SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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CENTER FOR JUDICIAL ACCOUNTABILITY, INC.
and ELENA RUTH SASSOWER, individually and
as Director of the Center for Judicial Accountability, Inc,
acting on their own behalf and on behalf of the People
of the State of New York & the Public Interest,

<u>July 6, 2022 Moving Affidavit</u>
in Support of Petitioners' Order to Show Cause for Determination of their *Matter of Law* Entitlement to a TRO/Preliminary Injunction Prior to July 8, 2022

Petitioners/Plaintiffs,

-against-

NEW YORK STATE JOINT COMMISSION ON PUBLIC ETHICS,
LEGISLATIVE ETHICS COMMISSION,
NEW YORK STATE INSPECTOR GENERAL,

KATHY HOCHUL, in her official capacity as
GOVERNOR OF THE STATE OF NEW YORK,

ANDREA STEWART-COUSINS, in her official capacity as
TEMPORARY SENATE PRESIDENT, & the NEW YORK STATE SENATE,

CARL HEASTIE, in his official capacity as
ASSEMBLY SPEAKER, & the NEW YORK STATE ASSEMBLY,

LETITIA JAMES, in her official capacity as
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

THOMAS DiNAPOLI, in his official capacity as
COMPTROLLER OF THE STATE OF NEW YORK,

Respondents/Defendants.

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

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the above-named unrepresented individual petitioner/plaintiff,[1] fully familiar with all the facts, papers, and proceedings heretofore had.

2. I submit this affidavit in support of an order to show cause to secure this Court's determination of petitioners' *matter of law* entitlement to a TRO and/or preliminary injunction to enjoin Part QQ of Education, Labor, Housing, and Family Assistance Budget Bill #S.8006-C/A.9006-C – the "ethics commission reform act of 2022" – from taking effect on Friday, July 8, 2022.

3. Petitioners' request for a TRO and/or preliminary injunction are the first two branches of their June 23, 2022 notice of petition (#46) – and our entitlement thereto, *as a matter of law*, rests on our summary judgment entitlement to the granting of our verified petition's sixth cause of action (#1, at ¶¶78-85), which, additionally, is the third branch of our June 23rd notice of petition:

> "declaring unconstitutional, unlawful, and void Part QQ of Education, Labor, Housing, and Family Assistance Budget Bill #S.8006-C/A.9006-C – the 'ethics commission reform act of 2022' – enacted in violation of mandatory provisions of the New York State Constitution, statutes, legislative rules, and caselaw…."

4. Our summary judgment entitlement to the granting of the petition's sixth cause of action is obvious from the petition's specificity as to the constitutional, statutory, and legislative rule violations committed by respondents governor and legislators with respect to the FY2022-23 state budget and the "ethics commission reform act of 2022" they included in it – as to which, in addition to the evidentiary exhibits and links, petitioners have filed a June 28, 2022 notice pursuant to CPLR §2214(c) (#60, #64) for respondents to furnish papers to the Court at the hearing of the July 23rd notice of petition. Its concluding paragraph reads:

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[1] For simplicity, the petitioners/plaintiffs are hereinafter referred to as "petitioners"; the verified petition/complaint is referred to as the "petition" – and respondents/defendants are referred to as "respondents".

> "PLEASE ADDITIONALLY TAKE NOTICE that your failure to make such production will entitle petitioners [to] the granting of the relief sought by their June 23, 2022 notice of petition, starting [with] the requested TRO, preliminary injunction, and declaration that Part QQ of Education, Labor, Housing, and Family Assistance Budget Bill S.8006-C/A.9006-C – the 'ethics commission reform act of 2022' – is unconstitutional, unlawful, and void as it was enacted in violation of mandatory provisions of the New York State Constitution, statutes, legislative rules, and caselaw.[fn4]"

The annotating footnote 4 reads:

> "See, *inter alia*, *New York State Bankers Association, Inc. et al. v. Wetzler, as Commissioner of the Department of Taxation and Finance of the State of New York*, 81 NY2d 98, 102 (1993) 'The question concerns not what was enacted or its effect on the budgetary process, but whether there was authority to enact the provision at all. Our precedents clearly compel the conclusion that the controversy is justiciable…'"

5. On Friday morning, July 1st – the return date of our June 23rd notice of petition – I called the Court, whose assignment to the case I was notified of in the evening of Thursday, June 30th, to make arrangements for an evidentiary hearing on the preliminary injunction, either for Wednesday, July 6th or Thursday, July 7th. Instead of a call back, I received from this Court's principal law clerk, an e-mail, approximately four hours later, at 2:25 p.m., stating:

> "Good Afternoon Ms. Sassower,
>
> Thank you for your patience, this message is in response to your phone call to chambers from this morning. This matter was recently assigned to Judge Gandin and we have been reviewing the parties' moving papers. At this time, the Court will NOT hear oral arguments. Any pending applications for temporary injunctive relief, petitions and motions before the Court will be decided on papers only as soon as possible." (capitalization in the original)

6. Upon discovering the e-mail, shortly before 4 p.m., I e-mailed back, *cc*'ing Assistant Attorney General Gregory Rodriguez, representing all respondents, as follows:

> "Dear Law Clerk Collado,
>
> Thank you for your response, disappointing as it is. Fortunately, I believe the verified petition, its exhibits, and my sworn affidavits in support of petitioners' notice of petition & orders to show cause to be more than sufficient for the granting of the TRO/preliminary injunction sought – and *as a matter of law*.

