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August 1, 1991

Stuart M. Cohen, Deputy Clerk
Court of Appeals
Albany, New York 12207

RE: Castracan v. Colavita

Dear Mr. Cohen:

Thank you for the additional time to prepare an appropriate response to your letter, dated July 16, 1991, inviting our written comments to buttress the conclusion that a substantial constitutional question is involved to support an appeal as of right. The enclosed Memorandum sets forth our position. Also enclosed is an appendix extrapolating references in the Record to show that Appellants raised constitutional questions in their initial Petition in the Supreme Court, as well as in their ensuing motion papers and briefs filed in the Appellate Division.

As requested, we transmit herewith copies of the aforesaid documents, clearly demonstrating that this is an appeal "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state and of the United States" (CPLR 5601(b)(1)).

We trust that the enclosed meets your requirements for subject matter jurisdiction. Please let us know if anything further is necessary to put the compelling constitutional issues before the Court.

Very truly yours,

ELI VIGLIANO
Pro Bono Counsel

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P. O. Box 70, Gedney Station
White Plains, New York 10605

EV/gd
Enclosures

cc: All Counsel

APPELLANTS' MEMORANDUM
IN SUPPORT OF SUBJECT MATTER JURISDICTION AS OF RIGHT

TO: New York State Court of Appeals

RE: Castracan v. Colavita

DATE: August 1, 1991

At the outset, it must be noted that this case was denied its rightful preference by the Appellate Division, Third Department. That preference should have been granted under the Election Law, as well as under the Appellate Division's own rules ("Appeals in election cases shall be given preference", Rules of the Third Department, Sec. 800.16). The explicit statutory direction is that Election Law proceedings:

> "...shall have preference over all other causes in all courts". (Election Law, Sec. 16.116) (emphasis added)

Appellants, therefore, invoke such mandated right of preference to obtain an expedited review by this Court. Expedited review is particularly critical in light of the fact that the third phase of the subject three-year cross-endorsements barter contract is being implemented in the November 1991 elections.

Appellants will contend on their proposed appeal that denial of the mandated preference by the Appellate Division was manifest error, representing an unwarranted frustration of the legislative will and impermissible infringement of constitutional voting rights, which the aforesaid provision of the Election Law was specifically intended to protect.

The proposed appeal involves questions which are novel, of public importance, and which require interpretation of prior decisions of this Court and of the Appellate Division in other cases.

Appellants' Petition (R. 16-17, 22-23) specifically alleges that under the New York State Constitution, the People are given the right to elect their Supreme Court judges, and that a certain cross-endorsements contract entered into between party leaders and their judicial nominees was in contravention of that constitutional mandate and of the state's Election Law designed to safeguard it.

The pivotal, profound and far-reaching issues requiring adjudication by the Court of Appeals are, inter alia:

(1) whether the major party cross-endorsements bartering contract at issue violates the state and federal Constitutions and the Election Law by guaranteeing uncontested elections of Supreme Court judges and a Surrogate judge. Appellants contend that such contract, expressed in resolution form (R. 52-54), effectively destroyed the electorate's right to choose their judges by a meaningful vote between competing candidates and that it further unlawfully impinged upon the constitutionally-mandated independence of the judiciary by requiring acceptance of cross-endorsement as the price of nomination. Also at issue is the constitutional validity of a contracted-for commitment by the judicial nominees for

early resignations to create new judicial vacancies[1] and a pledge to split patronage after consultation with the political leaders of both parties[2].

(2) whether the Appellate Division's failure to address these critical issues gives rise to "an appearance of impropriety" in that three members of the appellate panel which rendered the Decision, including the presiding justice[3], were, themselves products of cross-endorsement arrangements. Such "appearance of impropriety" is magnified by:

(a) the failure of the three cross-endorsed members of the appellate panel to disqualify themselves[4] or even to disclose their own cross-endorsements;

(b) the Appellate Division's rendition of a dismissal on procedural

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[1] See, inter alia, Appellants' Reply Brief, Exhibits "A-1", "A-2" thereto:

[2] Such commitment and pledge by Respondent judicial nominees, including sitting judges, runs afoul of the Code of Judicial Conduct, Canon 7, 1.B.(c) "A candidate, including an incumbent judge, for a judicial office ...." should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office...", as well as of the Rules of the Chief Administrator of the Court, Secs. 100.1; 100.2; 100.3(b)(4).

