To be argued
FREDERICK A. BRODIE
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

CENTER FOR JUDICIAL ACCOUNTABILITY, INC. AND ELENA RUTH SASSOWER, INDIVIDUALLY AND AS DIRECTOR OF THE CENTER FOR JUDICIAL ACCOUNTABILITY, INC., ACTING ON THEIR OWN BEHALF AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK & THE PUBLIC INTEREST,

Plaintiffs-Appellants,

-against- **No. 527081**

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEW YORK, JOHN J. FLANAGAN, IN HIS OFFICIAL CAPACITY AS TEMPORARY SENATE PRESIDENT, THE STATE OF NEW YORK STATE SENATE, CARL E. HEASTIE, IN HIS OFFICIAL CAPACITY AS ASSEMBLY SPEAKER, THE NEW YORK STATE ASSEMBLY, ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, THOMAS P. DINAPOLI, IN HIS OFFICIAL CAPACITY AS COMPTROLLER OF THE STATE OF NEW YORK, AND JANET M. DIFIORE, IN HER OFFICIAL CAPACITY AS CHIEF JUDGE OF THE STATE OF NEW YORK AND CHIEF JUDICIAL OFFICER OF THE UNIFIED COURT SYSTEM,

Defendants-Respondents.

BRIEF FOR RESPONDENTS

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Dated: September 21, 2018

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PRELIMINARY STATEMENT

For 13 years, from 1998 to 2012, the salaries of New York State judges remained frozen. In 2010, after the Court of Appeals held that state of affairs to be unconstitutional, the Legislature created a commission to recommend adjustments to judicial pay. The commission's recommendations, and those of a subsequent commission formed in 2015, acquired the force of law when the Legislature declined to modify or abrogate them by statute.

Plaintiff Elena Sassower[1] now asks this Court to declare the commissions unconstitutional and roll back judicial salaries to their 1998 level. Plaintiff also asks the Court to declare the entire State budgetary process violates the New York Constitution. In a judgment entered in Albany County on December 8, 2017, Supreme Court (Hartman, J.) correctly dismissed most of plaintiff's claims, and granted summary

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[1] Because the Center for Judicial Accountability, Inc. (CJA) is not properly before the Court (*see* Point I[A]), this brief refers only to the claims of plaintiff Sassower. Because Sassower's claims are identical to CJA's, that convention should not affect the result. For a full account of plaintiff's claims, we urge the Court to read her brief and the record, available on plaintiff's website, www.judgewatch.org.

judgment to defendants on the remainder (Record [R] 31-41). Supreme Court's judgment should be affirmed.

QUESTION PRESENTED

Did Supreme Court act properly in granting judgment to defendants on plaintiff's 10 causes of action?

Supreme Court answered this question in the affirmative. It dismissed the complaint except for the Sixth Cause of Action asserted by plaintiff Sassower (R52-60); denied plaintiff's motions for disqualification (R49-51) and summary judgment (R68-79); and granted summary judgment to defendants on the Sixth Cause of Action (R31-41).

STATEMENT OF THE CASE

A. The Judicial Pay Crisis

In 1998, the New York Legislature adjusted judicial compensation so that the salaries of State judges matched those earned by federal judges at the time. 1998 N.Y. Laws, ch. 630, § 1. For the next decade, New York judges received no pay adjustments.

Meanwhile, as the years passed, judicial caseloads continued to increase while compensation for New York Supreme Court justices sank to the lowest in the nation. *Matter of Pines v. State,* 115 A.D.3d 80, 83 (2d

Dep't), *app. dismissed,* 23 N.Y.3d 982 (2014). During the 13 years from January 1, 1999 to April 1, 2012, judicial compensation remained the same while the Consumer Price Index increased by over 40%. (R1093.) Some of the State's most respected jurists felt compelled to resign their positions. *Pines,* 115 A.D.3d at 83. Then-Chief Judge Jonathan Lippman remarked that, due to the excessive delay in increasing compensation, the State Judiciary was "being torn down brick by brick." *Id.* at 83-84 (internal quotation marks and citation omitted).

Ultimately, after 11 years, the Court of Appeals found the continued judicial pay freeze violated the separation-of-powers doctrine. *Matter of Maron v. Silver,* 14 N.Y.3d 230, 244, 261 (2010). With due deference to that principle, the Court did not order specific injunctive relief, but instead left to the Legislature the task of adjusting judicial compensation. *Id.* at 261, 263.

B. The Two Compensation Commissions

To resolve the crisis, in 2010 the Legislature created a Commission on Judicial Compensation (the First Commission). (R1093.) *See* 2010 N.Y. Laws, ch. 567. The First Commission, which would be reconstituted every fourth year, was charged to examine the prevailing adequacy of

judicial pay in the state courts and "determine whether any of such pay levels warrant adjustment." *Id.* § 1(a)(i). The First Commission would make recommendations to the Legislature, the Governor, and the Chief Judge, which would have the force of law "unless modified or abrogated by statute." *Id.,* § 1(h). Discharging its mandate, the First Commission in 2011 recommended that state judges receive phased-in salary increases over the following three years, so that State Supreme Court justices would "achieve parity with current Federal District Court judge salaries."[2]

In 2015, the Legislature repealed the enabling legislation from 2010 and created a new Commission on Legislative, Judicial and Executive Compensation (the Second Commission). 2015 N.Y. Laws ch. 60, § E (R1080-1082 [reproducing session law]). As relevant here, the Second Commission was directed to examine "the prevailing adequacy" of State judges' compensation and "determine whether any of such pay

[2] Final Report of the Special Commission on Judicial Compensation at 8 (Aug. 29, 2011), available at plaintiffs' website, http://www.judgewatch.org/judicial-compensation/ny/10-24-11-report/8-29-11-final-report.pdf (last viewed August 30, 2018).

levels warrant adjustment" or "warrant an increase." (R1080.) The Second Commission was directed to

> take into account all appropriate factors including, but not limited to: the overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise; and the state's ability to fund increases in compensation and non-salary benefits.

(R1080-1081.)

The statute required the Second Commission to make recommendations to the Governor, Legislature, and Chief Judge. (R1081.) The recommendations of a majority of the Second Commission would "have the force of law" and "supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law, section 169 of the executive law, and sections 5 and 5-a of the legislative law," *unless* the recommendations were "modified or abrogated by statute" prior to taking effect. (R1082.)

Acting under this mandate, the Second Commission held a day-long public hearing and public meetings that were broadcast live on the Internet. (R1084, 1092.) It reviewed the public testimony and "extensive

written submissions" concerning judicial compensation. (R1084-1085.) It considered and discussed the required factors (R1084), including the fact that New York State was "in a strong fiscal condition" and "enjoying a period of sustained economic growth" that would make the contemplated pay increase affordable (R1094).

On December 24, 2015, the Second Commission issued a report recommending that State Supreme Court Justice salaries be made commensurate with the salary of federal district court judges by 2018. (R1085, 1090.) The adjustment was intended to yield "equitable, appropriate and competitive judicial salary levels that will attract highly-qualified lawyers to the New York State bench, retain those judges and ensure the strong and independent judicial system that all New Yorkers need and deserve." (R1085.) The Second Commission's report did not contain any recommendation as to the legislative or executive branch.

C. Plaintiff's First Lawsuit

In March 2014, plaintiff sued in Supreme Court, Albany County, asserting a variety of challenges to the Governor's proposed budget for 2014-2015, as well as the proposed budgets of the Senate and Assembly and the Judiciary for 2014-2015. (R226-272.) Among other things, her

four causes of action averred that the proposed budgets were insufficiently itemized; improperly increased judicial salaries; contained reappropriations that were not certified; and were developed through a legislative process that violated various Senate and Assembly rules and statutes. (R269-270.)

The 2014 lawsuit was ultimately assigned to Justice Roger McDonough. On defendants' pre-answer motion, Supreme Court dismissed plaintiff's first three causes of action based on documentary evidence supplied by the defendants. (R330-331.) The fourth cause of action survived dismissal by pleading that defendants had violated Legislative Law § 32-a, which provides for public hearings on the proposed budget. (R331.)

Plaintiff then moved to disqualify Justice McDonough. That motion was denied; the court found "no basis in the record, Judiciary Law, Administrative Code or any relevant statute or case law for recusal." (R336.) Plaintiff also sought to supplement the complaint. Supreme Court granted that request, but noted that its decision did not "insulate the causes of action from a subsequent challenge to their merits" via a motion to dismiss or for summary judgment. (R336.) Plaintiff's verified

supplemental complaint added four more causes of action pertaining to the proposed budget for 2015-2016. (R273-314.)

