

No. _____

IN THE

Supreme Court of the United States

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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Petitioner,

—v.—

ROSS R. CALIGURI a/k/a ROSS CALIGURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Ross R. Caliguri (“Caliguri”) petitions for a writ of certiorari to review the Memorandum Decision of the Court of Appeals of the State of New York dated December 17, 2020.

QUESTION PRESENTED

(1) Whether the Court of Appeals of the State of New York was in a “conflict of interest” position when it issued its Memorandum Decision dated December 17, 2020 affirming the judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the “Second Department”) in this mortgage foreclosure action in violation of Caliguri’s 14th Amendment right?

PARTIES TO THE PROCEEDING

Petitioner, Caliguri, was the defendant in this action and also the appellant in the Court of Appeals of the State of New York.

Respondent, JPMorgan Chase Bank, N.A. was the plaintiff in this action and was the respondent in the Court of Appeals of the State of New York.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Caliguri respectfully petitions this Court for a writ of certiorari to review the Memorandum Decision of the Court of Appeals of the State of New York dated December 17, 2020. The Court of Appeals is the highest court in the State of New York Judicial System.

OPINION BELOW

The Court of Appeals' Memorandum Decision is reported at 36 N.Y.3d 953, 160 N.E.3d 693, 136 N.Y.S.3d 225, 2020 N.Y. LEXIS 2870, 2020 NY Slip Op 07660 (12/17/20) (Appx 5a-7a). The Memorandum Decision affirmed the decision of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the "Second Department") reported at 168 A.D.3d 819, 92 N.Y.S.3d 95, 2019 N.Y. App. Div. LEXIS 295, 2019 NY Slip Op 00262, 2019 WL 209065 (2nd Dept., 2019).

JURISDICTION

This Honorable Court has jurisdiction to determine this petition for a writ of certiorari pursuant to the provisions set forth in 28 U.S.C. §2101 as it pertains to a violation of Caliguri's 14th Amendment right. 28 U.S.C. §2101(c) provides:

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

Herein, the petition for a writ of certiorari is being timely filed as Caliguri had filed a motion for reargument with the Court of Appeals dated January 3, 2021, which was returnable on January 5, 2021; the Court of Appeals denied the motion for reargument on April 1, 2021 notwithstanding that the motion for reargument was unopposed by the Plaintiff-Respondent JPMorgan Chase Bank, N.A (Appx 1a-2a). As set forth in the Supreme Court's Rule 13.3:

“The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.”

Please see also Hibbs v Winn, 542 U.S. 88, 97, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004). Accordingly, given that there was a motion to reargue filed with the Court of Appeals, the Supreme Court of the United States has jurisdiction to determine the petition for a writ of certiorari although the petition was not filed within ninety (90) days of the issuance of the Memorandum Decision dated December 17, 2020, but was filed prior to the expiration of the Ninety (90) days from the denial of the motion for reargument dated April 1, 2021.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in Section 1:

“...; nor shall any State deprive any person of life, ... or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

The Plaintiff-Respondent JPMorgan Chase Bank, N.A. commenced a prior mortgage foreclosure action against Caliguri in the Supreme Court of the State of New York, Suffolk County (the “Suffolk Supreme Court”). (the “First Caliguri Action”). The First Caliguri Action was commenced by summons and complaint dated July 2, 2009 and was assigned to the Honorable Paul J. Baisley, Jr. (“Judge Baisley”), Index No. 25638/09. Caliguri prevailed in the First Caliguri Action when Judge Baisley issued the order granting summary judgment dated March 7, 2012 (the “First Caliguri Order”). The First Caliguri Order stated in pertinent part:

“ORDERED that the motion (motion sequence no. 004) of defendant Ross R. Caliguri for an order granting summary judgment dismissing this mortgage foreclosure action with prejudice, striking the complaint and, in the alternative, other sanctions, in accordance with CPLR §3126 and R. 3212, is granted as set forth hereinafter.

The submissions reflect that plaintiff J.P. Morgan Chase Bank, N.A. commenced the instant action to foreclose a consolidated mortgage on July 2, 2009. Thereafter defendant-mortgagor Ross R. Caliguri served an answer

which, *inter alia*, asserted plaintiff's lack of standing as an affirmative defense. Defendant subsequently served plaintiff with interrogatories and a demand for production of documents. In particular, defendant demanded that plaintiff produce the original note and original mortgage assignment for inspection at the Long Island office of plaintiff's attorney, Steven J. Baum, P.C 'on a mutually [convenient] date and time.' In response, plaintiff interposed various objections to defendant's interrogatories and document demands, and, citing the 'commercial sensitivity of these documents,' produced only a copy of the notes, mortgage and assignment without offering a date and time for the production of the original documents. Defendant thereafter interposed a motion (motion sequence no. 003) to compel plaintiff to 'fully and completely respond to all of the discovery requests propounded by [defendant].'

While the motion to compel, was *sub judice*, and after a compliance conference at which plaintiff's repeated failure to produce the original note and mortgage assignment was discussed, defendant served plaintiff a second request for production of documents dated September 9, 2011 which requested that the original mortgage note and the original mortgage assignment be made available for inspection at the Long Island office of plaintiff's attorney in Westbury on a date certain, to wit, October 5, 2011 at 2:00 p.m.

The submissions reflected that defendant's attorney appeared at the Westbury office of Steven J. Baum, P.C. on October 5, 2011 at 2:00 p.m., together with a forensic document examiner retained for the purpose of inspecting the original

documents. Notwithstanding the duly served ‘Second Request for Production of Documents,’ to which plaintiff did not respond or object, no original documents were produced for defendant’s inspection at that time or thereafter.

On October 7, 2011, defendant interposed the instant motion for summary judgment dismissing the action with prejudice, striking the complaint, and for other sanctions in accordance with CPLR §3126 and R. 3212. Defendant’s motion is predicated in substantial part on plaintiff’s failure to produce evidence of its standing to commence and prosecute this mortgage foreclosure action. It is well established that where the standing of a plaintiff in a mortgage foreclosure action is a contested issue, as here, the plaintiff must prove that it was the holder or assignee of both the subject mortgage and the underlying note at the time of commencement of the action in order to be entitled to relief (*Bank of New York v. Silverberg*, 86 AD3d 274 [2^d Dept 2011]). In opposition to defendant’s motion, plaintiff has submitted only the affirmation of its attorney, who does not have personal knowledge of the facts alleged therein and accordingly is incompetent to establish plaintiff’s standing (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Moreover, the documentary evidence annexed thereto, including a purported assignment executed by a purported ‘attorney in fact,’ fails to establish as a matter of law that plaintiff was the owner and holder of the subject note(s) and mortgage(s) at the time of commencement of this action. Plaintiff has thus failed to establish, by proof in admissible form, its standing to commence and maintain the instant

action. Accordingly, the submissions establish defendant's *prima facie* entitlement to summary judgment dismissing plaintiff's complaint.

Additionally, the submissions establish plaintiff's willful failure to comply with the discovery orders of this Court. The October 19, 2011 order of this Court (BAISLEY, J.) granted defendant's prior motion to compel discovery, noting that plaintiff's prior responses were 'substantially deficient' and that plaintiff's interposed objections were 'improper.' The order directed plaintiff to provide full, complete and substantive responses to each of defendant's interrogatories, including identifying with specificity 'any and all persons that assisted in the preparation of the responses,' 'all persons with knowledge of the facts at issue in this case,' and 'any and all witnesses' that plaintiff intends to call at trial, and providing a basis for interpreting the computerized payment schedule annexed to plaintiff's response to defendant's interrogatories, within 20 days of the date of service of notice of entry of this order.' In addition, the order directed plaintiff to 'make available for defendant's inspection the original mortgage note and original mortgage assignment, at a mutually convenient place and time but in no event later than 20 days after the date of service of notice of entry of this order.'

Notwithstanding the foregoing, the 'Amended Answers to Interrogatories' served by plaintiff on or about November 8, 2011 in response to the Court's order failed to comply with the order in several material respects. Plaintiff admittedly failed to 'identify all persons with knowledge of the facts at issue in this case,' failed to provid[e]

a basis for interpreting the computerized payment scheduled annexed to plaintiff's response to defendant's interrogatories,' and interposed substantially the same objections that had previously been ruled upon by the Court and found to be 'improper.' In light of the express directives contained in the order, plaintiff's failure to provide 'full, complete and substantive responses' must be deemed to be willful (*Forbes v. New York City Tr. Auth.*, 88 AD3d 546 [1st Dept 2011]) and provides an independent basis for striking plaintiff's complaint in this action."

(Footnote Omitted). Accordingly, the First Caliguri Order concluded by stating in pertinent part:

"In light of all of the foregoing, and in accordance with CPLR R. 3212 and §3126, the Court grants defendant's motion for summary judgment and strikes plaintiff's complaint."

(Appx 17a-22a). The Plaintiff-Respondent JPMorgan Chase Bank, N.A. never appealed the First Caliguri Order nor filed a motion for reargument.

Based on the provisions of the provisions of the First Caliguri Order, Caliguri commenced an action in the Suffolk Supreme Court by summons and complaint dated April 23, 2012 seeking an order cancelling and discharging the following mortgage liens against the Property possessed by JPMorgan Chase Bank, N.A., as successor to Washington Mutual Bank, FSB, pursuant to the provisions of NY RPAPL §1501: (a) the mortgage dated November 2, 2005 and recorded with the Suffolk County Clerk on November 18, 2005 at Liber M00021174, Page 335 to secure a borrowing in the original sum of Nine Hundred Forty Five Thousand and xx/100 Dollars (\$945,000.00); and (b) the mortgage dated October 31,

2007 and recorded with the Suffolk County Clerk on November 23, 2007 at Liber M00021637, Page 178 to secure a borrowing in the original sum of Seven Thousand One Hundred Seventy Five and 28/100 Dollars (\$7,175.28) (the “Discharge of Mortgage Action”); the Discharge of Mortgage Action was assigned Index No. 13522/2012. In lieu of answering the complaint in the Discharge of Mortgage Action, JPMorgan Chase Bank, N.A. filed its motion to dismiss the complaint in accordance with the provisions set forth in NY CPLR §3211; in response, Caliguri filed a cross-motion for summary judgment in accordance with the provisions set forth in NY CPLR §§3211(c) and 3212. In lieu of sending the case to Judge Baisley for an interpretation of the First Caliguri Order, the Honorable Ralph T. Gazzillo, another judge of the Suffolk Supreme Court, issued the Order dated May 13, 2013 (the “Gazzillo Order”). The Gazzillo Order granted JPMorgan Chase Bank, N.A.’s motion to dismiss the Discharge of Mortgage Action and denied Mr. Caliguri’s cross-motion for summary judgment. Caliguri took a timely appeal of the Gazzillo Order to the Second Department. The Second Department affirmed the Gazzillo Order by the Opinion dated October 29, 2014, 121 A.D.3d 1030, 996 N.Y.S.2d 73 ((2nd Dept., 2014), Docket No. 2013-06651; the latter opinion stated in pertinent part at 121 A.D.3d at 1031-1032:

“Contrary to the plaintiff’s contention, a dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes. Furthermore, the alternative basis for dismissal of the prior action, the striking of the complaint for noncompliance with a discovery order, was not a dismissal on the merits. Accordingly, the Supreme Court properly granted JPMorgan

Chase's motion to dismiss the complaint for failure to state a cause of action and denied, as academic, the plaintiff's cross-motion for summary judgment on the complaint."

(Citations Omitted). Caliguri filed a timely motion for re-argument or, in the alternative, motion for permission from the Second Department to appeal the Opinion of the Second Department Decision dated October 29, 2014. By Decision & Order dated April 6, 2015, the Second Department denied the Caliguri motion by the Decision & Order on Motion dated April 6, 2015. Caliguri also sought leave of the Court of Appeals to appeal the Second Department decision dated October 29, 2014 to the Court of Appeals, however, the Court of Appeals denied said permission to appeal.

The Plaintiff-Respondent JPMorgan Chase Bank, N.A. commenced a second mortgage foreclosure action against Caliguri seeking to foreclose the same mortgage on the Property based on the same purported mortgage note and the same default in payment in the Suffolk Supreme Court by summons and complaint dated August 7, 2014, Index No. 066298/2014 (the "Second Caliguri Mortgage Foreclosure Action"), which case was assigned to the Honorable John Rouse ("Judge Rouse"), a coordinate judge to Judges Baisley and Gazzillo on the Suffolk Supreme Court. Caliguri filed a timely answer and a motion to transfer the Second Caliguri Mortgage Foreclosure Action to Judge Baisley. And Caliguri propounded document demands upon JPMorgan Chase Bank, N.A. dated April 10, 2015, which included as the first item, the production of the original note for examination and inspection within thirty (30) days at the JPMorgan Chase Bank, N.A.'s attorney's office in Long Island. In lieu of responding

to the Caliguri discovery demands, JPMorgan Chase Bank, N.A. filed a motion for summary judgment and an opposition to the motion to transfer the case to Judge Baisley dated June 1, 2015; Caliguri filed his cross-motion and an opposition to the motion for summary judgment dated June 18, 2015; JPMorgan Chase filed its reply affirmation in support of motion and in opposition to the cross-motion for summary judgment dated June 29, 2015; and Caliguri filed his reply affirmation to the cross-motion dated July 3, 2015. Judge Rouse denied the Caliguri motion to transfer the Second Caliguri Foreclosure Action to Judge Baisley and granted summary judgment in favor of JPMorgan Chase Bank, N.A in the Order dated May 11, 2017 stating, in part, that the discovery demands by Caliguri did not have to be honored and the case need not be transferred to Judge Baisley. Caliguri appealed the Order dated May 11, 2017 to the Second Department by notice of appeal dated June 14, 2017.

The Second Department affirmed the Order dated May 11, 2017 by the Decision & Order dated January 16, 2019, 168 A.D.3d 819, 92 N.Y.S.3d 95 (2nd Dept., 2018), Docket No. 2017-06999. The January 16, 2019 Decision & Order acknowledged the demand for the discovery of the original mortgage note, but stated in pertinent part:

“JPMorgan Chase demonstrated its *prima facie* entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default. In addition, it established its standing by attaching to the summons and complaint a copy of the consolidated note, bearing an endorsement in blank from the original lender. Contrary to the defendant’s contention, ‘there is no requirement that an

entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it'. In opposition, the defendant failed to raise a triable issue of fact."

(Citations Omitted)

The Suffolk Supreme Court issued the judgment of foreclosure and sale dated February 8, 2019 in the Second Caliguri Mortgage Foreclosure Action.

The Court of Appeals granted Caliguri leave to appeal to the Court of Appeals to determine the issues set forth in the January 16, 2019 Decision & Order except the issue as to whether the Second Caliguri Mortgage Foreclosure Action should have been transferred to Judge Baisley (Appx 8a-9a). The Court of Appeals also issued a "stay" of the mortgage foreclosure sale of the Property, APL-2019-00119.

Caliguri perfected the appeal to the Court of Appeals by the filing of the appellate record and the Brief for Defendant-Appellant dated August 6, 2019 (received by the Court of Appeals on August 9, 2019; JPMorgan Chase Bank, N.A. filed the Brief of Plaintiff-Respondent JPMorgan Chase Bank, N.A. dated October 28, 2019; and Caliguri filed the Reply Brief for Defendant-Appellant dated November 25, 2019. The Caliguri appeal to the Court of Appeals had two (2) primary issues for the Court of Appeals to hear and determine. They were:

- a. did Judge Rouse, the Suffolk Supreme Court judge presiding over the Second Caliguri Mortgage Foreclosure Action prematurely grant summary judgment in favor of JPMorgan Chase Bank, N.A. when there were outstanding document demands including,

but not limited to, the production of the original mortgage for inspection; and

- b. did Judge Rouse, violate the doctrines of res judicata, collateral estoppel and/or law of the case by failing to follow the rulings made in the First Caliguri Action by Judge Baisley, a coordinate judge of the Suffolk Supreme Court, who presided over the First Caliguri Action “between the same parties”, such as the order requiring JPMorgan Chase Bank, N.A. to produce the original mortgage note for inspection and examination.

The Court scheduled oral argument on the Caliguri Court of Appeals appeal to be held on November 17, 2020 at 2:00 p.m. (Appx 15a-16a). Incredibly, the summary of the case prepared by the Court of Appeals was limited to the production of the original note and never mentioned the res judicata/collateral estoppel/law of the case issue. (Appx-23a-26a). The Court of Appeals issued the Memorandum Decision dated December 17, 2020 and Caliguri filed his motion for reargument dated January 3, 2021, which motion for reargument was denied on April 1, 2021.

REASONS FOR GRANTING THE WRIT

An action was commenced in the Suffolk Supreme Court pertaining to the termination of four (4) specific Appellate Division (intermediate level appellate court) judges due to their age, entitled:

“In the Matter of the Application of

HON. ELLEN GESMER, HON. DAVID FRIEDMAN, HON. SHERI S. ROMAN, HON. JOHN M. LEVENTHAL, and DANIEL J. TAMBASCO,

Petitioners-Plaintiffs

For a Judgment under Article 78 of the CPLR

-against-

THE ADMINISTRATIVE BOARD OF THE NEW YORK STATE UNIFIED COURT SYSTEM, JANET DIFIORE, AS CHIEF JUDGE OF THE NEW YORK STATE UNIFIED COURT SYSTEM, and LAWRENCE K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF THE NEW YORK STATE UNIFIED COURT SYSTEM,

Respondents-Defendants"

The latter action was assigned Index No. 616980/2020 (the "First Judge Action). The First Judge Action was commenced by summons dated November 5, 2020 and Verified Article 78 Petition and Complaint dated November 5, 2020. Please note that November 5, 2020 was only twelve (12) days prior to the scheduled oral argument in the Caliguri Appeal (November 17, 2020) and Chief Judge Janet DiFiore was a named respondent-defendant in the First Judge Action. The First Judge Action was assigned to Judge Baisley, (Appx 27a-80a), the same judge of the Suffolk Supreme Court who presided over the First Caliguri Action (Appx 150a).

The undersigned counsel first became aware of the pendency of the First Judge Action on Wednesday, November 18, 2020, one (1) day after the Caliguri Appeal oral argument before the Court of Appeals, when he read a front page article in the November 18, 2020 issue of the New York Law Journal pertaining to the First Judge Action and the article disclosed that Chief Judge DiFiore and others also failed to comply with a discovery order issued by Judge Baisley in the First Judge Action.

There was also a second action that was commenced against the Chief Judge Janet DiFiore and others in the Suffolk Supreme Court entitled:

“In the Matter of the Application of:

SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, Inc., by its President HON. ESTHER M. MORGENSTEIN, ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, by its President HON. CHARLES C. MERRELL, HON. KATHRYN E. FREED, HON. ORLANDO MARRAZZO, HON. LARRY D. MARTIN, HON. JAMES J. PIAMPIANO, HON. BERNICE D. SIEGAL, and HON. FERNANDO TAPIA,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules,

Petitioners

-against-

THE ADMINISTRATIVE BOARD OF THE NEW YORK STATE UNIFIED COURT SYSTEM, JANET DIFIORE, AS CHIEF JUDGE OF THE NEW YORK STATE UNIFIED COURT SYSTEM and LAWRENCE K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF THE NEW YORK STATE UNIFIED COURT SYSTEM,

Respondents”

This action was assigned Index No. 618314/2020 (the “Second Judge Action”). The Second Action was commenced by Summons and Verified Petition dated November 24, 2020. The Second Action was also assigned to Judge Baisley (Appx 156a-199a).

As stated previously, Judge Baisley, was the Suffolk Supreme Court justice, who issued the Order dated March 7, 2012 in the First Caliguri Action, which was part of the Record on Appeal in the Caliguri Appeal; the provisions of the Order dated March 7, 2012 was set forth in great detail above. As also set forth above, Judge Baisley was the judge that granted Caliguri granted summary judgment, with prejudice, on its motion for summary judgment pursuant to the provisions set forth in CPLR §§3126 and 3212 in the First Caliguri Action.

The First Judge Action was commenced by the Order to Show Cause dated November 5, 2020 issued by Judge Baisley (the same Suffolk Supreme Court judge that issued the Order dated March 7, 2012, which was part of the Record on Appeal in the Caliguri Appeal) which provided in pertinent part:

“ORDERED, that the Petitioners-Plaintiffs may seek expedited discovery in connection with their Article 78 claims;

ORDERED, that the Respondents-Defendants are to produce written discovery requests to the document requests attached as Exhibit 2 to the accompanying Catterson Aff. no later than *November 13, 2020*;

ORDERED, that the Respondents-Defendants will conduct the deposition of Chief Judge Janet DiFiore pursuant to the notice of deposition attached as Exhibit 3 to the accompanying Catterson Aff. on *November 16, 2020*.

(Emphasis Added) (Appx 151a-155a). Please note that the scheduled deposition of Chief Judge DiFiore on November 16, 2020 was only one (1) day prior to

the oral argument in the Court of Appeals (November 17, 2020) on the Caliguri Appeal.

After Chief Judge DiFiore and the other named respondents failed to produce the demanded documentary discovery and Chief Judge DiFiore failed to appear at the deposition scheduled to be held on November 16, 2020, the Plaintiffs in the First Judge Action filed a memorandum of law in support of Plaintiffs' Motion for Contempt of Court on November 18, 2020, with exhibits (one (1) day after the scheduled oral argument on the Caliguri Appeal). Pages 2 and 3 of the memorandum of law stated in pertinent part:

"Pursuant to the expedited discovery requests and the Court's expedited discovery order, Respondents' documents were due to be produced on *Friday November 13, 2020*, and Chief Judge DiFiore was to be deposed on *Monday November 16, 2020*. Respondents' counsel initiated a meet and confer on the very day documents were due. During that meet and confer, Respondents' counsel advised Petitioners' counsel that OCA (the Office of Court Administration) would be unable to produce the documents sought prior to the passage of at least two years' time. Without the courtesy of mentioning it, Respondents then filed a 50-page cross-motion, seeking, among other things, the instant motion for a protective order at nearly *11 p.m. on Friday, November 13, 2020*. The protective order is nothing more than a baseless attempt to re-litigate the expedited discovery order their counsel failed to oppose in the first place. But, as powerful as the Respondents are, they, like all defendants who appear before the Courts of this State, must abide by court-ordered discovery and must

adhere to court orders. The Respondents are not above the law and must set an example for other defendants who seek to evade legitimate discovery obligations. *To date, Respondents have produced no discovery whatsoever. Indeed, they have imperiously declared that they intend not to do so. They also have refused to sit for depositions, instead interposing a baseless motion simply to run out the clock. This will work a grave injustice on the Petitioners.*

Ultimately, Respondents can offer no legitimate excuse for their failure to obey this Court's Order, other than their counsel's 'screw up' in failing to appear at the hearing at which Respondents could have and should have presented the present arguments. Unless a swift and decisive message is sent, Respondents will continue to ignore this Court's authority and render null and void any relief the Court can provide in this matter."

(Emphasis Added). (Appx 157a-199a).

Accordingly, the similarities between the First Judge Action and the Caliguri Appeal to the Court of Appeals are incredibly stark. Both cases relate to the failure of a party to produce Court-ordered discovery and both concerned orders issued by Judge Baisley. The only difference is that in the Caliguri Appeal to the Court of Appeals, the non-compliant party was JPMorgan Chase Bank, N.A. and in the First Judge Action, the non-compliant parties included Chief Judge DiFiore. And Chief Judge DiFiore never recused herself from the Caliguri Appeal and, in fact, she even concurred in the Memorandum Decision dated December 17, 2020. However, as of November 17, 2020, the date of the Caliguri Appeal oral

argument, Chief Judge DiFiore was immediately placed in a conflict of interest situation; if she ruled in favor of Caliguri on the Caliguri Appeal, she may have negatively impacted her defense in the First Judge Action and possibly, the Second Judge Action. Please note that Caliguri is not addressing the merits of the First Judge Action or the Second Judge Action, but simply demonstrating that Chief Judge Janet DiFiore was conflicted as of November 17, 2020 (the date of the Caliguri oral argument) and remained conflicted as of December 17, 2020 (the date of the Memorandum Decision).

The Preamble of Part 100 entitled: "Judicial Conduct" of the Rules of the Chief Administrative Judge in the State of New York provides:

"The rules of governing judicial conduct are rules of reason. They should be applied consistently with *constitutional requirements*, statutes, other court rules and decisional law and in the context of all relevant circumstances. The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The rules are designed to provide guidance to judges and ... and to provide a structure of regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution.

The text of the rules is intended to govern conduct of judges and ... and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action...

The rules are not intended as an exhaustive guide for conduct. Judges and ... also should be

governed in their judicial and personal conduct by general ethical standards. The rules are intended, however, to state basic standards which should govern their conduct and to provide guidance to assist them in establishing and maintaining high standards of judicial and personal conduct.”

(Emphasis Added).

Section 100.0 entitled: “Terminology” includes:

“(R). “Impartiality” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

(S) An “independent” judiciary is one free of outside influence or control.

(T) “Integrity” denotes probity, fairness, honesty, uprightness and soundness of character. “Integrity” also includes a firm adherence to this Part or its standards of values.

(U) A “pending proceeding” is one that has begun but not yet reached its final disposition.”

Section 100.1 entitled: “A judge shall uphold the integrity and independence of the judiciary” provides:

“An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective,”

Section 100.2 entitled: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities” provides in pertinent part:

“(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

And Section 100.3 entitled: “A judge shall perform the duties of judicial office impartially and diligently” states in pertinent part:

“(A) **Judicial Duties in General.** The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative Responsibilities.

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism...

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person...

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.”

In the current matter, the impartiality and fairness of Chief Judge DiFiore was immediately cast in doubt upon the initiation of the First Judge Action and its demand for the production of documents, to which Chief Judge DiFiore and others had failed to comply and her failure to appear for a deposition as of November 17, 2020 (the date of the Caliguri oral argument) and as of December 17, 2020 (the date of

the Memorandum Decision). Accordingly, the participation of Chief Judge DiFiore in the Caliguri Appeal should have been immediately severed for all purposes relating to the Caliguri Appeal as she could no longer render an independent decision in the Caliguri Appeal as it may have impaired her ability to defend the First Judge Action wherein she failed to produce Court-ordered discovery and to appear for a Court-imposed deposition (ordered by the same Suffolk Supreme Court judge that issued the First Caliguri Order).

Caliguri filed a motion to reargue the Memorandum Decision dated January 3, 2021 and received by the Court of Appeals on or about January 5, 2021 pertaining to the above-referenced conflicts of interest by Chief Judge DiFiore. The motion to reargue was never opposed by JPMorgan Chase Bank. Notwithstanding, the Court of Appeals denied the motion for reargument on April 1, 2021.

Chief Judge DiFiore's participation in the Caliguri Appeal was a violation of Caliguri's Fourteenth Amendment right. The 14th Amendment provides in Section 1:

“...; nor shall any State deprive any person of life, ... or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

In the current matter, Caliguri's right in property is being adversely affected given that JPMorgan Chase Bank, N.A. is seeking to foreclose its mortgage on the Property. Thus, Caliguri's 14th Amendment right to a fair and neutral judicial tribunal is being trampled upon. Please see Williams v. Pennsylvania, 136 S.Ct. 1899, 195 L.Ed.2d 132, 2016 U.S. LEXIS 3774 (2016). And while Williams v. Pennsylvania pertained to a

criminal case, a similar result occurred in Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (quoting Winthrop v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)), which was a civil case. In sum, Caliguri's 14th Amendment right to a fair and neutral appellate tribunal was denied by the Chief Judge Janet DiFiore's conflict of interest. This taint was further evidenced by the failure of the Court of Appeals' summary to include any reference to the res judicata/collateral estoppel/the law of the case doctrines. And in fact, the Memorandum Decision barely referenced this issue of the Caliguri Appeal as it merely stated in the last sentence: "Defendant's remaining contentions are without merit" without providing any law or authority to support this conclusion of law.

The Court of Appeals, the highest state court in the State of New York, is a seven (7) member appellate tribunal. Williams v. Pennsylvania stated at 136 S.Ct. at 1909-1910:

"Having determined that Chief Justice Castille's participation violated due process, the Court must resolve whether Williams is entitled to relief. In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. (addressing 'the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case,' where that member's vote was outcome determinative). For the reasons discussed below, the Court holds that an unconstitutional failure

to recuse constitutes structural error even if the judge in question did not cast a deciding vote.

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect ‘not amenable’ to harmless-error review, regardless of whether the judge’s vote was dispositive. The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision making process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence,

‘The description of an opinion as being ‘for the court’ connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court’s perception of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member’s involvement plays a part in shaping the court’s ultimate disposition.’ 475 U.S. at 831, 106 S.Ct. 1580, 89 L.Ed.2d 823.’

These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party.

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias, demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will

permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any 'possible temptation... not to hold the balance nice, clear and true between the State and the accused.'