[3] Presiding Justice Mahoney was triple cross-endorsed by the Republican, Democratic, and Conservative parties.

[4] Disqualification is called for under paragraph C(1) of the Code of Judicial Conduct "in a proceeding in which his impartiality might reasonably be questioned"

grounds, not jurisdictional, not preserved for appellate review, and readily curable. Such dismissal by the Appellate Division was based on an approach, diametrically opposite to the approach taken by Justice Kahn and consented to by the parties. Moreover, it failed to afford Appellants the opportunity to supplement the record to establish that such procedural objections were without merit and that Respondents were without standing to assert them[5].

(c) the Appellate Division's failure to address the patently erroneous factual and legal finding of the Supreme Court that the constitutionality of the cross-endorsements contract could not be reviewed because there was "no proof"

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[5] Appellants have made these objections the subject of a motion for reargument in the Appellate Division, which also includes, alternatively, a request for leave to the Court of Appeals. That motion was expressly made "without prejudice to Appellants' contention that their appeal lies as a matter of right to the Court of Appeals because of the substantial constitutional issues involved..." If the Court of Appeals accepts Appellants' appeal as of right, they will withdraw the aforesaid motion.

that the judicial nominating conventions did not conform to Election Law requirements[6].

(d) the Appellate Division's denial of Appellants' preference entitlement on two separate occasions: On October 18, 1990, when Appellants were denied the automatic preference to which they were entitled as a matter of right under the Election Law and the Appellate Division's own rules; and again on October 31, 1990, when Appellants' formal application by Order to Show Cause was denied by written order of the Court. All five justices deciding that later motion were themselves cross-endorsed[7]--including two justices who ran uncontested races with "quadruple" endorsement by the Republican, Democratic, Conservative and Liberal parties.

In view of the apparently wide-spread cross-endorsement of judges on the Appellate Division level, it is

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[6] See Appellants' Reply Brief, pp. 1-4; pp. 27-29.

[7] This fact was also undisclosed.

respectfully submitted that such fact furnishes an added reason why this appeal should be heard by the Court of Appeals, whose judges are appointed, rather than elected.

Appellants on their appeal from the Appellate Division Order, as well as from the Order of the Supreme Court, contend that the dismissal of the Petition constitutes a dangerous precedent destructive of the democratic process and constitutionally protected voting rights--and gives a green light to the major parties for cross-endorsement bartering of judgeships as an accepted modus operandi.

As noted in the Record, the subject 1989 cross-endorsement agreement spawned another cross-endorsement arrangement in furtherance thereof in 1990 as to Respondent Miller. Moreover, according to a news article handed up, with the Court's permission, in connection with the oral argument before the Appellate Division, Respondent Miller acquired his seat as a result of a trade by the Republicans of three (3) non-judicial government posts in exchange for the (1) Supreme Court judgeship to be filled by a Republican (see, Document #25).

As a result of the lower courts' failure to take the corrective action prescribed by the New York State Constitution and the Election Law by invalidating the nominations in question, the 1991 phase of the subject three year cross-endorsement contract will be implemented as scheduled in this year's general elections--unless forestalled before Election Day by an unequivocal decision by the Court of Appeals that such contracts

are violative of the Constitution and otherwise illegal, unethical and against public policy.

This case gives the Court of Appeals an essential opportunity to update several of its prior decisions. There is a need for clarification of its Decision in Rosenthal v. Harwood, 35 N.Y.2d 469, cited and incorrectly relied on by several Respondents in the court below[8]. Rosenthal was not a case involving cross-endorsements with an articulated quid pro quo, but only the endorsement of a major party judicial candidate by a minor party. In that case, the Court of Appeals said the party could not prohibit the candidate from accepting such minor party endorsement because such restriction--even though in the form of a party's internal by-law--would compromise the independence of the judicial candidate in exercising his own judgement. The Court of Appeals has not yet ruled on the constitutionality of major party cross-endorsements under a contract between the party leaders, expressed in written form by resolutions adopted by the Executive Committees of both parties, ratified by the candidates at judicial nominating conventions, requiring the judicial nominees to accept the contracted-for cross-endorsements, as well as other bargained-for and agreed conditions, i.e., early resignations and a pledge to split patronage after consultation with party bosses (R. 52-54).