Defendants moved to dismiss the supplemental complaint and for summary judgment on plaintiff's fourth cause of action. (*See* R316.) Plaintiff cross-moved for, among other things, leave to file a second supplemental complaint. (*See* R316.)

Supreme Court granted summary judgment to defendants on the fourth cause of action, finding that "the relevant, documentary evidence fully demonstrates that defendants complied with Legislative Law § 32-a," which required public hearings on the budget. (R319.)

Supreme Court denied plaintiff's request for leave to file a second supplemental complaint. (R321.) It found the proposed ninth through twelfth causes of action "patently devoid of merit." (R321 [citation and internal quotation marks omitted].) As to the proposed thirteenth through sixteenth causes of action, defendants "adequately established the prejudice that would flow from allowing a second supplemental complaint setting forth entirely new facts, theories and causes of action several years after service of the original complaint." (R321.)

The causes of action in the first supplemental complaint were dismissed based, among other things, on documentary evidence. (R319-320.) Supreme Court denied the relief plaintiff sought and granted declaratory relief to defendants. (R322-323.) Specifically, Supreme Court declared that the proposed budgets and budget bills for 2014-2015 and 2015-2016 were not wrongful expenditures, illegal, unconstitutional, or a misappropriation. (R323.)

D. This Lawsuit

Plaintiff did not perfect an appeal from Justice McDonough's orders in the 2014 action. Instead, plaintiff commenced this lawsuit in Albany County Supreme Court in September 2016. (R98; *see* R85-225.)

In this lawsuit, "the factual allegations and eight causes of action of plaintiffs' March 23, 2016 second supplemental complaint in their prior citizen-taxpayer action" were "presented as a separate and new citizen-taxpayer action." (R98.) As described by plaintiff, her proposed second supplemental complaint had pleaded "violations of constitutional, statutory, and rule provisions pertaining to fiscal year 2016-2017" which "replicated identical constitutional, statutory, and rule violations in fiscal

year 2014-2015" that were the subject of her complaint in the prior action. (R97; emphasis in original.)

The 2016 lawsuit was assigned to Justice Denise Hartman. On defendants' pre-answer motion (R403-404), Supreme Court dismissed nine of the complaint's ten causes of action for failure to state a claim.[3] (R527-532.) The First through Fourth Causes of Action were dismissed because they were identical to four claims already dismissed in the prior action. (R531.) The Fifth Cause of Action similarly restated arguments and claims the court had already rejected. (R531.) The Seventh and Eighth Causes of Action were dismissed on procedural grounds. (R531.) The Ninth Cause of Action, which concerned the negotiation of the 2016-2017 budget, was moot because the budget had passed; even if it were not moot, it failed to allege a violation of law because nothing prohibited the Governor and leaders of the Legislature from holding budget negotiations. (R531-532.) The Tenth Cause of Action was dismissed because plaintiff's itemization arguments were non-justiciable; the district attorney salary appropriation specifically superseded any law to

[3] The decision and order, dated December 21, 2016, was later amended to include a recitation of the papers considered. (R52-60.)

the contrary; and the typographical error identified by plaintiff did not invalidate the legislation. (R532.)

Supreme Court denied defendants' motion to dismiss the Sixth Cause of Action, which consisted of five sub-causes challenging the Second Commission's authority on various grounds. (R532-533; *see* R109-112.) Supreme Court could not "say that plaintiff's claim is not cognizable" on "the record before it." (R533.)

Plaintiff moved for renewal and reargument, and also sought to disqualify Justice Hartman. (R536-537.) Supreme Court denied the motion in all respects. (R49-51.) With respect to disqualification, Justice Hartman observed that she had "no interest in this litigation or blood relation or affinity to any party hereto" and that plaintiff's "conclusory allegations of bias and fraud are meritless." (R50.) Justice Hartman also, separately, cited the Rule of Necessity, under which judges must decide a case if no other body has jurisdiction to do so. (R32-33.) *See Maron,* 14 N.Y.3d at 249 (cited at R32).

Meanwhile, defendants answered the complaint. (R548-553.) Plaintiff moved for summary judgment on the Sixth Cause of Action and requested leave to file a supplemental complaint. (R635-638.) Supreme

Court denied the motion in its entirety. (R68-78.) Analyzing each of the Sixth Cause of Action's five subparts, the court concluded that plaintiff had not established her entitlement to judgment on any of them. (R72-77.) The court denied leave to supplement the complaint because the proposed supplemental complaint "simply restate[d] for budget year 2017-2018 causes of action that the Court has already determined to be devoid of merit." (R77.)

Plaintiff then moved for reargument of Supreme Court's decisions denying her motions for reargument and disqualification. (R997-998.) Defendants opposed the motion, and cross-moved for summary judgment on the Sixth Cause of Action. (R1069-1070, 1072.) In a decision and judgment dated November 28, 2017, Supreme Court granted defendants' motion for summary judgment. (R31-41.) Supreme Court held that the 2015 enabling legislation contained standards and reasonable safeguards, consistent with the Constitution. (R35-36.) Further, while the Constitution forbids decreases in judicial salaries, the relevant provision does not mention increases. (R37.) The budget bill was timely because Article VII, § 3 of the Constitution allows the submission of such bills "at any time" with the consent of the legislature. (R38.) Provisions

creating the Second Commission were properly included in the budget bill because they "relate[d] specifically to items of appropriation in the 2015 budget" for judicial pay. (R39.)

This appeal followed.

ARGUMENT

POINT I

THE CLAIMS IN THE COMPLAINT ARE PROCEDURALLY AND SUBSTANTIVELY BARRED

A. The Appeal Should Be Dismissed as to CJA Because an Entity Cannot Appear Without Counsel

CJA claims to be a "national, non-partisan, non-profit citizens' organization." (R91.) It is not, however, represented by counsel. (R4.) Instead, CJA is represented by plaintiff, who purports to sue "individually & as Director" of CJA. (R4; Appellant's Brief [Br.] 70.) Plaintiff is not an attorney. (R530.)

An organization like CJA cannot appear *pro se*. Rather, it must be represented by an attorney. C.P.L.R. § 321(a); *see, e.g., Matter of Naroor v. Gondal,* 5 N.Y.3d 757, 757 (2005); *Schaal v. CGU Ins.,* 96 A.D.3d 1182, 1183 n.2 (3d Dep't 2012). In both this case and the prior action, Supreme Court properly dismissed CJA's claims for that reason. (R322-323, 530.)

Plaintiff does not argue against that determination on appeal, and thus has abandoned the point. *Matter of Rosado v. Venettozzi,* 160 A.D.3d 1330, 1330 (3d Dep't 2018). Without legal counsel, CJA cannot be heard in this Court and its purported appeal must be dismissed. *See Knobel v. Wei Group, LLP,* 160 A.D.3d 409, 409-10 (1st Dep't 2018).

B. Plaintiff's First through Fourth Causes of Action and Her Claims for Relief Based on Years Before 2016-2017 are Barred by the Prior Action

Plaintiff never perfected an appeal from Justice McDonough's orders dismissing the prior action. Instead, she commenced the present action seeking relief for 2016-2017. But plaintiff cannot use the new action to mount a collateral attack on Justice McDonough's rulings. *See Rainbow v. Swisher,* 72 N.Y.2d 106, 110 (1988) (judgment may generally be modified "only upon direct challenge"). Consequently, two portions of the instant complaint are barred.

First, Supreme Court in the prior action denied leave to serve a second supplemental complaint "as to causes of action 9-12" because it found those claims to be "patently devoid of merit." (R321 [internal quotation marks and citation omitted].) In this case, plaintiff acknowledges that her First through Fourth Causes of Action are the

same as the ninth through twelfth causes of action in the proposed second supplemental complaint. (R100, 103, 104, 106.) Because those claims were found meritless in the prior action, and plaintiff did not appeal from the order containing that finding, she is precluded from pursuing them here.

Second, the instant complaint is barred to the extent it challenges budgets prior to 2016-2017. In the prior action, Justice McDonough granted declaratory relief to defendants, sustaining the budgets for 2014-2015 and 2015-2016. (R323.) Because they were resolved in the prior action, plaintiff's claims as to budget years before 2016-2017 are barred by res judicata. *See Smith v. Annucci,* 162 A.D.3d 1430, 1431 (3d Dep't 2018) (claims raised in prior article 78 proceeding could not be relitigated in subsequent proceeding). Those claims are also barred by collateral estoppel. *See Killmer v. Village of Whitehall,* 81 A.D.2d 972, 972-73 (3d Dep't) (challenge to ordinance's constitutionality, "having been raised and rejected in the prior case, may not be relitigated in this action"), *lv. denied,* 54 N.Y.2d 608 (1981).