Where a judge has had an earlier significant, personal involvement in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level. Due process entitles Terrance Williams to 'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'"

(Citations Omitted). The concurrence in Isom v. Arkansas, ____ U.S. ___, 140 S.Ct. 342, 205 L.Ed.2d 373, 2019 U.S. LEXIS 7195 (2019) stated at 140 S.Ct. at 343-344:

"Our precedents require recusal where the 'probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' *Rippo v. Baker*, 580 U.S. ___, 137 S.Ct. 905, 197 L.Ed.2d 167 at 168 (*per curiam*) (quoting *Winthrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)). The operative inquiry is objective: whether, 'considering all the circumstances alleged,' *Rippo*, 580 U.S., at ___, 137 S.Ct. 905, 197 L.Ed.2d 167 at 168), 'the average judge in [the same] position is likely to be neutral, or whether there is an

unconstitutional potential for bias,’ *Williams v. Pennsylvania*, 579 U.S. ___, ___, 136 S.Ct. 1899, 195 L.Ed.2d 132 at 134 (2016)(internal quotation marks omitted). This Court has ‘not set forth a specific test’ or required recusal as a matter of course when a judge has had prior involvement with a defendant in his role as a prosecutor. Cf. *id.* at ___, 136 S.Ct. 1899, 195 L.Ed.2d 132 at 136). Nor has it found that ‘opinions formed by the judge on the basis of facts introduced or events occurring in the course of ... prior proceedings’ constitute a basis for recusal in the ordinary case. *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Indeed, ‘it may be necessary and prudent to permit judges to preside over successive causes involving causes involving the same parties or issues.’ *Id.*, at 562 (Kennedy, J., concurring).”

It should be noted that both Isom v. Arkansas and Williams v. Pennsylvania concerned recusals in criminal matters, although Williams v. Pennsylvania pertained to a judge on the highest court of Pennsylvania’s failure to recuse himself. However, Caperton v. A.T. Massey Coal Co., 562 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) pertained to the failure of a justice on the highest state court in West Virginia’s failure to recuse himself in a civil matter. Caperton v. A.T. Massey Coal Co. stated at 556 U.S. at 886-887:

“Justice Benjamin did undertake an extensive search for actual basis. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved. Due process ‘may sometimes bar trial by judges who have no actual bias and who would

do their very best to weigh the scales of justice equally between contending parties.' *Murchison*, 349 U.S., at 136, 75 S.Ct. 623, 99 L.Ed. 942. The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence – coupled with the temporal relationship between the election and the pending case – "offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Lavoie*, 475 U.S., at 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (quoting *Monroeville*, 409 U.S., at 60, 93 S.Ct. 80, 24 L.Ed.2d 267, in turn quoting *Tumey*, 273 U.S., at 532, 47 S.Ct. 437, 71 L.Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236). On these extreme facts the probability of actual bias rises to an unconstitutional level."

In Williams-Yulee v. Fla. Bar, 572 U.S. 433, 133 S.Ct. 1656, 191 L.Ed.2d 570 (2015), a case concerning campaign solicitations by judges, the Supreme Court quoting the Address of John Marshall, in *Proceedings and Debates of the Virginia State Convention of 1829-1830*, p. 616 (1830) stated at 572 U.S. at 447:

"A judge instead must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or control him but God and conscience."

Accordingly, Caliguri was entitled to a fair and impartial appellate court untainted by Chief Judge DiFiore and her conflicts of interest resulting by the commencement of the First Judge and the Second Judge Actions. The unfairness and taint of the Court of Appeals to provide Caliguri a neutral appellate

panel was a violation of Caliguri's 14th Amendment rights.

It is also problematic whether the remaining members of the Court of Appeals can be impartial and fair in the Caliguri Appeal given their knowledge of the First Judges and the Second Judges Actions and the confidential communications that they may have already had with Chief Judge DiFiore.

Therefore, it may be difficult to find a neutral tribunal to transfer the Caliguri Appeal. It may be possible that a neutral appellate tribunal can be a seven (7) member Fourth Department panel with it being temporarily granted the rights and privileges of the Court of Appeals of the State of New York; it is believed that the First Department and the Second Departments cannot be neutral as the First Judge Action was commenced by four (4) justices belonging to the First and Second Departments; and the Second Department having transferred the First and Second Judge Actions to the Third Department. And now that the Third Department has issued its decision reversing the order by Judge Baisley, it is doubtful that the Third Department can be impartial and, if the Court of Appeals must rule on the First Judge and the Second Judge Actions on appeal, it is doubtful that the Court of Appeals can be a neutral appellate tribunal even if Chief Judge DiFiore recuses herself from a reargument of the Caliguri Appeal.

CONCLUSION

A writ of certiorari should be issued to review the Memorandum Decision of the Court of Appeals of the State of New York dated December 17, 2020.

Respectfully submitted,

Jeffrey Herzberg
Jeffrey Herzberg, P.C.
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(631) 761-6558
jeff@jherzberglaw.com

Counsel for Petitioner

Dated: Hauppauge, New York
May 17, 2021

APPENDIX

Appendix A

STATE OF NEW YORK
COURT OF APPEALS

*Decided and Entered on the
first day of April, 2021*

Present, Hon. Janet DiFiore,
Chief Judge, presiding.

Mo. No. 2019-69

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,
Respondent,
—v.—

ROSS R. CALIGURI, &C.,
Appellant.

Appellant having moved for leave for reargument
in the above cause;

Upon the papers filed and due deliberstion, it is
ORDERED, that the motion is denied.

/s/ John P. Asiello
John P. Asiello
Clerk of the Court

Appendix B

STATE OF NEW YORK
COURT OF APPEALS

HON. JANET DiFIORE, Chief Judge, Presiding

Remittitur

[STAMP]
COPY

No. 85

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,
Respondent,
—v.—
ROSS R. CALIGURI, &C.,
Appellant,
ET AL.,
Defendants.

Appellant in the above entitled appeal appeared by Jeffrey Herzberg, Esq.; respondent appeared by Wilmer Cutler Pickering Hale & Dorr LLP.

The Court, after due deliberation, orders and adjudges that the judgment appealed from and so much of the Appellate Division order reviewed is affirmed, with costs, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

The Court further orders that this record of the proceedings in this Court be remitted to Supreme Court, Suffolk County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ John P. Asiello
John P. Asiello, Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
December 17, 2020

STATE OF NEW YORK
COURT OF APPEALS

MEMORANDUM

This memorandum is uncorrected and
subject to revision before publication
in the New York Reports.

No. 85

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,
Respondent,

—v.—

ROSS R. CALIGURI, &C.,
Appellant,
ET AL.,
Defendants.

Jeffrey Herzberg, for appellant.

Alan E. Schoenfeld, for respondent.

MEMORANDUM:

The judgment appealed from and so much of the Appellate Division order reviewed should be affirmed, with costs.

In this mortgage foreclosure action, defendant raised the affirmative defense of standing in his answer. Accordingly, to be entitled to summary judgment dismissing that defense, plaintiff bore the burden to demonstrate, as a matter of law, that it had standing to foreclose. There is no “checklist” of required proof to establish standing. Here, plaintiff satisfied its burden through evidence that it possessed the note when it commenced this action, including a copy of the original note endorsed in blank, and other supporting material, including an affidavit of possession based on an employee’s review of plaintiff’s business records (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). In response, defendant failed to raise any factual issue as to plaintiff’s standing or the authenticity of the note.

Under these circumstances, Supreme Court did not err in denying defendant’s request for inspection of the original note. Contrary to defendant’s contention, there is no *per se* rule requiring the court to grant a request for inspection of the original note prior to awarding summary judgment to a plaintiff in a mortgage foreclosure action (*see id.* at 362). To the extent that cases have held or suggested otherwise, they should not be followed (*see e.g. JP Morgan Chase Bank, NA. v Hill*, 133 AD3d 1057, 1058-1059 [3d Dept 2015]).

Defendant's remaining contentions are without merit.

Judgment appealed from and so much of the Appellate Division order reviewed affirmed, with costs, in a memorandum. Chief Judge Difiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided December 17, 2020

Appendix C

STATE OF NEW YORK
COURT OF APPEALS

*Decided and Entered on the
eleventh day of June, 2019*

Present, Hon. Janet DiFiore,
Chief Judge, presiding

Mo. No. 2019-340

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,
Respondent,
—v.—
ROSS R. CALIGURI, &C.,
Appellant,
ET AL.,
Defendants.

Appellant having moved for leave to appeal to the Court of Appeals in the above cause.

Upon the papers filed and due deliberstion, it is ORDERED, that the motion, deemed to be seeking leave to appeal (see CPLR 5512) from the February 2019 Supreme Court judgment of foreclosure and sale pursuant to CPLR 5602(a)(1)(ii) to review the January 2019 Appellate Division order, insofar as it seeks review of so much of the Appellate Division order as affirmed the denial of the motion for reassignment, is dismissed upon the ground that such portion of the order of the Appellate Division does not “necessarily affect” the judgment sought to be appealed from within the meaning of CPLR 5602(a)(1)(ii); it is further

ORDERED, that the motion for leave to appeal is otherwise granted.

/s/ John P. Asiello
John P. Asiello
Clerk of the Court

Appendix D

STATE OF NEW YORK
COURT OF APPEALS

APL-2019-00119
Suffolk County Clerk's Index No. 66298/14

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Plaintiff-Respondent,

—v.—

ROSS R. CALIGURI a/k/a ROSS CALIGURI,

Defendant-Appellant,

PENTAGON FEDERAL CREDIT UNION, AMERICAN
EXPRESS CENTURION BANK, BRIDGEHAMPTON
NATIONAL BANK, REVCO ELECTRICAL SUPPLY,
INC., EMIL NORSIC AND SON, INC., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., and
JOHN DOE and JANE DOE #1 through #7, the
last seven (7) names being fictitious and
unknown to the plaintiff, the persons or parties
intending being the tenants, occupants, persons
or parties, if any, having or claiming an interest
in or lien upon the mortgaged premises
described in the Complaint,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT

(Pages 1 and 2)

The Defendant-Appellant, Ross R. Caliguri (“Caliguri”), by and through his attorney, Jeffrey Herzberg, PC, files this Brief for Defendant-Appellant.

BASIS OF APPELLATE JURISDICTION

This Honorable Court has jurisdiction to determine the issues in this appeal in accordance with the provisions set forth in CPLR §5602, namely an appeal to the court of appeals by permission. This Honorable Court granted Caliguri leave to appeal by Decision and Order dated June 11, 2019 (R-714) of the Decision and Order by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the “Second Department”) dated January 16, 2019 (the “Second Department Decision”) (R-740-741). The judgment of foreclosure and sale was issued by the Supreme Court of the State of New York, County of Suffolk (the “Supreme Court”), dated February 8, 2019. The Second Department affirmed the Supreme Court order granting JPMorgan Chase Bank, National Association (“JP Morgan Chase”) summary judgment in this mortgage foreclosure action and appointed a referee to compute.

STATEMENT OF THE ISSUES

This Honorable Court must determine the following issues on this appeal:

- a. did the judge presiding over this second mortgage foreclosure action prematurely grant summary judgment in favor of JPMorgan Chase when there were outstanding document demands including, but not limited to, the production of the original mortgage note for inspection and examination?; and
- b. did the judge presiding over this second mortgage foreclosure action in the Supreme Court violate the doctrines of res judicata, collateral estoppel or law of the case by failing to follow the rulings made in the first mortgage foreclosure case by Justice Baisley, a coordinate judge of the Supreme Court, who presided over the first mortgage foreclosure action “between the same parties”, such as the order requiring JPMorgan Chase to produce the original mortgage note for inspection and examination?

The answer to both issues is that the judge presiding over the second mortgage foreclosure case prematurely granted summary judgment and the order of reference: (a) as there were outstanding discovery demanded by Caliguri, namely the examination and inspection of the original mortgage note by Caliguri’s forensic document specialist; and (b) he violated the provisions of the doctrines of res judicata, collateral estoppel and the law of the case when he refused to dismiss the Second Action and/or required the production of the purported original mortgage note for examination and inspection.

STATEMENT OF THE CASE

i. Procedural History

The following is the procedural history of this dispute:

Appendix E

STATE OF NEW YORK
COURT OF APPEALS

No. 85

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,
Respondent,
—v.—

ROSS R. CALIGURI, ET AL.,
Appellant,

20 Eagle Street
Albany, New York
November 17, 2020

Before:

CHIEF JUDGE JANET DI FIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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ALAN E. SCHOENFELD, ESQ.
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Penina Wolicki
Official Court Transcriber

(Page 2)

CHIEF JUDGE DIFIORE: The first appeal on this afternoon's calendar is appeal number 85, JPMorgan Chase, National Association v. Caliguri.

Counsel?

MR. HERZBERG: May it please the court, my name is Jeffrey Herzberg, appearing on behalf of the appellant, Ross Caliguri.

JUDGE RIVERA: Sir, what information would -- I'm sorry --

CHIEF JUDGE DIFIORE: Excuse me, Judge Rivera. One second.

Sir, would you like for me to reserve some rebuttal time for you?

MR. HERZBERG: Yes.

CHIEF JUDGE DIFIORE: How much would you like?

MR. HERZBERG: Three minutes.

CHIEF JUDGE DIFIORE: Three? Fine.

All right, Judge.

JUDGE RIVERA: Thank you. Sir, what - - - what information would be revealed by getting access to this original note?

MR. HERZBERG: Whether or not it was authentic in the chain of the original note.

JUDGE RIVERA: Um-hum. Something you say could not be discerned from the copy of the note; is that your

Appendix F

SUPREME COURT – STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 25638/2009
MOTION DATE: 12/22/2011
MOTION NO.: 004 MG

PLAINTIFF'S ATTORNEY:
STEVEN J. BAUM, P.C.
P.O. Box 1291
Buffalo, New York 14240-1291

DEFENDANTS' ATTORNEY:
ZINKER & HERZBERG, LLP
278 East Main St., Suite C
Smithtown, New York 11787

JPMORGAN CHASE BANK NATIONAL
ASSOCIATION,

Plaintiff,

—v.—

ROSS R. CALIGURI, AMERICAN EXPRESS CENTURION BANK, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR PENTAGON FEDERAL CREDIT UNION, JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.),

Defendants.

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/Order to show cause and supporting papers 1-15; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 16-24; Replying Affidavits and supporting papers 25-31; ~~Other~~ ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is, :

ORDERED that the motion (motion sequence no. 004) of defendant Ross R. Caliguri for an order granting summary judgment dismissing this mortgage foreclosure action with prejudice, striking the complaint and, in the alternative, other sanctions, in accordance with CPLR §3126 and R. 3212, is granted as set forth hereinafter.

The submissions reflect that plaintiff J.P. Morgan Chase Bank, N.A. commenced the instant action to foreclose a consolidated mortgage on July 2, 2009. Thereafter defendant-mortgagor Ross R. Caliguri served an answer which, *inter alia*, asserted plaintiff's lack of standing as an affirmative defense. Defendant subsequently served plaintiff with interrogatories and a demand for production of documents. In particular, defendant demanded that plaintiff produce the original note and original mortgage assignment for inspection at the Long Island office of plaintiff's attorney, Steven J. Baum, P.C "on a mutually [convenient] date and time." In response, plaintiff interposed various objections to defendant's interrogatories and document demands and, citing the "commercial sensitivity of these documents," produced only a copy of the notes, mortgage and assignment without offering a date and time for the production of the original documents. Defendant thereafter interposed a motion (motion sequence no. 003) to compel plaintiff to "fully and completely respond to all of the discovery requests propounded by [defendant]."

While the motion to compel was *sub judice*, and after a compliance conference at which plaintiff's repeated failure to produce the original note and mortgage assignment was discussed, defendant served plaintiff with a second request for production of documents dated September 9, 2011 which requested that the original mortgage assignment be made available for inspection at the Long Island office of plaintiff's attorney in Westbury on a date certain, to wit, October 5, 2011 at 2:00 p.m.

The submissions reflect that defendant's attorney appeared at the Westbury office of Steven J. Baum, P.C. on October 5, 2011 at 2:00 p.m., together with a forensic document examiner retained for the purpose of inspecting the original documents. Notwithstanding the duly served "Second Request for Production of Documents," to which the plaintiff did not respond or object, no original documents were produced for defendant's inspection at that time or thereafter.

On October 7, 2011, defendant interposed the instant motion for summary judgment dismissing the action with prejudice, striking the complaint, and for other sanctions in accordance with CPLR §3126 and R. 3212. Defendant's motion is predicated in substantial part on plaintiff's failure to produce evidence of its standing to commence and maintain this foreclosure action. It is well established that where the standing of a plaintiff in a mortgage foreclosure action is a contested issue, as here, the plaintiff must prove that it was the holder or assignee of both the subject mortgage and the underlying note at the time of commencement of the action in order to be entitled to relief (*Bank of New York v Silverberg*, 86 AD3d 274 [2d Dept 2011]). In opposition to defendant's motion, plaintiff has submitted only the affirmation of its attorney, who does not have personal knowledge of the facts alleged therein and accordingly is incompetent to establish plaintiff's standing (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Moreover, the documentary evidence annexed thereto, including a purported assignment executed by a purported "attorney in fact," fails to establish as a matter of law that plaintiff was the owner and holder of the subject note(s) and mortgage(s) at the time of

commencement of this action. Plaintiff has thus failed to establish, by proof in admissible form, its standing to commence and maintain the instant action. Accordingly, the submissions establish defendant's *prima facie* entitlement to summary judgment dismissing plaintiff's complaint.

Additionally, the submissions establish plaintiff's willful failure to comply with the discovery orders of this Court. The October 19, 2011 order of this court (BAISLEY, J.) granted defendant's prior motion to compel discovery, noting that plaintiff's prior responses were "substantively deficient" and that plaintiff's interposed objections were "improper." The order directed plaintiff to "provide full, complete and substantive responses to each of defendant's interrogatories, including identifying with specificity 'any and all persons that assisted in the preparation of the responses,' 'all persons with knowledge of the facts at issue, in this case,' and 'any and all witnesses' that plaintiff intends to call at trial, and providing a basis for interpreting the computerized payment schedule annexed to plaintiff's response to defendant's interrogatories, within 20 days of the date of service of notice of entry of this order." In addition, the order directed plaintiff to "make available for defendant's inspection the original mortgage note and original mortgage assignment, at a mutually convenient place and time but in no event later than 20 days after the date of service of notice of entry of this order."

Notwithstanding the foregoing, the "Amended Answers to Interrogatories" served by plaintiff on or about November 8, 2011 in response to the Court's order failed to comply with the order in

several material respects.¹ Plaintiff admittedly failed to “identify all persons with knowledge of the facts at issue in this case,” failed to: “provid[e] a basis for interpreting the computerized payment schedule annexed to plaintiff’s response to defendant’s interrogatories,” and interposed substantially the same objections that had previously been ruled upon by the Court and found to be “improper.” In light of the express directives contained in the order, plaintiff’s failure to provide, “full, complete and substantive responses” must be deemed to be willful (*Forbes v New York City Tr. Auth.*, 88 AD3d 546 [1st Dept 2011]) and provides an independent basis for striking plaintiff’s complaint in this action.

In light of all the foregoing, and in accordance with CPLR R. 3212 and §3126, the Court grants defendant’s motion for summary judgment and strikes plaintiff’s complaint. The compliance conference presently scheduled to be held before the undersigned on March 29, 2010 is cancelled.

Dated: March 7, 2012 /s/ Paul J. Baisley, Jr.
 PAUL J. BAISLEY, JR.
 J.S.C.

¹ Although the instant motion was interposed prior to the issuance of the October 19, 2011 order, the parties specifically addressed the sufficiency of plaintiff’s “Amended Answers to Interrogatories” in their respective submissions upon the motion, and at the Court’s request a complete copy of plaintiff’s “Amended Answers to Interrogatories” was subsequently provided to the Court and the motion is deemed amended accordingly. The Court also notes that by letter dated October 27, 2011, plaintiff offered for the first time to produce the original note and mortgage for defendant’s inspection, which defendant declined in light of the instant pending motion.

Appendix G

STATE OF NEW YORK
COURT OF APPEALS

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at 518-455-7711 or gspencer@nycourts.gov.

To be argued Tuesday, November 17, 2020
(arguments begin at 2 pm)

**No. 85 JPMorgan Chase Bank, National Association v Caliguri
No. 86 US Bank National Association v Nelson**

These mortgage foreclosure actions hinge on whether the plaintiffs established standing by providing evidence that they were the holder or owner of the mortgage note on which they sought

to foreclose, or whether they were required to provide such evidence.

In Case No. 85, JPMorgan Chase Bank brought this action in 2014 to foreclose a \$1 million mortgage on a Suffolk County house owned by Ross Caliguri, alleging he defaulted on the loan. The bank acquired the note in 2008 when it purchased all assets of the originator of the loan, Washington Mutual Bank (WaMu), in a receivership transaction. Caliguri raised affirmative defenses in his answer, including lack of standing, and demanded production of the original note. Chase, which had attached to its complaint copies of the mortgage and the note with a blank endorsement from WaMu, did not comply with the demand to inspect the original note. Supreme Court denied Caliguri's motion to dismiss, finding the bank had established standing, and granted the bank's motion for summary judgment.

The Appellate Division, Second Department affirmed, saying, "JPMorgan Chase demonstrated its *prima facie* entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default.... In addition, it established its standing by attaching to the summons and complaint a copy of the consolidated note, bearing an endorsement in blank from the original lender.... Contrary to the defendant's contention, 'there is no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it....'" Caliguri argues that Chase failed to establish standing by proving it had actual possession of the

original mortgage note. He says the lower courts acted prematurely in granting summary judgment to the bank when he had challenged the bank's standing and his demand for inspection of the original note had not been met.

In Case No. 86, US Bank brought this action in 2009 to foreclose a \$660,000 mortgage on a three-family residence in Brooklyn owned by Kenyatta and Safiya Nelson. US Bank alleged in its complaint that it was "the owner and holder of [the] note and mortgage being foreclosed." In their answers, the Nelsons denied the bank's factual allegations and raised several affirmative defenses, but did not expressly assert that US Bank lacked standing. Supreme Court granted the bank a judgment of foreclosure and sale in 2015.

The Appellate Division, Second Department affirmed on a 3-1 vote, ruling the Nelsons waived any claim that the bank lacked standing to foreclose. It said, "[The] issue of standing is waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer or in a pre-answer motion to dismiss. A mere denial of factual allegations will not suffice for this purpose." The dissenter said, "[T]here is no reason to adopt a rule of law that mandates that the defense of lack of standing is waived unless magic words such as 'defense' or 'affirmative defense' appear together with lack of standing in a responsive pleading....

[W]here ... a plaintiff alleges in its complaint that it is the 'owner and holder of [the] note being foreclosed'..., a denial ... should suffice to put the plaintiff on notice as to the issue of standing."

No. 85 For appellant Caliguri: Jeffrey Herzberg,
Hauppauge (631) 761-6558
For respondent JPMorgan Chase: Alan E.
Schoenfeld, Manhattan (212) 230-8800

No. 86 For appellant Nelsons: Jared B. Foley,
Manhattan (212) 935-3131
For respondent US Bank: Katherine
Wellington, Manhattan (212) 918-3000

Appendix H

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No. _____

In the Matter of the Application of
HON. ELLEN GESMER, HON. DAVID FRIEDMAN,
HON. SHERI S. ROMAN, HON. JOHN M.
LEVENTHAL, and DANIEL J. TAMBASCO,
Petitioners-Plaintiffs,
For a Judgment under Article 78 of the CPLR
—against—
THE ADMINISTRATIVE BOARD OF THE NEW
YORK STATE UNIFIED COURT SYSTEM, JANET
DiFIORE, AS CHIEF JUDGE OF THE NEW YORK
STATE UNIFIED COURT SYSTEM, and LAWRENCE
K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF
THE NEW YORK STATE UNIFIED COURT SYSTEM,
Respondents-Defendants.

SUMMONS

To the above-named Respondents-Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of an answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete, if this summons is not personally delivered to you within the State of New York), or on the consent of the attorney for the Petitioners-Plaintiffs, at the same time that you file a motion, opposition, answer or other response to the accompanying Verified Article 78 Petition, specifically in advance of the return as scheduled by the accompanying Order to Show Cause.

Dated: New York, New York
November 5, 2020

MORRISON COHEN LLP

Y. David Scharf
David B. Saxe
Danielle C. Lesser
Collin A. Rose
909 Third Avenue
New York, New York 10022
(212) 735-8600

and

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ James M. Catterson
James M. Catterson
250 West 55th Street
New York, NY 10019
(212) 836-8000

Attorneys for Petitioner-Plaintiffs

TO: THE ADMINISTRATIVE BOARD OF THE
NEW YORK STATE UNIFIED COURT SYSTEM
Office of Court Administration
Counsel's Office
25 Beaver St, 11th floor
New York, NY 10004

JANET DIFIORE, AS CHIEF JUDGE OF THE
NEW YORK STATE UNIFIED COURT SYSTEM
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

LAWRENCE K. MARKS, AS CHIEF
ADMINISTRATIVE JUDGE OF THE NEW YORK
STATE UNIFIED COURT SYSTEM
Office of Court Administration
25 Beaver Street
New York, NY 10004

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No. _____

In the Matter of the Application of
HON. ELLEN GESMER, HON. DAVID FRIEDMAN,
HON. SHERI S. ROMAN, HON. JOHN M.
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STATE UNIFIED COURT SYSTEM, and LAWRENCE
K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF
THE NEW YORK STATE UNIFIED COURT SYSTEM,

Respondents-Defendants.

**VERIFIED ARTICLE 78 PETITION
AND COMPLAINT**

**TO THE SUPREME COURT OF THE STATE
OF NEW YORK:**

Petitioners-Plaintiffs, Hon. Ellen Gesmer, Hon. David Friedman, Hon. Sheri S. Roman, Hon. John M. Leventhal, and Daniel J. Tambasco (collectively, the “Petitioners”) by their attorneys, Morrison Cohen, LLP, and Arnold & Porter Kaye Scholer LLP, allege the following as and for their Verified Article 78 Petition and Complaint against The Administrative Board of the New York State Unified Court System (the “Administrative Board”), Chief Judge Janet DiFiore as Chief Judge of the State of New York’s Unified Court System, Chief Administrative Judge Lawrence Marks as the Chief Administrative Judge of the State of New York’s Unified Court System (collectively, the “Respondents”):

PRELIMINARY STATEMENT

1. For decades, the Administrative Board has routinely authorized justices who have reached the age of 70 to continue to serve the people of the state of New York upon finding that (i) the judge had the mental and physical capacity to do so; and (ii) the justice’s services were necessary to expedite the business of the Supreme Court. This process is specifically authorized and governed by the Constitution of the State of New York (Art. 6, Sec. 25) and Section 115 of the New York State Judiciary Law.

2. Notwithstanding this, on September 29, 2020, Respondents announced their decision to deny all but three pending requests for certification, thereby terminating the services of approximately 46 Supreme Court justices, including seven presently serving on the Appellate Divisions, all of whom are aged 70 or older, as of December 31, 2020.

3. Petitioners Gesmer, Friedman, Roman, and Leventhal (the “Petitioner Justices”) are all Supreme Court justices currently serving on the Appellate Divisions who have had their requests for certification denied by Respondents despite lengthy and impressive histories of judicial service in the public interest, and despite being among the most productive members of the New York judiciary, by virtue of their experience and seniority. Petitioner Tambasco is a resident of Suffolk County and an attorney who regularly practices in the Supreme Court, Suffolk County.

4. Respondents did not come to this decision by making any individualized determinations as to whether the justices met the statutory and constitutional criteria, but justified their decision solely on alleged budgetary constraints.

5. Respondents denied certification to these judges with total disregard for the impact of their actions on the administration of justice for the citizens of this state. In particular, the wholesale denial of certifications by Respondents will result in even greater delays in decision making by the Appellate Divisions, delays in decision making by the trial courts, a decrease in resources for the provision of justice to the state’s most

disadvantaged citizens, and a decrease in diversity among the state's judiciary. All of these consequences will be inflicted on a court system teetering on the edge of total dysfunction.

6. In denying certification to these judges, the Respondents have engaged in blatant age discrimination. They decided to terminate the most experienced judges in the state and have already signaled their intention to replace those judges with younger and less experienced judges, some of whom have never been elected by the voters of this state.

7. In doing so, Respondents have violated their statutory and constitutional duties, committed acts of blatant age discrimination in violation of the New York State and New York City Human Rights Law, and violated state constitutional provisions thereby creating direct conflict with the prerogatives of the other branches of our state government.

8. By this action, Petitioners seek that this Court quash and reverse this unconstitutional and illegal plan proposed by the Respondents, return the Petitioner Justices to their rightful place in the administration of Justice and restore their valuable services to the citizens of the state.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to CPLR 3001 and 7804(b), which provide that the Supreme Court of the State of New York has jurisdiction over declaratory judgment actions and Article 78 special proceedings.

10. Venue is proper pursuant to CPLR 506(b) because this county is one where the material effects of Respondents' actions were felt.