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[8] For fuller discussion, see, inter alia, Appellants' Reply Brief, Point I (pp. 14-26)

There is also a need to update and reaffirm People v. Willett, 213 N.Y. 369 (1915) involving the predecessor section to present Election Law, Sec. 17-158, making specified corrupt practices a felony. Willett involved a monetary contribution to the party Chairman to procure a nomination at the judicial nominating convention for a Supreme Court judgeship. This Court therein expressly recognized, as a matter of law, what Justice Kahn chose to disregard: that the corrupt practices provisions of the applicable statute (then entitled "Crimes against the Elective Franchise") "should be construed to include...a nomination coming out of a political convention", irrespective of whether or not such convention conformed to procedural requirements of the Election Law. Castracan v. Colavita is today's pernicious counterpart to Willett[9]--a barter exchange of judgeships for judgeships, which has already metastasized into a trade for other non-judicial governmental offices as well.

Unfortunately, the more recent case of People v. Hochberg, 62 AD2d 239, did not reach the Court of Appeals, which would have permitted a ruling by our highest Court that an agreement assuring a candidate of guaranteed victory is a "sufficiently direct benefit...to be included within the term 'thing of value or personal advantage.'"[10]

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[9] For fuller discussion, see Appellants' Reply Brief, Point I(B), p. 18 et seq.

[10] For fuller discussion, see Appellants' Reply Brief, Point I(B), p. 16 et seq.

A favorable decision to Appellants in Castracan v. Colavita would represent a logical and necessary progression of thought essential to deal with modern subterfuge by politicians ready to eliminate the voters from meaningful participation in the electoral process. The public interest requires this Court's intervention and an unequivocal ruling that bartering judgeships is just as bad as buying them. It is an historic opportunity.

The public importance of this case transcends the parties to this proceeding[11]. Not only are the issues of major significance likely to arise again, but over and beyond the direct effect of this case in restraining the encroachment of politicians on the judiciary, a decision for Appellants would open the way for judicial selection based on merit rather than party labels and loyalties, which traditionally have excluded as candidates for office those outside the political power structure--minorities, women, independent and unregistered voters--no matter how meritorious.

Decisive adjudication on the merits of the issue as to whether or not the subject cross-endorsements violates constitutionally protected voting rights is an imperative--affecting, as it does, the lives, liberty, and property interests of one and a half million residents in the Ninth Judicial District. The practical effect of the musical-chair judge-

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[11] See Appellants' Reply Brief, Point III, pp. 30-31.

trading arrangement by party bosses[12] was to create a crisis situation in the already backlogged motion and trial calendars of the Court--resulting in severe, incalculable, and irreversible injury not only to litigants and their families, but to the public at large.

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[12] The Deal required Republican Respondent Emanuelli to resign his fourteen-year Supreme Court judgeship after only seven months in office so as to create a vacancy for Democratic Respondent County Court Judge Nicolai to fill in January 1991. The contracted-for resignation by Justice Emanuelli was timed so that Governor Cuomo could not fill it by interim appointment.

APPENDIX TO CONSTITUTIONAL REFERENCES IN THE RECORD[1]

PETITION: Paragraphs 16, 17, 18, 33, 34 (R 16-17, 22-23)

> "16. Pursuant to the provisions of Article 6, Section 6(c) of the Constitution of the State of New York, Justices of the Supreme Court for the State of New York, including the Ninth Judicial District 'shall be chosen by the electors of the judicial district in which they are to serve.
>
> 17. The provisions contained in the Election Law of the State of New York, Article 6, and specifically Sections 6-124 and 6-126, implementing the aforesaid State Constitutional provision by setting forth in detail the specific procedure for calling a Judicial Convention, electing the delegates and alternate delegates thereto, as well as the procedure to be followed in conducting the transacting the business of the Convention: the nomination of candidates for such judicial offices by political parties.
>
> 18. In late August and early September 1989, Respondent COLAVITA, acting by his legal counsel, Respondent PARISI, and Respondent WEINGARTEN, acting by his legal counsel, Respondent BREVETTI, in concert with one another and as part and parcel of a common plan and design, conspired to violate the Constitution of the State of New York and the Election Law of the State of New York by entering into a plan, scheme and design, hereinafter referred to as 'the Three Year Plan', whereby the electors of the Ninth Judicial District, duly registered to vote at the General Elections to be held in 1989, 1990, and 1991, were to be disenfranchised and deprived of their aforesaid constitutional right to choose Justices of the Supreme Court of the State of New York for the Ninth Judicial District.

