NEW YORK STATE BAR ASSOCIATION

Report of the New York City Bar Association - Constitutional Cap Proposal

June 2024

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

COVER NOTE

On September 8, 2023, the New York City Bar Association published a report entitled *REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS* (the "Report").[1]

On December 6, 2023, the New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair) endorsed the Report.

On January 8, 2024, the New York County Lawyers Association (Adrienne Koch, President) endorsed the Report.

On January 9, 2024, Governor Hochul expressed her support for repealing the constitutional cap on Supreme Court Justices.

On January 10, 2024, the Acting Supreme Court Judges Association (Gerry Lebovits, President) endorsed the Report.

Additionally, the Fund for Modern Courts supports repealing the constitutional cap on Supreme Court Justices and utilizing a "more modern and progressive approach to providing appropriate judicial resources" whereby the Unified Court System would "study and develop a system of analyzing the actual work-load of the courts with the goal of apportioning state judicial resources in a less arbitrary way than the antiquated system established in New York State Constitution."[2]

The New York State Bar Association's Committee on the State Constitution (Christopher Bopst, Chair) has agreed to consider endorsing the Report at its next meeting.

The New York City Bar Association respectfully requests that the New York State Bar Association's House of Delegates endorse the Report and treat this issue as a legislative priority for the 2024 legislative session.

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[1] https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/constitutional-cap-on-judges. The Report is also attached and fully incorporated herein.

[2] https://moderncourts.org/programs-advocacy/judicial-article-of-nys-constitution/resources-constitutional-limit-number-justices-supreme-court/

TITLE PAGE

REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS

NEW YORK CITY BAR ASSOCIATION
Council on Judicial Administration (Fran Hoffinger, Chair)
Subcommittee on the Constitutional Cap (Hon. Andrea Masley, Chair and Presenter)

LISTING OF MEMBER PAGE(S)

On September 8, 2023, the New York City Bar Association published a report entitled *REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS* (the "Report").

Lead Committee:
Council on Judicial Administration, Fran Hoffinger, Chair

Constitutional Cap Sub-Committee Members: Robert Calinoff; Maria Park; Hon. Steven L. Barrett; David H. Sculnick; James P. Chou; Steven B. Shapiro; Michael Graff; Hon. Philip Straniere; Hon. Andrea Masley (Subcommittee Chair); Raymond Vanderberg; Robert C. Newman; Daniel Wiig

The report was supported by the following City Bar committees: Alternative Dispute Resolution Committee (Philip Goldstein, Chair); Civil Court Committee (Sidney Cherubin, Chair); Criminal Courts Committee (Carola Beeney and Anna G. Cominsky, Co-Chairs); State Courts of Superior Jurisdiction Committee (Amy Carlin, Chair)

The Report is also endorsed by:

New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair).

New York County Lawyers Association (Adrienne Koch, President).

Acting Supreme Court Judges Association (Gerry Lebovits, President).

ACKNOWLEDGMENTS PAGE(S)

The City Bar's Constitutional Cap Sub-Committee began under the leadership of Council on Judicial Administration (CJA) Chair Steve Kayman. Hon. Carolyn E. Demarest and Michael Regan also chaired the CJA during the work of the Sub-Committee. The City Bar wishes to thank the City Bar's Librarian Richard Tuske and Administrative Assistant Dionie Kuprel. The Committee is most grateful to the following for sharing their expertise, advice, and/or data: Hon. Shahabuddeen Ally, Alex D. Corey, Esq., Prof. Peter J. Galie, Jonathan Goeringer, Esq., Gloria Smyth-Gottinger, Betty Hooks, Hon. Roslynn R. Mauskopf, Karen Milton, Esq., Prof. Dan Rabinowitz, Joan Vermeulen, Esq., and Hon. John Zhou Wang. The Report would not have been completed without the assistance of student interns Liam Clayton, Emily Friedman, Max Gerozissis, Fiona Lam, Samil Levin, Andrew Lymm, Max Sano, Sarah Shamoon, and Kristen Sheehan. The City Bar thanks editors Juanita Bright, Esq., Jamie N. Caponera, Esq., Hannah E. Reisinger, Esq, and Maria Reyes Vargas, Esq. Claudia Blanchard of Calinoff & Katz LLP provided Word expertise without which we would not have finished the Report.

Acknowledgement and thanks are extended to those who took the time to review, discuss and ultimately endorse the Report: the New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair); the Board of the New York County Lawyers Association (Adrienne Koch, President); and the Acting Supreme Court Judges Association (Gerry Lebovits, President).

INTRODUCTION

The effective and efficient administration of justice in the State of New York's Unified Court System requires adequate judicial resources to serve the needs of litigants that appear before those courts. Such resources include: a robust judiciary consisting of qualified jurists committed to the rule of law, adequate staffing of judicial and administrative clerks, personnel necessary to carry out the courts' functions, and basic supplies to operate the courts' facilities. While a wide array of factors play into the sufficiency of the courts' resources and ability to serve the people, including budgetary constraints, political will, and the need for legislative action, at a fundamental level, the number of judges and the means by which New York State determines that figure is a major consideration—*i.e.*, is the current calculation method yielding a sufficient number of judges necessary to provide litigants the quality of justice they deserve and to handle the court's ever-expanding caseload in a state that has increasingly become the world's forum of choice for complex commercial litigation? As discussed below, this question is particularly important with respect to the New York State Supreme Court, (collectively, the "Court" or the "Supreme Court"), not only by reason of its status as New York's trial court of general jurisdiction, but because the existing means by which the Supreme Court bench is populated impacts the number of judges and the administration of justice in other courts within the Unified Court System, including what are often called the "People's Courts"—the Family Court, Civil Court and local criminal courts.

In New York, the state constitution (the "Constitution") prescribes the number of judges for the Supreme Court. New York State is divided into thirteen judicial districts; each county within New York City is a single district, and the remaining districts contain multiple counties. Since 1846, Article VI of the Constitution has provided for a population-based formula allotting up to one elected Supreme Court judge—known as a "justice"—to a certain number of people. Since 1963, the formula has been one justice for every 50,000 people in the state, calculated by district. Based on data from the 2020 United States Census reflecting a population of 20.2 million, the New York State Legislature may authorize the Court to have up to 401 elected justices throughout the state. Currently, the Legislature has authorized only 364 elected justices to sit on the New York State Supreme Court bench—a number that more closely corresponds to the state's population in 1999: 18.2 million people.

This reduced number of judges, however, is confounding, since every indication is that the constitutional formula has proven woefully inadequate and outdated. Indeed, while the Supreme Court bench has 364 *elected* justices,[3] in reality, it is populated by an *additional* 317 judges– a number that has gone as high as 396 in 2012. These are judges that OCA has transferred from lower and other courts pursuant to constitutional provisions authorizing these appointments on a "temporary and emergency" basis. Thus, the number of acting justices is almost the same as the number of elected Supreme Court Justices and has often *exceeded* the number of elected Justices since 2008. Moreover, the designation of these "acting" justices has been anything but temporary,

[3] This number will increase by 3 in 2024 following the enactment of Senate Bill 7534, Chp. 749, which was signed into law by Governor Hochul on December 22, 2023.

and once so designated, it is rare, if ever, that an acting justice is returned to his or her original judicial office.

This practice of increasing the aggregate number of justices through the *ad hoc* appointment of judges from other courts puts squarely into question the efficacy of the constitutional formula and demonstrates that, at a minimum, the state needs a significant number of additional authorized Supreme Court justice seats. It also raises at least two concerns: (1) the depletion of resources from the other courts from which acting Supreme Court justices are drawn has a ripple effect, and ultimately impairs the administration of justice for litigants in those other courts; and (2) the current practice of *ad hoc* appointments—originally intended to serve as a provisional stopgap—has become a *de facto* permanent solution for what is effectively a perpetual emergency and runs afoul of both the original intent of the constitutional provision vesting OCA with this authority, as well as the constitutional provision granting citizens the right to choose, by election, those jurists who sit in the Supreme Court.

Unanimously, the participants in the courts—judges, litigants, and practitioners—have long voiced concerns with the ever-increasing and crushing dockets in the Supreme Court and the lower and other courts, and the resulting impact on the pace at which cases move through the judicial system. The situation has become even more critical in light of the impact of the COVID pandemic's economic fallout on the courts—specifically, a $300 million cut to the judiciary budget, which resulted in OCA's decision to (1) effectively terminate 46 certificated judges across the state in one fell swoop[4] and (2) reduce other resources and personnel, including the elimination of judicial hearing officers ("JHO") and certain law clerks. These cuts in judicial resources promise to tax an already over-burdened judiciary beset with backlogs[5] preceding COVID, such as long waits for decisions on motions or trial dates when both parties are ready.

The City Bar proposes eliminating the population-based cap in light of, among other things, (1) the over 300 acting Supreme Court judges assigned to supplement the 364 elected Supreme Court justices since 2008, (2) increasing caseloads, (3) frustration with the slow disposition of cases, (4) more than 60 Supreme Court justices routinely certificated as needed and qualified to serve up to three additional two year terms after turning 70 years of age, and (5) the decreasing number of jury trials in all courts because of the paucity of available judges. The City Bar also offers a practical alternative to determine the appropriate number of Supreme Court justices and judges based on meaningful metrics: the weighted caseload analysis. The Report reaches these recommendations based on (1) an analysis of the existing constitutional and statutory structure of

[4] Since the termination of these certificated judges in October 2020, twenty have been reinstated to the bench.

[5] "Backlog is a term reserved for a court's older cases. A standard definition of backlog involves cases that are pending beyond a certain time frame. For courts that have adopted time standards, backlogs are identified as the share of cases exceeding time standards (e.g., cases more than 365 days old)." National Center for State Courts, Trends in State Courts 2022, at 95, https://www.ncsc.org/__data/assets/pdf_file/0024/80358/Trends-2022.pdf. For the purposes of this report, a "backlog" occurs when more cases are filed in a certain period than are disposed during that period, which can be quantified as a "clearance rate." *Id*. at 94. Another helpful measure is the time to disposition measured from filing to resolution. *Id*. Likewise, the age of a pending case is a helpful measure of the days since filing, but that too is not what we mean in this report when we use the term "backlog." *Id.*

the courts and administration of the courts and (2) consideration of the Legislature's duty to authorize all judicial seats and its obligation to apportion those seats to achieve justice for all. It also draws on the methods of determining the number of judges utilized by the federal courts and 49 other states. The Report is organized in six parts:

First, the Report provides an overview of the relevant courts in the state's byzantine and often bewildering Unified Court System. A basic understanding of these various courts and how the number of jurists for such courts is determined is a requisite underpinning of the Report's analysis. Indeed, such analysis includes an assessment of the impact on these other courts' resources resulting from the transfers from lower courts to supplement the number of constitutionally elected justices. The analysis also addresses how the appointment of justices to the Supreme Court's four Appellate Divisions affects the Court's trial court bench and creation of new "temporary" seats when the Presiding Justice declares to the governor that the Department is "unable to dispose of its business within a reasonable time."

Second, the Report then discusses the historical origins of the constitutional formula for determining the number of Supreme Court justices—the primary subject of this Report's evaluation—and lays the groundwork for the City Bar's rejection of the formula's relevance and effectiveness today. The Report also examines the existing but unused constitutional provisions that contemplate mechanisms for the Legislature to revisit the existing methodology in recognition of the notion that the calculus should evolve and adapt to society's changing needs.

Third, the Report proceeds to assess the current burden on the Supreme Court, the significant increases in the number of cases filed in the court over the years, and the factors that have led to this drastic expansion. This part of the Report also discusses how the increasing burden on the Supreme Court bench is compounded by constitutional provisions and practices that affect the number of justices, such as the appointment of judges to the Appellate Divisions of the Supreme Court from the pool of elected Supreme Court justices in the trial courts, the mandatory retirement age, and the certification of judges. As part of this discussion, the Report also touches upon various reasons why the caseload of all courts within the Unified Court System has dramatically increased.

Fourth, the Report then examines the measures that OCA has implemented to address the need for additional justices by reassigning judges from other courts, including a discussion of the statutory basis for such action. The Report also examines the historical use of these makeshift measures, which were apparently necessitated by Legislative inaction in not authorizing the maximum number of Supreme Court seats to the cap and raises questions as to whether the current utilization of these temporary measures is in the best interests of justice and New York's citizens.

Fifth, the Report then proceeds to analyze the adverse impact of these emergency measures on the other courts from which OCA has drawn acting justices. Based on anecdotal

evidence and some publicly available data, the Report concludes that the lower and other courts, such as the New York City Civil Court, are unfairly deprived of much-needed judges to preside over cases, which ultimately inures to the detriment of the litigants in those courts.

Sixth, and finally, the Report explores possible solutions by first comparing practices in 49 state courts and the federal courts, examining the methods that these jurisdictions and systems use to set the number of judges within their respective judicial systems, and then offering non-constitutional and constitutional-based proposals.

I. EXECUTIVE SUMMARY

In sum, the Report examines and addresses the need for the New York State Legislature (the "Legislature") to provide the People of the State of New York with a sufficient number of judges to do justice.[6] Throughout its history, New York State has struggled with an insufficient number of judicial seats necessitating stopgap measures that have only resulted in a complicated, overworked, and confusing court system that fails to provide justice to all. The dire need for additional judges overall is a function of the chronic failure to provide adequate judicial resources to New York's Unified Court System. And while the reasons underlying such failure are manifold and multilayered, on a fundamental level, the lack of judicial resources stems largely from the constitutionally prescribed method by which the New York State Legislature determines the number of justices that can be elected to the state's trial court of general jurisdiction—the New York State Supreme Court. Since enacted in 1846, and as amended in 1961, Article 6 of the New York State Constitution, has set the number of Supreme Court seats—which are elected positions—for geographically-defined areas known as judicial districts by using a solely population-based ratio—i.e., one justice per 50,000 people. The effect of such a formula is to cap the number of legislatively authorized Supreme Court seats within each judicial district, leaving the Legislature powerless to authorize additional seats to meet the growing and particular needs of the courts in such districts. Thus, the purely population-based "constitutional cap" has proven over-simplistic, outdated, and unworkable. Even worse, it has created a ripple effect that has impacted the entire New York Court system. Specifically, to address the lack of resources at the Supreme Court level, the Office of Court Administration has long resorted to adopting makeshift measures that involve designating judges from other courts to sit on the Supreme Court on an "acting" basis. Not only has this "robbing Peter to pay Paul" approach depleted these other courts of judicial resources, it has created a *de facto* permanent and large class of "Acting Supreme Court Justices," sitting in a court other than the one to which they were either elected by the people or appointed by the relevant appointing authority.

[6] The Report does not address court merger about which much has been written. *See* New York City Bar, *2020 New York State Legislative Agenda*, (January 7, 2022), https://www.nycbar.org/issue-policy/issue/new-york-state-2022-legislative-agenda (listing "Simplify New York State's Courts through restructuring" as a topic). Nor does the Report address whether judges should be elected or appointed or both.

In this era of metrics, the people of New York State are entitled to a modern, flexible, evidence-based method of assessing the state's judicial needs, as is the case in many other states and the federal judiciary. To that end, **the Report makes the following recommendations** which should be enacted and implemented for the proper and adequate administration of justice in New York State's courts.

- First, A Constitutional Amendment to Eliminate the Cap: It is undisputed that the constitutional cap on the number of elected Supreme Court Justices must be eliminated. The Report thus proposes that the constitution be modified to remove the cap in its entirety, and add language that requires the Legislature to consider whether to change the number of Supreme Court justices in any judicial district at least once every ten years. The Report's comparison to 49 other states and the federal courts shows that such analysis is performed even more regularly including once a year or biannually.

- Second, Enabling Legislation: The Legislature must codify a mandatory regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges—at least every ten years when there is a new census, has been consistently breached, with the Legislature increasing the number of judges only on an ad hoc basis. The City Bar does not recommend how often such an evaluation must be performed in New York State, as such a decision should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts.

- Third, Annual Reporting: The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and he thus has a significant role in this process. His statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the number of judges in each court and request changes when appropriate. Requesting changes in the number of judges is not currently required and has not been the practice. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats.

- Fourth, Establish Assessment Methodology: The Legislature must adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations. The City Bar's review of the procedures for

determining the right number of judges in 49 states and the federal judiciary is attached.

- Fifth, Transparency: Information on such newly-adopted systems should be published. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

Sixth, Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available. For example, since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts with support from appropriate professionals, and change the number accordingly.

II. BACKGROUND

See above.

III. ANALYSIS AND PRESENTATION OF RECOMMENDATIONS

The recommendations are listed above and appear in full at pp. 56 – 60 of the Report. The first one – repealing the constitutional cap – requires a constitutional amendment. If the Legislature passes legislation that repeals the cap in the 2024 session, then the same bill must pass the Legislature in the 2025/26 session before being placed on the ballot for voters' approval.

The remaining recommendations are also directed at the Legislature and do not require a constitutional amendment. These recommendations urge the Legislature to codify a mandatory regular systematic assessment of the courts' specific judicial needs; to require annual reporting from the Chief Administrative Judge that includes an analysis of the number of judges in each court and a request for changes when appropriate; to adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations; to transparently publish such newly-adopted systems and analyses; and to, in the interim, concerning courts not subject to a constitutional cap, continually assess the judicial needs in those courts and change the number accordingly.

Legislative advocacy is anticipated this session, beginning with support for A.5366 (Bores)/S.5414 (Hoylman-Sigal), a CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY proposing amendments to article 6 of the constitution, in relation to the number of supreme court

justices in any judicial district. This bill would repeal the cap. In addition to endorsing the Report, the City Bar recommends that the New York State Bar Association support A.5366/S.5414.

IV. CONCLUSION

In the almost 60 years since 1962, when the constitutional formula changed to one judge per 50,000 people and the creation of the civil and criminal lower courts, there has been no change in the calculus of Supreme Court justices. Despite the constitutional obligation to reconsider the need for more justices every ten years based upon newly collected census data, the failure to increase the number of Supreme Court positions in light of the significant interim population growth has forced OCA to implement ad hoc mechanisms in order to provide the jurists needed to actually carry out the critical obligations of the third branch of government. Based on the assignment of at least 300 such acting justices for over ten years, the time has come to lift the cap and begin calculating the number of judges in all of New York's courts using actual data and modern methods of evaluation.

We urge the New York State Bar Association to endorse the Report and all recommendations contained therein and to support A.5366/S.5414 so that, in the first instance, the constitutional cap on judges can be repealed. The Report's remaining legislative recommendations are likewise critical so that a reliable and effective process for assessing judicial needs in Supreme Court is in place once the cap is lifted.

