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May 15, 2008

BY HAND

The Honorable Edward H. Lehner
Justice of the Supreme Court
Supreme Court of the State of New York
60 Centre Street, Room 570
New York, New York 10007

Re: *Chief Judge Judith S. Kaye and the New York State Unified Court System* v. *Sheldon Silver, et al.*, Index No. 400763/08

Dear Justice Lehner:

We received the letters sent to the Court yesterday by Mr. Dolan, on behalf of Defendants Sheldon Silver, the New York State Assembly, Governor David A. Paterson and the State of New York, and by Mr. Lewis on behalf of Joseph L. Bruno and the New York State Senate.

Mr. Dolan claims that there is no basis in the CPLR for our request that a trial commence in June. But in fact, as Mr. Lewis acknowledges, our May 12 letter to the Court cites Rule 3402 of the CPLR, which states that "at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar by filing . . . a note of issue . . . ." As our letter makes clear, we intend, on the fortieth day, which defendants say is May 26, to file a note of issue to place our case on the Court's trial calendar. And we will move for a preference under Rule 3403 because this action is brought by and against a branch of the State and its officers, and because it is in the interest of justice.

Mr. Lewis's assertion that we have failed to comply with procedural prerequisites for a trial preference is but makeweight. He claims that we failed to file a Request for Judicial Intervention; but we in fact did so on April 10, when we asked for a preliminary conference. As

for his claim that CPLR Rule 3403(a) does not mean what it says, Mr. Lewis cites a 101-year-old, pre-CPLR decision of this Court that simply has nothing to do with the meaning of Rule 3403(a). Rule 3403(a) speaks for itself: it grants a preference to "an action brought by or against the state, or a political subdivision of the state, or an officer . . . of the state," and to "an action in which the interests of justice will be served by an early trial." And it obviously applies here.

Additionally, on behalf of Mr. Bruno and the Senate, Mr. Lewis cites the recent "dry appropriation" for pay increases and suggests that the Legislature might see fit to moot the case before trial. Would that it were so. But our clients have heard such suggestions many, many times in the past three years — including dry appropriations that have come to nothing. Again and again, governors and legislative leaders have said to our clients, next session, next month, next week — just wait, wait, wait. Still their failure to act persists. Not surprisingly, Mr. Dolan, on behalf of Mr. Silver, the Assembly, and the Governor, makes no suggestion that any legislative solution is at hand, certainly no solution prior to the Legislature adjourning at the end of June. It is time to resolve the crisis prior to that adjournment through a trial of the claims asserted by our clients under the Constitution of the State of New York, as provided by the CPLR, which is the only option left to us.

Finally, as for defendants' other arguments, we have shown in our letter to this Court that there are disputed issues of fact in this interbranch conflict that are essential to plaintiffs' unique claims and must be resolved in an immediate trial. Moreover, as we have demonstrated in our memorandum of law filed on April 10, 2008, there are no constitutional impediments that prevent this Court from holding defendants accountable for their violation of the separation of powers and the independence of the Judiciary.

Respectfully submitted,

Bernard W. Nussbaum

cc: Richard H. Dolan, Esq.,
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May 14, 2008

BY HAND

Honorable Edward H. Lehner
Justice of the Supreme Court
60 Centre Street, Room 570
New York, N.Y. 10007

Re: Kaye, et al v. Silver, et al
Index No. 400763/08

Dear Justice Lehner:

I am the attorney for Joseph L. Bruno and the New York State Senate (hereinafter the "Senate defendants") in the instant action. The Senate defendants have passed Senate Bills S. 6550 and S. 5313. The legislation provided judges of the Courts of the State the requested pay raises. By the passage of those two bills, the Senate defendants and the Senate as a body exercised the totality of the power committed to them in the State Constitution as a single house in a bicameral government. N Y State Constitution Article III, Section 14 ("...nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature...")

The Senate defendants respectfully request that the Court set down this matter for a preliminary conference pursuant to 22 NYCRR 202.12 for Friday, May 16, 2008 at 3:30 PM. We respectfully request that the Court hear both sides on the issue of extending the defendants

time to answer to mid June. The Senate defendants need additional time in order to move to dismiss the complaint pursuant to CPLR 3211 (a) areas and for summary judgment on the pleading under CPLR 3212.

