John H. Babigian
One Christopher Street
Apartment 11-A
New York, New York 10014
(212) 374-8041 (Bus.)
(212) 255-8938 (Res.)

November 16, 1992

Governor Mario Cuomo
Executive Chambers
Two World Trade Center
New York, New York 10005

Re: Babigian v. Wachtler

Dear Governor Cuomo:

The New York Court of Appeals issues many questionable decisions, particularly its unsigned, per curiam opinions. In an article "Court of Appeals -- State Constitutional Law Review, 1990," 12 Pace L.Rev. 1, Professor Vincent M. Bonventre, the associate law professor at Albany Law School, concludes as follows regarding its per curiam opinions:

> "That leads to the second -- the negative -- impression: the court often decided substantial state constitutional cases in unsigned opinions. There may, perhaps, be nothing intrinsically wrong with an anonymous opinion -- per curiam or memorandum. But there certainly is, when the absence of a signature also means an inadequate, poorly reasoned or sloppily written decision. And there certainly is, when a dissenting opinion raises legitimate constitutional questions which the unsigned majority fails to address, or fails to address thoughtfully.

> "Indeed, it is not difficult to understand why opinions whose authors remain unnamed might tend to be less carefully considered and crafted than those that are signed. In 1990, fully one-third of the divided decisions of the Court of Appeals in cases raising a substantial state constitutional rights issue were rendered in an unsigned writing. Most of those writings to be kind, were unworthy of a distinguished tribunal.
>
> "For example, in Sirno, over a vigorous lone dissent, the court, in an anonymously written, superficial one-paragraph memorandum, held that a defendant had knowingly, intelligently and voluntarily waived his Miranda rights -- the court relying on the remarkable proposition that the defendant's "cooperation" with his interrogators could mean nothing else. Likewise, in Green, where the court held that claims of racial discrimination in jury selection, like most other claims of trial error, are waived upon a guilty plea, the court rendered its decision in a conclusory, one-page memorandum, devoid of much analysis and of any fair response to the strenuous lengthy dissent." (12 Pace L.Rev. 53-54) (emphasis supplied)

Professor Bonventre, who clerked for two of the judges, is not a hostile critic. In his introduction to the article he "acknowledges his considerable fondness for the court and admiration for current and former members." The article concludes: "...the author believes the New York Court of Appeals to be the nation's premier state tribunal."

Professor Bonventre's criticism of the court's per curiam decisions is not new. In a law review article: "NONPAREIL AMONG JUDGES: PER CURIAM OPINIONS," by Henry S. Manley, 34 Cornell Law Quarterly 50, 52 (1948), the author quotes a judge of the N.Y. Court of appeals, as follows: "A

per curiam opinion is one where we agree to pool our weaknesses."

In 1966 at a seminar conducted by the Federal Judicial Center at the Appellate Judges' Conference, the following was stated:

4. Memorandum and Per Curiam Opinions

> "The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree." (Bickel and Wellington, 71 Harv.L.Rev. 1, 3, on U.S. Supreme Court.) (See generally Manley, 34 Corn.L.Q. 50, Non-pareil Among Judges, about 'Judge per curiam' who 'has been drafted for too many hard cases'; A.B.A. Com Report, p. 26: Minimum Standards, pp. 385, 443.)
>
> There are other expressions of disparagement and suspicion of the uninformative memorandum or per curiam opinion; some of the most severe criticism have been justices dissenting from what they regarded as a brush-off.
>
> Perhaps these observations are justified when the highest court in the nation seems to handle in cursory fashion an issue of vital importance to the country at large." (63 F.R.D. 573-574, 1973).

In Babigian v. Wachtler, 69 N.Y.2d 1012, 517 N.Y.S.2d 905, 511 N.E.2d 49 (1987), the Court of Appeals was presented with the nation's first pure question of separation of powers: can a judge appoint a person to office as a full-fledged judge?

The above per curiam decision is a fraud issued to cover-up a scam that allows Chief Judge Sol Wachtler and his court appointees to illegally control the appointment of New York City Housing Court judges.

