SUPREME COURT OF 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,

Plaintiffs-Appellants,

-against-

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 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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November 27, 2018

Moving Affidavit in Support of Appellants' Order to Show Cause (#4)

App. Div. 3rd Dept. Docket #527081
Albany Co. Index # 5122-16

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the unrepresented individual plaintiff-appellant in this citizen-taxpayer action brought pursuant to Article 7-A of the State Finance Law (§123 *et seq.*) for declarations of unconstitutionality and unlawfulness with respect to the state budget – including with respect to the Judiciary budget and the commission-based judicial salary increases it embeds.

2. I am fully-familiar with all the facts, papers, and proceedings heretofore had and submit this affidavit in support of the relief sought by appellants' accompanying order to show cause

to disqualify the appeal panel consisting of Associate Justice William McCarthy, as presiding justice, and Associate Justices Robert Mulvey, Christine Clark, and Phillip Rumsey for the actual bias demonstrated by their November 13, 2018 decision and order on motion (Exhibit A-1), rendered before noon, and at the November 13, 2018 oral argument, held at 1 p.m. (Exhibit D).[1] Such actual bias includes their willful violation of the express proscription of Judiciary Law §14 by their sitting and taking part in this appeal in which they are "interested",[2] as well as of their mandatory disqualification/disclosure obligations under §§100.3E and F of the Chief Administrator's Rules Governing Judicial Conduct.

3. As this is a citizen-taxpayer action, plaintiffs-appellants proceed by order to show cause, consistent with the command of State Finance Law §123-c(4):

> "An action under the provisions of this article shall be heard upon such notice to such officer or employee as the court, justice or judge shall direct, and shall be promptly determined. The action shall have preference over all other causes in all courts" (underlining added).[3]

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1 With the Court's consent, I retained a videographer to record the November 13, 2018 oral argument (Exhibits B-1, B-2) – and it is from his VIDEO, now posted on CJA's website, here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/11-13-18-oral-argument.htm, that I made a transcription, annexed hereto as Exhibit D.

2 In pertinent part, Judiciary Law §14, entitled "Disqualification of judge by reason of interest or consanguinity", states:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. …" (underlining added)

3 As I previously identified, including by my October 18, 2018 affidavit in support of appellants' order to show cause to strike the attorney general's brief, etc.—which Associate Justice Sharon Aarons nonetheless declined to sign, without reasons, on October 22, 2018, thereby requiring appellants to proceed by ordinary motion:

> "Whenever a statute or rule requires that a given motion be made "on such notice as the court may direct,' or uses words to that effect, that is another legislative way of requiring that the motion be brought on by order to show cause…" McKinney's Consolidated Laws of New York Annotated, Book

4. Only a biased tribunal, motivated by undisclosed interests and relationships, could render the November 13, 2018 decision (Exhibit A-1). Closing with the line "McCarthy, J.P., Clark, Mulvey and Rumsey, JJ., concur", and bearing an auto-pen signature of Robert D. Mayberger, as Clerk of the Court, the two-sentence decision reads, in full:

> "Motion to strike respondents' brief, to declare Attorney General's appellate representation of respondents unlawful and for other relief.
>
> Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is
>
> ORDERED that the motion is denied, without costs."

5. Such decision is "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause" of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) – and is, *on its face*, improper. It cites NO facts and NO law in support of its bald denial of appellants' October 23, 2018 motion.[4] Nor are there ANY facts or law that could remotely justify it. Indeed, that the decision purports, by standard boilerplate, that the denial is "Upon the papers filed in support of the motion and the papers filed in opposition thereto" is an OUTRIGHT LIE. The ONLY determination possible based on those "papers" was the granting of ALL the relief sought by the

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> 7B, Practice Commentaries by Patrick Connors: C2214:25 – "What is a Proper Case?"

[4] *Cf.*, this Court's decision in *Dworetsky v. Dworetsky*,152 A.D.2d 895, 896 (1989):

> "We take this opportunity to indicate again our concern over the increasingly common practice in this department of matters being decided without any written rationale (*see*, *Flax v Standard Sec. Life Ins. Co.*, 150 A.D.2d 894). Written memoranda assure the parties that the case was fully considered and resolved logically in accordance with the facts and law.... We encourage and expect greater use of written memoranda by the Bench to accomplish these goals."

