SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

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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,

-against-

ANDREW M. CUOMO, in his official capacity
as Governor of the State of New York,
DEAN SKELOS in his official capacity
as Temporary Senate President,
THE NEW YORK STATE SENATE,
SHELDON SILVER, 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, and THOMAS DiNAPOLI,
in his official capacity as Comptroller of
the State of New York,

Defendants.

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VERIFIED SECOND SUPPLEMENTAL COMPLAINT

Index #1788-2014

JURY TRIAL DEMANDED

"…one need only examine the Constitutional, statutory, and Senate and Assembly rule provisions relating to openness – such as Article III, §10 of New York's Constitution '…The doors of each house shall be kept open…'; Public Officers Law, Article VI 'The legislature therefore declares that government is the public's business...'; Senate Rule XI, §1 'The doors of the Senate shall be kept open'; Assembly Rule II, §1 'A daily stenographic record of the proceedings of the House shall be made and copies thereof shall be available to the public' – to see that government by behind-closed-doors deal-making, such as employed by defendants CUOMO, [FLANAGAN], [HEASTIE], SENATE, and ASSEMBLY, is an utter anathema and unconstitutional – and that a citizen-taxpayer action could successfully be brought against the whole of the Executive budget."

– culminating final paragraph of plaintiffs' verified complaint (¶126)
& verified supplemental complaint (¶236)

Ex A

Plaintiffs, as and for their verified second supplemental complaint, respectfully set forth and allege:

237. By this citizen-taxpayer action pursuant to State Finance Law Article 7-A [§123 *et seq.*], plaintiffs additionally seek declaratory judgment as to the unconstitutionality and unlawfulness of the Governor's Legislative/Judiciary Budget Bill #S.6401/A.9001. The expenditures of such budget bill – embodying the Legislature's proposed budget for fiscal year 2016-2017, the Judiciary's proposed budget for fiscal year 2016-2017, and millions of dollars in uncertified and nonconforming legislative and judicial reappropriations – are unconstitutional, unlawful, and fraudulent disbursements of state funds and taxpayer monies, which plaintiffs hereby seek to enjoin.

238. Plaintiffs also seek, pursuant to State Finance Law Article 7-A, a declaration voiding the "force of law" judicial salary increases recommended by the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation because they are statutorily-violative, fraudulent, and unconstitutional, with a further declaration striking the budget statute establishing the Commission – Chapter 60, Part E, of the Laws of 2015 – as unconstitutional and itself fraudulent.

239. Additionally, plaintiffs seek declarations that the so-called "one-house budget proposals", emerging from the closed-door political conferences of the Senate and Assembly majority party/coalitions, are unconstitutional, as are the proceedings based thereon of the Senate and Assembly joint budget conference committee and its subcommittees; and that the behind-closed-doors, three-men-in-a-room budget dealing-making by the Governor, Temporary Senate President, and Assembly Speaker – such as produced Chapter 60, Part E, of the Laws of 2015 – is unconstitutional and enjoining same with respect to Judiciary/Legislative Budget Bill #S.6401/A.9001 and the whole of the Executive Budget.

240. Plaintiffs repeat, reallege, and reiterate the entirety of their March 28, 2014 verified complaint pertaining to the Legislature's and Judiciary's proposed budgets and the Governor's Legislative/Judiciary Budget Bill #S.6351/A.8551 for fiscal year 2014-2015 and the entirety of their March 31, 2015 verified supplemental complaint pertaining to the Legislature's and Judiciary's proposed budgets and the Governor's Legislative/Judiciary Budget Bill #S.2001/A.3001 for fiscal year 2015-2016, incorporating both by reference, as likewise the record based thereon.

241. Virtually all the constitutional, statutory, and rule violations therein detailed are replicated in the Legislature's and Judiciary's proposed budgets for fiscal year 2016-2017 and the Governor's Legislative/Judiciary Budget Bill #S.6401/A.9001 – including as to the judicial salary increases that will automatically take effect April 1, 2016. As stated at ¶129 of the verified supplemental complaint – and even truer now – "It is, as the expression goes, "déjà vu all over again".

242. For the convenience of the Court, a Table of Contents follows:

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The Legislature's Proposed Budget for Fiscal Year 2016-2017, Embodied in Budget Bill #S.6401/A.9001, is Unconstitutional & Unlawful

2008 reports on the Legislature. Rather, it is because – without warrant of the Constitution, statute, or Senate and Assembly rules, as here demonstrated, the Temporary Senate President and Speaker have seized control of the Legislature's own budget, throwing asunder the constitutional command: 'itemized estimate of the financial needs of the legislature, certified by the presiding officer of each house'".

316. Once again, defendant CUOMO has abetted this constitutional defiance – including by not even furnishing a recommendation on the Legislature's budget that he sends back to it "without revision".

AS AND FOR A TENTH CAUSE OF ACTION

The Judiciary's Proposed Budget for 2016-2017, Embodied in Budget Bill #S.6401/A.9001, is Unconstitutional & Unlawful

317. Plaintiffs repeat, reiterate, and reallege ¶¶1-316 with the same force and effect as if more fully set forth herein – and, specifically, their "Questions for Chief Administrative Judge Marks", transmitted by their February 2, 2016 e-mail (Exhibit 44).

318. The Judiciary's proposed budget for fiscal year 2016-2017, embodied by Budget Bill #S.6401/A.9001, is materially identical to the Judiciary's proposed budget for fiscal years 2014-2015 and 2015-2016, embodied by the Governor's Legislative/Judiciary budget bills for those years. As such, it suffers from the same unconstitutionality, unlawfulness, and fraudulence as set forth by the second cause of action of plaintiffs' verified complaint (¶¶99-108), reiterated and reinforced by the sixth cause of action of plaintiffs' supplemental verified complaint (¶¶179-193).

319. Identical to the Judiciary's proposed budget for the past two fiscal years, defendant CUOMO, his Division of the Budget, and defendants SENATE and ASSEMBLY are unable to comprehend the Judiciary's proposed budget for fiscal year 2016-2017 on its most basic level: its cumulative dollar amount and its percentage increase over the Judiciary's budget for the current

fiscal year. As stated at the outset of plaintiffs' "Questions for Chief Administrative Judge Marks" (Exhibit 44), they diverge as to relevant figures and percentages:

A. Defendant CUOMO's "Commentary of the Governor on the Judiciary" (Exhibit 79-a):

> "The Judiciary has requested appropriations of $2.13 billion for court operations, exclusive of the cost of employee benefits. As submitted, disbursements for court operations from the General Fund are projected to grow by $44.4 million or 2.4 percent."

B. Defendant CUOMO's Division of the Budget website, which defers to text furnished by Judiciary (Exhibit 29-a):

> "The Judiciary's General Fund Operating Budget requests $1.9 billion, excluding fringe benefits, for Fiscal Year 2016-2017. This represents a cash increase of $44.4 million, or 2.4%. The appropriation request is $1.9 billion, which represents a $43.4 million, or 2.3%, increase.
>
> ...
>
> The Judiciary's All Funds budget request for Fiscal Year 2016-2017, excluding fringe benefits, totals $2.13 billion, an appropriation increase of $48.3 million or 2.3% over the 2014-2015 All Funds budget..."

C. Senate Majority's "White Book", under Senate Finance Committee Chair Young's auspices (Exhibit 29-b):

> "The FY 2017 Executive Budget proposes All Funds spending of $2.9 billion, an increase of $112.2 million, or 4.1 percent." (p. 91). This is further particularized by a chart representing this as "Proposed Disbursements – All Funds": $2,865,600,000 – representing a change of $112,224.000 and a percentage of 4.08% (p. 93).
>
> "the Judiciary's proposed budget would increase general fund cash spending by $44.4 million, or 2.4 percent".

D. Senate Minority's "Blue Book", under Senate Finance Committee Ranking Member Krueger's auspices (Exhibit 29-c):

> "The Judiciary proposed Budget is $2.13 billion, an increase of $48.2 million or 2.3% from the SFY 2015-2016 Enacted Budget..." (p. 179).

This is further particularized by a chart as the "Executive Recommendation 2016-17": $2,132,526,345, the "$ change" as $48,254,307, and the "% Change" as 2.3% (p. 179).

E. Assembly Majority's "Yellow Book", under Assembly Ways and Means Committee Chair Farrell's auspices (Exhibit 29-d):

> "The Judiciary's proposed budget request recommends appropriations of $2.9 billion, which is an increase of $81.94 million or 2.9 percent from the State Fiscal Year (SFY) 2015-16 level." (p. 145).
>
> A table of "Appropriations" shows the "Exec Request", in millions, at "2,877.49" millions of dollars, representing a change of "81.94" millions of dollars with a percent change of "2.93'. A table of "Disbursements" shows an "Exec Request", in millions, at "2,865.60" millions of dollars, representing a change of "112.23" millions of dollars, for a percent change of "4.08". (p. 145).

F. Assembly Minority's "Green Book", under Assembly Ways and Means Committee Ranking Member Oaks' auspices (Exhibit 29-e):

> "$2.1 billion for the Judiciary, $48.3 million more than last year. This represents a 2.3% increase in spending."
>
> "General State Charges: (Non-Salary) Benefits: $730 million for General State charges. $34 million more than last year. This pays for fringe benefits of employees of the court system, including all statutorily-required and collectively bargained benefits."

