motion, *as a matter of law*, because, as demonstrated by appellants' October 4, 2018 reply brief on which the motion rests, Assistant Solicitor General Frederick Brodie's September 21, 2018 respondents' brief is "from beginning to end, 'a fraud on the court'" – underscoring that the attorney general has NO legitimate defense to the appeal and that his appellate representation of respondents is unlawful pursuant to Executive Law §63.1 – and belongs to appellants.

6. Further concealed by the November 13, 2018 decision is the threshold jurisdictional issue, identified at ¶2 of my November 13, 2018 reply affidavit in further support of the motion.[5] There stated is the fact that because of the appeal panel's "HUGE financial and other interests in the appeal", proscribed by Judiciary Law §14, it was:

> "without jurisdiction to sit – possibly even upon invocation of 'the rule of necessity'[fn2] – and that its threshold duty [was] to determine that issue, preceded by 'remittal of disqualification' pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct." (underlining in the original).

The annotating footnote 2 read:

> "New York cases invoking the rule of necessity invariably cite, either directly or through other cases, *United States v. Will*, 449 U.S. 200 (1980). Yet, it is unclear to me whether, in the federal system, there

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5 My November 13, 2018 reply affidavit was initially transmitted to the Court, by e-mail sent at 7:26 am, addressed to Chief Motion Attorney Ed Carey and Court Attorney Jane Landes (Exhibit A-2). The transmitting e-mail stated, in pertinent part:

> "As discussed, please promptly forward this e-mail/ or print out & deliver it to the appellate panel so that, optimally, the judges can decide the motion, returnable at 10 am today, before today's oral argument of the appeal at 1 pm – as the attorney general is NOT properly before the Court, representing the respondents and the respondents' brief, from which Mr. Brodie intends to argue (per para. 20 of his Nov. 2 opposing affirmation & his opposing memo, pp. 3-4), is fraudulent. I will endeavor to deliver the original reply affidavit to the Court by 10 am. I will be leaving White Plains shortly." (underlining and capitalization in the original).

Ex E

Upon arriving at the Clerk's Office shortly before 11 am, Court Attorney Jane Landes took from me the signed and notarized original reply affidavit and confirmed, in response to my question, that the appeal panel had already been furnished with the e-mailed reply affidavit, as I had requested.

Appellant Sassower's November 27, 2018 moving affidavit in support of 4th motion to Appellate Division paragraphs 6, 11-15

> is any analogue to Judiciary Law §14 – a statute which, as New York caselaw makes clear, removes jurisdiction from a judge under given circumstances such as interest, as opposed to mandating disqualification under such circumstances."

In substantiation, my November 13, 2018 reply affidavit annexed exhibits that had been previously furnished to the Court. These were Exhibit H-2, particularizing, *inter alia*, each justice's $75,000 yearly salary interest in the appeal and $300,000 "claw-back" liability for the commission-based judicial salary increases already paid; and Exhibits J and L, furnishing relevant treatise authority and caselaw establishing how unequivocally Judiciary Law §14 divests of jurisdiction "interested" judges, as, for instance, 32 New York Jurisprudence §43 (1963): 'Effect when judge disqualified under statute', stating:

> "A judge disqualified for any of the reasons set forth in the statute,[fn], or a court of which such judge is a member, is without jurisdiction, and all proceeding[s] had before such a judge or court are void.[fn] In that situation, jurisdiction cannot be conferred by consent.[fn] Such a judge is even incompetent to make an order in the case setting aside his own void proceedings.[fn] ..." (underlining in Exhibit J).

and the current treatise, 28 New York Jurisprudence 2nd §403 (2018) "Disqualification as causing a loss of jurisdiction", comparably reading:

> "A judge disqualified for any of the statutory grounds, or a court of which such a judge is a member, is without jurisdiction, and all proceedings had before such a judge or court are void.[fn] ... A disqualified judge is even incompetent to make an order in the case setting aside his or her own void proceedings.[fn]" (underlining in Exhibit J).

