

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION, THIRD DEPARTMENT

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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,

A.D. No. 527081

November 2, 2018

Plaintiffs-Appellants,

-against-

**AFFIRMATION  
IN OPPOSITION TO  
MOTION TO STRIKE  
AND FOR OTHER  
RELIEF**

ANDREW M. CUOMO, in his official capacity as  
Governor of the State of New York, JOHN J. FLANAGAN  
in his official capacity as Temporary Senate President,  
THE STATE OF NEW YORK STATE SENATE,  
CARL E. HEASTIE, 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,  
THOMAS P. DiNAPOLI, in his official capacity as Comptroller  
of the State of New York, and JANET M. DiFIORE, in her  
official capacity as Chief Judge of the State of New York and  
chief judicial officer of the Unified Court System,

Defendants-Respondents.

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Frederick A. Brodie, an attorney licensed to practice in the State of  
New York, affirms the following under penalty of perjury pursuant to  
C.P.L.R. 2106:

1. I am an Assistant Solicitor General of counsel in this matter to Barbara D. Underwood, Attorney General of the State of New York, attorney for defendants-respondents Governor Andrew M. Cuomo, the New York State Senate, the New York State Assembly, the Attorney General,<sup>1</sup> Temporary President of the Senate John J. Flanagan, Assembly Speaker Carl E. Heastie, New York State Comptroller Thomas DiNapoli, and Chief Judge Janet M. DiFiore in the above-captioned action. Except where otherwise indicated, I have personal knowledge of the matters set forth herein.

2. I submit this affirmation in opposition to the motion of plaintiffs-appellants Center for Judicial Accountability, Inc. and Elena Ruth Sassower (together, "plaintiff") to strike the respondents' appellate brief and for other relief set forth in plaintiff's notice of motion. This affirmation provides factual support for certain arguments made in the accompanying memorandum in opposition to plaintiff's motion.

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<sup>1</sup> The caption lists as a defendant the former Attorney General "in his official capacity." Based on that phrase, my understanding is that the intended defendant would be whoever currently fills the position of Attorney General.

**The Office of the Attorney General Has Determined That  
Defending Against this Appeal is in the Interest of the State**

3. The Office of the Attorney General has determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal.

4. None of the respondents has objected to the Attorney General's representation or sought to have different counsel appear on this appeal.

**Respondents' Brief Was Prepared Through an Objectively  
Reasonable Process Designed to Avoid Errors**

5. I was the primary drafter of respondents' brief in this appeal.

6. In preparing respondents' brief, I reviewed plaintiff's appellate brief; the record filed by plaintiff; the decisions of Supreme Court, Albany County (Hartman, J.) in this case; the decisions of Supreme Court, Albany County (McDonough, J.) in the predecessor case, *Center for Judicial Accountability v. Cuomo*, Index No. 1788-14 (Sup. Ct. Albany Cty.); materials from the record in the predecessor case; the relevant case law and statutes; and other relevant documents.

7. The record in this appeal is large. The papers below included numerous cross-references, both to other papers filed in this case and to

papers filed in the predecessor case. In drafting respondents' brief, I tried to eliminate (or at least reduce) the confusion caused by multiple cross-references. Among other things, I tried to cite the appropriate record portions to support the factual statements, and the appropriate cases or statutes to support the legal propositions.

8. The record in the predecessor case was stipulated to be part of the record on the instant appeal. (*See Record on Appeal*, last two pages.) Plaintiff, however, did not reproduce the record from the predecessor case. For the Court's review, I compiled the portions of the predecessor case's record that were relevant to respondents' brief, and had them filed as a supplemental record. Where necessary, respondents' brief cited to the factual materials in the supplemental record.

9. My draft of respondents' brief benefited from review and comments by Assistant Solicitor General Victor Paladino, who is supervising my work on this appeal. Based on conversations with Mr. Paladino, I understand that he has been admitted to the bar for more than 30 years and has spent his entire career working for the Office of the Attorney General, mostly in the Appeals & Opinions Bureau.

10. Nine days in advance of the filing date, I circulated a draft of respondents' brief to representatives of each of our clients. None of our clients objected to the filing of respondents' brief.

11. Before the filing date, I had a legal assistant in our office separately check the case, statute, and record cites contained in the brief to make sure they were accurate. (I personally cite-checked the references to two earlier-filed papers that the legal assistant did not have.)

**I Have Represented the Respondents  
On Appeal in Subjective Good Faith**

12. I have been a lawyer for almost 30 years. I graduated *magna cum laude* from Brown University in 1984, and from Yale Law School in 1987. In 1987-88, I served as a law clerk for the Honorable Joseph L. Tauro, a U.S. District Judge in the District of Massachusetts. In 1988-89, I served as a law clerk for the Honorable Bruce M. Selya, a Judge of the U.S. Court of Appeals for the First Circuit.

13. I was admitted to practice in the State of New York by this Court on January 24, 1989. On September 5, 1989, I started private practice as an associate at the law firm of Winthrop, Stimson, Putnam & Roberts (now known as Pillsbury Winthrop Shaw Pittman LLP) in New

York, NY. I was elected a partner of that firm effective March 1, 1996, and continued to practice in the firm's New York City litigation department through February 2015.

14. At the end of February 2015, I voluntarily left my law firm and moved to Albany, New York, to begin a new career in public service. I began work as an Assistant Solicitor General with the New York State Office of the Attorney General on March 9, 2015. Since that time, a Westlaw search indicates that I have participated in prosecuting or defending against more than 50 appeals as an employee of the Office of the Attorney General, including more than 20 in this Court.

15. During the course of my long and active career as a lawyer, I have never been sanctioned or had a misconduct grievance filed against me.

16. I have no desire to defraud the Court in this or any other appeal. To the contrary, I take care to ensure that the papers I submit to courts are trustworthy.

17. I believe that the arguments in respondents' brief all have legal and factual merit. The legal basis for each of respondents' arguments may

be found in the various cases, statutes, and other legal authorities cited in the text and footnotes pertaining to that particular argument in respondents' brief. The basis for each factual statement in respondents' brief may be found in the citations to the record on appeal and the supplemental record on appeal that pertain to such statements in the brief.

18. I believe the adversary system can be trusted to yield the proper result where the Court considers each side's submissions before making a decision—not just those of plaintiff.

19. Consistent with the idea that the Court should consider both sides' arguments, in footnote 1 on page 1 of respondents' brief, I wrote: "For a full account of plaintiff's claims, we urge the Court to read her brief and the record, available on plaintiff's website, [www.judgewatch.org](http://www.judgewatch.org)." I also did not object to plaintiff's request for extra space in her reply brief. For a full account of plaintiff's claims, the Court is urged to read her moving papers, briefs, and the record.

### **Striking the Brief Would Unfairly Prejudice Respondents**

20. Striking respondents' brief as plaintiff requests would unfairly and materially prejudice respondents. The return date on plaintiff's motion

is November 13, 2018—the very day this appeal is set for argument. Thus, I will have prepared for argument and argued the case based on the existing briefs. If respondents' brief is stricken, respondents will be materially prejudiced because they have been relying on that brief to set out their arguments for affirmance.

21. By setting November 13 as the return date, plaintiff has ensured that respondents will not have a fair opportunity to revise and resubmit the brief prior to argument, if the Court credits any of her arguments on this motion and requests a revised brief.

For the reasons discussed above and in respondents' accompanying memorandum of law, plaintiff's motion should be denied in its entirety.

Dated: Albany, New York  
November 2, 2018

  

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FREDERICK A. BRODIE