320. Plaintiffs now additionally challenge the constitutionality and lawfulness of the interchange provision appearing at §2 of the Judiciary's "single budget bill" (Exhibit 25-d) – and replicated, *verbatim*, in §2 of defendant CUOMO's Legislative/Judiciary Budget Bill #S.6401/A.9001[7] (Exhibit 27-b, p. 10). Such challenge is both *as written and as applied.*

321. Plaintiffs' challenge to the constitutionality of the interchange provisions, *as written*, begins with *Hidley v. Rockefeller*, 28 N.Y.2d 439, 447-449 (1971), wherein then Chief Judge Stanley Fuld, writing in dissent from the Court's decision addressed only to the issue of standing, stated:

[7] The same interchange provision identically appears at §2 of the Judiciary's "single budget bill" for the past two fiscal years, incorporated *verbatim* in defendant CUOMO's Legislative/Judiciary budget bills for those years.

> "...the provisions which permit the free interchange and transfer of funds are unconstitutional on their face...To sanction a complete freedom of interchange renders any itemization, no matter how detailed, completely meaningless and transforms a schedule of items or of programs into a lump sum appropriation in direct violation of Article VII of the Constitution. (underlining added).

322. *As written*, the interchange provision here at issue states:

> "Notwithstanding any provision of law, the amount appropriated for any program within a major purpose within this schedule may be increased or decreased in any amount by interchange with any other program in any other major purpose, or any appropriation in section three of this act, with the approval of the chief administrator of the courts." (Exhibit 27-b, p. 10).

323. *As written*, the "notwithstanding any provision of law" language is vague and overbroad. The "law" includes the New York State Constitution – and such is unconstitutional, *on its face*, as no statute can override the Constitution.

324. At bar, the "notwithstanding any provision of law" language authorizes the Judiciary to violate New York State Constitution, Article VII, §1, §4, §6, and §7, which speak of "itemized estimates", "items of appropriations"; "stated separately and distinctly...and refer each to a single object or purpose"; made for "a single object or purpose", that are "particular" and "limited"; that "distinctly specify the sum appropriated, and the object or purpose to which it is to be applied" as well as Article IV, §7 pertaining to the Governor's line-item veto of "items of appropriations".[8]

325. Moreover, the "law" includes the very statute governing judiciary interchanges, Judiciary Law §215 – and there is no basis for *sub silentio* repudiating its careful statutory

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[8] So, too, do the statutes pertaining to appropriations and reappropriations require specificity. See, also, State Finance Law §43, entitled "Specific appropriations limited as to use; certain appropriations to be specific": "Money appropriated for a specific purpose shall not be used for any other purpose, and the comptroller shall not draw a warrant for the payment of any sum appropriated, unless it clearly appears from the detailed statement presented to him by the person demanding the same as required by this chapter, that the purposes for which such money is demanded are those for which it was appropriated..."

restrictions and safeguards, other than to accomplish what both the statute and Constitution proscribe.

326. Judiciary Law §215(1), entitled "Special provisions applicable to appropriations made to the judiciary in the legislature and judiciary budget", states:

> "1. The amount appropriated for any program within a major purpose within the schedule of appropriations made to the judiciary in any fiscal year in the legislature and judiciary budget for such year may be increased or decreased by interchange with any other program within that major purpose with the approval of the chief administrator of the courts who shall file such approval with the department of audit and control and copies thereof with the senate finance committee and the assembly ways and means committee except that the total amount appropriated for any major purpose may not be increased or decreased by more than the aggregate of five percent of the first five million dollars, four percent of the second five million dollars and three percent of amounts in excess of ten million dollars of an appropriation for the major purpose. The allocation of maintenance undistributed appropriations made for later distribution to major purposes contained within a schedule shall not be deemed to be part of such total increase or decrease.

327. Judiciary Law §215(1) restricts interchanges and their amounts to programs within the same "major purpose" – as to which the Chief Administrator's approval must be filed with "the department of audit and control and copies thereof with the state finance committee and the assembly ways and means committee". Such accords with statutory requirements, conditions, and procedures set forth in State Finance Law §51 entitled "Interchange of appropriations or items therein" and the statutory sections to which State Finance Law §51 refers in stating:

> "No appropriation shall be increased or decreased by transfer or otherwise except as provided for in this section or section fifty-three, sixty-six-f, seventy-two or ninety-three of this chapter, or article eight of the education law"[9]

328. In other words, *as written*, the interchange provision of §2 gives the Chief Administrator complete discretion to do whatever he wants, unbounded by any standard and by any

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[9] State Finance Law §53, entitled "Special emergency appropriations"; State Finance Law §66-f, entitled "Certain interagency transfers authorized"; State Finance Law §72, entitled "General fund"; State Finance Law

reporting/notice requirement to the other two government branches. Such is unconstitutional and unlawful.

329. *As applied*, the interchange provision is unconstitutional and unlawful in that it creates a slush-fund and permits concealment of true costs. It has enabled the Judiciary to surreptitiously fund, in fiscal year 2013-2014, the second phase of the judicial salary increase recommended by the Commission on Judicial Compensation's August 29, 2011 Report, without identifying the dollar amount of such increase, and, in fiscal year 2014-2015, to even more surreptitiously fund the third phase of the judicial salary increase recommended by the Commission's August 29, 2011 Report, without even identifying the third phase.

330. The Judiciary's responses to legitimate FOIL requests about its use of the interchange provision in fiscal year 2015-2016 – and about the dollar costs of the Commission on Judicial Compensation's three-phase judicial salary increases, funded from reappropriations (Exhibits 50, 49) – only further reinforce the unconstitutionality of the interchange provision, *as applied*.

331. Should defendant CUOMO adhere to his Commentary, "...I expect that [the Judiciary] will again absorb the first year of recommended judicial salary increases within an overall spending level of 2 percent in the 2016-17 budget" (Exhibit 27-a), the Judiciary will presumably fund the first phase of the judicial salary increase recommended by the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation from the §3 reappropriations, *via* the §2 interchange provision.

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§93, entitled "Capital projects fund"; and Education Law §355(4)(c), "Powers and duties of trustees-

budget.[20] As for meaningful and accurate information about the Legislature's budget, the legislative committees whose charge that would be – the Senate Committee on Investigations and Government Operations; the Assembly Committee on Governmental Operations, and the Assembly Committee on Oversight, Analysis, and Investigation – will offer nothing on the subject.

AS AND FOR A THIRTEENTH CAUSE OF ACTION

Chapter 60, Part E of the Laws of 2015 is Unconstitutional, *As Written* – and the Commission's Judicial Salary Increase Recommendations are Null & Void by Reason Thereof

385. Plaintiffs repeat, reiterate, and reallege ¶¶1-384, with the same force and effect as if more fully set forth herein.

386. The budget bill statute establishing the Commission on Legislative, Judicial and Executive Compensation – Chapter 60, Part E, of the Laws of 2015 – is more egregiously unconstitutional than the materially identical statute it repealed and replaced: Chapter 567 of the Laws of 2010, which established the Commission on Judicial Compensation, as, unlike the predecessor statute, it is the product of behind-closed-doors, three-men-in-a-room budget deal-

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twenty-two of this article. The findings and descriptions contained in the report required by this section shall constitute the expression of legislative intent with respect to the budget to which such report relates."

20 The Senate Judiciary Committee's 2015 Annual Report's section on the Judiciary budget for fiscal year 2015-2016 is two sentences: "The Legislature adopted a Unified Court System Budget increase to $1.85 billion. This reflects an increase of $36.3 million. The overall Judiciary budget increase was 2%." (Exhibit 33-a).

The Assembly Judiciary Committee 2015 Annual Report's section is a single sentence longer, but only the first sentence contains any numbers: "The 2015-2016 State budget adopted without change the Judiciary's budget request for appropriations in the amount of $2.8 billion." (Exhibit 33-b, underlining added).

Quite apart from the nearly 1 billion dollar difference between their figures as to the dollar cost of the Judiciary budget for fiscal year 2015-2016, the Assembly Judiciary Committee's assertion that the Judiciary's budget request was "adopted without change" is false. There were approximately $9 million dollars cut from the Judiciary's budget request, but in the complete absence of any formatting changes in the amended bill and the complete absence of amended introducer's memoranda, fiscal note, fiscal impact statement, or reports pursuant to Legislative Law §54 and State Finance Law §22-b, the only way to discern is a line-by-line comparison of the original and enacted bill. Apparently the Assembly Judiciary Committee was unwilling to do even that.

making by defendants CUOMO, HEASTIE, and then Temporary Senate President SKELOS, with a timetable reinforcing it as "a devious and underhanded means" for legislators" to obtain "a salary increase without accepting any responsibility therefor".[21]

387. The record of this citizen-taxpayer action already contains a full briefing as to the unconstitutionality of both statutes, *as written*.[22] Below is a synthesis of what is already briefed and before the Court, now exclusively addressed to the unconstitutionality of Chapter 60, Part E, of the Laws of 2015, *as written*:

A. Chapter 60, Part E, of the Laws of 2015 Unconstitutionally Delegates Legislative Power by Giving the Commission's Judicial Salary Recommendations "the Force of Law"

388. On June 3, 2015, five Assembly members, all in the minority, and including the ranking member of the Assembly Committee on Governmental Operations, introduced a bill to amend Chapter 60, Part E, of the Laws of 2015 to remove its provision giving the Commission's salary increase recommendations "the force of law" and making its report for legislative and executive officers due at the same time as for judicial officers. The bill was A.7997 and its accompanying introducers' memorandum, submitted "in accordance with Assembly Rule III, Sec 1(f)" (Exhibit 34), stated, in pertinent part:

> "On March 31, 2015, a 137 page budget bill (S4610-A/A6721-A) was introduced, and was adopted by the Senate late that evening. The Senate bill was adopted by the Assembly after 2:30am on April 1, 2015.
>
> This budget bill included, inter alia, legislation to establish a special commission on compensation (hereinafter 'Commission') consisting of seven members, with three appointed by the Governor, one appointed by the Temporary

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21 Quote from introducers' memorandum to A.7997, *infra* at ¶388 (Exhibit 34).