Here is the decision, minus one paragraph that is not germane to the issue:

> "Plaintiff, an unsuccessful candidate for Housing Judge, challenges the constitutionality of CCA 110 (f), contending that--rather than Hearing Officers or Referees--Housing Judges are in fact full-fledged Judges; that the power to appoint Judges is an executive function; and that the statutory provision for appointment by the Chief Administrative Judge therefore violates the doctrine of separation of powers. Both lower courts granted defendants summary judgment, declaring the statute constitutional and dismissing the complaint. The Appellate Division sua sponte granted plaintiff leave to appeal to this court (CPLR 5713).
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> ****
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> "Plaintiff does not challenge the conclusion reached by the court in Glass v. Thompson (51 AD2d 69) that housing court officers were 'in essence referees * * * nonjudicial officers of the court, appointed to assist it in the performance of its judicial functions' (id., at 74). In fact, plaintiff asserts that the conclusion reached in Glass (supra) is 'obviously correct.' Plaintiff's argument that these officers are in fact Judges centers on the post-1976 amendments to the statute. However, no material enlargement of authority was made by the post-Glass amendments. Thus, plaintiff's claim, as framed by his own argument, lacks merit.
>
> "Finally, we note that the Appellate Division affirmed Supreme Court's order, without opinion, and sua sponte granted leave to appeal to this court. The Appellate Division's certification in the absence of any request by the parties bespeaks its conclusion, after having read the briefs, heard the

> parties and fully considered the appeal, that issues of law of particular significance were presented that merited the attention of this court, as well as the commitment of further time and expense by the litigants. While this court, and the entire appellate function, are better served when the regular review process is followed, including some articulation of the reasoning the intermediate appellate court chose to adopt when it considered the case and reached its result (see, Rufino v. United States, 69 NY2d 310), such an articulation is all the more important in those few cases singled out by the Appellate Division for sua sponte certification."

Judge Wachtler was awarded costs.

The Court of Appeals doesn't inform the profession that in the Rufino case they declined to decide the certified questions, yet in the prior paragraph they proceeded to "decide" the certified questions.

There is no statutory provision for the appointment of Housing Court judges by the "Chief Administrative Judge;" there is no such animal. Housing Court judges are appointed under the New York City Civil Court Act #110 (f) which provides that "The housing judges shall be appointed by the administrative judge from a list of persons selected * * * by the advisory council for the housing part." The Chief Judge of the New York Court of Appeals is the administrative head of the State's court system. He, in turn, appoints the "Chief Administrator of the Courts," who is not required to be a judge. The Chief Judge also selects the administrative judges of the various courts, including the Civil Court. In

his State of the Judiciary-1990 report, Judge Wachtler continued the deception of stating that Housing Court judges were "appointed by the Chief Administrator, following consultation with the Deputy Chief Administrative Judge for the Courts within New York City and the Administrative Judge of the Civil Court."

As the Chief Administrator of the Courts is the boss of all the administrative judges, they have simply shoved aside the Administrative Judge of the Civil Court, and order that Judge to sign the appointment papers for the Housing Court judges, who in reality are selected by the Chief Administrator. Obviously, the above take-over has the tacit approval of Judge Sol Wachtler, in whose name the present Chief Administrator, Mr. Matt Crosson, now overrides the re-appointment decisions of the Administrative Judge of the Civil Court.

The conduct of Judge Wachtler and Mr. Crosson also violates the New York Code of Professional Responsibility, DR 8-101:

> "A lawyer who holds public office shall not use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows, or it is obvious that action is not in the public interest."