As indicated by the R.J.I. to be filed by the defendants in this matter, the court's intervention is requested due to the needless intransigence of the plaintiffs in not granting further time to the defendants to move against the complaint asserting in part the very constitutional defenses available to the Senate defendants. The Senate defendants wish to raise substantive, prudential and procedural motions directed at the complaint. Under a procedure of their own devising, plaintiffs' counsel have filed a second letter with the Court reiterating and re arguing their position, instead of following the CPLR, the Rules of the Court or the Rules of New York County Supreme Court.

DEFENDANTS NEED FURTHER TIME TO MOVE AGAINST THE COMPLAINT ON CONSTITUTIONAL GROUNDS AND TO EXERCISE THEIR RIGHTS UNDER CPLR 3211 & CPLR 3212 WHICH WOULD RESOLVE THE CASE AND MOOT PLAINTIFFS'' TRIAL REQUEST

Senate defendants made a reasonable request for additional time to move against the complaint. Plaintiffs have unreasonably denied the request. Instead they responded with another missive.

The three causes of action should be dismissed as against the Senate defendants. The Senate motions to dismiss and for summary judgment are based upon certain matters already adjudicated by this Court adverse to the plaintiffs' position but brought in a new action, thus raising issues of motions to dismiss on the bases that another action is pending. The Senate's passage of the bills cited above demonstrates that the action should be dismissed on the basis of the documentary evidence that fully resolves the issue CPLR 3211 (a) (1).

The lawsuit also raises whether or not Judge Kaye in her representative capacity can sue on behalf of all the judges under the rubric of the Unified Court System and the scope of her powers and capacity to sue.

Finally the Senate defendants intend to move to dismiss on the basis of the complaint's failure to state a cause of action. Apart from the prudential concerns, areas of justiciability and the Speech and Debate Clause's absolute immunity, Senate defendants also contend that there is no justiciable separation of powers issue, conscious that this Court has ruled otherwise in Larabee v. Spitzer, 850 N.Y.S. 2d 885 (Sup. Ct N Y Cty 2008) .

The plaintiffs also assert albeit by letter that the Court has the power to reorder the state's priorities to pay the salaries of judges. The doctrine is dubious. The tools of the court are actually limited and the data cannot be fairly appraised and the court may not be able to reach conclusions to be able to enter judgment without violating the constitutional responsibilities of the Judiciary itself and the Legislative branch. Any judgment would of necessity require determinations concerning the allocation of the resources of the state and entangle the courts in the decision making functions of the political branches.

THE DEMAND FOR AN IMMEDIATE TRIAL IS PREMATURE

The demand for an immediate trial is premature. The predicate theory for the three causes of action attacks the legislature in the conducting of its business. Substantively the Senate defendants' motions pursuant to CPLR 3211 and 3212 when granted would expeditiously resolve the matter. The Senate defendants assert that the entirety of the instant action is barred by the Speech and Debate Clause of the New York State Constitution Article III Section 11. The plaintiffs' claim that the legitimate acts of the Senate are not within the sphere of legitimate legislative activities and that the protections of the Clause do not apply to interbranch lawsuits.

Both contentions are devoid of merit. The Speech and Debate Clause, creates a privilege that precludes this lawsuit in terms of all three causes of action in their entirety. The Clause would likewise bar any immediate or later trial because it precludes the testimony that the plaintiffs are eager to be introduced by the plaintiffs. As they have alleged the plaintiffs wish to conduct a show trial of legislative leaders. To do so they wish to call them into court to answer for their acts within the House in order to introduce evidence of legislative motives. The privilege under the Clause precludes the testimony sought to be introduced by the plaintiffs. See Campaign for Fiscal Equity v. State, 271 AD2d 379 (1 Dept 2000); Straniere v. Silver, 218 AD 2d 80, 82-83 (3d Dept.) aff'd 89 N.Y.2d 825(1996).

Were the Court to agree as a threshold matter with the Senate defendants interpretation of the law, the complaint must be dismissed at the threshold level. Other prudential concerns as to justiciability capacity of the plaintiffs to bring the action as well as political question doctrines will be raised as well as the failure to state a claim under CPLR 3211 (a)(7). Given that there are two other actions pending for the same relief, it provides a basis for dismissal of this complaint.