22 Plaintiffs' challenge to the constitutionality of Chapter 567 of the Laws of 2010, *as written*, is the second cause of action of their March 30, 2012 verified complaint in their declaratory judgment action, *CJA v. Cuomo, et al.* – a full copy of which plaintiff SASSOWER had handed up to defendants SENATE and ASEMBLY when she testified at their February 6, 2013 "public protection" hearing – and a duplicate of which she furnished the Court in support of plaintiffs' September 22, 2015 cross-motion in support of summary judgment and other relief. Plaintiffs' September 22, 2015 cross-motion and their November 5, 2015 reply papers expanded the challenge to encompass Chapter 60, Part E, of the Laws of 2015, *as written*.

President of the Senate, one appointed by the Speaker of the Assembly, and two appointed by the Chief Judge of the State of New York. There were no appointments from the Senate minority or the Assembly minority.

This budget bill required the Commission to make its recommendations for judicial compensation not later than December 31, 2015, and for legislative and executive compensation not later than November 15, 2016. The budget bill further stated that such determinations shall have 'the force of law' and shall 'supercede' inconsistent provisions of the Judiciary Law, Executive Law, and the Legislative Law, unless modified or abrogated by statute.

This budget bill would enable legislators to receive substantial salary increases after the next election without incurring any political backlash for voting for those increases.

The budget bill was clear that the salary recommendations for legislators would not be announced until after the next election, too late to encourage potential candidates to run in the election against the incumbents and too late to require incumbents to justify such a salary increase during the election.

By making the salary increases automatic, the legislators would not need to vote on such increases at all, thereby enabling the legislators to avoid the political liability that would result from voting for large and unpopular salary increases for themselves. Indeed, since the Legislature would normally not be in session immediately after an election, there would not even be an opportunity for individual legislators to vote on such salary increase unless both houses of the legislature were called back into special session for this specific purpose. This would enable all the legislators to speak out against the salary recommendations, while knowing that they would not actually need to vote against such increases."

389. The memorandum then specified six different respects in which the bill's provision giving the Commission's salary recommendations "the force of law" was unconstitutional:

"b. Article III, Section 1 of the New York State Constitution states that the legislative power 'shall be vested in the Senate and Assembly.' A non-elected commission cannot be delegated legislative power to enact recommendations 'with the force of law' that can 'supercede' inconsistent provisions of law.

...

d. Article III, Section 13 of the New York State Constitution states that 'no law shall be enacted except by a bill,' yet the salary commission was given the power to enact salary recommendations 'with the force of law' without any legislative bill approving of such salaries being considered by the legislature.

e. Article III, Section 14 of the New York State Constitution states that no bill shall be passed 'or become law' except by the vote of a majority of the members elected to each branch of the legislature. The budget bill, however, stated that the recommendations of the salary commission would 'have the force of law' without any vote whatsoever by the legislators. Such a provision deprives the members of

the legislature of their Constitutional right to vote on every bill prior to its enactment into law.

f. Article IV, Section 7 of the New York State Constitution gives the Governor the authority to veto any bill, but there is no corresponding ability of the Governor to veto any recommendations of the salary commission before such recommendations would become effective."

And, additionally:

"a. Article III, Section 6 of the New York State Constitution states that each member of the legislature shall receive an annual salary 'to be fixed by law.' The Constitution does not state that members of the legislature shall receive a salary 'to be fixed by a commission.'

...

c. Article III, Section 6 of the New York State Constitution states that legislators shall continue to receive their current salary 'until changed by law.' A non-elected commission cannot 'change the law' since only the State Legislature has the power to change the law." (Exhibit 34).

390. In *St. Joseph Hospital, et al. v. Novello, et al.*, 43 A.D.3d 139 (2007), a case challenging a statute that gave "force of law" effect to a special commission's recommendations – Chapter 63, Part E, of the Laws of 2005 – then Appellate Division, Fourth Department Justice Eugene Fahey, writing in dissent, deemed the statute unconstitutional, violating the presentment clause and separation of powers:

"It is apparent that the Legislation inverts the usual procedure utilized for the passage of a bill. According to the usual procedure, a bill is presented to the Governor for his or her signature or veto after passage by the Senate and the Assembly. Should the Governor sign the bill, it becomes law; should the bill be vetoed, the veto may be overridden by a two-thirds vote of the Legislature. Here, the Legislation creates a process that allows the recommendations of the Commission to become law without ever being presented to the Governor after the action of the Legislature." *Id*, 152.

391. Justice Fahey's dissent was cited by the New York City Bar Association's *amicus curiae* brief to the Court of Appeals in a different case challenging the same statute, *Mary McKinney, et al. v. Commissioner of the New York State Department of Health, et al.*, 15 Misc.3d 743 (S.Ct. Bronx 2006), affm'd 41 A.D.3d 252 (1st Dept. 2007), appeal dismissed, 9 N.Y.3d 891 (2007),

appeal denied, 9 N.Y.3d 815; motion granted, 9 N.Y.3d 986. It characterized "the force of law" provision as:

> 'a process of lawmaking never before seen in the State of New York' (at p. 24);
>
> a 'novel form of legislation...in direct conflict with representative democracy [that] cannot stand constitutional scrutiny (at p. 24)';
>
> a 'gross violation of the State Constitution's separation-of-powers and...the centuries-old constitutional mandate that the Legislature, and no other entity, make New York State's laws' (at p. 25);
>
> 'most unusual [in its]...self-executing mechanism by which recommendations formulated by an unelected commission automatically become law...without any legislative action' (at p. 28);
>
> unlike 'any other known law' (at p. 29);
>
> 'a dangerous precedent' (at p. 11) that
>
> 'will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to any public scrutiny or accountability (at p. 36).[23]

392. This outsourcing to an appointed seven-member commission of the duties of examination, evaluation, consideration, hearing, recommendation, which Chapter 60, Part E, of the Laws of 2015 confers upon it, are the duties of a properly functioning Legislature, acting through its committees – and there is NO EVIDENCE that any legislative committee has ever been unsuccessful in engaging in such duties and in producing bills based thereon that could not then be enacted by the Legislature and Governor.

393. The unconstitutionality of "the force of law" provision of Chapter 60, Part E, of the Laws of 2015 – and of the timing for the Commission's recommendation for legislative and

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23 The City Bar's *amicus* brief is posted on the webpage of this verified second supplemental complaint, on the Center for Judicial Accountability's website, www.judgewatch.org, accessible from the sidebar panel "Judicial Compensation-NY".

executive branch officers – requires the striking of the statute, in its entirety – there being no severability provision in the statute. (*St. Joseph Hospital, et al. v. Novello, et al., id.*).

B. Chapter 60, Part E, of the Laws of 2015 Unconstitutionally Delegates Legislative Power Without Safeguarding Provisions

394. By contrast to *McKinney*, where the Supreme Court upheld the statute because of the safeguarding provisions it contained, such safeguards are here absent.

395. Unlike the statute in *McKinney*, Chapter 60, Part E, of the Laws of 2015 does not provide for a commission of sufficient size and diversity, nor furnish the commission with sufficient guidance as to standards and factors governing its determinations.

396. It establishes a seven-member commission – and of these, only two members are legislative appointees, designated by the majority leaders of each house. This is an insufficient number to reflect the diversity of either the Legislature or the State.

397. Nor does the statute specify neutrality as a criteria for appointment – and having two commissioners appointed by the chief judge assures that at least two of the seven commissioners will have been appointed to achieve the Judiciary's agenda of pay raises.

398. As the Judiciary would otherwise have no deliberative role in determining judicial pay raises legislatively and the Chief Judge is directly interested in the determination, the Chief Judge's participation as an appointing authority is, at very least, a constitutional infirmity.

399. Additionally, Chapter 60, Part E, of the Laws of 2015 furnishes insufficient guidance to the Commission as to the "appropriate factors" for it to consider. The statute requires the Commission to "take into account all appropriate factors, including but not limited to" six enumerated factors (§2, ¶3). These six enumerated factors are all economic and financial – and are completely untethered to any consideration as to whether the judges whose salaries are being evaluated are discharging their constitutional duty to render fair and impartial justice and afford the

People their due process and equal protection rights under Article I of the New York State Constitution.

400. It is unconstitutional to raise the salaries of judges who should be removed from the bench for corruption or incompetence – and who, by reason thereof, are not earning their current salaries. *Consequently, a prerequisite to any judicial salary increase recommendation must be a determination that safeguarding appellate, administrative, disciplinary and removal provisions of Article VI of the New York State Constitution are functioning.*

401. Likewise, it is unconstitutional to raise the salaries of other constitutional officers and public officials who should be removed from office for corruption – and who, by reason thereof, are not earning their current salaries. *Consequently, a prerequisite to any salary increase recommendation as to them must be a determination that mechanisms to remove such constitutional and public officers are functional, lest these corrupt public officers be the beneficiaries of salary increases.*

402. The absence of explicit guidance to the Commission that corruption and the lack of functioning mechanisms to remove corrupt public officers are "appropriate factors" for its consideration in making salary recommendations renders the statute unconstitutional, *as written.*

C. Chapter 60, Part E, of the Law of 2015 Violates Article XIII, §7 of the New York State Constitution

403. Article XIII, §7 of the New York State Constitution states:

> "Each of the state officers named in this constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed".

404. This express prohibition was highlighted by the then Governor and the Senate and Assembly in 2009 in defending against the judges' judicial pay raise lawsuits before the New York Court of Appeals. Their November 23, 2009 brief stated:

> "This Court has never decided whether the provision of Article XIII, §7, banning salary increases during a State officer's term of office, applies to judges.... it seems unlikely that this Court could uphold the order below, to the extent it was adverse to Defendants, or grant relief to Plaintiffs on their appeal, without addressing Article XIII, §7."

