegation of power there challenged and that it carries the imprimatur of this Court.

The fifth paragraph states (at p. 8):

> "No New York court has ever held that delegating the determination of judicial salaries to a commission, based on the consideration of relevant factors and subject to Legislative amendment or veto, would be unconstitutional. None of the various decisions of this Court listed by plaintiffs (Leave Mtn. at 12-14) even addressed the issue. Thus, there is no conflict within the courts."

This is fraudulent – and in multiple respects.

First, at issue is not solely the constitutionality of "delegating the determination of judicial salaries to a commission", but, rather, of salaries of legislative, judicial, and executive officers – as clear from Chapter 60, Part E, of the Laws of 2015 and sub-causes A and B of appellants' sixth cause of action [R.109-111 (R.187-193)].

Second, Chapter 60, Part E, of the Laws of 2015 does not charge the Commission on Legislative, Judicial and Executive Compensation with "consideration of relevant factors". Rather, and as stated by sub-cause B of appellants' sixth cause of action:

> "The statute requires the Commission to 'take into account all appropriate factors including, but not limited to' six enumerated factors (§2, ¶3)" [R.192, ¶399].

Third, "No New York court" – including the Appellate Division, Third Department by its December 27, 2018 Memorandum and Order – has considered whether, as specified by sub-cause B of appellants' sixth cause of action:

> "The absence of explicit guidance to the Commission that corruption and the lack of functioning mechanisms to remove corrupt public officers are 'appropriate factors' for its consideration in making salary recommendations renders the statute unconstitutional, *as written*." [R.193, at ¶402, underlining in the original].

Fourth, in 2007, then Appellate Division, Fourth Department Justice Fahey, writing in dissent, in *St. Joseph Hospital v. Novello*, 43 A.D.3d 139, 148 (2007) held unconstitutional a similar so-called legislative veto, violating the presentment clause and separation of powers – and this is quoted by appellant's sub-cause A of their sixth cause of action [R.190] and by their March 26, 2019 letter (at p. 10), which annexes the dissent as its Exhibit A, without response from the Attorney General.

Fifth, this Court has never considered the constitutionality of the delegation of legislative power, challenged by appellants' sub-causes A and B of their sixth cause of action – which is why no decision pertaining thereto is included in the list of Court of Appeal decisions with which the Appellate Division's December 27, 2018 Memorandum conflicts, cited at pages "12-14" of appellants' motion.

Sixth, the Appellate Division's December 27, 2018 Memorandum upholds the constitutionality of the delegation of legislative power by concealing ALL the allegations of sub-causes A and B of appellants' sixth cause of action – just as Judge Hartman had. Such is summarized by appellants' March 26, 2019 letter (at p. 12) and further substantiated by appellants' "legal autopsy"/analysis of the December 27, 2018 Memorandum (at pp. 13-17), the accuracy of which the Attorney General does not dispute.

## The Attorney General's POINT II (at pp. 8-19) "THE RELIEF SOUGHT IN PLAINTIFFS' REARGUMENT MOTION SHOULD BE DENIED"

The Attorney General's Point II is divided into five sections – A through F – whose order and content do NOT track "the relief sought" by appellants' reargument motion.

### The Attorney General's Point II-A (at pp. 8-9) "Leave to Renew Should Be Denied"

The Attorney General's Point II-A does not start with the first relief sought by appellants' motion – reargument – but, rather, renewal, purporting that appellants have pointed to:

> "no facts that were previously unavailable, other than (i) this Court's dismissal of their appeal; and (ii) the Attorney General's citation to that dismissal in other litigation (Rearg. Mtn. at 17.)"

Thereby concealed and materially misrepresented are appellants' two stated grounds for renewal, identified at ¶¶24-25 and 27-28 of the motion:

- "the actual bias of the six associate judges", as manifested by their May 2, 2019 Order, already fully described and demonstrated by ¶¶4-23 of the motion to be "insupportable, constitutionally, statutorily, factually, and ethically".

- the Attorney General's misuse of the Court's May 2, 2019 Order in defending against the *Delgado* and *Barclay* litigation challenges recited by appellants' March 26, 2019

letter (at pp. 16-19) and April 11, 2019 letter (at pp. 14-15), by claiming that it affirmed "the settled nature of the controlling constitutional principles" pertaining to Chapter 60, Part E, of the Laws of 2015 – applicable to the materially identical Chapter 59, Part HHH, of the Laws of 2018.

Both grounds are "material" and "sufficient to 'change the prior determination", which is why the Attorney General conceals them, without addressing appellants' particularized showing with respect to either.

**The Attorney General's Point II-B (at pp. 9-10)**
**"Leave to Reargue Should Be Denied"**

The Attorney General's Point II-B (at p. 9) contains the memorandum's ONLY reference to appellants' March 26, 2019 and April 11, 2019 letters – a single sentence in its two-sentence first paragraph stating:

> "Here, plaintiffs claim this Court overlooked 'ALL the facts, law, and argument' in their March 26 and April 11, 2019 letters. (Rearg. Mtn. at 11, capitalization in the original.)"

This is followed by a single-sentence second paragraph, responding:

> "Obviously the Court did not overlook everything plaintiffs said. Rather, the Court made three precise holdings, as to which plaintiffs' arguments were immaterial."

This is a triple fraud: the May 2, 2019 Order dismisses appellants' appeal of right on three boiler-plate grounds, inconsistent with – and refuted by – appellants' "March 26 and April 11, 2019 letters", whose content it entirely conceals and none of whose "arguments were immaterial".

Tellingly, Point II-B does not identify a single one of appellants' supposedly "immaterial" arguments from those letters, nor, for that matter, recite ANY of the particulars presented by their motion in support of reargument, other than its assertion that "ALL the facts, law, and argument in their March 26 and April 11, 2019 letters" were "overlooked" by the May 2, 2019 Order.