11. Suffolk County has an estimated population of approximately 1,477,000 people and is the fourth most populous county in the entire state.

12. As a result of Respondents' actions, Suffolk County will lose the services of Hon. Stephen J. Lynch, Hon. Vincent J. Martorana, and Hon. Robert F. Quinlan.

13. As a result of Respondents' actions, the Appellate Division, Second Department—the appellate court responsible for appeals from Suffolk County—is losing the services of three justices, including two of the Petitioners.

14. Upon information and belief, Respondents' actions will greatly increase the time between the filing of a complaint and the note of issue, as well as increase the time from the note of issue to jury selection.

15. Upon information and belief, Respondents' actions will increase the time it takes between the filing of an appeal and the judicial resolution of that appeal.

16. Thus, Respondents' actions are causing significant damage to the residents of Suffolk County by impairing the administration of justice in this county. Litigants in Suffolk County will be denied timely access to the courts because of the increased delays resulting from the unconstitutional decision by the Respondents.

THE PARTIES

17. Petitioner-Plaintiff Justice Ellen Gesmer is a Justice of the Supreme Court of the State of New York and has been on the bench since 2004. She was appointed to the First Department in 2016. She has participated in over 3,000 appeals. The following is a summary of her judicial experience:

ASSOCIATE JUSTICE, APPELLATE DIVISION,
FIRST DEPARTMENT
February 2016 to present

JUSTICE, SUPREME COURT OF THE STATE OF
NEW YORK, MATRIMONIAL PART
New York County, March 2009 to February 2016
Bronx County, October 2006 to March 2009

JUDGE, CRIMINAL COURT, CITY OF NEW YORK
January to October 2006

JUDGE, CIVIL COURT, OF THE CITY OF NEW YORK
New York County, 2005
Kings County, 2004
New York County, 2003
Elected 2003

18. Petitioner-Plaintiff Justice David Friedman is a Justice of the Supreme Court of the State of New York and has been on the bench since 1990. He was appointed to the First Department in 1999. He has participated in over 10,000 appeals. The following is a summary of his judicial experience:

ASSOCIATE JUSTICE, APPELLATE DIVISION,
FIRST DEPARTMENT
March 1999 to Present

JUSTICE OF THE SUPREME COURT,
KINGS COUNTY
Presided over a medical malpractice and
criminal part of the Supreme Court,

January 1998 to March 1999
Elected 1997, Re-elected 2011

ACTING JUSTICE OF THE SUPREME COURT,
KINGS COUNTY

Presided over a criminal part of the Supreme
Court,
January 1994 to December 1997

JUDGE OF THE CIVIL COURT, KINGS COUNTY
January 1990 to December 1993

19. Petitioner-Plaintiff Justice Sheri S. Roman is a Justice of the Supreme Court of the State of New York and has been on the bench since 1985. She was appointed to the Second Department in 2009. She has participated in over 8,000 appeals. The following is a summary of her judicial experience:

ASSOCIATE JUSTICE, APPELLATE DIVISION,
SECOND DEPARTMENT
July 2009 to Present

SUPREME COURT JUSTICE, QUEENS COUNTY,
CIVIL AND CRIMINAL TERMS,
Re-elected 2009 to 2023
1995 to 2009

JUDGE, CRIMINAL COURT OF THE CITY OF
NEW YORK
1985 to 1994

20. Petitioner-Plaintiff Justice John M. Leventhal is a Justice of the Supreme Court of the State of New York and has been on the bench since 1994. He was appointed to the Second Department in 2008. He has participated in over 8,000 appeals. The following is a summary of his judicial experience:

ASSOCIATE JUSTICE, APPELLATE DIVISION,
SECOND DEPARTMENT,
Brooklyn, New York
January 25, 2008 to Present

PRESIDED OVER THE NATION'S FIRST
DEDICATED FELONY DOMESTIC VIOLENCE
"COURT."
June 1996-January 2008

PRESIDED OVER ARTICLE 81 GUARDIANSHIP
PROCEEDINGS.
2001 to January 2008

JUSTICE OF THE SUPREME COURT OF THE
STATE OF NEW YORK SECOND JUDICIAL
DISTRICT, Brooklyn, New York
Elected November 1995

21. Petitioner-Plaintiff Daniel J. Tambasco is a resident of Suffolk County. He is an attorney, admitted to practice in the Second Department in 1989. He regularly litigates civil actions in Supreme Court, Suffolk County.

22. Respondent-Defendant Administrative Board of the New York State Unified Court System (the "Administrative Board") is an administrative board that offers advice to, and consults with, the Chief Judge of the New York Court of Appeals and the Chief Administrative Judge of the Courts of the State of New York in overseeing and establishing administrative policies for the Courts of the State of New York. The Administrative Board is composed of the Chief Judge of the New York Court of Appeals and the four presiding justices of each Appellate Division of the Supreme Court. Currently, the Administrative Board is composed of Chief Judge Janet DiFiore, Presiding

Justice Rolando T. Acosta, Presiding Justice Alan D. Scheinkman, Presiding Justice Elizabeth A. Garry, and Presiding Justice Gerald J. Whalen.

23. Respondent-Defendant Chief Judge Janet DiFiore is the Chief Judge of the Court of Appeals and of the State of New York. She took office on January 21, 2016.

24. Respondent-Defendant Chief Administrative Judge Lawrence K. Marks is the Chief Administrative Judge responsible for overseeing the day-to-day operation of the New York State Unified Court System and leading the Office of Court Administration. He was appointed to his position on July 29, 2015, and answers directly to the Chief Judge.

25. Justice Rolando Acosta is a member of the Administrative Board in his capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, First Department. He was appointed to this position by Governor Cuomo on May 22, 2017.

26. Justice Alan D. Scheinkman is a member of the Administrative Board in his capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, Second Department. He was appointed to this position by Governor Cuomo on January 1, 2018. Presiding Justice Scheinkman is retiring at the end of this year.

27. Justice Elizabeth A. Garry is a member of the Administrative Board in her capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, Third

Department. She was appointed to this position by Governor Cuomo on January 1, 2018.

28. Justice Gerald J. Whalen is a member of the Administrative Board in his capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, Fourth Department. He was appointed to this position by Governor Cuomo on January 7, 2016.

FACTS COMMON TO
ALL CAUSES OF ACTION

**RESPONDENTS' DENIAL OF FORTY-SIX PENDING
CERTIFICATION APPLICATIONS**

29. Petitioner Justices, all Justices of the Supreme Court of the State of New York, were elected to their positions under Section 6 of Article VI of the Constitution of the State of New York, which provides that: "The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of justices of the supreme court shall be fourteen years from and including the first day of January next after their election."

30. All four Petitioner Justices are designated by the Governor of the State of New York as justices of the Appellate Division in their respective Judicial Departments.

31. Section 25(b) of Article VI of the Constitution provides that "[e]ach ... justice of the supreme court ... shall retire on the last day of December in the year in which he or she reaches the age of seventy." This applies even if a justice has not yet completed her fourteen (14) year term of office.

32. This section further provides that:

Each such former judge of the court of appeals and justice of the supreme court may [after turning seventy (70)] perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office.

33. Consistent with the Constitution, Section 115 of New York's Judiciary Law delineates the procedure for a justice to be certificated to continue her service as a justice beyond the age of seventy (70). It provides that:

Any justice of the supreme court, retired pursuant to subdivision b of section twenty-five of article six of the constitution, may, upon his application, be certified by the administrative board for service as a retired justice of the supreme court upon findings (a) that he has the mental and physical capacity to perform the duties of such office and (b) that his services are necessary to expedite the business of the supreme court.

34. Section 115 of the Judiciary Law further provides that if a retired justice is certificated, her certification will be valid for two years, and that

she may reapply for certification until she reaches the age of seventy-six (76).

35. Thus, pursuant to the Constitution and the Judiciary Law, the Administrative Board is empowered to accept applications from justices who are about to be retired and determine whether (a) each has the mental and physical capacity to perform the duties of such office, and (b) whether her services are necessary to expedite the business of the Supreme Court.

36. Before September 29, 2020, forty-nine justices, including all of the Petitioner Justices, had applied to the Administrative Board to be certificated for continued service for the two years immediately following January 1, 2021.

37. On September 29, 2020, Chief Administrative Judge Marks issued a memorandum (the “Certification Memo”) to the administrative judges for each judicial district announcing that the Administrative Board had decided to deny “all but a small handful” of the pending applications for certification or recertification filed by justices of the Supreme Court.

38. In the Certification Memo, with a subject line of “Certification,” Judge Marks asserted that Governor Andrew Cuomo had “exercised the emergency powers afforded him by the Legislature by cutting the current Judiciary budget by 10 percent, or by approximately \$300 million.”

39. While Judge Marks in the Certification Memo states that the Governor has already mandated budgetary cuts, in fact, he has not. Rather, Governor Cuomo has made it clear in

public statements that the state should not make budget cuts at this time because the state might be able to avoid emergency budget measures if a substantial federal stimulus package is passed.

40. On October 5, 2020, only days after the Certification Memo was issued, Governor Cuomo stated that he was going to avoid any “irreversible” cuts to the state budget in the hopes that the 2020 Elections would make conditions more favorable to a substantial federal stimulus.

41. Despite the fact that the Governor has not mandated a Judiciary budget cut and may not do so, Chief Administrative Judge Marks referred to the alleged budget cut in the Certification Memo as “dramatic” and used it as the sole justification “compel[ing] Respondents] to implement a range of painful measures.”

42. In particular, Judge Marks explained that “the Administrative Board has decided to disapprove all but a small handful of pending judicial applications for certification or recertification that would take effect on January 1, 2021.”

43. In the Certification Memo, Judge Marks asserted that these denials of certification applications would save \$55 million over the next two years and would help the court system to “avoid layoffs, or greatly reduce the number of layoffs should that extreme measure become unavoidable.”

44. Essentially, in the Certification Memo, Judge Marks announced that the Administrative Board decided to eliminate Supreme Court justices

in an attempt to preserve the jobs of the support staff for the courts.

45. Ultimately, the Certification Memo effected the Administrative Board's decision to issue a blanket denial of certification applications (with exceptions made for three justices) with no justification other than to purportedly save money. The Petitioner Justices' certification applications were all denied as a result of the Administrative Board's decision.

46. Upon information and belief, the vote by the Administrative Board to deny certification was initially not unanimous. Originally, the straw vote was 3-2 against the plan to deny certification with only the Chief Judge and Justice Whelan of the Fourth Department initially voting in favor of the plan. The swing vote in favor of the plan to deny certification ultimately was Justice Scheinkman of the Second Department, who had previously stated to justices for the Second Department that he would support certification given the necessity of their continued service. Justice Scheinkman was originally elected in Westchester County, Ninth Judicial District, which is Judge DiFiore's home district. Judge Difiore was his mentor when he was appointed as Presiding Justice of the Second Department.

47. Upon information and belief, in voting to deny certification, Judge Marks and the Administrative Board did not act in accordance with the statutory or Constitutional criteria for denying certification. They neither evaluated the mental and physical capacities of the particular justices applying for certification (including

Petitioners), nor reached a determination that the services of these justices, deemed necessary to expedite the business of the Supreme Court for decades, are no longer necessary.

48. At the time the Respondents elected to deny Petitioners' certification, all of the Petitioner Justices were approved by the New York City Bar Association and their local bar associations for continued certificated service at the time of the Certification Memo.

49. Moreover, at the time the Certification Memo was issued, all but one of the Petitioner Justices had in fact passed the medical exam required to demonstrate their physical and mental capacity to be certificated. With respect to the Petitioner Justice who had not yet passed the medical exam, this only occurred because her appointment to take the necessary exams was postponed until October 2020 by the temporary closing of the medical provider due to the pandemic, and then cancelled by the Office of Court Administration after Respondents' denials of certification.

50. Respondents' denials of forty-six (46) of forty-nine (49) pending applications for certification from justices of the Supreme Court, including those of the Petitioner Justices, threatens the administrative and constitutional underpinnings of the New York Unified Court System and will further slow an already overburdened and underfunded court system, with the inevitable result of denying justice to the citizens of New York State.

THE HISTORICAL NECESSITY OF APPELLATE DIVISION JUSTICES

51. As a result of constitutional convention of 1894, the State of New York amended Article VI of the New York State Constitution to make major changes, including the creation of the Appellate Divisions. These changes were made to remedy two evils: the great delay in bringing cases to trial and in securing the final disposition of cases on appeal. The decision of the Administrative Board to eliminate the certification of senior judges has in practice largely undone these changes and will cause the court system to revert to the inefficient, wasteful and inadequate system of 1894.

52. The original constitutional convention provided for five justices to sit in each Department. In 1925, this allocation was increased to seven justices for each Department who would form what is known as the Constitutional Court. Every additional justice appointed to the Appellate Division, has been appointed by the Governor on certification of need by each Department's presiding justice with the consultation of the justices of the Constitutional Court. N.Y. Const. Art. VI, § 4(e). Thus, since 1925, the presiding justices have certificated to the Governor that the additional justices, in addition to the seven members of the Constitutional Court, were and are necessary to the functioning of their respective Departments.

53. Petitioner Justices are all justices who were appointed to the Appellate Division because their appointments were necessary to ensure the speedy disposition of business before the court.

54. Upon information and belief, the workload in each Department has grown exponentially over the years. At no time has any Department requested that the Governor reassign any justice because the justice was no longer needed on the court. The current workload is consistent with the presiding justices' repeated certifications to the Governor that the judges in addition to the Constitutional Court were necessary to handle the workload of the respective Departments.

55. The workload of the courts has certainly not decreased as a result of the temporary COVID-19 shutdown of the court system. Rather, that temporary shutdown has caused a backlog in the First Department and exacerbated the backlog in the Second Department. While both Departments added additional sittings in order to diminish the backlogs, neither department will be able to continue to conduct the additional sittings if the respondents' decision to terminate the petitioners is permitted to stand.

56. Indeed, Justice Acosta has verified that, at least for the First Department, there are an insufficient number of judges on the Court to handle the existing workload. Similarly, Justice Scheinkman has also certified to the Governor that additional, designated justices are necessary for the speedy disposition of the business before it.

57. Thus, all four Appellate Division Departments have not departed from their prior attestations of the necessity of the current complement of justices to expedite the business of the courts.

58. Respondents' actions here, denying certification to the Petitioner Justices, all Appellate Division justices who have for decades been deemed to be necessary to the efficient administration of justice in the States, will have incalculable repercussions on justice system in this State.

THE CURRENT MAKE-UP OF THE APPELLATE DIVISIONS

59. The Appellate Division, Second Department is currently composed of the following justices:

Hon. Alan D. Scheinkman, Presiding Justice
Hon. William F. Mastro
Hon. Reinaldo E. Rivera
Hon. Mark C. Dillion
Hon. Ruth C. Balkin
Hon. Cheryl E. Chambers
Hon. Leonard B. Austin
Hon. John M. Leventhal
Hon. Sheri S. Roman
Hon. Jeffrey A. Cohen
Hon. Robert J. Miller
Hon. Sylvia Hinds-Radix
Hon. Joseph J. Maltese
Hon. Colleen D. Duffy
Hon. Hector D. LaSalle
Hon. Betsy Barros
Hon. Francesca E. Connolly
Hon. Valerie Brathwaite Nelson
Hon. Angela G. Iannacci
Hon. Linda Christopher
Hon. Paul Wooten

60. Of these justices, the Constitutional Court in the Second Department is comprised of Justices Scheinkman, Mastro, Rivera, Balkin, Dillon, Chambers and Austin. The remaining fourteen Associate Justices of the Second Department were, at the time of their respective appointments all considered to be necessary to the functioning of the Court.

61. Petitioners Justice John M. Leventhal and Justice Sheri S. Roman have been denied certification by virtue of the order effective January 1, 2021. Collectively these two justices have sat on approximately 15,000 appeals.

62. The Appellate Division, First Department is currently composed of the following justices:

Hon. Rolando T. Acosta, Presiding Justice
Hon. David Friedman
Hon. Dianne T. Renwick
Hon. Sallie Manzanet-Daniels
Hon. Judith J. Gishe
Hon. Barbara R. Kapnick
Hon. Troy K. Webber
Hon. Angela M. Mazzarelli
Hon. Ellen Gesmer
Hon. Cynthia S. Kem
Hon. Jeffrey K. Oing
Hon. Anil C. Singh
Hon. Peter H. Moulton
Hon. Lizbeth Gonzalez
Hon. Tanya R. Kennedy
Hon. Saliann Scarpulla
Hon. Manuel J. Mendez
Hon. Martin Shulman

63. Of those justices, the Constitutional Court of the First Department is comprised of Justices Acosta, Friedman, Renwick, Manzanet-Daniels, Gische, Kapnick and Webber. The remaining eleven Associate Justices of the First Department were at the time of their respective appointments, all considered to be necessary to the functioning of the Court. Given Presiding Justice Acosta's statements referred to above, all of the justices of the Court are necessary to keep pace with the current filings in the Court.

64. Despite that acknowledged need, Petitioners Justice Friedman, on the Constitutional Court, and Justice Gesmer have been denied certification by virtue of the order effective January 1, 2021. Justice Mazzarelli was recertified as an exception to the order. Justices Friedman and Gesmer collectively have sat on approximately 15,000 appeals.

65. In addition to Petitioners, Respondents' actions denied certification to three other Appellate Division justices: (1) Hon. Jeffrey A. Cohen, Appellate Division, Second Department, (2) Hon. Eugene P. Devine, Appellate Division, Third Department, and (3) Hon. Joseph J. Maltese, Appellate Division, Second Department.

66. In addition to the justices on the Appellate Division, the following Supreme Court justices in the Second Department were denied certification by the order effective January 1, 2021:

Hon. Thomas A. Adams
Presiding Justice, Appellate Term,
9th & 10th JD

Hon. Antonio I. Brandeveen
NYS Supreme Court, Nassau County

Hon. Jeffrey S. Brown
NYS Supreme Court, Nassau County

Hon. Stephen A. Bucaria
NYS Supreme Court, Nassau County

Hon. Richard Lance Buchter
NYS Supreme Court, Queens County –
Criminal Term

Hon. Lawrence H. Ecker
NYS Supreme Court, Westchester County

Hon. Joseph J. Esposito
NYS Supreme Court, Queens County –
Civil Term

Hon. Thomas Feinman
NYS Supreme Court, Nassau County

Hon. William J. Giacomo
NYS Supreme Court, Westchester County

Hon. Maureen A. Healy
NYS Supreme Court, Queens County –
Civil Term

Hon. Daniel Lewis
NYS Supreme Court, Queens County –
Criminal Term

Hon. Stephen J. Lynch
NYS Supreme Court, Suffolk County

Hon. Ira H. Margulis
NYS Supreme Court, Queens County –
Criminal Term

Hon. Orlando Marrazzo, Jr.
NYS Supreme Court, Richmond County –
Civil Term

Hon. Larry D. Martin
NYS Supreme Court, Kings County –
Civil Term

Hon. Vincent J. Martorana
NYS Supreme Court, Suffolk County

Hon. Robert F. Quinlan.
NYS Supreme Court, Suffolk County

Hon. Bernice D. Siegal
NYS Supreme Court, Queens County –
Civil Term

Hon. Bruce E. Tolbert
NYS Supreme Court, Westchester County

67. The following Supreme Court justices in the First Department were denied certification by the order effective January 2, 2021:

Hon. Lester B. Adler
NYS Supreme Court, Bronx County

Hon. Ben R. Barbato
NYS Supreme Court, Bronx County

Hon. Steven L. Barrett
NYS Supreme Court, Bronx County

Hon. Lucy A. Billings
NYS Supreme Court, New York County

Hon. Kathryn E. Freed
NYS Supreme Court, New York County

Hon. Nicholas J. Iacovetta
NYS Supreme Court, Bronx County

Hon. Robert T. Johnson
NYS Supreme Court, Bronx County

Hon. Alan C. Marin
NYS Supreme Court, New York County

Hon. Donald H. Miles
NYS Supreme Court, Bronx County

Hon. Michael J. Obus
NYS Supreme Court, New York County

Hon. Howard H. Sherman
NYS Supreme Court, Bronx County

Hon. Fernando Tapia
NYS Supreme Court, Bronx County

**RESPONDENTS' ACTIONS THREATEN THE
WORKING OF THE COURT SYSTEM**

68. By denying the Petitioner Justices and forty-two other justices certification and removing them from the bench, Respondents' actions ensure a slowdown of the already glacial pace of litigation in the Supreme Court.

69. Indeed, because the Petitioner Justices have not been certificated, several of them are not serving on appellate panels for the balance of 2020, or will soon stop sitting. The First and Second Departments had each added an additional day of argument each week to address the backlogs caused by the pandemic. As a result of the denials of certifications, the Appellate Divisions will no longer be able to schedule the extra argument panel each week. Moreover, in some cases in the Second Department, appeals may be heard by three panels of three justices per week instead of

four panels of four justices hearing appeals each week in November and December 2020.

70. Currently, even with the presence of these justices denied certification, the New York Unified Court System already has struggled to expeditiously hear, try, and decide cases. There are numerous examples of these types of delay already present in the New York Unified Court System.

71. For example, the Second Department currently has a delay of at least three years from the date of perfecting an appeal until the parties have oral argument, a back log that Presiding Justice Scheinkman has tried to address by hiring additional attorneys for short, one-year terms to assist with the workload before the Second Department. With the loss of four senior judges of the Court, the retirement of the presiding justice, and two other vacancies, however, there can be no dispute that the time for hearing an appeal will continue to grow to record levels of delay.

72. This type of delay and back log in the courts system has only been exacerbated by COVID-19.

73. For example, Presiding Justice Acosta was quoted in the New York Law Journal as stating that, because of the pandemic, “we have seen a significant increase in the number of perfected-but-uncalendared cases for the first time in my tenure as Presiding Justice. The pandemic required us to suspend our April calendar of perfected appeals and adjourn those cases to subsequent months. Although we heard hundreds of appeals as a virtual court during our Special

May and June terms, many appeals had to be adjourned. And, as usual, we received hundreds of newly perfected appeals for September. As a result, we currently have more than 1,100 perfected appeals for the September term. Given our typical capacity to hear fewer than 300 appeals per term, it is clear that we have a challenging road ahead.”

74. Similarly Presiding Justice Scheinkman has publicly acknowledged that since the pandemic, the Second Department has dropped from hearing around 20 cases in a sitting to 16 cases in a sitting, creating an additional backlog for appeals.

75. This backlog, which will be substantially worsened by the Respondents’ denials of certification, will disproportionately affect minority communities. For example, the Second Department—where the backlog of cases is worst among the four Appellate Divisions—includes Kings County and Queens County, both of which have diverse demographic makeups. In Kings County, approximately 63.8% of its residents (an estimated total population of 2,559,903) belong to minority groups and 45.4% speak languages other than English at home. Similarly, in Queens County, approximately 55.92% of its residents (an estimated total population of 2,253,858) belong to minority groups and 56.16% speak languages other than English as their primary language. Respondents’ actions undeniably harm these diverse communities’ access to the court system.

76. Since Respondents denied the Petitioner Justices certification, many legal organizations

and associations have condemned and opposed Respondents' actions, particularly with respect to their effect on the pace of litigation in New York, including: the New York City Bar Association (Council on Judicial Administration), New York State Trial Lawyers Association, LGBT Bar Association of Greater New York, Assigned Counsel Association – NYS, Inc., New York State Assembly Committee on the Judiciary, Supreme Court Justices Association of the City of New York, Inc., the Association of Justices of the Supreme Court of the State of New York, Inc., and the Judicial Friends Association, Inc.

77. While the Chief Administrative Judge and the Chief Judge have cited budgetary constraints as requiring the denial of certification to judges deemed necessary to advance the administration of justice in this State, they have unabashedly continued to seek the designation of civil court judges as Acting Justices of the Supreme Court, in an attempt to stem the burdensome and ever-growing caseload of the present system.

78. As of 2019, there are 333 elected Supreme Court justices and approximately 260 acting Supreme Court Justices. Seventy-three Acting Supreme Court justices were appointed from the Court of Claims. The remainder were designated acting Supreme Court justices from the lower courts such as County Court and Family Court.

79. On June 20, 2019, the Senate confirmed the Governor's appointment of ten judges to the Court of Claims. All but two of these appointments were re-appointments. Further, nine of the ten judges

confirmed at that time have been appointed acting Supreme Court justices.

80. In the midst of the pandemic and ensuing budget crisis and two months before the Certification Memo denying certification to 49 elected judges for purported budgetary reasons, on July 24, 2020 the Senate confirmed the Governor's appointment of an additional four judges to the Court of Claims: Veronica G. Hummel, Charles M. Troia, Adrian N. Armstrong and Adam W. Silverman. Judges Troia, Hummel and Silverman were immediately appointed acting Supreme Court justices.

81. From the records available to the public on OCA's website, it appears that several Court of Claims judges who were appointed acting Supreme Court justices have been certificated under Judiciary Law §115. There are no legal basis for such certifications.

82. Thus, while the Chief Judge and the Chief Administrative Judge (himself a Court of Claims Judge named as an acting Supreme Court justice) have cited budgetary reasons to deny certification to the most seasoned and experienced judges in our system of justice, they nevertheless have also simultaneously sought the appointment of acting justices, undercutting the so-called budgetary justifications for denial of certification.

AS AND FOR A FIRST CAUSE OF ACTION
(For Judgement Pursuant to CPLR 7803)

83. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

84. Article 78 of New York's Civil Practice Law and Rules supersedes the common-law writs and provides a device for challenging the actions of the Respondents, administrative agencies and officers of the State of New York.

85. In particular, Section 7803(3) of the CPLR authorizes a petitioner to raise in a special proceeding before a Supreme Court "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."

86. Here, the Respondents' decisions must be guided by the requirements of the Constitution of the State of New York and Section 115 of the Judiciary Law.

87. Section 115 of the Judiciary Law provides two basis for denial of certification: each individual justice's certification or recertification application may be denied upon an assessment of (a) the mental and physical capacity to perform the duties of such office, and (b) the necessity to expedite the business of the Supreme Court.

88. As a matter of law, the determination of necessity includes consideration of the need for additional judicial capacity and whether the

individual seeking certification can meet this need.

89. The Respondents did not deny the Petitioner Justices' certification applications on both or either of these requisite bases, or indeed on any individual basis. Rather, Respondents' relied on budgetary concerns for the wholesale and across the board denial of certification or recertification, a consideration which is explicitly outside the bases set forth in the Judiciary Law.

90. Accordingly, Respondents violated the lawful procedures contemplated by the Constitution of the State of New York and required by Section 115 of the Judiciary Law.

91. Because Respondents did not comply with these procedures, their denials of certification were "made in violation of lawful procedure" as contemplated by CPLR 7803(3).

92. Accordingly, Respondents' denials of certification with respect to the Petitioner Justices must be annulled and Respondents must make determinations as to (i) the mental and physical capacity of the Petitioner Justices to continue their duties as justices of the Supreme Court, and (b) whether the Petitioner Justices' continued service is necessary to expedite the business of the Supreme Court.

AS AND FOR A SECOND
CAUSE OF ACTION

(For Judgment Pursuant to CPLR 7803)

93. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

94. Section 7803(3) of the CPLR authorizes a petitioner to raise in a special proceeding before a Supreme Court “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.”

95. Here, the blanket denials of certification issued by Respondents with respect to the Petitioner Justices were not only made in violation of lawful procedure, but are further subject to challenge because Respondents’ denials were arbitrary and capricious.

96. Upon information and belief, Respondents considered criteria which bore no rational relationship to the statutory and constitutional criteria.

97. Agency action will be overturned as “arbitrary and capricious” where “the record shows that the agency’s action was ‘arbitrary, unreasonable, irrational or indicative of bad faith.’” *Matter of Zutt v. State of New York*, 99 A.D.3d 85, 97 (2d Dep’t 2012) (quoting *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005)).

98. Respondents' blanket denials of certification are "arbitrary, unreasonable, irrational, or indicative of bad faith."

99. The sole justification provided by Chief Administrative Judge Marks for the denial of Petitioners' certification applications were fiscal concerns arising out of an expected, but not certain, \$300 million budget cut to the Judiciary undertaken by Governor Cuomo.

100. In this context, Chief Administrative Judge Marks in the Certification Memo explained that the decision to deny almost all of the pending certification applications would save the New York Unified Court System \$55 million over two years.

101. Savings of \$55 million over two years is an unsupportable figure.

102. The Certification Memo suggests that Respondents calculated the average savings of denying each justice's certification application as almost \$1.2 million over two (2) years.

103. None of the Respondents have provided any justification or empirical basis for this expected savings figure.

104. In fact, denying certification to the Petitioner Justices and the other justices whose pending applications for certification were denied could never result in \$55 million in savings over two years.

105. Respondents failed to consider the costs to the court system from denying certification. Respondents also failed to consider the non-monetary costs of denying certification which

include, but are not limited to: the court system's loss of prestige for engaging in blatantly discriminatory conduct, the decline in morale among the remaining judges and justices, and the decreased efficiency of a court system deprived of its senior bench.