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street, New York, NY 10036
212.382.6600 | www.nycbar.org

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WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS

EXECUTIVE SUMMARY

This report (the "Report") examines and addresses the need for the New York State Legislature (the "Legislature") to provide the People of the State of New York with a sufficient number of judges to do justice.[1] Throughout its history, New York State has struggled with an insufficient number of judicial seats necessitating stopgap measures that have only resulted in a complicated, overworked, and confusing court system that fails to provide justice to all. The dire need for additional judges overall is a function of the chronic failure to provide adequate judicial resources to New York's Unified Court System. And while the reasons underlying such failure are manifold and multilayered, on a fundamental level, the lack of judicial resources stems largely from the constitutionally prescribed method by which the New York State Legislature determines the number of justices that can be elected to the state's trial court of general jurisdiction—the New York State Supreme Court. Since enacted in 1846, and as amended in 1961, Article 6 of the New York State Constitution, has set the number of Supreme Court seats—which are elected positions—for geographically-defined areas known as judicial districts by using a solely population-based ratio—i.e., one justice per 50,000 people. The effect of such a formula is to cap the number of legislatively authorized Supreme Court seats within each judicial district, leaving the Legislature powerless to authorize additional seats to meet the growing and particular needs of the courts in such districts. Thus, the purely population-based "constitutional cap" has proven over-simplistic, outdated, and unworkable. Even worse, it has created a ripple effect that has impacted the entire New York Court system. Specifically, to address the lack of resources at the Supreme Court level, the Office of Court Administration has long resorted to adopting makeshift measures that involve designating judges from other courts to sit on the Supreme Court on an "acting" basis. Not only has this "robbing Peter to pay Paul" approach depleted these other courts of judicial resources, it has created a *de facto* permanent and large class of "Acting Supreme Court Justices," sitting in a court other than the one to which they were either elected by the people or appointed by the relevant appointing authority.

In this era of metrics, the people of New York State are entitled to a modern, flexible, evidence-based method of assessing the state's judicial needs, as is the case in many other states and the federal judiciary. To that end, the Report makes the following recommendations which

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necessary at a given time to fulfill all judicial obligations. The Council's review of the procedures for determining the right number of judges in 49 states and the federal judiciary is attached.

- Fifth, Transparency: Information on such newly-adopted systems should be published. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

- Sixth, Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available. For example, since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts with support from appropriate professionals, and change the number accordingly.

INTRODUCTION

The effective and efficient administration of justice in the State of New York's Unified Court System requires adequate judicial resources to serve the needs of litigants that appear before those courts. Such resources include: a robust judiciary consisting of qualified jurists committed to the rule of law, adequate staffing of judicial and administrative clerks, personnel necessary to carry out the courts' functions, and basic supplies to operate the courts' facilities. While a wide array of factors play into the sufficiency of the courts' resources and ability to serve the people, including budgetary constraints, political will, and the need for legislative action, at a fundamental level, the number of judges and the means by which New York State determines that figure is a major consideration—*i.e.*, is the current calculation method yielding a sufficient number of judges necessary to provide litigants the quality of justice they deserve and to handle the court's ever-expanding caseload in a state that has increasingly become the world's forum of choice for complex commercial litigation? As discussed below, this question is particularly important with respect to the New York State Supreme Court, (collectively, the "Court" or the "Supreme Court"), not only by reason of its status as New York's trial court of general jurisdiction, but because the existing means by which the Supreme Court bench is populated impacts the number of judges and the administration of justice in other courts within the Unified Court System, including what are often called the "People's Courts"—the Family Court, Civil Court and local criminal courts.

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This reduced number of judges, however, is confounding, since every indication is that the constitutional formula has proven woefully inadequate and outdated. Indeed, while the Supreme Court bench has 364 *elected* justices,[2] in reality, it is populated by an *additional* 317 judges– a number that has gone as high as 396 in 2012. These are judges that OCA has transferred from lower and other courts pursuant to constitutional provisions authorizing these appointments on a "temporary and emergency" basis. Thus, the number of acting justices is almost the same as the number of elected Supreme Court Justices and has often *exceeded* the number of elected Justices since 2008. Moreover, the designation of these "acting" justices has been anything but temporary, and once so designated, it is rare, if ever, that an acting justice is returned to his or her original judicial office.

This practice of increasing the aggregate number of justices through the *ad hoc* appointment of judges from other courts puts squarely into question the efficacy of the constitutional formula and demonstrates that, at a minimum, the state needs a significant number of additional authorized Supreme Court justice seats. It also raises at least two concerns: (1) the depletion of resources from the other courts from which acting Supreme Court justices are drawn has a ripple effect, and ultimately impairs the administration of justice for litigants in those other courts; and (2) the current practice of *ad hoc* appointments—originally intended to serve as a provisional stopgap—has become a *de facto* permanent solution for what is effectively a perpetual emergency and runs afoul of both the original intent of the constitutional provision vesting OCA with this authority, as well as the constitutional provision granting citizens the right to choose, by election, those jurists who sit in the Supreme Court.

Unanimously, the participants in the courts—judges, litigants, and practitioners—have long voiced concerns with the ever-increasing and crushing dockets in the Supreme Court and the lower and other courts, and the resulting impact on the pace at which cases move through the judicial system. The situation has become even more critical in light of the impact of the COVID pandemic's economic fallout on the courts—specifically, a $300 million cut to the

[2] This number will increase by 3 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

judiciary budget, which resulted in OCA's decision to (1) effectively terminate 46 certificated judges across the state in one fell swoop[3] and (2) reduce other resources and personnel, including the elimination of judicial hearing officers ("JHO") and certain law clerks. These cuts in judicial resources promise to tax an already over-burdened judiciary beset with backlogs[4] preceding COVID, such as long waits for decisions on motions or trial dates when both parties are ready.

The Council proposes eliminating the population-based cap in light of, among other things, (1) the over 300 acting Supreme Court judges assigned to supplement the 364 elected Supreme Court justices since 2008, (2) increasing caseloads, (3) frustration with the slow disposition of cases, (4) more than 60 Supreme Court justices routinely certificated as needed and qualified to serve up to three additional two year terms after turning 70 years of age, and (5) the decreasing number of jury trials in all courts because of the paucity of available judges. The Council also offers a practical alternative to determine the appropriate number of Supreme Court justices and judges based on meaningful metrics: the weighted caseload analysis. The Report reaches these recommendations based on (1) an analysis of the existing constitutional and statutory structure of the courts and administration of the courts and (2) consideration of the Legislature's duty to authorize all judicial seats and its obligation to apportion those seats to achieve justice for all. It also draws on the methods of determining the number of judges utilized by the federal courts and 49 other states. The Report is organized in six parts:

> First, the Report provides an overview of the relevant courts in the state's byzantine and often bewildering Unified Court System. A basic understanding of these various courts and how the number of jurists for such courts is determined is a requisite underpinning of the Report's analysis. Indeed, such analysis includes an assessment of the impact on these other courts' resources resulting from the transfers from lower courts to supplement the number of constitutionally elected justices. The analysis also addresses how the appointment of justices to the Supreme Court's four Appellate Divisions affects the Court's trial court bench and creation of new "temporary" seats when the Presiding Justice declares to the governor that the Department is "unable to dispose of its business within a reasonable time."

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[3] Since the termination of these certificated judges in October 2020, twenty have been reinstated to the bench.

[4] "Backlog is a term reserved for a court's older cases. A standard definition of backlog involves cases that are pending beyond a certain time frame. For courts that have adopted time standards, backlogs are identified as the share of cases exceeding time standards (e.g., cases more than 365 days old)." National Center for State Courts, Trends in State Courts 2022, at 95, https://www.ncsc.org/__data/assets/pdf_file/0024/80358/Trends-2022.pdf. For the purposes of this report, a "backlog" occurs when more cases are filed in a certain period than are disposed during that period, which can be quantified as a "clearance rate." *Id*. at 94. Another helpful measure is the time to disposition measured from filing to resolution. *Id.* Likewise, the age of a pending case is a helpful measure of the days since filing, but that too is not what we mean in this report when we use the term "backlog." *Id.*

Second, the Report then discusses the historical origins of the constitutional formula for determining the number of Supreme Court justices—the primary subject of this Report's evaluation—and lays the groundwork for the Council's rejection of the formula's relevance and effectiveness today. The Report also examines the existing but unused constitutional provisions that contemplate mechanisms for the Legislature to revisit the existing methodology in recognition of the notion that the calculus should evolve and adapt to society's changing needs.

Third, the Report proceeds to assess the current burden on the Supreme Court, the significant increases in the number of cases filed in the court over the years, and the factors that have led to this drastic expansion. This part of the Report also discusses how the increasing burden on the Supreme Court bench is compounded by constitutional provisions and practices that affect the number of justices, such as the appointment of judges to the Appellate Divisions of the Supreme Court from the pool of elected Supreme Court justices in the trial courts, the mandatory retirement age, and the certification of judges. As part of this discussion, the Report also touches upon various reasons why the caseload of all courts within the Unified Court System has dramatically increased.

Fourth, the Report then examines the measures that OCA has implemented to address the need for additional justices by reassigning judges from other courts, including a discussion of the statutory basis for such action. The Report also examines the historical use of these makeshift measures, which were apparently necessitated by Legislative inaction in not authorizing the maximum number of Supreme Court seats to the cap and raises questions as to whether the current utilization of these temporary measures is in the best interests of justice and New York's citizens.

Fifth, the Report then proceeds to analyze the adverse impact of these emergency measures on the other courts from which OCA has drawn acting justices. Based on anecdotal evidence and some publicly available data, the Report concludes that the lower and other courts, such as the New York City Civil Court, are unfairly deprived of much-needed judges to preside over cases, which ultimately inures to the detriment of the litigants in those courts.

Sixth, and finally, the Report explores possible solutions by first comparing practices in 49 state courts and the federal courts, examining the methods that these jurisdictions and systems use to set the number of judges within their respective judicial systems, and then offering non-constitutional and constitutional-based proposals.

PART I: THE CURRENT LANDSCAPE OF NEW YORK'S UNIFIED COURT SYSTEM

The New York State Constitution provides that "there shall be a unified court system" that consists of the Courts of Appeals, the Supreme Court including the Appellate Divisions of

the Supreme Court, the Court of Claims, the County Court, the Surrogate's Court, the Family Court, the courts of civil and criminal jurisdiction of the City for New York, and such other courts that the Legislature decides.[5] New York State's Constitution thus prescribes a multilayered judicial structure, which over time has evolved into a byzantine system that is incomprehensible to most practitioners. The following passage illustrates the point markedly:

> "On the trial court side, we have eleven separate courts including a court of general civil and criminal jurisdiction, courts of limited civil and general criminal jurisdiction, courts of special jurisdiction, a court of limited civil jurisdiction only, a court of limited criminal jurisdiction only, and courts of both limited civil and limited criminal jurisdiction. Some of these courts sit across that state, some sit only in New York City, some sit only outside New York City; some sit only on Long Island; some exercise all the jurisdiction they are granted; some exercise only a portion of their jurisdiction. Most of these courts exercise only trial jurisdiction; some, however, exercise both trial and appellate jurisdiction. Some of the judges of these courts are elected; some are appointed. And of those that are appointed, some are appointed by the governor, some by the mayor of the municipality in which they serve, and some by a city's common council. Some judges serve fourteen-year terms; some ten-year terms; some nine-year terms; some six-year terms; and some four-year terms. Some judges never sit on the court for which they are chosen; some are chosen to sit in two or three courts at once. In some courts, court parts are not even presided over by judges but, instead, by quasi-judicial hearing officers."[6]

Accordingly, to evaluate the adequacy and allocation of judicial resources, a basic understanding of New York's complex judicial system and how judges are assigned to the various courts in keeping with the constitution is essential.[7]

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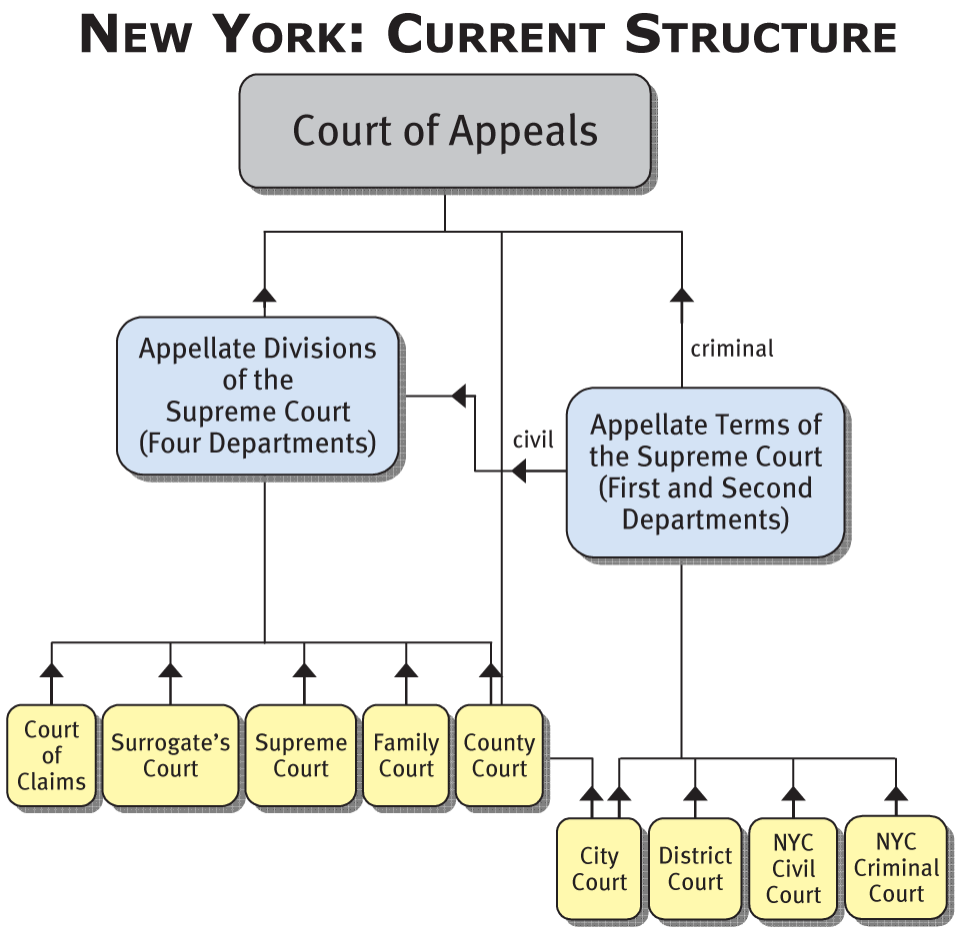
[5] N.Y. Const. Art. VI, §1.

[6] L. Daniel Feldman and Marc C. Bloustein, New York State's Unified Court System 81, New York's Broken Constitution: The Governance Crisis and The Path to Renewed Greatness (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

[7] See Exhibit 2 for the statutory source of each judicial seat.

The following diagram illustrates the structure of the courts described above:[8]



A. Courts with Jurisdiction Across All of New York[9]

1. The Court of Appeals of the State of New York. The Court of Appeals sits at the apex of the Unified Court System, serving as New York State's highest and last court of resort. The Court of Appeals' jurisdiction is generally limited to the review of questions of law.[10] Composed of the Chief Judge and six Associate Judges, each appointed to a 14-year

[8] The Fund for Modern Courts, *Structure of the Courts* (2022), https://moderncourts.org/programs-advocacy/judicial-article-of-nys-constitution/structure-of-the-courts/. (Also appears as Exhibit 1).

[9] N.Y. Const. Art. VI, § 1; N.Y. Jud. Law §2, "Courts of Record".

[10] N.Y. Const. Art. VI, § 3(a).

term,[11] the highest court may seek to increase its composition on a temporary basis by way of a request to the governor certifying the need and gubernatorial designation.[12]

2. The Supreme Court. Bearing a name that confusingly suggests that it is the state's court of last resort, the Supreme Court is New York's trial court of general jurisdiction in law and equity.[13] Under the constitution, the judges sitting on this court are known as "Justices" and are elected to 14-year terms[14] from one of 13 judicial districts.[15] A Supreme Court Justice may serve until December 31 of the year in which he or she reaches age 70, and may thereafter perform duties as a Supreme Court Justice if OCA certifies that the Justice's services are necessary to expedite the business of the Court, and that he or she is physically and mentally competent to fully perform the duties of such office.[16] Certification is valid for a two-year term and may be extended for up to two additional two-year terms,[17] but in no event beyond December 31 in the year in which he or she reaches age 76.[18] In addition to OCA's certification process, judges seeking to continue performing judicial functions in New York City after reaching 70 years of age appear before the New York City Bar Association's Judiciary

[11] N.Y. Const. Art. VI, § 2(a).

[12] N.Y. Const. Art. VI, § 2(b) ("Whenever and as often as the court of appeals shall certify to the governor that the court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the governor shall designate such number of justices of the Supreme Court as may be so certified to be necessary, but not more than four, to serve as associate judges to the court of appeals.").

[13] N.Y. Const. Art. VI, § 7(a).

[14] The fourteen-year term was the result of a compromise in 1867 where the debate was between lifetime tenure, allowing judges to devote themselves to their work, and a fixed term. Looking Back on a Glorious Past 1691-1991, NYS Bar Association Journal citing Judge Francis Bergan, The History of the New York Court of Appeals, 1847-1932 (Columbia University Press, 1985). The fourteen-year term was selected based on "the statistical average of the actual number of years that had been served by federal judges and others who had life tenure." *Id*.

[15] N.Y. Const. Art. VI, § 6(c).

[16] N.Y. Const. Art. VI, § 25(b).

[17] In light of COVID and alleged budget cuts, however, 46 certifications were denied. *See* Heather Yakin, *To meet budget cut goals, New York courts won't extend terms for senior judges*, Record Online (Oct. 7, 2020), https://www.recordonline.com/story/news/2020/10/02/state-courts-wont-extend-terms-this-year-for-judges-over-age-70/5870683002/; Ryan Tarinelli, *'Teetering on the Edge of Total Dysfunction': Older Judges Being Forced From Bench Sue NY Court Officials, Warn of Chaos*, Law.com (Nov. 5, 2020), https://www.law.com/newyorklawjournal/2020/11/05/older-judges-being-forced-from-bench-sue-ny-court-officials/?slreturn=20201103170944.

[18] N.Y. Const. Art. VI, § 25(b).