Indeed, so total is the Attorney General's concealment of the motion's particulars with respect to reargument that Point II-B does not even reveal appellants' description of the May 2, 2019 Order, set forth by the first branch of their notice of motion: "unconstitutional, jurisdictionally-void, and fraudulent", or the similar descriptives in the motion, as, for instance, at ¶4: "indefensible and, if rendered by the six associate judges, impeachable", or by the specifics set forth by ¶¶4-10, 12-16 and by appellants' "legal autopsy"/analysis of the Order, annexed to the motion as Exhibit D, whose prefatory description of the Order is "so utterly devoid of legal and evidentiary support as to be unconstitutional…a judicial fraud".

Instead, Point II-B offers up three paragraphs purporting to justify the May 2, 2019 Order, completely unresponsive to appellants' motion, as follows:

> "First, the Court held that CJA's appeal could not be heard because it was not represented by counsel. (Rearg. Mtn. Ex. A-1.) That result was legally required by C.P.L.R. 321(a). (*See* Point I[A][1])"

This is fraudulent. The threshold issue with regard to representation is not CPLR §321(a), but Executive Law §63.1 and State Finance Law, Article 7-A, pursuant to which both the corporate and individual appellants asserted their entitlement to the Attorney General's representation – and as to which the May 2, 2019 Order made no determination. Appellants' Exhibit D "legal autopsy"/analysis furnished the relevant particulars, but the memorandum does not address it, just as it does not address ¶16 of appellants' motion – with its record references to their April 11, 2019 letter (at p. 10) and February 26, 2019 Preliminary Appeal Statement (at #10), not determined by the Court.

Point II-B then continues (at pp. 9-10):

> "Second, the Court held that no substantial constitutional question was 'directly involved' in plaintiffs' appeal on the merits. (Rearg. Mtn. Ex. A-1.) That holding was correct because plaintiffs' procedural errors and defaults would prevent the Court from reaching the constitutional issues that plaintiffs wish to raise (*see* Point I[A]), and because the underlying claims were governed by settled law in any event."

This is fraudulent – and in multiple respects.

First, the May 2, 2019 Order did not explicate the basis for its *sua sponte* dismissal of the appeal for lack of a "substantial constitutional question…'directly involved'".

Second, the unconstitutionality of dismissal on that ground was expressly challenged by appellants' March 26, 2019 letter (at p. 9) and April 11, 2019 letter (at p. 3) and reiterated and expanded upon by their reargument motion (at ¶¶9, 19-23) based on Article VI, §3(b)(1) of the New York State Constitution and CPLR §5601(b)(1).

Third, there are no "procedural errors and defaults" preventing the Court from reaching the constitutional issues" – and appellants' April 11, 2019 letter (at p. 10-15) detailed the deceit of the Attorney General's March 26, 2019 letter (at p. 4) on that subject, regurgitated from the Attorney General's respondents' brief (at pp. 13-19).

Fourth, appellants' "underlying claims" are not "governed by settled law" and the Attorney General does not identify what "underlying claims" are being referred-to, including by citing to her Point I-B(2) "Plaintiffs' claims on the merits are not novel" (at pp. 5-6), whose only identified "claim" is the unconstitutionality of the "force of law" delegation of legislative power by Chapter 60, Part E, of the Laws of 2015.

Finally, Point II-B states (at p. 10):

> "Third, the Court held that the Third Department's denial of four interlocutory motions did not 'finally determine the action within the meaning of the Constitution.' (Rearg. Mtn. Ex. A-1) That holding was correct as well. The action was finally determined by the Third Department's December 27, 2018 Memorandum and Order. (Leve Mtn. Ex. A-1.) That order was issued more than a week after all of plaintiffs' interlocutory motions had been denied. (*See* Leave Mtn. Exs. A-2, A-3, A-4, A-5.) Plaintiffs do not explain how the denial of any of their motions would have finally determined the action."

This is fraudulent. Finality is not at issue, but whether the Appellate Division's four orders denying appellants' motions necessarily affect its December 27, 2018 Memorandum and Order – which they do. This is identified at ¶14 of appellants' motion and by their Exhibit D "legal autopsy"/analysis of the Court's May 2, 2019 Order – furnishing record references for the fraud put forward by the Attorney General's March 26, 2019 letter on the subject of finality, pointed out by appellants' April 11, 2019 letter (at p. 9 and its footnote 10) – fraud which this Point II-B here replicates.

The Attorney General then states, in a single-sentence concluding paragraph (at p. 10):

> "Because each of the Court's three precise holdings were correct, leave to reargue should be denied."

Again fraudulent. The so-called "three precise holdings" are nothing of the sort. Nor are they correct, as the above rebutting record references establish.

## The Attorney General's Point II-C (at pp. 10-15)
## "The Court Had Jurisdiction to Dismiss the Appeal"

The Attorney General's Point II-C presents three sections under this heading, prefaced by the assertion:

> "Plaintiffs' 'threshold' argument that this Court lacked jurisdiction to dismiss their appeal (Notice of Rearg. Mtn. ¶2) must be rejected for multiple reasons."

This is fraudulent. None of the Attorney General's three sections establish that the associate judges had jurisdiction to dismiss appellants' appeal, if, in fact they did dismiss it by the Court's May 2, 2019 Order – and all three sections conceal the threshold question presented by the motion (at ¶¶4, 12-14) as to whether they did.

**The Attorney General's Point II-C(1) (at pp. 11-12)**
**"Disqualification was not required because the Rule of Necessity Applies to this case"**

In addition to its title, the Attorney General's Point II-C(1), consisting of four paragraphs, is fraudulent throughout.

The first paragraph purports:

> "The Rule of Necessity allowed this Court to dismiss the appeal in this case, despite the fact that its Judges have an economic interest in being paid adequate salaries (Rearg. Mtn. at 18-19). Specifically, this Court has held that the Rule of Necessity enables it to decide litigation concerning judicial compensation, because any state judge would face the same purported conflict. *Matter of Maron v. Silver*, 14 N.Y.3d 230, 248-49 (2018).

This is fraudulent – and in multiple respects.

First, the Court's May 2, 2019 Order dismissing appellants' appeal of right did NOT invoke "Rule of Necessity".