THE PLAINTIFFS ARE NOT ENTITLED TO A PREFERENCE

Counsel for the plaintiffs having previously demanded a May trial date, when no counsel represented the defendants, now seeks a trial date of June 2 on the basis that, well they just want it. Although they cite to the relevant sections of law CPLR 3402 and CPLR 3403, it appears they fail to note that they do not procedurally or substantively qualify to obtain what they insist that they want. Procedurally, the means of obtaining a preference as it is for so many other forms of relief is the R.J.I. The plaintiffs for some reason, proceed by letter evading the expense of filing a motion. CPLR 3402 governs the issue of preferences. The plaintiffs have failed to follow the CPLR 3403 (b) steps for obtaining a preference and provide no reason for such failure. The section provides in relevant part that unless the court otherwise orders, notice

of a motion for preference shall be served with the note of issue by the party serving the note of issue, or ten days after such service by any other party. Assuming that the letter seeks the Court to order otherwise, that request should in all respects be denied. A note of issue may not be filed until issue is joined or at least 40 days after service has been completed. CPLR Rule 3402. While Mr. Nussbaum held his press conference and filed papers at the County Clerk's Office on April 10, 2008, the Senate defendants were not served until April 14, 2008 and therefore the 40th day is May 24 and the matter would carry over to Monday May 26, 2008. Thus Mr. Nussbaum's letter assuming it is a motion should be denied as premature.

Were it to be considered on the issue of its merits, it should likewise fail. Moreover, plaintiff has the burden of establishing the right to a preference, and nothing less than unequivocal proof will do. Meyers v. City of New York, 7 A.D. 2d 903 (1st Dept. 1959); Dodumoff v. Lyons, 4 A.D.2d 626 (1st Dept. 1957). .

Preferences are granted in six circumstances none of which are applicable to this action. CPLR 3403 (a) 1-6:

> 1. an action brought by or against the state, or a political subdivision of the state, or an officer or board of officers of the state or a political subdivision of the state, in his or its official capacity, on the application of the state, the political subdivision, or the officer or board of officers;
> 2. an action where a preference is provided for by statute; and
> 3. an action in which the interests of justice will be served by an early trial.
> 4. in any action upon the application of a party who has reached the age of seventy years.
> 5. an action to recover damages for medical, dental or podiatric malpractice.
> 6. an action to recover damages for personal injuries where the plaintiff is terminally ill and alleges that such terminal illness is a result of the conduct, culpability or negligence of the defendant.

The only legitimate bases to consider a preference is either CPLR 3403 (a) (1) or (a) (3).

a. A PREFERENCE BASED ON A GOVERNMENTAL ENTITY AS A PARTY IS INAPPLICABLE

With regard to a preference under CPLR 3403 (a) (1), because the action involves the state on each side, this preference is inapplicable. Where both sides are the "government side" it is inappropriate to grant a preference about all other cases and certainly inappropriate to do so for a date certain. See People v. McClellan, 56 Misc. 123 (Supreme Court, New York 1907) rev'd on other grounds 124 A.D. 215 (1st Dept. 1908) and rev'd on other grounds, 191 N.Y. 341 (1908).

b. AN INTEREST OF JUSTICE PREFERENCE IS LIKEWISE INAPPLICABLE AND INAPPROPRIATE

Substantively, plaintiffs cannot truly be entitled to a preference. The plaintiffs argue in their letter that they are entitled to a preference and immediate trial because the matter is unique claiming that the clash between branches is such that all government teeters on the precipice. In essence the lawsuit brought by Judge Kaye claims a preference on constitutional grounds. Claiming that this Court must adjudicate matters promptly when constitutional claims are asserted, plaintiffs equate their lawsuit for pay with the same constitutional dimension as President Nixon's pre impeachment battle over subpoenaed material. Letter page 2.

