To be argued by:
MICHAEL J. DELL, ESQ.
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

APPELLATE NO.: 2022-03908

NEW YORK COUNTY LAWYERS ASSOCIATION, BRONX COUNTY BAR ASSOCIATION, BROOKLYN BAR ASSOCIATION, QUEENS COUNTY BAR ASSOCIATION, RICHMOND COUNTY BAR ASSOCIATION, ASSIGNED COUNSEL ASSOCIATION OF NEW YORK STATE, INC. (ACA-NYS, INC.), METROPOLITAN BLACK BAR ASSOCIATION, MACON B. ALLEN BLACK BAR ASSOCIATION, LATINO LAWYERS ASSOCIATION OF QUEENS COUNTY, AND ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK,

Plaintiffs-Respondents,

—against—

THE STATE OF NEW YORK,

Defendant-Respondent,

—and—

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, and SHERIF SOLIMAN, in his official capacity as Commissioner of the New York City Department of Finance,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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Plaintiffs-Respondents, the bar associations for all five counties of New York City, the Assigned Counsel Association of New York State, Inc., the Metropolitan Black Bar Association, the Macon B. Allen Black Bar Association, the Latino Lawyers Association of Queens County, and the Asian American Bar Association of New York (together, "Respondents"), respectfully submit this brief in opposition to the appeal of Defendants-Appellants the City of New York, New York City Department of Finance, and Sherif Soliman (together, "Appellants") from a portion of the decision and order of the Supreme Court, New York County (Hon. Lisa S. Headley, J.), entered on July 25, 2022 (the "Order"). Appellants appeal from the Order *only* to the extent it requires them to pay assigned counsel at the rate of $158 per hour during the period from February 2, 2022, when Respondents filed their request for an order that Appellants show cause why that rate should not be paid immediately, to July 25, 2022, when Supreme Court granted the requested preliminary injunctive relief.[1]

PRELIMINARY STATEMENT

The true measure of a society can be found in the manner in which it treats its most vulnerable members. This case is about New York State and New York

[1] Citations to "R." refer to the Record. (*See* App. Div. Doc. Nos. 4-13). "Br." refers to Appellants' brief on this appeal. (*See* App. Div. Doc. No. 14). "App. Div. Doc. No." refers to this Court's NYSCEF docket. "NYSCEF Doc. No." refers to the trial court's NYSCEF docket.

City's decades-long failure to honor their obligation to safeguard the constitutional rights of children and indigent adults, the most vulnerable members of our society, to meaningful and effective legal representation by assigned private counsel in Family and Criminal Court proceedings in the City. The State and the City failed to ensure that representation by refusing to pay adequate compensation to such counsel.

More than twenty years ago, this Court found in *New York County Lawyers Association v. State* ("*NYCLA I*") that the courts have the authority to determine whether the failure to pay private assigned counsel sufficient compensation to ensure meaningful and effective legal representation of children and indigent adults violates their constitutional rights:

> "[A]s the Court in *Klostermann v. Cuomo* (61 N.Y.2d 525, 531) stated, when the Legislature creates a duty of compensation "it is within the courts' competence to ascertain whether [the State] has satisfied [that] duty . . . and, if it has not, to direct that the [State] proceed forthwith to do so." Even though the Legislature, when creating that duty, also established rates for compensation, the courts must have the authority to examine that legislation to determine whether its monetary cap provisions create or result in the alleged constitutional infirmity (*see Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 39, *appeal dismissed* 459 U.S. 1138)."

294 A.D.2d 69, 72 (1st Dep't 2002).

On May 3, 2002, Supreme Court found there was in fact a "serious and imminent danger of ineffective assistance of counsel to indigent litigants in the New York City family and criminal courts resulting from the inadequate compensation rates [the defendants] paid to assigned counsel." *NYCLA v. State*, 192 Misc. 2d 424, 425, 436 (Sup. Ct. N.Y. Cty. 2002). The Court issued a mandatory preliminary injunction directing payment of an interim rate of $90 per hour, the rate at which assigned counsel were then paid under the Criminal Justice Act (the "CJA") to represent indigent defendants in New York federal courts, "given the comparable importance" of state and federal proceedings. *Id*. at 436. The Court explained "court administrators have recognized for years that New York's assigned counsel rates undermine both the operation of the courts and the quality of the representation provided to children and indigent adults." *Id*. at 435. "[W]hen 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 preliminary injunction." *Id*. at 436.

The following year, on February 5, 2003, Supreme Court found the State and the City had created a severe and unacceptably high risk that children and indigent adults were receiving inadequate legal representation in the City in violation of the New York and United States Constitutions and granted declaratory relief and a

permanent injunction requiring an increase in assigned counsel compensation to the then federal CJA rate of $90 per hour. *NYCLA v. State*, 196 Misc. 2d 761 (Sup. Ct. N.Y. Cty. 2003). The Court also found that Article 18-B, the Family Court Act (the "FCA"), and the Judiciary Law "were enacted without a mechanism for automatic periodic increases [in assigned counsel rates], therefore *requiring* recurrent visitation by the Legislature." *Id.* at 763 (emphasis added).

In 2004, the Legislature *reduced* the court-ordered rates for assigned counsel from $90 per hour to $60 per hour for counsel for indigent adults facing criminal misdemeanor charges and $75 per hour for others. In the almost two decades since then, the State and the City have ignored Supreme Court's admonition for "recurrent visitation" of the rates, and failed to increase them even once. During that same period the CJA rate paid to assigned counsel in federal court proceedings "of comparable importance" was increased sixteen times. Effective as of January 1, 2023, it is now $164 per hour.

By 2022, the failure of the State and the City to increase assigned counsel compensation had caused a heartbreaking crisis for children, indigent adults and the Family and Criminal Court systems. On September 13, 2021, then Deputy Administrative Judge of the New York City Family Courts Anne-Marie Jolly testified at the Hearing on Civil Legal Services that, because the majority of the children and indigent adults in the City who are represented by assigned counsel

are people of color, the failure to increase the 2004 rates had created a second-class system of justice for people of color and "perpetuate[s] a 'dehumanizing experience' that has a disparate impact on Black and Latinx litigants." (R. 151). Then Chief Judge Janet DiFiore could not have been clearer at the Annual Meeting of the New York State Bar Association on January 22, 2022:

> The state's continuing failure to raise 18-B rates has enormous impact across our state. It has created a severe shortage of assigned counsel that is, without doubt, disrupting the efficient operation of our high-volume criminal and family courts, and harming litigants of limited means seeking vital services in those courts, litigants who experience: delays in the assignment of counsel;… repeated adjournments;… fewer opportunities and less time to meaningfully consult with their overburdened lawyers;… and an overall substandard quality of representation that contributes directly to the inequitable, dehumanizing conditions described by Secretary [Jeh] Johnson.