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[1] The references herein are to Appellants' previously-filed papers, copies of which are transmitted herewith. Underlined quoted passages reflect emphasis added to highlight the raising of constitutional arguments by Appellants.

...

33. By reason of the foregoing illegal contract entered into by Respondents COLAVITA and WEINGARTEN, adopted and ratified by Respondent MEHIEL, and the candidates who were, and are, the beneficiaries of the aforesaid patently illegal "three year plan", the electors of the Ninth Judicial District were, in 1989, and will be, in 1990 and 1991, deprived of their right of 'election' between opposing candidates of the Democratic and Republican Parties to fill said judicial offices, all in flagrant violation of the provisions of the Constitution of the State of New York and the Election Law of the State of New York.

34. By reason of the foregoing, electors of the Ninth Judicial District entitled to vote in the General Election to held on November 6, 1990 to fill said judicial offices have suffered, and will suffer, a serious, substantial, and unprecedented violation of their voting rights, as guaranteed by the Constitution of the State of New York, which rights have been impaired, impeded, and prejudiced by the aforesaid Contract of Respondents COLAVITA and WEINGARTEN."

AFFIDAVIT OF ELI VIGLIANO IN SUPPORT OF THE PETITION, (R. 64)

"1. I am an attorney licensed to practise law in the State of New York since 1950. I am currently Chairman of the Ninth Judicial Committee, a group organized in Westchester County in 1989, comprised of lawyers and non-lawyers working to assure that the most qualified judges are chosen, that politics and politicians are removed as far as possible from the judicial arena and, in particular, to assure that the election of Judges in the Ninth Judicial District is accomplished in accordance with the legal requirements of the Election Law and Constitution of the State of New York."

APPELLANTS' APPELLATE BRIEF:

pp. 3-4: QUESTIONS PRESENTED

> "2. Is a cause of action stated by a Petition alleging that:
>
> (A) Respondents, two major political parties, their leadership, their judicial nominees, and others, entered into an agreement...
>
> (C) effectively disenfranchised the voting public of rights guaranteed under the Constitution of the State of New York and the New York State Election Law."

pp. 10-19: POINT I (see the entire point)

> "THE CROSS-ENDORSEMENTS CONTRACT IN ISSUE IS AN INVIDIOUS VIOLATION OF THE NEW YORK STATE CONSTITUTION, THE ELECTION LAW OF NEW YORK STATE, AND THE CODE OF JUDICIAL CONDUCT AND COURT RULES RELATIVE THERETO. AS SUCH, IT IS ILLEGAL, VOID, AND AGAINST PUBLIC POLICY"

pp. 22: POINT II

> "Justice Kahn erroneously held that as long as there is a properly convened convention, following mandated procedures of the Election Law, any agreement adopted at the Convention is unassailable, even if it violates the New York State Constitution, the Election Law, the Rules of Judicial Conduct, and this State's public policy."

pp. 27-29: POINT VI

> "The remedies sought in this proceeding are clearly not equitable. The relief sought in this Order to Show Cause was to have the cross-endorsement contract (1) declared illegal and void as violative of the New York State Constitution, New York statutory law, and the public policy of this State; (2) to have vacated the nominations of the respondent nominees pursuant to New York Election Law Sec. 16-102 for all the reasons stated in Point I herein;..."

"Moreover, the Petition asserts a transcendent public interest in invalidating judicial nominations arising out of an illegal political contract, which violates the New York State Constitution, New York State Election Law, Sec. 17-158, the Code of Judicial Conduct and Court Rules relative thereto, and New York State public policy..."