> Should the Court decide that it will entertain not just argument, but petitioners' requested EVIDENTIARY hearing (¶12 of my 6/28/22 affidavit) – substantiated by their CPLR §2214(c) notice – it will only confirm as much.
>
> Meantime, I have packed up a hard copy of petitioners' papers to send to the Court, as required – and will be leaving shortly for the post office.
>
> May your 4th of July observances be meaningful.
>
> Thank you."

7. In fact, the "papers" before the Court were not only "more than sufficient for the granting of the TRO/preliminary injunction sought", but the Court's granting of the TRO/preliminary injunction was the ONLY decision it could make because Mr. Rodriguez had interposed NO opposition to it. Instead, and reflecting that he had NO basis upon which to oppose the TRO/preliminary injunction, he filed a paltry June 27th motion to dismiss the petition (#50), whose frivolous, fraudulent nature was resoundingly demonstrated by my June 28th affidavit in opposition and in further support of the June 23rd notice of petition (#61).

8. As a consequence, the ONLY way the Court could get out of the ONLY decision possible from the "papers" was to defer decision until AFTER July 8th so as to deny the TRO/preliminary injunction as moot. That this is what the Court was intending to do was apparent from Mr. Collado's e-mail, which, conspicuously, did not state that the Court's decision would be expeditious or prior to July 8th.

9. Instead of Mr. Collado's non-committal "only as soon as possible" date for determination of the TRO/preliminary injunction, his e-mail to me should have stated "no later than Tuesday, July 5th" – as even the most cursory review of the "papers" on Friday, July 1st would have revealed that without oral argument and an evidentiary hearing, the Court would have NO grounds to do anything but issue a TRO/preliminary injunction, unless it was planning to trash, ENTIRELY, the controlling statutory provision for preliminary injunctions: CPLR §§6312(a) and (c).

10. CPLR §§6312(a) and (c) states:

> "(a) Affidavit; other evidence. On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual…
> …
> (c) Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists." (underlining added).

11. Indeed, page 4 of my June 23rd affidavit in support of petitioners' June 23rd notice of petition (#47) helpfully quoted these two paragraphs – thereby reminding the Court of the parties' evidentiary burdens and its duty with respect thereto. Examination of Mr. Rodriguez's "papers" – easily done within minutes – would have disclosed that they presented ZERO "evidence to raise an issue of fact" as to petitioners' sixth cause of action, or their other nine causes of action – and that there was NO argument, at all, in opposition to the granting of a TRO/preliminary injunction, as to which my four sworn affidavits in the "papers" dated June 6th (#32), June 21st (#43), June 23rd (#47), and June 28th (#61) particularized the requisite three factors, all favoring petitioners, overwhelmingly: (1) substantial likelihood of success on the merits; (2) immediate, irreparable injury; and (3) balance of equities – with no aspect contested by respondents.

12. Yesterday, July 5th, with no notification from the Court either as to its decision granting petitioners the TRO/preliminary injunction to which we are entitled, *as a matter of law*, nor of its scheduling of oral argument and an evidentiary hearing for July 6th or for the only other date possible, July 7th, it became apparent that an order to show cause to secure determination of the TRO/preliminary injunction on July 7th would be necessary. This morning, I called chambers to

make appropriate arrangements, explained the situation to the Court's secretary, Tara Buyl, and, at her request, sent an e-mail. It read:

> "Dear Law Clerk Collado,
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> Following up my phone call to chambers at 9:15 this morning (845-481-9399) and the message I left with Tara, please call me, as immediately as possible, so that I can make arrangements with you for tomorrow, July 7th to physically present the Court with an order to show cause for a TRO/preliminary injunction – as on Friday, July 8th, the TRO/preliminary injunction, as to which petitioners have a *matter of law* entitlement based on the "papers" before the Court, will be moot, as presumably the Court is aware in not rendering the ONLY decision the 'papers' will allow it to make, namely, granting the TRO/preliminary injunction.
>
> As I stated to Tara, I have already drafted the order to show cause and am working on my affidavit, which I will forward to you and Assistant Attorney General Rodriguez when done, but I wish to discuss them with you before doing so.
>
> Thank you." (underlining and italics in the original).

13. I further stated to Tara my belief that the Court's attempt to moot petitioners' *matter of law* entitlement to a TRO/preliminary injunction by delaying decision until after July 7th could not be explained as other than a manifestation of actual bias, arising from its financial and other interests in the case.