(R. 60). On January 25, 2022, then Chief Administrative Judge Lawrence Marks submitted written remarks at a joint legislative hearing concerning Governor Kathy Hochul's budget:

> The State can ill afford to wait any longer to adjust their compensation to keep pace with inflation. Failure to do so has reduced the number of lawyers willing to take on these assignments, which are vital to the health of our criminal justice and Family Court Systems. In the attorney for the child program alone, the number of panel attorneys has declined by nearly 30%—just since 2018. This leads to delays in adjudication that can jeopardize the rights and welfare of litigants, especially those who are disadvantaged and vulnerable.

(R. 165). On January 27, 2022, the New York City Family Court Judges Association further highlighted the dire situation in a letter to Governor Hochul. They explained the courts "have lost countless capable attorneys from our assigned counsel panels. At $75/hour, the low rate of pay explains both this attrition as well as the extraordinary challenge the panel administrators have had in recruiting new members:"

> As judges, we observe daily the heartbreaking impact the inadequate supply of attorneys has on the children and families who come before us, and it is not an overstatement to assert that our system for providing counsel to indigent litigants in Family Court is in a crisis. . . .
>
> Across our five courthouses, every day there are literally hundreds of new cases requiring the assignment of counsel. In each county, on each court day, there is [a] list of panel attorneys who are available for new assignments. Over the last two years, there were often days when only one or two lawyers were on this list. In the last six months, there have been many days when zero attorneys were on the list. Volunteers were impossible to come by, because the attorneys are frantically trying to cover their scheduled matters and attend to emergencies on their existing caseloads, with no slack time to take on something new.
>
> When no attorney is available to take a litigant's case, it means their fundamental constitutional rights may be at risk until such time that a lawyer can be found, but not deciding something until a lawyer can be assigned is itself a decision that can have grave consequences . . . . <u>Every day, we are forced to make interim rulings when one side may be represented but the other is not because the pay rate for assigned counsel is too low</u>.

(R. 36).

A few days later, on February 2, 2022, Respondents moved for a preliminary injunction to require the State and Appellants to protect the constitutional right to counsel of children and indigent adults. Respondents sought "immediate" relief, arguing it was time to put an end to Appellants and the State's requests for lengthy delays to answer Respondents' amended complaint or come up with a solution that never arrived. Respondents explained that if the constitutional right to counsel of children and indigent adults in the City is more than an empty promise, that right cannot and should not be ignored for even one more day. But that did not stop Appellants' and the State's continued delays and meritless arguments, which continued to put off a decision on Respondents' motion.

On July 25, 2022, Justice Headley granted a preliminary injunction. The Order required the State and the City to increase assigned counsel compensation in the City to $158 per hour, the CJA rate then paid to assigned counsel in federal courts in New York, starting on February 2, 2022, the date Respondents filed their request for an order to show cause. (R. 10). Contrary to Appellants' argument, the Order is not limited to the period "while the State considered legislation to permanently increase the current rates set by state statute." (R. 9-10). Supreme Court found "that severe and irreparable harm to children and indigent adult litigants would occur without an injunction" and the violation of their

constitutional rights is of "paramount importance." (R. 9-10). The Court explained "the quality of legal representation for children and indigent adults, as well as their due process rights would continue to decline without a preliminary injunction…[and] it is certain that a decrease in the number of assigned counsel leads to an already overburdened assigned attorney having to assume an increased workload. Furthermore … the overburdened workload affects the quality and time an assigned counsel spends on each child litigant or indigent adult's case." (R. 9-10).

Supreme Court reiterated its 2003 holding that "[t]hese litigants suffer irreparable constitutional harm when they are denied their rights to counsel, when they are unrepresented during critical periods of their proceedings where their due process and liberty rights are at stake because no assigned counsel are available to represent them, when they are represented by overburdened and inattentive assigned counsel who fail to, or are unable to, perform the basic tasks necessary to provide meaningful and effective representation, and when they must endure prolonged delays in Family and Criminal Court proceedings." (R. 9). Supreme Court found that if "injunctive relief was not issued by this Court, the constitutional rights of children litigants and indigent adults would be violated. Said children and indigent adults would be subject to inadequate counsel, which would deprive them of the opportunity to have effective counsel in critical Family

Court and Criminal Court proceedings." (R. 10). The Court directed the State and Appellants "to revisit and consider an increase in salary for assigned counsel, who represent children and indigent adults in Family Court, Criminal Court and other court proceedings in New York City, at the same rate and at the same time the federal assigned counsel receive an increase in compensation." (R. 10).

The State has not appealed the preliminary injunction order, and Appellants do "not contest this injunction to the extent it applies prospectively from the date of Supreme Court's order." (Br. 1). But that was not Appellants' position when Respondents filed their motion. At that time Appellants raised frivolous arguments in opposition to the motion, such as a purported lack of irreparable injury. As they now admit (Br. 11), they also sought and obtained extensions to negotiate a legislative settlement that never happened.

There is no basis to Appellants' appeal. Appellants ask the Court to reward them for their delaying tactics by relieving them of the obligation to pay the Court-ordered rates for assigned counsel services to children and indigent adults during the period from February 2, 2022, when Respondents filed their motion for immediate relief, and the July 25, 2022, date of Supreme Court's Order. Appellants bootstrap on their own delays of the process to mischaracterize the Order as directing "backpay." (Br. 1). The State has not taken that position. It has paid or is paying the increased compensation from and between February 2, 2022,

and July 25, 2022, for the portion of the assigned counsel services for which it asserts it is responsible under the statutes, while Appellants refuse to pay the balance.

As a preliminary dispositive matter, Appellants did not preserve their argument that relief for the period from February 2, 2022, to the date of the Order is improper, because they did not raise it in the trial court. That failure cannot be excused by their argument that Respondents did not request that relief. Contrary to Appellants' assertion, Respondents expressly sought and requested "immediate" relief to prevent the same irreparable harm that Appellants do not dispute on this appeal warrants injunctive relief. "Immediate" means immediate—starting from the date of the Motion.

Even if this Court were to consider Appellants' unpreserved argument, Supreme Court's decision to grant the challenged relief was not an abuse of discretion, and should be affirmed, for several reasons. *First*, payment for the pre-Order period is far from "wholly unrelated to the right to counsel that Supreme Court's injunction was intended to protect," as Appellants argue. (Br. 2). The opposite is true. It is integral to the protection of that right, particularly in the context of the State and the City's decades-long failure to honor their constitutional responsibility to the children and indigent adults in the City or abide by Supreme Court's 2003 order "requiring recurrent visitation" of assigned counsel

compensation, because it encourages lawyers who are currently providing the service to continue to do so and others to start.

Appellants concede Respondents submitted to the trial court abundant evidence and expert reports that reiterate that the pre-Order hourly rates for assigned counsel were too low to convince enough attorneys to perform this important work or to allow those who did adequate time to do so. (Br. 7, 10-11). Many assigned counsel were on the cusp of stopping their work or had already done so. For lawyers to start or continue, they have to know they will have a steady income that allows them to pay their basic overhead and living expenses. They also need the assurance that the State and Appellants are not incentivized to delay increases in compensation until the courts compel them to act. The challenged portion of the Order addresses those concerns. It permits assigned counsel who are already under water financially to continue. And it encourages lawyers to start, resume, or continue to provide those services. Appellants did not submit any evidence to the contrary, and do not cite any evidence to support their factual assertions on this point, which lack any basis in the record and should be stricken or ignored. (*See, e.g.*, Br. 18-20).

