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November 12, 2020

STATEMENT OF THE NYCLA SUPREME COURT COMMITTEE

We write on behalf of the New York County Lawyers Association Committee on the Supreme Court in response to the Memorandum from Chief Administrative Judge Lawrence K. Marks, dated September 29, 2020, specifically regarding the decision to defund the essential program to certificate retired justices of the Supreme Court for continued service, pursuant to Judiciary Law § 115. We understand that there are over 45 justices whose continuing essential service would be eliminated should the disapproval of nearly all pending certifications and re-certifications be carried out.

While we recognize that the economic realities brought about by the COVID-19 pandemic are severe and must be addressed, we strongly believe that the most experienced members of the judiciary are now more valuable than ever. These difficult times require experienced judges to cut through the considerable backlog of cases built up from the pandemic. In short, we respectfully view this drastic action as a measure of last resort – eliminating our most valuable judicial resources at a time when they are needed the most.

We respectfully assert that the need to adapt to new budget realities imposed by the pandemic must not be divorced from the critical necessity to maintain essential re-sources that the citizens of New York require in order to protect their legal rights. Indeed, if Statewide cuts are necessary, the New York City courts – among the busiest in the world – must be spared. As proceedings have been delayed by the pandemic and budget constraints have already begun to take their toll, caseloads and backlogs are rising. Distress brought on by the pandemic will continue to have profound effects throughout the criminal and civil branches in New York City. Justices who have been certificated and will be available to continue performing their judicial duties will be key to eliminating the backlog.

The pandemic has unquestionably brought about increased demand for access to the trial courts, and the need for an adequate number of judges to handle the onslaught of old and new cases. In addition, eliminating certification will severely impact the operations of the appellate courts that New York citizens rely on to oversee the fair, efficient and consistent disposition of litigated matters. Prior to the pandemic, the Second Department was already severely backlogged – the loss of four justices will only serve to further cripple its operations. Nor can the First Department afford to lose two justices given the increasing backlog and appeals docket resulting from the pandemic.

Certificated justices are critical to helping the court system recover from the pandemic, and it would be counterproductive to limit their availability. With growing backlogs, there will be increased pressure, but decreased capability, to achieve the efficient disposition of matters in an environment where the availability of trial opportunities will be severely constrained. Certificated justices provide the requisite experience necessary to assess cases and move them to a fair resolution under the challenging and demanding circumstances New York’s judicial system is currently facing. A loss of this magnitude may well increase, rather than reduce, overall costs to the judiciary and the State through adverse impacts on the efficient disposition of cases. Pressures on existing judicial resources will also be compounded by the need to redistribute the dockets of retiring justices to others already dealing with increased caseloads and backlogs.

While we understand that the economic realities of budget constraints must be considered, and that the judiciary is not exempt from having to make adjustments to expenditures, limiting or eliminating the availability of the courts’ most valuable resource – experienced justices, many of whom have continued to work diligently throughout the pandemic – is not the place to start. We urge you to make every effort to continue the certification of justices even in the face of new budgetary realities, and to seek every alternative to terminating a program that has provided, and will continue to provide, an enormously valuable contribution to the needs of the public and the courts.¹

¹ The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas.

The views expressed here are those of the Supreme Court Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

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REPORT OF THE NYCLA APPELLATE COURTS COMMITTEE

The Appellate Courts Committee of the New York County Lawyers Association Opposes the Decision to Eliminate Appellate Justices

The Appellate Courts Committee of the New York County Lawyers Association opposes the state court system's recent decision to deny recertification to 46 Supreme Court justices who have passed the age of 70 in the face of pandemic-driven budget cuts, thereby weakening the only branch of government tasked with enforcing the state and federal constitutions.

We write to express particular alarm at the harmful effects that this decision will have on our State's already-overburdened appellate courts. The court system should reconsider this short-sighted approach for numerous reasons.

1. Fewer Justices Means Less Law at a Slower Pace

Our State's high-volume appellate courts already produce summary decisions on a regular basis. But reducing the number of appellate justices may result in even shorter decisions with even more cursory reasoning. Relatedly, reducing the number of appellate justices will likely create an institutional incentive to avoid the sometimes-intricate merits of cases and instead dispose of appeals on technical procedural grounds like waiver and preservation, thereby significantly impairing the law's development.

Moreover, our appellate courts already were struggling with enormous backlogs when COVID-19 struck this past spring. The elimination of two experienced justices from the First Department and four from the Second Department—approximately 16% of those

Departments' total staff—without any plan to replace them will only compound the problem. That is true even if the governor eventually replaces these seasoned justices with trial-level justices not as well-versed in appeals.

2. More Money Can Be Found Elsewhere

During this budget crisis, the court system can save money while enhancing rather than hampering justice at the appellate level. “Going green” is one such way. The elimination of paper filing and service would save our system millions of dollars over the next ten years as publicly-funded organizations reduce paper, printing and shipping costs. COVID-19 already has spurred our appellate courts to make this much-needed change. Paper filings there finally have ceased as records and briefs are filed via NYSCEF, thereby confirming, not that “the future is now,” but that it was yesterday. The Court of Appeals should follow suit and eliminate paper filings as soon as possible.²

The court system also can save money by eliminating needless trial-level court appearances, which waste resources. For example, courts can eliminate the need for in-person appearances for certain ministerial matters like adjournments.

The total savings from the elimination of experienced appellate judges pales in comparison to the jurisprudential capital it will destroy. Larger savings that benefit the system can and should be found elsewhere instead.

3. No Transparency

Lawyers instinctively search for the reasoning underlying important decisions. The court system provided neither here. Hidden completely from public view is how this sweeping decision was made. Answers to critical, yet basic questions like “Who was involved?” “what alternatives were considered?” and “did anybody disagree or dissent?” are nowhere to be found. The sudden loss of a sizeable contingent of our appellate bench in one fell swoop demands openness and a meaningful opportunity for public input.

² This Committee has previously made such recommendations. *See* Letter from NYCLA Committee on Appellate Courts to the Clerk of the Court of Appeals (July 13, 2018) (recommending abolition of paper filings for motions for leave to appeal) (citing Chief Judge Janet DiFiore, *Going Paperless: The New York City Family Court*, 90(3), *The New York State Bar Association Journal* 10-12 (March/April 2018)) (<https://www.nycla.org/pdf/Updated%20FINAL.PDF>); Statement of the New York County Lawyers Association, *Electronic Filing and Service During the Current Pandemic* (March 23, 2020) (recommending the adoption of electronic filing and service) (<https://www.nycla.org/pdf/NYCLA%20Statement%20re%20E-Service%20and%20Filing%20during%20Pandemic%203.25.20.pdf>).

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Our court system's proud mission is "to promote the rule of law and serve the public by achieving just and timely resolution of all matters before the courts."³ This measure undermines that mission and does a disservice to members of the bench, the bar, and judicial staff who hold dear the Unified Court System's strive for continued excellence. More importantly, driving veteran appellate justices from the bench delays the very justice New Yorkers count on the court system to deliver. We urge the court system to reconsider its decision.⁴

³ <https://www.nycourts.gov/excellence-initiative/>.

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