Second, "economic interest" is proscribed by Judiciary Law §14 and, by reason thereof, the associate judges were divested of jurisdiction to "sit" or "take any part" in the May 2, 2019 Order.

Third, the Court's decision in *Maron v. Silver* makes NO mention of Judiciary Law §14 in invoking "Rule of Necessity" – a fact to which appellants alerted the Attorney General repeatedly. This includes by their "legal autopsy"/analysis of the Appellate Division's December 27, 2018 Memorandum (at p. 8), accompanying their March 26, 2019 letter in support of their appeal of right.

Fourth, inferable from the Court's failure, in *Maron*, to refer to Judiciary Law §14 is that it could not do so and invoke "Rule of Necessity" as the two are incompatible because – as is clear from *United States v. Will*, 449 U.S. 200 (1980) – judges must have jurisdiction, in the first instance, in order to invoke "Rule of Necessity" – and to this appellants also repeatedly alerted the Attorney General, including by their "legal autopsy"/analysis of the December 27, 2018 Memorandum.[8]

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[8] *See* Exhibit B thereto: appellants' November 27, 2018 order to show cause, which, at ¶6 of appellant Sassower's moving affidavit, quotes her repeated assertion:

> "New York cases invoking the rule of necessity invariably cite, either directly or through other cases, *United States v. Will*, 449 U.S. 200 (1980). Yet, it is unclear to me whether, in the federal system, there is any analogue to Judiciary Law §14 – a statute which, as New York caselaw makes clear, removes jurisdiction from a judge under given circumstances such as interest, as opposed to mandating disqualification under such circumstances.".

A substantiating quote from 32 New York Jurisprudence §45 "Disqualification as yielding to necessity" (1963), follows at ¶11:

The second paragraph purports:

> "plaintiffs tacitly acknowledge the Rule of Necessity's application when they ask that Supreme Court justices be designated to decide the appeal. (Notice of Rearg. Mtn. ¶5.) Supreme Court justices and the Judges of this Court all have a financial interest in adequate salaries."

This is fraudulent. Appellants' contention is that IF "Rule of Necessity" can be invoked by interested judges who Judiciary Law §14 divests of jurisdiction, it cannot be by judges whose presumptive bias has been actualized – such as by the Court's May 2, 2019 Order, if, in fact, the associate judges rendered it. This is why appellants' fifth branch of their motion reads:

> "Pursuant to Article VI, §2a of the New York State Constitution, designating justices of the Supreme Court to serve as judges of this Court in connection with this appeal, with the condition that the so-designated judges follow the 'remittal of disqualification' procedure of §100.3F of the Chief Administrator's Rules Governing Judicial Conduct". (underlining added).

The third paragraph states:

> "Plaintiffs' argument that this Court did not 'invoke' the Rule of Necessity (Rearg. Mtn. at 4, 5) is misguided. The Rule need not be formally 'invoked' by a court when deciding a matter. When the Rule applies, the court '*must* hear and dispose of' the issues presented. *Maron*, 14 N.Y.3d at 248-49 (emphasis added)."

This is fraudulent. Nothing in the Court's *Maron* decision stands for the proposition that judges need not "formally" invoke "Rule of Necessity" in situations where it might be applicable. To the contrary, in *Maron*, the Court "formally" invoked "Rule of Necessity", seemingly on its own initiative, without any disqualification motion having been made by the parties, stating, as follows:

> "III. Rule of Necessity
>
> Members of the Court of Appeals are paid via the salary schedule delineated in Judiciary Law §221 and therefore will be affected by the outcome of these appeals. Ordinarily, when a judge has an interest in litigation, recusal is warranted. But this case falls within a narrow exception to that rule. Because no other judicial body with jurisdiction exists to hear the constitutional issues raised herein, this Court must hear and dispose of these issues pursuant to the Rule of Necessity (*see Maresca v Cuomo,* 64 NY2d 242, 247 n 1 [1984], *appeal dismissed* 474 US 802 [1985] [addressing a challenge to the State Constitution's mandatory retirement age requirements for

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> "Moreover, since the courts have declared that the disqualification of a judge for any of the statutory reasons deprives him of jurisdiction,[fn] a serious doubt exists as to the applicability of the necessity rule where the judge is disqualified under the statute.[fn]"

certain state judges], citing *Matter of Morgenthau v Cooke,* 56 NY2d 24, 29 n 3 [1982])." (underlining added).

Likewise, in BOTH *Maresca* and *Morgenthau*, the Court "formally" invoked "Rule of Necessity".[9] Consequently, the Attorney General has ZERO legal authority to support her concocted, utterly frivolous assertion that the Court did not have to "formally" invoke "Rule of Necessity" in rendering its May 2, 2019 Order – which is her euphemism for the Court's not referring to "Rule of Necessity, at all.

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[9] In *Maresca*, the Court stated, at the outset of its decision, in its footnote 1:

> "That members of this court may be affected by the outcome of this appeal does not call for recusal. In the circumstances, inasmuch as this court has exclusive jurisdiction under the Constitution to hear this appeal (art VI, § 3, subd b, par [1]) and no other judicial body exists to which this appeal could be referred for disposition, the present members of the court are required to hear and dispose of it under the Rule of Necessity (*Matter of Morgenthau v Cooke*, 56 N.Y.2d 24, 29, n 3). The Chief Judge has recused himself in conformity with his customary practice when, as here, the Office of Court Administration is a party to an appeal." (underlining added).