Committee.[19] Currently, there are 364 judicial seats authorized by the Legislature for election,[20] while the constitutional cap allows for 401 judicial seats. Certificated judges are not counted toward the cap.

3. The Supreme Court, Appellate Division. Technically a part of the Supreme Court, the Appellate Divisions hear appeals from judgments or orders from the Supreme Court,[21] Surrogate's Court,[22] Appellate Term of the Supreme Court,[23] Family Court,[24] Court of Claims,[25] and County Courts.[26] While it is an intermediate court between the Supreme Court and the Court of Appeals, as a practical matter, the Appellate Divisions are the last court of resort for the vast majority of cases, as leave is required for appeals to proceed to the Court of Appeals, with limited exceptions.[27] The four Appellate Divisions hear cases from specified geographic districts in the state.[28] The constitution sets the number of Appellate Division judges—also known as justices—who are appointed by the governor and selected from among the elected Supreme Court justices.[29] Thus, to fill a constitutional seat on the Appellate Division, the judge first must be an elected Supreme Court justice.[30] Acting justices, who are designated and note elected to the Supreme Court do not qualify. The constitution also permits temporary assignments and appointments of justices to the Appellate Division among the departments by agreement of the presiding justices of the four departments, initiated by the presiding justice of the department in need.[31] These "temporary" judges must also first be elected as Supreme Court justices. In 2020, prior to COVID, there were four presiding justices, 20 justices authorized by the constitution, 30

[19] See e.g., letter from Chief Administrative Judge Marks, July 12, 2021, inviting views on 18 Judges from The First and Second Departments who applied for certification to begin in 2022. The American Lawyer, New Crop of Older New York Judges seeking approval to stay on bench (July 19, 2021). For a description of the process, see Facing the Future at 70, Judge Wonders if Certification is an Option, NYLJ, April 14, 2003.

[20] N.Y. Jud. Law §140-a. See Exhibit 12 for changes to N.Y. Jud. Law §140-a. This number will increase to 367 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[21] N.Y. CPLR 5701 (1999).

[22] N.Y. SCPA § 2701(1) (1967).

[23] N.Y. CPLR 5703 (1963).

[24] N.Y. Family Ct. Act § 1111 (1969).

[25] N.Y. Ct. Cl. Act § 24 (1979).

[26] N.Y. CPLR 5701 (1999).

[27] Thomas R. Newman et. al., *Clerk's Annual Report for the Court of Appeals*, New York Law Journal, Law.com (May 3, 2022), https://www.law.com/newyorklawjournal/2022/05/03/clerks-annual-report-for-the-court-of-appeals/.

[28] For a map of the four Appellate Divisions, see Exhibit 3.

[29] N.Y. Const. Art. VI, § 5; N.Y. Family Ct. Act § 1111; N.Y. CPLR Art. 57; N.Y. Ct. Cl. Act § 24.

[30] N.Y. Const. Art. VI, §§ 4(b), (c).

[31] N.Y. Const. Art. VI, § 4(g).

"temporary" justices[32] and seven certified justices,[33] for a total of 61.[34] As Supreme Court justices, 54 of the 61 Appellate Division justices are part of the 364 judicial seats authorized by the Legislature; the seven certificated justices do not count towards the constitutional cap.

4. The Supreme Court, Appellate Terms. The Appellate Terms are part of the Supreme Court and hear appeals from lower courts. Sitting only in the First[35] and Second Departments,[36] the Appellate Terms in New York City hear appeals from New York City Civil Court and convictions in New York City Criminal Court.[37] The First Department's Appellate Term covers New York and Bronx Counties.[38] Each of the two Appellate Terms in the Second Department is composed of not less than three but not more than five elected Supreme Court justices and each of the two Appellate Terms has a presiding justice.[39] Currently, each Appellate Term consists of four Supreme Court justices and a presiding justice.[40] "The Appellate Terms in the Second Department are comprised of two separate courts . . . One court serves the 2nd, 11th and 13th Judicial Districts (Kings, Queens and Richmond Counties), and the other the 9th and 10th Judicial Districts (Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess Counties)."[41] "In the Second Department, the Appellate Terms also have jurisdiction over appeals from civil and criminal cases originating in District, City, Town and Village Courts, as well as non-felony appeals from the County Court."[42] All of the Appellate Term judges are designated by the Chief Administrator of the Courts with the approval of the presiding justice of the appropriate Appellate Division.[43] In addition to their appellate duties, each Appellate Term

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[32] N.Y. Const. Art. VI, § 4(e) provides that: "In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease."

[33] N.Y. Const. Art. VI, § 25(b) allows elected judges who reach 70 years of age to apply to the Administrative Board to be certificated for two more years of additional service up to a total of 6 years. "[T]he services of such judge or justice [must be] necessary to expedite the business of the court and [] he or she is mentally and physically able and competent to perform the full duties of such office." *Id.*

[34] *See* Exhibit 5, NYS Unified Court System 2022 Judicial Positions of Total Number of Judges.

[35] 22 NYCRR § 640.1.

[36] 22 NYCRR § 730.1.

[37] N.Y. Const. Art. VI, §§ 8(a), (d).

[38] N.Y. Const. Art. VI, § 4(a).

[39] N.Y. Const. Art. VI, § 8(a).

[40] New York State Unified Court System, *Lower Appellate Courts: First Judicial Department Appellate Term, Supreme Court* (Aug. 17, 2020), https://www.nycourts.gov/courts/appterm_1st.shtml.

[41] Supreme Court of the State of New York Appellate Term, Second Judicial Department, *About the Court: An Overview of the Appellate Terms*, https://www.nycourts.gov/courts/ad2/appellateterm_aboutthecourt.shtml.

[42] New York State Unified Court System, *Lower Appellate Courts* (June 9, 2014), https://www.nycourts.gov/courts/lowerappeals.shtml.

[43] *Id.*

judge continues to preside over a Supreme Court part. As Supreme Court justices, the Appellate Term justices' seats are part of the 364 judicial seats authorized by the Legislature, except for the presiding justice in the ninth and tenth judicial district who is certificated.

5. The Family Court of the State of New York. The Family Court is a specialized court that handles issues such as child abuse and neglect, adoption, child custody and visitation, domestic violence, juvenile delinquency, paternity, and child support.[44] It is a statewide court from which appeals go to the Appellate Division.[45] Within New York City, the Family Court has concurrent jurisdiction with the New York Criminal Court for family offenses.[46] Each county in the state must have at least one Family Court judge.[47] As of January 2023, the Family Court Act authorizes 150 Family Court judges statewide,[48] of which 60 judges are in New York City.[49] Family Court judges outside of New York City are elected to ten-year terms.[50] Family Court judges in New York City are appointed by the mayor of New York City for ten-year terms.[51] In 2022, 57 appointed Family Court judges sat in New York City Family Court[52] with the remaining three Family Court judges assigned to other courts.[53] In New York City, elected Civil Court judges have occasionally been temporarily assigned to Family Court as acting Family Court judges.[54] Some judges from other courts have also volunteered to assist during COVID.[55] In 2021, certificated judges were assigned to Family Court as well.[56] Family Court judges are assisted by JHOs and nonjudicial officials such as child support magistrates who have at times outnumbered the judges.

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[44] N.Y. Const. Art. VI, §§ 7(a), 13(b), 13(c).

[45] N.Y. Family Ct. Act § 1111; N.Y. Const. Art. VI, § 4.

[46] N.Y. Const. Art. VI, § 15(c).

[47] N.Y. Const. Art. VI, § 13(a).

[48] This number will increase by 13 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[49] N.Y. Family Ct. Act §§121, 131. This number will increase to 63 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[50] N.Y. Const. Art. VI, § 13(a).

[51] *Id.*

[52] NYS Unified Court System 2022 Judicial Positions. *See* Exhibit 5.

[53] *Id.*

[54] The Family Court Judicial Appointment and Assignment Process, (Dec. 2020) https://s3.amazonaws.com/documents.nycbar.org/files/2020790-FamilyCourtJudicialAppointmentProcess.pdf.

[55] Thirty-five judges from other courts volunteered for Family Court. New York County Lawyer's Association, *Message from Chief Judge Janet DiFiore* (Dec. 28, 2020), https://www.nycourts.gov/whatsnew/pdf/December28-CJ-Message.pdf.

[56] Ryan Tarinelli, n*early 20 older judges return after having been ousted from the bench*, New York Law Journal (June 18, 2021), https://www.law.com/newyorklawjournal/2021/06/18/nearly-20-older-judges-return-after-having-been-ousted-from-the-bench/.

> "Reading Section 121 [of the Family Court Act], an attorney, a party, or a member of the general public, i.e., any individual who is not experienced in Family Court practice, would assume that the court is served exclusively by the specified number of judges. However, as an integral part of the Unified Court system with flexible assignment and transfer policies, the judge presiding in a Family Court part may well be an individual other than one of the 56 Section 121 judges. Further, "Raise the Age" legislation has established "Adolescent Offender" parts which are endowed with Family Court authority, but may or may not be assigned a Section 121 judge. Last, for many years there has been a proliferation of support magistrates and referees, non-judicial adjudicatory officials who exercise Family Court jurisdiction (see the Original Commentary at pp. 57-58). Reality has superseded Section 121."[57]

There is no constitutional cap on the number of Family Court judges; the New York State Legislature determines the number of seats.[58] But there is no regular assessment of the number of judges necessary to meet the demands of the Family Court and its litigants. Like the Supreme Court, the Legislature arbitrarily changes the number of Family Court judges. Until 2022's increase of seven Family Court judges, the last increase occurred in 2014,[59] following the advocacy of the New York State Coalition for More Family Court Judges, a group of over 100 organizations.[60] Twenty-five new judicial seats were created in 2014.[61] Before that, the Family Court saw no increases in the number of its judges for 24 years.[62]

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[57] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2019). "As of 2003, for example, the New York City Family Court employed a complement of 72 non-judge adjudicating officials, compared to 47 judges. …The case migration to non-judge officials has also eroded Article One and Article Two's [of the Family court Act] significance; the carefully constructed statutory provisions governing judges, including qualifications, election or appointment procedures, and the authority to issue process do not apply to referees or support magistrates." Merril Sobie, Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121.

[58] N.Y. Const. Art. VI, § 13(a).

[59] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2014).

[60] For list of 100 members of the New York State Coalition for More Family Court Judges, *see* https://moderncourts.org/programs-advocacy/access-to-justice/family-court-reform/.

[61] *State to Strengthen Family Court Bench*, NIAGARA GAZETTE (June 20, 2014), https://www.niagara-gazette.com/news/local_news/courts-state-to-strengthen-family-court-bench/article_cae6bd35-06d1-52be-addc-0c5613653ec9.html.

[62] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2014).

In 2022, 446,022 new petitions were filed in Family Court while there were 441,038 dispositions,[63] which compares to 578,346 filings and 570,826 dispositions in 2019.[64] While the number of filings and dispositions may be down, the continuing unaddressed need persists. In his 2020 report to the Chief Judge, Jeh Johnson, criticized the "demeaning cattle-call culture" of the Family Court, and other courts, and "dehumanizing effect it has on litigants, and the disparate impact of all this on people of color," caused by the "under-resourced, over-burdened court system."[65] As a result of backlogs after the pandemic, trials are scheduled eight months after the scheduling date compared to a four month delay before the pandemic.[66] "And for the court users themselves, the delay in case resolution could mean a parent is unable to see their children for an extended period of time or a child's future remains uncertain."[67] Sadly, "litigants in Family Court feel so disheartened by persistent delays that they eventually fail to appear at all."[68] Accordingly, "increasing the number of Family Court judges will address unconscionable delays in resolving cases, avoiding longer periods of stay in foster care for children, longer periods of uncertainty in custody cases, longer time for resolution of juvenile delinquency cases, longer periods of anxiety for domestic violence victims, and protracted periods of the stress, instability and trauma implicit in the cases heard in Family Court."[69]

6. Surrogate's Court of the State of New York. Each county within the state has a Surrogate's Court, which handles all probate and estate proceedings.[70] Each Surrogate's Court has one judge—referred to as a "surrogate"—except for New York and Kings Counties, which each has two surrogates.[71] In some counties, a judge may discharge the duties of surrogate, county court, and family court.[72] Surrogates are elected to ten-year terms, except those in the

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[63] 2022 Annual Report New York Unified Court System, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf, at 66.

[64] 2019 Annual Report New York Unified Court System, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf, at 40.

[65] Johnson, Jeh, Oct. 1, 2020, Special Advisor Equal Justice Report at 54, https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

[66] Kaye, Jacob, Queens has Fewest Family Court Judges per capita-a New Bill Could Change That, Queens Daily Eagle May 24, 2023. https://queenseagle.com/all/2023/5/24/queens-has-fewest-family-court-judges-per-capita-a-new-bill-could-change-that.

[67] *Id.*

[68] Johnson, Jeh, Oct. 1, 2020, Special Advisor Equal Justice Report at 56, https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

[69] Franklin H. Williams Judicial Commission of the New York State Court Report on New York City Family Courts, December 19, 2022, at 8. https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf.

[70] N.Y. SCPA § 201(3) (1980).

[71] N.Y. Const. Art. VI, § 12(a); N.Y. Jud Law § 179.

[72] "The Legislature may at any time provide that outside the city of New York the same person may act and discharge the duties of county judge and surrogate or of judge of the family court and

five counties within New York City where the term is 14 years.[73] There is no cap on the number of Surrogate's Court judges. The New York State Legislature determines the number of seats.[74] There are 32 elected surrogate judges plus 50 additional judges with multi-court assignments which include sitting part-time in Surrogate's Court.[75] 15 Acting Supreme Court Justices come from Surrogate's Court.[76] Surrogate's Court decisions are appealed to the Supreme Court, Appellate Division.[77] In 2022, 146,396 cases were filed in Surrogate's Court with 114,394 dispositions as compared to 141,237 filings and 117,976 dispositions in 2019.[78]

7. The New York State Court of Claims. The Court of Claims' stated function is to adjudicate civil lawsuits in nonjury trials against the State of New York, as well as certain quasi-governmental authorities.[79] The governor appoints Court of Claims judges with the advice and consent of the Senate.[80] The constitution authorizes eight Court of Claims judges but the number may be increased without limitation by the Legislature and reduced to no less than six.[81] At present, 86 Court of Claims judgeships with nine-year terms have been authorized and the judges appointed pursuant to the Court of Claims Act.[82] But only 15 judges of the 86 actually hear cases against New York State in the Court of claims on a full time basis and 8 on a part-time basis.[83] The additional 59 judges appointed to the Court of Claims have been designated as acting Supreme Court justices to sit in Supreme Court, 32 of which sit in New York City.[84] In 2022, 1,251 claims were filed against the state and 1,403 claims were resolved.[85] Court of Claims decisions are appealed to the Supreme Court, Appellate Division.[86]

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surrogate, or of county judge and judge of the family court, or of all three positions in any county." (N.Y. Const. Art. VI, § 14.

[73] N.Y. Const. Art. VI, § 12(c).

[74] N.Y. Const. Art. VI, § 12(a).

[75] See NYS Unified Court System 2022 Judicial Positions, Exhibit 5.

[76] See Detailed Acting Supreme Court Judges and their Statutory Count, Exhibit 8.

[77] N.Y. SCPA § 2701. *See* map of courts, Exhibit 3.

[78] 2022 Annual Report New York Unified Court System at 66, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf; 2019 Annual Report New York at 40, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[79] N.Y. Const. Art. VI, § 9.

[80] *Id.*

[81] *Id.*

[82] N.Y. Ct. Cl. Act § 2.

[83] Irene Sazzone, Court of Claims Clerk, interview May 5, 2023. See Exhibit 5.

[84] *See* Exhibit 5, NYS Unified Court System 2022 Judicial Positions of total number of judges in 2022.

[85] 2022 Annual Report New York Unified Court System at 65.

[86] N.Y. Ct. Cl. Act § 24.

B. Courts Limited to New York City Jurisdiction

1. New York City Civil Court. Established in 1962 by amendment to the constitution,[87] the New York City Civil Court hears legal claims for damages up to $50,000.[88] Civil Court judges also hear small claims matters limited by a damages cap of $10,000,[89] Each borough (county) within New York City has a Civil Court, but it is considered a single citywide court.[90] Judges are elected for ten-year terms.[91] The Civil Court Act authorizes 131 judgeships for the Civil Court,[92] but only 120 seats[93] have actually been funded.[94] The other 11 slots are authorized by the 1982 Session laws, chapter 500, but were never filled.[95] Appeals go to the New York State Supreme Court, Appellate Term.[96] In 2022, of 120 elected Civil Court judges, 48 are sitting in Civil Court,[97] the remaining 30 are assigned to NYC Criminal Court or Family Court,[98] and 42 were designated as Acting Supreme Court Justices and reassigned to hear Supreme Court cases.[99] There is no constitutional cap on the number of Civil Court judges. The Legislature determines the number of seats.[100] Because the New York Constitution does not allow for Civil Court judges to be certificated, they must retire at age 70, even if they have been serving as Acting Supreme Court Justices. In 2022, 347,295 new cases[101] were filed in Civil Court, not including Housing Court, with 202,403 dispositions compared to 244,235 filings and 184,059 dispositions in 2019.[102]

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[87] *Cox v Katz*, 30 A.D.2d 432, 433-35 (1st Dep't 1968) (The court held that neither § 1 nor the equal protection rights of the voters were violated by 1968 N.Y. Laws ch. 987. The court also ruled that that there was no constitutional requirement that judges be allocated solely on the basis of population), *aff'd* 22 N.Y.2d 969 (1968), *cert denied* 394 U.S. 919 (1969).

[88] N.Y. Const. Art. VI, § 15(b); N.Y. NYC Civil Ct. Act § 202 (1984). The jurisdictional amount was $25,000 until 2021, when New Yorkers voted to increase it to $50,000.

[89] N.Y. NYC Civil Ct. Act § 1801 (2022). The housing part, where Housing Court judges decide residential landlord-tenant disputes, is a component of the NYC Civil Court. N.Y. NYC Civil Ct. Act § 110 (2022).

[90] N.Y. Const. Art. VI, § 15(a).

[91] *Id.*

[92] N.Y. NYC Civil Ct. Act § 102-a(1).

[93] This number will increase to 2 judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[94] See NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[95] New York State Unified Court System 29th Annual Report:2006 at 2 n. d.

[96] N.Y. Const. Art. VI, § 8(a), (d).

[97] New York State Unified Court System, *Judges of the Civil Court of the City of New York*, https://nycourts.gov/courts/nyc/civil/profiles.shtml.