APPELLANTS' PREFERENCE APPLICATION:

ORDER TO SHOW CAUSE: at p. 2

"LET Respondent-Respondents show Cause...why an Order should not be made and entered herein:

1. Granting a preference to the instant appeal pursuant to Supreme Court Rules, Third Dept., Article 3, Part 800, Section 800.16, Article 1, Sections 6, 9, and 11 of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States of America..."

SUPPORTING AFFIRMATION OF DORIS L. SASSOWER:

"2. It is respectfully submitted that Petitioners are further entitled to such preference as a matter of right pursuant to Section 800.16 of the published Rules of this Court, as well as under applicable provisions of the Federal and State Constitutions, as detailed in the Order to Show Cause annexed hereto." (at p. 2)

...

"4. For the summary judicial relief provided under Article 16 to be meaningful, it must be afforded with the six weeks prior to Election Day, since the prime purpose of the Election Law is to protect the constitutionally guaranteed rights of the voters, not to defeat them. Otherwise, candidates would claim that their illegally or fraudulently gained 'rights' had vested by virtue of their election." (at p. 3)

"5. The legislative timetable clearly necessitates the mandatory preference granted to Election Law cases by this Court when it adopted Rules, Sec. 800.16, since the Court is cognizant that absent the granting of the omnibus relief, hereinafter described, the Decision-Order of Special Term would not only be the first word, but the last word. This would then lead to the legislatively-proscribed and unintended consequence that illegally and fraudulently nominated candidates would be elected, without any appellate review, and without Petitioners having had their 'day in Court'--all in violation of the Constitutions of the State of New York and the Constitution of the United States." (at p. 3)

...

"7. This special proceeding, under the Election Law, to enforce constitutionally-guaranteed voting rights, was commenced by Order to Show Cause, dated September 26, 1990..." (at p. 3)

...

"14. In addition, the Petition alleges that the judicial nominees in question are the result of an illegal contract, violative of penal provisions of the Election Law, Sec, 17-158, expressing a public policy of the State of New York prohibiting practices corruptive of the democratic process and which impair constitutionally-guaranteed voting rights..." (at pp. 6-7)

...

"26. The importance of this case transcends this one election. A decision reversing the Lower Court is essential. Otherwise, the Lower Court decision will be cited as authority for future illegal cross-endorsement contracts between party bosses pre-ordaining our judges under Three-Year Plans, Five Year Plans or longer, and 'rigged' Judicial Nominating Conventions, acting as rubber stamps will be the rule. Voters will thus continue to be deprived of their constitutional right to 'elect' between judicial candidates of opposing parties..." (at p. 11)

DORIS L. SASSOWER'S AFFIRMATION IN REPLY:
(Preference Application)

"7. This Court's obligation to grant a preference is clear. With election time almost at hand, the Court has an even greater responsibility to safeguard the constitutionally-protected public interest at stake..." (at p. 5)

"13. The paramount issue in this case, involving the constitutionally-protected voting rights of nearly a million voters in the Ninth Judicial District, requires the most expeditious attention..." (at p. 8)

"26. It is thus imperative that the legality of the cross-endorsements contract in issue be speedily and dispositively resolved by this Court and/or the Court of Appeals. Until the issue is adjudicated, it is just and proper that the names of these judicial nominees be stricken from the ballot on Election Day. Unquestionably, the potential harm to the public by reason of their otherwise assured election is far outweighed by the injury to the public weal represented by the violation of voting rights, protected by the Federal and State Constitution as well as the Election Law of the State of New York." (at p. 16)

"55. It is respectfully submitted that the cost and inconvenience to the Boards of Election is insignificant where constitutional rights of the public are concerned and where it is clear that irreparable harm would be done to the democratic process by the inevitable election of Respondent judicial nominees." (at p. 31)

"56. Mr. Dranoff misrepresents the state of the law relative to the matter of cross-endorsements. He asserts that the Court of Appeals has repeatedly validated multi-party candidates particularly in judicial races, citing Rosenthal v. Harwood, 35 NY2d 469. In that case, the Court of Appeals held that a party by-law prohibiting a judicial candidate from accepting a cross-endorsement was invalid. However, the rationale of that decision, i.e., that such restriction would

improperly compromise the independence of the judicial nominee, applies with equal, if not more, force to invalidate the party resolution involved in the instant case. Rosenthal did not say, conversely, that a party can require a judicial candidate to accept a cross-endorsement and other conditions similarly impinging on the judicial nominee's independent judgment, such as exist in the illegal contract underlying this proceeding. Indeed, all of the reasoning expressed in Rosenthal to make such restriction void, exists, a fortiori, in the case at bar--where, not only were there a series of cross-endorsements over a three-year period, but contracted-for resignations by the judicial nominees, once elected, as well as a pledge to divide up patronage appointments equally between the two parties." (at pp. 31-32)