Second, the relief Appellants seek would have the perverse effect of creating an incentive for the State and Appellants to ignore their responsibility to protect the constitutional rights of children and indigent adults by providing adequate

compensation to assigned counsel, and for parties more generally to baselessly oppose motions for injunctive relief and drag out proceedings. Appellants should not be permitted to benefit from their own dilatory tactics. Notably, Appellants now concede Supreme Court directed them to revisit and consider an increase in salary for assigned counsel when the federal CJA rate is increased. (Br. 12). That happened on January 1, 2023, but Appellants have refused to match it. Will they now ask to be rewarded for that delay too? What message would that send to lawyers considering whether to have a career as an 18-B lawyer?

Third, even if there were any basis to Appellants' mischaracterization of the challenged relief as "retroactive backpay," their contention that such relief is improper would lack merit.

Fourth, Appellants did not preserve their new argument that Respondents lack associational standing as to the challenged portion of Supreme Court's Order, and the argument is in any event incorrect.

For these reasons, and as more fully explained below, the Court should affirm the challenged portion of the Order to protect the constitutional rights of children and indigent adults.

COUNTERSTATEMENT OF QUESTION PRESENTED

Did Supreme Court abuse its discretion in the portion of its preliminary injunction Order that directed Appellants to increase assigned counsel compensation to $158 per hour for the period from the date of Respondents' Motion for "immediate" relief to the date of the Order?

No. The trial court's Order that Appellants increase assigned counsel compensation from the date of Respondents' Motion is correct and should be affirmed.

COUNTERSTATEMENT OF FACTS

A. The Constitutional Right to Assigned Private Counsel in New York

Supreme Court explained in its 2003 order in *NYCLA I*:

> "'The true administration of justice is the firmest pillar of good government.' The courts of this state cannot be true to George Washington's conviction when the most vulnerable in our society, children and indigent adults, appear in courts without advocates to champion or defend their causes. The pusillanimous posturing and procrastination of the executive and legislative branches have created the assigned counsel crisis impairing the judiciary's ability to function. This pillar is essential to the stability of our political system. It should therefore be continually strengthened and not allowed to crumble into the detritus of a constitutional imbalance among the branches of government. Equal access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded."

196 Misc. 2d at 762 (quoting inscription on Supreme Court's entrance portico ascribed to George Washington).

The right of children and indigent adults, the most vulnerable among us, to counsel in Family Court and criminal proceedings has a long tradition in this State. It dates back to President Washington's early words quoted by Supreme Court, and is enshrined in the State's Constitution. But the "perpetual pledge [to] vigilantly guard" these individuals' right of equal access to justice has not been kept. That failure has put children and indigent adults at unreasonable risk of being deprived of their constitutional right to counsel.

Federal and State law firmly establish the right of children and indigent adults in New York to the meaningful and effective assistance of counsel. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that the Sixth and Fourteenth Amendments to the United States Constitution require the States to provide adequate legal representation to children and indigent adults charged with felonies. The Court explained:

> "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Id. at 344.

That same year, the United States Supreme Court held in *Douglas v. California*, 372 U.S. 353 (1963), that the federal constitution also requires the States to provide indigent defendants with counsel in their first appeal as of right in all criminal cases. As the Court later clarified, that includes the right to meaningful and effective assistance of appellate counsel. *See Evitts v. Lucey*, 469 U.S. 387 (1985).

New York law provides a more expansive right to counsel in criminal cases than the United States Constitution. More than eighty years before *Gideon*, New York recognized that children and indigent adults who are charged with serious

crimes have a right to counsel. In 1881, the New York Legislature adopted Criminal Procedure Law §308, which directed courts to appoint private counsel on a pro bono basis for unrepresented defendants who must respond to an indictment.

Less than two years after *Gideon*, our Court of Appeals held indigent defendants are entitled to have counsel appointed to represent them in all criminal cases, and not merely in felony prosecutions. *See People v. Witenski*, 15 N.Y.2d 392 (1965). The Court explained the "right and the duty of our courts, to assign counsel for the defense of destitute persons, indicted for crime, has been, by long and uniform practice, as firmly incorporated into the law of the State, as if it were made imperative by express enactment." *Id*. at 397. The Court found "the right to counsel must be made 'meaningful and effective' in criminal courts on every level." *Id.* at 395; *see also Hurrell-Harring v. State of New York*, 66 A.D.3d 84 (3d Dep't 2010) (reaffirming the right to effective assistance of counsel).

In 1965, our Court of Appeals also held an indigent criminal defendant "who is by statute accorded an absolute right to appeal . . . is entitled to the assignment of counsel to represent him on such appeal if he so requests." *People v. Hughes*, 15 N.Y.2d 172, 173 (1965). This requires the effective assistance of assigned appellate counsel. *See People v. Gonzalez*, 47 N.Y.2d 606 (1979).

The United States Constitution gives the right to counsel to children accused of crimes who are tried in family court rather than criminal court. In 1967, the

United States Supreme Court ruled that when a child faces a loss of liberty, he or she is constitutionally entitled to meaningful and effective assistance of counsel. *See In re Gault*, 387 U.S. 1 (1967). Five years earlier, in 1962, New York adopted the FCA. That placed this State at the forefront of the protection of children's rights. The FCA provides that each child who is the subject of a Family Court proceeding, or an appeal of a proceeding originating in Family Court, is entitled to representation by counsel of his or her choice or by an attorney for the child appointed by the State. *See* FCA § 241.

New York courts have held that indigent children who press claims in Family Court that implicate their liberty interest, such as allegations of child abuse, are also entitled to meaningful and effective legal representation by assigned counsel. *See Silverman v. Silverman*, 186 A.D.3d 123, 129 (2d Dep't 2020); *In re Payne v. Montano*, 166 A.D.3d 1342, 1345 (3d Dep't 2018); *In re Brian S.*, 141 A.D.3d 1145, 1147 (4th Dep't 2016); *In re Jamie TT*, 191 A.D.2d 132 (3d Dep't 1993).

Federal and New York law also require that indigent adults have meaningful and effective legal representation in other family proceedings. For example, the United States Supreme Court has held that an indigent adult has a right to meaningful and effective legal representation in child custody proceedings. *See Lassiter v. Dep't of Soc. Servs. of Durham Cty. N.C.*, 452 U.S. 18 (1981). And the

FCA extends the right of assigned counsel to indigent adults in a wide range of Family Court proceedings including abuse and neglect, family offense, child custody, and termination of parental rights pursuant to Social Services Law § 384-b. *See* FCA § 262.