The statements that plaintiff agreed with the conclusion that Housing Court judges were referees is a

patent lie. Plaintiff emphatically challenged the conclusion that Housing Court judges are referees. Point II of plaintiff's Brief was the argument that "A Housing Court Judge is Not a Referee Because There is no Control Over His Actions by Another Judge." The transcript of the oral argument makes it perfectly clear:

> "JUDGE SIMONS: In terms of your case, 110 on up of the statute is unconstitutional and that is because you say Housing Court judges are not judges.
>
> MR. BABIGIAN: No, I say Housing Court judges are judges.
>
> JUDGE SIMONS: What distinguishes between judges and referees?
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> MR. BABIGIAN: A referee is an individual who has a case referred to him from a judge. The order of reference confirms his authority in the particular matter presented to him. After the referee hears the matter or tries it or whatever, his decision or ruling has to go back to the judge who referred the matter to him, then it's up to the judge to either affirm, disaffirm or whatever. He doesn't have -- a referee does not have any general authority.
>
> JUDGE KAYE: You say because of the numbers involved that that couldn't possibly be taking place?
>
> MR. BABIGIAN: Well, yes, because of the numbers it would be impossible to do because in addition to the cases, in addition to the petitions and the orders to show cause, there are special proceedings in the Housing Courts which are not initiated by the litigants. There are court initiated motions, which are carried on by some judges, including the one that I work for, where we have court initiated motions to, for example, kick out crack dealers from apartments. We have court initiated motions appointing 7-A administrators when one tenant comes in on a case and the evidence is

that the building is in bad shape, we make an initiative by an order to show cause to have a 7-A administrator appointed.

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JUDGE KAYE: The various functions that you have described: the orders to show cause, the administrative orders, is it your position that only a judge and never a referee can do any of those things?

MR. BABIGIAN: No. Practically anything that any judge can do can be delegated to a referee or whatever.

JUDGE KAYE: Isn't that what's happened here that a delegation --

MR. BABIGIAN: There has not been a delegation."

Judge Kaye was commenting on plaintiff's earlier statement that the Bronx Housing Court judges processed over 33,000 petitions a year, and that the four Civil Court judges could hardly confirm all their decisions and rulings.

Plaintiff then read the following portion of section #110 (c) of the Housing Court Act, and argued that the Housing Court judges possessed greater powers than any other trial judge:

"(c) Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest...."

The Court of Appeals in People v. Scalza, 76 N.Y.2d 604, 562 N.Y.S.2d 14, 563 N.E.2d 705 (1990) indicates their knowledge of the ultimate control over a referee's actions by a judge. There is no control whatsoever of the trials and decisions of Housing Court judges by a Civil Court judge. To call them "essentially referees" is obscene.

A visibly annoyed Judge Simons then abruptly, without any explanation or query as to whether he had anything else to present, cut off plaintiff in seven minutes and fifty seconds of his allotted twenty minutes. No other litigant received such treatment. As Judge Wachtler could not sit on the case, the appeal was the last one that afternoon.

The statements that "no material enlargement of authority was made by the post-Glass amendments," and "Thus, plaintiff's claim, as framed by his own argument, lacks merit" is outright perjury.

The Glass decision was decided in 1976. At that time the Housing Court judges didn't have the title of judge; they were dubbed "hearing court officers." Actually they were de facto judges who tried cases without any interference from Civil Court judges, and their decisions went on appeal in the same way as those of the Civil Court judges.

They could not be considered full-fledged de facto judges because they lacked the critical power of a judge to impose civil and criminal contempt. By directive of the Administrative Judge, they could not sign or decide the motions regarding their cases; this authority was reserved for the Civil Court judges. Similarly, they could not conduct traverses of service of process. And, of course, they lacked the title of judge.

In 1977 the Legislature amended the Housing Court Act to provide for all the above powers they lacked. In plaintiff's Brief the complete legislative memorandum was set forth:

> "This bill expands the jurisdiction of the Housing part (the "Housing Court") of the New York City Civil Court to allow the court to enforce all laws setting standards for proper housing maintenance. the court's jurisdiction also would be extended to allow consideration of actions brought by tenants for the correction of code violations and for civil penalties upon the failure to correct such violations.
>
> "The bill allows any code enforcement cases prosecuted by a government agency to be brought up for a hearing by order to show cause returnable within five days or less. The Housing Court will also be staffed with clerks to assist litigants unrepresented by counsel and to make referrals to appropriate housing agencies. Other provisions increase the term of office for hearing officers from three to five years, grant hearing officers contempt powers and the power to render judgments in equity actions.
>
> "The New York City Housing Court, created by Chapter 982 of the Laws in 1972, has been in existence for four years without substantial change.