106. By denying the pending certification applications for forty-six justices, these vacated seats on the Supreme Court may be filled by appointments well before any certification period would expire.

107. Moreover, these forty-six justices will receive full pension payments as opposed to their yearly salaries. Thus, the cost to the public is virtually the same. The main difference is that the retired justices will receive a near to full salary but not work as judges. The court system will lose all of the benefits of their hard work and expertise but the state will still be paying for it.

108. As a result, it is rational and reasonable to expect that the budgetary impact of Respondents' actions will not lessen the strain on New York's Judiciary budget, but could increase the strain.

109. Based upon the foregoing, the \$55 million in expected savings cited by Chief Administrative Judge Marks is a non-empirical figure not rationally based on the actual expected budgetary impact of the Administrative Board's decision to deny almost all of the pending certification applications for justices of the Supreme Court.

110. Thus, Respondents' reliance on this unsupported expected savings figure in denying the Justice Petitioners' applications for certification renders their decision(s) irrational and

unreasonable, and therefore arbitrary and capricious under CPLR 7803(3).

111. Moreover, because Section 115 of the Judiciary Law requires the Administrative Board to consider the “necessity” of the justices applying for certification, the budgetary savings – if indeed any exist at all – must be balanced against the current and documented necessity for justices in the New York Unified Court System.

112. As outlined above, the New York Unified Court System is currently experiencing an extreme backlog of cases, with justice delayed becoming justice denied in far too many cases. By denying certification to forty-six justices of the Supreme Court, including Petitioners, Respondents are only ensuring that this backlog will worsen.

113. As a result, even if Respondents could demonstrate that the denial of forty-six pending certification applications could result in *de minimis* savings, these savings would be insufficient, under Section 115 of the Judiciary Law, to rationalize Respondents’ choice to disapprove of the Petitioner Justices’ applications for certification. This is particularly true with respect to the Petitioner Justices, justices of the Supreme Court, Appellate Division, who represent only a small fraction of any *de minimis* expected savings under Respondents’ plan.

114. For all of the foregoing reasons, the Respondents’ decision to deny certification to all of the Petitioners was arbitrary and capricious under CPLR 7803(3).

115. Accordingly, Respondents' denials of certification with respect to the Petitioner Justices must be annulled.

AS AND FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

116. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

117. CPLR § 3001 authorizes the Supreme Court to render a declaratory judgment "having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

118. Consistent with the Constitution of the State of New York, Section 115 of New York's Judiciary Law, a measure enacted by the legislature of the State of New York, delineates the procedure for a justice to be certificated to continue service as a justice beyond the age of seventy (70). It provides that:

Any justice of the supreme court, retired pursuant to subdivision b of section twenty-five of article six of the constitution, may, upon his application, be certified by the administrative board for service as a retired justice of the supreme court upon findings (a) that he has the mental and physical capacity to perform the duties of such office and (b) that his services are necessary to expedite the business of the supreme court.

119. Despite constitutional and legislative enactments, Respondents have ultimately and unilaterally determined, without any amendment of this provision by the legislature, that due to budgetary concerns, the Petitioner Justices' certification applications should be denied.

120. Because Respondents have not evaluated the Petitioner Justices' certification applications on the two grounds specified by the Constitution of the State of New York and by the legislature in the Judiciary Law, Respondents have, by their actions, repealed these provisions, disregarded the judgment of the New York State Legislature, and eliminated the certification process for justices on their own accord.

121. Altogether, Respondents' actions have unconstitutionally negated Section 115 of the Judiciary Law, a legislative enactment by the New York State Legislature meant to effectuate the role and operation of the New York State Unified Court system consistent with Article 6 of the Constitution of the State of New York.

122. Respondents' actions threaten the functioning of the court and do away with the certification program's purpose of ensuring that the courts do not lose the benefit of experienced, productive and capable justices after they turn seventy (70) years old.

123. Moreover, by failing to implement the Judiciary Law, Respondents have entirely disregarded the certification program and usurped the power of the New York State Legislature.

124. As evidenced by the above, a justiciable controversy exists concerning whether Respondents actions are unconstitutional and illegal.

125. A declaration of the parties' rights under the Constitution of the State of New York and the Judiciary Law is required.

126. Based upon the foregoing, Petitioners are entitled to a declaration that Respondents' denial of Petitioners' certification applications was unconstitutional and illegal in violation of the Constitution of the State of New York and the Judiciary Law.

**AS AND FOR A FOURTH
CAUSE OF ACTION**
(Declaratory Judgment)

127. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

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

129. Here, the Petitioner Justices have a property interest in their terms and continued service as justices of the Supreme Court even after their mandatory retirement age, as specifically contemplated by the procedures required by Constitution of the State of New York and the Judiciary Law.

130. Because the Petitioner Justices have such a property interest, they were and continue to be

entitled to procedural due process protections to ensure that they are not deprived of that right in a way that violates fundamental fairness.

131. Here, Respondents decision to deny Petitioners certification applications has violated fundamental fairness principles because Respondents' decision has ensured that the Petitioner Justices have been unfairly and erroneously deprived of their ability to continue to serve as justices of the Supreme Court.

132. Moreover, Respondents' chosen course of action—ignoring the guidelines and standards laid out in Judiciary Law Section 115 and denying Petitioners' applications for certification—has arbitrarily deprived the Petitioner Justices of their interest in continuing to serve as justices of the Supreme Court.

133. Thus, Respondents have denied the Petitioner Justices procedural due process under the law.

134. As evidenced by the above, a justiciable controversy exists concerning whether Respondents' near-blanket denial of pending certification applications, including those of the Petitioner Justices, denied the Petitioner Justices due process.

135. A declaration of the parties' due process rights under the Constitution of the State of New York and the Judiciary Law is required.

136. Based upon the foregoing, Petitioners are entitled to a declaration that Respondents' denial of Petitioners' certification applications denied the Petitioners due process under the Constitution of the State of New York.

AS AND FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment)

137. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

138. Section 4(e) of Article 6 of the Constitution of the State of New York provides:

In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease.

139. Upon a showing of necessity, this provision empowers Appellate Divisions to request that the governor designate additional justices to help expedite the business of the Appellate Division. Without these necessity designations, the Appellate Divisions would only consist of seven (7) justices, the Constitutional Court, as specified by Section 4(b) of Article 6 of the Constitution of the State of New York. The seven justices of all four Appellate Divisions who are serving pursuant to Section 4(b) rather than Section 4(e) compose the Constitutional Court.

140. Section 4(d) of Article 6 of the Constitution of the State of New York allows that where the governor designates such an additional justice (or

does so other under circumstances) to serve on the Appellate Division, and those designated justice departs the courts (i.e. a vacancy opens up) the governor thereby “shall make new designations.”

141. It is pursuant to these constitutional provisions that the size of the Appellate Divisions have consistently increased well-beyond the size of the Constitutional Court to their current sizes.

142. For over a century, Appellate Divisions have continued to certify to the governor the need for additional justices, and the governor has replaced these designated justices as vacancies arise.

143. Upon information and belief, never has an Appellate Division certified to a governor that a designated additional Appellate Division justice was no longer necessary for the “speedy disposition of the business before it.”

144. Thus, the absence of a certification to the Governor that necessity no longer exists, demonstrates that the Appellate Divisions have undisputedly expressed to the Governor their continued belief in the necessity of the justices serving on the Appellate Divisions.

145. However, by Respondents’ actions, Respondents have superseded and disregarded the Appellate Division’s determinations of necessity and determined that the Petitioner Justices, along with several other Appellate Division justices, are no longer necessary for the business of the Appellate Division.

146. Moreover, in issuing their certification denials on grounds independent of those specified

by Section 115 of the Judiciary Law, Respondents have overstepped their own constitutional authority and interfered with the Appellate Divisions' ability to certify to the Governor the continued necessity of their justices' services.

147. Thus, Respondents' almost-blanket denial of pending applications for certification from Appellate Division justices (and Petitioners)—as opposed to the good faith, case-by-case basis required by the Constitution of the State of New York—has usurped and contradicted the constitutional authority provided to the Appellate Divisions to certify to the Governor the continued necessity of those justices designated for necessary service on the Appellate Division.

148. Respondents' denials of almost all pending certification applications are therefore unconstitutional because Respondents are overstepping their constitutional authority and interfering with the constitutional relationship between the Appellate Divisions and the Governor concerning the necessity of justices.

149. As evidenced by the above, a justiciable controversy exists concerning whether Respondents' denials of almost all pending certification applications violate the Constitution of the State of New York.

150. A declaration of whether the Respondents' near-blanket denial of pending certification applications violates the Constitution of the State of New York is required.

151. Based upon the foregoing, Petitioners are entitled to a declaration that Respondents' denial

of Petitioners' certification applications violated the Constitution of the State of New York.

AS AND FOR A SIXTH CAUSE OF ACTION

(Discrimination under New York's
Human Right Law)

152. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

153. The State of New York's Human Rights Law ("NY HRL") is set forth in Article 15 of New York's Executive Law. Section 291 of the NY HRL provides, "The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right."

154. Moreover, Section 296(1) of the NY HRL provides that "It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

155. “Employer” is defined in Section 292 of the NY HRL as referring to “all employers within the state.”

156. Section 297(9) of the NY HRL provides that individuals may seek redress for unlawful discrimination under the NY HRL by bringing suit in a court of appropriate jurisdiction, stating:

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of employment discrimination related to private employers and housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section

157. Here, the Petitioner Justices are all justices of the Supreme Court of the State of New York who have extensive judicial experience and have served the public with distinction.

158. The Petitioner Justices all reside within the State of New York and are employed by the New York State Unified Court System.

159. The Petitioner Justices are all at least seventy (70) years old and by the explicit terms of the NY HRL belong to a protected class on the basis of their age.

160. Respondents’ actions to eliminate and deny the Petitioner Justices’ pending requests for certification—thereby effectively firing the Petitioner Justices—targeted and discriminated against Petitioners on the basis of their age.

161. In fact, Respondents' own justifications for their actions indicated that they targeted the Petitioner Justices and forty-two other elder justices in connection with purported budgetary cuts rather than undertake age-neutral layoffs in other areas of the New York Unified Court System.

162. Moreover, Respondents' denial of the Petitioner Justices' certification applications ensures that Petitioners will be replaced in favor of younger justices.

163. Thus, Respondents' actions to deny the Petitioner Justices' requests for certification were discriminatory and illegal under the NY HRL.

**AS AND FOR A SEVENTH
CAUSE OF ACTION**

(Discrimination under New York City's
Human Right Law)

164. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

165. In addition to the State of New York, New York City has its own regulations in place outlawing discriminatory practices.

166. New York City's Human Rights Law ("NYC HRL") is set forth in Title 8 of the Administrative Code of the City of New York. Section 8-101 of the NYC HRL states New York City's policy as follows:

In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of

groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, immigration or citizenship status, gender, sexual orientation, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, uniformed service, any lawful source of income, status as a victim of domestic violence or status as a victim of sex offenses or stalking, whether children are, may be or would be residing with a person or conviction or arrest record.

167. Section 8-107 of the NYC HRL provides:

1. Employment. It shall be an unlawful discriminatory practice:
 - (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person:
 - (1) To represent that any employment or position is not available when in fact it is available;
 - (2) To refuse to hire or employ or to bar or to discharge from employment such person; or
 - (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

168. Section 8-102 of the NYC HRL defines “employer” for the purposes of Section 8-107(1) as any employer with four or more persons in its employ.

169. Section 8-502 of the NYC HRL governs the right of individuals to enforce the terms of the NYC HRL by civil action. It provides:

a. Except as otherwise provided by law, any person claiming to be a person aggrieved by an unlawful discriminatory practice as defined in chapter 1 of this title or by an act of discriminatory harassment or violence as set forth in chapter 6 of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence. For purposes of this subdivision, the filing of a complaint with a federal agency pursuant to applicable federal law prohibiting discrimination which is subsequently referred to the city commission on human rights or to the state division of human rights pursuant to such law shall not be deemed to constitute the filing of a complaint under this subdivision.

170. Here, the Petitioner Justices are all justices of the Supreme Court of the State of New York who have extensive judicial experience and have served the public with distinction.

171. The Petitioner Justices all reside in New York City and were elected as Supreme Court justices in a county within New York City. The Petitioner Justices are all employed by the New York State Unified Court System, an agency with more than four employees.

172. The Petitioner Justices are all at least seventy (70) years old and by the explicit terms of the NYC HRL belong to a protected class on the basis of their age.

173. Respondents' actions to eliminate and deny the Petitioner Justices' pending requests for certification—thereby effectively firing Petitioners—targeted and discriminated against Petitioners on the basis of their age.

174. In fact, Respondents' own justifications for their actions indicated that they targeted the Petitioner Justices and forty-two other elder justices in connection with purported budgetary cuts rather than undertake age-neutral layoffs or budgetary cuts with respect to other areas of the New York Unified Court System and its budget.

175. Moreover, Respondents' denial of the Petitioner Justices' certification applications ensures that Petitioners will be replaced in favor of younger justices.

176. Thus, Respondents' actions to deny the Petitioner Justice' requests for certification were discriminatory and illegal under the NYC HRL.

WHEREFORE, Petitioners respectfully request that this Court grant judgment in its favor as follows:

- (a) On the first cause of action, finding that Respondents' actions were in violation of lawful procedure under CPLR 7803(3);
- (b) On the second cause of action, finding that Respondents' actions were arbitrary and capricious under CPLR 7803(3);
- (c) On the third cause of action, a declaration that Respondents' actions were unconstitutional and illegal;
- (d) On the fourth cause of action, a declaration that Respondents' actions denied Petitioners' due process under the Constitution of the State of New York;
- (e) On the fifth cause of action, a declaration that Respondents' actions were unconstitutional;
- (f) On the sixth cause of action, finding that Respondents' actions were discriminatory in violation of New York's Human Rights Law;
- (g) On the seventh cause of action, finding that Respondents' actions were discriminatory in violation of New York City's Human Rights Law;
- (h) Granting such further and additional relief as the court deems just and proper.

Dated: New York, New York
November 5, 2020

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Attorneys for Petitioner-Plaintiffs

VERIFICATION

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

ELLEN GESMER, being duly sworn, deposes and says:

I am Petitioner-Plaintiff Justice Ellen Gesmer in this action. I have reviewed the foregoing Verified Article 78 Petition and Complaint and know the contents thereof, and the same are true and correct to the best of my knowledge, except as to those matters that are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Dated: New York, New York
November 4, 2020

/s/ Ellen Gesmer
Hon. Ellen Gesmer

Notarization was made pursuant
to Executive Order 202.7
Sworn to me before this
4th day of November, 2020

/s/ Lucy Mahecha
Notary Public

[STAMP]
LUCY MAHECHA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6384242
Qualified in Rockland County
My Commission Expires 12-10-2022

VERIFICATION

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

DAVID FRIEDMAN, being duly sworn, deposes and says:

I am Petitioner-Plaintiff Justice David Friedman in this action. I have reviewed the foregoing Verified Article 78 Petition and Complaint and know the contents thereof, and the same are true and correct to the best of my knowledge, except as to those matters that are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Dated: Kings, New York
11/4/2020

/s/ David Freidman
Hon. David Friedman

Notarization was made pursuant
to Executive Order 202.7
Sworn to me before this
4th day of November, 2020

/s/ Lucy Mahecha
Notary Public

[STAMP]
LUCY MAHECHA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6384242
Qualified in Rockland County
My Commission Expires 12-10-2022

VERIFICATION

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

JOHN M. LEVENTHAL, being duly sworn,
deposes and says:

I am Petitioner-Plaintiff Justice John M. Leventhal in this action. I have reviewed the foregoing Verified Article 78 Petition and Complaint and know the contents thereof, and the same are true and correct to the best of my knowledge, except as to those matters that are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Dated: 11-4-2020, New York

11/4/2020

/s/ John M. Leventhal
Hon. John M. Leventhal

Notarization was made pursuant
to Executive Order 202.7
Sworn to me before this
4th day of November, 2020

/s/ Lucy Mahecha
Notary Public

[STAMP]
LUCY MAHECHA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6384242
Qualified in Rockland County
My Commission Expires 12-10-2022

Appendix I

**Older Appellate Division Justices
Ask Court To Hold DiFiore,
Other Defendants in Contempt**

BY JASON GRANT

THE FOUR Appellate Division justices who have sued the state court system for not to recertifying them to the bench on Wednesday afternoon filed emergency papers asking a Suffolk County judge to find the state's chief judge, Janet DiFiore, and other state defendants in contempt of court for not complying with court-ordered expedited discovery.

A 4:30 p.m. hearing on the order to show cause was happening before Suffolk County Supreme Court Justice Paul Baisley Jr. on Wednesday, as the plaintiffs, Appellate Division Justices Ellen Gesmer, David Friedman, Sheri Roman and John Leventhal, asked for Baisley to hold the defendants in civil contempt of court.

“This motion is about recognizing the Rule of Law,” said Y. David Scharf, a Morrison Cohen partner and a lead lawyer for the Appellate Division justices in their suit, in a text message Wednesday afternoon from the courthouse.

Lucian Chalfen, chief spokesman for the state court system, declined to comment Wednesday while the hearing before Baisley was ongoing. He said he would comment after the hearing was completed.

The hearing was not available for the public to see or hear via video or audio feed. It was being held with the lawyers for both sides of the suit present in the courtroom.

The filing lodged Wednesday by the older Appellate Division justices and their legal team complains that DiFiore would not and did not appear for a deposition on Monday, Nov. 16, and that state Chief Administrative Judge Lawrence Marks also did not appear for his slated deposition today.

Both depositions had been ordered by Baisley to happen, after he signed off on a Nov. 5 order to show cause submitted by the justices and their lawyers that asked that expedited discovery in their lawsuit be granted.

In addition, Baisley's order had instructed the court system defendants to produce documents in the case by Nov. 14, before the scheduled depositions. But the justices and Scharf say those documents were not produced.

The court system defendants "have decided to simply ignore the Order of this Court to turn over documents and to appear for depositions," states a memorandum of law filed Wednesday in support of justice's motion for contempt of court to be ordered. The memorandum is signed by several lawyers at Morrison Cohen, including partners Scharf and David Saxe, and by James Catterson, a partner at Arnold & Porter Kaye Scholer.

The memo in support also states, "Our court system plays the central role in upholding the rule of law. The rule of law ensures that no one is beneath the protection of the law and no one is free

from the obligation to comply with it, including the Chief Judge [Difiore] of the Unified Court System and the Court of Appeals as well as the Chief Administrative Judge [Marks].”

It continues, “The instant motion is one that is not easy to make, and it is with great regret that the Petitioners [the plaintiff appellate justices] find themselves in the present situation. However, the Respondents [the court system defendants] have done everything in their power – and their power over the court system is considerable – to drag out these proceedings with the understanding that by so doing, the Petitioners will be nonsuited by nothing more than the passage of time.”

“In taking the oath of office, each judge or justice in New York State swears to to uphold the United States Constitution and the New York State Constitution,” the memorandum adds. “Implicit in that oath is fealty to the rules of practice as well as obedience to lawful orders of the Court.”

The court system defendants made their own motion last week, asking that the entire case be moved in its venue from Suffolk to Albany County. That motion is pending.

The appellate justices’ lawsuit, filed Nov. 5, alleges violations of state constitutional rights, along with age discrimination under the state and New York City Human Rights Acts. It springs out of a decision announced by Chief Administrative Judge Marks in late September that “all but a small handful” of older judges’ applications in the state for certification or recertification to the bench would be denied due to a court system budget cut of \$300 million handed down by Gov. Andrew Cuomo.

Cuomo, under extraordinary budget pressure because of the COVID-19 pandemic's economic fallout, announced the court-system budget slash in September. In total, 46 of 49 older judges, all between ages 70 and 76, are being effectively terminated on Dec. 29 due to the court system not certifying or recertifying them to the bench. The court system's recertification process for judges reaching age 70 has long allowed the state's courts to keep on the bench, for up to six years, many of its most experienced judges.

In the weeks and months since Marks announced that 46 senior justices would not be certified or recertified, there has been mounting public pushback against the decision. State bar groups, some legislatures in Albany and lawyers for the terminated justices have decried that the decision may create "chaos" in an already over-worked system, and lead to a failure to serve litigants and their lawyers properly or in a timely way. They also say that the decision was made prematurely, before it becomes clear what financial aid the state may get from the federal government, and before Cuomo has said that judges should be cut loose.

The New York Law Journal has reported that sources with knowledge of discussions among the 46 judges say that a lawsuit separate from the appellate justices' action may be brought by dozens of trial court-level judges affected by the court system's choice not to recertify them.

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Appendix J

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No. _____

HON. _____, J.S.C.

In the Matter of the Application of

SUPREME COURT JUSTICES ASSOCIATION OF
THE CITY OF NEW YORK, INC., by its President
HON. ESTHER M. MORGENSTERN, ASSOCIATION
OF JUSTICES OF THE SUPREME COURT OF THE
STATE OF NEW YORK, by its President HON.
CHARLES C. MERRELL, HON. KATHRYN E. FREED,
HON. ORLANDO MARRAZZO, HON. LARRY D.
MARTIN, HON. JAMES J. PIAMPIANO, HON.
BERNICE D. SIEGAL, and HON. FERNANDO TAPIA,

For a Judgment Pursuant to Article 78 of
the New York Civil Practice Law and Rules

—against— *Petitioners*,

THE ADMINISTRATIVE BOARD OF THE NEW
YORK STATE UNIFIED COURT SYSTEM, JANET
DiFIORE, AS CHIEF JUDGE OF THE NEW YORK
STATE UNIFIED COURT SYSTEM, and LAWRENCE
K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF
THE NEW YORK STATE UNIFIED COURT SYSTEM,

Respondents.

VERIFIED PETITION

Supreme Court Justices Association of the City of New York, Inc., by its President Hon. Esther M. Morgenstern, Association of the Justices of the Supreme Court of the State of New York, by its President Hon. Charles C. Merrell, Hon. Kathryn E. Freed, Hon. Orlando Marrazzo, Hon. Larry D. Martin, Hon. James J. Piampiano, Hon. Bernice D. Siegal, and Hon. Fernando Tapia (collectively, "Petitioners") state the following as and for their Petition pursuant to Article 78 of the New York Practice Laws and Rules ("CPLR") against the Administrative Board of the New York State Unified Court System (the "Administrative Board"), Chief Judge Janet DiFiore as Chief Judge of the State of New York's Unified Court System, Chief Administrative Judge Lawrence Marks as the Chief Administrative Judge of the State of New York's Unified Court System (collectively, the "Respondents"):

INTRODUCTION

1. Petitioners file this Verified Petition for judgment pursuant to Article 78 of the New York Civil Practice Laws and Rules ("CPLR") as follows:

- a. invalidating the Administrative Board's determination to deny certification to 46 Supreme Court Justices as against the lawful procedure set forth under New York State's Constitution;
- b. vacating the Administrative Board's determination to deny certification to each of the

46 Supreme Court Justices as arbitrary and capricious;

- c. finding that Respondents' actions were discriminatory in violation of New York State's Human Rights Law;
- d. ordering the Administrative Board to expeditiously reevaluate each Petitioner's request for certification on an individualized basis, as required by New York State's Constitution;
- e. ordering that any Supreme Court Justice who filed the appropriate pension and health care papers in reliance on their denial of certification be permitted to withdraw those papers if the Administrative Board's decision is vacated; and
- f. awarding Petitioners such other and further relief as the Court deems just and proper.

2. No prior application has been made for the relief requested herein.

3. This proceeding is related to a proceeding filed in the Supreme Court of the State of New York, Suffolk County titled In the Matter of the Application of Hon. Ellen Gesmer, et al., Index No. 616980/2020 (Sup. Ct. Suffolk Cnty. 2020).

4. This proceeding is not about whether the Court System can afford to continue the dedicated service of 46 experienced jurists, despite Respondents' public protestations. Rather, this proceeding focuses on the Court System's failure to adhere to the constitutionally required criteria for

determining whether an elected Supreme Court Justice should be “certificated” to continue to serve the people that elected them.

5. Pursuant to New York State’s Constitution and Judiciary Law, before denying certification to a judge or justice, the Administrative Board must determine whether the justice is “necessary to expedite the business of the court” and whether “he or she is mentally and physically able and competent to perform the full duties of such office.” N.Y. CONST. art. VI, § 25(b); see also N.Y. JUD. LAW § 115(1).

6. The Administrative Board’s decision not to certificate 46 of 49 Supreme Court Justices amid a global pandemic has created a devastating domino effect that will hinder the operations of the court at virtually every level.

7. Previously, with 30 to 40 applications each year, the Administrative Board declined certification to some three judges in a three-year period. This year, all but three were summarily denied. These judges include those serving on the Appellate Divisions of the state, on the Appellate Term, and in the trial courts.

8. In addition to those who were discontinued, many more judges have voluntarily retired, reducing the ranks of Supreme Court Justices further. Thus, to fill empty seats at the Appellate Division, the ranks of trial court judges will be further depleted. All this without any indication that the Court System considered any of the 46 judges individually or studied the consequent impact of their determination.

9. The Administrative Board's decision to not certificate, en masse, 46 judges to avoid making other tough budgetary choices effectively reads the certification process out of the Constitution.

10. Likewise, the determination violates the Constitution by failing to consider each judge individually and, instead, basing the determination on the improper and illegal criteria that these judges are technically "retired" and have already had long careers.

11. That cannot be a constitutional criteria, for the certification process is reserved precisely for "retired" elected Supreme Court Justices and evidences the value placed on continued service by these experienced jurists.

12. Further, the failure to certificate these judges is irrational and contrary to the Court System's mission. As the Administrative Board itself has expressed, justice delayed is justice denied.

THE PETITIONERS

13. The Association of the Justices of the Supreme Court of the State of New York, Inc. (the "State Association") was established pursuant to Judiciary Law § 217. The State Association is organized as a not-for-profit corporation under New York law to encourage and advance the proper protection of the professional, social and economic interests of the judicial and non-judicial personnel of the court and to work towards improving the judicial system. Judiciary Law § 217 vests in the State Association, as well as other

court-based judicial associations, the obligation to, on behalf of its members, “consult with the chief judge and the chief administrator with respect to the impact of administrative policies on the functioning of the courts and related agencies of the unified court system.” See N.Y. JUD. LAW § 217. No such consultation was permitted here.

14. The Supreme Court Justices’ Association of the City of New York, Inc. (the “City Association,” and together with the State Association, the “Associations”) was established as a not-for-profit corporation under New York law to represent New York State Supreme Court Justices who serve in the City of New York. The City Association’s goals include improving the working conditions and welfare of the Supreme Court Justices of New York City by promoting appropriate laws, regulations and policies to support the Judiciary. The City Association represents Supreme Court Justices presiding in New York City and the State Association represents Supreme Court Justices presiding in New York State.

15. The Administrative Board’s decision to deny certification to 94% of the New York Supreme Court Justices that applied this year has had a profound impact on the Associations’ members. Unlike in previous years, however, several of the Associations’ members were denied certification for the term beginning January 2021. Certification not only impacts the Associations’ members who were denied certification, but it affects the remaining Associations’ judges who, if this is not reversed, would bear the burden of increased caseloads due to the drastic reduction in the number of New York State Supreme Court Justices

serving on the Judiciary. They would now face the daunting task of quickly familiarizing themselves with newly transferred cases, many of which were commenced years before, while also juggling the demands of their existing caseloads. Moreover, members of the Associations expect to apply for certification or re-certification next year and have a vested interest in determining the scope of the Administrative Board's authority with regard to certification.

16. Petitioner Kathryn E. Freed is a Justice of the Supreme Court of the State of New York in New York County and has been on the bench since 2004. She is a member of the City Association and was summarily denied certification on September 29, 2020 despite meeting the constitutional criteria. Justice Freed was elected to the New York Civil Term in 2014, and since that time she has been sitting in General IAS Part 2. She has been certificated twice before, demonstrating her continued ability to serve on the bench. The following is a summary of her judicial experience:

- Certificated Justice, Supreme Court, New York County (2016 to 2020)
- Justice, Supreme Court, New York County (2014 to 2015)
- Acting Justice, Supreme Court, New York County, Appointed by Chief Administrative Judge A. Gail Prudenti (2011 to 2014)
- Judge, Civil Court of the City of New York, New York County (2010 to 2011)
- Judge, Civil Court of the City of New York, Kings County (2006 to 2009)

- Judge, Criminal Court of the City of New York (2004 to 2005)

17. Petitioner Orlando Marrazzo is a Justice of the Supreme Court of the State of New York in Richmond County and has been on the bench since 2010. Justice Marrazzo currently presides over the Commercial, Medical Malpractice and Guardianship Parts in Richmond County. He also handles other civil matters and currently has an inventory of approximately 500 cases. He is a member of the Associations and was summarily denied certification on September 29, 2020 despite meeting the constitutional criteria. The following is a summary of his judicial experience:

- Justice, Supreme Court, Richmond County (2019-Present)
- Acting Justice, Supreme Court, Richmond County (2012-2020)
- Judge, Civil Court of the City of New York, Richmond County (2010 to 2019)

18. Petitioner Larry D. Martin is a Justice of the Supreme Court of the State of New York and has been on the bench since 1992. In 2019 he was appointed the Presiding Justice of the Commercial Division of Kings County. He has presided over hundreds of trials including felony, medical malpractice, civil and commercial cases and is currently responsible for an inventory of over five hundred commercial actions. He is a member of the Associations and was summarily denied certification on September 29, 2020 despite meeting the constitutional criteria. The following is a summary of his judicial experience:

- Presiding Justice of the Commercial Division of Kings County (Oct. 2019 to Present)
- Supreme Court Justice, Kings County, Civil and Criminal Terms (Jan. 1994 to Present)
- Judge, Criminal Court of the City of New York, Kings County (1992 to 1994)
- Judge of the Civil Court (1992 to 1994). Assigned to the Criminal Part.