The need for a preference is nil. While the Senate has adopted the remedy that the plaintiffs seek, the Assembly has not. The gravamen of the suit is that the legislature has not adopted that which the plaintiffs believe to be the correct legislative response to their legitimate grievance. A trial preference in the interest of justice should only be granted where circumstances are sufficiently unusual and extreme to justify the extraordinary privilege. Such a situation does not exist in the present matter. No matter

what purported merits are claimed by the plaintiffs, the alleged merits do not entitle the plaintiff to a preference. See e.g. Binninger v. Grillo, 28 A.D. 2d 1100 (1 Dept. 1967) ([clear case of liability].

The preference is not to be lightly granted since it favors one litigant and one case over all others. It is yet another unseemly step in this litigation that the Judiciary seeks one of its members to grant it a preference on the issue of its salaries. It would require the setting aside of those cases of persons injured and maimed, those persons aggrieved by their total loss of any salary facing more direct and dire consequences, rather than a mere claim of getting too little. Although dressed as a matter of constitutional law, in the end it is about not getting enough money.

The constitutional crisis is of the plaintiffs' own making. With a dry appropriation, the authority to spend money for judicial pay raises is in the budget. The only step left is to amend the relevant sections of the Judiciary Law and other court acts as the Senate did in S. 6550. The plaintiffs unwilling to wait to see if this legislative session would provide the pay raises. Despite the fact that both houses and the Governor as part of the budget process took the preliminary step of passage of judicial raises be enacting a "dry appropriation", plaintiffs commenced suit. Forcing the constitutional confrontation, plaintiffs seek to invoke the doctrine of the judiciary's inherent power not in service of maintaining the courts or the litigants or the machinery of justice in favor of those who seek justice at the bar, but for their own financial benefit based upon the fact that they have not had salaries that keep pace with inflation.

By this lawsuit the plaintiffs seek an order of the court that in attacking the legislature for failing to raise judicial pay, the plaintiffs out of legitimate frustration seek to upend the balance of power and the state constitution for money. The pay raise albeit well deserved is not correctly claimed to be in the interest of the judicial branch but more

accurately about the interests of the individual members of the judiciary, a distinction that is a substantive difference with and from in the case law cited by the plaintiffs.

The Constitution, in its specific allocation of powers, vested in the Legislature the political choices of the economic distribution of the resources of the people of the state is entrusted by the people to officers answerable to them every two years. Judges however are granted multi-year terms established to protect judicial independence. The independence is principally assured by insulation from the voters. The terms provide roughly a decade long sinecure upon good behavior.

As a matter of constitutional separation of powers, the legislature is entrusted with the details to set judicial salaries not with respect to how long judges had to wait without an increase. The Legislature must exercise its power in the context of funding determinations for the children in the schools, the poor, the infrastructure, the courts system itself, the jails and hospitals of the state, police, fire services, cultural institutions such as museums and libraries as well as the range of services provided by the state to a range of eligible needy dependent persons. The primary responsibility for allocation of resources and the attendant policy decisions is lodged in the legislative body. As the Court of Appeals wrote in Jones v. Beame, 45 NY 2d 402 (1978), obviously it is untenable that the judicial process at the instance of particular persons and groups affected by and concerned with the inevitable consequences of the government's fiscal condition should "intervene and re order priorities, allocate the finite resources available and in effect direct how the vast governmental enterprise should conduct its affairs.

Because none of the requisite reasons are present for the granting of a preference, the court is powerless to grant such a preference.

PLAINTIFFS ARE NOT ENTITLED TO AN IMMEDIATE TRIAL

Plaintiffs are not entitled to an immediate trial. As Siegel states in his Commentary at C 3402:2: While according to CPLR 3402(a), the note of issue can be filed any time after issue is joined (i.e., the defendant has served its answer), or any time after the 40th day following the service of the summons even if issue has not been joined--or, indeed, even if a complaint has not yet been served. A filing of a note of issue this early in the litigation would bring the hermits out of the mountainside to gaze and gasp.

First they appear to believe that they are exempt from the minimum requirements of a note of issue CPLR 3402. [1] Second, they have to file a certificate of readiness. It is clear that the case is not ready and such a certificate if filed will be subject to motion practice further delaying this matter. Defendants will move to strike the note of issue and the certificate of readiness because the issues raised by the plaintiffs require discovery. Plaintiffs' counsel rejected any idea that discovery could be had because there was no entitlement to it.

