

Center for Judicial Accountability, Inc. (CJA)

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Thursday, April 25, 2019 11:46 AM
To: 'mmiller@tourolaw.edu'; 'apierce@hancocklaw.com'
Cc: 'kbaxter@nysba.org'; 'rkennedy@nysba.org'; 'kmchargue@nysba.org'; 'rrifkin@nysba.org'; 'richardrifkin54@gmail.com'; 'kkerwin@nysba.org'; 'bmahan@nysba.org'; 'mclair@nysba.org'
Subject: STATUS? "Building scholarship -- & amicus curiae support for a monumental appeal of right 'wherein is directly involved the construction of the constitution of the state...'"
Attachments: 4-18-19-email-to-nysba.pdf; 4-15-16-email-from-baxter.pdf; 4-25-16-email-nysba.pdf

Dear Professor Miller and Mr. Pierce,

It is now more than three weeks since our phone conversations and my below e-mails and I have received no response from either of you. Have you responded?

Do you have any doubt that my March 26, 2019 letter to the Court of Appeals: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/3-26-19-ltr.htm> establishes that Article VI, §3(b)(1) of the New York State Constitution, reiterated by CPLR §5601(b)(1), gives CJA's citizen-taxpayer action an absolute entitlement to an appeal of right – and presents a dispositive challenge to the Court's rewrite of its mandatory constitutional and statutory duty – the subject of your two law review articles, arising from Judge Robert Smith's "whistle-blowing" dissent in *Kachalsky v. Cacace*, [14 NY3d 743](#) (2010).

In the words of the Court of Appeals' 1993 decision in *King v. Cuomo*, [81 NY2d 247](#) (1993), relied upon, in a different context, by my March 26, 2019 letter (at pp. 19-20) in support of the appeal of right:

"When language of a constitutional provision is plain and unambiguous, full effect should be given to 'the intention of the framers * * * as indicated by the language employed' and approved by the People (*Settle v Van Evrea*, 49 N.Y. 280, 281 [1872]; *see also*, *People v Rathbone*, 145 N.Y. 434, 438). ...

If the guiding principle of statutory interpretation is to give effect to the plain language (*Ball v Allstate Ins. Co.*, 81 N.Y.2d 22, 25; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 N.Y.2d 657, 661; McKinney's Cons Laws of NY, Book 1, Statutes § 94), '[e]specially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State' (*Settle v Van Evrea*, 49 NY, at 281, *supra*). ..." (at p. 253).

Isn't Article VI, §3(b)(1) of the New York State Constitution "plain and unambiguous"?

On April 11, 2019, I sent a further letter to the Court of Appeals – tearing apart the Attorney General's opposition to the appeal of right. The link to the webpage for my April 11, 2019 letter is here: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/4-11-19-ltr-to-ct-appeals.htm>.

Time is of the essence. Please advise, as soon as possible – including as to what you will do to advance the important scholarship you began by your law review articles, but have seemingly abandoned – and which New York's bar associations and scholars of our state Constitution have not picked up. Don't you agree that the serious and substantial constitutional and legal issues presented by my March 26, 2019 letter trigger your professional and ethical responsibilities to – at very least – alert the bar associations and professors of constitutional law and appellate practice

to the pending appeal of right? Will you not take steps to recommend that they apply their scholarship and expertise to furnishing the Court of Appeals with *amicus curiae* briefs on the mountain of issues of constitutional construction directly involved?

So that you can see how very urgently I need your assistance in this regard, I've created a webpage from which you can examine my own, as yet unsuccessful, outreach efforts for *amicus curiae* support and scholarship, since contacting you. The direct link is here: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/ct-appeals-outreach-for-amicus.htm>.

I take this opportunity to especially request Mr. Pierce's assistance vis-à-vis the New York State Bar Association, inasmuch as he not only chaired its Committee on Appellate Jurisdiction, but, by reason thereof, participated in the report on Article VI – the Judiciary Article – written by the State Bar's Committee on the New York State Constitution and approved by its House of Delegates on January 27, 2017: <http://www.nysba.org/judiciaryreport2017/> (see last page). How is it that even the report's footnote 126 makes no mention of the Court of Appeals' subversion of Article VI, §3(b)(1), converting appeals of right on issues of constitutional construction to discretionary appeals?

It must be noted that on April 15, 2019, the State Bar held a paid program, "New York Appellate Process 2019", with "Agenda Topics" including: "The basics of appellate jurisdiction"; "Taking, perfecting and opposing an appeal to the Court of Appeals"; and "The internal process of the Appellate Courts" – and among its "Faculty" were Court of Appeals Chief Clerk John Asiello, Esq., Court of Appeals Deputy Clerk Heather Davis, Esq., Court of Appeals Assistant Deputy Clerk Margaret Wood, Esq., and Court of Appeals Judge Michael Garcia: <https://www.nysba.org/store/events/registration.aspx?event=0FZ37>. Another paid program will be offered on May 18, 2019, entitled "Court of Appeals Review and Preserving the Record for Appellate Review", as part of the spring meeting of the State Bar's Criminal Justice Section – and Court of Appeals Judge Jenny Rivera will be among the presenters: <http://www.nysba.org/store/events/registration.aspx?event=CRIMSP19>. Don't you think the State Bar owes the attendees of these programs some discussion of Judge Smith's *Cachalsky* dissent and your law review articles?

To help prompt the State Bar in addressing the foregoing issues, I am cc'ing State Bar General Counsel Kathleen Baxter and the other State Bar recipients of my as-yet unresponded-to April 18, 2019 e-mail to her entitled "Request for Amicus Curiae Support & Scholarship: Citizen-taxpayer action challenging NYS budget – NOW at the Court of Appeals on an appeal of right on the issues of constitutional construction directly involved" – a copy of which I am annexing, with its two referred-to-enclosures.

Kindly, let me hear from you, at your earliest opportunity – and in advance of "Law Day", May 1st.

Thank you.

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: Wednesday, April 3, 2019 12:24 PM
To: 'apierce@hancocklaw.com' <apierce@hancocklaw.com>
Cc: '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 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).

Thank you.

Sincerely,

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