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).

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.

> 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

without stating their belief they could be fair and impartial, and without asking me any questions – either about the foregoing, or about the course of the proceedings below, or about the course of appellants' three orders to show cause before the Court's other justices. And they allowed Mr. Brodie to freely repeat the frauds of his respondents' brief, exposed by appellants' reply brief – whose repetition, at the oral argument, the October 23, 2018 motion had sought to prevent.

8. Establishing precisely what occurred – and my protests to the four appeal panel justices about their willful violation of Judiciary Law §14 and their disclosure/disqualification obligations, replicating what their fellow justices had done on appellants' two earlier motions – and what Judge Hartman had done below – to which they sat mute – is the VIDEO of the November 13, 2018 oral argument – a transcription of which is annexed (Exhibit D). Additionally, annexed is my "legal autopsy"/analysis of Mr. Brodie's just under seven-minute oral argument (Exhibit E), establishing the truth of what I stated, in rebuttal:

> "...I made a motion, which you denied an hour ago, giving no reasons and allowing this proceeding, this appellate argument, in which Mr. Brodie repeated the outright lies and frauds already demonstrated in my papers to you, in the reply brief, in the motions.
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> ...you have allowed the most flagrant fraud, fraud, with respect to everything.
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> ...no bench conversant with the briefs could allow the drivel of Mr. Brodie here, repeating what has already been exposed as deceits." (Exhibit D).

9. Based on the November 13, 2018 decision (Exhibit A-1) and oral argument (Exhibit D), it appears that the appeal panel is intending to render a decision on the appeal, without ruling on

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> occupy the latter, it must be only as an idle spectator and not as a judge. He can not sit as such. The spirit and language of the law are against it. Having disqualified him from sitting as a judge, the statute further declares that he can neither decide nor take part in the decision of the cause, as to which he is divested of the judicial function. **Nor ought he to wait to be put in mind of his disability, but should himself suggest it and withdraw, as the judge with great propriety attempted to do in the present case.** He can

its jurisdiction to do so, because – as is clear from Judiciary Law §14, caselaw, and treatise authority – it has NO jurisdiction by reason of the HUGE financial interest of each of its four justices – a state of affairs whose acknowledgment would prevent it from "throwing" the appeal by a fraudulent judicial decision, which is the ONLY way it can uphold the unconstitutional, statutorily-violative, and fraudulent judicial salary increases that are the subject of appellants' sixth, seventh, and eighth causes of action, to which, as appellants' brief and reply brief establish, respondents have NO defense, as, likewise, NO defense to appellants' seven other causes of action.

10. Appellants make this motion to secure a responsive ruling to the dispositive threshold issue that Judiciary Law §14 divests the appeal panel of jurisdiction, voiding any decision it may render – just as it voids the decisions below that are the subject of the appeal. The alternative would be an Article 78 proceeding[7], which, upon commencement in this Court, would require transfer to another judicial department, consistent with *Capoccia v. Appellate Division, Third Department*, 104 A.D.2d 536, 537 (3rd Dept 1984):

> "Inasmuch as the Justices of this court are named as respondents in this proceeding, the matter may not be adjudicated here (Judiciary Law, §14) and must be transferred to another court for determination.
>
> Proceeding transferred to the Appellate Division, Fourth Department, for determination."

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not sit, says the statute. It is a legal impossibility, and so the courts have held it. *Edwards* v. *Russell*, 21 *Wend.* 63; *Foot* v. *Morgan*, 1 *Hill*, 654.)"

7 *Matter of Sterling Johnson, Jr. v. Hornblass*, 93 AD2d 732, 733 (1st Dept. 1983):

> "We are again confronted with the question of whether or not a determination by a Justice at *nisi prius* not to disqualify himself is subject to review by this court pursuant to CPLR article 78. Section 14 of the Judiciary Law... is the sole statutory authority in New York for disqualification of a Judge. If disqualification under the statute were found, prohibition would lie, since there would be a lack of jurisdiction. There is an express statutory disqualification. *(See Matter of Merola v. Walsh*, 75 AD2d 163; *Matter of Katz v. Denzer*, 70 AD2d 548; *People ex rel., Devery v. Jerome*, 36 Misc 2d 256.)"