B. New York's Assigned Counsel System

In 1965, to satisfy New York's long-standing obligation to protect the constitutional right of indigent and vulnerable litigants to effective legal representation, the Legislature adopted Article 18-B. Article 18-B requires local governments to implement systems that provide adequate legal representation for children and indigent adults charged with crimes. The New York State Bar Association report that preceded the original enactment of Article 18-B recommended that "[l]awyers who are assigned to represent indigent [parties] should be compensated sufficiently to permit them to devote the time, care and patience to the preparation and disposition of the cases which are necessary to meaningful exercise of the right to counsel." Comm. on State Legis., NYSBA Report No. 48, at 2 (1965).

In November 1965, Mayor Robert F. Wagner signed Executive Order No. 178, which designated the Legal Aid Society as the provider of legal representation to children and indigent adults under Article 18-B, and called for the establishment of an Assigned Counsel Plan. Assigned counsel were and continue to be

designated to represent clients when, for example, representation by an institutional provider such as the Legal Aid Society would present a conflict. Both Judicial Departments in New York City have established panels of assigned counsel from which attorneys are designated to represent children or indigent adults in Family, Criminal, and Supreme Court proceedings, and have created protocols for screening, certifying, and impaneling assigned counsel.

C. Supreme Court's 2003 Ruling That Inadequate Compensation for Assigned Counsel Creates an Unacceptably High Risk of Ineffective Representation and Violates the New York and United States Constitutions

In 1965, County Law 722-b set the compensation rates for assigned counsel at $15 per hour for in-court and $10 per hour for out-of-court time, with caps of $500 and $300. Those rates were increased twice over the next twenty years, the last time in 1986. As of 2001, Appellants compensated assigned counsel at the 1986 rates: $25 per hour for out-of-court and $40 per hour for in-court work, with a cap of $800 for misdemeanor and Family Court cases and $1,200 for felonies and appellate matters.

In contrast, assigned private counsel in New York's federal courts received $75 per hour for time spent in and outside court. By 2003, their compensation had increased to $90 per hour.

On February 5, 2003, Supreme Court confirmed that the assignment of counsel who are not adequately compensated to represent children and indigent adults creates a severe and unacceptably high risk that children and indigent adults receive inadequate legal representation in New York City in violation of the New York and United States Constitutions. Under New York law and its constitution, attorneys assigned to represent children and indigent adults in family court and criminal proceedings must be adequately compensated so they can devote sufficient time and resources to their cases. *NYCLA I*, 196 Misc. 2d 761 (Sup. Ct. N.Y. Cty. 2003); *see also NYCLA I*, 192 Misc. 2d at 425-26.

Accordingly, Supreme Court granted NYCLA's request for a permanent injunction and declaratory relief in *NYCLA I*. The Court concluded:

> "(1) assigned counsel are necessary; (2) there are an insufficient number of them; (3) the insufficient number results in denial of counsel, delay in proceedings, excessive caseloads, and inordinate intake and arraignment shifts, further resulting in rendering less than meaningful and effective assistance of counsel, and impairment of the judiciary's ability to function; and (4) the current assigned counsel compensation scheme—the rates, the distinction between the rate paid for in- and out-of-court work, and the monetary caps on per case compensation—is the cause of the insufficient number of assigned counsel."

196 Misc. 2d at 764. Supreme Court explained that compensation rates for assigned counsel had not been increased in seventeen years, *id.* at 764, and assigned counsel in federal courts in New York City were paid two to three times

as much as assigned counsel in state court *even though trial testimony "established that attorneys' work in state courts requires more preparation and skill.,*" *id*. at 785 (emphasis added).

Supreme Court also considered the cost of operating an attorney business in New York. It concluded that assigned counsel compensation rates must "enable the panel attorneys to pay overhead and earn a reasonable income" because "when the rate is insufficient to cover overhead and provide a profit, attorneys refuse to take cases." *Id*. at 787-88. Supreme Court issued a permanent injunction ordering the defendants to pay the interim rate of $90 per hour for in-court and out-of-court work in Criminal Court, Family Court, and Supreme Court, Criminal Term until the Legislature acted or further order of the Court. *Id*.

The following year, in 2004, the Legislature amended Article 18-B, FCA § 245, and Judiciary Law § 35 to *reduce* the compensation rates for assigned private counsel from the Court-ordered $90 per hour to $75 per hour for work on felony and family court cases and $60 per hour for work on misdemeanor cases. The Legislature also amended the statutes to increase the caps to $4,400 for felony cases and family court matters, and $2,400 for misdemeanor cases. As before, exceptions to these rates and caps were permitted only in "extraordinary

circumstances" upon application to the court. Such exceptions are rarely if ever granted. (R. 994).[2]

These rates remained in place until Supreme Court's 2022 Order. The State and the City did not comply with Supreme Court's 2003 order for "recurrent visitation" of the assigned counsel compensation rates to ensure they remain constitutionally sound.

D. This Lawsuit and Appellants' Delays

In 2021, NYCLA sued the State and the City once again, and the other Respondents joined as plaintiffs, to protect the constitutional right of children and indigent adults to meaningful and effective legal representation by assigned private counsel in Family and Criminal Court proceedings in the City ("*NYCLA II*"). Respondents filed a Complaint on July 26, 2021 and an Amended Complaint on September 30, 2021.

The pleadings explained that the assigned counsel system had again deteriorated to the point where it subjected children and indigent adults to a severe

[2] Supreme Court's orders setting the $90 per hour rate applied until the State and City "modifie[d]" the applicable laws "or further order of this Court." *NYCLA I*, 192 Misc. 2d at 437-38; *NYCLA I*, 196 Misc. 2d at 790. Even if the Legislature's subsequent decision to "modify" the laws at rates lower than the $90 per hour technically complied with the orders, the reduction was inconsistent with the spirit of the orders, including Supreme Court's specific reference to the CJA rate paid to assigned counsel in federal court as a basis for determining the rate to be paid to assigned counsel in state court.

and unacceptably high risk that meaningful and effective legal representation would not be provided. For example, children were languishing in foster care for long periods due to continuous adjournments to find assigned counsel or because counsel's heavy caseloads required adjournments of three to five months or more. (R. 998-99). Parents were denied rights to visit their children or lost custody for long periods because courts could not find assigned counsel to represent the parents. (R. 999). Overburdened attorneys who represented litigants in custody and visitation matters were less likely to prevent their clients' adversaries from moving far away. (R. 999). Juveniles faced delays in delinquency proceedings that often lengthened their time in detention facilities. (R. 999). Children were removed from the custody of their parents because the parents were unrepresented. (R. 999). Parents often were not represented during child protective investigations or timely represented at abuse and neglect hearings. (R. 999).