Experience with the court's operations during this period strongly suggests the need for statutory amendments, particularly to strengthen the court's performance in the area of housing code enforcement.

"It is essential that the Court play a greater role in code enforcement, if the existing housing supply is to be maintained in habitable condition. As of June 20, 1977, there were 1,321,414 outstanding code violations in New York City multiple dwellings. To enforce correction of these violations there were only sixteen Housing Court hearing officers and twenty-five city attorneys available for the entire city. In the past, the great bulk of litigation before the Court involved landlord initiated eviction proceedings and only a small fraction of the total cases were those brought by the City of New York seeking correction of code violations. This situation has not been in accord with the legislative purpose to make code enforcement the Court's highest priority.

"Consistent with the Legislature's original intent to consolidate in one court 'all actions related to effective building maintenance and operation,' this bill expands the Court's jurisdiction beyond the multiple dwelling law and the housing maintenance code to all state and local laws setting housing standards. The bill also allows the commencement of actions to enforce such laws by private parties adversely affected by violations, as well as the public enforcement agencies presently authorized to bring code enforcement actions. These amendments will greatly increase the amount of code enforcement activity within the Housing Court.

"The increased powers granted hearing officers by this bill will strengthen their ability to make the Housing Court a more effective agency for the enforcement of housing standards."

In 1978 the Legislature recognized reality and changed their title from hearing court officer to judge.

The legislative memorandum on the bill, also set forth in plaintiff's Brief, stated, in pertinent part:

> "The Housing Court is a court of record and decisions of hearing officers may be appealed to the Appellate Term of the Supreme Court in the same manner as are decisions of Judges of the civil Court. Because of their substantial powers, duties and responsibilities, those who preside over Housing Court proceedings suffer from the misnomer of 'hearing officer.'" (emphasis supplied)

In 1984 the Legislature amended the act to state that Housing Court judges were "duly constituted judicial officers." In 1985 the Legislature finished the job by dramatically raising their salaries to almost the same level as those of Civil Court judges, and by furnishing each Housing Court judge with a full-time law clerk.

The lower Supreme Court set up the sleaze by totally ignoring the key 1977 amendments:

> "The legislative intent in changing 'hearing officer' to 'housing judge' and denominating Housing Judges 'duly constituted judicial officers' was clearly only to invest Housing Judges with as much authority and dignity as possible consistent with Glass v. Thompson (51 AD2d 69). neither resulted in any increase of authority so as to require a result different from that which was reached in Glass. Housing Judges remain essentially Referees, an officer of the court appointed to assist it in the performance of its judicial functions." 133 Misc.2d 111,114, 506 N.Y.S.2d 506, 509.

At the argument before the Appellate Division, the judges sat glumly, and despite plaintiff's plea for questions, remained mute. When plaintiff finished, one

judge almost whispered "Do you think the Mayor (New York City) will do a better job?" Had plaintiff succeeded, the Legislature would be required to place the appointive power in the Mayor; the Governor can't appoint local, as opposed to state-wide judges.

Your pronouncements on the subject are based on your desire to prevent the Mayor from acquiring the appointive power.

In 1984, when signing the amendment stating that Housing Court judges were "duly constituted judicial officers," you stated that you were signing the bill only on the assurance of its sponsor, Senator Manfred Ohrenstein, that it did not enhance the authority or powers of the Housing Court judges from their status in 1976 when the Glass case was decided.