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."

therefore, can invoke "rule of necessity" accompanied by a statement that it believes it can be fair and impartial.

17. Pursuant to Article VI, §3b(4) of the New York State Constitution, the panel may "certif[y] that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals". This then brings before the Court of Appeals "only the question or questions so certified", following which the Court of Appeals "certif[ies] to the appellate division its determination upon such question or questions".

18. In view of the magnitude of this citizen-taxpayer action and its consequences for "the People of the State of New York & the Public Interest", on whose behalf appellants are expressly acting – and the course of the proceedings below and before this Court – certification pursuant to Article VI, §3b(4) is warranted. And so is certification of an additional threshold issue: the lawfulness, if not constitutionality, of the attorney general's representation of respondents pursuant to Executive Law §63.1 – where, as demonstrated, the office brazenly corrupts the judicial process with litigation fraud, falsifying and subverting the most black-letter law because it has NO legitimate defense – reflective of the fact that the attorney general's statutory and constitutional duty is to be prosecuting the case, on behalf of appellants, who have summary judgment on each of their ten causes of action.

19. As the constitutional function of New York's attorney general is to ensure that the state and its public officers comply with the United States and New York Constitutions and that laws promulgated are consistent therewith and, where consistent, complied with – including by state judges and the attorney general's own office – Mr. Brodie must be expected to furnish the Court with guidance, by an appropriate memorandum of law on the suggested certified questions.

20. Alternatively, the panel could transfer this appeal to another judicial department[13], thereby allowing a tribunal that has not already demonstrated actual bias, born of interests and relationships, to have an opportunity to show how judges can, in fact, rise above their interests and relationships to do their duty because that is their job.[14] Certainly, at bar, the appeal panel cannot confront the indefensibility and unconstitutionality of Judge Hartman's November 28, 2017 decision and judgment, beginning with the threshold integrity issues of her concealment of, and failure to disclose, her financial interests and relationships, and her concealment of, and failure to adjudicate, the lawfulness of the attorney general's defense representation, without exposing the indefensibility and unconstitutionality of its November 13, 2018 decision (Exhibit A-1).

21. Because Judiciary Law §14 and interpretive caselaw and treatises are so clear and unequivocal that the appeal panel is without jurisdiction to sit and render any decision herein, appellants are constrained from offering up "such other and further relief as may be just and proper". That being said, appellants' notice of motion does include the bare minimum of what would be "just and proper" in other circumstances.[15] The starting point, of course, is disclosure pursuant to

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[13] Article VI, §4(i) of the New York State Constitution provides:

> "In the event that the disqualification, absence or inability to act of justices in any appellate division prevents there being a quorum of justices qualified to hear an appeal, the justices qualified to hear the appeal may transfer it to the appellate division in another department for hearing and determination. In the event that the justices in any appellate division qualified to hear an appeal are equally divided, said justices may transfer the appeal to the appellate division in another department for hearing and determination..."

[14] In such case, appellants' request transfer to the Fourth Judicial Department in the belief that its location makes its financial interests and relationships less overwhelming.

[15] Inasmuch as the appeal panel "overlooked" all the facts, law, and legal argument presented by appellants' "papers filed in support of the motion" – none identified or addressed by its November 13, 2018 decision – such constitutes grounds for reargument, pursuant to CPLR §2221(d). As for "new facts not offered on the prior motion", constituting a basis for renewal, pursuant to CPLR §2221(e), it is the actual bias of the appeal panel justices demonstrated by the November 13, 2018 decision. The "reasonable justification" for appellants not having presented this actual bias "on the prior motion" is that it is a supervening occurrence.

§100.3F of the Chief Administrator's Rules Governing Judicial Conduct[16] – and in keeping with *Oakley v. Aspinwall* (*see* fn. 6, *supra*).