14. The Court's duty, in response to this order to show cause, is to furnish such other explanation as it has – and, in any event, to make disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of its financial and other interests.

15. Disclosure is especially requisite if the Court refuses to disqualify itself, based on the appearance and actuality of its interest and bias, refuses to confront its lack of jurisdiction arising from interest proscribed by Judiciary Law §14 , and refuses to address the additional threshold relief sought, with disclosure, by this order to show cause's branch of "other and further relief as may be just and proper", *to wit*,

"(b) transferring/removing this case to federal court, including pursuant to Article IV, §4 of the United States Constitution: 'The United States shall guarantee every State in this Union a Republican Form of Government', inasmuch as this Court and every justice and acting justice of the Supreme Court of the 62 counties of New York State are divested of jurisdiction to hear the case pursuant to Judiciary Law §14 because of their direct financial and other interests and 'rule of necessity' cannot be invoked by reason thereof – or, alternatively, certifying the question to the Appellate Division, Third Department or to the New York Court of Appeals;

(c) requiring Attorney General James, a respondent/defendant, to furnish a sworn statement that her representation of respondents/defendants, rather than petitioners/plaintiffs, is based on a determination that they have a 'merits' defense to this case, such that representing them is in the 'interest of the state', as Executive Law §63.1 requires; and (ii) that her own direct financial and other interests in the case, as in petitioners/plaintiffs' March 5, 2021 complaint against her filed with respondent/defendant Joint Commission on Public Ethics (Exhibit D to the petition/complaint), does not require that she secure independent, outside counsel to determine the 'interest of the state' pursuant to Executive Law §63.1 – and petitioners/plaintiffs' entitlement to representation".

16. Suffice to say that notwithstanding the Court's absence of jurisdiction, by reason of its proscribed Judiciary Law §14 interest, its *matter of law* granting of TRO/preliminary injunctive relief is a ministerial act – a "housekeeping" task, preserving the *status quo*, comparable to the Court's ability to make an order transferring/removing the case to federal court, or certifying the question to the Appellate Division, Third Department or the New York Court of Appeals, both sought by the June 23rd notice of petition, as here on this order to show cause.

17. Finally, this Court's yesterday's inaction in failing to come forward with a decision on the *matter of law* TRO/preliminary injunction branches of the June 23rd notice of petition or to schedule oral argument and an evidentiary hearing for today or tomorrow must be seen in the context of my four e-mails to which I *cc*'d the Court and Mr. Rodriguez on Saturday night, July 2nd, and Sunday morning, July 3rd, all four bearing the identical title: "TIME IS OF THE ESSENCE – TRO/Preliminary Injunction: 'ethics commission reform act of 2022' – CJA, et al. v. JCOPE, at al. (Albany Co. #904235-22)". I am, therefor, making them exhibits to this affidavit, as follows:

Exhibit A-1: my July 2, 2022 e-mail to New York's 15 law school deans comprising the "independent review committee" of the "ethics commission reform act of 2022";

Exhibit A-2: the sole attachment to my July 2, 2022 e-mail to the 15 law school deans, *to wit*, my June 12, 2022 letter to them entitled "Lawsuit to VOID the 'ethics commission reform act of 2022', TRO to stay the statute from taking effect on July 8th – & your ethical, professional, and civic responsibilities with respect thereto".

Exhibit B: my July 2, 2022 e-mail to the "JCOPE Must Go" Coalition of supposed "good government groups";

Exhibit C: my July 3, 2022 e-mail to the New York City Bar Association, which is, additionally, a member of the "JCOPE Must Go" Coalition;

Exhibit D: my July 3, 2022 e-mail to the New York State Bar Association.

18. I have received no responses from any of the recipients of these e-mails – and it should be obvious that if they could deny or dispute the accuracy of the content of my e-mails – or of my June 12th letter to the law school deans it annexed – beginning with the flagrant unconstitutionality and unlawfulness of the enactment of the "ethics commission reform act of 2022" – the basis of petitioners' *matter of law* entitlement to the TRO/preliminary injunction – they would have done so.[2]

19. No other application for the same or similar relief has been previously sought, except as hereinabove described and particularized by my four prior affidavits, above cited at ¶11 and linked.

[2] Although not parties, the relevant principles, applicable to summary judgment, are certainly known to the mostly lawyer recipients: "failing to respond to a fact attested in the moving papers... will be deemed to admit it", Siegel, New York Practice §281 (1999 ed., p. 442) – citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 599 (1975), itself citing Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3212:16, p 437): "If key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it" id. Undenied allegations will be deemed to be admitted, *Whitmore v. J Jungman, Inc.*, 129 N.Y.S. 776, 777 (S.Ct., NY Co. 1911).

ELENA RUTH SASSOWER

Sworn to before me this
6th day of July 2022

Notary Public

PHILIP L. RODMAN
Notary Public, State of New York
No. 02RO6398593
Qualified in Westchester County
Commission Expires September 30, 2023