Plaintiff contends that Justice McDonough's decisions do not affect this action because they were "judicial fraud[s]" that "conceal[ed]

plaintiffs' entitlement to summary judgment" and were influenced by "actual bias born of his financial interest in the litigation." (R100, 103, 104, 106-107.) However, by not appealing Justice McDonough's two denials of her motions for recusal (R321-322, 336), plaintiff waived her argument that he was biased. *See Roberts v. Incorporated Village of Great Neck,* 63 A.D.2d 967, 968 (2d Dep't 1978).

C. Supreme Court Properly Denied Leave to Supplement the Complaint with Claims Based on the 2017-2018 Budget

The instant complaint was filed in September 2016. Without amendment or supplementation, it could not have addressed the 2017-2018 or 2018-2019 budget year, because budgets for those years had not yet been adopted. Plaintiff therefore moved "to supplement [her] September 2, 2016 verified complaint (pertaining to fiscal year 2016-2017) by [her] March 28, 2017, verified supplemental complaint (pertaining to fiscal year 2017-2018)." (R636.) If granted, the motion would have extended the complaint to cover the 2017-2018 budget year.

Supreme Court denied the motion to supplement. (R68-69.) As a result, the 2017-2018 budget year is not part of this case, which is

restricted to 2016-2017. And no motion to amend or supplement the complaint was ever made with respect to 2018-2019 or later years.

To be sure, because this lawsuit disputes the legality of the Commission (or makes a structural challenge to the budget process), its resolution could be binding precedent for future fiscal years. But plaintiff has not succeeded in bringing those years into issue. Plaintiff did not obtain any relief from the denial of her motion to supplement. Although she noticed an interlocutory appeal (R61-62), plaintiff did not perfect it. Assuming the prior nonfinal order denying the motion to supplement remains reviewable on plaintiff's appeal from the final judgment, Supreme Court did not abuse its discretion in denying leave to supplement the complaint.

Whether an amendment should be allowed is "committed to the discretion of the trial court, and its exercise of that discretion will not be lightly set aside." *Brown v. Samalin & Bock, P.C.,* 155 A.D.2d 407, 408 (2d Dep't 1989); *see, e.g., Robert v. Bango,* 146 A.D.3d 1101, 1103 (3d Dep't 2017). Like amendment, supplementation is discretionary. *See, e.g., Village Bank v. Wild Oaks Holding, Inc.,* 196 A.D.2d 812, 813 (2d Dep't 1993). Here, Supreme Court denied leave because similar claims for

2015-2016 and 2016-2017 had already been denied. (R69.) That denial of leave fell comfortably within Supreme Court's wide discretion. *See Cafferty v. Cahill,* 53 A.D.3d 1007, 1008 (3d Dep't), *lv. dismissed and denied,* 11 N.Y.3d 861 (2008); *accord Brown,* 155 A.D.2d at 408.

Even if this Court were to conclude that Supreme Court erred in denying leave to amend (and there was no error), it could not grant the relief sought in the proposed amendment. Rather, the matter would need to be remitted to Supreme Court, so defendants could answer and defend against the new allegations.

D. The Complaint is Moot

As shown above, claims based on budget years before 2016-2017 are barred by the prior action (Point I[B]), and claims based on budget years post-2016-2017 are not part of the complaint because plaintiff's motion to supplement was denied (Point I[C]). Thus, the 2016-2017 budget is the only one at issue.

The authority to spend funds pursuant to the 2016-2017 budget appropriations has lapsed; therefore, no future expenditures will be paid pursuant to the 2016-2017 budget appropriation authority. *See* State Finance Law § 40; *see also* N.Y. Const. Art. 7, § 7. Consequently,

plaintiff's lawsuit is moot because "the primary relief requested"—an injunction against funding judicial pay raises and district attorney salaries as provided in the 2016-2017 budget (R131)—is "no longer attainable." *Matter of Cannon v. City of Watervliet,* 263 A.D.2d 920, 921 (3d Dep't), *lv. denied,* 94 N.Y.2d 756 (1999).

The exception to mootness does not apply because the Second Commission's recommendations were rendered in 2015 (R1083-1102), and its work is finished (R1082), making repetition unlikely. *See N.Y. Public Interest Rsch. Grp., Inc. v. Regan,* 91 A.D.2d 774, 775 (3d Dep't 1982), *lv. denied,* 58 N.Y.2d 610 (1983). Further, as shown in Point II, the issues raised by plaintiff are not "substantial." *Id.* Nor are plaintiff's claims likely to evade review; they were considered in detail and rejected on the merits by the court below and in the prior action. *Id.* The reason why plaintiff can no longer obtain appellate review is that she failed to perfect either of her interlocutory appeals within the nine-month time frame (*see* R42-43, 61-62) and delayed six months before perfecting this appeal (*see* R1-2).

E. Plaintiff is Not Entitled to Representation by the Attorney General

Plaintiff has asked that Attorney General Underwood be directed "to represent appellants and/or intervene on their behalf." (Br. v; *accord* Br. 2, 31, 47.) No statute entitles plaintiff to such representation.

Under Executive Law § 63(1), "[n]o action or proceeding affecting the property or interests of the state" shall be instituted or defended "by any department, bureau, board, council, officer, agency or instrumentality *of the state*" without notice to the attorney general. (Emphasis added.) The Attorney General must be notified "so that [she] may participate or join therein if in [her] opinion the interests of the state so warrant." *Id.* Under that clause, the decision of whether to participate is left to the Attorney General's discretion.

Nowhere does Executive Law § 63(1) entitle private citizens to be represented by the Attorney General. And nothing in the statute enables plaintiff or any other private citizen to control or direct the Attorney General's actions. Similarly, while State Finance Law § 123-c(3) requires that citizen-taxpayer complaints be served on the Attorney General, it does not empower citizen-taxpayers to compel the Attorney General to intervene as a plaintiff.

The Attorney General is authorized to defend State officers and entities in litigation, *see* Exec. L. § 63(1), and to litigate in support of the constitutionality of the State's statutes, *see* Exec. L. § 71(1). In this case, she is doing both. Because she represents the respondents, the Attorney General cannot and will not switch sides to represent appellants.

F. Plaintiff's Requests for Preliminary Injunctive Relief Were Properly Denied

Supreme Court properly denied plaintiff's repeated requests for a temporary restraining order (TRO) and preliminary injunction (R80, 635; *see* Br. v). A preliminary injunction is "drastic relief."[4] *Rural Community Coalition, Inc. v. Village of Bloomingburg,* 118 A.D.3d 1092, 1095 (3d Dep't 2014). It requires a showing of probable success on the merits, irreparable injury, and a balance of equities in the movant's favor. *Id.* Plaintiff bears the ultimate burden of proof as to all those elements. *Rockland Dev. Assocs. v. Village of Hillburn,* 172 A.D.2d 978, 979 (3d Dep't 1991). When the constitutionality of legislation is challenged, "the

[4] Because Supreme Court and this Court denied plaintiff's motions for a preliminary injunction, her requests for a TRO are moot. *See* C.P.L.R. § 6313(a) (TRO restrains defendant "before a hearing can be had" on "a motion for preliminary injunction").

burden becomes more difficult as there exists an exceedingly strong presumption of constitutionality." *Schulz v. State Executive,* 108 A.D.3d 856, 857 (3d Dep't) (internal quotation marks and citation omitted), *lv. dismissed*, 21 N.Y.3d 1051 (2013).

Even when the criteria are met, the question of whether to grant a preliminary injunction rests squarely in Supreme Court's discretion, limiting this Court's review to whether Supreme Court exceeded or abused its discretion. *Biles v. Whisher,* 160 A.D.3d 1159, 1160 (3d Dep't 2018).

As shown above and in Point II, plaintiff's claims are legally meritless and thus unlikely to succeed. Moreover, the balance of equities favors the individual judges and district attorneys who have received and relied upon the salary increases in question. Supreme Court therefore cannot be said to have abused its discretion in denying plaintiff's requests. Indeed, this Court on August 7, 2018, denied a similar emergency motion by plaintiff. *See* Decision and Order on Motion (3d Dep't Aug. 7, 2018).