[98] www.nycourts.gov/courts/nyc/civil/judges.shtml

[99] Acting Supreme Court Justices and their Statutory Court 2007 to 2022, Exhibit 8.

[100] N.Y. NYC Civil Ct. Act § 102 (1963).

[101] Cases include civil cases, small claims and commercial claims, not housing claims.

[102] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41 https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

2. New York City Housing Court. The Housing Court, a component of the Civil Court, was created in 1972 by amendment of the New York City Civil Court Act.[103] "The Housing Court handles almost all the residential landlord-tenant cases in New York City, including eviction cases filed by landlords, repair cases filed by tenants and by the City of New York, illegal lockout cases filed by tenants, and cases complaining of harassment."[104] Housing Court judges are appointed by the Deputy Chief Administrative Judge for five-year terms.[105] Fifty judges serve[106] in New York City Housing Court.[107] Appeals are heard by the Appellate Term of either the First or Second Department.[108] There is no cap on the number of Housing Court judges.[109] In 2022, the Housing Court received 126,498 new cases and disposed of 79,425 cases compared to 193,523 filings and 221,534 dispositions in 2019.[110]

3. The New York City Criminal Court. Created in 1962, the Criminal Court handles misdemeanors and lesser offenses, and conducts arraignments and preliminary hearings in felony cases.[111] The court includes an arraignment part, an all-purpose part, a felony waiver part, a trial part, a problem-solving court, and a summons part.[112] The New York City Criminal

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[103] N.Y. NYC Civil Ct. Act § 110. The Housing Court began with 16 hearing officers (later reclassified as judges) with three-year terms assigned to four boroughs, excluding Richmond. Dennis E. Milton, *Comment: The New York City Housing Part: New Remedy for an Old Dilemma*, 3 FORDHAM URB. L.J. 267 (1975). In 1997, there were 35 Housing Court Judges. Chief Justice Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, *Housing Court Program: Breaking Ground*, 1 (Sept. 1997), https://nycourts.gov/COURTS/nyc/housing/pdfs/housing_initiative97.pdf.

[104] New York City Housing Court at nycourts.gov, Welcome. https://www.nycourts.gov/COURTS/nyc/housing/welcome.shtml.

[105] See N.Y.S. Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[106] N.Y. NYC Civil Ct. Act § 110(i) authorizes the court but does not state the number of seats.

[107] New York State Unified Court System, *Housing Court Judges* (May 13, 2022), https://www.nycourts.gov/courts/nyc/housing/judges.shtml. In its January 2018 report to Chief Judge DiFiore, the Special Commission on the Future of the New York City Housing Court, recommended increasing the number of judges by at least 10, in addition to providing each Housing Court judge with two law clerks. Special Commission on the Future of the New York City Housing Court, *Report to the Chief Judge*, 22 (Jan. 2018), http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/housingreport2018_0.pdf. With the 50 Housing Court Judges handling a "surreal" 7,000 cases per judge per year, this increase is "not simply requested but mandated." *Id.*

[108] N.Y. NYC Civil Ct. Act § 1701 (1963).

[109] N.Y. NYC Civil Ct. Act § 110(f).

[110] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[111] N.Y. Const. Art. VI, § 15(c); N.Y. NYC Crim. Ct. Act § 31 (1996).

[112] Chief Justice Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, *The New York State Courts: An Introductory Guide*, 4 (2000), https://web.archive.org/web/20160304023432/http://nycourts.gov/reports/ctstrct99.pdf.

Court Act authorizes the Mayor of the City of New York to appoint 107 judges,[113] each serving a ten-year term.[114]

As of 2022, 38 judges sit in Criminal Court, while sixty-nine are assigned to the Supreme Court as Acting Supreme Court Justices.[115] Meanwhile, Civil Court judges are routinely assigned to Criminal Court. JHOs, who are retired judges appointed by the Chief Administrative Judge, preside over summons parts.[116] In 2022, 195,620 cases were filed,[117] and 210,026 cases were disposed compared to 278,928 filed in 2019 and 303,44 disposed.[118] Appeals go to the Supreme Court, Appellate Term.[119]

C. Courts of Limited Jurisdiction Outside New York City

1. District Courts. The county District Court is the Long Island analog to the New York City Civil Court. It is a trial court of limited jurisdiction serving Nassau County and the five western towns in Suffolk County.[120] This court has jurisdiction over civil matters seeking monetary damages up to $15,000, small claims matters seeking damages up to $5,000, and landlord-tenant cases.[121] The court's criminal jurisdiction includes misdemeanors and preliminary jurisdiction over felonies.[122] District Court judges are elected to six year terms.[123] Fifty judicial seats are presently authorized.[124] The Legislature creates the districts where there must be at least one judge per district.[125] The seats are apportioned according to population and judicial business.[126] District Court decisions are appealed to the Appellate Term.[127]

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[113] This number will increase by two judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[114] N.Y. NYC Crim. Ct. Act § 20 (1982). The court began with 78 judges to which 29 judges were added.

[115] *See* Exhibit 5 *infra*, NYS Unified Court System 2022 Judicial Positions Chart and Exhibit 6 Sunburst chart of allocation of all Supreme Court Judges.

[116] N.Y. Jud. § 851 (1983). However, JHOs are not mentioned in the current 2023 budget.

[117] Cases include arrests and summons cases, not traffic and parking tickets.

[118] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[119] N.Y. Const. Art. VI, § 8(a), (d).

[120] N.Y. Const. Art. VI, § 16(a).

[121] N.Y. Const. Art. VI, § 16(d); NY Uniform District Court Act §201.

[122] New York State Unified Court System, *10th JD – Nassau County: District Court*, https://ww2.nycourts.gov/COURTS/10JD/nassau/district.shtml.

[123] N.Y. Const. Art. VI, § 16(h); NY Uniform District Court Act §103(b).

[124] See Exhibit 5, NYS Unified Court System 2022 Judicial Positions Chart.

[125] N.Y. Const. Art. VI, § 16(e)(f).

[126] N.Y. Const. Art. VI, § 16(g).

[127] N.Y. Const. Art. VI, § 8(e).

2. The County Court. The County Court is a court of general jurisdiction outside of New York City,[128] vested with unlimited criminal jurisdiction and civil jurisdiction where the amount in controversy is no more than $25,000.[129] County Court judges are elected to ten-year terms.[130] Of the 128 authorized County Court judges[131] 55 also serve as Family Court and Surrogate's Court judges.[132] County Court decisions are appealed to the Appellate Division.[133] The County Courts in the Third and Fourth Departments (although primarily trial courts) hear appeals from cases originating in the city, town and village courts.[134] The Legislature determines the number of seats.[135]

3. Town and Village Courts. (Known collectively as the "Justice Courts") are local courts that handle traffic tickets, criminal matters, small claims matters, and local code violations.[136] Town justices are elected to four year terms.[137] Justices in these courts are not required to be lawyers, and indeed, the majority are not.[138] Within the 56 counties of New York State, excluding New York City, there are 1,270 town and village courts with 2,200 justices.[139] There is no cap on the number of judges for the Justice Courts; the number is set by the local community.[140] Two or more towns within a county, however, may combine resources to share a town and village judge after conducting a study and a public hearing.[141] Appeals are heard by the County Courts and the Appellate Terms.[142]

4. Quasi-Judicial Officers. The courts are assisted by quasi-judicial officers, including referees, JHOs, magistrates in Family Court only, and discovery masters. Quasi-judicial officers are part of the fabric of the courts. For example, courts have been referring

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[128] N.Y. Const. Art. VI, § 10.

[129] N.Y. Const. Art. VI, § 11(a).

[130] N.Y. Const. Art. VI, § 10(b).

[131] NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[132] "The Legislature may at any time provide that outside the city of New York the same person may act and discharge the duties of county judge and surrogate or of judge of the family court and surrogate, or of county judge and judge of the family court, or of all three positions in any county." N.Y. Const. Art. VI, § 14.

[133] N.Y. CPLR 5701 (1999); NY Const. Art. VI, § 5.

[134] N.Y. Const. Art. VI, § 17.

[135] Judiciary Law § 182 was last increased by 1 judicial seat in 2019 and 2 added seats in 2005.

[136] New York State Unified Court System, *Town & Village Courts: Overview* (May 5, 2022), https://www.nycourts.gov/courts/townandvillage/.

[137] N.Y. Const. Art. VI, § 17(d).

[138] *People v. Skrynski*, 42 N.Y.2d 218, 221 (1977).

[139] N.Y. Const. Art. VI, § 17; New York State Unified Court System, *Town & Village Courts: Introduction* (May 6, 2022), https://www.nycourts.gov/courts/townandvillage/introduction.shtml.

[140] N.Y. CLS Vill. § 3-301(2)(a) (2016).

[141] N.Y. CLS UJCA § 106-b (2018).

[142] N.Y. Const. Art. VI, § 8(e).

long-form accountings to referees even before the adoption of the 1777 Constitution.[143] Now, courts refer certain designated matters on consent of the parties, and sometimes without it, to referees pursuant to CPLR 4317.[144] For example, some referees hold hearings on issues clearly delineated by a judge such as legal fees, mediation of cases, and supervision of discovery. Since 1983, Judiciary Law §850 *et seq*. has provided for the designation and compensation of judicial hearing officers who must be former judges[145] and who are paid a modest per diem.[146] The Chief Administrative Judge appoints JHOs, who have the physical and mental capacity to perform, when their services are necessary.[147] Procedurally, in regard to civil actions, various sections of the CPLR were amended to incorporate JHOs in all of the provisions relating to referees.[148] JHOs, however, are traditionally cut from the budget during a financial crises. In the 2011 budget crunch, JHOs were quickly cut from the budget.[149] More recently, during COVID when JHOs were eliminated and a hiring freeze decreased the number of law clerks who had regularly conducted discovery conferences and moved cases through discovery, retired attorneys volunteered to help the courts address discovery delays.[150]

Under CPLR 3104, the parties may agree to the appointment of a special referee who is an attorney and agree to share the fees that the special referee charges.[151]

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[143] N.Y. CPLR 4317 (2006). McKinney's Legislative Studies and Reports at 534.

[144] "(a) Upon consent of the parties. The parties may stipulate that any issue shall be determined by a referee. Upon the filing of the stipulation with the clerk, the clerk shall forthwith enter an order referring the issue for trial to the referee named therein. Where the stipulation does not name a referee, the court shall designate a referee. Leave of court and designation by it of the referee is required for references in matrimonial actions; actions against a corporation to obtain a dissolution, to appoint a receiver of its property, or to distribute its property, unless such action is brought by the attorney-general; or actions where a defendant is an infant.
(b) Without consent of the parties. On motion of any party or on its own initiative, the court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account, including actions to foreclose mechanic's liens; or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law." *Id*.

[145] N.Y. Jud. §§ 851, 852 (1983).

[146] *Id*.; See John Caher, *Volunteer JHOs Refuse to Abandon Court System*, NYLJ (Online) December 1, 2011. https://www.law.com/newyorklawjournal/almID/1202533977804/

[147] N.Y. Jud. §§ 851, 852 (1983).

[148] S*ee* N.Y. CPLR 105, 3104, 4301, 4312, 4313, 4315, 4321, 7804. (*See, Lipton v. Lipton*, 128 Misc. 2d 528, 530 (N.Y. Sup. Ct. 1985), *affd.* 119 A.D.2d 809, 501 N.Y.S.2d 437 (1986)). For a history of JHOs, see *Schanback v Schanback*, 130 A.D.2d 332 (2d Dep't 1987).

[149] Joel Stashenko, With Budget in Flux, Administrators Put the Brakes on Use of JHOs, March 16, 2011, https://www.law.com/newyorklawjournal/almID/1202486286989/; CA Joel Stashenko, Welcomes as Volunteers JHOs Cut in Budget Crunch, April 26, 2011, https://www.law.com/newyorklawjournal/almID/1202491460597/.

[150] Grant, Jason, Citing Budget Cuts, Justice Denies Request for Judicial Hearing Officer for Discovery, NYLJ, Oct. 9, 2020.

[151] S*ee* N.Y. CPLR 3104(b) (1983).

New York Court Rule § 202.14 allows judges to appoint attorneys, known as "special masters," to supervise discovery.[152]

D. Administration of the Courts

Divided into four broad geographic departments and 13 smaller judicial districts, the Unified Court System is administered by a combination of stakeholders.

First and foremost, "[t]he chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system."[153] The Chief Judge carries out this function with the assistance of the Chief Administrative Judge, who is appointed by the Administrative Board of the Courts and charged with oversight of the Office of Court Administration (OCA).[154] Consisting of the Chief Judge and the presiding justices of the four Appellate Divisions, [155] the Administrative Board serves an advice and consent role with respect to the Chief Administrative Judge's establishment of statewide administrative standards, policies, and rules regulating practice and procedure in the courts.[156]

OCA is responsible for all of the non-substantive functions of the court system. Created in 1955 by the Legislature, OCA represented a major step towards statewide management of court operations.[157] Its operational divisions include Division of Administrative Services, Division of Professional and Court Services, Division of Human Resources, Division of Technology, Division of Financial Management, Counsel's Office, Court Facilities Unit, Offices of Court Research, Office of Public Affairs, Office of Public Information, Office of Workforce Diversity, Office of Inspector General, Internal Audit Services and Department of Public

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[152] 22 NYCRR § 202.14 (1988).

[153] N.Y. Const. Art. VI, § 28.

[154] *Id.*; N.Y. Jud. § 213 (1978).

[155] N.Y. Const. Art. VI, § 28(a).

[156] N.Y. Jud. § 213. N.Y. Jud. §§ 214 and 214-a also provide for the Judicial Conference of the State of New York, which has responsibility for surveying current administrative practices in the courts, compiling statistics and proposing legislation and regulations. Judiciary Law § 214 mandates both the composition and selection of the Judicial Conference, which consists of representative judges of the various courts within the Unified Court System with two-year terms and *ex officio* members, which include Legislators from the Senate and Assembly Judiciary and Codes Committees. Although the Judicial Conference was continued in 1978, the year that § 213 was enacted, the Judicial Conference was effectively replaced by OCA with the Administrative Board of the Judicial Conference continuing. Compare to state courts and federal courts which are governed by such judicial conferences. See 49-State Survey, Appendix, e.g. Alaska, California, Georgia, Kansas, Louisiana, Minnesota, Montana, New Hampshire, Texas and Utah. Illinois recently reinstated its Judicial Conference. *Id*. The Council notes the Judicial Conference is an existing structure that could be redeployed to conduct the weighted caseload analysis recommended here. See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[157] Joseph W. Bellacosa, *Judicial Administration – Spell it O-C-A NOT O-R-C-A*, 58 N.Y.S. Bar J. 6 (1986).

Safety.[158] The Chief Administrative Judge has a long list of tasks, including issuing an annual report with statistics.[159] Generally, he or she must "(j) Collect, compile and publish statistics and other data with respect to the unified court system and submit annually, on or before the [15th] day of March, to the [L]egislature and the governor a report of his or her activities and the state of the unified court system during the preceding year."[160] Specifically, he or she must:

> "(u-1) Compile and publish data on misdemeanor offenses in all courts, disaggregated by county, including the following information:
>
> (i) the aggregate number of misdemeanors charged, by indictment or the filing of a misdemeanor complaint or information;
>
> (ii) the offense charged;
>
> (iii) the race, ethnicity, age, and sex of the individual charged;
>
> (iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged misdemeanor;
>
> (v) the precinct or location where the alleged misdemeanor occurred;
>
> (vi) the disposition, including, as the case may be, dismissal, acquittal, adjournment in contemplation of dismissal, plea, conviction, or other disposition;
>
> (vii) in the case of dismissal, the reasons therefor; and
>
> (viii) the sentence imposed, if any, including fines, fees, and surcharges."[161]
>
> and
>
> "(v-1) Compile and publish data on violations, to the greatest extent practicable, in all courts, disaggregated by county, including the following information:
>
> (i) the aggregate number of violations charged by the filing of an information;
>
> (ii) the violation charged;

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[158] New York State Unified Court System, *Administrative Structure of the New York State Unified Court System* as of July 2022. The chart is available from the drafting committee.

[159] N.Y. Jud. § 212(1)(j) (2021).

[160] *Id.*

[161] N.Y. Jud. § 212(u-1).

(iii) the race, ethnicity, age, and sex of the individual charged;

(iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged violation;

(v) the precinct or location where the alleged violation occurred;

(vi) the disposition, including, as the case may be, dismissal, acquittal, conviction, or other disposition;

(vii) in the case of dismissal, the reasons therefor; and

(viii) the sentence imposed, if any, including fines, fees, and surcharges."[162]

And all of this information must be publicly available on the court's website.[163]

PART II: ORIGINS OF THE CONSTITUTIONAL CAP FOR SUPREME COURT JUSTICES: A BRIEF HISTORY

The struggle to determine and secure the appropriate number of Supreme Court Justices necessary to properly meet the needs of the state's expanding population dates back to at least the 1820s and 1830s at a time when New York City and State experienced tremendous population and commercial growth. By then, the need for greater elasticity to meet the demand for judicial resources among a growing population was widely recognized. Indeed, the judicial system in place in 1820 was "framed" on the basis of a population of 1,372,812, which had doubled by 1845 to 2,604,495, the last census.[164] Likewise, the wealth of the state had grown even more than the population, unavoidably causing more disputes and controversies among "an active, energetic and prosperous population."[165] The Supreme Court (known at that time as the Supreme Court of Judicature), however, "[was] insufficient in the number of its judges to dispose of the great mass of business to be done in it . . . its calendars [were] so [burdened] and

[162] N.Y. Jud. § 212(v-1).

[163] N.Y. Jud. § 212(w-1). "The OCA-STAT Act Dashboard aggregates the case-level data in the OCA-STAT Act Extract into dynamic tables and graphs. Both the extract and dashboard contain information on cases arraigned from the beginning of November 2020, refreshed monthly to add cases from the previous month and to update information from months prior. For example, the extract posted in December will include arraignments through November 30th of that year." New York State Unified Court System, *OCA-STAT Act Report* (2020), http://ww2.nycourts.gov/oca-stat-act-31371.

[164] Charles H. Ruggles, Chairman of the Judicial System Committee, Debates and Proceedings in the New York State Convention for the Revision of the Constitution 371 (1846) (Reporters: S. Croswell and R. Sutton).