405. Yet, the Court of Appeals' February 23, 2010 decision in *Maron v. Silver*, 14 N.Y.3d 230, granting judgment in favor of the judges, neither addressed nor even mentioned Article XIII, §7.

406. Because Chapter 60, Part E, of the Laws of 2010, *as written*, allows the Commission to effectuate salary increases for judges during their terms, it violates Article XIII, §7 and is unconstitutional.

D. <u>Chapter 60, Part E, of the Laws of 2015 is Unconstitutional because Budget Bill #S.4610/A-6721 Violated Article VII, §6 of the New York State Constitution – and, Additionally, Article VII, §§2 and 3</u>

407. Beyond the six constitutional violations that the legislators' introducers' memorandum for A.7997 itemized concerning "the force of law" provision of Chapter 60, Part E, of the Laws of 2015 (Exhibit 34), their memorandum included a further constitutional violation as to the whole of Part E:

> "Article VII, Section 6 of the New York State Constitution states in relevant part that '(n)o provision shall be embraced in any appropriation bill unless it relates specifically to some particular appropriation in the bill,' yet there was no appropriation in the budget bill relating to the salary commission. Thus, this legislation was improperly submitted and considered by the legislature as an unconstitutional rider to a budget bill."

408. In fact, Part E, which was Part E of defendant CUOMO's Budget Bill #S.4610/A.6721 (Exhibit 35-a), violated not only Article VII, §6, but Article VII, §§2 and 3.

409. In pertinent part, Article VII, §§2 and 3 state:

§2. ...on or before the second Tuesday following the first day of the annual meeting of the legislature..., the governor shall submit to the legislature a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the basis of such estimates and recommendations as to proposed legislation, if any, which the governor may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures. It shall also contain such other recommendations and information as the governor may deem proper and such additional information as may be required by law.

§3. At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein. The governor may at any time within thirty days thereafter 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..."

410. Pursuant to Article VII, §2, defendant CUOMO submitted his executive budget for fiscal year 2015-2016 on January 21, 2015. No Budget Bill #S.4610/A.6721 was part of his submission – nor any legislation proposing a Commission on Legislative, Judicial and Executive Compensation.

411. On March 31, 2015, following behind-closed-doors, three-men-in-a-room budget deal-making, Budget Bill #S.4610/A.6721, bearing the date March 31, 2015, was introduced (Exhibit 35-a) – containing a Part E (pp. 93-95), summarized at the outset of the bill as:

"establishing a commission on legislative, judicial and executive compensation, and providing for the powers and duties of the commission and for the dissolution of the commission and repealing chapter 567 of the laws of 2010 relating to establishing a special commission on compensation, and providing for their powers and duties; and to provide periodic salary increases to state officers".

412. Such Budget Bill #S.4610/A.6721 was unconstitutional, *on its face*:

(a) it was untimely – Article VII, §3 required defendant CUOMO to submit his "bills containing all the proposed appropriations and reappropriations" when he submitted

his executive budget, on January 21, 2015. Likewise his proposed legislation relating thereto. No new budget bill, embracing never-proposed legislation, could be constitutionally submitted by him on March 31, 2015 (*Winner v. Cuomo*, 176 A.D.2d 60, 63 (3rd Dept. 1992));[24]

(b) its content was improper – Part E was not legislation capable of providing "monies and revenues" for expenditures of the budget, as Article VII, §2 specifies and, compared to other Parts of the bill, it had the most tenuous connection to the budget, having no relation at all. (*Pataki v. Assembly*, 4 NY3d 75 (2004)).[25]

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[24] *Winner v. Cuomo*, at p. 63: "As Members of the State Assembly, plaintiffs are charged with acting on the Executive Budget (NY Const, art VII, § 4). Defendant, in turn, has a constitutional and statutory obligation to timely submit his budget bills to the Legislature (NY Const, art VII, §3; State Finance Law §24). By reducing the time available to review the budget bills, defendant impinges upon the Legislature's opportunity to timely review his proposals and hampers the ability to question Executive Department heads regarding the budget (Legislative Law § 31)."

State Finance Law §24, "Budget bills": "1. The budget submitted annually by the governor shall be simultaneously accompanied by a bill or bills for all proposed appropriations and reappropriations and for the proposed measures of taxation or other legislation, if any, recommended therein. Such bills shall be submitted by the governor and shall be known as budget bills."

[25] While the three-judge plurality opinion in *Pataki v. Assembly*, 4 NY 3d. at 99, "le[ft] for another day the question of what judicially enforceable limits, if any, beyond the anti-rider clause of article VII, §6, the Constitution imposes on the content of appropriation bill", the concurrence of Judge Rosenblatt, which had made the plurality a majority, took issue with their approach stating (at 101-102):

> "A proper resolution of these lawsuits requires a test, consisting of a number of factors, no single one of which is conclusive, to determine when an appropriation becomes unconstitutionally legislative. To begin with, anything that is more than incidentally legislative should not appear in an appropriation bill, as it impermissibly trenches on the Legislature's role. The factors we consider in deciding whether an appropriation is impermissibly legislative include the effect on substantive law, the durational impact of the provision, and the history and custom of the budgetary process.
>
> In determining whether a budget item is or is not essentially an appropriation, one must look first to its effects on substantive law. The more an appropriation actively alters or impairs the State's statutes and decisional law, the more it is outside the Governor's budgetary domain. A particular 'red flag' would be non-pecuniary conditions attached to appropriations.
>
> History and custom also count in evaluating whether a Governor's budget bill exceeds the scope of executive budgeting. The farther a Governor departs from the pattern set by prior executives, the resulting budget actions become increasingly suspect. I agree that customary usage does not establish an immutable model of appropriation (*see* plurality op at 98). At the same time, it would be wrong to ignore more than 70 years of executive budgets that basically consist of line items.
>
> The more an executive budget strays from the familiar line-item format, the more likely it is to be unauthorized, nonbudgetary legislation. As an item exceeds a simple identification of a sum of money along with a brief statement of purpose and a recipient, it takes on a more legislative character. Although the degree of specificity the Governor uses in describing an appropriation is within executive discretion (*see People v Tremaine*, 281 N.Y. 1, 21 N.E.2d 891 [1939]), when the specifics transform an appropriation into proposals for programs, they poach on powers reserved for the Legislature.

E. Chapter 60, Part E, of the Laws of 2015 is Unconstitutional because Budget Bill #S.4610-A/A.6721-A was Procured Fraudulently and Without Legislative Due Process

413. Budget Bill #S.4610/A.6721, both introduced and amended on March 31, 2015 (Exhibits 35-a, 35-b), stated in its first section:

> "This act enacts into law major components of legislation which are necessary to implement the state fiscal plan for the 2015-2016 state fiscal year. Each component is wholly contained within a Part identified as Parts A through J."

414. This was false and fraudulent with respect to Part E. Part E was in no way a "component[] of legislation necessary to implement the state fiscal plan for the 2015-2016 state fiscal year", let alone a "major" one.

415. Also materially false and fraudulent was the prefatory paragraphs to the amended Budget Bill #S.4610-A/A.6721-A (Exhibit 35-b), insofar as they connote legitimate legislative process:

> "IN SENATE – A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution – read twice and ordered printed, and when printed to be committed to the Committee on Finance – committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee
>
> IN ASSEMBLY – A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution – read once and referred to the Committee on Ways and Means – again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee".

In addition, the more a provision affects the structure or organization of government, the more it intrudes on the Legislature's realm. The executive budget amendment contemplates funding – but not organizing or reorganizing – state programs, agencies and departments through the Governor's appropriation bills.

The durational consequences of a provision should also be taken into account. As budget provisions begin to cast shadows beyond the two-year budget cycle, they look more like nonbudget legislation. The longer a budget item's potential lifespan, the more legislative is its nature. Similarly, the more a provision's effects tend to survive the budget cycle, the more it usurps the legislative function."

416. The amending of Budget Bill #S.4610/A.6721 was completely opaque, both in the Senate and Assembly. Upon information and belief, the amendments were not voted on in any committee or on the Senate and Assembly floor and no amended introducers' memorandum revealed the changes to the bill. Reflecting this – as relates to the Senate Finance Committee – is the video of its two-minute March 31, 2015 meeting,[26] whose sole agenda item was #S.4610-A/A.6721-A. Notwithstanding audio unintelligibility in parts, the following can be discerned:

Chair DeFrancisco: Senate Finance Committee meeting for this budget cycle and would you please read.

Clerk: Senate Bill 4610-A, a budget bill, enacts various provisions of law necessary to implement the state fiscal plan for the 2015-2016 state fiscal year.

Chair DeFrancisco: Is there a motion?

Unidentified woman: Yes.

Chair DeFrancisco: Senator Squadron. Yes, Senator Squadron.

Senator Squadron: I note this is an A. When did the original..?

Chair DeFrancisco: Sometime before the A, I don't know.

Laughter

Chair DeFrancisco: I simply don't, I simply don't. And is there some relevance to when it was actually?

Senator Squadron: I was just curious as to highlight, when this bill came out.

Chair DeFrancisco: It was before the Governor's original submission was the bill number 4610. This is an A because it made changes

Senator Squadron: They were both submitted then?

Chair DeFrancisco: They were what?

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26 http://www.nysenate.gov/calendar/meetings/finance/march-31-2015/finance-meeting-1. The Senate webpage shows the vote as having been 29 ayes, 2 nays, with 6 ayes without rec.

Senator Squadron: They were both submitted then?

Chair DeFrancisco: The Governor's bill was submitted a long time ago.