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16 On the subject of disclosure, the bio of panel presiding justice McCarthy, posted on the Court's website, http://www.nycourts.gov/ad3/Bios/McCarthyBios.html, indicates that he "Served as Senior Assistant Counsel to Governor George Pataki (1998-2004)".

Can he be fair and impartial given my extensive communications with Governor Pataki's office during that period and in years preceding, chronicling the Governor's collusion with the legislature in politicizing the courts with unworthy and corrupt judicial appointees and in perpetuating the corruption of the Commission on Judicial Conduct, in collusion with the attorney general and the New York State Ethics Commission – the sole state agency having ethics jurisdiction over the Governor, which he had disabled. Is Justice McCarthy unaware of these communications, including opposition to Governor Pataki's appointments to the New York Court of Appeals, beginning with his appointment of Appellate Division, Second Department Justice Albert Rosenblatt in December 1998.

Is he unaware of the complaints I filed against Governor Pataki with the Ethics Commission, beginning on March 26, 1999, and with the U.S. Attorney for the Eastern District of New York, beginning on September 7, 1999, embracing CJA's Article 78 proceeding against the Commission on Judicial Conduct, arising from Governor Pataki's role, with the legislature and the Commission on Judicial Conduct, in the corrupting of "merit selection" to the Court of Appeals in connection with the Rosenblatt appointment – a lawsuit spanning from April 1999 to December 2002 which, at every court level, up to and including the Court of Appeals, was "thrown" by fraudulent judicial decisions – and whose record, encompassing two other Article 78 proceedings against the Commission on Judicial Conduct, also "thrown" by fraudulent judicial decisions, aided and abetted by then Chief Judge Judith Kaye, then Chief Administrative Judge Jonathan Lippman, and the Office of Court Administration, would be the initial impetus for CJA's 2011 opposition to the judicial pay raises – an opposition that would thereafter lead to my exploration of the budget from which the pay raises are disbursed.

CJA's webpage for this November 27, 2018 order to show cause: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/11-27-18-osc.htm posts a link to our webpage for Governor Pataki, from which my mountain of written communications to his office are accessible. This includes my February 23, 2000 letter to Governor Pataki, furnishing him with a copy of the Supreme Court record in CJA's then-ongoing Article 78 proceeding against the Commission on Judicial Conduct, including its incorporated Supreme Court record of the 1999 Article 78 proceeding *Michael Mantell v. Commission on Judicial Conduct* – the Supreme Court record of the 1995 Article 78 proceeding *Doris L. Sassower v. Commission on Judicial Conduct*, having already been furnished to the Governor years earlier, by a May 6, 1996 hand-delivered letter to his then First Assistant Counsel, and later Appellate Division, First Department Justice, James McGuire.

Finally, inasmuch as Justice McCarthy's 1998-2004 tenure with Governor Pataki coincided with the Governor's budget litigation against the Legislature and the Legislature's budget litigation against the Governor, to which Mr. McGuire, as the Governor's Chief Counsel, from October 1997 to March 2003, was instrumental, it is germane to ask whether Senior Assistant Counsel McCarthy worked on those litigations and participated in what appears to have been the concealment by all parties – and thereafter by the Court of Appeals, *Silver v. Pataki/Pataki v. Assembly & Senate*, 4 N.Y.3d 75 (2004) – with what Article VII, §4 of the New York State Constitution makes obvious – that the state budget is flagrantly "OFF the constitutional rails", *inter alia*, because – as highlighted by appellants' fourth, fifth, and ninth causes of action and the record thereon [R.644-645, R.803, R.829] – Article VII, §4 ordains a "rolling budget", whose budget bills, except for the legislative and judiciary budget bills, never go back to the governor, but are enacted, bill by bill, by the legislature, upon their reconciling differences between the Senate and Assembly amendings of each bill in conformity with Article VII, §4.

22. As neither this Court nor the attorney general has addressed the law and argument relating to Judiciary Law §14 and "rule of necessity", annexed to my November 13, 2018 reply affidavit as Exhibits J and L, or relating to Executive Law §63.1, annexed to my October 18, 2018 moving affidavit as Exhibits E, F, and G, appellants' rest on those presentations and the above additional exposition, in the interest of economy, in support of all the relief this motion seeks.