[165] *Id.*

surcharged with business that suitors and counsel, after travelling great distances to arrive at the court, [were] frequently compelled to wait in vain for the opportunity to be heard."[166]

The widespread dissatisfaction with the court system was one of the principal reasons that New York's citizens called for a Constitutional Convention of 1846, which resulted in the significant overhaul and reform of the judiciary.[167] Of particular significance, the 1846 Constitution was the first time that the state was divided into judicial districts, and that constitution provided the first formula for the appointment of justices with a cap based on the population to provide for a sufficient number of justices while, at the same time, preclude the legislative urge to create too many judicial seats at low salaries—a practice that had become prevalent under the prior 1820 judicial structure.[168]

The specific constitutional cap adopted was "one judge to every 72,347 inhabitants," calculated per district.[169] But the proposed system contemplated future expansion: "The system proposed, is, however, capable of expansion without further constitutional provision. This may be done by adding to the number of districts after the state census of 1855; or by the establishment of superior courts if the Supreme Courts should be found overcharged with business."[170]

Indeed, the population-based mechanism for calculating the maximum number of allowable Supreme Court justices has evolved over time. In 1905, the ratio was 1:80,000, or a fraction over 40,000,[171] and in 1925, it dropped to 1:60,000, or a fraction over 35,000.[172] It was not until 1963, that the current formula of 1:50,000, or a fraction over 30,000 was established.[173]

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[166] *Id.*

[167] *Id.*

[168] N.Y. Const. Art. VI, § 4.

[169] Charles H. Ruggles, Chairman of the Judicial System Committee, Debates and Proceedings in the New York State Convention for the Revision of the Constitution 373 (1846) (Reporters: S. Croswell and R. Sutton).

[170] *Id.*, at 373-374.

[171] Charles Z. Lincoln, The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905: Showing the Origin, Development, and Judicial Construction of the Constitution 524 (Vol. 3 1905). This can be found at: https://nysl.ptfs.com/#!/s?a=c&detached=1&docid=88515.

[172] James C. Cahill, Basil Jones & Austin B. Griffin, Cahill's Consolidated Laws of New York: Being the Consolidated Laws of 1909, as Amended to July 1, 1930, Officially Certified by the Secretary of State and Entitled to be Read in Evidence (Vol. 2 1930). On November 3, 1925, the popular vote on the ballot imitative was 1,090,632 for the amendment of Article 6 (relating to organization of state judicial system) and 711,018 against. https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf.

[173] N.Y. Const. Art. VI, § 6. The Nov. 7, 1961 ballot proposal amended the Constitution by repealing article 6 as of Sept. 1, 1962 and replacing it with a new article 6 (providing for reorganization of the state court system). https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf.

The current version of Article VI, Section 6(d), of the New York State Constitution was adopted in 1963 and reads as follows:

> [The Legislature] may increase the number of justices of the supreme court in any judicial district, except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The Legislature may decrease the number of justices of the supreme court in any judicial district, except that the number in any district shall not be less than the number of justices of the supreme court authorized by law on the effective date of this article.

Section 6(b) of Article VI provides a mechanism for reapportioning Supreme Court justices, providing that: "[o]nce every ten years the Legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines." The adoption of the cap in 1963, however, has done little to alleviate the growing demands on the Court. When the 50,000-person formula went into effect, the population in New York State was 18.2 million making the cap 364 justices.

The number of justices finally hit the 1963 census population cap in 2022.

Meanwhile, New York courts processed fewer than one million new cases annually in the 1950s.[174] That number exploded in the 1970s to several million per year. Currently, over 3 million new cases are filed in New York trial courts each year.[175] Yet, the number of elected justices authorized by the Legislature has not significantly changed since 1990, despite numerous efforts at reform.[176]

As early as 1967, only four years after the 50,000-formula was adopted, the Temporary State Commission on the Constitutional Convention argued for the necessity of more elected justices to the Supreme Court and decried the inaction of the Legislature to increase the number of justices by stating the following:

> From 1905 to 1967, the number [of Supreme Court justices] has been increased from 76 to 199 – 27 of whom sit only as Appellate Division justices, leaving 172 to serve in the Supreme Court itself. In those years, the New York State population increased from about 6,500,000 to

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[174] L. Danial Feldman and Marc C. Bloustein, New York State's Unified Court System, New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness 85 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

[175] New York State Unified Court System, *2021 Annual Report* 59 (2021), https://www.nycourts.gov/legacyPDFS/21_UCS-Annual_Report.pdf for 5-year comparison and pie chart showing filings by case type.

[176] See Exhibit 12 for changes to N.Y. Jud. Law 140-a.

> 18,000,000 persons. During the same period, the number of cases noticed for trial in the Supreme Court and the number of dispositions substantially increased.
>
> Relying on this record, proponents of change assert that additional Supreme Court justices are clearly required and that reasons not having to do with the appropriate administration of justice in New York State have been responsible for the Legislature not authorizing the increase. Some accordingly propose that the [c]onstitution either specify a minimum number of Supreme Court justices, in addition to those now serving, or contain a formula for mandatory increases to reflect increases in population, increases in the interval from note of issue to trial or some other index reflecting the level of judicial business in a judicial department or in the court system itself. [177]

In 1967, because the New York State Constitution did not adequately address the needs of Supreme Court justices in the state, two lawsuits filed in federal court sought a declaration that the Legislature rectify delays caused by the shortages of judges on the trial level.[178] The federal courts dismissed both actions because they lacked jurisdiction to hear the matters and observed that the problem should be resolved by the Legislature or an upcoming Constitutional Convention pursuant to the New York Constitution.[179]

Currently, 12 of 13 judicial districts are below the maximum number of elected Supreme Court justices, which they are allowed under the constitution.[180] Indeed, the only judicial district that has the requisite number of justices based on the 1:50,000-ratio is the First Judicial District (New York County) which exceeds the Constitutional Cap by four judges. The number of elected justices in every other judicial district is under the 2020 cap.

Richmond County, which became its own judicial district in 2007, illustrates the underrepresentation poignantly. At the time the Thirteenth Judicial District was created for only Richmond County, an inadequate number of Supreme Court justices were assigned to it. As of 2007, it was estimated that the population of Richmond County was 470,728.[181] Thus, applying the constitutional formula to the county's population, Richmond County should have been assigned nine Supreme Court justices. Instead, only three elected justices were authorized for the new district.[182] Currently, there are seven judicial seats allocated to Richmond County which

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[177] Temporary State Commission on the Constitutional Convention, The Judiciary, March 31, 1967, at 155.

[178] *See New York State Asso. of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (sought to compel court reapportionment designed to eliminate court delay in the Supreme and lower courts under 14th Amendment); *Kail v. Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967).

[179] *Id.*

[180] See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number. See Exhibit 13 for bar chart showing number of acting judges as percent of total.

[181] Richmond County, New York (NY), City-Data.com, www.city-data.com/county/Richmond_County-NY.html.

[182] N.Y. Jud. Law § 140-a.

will increase to 9 in 2023.[183] Based on the 2020 Census, however, there should be ten elected Supreme Court justices.[184]

Currently, Judiciary Law §140-a authorizes 364 statewide elected judicial seats for the Supreme Court.[185] Using the 2020 census numbers, the New York Constitution's cap, however, allows for 401 seats. As set forth below, the 364 authorized seats are woefully inadequate to meet the demands placed on the Court, and legislative inaction has necessitated workarounds to meet such demands. While these workarounds are provided for by the constitution on a temporary basis, they are anything but temporary, demonstrating the dire need.

PART III: FACTORS AFFECTING THE CURRENT BURDEN ON THE SUPREME COURT

The challenge New York courts face in handling a caseload with over 3 million new matters annually on average[186] is further complicated by unequal distribution of judicial resources within the current framework. One poignant illustration of this problem occurred in the 9th judicial district.[187] "According to state court system figures for 2018, Orange County had 18.4% of the district population, 19.9% of the new Supreme Court case filings and 12.5% of the Justices. The numbers work out to 456 cases per justice in Westchester County (for 19 justices), to 752.4 per justice in Orange County, and more than 1,000 each in Rockland and Dutchess." [188] What is most telling about this situation is how it reflects upon the efficacy of the New York Constitution's intent to have one judge per 50,000 New York citizens. Currently, Westchester County has one justice per 55,803 people, Putnam has one justice per 32,556 people, while

[183] *Id*. See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number.

[184] See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number.

[185] This number will increase by three judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[186] For five-year comparison of new filings in trial courts, see New York State Unified Court system, *Annual Report of the Chief Administrator of the Courts for 2021,* at 59, https://www.nycourts.gov/legacyPDFS/21_UCS-Annual_Report.pdf.

[187] The ninth judicial district, which presently has 33 elected Supreme Court judges, is comprised of Dutchess, Orange, Putnam, Rockland and Westchester counties. (See Exhibit 3 for a map of judicial districts.) https://iapps.courts.state.ny.us/judicialdirectory/Bio?judge_id=J/29DKCbsRMt464/bnx7tw%3D%3D. This number will increase to 34 judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[188] Heather Yakin, *Local District Supreme Court Imbalance Concerns Lawyers*, Times Herald-Record (Middleton) (September 23, 2019).

Rockland County has only one justice per 112,000 people.[189] Population and caseloads, however, are not the only factors affecting the administration of justice.

A. Special Factors that Influence the Number of Available Trial Judges

A number of factors unique to New York's court system affect the allocation of judges to trial courts.

1. Assignment of Justices to the Appellate Courts

The appointment of Appellate Division judges contributes to the long-term and short-term shortage of trial court judges in the Supreme Court. As noted above, the Appellate Division is a part of the Supreme Court, and under Article VI, section 4 of the constitution, the judges who populate the Appellate Divisions must first be elected Supreme Court justices—*i.e.*, elected trial court judges sitting in Supreme Court. Acting Supreme Court justices designated to serve on the Supreme Court bench are not eligible to serve on the Appellate Divisions because they were not elected to the Supreme Court. Thus, when a Supreme Court trial judge is assigned to the Appellate Division to fill a vacancy, the number of elected Supreme Court justices presiding in the trial courts necessarily decreases on a 1:1 basis, temporarily. Though temporary, this movement of judges can be devastating to the trial court if several trial judges are appointed to a particular Appellate Division simultaneously—a scenario which occurred in New York County in 2017 when the governor appointed four Supreme Court trial judges to the Appellate Division, First Department.[190] The process that occurs to fill the void when a trial level judge is appointed to the Appellate Division is to assign the trial court cases handled by the newly appointed Appellate Division judge to the remaining trial judges who may be either elected Justices or acting justices. Alternatively, a new acting justice may be transferred from a lower court to take the caseload.

When an appellate justice retires, resigns, or turns 70 and remains as a certified judge, the change creates a new Supreme Court vacancy, which will be filled at the next election. The justice elected to that vacant seat will go to the trial court, not one of the Appellate Divisions.

An additional eight judges in the Appellate Divisions are certificated judges over 70 years of age as of 2022.[191]

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[189] US Census as of April 1, 2020, Census.gov, http://ww2.nycourts.gov/courts/9jd/landing-courts.shtml.

[190] In July 2017, the governor appointed four trial judges from Supreme Court, N.Y. County, Civil, to the Appellate Division. David B. Saxe, *End of Summer at the First Department*, N.Y.L.J., at 6 (Aug. 30, 2017).

[191] See 2022 Judicial Positions, Exhibit 5. This number will increase by 3 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

A further problem arises from the constitutional provision under which each Appellate Division presiding justice may certify to the governor that more judges "are needed for speedy disposition of the business before it."[192] And upon request by the presiding justice of each Appellate Division, the governor "may also . . . make temporary designations" of Appellate Division justices "in case of the absence or inability to act of any justice in such appellate division, for service only during such absence or inability to act."[193] Indeed, even though the constitution authorizes only a total of 23 justices in the four Appellate Division departments,[194] 31 additional elected Supreme Court justices are serving in the Appellate Divisions as "temporary emergency" judges.[195]

Such temporary designations have effectively become permanent seats, with no provision for election of a new Supreme Court justice to fill the resulting void in the trial court. Our Proposal #2 (at p. 62, *infra*) would address this problem by providing that when a presiding justice of a particular Appellate Division expresses such a serious need, which is anything but temporary, it would create a Supreme Court vacancy to be filled at the next election. Such an increase in the number of Supreme Court seats would be permissible if the cap on the number of Supreme Court judges is removed.

Similarly, the appointment of Appellate Term justices who assume their appellate duties while maintaining a trial court docket necessarily reduces the amount of time they have to devote to their trial level work. In 2022, seventeen judges were assigned to the Appellate Terms plus two additional certificated judges.[196]

2. Mandatory Retirement Age

New York State's mandatory retirement age for judges and the practice of certificating judges who reach mandatory retirement also impact the availability of trial judges. The mandatory retirement age for judges in New York is 70.[197] Judges retire from the court to which

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[192] N.Y. Const. Art. VI, §4e. Likewise, "when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor." *Id*.

[193] N.Y. Const. Art. VI, §4(d).

[194] N.Y. Const. Art. VI, §4(b).

[195] First Department – 17 justices. *See* New York State Unified Court System, *Justices of the Court, First Department*, http://www.nycourts.gov/courts/AD1/justicesofthecourt/index.shtml.

Second Department – 21 justices. *See* Supreme Court of the State of New York Appellate Division, *Justices of the Court, Second Judicial Department*, http://www.nycourts.gov/courts/ad2/justices.shtml.

Third Department – 11 justices. *See The Members of the Court*, http://www.nycourts.gov/ad3/Justices.html.

Fourth Department – 11 justices. *See* Supreme Court of the State of New York, *Justices of the Court, Fourth Judicial Department*, http://www.nycourts.gov/courts/ad4/Court/Judges.html.

[196] See 2022 Judicial Positions, Exhibit 5.

[197] N.Y. Const. Art. VI, §25(b).

they are elected or appointed—not from the Supreme Court to which they are assigned as acting justices. In theory, every retirement, which occurs on or before December 31st of the year in which the retiring justice reaches 70, creates a vacancy. So that there is no gap between the retiring elected justice's term and an incoming justice's term, the vacancy is typically filled in the election cycle of the year the retiring justice turns 70. In the case of a retiring appointed judge in a lower or other court, the appointing authority has the responsibility to fill the vacancy at some point after the retiring judge steps down, with the timing of such appointment entirely within the discretion of the appointing authority. Thus, in theory, there should be no net loss in the number of constitutionally-elected or appointed judges from any particular court or within any particular jurisdiction brought about by the retirement of a sitting judge, although in the case of a vacant appointed seat, the appointing authority could conceivably leave the seat vacant indefinitely.[198] If a judge who reaches 70 decides to apply for certification and is so certificated, the court enjoys the benefit of an additional judge since his or her seat is also filled by election.

3. Certification

The constitution includes an exception to the mandatory retirement age which allows for the certification of elected Supreme Court justices who have reached 70 years of age where it is "necessary to expedite the business of the court and [the retiring justices are] mentally and physically able and competent to perform the full duties of such office."[199] Under this exception, Court of Appeals judges may conceivably continue to serve in the Supreme Court as certificated justices.[200] The certification is valid for two years and may be extended for "additional terms of two years" "until the last day of December in the year in which [the Justice] reaches the age of seventy-six."[201] Notably, certification increases the number of sitting Supreme Court justices beyond that expressly authorized by the Legislature. In other words, certificated judges do no take up a constitutional Supreme Court seat, which as noted above, is filled through the usual political and elective process, and are not taking up a position limited by the Constitutional Cap or the number of seats that the Legislature has decided to authorize. Thus, the practice of certificating judges has been a valuable means of helping to alleviate the shortage of

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[198] Corinne Ramey, *Court Official Blast Mayor de Blasio for Delays on Judges*, Wall St. J. (Jan. 2, 2019); Corinne Ramey, *New York City Council Members Criticize Mayor for Delayed Court Appointments*, Wall St. J. (April 17, 2017); Rebecca Davis et. al., *Cuomo Appoints 10 Appeals-Court Justices Amid Criticism of Delays*, Wall St. J. (Feb. 18, 2016).

[199] N.Y. Const. Art. VI, § 25(b); David Saxe, Chief Judge's inquiry into dissents intrudes on Judicial Independence, N.Y.L.J. (Online) (January 23, 2019); Deposition of Lippman ordered in suit against OCA over Certification, N.Y.L.J. (Online) (January 24, 2007).

[200] N.Y. Const. Art. VI, § 25(b); Joel Stashenko, Pigott seeks return to trial-level work after retirement, N.Y.L.J. (October 26, 2016) at 1, col. 5; see also Timothy P. Murphy, Judge Pigott returns to trial bench after Illustrious Appellate Career, New York State Bar Association Leaveworthy, Vol. VI No. 1 (2017).

[201] *Id.*

constitutionally-elected and appointed judges.[202] In 2019, 71 certificated justices were in Supreme Court, Appellate Divisions, and administrative posts while the number of certificated judges in 2022 dropped to 46 with 37 certificated judges in Supreme Court, eight in the Appellate Divisions and one in administration.[203]

The significance of certification as a stopgap measure has become all the more evident with OCA's decision not to re-certificate some 46 judges in response to a possible $300 million cut to the 2021 judiciary budget because of the COVID pandemic's economic fallout.[204] This created significant consternation in the legal community about the chaos that would ensue if the certificated judges at issue were effectively terminated, as OCA would be required to re-assign some 21,000 cases to an already over-taxed judiciary.[205] On December 31, 2020, the New York State Supreme Court ruled that OCA's decision to decline the application of 46 Supreme Court justices to serve as certificated judges for the years 2021-2022 was "annulled as arbitrary and capricious."[206] But that decision was reversed.[207] In the meantime, by agreement 20 of those 46

[202] In 2017, 39 of 43 applicants were approved for certification. Joel Stashenko, *Productivity of Judges Weighed in Extending Judicial Terms,* N.Y.L.J. (Online) (December 2, 2016). In 2016, 42 judges applied for two-year terms. Joel Stashenko, *42 Judges Seek Terms Beyond Mandatory Retirement Age*, N.Y.L.J. (August 15, 2016). In 2015, 34 judges were approved to begin two-year term, totaling 70 judges serving. Joel Stashenko, *Judges Serve Past Retirement Age*, N.Y.L.J. (Online) (January 16, 2015); John Caher, *40 Judges Certificated by Administrative Board*, N.Y.L.J. 1, col. 2 (December 24, 2013); Leigh Jones, *Facing the Future At 70, Judge Wonders if Certification Is an Option,* N.Y.L.J. (Online) (April 14, 2003). In 1997, thirty-one judges were approved for certification. *Certification Issued to 31 Judges*, N.Y.L.J. 30 (September 2, 1997). Clearly, the courts depend on these experienced judges to supplement the deficiency and the continued availability of these judges is presumed.