Indigent criminal defendants faced a substantial risk that they would have to make crucial decisions about plea offers before their attorneys had an adequate opportunity to assess the strengths and weaknesses of their cases. (R. 999). Domestic violence and family offense survivors filed petitions without the assistance of counsel, often left out crucial information that would have enabled them to obtain greater protection from the courts, and as a result their petitions were often denied or inadequate relief was provided. (R. 999). Temporary orders

of protection were not granted to indigent petitioners because their petitions were poorly drafted and counsel could not be assigned quickly enough to provide adequate representation at the early stages of the proceedings, leaving some litigants in physical danger. (R. 999). And family court proceedings were subject to lengthy delays or adjournments because there were not enough panel attorneys to assign to litigants at their first, second, or third appearances. (R. 999).

As Appellants acknowledge (Br. 7), the urgency of the crisis was widely recognized. For example, then Chief Judge DiFiore pleaded repeatedly for the Legislature to increase assigned counsel compensation rates. In a 2021 letter to then Governor Andrew Cuomo and legislative leaders, she wrote:

> "[A]ssigned counsel rolls continue to struggle across the state exacerbating already excessive caseloads, endangering the quality of legal representation for indigent litigants and contributing to the backlogs that impair the operational efficiencies of our criminal and family courts. For example, since 2013 more than a third of the lawyers serving on our attorney-for-the-child panels have dropped out of the program, leading to increased adjournments and worsening delays in many of our family courts . . . . Without appropriate compensation ensuring an adequate pool of well-qualified assigned counsel, the overall quality of our indigent representation system is diminishing and the important policy goals of many recent enactments implicating the rights of criminal defendants and children—including bail and discovery reform, Raise the Age, and the Family First Prevention Services Act—are at risk of being compromised."

(R. 123). Respondents argued Appellants and the State had a constitutional obligation "to end this crisis now, without further delay." (R. 1031).

For six months after the *NYCLA II* complaint was filed, the State and Appellants sought delay after delay to answer and to come up with a solution. Respondents gave them every opportunity to comply with their constitutional obligations and Supreme Court's orders to regularly revisit assigned counsel compensation rates. For example, on August 12, 2021, six days before Appellants' response to the Complaint was due, the State requested a two-month extension to October 14, 2021. (R. 1087). Appellants joined the request. Respondents consented, on the expectation that the defendants would be determining whether to make a proposal to honor their constitutional obligation. But the defendants did not do so. (R. 1087).

Respondents amended their complaint on September 30, 2021, to incorporate subsequent events in the continuing crisis and add plaintiffs. One week later, Respondents agreed to a request to extend defendants' time to respond yet again, from October 20, 2021 to November 17, 2021, on the assurance that there were "serious" internal discussions concerning how to resolve the litigation. (R. 1087-88). But still, the defendants made no proposals.

On November 22, 2021, the State said it expected to be able to make a settlement proposal by December 7, 2021. They asked Respondents to delay filing

their motion for a preliminary injunction until that date. Respondents agreed. (R. 1088). But on December 7, 2021, the State said it needed more time to formulate its proposal and expected to make one in early January, and no later than January 18, 2022, when the Governor would present her budget. Again, they asked Respondents to delay filing their motion for a preliminary injunction. Again, Respondents agreed. (R. 1088). And again the defendants did nothing, and the budget included nothing to meet the obligation.

On January 19, 2022, the State informed Respondents the proposal was not ready, but the State believed it would be able to provide one the following Monday, January 24, 2022. Again, Respondents agreed to delay filing their motion for a preliminary injunction (R. 1088), and then nothing was proposed. On January 24, 2022, the State said it still did not have a proposal and did not know when it would. (R. 1088). The next day, Respondents informed the State and Appellants that Respondents could not wait any longer and intended to file their motion for a preliminary injunction the following week. (R. 1089).

On February 2, 2022, Respondents filed their motion for a preliminary injunction. Respondents requested "immediate" relief. For example, Respondents argued "the compensation rate for such counsel should be increased immediately" (R. 1025), "the balance of the equities plainly favors an immediate increase" (R. 1027), and the Court should grant a "preliminary injunction requiring Defendants

immediately to compensate assigned counsel at the $158 per hour rate paid to assigned counsel in New York's Federal Courts," (R. 1046; *see also* NYSCEF Doc. No. 126 at 1).

Supreme Court incorporated that request in its February 4, 2022, Order to Show Cause, directing Appellants to "show cause . . . why an order should not be entered requiring Defendants ***immediately*** to compensate assigned counsel at the rate paid to assigned counsel in New York's Federal Courts and awarding such other and further relief as is just and proper." (R. 13 (emphasis added)).

Appellants' opposition to the motion acknowledged Respondents' request for an "immediate rate increase." (R. 1080). But Appellants continued their dilatory tactics.

On March 2, 2022, just two days before their opposition to Respondents' motion for a preliminary injunction was due, Appellants joined the State's request for a one-month adjournment to file their opposition. (Br. 11; R. 1177). State Budget Director Robert Mujica submitted an affidavit that "the Executive will negotiate increases to the rates at issue in this matter in an effort to reach Legislatively agreed upon rate increase" by April 1, 2022. (R. 1172-73). Respondents opposed the requested adjournment (R. 1079), but Supreme Court granted it. The State budget was released on April 7, 2022, and did not include any rate increase.

On April 21, 2022, Supreme Court heard oral argument on Respondents' motion for a preliminary injunction. At the argument, Appellants joined the State's request for a further delay:

> "So, what I would be asking, what the City would be asking is, that number one, the Court stay its hand and allow the parties at least a brief amount of time to report back with possible progress. But even should the Court determine it necessary to act, that the appropriate exercise of the judicial power would simply be to identify what is constitutional or unconstitutional if there is a violation, and then give the parties a chance to remedy that within whatever time the Court deems appropriate. But the actual act of rate setting we would continue to submit, is really not the province of the Court. That's really the province of the other two branches. That's why we would ask that degree of restraint and deference."

(R. 5145; Br. 11).

The trial court directed Appellants and the State to work to come up with a solution:

> "[C]ontinue to do what you're going to do, what you have committed publicly that you are going to do, and what you say that you want to do and want to achieve. So, I encourage all parties, the City and the State to go forward with that. And please, of course, include the plaintiffs when you possibly can in your negotiations."

(R. 5151-52). But Appellants and the State never proposed a solution to Respondents. Instead, their dilatory tactics prolonged the years-long crisis, further depriving children and indigent adults of their constitutional right of access to justice.

On July 25, 2022, Supreme Court granted the preliminary injunction requiring the State and Appellants to increase assigned counsel compensation in the City to $158 per hour, the CJA rate then paid to assigned counsel in New York federal courts, from February 2, 2022. (R. 10). The Court found "that severe and irreparable harm to children and indigent adult litigants would occur without an injunction" and the violation of their constitutional rights is of "paramount importance." (R. 9). The Court also directed that, "[t]o avoid being in this position again," the State must "revisit and consider an increase in salary for assigned counsel, who represent children and indigent adults in Family Court, Criminal Court and other court proceedings in New York City, at the same rate and at the same time the federal assigned counsel receive an increase in compensation." (R. 10).

Respondents now appeal the portion of the Order that granted relief from the date of the Motion through the date of the Order.