I noted that both treatises cited to *Oakley v. Aspinwall*, 3 NY 547 (1850), with the latter treatise including citations to such decisions of this Court consistent therewith as its 2008 decision in *People v. Alteri*, 47 A.D.3d 1070 (2008), wherein it stated:

> "A statutory disqualification under Judiciary Law §14 will deprive a judge of jurisdiction (*see Wilcox v. Supreme Council of Royal Arcanum*, 210 N.Y. 370, 377, 104 N.E. 624 [1914]; *see also Matter*

> *of Harkness Apt. Owners Corp. v. Abdus–Salaam*, 232 A.D.2d 309, 310, 648 N.Y.S.2d 586 [1996]) and void any prior action taken by such judge in that case before the recusal (*see People v. Golston*, 13 A.D.3d 887, 889, 787 N.Y.S.2d 185 [2004], lv. denied 5 N.Y.3d 789, 801 N.Y.S.2d 810, 835 N.E.2d 670 [2005]; *Matter of Harkness Apt. Owners Corp. v. Abdus– Salaam*, 232 A.D.2d at 310, 648 N.Y.S.2d 586). In fact, ''a judge disqualified under a statute cannot act even with the consent of the parties interested, because the law was not designed merely for the protection of the parties to the suit, but for the general interests of justice' ' (*Matter of Beer Garden v. New York State Liq. Auth.*, 79 N.Y.2d 266, 278–279, 582 N.Y.S.2d 65, 590 N.E.2d 1193 [1992], quoting *Matter of City of Rochester*, 208 N.Y. 188, 192, 101 N.E. 875 [1913])".

7. The non-responsiveness of the appeal panel, by its November 13, 2018 decision (Exhibit A-1), to the threshold integrity issues pertaining to itself and to the attorney general, presented and substantiated by the October 23, 2018 motion, continued at the November 13, 2018 oral argument (Exhibit D). Without identifying that Associate Justice Michael Lynch was not participating with them, or why (Exhibit C), the four appeal panel justices came to the bench, without asserting their jurisdiction to sit and take part in the appeal, without invoking the "rule of necessity", without making any disclosure of their financial and other interests and relationships,[6]

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[6] The contrast to *Oakley v. Aspinwall*, *supra*, at 548, 551, could not be more stark:

> "It appears that **upon the appeal being moved for argument, Judge Strong informed the counsel for both parties of his relation to the Messrs. Aspinwall, the appellants,** and that because of it he should decline to sit in the case; but that the counsel consented that he should sit, and that he was particularly urged to it by the counsel for the respondent; that he finally consented to hear the cause upon its being suggested, that the appellants Aspinwall were not parties in interest, and would not suffer by the judgment…
>
> …
>
> The statute declares, that 'no judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties.' (2 *R.S.* 275 §2; *Revisers' Notes,* 3 *R.S.* 694.)
>
> After so plain a prohibition, can anything more be necessary to prevent a judge from retaining his seat in the cases specified?... The exclusion wrought by it is as complete as is in the nature of the case possible. The judge is removed from the cause and from the bench; or if he will

11. With regard to such responsive ruling, I take this opportunity to reinforce the observation made by my above-quoted ¶2 of my November 13, 2018 reply affidavit, with its footnote 2, questioning the applicability of "rule of necessity" to Judiciary Law §14 – which I reiterated at the oral argument. 32 New York Jurisprudence §45, "Disqualification as yielding to necessity" (1963), is that reinforcement, stating, by its concluding sentence that I had not previously read:

> "Moreover, since the courts have declared that the disqualification of a judge for any of the statutory reasons deprives him of jurisdiction,[fn] a serious doubt exists as to the applicability of the necessity rule where the judge is disqualified under the statute.[fn]"

12. 55 years later, there appears to be NO subsequent caselaw or treatise authority dispelling the "serious doubt...as to the applicability of the necessity rule where the judge is disqualified under the statute". This not only includes the 1980 United States Supreme Court decision in *United States v Will*, *supra*, but the 2010 New York Court of Appeals decision in *Maron v. Silver*, 14 N.Y.3d 230 (2010) which, notwithstanding its subject was judicial salary increases, conspicuously made no reference to statutory disqualification for interest under Judiciary Law §14 in its brief discussion under the title heading "Rule of Necessity", citing to *Maresca v. Cuomo*, 64 N.Y.2d 242, 247 (fn. 1) (1984), appeal dismissed 474 US 802 (1985), and its citation to *Morgenthau v. Cooke*, 56 NY2d 24 (fn. 3) (1981), relying on *United States v. Will*, with neither its *Maresca* decision, nor its Morgenthau decision identifying Judiciary Law §14.[8]