[203] *See* NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[204] *Pocket Change? Noncertification of Older Judges Barely Makes Dent in Resolving Budget Cut,* N.Y.L.J. (Online) (March 4, 2021); Hon. Carmen Valesquez et.al., *Coverage of Judge Recertification Issue Missed Key Points; Letters to the Editor*, N.Y.L.J. 6, col. 4 (January 5, 2022); Summons and Complaint, NYSCEF 1, *Gesmer et al v. The Administrative Board of the New York State Unified Court System et al*, (N.Y. Sup. Ct., Suffolk County, Index No. 616980/2020); Petition, NYSCEF 1; *Supreme Court Justices Association of the City of New York, Inc. et al v. The Administrative Board of the New York State Unified Court System et al* (N.Y. Sup. Ct., Suffolk County, Index No. 618314/2020).

[205] *Hon. Ellen Gesmer et al v. The Administrative Board of the New York State Unified Court System et al*, No. 616980/2020 (N.Y. Sup. Ct. Suffolk Cnty) NYSCEF 1, Petition and Complaint.

[206] *Id*., NYSCEF 127, Decision. Supreme Court Judges Association of the State of New York v. Administrative Board of New York State Unified Court System, Index No. 618314/2020, Suffolk County, NYSCEF Doc. No. 1 (Petition) ¶44].

[207] *Gesmer v Admin. Bd. of New York State Unified Ct. Sys.*, 194 A.D.3d 180 (N.Y. App. Div. 2021).

judges returned to the bench.[208] The ousted judges' litigation against the Chief Judge was ultimately dismissed in the New York State Court of Appeals as moot.[209]

4. Unexpected Vacancies

In addition to the judges who retire at 70, sometimes there are unexpected circumstances that create vacancies, such as deaths, retirements before age 70, or election of a Civil Court judge to a Supreme Court seat, leaving a vacant Civil Court seat that cannot be filled by way of election until the following election cycle. When such unexpected vacancies arise, there is no guarantee that they will be filled within reasonable time.[210] In the case of unexpected vacancies of elected judicial seats, the vacancies are filled in the next election cycle. In the interim, an appointing authority typically fills the seat with a temporary appointment—in the case of the Supreme Court, the governor; in the case of the Civil Court, the Mayor.[211] In the case of appointed seats, vacancies are filled by the regular appointing authority at a time of its choosing, or in the case of the Court of Appeals[212] by the statutory deadline[213] (e.g., the Court of Appeals, Court of Claims, Family Court, Criminal Court). Delays, however, by the governor or a Mayor in filling judicial vacancies has a profound impact on the courts.

5. Legislative Changes that Impact the Trial Courts

New legislation can result in a sudden and dramatic increase in new types of matters that are assigned judges without a corresponding increase in the number of judges to handle the expanded workload. Such legislation includes laws that (i) establish new procedures that increase the requirements for access to the courts and utilization of court resources, or (ii) define additional new substantive provisions that necessarily broaden judicial responsibilities. Examples include:

- The increase to the jurisdictional limit of the New York City Civil Court from $25,000 to $50,000 without increasing the number of judges;[214]

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[208] Ryan Tarinelli, *Nearly 20 Older Judges Return After Having Been Ousted from the Bench*, N.Y.L.J. (June 18, 2021).

[209] *Gesmer v. Admin. Bd. of New York State Unified Ct. Sys.*, 37 N.Y.3d 1103 (N.Y. App. Div. 2021).

[210] N.Y. Const. Art. VI, § 21; *see* Andrew Denney, *DeBlasio Counsel Sees Difficulty in Filling Vacant Civil Court Seats*, N.Y.L.J. (April 17, 2017).

[211] N.Y. Const. Art. VI, § 21.

[212] N.Y. Const. Art. VI, § 2.

[213] N.Y. Jud. Law §68.

[214] Jane Wester, Voters Approve Raised Cap for New York City Civil Court Claims, But Lawyers Warn More Judges Will Be Needed, N.Y.L.J. 1, col. 3 (November 4, 2021). https://www.law.com/newyorklawjournal/2021/11/03/voters-approve-raised-cap-for-nyc-civil-court-claims-but-lawyers-warn-more-judges-will-be-needed/.

- The passage of an important law guaranteeing the right to a jury trial for persons accused of B misdemeanors in NYC, a right long enjoyed by defendants outside NYC.[215] The immediate effect of this will be to discourage prosecutors from "reducing" A misdemeanor charges to B misdemeanor charges for the purpose of eliminating the jury trial right, as prosecutors have been doing for years. This could result in more jury trials, which would require more judicial resources;

- The 2019 enactment of the Child Victim Act changing the statute of limitations for such crimes from 23 to 55 for sex abuse they experienced prior to age 18.[216] During the two-year window, over 9,000 cases were filed.[217] There was no increase in the number of judges to manage these new cases;

- The Legislature's decision in 2015 to confer jurisdiction over spousal support matters on the Family Court. But in doing so, the Legislature did not allocate funds or other resources for training, additional personnel, and changes in the computer system and forms;[218]

- The creation in 2017 of youth courts in connection with the "Raise the Age" legislation, which radically altered the treatment of youths charged with adult crimes, taking Supreme Court and Family Court judges out of their regular assignments and making them dedicated youth part judges;[219]

- The number and variety of Penal Law offenses has grown exponentially in recent years. Such offenses include highly complex crimes, such as

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[215] 2021 N.Y. Laws, ch. 806 (amending N.Y. CRIM PROC. § 340.40) to provide the right to a jury trial to all defendants accused of misdemeanors. This right had previously applied everywhere except for persons charged with Class B misdemeanors in New York City Criminal Court. The majority of all persons charged with misdemeanors statewide are charged in NYC Criminal Court. Prior to passage of this law, prosecutors routinely reduced A misdemeanor charges to B misdemeanor "attempts" effectively preventing the defendant from demanding a jury trial.

[216] NY State Courts Prepared for Flood of Lawsuits Under New Child Victims Act, Officials Say, N.Y.L.J. (Online) (August 13, 2019). https://www.law.com/newyorklawjournal/2019/08/13/ny-state-courts-prepared-for-flood-of-lawsuits-under-new-child-victims-act-officials-say/.

[217] Bob Dylan Accused of Sexually Abusing 12-Year-Old in Lawsuit Filed as Child Victims Act Expires, N.Y.L.J. (Online) (August 16, 2021). https://www.law.com/newyorklawjournal/2021/08/16/bob-dylan-accused-of-sexually-abusing-12-year-old-in-lawsuit-filed-as-child-victims-act-expires/.

[218] *See* FAM. CT. ACT § 412 (amended by 2015 N.Y. Laws, ch. 2659, § 7).

[219] 2017 N.Y. Laws c. 59 (enacting Crim. Proc. Law § 722).

enterprise corruption, and new areas of concern, such as domestic violence offenses and crimes involving the exploitation of children;[220]

- The expected increase in nonpayment proceedings as public entitlements were reduced under the Federal Welfare Reform Bill. Meanwhile, the State Rent Regulation Act of 1997 added to Housing Court workloads by requiring Housing Court judges to hold immediate hearings when a tenant requested a second adjournment to establish certain defenses or pay a rent deposit;[221]

- The sentencing restructuring provisions during the 1990s, whereby state prison sentences for violent offenders were converted to determinate sentences while indeterminate sentencing was retained in other contexts, leading to complicated sentencing rules and a general increase in incarceratory sentences across the board;[222]

- The adoption of new provisions relating to sex offenders, creating additional, judicial obligations in dealing with such cases, e.g., SORA hearings;[223]

- The assignment of Supreme Court and Criminal Term judges to preside over Mental Health Law Article 10 jury trials, which take precedence over other trial schedules of such judges;[224]

- The establishment and growth of various specialty courts, *e.g.*, the Commercial Division of the Supreme Court, presided over by judges selected from Supreme Court trial parts. In part, the creation of this new division was necessitated when in 1984, the Legislature enacted General Obligations Law §5-1402, pursuant to which New York courts would hear contract cases arising from forum selection or choice of law provisions in matters over $1 million;[225] and

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[220] *See, e.g.*, 1986 N.Y. Laws, ch. 516 (enterprise corruption); 2012 N.Y. Laws, ch. 491 (aggravated domestic violence); 2018 N.Y. Laws, ch. 189 (sex trafficking of a child).

[221] Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman, Housing Court Program, Breaking New Ground, September 1997, at 2. Housing Court Program, September 1997.pdf (nycourts.gov).

[222] 1995 N.Y. Laws, ch. 3.

[223] 1995 N.Y. Laws, ch. 192, and subsequent amendments.

[224] 2007 N.Y. Laws 2007, ch, 7, § 2; N.Y. Mental Hyg. § 10.01.

[225] New York State Unified Court System, *Commercial Division – NY Supreme Court, History*, http://ww2.nycourts.gov/courts/comdiv/history.shtml.

- Recent changes in bail and discovery statutes, increasing the number of fact-finding proceedings that judges are required to conduct, and explanations they are required to give, in the course of processing criminal cases.[226]

In every instance noted, legislatively created demands on the judiciary to accommodate the additional responsibilities spawned by the new law, or to redirect judicial resources by designating judges to handle the new matters exclusively, were not accompanied by a corresponding addition of authorized judges for the affected courts.[227] This invariably left fewer judges available to conduct the regular business of the court, or led to a dramatic increase in each judge's caseload. That this incipient depletion of judicial resources has occurred with some regularity over the years and has established a new permanence illustrates that the issue is not trivial.

6. Societal Changes that Affect the Number of Cases Filed

The population-based formula overlooks other factors that impact the number of cases filed. For example, since the population formula was initiated in 1846, the number of business corporations, not-for-profit corporations, limited liability companies, general partnerships, limited partnerships, and sole proprietorships registered with the State of New York have exploded. These entities file cases in our courts but are overlooked by the formula. Likewise, the formula overlooks venue provisions. For example, due to a venue statute which allows divorce filings without a nexus to the county, Manhattan is the divorce capital of New York, but the number of divorce filings is completely untethered from the population resident in the county.[228]

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[226] 2019 N.Y. Laws, ch. 59.

[227] There has been one notable exception where a sudden increase in cases before the Supreme Court by reason of new legislation was accompanied by a corresponding increase in judicial resources in recognition of the need for additional judges to deal with the additional work—specifically, the creation of a new category of Court of Claims judges with a separate and unique jurisdiction to meet the anticipated flood of felony cases in the Supreme Court, due to the passage of the Rockefeller Drug Laws in 1973. *See, Taylor v Sise*, 33 NY2d 357 (1974). This corresponding creation of additional judges to meet a specific new challenge attributable to new legislation addressed immediately and effectively the need for increased judicial resources and continues to stand as a model for appropriate legislative action in coordination with a legislatively created infusion of new cases.

[228] *Castaneda v. Castaneda*, 36 Misc.3d 504 (N.Y. Sup. Ct. 2012) (Hon. Matthew Cooper's plea for the Legislature to intervene by requiring divorces to be filed in counties where at least one party resides). "Practitioners have experienced increasing delays. In Manhattan, the time from filing of final uncontested divorce papers to obtaining a judgment of divorce has apparently grown from a few months to a year or more. In Brooklyn, the time to obtain an uncontested divorce judgment has increased to about 10 months." New York City Bar Association, Council on Judicial Administration, Written

7. Legislative Inaction

As illustrated in Exhibit 12, Changes to Judiciary Law §140-a, the Legislature sporadically evaluates the number of Supreme Court justices and increases the number of seats. Legislative inaction despite Article VI, Section 6(b), which provides that the Legislature "may" change the judicial districts and thus reapportion the justices within them, is not new.[229] Likewise the Legislature "may" change the number of Supreme Court justices anytime, up to the population cap of 50,000/1.[230] In 1967, the Temporary State Commission on the Constitutional Convention proposed mandatory increases in the number of judges when population increased or a formula linked to "the level of judicial business" such as the interval between the filing of the note of issue and trial.[231] Such inaction affects other courts without caps too. Family Court went without an increase in the number of judges for 24 years all while the population and number of cases was exploding resulting in a crisis.[232] Likewise, no additional Criminal Court judgeships have been created in the last 34 years, in spite of significant workload increases.[233]

PART IV: MAKESHIFT MEASURES NECESSARY TO ADDRESS JUDICIAL SHORTAGES

A. Appointment of Acting Supreme Court Justices

To address the burden on the Supreme Court, OCA has used its authority to implement makeshift measures that, while well-intended, serve only as a stopgap and do not ultimately resolve the shortage of judges in the Unified State Court System. [234] One such measure is the

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Testimony in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://s3.amazonaws.com/documents.nycbar.org/files/20221136_Judiciary2023-24BudgetRequest.pdf. "Anecdotal evidence also suggests that the handling of divorce matters in Supreme Court is extremely backed up in New York City. We understand that, with respect to matters where final divorce papers are e-filed in New York County, the time to issue a judgment of divorce has grown from three or four months to a year or more. The divorce matter backlogs in Queens and Kings Counties are apparently equally severe." New York City Bar Association, Council on Judicial Administration, Report in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/2022-2023-judiciary-budget. (Jan. 2022).

[229] New York Temporary Commission on the Constitutional Convention, The Judiciary, at 155 (March 31, 1967).

[230] N.Y. Const. Art. VI, § 6(d).

[231] *Id*. at 155-156.

[232] See Part I (A)(5) Family Court of the State of New York; Part V (C) Impact on Family Court.

[233] New York City Criminal Court Act §20. See Part I (B)(3) Criminal Court; Part V(B) Impact on Criminal Court.

[234] Special Commission on the Future of the New York State Courts, *A Court System for the Future: The Promise of Court Restructuring in New York State*, at 24 (February 2007). See this report for

certification of judges, which, as discussed above, has some benefits, but is ultimately unreliable and potentially counterproductive, as it appears to have created a disincentive for the Legislature to authorize much needed additional Supreme Court seats. Nowhere, however, is the adverse impact of OCA's makeshift measures more evident than in its practice of reassigning judges from lower and other courts to the Supreme Court.

Part 33 of the Chief Judge's rules confers on OCA the authority to make temporary assignment of judges and justices pursuant to Article VI, § 26 of the New York State Constitution.[235] The acting judges have the same jurisdiction as the judges of the court to which they are assigned.[236] OCA has utilized this authority to appoint Acting Supreme Court justices from a pool of judges ***not*** elected to serve on the Supreme Court bench.[237] As discussed below, this stopgap measure of designating lower court judges to the state's constitutional trial court of general jurisdiction has become an established and routine practice, such that it would simply be erroneous to characterize such designations as temporary. In fact, they are anything but temporary, and as a result, have led to an adverse impact on the courts to which these Acting Supreme Court justices were originally elected or appointed, as the case may be.

1. From the Lower Courts

Perhaps the largest pool from which OCA selects judges to serve as acting Supreme Court justices are the lower courts, such as the New York City Civil Court and Criminal Court. Since 2007, the number of acting Supreme Court judges from Civil Court has ranged from 34 to 67 while 60 to 86 Criminal Court judges have been assigned as Acting Supreme Court justices.[238] In 2022, 42 Acting Supreme Court justices came from New York City Civil Courts, while 69 came from New York City Criminal Courts.[239] "While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and

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a thorough review of past proposals, calls for reform and other administrative initiatives by OCA. [https://ww2.nycourts.gov/sites/default/files/document/files/2018-05/courtsys-4future_2007.pdf].

[235] Temporary assignment of lower court judges preceded the Constitutional change in 1977 creating OCA and allowing for the temporary assignment of judges. See *Morgenthau v Cooke*, 56 NY2d 24 note 3 (1982)(NY County District Attorney challenged OCA's plan to institute a rotation system of temporary assignments of lower court judges to Supreme Court as acting Supreme Court judges).

[236] *See People v. Harris*, 177 Misc.2d 154 (N.Y. Sup. Ct., Kings Cty 1998) (capital criminal defendant lacks standing to challenge the practice of assigning Judges of the Court of Claims and the New York City Civil and Criminal Courts to serve as Acting Supreme Court Justices based upon alleged violations of Voting Rights Act § 2, 42 USC § 1973); *People v. Scully*, 110 A.D.2d 733 (2d Dept 1985)(See cases collected therein); *People v. Campos*, 239 A.D.2d 185 (1st Dept 1997) ("defendant's conviction may not be invalidated on the basis of any alleged illegality in the assignment of a Judge of the Criminal Court to preside over defendant's trial as an acting justice of the Supreme Court").

[237] N.Y. Const. Art. VI, § 26, "Temporary assignments of judges and justices." (adopted Nov. 7, 1961.)

[238] For a detailed list of each acting judge and their source court, see Exhibit 8.

[239] Id.

jurisdiction of a judge or justice of the court to which assigned."[240] These temporary assignments are "made by the chief administrator of the courts."[241] The only limit on the number of acting justices that OCA may elevate to the Supreme Court is the size of the pool of lower court judges and legislative will as exemplified by the Court's budget. Further, while the constitutional provision that OCA relies on to designate acting justices expressly provides that the positions are temporary, the appointments are anything but provisional. Indeed, there are many lower court judges who have been serving as acting Supreme Court justices and carrying out the duties of a duly elected Supreme Court justice for more than a decade. The entrenched and longstanding practice has become the norm, and in some counties, a rite of passage for lower court judges before they can realistically be elected to an authorized Supreme Court seat.

The end result is that this practice perpetuates the shortage of judges rather than remedies it. Indeed, as further discussed below, the designation of an acting Supreme Court justice unavoidably and necessarily creates vacancies in lower or other courts of limited jurisdiction, while ostensibly obviating the need to create more authorized seats at the Supreme Court level. Even worse, to deal with the vacancies created by this practice, OCA often reassigns judges between the lower courts. For example, Civil Court judges have been assigned to sit in Criminal Court or Family Court, further depleting the Civil Court's resources.[242] Meanwhile, the Legislature increased the jurisdictional amount in NYC Civil Court to $50,000.

2. From the Court of Claims

In the absence of legislative action to create more authorized Supreme Court seats when needed, the governor has, at times, undertaken the task of ameliorating shortages through the appointment of Court of Claims judges, whom OCA immediately[243] appoints as acting Supreme Court justices—a position whose role is very different from that of a Court of Claims judge. [244]

The Court of Claims was established in 1950 in order to form a judicial body that presides over cases where New York State is a named party.[245] As noted above, however, in 1973, an increase in drug-related cases prompted the need for more judges at the Supreme Court

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[240] N.Y. Const. Art. VI, § 26(k).