ARGUMENT

The standard for this Court's review of the challenged portion of Supreme Court's Order is abuse of discretion. "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts. Our power to review such decisions is thus limited to determining whether the lower courts' discretionary

powers were exceeded or, as a matter of law, abused." *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005); *see also Doe v. Dinkins*, 192 A.D.2d 270, 271 (1st Dep't 1993) ("It was not an abuse of discretion to grant the plaintiffs' motion for a preliminary injunction"); *Indosuez Int'l Fin., B.V. v. Nat'l Rsrv. Bank*, 304 A.D.2d 429, 430 (1st Dep't 2003) ("It was not an abuse of discretion to grant, sua sponte, a preliminary injunction pending a determination on the parties' summary judgment motions.").

I. THE CHALLEGED PORTION OF THE ORDER SHOULD BE AFFIRMED BECAUSE APPELLANTS FAILED TO PRESERVE THEIR ARGUMENT FOR APPEAL

Appellants' only challenge to the Order is that it should not apply to the period between February 2, 2022, when Respondents filed their motion, and the date of the Order. That argument should be rejected because Appellants failed to preserve it for appeal.

Respondents expressly and repeatedly requested in their motion for a preliminary injunction that the State and Appellants be required "immediately to compensate assigned counsel at the rate paid to assigned counsel in New York's Federal Courts." (*See, e.g.*, R. 1046; *see also* R. 1025 (the "compensation rate for such counsel should be increased immediately"), R. 1027 (the "balance of the equities plainly favors an immediate increase"); NYSCEF Doc. No. 126 at 1 (asking Supreme Court to order the defendants to provide that relief

"immediately")). Immediate means "[o]ccurring without delay; instant." Black's Law Dictionary 897 (11th ed. 2019). Thus, Appellants' contention that Respondents did not make this request (Br. 12) is simply incorrect. Moreover, Supreme Court's Order to Show Cause directed Appellants to show cause "why an order should not be entered requiring Defendants *immediately* to compensate assigned counsel at the rate paid to assigned counsel in New York's federal courts" and "awarding such other and further relief as is just and proper." (R. 13 (emphasis added)).

In the trial court, while Appellants opposed Respondents' motion, they did not object to the relief being "immediate," if awarded. Accordingly, they cannot object to it "now at the appellate level for the first time." *Murray v. City of New York*, 195 A.D.2d 379, 381 (1st Dep't 1993); *see also McGovern v. Mount Pleasant Cent. Sch. Dist.*, 25 N.Y.3d 1051, 1053 (2015) (arguments on appeal were not preserved for appellate review because the appellant "did not raise them at Supreme Court"); *Lopez v. City of New York*, 192 A.D.3d 634, 639 (1st Dep't 2021) ("the argument was not raised below and so is unpreserved"); *Pirraglia v. CCC Realty NY Corp*., 35 A.D.3d 234, 235 (1st Dep't 2006) (rejecting argument because it was "improperly raised for the first time on appeal, and thus not preserved for review").

II. THE CHALLENGED RELIEF WAS AN APPROPRIATE EXERCISE OF SUPREME COURT'S DISCRETION AND SHOULD BE AFFIRMED

A. The Challenged Portion of the Order Was an Essential Aspect of the Relief

The courts "clearly ha[ve] the power and should render such relief as is appropriate to the wrongs of the defendant," and "may properly shape [their] decree[s] in accordance with the equities of the case" because "[t]he power of equity is as broad as equity and justice require." *Kaminsky v. Kahn*, 23 A.D.2d 231, 237 (1st Dep't 1965).

Here the challenged portion of the Order is an important aspect of the relief requested. It is in accordance with the requirements of equity and justice. And it is appropriate to the wrongs of the State and Appellants, including their failure to protect the right of children and indigent adults to the meaningful and effective assistance of counsel in New York City's Family and Criminal Courts for decades and to heed Supreme Court's admonition in 2003 for "recurrent visitation" of assigned counsel rates.

The overwhelming and undisputed evidence presented by Respondents, much of it acknowledged by Appellants (Br. 7, 10-11), including the statements and testimony of numerous judges, retired judges, experts, assigned counsel, and others, shows the State and Appellants' decades-long failure to protect the constitutional right to assigned counsel by providing adequate compensation

created a crisis that required immediate relief. As Appellants also acknowledge (Br. 7), assigned counsel simply could not afford to provide their services and were changing their practices to other work or retiring. They had learned the hard way that the State and Appellants would not do anything unless they were ordered to do so, and even then would (as in 2004) seek to reduce the amounts they were ordered to pay and (as from 2003 to the time of the motion and beyond) ignore the Court's admonitions to act. Appellants did not submit any evidence to the contrary. They concede that they and the State failed to heed the courts' repeated direction to revisit and increase assigned counsel compensation when federal assigned counsel receive rate increases. (Br. 12).

Members of the judiciary urged immediate action. On January 25, 2022, then Chief Administrative Judge Marks submitted written testimony before a joint legislative hearing that the New York government "can ill afford to wait *any longer* to adjust [assigned counsel] compensation to keep pace with inflation. Failure to do so has reduced the number of lawyers willing to take on these assignments, which are vital to the health of our criminal justice and Family Court Systems." (R. 165 (emphasis added); *see also* R. 36 (January 27, 2022 Letter from New York City Family Court Judges Association to Governor) ("Across our five courthouses, *every day* there are literally hundreds of new cases requiring the assignment of counsel. Over the last two years, there were often days when only

one or two lawyers were on th[e] [assigned counsel] list. . . . *Every day*, we are forced to make interim rulings when one side may be represented but the other is not because the pay rate for assigned counsel is too low.") (emphasis added)). As Appellants acknowledge (Br. 10-11), experts also opined that if the crisis was not rectified by an immediate rate increase, the City's assigned counsel system would continue to deteriorate into the future. (*See, e.g.*, R. 341 (Steinkamp Aff. ¶ 24) ("Without adequate compensation, assigned counsel attorneys are unable or unwilling to give their cases the attention they deserve. This can lead to . . . fewer attorneys participating in the assigned counsel system [and] significantly worse outcomes for defendants . . . .")).

In this context, it was an abundantly sound exercise of the Court's discretion to increase compensation from the date of the motion. That encourages assigned counsel to remain in the system, encourages others to provide the service, and discourages the State and the City from further recalcitrance. Notably, Appellants' co-defendant, the State, does not challenge the Order and has paid or is paying the portion of the increased assigned counsel pay from the date of the motion for which the State asserts it is responsible under the statutes.

In contrast, a reversal of the challenged portion of the Order would create a perverse incentive for the State and Appellants to continue to delay and obstruct any lawsuit or motion to protect the constitutional right to counsel, and any parties

more generally to oppose meritorious motions for injunctive relief and to drag out proceedings.