The Plaintiffs counsel in this last communication as it has in its pleading has staked out its particular purpose and goal in seeking an immediate trial. They have committed themselves to attempting a direct violation of the specific constitutional privilege from forcing testimony from legislators and wiping away legislative immunity under Article III in service of their fairly vague and in part already rejected causes of action. Article III Section 11 of the very constitution that the plaintiffs have sworn to uphold specifically precludes trial on this matter insofar as the plaintiffs demand to place under oath "the defendants themselves and "must be made to explain in open court their insistence that judicial pay increases ...be held hostage to the desire of legislators to increase their own salaries. (Letter of May 12, 2008). Clearly because the Senate has passed the legislation authorizing the raises, there is no reason to put the Senate

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[1] Citing a statute is not sufficient to observe it.

defendants under oath. By their explicit desire to do so, plaintiffs seek to willfully violate the Constitution. The Senate defendants have a legal immunity from such calling to account outside the House, and because the testimony sought is absolutely privileged, the suit against the Senate defendants should be dismissed. The pleadings and the letters filed raise substantial prudential concerns regarding the scope of judicial power and the need for judicial restraint under the doctrine of justiciability and political questions doctrine.

CONCLUSION

Because of the complexity of the issues, the potential for permanent damage to the balance of power at the expense of the legislative branch and for all reasons just and proper, the defendants should be provided with the time to raise and perfect the appropriate arguments to dismiss this complaint under CPLR 3211 and 3212 .A stampede to trial serves none of the vital constitutional powers and privileges of either branch of government

Respectfully submitted

DAVID L. LEWIS

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May 14, 2008

BY HAND

Hon. Edward H. Lehner
Supreme Court, State of New York
60 Centre Street, Room 570
New York, New York 10007

Re: Chief Judge Kaye et al. v. Sheldon Silver et al.
New York County Index No. 400763/2008

Dear Justice Lehner:

We are the attorneys for Defendants Sheldon Silver, the New York State Assembly, Governor David A. Paterson, and the State of New York in the above-captioned matter. I write in response to the most recent letter to the Court from Bernard W. Nussbaum, Esq., attorney for Plaintiffs, dated May 12, 2008, asking the Court to fix an immediate trial date for this case.

On behalf of our clients, we anticipate submitting a motion to dismiss the complaint on several grounds, and dismissing Governor Paterson, Speaker Silver and the New York State Assembly as improper parties. I am told that David Lewis, counsel for Senate Majority Leader Joseph L. Bruno and the New York State Senate, also intends to make a motion to dismiss. Mr. Lewis and I discussed a proposed motion schedule with Mr. Nussbaum, but the parties have been unable to reach agreement, in large part because of Plaintiffs' request for an immediate trial.

There is no basis in the CPLR – and none is cited – for Plaintiffs' demand for a trial commencing in June, before issue will even have been joined. Among other defects, that request ignores the Uniform Rules which require a preliminary conference in every case, among other reasons, to consider the "simplification and limitation of factual and legal issues," and provide that "[n]o action or proceeding ... shall be deemed ready for trial unless there is compliance with the provisions of this section and any order issued pursuant thereto." Uniform Rule 202.12(c)(1) and (i).

Obviously, a trial is required only if there is some disputed issue of fact relevant to the underlying legal claims that must be resolved. In this case, both aspects of that proposition are seriously in doubt. The point of Defendants' proposed motion to dismiss is that there are no such factual issues requiring resolution at trial before this case can be adjudicated. I note that, in a similar action, the Court has already dismissed claims quite similar to some of those asserted in the complaint in this action. *See Larabee v. Spitzer*, 19 Misc.3d 226, 850 N.Y.S.2d 885 (Sup. Ct., N.Y. Co. 2008); *see also, Maron v. Silver*, 2007 N.Y. Misc. LEXIS 8086, 238 N.Y.L.J. 109 (Sup. Ct. Albany Co. Nov. 30, 2007).