G. A Rollback of Judicial Salary Increases Would Be Unconstitutional

Plaintiff asks the Court to "enjoin[] the ongoing disbursement of monies for the judicial salary increases" resulting from the reports of the First Commission and the Second Commission. (Br. 70.) Such relief would reduce current judicial compensation by eliminating that portion attributable to the Commissions' reports. It would therefore violate Article VI, § 25 of the State Constitution, which provides that a judge's compensation "shall not be diminished during the term of office for which [the judge] was elected or appointed."

Additionally, the Court of Appeals has already ruled that the judicial salary freeze from 1998-2010 violated the Separation of Powers Doctrine. *Maron,* 14 N.Y.3d at 244, 261. Rolling back compensation to the 1998 level would revive that violation. To prevent a constitutional violation, the requested relief must be denied.

POINT II

SUPREME COURT PROPERLY GRANTED JUDGMENT TO DEFENDANTS

Apart from the procedural and substantive defects noted in Point I, each of plaintiff's 10 causes of action fails on its merits.

A. First Cause of Action: Legislature's Budget

In her First Cause of Action, plaintiff alleges that the proposed budget for the Legislature did not include "[i]temized estimates of the financial needs of the legislature," as required by N.Y. Const. Art. VII, § 1 (*see* R100, 159). Court of Appeals precedent makes clear, however, that the failure of a budget to include "itemized estimates" is not justiciable. Itemization is purely for the legislature's convenience, and "the degree of itemization" must be "determined by the Governor and the Legislature, not by judicial fiat." *Saxton v. Carey,* 44 N.Y.2d 545, 550-51 (1978); *accord Urban Justice Ctr. v. Pataki,* 38 A.D.3d 20, 30 (1st Dep't 2006), *lv. denied*, 8 N.Y.3d 958 (2007). Even if the Legislature should "fail in its responsibility to require a sufficiently itemized budget, the remedy lies not in the courtroom, but in the voting booth." *Saxton,* 44 N.Y.2d at 551.

Plaintiff's allegation that the presiding officer of each house did not certify the budget (R140, 159) fails because the Legislature's budget was, in fact, certified (R330, 749, 765; Supplemental Record on Appeal [SR] 5, 77),[5] as was the Judiciary's (R761-764; SR19-21, 96-98). A generic direction that documents be "certified," as in N.Y. Const. Art. VII, § 1, does not require a particular form or language. *See Rattley v. N.Y. City Police Dep't,* 96 N.Y.2d 873, 875 (2001) (construing FOIL); *Lazzari v. Town of Eastchester,* 20 N.Y.3d 214, 222 (2012) (construing Civil Service Law). Here, the Legislature's certification took the form of a letter signed by the Senate's President Pro Tem and the Speaker of the Assembly. (*E.g.,* R765.) The acceptability of that form was an internal matter for the Legislature, which can reject any certification it finds unsatisfactory. *Maybee v. State of N.Y.,* 4 N.Y.3d 415, 420 (2005).

The certified, itemized estimate of the Legislature was included in the Governor's Executive Budget, as was that of the Judiciary. (*See, e.g.,* SR4-70, 76-330.)

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[5] The record in this case was stipulated to include the record from the prior action. (R1387-1388.) Plaintiff, however, did not reproduce the prior action's record. Defendants therefore have reproduced the cited excerpts from the prior action's record in a Supplemental Record on Appeal, submitted herewith.

B. Second Cause of Action: Judiciary Budget and "Interchange" Provision

Plaintiff's second cause of action alleges that the budget bill's "interchange provision" was unconstitutional (R103-104, 164-167). The interchange provision allows appropriations from one program to be transferred to the other with the approval of the chief administrator of the courts. (R165.) It governs "[n]otwithstanding any provision of law" that might otherwise preclude its application. (SR363.)

There is no force to plaintiff's allegation that the prefatory phrase "notwithstanding any provision of law" is unduly vague (R165). Its meaning is clear: this law supersedes all others with respect to the transfer of appropriations. *See DelTero v. Hosp. for Special Surgery,* 95 A.D.3d 551, 552-53 (1st Dep't 2012); *accord Graytwig v. Dryden Mut. Ins. Co.*, 149 A.D.3d 1424, 1426 (3d Dep't 2017) (interpreting contractual "notwithstanding" provision). Among the laws superseded are Judiciary Law § 215(1) and State Finance Law § 51, both of which plaintiff relies upon as authority (R166). The dissent in *Hidley v. Rockefeller*, 28 N.Y.2d 439, 447-49 (1971), on which plaintiff also relies (R164-165), dealt with itemization. Its analysis was superseded by *Saxton* and the other decisions cited in Point II(A).

Plaintiff's real complaint is that the interchange provision helped provide funding for the judicial salary increases recommended by the Commission. (R167.) But as the complaint reflects, the money was not appropriated "surreptitiously"; rather, it was made available through an overall spending increase of 2% for the Judiciary. (R167; *see* SR360.)

C. Third Cause of Action: Reappropriations

Plaintiff's brief contains two fleeting mentions of reappropriations in quoted material (Br. 24, 60), but nowhere explains why the Third Cause of Action, which challenges budgetary reappropriations, had any merit. The point is therefore abandoned. *See Brown v. Gov't Employees Ins. Co.,* 156 A.D.3d 1087, 1088 n.1 (3d Dep't 2017).

The Third Cause of Action was properly dismissed in any event. It alleged that certain reappropriations were submitted "in an out-of-sequence section at the back of defendant CUOMO's Legislative/Judiciary Budget Bill." (R105-106.) But "out-of-sequence section[s]" are not prohibited. The Constitution requires simply that the Governor "submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget." N.Y. Const. Art. VII, § 3.

To be sure, State Finance Law § 25 requires that, "[i]f it is proposed to change in any detail the purpose for which the original appropriation was made, the bill as submitted by the governor shall show clearly any such change." As shown in plaintiff's own pleading, however, the Governor's budget bill stated that the "amounts named herein" were "reappropriated from the same funds as made available for the same purposes as the prior year's appropriations." (R145; *see* SR364.)

Plaintiff further alleged that the reappropriations were not part of the Legislature's proposed budget submitted to the Governor (R168) and therefore were not certified (R124). Plaintiff, however, did not identify any difference between (i) the amounts sought by the Judiciary and Legislature and the purposes therefor; and (ii) the amounts and purposes listed in the Executive Budget. To the contrary, she pleaded affirmatively that according to the budget bill, "unless a change is clearly indicated by the use of brackets [ ] for deletions and italics for additions, the purposes, amounts, funding source and all other aspects pertinent to each item of appropriation shall be as last appropriated." (R146 [emphasis omitted]; *see* SR364.) Plaintiff further pleaded that the budget bill contained no

brackets or italics. (R146.) Thus, unless plaintiff can identify a material change, there appears to have been none.

Plaintiff finally alleges that the reappropriations were unconstitutional because defendants did not answer numerous questions listed in the complaint. (R105-106, 168-169.) No constitutional provision conditioned the budget bill's effectiveness on responding to plaintiff's inquiries.

D. Fourth Cause of Action: Adoption Process

The Fourth Cause of Action alleges that the process by which the 2015-2016 budget was adopted violated rules of the Legislature and various sections of the Legislative Law. That claim was properly dismissed.

First, plaintiff's claim that the Legislature violated its own internal rules (*e.g.*, R108; 186; Br. 13, 22) is not justiciable. Whether a rule of the Senate or Assembly has been violated is the Legislature's responsibility and lies beyond judicial review. *Heimbach v. State,* 59 N.Y.2d 891, 892 (1983). In *Heimbach,* the plaintiffs alleged that the roll call vote on a particular bill was not correctly registered by the Clerk of the Senate. *Id.* at 892. The Court of Appeals observed that, "based upon our respect for

the basic polity of separation of powers and the proper exercise of judicial restraint, we will not intrude into the wholly internal affairs of the Legislature." *Id.* at 893. It is "not the province of the courts" to direct the legislature how to do its work, "particularly when the internal practices of the Legislature are involved." *Urban Justice Ctr.,* 38 A.D.3d at 27 (citations and internal quotation marks omitted).

Second, a Conference Committee was convened in accordance with Legislative Law § 54-a(1). (*See* SR383-387.) Each house individually also used committees in considering the budget bill. (*See* R758.)

Third, the budget schedules required by Legislative Law §54-a(2) were, in fact, issued. (*See* SR380-381.)

Fourth, public hearings on the budget bill were held. (SR332-348.)