19. Petitioner James J. Piampiano is a Justice of the Supreme Court of the State of New York in the 7th Judicial District and has been on the bench since 2008. He is a member of the State Association and was summarily denied certification on September 29, 2020 despite meeting the constitutional criteria. The following is a summary of his judicial experience:

- Justice, Supreme Court, 7th Judicial District (2016 to Present)
- Monroe County Court Judge and Acting Supreme Court Justice (2011 to 2015)
- Acting Rochester City Court Judge (2009 to 2010)
- Henrietta Town Justice (2008 to 2010)

20. Petitioner Justice Bernice D. Siegal is a Justice of the Supreme Court of the State of New York in Queens County and has been on the bench since 2002. She is a member of the Associations and was summarily denied certification on September 29, 2020 despite meeting the constitutional criteria. Justice Siegal was appointed by Hon. Larry Marks to the Appellate Term, Second Department, in 2018. In addition to her duties on the Appellate Term, she continues to

preside over one of only three Guardianship Parts in the 11th Judicial District, Queens County. Her current guardianship caseload is some 1,685 cases. The following is a summary of her judicial experience:

- Justice, Appellate Term, Second Department (2018 to Present)
- Justice, Supreme Court, Queens County (2009 to 2020)
- Supervising Judge, Civil Court of the City of New York, Queens County (2007 to 2008)
- Judge, Civil Court of the City of New York, Queens County (2002 to 2008)

21. Petitioner Justice Fernando Tapia is a Justice of the Supreme Court of the State of New York in Bronx County and has been on the bench since 2003. He presides over complex legal disputes and trials involving medical malpractice, labor, and products liability. He is a member of the Associations and was summarily denied certification on September 29, 2020 despite meeting the constitutional criteria. The following is a summary of his judicial experience:

- Justice, Supreme Court, Bronx County (2013 to Present)
- Acting Justice, Supreme Court, Bronx County, Appointed by Chief Administrative Judge Ann Pfau (2010)
- Judge, Civil Court of the City of New York, New York County (2003 to 2012)

RESPONDENTS

22. Chief Judge Janet DiFiore is the Chief Judge of the Court of Appeals and the State of New York. The Constitution designates Judge DiFiore as the head of the Judiciary, and she may adopt administrative policy for the courts after consultation with the Administrative Board of the New York State Unified Court System (the “Administrative Board”).

23. The Administrative Board is comprised of the Chief Judge and the Presiding Justices of the four Appellate Divisions of the Supreme Court.¹ Currently, the Administrative Board is composed of Chief Judge Janet DiFiore, Presiding Justice Rolando T. Acosta, Presiding Justice Alan D. Scheinkman, Presiding Justice Elizabeth A. Garry, and Presiding Justice Gerald J. Whalen.

24. With the advice and consent of the Administrative Board, the Chief Judge also appoints a Chief Administrative Judge who is responsible for supervising the day-to-day administration and operation of the trial courts.² The current Chief Administrative Judge is Lawrence K. Marks. The Chief Administrative Judge establishes the administrative office of the courts, which includes the Office of Court Administration (“OCA”).³

¹ See State of New York Unified Court System, Judiciary Budget FY 2019-20, available at: <http://ww2.nycourts.gov/sites/default/files/document/files/2018-11/2019-20-JUDICIARY-Budget.pdf> (last accessed Nov. 22, 2020) [Hereinafter “OCA 2019-20 Budget”] (attached hereto as Ex. 1).

² See id.

³ See id.

25. Supreme Court Justices are not OCA employees and retain judicial independence from OCA.⁴

ALLEGATIONS

New York's Overburdened Court System

26. New York State's Unified Court System is among the largest and busiest in the country, with volumes of complex matters filed daily.⁵

27. Article VI of the New York State Constitution establishes the Judicial branch and defines the organization and jurisdiction of the courts.⁶

28. The New York State Court System is comprised of thirteen judicial districts and four appellate departments.

29. There are eleven lower courts of original jurisdiction, including: the Supreme Court, the Court of Claims, District Courts, County Courts, Family Courts, Surrogate's Courts, City Courts, a New York City Criminal Court, a New York City Civil Court, and the Town and Village Courts.⁷

⁴ Rob Abruzzese, [Biggest opponents to court-merger plan continues to be Supreme Court justices](https://brooklyneagle.com/articles/2019/11/23/biggest-opponents-to-court-merger-plan-continues-to-be-supreme-court-justices/), BROOKLYN DAILY EAGLE (Nov. 23, 2019), available at: <https://brooklyneagle.com/articles/2019/11/23/biggest-opponents-to-court-merger-plan-continues-to-be-supreme-court-justices/> (last accessed Nov. 22, 2020).

⁵ Jeh Charles Johnson, [Report from the Special Adviser on Equal Justice in the New York State Courts](http://courts.state.ny.us/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf) (Oct. 1, 2020), at 25, available at: <http://courts.state.ny.us/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf> [Hereinafter “Equal Justice Report”] (attached hereto as Ex. 2).

⁶ See N.Y. CONST. art. VI.

⁷ Equal Justice Report at 16 (attached hereto as Ex. 2).

30. The New York State Court System employs over 1,200 state-paid judges and 15,500 nonjudicial staff, many of whom provide services directly to the public.⁸

31. New York State courts are overburdened, forcing judges to work as efficiently as possible to meet the demands of their unprecedented caseloads.

32. A Report from the Special Adviser on Equal Justice in the New York State Courts, commissioned by Chief Judge DiFiore, found that the public routinely complained about “an under-resourced, over-burdened New York State Court System, the dehumanizing effect it has on litigants, and the disparate impact of all this on people of color.”⁹

33. An under-resourced and overburdened judicial system could impel judges to make rushed decisions without having the opportunity to reconsider their assumptions and biases, contributing to further implicit bias in the Court System and undermining public confidence in a fair judicial process.¹⁰

⁸ Assembly Standing Committee on the Judiciary, Notice of Online Video Public Hearing, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020), available at: <https://nyassembly.gov/comm/?id=24&sec=story&story=94227> (attached hereto as Ex. 3).

⁹ Equal Justice Report at 54.

¹⁰ See id.; see also Susan C. Bryant, NYS Defenders Association, Testimony at Assembly Standing Committee on the Judiciary, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020) (transcript unavailable).

34. In 2018, the New York State trial courts experienced one of the highest number of civil case filings in the country, second only to Texas, which has a population of 9.1 million more people than New York.¹¹

35. At the trial court level, New York State judges hear an average of 3,236,334 new cases per year.¹²

36. The Supreme Court of New York carries a particularly heavy load. Over the last three years, the Supreme Court has received an average of 459,586 civil filings per year, including an average of 175,151 new cases.¹³ Over that same period, the Supreme Court of New York handled approximately 39,145 new felony case filings per year.¹⁴

¹¹ 2018 Statewide Civil Caseloads and Rates, COURT STATISTICS PROJECT, available at: http://popup.ncsc.org/CSP/CSP_Intro.aspx (last accessed Nov. 9, 2020).

¹² See id.

¹³ New York State Unified Court System 2017 Annual Report, Report of the Chief Administrator of the Courts, at 46, available at: http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/17_UCS-Annual_Report.pdf (last accessed Nov. 15, 2020) [Hereinafter “2017 UCS Report”] (attached hereto as Ex. 4); New York State Unified Court System 2018 Annual Report, Report of the Chief Administrator of the Courts, at 40, available at: https://www.nycourts.gov/legacy/pdfs/18_UCS-Annual_Report.pdf (last accessed Nov. 15, 2020) [Hereinafter “2018 UCS Report”] (attached hereto as Ex. 5); New York State Unified Court System 2019 Annual Report, Report of the Chief Administrator of the Courts, at 36, available at: https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf (last accessed Nov. 15, 2020) [Hereinafter “2019 UCS Report”] (attached hereto as Ex. 6).

¹⁴ 2017 UCS Report at 46; 2018 UCS Report at 40; 2019 UCS Report at 36.

37. The Appellate Division's caseload is also on the rise: 9,359 records on appeal and 16,461 dispositions were filed in the four departments in 2016.¹⁵ By 2019, that number increased to 9,764 records on appeal and 19,094 dispositions per year.¹⁶

The New York State Constitution Certification Process Helps Manage the State's High Caseloads

38. Petitioners are talented and experienced judges, who were selected by New York State's electors to serve the public on the Supreme Court of New York. The Supreme Court of New York is a court of general original jurisdiction vested with the authority to hear any criminal or civil action or proceeding irrespective of its nature or amount, except claims against the State for money damages.¹⁷

39. The New York State Constitution provides that the Justices of the Supreme Court "shall be chosen by the electors of the judicial district in which they are to serve" for fourteen year terms.¹⁸

¹⁵ See New York State Unified Court System 2016 Annual Report, Report of the Chief Administrator of the Courts, at 25, available at: http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/16_UCS-Annual_Report.pdf (last accessed Nov. 15, 2020) [Hereinafter "2016 UCS Report"] (attached hereto as Ex. 7).

¹⁶ See 2019 UCS Report at 34.

¹⁷ Division of Local Government Services, Local Government Handbook (Mar. 13, 2018), at 25-26, available at: https://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf.

¹⁸ See N.Y. CONST. art. VI, § 6.

40. The selection process for New York State's Supreme Court Justices is unique and differs from the selection process for judges serving on the Court of Appeals, Court of Claims, New York City Family Court, Criminal Court, and Housing Courts.¹⁹ Those judges are not independently elected; instead, they are appointed by the Governor, local mayor, or Administrative Judge of New York.

41. As of 2019, there were 328 New York State Supreme Court Justices.²⁰ There are currently some 333 Supreme Court Justices.

42. Unlike United States Supreme Court Justices and other Article III judges who are appointed for life, New York's Constitution mandates that New York Supreme Court Justices are reelected at the end of each 14-year term and retire on the December 31st of the year they attain the age of 70.²¹ This mandatory retirement age may have made sense when it was adopted in 1869 and an individual's life expectancy was approximately 40 years, far lower than the life expectancy today.²²

¹⁸ See N.Y. CONST. art. VI, § 6.

¹⁹ See generally New York City Bar Association, Judicial Selection Methods in the State of New York: A Guide to Understanding and Getting Involved in the Selection Process, Council on Judicial Administration (Mar. 2014), available at: <https://www2.nycbar.org/pdf/report/uploads/20072672-GuidetoJudicialSelectionMethodsinNewYork.pdf>.

²⁰ Division of Local Government Services, Local Government Handbook (Mar. 13, 2018), at 23, available at: https://www.dos.ny.gov/lg/handbook/html/thejudicial_system.html.

²¹ See N.Y. CONST. art. VI, § 25(b).

²² Robert S. Smith, Let judges serve in their prime years, N.Y. DAILY NEWS (Oct. 3, 2013), available at:

43. Still, even then New York's Constitution recognized the value that experienced Supreme Court Justices bring to the Court System by providing for a process by which New York Supreme Court Justices may extend their terms beyond age 70.

44. Retired Justices may be, and regularly have been, certificated for up to three two-year terms after reaching age 70, provided that the justice's services are "necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office."²³

45. The certification process is reserved in New York State's Constitution for elected judges, who are voted by electors to serve their terms.²⁴

46. Certification has historically been granted on a regular basis. From 2018 to 2020, between 30 to 46 Supreme Court Justices applied for certification *each year*.²⁵ Because of the Justices' strong qualification and the demand for experienced judges to serve in New York State courts, the Administrative Board declined only three individual applications for certification during that three-year period.²⁶

<https://www.nydailynews.com/opinion/judges-serve-prime-years-article-1.1474503>; Life expectancy (from birth) in the United States, from 1860 to 2020, STATISTA, available at: <https://www.statista.com/statistics/1040079/life-expectancy-united-states-all-time/>.

²³ See N.Y. CONST. art. VI, § 25(b).

²⁴ See *id.*

²⁵ OCA, [List of Supreme Court Justices Certificated](#) (2018-2020) (attached hereto as Exs. 8 to 10).

²⁶ See *id.*

47. Now, as the State enters one of its most trying periods, all but three of the 49 Justices eligible for certification have been summarily terminated this year.

48. The Supreme Court Justices denied certification this year are part of the backbone of New York State Courts, serving the public each day by diligently managing their individual caseloads, totaling some 21,000 cases.²⁷ Their productivity as experienced jurists and their dedication to the Supreme Court of New York through the certification process has filled a need for more judges that would otherwise need to be addressed by legislation to create more Supreme Court Justices.

49. Recognizing the importance of certification, the New York State Bar Association adopted a report advocating amending New York's Constitution to allow all judges to take advantage of the certification process.²⁸ In calling for higher judicial

²⁷ Esther M. Morgenstern, Testimony at Assembly Standing Committee on the Judiciary, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020) (transcript unavailable).

²⁸ See generally New York State Bar Association, Report and Recommendations of the New York State Bar Association Committee on the New York State Constitution, The Judiciary Article of the New York State Constitution—Opportunities to Restructure and Modernize the New York Courts (Jan. 27, 2017), available at: <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Report%20on%20Judiciary%20Article.pdf>; James C. McKinley, Jr., Plan to Raise Judges' Retirement Age to 80 Is Rejected, N.Y. TIMES (Nov. 6, 2013), available at: <https://www.nytimes.com/2013/11/06/nyregion/plan-to-raise-judges-retirement-age-to-80-is-rejected.html>.

retirement ages across the board, the New York State Bar Association pointed to the need for experienced judges to handle ever-increasing caseloads in the courts, even though this proposal was not adopted by New York's electors four years before.²⁹

Chief Judge DiFiore's Excellence Initiative

50. Chief Judge DiFiore and the Administrative Board of the Courts have been outspoken about the strain and frustration felt by litigants in New York State's Court System, which continues to suffer from a lack of judicial resources and growing caseloads. Chief Judge DiFiore has remarked:

When cases languish for years, litigants grow frustrated about the cost and length of litigation, and ordinary people feel as if justice is beyond their reach. And it is the rule of law that suffers because long delays and excessive costs lead to an inevitable loss of public respect for our justice system, along with increased receptivity to demagogues who attack our courts and institutions of justice for their own political ends.³⁰

²⁹ See generally New York State Bar Association, Report and Recommendations of the New York State Bar Association Committee on the New York State Constitution, The Judiciary Article of the New York State Constitution – Opportunities to Restructure and Modernize the New York Courts (Jan. 27, 2017), available at: <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Report/PDF/Report%20on%20Judiciary%20Article.pdf>; McKinley Jr., supra, note 28.

³⁰ See Hon. Janet DiFiore, Brennan Lecture, The Excellence Initiative and the Rule of Law, 93 N.Y.U. L. Rev. 1053, 1058 (Nov. 2018) (attached hereto as Ex. 11).

In the Administrative Board's view, "justice delayed is justice denied" and "[c]itizens deserve, fundamentally, to have their cases heard and resolved in a fair, timely, efficient and cost effective manner."³¹

51. To ensure timely justice, Chief Judge DiFiore implemented a policy called the "Excellence Initiative" in 2016 to increase efficiency in the New York Court System. The Excellence Initiative seeks to evaluate court operations and administration at every level, toward the goal of "operational and decisional excellence in everything that we do."³²

52. In the Administrative Board's own words, the "Excellence Initiative reflects the Court System's primary ongoing focus on the core mission of the Judiciary—to fairly and promptly adjudicate each of the millions of cases filed in the New York State courts every year."³³

53. Over the last three years, the Administrative Board has made concerted efforts to diminish delays and backlogs in court operations to ensure access to justice for all persons entering the Court Systems.³⁴ The Administrative Board stressed that a focus on "prompt adjudication will continue" to achieve the

³¹ New York State Unified Court System, [The State of Our Judiciary 2017: Excellence Initiative: Year One](#) (Feb. 2017), at i, available at: <http://ww2.nycourts.gov/sites/default/files/document/files/2018-11/SOJ-2017.pdf> (attached hereto as Ex. 12).

³² OCA 2019-20 Budget at i (attached hereto as Ex. 1).

³³ [See id.](#)

³⁴ [See id.](#)

fundamental principles of speed and efficiency for the Excellence Initiative.³⁵

54. Over the last four years, the Supreme Court Justices—including those recently denied certification—adhered to this message and initiative, increasing their productivity and moving their caseloads expeditiously. The decision to not certificate 46 judges—constituting a 14% reduction in Supreme Court Justices State-wide—runs counter to the Court System’s mission, as expressed through the Excellence Initiative.³⁵

The Judiciary’s Proposed 2020-21 Fiscal Budget

55. Pursuant to Article VII, Section 1 of the State Constitution, the New York State Judiciary submitted an itemized estimate of its financial needs for Fiscal Year 2020-2021 on November 29, 2019.³⁶

56. The request sought \$2.36 billion for the State Operations portion of the Judiciary budget, representing an increase of \$45.9 million, or 2%, over the then-current-year cash funding.³⁷ The Judiciary sought a capital appropriation of \$25 million dollars to continue infrastructure modernization.³⁸

³⁵ See id. at ii-iii.

³⁶ New York State Unified Court System, Judiciary Budget FY 2020-21, at i, available at: http://ww2.nycourts.gov/sites/default/files/document/files/2019-12/2020-21_Judiciary_Budget_0.pdf [Hereinafter “OCA 2020-21 Budget”] (attached hereto as Ex. 13).

³⁷ See id.

³⁸ See id. at x.

57. The Judiciary's proposed budget included an allocation of \$492,491,783 in New York's Supreme and County Courts.³⁹

58. The Judiciary's budget also requests funding for both personal and nonpersonal services.⁴⁰ The personal service funding request for the New York State Court System included funding for all judicial positions and all filled nonjudicial positions.⁴¹ The nonpersonal service funding for the New York State Court System supports usual and necessary expenses associated with trial court operations, support, and administration.⁴²

59. For the 2020-21 fiscal year, the Unified Court System recommended that nearly \$125 million dollars should be budgeted for "Other Professional Services," \$11.3 million dollars should be budgeted for postage and printing, \$7 million for supplies and materials, \$4 million for records management services, almost \$6 million for transcripts.⁴³

60. The 2021-22 judiciary budget request is expected to be submitted to the Division of Budget in the coming weeks.

The COVID-19 Pandemic

61. On March 7, 2020, Governor Cuomo issued Executive Order Number 202, declaring an

³⁹ See id. at 18.

⁴⁰ See id. at 19.

⁴¹ See id.

⁴² See id.

⁴³ See id. at 8.

emergency for the entire State of New York due to the COVID-19 pandemic.⁴⁴

62. On March 13, 2020 and March 15, 2020, the Unified Court System issued two memoranda to all judicial and non-judicial personnel of the Unified Court System regarding the coronavirus crisis.⁴⁵ Pursuant to the memoranda, effective March 16, 2020, “civil jury trials in which opening statements have not commenced shall be postponed until further notice; civil jury trials already commenced shall continue to conclusion.”⁴⁶

63. New York’s State’s trial courts also stopped accepting non-essential filings, both paper and electronic. Chief Administrative Judge Marks ordered that no papers shall be accepted except for matters of a type “included on the list of essential matters.”⁴⁷

⁴⁴ State of New York, Executive Order No. 202, available at: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf.

⁴⁵ See Memorandum from Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Coronavirus – Procedures to Reduce Courthouse Traffic (Mar. 13, 2020), available at: <https://www.nycourts.gov/whatsnew/pdf/MEMO-3.13.20.pdf>; Memorandum from Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Updated Protocols (Mar. 15, 2020), available at: [nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf](https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf).

⁴⁶ See Memorandum from Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Coronavirus – Procedures to Reduce Courthouse Traffic (Mar. 13, 2020), available at: <https://www.nycourts.gov/whatsnew/pdf/MEMO-3.13.20.pdf>.

⁴⁷ See Administrative Order of the Chief Admin. Judge of the Courts, AO/78/20, N.Y. State Court System (Mar. 22, 2020), available at <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

64. All four Departments of New York's Appellate Division suspended appeals deadlines under their own rules.⁴⁸ Civil trial assignment parts were suspended and motions were taken on submission.⁴⁹ In criminal cases, only arraignments and essential applications as the court may allow were permitted.⁵⁰ Still, the work continued remotely, with Judges continuing to address those applications and cases that could be handled remotely.

65. On April 6, 2020, Chief Judge DiFiore and Chief Administrative Judge Marks reported that virtual court operations would be conducted remotely for emergency and essential matters.⁵¹

⁴⁸ See, e.g., Order, In the Matter of the Temporary Suspension of Perfection, Filing and other Deadlines During Public Health Emergency (N.Y. App. Div. 1st Dep't Mar. 17, 2020), available at <http://www.courts.state.ny.us/courts/ad1/PDFs/Temporary%20Suspension%20Order.pdf>. The First Department modified its suspension order on May 7, 2020; the Second Department modified its suspension order on July 7, 2020; the Third Department modified its suspension order on May 22, 2020, and the Fourth Department modified its suspension order on April 17, 2020.

⁴⁹ See Memorandum from Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Coronavirus – Procedures to Reduce Courthouse Traffic (Mar. 13, 2020), available at: <https://www.nycourts.gov/whatsnew/pdf/MEMO-3.13.20.pdf>.

⁵⁰ See Memorandum from Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Updated Protocols (Mar. 15, 2020), available at: [nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf](https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf).

⁵¹ See Press Release, Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Virtual Courts Up and Running Statewide (Apr. 6, 2020), available at: https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_14virtualcourtsstatewide.pdf.

66. On April 13, 2020, the Unified Court System extended its virtual cases to “include pending tort, asbestos, commercial, matrimonial, trusts and estates, felony, family and other cases, which make up the vast bulk of trial court caseloads.”⁵² The existing ban on the filing of new “non-essential” matters remained in effect through May 20, 2020.⁵³

67. A July 7, 2020 press release stated that grand juries would resume in New York City on August 10, 2020 and in-person proceedings would be expanded “to include a limited number of bench trials in civil matters.”⁵⁴

68. As of September 9, 2020, the New York State courts implemented a slow-measured pilot program to resume in-person civil and criminal jury trials outside of New York City.⁵⁵

⁵² See Press Release, Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Virtual Courts Expanded Beyond the Limited Category of Essential and Emergency Matters (Apr. 13, 2020), available at: https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_15virtualcourtstortsetc.pdf.

⁵³ See *id.*; see also Press Release, Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Filing of New Cases (May 20, 2020), available at: <https://www.nycourts.gov/whatsnew/pdf/LKMarks-memo-May 20.pdf>.

⁵⁴ See Press Release, Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Grand Juries to Resume Next Month in the City’s Five Boroughs: New York City Courts to Expand In-Person Criminal Proceedings (July 7, 2020), available at: https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_34.pdf

⁵⁵ New York State Unified Court System, Coronavirus and the New York State Courts (Sept. 9, 2020), available at: <https://www.nycourts.gov/index.shtml>.

69. On October 13, 2020, Chief Judge DiFiore announced that the state Court System planned to resume civil jury trials at the end of October.⁵⁶

70. As of October 26, 2020, criminal jury trials resumed in New York City after a seven month pause.⁵⁷ In fact, Chief Judge DiFiore praised Justice Michael Obus, who serves on New York County's Criminal Term, for "work[ing] so hard to prepare for and carry out the safe resumption of jury trials."⁵⁸ Despite Justice Obus's 34 years of service and recent efforts to resume jury trials in unprecedented circumstances, the Administrative Board declined to certificate him for another two-year term.

71. On November 13, 2020, less than one month after civil and criminal jury trials resumed, Chief Administrative Judge Marks issued a memorandum stating that pending criminal and civil jury trials would continue to conclusion, but no new prospective civil or criminal jurors would

⁵⁶ Ryan Tarinelli, DiFiore: Court System Planning to Restart NYC Civil Jury Trials as It Monitors Coronavirus Figures, N.Y. LAW J. (Oct. 13, 2020), available at: <https://www.law.com/newyorklawjournal/2020/10/13/difiore-court-system-planning-to-restart-nyc-civil-jury-trials-as-it-monitors-coronavirus-figures/>.

⁵⁷ Noah Goldberg, Criminal jury trials in NYC resume Monday with plexiglass barriers and social distancing, N.Y. DAILY NEWS (Oct. 25, 2020), available at: <https://www.nydailynews.com/new-york/ny-criminal-jury-trials-nyc-social-distancing-coronavirus-20201025-gahgsvmie5cy5d7gbnhdigtjm-story.html>.

⁵⁸ Message from Chief Judge Janet DiFiore (Nov. 2, 2020), available at: <https://www.nycla.org/pdf/November2-CJ-Message.pdf> (attached hereto as Ex. 14).

be summoned due to adverse trends in coronavirus transmission.⁵⁹

72. Thus, for the foreseeable future, civil litigants and criminal defendants will continue to experience massive delays in their ability to prosecute their cases.

73. In addition to changes to court procedures, on March 20, 2020, Governor Cuomo issued an executive order tolling several statutes of limitations under New York Law until April 19, 2020 (the “Tolling Order”).⁶⁰

74. Pursuant to the Tolling Order, any time limit for “the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding” was suspended and tolled for the period from March 20, 2020 through April 19, 2020.⁶¹ The Tolling Order applied to any such time limits “prescribed by any procedural laws” of New York, expressly including the civil practice law and rules, criminal procedure law, the family court act, the court of claims act, the surrogate’s court procedure act, and the uniform court acts, or “any other statute, local law, ordinance, order, rule, or regulation.”⁶²

⁵⁹ See Memorandum from Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Revised Pandemic Procedures in the Trial Courts (Nov. 13, 2020), available at: https://www.nycourts.gov/whatsnew/pdf/JT_Memo_Nov13-001.pdf.

⁶⁰ See State of New York, Executive Order No. 202.8, available at: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf (attached hereto as Ex. 15).

⁶¹ See *id.*

⁶² See Shearman & Sterling, Perspectives, New York Issues Important Orders Regarding Court Filings and

75. Thus, the Tolling Order not only extended certain statutes of limitations, it also tolled deadlines to file motions. Governor Cuomo issued subsequent executive orders repeatedly extending the Tolling Order, including the most recent one through November 3, 2020.⁶³ That order affirmatively provides that there will be no more extensions “for any civil case” after November 3, 2020.⁶⁴ Therefore, the Tolling Order no longer remains in effect as of November 4, 2020.⁶⁵

The Anticipated Avalanche of Cases and Applications

76. Chief Judge DiFiore warned at the beginning of the pandemic that: “[W]e will have our hands full once this crisis is over. If there is one thing we’ve learned over the years, it’s that the economic consequences and legal fallout of any

Limitations Periods in Light of Covid-19 With Potentially Far-Reaching Consequences (Mar. 23, 2020), available at: <https://www.shearman.com/perspectives/2020/03/new-york-issues-important-orders-regarding-court-filings-and-tolling-periods-in-light-of-covid-19/>.

⁶³ See State of New York, Executive Order Nos. 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, available at: <https://www.governor.ny.gov/executiveorders>.

⁶⁴ See *id.*

⁶⁵ See State of New York, Executive Order No. 202.72, available at: <https://www.governor.ny.gov/news/no-20272-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. However, Executive Order 202.72 states that: “[A]ny criminal procedure law suspension remains in effect and provided that all suspensions of the Family Court Act remain in effect until November 18, 2020 and thereafter continue to remain in effect for those juvenile delinquency matters not involving a detained youth and for those child neglect proceedings not involving foster care.”

societal crisis,—especially one of this magnitude,—will be manifested and felt in our court dockets.”⁶⁶

77. That message has become a reality eight months later, as the stress placed on New York’s Court System by the COVID-19 pandemic resulted in lengthy delays and impending backlogs for litigants and defendants.⁶⁷

78. At a public hearing held before the New York State Assembly on November 12, 2020—in which the Court System declined to participate—Supreme Court Justices, New York State lawmakers, New York State court staff and several non-profit organizations provided several hours of testimony regarding the severe consequences that the Administrative Board’s denial of certification to 46 Supreme Court Justices and other cuts to services provided directly to the public would have on litigants’ access to justice in New York State Courts during the COVID-19 pandemic.⁶⁸

79. Due to the expiration of Governor Cuomo’s Tolling Order on November 3, 2020, any litigant who did not file a lawsuit during the pandemic will

⁶⁶ See Message from Chief Judge DiFiore on Coronavirus Emergency (Mar. 20, 2020), available at: <http://www.courts.state.ny.us/whatsnew/pdf/Transcript-Message320.pdf> (attached hereto as Ex. 16).