[241] N.Y. Const. Art. VI, § 26(i).

[242] City Bar Association Family Court Judicial Appointment & Assignment Process Work Group, *The Family Court Judicial Appointment & Assignment Process*, December 2020. "A recurring problem is the assignment of judges to Family Court from other courts on short-term appointments." Jane Wester, *Gaps in Family Court Compromise Justice for New York Families and Children, City Bar Report Finds*, N.Y.L.J. (Online) (March 10, 2021), https://www.law.com/newyorklawjournal/2021/03/10/gaps-in-family-court-compromise-justice-for-new-york-families-and-children-city-bar-report-finds/.

[243] Irene Sazzone, Court of Claims Clerk, interview May 5, 2023

[244] N.Y. Const. Art. VI, § 9. Section 9 of the Court of Claims Act outlines what kinds of cases are to be heard by the judges who are appointed by the governor to the Court of Claims Court.

[245] N.Y. Const. Art. VI, § 23.

level to handle criminal cases. OCA designated Court of Claims judges as acting Supreme Court justices, and the Court of Claims judges were authorized to try felony cases.[246] In response, the Court of Claims Act was amended, and five judges were added to address this need.[247] Since then, the Court of Claims Act has been amended an additional eight times, most times in order to add judges who preside over both criminal and civil cases in which the state is *not* a named party.[248] The New York Bill Jacket associated with the most recent amendment in 2005 stated, "Currently, there are insufficient numbers of judges to handle the growing case load in certain parts of the State . . . This bill would help to alleviate this problem and make the Unified Court System more efficient."[249] In 2022, 1,251 claims were filed in the Court of Claims, while 1,403 claims were decided.[250] Of the 86 authorized Court of Claims judges, 15 hear claims against the state full-time and eight judges are 'hybrid," meaning they hear such claims and have other assignments.[251] The remaining 59 judges are assigned primarily to Supreme Court, Criminal Term, as well as the Commercial Division of the Supreme Court.[252]

As of the date of this Report, the number of acting Supreme Court justices stands at 317.[253] Of the 627 (310 elected plus 317 acting) judges presiding over and adjudicating Supreme Court cases statewide,[254] the percentage serving as acting Supreme Court justices is 50%. Without these acting justices, the Supreme Court would itself be incapable of handling its caseload in a timely manner. Even with this significant addition of acting justices, felony cases pending in Supreme Court, Criminal Term in New York City face significant delays.[255] Indeed, the average number of days between indictment and disposition (pleas, convictions, acquittals,

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[246] In *Taylor v. Sise*, 33 N.Y.2d 57 (N.Y. 1974), the Court of Appeals held that judges appointed to the Court of Claims by the governor could preside over criminal cases as Acting Supreme Court Justices as long as they were appointed by the governor and designated by the Appellate Division.

[247] Francis X. Clines, *Changes Expected in Plan on Judges*, N.Y. Times, May 14, 1973 http://www.nytimes.com/1973/05/14/archives/change-expected-in-plan-on-judges-rockefeller-reported-ready-to-ask.html?_r=0.

[248] N.Y. CT. CL. ACT § 2; 1982 N.Y. Laws, ch. 500, § 5, ch. 501, § 1; 1986 N.Y. Laws, ch. 906, § 1; 1990 N.Y. Laws, ch. 209, § 3; 1991 N.Y. Laws, ch. 195, § 1; 1992 N.Y. Laws, ch. 68, § 1; 1996 N.Y. Laws, ch. 731, §§ 1-3; 2005 N.Y. Laws, ch. 240, § 1.

[249] 2005 S.B. 5924, ch. 240.

[250] 2022 Annual Report of the Unified Court System at 65, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf.

[251] Irene Sazzone, Court of Claims Clerk interview May 5, 2023.

[252] *Id.*

[253] See Summary Acting Justices of the Supreme Court Analysis, Exhibit 7.

[254] See Table by Judicial District: Number of Actual Judicial Seats Compared to Cap, Exhibit 4. See Exhibit 13 for bar chart showing number of acting judges as percent of total.

[255] Brian Lee, *New York's Pending Court Caseload Has Increased 15% From Pre-Pandemic Numbers*, NYLJ, July 22, 2022, at 1; George Joseph, Crisis at Rikers: How Case Delays Are Locking Up More and More People for Years Without Trial, Gothamist (November 23, 2021).

and dismissals) for felonies in New York City rose from 293 to 316 days between 2014 and 2019.[256] And the pandemic only made matters worse.[257]

PART V: ADVERSE IMPACT OF MAKESHIFT MEASURES ON JUSTICE

Upstreaming lower court judges to the Supreme Court has left the lower courts from which these judges are selected hampered in their ability to efficiently and properly administer justice. In addition to inordinate delays in judicial proceedings, trials have become an endangered species nationally.[258] To be sure, there are few trials in the Civil Court of the City of New York, the Criminal Court, or Surrogate's Court.[259] This necessarily deprives litigants of their day in court.

The lower courts have traditionally been the incubator of trial lawyers. Without the emergence of a well-trained cadre of young trial lawyers, the profession, and ultimately litigants seeking justice through the courts, end up paying the price. Below, this Report examines in more detail the impact that shuffling judges between the various courts has had on the lower courts.

A. Impact on Civil Court

The re-designation of judges from the lower courts to the Supreme Court has deprived those lower courts of vital judicial resources, leading to serious, negative consequences to the administration of justice in those jurisdictions. The New York City Civil Court Act authorizes 131 judges in Civil Court, but only 120 judicial seats have been allocated among the five boroughs.[260] Again, as of 2022, there were 47 of 120 judges sitting in Civil Court; 31 judges

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[256] Joanna Weill, et. al., *Felony Case Delay in New York City, Lessons from a Pilot Project in Brooklyn*, Center for Court Innovation (March 2021), https://www.courtinnovation.org/sites/default/files/media/document/2021/Case_Delay_Policy_Brief_3.29.2021.pdf.

[257] Alan Feuer et. al., N.Y.'s *Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, The New York Times, June 22, 2020, https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html.

[258] Stephen Susman, *Jury Trials, Though in Decline, Are Well Worth Preserving*, LAW 360 (April 23, 2019); *see also* NYU School of Law, *Civil Jury Project*, https://civiljuryproject.law.nyu.edu/#:~:text=The%20Civil%20Jury%20Project%20at%20NYU%20School%20of%20Law%20examines,system%20and%20society%20more%20broadly.

[259] See Exhibit 14, Chart of Jury Trials Commenced 2019 to 2022.

[260] N.Y. Civil Ct. Act § 102-a (1), (2) (Consol. 2021).

sitting in New York City Criminal Court and Family Court; and 42 judges transferred to Supreme Court as Acting Judges.[261]

In addition to appointing Criminal Court judges and Family Court judges in New York City, the Mayor is required to fill any vacancy that occurs in Civil Court before the end of the term[262]. Mayors, however, have experienced difficulty in filling those seats.[263]

Council Member Rory Lancman, who led oversight hearings in early 2016 on the delays in the City's criminal courts, told *The New York Times* that about half of the judges appointed by the Mayor to Criminal Court have been transferred to hear felony cases in Supreme Court.[264] According to the Council Member Lancman, to then fill some of the shortages in Criminal Court, about two dozen Civil Court judges were transferred to Criminal Court.[265] Indeed, today 73 Civil Court judges are assigned to other courts. [266]

There are numerous examples of how the reassignment of Civil Court judges to the Supreme Court or to the Criminal Court has had severe and negative consequences to litigants who appear in Civil Court. In New York City Civil Court, New York County, there has been a drastic drop in the number of jury trials conducted. In 2013, 151 jury trials commenced, but in 2014, only one jury trial commenced, and in 2015 and 2022, two jury trials commenced.[267] By contrast, in that same period, 942 non-jury trials commenced in the Civil Court in 2013 and 5 non-jury trials in 2022. [268] But these decreases in jury trials began long before COVID. While there are a variety of factors contributing to these dramatic decreases in jury trials, the

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[261] New York State Unified Court System, *Judges of the Civil Court of the City of New York*, https://nycourts.gov/courts/nyc/civil/profiles.shtml. See Sunburst chart, Exhibit 6 and Detailed Source of Actings SCJs, Exhibit 8.

[262] N.Y. Civil Ct. Act, Law § 102-a (3) (Consol. 2021).

[263] *See* Corinne Ramey, *Court Officials Blast Mayor De Blasio For Delays On Judges*, Wall St. J. (January 2, 2019), https://www.wsj.com/articles/court-officials-blast-mayor-de-blasio-for-delays-on-judges-11546465712; Reuven Blau, *Blaz Judged Deficient On Appointees*, Daily News (New York) (January 2, 2019); Andrew Denney, *De Blasio Counsel Sees Difficulty In Filling Vacant Civil Court Seats*, N.Y.L.J. (April 14, 2017).

[264] Benjamin Weiser et. al., *Delays in Bronx Courts Violate Defendants' Rights. Lawsuit Says*, N.Y. Times, at A19, col. 2 (May 11, 2016). https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html.

[265] *Id*.

[266] https://www.nycourts.gov/COURTS/nyc/civil/profiles.shtml.

[267] NYS Unified Court System, Division of Technology and the Office of Court Research UCS 175 Local Civil Dump Report - Full Year 2013-2015 and 2022. (Report available from Drafting committee).

[268] *Id.* Exhibit 14, OCA Jury Trial chart. See also footnote 258, supra regarding Steven Susman's work on declining jury trials.

reassignment of Civil Court judges, decreasing the number of judges available to preside over jury trials, appears to be a strong possibility.

Non-jury trials are impacted too. Indeed, as of January 2016, there were no trials scheduled in the New York City Civil Court's Commercial Landlord Tenant Part, New York, that are presided over by Civil Court judges, [269] because of the lack of judges.[270] In 2022, there were 24 non-jury trials in that part in New York County, but in prior years, there had been over 150 non-jury trials per year.[271]

In its 2016 budget letter, the City Bar also stated that because of a shortage of judges in the no-fault part of Civil Court in New York County, there was a delay of one year for pre-trial conferences.[272] Eight years later, in 2023, a no-fault practitioner with over 35,000 pending no-fault cases in New York City at one time reported that "we have transitioned almost 98% to arbitration over the past 5 or more years . . . our presence in the City Civil Courts are limited at this point…Essentially – we don't look to the courts to timely adjudicate cases."[273] In 2023, there is reportedly no delay in no-fault parts, but the reason that the backlog receded appears to be that the cases moved to arbitration when judges were not available to hear the cases.[274]

Likewise, in a December 22, 2015 article, Leonard Levenson, Esq., used one of his cases to underscore the need for more judges and court parts in Civil Court in Kings County.[275] He reported that in a simple personal injury case, his opposing counsel had requested three adjournments to provide discovery.[276] Although Levenson was disturbed that the adjournments were granted with no inquiry as to their necessity, he was equally perturbed with the length of each adjournment, which was two or three months long, simply because there was a lack of available judges.[277]

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[269] These cases are not handled in Housing Court.

[270] New York City Bar, *Report in Support of the Judiciary's 2016-2017 Budget Request*, 4, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-judiciarys-2016-2017-budget-request.

[271] NYS Unified Court System, Division of Technology and the Office of Court Research UCS 175 Local Civil Dump Report - Full Year 2013-2015 and 2022. (Report is avaible from drafters of the report).

[272] *Id.*

[273] May 2023 interview of Civil Courts Committee members by Steve Shapiro of the Drafting Committee.

[274] *Id.*

[275] Leonard Levenson, *Justice Denied When Court Calendars are Unmanageable*, N.Y.L.J. (December 22, 2015).

[276] *Id.*

[277] *Id.*

Long before COVID-19, the Chair of the City Bar's Civil Courts Committee stated that Civil Court is a "frustrating place to practice" because growing calendars result in excessive delays.[278] Even when a judge had signed an Order to Show Cause, intended to expedite proceedings, many weeks would pass by before the Court heard the matter. She reported that in 2018, more than 100,000 consumer-related cases were filed in the Civil Court, a marked increase over the preceding year.[279] In 2022, the Consumer Credit Part is back to its pre-Covid delays.[280] Where consumers filed answers in 2020, preliminary conferences in their consumer credit cases are scheduled in 2023.[281] The New York City Housing Court, a branch of the Civil Court, is particularly under-resourced, as an expansion of tenants' right to counsel leads to more trials and the need for judges to conduct them.[282]

B. Impact on Criminal Court

The reassignment of the lower court judges has had a similar negative impact on the New York City Criminal Court, where misdemeanor cases are heard.[283] In a lawsuit filed in federal court in 2016, *Trowbridge v. Cuomo*, No. 16 CV 3455, the plaintiffs alleged that the delays in misdemeanor cases in the Bronx were "caused by a shortage of judges, court officers and court reporters that keep trial parts idle and locked."[284] One of the solutions the plaintiffs sought in the lawsuit was "allocating more judges and court staff."[285]

This situation has not been ameliorated. According to OCA's 2019 NYC Criminal Court Caseload Activity Report, there were 394 trials conducted citywide in Criminal Court (excluding summons parts) of which 207 were jury trials, out of 183,572 cases altogether that were disposed of in the All-Purpose Parts (cases that survived arraignment) in the Criminal Court. More recently, of cases that were resolved in 2022, there were only 115 trials, compared to 33,383

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[278] Interview with Shanna Tallarico, 2019 Chair, NYC Bar Association Civil Court Committee and Supervising Attorney Consumer Protection Unit at the New York Legal Assistance Group (May 31, 2019).

[279] *Id.*

[280] May 22, 2023 interview with ABCNY Civil Court Committee member.

[281] *Id.*

[282] Interview with Shanna Tallarico, footnote 278, supra; Will Drickey, *NYC Evictions Down Thanks to Legal Aid Program for Tenants*, Metro - New York (February 4, 2019). See also State of New York City Housing Court, Report of the New York City Bar Association Housing Court Committee, April 2019, https://s3.amazonaws.com/documents.nycbar.org/files/2019506-State_of_Housing_Court.pdf (calling for more judges, court attorneys, clerks, translators and guardians ad litem).

[283] Misdemeanors are criminal cases "for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed." N.Y. Penal Law § 10.00(4) (Consol. 2021).

[284] Benjamin Weiser and James C. McKinley, Jr., *Delays in Bronx Courts Violate Defendants' Rights. Lawsuit Says*, N.Y. Times, at A19, col.2 (May 11, 2016).

[285] *Id.*

guilty pleas and 86,372 dismissals.[286] Although it is difficult to know for certain whether non-trial dispositions of cases are attributable to the lack of judges or trial-ready courtrooms,[287] the percentage of tried cases revealed by these statistics is nonetheless an infinitesimal number relative to the total number of cases disposed. Indeed, the 2022 figure is one-tenth of one percent.[288]

Another disturbing statistic that reports reveal relates to the "mean age at disposition" of cases that were tried. It took far longer to get a trial in recent years than it did in 1994. In 2017, in the Bronx, the wait was 437 days for a bench trial and 777 days for a jury trial.[289] In the first four months of 2022, when courts had fully re-opened, the median time from arraignment to verdict for cases tried in the Bronx was 548 days.[290] The citywide median was not much better—469 days from arraignment to verdict (not distinguishing between bench and jury trials).[291] In

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[286] NYS Unified Court System, NYC Criminal Court Executive Summary, 2022 Term Trends, dated 1/11/23. 2020 and 2021 figures are not reported here because the relevant statistics for both years were heavily influenced by COVID-related closures and delays, that began in March 2020 and continued into 2021, especially with respect to trials. Jaclyn Cangro, Courts Facing Lengthy Case Backlogs Amid Ongoing Covid-19 Restrictions, https://spectrumlocalnews.com/nys/central-ny/news/2021/06/29/faced-with-restrictions--county-courts-deal-with-backlogs; Alan Feuer, et. al., N.*Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, The New York Times (June 22, 2020).

[287] Of course, cases in Criminal Court are resolved for many reasons, such as that prosecutors are persuaded to offer a plea to a lesser charge, the evidence in the case does not support a criminal conviction for the crime that was initially charged, or the prosecutors are not ready for trial within the statutory period. However, when an overly lenient plea offer is made because the court lacks resources to try the case, or an innocent person is pressured into pleading guilty because it simply takes too long to get a trial, the public interest is disserved.

[288] It should be recognized, however, that nationwide, there has been a decrease of jury trials in the civil context. *See* NYU School of Law, *Civil Jury Project*, https://civiljuryproject.law.nyu.edu/#:~:text=The%20Civil%20Jury%20Project%20at%20NYU%20School%20of%20Law%20examines,system%20and%20society%20more%20broadly ("The Seventh Amendment to the US Constitution and provisions of most state constitutions guarantee citizens the right of trial by jury in common-law civil cases. But it is beyond dispute that the civil jury trial is a vanishing feature of the American legal landscape. In 1962, juries resolved 5.5 percent of federal civil cases; since 2005, the rate has been below one percent. In 1997, there were 3,369 civil jury trials in Texas state courts; in 2012, even as the number of lawsuits had risen substantially, there were fewer than 1,200. Similar trends are evident in states across the nation").

[289] In 2019, the average wait from arraignment to verdict in the Bronx, not specifying jury or bench, was 506 days. New York City Criminal Court Caseload Activity Report, "Annual Trends," January 18, 2022.

[290] NYS Unified Court System, Division of Technology and Court Research, NYC Criminal Court Caseload Activity Report, dated 5/5/23.

[291] Id. In 2019, the average citywide wait was 383 days, again not distinguishing jury from bench

1994, the citywide wait for a bench trial was 176 days and for a jury trial was 237 days, less than a year.[292] This change was gradual. In 1999, the average number of days for a bench trial citywide was 293 days and 352 days for a jury trial.[293] Five years later, in 2004, the average wait for a bench trial citywide was 309 days, but in the Bronx, it was 445 days.[294] For a jury trial, it took 320 days citywide and 501 days in the Bronx.[295]

There has been a reported increase in delays in Supreme Court, Criminal Term as well. In 2012, in Brooklyn, the average length of time it took for a criminal case to conclude—from arraignment on an indictment to the disposition was 243 days.[296] In 2021, as the courts were recovering from COVID shutdowns, the median time, across New York City, from arraignment on an indictment to final disposition was 620 days.[297] While parties' reactions to delays can vary, the tragic consequences of excessive and wasteful delays on victims have been well documented, [298] and delays likewise have a severe impact on individuals who are incarcerated pending trial, notwithstanding their presumption of innocence.