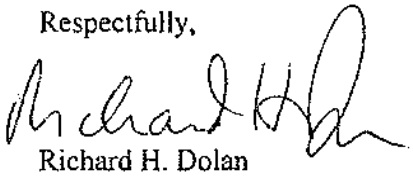
Even if, after consideration of Defendants' proposed motion, this Court eventually sustains any part of the complaint, it is far from clear what factual disputes, if any, can be the subject of a trial. Given the subject matter of the complaint, the Speech and Debate Clause's prohibition against questioning the Speaker, any member of the Assembly or the Governor about "any speech or debate" is obviously implicated. As this Court noted in *Larabee*, that Clause "grants immunity to members of the executive branch [as well as legislators] 'when they perform legislative functions.'" *Id.* at 237-38 (quoting *Brogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)).

The constitutional issues presented by this case require careful consideration. The only sensible approach is to proceed in the normal manner, as contemplated by the CPLR and the Uniform Rules, by first determining the legal sufficiency of the complaint; then identifying any disputed issues of fact that may require trial, in light of the limitations presented by the Speech and Debate Clause, the Separation of Powers doctrine or other applicable constitutional considerations; then proceeding with whatever pre-trial discovery may be necessary with respect to any such issues; and only then proceeding to resolve any such issues at trial. By adopting that approach, moreover, the Court may well obtain the benefit of an intervening ruling by the Appellate Division in either the *Larabee* case or the *Maron* case. I note that the appeal in *Maron* has already been perfected by plaintiffs-appellants; the appeal and cross-appeal are scheduled for the September Term, which begins September 2, 2008.

Because the constitutional issues are both complex and important, Mr. Lewis and I told Plaintiffs' counsel that our proposed motions will not be ready for filing until early June. With that schedule in mind, we attempted to reach agreement with Plaintiffs' counsel on a realistic motion schedule. Plaintiffs declined, on the ground that Plaintiffs want an immediate trial.

To resolve that scheduling issue, we will be filing today a request for judicial intervention asking the Court to conduct a preliminary conference. Defendants' response to the complaint is currently due on May 19. By this letter, we ask the Court to extend the time within which Defendants must respond to the complaint to and including June 5, 2008. At the preliminary conference, the Court will be in a better position to fix a realistic schedule for other aspects of the case.

Respectfully,



Richard H. Dolan

RHD:em
cc: Bernard W. Nussbaum, Esq.
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May 12, 2008

BY HAND

The Honorable Edward H. Lehner
Justice of the Supreme Court
Supreme Court of the State of New York
60 Centre Street, Room 570
New York, New York 10007

Re: *Chief Judge Judith S. Kaye and the New York State Unified Court System* v. *Sheldon Silver, et al.*, Index No. 400763/08

Dear Justice Lehner:

As the Court is aware, on April 10 we brought an action on behalf of Chief Judge Kaye and the Judiciary to remedy constitutional violations that threaten the independence of the courts. We asked at that time for a prompt trial. Now that the defendants have retained private counsel, we respectfully renew that request and urge the Court to schedule a trial of all issues to begin on or about June 2.

THE URGENCY OF AN IMMEDIATE TRIAL

What we ask is unusual, but this case is unusual. It is not a dispute between significant private interests; and it is more than a case against the State and its officials, to be given a trial preference under CPLR 3403. Those matters are important, but this one is even more so.

It is a clash among all three branches of the government of this State. We allege here, and we will prove, that the political branches have violated the State Constitution — by refusing to compensate judges adequately, by singling out judges' pay for specially unfavorable treatment, and by holding that pay hostage to unrelated political matters. Relations among the branches have deteriorated, and the crisis threatens to worsen, fueled by persistent uncertainty. The Attorney General has disqualified his office from representing the Executive and the Legislature in the dispute.

The conflict's more specific impact on individual judges and the judicial branch is beyond cavil — from the financial hardship suffered by judges, to rapidly diminishing judicial morale, to serious impediments to long-term initiatives to address caseloads and other problems faced by the Judiciary. The defendants themselves realize, and acknowledge, that their failure for the past decade to enact even cost-of-living increases has created a serious problem for our State. But rather than act, they have insisted upon holding judicial pay adjustments — and as a result, their own constitutional duties — hostage to extraneous issues. The independence and co-equal status of our Judiciary, a bedrock element of the separation of powers, is under assault.