⁶⁷ Alan Feuer et. al., N.Y.’s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases, N.Y. TIMES, (June 22, 2020), available at: <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html>.

⁶⁸ Assembly Standing Committee on the Judiciary, Notice of Online Video Public Hearing, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020), available at: <https://nyassembly.gov/comm/?id=24&sec=story&story=94227> (attached hereto as Ex. 2).

be required to do so now or risk losing a viable claim due to the statute of limitations running.⁶⁹

80. In addition to the flood of impending cases due to the Tolling Order's expiration, Chief Administrative Judge Marks stated there are approximately 200,000 pending pre-COVID cases still waiting to be heard.⁷⁰

81. By mid-June, the backlog of pending cases in New York City's criminal courts alone was 39,200 and hundreds of jury trials were placed on hold.⁷¹ Even as courts move their dockets forward using remote technology, there will be a growing backlog of cases across the Court System.⁷²

82. Measures taken by courts in response to the virus—including cancelled oral arguments, postponed conferences, motions, and trials, reduced

⁶⁹ See Duane Morris, New York Governor Issues One More (and One Final?) COVID-Related Executive Order Tolling Statutes of Limitations (Oct. 14, 2020), available at: https://www.duanemorris.com/alerts/new_york_governor_issues_one_more_one_final_covid_related_executive_order_tolling_1020.html.

⁷⁰ Morgan McKay, Backlogged Court Systems: 200K Pre-COVID-19 Cases Waiting To Be Heard, SPECTRUM NEWS (Aug. 21, 2020), available at: <https://spectrumlocalnews.com/nys/central-ny/politics/2020/08/21/backlogged-court-systems-200k-pre-covid-19-cases-waiting-to-be-heard-> (attached hereto as Ex. 17).

⁷¹ Alan Feuer et. al., supra, note 67.

⁷¹ See id.

⁷² Quinn Emanuel Urquhart & Sullivan, U.S. Outlook: Top Questions About Civil Litigation Amid Coronavirus Outbreak (Mar. 24, 2020), available at: https://iclg.com/briefing/12291-u-s-outlook-top-questions-about-civil-litigation-amid-coronavirus-outbreak#_ednref16.

courthouse operations, workforce reductions, and court closures—will exacerbate an already burdened system.⁷³

83. On November 12, 2020, Susan C. Bryant, Executive Director of the New York State Defenders Association, warned about the effect that the Administrative Board’s decision would have on criminal defendants’ constitutional rights to a speedy trial due to significant backlogs in the New York State Court System.⁷⁴

84. The impact will be particularly acute for medical malpractice cases. The overwhelming majority of medical malpractice trials are conducted before a jury.⁷⁵ Because courts have not been fully operational and have not been conducting regular civil jury trials, medical malpractice cases and trials will be further delayed. In addition, the circumstances created by the pandemic could also give rise to more lawsuits alleging that health care organizations acted negligently.⁷⁶

85. New York’s shutdown also severely impacted the family courts, creating “a huge backlog of new matters related to child support modification, child

⁷³ See id.

⁷⁴ Susan B. Bryant, NYS Defenders Association, Testimony at Assembly Standing Committee on the Judiciary, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020) (transcript unavailable).

⁷⁵ Paul Greve, JD RPLM, et al., COVID-19 and its Impact on Medical Professional Liability: First Impressions, Q1 Plus J. 29, 30 (2020), available at: https://www.transre.com/wp-content/uploads/2020/07/COVID-19-and-its-Impact-on-Medical-Professional-Liability_Greve-et-al_Q2-2020.pdf.

⁷⁶ See id.

custody modifications and even divorce filings” because of the current crisis.⁷⁷

86. Based on current trends, the shutdown means that 80,000 dispositions involving child support to foster care placements to adoptions were put on hold.⁷⁸ Ms. Bryant of the New York State Defenders Association warned about the devastating effect that the backlogs would have on family court litigants who risk losing rights to their children permanently.⁷⁹ And, of direct relevance here, having reduced Supreme Court Justices by 14%, Chief Judge DiFiore is now planning to address the impending backlogs in the family courts by having remaining Supreme Court Justices and Acting Supreme Court Justices in New York City step in and hear newly-filed custody and visitation matters without adequate training.⁸⁰

87. Survivors of domestic violence have also faced barriers in their access to the New York

⁷⁷ Stephen Williams, Family Court case backlog growing during COVID-19 crisis, THE DAILY GAZETTE (Apr. 15, 2020), available at: <https://dailygazette.com/2020/04/15/family-court-case-backlog-growing-during-crisis/>.

⁷⁸ Yancey Roy, Justice delayed by virus, but NY civil courts slowly opening back up, NEWSDAY (May 5, 2020), available at: <https://www.newsday.com/news/health/corona-virus/covid-19-courts-new-york-1.44310637>.

⁷⁹ Susan C. Bryant, NYS Defenders Association, Testimony at Assembly Standing Committee on the Judiciary, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020) (transcript unavailable).

⁸⁰ Message from Chief Judge Janet DiFiore (Nov. 9, 2020), available at: <https://www.nycourts.gov/whatsnew/pdf/November9-CJ-Message.pdf> (attached hereto as Ex. 18).

State Court System. With reports of increased domestic violence cases during COVID-19, the lack of access to domestic violence courts exacerbates already dangerous situations for domestic violence survivors. City Association President Justice Esther M. Morgenstern testified on November 12, 2020 before the New York State Assembly that the Integrated Domestic Violence Court, over which she presides, had over 800 pending cases when COVID-19 hit.⁸¹ They did not begin to transfer new cases into the part until October.

88. Beth Goldman, of New York Legal Assistance Group, posits that with increased reports of domestic violence during COVID-19, domestic violence survivors may continue to face dangerous situations due to court delays.⁸²

89. Further straining judicial resources is the voluntary retirement this year of two Manhattan Commercial Division Justices.⁸³ Justice Saliann Scarpulla also “recently moved from the Manhattan Commercial Division court to the Appellate Division, First Department court, hereby leaving

⁸¹ Justice Esther M. Morgenstern, Testimony at Assembly Standing Committee on the Judiciary, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020) (transcript unavailable).

⁸² Beth Goldman, New York Legal Assistance Group, Assembly Standing Committee on the Judiciary, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020) (transcript unavailable).

⁸³ Jason Grant, 2 Manhattan Commercial Division Justices to Retire as Judicial Budget Cut Takes Hold, N.Y. LAW J. (Oct. 2, 2020), available at: <https://www.law.com/newyorklawjournal/2020/10/02/two-manhattan-commercial-division-justices-to-retire-as-judicial-budget-cut-takes-hold/>.

another vacancy on a Manhattan Commercial Division that normally has eight Justices who share a large and constantly added-to docket filled with high-value cases.”⁸⁴

90. Petitioners are also aware of at least ten addition Supreme Court Justices who will be retiring in New York City.

The Administrative Board Denies Recertification to 46 Experienced Judges

91. This year, 49 Supreme Court Justices applied to be certificated effective January 2021. While 15 of the Supreme Court Justices are seeking certification for the first time, the Administrative Board previously decided that a majority of the Justices are mentally competent, physically able and necessary to the New York State courts. Twenty of the Justices are seeking recertification for a second time and another 14 of those Justices are seeking recertification for a third time.⁸⁵

92. The Supreme Court Justices seeking certification this year were found to be physically and mentally competent.

93. But three months before the Supreme Court Justices’ certification would take effect, Chief Administrative Judge Marks issued a memorandum to all Administrative Judges stating that “the Administrative Board has decided to disapprove all but a small handful of pending

⁸⁴ Id. (internal citations omitted).

⁸⁵ OCA, List of Supreme Court Justices Certificated—2019 (attached hereto as Ex. 9).

judicial applications for certification or recertification that would take effect on January 1, 2021.”⁸⁶

94. In a related proceeding in Suffolk County, Chief Administrative Judge Marks admitted that the Administrative Board did not consider the certification criteria laid out under New York State’s Constitution, stating that the Administrative Board determined not to have a certification program this year.⁸⁷

95. On October 5, 2020, Chief Judge DiFiore issued a public message stating that the Administrative Board would “deny the applications of 46 Supreme Court Justices for certification or recertification to additional two year-terms of service that would have taken effect on January 1, 2021.”⁸⁸

96. The Administrative Board’s reason for granting certification to just three Supreme Court Justices because they serve on several task forces and commissions, preside over a “complex” caseload and matters of election law, and handle large civil opioid trial.⁸⁹

⁸⁶ See Memorandum from Hon. Lawrence K. Marks, Chief Admin. Judge, State of New York Unified Court System, Certification (Sept. 29, 2020) (attached hereto as Ex. 19).

⁸⁷ Affidavit of Lawrence K. Marks, In the Matter of the Application of Hon. Ellen Gesmer, et al., Index No. 616980/2020, NYSCF Doc. No. 22, ¶ 9 (attached hereto as Ex. 20).

⁸⁸ See Message from Chief Judge Janet DiFiore, available at: <http://nycourts.gov/whatsnew/pdf/October5-CJMessage.pdf> (Oct. 5, 2020) (attached hereto as Ex. 21).

⁸⁹ David Brand, Here are the 46 judges being terminated by the New York court system, QUEENS DAILY EAGLE (Oct. 5, 2020), available at: <https://queenseagle.com/all/here-are-the-46-judges-being-terminated-by-the-new-york-court-system>.

97. The Supreme Court Justices who were denied certification represent about 3.5% of the state's nearly 1200 judges and 14% of all Supreme Court Justices.⁹⁰

98. The stated basis for the Administrative Board's decision is Governor Cuomo's anticipated move to cut the state Court System's annual budget by 10% to help close a \$14.5-billion, pandemic-induced state deficit.⁹¹

99. However, the State has not made any permanent spending cuts because it is waiting on clarity on federal support to offset New York State's COVID-19 revenue losses.⁹² With the Biden/Harris victory, Governor Cuomo's hope for federal funding to address budget shortfalls is greatly strengthened.⁹³ Thus, while the Administrative Board projects that the decision will save the Court System approximately \$55 million dollars over the next two years in an effort to achieve \$300 million dollars in savings in this year's previously approved budget allocation, that projection is

⁹⁰ See *id.*

⁹¹ Bernadette Hogan & Rebecca Rosenberg, Cuomo continues COVID-19 cuts with \$300M slash looming over state courts, NY POST (Sept. 29, 2020), available at: <https://nypost.com/2020/09/29/cuomo-planning-to-cut-300m-from-state-courts-system-memo/>.

⁹² See *id.*; see also Denis Slattery, \$50B hole in budgets across state must wait: Gov, N.Y. DAILY NEWS (Oct. 8, 2020), available at: <https://www.pressreader.com/usa/new-york-daily-news/20201008/281509343649384>.

⁹³ Brand, *supra*, note 89; Jon Campbell & David Robinson, Despite Senate uncertainty, Andrew Cuomo still banking on federal stimulus money, DEMOCRAT & CHRONICLE (Nov. 6, 2020).

premature given that no budget cuts have been implemented.⁹⁴

100. Nevertheless, the Administrative Board denied certification to 46 judges and laid off 92 non-judicial chambers staff, directly impeding the public's access to the courts, rather than focusing its budget cuts on non-public facing administrative efficiencies.

101. In the Chief Judge and the Administrative Board's view, they would rather eliminate older judges who have had a career instead of engaging in seniority-based layoffs, which would terminate younger employees who are just starting out and have family obligations.⁹⁵

102. Further undermining the Administrative Board's position that budget constraints necessitated denying certification to nearly all Supreme Court Justices is the recent appointment of several acting Supreme Court Justices who will be paid a salary commensurate with a Supreme Court Justice's salary.⁹⁶

⁹⁴ See Message from Chief Judge Janet DiFiore, available at: <http://nycourts.gov/whatsnew/pdf/October5-CJMessage.pdf> (Oct. 5, 2020) (attached hereto as Ex. 21).

⁹⁵ Message from Chief Judge Janet DiFiore, available at: <https://www.nycla.org/pdf/October5-CJMMessage.pdf> (stating that the Administrative Board's decision "will put us in a position to achieve enough cost savings to avoid or at least greatly limit layoffs in our nonjudicial workforce") (Oct. 5, 2020) (attached hereto as Ex. 21); Letter from Hon. Janet DiFiore, Chief Judge to Clifford M. Welden, Esq. (Nov. 6, 2020) (attached hereto as Ex. 22).

⁹⁶ OCA 2020-21 Budget at 18 (attached hereto as Ex. 13).

103. Indeed, just before the Administrative Board's decision to deny certification was issued, in July 2020, Governor Cuomo nominated four New York State Court of Claims judges.⁹⁷ Pursuant to the Judiciary law, if the Court of Claims Judges' statutory salary is less than that of a Supreme Court Justice, they are entitled to a pay differential for the balance.⁹⁸ Accordingly, the Acting Supreme Court Justices will be paid an equivalent salary to a certificated Supreme Court Justice, but will have substantially less familiarity with their new cases and are not the jurist selected by the electorate to serve their communities.

104. Moreover, at this dire time, the Chief Judge still seems intent to continue to press for court consolidation. Not only will Chief Judge DiFiore's consolidation plan cost at least approximately \$13.1 million annually to implement, but it also revealingly contemplates a phase out of the New York State Constitution's certification process.⁹⁹

⁹⁷ Governor Andrew M. Cuomo, [Governor Cuomo Announces Nominations and Appointments to Administration](#) (July 23, 2020), available at: <https://www.governor.ny.gov/news/governor-cuomo-announces-nominations-and-appointments-administration-0>.

⁹⁸ OCA 2020-21 Budget at 18 (attached hereto as Ex. 13).

⁹⁹ [New York Court Consolidation to Cost \\$13.1 Million](#), BLOOMBERG LAW (Nov. 21, 2019), available at: <https://news.bloomberglaw.com/us-law-week/n-y-court-consolidation-to-cost-13-1-million>; Key Provisions of the Chief Judge's Court Consolidation Proposal, available at: <https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/CourtMergerSummaryandProposal.pdf> (Pursuant to the proposal, certification shall continue, except that the only Justices who will be eligible for it will be: (1) those who first assumed office prior to January 1, 2022, and (2) those assuming office after

The proposal creates newly appointed Supreme Court Justices and abolishes Court of Claims Judges, who will instead become Supreme Court Justices.¹⁰⁰

105. Several prominent organizations across New York State denounced the Administrative Board's hasty decision, highlighting the deleterious impact it would have on the administration of justice in the New York State Court System.

106. The New York City Bar Association issued a letter stating that "[t]hese difficult times require experienced judges to cut through the considerable backlog of cases built up from the pandemic," and requested that the Administrative Board's action to deny recertification to 46 Supreme Court Justices be one "of last resort."¹⁰¹

107. The City Bar Association argued that certificated judges would be key to the effort of restoring New York City courts to the level of operations required to protect New Yorkers' legal rights.¹⁰²

108. The New York State Bar Association echoed those concerns, warning that: "This budget cut is a matter of grave concern to the New York State Bar Association because it will inevitably create hard-

such date who, prior to the mandatory retirement date have at least ten years' tenure on Supreme Court.).

¹⁰⁰ See id.

¹⁰¹ Letter from Michael P. Regan, Chair Council on Jud. Admin., New York City Bar to Hon. Janet DiFiore & Hon. Lawrence K. Marks (Oct. 1, 2020) (attached hereto as Ex. 23).

¹⁰² See id.

ship for litigants and delay the administration of justice.”¹⁰³

109. The Judicial Friends Association, Inc. condemned the Administrative Board’s decision as creating “chaos, requiring the immediate reassessment of what may be inexperienced Justices to cover cases in the midst of an exponential increase in the number of cases due to the pandemic.”¹⁰⁴ Their letter further criticized the Administrative Board by stating that: “It appears that the Court System settled for an easy way out of making a difficult budgetary decision by simply terminating the Judges with pending certifications and re-certifications like low-hanging fruit, rather than seeking alternative methods of budget reduction.”¹⁰⁵

110. The Associations—in an effort to reach an amicable resolution with the Administrative Board—worked diligently to propose alternative options that would allow the 46 Supreme Court Justices to serve just one year longer, providing added assistance in managing the “avalanche” of post-COVID cases and time to transition cases and place their staff within the Court System.

111. The Administrative Board rejected the proposal, reiterating its preference to preserve the

¹⁰³ Timothy Bolger, NY Forcing 7 Long Island Judges To Retire, LONG ISLAND PRESS (Oct. 14, 2020), available at: <https://www.longislandpress.com/2020/10/14/ny-forcing-7-long-island-judges-to-retire/>.

¹⁰⁴ Letter from Hon. Erika M. Edwards, President, Judicial Friends Association, Inc. to Hon. Janet DiFiore & Hon. Lawrence K. Marks (Nov. 2, 2020) (attached hereto as Ex. 24).

¹⁰⁵ See id.

positions of non-judicial staff.¹⁰⁶ That preference, however, ignores the 92 non-judicial chambers positions that will be eliminated by the Administrative Board's decision.

112. In fact, the Associations floated the idea of just a six-month extension that would allow these Justices time to plan their future and to afford their staff adequate time to secure new employment in these challenging times—a period already covered by the existing Judiciary budget—only to have even that summarily rejected.

113. Lawmakers, too, have been vocal about the severe repercussions from the Administrative Board's decision. Assembly Judiciary Committee Chair Jeffrey Dinowitz urged New York's top judges to reconsider, stating that: "This decision, which by definition is a form of age discrimination, will exacerbate the crisis facing our court system and will significantly impact the already huge backlog facing many of the courts due to COVID-19."¹⁰⁷ He warned that the decision will lead to delayed justice.¹⁰⁸

¹⁰⁶ Letter from City Association to Chief Judge of the State of New York (Oct. 1, 2020) (attached hereto as Ex. 25); Letter from State Association to Chief Judge of the State of New York (Oct. 8, 2020) (attached hereto as Ex. 26); Letter from Hon. Janet DiFiore, Chief Judge of the State of New York to Hon. Charles C. Merrell & Hon. Carmen R. Velasquez (Oct. 14, 2020) (attached hereto as Ex. 27).

¹⁰⁷ David Brand, New York Court leaders double down on plan to cut 46 judges, QUEENS DAILY EAGLE (Oct. 6, 2020), available at: <https://queenseagle.com/all/new-york-court-leaders-double-down-on-plan-to-cut-46-judges>.

¹⁰⁸ See id.

The Administrative Board Eliminates the Most Experienced and Productive Justices

114. The loss of experienced justices will be devastating for the public where they serve. Justice Antonio I. Brandveen, Supreme Court Justice in Nassau County has served on the bench for 40 years, amassing a wealth of knowledge as a judge on Criminal, Housing and Family courts.¹⁰⁹

115. Twenty-six of the Justices denied certification have a similar level of experience, having served on the bench for over 20 years.

116. Nineteen Justices have served in the civil courts and 12 have experience serving on criminal courts. Justices Antonio I. Brandveen, Bruce E. Tolbert and Anthony J. Paris have all served on the bench for more than 20 years and have family court expertise.

117. Justice Brandveen and Justice Howard H. Sherman have served on the bench for over 30 years, with part of their tenures on the housing courts.

118. Justices Joan Madden has also served on the bench for over 18 years, developing specialized knowledge over medical malpractice law.

119. The collective expertise of these Justices in family, medical malpractice, housing, criminal and civil law matters enables them to decide cases efficiently and fairly—precisely at a time when the courts need seasoned judges in these areas to

¹⁰⁹ Antonio I. Brandveen, Judge Profile, NEW YORK LAW J., available at: <https://judges.newyorklawjournal.com/JudgeProfile.aspx?id=Antonio%20Brandveen-421.xml> (last accessed Nov. 22, 2020).

address massive backlogs and delays due to COVID-19.

120. Petitioner Justice Bernice D. Siegal's departure from the court after 18 years will have long-lasting consequences for the community she was elected to serve in Queens County. Shepherd-ing approximately 1,685 guardianship cases on her court docket is a challenging feat, but she works tirelessly to do so, even throughout the entirety of the COVID-19 pandemic. Her guardianship cases, some of which began in the 1990s, cannot be easily transferred to a new judge who lacks institutional knowledge of the cases pending before her. Guardianship law is also a highly sensitive area of the law that requires prompt adjudication due to the severe consequences that could befall an individual deemed incapacitated. Reassigning over 1600 guardianship cases to another judge with an already full caseload who is unfamiliar with the needs of Queens County or guardianship law will contribute to further delays and add more stress to an already vulnerable population.

121. Bronx County's guardianship litigants will also suffer from the departure of Justice Robert Johnson and Howard H. Sherman from the Bronx County, Civil Term. Justices Johnson and Sherman are the only Justices presiding over guardianship cases in Bronx County and both were denied certification this year.¹¹⁰ Their loss will leave a court attorney referee as the lone experienced staff

¹¹⁰ Justice Robert T. Johnson, Part Rules, available at: <https://www.nycourts.gov/LegacyPDFS/courts/l2jd/bronx/civil/pdfs/Part-Rules-1A-12.pdf>.

member. Petitioners are not aware of any plan to transition and manage these cases.

122. Similarly, Justice Ira Margulis currently presides over Queens County's Criminal Term and has served on the bench for 17 years. He has been tasked with handling complicated criminal cases involving mentally ill defendants.¹¹¹ Attorneys who appear before him say his departure will strike a blow to the justice system in Queens.¹¹²

123. The consequences of the Administrative Board's decision will also be felt by litigants appearing in the 7th Judicial District. There, the loss of Justice John J. Ark, Petitioner Justice Piampiano, and another Civil Term judge to the Surrogate's Court will require the reassignment of approximately 700-800 cases to other Supreme Court Justices in their district with already full caseloads. Justice Ark has served on the bench for 26 years and has a unique docket: he presides over nearly every election-related lawsuit in his county and handles approximately 50 asbestos cases brought by plaintiffs suffering from mesothelioma. Justice Ark endeavors to complete the mesothelioma cases within one year because a plaintiff's lifespan is often quite short. Frustrated mesothelioma

¹¹¹ David Brand, Judge's forced exit will hinder mental health criminal cases in Queens, lawyers say. QUEENS DAILY EAGLE (Oct. 16, 2020), available at: <https://queens-eagle.com/all/judges-forced-exit-will-hinder-mental-health-criminal-cases-in-queens-lawyers-say#:~:text=October%2016%2C%202020-,Judge's%20forced%20exit%20will%20hinder%20mental,cases%20in%20Queens%2C%20lawyers%20say&text=A%20Queens%20judge%20tasked%20with,over%2070%20in%20the%20state.>

¹¹² See id.

attorneys worry that transferring Justice Ark's cases to another judge unfamiliar with them will mean that some plaintiffs may not live to see the outcome of their cases.¹¹³

124. Losing Petitioner Justice Piampiano from the 7th Judicial District will be difficult for medical malpractice litigants in his district. He presides over time-consuming medical malpractice cases, which often go to trial lasting approximately 3-5 weeks. The shutdown severely limited Justice Piampiano's ability to hold trials. Now, he has approximately 10 medical malpractice trials that were taken off the calendar due to the shutdown, another 10 medical malpractice trials that are awaiting calendaring, and 70 cases awaiting trial with Notes of Issue that cannot be scheduled due to COVID-19 safety constraints. A new Justice will need to find time on their already busy docket to preside over these trials.

125. Similarly, Petitioner Justice Freed's departure will result in added delays and expense for litigants appearing before her in complicated Frye hearings. One case involving a defect to a BMW's fuel line resulted in severe illness and developmental disabilities for a mother and her son. That case has been the subject of ongoing litigation since 2008. The case was transferred to Justice Freed in 2014, and over the last six years she has become familiar with the thousands of pages of

¹¹³ Berkeley Brean, My clients don't have eight weeks! Lawyer concerned with cancer cases after NYS cuts 46 judges, WHEC (Oct. 7, 2020), available at: <https://www.whec.com/rochester-new-york-news/lawyer-concerned-with-cancer-cases-after-nys-cuts-46-judges/5887279/>.

expert testimony and hundreds of exhibits presented in the case. Reassigning her Frye hearings to a new Justice will further delay justice for the victims and their families, who have waited long enough to have their cases decided. It will also create needless expense for the six sets of litigants who will need to present their arguments to a new Justice.

126. Several of the Justices also have substantial family court experience. Bruce E. Tolbert, a Supreme Court Justice from Westchester County, has served on the bench for 35 years, including as a family court judge in Westchester County for 17 years. Westchester County Bar Association Vice President Dolores Gebhard stated that: "Judge Tolbert spent many years as a Judge in Family Court and in the Matrimonial Part of Supreme Court, where he presided over matters that were among the most challenging, both legally and emotionally. His focus was first, last and always on the children of Westchester."¹¹⁴

127. Likewise, Anthony J. Paris, a Supreme Court Justice from Onondaga County, served on the bench for 27 years, including as a family court judge in Onondaga County for six years, and Antonio I. Brandveen, a Supreme Court Justice from Nassau County, served as a family court judge for approximately 18 years. These Justices' unique specialty in family law is an invaluable resource that, by Chief Judge DiFiore's own

¹¹⁴ Westchester County Bar Association, November President's Message, WCBA expresses gratitude to three Westchester County Supreme Court Justices, available at: <https://www.wcbany.org/?pg=president>.

admission, the family courts need at this difficult time.

128. Finally, at a time when medical malpractice cases will likely be on the rise due to COVID-19, the Administrative Board will force the courts to lose Justices Joan Madden, Orlando Marrazzo, and Larry D. Martin, who have experience presiding over the medical malpractice trials in their respective counties.¹¹⁵ Justice Marrazzo worries about substantial delays to upcoming medical malpractice trials in Richmond County if he departs the court. He has a heavy trial docket, presiding over medical malpractice trials 3-4 days per week. Because medical malpractice trial conferences have been put on hold until January or February 2021, litigants in his court worry about severe delays from transitioning their cases to a new judge.

The Administrative Board's Decision Disproportionately Affects the Busiest Court

129. A majority of the Supreme Court Justices denied certification also disproportionately come from courts in New York State with heavy dockets and high-filing volumes. Of the seven Appellate Division judges denied certification, four come from the Second Department, the busiest appellate court in the country.¹¹⁶ In 2019, OCA's annual report indicated that 4,295 records on appeal were filed in the Second Department—nearly double the

¹¹⁵ New York State Unified Court System, Litigation Coordinating Panel, Justice Joan A. Madden, available at: <http://ww2.nycourts.gov/courts/1jd/supctmanh/LCP/JoanAMadden.shtml>.

¹¹⁶ See id.

amount of any other department.¹¹⁷ Litigants in the Second Department often lament the significant backlog of perfected civil appeals awaiting calendaring.¹¹⁸ Before the pandemic, Justices in the Second Department sat on the bench four days a week and typically heard approximately 20 cases a day. At that pace, litigants faced 18 months for a civil appeal to obtain a place on the court's day calendar and then almost three years for a decision to be rendered.¹¹⁹ Those delays risk increasing exponentially due to court closures and backlogs, particularly because the Second Department has been limited to closer to 16 cases a day with about 40 percent of court staff working in person.¹²⁰

130. Two Appellate Division Justices come from the First Department, where long-standing judicial vacancies already created delays and backlogs before the COVID-19 pandemic. In November 2019, the First Department announced that it would be reducing its weekly oral argument sessions from

¹¹⁷ 2019 UCS Report at 34 (attached hereto as Ex. 6).

¹¹⁸ Alan D. Scheinkman, Appellate Division Second Judicial Department, Tackling the Backlog: New Initiatives in the Second Department, available at: http://www.courts.state.ny.us/courts/ad2/PJ_Scheinkman_Initiatives.shtml.

¹¹⁹ See *id.*; New York Appeals, The New York Constitution Can Help Fix the Backlog of Appeals in the Appellate Division, Second Department, available at: <https://nysappeals.com/2019/01/25/the-new-york-constitution-can-help-fix-the-backlog-of-appeals-in-the-appellate-division-second-department/>.

¹²⁰ Rob Abruzzese, Justice Scheinkman gives update on Appellate Division amid COVID-19, BROOKLYN DAILY EAGLE (June 30, 2020), available at: <https://brooklyn-eagle.com/articles/2020/06/30/justice-scheinkman-gives-update-on-appellate-division-amid-covid-19/>.

three to just two.¹²¹ The move, which took effect at the start of the court’s January 2020 term, came on the heels of a related decision by Presiding Justice Rolando Acosta in April to scale back appellate panels from five to four judges.¹²² Advocates warned that the reduction to oral argument sessions would have a disproportionate impact on commercial cases and could lead to a troubling backlog.¹²³ Those Appellate Division positions would need to be filled from the New York Supreme Court’s trial courts, which have already been significantly depleted by this decision.