Senator Squadron: The original 4610 wasn't [unintelligible].

Chair DeFrancisco: Clarification.

Ranking Member Krueger: The section C in this bill between the, sorry, Senator Squadron? In the amended version, section C is different than in the previous version. And, also, the fact sheet has not been updated, so that it's actually not correct, so you might just want to double check section C.

Senator Squadron: Thank you very much.

Chair DeFrancisco: The bill has been moved. The bill has been moved and seconded. All in favor.

Voices: Aye.

Chair DeFrancisco: Opposed.

Silence.

Senator Squadron: Without rec.

Chair DeFrancisco: Without rec, Senator Squadron, Rivera, Dilan. Perkins?

Chair DeFrancisco: No, for Senator Perkins. The bill is reported direct to the third reading. (gavel) We are adjourned.

417. Such video additionally establishes that the vote by the Senate Finance Committee – without which Budget Bill #S.4610-A/A.6721-A could not have proceeded to the Senate floor – was fraudulently procured by then Senate Judiciary Committee Chair DeFrancisco and Ranking Member Krueger, both of whom knew – including from the very face of the bill which identified that day's date – that it was not introduced "a long time ago".

418. Part E, which was not amended when Budget Bill #S.4610/A.6721 was amended, was entirely new legislation. However, notwithstanding the bill's "EXPLANATION – Matter in <u>italics</u>

(underscored) is new; matter in brackets [ ] is old law to be omitted", nothing in either the unamended bill nor the amended bill revealed that Part E was new (Exhibits 35-a, 35-b).

419. In fact, Part E did not belong in Budget Bill #S.4610/A.6721. If it belonged in any budget bill, it would have been defendant CUOMO's Budget Bill #S.2005/A.3005, introduced on January 21, 2015 as his "Public Protection and General Government Article VII Legislation" (Exhibit 36-a) – and containing a Part I (eye) establishing a Commission on Executive and Legislative Compensation, structured differently from Chapter 567 of the Laws of 2010, which it did not repeal. Most significantly, the salary recommendations of the Commission on Executive and Legislative Compensation would not have "the force of law" (Exhibits 36-a, 36-b, 36-c).

420. On March 27, 2015, by an opaque amendment process, this Protection/General Government Budget Bill #S.2005/A.3005 was amended twice – the first time, retaining Part I (eye) (pp. 42-44), and second time, dropping it as "Intentionally Omitted" (p. 21). The Assembly memorandum for this second amendment, A.3005-B, (Exhibit 36-d) gave no explanation for why Part I (eye) was dropped – or, for that matter, what the now omitted Part I (eye) had consisted of.

421. Four days later, on March 31, 2015, and without any accompanying introducer's memorandum, in violation of Senate Rule VII, §1 and Assembly Rule III, §§1f, 2(a), defendant CUOMO's Budget Bill #S.4610/A.6721 (Exhibits 35-a, 35-b) was untimely introduced in violation of Article VII, §§2, 3 of the New York State Constitution and State Finance Law §24 based thereon, and then, in violation of Senate Rule VII, §4b and Assembly Rule III, §§1f, 6, amended in an even more opaque fashion (Exhibits 35-a, 35-c) and without any amended introducer's memorandum (Exhibit 35-d). Its Part E repealed Chapter 567 of the Laws of 2010, thereupon modeling the Commission on Legislative, Judicial and Executive Compensation on the repealed statute – including its provision for giving the Commission's salary recommendations "the force of law".

422. The fact that this just-introduced/just-amended S.4610-A/A.6721-A, with its Part E, was then sped through to the Senate and Assembly floor, on a "message of necessity", to meet an April 1 fiscal year deadline, which had no relevance to it, only exacerbates the injury to the public which, pursuant to Legislative Law §32-a, had a right to be heard at a legislative hearing on the budget about a budget bill containing Part E (*Winner v. Cuomo, supra*, at p. 62, fn. 24.)

423. At bar, defendants' violations of multitudinous constitutional, legislative, and mandatory Senate and Assembly rule provisions, denying the People legislative due process and perpetrating fraud, render Chapter 60, Part E, of the Laws of 2015 unconstitutional. "*Albany's Dysfunction Denies Due Process*", 30 Pace L. Rev. 965, 982-983 (2010) Eric Lane, Laura Seago.

AS AND FOR A FOURTEENTH CAUSE OF ACTION

Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, *As Applied* – & the Commission's Judicial Salary Increase Recommendations are Null & Void by Reason Thereof

424. Plaintiffs repeat, reiterate, and reallege ¶¶1-423, with the same force and effect as if more fully set forth herein.

425. Defendants' refusal to discharge ANY oversight duties with respect to the constitutionality and operations of a statute they enacted without legislative due process renders the statute unconstitutional, *as applied*. Especially is this so, where their refusal to discharge oversight is in face of DISPOSITIVE evidentiary proof of the statute's unconstitutionality, *as written and as applied* – such as plaintiffs furnished them (Exhibits 38, 37, 39, 40, 41, 42, 43, 44, 46, 47, 48).

426. The Commission on Legislative, Judicial and Executive Compensation operated unconstitutionally in at least four specific respects – and plaintiffs presented these to the Commission as threshold issues for its determination.

427. The Commissioners' willful disregard of these four threshold issues suffice to render the judicial salary increase recommendations of their December 24, 2015 Report void *ab initio* – and Chapter 60, Part E, of the Law of 2015 unconstitutional, *as applied*.

A. ***As Applied*, a Commission Comprised of Members who are Actually Biased and Interested and that Conceals and Does Not Determine the Disqualification/Disclosure Issues Before it is Unconstitutional**

428. Plaintiff SASSOWER raised the threshold issue of the disqualification of three of the Commission's seven members – Barry Cozier, Esq., James J. Lack, Esq., and Chair Sheila Birnbaum, Esq. – directly to them at the conclusion of the Commission's first organizational meeting on November 3, 2015. The context was her furnishing to each Commissioner a copy of plaintiffs' October 27, 2011 Opposition Report to the Commission on Judicial Compensation's August 29, 2011 Report, pivotally demonstrating that systemic judicial corruption, involving supervisory and appellate levels and embracing the Commission on Judicial Conduct is a constitutional bar to raising judicial salaries.

429. Later that day, plaintiff SASSOWER reiterated the disqualification issue by a November 3, 2015 e-mail,[27] stating:

> "...should any of the Commissioners feel themselves unable to discharge their duties with respect to the systemic, three-branch corruption issues presented by CJA's citizen opposition – and that other citizens will be presenting, as well – they should step down from the Commission forthwith. Two Commissioners, Cozier and Lack, are absolutely disqualified by reason of their active role in that corruption – and Chairwoman Birnbaum perhaps as well. I so-stated this to them, this morning – and will particularize the details, with substantiating evidence, in advance of the November 30, 2015 public hearing, should they fail to step down from the Commission – or publicly disclose and address their conflicts of interest."

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[27] Exhibit 6 to plaintiffs' November 30, 2015 written testimony, contained in accompanying free-standing folder, at pp. 3-4.

430. In testifying at the Commission's November 30, 2015 hearing, plaintiff SASSOWER repeated that:

> "This Commission's threshold duty is, of course, to address issues of the disqualification of its members for actual bias and interest" (testimony, p. 4)

and that, with respect to Commissioners Cozier and Lack and Chair Birnbaum,

> "all three [had] demonstrated their utter disregard for casefile evidence of judicial corruption, particularly as relates to the Commission on Judicial Conduct and the court-controlled attorney disciplinary system, whose corruption they have perpetuated." (testimony, p. 4).

431. Plaintiff SASSOWER's December 2, 2012 supplemental submission furnished the particulars as to why these three Commissioners could not examine the evidence of systemic judicial corruption, raised by plaintiffs and other citizens in opposition to judicial salary increases, without exposing their pivotal roles in covering up that evidence and perpetuating the corruption (free-standing folder).

432. The failure and refusal of Commissioners Cozier, Lack, and Chair Birnbaum to rule upon the disqualification issue raised, the failure and refusal of their fellow Commissioners to rule upon it, and the concealment of the disqualification issue from the Commission's December 24, 2015 Report – simultaneously with concealing that systemic judicial corruption was ever raised in opposition to the judicial salary increases and that it is an "appropriate factor" – concede the disqualifications, *as a matter of law* – and renders the Report a nullity.

B. ***As Applied*, a Commission that Conceals and Does Not Determine Whether Systemic Judicial Corruption is an "Appropriate Factor" Barring Judicial Salary Increases is Unconstitutional**

433. In testifying before the Commission on November 30, 2015 at its one and only hearing on judicial compensation, plaintiff SASSOWER identified, both by her oral and written presentation, that:

> "The appellate, administrative, disciplinary, and removal provisions of Article VI [of the New York State Constitution] are safeguards whose integrity – or lack thereof – are not just 'appropriate factors' [for the Commission's consideration], but constitutional ones. Absent findings that these integrity safeguards are functioning and not corrupted, the Commission cannot constitutionally recommend raising judicial pay."

434. In so-stating, she was quoting from plaintiffs' October 27, 2011 Opposition Report which presented a constitutional analysis of the Court of Appeals February 23, 2010 decision in *Maron v. Silver,* 14 N.Y.3d 230, and Article VI of the New York State Constitution – and her written testimony appended the analysis, in full (Exhibit 3 thereto).

435. The Commissioners' failure to deny or dispute the accuracy of that analysis in any respect – and their concealment, by their December 24, 2015 Report, of the very issue that systemic judicial corruption, involving supervisory and appellate levels and the Commission on Judicial Conduct is an "appropriate factor" of constitutional magnitude – concedes it, *as a matter of law*.