A case like this should be heard and resolved quickly. As we say, there has never been one like it in this Court, but there have been elsewhere, and when they have arisen, courts have recognized that they must be given priority and resolved with great expedition. The United States Supreme Court long has recognized the unique urgency of interbranch conflicts over the separation of powers. "This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). The Supreme Court has repeatedly made clear that significant separation-of-powers crises must be resolved with extraordinary expedition. In *United States* v. *Nixon*, 418 U.S. 683, 687 (1974), for example, the Court granted certiorari before judgment of the D.C. Circuit "because of the public importance of the issues presented and the need for prompt resolution." The Court has underscored the Judiciary's responsibility to resolve separation-of-powers conflicts between the branches:

> Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . . *Marbury v. Madison*, 1 Cranch 137 (1803), was also a "political" case. . . . But courts cannot reject . . . a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.

Immigration and Naturalization Service v. *Chadha*, 462 U.S. 919, 943 (1983) (quotation marks omitted).

Here, the need for resolution of the interbranch conflict compels that this Court conduct a prompt trial and fulfill its duty as the "ultimate expositor of the constitutional text." *United States* v. *Morrison*, 529 U.S. 598, 616 n.7 (2000). The defendants now have retained private counsel, their time to answer was extended to May 19, any motions they may make by that date can be considered at trial, and the case should now move forward with dispatch in the interest of the State Constitution and the people that it serves.

Accordingly, pursuant to CPLR 3402 and 3403, we intend to file a note of issue to place the case on this Court's trial calendar, with preference because this action is brought by and against a branch of the State and its officers, and it is in the interest of justice.

THE NEED FOR A TRIAL

A trial is essential to the resolution of each of the claims raised by this suit. First, plaintiffs must be given the opportunity to demonstrate that the political branches have failed to provide constitutionally adequate judicial pay, pay "sufficient to provide judges with a level of remuneration proportionate to their learning, experience, and elevated position . . . in our modern society." *Goodheart* v. *Casey*, 555 A.2d 1210, 1212 (Pa. 1989). As our complaint states, a trial is critical for the Chief Judge and the Unified Court System to be able to show the constitutional inadequacy of judicial salaries based on factors that include:

- what New York State judges were paid historically,
- what judges in other States are presently paid,
- what federal district judges are presently paid,

- what attorneys in significant positions in public service earn,
- what attorneys in private practice earn, including first-year lawyers in firms in major cities where many of the judges are located,
- what professors and deans of New York law schools earn,
- what is necessary to provide compensation proportionate to the position which judges occupy in our society, and
- what the Executive and the Legislature have conceded in various proposals to be an adequate salary.

We will prove at trial, considering these and other measures, that the salaries of New York State judges have been permitted to decline to a level that is constitutionally inadequate.

Second, the Chief Judge and the Judiciary must have the opportunity to prove at trial that the Judiciary has suffered discriminatory treatment by the executive and legislative branches in the face of inflation. We will demonstrate that the executive and legislative branches have singled out judges for specially unfavorable treatment by freezing judicial salaries while regularly ensuring pay increases for virtually all other State employees to keep pace with inflation. The very character of the Compensation Clause, as set forth by the United States Supreme Court in *United States* v. *Hatter*, 532 U.S. 557 (2001), requires a demonstration at trial that judicial salaries were indirectly and discriminatorily diminished. And the fact that legislative salaries also have been frozen does not eliminate this charge of discrimination. Legislators, unlike judges, can and do earn outside income — in some cases, as we will show, substantial amounts. Only at trial can plaintiffs reveal the material ways in which legislators are not in the same position as judges and other full-time State employees.

Third, a trial is necessary for the Chief Judge and the Judiciary to adduce a record of the variety of ways in which the Executive and Legislature's practice of holding judicial pay hostage to their own self-interests has violated the separation of powers and the independence of the Judiciary. Through testimony from the Chief Judge and from defendants, plaintiffs will prove the political branches' linkage of judicial pay with legislative pay or other unrelated political issues. The defendants themselves — the leaders of the Legislature and the Executive — must be made to explain in open court their insistence that judicial pay increases (which they all agree are warranted) be held hostage to the desire of legislators to increase their own salaries,

or the desire of the Executive to push through other initiatives resisted by the Legislature. We will show at trial that this linkage has undermined the co-equal and independent status of the Judiciary, by making the setting of judicial compensation dependent on the political willingness of legislators to increase their own salaries, and by involving the Judiciary in the Legislature and Executive's unrelated political agenda, to which the fate of judicial pay increases has been inextricably — and inexplicably — tied.