Finally, an email submitted by plaintiff indicates that the Legislature did issue reports on the budget.[6] (*See* SR373.) Even if reports were not issued as required, the failure to issue a report after-the-fact does not invalidate the entire budget retroactively. At most, it provides a

[6] The Court may take judicial notice that the legislative report on the 2015-2016 budget was, in fact issued. See https://www.nysenate.gov/sites/default/files/articles/attachments/FINAL%20Adopted%20Budget%20Fact%20Sheet%20Complete%204.14.15.pdf (last viewed Sept. 12, 2018).

ground for suing to compel a report's issuance, which plaintiff has not done. In any event, plaintiff did not brief the absence of a report, and thus has abandoned the issue on appeal. (*See* Points I[A], II[C] and cases cited.)

E. Fifth Cause of Action: Compliance with Article VII

The Fifth Cause of Action repeats allegations from elsewhere in the complaint, and alleges that defendants "took no remedial steps to correct the specified violations" of N.Y. Const. Art. VII, §§4, 5, and 6. (R108.) But those sections of Article VII were not violated, so remedial steps were unnecessary. In addition to the points made elsewhere (*see* Point II[F][4], [I], [J]):

- Art. VII, § 4 by its terms does not apply to "appropriations for the legislature or judiciary," which are at issue here.
- Article VII, § 5 provides that neither house shall consider any other appropriation bill until the Governor's budget has been finally acted on by both houses. Plaintiff supplies no evidence or specific allegation of how that provision was purportedly violated. Further, § 5 makes an exception if there is a "message from the governor certifying to the necessity of the immediate

passage of such a bill." The record of the budget bill finally enacted reflects that a message of necessity was issued. (R753, 756.)

- Under Article VII, § 6, the provisions of an appropriation bill must "relate[] specifically to some particular appropriation in the bill." Plaintiff's argument presumably is that creation of the Second Commission did not relate to a specific appropriation. But it did—it related directly to the appropriation for the judiciary that covered judicial salaries. (*See* Point II[F][4].)

F. Sixth Cause of Action: The Second Commission

The Sixth Cause of Action challenges the Second Commission's enabling statute. To challenge the facial constitutionality of a statute, plaintiff "must surmount the presumption of constitutionality accorded to legislative enactments by proof 'beyond a reasonable doubt.'" *Matter of Moran Towing Corp. v. Urbach,* 99 N.Y.2d 443, 448 (2003) (citation omitted). The challenger must show the law suffers "wholesale constitutional impairment" in "every conceivable application" and that "no set of circumstances exists under which the Act would be valid." *Id.* (internal quotation marks and citations omitted).

As shown below, plaintiff has failed to meet that rigorous standard. The Sixth Cause of Action contains five subparts; we address each one separately.

1. The Legislature Permissibly Delegated the Increase of Judicial Compensation to the Second Commission

Plaintiff asserts that the enabling statute delegated power to the Second Commission unconstitutionally by giving the Commission's recommendations "the force of law." (R110, 188, 190-192.) The delegation at issue fell well within the Legislature's power.

Even though the Legislature cannot delegate all of its law-making functions to other bodies, "there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature." *Matter of Levine v. Whalen,* 39 N.Y.2d 510, 515 (1976). The Legislature may delegate "far-reaching control" to a commission, and charge it with "implementing a pervasive regulatory program." *Matter of City of N.Y. v. State of N.Y. Commission on Cable Television,* 47 N.Y.2d 89, 93 (1979). The principle that the Legislature may not delegate all its

law-making power to the executive branch "has been applied with utmost reluctance." *Boreali v. Axelrod,* 71 N.Y.2d 1, 9 (1987).

It is, of course, "incumbent upon the legislative authority to set forth standards to indicate to an administrative agency the limits of its power." *Sleepy Hollow Lake, Inc. v. Public Service Comm'n,* 43 A.D.2d 439, 443 (3d Dep't), *lv. denied,* 34 N.Y.2d 519 (1974). Those standards, however, may be quite broad. Thus, in *Sleepy Hollow,* this Court held that the "public interest" provided a constitutionally sufficient standard for guiding the exercise of administrative power to order that wiring be placed underground. *Id.* at 443-44. And in *Levine,* the Court of Appeals found that "protection and promotion of the health of the inhabitants of the state" was a constitutionally sufficient standard for revoking a hospital's operating certificate. 39 N.Y.2d at 516-17.

Here, the enabling statute specifies that compensation levels must be "adequate," and directs the Second Commission to examine the "prevailing adequacy" of judicial pay. (R1080.) The statute sets forth six non-exclusive factors to consider in determining whether judicial salaries "warrant an increase." (R1080-1081.) These factors focus on circumstances that would reasonably be considered in setting salary

rates: parity with other governmental bodies (compensation levels of executive branch officials in other states and the federal government); competitiveness in the market (compensation of professionals in government, academia, and private and nonprofit enterprise); fairness to the recipients (rates of inflation); and affordability to the State (the overall economic climate, changes in public-sector spending, and the state's ability to fund increases).

The enabling statute thus "provides adequate guidance" for the Second Commission's task. *Matter of Retired Pub. Empls. Ass'n v. Cuomo,* 123 A.D.3d 92, 97 (3d Dep't 2014). The delegation was constitutional because "the basic policy decision[]" underlying the Second Commission's operation—namely, that judges should receive "adequate" compensation as determined by relevant factors—was "made and articulated by the Legislature." *Matter of N.Y. State Health Facilities Ass'n v. Axelrod,* 77 N.Y.2d 340, 348 (1991); *accord Dalton v. Pataki,* 5 N.Y.3d 243, 262 (2005).

2. The Delegation of Authority to the Second Commission Contained Adequate Safeguards

Plaintiff alleges that the Second Commission's enabling statute violated the constitution by delegating legislative power "without safeguarding provisions" (R110, 192). In fact, the statute contained a key safeguard. The Legislature reserved to itself the right to "modif[y] or abrogate[]" the Second Commission's recommendations through the ordinary process of passing a statute. (R1082.) The Second Commission was required to send its recommendations to the Legislature by December 31. (R1081.) The recommendations would become law only if the Legislature declined to act by April 1, more than three months later. (R1082.)

Similarly-structured commissions have been held constitutional. For example, the Legislature created an independent commission to address the problem of excess hospital capacity. The commission was charged with undertaking "a rational, independent review of health care capacity and resources in the state" and "recommending changes that will result in a more coherent, streamlined health care system." 2005 N.Y. Laws, ch. 63, Part E, § 31(1). Among other things, the commission would "make recommendations relating to facilities to be closed." *Id.*,

§ 31(8)(b). The Department of Health was required to implement whatever recommendations the commission made, unless the Governor failed to transmit the final report or a majority of each house of the Legislature voted to reject them. *Id.,* § 31(9)(a)-(b).

When a taxpayer challenged the statute, the Appellate Division, First Department "reject[ed] plaintiffs' argument that the subject legislation unconstitutionally delegated the Legislature's lawmaking power." *McKinney v. 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). Having made the "basic policy choice" that some hospitals needed to be closed and others needed to be restructured, the Legislature "permissibly authorized the Commission" to "fill in details" and make "subsidiary policy choices consistent with the enabling legislation." *Id.*[7]

Plaintiff further avers that the Second Commission was not sufficiently diverse in ideology. (R192.) The Constitution, however, does not require ideological diversity. The Second Commission's seven

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[7] The Fourth Department upheld the same statute in *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) (R190-191). As authority for her argument, plaintiff cites a single-judge dissent from the Fourth Department case (*see* R190-191).

representatives were appointed by different persons: three were named by the Governor; one by the Temporary President of the Senate; one by the Speaker of the Assembly; and two by the Chief Judge. (R1081.) That structure evinced a reasonable legislative judgment that the Second Commission should reflect the balance of power among the government's three branches.

Plaintiff finally claims it would be unconstitutional to raise the salaries of judges "who should be removed from the bench for corruption or incompetence" (R110, 193). But if a judge "should be removed from the bench," the law provides a means for removal. *See, e.g.,* N.Y. Const. Art. VI, § 23. The fact that some judges may be unworthy does not support denial of an adequate salary for the rest of the judiciary.

3. Increasing Judicial Salaries Does Not Violate the Constitution

Plaintiff's contention that the Constitution precludes salary increases while a judge is in office (R111, 193-194) does not survive analysis.