13. Consequently, what is before appeal panel, by this motion, is seemingly unchartered territory: at bar, by reason of HUGE financial interest, every New York Supreme Court and Appellate Division justice and every Court of Appeals judge is without jurisdiction to sit and decide

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[8] So, too, this Court's 2008 decision in *Maron v. Silver*, 58 AD3d 102, 106-107, whose invocation of rule of necessity cites to *United States v. Will* and *Maresca v. Cuomo*, but NOT Judiciary Law §14.

this case, pursuant to Judiciary Law §14 – and "rule of necessity" cannot be invoked. Or can it? And if not, are there constitutional and statutory provisions to vouch in judges to sit and decide the appeal who, at very least, would not have salary interests[9] – or can the appeal be transferred/removed to the federal courts based, perhaps, on Article IV, §4 of the United States Constitution: "The United States shall guarantee to every State in this Union a Republican Form of Government".

14. There are other questions pertaining to "rule of necessity" – also seemingly of first impression. As I stated before Associate Justice Eugene Devine at the August 2, 2018 oral argument of appellants' TRO to enjoin further disbursement of monies for the judicial salary increases:

> "rule of necessity does not permit an actually biased judge to sit. It permits a judge who is interested, but who is able to rise above his interests, because every other judge is also interested. But that special judge who can say, yes, I have a vested interest, but, nonetheless, I do my duty because that is my job." [10]

In other words, and as identified, as well, in appellants' motion papers,[11] "rule of necessity" is not a license for actually biased judges to sit in cases for the purpose of acting upon their biases. Indeed, this would be unconstitutional. As recognized by the New York Court of Appeals in

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9 New York State Constitution, Article VI, §4(d) pertaining to the appellate division: "…The governor may also, on request of any appellate division, make temporary designations in case of the absence or inability to act of any justice in such appellate division, for service only during such absence or inability to act.";
New York State Constitution, Article VI, §2, pertaining to the Court of Appeals: "…In case of the temporary absence or inability to act of any judge of the court of appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act….".

10 The VIDEO of the August 2, 2018 oral argument is posted on CJA's website, here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/8-2-18-oral-argument.htm. My transcription, made from the VIDEO, is Exhibit B to my October 9, 2018 reply affidavit in further support of appellants' September 12, 2018 order to show cause to disqualify the Court for demonstrated actual bias, etc.

11 *See*, my July 24, 2018 moving affidavit (at ¶6) in support of appellants' order to show cause for disclosure/disqualification by the Court's justices, signed by Justice Devine on August 2, 2018, and, additionally, my October 9, 2018 reply affidavit (at p. 8) in further support of appellants' order to show cause to disqualify the Court for demonstrated actual bias, etc., signed by Presiding Justice Elizabeth Garry on September 12, 2018.

General Motors Corp. v. Rosa, 82 N.Y.2d 183, 188 (1993), in its first sentence under the heading "The Rule of Necessity":

> "The participation of an independent, unbiased adjudicator in the resolution of disputes is an essential element of due process of law, guaranteed by the Federal and State Constitutions (*see*, US Const, 14th Amend, §1; NY Const, art I, §6...)" (underlining added).[12]

15. Consequently, a judge invoking "rule of necessity" must believe himself capable of fair and impartial judgement – and so-state. Yet, the judge-created doctrine of "rule of necessity" does not appear to have engendered any safeguarding rules for its invocation – including for affording the parties and their attorneys the right to be heard. Thus, a further question is as to the safeguarding prerequisites for invocation of "rule of necessity", reasonably encompassing §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, "remittal of disqualification", stating, in pertinent part:

> "A judge disqualified by the terms of subdivision (E) [of §100.3 of the Chief Administrator's Rules Governing Judicial Conduct] ...may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

16. The above constitutionally-weighted threshold issues pertaining to Judiciary Law §14 and "rule of necessity" are best addressed by a tribunal that, albeit afflicted by a Judiciary Law §14 jurisdictional bar, has not engaged in any act of actual bias in connection with this case – and which,

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12 United States Constitution, 14th Amendment, §1: "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article I, §6: "No person shall be deprived of life, liberty or property without due process of law."