C. *As Applied*, a Commission that Conceals and Does Not Determine the Fraud before It – Including the Complete Absence of ANY Evidence that Judicial Compensation and Non-Salary Benefits are Inadequate – is Unconstitutional

436. From the very first of plaintiff SASSOWER's e-mails to the Commission – on November 2, 201528 – she advised that the Commission on Judicial Compensation's August 29, 2011 Report was the product of fraud "covered up by all the executive and legislative public officers who believe themselves entitled to pay raises". Her e-mail stated that this was:

> "chronicled in CJA's October 27, 2011 Opposition Report, in a mountain of correspondence, criminal and ethics complaints relating thereto, and by the public interest litigations we have undertaken over the past four years, all accessible from the prominent links on CJA's homepage, www.judgewatch.org. ...
>
> Please forward this e-mail to all seven members of the Commission on Legislative, Judicial and Executive Compensation so that they can be

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28 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at pp. 5-6.

apprised of the systemic fraud, corruption, and dysfunction that is before them, threshold, not only with respect to judicial compensation, but with respect to legislative and executive compensation." (underlining in the original).

437. The following morning, November 3, 2015, before the Commission's first organizational meeting, plaintiff SASSOWER sent a second e-mail stating:

> "...inasmuch as CJA's October 27, 2011 Opposition Report to the Commission on Judicial Compensation's August 29, 2011 Report is the STARTING POINT for your determination of the compensation issues as relate to ALL THREE BRANCHES, I take this opportunity to furnish you that link, directly. Here it is: http://www.judgewatch.org/web-pages/judicial-compensation/opposition-report.htm. The four-page executive summary is attached.
>
> I am available to answer questions, including publicly and under oath." (red and capitalization in the original).

438. Following the November 3, 2015 first organizational meeting, plaintiff SASSOWER sent a second November 3, 2015 e-mail,[29] stating:

> "I hereby request to testify at the Commission's November 30, 2015 public hearing in New York City.
>
> Such hearing date, nearly 4 full weeks from now, gives each Commissioner ample time to individually determine whether, as particularized by CJA's October 27, 2011 Opposition Report, the 3-phase judicial pay raises recommended by the August 29, 2011 Report of the Commission on Judicial Compensation and received by this state's judges beginning April 1, 2012, are statutory-violative, fraudulent, and unconstitutional – thereby requiring that this Commission's recommendations – having 'the force of law' – be for the nullification/voiding of the August 29, 2011 Report AND a 'claw-back' of the $150-million-plus dollars that the judges unlawfully received pursuant thereto.
>
> Because of the importance of CJA's October 27, 2011 Opposition Report, not only to your statutorily-required December 31, 2015 report of 'adequate levels of compensation and non-salary benefits' for this state's judges, but to your statutorily-required November 15, 2016 report of 'adequate levels of compensation and non-salary benefits' for our legislative and executive constitutional officers, I furnished a hard copy of the full October 27, 2011 Opposition Report to Chairwoman Birnbaum at the conclusion of this morning's organizational meeting. It consisted of: (1)

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29 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at pp. 3-4.

CJA's 38-page Opposition Report; (2) CJA's substantiating two-volume Compendium of Exhibits; and (3) the final two motions in CJA's lawsuit against the Commission on Judicial Conduct that went up to the Court of Appeals in 2002 – identified by the Opposition Report as having been handed up by me to the Commission on Judicial Compensation at its one and only July 20, 2011 public hearing, in support of my testimony.

To the other three Commissioners physically present at this morning's meeting – Commissioners Johnson, Cozier, and Lack – I furnished to each, *in hand*, a copy of the 38-page Opposition Report and its 4-page Executive Summary.

As for the three Commissioners not physically present – Commissioners Hedges, Reiter, and Hormozi – I had brought to the meeting copies of the 38-page Opposition Report and 4-page Executive Summary for them, as well. Unless they request same, I will assume they will be reading and/or downloading the Opposition Report from CJA's webpage: http://www.judgewatch.org/web-pages/judicial-compensation/opposition-report.htm. The Executive Summary is attached. ..." (underlining, capitalization, and italics in the original).

439. Two weeks later, by a November 18, 2015 e-mail,[30] plaintiff SASSOWER stated that by now the Commissioners

> "should have each read and considered [the October 27, 2011 Opposition Report] so dispositive as to mandate a Commission request, if not demand, to the Judiciary and other judicial pay raise advocates for their comment, including their findings of fact and conclusions of law with respect thereto." (underlining in the original).

Based thereon, she stated:

> "please deem this e-mail as CJA's request that the Commission...give notice to the Judiciary and judicial pay raise advocates for their findings of fact and conclusions of law with respect to CJA's October 27, 2011 Opposition Report. As seen from the annexed October 28, 2011 e-mail from CJA to the Judiciary and judicial pay raise advocates, they have had a FULL FOUR YEARS to have made findings of fact and conclusions of law.
>
> Needless to say, the Commission's notice to the Judiciary and judicial pay raise advocates – particularly those who have already contacted the Commission about testifying at the November 30th Manhattan hearing – should request their response to CJA's assertion that the October 27, 2011 Opposition Report requires "that this Commission's recommendations – having 'the force of law' – be for the nullification/voiding of the August 29, 2011 Report AND a 'claw-back' of the $150 million-plus dollars that the

30 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at pp. 2-3.

judges unlawfully received pursuant thereto." (underlining added, capitalization in the original).

440. Yet, eleven days later, at the Commission's November 30, 2015 public hearing, the Commissioners allowed the Judiciary and judicial pay raise advocates to urge them to rely on the Commission on Judicial Compensation's August 29, 2011 Report – without the slightest inquiry as to their findings of fact and conclusions of law with respect to plaintiffs' October 27, 2011 Opposition Report.

441. Plaintiff SASSOWER's own testimony at the hearing reiterated that plaintiffs' October 27, 2011 Opposition Report "proved" the "fraudulence, statutory violations, and unconstitutionality of the Commission on Judicial Compensation's August 29, 2011 Report and its recommended judicial salary increases – and that the record of plaintiffs' three litigations based thereon established that:

> "But for the evisceration of any cognizable judicial process in ALL three of these litigations…current judicial salaries would rightfully be what they were in 2011 and the 2010 statute that created the Commission on Judicial Compensation which, in 2015, became the template for the statute creating this Commission, would have been declared unconstitutional, long, long ago." (testimony, p. 2).

She stated:

> "The Judiciary and judicial pay raise advocates testifying here today, and by their written submissions, tout the excellence and high-quality of the Judiciary – implicitly recognizing that judicial salary increases are predicated on judges fulfilling their constitutional function of rendering justice. Plainly, they need a reality check if they are actually unaware of the lawlessness and non-accountability that reigns in New York's judicial branch, notwithstanding our notice to them, again, and again, and again. Let them confront, with findings of fact and conclusions of law, our October 27, 2011 Opposition Report and our three litigations arising therefrom. This includes our constitutional analysis, drawn from the Court of Appeals' February 23, 2010 decision in the judges' judicial compensation lawsuits and from Article VI of the New York State Constitution…" (testimony, p. 2, underlining added).

She further stated that each of the Commissioners, by then, had had ample time to verify the accuracy of the October 27, 2011 Opposition Report and that "current judicial salary levels are…'ill-gotten gains', stolen from the taxpayers" (at p. 4).

442. On December 2, 2015, plaintiffs furnished the Commission with a supplemental submission stating:

> "The Commission's charge is to 'examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits' (§2.1) and 'the prevailing adequacy of pay levels and other non-salary benefits' (§2.2a(2)). None of the judges and other pay raise advocates testifying before you identified this. Instead, they misled you with rhetoric that the levels you should be setting are the ones they view as 'fair', 'equitable', and commensurate with their self-serving notions of the dignity and respect to be accorded the judiciary, furnishing NO EVIDENCE as to the inadequacy of current judicial salary levels – bumped up $40,000 by the Commission on Judicial Compensation's August 29, 2011 Report. They did not even assert that current salary levels are inadequate, let alone after the addition of non-salary benefits. In fact, and repeating their fraud at the Commission on Judicial Compensation's July 20, 2011 hearing, they made no mention of non-salary benefits – or their monetary value – a concealment also characterized by their written submissions before you.
>
> …CJA's October 27, 2011 Opposition Report…highlighted (at pp. 1, 17-18, 22, 31) that among the key respects in which the Commission on Judicial Compensation's August 29, 2011 Report was statutorily-violative and fraudulent is that its salary increase recommendations were 'unsupported by any finding that current 'pay levels and non-salary benefits' [were] inadequate' – reflective of the fact that the judges and judicial pay raise advocates had not furnished probative evidence from which such finding could be made. Such finding, moreover, would require an articulated standard for determining adequacy…" (pp. 1-2, capitalization in the original).

The December 2, 2015 supplemental submission then went on to show (pp. 2-3) that the ONLY evidence that the Commission had before it was as to the adequacy of existing salary and non-compensation benefits.

443. On December 21, 2015, plaintiff SASSOWER furnished the Commission with a further submission. Entitled "Assisting the Commission in discharging its statutory duty of 'tak[ing]

into account all appropriate factors' as to 'adequate levels of compensation and non-salary benefits", it presented:

> "further evidence of 'the lawlessness and non-accountability that reigns in New York's judicial branch, to which [she] testified at the November 30, 2015 hearing as not only an 'appropriate factor' for the Commission's consideration, disentitling the judiciary to any salary increases, but a 'factor' of constitutional magnitude." (underlining in the original).

The letter reiterated that the judges and judicial pay raise advocates could easily corroborate this – prefatory to furnishing the Commission "with findings of fact and conclusions of law with respect to…CJA's October 27, 2011 Opposition Report and the record of the three litigations based thereon.