Article XIII, § 7 states that the compensation of State officers named in the Constitution must be fixed by law and "shall not be

increased or diminished during the term for which he or she shall have been elected or appointed." But more specific provisions govern the compensation of legislators and judges. For legislators, compensation must be fixed by law and may not be "increased or diminished during, and with respect to, the term for which he or she shall have been elected." N.Y. Const. Art. III, § 6. For judges, compensation "shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed." N.Y. Const. Art. VI, § 25.[8]

The general principle stated in Article XIII, § 7 must yield to the specific provisions in Art. III, § 6 and Art. VI, § 25 covering the same subject matter. Rules of statutory construction apply equally to the Constitution. *Wendell v. Lavin,* 246 N.Y. 115, 123 (1927). It is "a rule of construction that in the event of an apparent conflict between parts of a statutory scheme the specific overrides the general." *People v. Walker,* 81 N.Y.2d 661, 664 (1993); *accord* N.Y. Statutes § 238 at 404-05 (McKinney 1971). Thus, the general restrictions in Art. XIII, § 7 "do not control the compensation paid to Supreme Court Justices." *Cty. of*

[8] The judicial compensation increases recommended by the First and Second Commission were, of course, established by law. *See* 2015 N.Y. Laws ch. 60, part E (R1080-1082); 2010 N.Y. Laws, ch. 567.

Broome v. Bates, 197 Misc. 88, 91 (Sup. Ct. Albany Ct. 1950), *aff'd*, 302 N.Y. 587 (1951) (citing Art. XIII, § 12, later renumbered as Art. XIII, § 7).

As Supreme Court observed (R75), a prohibition against increasing judicial compensation is "conspicuously absent" from Article VI, § 25(a), which provides only that a judge's compensation "shall not be diminished" during the term of office. The principle of *expressio unius*—"the specific mention of one person or thing implies the exclusion of other persons or thing[s]," N.Y. Statutes § 240 at 411—counsels against implying such a provision. *See Matter of Chemical Specialties Mfrs. Ass'n v. Jorling,* 85 N.Y.2d 382, 394 (1995) (when construing statute, an "'inference must be drawn that what is omitted or not included was intended to be omitted and excluded'") (citation omitted).

In short, the specific constitutional provision governing judicial compensation—Article VI, § 25—prohibits only pay reductions during a judge's term of office, and does not speak to pay increases.

4. The Enabling Legislation Did Not Violate Article VII, §§ 2, 3, or 6 of the New York Constitution

Plaintiff has not demonstrated that the Second Commission's enabling legislation violated the technical requirements for budget bills set forth in Article VII, §§ 2, 3, and 6 of the New York Constitution. To begin with, the 2015 budget was passed and the appropriations made in the bill have expired. Thus, this sub-cause is moot. *See Pataki v. N.Y. State Assembly,* 4 N.Y.3d 75, 85 (2004).

Article VII, § 2 provides that the Governor must annually submit a budget to the Legislature. There is no evidence the Governor failed to do so. To the contrary, the record shows that the 2015 budget bill was timely, having been introduced January 21. (SR284.)

Plaintiff asserts that the budget bill was impermissibly amended on March 31 to add the provision creating the Second Commission (R195). But Article VII, § 3 allows the Governor to amend or supplement budget bills "at any time" before the Legislature adjourns, "with the consent of the legislature." As Supreme Court pointed out, "the Legislature's consideration and passage of the bill is effective consent in itself." (R38.) *Compare Matter of FMC Corp. v. N.Y. State Dep't of Envt'l Conserv.,* 31 N.Y.3d 332, 342 (2018) (even without formal determination of cost-

effectiveness, department's "decision to proceed unilaterally demonstrates it determined that path was cost-effective").

Finally, the Court should reject plaintiff's further argument that the enabling provision had "no relation at all" to budget expenditures (R196) and that the enabling legislation was an "unconstitutional rider" because it did not "relate[] specifically to some particular appropriation in the bill" as required by Article VII, § 6 (R194). The purpose of Article VII, § 6 was "to eliminate the legislative practice of tacking on to budget bills propositions which had nothing to do with money matters; that is, to prevent the inclusion of general legislation in appropriation bills." *Schuyler v. S. Mall Constructors,* 32 A.D.2d 454, 455 (3d Dep't 1969). That standard is met here. The Second Commission's stated purpose was "to examine, evaluate and make recommendations with respect to adequate levels of compensation." (R1080.) The budget bill's summary further elaborated that the Second Commission was intended to "provide periodic salary increases to state officers." (SR366.) Those salary increases would be appropriated from the budget. Thus, establishment of the Second Commission was not "essentially nonbudgetary." *Pataki v. N.Y. State Assembly,* 4 N.Y.3d at 99.

5. The Enabling Legislation Was Not Procured by Fraud

The elements of a fraud claim are that (1) the defendant made a misrepresentation as to a material fact; (2) the representation was false; (3) the defendant intended to deceive the plaintiff; (3) the plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) the plaintiff was injured as a result of such reliance. *Young v. Williams,* 47 A.D.3d 1084, 1086 (3d Dep't 2008).

Plaintiff has neither pleaded nor proven the elements of fraud as to the enabling legislation. Although she alleges that Senator DeFrancisco falsely stated at the hearings that the Governor's bill had been "submitted a long time ago" (R199), when read in context, that statement refers to an earlier version of the bill (*see* R198-199). And Senator DeFrancisco is not a defendant in this case. Nor has plaintiff pleaded or proven that Senator DeFrancisco's statement, or any other, was made by defendants with intent to deceive her. And she could not have relied detrimentally on any such statement. To the contrary, plaintiff was not a member of the Legislature, and thus did not rely on any of the bill

descriptions that she claims were misleading. (*See* R197-200.) Notably, the Legislature has not claimed it was bamboozled.

G. Seventh Cause of Action: More Claims Regarding the Second Commission

The Seventh Cause of Action contains a miscellany of attacks on the Second Commission's composition and actions. None of plaintiff's attacks can endure even cursory appellate scrutiny.[9]

First, plaintiff asserts that defendants did not "discharge ANY oversight duties" with respect to the Second Commission. (R112, 201 [some emphasis omitted].) But plaintiff does not identify any oversight duties that would provide her with a cause of action. In fact, the enabling statute does not impose oversight duties on defendants, apart from the

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[9] Supreme Court dismissed the Seventh and Eighth Causes of Action because they challenged acts of the Second Commission, a nonparty. (R56.) While the principle employed by Supreme Court would govern in an article 78 proceeding, *see Matter of Wittenberg Sportsmen's Club, Inc. v. Town of Woodstock Planning Bd.,* 16 A.D.3d 991, 993 (3d Dep't 2005), its application to State Finance Law § 123-b is unclear. The Court need not reach the issue, however, because alternate grounds for dismissing the Seventh and Eighth Causes of Action appear on the law and the face of the record. *See Olim Realty v. Lanaj Home Furnishings,* 65 A.D.3d 1318, 1320 (2d Dep't 2009); *accord Am. Sugar Refining Co. v. Waterfront Comm'n,* 55 N.Y.2d 11, 25 (1982).

Legislature's right to modify or abrogate the Second Commission's recommendations by statute. (*See* R1082.)

Second, plaintiff complains that three members of the Second Commission were "actually biased." (R113, 202-203.) However, she has not pleaded or proven facts that would be legally sufficient to show personal bias; her generalized allegations of "judicial corruption" (R203) are not sufficient. In fact, the three members plaintiff attacks were all distinguished members of the New York bar, and none was a sitting judge. (*See* R1087-1088.)

Third, plaintiff similarly argues that the Second Commission's deliberations did not take "judicial corruption" into account (R113, 203-204). But plaintiff says she testified to the Second Commission on this issue. (R203-204.) The Second Commission, in turn, "carefully reviewed the public testimony and extensive written submissions" that it received. (R1084.) Plaintiff's disagreement with the Second Commission's weighing of her testimony is not a ground for overturning its conclusions. The remedy for judicial corruption is the removal of corrupt judges by ordinary means. *See* N.Y. Const. Art. VI, § 23.

Fourth, plaintiff alleges that the Second Commission lacked evidence, and made no finding, that "existing levels of judicial compensation and non-salary benefits were inadequate." (R209; *see* R113, 204-209.) In fact, the Second Commission analyzed the required factors in detail, including the fact that the salary of a New York State Supreme Court Justice "rank[ed] 47th nationally among trial courts of general jurisdiction when adjusted for cost of living." (R1094-1095.) The Second Commission fulfilled its mission of determining whether judicial salaries "warrant[ed] an increase" (R1080), as reflected in its recommendation that New York take the "reasonable, appropriate step" of increasing judicial salaries to restore parity between the pay of State Supreme Court Justices and federal district judges (R1092).