In *Morgenthau*, the Court stated, also at the outset of its decision, and also in a footnote, #3:

> "At the outset we dispose of any speculation that, because one of the constitutional deficiencies urged by petitioners was the failure to obtain approval of any pertinent standard or administrative policy by the Court of Appeals, the members of this court should decline to participate in the appeal. Even if we were to assume that a disqualifying ex officio interest exists which might be a basis for recusal (but see *Matter of Ryers*, 72 N.Y. 1), we would nevertheless be required to proceed in the matter under the 'Rule of Necessity'. As stated by Sir Frederick Pollock, that rule mandates that 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise' (Pollock, A First Book of Jurisprudence [6th ed, 1929], p 270; cf. *United States v Will*, 449 US 200). With respect to the litigation before us, this court has exclusive jurisdiction under the Constitution of this State to hear the appeal from the order of the Appellate Division (art VI, § 3, subd b, par 1); no other judicial body exists to which this appeal could be referred for disposition. Nor would the situation be different if the members of this court were to recuse themselves and summon other jurists to serve in their place for the purpose of deciding this appeal. Substitute Judges who might be designated to this Bench would themselves, for the period of their service, assume the institutional character of this court and would therefore be subject to the same suggestion of disability that might be thought to exist as to the court as presently composed. Indeed, the present circumstance is not conceptually different from the situation in which the court is called on to determine the scope of its own jurisdiction, a determination which it makes with some frequency. Finally, to the extent that there might be apprehended some personal discomfiture to the members of this court in ruling on an appeal in which the Chief Judge is a litigant, such discomfort provides no justification for our declining to execute the duties of our judicial offices."

Suffice to say, the Court's failure to invoke "Rule of Necessity" is one of the grounds upon which appellants' motion asserts that its May 2, 2019 Order is unconstitutional. As stated by appellants' ¶8 – the accuracy of which the Attorney General does not dispute –

> "As the May 2, 2019 Order does not invoke 'Rule of Necessity', it is unconstitutional, pursuant to all U.S. Supreme Court caselaw, as may be discerned from Chief Justice Roberts' dissent in *Caperton*[fn.5] because the six associate judges each have 'direct, personal, substantial pecuniary interest[s]'. This, quite apart from their other interests and relationships contributing to the "probability" of bias, viewed by the *Caperton* majority to also be unconstitutional." (underlining in the original).

The fourth paragraph reads:

> "To be sure, if individual judges believe the potential economic effect of a challenge to judicial salaries renders them unable to decide the matter fairly and impartially, they should recuse themselves. Under such circumstances, the decision to recuse, or to continue presiding over a case, is entrusted to the judge's discretion and rests 'within the personal conscience' of the judge. *People v. Glynn*, 21 N.Y3d 614, 618 (201[3]); *accord Matter of Robert Marini Builder, Inc. v. Rao*, 263 A.D.2d 846, 848 (3d Dep't 1999). But if judges are satisfied they can serve impartially, they have 'an obligation not to recuse.' *Marini*, 263 A.D.2d at 848 (emphasis added); citation and internal quotation marks omitted); *accord Silber v. Silber*, 84 A.D.3d 931, 932 (2d Dep't 2011)."

This is fraudulent. The Attorney General has here converted the mandatory, statutory disqualification for interest of Judiciary Law §14 into a matter of "discretion" and "personal conscience" – disregarding ALL New York caselaw, including the Attorney General's own cited case *People v. Glynn*, 21 N.Y3d 614, 618, which states:

> "Unless disqualification is required under Judiciary Law §14, a judge's decision on a recusal motion is one of discretion (*see People v Moreno*, 70 N.Y.2d 403,405 [1987])". (underlining added).

**The Attorney General's Point II-C(2) (at pp. 12-14)**
**"There is no evidence of 'actual bias'"**

In addition to its title, the Attorney General's Point II-C(2) is fraudulent throughout.

The first and second paragraphs read:

> "Plaintiffs assert that this Court harbors 'actual bias' against them (Rearg. Mtn. at 15) based on a supposed 'reputational interest' in the judiciary budget (Rearg. Mem. at 21) and 'professional and personal relationships' with other judges (Rearg. Mem at 28). But 'the mere allegation of bias is insufficient to require recusal.' *Marini*, 263 A.D.2d at 848; *accord Matter of Taja K.*, 51 A.D.3d 1027, 2027 (2d Dep't 2008).

> Plaintiff provide no evidence to show that any specific interest has affected the Judges in this case. Their 'evidence' of actual bias seems to be the fact that the Court dismissed their appeal, a ruling plaintiffs feel is 'insupportable' (Rearg. Mtn. at 15). But bias 'will not be inferred' from adverse rulings. *Knight v. N.Y. State Local Ret. Sys.*, 266 A.D.2d 774, 776 (3d Dep't 1999); *accord S.L. Green Props., Inc. v. Shaoul*, 155 A.D.2d 331, 332 (1st Dep't 1989). '[T]he fact that a judge issues a ruling that is not to a party's liking does not demonstrate either bias or misconduct.' *Matter of Gonzalez v. L'Oreal USA, Inc.*, 92 A.D.3d 1158, 1160 (3d Dep't), *lv. dismissed*, 19 N.Y.3d 874 (2012)." (underlining added).

This is fraudulent. Appellants' motion (¶¶4-24) asserts that the Court's May 2, 2019 Order, if rendered by the associate judges, demonstrates their actual bias, born of interests and relationships, because it is insupportable. By no stretch can the particularity of their motion – including its annexed Exhibit D "legal autopsy"/analysis of the Order – be deemed "mere allegations of bias" and "no evidence…that any specific interest has affected the judges in this case". That the memorandum attempts to spin it as a ruling "not to their liking" because it is "adverse" is a *verbatim* reprise of what the Attorney General purported before the Appellate Division, both with respect to Judge Hartman's decisions and the Appellate Division's – including by respondents' brief (at pp. 59-60), objected to by appellants' reply brief (at pp. 2-5).

The memorandum then purports (at p. 13) that "Plaintiffs' additional attacks on two individual Judges do not present cognizable evidence of bias." This is fraudulent. The recitations in appellants' motion pertaining to Chief Judge DiFiore and Associate Judge Garcia (at ¶¶37-43, 46-49) are not for purposes of presenting "cognizable evidence of bias" by them.

**Mr. Brodie's Point II-C(3) (at pp. 14-15)**
**"The Judiciary Law did not deprive this Court of jurisdiction to dismiss plaintiffs' appeal"**

In addition to its title, two of the Attorney General's three paragraphs of Point II-C(3) are fraudulent.