The Legislature, ignoring Babigian v. Wachtler, passed a bill to place the Housing Court judges under the jurisdiction of the State Commission on Judicial Conduct. You vetoed the bill. Here is the veto message:

> "Section 22(a) of Article VI of the Constitution provides, in part, that the Commission on Judicial Conduct shall investigate and hear complaints against any 'judge or justice of the unified court system'."
>
> "Neither Housing Court judges nor judicial hearing officers are 'judges or justices of the united court system.' Both serve in courts that are part of the unified court system, but they do not serve in the capacity of a judge or justice of such

> courts, as those officers are defined in the Constitution. By adding persons who are not judges or justices of the unified court system to the Commission's jurisdiction without changing the constitutional language that limits the Commission's jurisdiction to such judges and justices, the bills are inconsistent with the constitutional limitations on the Commission's jurisdiction." (emphasis supplied)

The above is gobbledygook, wacky and preposterous.

The New York State Constitution, Article 6, #1 is entitled "Establishment and organization of unified court system; courts of record ..." Subdivision (b) sets forth the various courts included in the unified court system, and then states "...and such other courts as the legislature may determine shall be courts of record." In the veto message, you stated, "...I believe a constitutional amendment is required to achieve the bills' objectives," and concluded, "It is my best judgment that the Legislature lacks the power to enlarge the jurisdiction of the Commission by law."

It's Hornbook law that the Legislature has the power under the New York Constitution to create and to abolish courts. People ex rel, Swift v. Luce, 204 N.Y. 478, 491 (1912). In the above action, the effect of abolishing the court was to remove judges from office.

In opposing the legislation, the Commission's Chairman, Gerald Stern, handed you a legal memorandum which cited subdivision (a) or Article 6, #1, but ignored the

pertinent subdivision (b). Judge Wachtler's counsel, in opposing the bill, only cited the Glass and Babigian decisions; they never mentioned the nonsense about the "unified court system" since, in response to the issue in a letter to an attorney who sued Stern to compel him to accept jurisdiction over Housing Court judges, they categorically stated that they were part of the unified court system.

Shortly thereafter, the Court of Appeals adopted rules on sanctions, similar to Rule 11 in the Federal courts.

The rules provide that:

> "This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under articles 3, 7, 8, or 10 of the Family Court Act."

Under subdivision (a) of Article 6, #1, town and village courts are specifically named as part of the unified court system, and so is the Civil Court of the City of New York. The Family Court is also a part of the unified court system.

Now look what the Court of Appeals did to and for the Housing Court judges:

> **"103-1.4 Application to officers other than judges of the courts of the Unified Court System.** The powers of a court set forth in this Part shall apply to judges of the housing part of the New York City Civil Court and to hearing examiners appointed pursuant to section 439 of the Family Court Act,

except that the powers of Family Court hearing examiners shall be limited to a determination that a party or attorney has engaged in frivolous conduct, which shall be subject to confirmation by a judge of the Family Court who may impose any costs or sanctions authorized by this Part."

The following appeared in the ALBANY TIMES UNION, April 10, 1991, in a column by John Caher:

"Even the perception of impropriety diminishes the judiciary and undermines the work of a court, a judge on New York's highest tribunal told law students Tuesday.

Associate Judge Richard D. Simons of the Court of Appeals said the courts rely on 'the confidence of the public that our decisions reflect something more than a political decision or a personal decision * * * that we decide cases on the basis of principle.'

Simons stressed judicial ethics in an address to Albany Law School students and focused on the need for jurists to avoid the appearance of partiality.

'When the executive and legislative branches act, they reflect the will of the majority,' Simons told associate professor Vincent M. Bonventre's class. 'When the courts make law they address a narrow question that may have nothing to do with the will of the majority and, indeed, may be the opposite of the will of the majority."

Based upon Professor Bonventre's analysis, the Babigian I decision, your veto message, and the Court of Appeals rule on sanctions, in plaintiff's book Judge Simons is an outright liar.

Plaintiff reinstituted his action in the New York Supreme Court based on new circumstances. Judge Wachtler pleaded res judicata and demanded sanctions.

The decision, Babigian v. Wachtler, Index No. 281 93-85 (N.Y.Co.), by Justice Carmen B. Ciparick, is sloppy and a pack of lies. Plaintiff never stated that Housing Court judges today are "de facto full-fledged judges...." Justice Ciparick deliberately repeats the error that under section #110 (f) of the Housing Court Act the judges are appointed by the Chief Administrator of the Courts; she was a law assistant for a Housing Court judge and knows better.