From the time Respondents commenced this case on July 26, 2021, and then when they sought injunctive relief on February 2, 2022, Appellants and the State continually sought adjournments, assuring Respondents or the trial court that they were working on a resolution. In the meantime, children and indigent litigants continued to suffer constitutional injury. Assigned counsel are cost-strapped due to the substandard compensation they have received for years. They struggle to fund necessary continued litigation for their clients. The challenged portion of the Order alleviates that burden. On the other hand, if actual or potential assigned counsel observe that government-induced delays in litigation seeking to hold the government accountable will inhibit their ability to receive timely pay increases in the future, they will decline to join or continue on assigned counsel panels. Removing that uncertainty for existing panel members and potential new members directly protects the constitutional right to meaningful and effective counsel in the future. It was particularly appropriate for Supreme Court to use its discretion for that purpose, which also prevented Appellants from benefiting from their dilatory tactics here, when Appellants do not even dispute on this appeal that the immediate injunctive relief Respondents sought was necessary to cure serious and ongoing constitutional deprivations. (Br. 1-11).

It is telling that Appellants concede, as they must, that the Order also directed them to revisit and consider an increase in salary for assigned counsel when the federal rate is increased. (Br. 12). That happened on December 29, 2022, when the Administrative Office of the United States Courts announced an increase in the federal assigned counsel rate to $164 per hour, effective January 1, 2023. *See* Memorandum Regarding Implementation of Increases to Panel Attorney Hourly Rates and Case Compensation Maximums Under the Criminal Justice Act, Hon. Roslynn R. Mauskopf, Administrative Office of the United States Courts (Dec. 29, 2022); *see also* Guide to Judiciary Policy, Volume 7A (CJA Guidelines) § 230.16, *available at* https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_16.

Yet Appellants have informed Respondents that "the City has no plan to increase the hourly rates or case caps for assigned counsel." Will they now ask to be rewarded for that delay too? Will they ever act before they are ordered to do so? What message will that send to lawyers considering whether to continue or start a career as an 18-B lawyer? The constitutional right of children and indigent adults to counsel will be safeguarded only if assigned counsel have assurances that they will continue to be compensated at a constitutionally sound rate.

Other evidence Respondents submitted with their motion further underscored that the challenged portion of the Order is a necessary remedy for the

constitutional crisis, not backpay for a performance claim for ineffective assistance of counsel. For example, practitioners explained that absent an immediate pay increase, they would be forced to resign and seek positions that offer a living wage with predictable and timely increases. (*See, e.g.*, R. 586 (Tirgary Aff. ¶ 20) (explaining that assigned counsel, in light of the uncertainty surrounding whether and when they will receive increased compensation, will continue to resign to take positions where they are guaranteed "regular increases and a consistent rate of pay"); R. 590 (Tirgary Aff. ¶ 30) (assigned counsel "cannot be expected to go another day without a rate increase" because they "have families to support and expenses to pay" and without an immediate rate increase they will be forced to resign); R. 551 (Seger Cobos Aff. ¶ 18) (without an immediate rate increase, "I cannot afford even the most basic professional support staff and legal tools" and "[m]y practice cannot run effectively"); R. 617 (Zitman Aff. ¶ 15) ("As I sit here today, I have been actively seeking out employment and exploring other opportunities available to me. I do this not because I want to – I absolutely do not – but because I have no choice . . . I must make a compromise that will allow me to survive, and continue to provide for my children's needs which, absent a livable wage increase, will be impossible on the panel."); R. 543 (Playter Aff. ¶ 25) ("I have had to utilize my savings to cover office overhead deficits. This predicament caused me to seriously consider not recertifying for the Panel this past December.

I simply cannot afford to remain on this Panel without a wage increase.")). Appellants themselves concede "the number of attorneys participating in the 18-b Program has decreased, which practitioners as well as current and former Family and Criminal Court judges have attributed to the low rates of compensation." (Br. 7).

B. The Challenged Portion of the Order is Not "Retroactive Backpay" and is in Any Event Appropriate

Appellants mischaracterize the challenged portion of the Order as "retroactive backpay" that is "wholly unrelated to the right to counsel that the Supreme Court's injunction was intended to protect." (Br. 2, 15). That is incorrect, and it was entirely within Supreme Court's discretion to award it, as explained above.

In any event, Appellants' cases do not support their argument that Supreme Court should not have awarded relief to address a constitutional claim of irreparable injury for the period between the date Respondents filed their request for an order to show cause and the date Supreme Court decided the motion. (Br. 15-17).[3] The cases Appellants cite to support their contention that a preliminary

[3] For example, Appellants cite *Purvi Enterprises, LLC v. City of New York*, 62 A.D.3d 508, 509 (1st Dep't 2009), for the proposition that injunctive relief should not be directed toward "past conduct." (Br. 16). But the injunction sought there was to cure an earlier breach of the parties' zoning agreement, not an ongoing

injunction cannot award compensatory relief are also inapposite because here, the increased compensation is the means to protect the constitutional rights of children and indigent litigants and prevent irreparable injury to them, not to enrich the attorneys themselves. As Appellants acknowledge, Respondents "do not . . . argue that they have a right to increased compensation independent from the constitutional and statutory rights to counsel of their members' clients." (Br. 18).

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constitutional crisis for which the Supreme Court granted relief designed to prevent future irreparable harm.

Similarly inapposite are Appellants' cases concerning requests for injunctions to remedy "economic" harm (Br. 16-17), and not the ongoing irreparable infringement of children's and indigent adults' constitutional rights addressed by Supreme Court here. *See, e.g.*, *In re Armanida Realty Corp. v. Town of Oyster Bay*, 126 A.D.3d 894, 895 (2nd Dep't 2015) (because alleged injuries were due to a dangerous condition at the subject premises, they "were all economic in nature" and did not constitute irreparable injury); *New York City Off-Track Betting Corp. v. New York Racing Ass'n, Inc.*, 250 A.D.2d 437, 442 (1st Dep't 1998) (concluding "there has been no showing that [plaintiff-]OTB will be irreparably injured" by defendant's refusal to simulcast OTB's races "since the injury alleged is pecuniary in nature, and may be adequately compensated by money damages"); *St. Paul Fire & Marine Ins. Co. v. York Claims Serv., Inc.*, 308 A.D.2d 347, 349 (1st Dep't 2003) (trial court improperly enjoined defendant to return money that was allegedly converted because that was "the ultimate relief [plaintiff] requested in its summons--return of the money allegedly converted by [defendant]").

Appellants' other cases are also inapposite. *See, e.g.*, *In re 144-80 Realty Assocs. v. 144-80 Sanford Apartment Corp.*, 193 A.D.3d 723 (2d Dep't 2021) (affirming injunction to protect property rights without considering whether relief was retroactive); *Bass v. WV Pres. Partners, LLC*, 209 A.D.3d 480 (1st Dep't 2022) (preservation of status quo required tolling the exclusive purchase period for an apartment and enjoining defendants from selling the apartment, but not considering whether pre-Order relief was appropriate); *see also Exch. Bakery & Rest., Inc. v. Rifkin*, 245 N.Y. 260 (1927) (century-old case concerning property rights).