131. The impact of the Administrative Board’s decision is particularly acute for the five boroughs. In 2019, OCA’s annual report indicated that almost half of the 172,102 new civil cases and 36,077 felony cases filed in New York State were initiated in New York City alone.¹²⁴ Thus, nearly half of all new Supreme Court cases are filed each year in New York City and demand for more judicial resources is high.¹²⁵

132. The population-based constitutional cap on Supreme Court Justices in New York City as a whole already limits the New York Supreme Court’s ability to meet this demand.¹²⁶

¹²¹ See id.

¹²² See id.

¹²³ See id.

¹²⁴ 2019 UCS Report at 36, 38 (attached hereto as Ex. 6).

¹²⁵ See id.

¹²⁶ The Fund for Modern Courts, Resources: The Constitutional Limit on the Number of Justices in the Supreme Court, available at: <https://moderncourts.org/programs-advocacy/judicial-article-of-nys-constitution/resources-constitutional-limit-number-justices-supreme-court/>.

133. Of the 154 Justices currently authorized to sit in New York City Supreme Court, only 136 actually serve in Supreme Court trial parts because some of the Justices are assigned to the Appellate Division. The New York State Court System has been forced to create an ad hoc fix that “borrows” 35 judges from the New York City Civil Court, 69 judges from New York City Criminal Court, 63 judges from the Court of Claims and 3 Family Court judges to make them Acting Supreme Court Justices.

134. The Administrative Board’s decision would force the Bronx, in particular, to lose eight Supreme Court Justices—the most of any county in the state—and Queens and Manhattan to lose six Supreme Court Justices each. This decision would prove especially difficult for the Bronx, which is the most under-funded borough in New York City with approximately 7% of New York State’s population.¹²⁷

135. Petitioner Justice Tapia, who serves in Bronx County, feels the burden of heavy caseloads on his calendar each day. To address backlogs and move his docket forward, he often makes decisions orally from the bench to avoid further delays.

136. The departure of Justices from Queens is also problematic. Queens has the most diverse population in the United States with approximately 2.3 million people who speak 160 different languages. Many litigants do not speak English

¹²⁷ Jeffrey Dinowitz, Testimony at Assembly Standing Committee on the Judiciary, Budget and Staffing Reductions in the Judiciary Branch (Nov. 12, 2020) (transcript unavailable).

and require interpreters for their cases, adding to delays in disposing of cases.

137. Staten Island would also be significantly impacted. Justice Maltese from the Second Department, Appellate Division and Justice Marrazzo from Richmond County, Civil Term, have been denied recertification and would depart the court this year. Sheila McGinna, president of Richmond County Bar Association states that: “We have attorneys and staff who will be greatly affected because we will be operating with two less on the bench on Staten Island. This is a gap, and it creates a vacuum.”¹²⁸

138. Notwithstanding the disproportionate burden carried by the Supreme Court in New York City, the majority of the Justices denied certification at the trial-court level preside in New York City. Eight of the Justices denied certification are Bronx County Justices, six are New York County Justices, six are Queens County Justices, one is a King’s County Justice, and one is a Richmond County Justice.¹²⁹

The Petitioners’ Retiree Health Benefits

139. Petitioners consulted New York State Health Insurance Plan (“NYSHIP”) and New York Association of Public Employee Retirement Systems

¹²⁸ Frank Donnelly, Staten Island to lose 2 judges in budget slash could there be more cuts, SI LIVE (OCT. 2, 2020), available at: <https://www.silive.com/news/2020/10/staten-island-to-lose-2-judges-in-budget-slash-could-there-be-additional-cuts.html> (last accessed Nov. 22, 2020).

¹²⁹ Brand, supra, note 89.

(“NYPERS”) in anticipation of their forced departure from the bench.

140. Petitioners were advised that because they are not being certificated, they must notify NYSHIP and NYPERS by December 15, 2020 if they intend to retire directly from active service effective December 31, 2020.

141. One consequence of failing to retire directly from active service may be that a judge may lose the right to receive retiree health benefits after retirement.

FIRST CAUSE OF ACTION: JUDGMENT
PURSUANT TO CPLR ARTICLE 7803(3)
VACATING RESPONDENTS' DECISION
TO DENY CERTIFICATION TO 46
SUPREME COURT JUSTICES AS
VIOLATING THE NEW YORK STATE
CONSTITUTION AND JUDICIARY LAW'S
LAWFUL PROCEDURES

142. Petitioners repeat and reallege the allegations set forth in the foregoing paragraphs as if set forth herein.

143. Pursuant to CPLR 7803(3), this Court has jurisdiction to vacate Respondents' decision to deny certification to 46 Supreme Court Justices if “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”

144. The New York State Constitution requires Respondents to certificate New York State Supreme Court Justices in a manner “necessary to

expedite the business of the court.” N.Y. CONST. art. VI,§ 25(b).

145. Respondents are bound by the New York State Constitution.

146. Respondents did not engage in the constitutionally prescribed mandate to determine whether 46 Supreme Court Justices are “necessary to expedite the business of the court” before it denied them certification amid a global pandemic creating unprecedent case backlogs. N.Y. CONST. art. VI, § 25(b).

147. Respondents’ decision to deny certification to 46 Supreme Court Justices therefore violates the lawful procedure set forth under New York State’s Constitution for certification of Supreme Court Justices.

**SECOND CAUSE OF ACTION: JUDGMENT
PURSUANT TO CPLR ARTICLE 7803(3)
VACATING RESPONDENTS’ DECISION TO
DENY CERTIFICATION TO 46 SUPREME
COURT JUSTICES WAS ARBITRARY AND
CAPRICIOUS BECAUSE IT IS CONTRARY
TO THE MISSION OF THE COURT SYSTEM
TO PROVIDE TIMELY JUSTICE, AS
CONFIRMED BY CHIEF JUDGE DIFIORE’S
EXCELLENCE INITIATIVE**

148. Petitioners repeat and reallege the allegations set forth in the foregoing paragraphs as if set forth herein.

149. Pursuant to CPLR 7803(3), this Court has jurisdiction to vacate Respondents’ decision to

deny certification to 46 Supreme Court Justices if “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”

150. Over the last four years, the Administrative Board and Chief Judge DiFiore have expressed the primary mission of the Court System through the development of the “Excellence Initiative,” prioritizing speed and efficiency in court operations. The Excellence Initiative endeavors to ensure access to justice for all persons entering the Court System.

151. The Administrative Board’s decision to deny certification contradicts these policy objectives by removing 46 experienced Supreme Court Justices from a Court System currently reeling from a logjam of cases and the accumulation of paused trials caused by COVID-19.

152. This action will place the Court System in chaos, resulting in significant repercussions for the public, who rely on New York’s Court System to promptly resolve disputes affecting their lives and livelihood.

153. The Administrative Board’s decision directly undermines its stated mission Excellence Initiative’s efforts to improve promptness and productivity, eliminate case backlogs and delays, and provide better service to the public in New York State courts.

154. Respondents’ decision to deny certification to 46 Supreme Court Justices was therefore arbitrary and capricious.

THIRD CAUSE OF ACTION:
RESPONDENTS DISCRIMINATED
AGAINST PETITIONERS UNDER NEW
YORK'S HUMAN RIGHTS LAW

155. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

156. The New York State Human Rights Law (“NY HRL”) is codified in New York State’s Executive Law, which prohibits anyone in an employer capacity from terminating or discriminating against an employee “in promotion, compensation or in terms, conditions, or privileges of employment” because of his or her age. See N.Y. EXEC. LAW §§ 296(1), 296(3-a)(a).

157. The NY HRL protects Petitioners, as constitutional officers, from the discriminatory actions of the Administrative Board and Chief Judge DiFiore, who supervise the administration and operation of the trial courts.

158. Section 292 of the NY HRL defines “employer” broadly as “all employers within the state.” N.Y. EXEC. LAW § 292(5).

159. The term “employee” is similarly broad in scope, excluding only “any individual employed by his or her parents, spouse or child, or in the domestic service of any person except as set forth in section two hundred ninety-six-b of this title.” N.Y. EXEC. LAW § 292(6).

160. The Administrative Board’s decision effectively deprives the Justices of the certification process set forth in New York State’s Constitution, precluding them from continuing to serve on the

New York State Supreme Court for an additional two years.

161. Petitioners are all at least 70 years old and are therefore members of a protected class under NY HRL because of their age.

162. Petitioners passed the mental and physical exams required by New York State's Constitution, evidencing their continued ability to serve on the bench for another two-year term.

163. The Administrative Board's decision effectively deprives the Justices of the certification process set forth in New York State's Constitution, precluding them from continuing to serve on the New York State Supreme Court for an additional two years.

164. The Chief Judge and the Chief Administrative Judge have stated that the blanket denial was based upon the value judgment that maintaining the employment of younger non-judicial staff was preferable to maintaining the services of the older, more experienced judges seeking certification.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully requests that the Court:

- a) On the first cause of action, find that Respondents' actions in denying Petitioners certification were in violation of lawful procedure under CPLR 7803(3);
- b) On the second cause of action, find that Respondents' actions in denying certification

of Petitioners were arbitrary and capricious under CPLR 7803(3);

- c) On the third cause of action, find that Respondents' actions in denying Petitioners certification were discriminatory in violation of New York's Human Rights Law;
- d) Order Respondents to expeditiously reevaluate each Petitioner's request for certification on an individualized basis, as required by New York State's Constitution;
- e) Permit Petitioners to withdraw their pension and health care papers that were submitted in reliance on the Administrative Board's unconstitutional denial of certification;
- f) Award Petitioners such other and further relief as the Court deems just and proper.

Dated: November 24, 2020

Respectfully submitted,

/s/ ALAN M. KLINGER
STROOCK & STROOCK & LAVAN LLP
Alan M. Klinger, Esq.
Dina Kolker, Esq.
Elizabeth C. Milburn, Esq.
180 Maiden Lane
New York, New York 10038
(212) 806-5400
aklinger@stroock.com
dkolker@stroock.com
ecmilburn@stroock.com

Counsel for Petitioners

VERIFICATION

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

ESTHER M. MORGENSTERN, being duly sworn,
deposes and says:

I am President of the Supreme Court Justices Association of the City of New York, Inc. ("City Association"), a petitioner in this proceeding. I have read the foregoing Verified Petition, know the contents thereof and the same are true to my knowledge as they pertain to me and the City Association. As to those matters therein which do not pertain to me or the City Association, I believe them to be true on information and belief.

Dated: New York, New York
November 23, 2020

/s/ Esther M. Morgenstern
Hon. Esther M. Morgenstern

Sworn to before me this
23rd day of November, 2020

/s/ Nicole Fiore
Notary Public

[STAMP]
NICOLE FIORI
NOTARY PUBLIC, STATE OF NEW YORK
No. 01FI6342751
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires May 31, 2024

VERIFICATION

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

CHARLES C. MERRELL, being duly sworn,
deposes and says:

I am President of Justices of the Supreme Court
of the State of New York ("State Association"), a
petitioner in this proceeding. I have read the
foregoing Verified Petition, know the contents
thereof and the same are true to my knowledge as
they pertain to me and the State Association. As to
those matters therein which do not pertain to me
or the City Association, I believe them to be true
on information and belief.

Dated: Lowville, New York
November 23, 2020

/s/ Charles C. Merrell
Hon. Charles C. Merrell

Subscribed and sworn to
before me this 23rd day
of November, 2020

/s/ Edgar S.K. Merrell 3rd
Notary Public

[STAMP]
EDGAR S.K. MERRELL 3RD
NOTARY PUBLIC, STATE OF NEW YORK
LEWIS COUNTY NO. 4688202
TERM EXPIRES SEPTEMBER 30, 2021

VERIFICATION

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

KATHRYN E. FREED, being duly sworn, deposes and says:

I am Petitioner Kathryn E. Freed in this action. I have read the foregoing Verified Petition, know the contents thereof and the same are true to my knowledge as they pertain to me. As to those matters therein which do not pertain to me or the City Association, I believe them to be true on information and belief.

Dated: New York, New York
November 24, 2020

/s/ Kathryn E. Freed
Hon. Kathryn E. Freed

/s/ Jonathan A. Judd

[STAMP]
JONATHAN A. JUDD
Notary Public, State of New York
No. 02JU6178570
Qualified New York County
Commission Expires Dec. 3, 2023

VERIFICATION

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

ORLANDO MARRAZZO, being duly sworn,
deposes and says:

I am Petitioner Orlando Marrazzo in this action.
I have read the foregoing Verified Petition, know
the contents thereof and the same are true to my
knowledge as they pertain to me. As to those
matters therein which do not pertain to me, I
believe them to be true on information and belief.

Dated: S.I., New York
November 23, 2020

/s/ Orlando Marrazzo
Hon. Orlando Marrazzo

/s/ Christine R. Martin

[STAMP]
CHRISTINE R. MARTIN
Notary Public, State of New York
No. 4843950
Qualified in Richmond County
Commission Expires 12-31-2021

VERIFICATION

STATE OF FLORIDA)
COUNTY OF ST. LUCIE) ss.:)

LARRY D. MARTIN, being duly sworn, deposes and says:

I am Petitioner Larry D. Martin in this action. I have read the foregoing Verified Petition, know the contents thereof and the same are true to my knowledge as they pertain to me. As to those matters therein which do not pertain to me, I believe them to be true on information and belief.

Dated: 11-24-2020, Florida
November 24, 2020

/s/ Larry D. Martin
Hon. Larry D. Martin

[STAMP]
DON D. ANDREWS
Notary Public – State of Florida
Commission # GG 201941
My Comm. Expires March 29, 2022
Bonded through National Notary Assn.

VERIFICATION

STATE OF FLORIDA)
) ss.:
COUNTY OF ORANGE)

JAMES J. PIAMPIANO, being duly sworn, deposes and says:

I am Petitioner James J. Piampiano in this action. I have read the foregoing Verified Petition, know the contents thereof and the same are true to my knowledge as they pertain to me. As to those matters therein which do not pertain to me, I believe them to be true on information and belief.

Dated: Orlando, Florida
November 24, 2020

/s/ James J. Piampiano
Hon. James J. Piampiano

State of Florida County of Orange
Subscribed and sworn before me
on 11/24/2020

/s/ Marla V. Romero
(Notary Signature)

[STAMP]
Marla V. Romero
State of Florida
My Commission Expires 02/05/2021
Commission No. GG 69709

VERIFICATION

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

BERNICE D. SIEGAL, being duly sworn, deposes and says:

I am Petitioner Bernice D. Siegal in this action. I have read the foregoing Verified Petition, know the contents thereof and the same are true to my knowledge as they pertain to me. As to those matters therein which do not pertain to me, I believe them to be true on information and belief.

Dated: Queens, New York
November 23, 2020

/s/ Bernice D. Siegal
Hon. Bernice D. Siegal

Sworn to before me this
23rd day of November, 2020

/s/ Nicole Fiore
Notary Public

[STAMP]
NICOLE FIORI
NOTARY PUBLIC, STATE OF NEW YORK
No. 01FI6342751
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires May 31, 2024

VERIFICATION

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

FERNANDO TAPIA, being duly sworn, deposes and says:

I am Petitioner Fernando Tapia in this action. I have read the foregoing Verified Petition, know the contents thereof and the same are true to my knowledge as they pertain to me. As to those matters therein which do not pertain to me, I believe them to be true on information and belief.

Dated: Bronx, New York
November 24, 2020

/s/ Fernando Tapia
Hon. Fernando Tapia

Sworn to before me this
24th day of November, 2020

/s/ Nicole Fiore
Notary Public

[STAMP]
NICOLE FIORI
NOTARY PUBLIC, STATE OF NEW YORK
No. 01FI6342751
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires May 31, 2024

Appendix K

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

At IAS Part 36 of the Supreme Court of
the State of New York, held in and for
the County of Suffolk, at the Courthouse,
at 1 Court Street, Riverhead, New York,
New York, on the 5th day of November, 2020

PRESENT: HON. Paul J. Baisley, Jr., J.S.C.

Index No. 616980/2020

Mot Seq. No. 001

In the Matter of the Application of
HON. ELLEN GESMER, HON. DAVID
FRIEDMAN, HON. SHERI S. ROMAN,
HON. JOHN M. LEVENTHAL,
and DANIEL J. TAMBASCO,
Petitioners-Plaintiffs,
For a Judgment under Article 78 of the CPLR
—against—
THE ADMINISTRATIVE BOARD OF THE NEW
YORK STATE UNIFIED COURT SYSTEM,
JANET DIFIORE, AS CHIEF JUDGE OF THE
NEW YORK STATE UNIFIED COURT SYSTEM,
and LAWRENCE K. MARKS, AS CHIEF
ADMINISTRATIVE JUDGE OF THE NEW YORK
STATE UNIFIED COURT SYSTEM,
Respondents-Defendants.

**ORDER TO SHOW CAUSE FOR
HEARING ON ARTICLE 78 PETITION
AND COMPLAINT AND FOR
EXPEDITED DISCOVERY**

UPON the annexed Emergency Affirmation of James Catterson, Esq., executed on November 5, 2020 (the “Catterson Aff.”), and the exhibits annexed thereto; the accompanying memorandum of law; the Verified Petition and Complaint dated November 5, 2020 (the “Petition”) and upon all of

the pleadings and proceedings heretofore had herein, and sufficient cause having been shown;

LET Respondents-Defendants, by their attorneys, show cause before this Court at IAS Part 36, of the Supreme Court of the State of New York, County of Suffolk, to be held at the Court, located at 1 Court Street, Riverhead, New York, Room 405, on December 7th, 2020, at 9:30 o'clock a.m., or as soon thereafter as counsel may be heard, why an Order should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules to review and render a judgment to annul, vacate and set aside the Respondents-Defendants' decision to deny Petitioners certification pursuant to the Petition as follows:

- a) On the first cause of action, finding that Respondents' actions in denying Petitioners certification were in violation of lawful procedure under CPLR 7803(3);
- b) On the second cause of action, finding that Respondents' actions in denying Petitioners certification were arbitrary and capricious under CPLR 7803(3);
- c) On the third cause of action, a declaration that Respondents' actions in denying Petitioners certification were unconstitutional and illegal;
- d) On the fourth cause of action, a declaration that Respondents' actions in denying Petitioners certification denied Petitioners' due process under the Constitution of the State of New York;

- e) On the fifth cause of action, a declaration that Respondents' actions in denying Petitioners certification were unconstitutional;
- f) On the sixth cause of action, finding that Respondents' actions in denying Petitioners certification were discriminatory in violation of New York's Human Rights Law;
- g) On the seventh cause of action, finding that Respondents' actions in denying Petitioners certification were discriminatory in violation of New York City's Human Rights Law;
- h) Petitioners-Plaintiffs may seek expedited discovery in connection with their Article 78 claims; and
- i) And for such other and further relief to this Court seems just and proper.

Sufficient reason appearing therefore, it is hereby

ORDERED, that the Petitioners-Plaintiffs may seek expedited discovery in connection with their Article 78 claims;

ORDERED, that the Respondents-Defendants are to produce written discovery requests to the document requests attached as Exhibit 2 to the accompanying Catterson Aff. no later than November 13, 2020;

ORDERED, that the Respondents-Defendants will conduct the deposition of Chief Judge Janet DiFiore pursuant to the notice of deposition attached as Exhibit 3 to the accompanying Catterson Aff. on November 16, 2020;

ORDERED, that the Respondents-Defendants will conduct the deposition of Chief Administrative Judge Lawrence Marks pursuant to the notice of deposition attached as Exhibit 4 to the accompanying Catterson Aff. on November 18, 2020 (collectively, the "Discovery");

~~ORDERED, that the custodian of records for the Administrative Board will appeal for deposition with the requested documents attached as Exhibit 5 to the accompanying Catterson Aff. no later than November 13, 2020;~~

~~ORDERED, that papers in further support of the Petition shall be due 5 days after the completion of the Discovery set forth and defined below ("Further Supporting Papers");~~

Initialed PJB, JSC

ORDERED, that opposing papers, if any, which shall include opposing papers, if any, shall be served by overnight mail delivery or e-filing so as to be received by counsel for Petitioners, James Catterson, Esq., Arnold & Porter Kaye Scholer LLP, 250 West 55th Street, New York, NY 10019-9710 and Y. David Scharf, Esq., Morrison Cohen LLP, 909 Third Avenue, New York, New York 10022 on or before November 13, 2020, which shall be __ days after the Further Supporting Papers are served and that such delivery shall be deemed good and sufficient service; [11/12 written in margin]

~~ORDERED, that reply papers, if any, shall be served by overnight mail delivery or e-filing so as to be received by counsel for Respondents-Defendants on or before _____, 2020, which shall be __ days after the Further Supporting~~

~~Papers are served and that such delivery shall be deemed good and sufficient service, and it is further~~

ORDERED, that personal service and service by e-mail of a copy of this Order and the papers upon which it is granted, including the Summons and Petition and Complaint, shall be deemed good and sufficient service, if made no later than November 6th, 2020;

ENTER:

/s/ Paul J. Baisley, Jr.
J.S.C.

HON. PAUL J. BAISLEY, JR.

[STAMP]
GRANTED

NOV 05 2020

JUDITH A. PASCALE
Clerk of Suffolk County

Appendix L

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No. 616980/2020

(Baisley, J.S.C.)

Motion Sequence No. ____

In the Matter of the Application of
HON. ELLEN GESMER, HON. DAVID FRIEDMAN,
HON. SHERI S. ROMAN, HON. JOHN M.
LEVENTHAL, and DANIEL J. TAMBASCO,
Petitioners-Plaintiffs,
For a Judgment under Article 78 of the CPLR
—against—
THE ADMINISTRATIVE BOARD OF THE NEW
YORK STATE UNIFIED COURT SYSTEM, JANET
DIFIORE, AS CHIEF JUDGE OF THE NEW YORK
STATE UNIFIED COURT SYSTEM, LAWRENCE K.
MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF
THE NEW YORK STATE UNIFIED COURT SYSTEM,
Respondents-Defendants.

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR
CONTEMPT OF COURT**

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Petitioners-Plaintiffs Justices Gesmer, Friedman, Roman, and Leventhal (the “Petitioner Justices”), as well as Daniel J. Tambasco (together with the Petitioner Justices, the “Petitioners”), through their undersigned attorneys, respectfully submit this memorandum of law in support of their motion for an Order: (1) pursuant to Judiciary Law § 753 and the general supervisory and equitable powers of this Court, adjudging Respondents-Defendants the Administrative Board of the New York State Unified Court System (the “Administrative Board”), Chief Judge Janet DiFiore, and Chief Administrative Judge Lawrence K. Marks (collectively, the “Respondents”) in civil contempt of this Court’s signed order to show cause, dated November 5, 2020 (the “Order”); (2) pursuant to Judiciary Law § 753 and this Court’s equitable powers, compelling Respondents to comply with the Order granting Petitioners’ expedited discovery requests, including producing documents and appearing for depositions prior to the return date of Petitioners’ Verified Petition and Complaint, (3) denying Respondents’ cross-motion, dated November 13, 2020, in particular the portion seeking a protective order; and (4) for such other and further relief as this Court deems just and proper.

PRELIMINARY STATEMENT

Our court system plays the central role in upholding the rule of law. The rule of law ensures that no one is beneath the protection of the law and no one is free from the obligation to comply with it, including the Chief Judge of the Unified Court System and the Court of Appeals as well as

the Chief Administrative Judge. In taking the oath of office, each judge or justice in New York State swears to uphold the United States Constitution and the New York State Constitution. Implicit in that oath is fealty to the rules of practice as well as obedience to lawful orders of the Court. Here, the Respondents have decided to simply ignore the Order of this Court to turn over documents and to appear for depositions. Ensuring that the Respondents do not flout this Court's Order, and that the rule of law prevails no matter whether the litigants enjoy the status of heads of the entire court system, is at the heart of this motion.

The instant motion is one that is not easy to make, and it is with great regret that the Petitioners find themselves in the present situation. However, the Respondents have done everything in their power—and their power over the court system is considerable—to drag out these proceedings with the understanding that by so doing, the Petitioners will be nonsuited by nothing more than the passage of time.

The Petitioner Justices, who have had decades of loyal service to the people of the State of New York, will be unceremoniously forced to retire on the pretext of bogus budgetary concerns.

In order to take discovery on these claims, on an expedited time frame, Respondents were provided notice of a motion, brought on by order to show cause, for expedited discovery. Not only did the Office of Court Administration ("OCA") or any of its many minions not appear at that hearing, its counsel has admitted that OCA "screwed up" in not doing so. Petitioners' counsel appeared in

person in the courtroom of the Special Term Judge, the Hon. Paul J. Baisley, Jr., where they were made to wait for several hours. Counsel for Respondents did not call the Special Term clerk, chambers, or the Clerk of the Court, or appear in any manner. Justice Baisley reviewed the Petitioners' order to show cause, including the attached discovery notices, and signed the Order, granting the Petitioners expedited discovery.

Pursuant to the expedited discovery requests and the Court's expedited discovery order, Respondents' documents were due to be produced on Friday November 13, 2020, and Chief Judge DiFiore was to be deposed on Monday November 16, 2020. Respondents' counsel initiated a meet and confer on the very day documents were due. During that meet and confer, Respondents' counsel advised Petitioners' counsel that OCA would be unable to produce the documents sought prior to the passage of at least two years' time. Without the courtesy of mentioning it, Respondents then filed a 50-page cross-motion, seeking, among other things, the instant motion for a protective order at nearly 11 p.m. on Friday, November 13, 2020. The protective order is nothing more than a baseless attempt to re-litigate the expedited discovery order their counsel failed to oppose in the first place. But, as powerful as the Respondents are, they, like all defendants who appear before the Courts of this State, must abide by court-ordered discovery and must adhere to court orders. The Respondents are not above the law and must set an example for other defendants who seek to evade legitimate discovery obligations. To date, Respondents have produced no discovery whatsoever. Indeed, they

have imperiously declared that they intend not to do so. They also have refused to sit for depositions, instead interposing a baseless motion simply to run out the clock. This will work a grave injustice on the Petitioners.

Ultimately, Respondents can offer no legitimate excuse for their failure to obey this Court's Order, other than their counsel's "screw up" in failing to appear at the hearing at which Respondents could have and should have presented the present arguments. Unless a swift and decisive message is sent, Respondents will continue to ignore this Court's authority and render null and void any relief the Court can possibly provide in this matter.

FACTUAL BACKGROUND

The factual background of this matter is set forth in the accompanying Affirmation of Urgency of James M. Catterson, dated November 18, 2020 (the "Catterson Aff."), and the Affirmation of Danielle C. Lesser, dated November 18, 2020 (the "Lesser Aff."). The Order is attached to the Catterson Affirmation as Exhibit 1.

ARGUMENT

I. THIS COURT SHOULD HOLD RESPONDENTS IN CONTEMPT

Holding Respondents in contempt is thoroughly warranted. Respondents' intentional disregard of this Court's Order is precisely the type of action that contempt findings are meant to discourage and remedy.

A. A Finding of Civil Contempt Is Warranted

A court may punish a party for civil contempt when that party violates an order of the court. Jud. L. § 753. To establish civil contempt due to the violation of a court order, Petitioners must show that “a lawful order of the court clearly expressing an unequivocal mandate was in effect,” that “the order has been disobeyed,” and that “the party charged ... had knowledge of the court’s order.” Dep’t of Envt’l Protection of City of N.Y. v. Dep’t of Envt’l Conservation of State of N.Y., 70 N.Y.2d 233, 240 (1987) (citations omitted); accord Town Bd. of Town of Southampton v. R.K.B. Realty, LLC, 91 A.D.3d 628, 629 (2d Dep’t 2012); see also Gryphon Domestic VI, LLC v. APP Int’l Fin. Co., 58 A.D.3d 498, 499 (1st Dep’t 2009) (affirming finding of civil contempt for failure to comply with court order).

The purpose of civil contempt is “to compensate the injured party or to coerce compliance with the court’s mandate or both.” Dep’t of Envt’l Prot. of City of N.Y., 70 N.Y.2d at 239; accord Penavic v. Penavic, 109 A.D.3d 648, 649 (2013) (same); see also McCain v. Dinkins, 84 N.Y.2d 216, 226 (1994) (purpose of civil contempt is to compensate injured party for its loss). Thus, a party seeking remedies for civil contempt should “show[] that [its] rights have been prejudiced.” Town of Southampton, 91 A.D.3d at 629 (citing McCain, 84 N.Y.2d at 226). This requirement is satisfied where “the contemnor’s actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party.” Astrada v Archer, 71 A.D.3d 803, 807 (2d Dep’t 2010), appeal dismissed, denied in part,

14 N.Y.3d 922; see Inc. Vill. of Plandome Manor v. Ioannou, 54 A.D.3d 365, 366 (2d Dep’t 2008) (affirming civil contempt order where the record supported a finding that “the defendant’s conduct was calculated to, or actually did, defeat, impair, impede, or prejudice the plaintiff’s rights or remedies”).