23. Appellants have made no prior application for the same relief based on the actual bias, demonstrated by the appeal panel's November 13, 2018 decision and oral argument. Similar and related relief, however, was sought by appellants' first three orders to show cause, as follows:

- **Appellants' first order to show cause,**[17] filed on July 25, 2018, simultaneously with the filing of their brief and record on appeal, sought, as its first two branches of relief:

  (1) pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, disclosing, on the record, the financial interests of this Court's justices in this appeal and in the TRO and preliminary injunction herein sought, as well as their personal, professional, and political relationships impacting upon their fairness and impartiality; and, pursuant to §100.3E of the Chief Administrator's Rules, disqualifying Associate Justice Michael Lynch for demonstrated actual bias;

  (2) directing that Attorney General Barbara D. Underwood identify who has determined "the interest of the state" on this appeal – and plaintiffs-appellants' entitlement to the Attorney General's representation/intervention pursuant to Executive Law §63.1 and State Finance Law, §123 *et seq.*, including *via* independent counsel, and how, if at all, she has addressed her own conflicts of interest with respect thereto;

  The Court's August 7, 2018 decision by a motion panel consisting of this Court's Presiding Justice Elizabeth Garry and Associate Justices Eugene Devine, John Egan, Jr., and Stanley Pritzker denied the order to show cause, without reasons, in four sentences that concealed the denial.

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[17] The three-page order to show cause, as signed on August 2, 2018 by Justice Devine, is annexed to my November 13, 2018 reply affidavit as Exhibit H-1 – with the motion panel's August 7, 2018 decision thereon as Exhibit H-3.

- **Appellants' second order to show cause,**[18] e-mailed and express mailed to the Court on September 10, 2018, sought the Court's disqualification for demonstrated actual bias, based on the motion panel's August 7, 2018 decision, additionally seeking vacatur of the decision, including "pursuant CPLR §5015(a)(4) for 'lack of jurisdiction' by reason of the financial interest of its justices", with a third branch:

  > (3) transferring plaintiffs-appellants' perfected appeal to another judicial department or, alternatively, transferring it to the New York Court of Appeals for purposes of determining the constitutional issues directly involved, beginning with the constitutionality of adjudication by an actually-biased tribunal whose judges have *sub silentio* repudiated their mandatory disqualification/disclosure obligations pursuant to §§100.3E and F of the Chief Administrator's Rules Governing Judicial Conduct;

  The motion panel denied this second order to show cause, without reasons, by a two-sentence October 23, 2018 decision.

- **Appellants' third order to show cause,**[19] e-mailed and express-mailed to the Court on October 18, 2018, sought, as its first two branches of relief:

  1. striking the "Brief for Respondents", signed by Assistant Solicitor General Frederick Brodie, on behalf of Attorney General Barbara Underwood, and bearing the name of Assistant Solicitor General Victor Paladino, as "a fraud on the court", including by its pretense that the attorney general could properly represent respondents;

  2. declaring Attorney General Underwood's appellate representation of respondents unlawful for lack of any evidence – or even a claim – that it is based on a determination pursuant to Executive Law §63.1 that such is in "the interest of the state", with a further declaration that such taxpayer-paid representation belongs to appellants;

  Without reasons, Associate Justice Aarons, to whom the order to show cause was presented, declined to sign it, on October 22, 2018 – forcing appellants to proceed, by notice of motion, which they did, on October 23, 2018, seeking the identical relief. The motion was returnable on November 13, 2018 and submitted to the appeal panel with my November 13, 2018 reply affidavit, alerting it to the Judiciary Law §14

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[18] The three-page order to show cause, as signed on September 12, 2018 by Presiding Justice Garry, is annexed to my November 13, 2018 reply affidavit as Exhibit I-1 – with the motion panel's decision thereon as Exhibit I-2.