Finally, plaintiff complains that the Second Commission did not provide adequate notice of its hearing and disregarded her input. (R114, 209-212.) As to notice, plaintiff neither pleads nor proves that any person was deprived of the opportunity to testify before the Second Commission due to inadequate notice.[10] The Second Commission held three public

[10] Plaintiff suggests that the Second Commission issued "no press announcement or release" concerning the hearing (R211). In fact, the Second

meetings and a public hearing, at which witnesses for 15 organizations and one individual testified. (R1092.) The Second Commission also invited written commentary and received 23 written submissions from judicial associations, bar associations, corporate and business groups, good government groups, institutional litigants, individuals and organizations. (R1092.) Plaintiff lacks standing to make such a complaint in any event, because she admittedly testified before the Second Commission. (R203-204, 207-209.) The fact that the Second Commission did not follow plaintiff's advice does not render its actions unconstitutional.

H. Eighth Cause of Action: The Second Commission's Consideration of the Statutory Factors

The Eighth Cause of Action alleges that the Second Commission did not consider the various factors it was supposed to weigh. (R114, 212-213.) The record disproves this claim. The Second Commission's Chair wrote that it "considered a broad range of pertinent data, beginning with the factors delineated in Part E of Chapter 60." (R1084.) The Second

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Commission issued such a press release 11 days in advance of the hearing, on November 19, 2015. *See* http://www.nyscommissiononcompensation.org/pdf/salarycommissionadvisory.pdf (last visited Sept. 8, 2018).

Commission's report expressly discussed every factor identified in the statute: the overall economic climate (R1094); rates of inflation (R1093, 1098); changes in public-sector spending (R1093, 1100); levels of compensation in other states and the federal government (R1093-1096, 1098-1100); levels of compensation in government, academia, and private and nonprofit enterprise (R1094, 1099); and the State's ability to fund increased compensation (R1094).

In any event, although the Second Commission referenced each of the necessary factors, it was not required to do so. Parole cases provide an analogy. The Second Commission's mandate that it "shall take into account all appropriate factors including, but not limited to" an itemized list (R1080-1081) resembles the mandate in Executive Law § 259-i that the Parole Board's procedures "shall require that the following [factors] be considered." Exec. L. § 259-i(2)(c)(A). This Court has held that the Parole Board "is not required to specifically articulate all of those factors in its decision." *Matter of Comfort v. N.Y. State Div. of Parole,* 68 A.D.3d 1295, 1296 (3d Dep't 2009); *accord Matter of Duffy v. N.Y.S. Dep't of Corrections & Community Supervision,* 132 A.D.3d 1207, 1208 (3d Dep't 2015).

The absence of a recommendation on non-salary benefits (R212) does not invalidate the Second Commission's other recommendations. Indeed, the enabling statute directed the Second Commission to determine whether "the annual salaries" for judges "warrant an increase"; it did not include a similar command for non-salary benefits. (R1080.)

Similarly, the Second Commission's existence was not vitiated because some members were not appointed until after its establishment (*cf.* R213). The enabling statute described how the members "shall be appointed." (R1081.) It did not require that they be appointed immediately. Plaintiff does not allege that the Second Commission lacked the required seven members—nor could she. (*See* R1087-1088.)

Finally, plaintiff's allegation that the Second Commission did not respond adequately to a FOIL request (R213) must be pursued separately through an article 78 proceeding after plaintiff's administrative remedies have been exhausted. *See Matter of Wilkerson v. Annucci,* 137 A.D.3d 1444, 1446 (3d Dep't 2016); Pub. Off. L. § 89(4)(a)-(b).

I. Ninth Cause of Action: Budget Negotiations

Plaintiff's Ninth Cause of Action challenges "three-men-in-a-room" budget deals (R115, 126, 214-219; Br. 8, 10-11, 12-13, 44). As Supreme Court held (R56), challenges to actions taken in negotiating a budget become moot after the budget passes. *N.Y. Public Interest Rsch. Grp. v. Regan,* 91 A.D.2d 774, 774-75 (3d Dep't 1982), *lv. denied,* 58 N.Y.2d 610 (1983). Even if the allegations here were held to satisfy the mootness exception (and they do not), budget negotiations do not violate the Constitution.

As Supreme Court recognized, nothing "prohibits the Governor and leaders of the Senate and Assembly from holding budget negotiations." (R57.) Indeed, as the Court of Appeals observed in *Saxton,* the drafters of the Constitution "certainly envisioned" that budgets would be decided through "the political process" and "interplay between the various elected representatives of the people." 44 N.Y.2d at 550. And that is what happens. "All budgets within recent memory have been largely a product of such negotiations, often extremely protracted ones." *Pataki v. N.Y. State Assembly,* 4 N.Y.3d 75, 85 (2004). Without a negotiated budget,

New Yorkers could face a standoff and the resulting shutdown of State government.

Plaintiff's citation to *King v. Cuomo,* 81 N.Y.2d 247 (1993) (*see* R215-217), upon which her Ninth Cause of Action "principally relies" (Br. 12-13), is misplaced. That decision held that the bicameral "recall" practice, by which the Legislature asked the Governor to return a bill after transmitting it for signature, conflicted with an "express mandate of the Constitution" which "expressly shifts power solely to the Executive upon passage of a bill by both houses and its transmittal to the Executive." *Id.* at 250, 254. The decision did not speak to budget negotiations like those at issue, which no Constitutional provision expressly prohibits, and in which each branch retains its Constitutional powers while reaching an accommodation with the others.

Plaintiff's further argument that "behind-closed-doors budget negotiations, conducted largely by staff" violated the Open Meetings Law (R185) fails because the Open Meetings Law applies only to a "public body," which small groups of staffers are not. Pub. Off. L. § 103(a). Moreover, the Open Meetings Law is not violated in the absence of a quorum. *Matter of Halperin v. City of New Rochelle,* 24 A.D.3d 768, 777-

78 (2d Dep't 2005) (citing cases), *lv. dismissed,* 71 N.Y.3d 708 (2006). Plaintiff does not claim that a quorum of either house met behind closed doors.

Similarly, the Constitution's provision that "[t]he doors of each house shall be kept open," N.Y. Const. Art. III, § 10 (*see* Br. 13), does not apply to meetings of individual staffers, who do not constitute a "house of the legislature" as referenced in the provision. More fundamentally, plaintiff has not alleged or proven that the doors of either house were ever improperly closed.

Plaintiff also contends that the "budget dealmaking" included the unconstitutional "amending of budget bills" (Br. 12). Budget bills can be amended, however. After submitting budget bills to the Legislature, "[t]he governor may at any time within thirty days and, with the consent of the legislature, at any time before the adjournment thereof, amend or supplement the budget and submit amendments to any bills submitted by him or her or submit supplemental bills." N.Y. Const. Art. VII, § 3. Plaintiff does not show any particular instance in which that provision was violated.

Finally, under Art. VII, § 4, the Legislature may "strike out or reduce items" in an appropriations bill, and may also "add thereto items of appropriation." While § 4 subjects legislative additions to certain restrictions, the additional restrictions do not apply to "appropriations for the legislature or judiciary." *Id.*

J. Tenth Cause of Action: District Attorney Salaries

The Tenth Cause of Action asserts that the appropriation for district attorney salaries was defective. None of plaintiff's theories for invalidating this appropriation can withstand analysis.

First, plaintiff observes that the law mistakenly retained language from prior legislation appropriating monies for fiscal year 2014-2015 (R117). As Supreme Court ruled, however, that typographical error did not invalidate the legislation. (R57.) The drafting error was inconsistent with the Legislature's obvious intent, which was to fund 2016-2017. *See Matter of Morris Builders, LP v. Empire Zone Designation Bd.,* 95 A.D.3d 1381, 1383 (3d Dep't 2012) (obvious drafting errors did not invalidate administrative determination), *aff'd,* 21 N.Y.3d 233 (2013); *accord Matter of Doorley v. DeMarco,* 106 A.D.3d 27, 37 (4th Dep't 2013) (typographical error did not render statute ambiguous); *Matter of City of N.Y.,* 95 A.D.

552, 555, 559 (1st Dep't 1904) (inadvertent use of incorrect fraction did not invalidate statute).

Second, the appropriation does not conflict with County Law § 700 or Judiciary Law § 183-a (R117-120). The appropriation at issue expressly applies "[n]otwithstanding the provisions of subdivisions 10 and 11 of section 700 of the county law or any other law to the contrary." (R376.) Indeed, the complaint pleads this affirmatively. (R116.)