To establish civil contempt, “it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party.” Philie v. Singer, 79 A.D.3d 1041, 1042 (2d Dep’t 2010); P.B. #7, LLC v. 231 Fourth Ave. Lyceum, LLC, 167 A.D.3d 1028, 1030 (2d Dep’t 2018), leave to appeal dismissed, 34 N.Y.3d 962 (2019), and appeal dismissed, 34 N.Y.3d 1175 (2020); see also El-Dehdan v. El-Dehdan, 26 N.Y.3d 19, 35 (2015) (explaining that willful misconduct is not required for civil contempt).

Here, all of the requirements for a contempt finding against Respondents are met. There can be no doubt that (1) this Court issued the Order authorizing expedited discovery, including those document requests and notices of deposition interposed by Petitioners at issue here, (2) the Respondents had knowledge of the Petitioners’ motion for expedited discovery, this Court’s Order granting expedited discovery, and Petitioners’ discovery demands themselves,¹ and (3) Respon-

¹ Though Petitioners adequately served the Order and its corresponding discovery demands on Respondents, the Court need not find that Respondents were served with these documents to hold Respondents in civil contempt. Knowledge of this Court’s Order is sufficient to hold Respondents in civil

dents have intentionally and flagrantly disregarded this Court's Order. See, e.g., P.B. #7, LLC, 167 A.D.3d at 1030 (upholding finding of civil contempt for party's failure to obey court order with knowledge of its terms, to opposing party's detriment); Philie, 79 A.D.3d at 104 (same); Sexter v. Kimmelman, Sexter, Warmflash & Leitner, 277 A.D.2d 186, 187 (1st Dep't 2000) (affirming contempt order for party's failure to comply with court's discovery order). In fact, not only have the Respondents' violated the Order, they have sought a protective order from Petitioners' discovery demands that *were specifically authorized by this Court*. As described below, Respondents' cross-motion for a protective order pursuant to CPLR 3103 is procedurally improper and demonstrative of the Respondents' disregard of this Court's Order.

B. A Protective Order Is Not Available in the Face of This Court's Order

CPLR 3103(a) provides that a court may "on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." After a motion for a protective order is made, the discovery obligations at issue in the motion are stayed. See CPLR 3103(b). The purpose of CPLR 3103 protective orders is to allow a party who seeks to avoid an abusive discovery request to invoke the

contempt. See McCain, 84 N.Y.2d at 226 (holding that service of an order on the party to be held in contempt is "not necessary," provided the party mere had "knowledge of the order."). It is beyond dispute that Respondents knew of this Court's Order.

judicial discretion of the court to review and modify the discovery device in question. Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of NY, CPLR C3103:1 ("If, for any reason sufficient to invoke that undefinable commodity known as judicial 'discretion,' an adjustment in the use of disclosure is called for by the facts of any case, CPLR 3103 is at hand to confer the discretion.").

Generally speaking, of course, parties exchange discovery requests without any court supervision because the CPLR "envisages a maximum disclosure of facts with a minimum of supervision." Wiseman v. Am. Motors Sales Corp., 103 A.D.2d 230, 232 (2d Dep't 1984). Thus, CPLR 3103 provides the procedure whereby a party may have the court evaluate potentially abusive discovery demands after they are served by a party but before a court has any knowledge of them. Put differently, CPLR 3103 is structured such that a protective order only ever precedes judicial supervision; it never follows it. Here, Respondents have turned this process on its head by attempting to invoke the stay function of CPLR 3103 after the Court has already passed on the legitimacy of the discovery devices in question.

Worse still, Respondents' failure to timely oppose the discovery in this matter on November 5, 2020 weighs in favor of rejecting wholesale their belated request for a protective order. See, e.g., Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of NY, CPLR C3103:3 ("The worst practice is to provide no response [to discovery demands] and postpone the motion [for a protective order] until after the scheduled due date

of the disclosure. This is a courtesy to the lawyer who requested the disclosure **and is likely to invite a rebuke from the court.”**) (emphasis added).

Respondents’ baseless and transparent gambit will not succeed. It is well recognized that where, as here, judicial discretion has already been exercised, and the Court has already approved specific measures, a second round of judicial review is unnecessary to determine whether the discovery in question was appropriate. See Kihl v. Pfeffer, 94 N.Y.2d 118, 123 (1999) (“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity [C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.”); see also Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 81 (2010) (“[T]here is also a compelling need for courts to require compliance with enforcement orders if the authority of the courts is to be respected by the bar, litigants and the public.”). Indeed, courts have sanctioned parties who have responded to court-ordered discovery obligations by seeking relief contrary to the court’s prior discovery mandates. See Vandashield Ltd. v. Isaacson, 146 A.D.3d 552, 555 (1st Dep’t 2017) (upholding sanction against party that had failed to comply with court-ordered discovery obligations).²

² Though not expressly stated in the First Department’s opinion, the parties’ briefing makes clear that in Vandashield, as here, the defendants responded to the motion court’s order to disclose information by a date certain with a motion for a protective order, rather than timely disclosure, thus prompting

Moreover, as discussed above, Respondents' request for a protective order alone evinces their disregard for this Court's Order, even if their cross-motion is denied as meritless. Respondents' cross-motion is set for a December 7, 2020 return date. See Respondents' Notice of Cross-Motion dated Nov. 13, 2020 (NYSCEF No. 20). Through the Order, the Court effectively required that all discovery be completed by that date so that the issues raised by Petitioners could be adjudicated at a hearing. See Order. That timing was by design—as Respondents and this Court are well-aware, the Petitioners will be required to retire on December 16, 2020. See Affirmation of Urgency of James M. Catterson dated Nov. 5, 2020 ¶ 4 (NYSCEF No. 3). By seeking a protective order through a motion returnable on December 7, the Respondents have *sub silentio* indicated to the Court that they will not comply with this Court's Order in any way that might help Petitioners obtain the relief they seek. Even in the likely event that the Court denies as meritless Respondents' request for a protective order, the damage to Petitioners' discovery rights and ability to present their case will have been done. This baseless attempt to flout the Court's order with a belated discovery motion warrants a finding of contempt. See Vandashield, 146 A.D.3d at 555 (upholding sanctions for failure to comply with court-ordered discovery where party instead filed belated motion for a protective order).

sanctions. See Brief of Appellants-Cross Respondents at 15-16, Vandashield Ltd. v. Isaacson, No. 1840, 2018 WL 6727073 (1st Dep't 2016).

Indeed, Respondents must know that their request for a protective order is improper because they do not cite a single case in which a protective order was issued after the court had passed on the discovery devices in question. Respondents contend that a “proactive[]” protective order is not just appropriate, but necessary, relief. See Memorandum of Law in Support of Respondents’ Motion to Transfer Venue to Albany County, to Dismiss the Verified Petition, and for a Protective Order dated Nov. 13, 2020, at 33. In so doing, however, Respondents cite only cases where the movant obtained a protective order in vastly different circumstances than those here.³ Simply

³ For example, in one case the movants obtained a protective order only on the basis that the privacy provisions of the federal Health Insurance Portability and Accountability Act (HIPAA) expressly prohibited the disclosure sought—and again, the court there had not already authorized the discovery before the protective order was sought. See Westbury Med. Care, P.C. v. Lumbermans Mut. Ins. Co., 5 Misc. 3d 838, 840 (Dist. Ct. Nassau Cnty. 2004). Respondents otherwise cite to cases where the movant has obtained relief after objecting to a particularly irrelevant and invasive subset of deposition questions, Monica W. v. Milevoi, 252 A.D.2d 260, 262 (1st Dep’t 1999), or where a protective order was deemed appropriate to preclude a videotaped deposition to be taken by a party with a lengthy—and criminal—history of harassing and seeking to embarrass the movant, Jones v. Maples, 257 A.D.2d 53, 54-56 (1st Dep’t 1999). None of these cases support the notion that a party may seek a protective order as a means of delaying or evading disclosure already approved of by the Court. In fact, in one instance, Respondents even cite to an Appellate Division case affirming, with costs, the *denial* of a protective order where the lower court had already authorized depositions subject to limitations to which the deposing party had consented. See Tilles Inv. Co. v. Oyster Bay, 139 A.D.2d 575 (2d Dep’t 1988).

put, there is no legal support for Respondents' request for a protective order.

Respondents' request for a protective order does not change the obvious: Respondents have refused to obey this Court's unequivocal Order despite their full knowledge of what the Order required, and by doing so, have prejudiced Petitioners' right to obtain the discovery to which this Court has already found Petitioners entitled.⁴ For this additional reason, this Court should hold Respondents in contempt.

C. Respondents Cannot Collaterally Attack This Court's Order, Which Is Law of the Case

In addition to being procedurally improper, Respondents' eleventh-hour cross-motion for a protective order further demonstrates Respondents' disregard of this Court's Order because it is a plainly improper collateral attack on the Order. Orders like the one at issue here constitute the law of the case, precluding their re-examination. See Hudson City Savings Bank v. 59 Sands Point, LLC, 162 A.D.3d 644, 646 (2d Dep't 2018) (holding that law of the case precluded reconsideration of previously decided discovery issues); Grossman v. Team Care Home Care Agency, Inc., 14 A.D.3d 652, 652 (2d Dep't 2005) ("The Supreme Court correctly concluded that the disclosure sought by plaintiffs ... had been granted by a prior order from which no appeal had been taken. Since the prior determination was the law of the case, the Supreme Court properly granted that branch of the plaintiff's motion which was to compel such disclosure" (citations omitted)); see also Certain

Underwriters at Lloyd's London v. N. Shore Signature Homes, Inc., 125 A.D.3d 799, 799-800 (2d Dep't 2015) (holding that Supreme Court properly applied the law of the case doctrine where prior order had already determined that the file sought was not discoverable); Vladenn Med. Supply Corp. v. United Servs. Auto. Ass'n, 56 Misc. 3d 138(A) (App. Term. 2d Dep't 2017) (holding that the court properly directed plaintiff to comply with the prior order requiring plaintiff to respond to defendant's discovery demands, as the prior determination that the documentation at issue is discoverable was law of the case).

The law of the case doctrine precludes reexamination of issue previously raised and decided against a party where the party had a full and fair opportunity to address it. Fulmer v. Buxenbaum, 109 A.D.3d 822, 823 (2d Dep't 2013).⁵ Indeed, the doctrine of law of the case is "an articulation of sound policy, that when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of coordinate jurisdiction are concerned." Ramanathan v. Aharon, 109 A.D.3d 529, 529 (2d Dep't 2013); see also Bristow v. Bristow, 58 Misc. 3d 1023, 1026

⁵ It is also worth noting that the Court of Appeals, in a decision joined by Chief Judge DiFiore, has held that a prior determination, submitted without objection, is the law of the case. See, Killon v. Parrotta, 28 N.Y.3d 101 (2016) ("[w]e must consider the jury charge as to the initial aggressor and self-defense that was given during the first trial because the instruction, submitted without objection, is the law of the case"). As set forth herein, Respondents could have appeared at the hearing on the November 5, 2020 order to show cause to object to any portion of the relief sought therein and *chose* not to.

(Sup. Ct., Kings Cnty. 2018) (denial of application made by order to show cause was deemed law of the case).⁶

The Order and the determination that the discovery sought by Petitioners should be produced is the law of the case. Here, Respondents had the opportunity to appear on November 5, 2020, and present the arguments they now make in support of the cross-motion for a protective order but which really only constitute opposition to Petitioners' motion for expedited discovery and discovery demands. OCA chose not to appear. And now, rather than demonstrating respect for this Court's Order, OCA has instead attempted to cross-move for a protective order to collaterally attack the Order. Because Respondents have disobeyed the Order, Respondents should be held in contempt.

D. Respondents Should Be Compelled To Produce Documents And Appear For Depositions

Because Petitioners have established that Respondents should be held in contempt, this Court must fashion a remedy that undoes the prejudice to Petitioners caused by Respondents'

⁶ While the Second Department has held that "the doctrine of the law of the case does not apply to an ex parte order, such as an order to show cause" (*Richter v. Richter*, 156 A.D.2d 653, 653 (2d Dep't 1989) (citations omitted)), this caselaw is inapposite because the order to show cause in this case was not sought on an ex parte basis. Respondents admittedly received notice of the application and had an opportunity to contest the order to show cause, and chose not to. Any further representations by Respondents' counsel that the order was obtained ex parte would be false and sanctionable.

actions (to the extent possible). Accordingly, this Court should, in addition to holding Respondents in contempt, compel Respondents to comply with its Order and Petitioners' expedited discovery demands, including both Petitioners' document requests and notices of deposition on an expedited schedule. This type of remedy has been utilized in prior cases similar to this one and it is the only remedy that will partially allay the prejudice done to Petitioners by Respondents' actions (as well as provide Respondents an opportunity to purge their contempt). See DeMaio v Capozello, 114 A.D.3d 899, 901 (2d Dep't 2014) (holding that defendant should have been held in contempt for failure to comply with court-ordered discovery and that lower court should have directed defendant to fully comply with previous court order); Kaywood v. Cigpak, Inc., 258 A.D.2d 623, 623 (2d Dep't 1999) (finding that lower court should have held defendant in contempt for failing to appear at a deposition in an attempt to prejudice plaintiff's rights and should, on remand, direct defendant to appear); N. Tonawanda First v. City of N. Tonawanda, 94 A.D.3d 1537, 1538 (4th Dep't 2012) (upholding lower court's finding of contempt and subsequent order directing violating party to purge contempt by complying with court-ordered discovery). Moreover, because Respondents' cross-motion to seek a protective order from this Court's Order was procedurally improper and flagrantly violative of the Order, this Court should also exercise its discretion to summarily deny Respondents' cross-motion, filed in response to Petitioners' Verified Petition and Complaint.

CONCLUSION

For the reasons set forth above, Petitioners' motion should be granted. This Court should issue an Order: (1) pursuant to Judiciary Law § 753 and the general supervisory and equitable powers of this Court, adjudging all three respondents to Respondents be in civil contempt of the Order entered by this Court on November 5, 2020; (2) pursuant to Judiciary Law § 753 and this Court's equitable powers, compelling Respondents to comply with Petitioners' expedited discovery requests, including producing documents and appearing for depositions prior to the return date of Petitioners' Verified Petition and Complaint, (3) denying Respondents' cross-motion, in particular the portion seeking a protective order; and (4) for such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 18, 2020

MORRISON COHEN LLP

By: */s/ Y. David Scharf*
Y. David Scharf
David B. Saxe
Danielle C. Lesser
Collin A. Rose
909 Third Avenue
New York, New York 10022
(212) 735-8600
and

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ James M. Catterson

James M. Catterson
250 West 55th Street
New York, NY 10019
(212) 836-8000

Attorneys for Petitioners-Plaintiffs

180a

EXHIBIT 2

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No. 616980/2020

NOTICE OF
MOTION/CROSS MOTION

In the Matter of the Application of
HON. ELLEN GESMER, HON. DAVID FRIEDMAN,
HON. SHERI S. ROMAN, HON. JOHN M.
LEVENTHAL, and, DANIEL J. TAMBASCO,
Petitioners-Plaintiffs,
For a Judgment under Article 78 of the CPLR
—against—

THE ADMINISTRATIVE BOARD OF THE NEW
YORK STATE UNIFIED COURT SYSTEM, JANET
DiFIORE, AS CHIEF JUDGE OF THE NEW YORK
STATE UNIFIED COURT SYSTEM, and LAWRENCE
K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF
THE NEW YORK STATE UNIFIED COURT SYSTEM,

Respondents-Defendants.

PLEASE TAKE NOTICE that, upon the
accompanying memorandum of law, the Affidavit
of Lawrence K. Marks, the Affirmation of

Elizabeth Forman, and all prior pleadings and proceedings herein, the undersigned, on behalf of Respondents The Administrative Board of the New York State Unified Court System, Janet DiFiore, as Chief Judge of the New York State Unified Court System, and Lawrence K. Marks, as Chief Administrative Judge of the New York State Unified Court System will move/cross move this Court at the Supreme Court of the State of New York, Suffolk County, One Court Street, Riverhead, New York on December 7, 2020 at 9:30 a. m. or such other time and date to be determined by the Court, for (1) an order, pursuant to CPLR 506, 510 and 511 for a change of venue; (2) for an order pursuant to CPLR 3211 dismissing this proceeding for failure to state a claim upon which relief may be granted, and further as against petitioner Daniel J. Tambasco for lack of standing; and (3) for reconsideration pursuant to CPLR 2221(d) and (e) of this Court's Order to Show Cause, dated November 5, 2020, and seeking a protective order pursuant to CPLR 3103(a), and for such other relief as the Court deems just and proper.

Dated: New York, New York
November 13, 2020

EILEEN D. MILLETT
Attorney for Respondents
Office of Court Administration
25 Beaver Street, 11th floor
New York, New York 10004
(212) 428-2150

By: Elizabeth A. Forman
Elizabeth A. Forman,
Deputy Counsel

TO: James Catterson, Esq.
Arnold & Porter Kaye Scholer
250 West 55th Street
New York, New York 10019-9710

Y. David Scharf, Esq.
Morrison Cohen, LLP
909 Third Avenue
New York, New York 10022

184a

EXHIBIT 3

From: Lesser, Danielle
Sent: Tuesday, November 17, 2020 2:27 PM
To: Elizabeth Forman
Cc: V. David Scharf; Catterson, James M.; Saxe, David B; Rose, Collin A.
Subject: NOTICE OF IN PERSON
PRESENTATION OF ORDER TO SHOW
CAUSE-Gesmer v. The Administrative
Board Index. No. 616980/2020

Dear Liz:

This e-mail constitutes notice that tomorrow afternoon, at 2 PM, Petitioners intend to present a motion to the Supreme Court, Suffolk County, by order to show cause, requesting that the Court hold Respondents in contempt for their failure to comply with the Court's signed Order, dated November 5, 2020. Petitioners will be appearing in person at the Suffolk County courthouse to present this motion. Counsel will present the application to Justice Paul J. Baisley, Jr. at the courthouse located at 1 Court Street, Riverhead, NY 11901.

Thank you

Danielle C. Lesser
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(917) 522-3102 (direct fax)
(212) 735-8708 (main fax)
dlesser@morrisoncohen.com
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SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No. 616980/2020

In the Matter of the Application of
HON. ELLEN GESMER, HON. DAVID FRIEDMAN,
HON. SHERI S. ROMAN, HON. JOHN M.
LEVENTHAL, and DANIEL J. TAMBASCO,
Petitioners-Plaintiffs,
For a Judgment under Article 78 of the CPLR
—against—
THE ADMINISTRATIVE BOARD OF THE NEW
YORK STATE UNIFIED COURT SYSTEM, JANET
DiFIORE, AS CHIEF JUDGE OF THE NEW YORK
STATE UNIFIED COURT SYSTEM, and LAWRENCE
K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF
THE NEW YORK STATE UNIFIED COURT SYSTEM,
Respondents-Defendants.

AFFIRMATION OF DANIELLE C. LESSER

DANIELLE C. LESSER, an attorney duly
admitted to practice before the Courts of this

State, affirms the following to be true under penalties of perjury:

1. I am a member of Morrison Cohen LLP, attorneys for Petitioners-Plaintiffs-Appellants Hon. Ellen Gesmer, Hon. David Friedman, Hon. Sheri S. Roman, Hon. John M. Leventhal (collectively, the “Petitioner Justices”), and Daniel J. Tambasco (together with the Petitioner Justices, the “Petitioners”), and as such I am familiar with the facts set forth herein. I respectfully submit this affirmation in support of Petitioners’ motion to hold Respondents in civil contempt for failing to comply with this Court’s signed Order to Show Cause, dated November 5, 2020 (the “Order”), which authorized the Petitioners to move forward with expedited discovery, including document demands and notices of deposition for Respondent Chief Judge DiFiore and Respondent Chief Administrative Judge Marks.

2. On November 4, 2020, my colleague, Y. David Scharf, informed Respondents of Petitioners intent to present a verified petition and complaint, along with a motion seeking expedited discovery, by way of order to show cause at this Court at 1 Court Street, Riverhead, New York, at 2 PM on November 5, 2020. A copy of this e-mail is attached hereto as **Exhibit 1**.

3. On November 5, 2020, Petitioners presented their order to show cause and supporting materials, resulting in this Court’s Order, which, among other things, granted Petitioners’ request to move forward with expedited discovery, including document requests and notices of deposition that Petitioners had annexed to their order to

show cause. Respondents did not contact Petitioners or appear on November 5, 2020, despite advanced notice.

4. On November 6, 2020, Petitioners sent their order to show cause and supporting documents, along with this Court's signed Order, to Respondents by e-mail, as required by the Order. A copy of this e-mail is attached hereto as **Exhibit 2**. Petitioners attempted to personally serve Respondents with these papers as well, but were unable to serve the Administrative Board and Chief Administrative Judge Marks, as the Office of Court Administration (OCA), located at 25 Beaver Street, New York, New York 10004, was closed due to the ongoing COVID-19 pandemic.

5. On November 10, 2020, my colleague, Collin A. Rose, served counsel for Respondents with the document requests and notices of deposition that had already been annexed to Petitioners' original order to show cause. A copy of this e-mail is attached hereto as **Exhibit 3**. Petitioners did not respond to this e-mail.

6. On November 12, 2020, after several more attempts to personally serve Chief Administrative Judge Marks and the Administrative Board, my colleague, Collin A. Rose, sent Respondents' counsel a request for them to accept personal service. A copy of this e-mail is attached hereto as **Exhibit 4**. Respondents' counsel did not respond despite the fact that Respondent had filed an Affidavit of Service of Demand for Change of Venue on November 10, 2020.

7. On November 13, 2020, the date by which Respondents were supposed to have responded to

Petitioners' document requests, Respondents' counsel reached out and requested to discuss discovery, stating that it was "unnecessary, overbroad, burdensome and improper."

8. Following Respondents' counsel's outreach, we exchanged e-mails. In one of these emails, Ms. Forman admonished Petitioner's counsel for contacting Chief Judge DiFiore's office. In fact, all that occurred was a managing clerk of my law had contacted the New York Court of Appeals for the sole purpose of arranging the logistics for the deposition of Chief Judge DiFiore to take place at the Court of Appeals, consistent with the notice of deposition that had already been noticed on Chief Judge DiFiore. Ultimately, we were informed that there was no one who could assist in setting up a conference room to hold the deposition in and were directed to contact Respondents' counsel for further assistance. After an e-mail exchange explaining these circumstances, I spoke with Respondents' counsel, Elizabeth Forman, Esq., Deputy Counsel for the Office of Court Administration. The emails leading up to our phone call are attached as **Exhibit 5**.

9. In the beginning of our call, Respondents' counsel admitted that, contrary to her assertion in a prior e-mail, that her failure to not appear was not as a result of a lack of notice from Petitioners, which she conceded was provided but rather her own "screw-up" in expecting that the proceedings would be virtual and that Petitioners would provide additional details beyond those already provided on November 4, 2020, the day before Petitioners moved this Court by order to show cause.

10. With respect to Petitioners' document requests, Respondents' counsel first maintained in our call that this Court's Order did not authorize Petitioners to receive document discovery from Respondents. Moreover, Respondents' counsel maintained that the document requests were overbroad and irrelevant to any of the claims, and stated that Petitioners' counsel was being purposefully abusive towards OCA. Alternatively, Respondents' counsel maintained that if there was to be discovery, it needed to wait until after December 7, 2020, the return date of Petitioners' Verified Petition and Complaint.

11. I advised Ms. Forman that delaying discovery until December 7, 2020, not only would defeat the purpose of this Court's Order, but would eliminate Petitioners' ability to litigate their underlying claims, which will be mooted if the Petitioner Justices are made to retire in December 2020.

12. Over the course of the call, when Respondents' counsel attempted to identify specific categories of documents that she would be unable to produce, she identified budgetary documents, deliberative documents, any documents concerning the appointment of Court of Claims justices, and all electronically-stored information (ESI) as being unable to be produced and said that production would be "practically impossible" and could take "two years" to gather.

13. Of course, withholding these categories of documents would entirely defeat the purpose of Petitioners' document requests. This is particularly so with regard to Ms. Forman's intention to withhold ESI, which would mean that OCA would

produce no electronically stored documents, the methodology in general use for the transmission and maintenance of communications and other documents. OCA's offices are closed in the wake of the COVID-19 pandemic, and therefore actual paper copies of responsive documents are probably nonexistent.

14. In response to Respondents' counsel's concerns, I offered to reexamine and narrow Petitioners' specific document requests if Respondents could produce anything they had already gathered at the time of the call. Respondents' counsel insisted that they were not prepared to produce anything that day, other than the Certification Memorandum issued by Respondents on September 29, 2020, a publicly-available document.

15. Understanding that Respondents did not intend to produce any documents, I then asked Respondents' counsel where and when Chief Judge DiFiore would like to be deposed, since Respondents' notice of deposition stated that she was to be deposed on Monday, November 16, 2020, and we were willing to arrange for the deposition in Albany or in Westchester. Respondents' counsel maintained that she did not have the authority to respond but that she did not expect Chief Judge DiFiore to be available on Monday, November 16, 2020. Respondents' counsel did not provide any alternative dates or locations for Chief Judge DiFiore to be deposed, instead seemingly maintaining that Chief Judge DiFiore would not appear for a deposition at all. Instead, Respondents' counsel indicated that she would e-mail us with additional information concerning Chief Judge

DiFiore's deposition later that day. Respondents' counsel has not provided any further information to date.

16. I then asked Respondents' counsel the same question with respect to Chief Administrative Judge Marks and his scheduled deposition on Wednesday, November 18, 2020. Respondents' counsel stated that she had not spoken to Chief Administrative Judge Marks and had no information to impart.

17. Following our call, I sent to Respondents' counsel an e-mail meant to confirm that (1) Respondents did not produce any documents as of November 13, 2020, and Respondents believed that document discovery should be postponed until after the Verified Petition and Complaint's return date, and (2) Respondents' counsel did not have the authority to say where and when Chief Judge DiFiore would prefer to be deposed but that she would not expect Chief Judge DiFiore to be available for a deposition on Monday. Respondents' counsel responded on Saturday, November 14, 2020, indicating that my e-mail did not accurately state Respondents' position.

18. On Sunday, November 15, 2020, Ms. Forman replied further with a ponderous email. Attached as **Exhibit 6** is a copy of this email chain. She cited her stated (and mistaken) belief, without providing any legal support, that OCA's motion for a protective order trumped this Court's expedited discovery order. She also offered that her office could, "if discovery is ordered, be able to produce, in short order, non-deliberative final budgetary materials," which are, of course, freely available on the internet and of no help at all. Ms. Forman

further stated, in conclusory fashion, apparently having weighed and pre-determined all the legal arguments herself, that “More importantly, the particulars of that [budgetary] calculation are immaterial, because it is beyond dispute that cost is a legitimate reason not to certificate, and that certification of judges is a financial cost to UCS.” Finally, Ms. Forman emphasized her belief that the depositions of Chief Judge DiFiore and Chief Administrative Judge Marks, noticed for this week, are “stayed by our motions” and that, in any event, both would not be available for depositions.

19. Respondents’ actions demonstrate their outright rejection of this Court’s signed Order, which compelled the very same discovery the Respondents now are attempting to delay and defeat.

Dated: New York, New York
November 18, 2020

/s/ Danielle C. Lesser
DANIELLE C. LESSER

194a

EXHIBIT 1

From: Nicolo, Carmela on behalf of Y. David Scharf
Sent: Wednesday, November 4, 2020 3:39 PM
To: Y. David Scharf; jdifiore@nycourts.gov; lmarks@nycourts.gov
Cc: James.Catterson@arnoldporter.com
Subject: Sent per the request of Y. David Scharf

This firm and Arnold & Porter Kaye Scholer LLP are counsel to Justices Gesmer, Friedman, Levanthal, Roman and Mr. Dan Tambasco. On their behalf, we will be presenting a verified petition and complaint together with a motion seeking expedited discovery naming as respondents the Administrative Board, Judge Janet DiFiore and Judge Marks, to the Supreme Court, Suffolk County, located at 1 Court Street, Riverhead, New York at 2 pm tomorrow.

Thank you.

Y. David Scharf
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196a

EXHIBIT 2

From: Nicolo, Carmela on behalf of Y. David Scharf
Sent: Friday, November 6, 2020 4:46 PM
To: jdifiore@nycourts.gov; lmarks@nycourts.gov; question@nycourts.gov
Cc: James.Catterson@arnoldporter.com; Y. David Scharf
Subject: E-mail on Behalf of David
Attachments: Article 78 (Certification).zip

As you know, this firm and Arnold & Porter Kaye Scholer LLP are counsel to Justices Gesmer, Friedman, Levanthal, Roman and Mr. Dan Tambasco. Please see attached the papers we filed yesterday in connection with our verified petition and complaint and motion brought on by order to show cause for expedited relief, which names the Administrative Board, Chief Judge Janet DiFiore, and Chief Administrative Judge Marks as respondents.

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198a

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Cc: James.Catterson@arnoldporter.com; Y. David Scharf
Subject: E-mail on Behalf of David
Attachments: Article 78 (Certification).zip

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