444. The Commission's December 24, 2015 Report ignored ALL the foregoing. It made no mention of any opposition to the judicial salary increases, made no mention of plaintiffs' October 27, 2011 Opposition Report, made no findings of fact and conclusions of law with respect to it – or with respect to the record of the three lawsuits based thereon – or as to the adequacy of existing levels of judicial compensation and non-salary benefits. Its judicial salary increase recommendations rested on the Commission on Judicial Compensation's August 29, 2011 Report – and on no finding that existing levels of judicial compensation and non-salary benefits were inadequate. In other words, the December 24, 2015 Report is based on the very fraud and absence of evidence that plaintiffs had presented in opposition.

D. ***As Applied*, a Commission that Suppresses and Disregards the Input of Taxpaying Citizens, Particularly in Opposition to Salary Increases, is Unconstitutional**

445. By an November 18, 2015 e-mail,[31] plaintiff SASSOWER objected to the Commission's decision, at its November 3, 2015 first organizational meeting, to hold only a single hearing on judicial compensation, in Manhattan – "without the slightest discussion of whether that

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31 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at p. 2.

would be fair to New Yorkers in the state's vast western, northern, and central regions, where, additionally, salaries and costs of living are so markedly lower." She requested that the Commission "schedule at least one upstate public hearing on judicial compensation".

446. Later that day, plaintiff SASSOWER sent another e-mail,[32] this one entitled: "Informing the Public about the Commission's Nov. 30 Public Hearing on Judicial Compensation & its Opportunity to be Heard". Noting that in the two weeks since the Commission had scheduled its November 30 2015 public hearing in Manhattan, it had "yet to send out a press release about it and the opportunity the public has to testify and/or make written submissions about salaries and benefits for judges, whose costs it pays for", she requested that the Commission immediately put out a press release about the November 30th hearing – "and the opportunity the public has to testify and/or to furnish written comment". She further stated:

> "the only reason for the Commission's proceeding 'quietly' – as it has – is its knowledge that the taxpaying public would never tolerate pay raises for corrupt and incompetent judges – such as we have and cannot rid ourselves of. Likewise pay raises for our collusive and corrupt Legislators and Governor, Attorney General, and Comptroller…"

447. Plaintiff SASSOWER received no response to either of these two requests because the Commissioners did not send her any response.

448. At the November 30, 2015 public hearing, plaintiff SASSOWER preceded her testimony by the observation that:

> "There was no press announcement from this Committee, press release sent out notifying the public of this hearing today and, consequently, there are not many people present, nor who requested to testify because they didn't know about this hearing. Nor did they ever know or do they know that they have an opportunity to make written submissions." [transcript, p. 70].

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32 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at p. 1.

449. None of the Commissioners disputed that there had been no press announcement or release sent out to inform the public. Nevertheless, a week later, Chair Birnbaum opened the Commission's December 7, 2015 meeting – its first after the hearing – by stating:

> "there was a statement made about that we did not get notice of the hearings out to the public. I just would like to tell you that there was an in-media advisory that is on our website and that was sent out to over 100 media outlets throughout the state and that was also distributed to wire services who have nationwide distribution. So we feel strongly that there was more than sufficient publicity about the hearings. And the hearings were very well attended..." [transcript, p. 2].

450. Upon information and belief, Chair Birnbaum's assertion that a media advisory posted on the Commission's website had been sent out to over 100 media outlets throughout the state and ...distributed to wire services who have nationwide distribution" is false.[33] No substantiation was furnished in response to plaintiff SASSOWER's FOIL request.[34]

451. The Commission's December 24, 2015 Report concealed the paucity of its outreach. Stating that it had "invited written commentary and established post office and e-mail addresses" (at p. 4), the Report did not reveal how this had been publicized or the opportunity to testify at the hearing, which, in three separate places (Chair Birnbaum's coverltr, pp. 1, 4), it misrepresented as being "day-long", when, in fact, it was only 2-1/2 hours. It concealed entirely that there was any opposition to judicial salary increases, whether from "interested individuals" or "organizations", let alone its basis, and made no finding as to its legitimacy or sufficiency in rebutting support for the judicial salary increases.

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[33] The Commission made no claim to having sent out any press release for its March 10, 2016 hearing on legislative and executive compensation, held in the same location as its November 30, 2015 hearing. The result was that it had only two witnesses testifying – the executive directors of Common Cause-NY and Citizens Union.

[34] Plaintiffs' FOIL requests to the Commission are in the accompanying free-standing folder containing their submissions to the Commission.

452. The Commission's failure to meaningfully elicit citizen input – and to address the citizen opposition to judicial salary increases and its basis that it had before it – renders its December 24, 2015 Report unconstitutional, *as a matter of law*.[35]

AS AND FOR A FIFTEENTH CAUSE OF ACTION

The Commission's Violation of Express Statutory Requirements of Chapter 60, Part E, of the Laws of 2015 Renders their Judicial Salary Increase Recommendations Null & Void

453. Plaintiffs repeat, reiterate, and reallege ¶¶1-452, with the same force and effect as if more fully set forth herein.

454. The Commission on Legislative, Judicial and Executive Compensation violated Chapter 60, Part E, of the Laws of 2015 in multiple respects:

(i) in violation of §2, ¶¶1, 2(a), the Commission examined only judicial salary, not "compensation" apart from salary, and not "non-salary benefits";

(ii) in violation of §2, ¶¶1, 2(a), the Commission made no finding and furnished no evidence that current "compensation and non-salary benefits' or "pay levels and non-salary benefits" of New York State judges are inadequate;

(iii) in violation of §2, ¶3, the Commission did not "take into account all appropriate factors", such as systemic judicial corruption and citizen opposition – and made no claim that it had;

(iv) in violation of §2, ¶3, the Commission did not "take into account three of the six enumerated "appropriate factors".

455. Each of these statutory violations is particularized by plaintiffs' 12-page "Statement of Particulars in Further Support of Legislative Override of the 'Force of Law' Judicial Salary Increase Recommendations, Repeal of the Commission Statute, Etc." (Exhibit 40), which plaintiffs January 15, 2015 letter to defendants FLANAGAN and HEASTIE furnished those defendants and

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35 "It is basic that an 'act of the legislature is the voice of the People speaking through their representatives. The authority of the representatives in the legislature is a delegated authority and it is wholly derived from and dependent upon the Constitution' (*Matter of Sherrill v O'Brien*, 188 NY 185, 199).", *New York State Bankers Association, Inc. v. Wetzler*, 91 N.Y.2d 98, 102 (1993) (underlining added).

the chairs and ranking members of the Legislature's "appropriate committees" (Exhibit 39). Individually and collectively, these statutory violations are sufficient to void the judicial salary increase recommendations of its December 24, 2015 Report, *as a matter of law*.

456. The Commission's foregoing statutory violations do not exhaust all its statutory violations which additionally include:

> (i) in violation of §2, ¶1, the Commission was not "established" "commencing June 1, 2015". Instead, the Commission's four appointing authorities delayed their appointments, with defendant Cuomo's appointments not until almost four months later, October 30, 2015. The result was that the Commission did not have the statutorily-contemplated six months to discharge its duties with respect to "judges and justices of the state-paid courts of the unified court system". Instead, it had but two months, further reduced by the holiday season;
>
> (ii) in violation of §3, ¶2 , requiring that the Commission be "governed by articles 6, 6-A and 7 of the public officers law", it failed to furnish records it was duty-bound to disclose under Public Officers Law, Article VI [Freedom of Information Law [FOIL] (see accompanying folder);
>
> (iii) in violation of §3, ¶¶2, 5, and 6, the Commission did not utilize the significant investigative powers and resources available to it to discharge its statutory-mandate.

457. Underlying all these statutory violations was the Commissioners' bias and interest in securing the predetermined result of increasing judicial salary levels, additionally rendering its Report and recommendations unconstitutional, *as applied*.

AS AND FOR A SIXTEENTH CAUSE OF ACTION

Three-Men-in-a-Room, Budget Dealing-Making is Unconstitutional, *As Unwritten* and *As Applied*

458. Plaintiffs repeat, reiterate, and reallege ¶¶1-457, with the same force and effect as if more fully set forth herein.

A. Three-Men-in-a-Room Budget Deal-Making is Unconstitutional, *As Unwritten*

459. The procedure governing the submission and enactment of the state budget is laid out in Article VII, §§1-7 of the New York State Constitution. Upon the Governor's submission of the budget to the Legislature pursuant to §2, the procedure, is spelled out in §§3, 4.[36]

460. Pursuant thereto, once the Governor submits the budget, it is within the legislative branch. He has thirty days, as of right, within which to submit any amendments or supplements to his bills, following which it is by "consent of the legislature". He also has the right "to appear and be heard during the consideration thereof, and to answer inquiries relevant thereto." Further, the Legislature may request the Governor to appear before it – and may command the appearance of his department heads to "answer inquiries" with regard to the executive budget. Based thereon, and in such public fashion, it may "consent" to the Governor's further amending and supplementing his budget.

461. Neither the Constitution, nor statute, nor Senate and Assembly rules authorize the Governor, Temporary Senate President, and Assembly Speaker to huddle together for budget negotiations and the amending of budget bills – and it is an flagrant violation of Article VII, §§3, 4 and Article IV, §7, transgressing the separation of powers, for them to do so.

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36 Article VII, §3 is quoted at ¶¶377, 379, *supra*. Article VII, §4 is quoted at ¶369.

462. Consistent with the Court of Appeals decision in *King v. Cuomo*, 81 N.Y.2d 247 (1993) – and for the multitude of reasons that decision gives with respect to the bicameral recall practice – such three-men-in-a-room, budget deal-making must be declared unconstitutional.