THE COURT'S POWER TO REDRESS CONSTITUTIONAL VIOLATIONS BY ORDERING THE STATE TO MAKE APPROPRIATE PAYMENTS

Finally, there can be no doubt that if this Court finds a constitutional violation, it can remedy that violation by ordering the State to make appropriate payments. All we ask for is precisely the sort of injunctive relief that has been ordered in many other cases in which a constitutional violation has been remedied by the expenditure of public funds.

In *New York County Lawyers' Association* v. *State*, for example, this Court held that "when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the Constitution by order of a mandatory . . . injunction." 192 Misc.2d 424, 436 (Sup. Ct. N.Y. Co. 2002). Based on fact-finding at trial, the Court determined that the State's existing compensation rates resulted in deficiencies in the assigned private counsel system that "seriously impaired the courts' ability to function" and violated indigent citizens' constitutional right to representation. 196 Misc.2d 761, 775 (Sup. Ct. N.Y. Co. 2003). Accordingly, this Court issued a mandatory permanent injunction to the State, directing that assigned private counsel be paid the increased compensation of $90 per hour.

The *NYCLA* case does not stand alone. As early as 1973, in *McCoy* v. *Mayor of the City of New York*, the Supreme Court ordered executive branch officials "to take the necessary action to make available the funds which are required to properly staff and operate" a housing court established in the City of New York. 73 Misc.2d 508, 513 (Sup. Ct. N.Y. Co. 1973). As recently as last year, in *Kelch* v. *Town Board*, the Appellate Division affirmed this Court's exercise of the inherent power to order the State to make higher salary payments:

"Judicial interference in this legislative action is necessary because [defendants] violated . . . the constitutional princip[les] of separation of powers in setting petitioner's exceedingly meager salary." 36 A.D.3d 1110, 1112 (3d Dep't 2007) (internal citations omitted). As the New York Court of Appeals has stated, "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, *and order redress for violation of them.*" *Campaign for Fiscal Equity, Inc.* v. *State*, 8 N.Y.3d 14, 28 (2006) (emphasis added).

The highest courts of many other States also have redressed constitutional violations by compelling the State to remit funds to the Judiciary. In a seminal decision widely cited by state courts across the Nation, the Supreme Court of Pennsylvania upheld an order compelling increases in funding of the courts:

> The Judiciary *must possess* the inherent power to determine and compel payment of those *sums of money which are reasonable and necessary* to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.

Commonwealth ex rel. Carroll v. *Tate*, 274 A.2d 193, 197 (Pa. 1971) (emphasis added in part). The court concluded that not only does the Judiciary possess this inherent power, but the Constitution compels its invocation to repel a constitutional breach: "[T]he Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." *Id.* These fundamental principles have formed the basis of decisions by the highest courts in a variety of other States — from Michigan and Massachusetts, to Colorado, Indiana, and Washington — all validating the Judiciary's authority to compel increases in funding to the judicial branch. *See Judges for the Third Judicial Circuit* v. *County of Wayne*, 190 N.W.2d 228 (Mich. 1971); *O'Coin's, Inc.* v. *Treasurer of Worcester County*, 287 N.E.2d 608 (Mass. 1972); *Smith* v. *Miller*, 384 P.2d 738 (Colo. 1963); *Noble Co. Council* v. *State ex rel. Fifer*, 125 N.E.2d 709, 713 (Ind. 1954); *Carlson* v. *State ex rel. Stodola*, 220 N.E.2d 532 (Ind. 1966); *In re Salary of the Juvenile Director*, 552 P.2d 163 (Wash. 1976).

The form of relief we seek here is no different than that ordered in these cases where the courts have found — and remedied — constitutional violations.

For these reasons, we ask that the Court schedule a prompt trial to resolve this crisis. We are available to discuss this matter at the Court's convenience.

Respectfully submitted,

Bernard W. Nussbaum

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