[19] The three-page order to show cause, which Associate Justice Aarons declined to sign, on October 22, 2018 is directly beneath appellants' three-page October 23, 2018 notice of motion, seeking the identical relief. The appeal panel's November 13, 2018 decision thereon is Exhibit A-1 annexed to this order to show cause.

jurisdictional issue, arising from "its HUGE financial and other interests in the appeal". The appeal panel's denial of the motion, without reasons, by its two-sentence November 13, 2018 decision (Exhibit A-1), was handed to me approximately an hour before the 1 p.m. oral argument, prompting my comments about it – and about the two prior motions – at the oral argument (Exhibit D), as follows:

> "Each of the justices here have a huge financial interest. You are each disqualified. You not only are disqualified, but pursuant to Judiciary Law 14, you have no jurisdiction to sit. I have brought that issue to your attention and you have ignored it. And you, as well as your fellow justices of this Court, have rendered three decisions that completely ignored the serious and substantial financial interests that each of you have by reason of the fact that this citizen-taxpayer action challenges your commission-based judicial pay raises that have given you a salary of $75,000 a year beyond what you are entitled. A determination for the plaintiffs, the appellants here, will knock down that salary of yours by $75,000 and subject you to a claw-back of probably about $300,000 per judge. That was also the issue below. And you have failed to make any disclosure on that issue, disqualification with respect to that issue, and it appears that not only are you refusing to address your disqualification, mandatory disqualification, voiding any decision you might render, but you, like the court below, are countenancing litigation fraud by the attorney general.
>
> ...
>
> [Judge Hartman] had an interest that is proscribed by Judiciary Law 14 – just as you have interests, identical interests, financial interests that are proscribed by Judiciary Law 14 that divest you of jurisdiction to sit. And I made a motion, which you denied an hour ago, giving no reasons and allowing this proceeding, this appellate argument, in which Mr. Brodie repeated the outright lies and frauds already demonstrated in my papers to you, in the reply brief, in the motions. You have denied three motions, three fact-specific, record-based, law-supported motions, addressed to your disqualification for interest and for relationships, calling upon you to make disclosure, calling upon you to address whether or not, in fact, under Judiciary Law 14, you may even invoke the rule of necessity so as to sit here. And you have allowed the most flagrant fraud, fraud, with respect to everything."

Elena Ruth Sassower, Unrepresented Plaintiff-Appellant

Sworn to before me this
27th day of November 2018

Notary Public

JOSEPH SAM MAZZA
Notary Public, State of New York
No. 04MA6045640
Qualified in Westchester County
Commission Expires July 31, [illegible]

TABLE OF EXHIBITS

Exhibit A-1: The Court's November 13, 2018 decision and order on motion ("McCarthy, J.P., Clark, Mulvey and Rumsey, JJ., concur")

Exhibit A-2: Appellant Elena Sassower's November 13, 2018 e-mail to Chief Motion Attorney Edward Carey & Court Attorney Jane Landes (7:26 am) – "...appellants' motion to strike respondents brief, disqualify AG, etc. – returnable today: please deliver immediately to appellate panel"

Exhibit B-1: Appellant Sassower's November 2, 2018 e-mail to Managing Attorney Eric Putnam Little – "...November 13, 2018 oral argument"

Exhibit B-2: Managing Attorney Little's November 7, 2018 e-mail

Exhibit C: Session Calendar for Tuesday, November 13, 2018

Exhibit D: Transcription from VIDEO of November 13, 2018 oral argument of the appeal

Exhibit E: "Legal autopsy"/analysis of Assistant Solicitor General Frederick Brodie's November 13, 2018 oral argument

Appellate Division Docket #527081

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,

Plaintiffs-Appellants,

November 27, 2018

-against-

Albany Co. Index # 5122-16

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 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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Appellants' Order to Show Cause (#4) to Disqualify the Appeal Panel for Demonstrated Actual Bias, including its Willful Violation of Judiciary Law §14, for Certification of Questions to the Court of Appeals, & Other Relief

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ELENA RUTH SASSOWER, Unrepresented Plaintiff-Appellant,
individually & as Director of the Center for Judicial Accountability, Inc.,
and on behalf of the People of the State of New York & the Public Interest

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