The first paragraph, consisting of a quote of the first sentence of Judiciary Law §14, removes its initial language, here underlined:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

Instead, it substitutes: "Judiciary Law §14 precludes a judge from deciding…", thereby modifying the wording that has been held to divest the affected judge of jurisdiction.

The second paragraph (at p. 14) states:

> "'Actual bias' is not a statutory ground for disqualification under Judiciary Law §14. *Matter of Rotwein*, 291 N.Y. 116, 123 (1943) (citing prior enumeration of provision). The only statutory disqualifier alleged here is that the Judges are 'interested' because they benefit from judicial salary increases. As shown above, this Court expressly held in *Maron* that the Rule of Necessity overrides such an interest. (*See* Point II[C][1].)"

This is fraudulent. Appellants never asserted – as is here implied – that "actual bias" is a ground for disqualification under Judiciary Law §14. What they asserted is that Judiciary Law §14 divests interested judges of jurisdiction – and that the Court's invocation of "Rule of Necessity" in *Maron* is without mentioning Judiciary Law §14, inferentially conceding what *U.S. v. Will*, 449 U.S. 200 (1980), makes obvious: that judges need jurisdiction in order to invoke the judge-made "Rule of Necessity". (*see* fn. 8, *supra*).

The third paragraph (at p. 15) states:

> "The case plaintiffs cite for their jurisdictional argument, *Oakley v. Aspinwall*, 3 N.Y. 547 (1850) (*See* Notice of Rearg. Mtn. ¶¶1, 2[a], 3; Rearg. Mtn. at 1, 3-4, 15, 20, 33, n.28), does not assist them. In *Oakley*, the judge was related to one of the parties. The Court observed that '[p]artiality and bias are presumed from the relationship or consanguinity of a judge to the party,' and that presumption was 'conclusive and disqualifie[d] the judge.' *Id.* at 550. A statute forbade the judge from sitting under those circumstances. *Id.* at 551. No such express statutory prohibition exists here."

This is fraudulent. The statute at issue in *Oakley* is what is today Judiciary Law §14, entitled "Disqualification of judge by reason of interest or consanguinity" – and it pertains now, as then, not just to consanguinity, but to interest. And making this plain is the decision in *Oakley* itself, not only stating – as the Attorney General here quotes:

> "'[p]artiality and bias are presumed from the relationship or consanguinity of a judge to the party,' and that presumption was 'conclusive and disqualifie[d] the judge.' *Id.* at 550",

but, on the very same page 550:

> "The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which make no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge. Hence the statute declares, that 'no judge of any court can sit as such in any cause to which he is a party or in which he is interested...'" (underlining added).

And then, three pages later:

"it seems proper to hold that the jurisdiction conferred on the judges of this court in general terms, is subject to an implied exception in favor of the operation of the rule by which they would be excluded from sitting in cases where they may be interested or related to the parties. Such an exception is implied under the most comprehensive grant of jurisdiction by statute..." (at p. 553, underlining added).

**The Attorney General's Point II-D (at pp. 15-17)**
**"Respondents are Properly Represented by the Attorney General"**

In addition to its title, the six paragraphs of the Attorney General's Point II-D are each fraudulent.

The first paragraph (at p. 15) states:

"Plaintiffs err in arguing that the Attorney General acts under a conflict of interest (Rearg. Mtn. at 34, 35-36)."

This is fraudulent. And appellants' argument begins, not at page 34 of their motion, but at page 32, and extends to page 41, not 36 – all under the title heading:

"The Financial and Other Interests of Attorney General Letitia James in this Appeal, and her Knowledge of, and Collusion in, the Corruption of the Proceedings Below and before this Court, Requiring Her Disqualification & Appointment of Independent/Special Counsel."

The second paragraph (at p. 15) states:

"First, there is no conflict between the Attorney General and her clients (none of whom has objected to the representation). As the Third Department observed, the Attorney General and her clients are 'united in interest.' (Leave Mtn. Ex. A at 4.) All wish to see the Legislature's authorizing statute and the Commission's resulting recommendations upheld and implemented."

This is fraudulent. The conflicts of interest from which the Attorney General suffers are NOT between her and her clients – and appellants' motion, whose ¶55A-D specifies the Attorney General's conflicts of interests, does NOT assert that they are. Consequently, this second paragraph is additionally meaningless.

The third paragraph (at p. 16) states:

"Second, the Attorney General has no financial interest in this case. The recommendations at issue concern only judicial salaries, not executive-branch pay. (*See* R1089.) The fact that the Attorney General's pay may be subject to future review by a different commission (*see* Rearg. Mtn. at 37) does not establish a conflict in *this* case." (italics in the original).

This is fraudulent, as the Attorney General HAS "a financial interest in this case". Appellants' sixth cause of action [R.109-112 (R.187-201)] challenges the constitutionality of the commission scheme through which the Attorney General will obtain future salary increases – Chapter 60, Part E, of the Laws of 2015. Indeed, a declaration of unconstitutionality will result in the voiding of the committee scheme through which the Attorney General has already obtained a salary increase and will obtain two more increases in each of the next two years. ¶55A of appellants' motion specifies both of these aspects of "financial interest" as follows – and its accuracy is not contested by the Attorney General:

> "(A) [The Attorney General], like her fellow defendant-respondents and this Court's judges, has a HUGE salary interest in appellants' sixth cause of action for declarations that Part E, Chapter 60 of the Laws of 2015 is unconstitutional, *as written* and by its enactment [R.109-112 (R.187-201)]. The Commission on Legislative, Judicial and Executive Compensation it creates is scheduled to be re-established on June 1, 2019 – and her own salary increases are within the purview of its seven members, two of whom will be defendant DiFiore's appointees [R.1080-1082].
>
> And, already, Attorney General James is benefiting from the materially identical Part HHH, Chapter 59 of the Laws of 2018 that established the Legislative and Executive Compensation Committee, which, like Part E, Chapter 60 of the Laws of 2015, was an unconstitutional rider, inserted into the budget as a result of behind-closed-doors, three-men-in-a-room budget deal-making. By its December 10, 2018 Report – replicating ALL the violations which are the subject of appellants' seventh and eighth causes of action [R.112-114 (R.201-213)] – she benefited from a $38,5000 salary raise.
>
> On December 31, 2018, the Attorney General's salary, pursuant to Executive Law §60, was $151,500. As a result of the 'force of law' recommendations of the Committees' December 10, 2018 Report, it zoomed to $190,000, effective January 1, 2019. On January 1, 2020, this will shoot up another $20,000 to $210,000, and then, on January 1, 2021, by another $10,000 to $220,000." (capitalization in the original)