She states:

> "...plaintiff based his claim in Babigian on the change in the title from 'hearing officer' to 'housing judge' and the designation of housing court judges as 'judicial officers' as a material enlargement of authority subsequent to the decision in Glass. None of such changes, including those alleged in this action, have actually materially expanded the authority of housing court judges, and at no time has plaintiff claimed or had a basis for claiming that the subject matter jurisdiction of housing court judges has been expanded."

In 1984 they were designated as "duly constituted judicial officers," thus they were no longer de facto, but de jure.

To emphasize the importance of the contempt power as a material enlargement of authority--neither Judge Wachtler

nor the Court of Appeals raised the issue--plaintiff's memorandum of law was overly-detailed on the issue:

> "On a scale of 1 to 10, let's see what the U.S. Supreme Court thinks of the power of contempt:
>
> 'The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, order, and writs of the courts and, consequently, to the due administration of justice. The moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of the power.' (Ex parte Robinson, 19 Wall (86 U.S.) 505, 510 (1874)).
>
> '* * * the power of courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law.' (Gompers v. Bucks Steve & Range Co., 221 U.S. 418, 450, 31 S.Ct. 492, 501, 55 L.Ed 797 (1910)).
>
> 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as necessary incident and attribute of a court, without which it could no more exist than without a judge.' (In re Debs, 158 U.S. 564, 595, 15 S.Ct. 900, 39 L.Ed. 1902)).
>
> The Court of appeals has agreed to agree with the U.S. Supreme Court -- only a court has the power of contempt. New York Judiciary Law, #750(A) and (C), #753 (B); Spector v. Allen, 281 N.Y. 251, 260 (1939); Goldberg v. Extraordinary Special Grand Juries, 69 A.D.2d 1, 7, appeal denied, 48 N.Y.2d 608 (1979)."

Judge Wachtler never responded to the above contention.

To graphically emphasize the expansion of jurisdiction provided by the 1977 amendment, plaintiff

attached as one of his exhibits a photocopy of the entire law review article that triggered the 1977 amendment: "The New City Housing Court: Trial and Error in Housing Code Enforcement," 50 N.Y.U. L.Rev. 738-797.

Justice Ciparick's rationale is appalling:

> "As for the only actual change affecting housing court judges since Babigian I was decided, on which plaintiff relies, namely the Rules of the Chief Judge regarding sanctions, plaintiff failed to properly note that §130-1.4 (22-NYCRR §130 1.4) explicitly provides for the extension of the new rules to 'Officers Other Than Judges of the Courts' and includes, as such, the judges of the Housing Part of the New York City Civil Court. Even if housing court judges perform many or most of the functions of judges of the Unified Court System, housing court judges are so empowered only within the very narrowly defined and limited jurisdiction of the housing court, and their powers are no less limited than they were at the time of Babigian I." (emphasis supplied)

Justice Ciparick denied Judge Wachtler's demand for sanctions by casting plaintiff as a fool. "On these papers it appears that in commencing and pursuing this action plaintiff has displayed an impassioned, albeit totally misguided belief in the validity of his position, rather than acted frivolously." (emphasis supplied)

The selection of Justice Ciparick as a candidate for the Court of Appeals is outrageous.

Both the Court of Appeals and Justice Carmen B. Ciparick have charged me with professional misconduct. Pursuant to In Re Wilson, 170 N.Y.S. 725 (App. Div. 2nd

1918), I am requesting the Appellate Division: Third Department to investigate the charges against me. Also, I am charging the Court of Appeals and Justice Ciparick with wrongdoing. Opinion of The Justices, 232 App. Div. 23, 248 N.Y.S. 312 (2d Dept. 1931); In Re Droege, 129 App. Div. 866, 114 N.Y.S. 375.

Yours,

John Babigian

JOHN H. BABIGIAN

cc: Clerk of the Appellate Division