

Center for Judicial Accountability, Inc. (CJA)

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Wednesday, April 3, 2019 12:24 PM
To: 'apierce@hancocklaw.com'
Cc: 'mmiller@tourolaw.edu'
Subject: Building scholarship -- & amicus curiae support for a monumental appeal of right "wherein is directly involved the construction of the constitution of the state..."
Attachments: 4-1-19-foil-ag-mckinney.pdf; 4-1-19-ag-acknowledgment.pdf

Dear Mr. Pierce –

Thank you for giving me the opportunity to speak with you, a short time ago, concerning your important 2012 law review article "*What Does It Mean If Your Appeal of Right Lacks A 'Substantial' Constitutional Question in the New York Court of Appeals?*" – and the imperative that it be updated, refined, and further developed because, in the past seven years, the Court of Appeals has seemingly taken NO steps consistent with your salutary recommendations contained in your conclusion (at pp. 927-929). As discussed, CJA's citizen-taxpayer action challenging the constitutionality of the whole of the state budget, now before the Court of Appeals on an appeal of right, is a powerful vehicle to change that – and such is clear from my March 26, 2019 letter to the Court of Appeals, citing to your law review article – and pivotally resting on *Valz v. Sheepshead Bay*, discussion of which you properly include in your law review article (at pp. 910-911).

CJA's webpage for my March 26, 2019 letter, which also posts your law review article, is here:

<http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/3-26-19-ltr.htm>.

Below is the e-mail I sent yesterday to Professor Meredith Miller, following my phone conversation with her about her own important 2011 law review article "*An Illusory Right of Appeal: Substantial Constitutional Questions at the New York Court of Appeals*", to which your law review article not only cites, but responds (at footnotes 5, 28, 137-139).

As I stated to Professor Miller – and repeated to you – if your present professional commitments make it impossible for you to undertake follow-up scholarship and writing about the critical issue of the Court of Appeals' subverting of our state Constitution and the CPLR with regard to appeals of right, please forward my March 26, 2019 letter to academic and bar association colleagues, etc. – and, as soon as possible – including for purposes of their *amicus curiae* support for the appeal of right it seeks to enforce based on the Constitution and CPLR, as well as for their presentations on the substantive issues of constitutional construction directly involved. As stated, in the conclusion of my letter, without exaggeration:

"What is before the Court, on this appeal of right, is catastrophic. Gone is the constitutional design of separation of executive and legislative powers – replaced by collusion of powers that has undone our State Constitution. And more than the budget is at issue. It is the very governance of this State, as the budget has become a pass-through for policy having nothing to do with the budget..." (at p 21, underlining in the original).

Thank you.

Sincerely,

Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
www.judgewatch.org
914-421-1200

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>

Sent: Tuesday, April 2, 2019 7:40 PM

To: 'mmiller@tourolaw.edu' <mmiller@tourolaw.edu>

Subject: Building scholarship -- & amicus curiae support for a monumental appeal of right "wherein is directly involved the construction of the constitution of the state..."

Dear Professor Miller –

Thank you for your prompt return call this afternoon – and the time you gave to our conversation about your important 2011 law review article “*An Illusory Right of Appeal: Substantial Constitutional Questions at the New York Court of Appeals*”, embodied in my March 26, 2019 letter to the Court of Appeals in support of an appeal of right in CJA’s ground-breaking citizen-taxpayer action challenging, by ten causes of action, the constitutionality of the ENTIRE state budget – and the commission-based judicial salary increases it embeds.

CJA’s webpage for the letter – and for the referred-to evidence substantiating it, including your law review article, is here: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/3-26-19-ltr.htm>. Under the title heading “Appellants Meet the Constitutional Requirements Entitling Them to an Appeal of Right, Pursuant to Article VI, §3(b)(1) of the New York State Constitution, Reiterated by CPLR §5601(b)(1)” (at pp. 8-9), the letter expressly raises, as a “substantial constitutional question...directly involved”, the Court’s unconstitutional repudiation of its constitutional function with respect to appeals of right – citing to Judge Robert Smith’s dissent in *Kachalsky v. Cacace*, underlying your law review article and the 2012 law review article of Alan Pierce “*What Does It Mean If Your Appeal of Right Lacks A ‘Substantial Constitutional Question in the New York Court of Appeals?’*”, also cited in the letter (at p. 9, fn. 3).

As to what the Court of Appeals did in the *McKinney* and *St. Joseph Hospital* cases – cited at footnotes 47 and 55 of your law review article – both cases coming to the Court, almost simultaneously in 2007, first on appeals of right and then by motions for leave – my letter graphically describes it under the title heading “Appellants’ Sub-Causes A & B of their Sixth Cause of Action are *A Fortiori* to the 2007 Appeals of Right in *McKinney* and *St. Joseph Hospital*, to which those Appellants were Entitled” (at pp. 9-15). Its footnote 4 (at p. 15) also furnishes insight into the Court’s self-dealing with respect to *McKinney* and *St. Joseph Hospital* – and its consequences, giving rise to this appeal.

Nine years after Judge Smith’s dissent in *Kachalsky*, eight years after your law review article, and seven years after Mr. Pierce’s law review article, the Court of Appeals shows no signs of returning to its mandatory constitutional duty with respect to appeals of right “wherein is directly involved the construction of the constitution of the state or of the United States...” – or in building educating caselaw on the subject of appeals of right. I hope you will agree that my letter, explicating why CJA’s citizen-taxpayer appeal is entitled to an appeal of right, is a powerful catalyst for such long-overdue change, essential to constitutional governance.

Please consider this a request that you update, refine, and further develop your 2011 law review article – and, if that is not feasible because you are engaged in other areas of teaching and scholarship, that you forward my March 26, 2019 letter to your academic and bar association colleagues, etc. – and, as soon as possible – including for purposes of their *amicus curiae* support of the appeal of right and for their presentations on the substantive issues of constitutional construction directly involved. As stated, in the conclusion of my letter, without exaggeration:

“What is before the Court, on this appeal of right, is catastrophic. Gone is the constitutional design of separation of executive and legislative powers – replaced by collusion of powers that has undone our State Constitution. And more than the budget is at issue. It is the very governance of this State, as the budget has become a pass-through for policy having nothing to do with the budget...” (underlining in the original).

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