The fourth paragraph (at p. 16) states:

> "Third, plaintiffs' meritless threat of sanctions or prosecution (*see* Rearg. Mtn. 37) does not create a conflict on the Attorney General's part. In the predecessor case, Supreme Court 'searched the records' and found 'absolutely no basis' to award sanctions or take any other disciplinary action against defendants' counsel. (R329.) In both the predecessor case and this one, Supreme Court ruled in defendants' favor on the merits. (R31-41, 52-60, 68-79, 315-325.) On appeal in this case, the Appellate Division affirmed Supreme Court's judgment for defendants on the merits. (Leave Mtn. Ex. A.) In short, every judicial officer to consider plaintiffs' claims has rejected them." (underlining added).

This is fraudulent – and in two respects.

First, it is the Attorney General's litigation conduct before this Court that is at issue on appellants' motion – NOT before the Supreme Court, either in "the predecessor case" or in this case – nor before the Appellate Division. This is explicit from the second branch of appellants' notice of motion, whose request for determination/certification of two threshold questions pertaining to the Attorney General read:

> "d) Whether the Attorney General can lawfully and constitutionally represent defendant-respondents before this Court where she has financial and other interests in the outcome of the appeal? – and manifested same by a fraudulent submission opposing plaintiff-appellants' appeal of right, because she had NO legitimate grounds for opposition;
>
> e) Whether, pursuant to Executive Law §63.1 and State Finance Law Article 7-A, the unrepresented plaintiff-appellants are entitled to the Attorney General's representation and/or intervention before this Court – including *via* appointment of special counsel? – because it is they who are upholding the "interest of the state" and the Attorney General has NO legitimate opposition to their appeal of right, nor defense of the course of the proceedings below, obliterating all semblance of the Rule of Law" (underlining added).

Likewise, it is explicit from the motion's sixth branch:

> "Pursuant to §100.3D(2) of the Chief Administrators Rules Governing Judicial Conduct, issuing a show cause order requiring Attorney General Letitia James, Solicitor General Barbara Underwood, Assistant Solicitor General Victor Paladino, and Assistant Solicitor General Frederick Brodie to respond to appellants' April 11, 2019 letter, as expressly sought in its concluding paragraph:
>
> > 'if the Attorney General [did] not promptly withdraw her fraudulent March 26, 2019 letter [urging the Court's *sua sponte* dismissal of the appeal of right] and take steps to secure independent counsel 'to represent the interest of the state' pursuant to Executive Law §63.1 and to disqualify herself based on her direct financial and other interests in the appeal'. (at pp. 15-16, underlining in the original)."

The Attorney General here cites to neither of these, but to "(*see* Rearg. Mtn. 37)", whose ¶55B is also explicit in stating:

> "[the Attorney General] has a HUGE interest in preventing adjudication of the threshold issue of the litigation fraud perpetrated by her March 26, 2019 letter because, in addition to her liability for

> financial sanctions and costs, pursuant to §130.1.1 of the Chief Administrator's Rules and Judiciary Law §487, such corrupting of the judicial process triggers the Court's mandatory disciplinary responsibilities, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, to refer her and her conspiring attorney staff to disciplinary and criminal authorities – the consequence of which, based on this record, will be disbarment, indictments, and convictions". (¶55B, capitalization in the original, underlining added).

Second, there is nothing "meritless" about appellants' showing that the Attorney General's March 26, 2019 letter is "a fraud on the court", warranting "sanctions or prosecution". Its "merit" is established by appellants' April 11, 2019 letter, whose accuracy the Attorney General does not dispute, notwithstanding the motion's sixth branch seeks to compel her response to it. Instead, the memorandum conceals the sixth branch.

The fifth paragraph (at pp. 16-17) states:

> "Fourth, contrary to plaintiffs' suggestion (Rearg. Mtn. at 34), the Attorney General is not authorized to represent private parties like plaintiffs. *People v. Albany & Susquehanna R. Co.,* 57 N.Y. 161, 167-68 (1874); *Waldman v. State of New York*, 140 A.D.3d 1448, 1449 (3d Dep't 2016); *Matter of Cliff v. Vacco*, 267 A.D.2d 731, 732 (3d Dep't 1999, *lv. denied*, 94 N.Y.2d 762 (2000))."

This is fraudulent. Apart from the fact that appellants are explicitly acting "on behalf of the People of the State of New York and the public interest", the Attorney General is "authorized" to represent private parties, pursuant to Executive Law §63.1, where such is in "the interest of the state". Likewise, the Attorney General is authorized to represent and/or intervene on behalf of private parties by State Finance Law Article 7-A. Nothing in the three cited cases is to the contrary – and the Attorney General's deceitful citation to *Cliff v. Vacco* and *Waldman v. State of New York* mirrors the even more deceitful citation to them in the Appellate Division, exposed by appellants' November 13, 2018 reply in further support of their October 23, 2018 motion to strike the Attorney General's September 21, 2018 respondents' brief.[10]

The sixth paragraph, with its annotating footnote, (at p. 17) states:

> "Conversely, the Attorney General's defense of respondents is expressly authorized by Executive Law §§63(1) and 71(1).[fn2]"
>
> [fn 2] "Although such proof was unnecessary, respondents also provided the Third Department with their counsel's affirmation that '[t]he Office of the Attorney

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[10] *See* November 13, 2018 reply affidavit, at page 5 and Exhibit S thereto, at p. 4 – responding to page 7 of the Attorney General's November 2, 2018 memorandum in opposition to appellants' October 23, 2018 motion to strike the respondents' brief.