Nor do Supreme Court's decisions in *NYCLA I* support Appellants' argument that what they mischaracterize as "retroactive backpay" does not protect the right to counsel. (Br. 18-20). *NYCLA I* did not address that question. But *NYCLA I* explained that, "Although injunctive relief will financially impact defendants, these fiscal concerns are heavily outweighed by the irreparable harm that the most vulnerable in our society will continue to suffer if permanent injunctive relief is denied," 196 Misc. 2d at 789, and equity required the Court to be "mindful of the past conduct of the State and City who have for many years ignored New York City's assigned counsel crisis." *Id.* at 784. The State and the City have continued to ignore the assigned counsel crisis even after that order, and have failed to heed Supreme Court's admonition for recurrent visitation of the rate of compensation for assigned counsel.

C. Appellants Waived Their Standing Argument, and in Any Event Respondents Have Associational Standing as to the Challenged Portion of the Order

Appellants waived their argument that Respondents do not have standing to seek relief for the period from the filing of their motion to the date Supreme Court issued its decision by failing to raise it in their answer (R. 1115) or a pre-answer motion to dismiss. *See* CLPR 3211(e); *US Bank Nat'l Ass'n v. Nelson*, 36 N.Y.3d 998, 999 (2020) ("Defendants failed to raise standing in their answers or in pre-answer motions as required by CPLR 3211(e) and accordingly . . . the defense was

waived."); *CUCS HDFC v. Aymes*, 191 A.D.3d 522, 523 (1st Dep't 2021) ("Petitioners waived any defense that respondent lacks standing . . . by failing either to raise such affirmative defenses in their reply to the counterclaim or to move to dismiss the counterclaim on those grounds"). Appellants also failed to argue lack of standing in opposition to Respondents' motion for a preliminary injunction. As explained above, that means their standing argument was not preserved for this appeal. *See McGovern*, 25 N.Y.3d at 1053; *Pirraglia*, 35 A.D.3d at 235.

Beyond that, this Court's decision in *NYCLA I* shows there is no merit to Appellants' contention that Respondents lack standing to assert a claim on behalf of children and indigent litigants for relief that starts on the date Respondents filed their motion, rather than on the date the Court grants the relief. (Br. 21-26). This Court found a "'substantial relationship' between those whose rights are threatened and [NYCLA]" because the "organization and its panel attorney members have an inherent interest in providing effective representation for, and protecting the rights of, their present and prospective clients." 294 A.D.2d 69, 75-76 (1st Dep't 2002). That remains true of NYCLA today, and that interest is shared by the other Respondents. (*See* R. 978-80). This Court also found in *NYCLA I* that it was "readily apparent that the clients themselves are not in a position to protect their own rights," 294 A.D.2d at 76, and that is still true today. And this Court found a

"systemic problem resulting in widespread violation of the right to effective representation" that could be more effectively vindicated by attorney-led litigation than through individual remedies. *Id*.

At bottom, Appellants' argument is based on their mischaracterization of the nature of the relief the Supreme Court granted. They argue Respondents can receive what Appellants wrongly assert is retroactive "backpay" only if they assert performance-based ineffective-assistance-of-counsel claims on behalf of their members. (Br. 21-22). That is incorrect. Respondents have sought a remedy for a constitutional crisis. As discussed above, and contrary to Appellants' argument, the challenged relief provides a clear "adjudicative benefit" to protect the constitutional right to counsel and Respondents have standing to seek that. (Br. 25).

The authorities Appellants cite for the proposition that individuals can sue for deficient representation are not to the contrary. (Br. 23 (citing *People v. Baldi*, 54 N.Y.2d 137 (1981), *Judith L.C. v. Lawrence Y.*, 179 A.D.3d 616, 617 (1st Dep't 2020), and *Miller v. King*, 149 A.D.3d 942, 943 (2d Dep't 2017))). This Court has already found in *NYCLA I* that it is "readily apparent" that children and indigent litigants "themselves are not in a position to protect their own rights to receive effective assistance from attorneys not overburdened with excessive caseloads." 294 A.D.2d at 76. "Further, the only organizations likely to step forward . . . are

attorney organizations." *Id.* This Court also rejected the notion that children and indigent litigants can protect themselves with post-judgment remedies like those sought in the cases Appellants cite. *Id.* It is simply untenable for Respondents to argue that children and indigent litigants who already lack the means to afford effective counsel have the means to sue their lawyers for ineffective assistance.[4]

Appellants' other authorities concerning standing also do not support their argument. *Soc'y of Plastics Indus. v. Cty. of Suffolk*, 77 N.Y.2d 761, 773 (1991) (Br. 24), addresses the "general prohibition on one litigant raising the legal rights of another," but Appellants acknowledge that third-party and associational standing are exceptions to that general principle. *See Grant v. Cuomo*, 130 A.D.2d 154, 159 (1st Dep't 1987), *aff'd*, 73 N.Y.2d 820 (1988) ("[W]e cannot ignore the obvious fact that if organizations of this kind are denied standing, the practical effect would be to exempt from judicial review the failure of the defendants, *here conceded*, to comply with their statutory obligations.") (emphasis added). In *In re Mental Hygiene Legal Serv. v. Daniels* (Br. 24-25), the plaintiff did not make a third-party standing argument. 33 N.Y.3d 44, 51 (2019) (an organization may assert associational standing if "at least one of its members would have standing to

[4] Assigned counsel representing indigent litigants in appeals and postconviction proceedings receive the same low rates of compensation as counsel at trial and face the same challenges effectively to represent their clients. (*See, e.g.*, R. 433 (Borenstein Aff. ¶ 3); R. 455 (Calderon Aff. ¶¶ 2-3, 10); R. 534 (Nivin Aff. ¶ 1); R. 563 (Steinberg Aff. ¶ 2)).

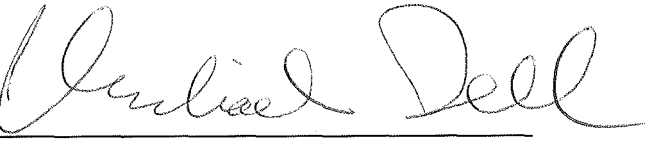
sue, . . . [the claim] is representative of the organizational purposes it asserts and . . . the case would not require the participation of individual members"). And *Hurrell-Harring* (Br. 24) did not concern standing. 15 N.Y.3d at 19.

CONCLUSION

The challenged portion of the Order should be affirmed.

Dated: New York, New York
April 19, 2023

Respectfully submitted,

By: 

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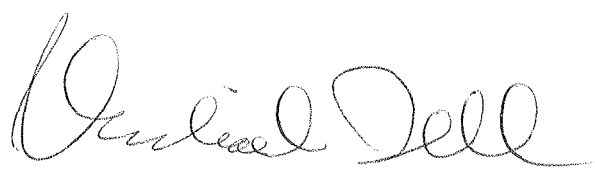

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