"57. Thus, Mr. Dranoff is seen to be reckless with the truth when he states, flatly and unequivocally, that this is 'an issue which has already been decided by the Court of Appeals'." (at p. 32)

"58. The instant proceeding is not a case where one major political party cross-endorses, without pre-conditions, a single judicial candidate of the other major political party in a single election. Contrary to Mr. Dranoff's broad statements, the far-reaching, ultimate, and unresolved question presented by the Petition is the legality of a particular cross-endorsements contract, running over a period of years, put in written resolution form, which required judicial nominees, as a condition to obtaining their nomination, to accept such cross-endorsements, to agree to contracted-for resignations so as to create new judicial vacancies, and to a provision that, once elected, they would divide patronage appointments equally, in accordance with the recommendations of their party leaders." (at pp. 32-33)

Exhibit "B" to Doris Sassower's Affirmation in Reply (Preference Application): Letter of Eli Vigliano, Esq., dated November 1, 1989, hand-delivered to the offices of Governor Mario Cuomo:

> "When not only the spirit of Article 6, Section 1, of the State Constitution mandating the election of Judges of the Supreme Court is violated, but the letter is arrogantly ignored, the citizens are entitled to have the wrong redressed." (at p. 3)

APPELLANTS' REPLY BRIEF:

pp. 14-26 POINT I: (see entire point)

> RESPONDENTS HAVE FAILED TO REFUTE CONTROLLING AUTHORITY THAT THE 'THREE YEAR PLAN' IS, AS A MATTER OF LAW, ILLEGAL, UNETHICAL AND PROHIBITED AS A MATTER OF PUBLIC POLICY"
>
> A. Rosenthal v. Harwood, 35 N.Y.2d 469, 363 NYS2d 937, 323 NE2d 179 (1974), Relied on By Respondents, Does Not Sustain the legality of the 'Three-Year Plan'.
>
> B. Respondents Have Failed to Refute Petitioners' Arguments that the 'Three Year Plan' Contravenes Law and Public Policy, As Reflected in Constitutional and Statutory History and Ethical Rules.

pp. 30-1: POINT III: (see entire point)

> "THE PUBLIC IMPORTANCE OF THIS CASE TRANSCENDS THE PARTIES TO THIS PROCEEDING"
>
> "This case is an opportunity to chart new waters in the definition of future limits of permissible activity by party officials and judicial candidates. As the historical background, hereinabove discussed, and the prior judicial interpretations thereof make manifest, the Legislature has spoken to the long-standing tradition of political abuse by clever party leaders and all-too-eager office-seekers. The Election Law is the vehicle, provided by the Legislature, to enforce mandates standards of political conduct so as to protect the public and

their right of election. Any deal effectively disenfranchising the electorate and diminishing the value of that vote is repugnant to the expressed legislative intent."

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APPELLANTS' SUPPLEMENTAL RECORD ON APPEAL

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15: Brief of Respondents Westchester Democratic County Committee, Dennis Mehiel, and Richard Weingarten

16: Brief of Respondent Francis A. Nicolai

17: Brief of Respondent Howard Miller

18: Brief of Respondent Albert J. Emanuelli

19: Brief of Respondent New York State Board of Elections

20: Letter of Respondent Westchester County Board of Elections

21: APPELLANTS' REPLY BRIEF

22: Letter of NAACP Legal and Educational Defense Fund, dated February 8, 1991

23: Decision of Appellate Division, Third Dept., dated February 21, 1991

24: Letter of NAACP Legal and Educational Defense Fund, dated March 1, 1991

25: Gannett newspaper extract (9/12/90) handed up by Appellants, with the Court's permission, in connection with the March 25, 1990 oral argument before the Appellate Division.