> General has determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal.' (11/2/18 Brodie Aff., ¶3.)"

This is fraudulent. The first sentence of Executive Law §63.1 – not quoted by the memorandum – specifies the Attorney General's duty to:

> "Prosecute and defend all actions and proceedings in which the state is interested…in order to protect the interest of the state."

In other words, Executive Law §63.1 also expressly authorizes the Attorney General to prosecute respondents – and the determination of whether to prosecute or defend is contingent on "the interest of the state".

As for the quoted "¶3" of "counsel's affirmation", dated "11/2/18", by Assistant Solicitor General Brodie, such was NOT "unnecessary", as appellants' October 23, 2018 motion to strike respondents' brief – to which his affirmation was in opposition – sought, by its second branch, an order:

> "declaring Attorney General Underwood's appellate representation of respondents unlawful for lack of any evidence – or even a claim – that it is based on a determination pursuant to Executive Law §63.1 that such is in 'the interest of the state', with a further declaration that such taxpayer-paid representation belongs to appellants".

Nor was Assistant Solicitor General Brodie's ¶3 "proof" of anything, except of "obvious perjury". Appellants' November 13, 2018 reply[11] stated this, as follows:

> "…¶3…is NOT evidence, as it is completely conclusory, failing even to provide the names of such persons in the attorney general's office as supposedly 'determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal.' – or any evidence in corroboration. Indeed, it is an obvious perjury, rebutted by ALL the EVIDENCE constituting the record of this citizen-taxpayer action below, as well as ALL the EVIDENCE constituting the record of the proceedings before this Court with respect to appellants' three motions, each intended to ensure the integrity of the appellate proceedings – each of which Mr. Brodie corrupted with litigation fraud, because he had NO legitimate defense." (underlining and capitalization in the original).

As for Executive Law §71.1, it merely authorizes the Attorney General to appear in cases involving "the constitutionality of an act of the legislature, or a rule or regulation adopted pursuant thereto", it does not require him to do so. Nor could it, as the Attorney General could not be required to "litigate

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[11] See appellants' November 13, 2018 reply affidavit, at Exhibit S, p. 4.

in support of the constitutionality'" where a statute, rule, or regulation is, in fact, unconstitutional. This is the situation at bar – and appellants pointed this out previously, including by their October 4, 2018 reply brief (at p. 11) and November 13, 2018 reply to the Attorney General's November 2, 2018 opposition to their October 23, 2018 motion.[12] The Appellate Division denied the motion, without facts, law, or reasons, by its November 13, 2018 decision and order on motion.

**The Attorney General's Point II-E (at pp. 17-18)**
**"There is No Basis for the Other Relief Plaintiffs Seek"**

In addition to its title, the five paragraphs of the Attorney General's Point II-E are each fraudulent.

The first paragraph (at p. 17) states:

> "None of the remaining requests for relief listed in plaintiffs' notice of motion has a legal basis."

This is fraudulent. All the requested relief has "a legal basis".

The second paragraph (at p. 17) states:

> "First, no statute authorizes the New York State courts to transfer this case to the federal courts (*see* Notice of Rearg. Mtn. ¶¶1, 2[a]). The suggestion is particularly unseemly coming from plaintiffs, who chose to bring both this case and the predecessor lawsuit in the State courts."

This is fraudulent, as the absence of a statute for transfer to the federal courts does not mean the request is without "legal basis" – nor that there is not a legal remedy. The memorandum here conceals the relief sought by the first branch of appellants' notice of motion, to which it cites, *to wit*, that the Court take "emergency steps to ensure a forum in the federal courts", where – because of Judiciary Law §14 and the Court's interpretive decision in *Oakley v. Aspinwall* – the associate judges are without jurisdiction. Likewise, the relief sought by the second branch (part a) of appellants' notice of motion, although cited-to, is here concealed, *to wit*, "certifying" to the United States Supreme Court the question as to whether the case could be transferred to the federal court, "including pursuant to Article IV, §4 of the United States Constitution: 'The United States shall guarantee every State in this Union a Republican Form of Government". Conspicuously, the Attorney General does not state that either or both could not be done.

As for appellants having "chos[en] to bring both this case and the predecessor lawsuit in the State courts", the record shows that appellants, "acting on their own behalf and on behalf of the People of the State of New York & the Public Interest", vigorously sought the representation of the Attorney General pursuant to Executive Law §63.1 and State Finance Law, Article 7-A. Upon the Court's determination of their entitlement thereto, including *via* independent counsel, appellants would have

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12 See appellants' November 13, 2018 reply affidavit, at Exhibit S, p. 3.

no objection to the Attorney General or such independent counsel taking steps to transfer the case to the federal courts, including by a petition for a writ of certiorari to the U.S. Supreme Court.

The third paragraph (at p. 17) states:

> "Second, the disclosure and consent procedure in 22 N.Y.C.R.R. §100.3(F) (*see* Notice of Rearg. Mtn. ¶¶2[b], 3, 5) applies only when a judge has been disqualified under §100.3(E). There has been no such disqualification here."

This is fraudulent – and regurgitates the Attorney General's interpretive perversion of 22 NYCRR §100.3(F) offered up before the Appellate Division in OPPOSING, as here, the disclosure and "Remittal of Disqualification" procedure it specifies – objected to and exposed by appellants, repeatedly,[13] without adjudication by the Appellate Division, in its underlying decisions and orders on motion or by its December 27, 2018 Memorandum and Order.

§100.3F rests on §100.3E, entitled "Disqualification" – and states, in mandatory terms, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to...." 22 NYCRR §100.3F states:

> "A judge disqualified by the terms of subdivision (E)..., of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

In other words, absent dispute by each judge, as relates to him/her, of the reasonable questions raised by the specifics of appellants' motion, he/she is disqualified, pursuant to §100.3E – and cannot sit, except by making disclosure with respect thereto and asserting his/her belief that he/she can be impartial and is willing to participate, with the parties then agreeing, outside the presence of the judge, and then incorporating the agreement in the record.