Third, plaintiff alleges that the failure to use committees in the budget process violated Article VII, § 4 of the State Constitution. (R109, 177-178.) But Article VII, § 4 says nothing about committees. Further, it specifies that "[n]one of the restrictions of this section" shall apply to "appropriations for the legislature or judiciary." Nor is there a violation of Legislative Law § 54-a (*see* R185), which requires the Legislature to set "a date for the establishment" of committees and "a date by which such joint budget conference committee or committees shall issue their final reports." Section 54-a does not speak to situations where budgets are negotiated. In any event, such dates were established (SR379-381), and a conference committee was convened (SR382-387). Indeed, plaintiff admits that a Joint Budget Conference Committee existed and held

meetings. (R185.) While plaintiff urges that the meetings should have been longer and more substantive (R185), the Constitution does not enact her personal preferences.

Fourth, plaintiff also claims violations of Article VII, §§ 5 and 6 (R109, 180-181), but it is difficult to discern how either section was allegedly violated. For example, she argues that legislative committees could have amended the Legislative/Judiciary Budget Bill or requested information from the heads of departments (R181-184), but fails to allege what amendments or requests, if any, were constitutionally required. To the extent the Tenth Cause of Action alleges a lack of specificity in the budget bills (*e.g.,* R181-182), that is a non-justiciable itemization issue. (*See* Point II[A].) To the extent the Tenth Cause of action complains about "three-men-in-a-room" budget negotiations (*e.g.,* R185), it fails for the reasons set forth in Point II(I).

Finally, plaintiff's suggestion that district attorneys are overpaid (Br. 64-65) is more properly addressed to the Legislature. Since 1972, New York law has embodied a legislative judgment that district attorneys' pay should match that of Supreme Court justices. *See* Judiciary Law § 183-a.

POINT III

PLAINTIFF'S ALLEGATIONS OF FRAUD AND CONFLICTS OF INTEREST ARE MERITLESS

A. Plaintiff Has Failed to Plead or Prove a Fraud

In plaintiff's prior action, Justice McDonough found plaintiff's allegations of fraud by the Attorney General's office "wholly unsubstantiated." (R321.) The court "searched the records" and found "absolutely no basis" to award sanctions or take any other disciplinary action against defendants' counsel. (R329.) Nonetheless, plaintiff continues to allege that the Attorney General's office and the courts are engaged in fraud.

Plaintiff's allegations of fraudulent concealment rely on instances where Supreme Court or opposing counsel disagreed with her legal position and/or did not recite each one of her numerous arguments. (*See, e.g.,* Br. iv, 7-9, 34, 35, 45, 47, 55, 55-56.) That is not fraud.

To support a claim of fraud by concealment, there must be a duty to disclose. *Towne v. Kingsley,* 163 A.D.3d 1309, 1311 (3d Dep't 2018). Supreme Court has no duty to address individually each meritless argument that plaintiff may assert. Counsel has no duty to repeat the

opposing side's arguments, especially when they have already been filed with the Court.

Not addressing an argument does not equate to fraud. An argument might not be addressed for many reasons. It could be unimportant in light of other points. It could be refuted elsewhere. Or it could be immaterial, duplicative, or just plain meritless.

Similarly, taking a legal position that plaintiff opposes is not fraud, even if the Court later rules in her favor. *See Zuyder Zee Land Corp. v. Broadmain Bldg. Co.,* 86 N.Y.S.2d 827, 828 (Sup. Ct. N.Y. Cty.) (representation as to effect of lease terms, "involving as it did the interpretation of a written document, falls in the category of an opinion or statement of law which, even when inaccurate, cannot afford a basis for recovery in fraud"), *aff'd without op.,* 276 A.D. 751 (1st Dep't 1949); *Abraham v. Wechsler,* 120 Misc. 811, 812 (Sup. Ct. N.Y. Cty. 1923) ("[T]he defendant represented that something was lawful, and the plaintiff claims it was unlawful. Such a representation does not amount to fraud."), *aff'd,* 201 A.D. 876 (1st Dep't 1924).

Here, defendants' legal arguments have already been found meritorious: they have prevailed before two Supreme Court Justices.

Thus, defendants' arguments in Supreme Court and this Court fall well within the latitude afforded to trial-level and appellate advocacy.

Finally, in footnote 1 of this Brief and our letter and memorandum opposing the preliminary injunction motion, we have urged the Court to read plaintiff's appellate brief and the record. Thus, rather than concealing plaintiff's papers, the Attorney General's office has encouraged the Court to read them. That cannot be fraud.

B. Justice Hartman Properly Denied Plaintiff's Disqualification Motion

Unless a statutory ground for recusal exists (and none existed here), the decision of a recusal motion "is generally a matter of personal conscience" for the judge. *People v. Smith,* 63 N.Y.2d 41, 68 (1984). Justice Hartman committed no error in denying recusal.

First, the fact that plaintiff challenges judicial salaries does not require disqualification. Every judicial officer would suffer the same purported conflict. *Maron,* 14 N.Y.3d at 248-49 (discussing Rule of Necessity); *Pines,* 115 A.D.3d at 90-91 (similar). Thus, Justice Hartman's decisions cannot be impeached on this ground.

Second, Justice Hartman's former employment with the Attorney General's office did not warrant disqualification. The situation resembles one where a judge, who was formerly a district attorney, hears a criminal case. This Court has allowed judges to act in such circumstances, even when, as district attorney, the judge had prosecuted the defendant for unrelated matters. *See, e.g., People v. Casey,* 61 A.D.3d 1011, 1014 (3d Dep't)*, lv. denied,* 12 N.Y.3d 913 (2001); *People v. Mitchell,* 288 A.D.2d 622, 623 (3d Dep't 2001), *lv. denied,* 99 N.Y.2d 538 (2002); *People v. Jones,* 143 A.D.2d 465, 466-67 (3d Dep't 1988). The case against recusal is even stronger here: there is no evidence that Justice Hartman was involved with the defense of this lawsuit or the prior action before taking the bench.

Third, plaintiff has tendered no "demonstrable proof of bias," *see Modica v. Modica,* 15 A.D.3d 635, 636 (2d Dep't 2005), beyond Justice Hartman's rulings. (*See, e.g.,* R1009.) Bias "will not be inferred" from adverse decisions. *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 (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."

Gonzalez v. L'Oreal USA, Inc., 92 A.D.3d 1158, 1160 (3d Dep't), *lv. dismissed,* 19 N.Y.3d 874 (2012).

In any event, Justice Hartman's rulings were even-handed. For example, she permitted plaintiff's faulty service of process (R55); denied defendants' motion to dismiss the Sixth Cause of Action (R57-58); and denied defendants' request for sanctions based on plaintiff's repetitive, meritless filings (R40). *See Smith,* 63 N.Y.2d at 68.

Finally, plaintiff was not entitled to disclosure of Justice Hartman's "financial interests and relationships with defendants" (Br. iv). Under certain circumstances, a judge who disqualifies herself "*may* disclose on the record" the basis for disqualification. 22 N.Y.C.R.R. § 100.3(F) (emphasis added). Such disclosures are not required. Nor does plaintiff have a right to Justice Hartman's personal information beyond what is mandated by 22 N.Y.C.R.R. § 40.2.[11]

[11] Plaintiff should not be heard to attack Justice McDonough's good faith (*e.g.,* Br. 8; R104). As shown in Point I(B), this case cannot be used to collaterally attack Justice McDonough's rulings. In any event, the same grounds for rejecting plaintiff's attacks on Justice Hartman hold true for Justice McDonough.

C. Attorney General Underwood Has No Conflict of Interest

There is no basis for plaintiff's claim that the Attorney General should be disqualified (Br. iv). Attorney General Underwood has no conflict of interest. She is defending both herself and the other State officers and entities, all of whom are defendants-respondents. Defendants-respondents are united in their interest in defeating plaintiff's claims.

D. Plaintiff's Requests for Sanctions and an Investigation Must Be Denied

The Court should deny plaintiff's request for sanctions and an investigation (Br. iv, 2, 47). Such actions would be unwarranted because plaintiff's claims are procedurally and substantively barred (*see* Point I), as well as deficient on the merits (*see* Point II), and she has shown no impropriety (*see* Point III[A]-[C]). In any event, it is improper to ask the Court to "requir[e]" that unnamed "public officers and their agents" be "criminally prosecuted and removed from office" (Br. v). Criminal actions may be commenced only through legally prescribed procedures. *See* C.P.L. § 100.05.

CONCLUSION

Supreme Court's judgment should be affirmed.

Dated: Albany, New York
September 21, 2018

Respectfully submitted,

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