463. The parallels between the bicameral recall practice declared unconstitutional in *King v. Cuomo* and the challenge, at bar, to three-men-in-a-room budget deal-making are obvious. Only minor alterations in the text of the decision in *King v. Cuomo* are needed to support the declaration here sought, as by the below bold-faced & bracketed insertions to pp. 251-255:

> "The challenged [] practice significantly unbalances the law-making options of the Legislature and the Executive beyond those set forth in the Constitution. By modifying the nondelegable obligations and options reposed in the Executive **[and Legislature]**, the practice compromises the central law-making rubrics by adding an expedient and uncharted bypass. The Legislature **[and Executive]** must be guided and governed in this particular function by the Constitution, not by a self-generated additive (see, *People ex rel. Bolton v Albertson*, 55 NY 50, 55).
>
> Article IV, §7 and **[Article VII, §§1-4]** of the State Constitution prescribes how a **[budget]** bill becomes a law and explicitly allocates the distribution of authority and powers between the Executive and Legislative Branches…
>
> The description of the process is a model of civic simplicity…
>
> The putative authority **[for behind-closed-doors, three-men-in-a-room budget deal-making]** 'is not found in the constitution' (*People v Devlin*, 33 NY 269, 277). We conclude, therefore, that the practice is not allowed under the Constitution….
>
> 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 NY 280, 281 [1872]; *see also, People v Rathbone*, 145 NY 434, 438). In a related governance contest, this Court found 'no justification ... for departing from the literal language of the constitutional provision' (*Anderson v Regan*, 53 NY2d 356, 362 [emphasis added]). As we stated in *Settle v Van Evrea*:
>
> > '[I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.
> >
> > 'That would be *pro tanto* to establish a new Constitution and do for the people what they have not done for themselves' (49 NY 280, 281, *supra*).

Thus, the State's argument that the **[three-men-in-a-room budget deal-making]** method, in practical effect and accommodation, merely fosters the underlying purpose of article IV, §7 **[and article VII, §§1-4]** is unavailing (see, *New York State Bankers Assn. v Wetzler*, 81 NY2d 98, 104, *supra*).

If the guiding principle of statutory interpretation is to give effect to the plain language (*Ball v Allstate Ins. Co.*, 81 NY2d 22, 25; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 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*). These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other Branches themselves that substantially alters the specified law-making regimen. Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent 'practice and usage of those charged with implementing the laws' (*Anderson v Regan*, 53 NY2d 356, 362, supra; *see also, People ex rel. Burby v Howland*, 155 NY 270, 282; *People ex rel. Crowell v Lawrence*, 36 Barb 177, *affd* 41 NY 137; *People ex rel. Bolton v Albertson*, 55 NY 50, 55, *supra*).

The New York Legislature's long-standing **[three-men-in-a-room budget deal-making]** practice has little more than time and expediency to sustain it. However, the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution. We do not believe that supplementation of the Constitution in this fashion is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution.

The Governor has been referred to as the 'controlling element' of the legislative system (4 Lincoln, The Constitutional History of New York, at 494 [1906]). The **[three-men-in-a-room budget deal-making]** practice unbalances the constitutional law-making equation... By the ultra vires **[]** method, the Legislature **[and Executive]** significantly suspends and interrupts the mandated regimen and modifies the distribution of authority and the complementing roles of the two law-making Branches. It thus undermines the constitutionally proclaimed, deliberative process upon which all people are on notice and may rely. Realistically and practically, it varies the roles set forth with such careful and plain precision in the constitutional charter...

Though some practical and theoretical support may be mustered for this expedient custom (*see, e.g.*, 4 Lincoln, *op. cit.*, at 501), we cannot endorse it. Courteous and cooperative actions and relations between the two law-making Branches are surely desirable and helpful, but those policy and governance arguments do not address the issue to be decided. Moreover, we cannot take that aspirational route to justify this unauthorized methodology.

The inappropriateness of this enterprise, an 'extraconstitutional method for resolving differences between the legislature and the governor,' also outweighs the claimed convenience (Zimmerman, The Government and Politics of New York State, at 152). For example, '[t]his procedure 'creates a negotiating situation in which,

under the threat of a full veto, the legislature **[through its Temporary Senate President and Assembly Speaker negotiate with]** the governor, thus allowing him to exercise *de facto* amendatory power'' (Fisher and Devins, *How Successfully Can the States' Item Veto be Transferred to the President?*, 75 Geo LJ 159, 182, quoting Benjamin, *The Diffusion of the Governor's Veto Power*, 55 State Govt 99, 104 [1982]).

Additionally, the **[three-men-in-a-room]** practice 'affords interest groups another opportunity to amend or kill certain bills' (Zimmerman, *op. cit.*, at 152), shielded from the public scrutiny which accompanies the initial consideration and passage of a bill. This 'does not promote public confidence in the legislature as an institution' because 'it is difficult for citizens to determine the location in the legislative process of a bill that may be of great importance to them' (*id.*, at 145, 152). Since only 'insiders' are likely to know or be able to discover the private arrangements between the Legislature and Executive when the **[three-men-in-a-room]** method is employed, open government would suffer a significant setback if the courts were to countenance this long-standing practice.

In sum, the practice undermines the integrity of the law-making process as well as the underlying rationale for the demarcation of authority and power in this process. Requiring that the Legislature adhere to this constitutional mandate is not some hypertechnical insistence of form over substance, but rather ensures that the central law-making function remains reliable, consistent and exposed to civic scrutiny and involvement.

...It is no justification for an extraconstitutional practice that it is well intended and efficient, for the day may come when it is not so altruistically exercised.

Appellants are entitled, therefore, to a judicial declaration that the **[three-men-in-a-room]** practice is not constitutionally authorized."

464. At bar, the unconstitutionality is *a fortiori* to that in *King* because, unlike with bicameral recall, no Senate and Assembly rules "reflect and even purport to create the [three-men-in-a-room] practice" (at p. 250) AND such budget deal-making by them, conducted behind-closed-doors, is UNIFORMLY derided as deleterious to good-government.

465. Further underscoring the unconstitutionality of three-men-in-a-room budget dealmaking is the Court of Appeals decision in *Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235 (1995), where the Court held that the Legislature's withholding of a passed-bill from the Governor violates Article IV, §7. In addition to resting on *King v. Cuomo*, the Court reiterated:

"The practice of withholding passed bills while simultaneously conducting discussions and negotiations between the executive and legislative branches is just

another method of thwarting open, regular governmental process, not unlike the unconstitutional 'recall' policy, which, similarly, violated article IV, §7.", *id*, at 239.

466. Additionally, the "three-men-in-a-room" shrinks the two-branch 213-member legislature to just two members, flagrantly violating the constitutional design, which recognized in size a safeguard against corruption. *Cf.*, *The Anti-Corruption Principle*" by Zephyr Teachout, Cornell Law Review, Vol 94: 341-413.[37]

B. Three-Men-in-a-Room Deal-Making is Unconstitutional, *As Applied*

467. Three-men-in-a-room budget deal-making, *unwritten* in the Constitution, in statute, and in Senate and Assembly rules, is entirely unregulated.

468. That it takes place behind-closed-doors, out of public view, is a further constitutional violation – violating Article III, §10: "The doors of each house shall be kept open", as well as Senate and Assembly rules consistent therewith: Senate Rule XI, §1 "The doors of the Senate shall be kept

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[37] The framers were "obsessed with corruption" and "one of the most extensive and recurring discussions among the delegates [to the Constitutional Convention] about corruption concerned the size of the various bodies." It was the reason they made the House of Representatives larger than to the Senate because, in their view, "[t]he larger the number, the less the danger of their being corrupted."

> "Several delegates reiterated a relationship between size and corruption, suggesting that it was, or at least was becoming, conventional wisdom. Magistrates, small senates, and small assemblies were easier to buy off with promises of money, and it was easier for small groups to find similar motives and band together to empower themselves at the expense of the citizenry. Larger groups, it was argued, simply couldn't coordinate well enough to effectively corrupt themselves.
>
> ...
>
> Notably, George Washington's only contribution to the Constitutional Convention arose in the context of a debate about the size of the House of Representatives.[fn.] First, it would take too much time for representatives in a large legislative body to create factions. Second, differences between legislators would lead to factional jealousies and personality conflicts if the same corrupting official tried to buy, or create dependency, across a large body. Because secrets are hard to keep in large groups, and dependencies are therefore difficult to create, the sheer size and diversity of the House would present a formidable obstacle to someone attempting to buy its members.
>
> Madison claimed that they had designed the Constitution believing that 'the House would present greater obstacles to corruption than the Senate with its paucity of members.'[fn.] ..." (at p. 356).

open"; Assembly Rule II, §1 "A daily stenographic record of the proceedings of the House shall be made and copies thereof shall be available to the public" and Public Officers Law, Article VI "The legislature therefore declares that government is the public's business...".

469. Compounding the unconstitutional exclusion of the public from the three-men-in-a-room budget negotiations is that the three-men do not, thereafter, disclose the extent of their discussions and changes to budget bills. As illustrative, neither last year nor the year before was there any memo, itemized sheet, or report setting forth their agreed-to changes to the Legislative/Judiciary budget bills – each unamended bills prior to the three-men-in-a-room huddle, but, after the huddle, introduced as amended bills and referred to the fiscal committees. Nor were the changes identified by italics, underscoring, or bracketing in the amended bills' formatting – at least with respect to the Judiciary/Legislative budget bills.

470. That what they have done to alter massive budget bills, in secret and without full disclosure to legislators and the public, they then speed through the Legislature on a "message of necessity", dispensing with the requirement that each bill be "upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage", pursuant to Article III, §14, further compounds the constitutional violations.