Tellingly, no legal authority is furnished to support the Attorney General's interpretation of §100.3F – reflective that there is NONE. Certainly, the Attorney General could have easily availed herself of the interpretation of the Commission on Judicial Conduct in its 2019 annual report, posted on its website: http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2019Annualreport.pdf, containing the following, readily-found from its table of contents:

> "**Conflicts of Interest.** All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which

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13 See, *inter alia*, appellants' October 4, 2018 reply brief (at pp. 5-7); appellants' August 1, 2018 reply affidavit, at Exhibit Z (at pp. 25-28).

> their impartiality might reasonably be questioned; two judges were cautioned for failing to so disqualify and/or disclose. ..." (at p. 17, bold in the original, underlining added).

The fourth paragraph (at p. 18) states:

> "Third, to establish its jurisdiction, the Court properly required that a substantial constitutional question be directly involved (Rearg. Mtn. Ex. A-1 at 1-2; *see* Notice of Rearg. Mtn. ¶2[c]; Rearg. Mtn. at 12-14). That requirement is both sensible and necessary. Without it, parties could obtain review in this Court on any appeal by purporting to relitigate basic constitutional issues that have already been decided."

This is fraudulent. It is unconstitutional – irrespective of the reason – for the Court to alter the appeal-of-right entitlement that Article VI, §3(b)(1) of the New York State Constitution and CPLR §5601(b)(1) confer when there is "directly involved the construction of the state or of the United States" – and such is the threshold question, for the Court's determination or certification, requested by "Notice of Rearg. Mtn. ¶2[c]", to which the memorandum here cites, without specifying what it is:

> "Is this Court's substitution of the language of Article VI, §3(b)(1) of the New York State Constitution and CPLR §5601(b)(1), granting appeals of right 'wherein is directly involved the construction of the constitution of the state or of the United States', with a *sua sponte* ground to dismiss because 'no substantial constitutional question is directly involved' unconstitutional, *as written, as unwritten, and as applied*?" (underlining and italics in the original).

Suffice to add that memorandum does not deny or dispute the accuracy of pages 12-14 of appellants' motion, to which it also cites, without identifying that it is argument substantiating the unconstitutionality of the Court's rewrite.

The fifth paragraph (at p. 18) states:

> "Finally, no procedure exists for designating unspecified Supreme Court justices to take this Court's place in deciding the appeal (see Notice of Rearg. Mtn. ¶5)."

This is fraudulent – the "procedure" is identified by the fifth branch of appellants' notice of motion, whose requested relief begins as follows:

> "Pursuant to Article VI, §2a of the New York State Constitution, designating justices of the Supreme Court to serve as judges of this Court in connection with this appeal..."

Article VI, §2a states:

> "In case of the temporary absence or inability to act of any judge of the court of appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act."

Inasmuch as this provision has been utilized by the Court, the "procedur[al" mechanics obviously "exist[]".

**The Attorney General's Point II-F (at pp. 18-19)**
**"Plaintiffs' Allegations of 'Litigation Fraud' are Baseless"**

This title heading and the five paragraphs thereunder purporting that the Attorney General has not misled this Court or the courts below are each fraudulent – and materially replicate the Attorney General's fraud before the Appellate Division, including by her respondents' brief, and before this Court, by her March 26, 2019 letter. They each contain, *verbatim*, the same indefensible, deceitful argument.

The true facts are established by:

- appellants' October 4, 2018 reply brief, constituting a "legal autopsy"/analysis of the Attorney General's respondents' brief – as to which the Appellate Division made no findings;

- appellants' reply papers on each of their four motions before the Appellate Division, each furnishing "legal autopsy"/analyses of the Attorney General's opposition to the motions – as to which the Appellate Division made no findings;

- appellants' April 11, 2019 letter to this Court entitled "Aiding the Court in Protecting Itself & Appellants' Appeal of Right from the Litigation Fraud of the New York State Attorney General" – as to which the Court made no findings; and

- this "legal autopsy"/analysis of the Attorney General's June 27, 2019 "Memorandum in Opposition to Motions for (i) Leave to Appeal; and (ii) Reargument/Renewal and Other Relief".

## The Attorney General's "CONCLUSION" (at p. 20)

The Attorney General's single-sentence "Plaintiffs' motions should be denied in all respects" is fraudulent – as demonstrated hereinabove, by the memorandum's deceit, throughout.

Indeed, were the Court to deny the motions "in all respects", its associate judges would be committing an act so treasonous to the oaths of office to which they swore, pursuant to Article XIII, §1 of the New York State Constitution, as to mandate not only their removal from office pursuant to the constitutional remedies of Article VI, §22, § 23, and §24 – but their criminal prosecution for the same penal law violations for which the Attorney General must also be prosecuted, including:

> Penal Law §175.35 "offering a false instrument for filing in the first degree";
>
> Penal Law §195 "official misconduct";
>
> Penal Law §496 "corrupting the government in the first degree"/"public corruption" [PUBLIC TRUST ACT];
>
> Penal Law §195.20 "defrauding the government";
>
> Penal Law §190.65 "scheme to defraud in the first degree";
>
> Penal Law §155.42 "grand larceny in the first degree";
>
> Penal Law §105.15 "conspiracy in the second degree;
>
> Penal Law §20 "criminal liability for conduct of another".

And, of course, the judges would have no immunity defense for money damages in a federal lawsuit against them – their actions being "in the clear absence of all jurisdiction" by virtue of Judiciary Law §14 and the Court's own interpretive caselaw, beginning with *Oakley v. Aspinwall*, 3 NY 547 (1850) and reiterated in such cases as *Wilcox v. Royal Arcanum*, 210 N.Y. 370 (1914). Indeed, in *Stump v. Sparkman*, 435 U.S. 349, 358 (1978), the U.S. Supreme Court's grant of judicial immunity was because "neither by statute nor by case law has the broad jurisdiction granted...been circumscribed..." – emphatically NOT the situation presented by the unequivocal language of Judiciary Law §14 and *Oakley v. Aspinwall*.