A further set of troubling statistics reflect the rapidly increasing average number of cases calendared per day in the All Purpose Parts in Criminal Court. In 2017, Staten Island had 134 cases calendared per day.[299] Although this number was an outlier compared to the other counties, which had a range between 70 and 93 cases calendared per day, even these daily caseloads, which have been consistent over the past decade,[300] are extremely high. It is nearly impossible for a judge to hear and consider difficult contested issues, which include change of bail applications and applications to modify orders of protection, in more than a small handful of daily cases, when confronted with such a workload. In addition, Criminal Court judges have

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trials. New York City Criminal Court Caseload Activity Report, "Annual Trends," dated January 18, 2022.

[292] New York State Unified Court System, *2014 Annual Report of the New York City Criminal Court*, at 27.

[293] *Id*.

[294] *Id*.

[295] *Id*.

[296] Stephanie Clifford, *For Victims, an Overloaded Court System Brings Pain and Delays*, N.Y. Times (Jan. 31, 2016), https://www.nytimes.com/2016/02/01/nyregion/for-victims-an-overloaded-court-system-brings-pain-and-delays.html.

[297] NYS Division of Criminal Justice Services, Criminal Case Processing Report, Criminal Justice Case Processing: New York State Report, dated June 2022, Table 8.

[298]William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013). https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html.

[299] 2017 Criminal Court of the City of New York annual Report 40, https://www.nycourts.gov/LegacyPDFs/COURTS/nyc/criminal/2017-Annual-Report.pdf

[300] *Id*.

motions and other written applications that must be read and decided that require their time outside of the courtroom.

These challenges facing the Criminal Court were highlighted in the above-referenced City Council oversight hearing held on February 29, 2016. The Queens District Attorney's Office testified that in 2015, out of more than 8,000 pending cases in Queens Criminal Court, only nine misdemeanor jury trials and 30 bench trials were held.[301] According to the Queens District Attorney's Office, during an approximate eight-month period preceding the hearing, 332 trials were adjourned[302] because there was "no jury trial part at all."[303] Similar testimony was offered by the Staten Island District Attorney's office which lamented that while the DA was grateful for a new courthouse and additional judge, there was no new staff to support the changes.[304] The Bronx Defenders testified to 33 adjournments because there were no judges available for the trial.[305] After hearing this testimony, Council Member Lancman, who presided, determined that "a shortage of judges, court officers and courtrooms were the major reasons for the backlogs."[306]

As noted, a major factor underlying the Criminal Court's inability to timely try cases is that the court lacks enough sitting judges. The OCA's 2017 Criminal Court Report states that there were 76 judges sitting in Criminal Court (at least at some point during the year), and only 33 of them (excluding supervising judges) were appointed Criminal Court judges.[307] The remainder were Civil Court judges reassigned to Criminal Court or Acting Supreme Court justices (some of whom had originally been appointed to lower Criminal Court).[308]

This contrasts with a total of 107 Criminal Court judges authorized by statute, presumably based on the formula in section 20 of the New York City Criminal Court Act, which authorizes the number of judges sitting in the predecessor local courts in 1962, plus 29 more authorized as of 1982. No additional Criminal Court judgeships have been created in the last 34 years, despite significant workload increases. The full complement of authorized Criminal Court judges is not sitting in that court, however, because many Criminal Court judges have been assigned to other courts.

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[301] New York City Council Committee on Courts and Legal Services (Feb. 29, 2016) Deputy Executive Assistant District Attorney Laura M. Henigman, of Queens County District Attorney's Office), at Hearing Transcript at 35-36. http://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=27452&GUID=319891B8-7F93-4063-AA20-FE0D9C62D2B0&Search=.

[302] *Id*. at 37:1-17.

[303] *Id*. at 35:20-21.

[304] *Id*. at 47:5-48:11.

[305] *Id*. at 69:15-23.

[306] *Id*.

[307] OCA's 2017 Criminal Court of the City of New York Annual Report at 6.

[308] *Id*.

C. Impact on Family Court

Family Court judges have also been assigned to sit in Supreme Court as "temporary" acting justices. Some have presided in the Supreme Court for years. Because of the huge caseloads in the chronically under resourced Family Court, the loss of even one judge to the Supreme Court has a significant impact on the overall ability of the Court to manage its caseload in optimal fashion.[309] OCA makes some effort to ameliorate the consequences of the loss of Family Court judges by assigning jurists from other courts (generally Civil or Criminal) to sit in Family Court on a temporary basis, but this practice has proven problematic.[310] As noted above, the practice necessarily depletes the other courts of valuable and much needed jurists. Moreover, concerns have been raised about delays in the replacement of judges from other courts whose temporary assignment to the Family Court have ended; use of judges who have no prior Family Court experience and have not been adequately trained in Family Court practice; and short-term appointments resulting in significant caseloads left uncovered, leading to exceptionally lengthy adjournments.[311] Indeed, cases in the Family Court can drag on for years, allowing, for example, child neglect cases which are commenced when the child is an infant to be concluded when the child is well into his or her school age years.[312] It can be hard to square this practice with the public policy mission of acting in the "best interests" of the child.

D. Resources for Acting Supreme Court Justices

Even though acting justices enjoy the powers and privileges of fully elected Supreme Court justices, they do not have access to all the same staffing resources. For example, under the

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[309] The Council acknowledges that some Family Court judges have been appointed as Acting Supreme Court Justices to sit in the Integrated Domestic Violence parts which are hybrid courts which hear related Family Court, matrimonial and criminal cases. See https://ww2.nycourts.gov/Courts/8jd/idv.shtml. Currently, two Family Court judges and one Criminal court judge sit in an IDV part in New York City. Appointments to an IDV Part do not take these judges from Family Court as much as give them the jurisdiction to hear the related matrimonial and felony cases.

[310] City Bar Association Family Court Judicial Appointment & Assignment Process Work Group, The Family Court Judicial Appointment & Assignment Process, December 2020; Jane Wester, Gaps in Family Court Compromise Justice for New York Families and Children, City Bar Report Finds, N.Y.L.J. (Online) (March 10, 2021). https://www.nycbar.org/media-listing/media/detail/gaps-in-family-court-compromise-justice-for-new-york-families-and-children-city-bar-report-finds-new-york-law-journal.

[311] *Id.*

[312] Robert Z. Dobrish *Solving the Hearing Problems in Custody Litigation*, N.Y.L.J. (December 28, 2021); Chris Bragg, *Falling Through Cracks in The System*, The Times-Union (May 25, 2020). https://www.timesunion.com/local/article/Falling-through-cracks-in-the-system-15292710.php. "A practitioner reports that in Kings County, a first appearance in May 2023 was scheduled for a modification of child support petition filed in September 2022. This level of delay in NYC child support cases is not atypical." New York City Bar Association, Council on Judicial Administration, Written Testimony in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://s3.amazonaws.com/documents.nycbar.org/files/20221136_Judiciary2023-24BudgetRequest.pdf.

constitution, every elected Supreme Court justice is not only assigned a law clerk, but is entitled to a confidential secretary, who performs administrative tasks.[313] An acting Supreme Court justice, however, is assigned a law clerk but not a confidential secretary.[314] Thus, while acting Supreme Court justices have the same caseload as elected justices, and sometimes more, they enjoy half the staff, which can adversely impact their productivity.

Additionally, many acting Supreme Court justices continue to be responsible for work in the lower courts on top of their Supreme Court duties. Each acting Supreme Court justice who was appointed from Civil Court or Criminal Court must handle weekend and holiday arraignment shifts in Criminal Court.[315] This assignment, which is not required of elected Supreme Court justices, imposes the obligation for acting Supreme Court justices to arraign criminal defendants between five to ten times a year.[316] Some cite to the assignment of acting justices with little to no criminal experience to criminal arraignments as yet another example of the negative consequences of the acting justice stopgaps.

At bottom, the current constitutional apportionment of Supreme Court justices is woefully inadequate to meet the Supreme Court's, and ultimately the public's need for more judicial resources. An observation made in 1904, in the Report of the Commission on Laws Delays, is particularly applicable today, over 100 years later: "The remedies adopted by the Constitutional Convention for the relief of large cities of the State have obviously proven totally inadequate to meet the exigencies of the situation and other and different remedies must be sought."[317] This Report will now address potential solutions to New York's justice shortfall crisis.

PART VI: SOLUTIONS TO NEW YORK STATE'S JUDICIAL SHORTFALL CRISIS

A. How New York's Formula Compares to Other Jurisdictions

In developing proposals to address the shortfall of judges, the methods that 49 other states use to determine the number of judicial seats for their respective trial courts of general jurisdiction were first surveyed. The method utilized to set the number of judges in the federal

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[313] N.Y. JUD. LAW §272.

[314] N.Y. JUD. LAW §36.

[315] Arraignments are the first-time criminal defendants appear before a judge and where they learn for the first time what the criminal charges are that have been filed against them. N.Y. CRIM. PROC. § 170.10(2). A number of criminal defendants plead guilty at the Criminal Court arraignment, and it is also the first time that bail is set if required. *Id.* at §§ 170.10(7); 530.20.

[316] See arraignment schedule on file with the City Bar CJA Subcommittee.

[317] Report of the Committee on Laws Delays, N.Y. S. Doc., Vol 9 at 22, (127th Sess. 1904).

courts as also examined. [This goes to who is signing and which names are listed. We can discuss. We want the report to be considered a City Bar report overall.]

1. State Courts

In all but four states, the responsibility of fixing the number of judicial seats is discretionary and falls entirely on the state Legislature, which uses either an ad hoc approach or a methodical evaluation of a variety of metrics, depending on the state.[318] Similar to New York, some states, such as Arizona (1 judge/ 30,000 people), Illinois (Cook County), Iowa (associate judges within districts), Nevada (family court if district population is over 100,000), Oklahoma (adds a Special Judge for every additional 50,000), West Virginia (in 2022, one magistrate court judges per 15,500) use population to set the number of some judges.[319] Our research found 27 states have used the weighted caseload analysis on a recently or on a regular basis[320] and Illinois is in the process of joining that list.[321] Some states use commissions consisting of a variety of participants appointed by a variety of principals.[322] In some states, the judiciary submits a request to change the number of judicial seats with its proposed budget. (*See e.g.*, Hawaii and Colorado). Some commissions are created by statute (Arkansas, Nebraska) while others are created by the judiciary (California, Florida, Georgia).[323] Sometimes these commissions collect and evaluate the data, or they are assisted by professionals such as the National Center for State Courts ("NCSC") to crunch the numbers provided by the court system. NCSC has been assisting courts to compile caseload statistics since 1975.[324] Indeed, the NCSC has worked with 35 states, territories, or subsets thereof, such as counties or particular courts, and five international

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[318] In North Dakota, the Supreme Court is empowered to create a Court of Appeals, while the courts in Ohio, Oklahoma, and South Dakota are involved in determining the number of judges. *See* Appendix, 49-State Survey. See also Exhibit 15, NCSC chart comparing the number of judges in 50 states.

[319] *See* Appendix, 49-State Survey.

[320] Alabama, California, Florida, Georgia, Indiana, Iowa, Kentucky, Michigan, Montana, Nebraska, Minnesota, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming. *See* Appendix, 49-State Survey. See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[321] *See* 49-State Survey, Appendix.

[322] States include Alabama, Arkansas, California, Florida, Georgia, Nebraska, Virginia, and Texas. *See* Appendix, 49-State Survey. In Tennessee, the Comptroller conducts the weighted caseload study, while in Utah, the Legislature Auditor General conducts the study. *Id.* See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[323] *See* 49-State Survey, Appendix.

[324] Court Statistics Project, Guide to Statistical Reporting, https://www.courtstatistics.org/pub-and-def-second-row-cards/guide-to-statistical-reporting.

studies[325] to evaluate their data collection and calculate the right number of judges.[326] The NCSC's "The State Court Guide to Statistical Reporting: Standardized Reporting Framework for State Court Caseload Statistics Designed to Promote Comparisons among State Courts," assists courts by standardizing the collection of data allowing for comparisons across courts, specialties, and states. NCSC publishes statistics for 50 states.[327]

Many states use the "weighted caseload" model created by the NCSC in 1975.[328] The weighted caseload calculates judicial need based on total judicial workload. "The weighted case load formula consists of three critical elements: (1) case filing, or the number of cases of each type opened each year; (2) case weights which represent the average amount of judicial time required to handle cases of each type over the life of the case; and (3) the judge year value, or the amount of time each judge has available for case related work in one year."[329] For example, Indiana has been using the "weighted caseload" system since 1996, but it began in 1993 with a two-year study.[330]

> "The basic premise of a caseload assessment system is that all case types are not equal and each case type requires a different amount of time to complete from initial filing up through the final disposition of the case. To establish the "weight" each case type should be given, it first must be determined the average amount of time in minutes each case type takes to complete. During the most recent weighted caseload assessment study, thirty-nine case categories were examined."[331]

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[325] The World Bank studied the lessons learned from the 40-year history of weighted case analysis, and identified limitations and good practices in an effort to help policy makers decide whether and when to engage in a weighted case analysis. Case-Weighting Analyses as a Tool to Promote Judicial Efficiency: Lessons, Substitutes and Guidance (December 2017) https://documents1.worldbank.org/curated/en/529071513145311747/pdf/Case-weighting-analyses-as-a-tool-to-promote-judicial-efficiency-lessons-substitutes-and-guidance.pdf.

[326] November 16, 2021, interview of Suzanne Tallarico, Principal Court Management Consultant, Court Consulting Services, NCSC.

[327] NCSC Court Statistics Project, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat.

[328] *Id.*

[329] Matthew Kleiman, et. al., *Workload Assessment: A Data-driven Management Tool for the Judicial Branch*, National Center for State Courts at 243 (2013), https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2088/.

[330] *Weighted Caseload Measures and the Quarterly Case Status Report*, IN.GOV, https://www.in.gov/courts/iocs/files/pubs-trial-court-weighed-caseload.pdf.

[331] *Id.*

Another factor relevant to the evaluation is "clearance rates," which is the number of disposed cases as a percentage of the incoming cases.[332] Case counts are an important factor in this evaluation, but weighting the cases is imperative. "While case counts alone have a role in determining the demands placed on state judicial systems, they are silent about the resources needed to process the vast array of cases differently. That is, raw, unadjusted case filing numbers offer only minimal guidance regarding the amount of work generated by those case filings."[333] Indiana's July 1, 2021, report details the process it follows.[334]

As Indiana illustrates, there is an expense to initiating the process and implementing it. Accordingly, some states evaluate the need to change the number of judges biannually, (California, Hawaii, and Kansas)[335] while other states conduct such an evaluation every year (e.g., Alabama, Arkansas, Georgia, Idaho, Missouri, Nebraska, New Hampshire, Tennessee, Utah, West Virginia), every four years and at no other time (Iowa), every eight years (Kentucky), twice a year (Indiana) or every ten years (Mississippi). In 1998, the U. S. Department of Justice Office of Justice Program recommended that Florida adopt a weighted caseload system which was estimated to cost $52,000 per year every four years to update weights.[336]

Whether it is a commission, the judiciary, or the Legislature, relevant factors and metrics analyzed are wide ranging and, in some cases, specific to the unique needs of the jurisdiction. They include, among other things: population by district or circuits using latest U.S. census; judicial duties; specialized courts; number of civil, criminal, and domestic cases in each circuit; caseload by geographic area; court's data collected and averaged over three years; workload estimate from the average amount of time of bench and off-bench work required to resolve a case; ranking based on need; weighted case load studies; new case filings by case type; case weights which represent the average amount of judge or judicial officer time required to handle the case by type of case; and the amount of time each judge or judicial officer has available for case-related work per year.

Some unique provisions in the following states are worth highlighting:

> In Missouri**,** the relevant statute mandates the creation of an additional circuit judge position where, for three consecutive years, the annual judicial performance report indicates the need for two or more full-time judicial positions in any judicial circuit.[337] Because, however, the mandate

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[332] National Center for State Courts, *CourTools, Trial Court Performance Measures*, https://www.courtools.org/__data/assets/pdf_file/0012/7320/courtools-measure-2-clearance-rates.pdf.

[333] *Id.*

[334] See Exhibit 9.

[335] *Id.* See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[336] Weighted Caseload Methods of Assessing Judicial Workload and Certifying the Need for Additional Judges, https://www.ojp.gov/ncjrs/virtual-library/abstracts/weighted-caseload-methods-assessing-judicial-workload-and.

[337] Mo. Rev. Stat. § 478.330 (2018).

is subject to appropriations made for that purpose, the Legislature ultimately retains the authority to create the position since it has the power to fund the new judgeship or not.[338]

North Dakota uses a two-year rolling average.[339]

In Florida, the constitution requires the state's Supreme Court to establish uniform criteria for determining the lower courts' need for additional judges. If the Supreme Court finds that a need exists, the Florida Constitution mandates that it certify to the Legislature its findings and recommendations to address such needs. At the Legislature's next regular session, it must consider the findings and recommendations, and may either reject the recommendations or by law implement the recommendations in whole or in part. The Legislature is permitted to create more judicial offices than the Supreme Court recommends and may also decrease the number of judicial offices by a greater number than recommended only if two-thirds of the membership of both houses of the Legislature finds that such a change is warranted.[340]

In Delaware, the governor has the authority to appoint judges *ad litem*.[341] For example, when Supreme Court judges disqualified themselves from the highest court, the governor appointed temporary judges to hear the appeal.[342]

In Indiana, the Legislature fixes the number of judges, but the constitution also commands the state's chief justice to regularly report to the Legislature. The Office of Judicial Administration ("OJA"), a department of the judiciary, assists the chief judge in meeting this requirement by collecting and compiling statistical data and other information on the Indiana court's work and publishing reports on the nature and volume of judicial work performed by the courts one to two times per year. The OJA uses a weighted caseload measurement system to establish an objective and uniform method for comparing trial court caseloads across the state. The OJA accomplishes this by dividing collected data into three categories: need, have, and utilization and ranking the categories county by county.[343]

In Texas, the Legislature must reapportion judicial districts at least every 10 years, but if the Legislature fails to do so, "the Judicial Districts Board shall convene not later than the first Monday of June of the third year following the year in which the federal decennial census is taken to make a statewide reapportionment of the districts. The Judicial Districts Board shall

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[338] *See* 49-State Survey, Appendix.
[339] *See* 49-State Survey, Appendix.
[340] Fla. Const. Art V, §9.
[341] *See* 49-State Survey, Appendix.
[342] *Nellius v. Stiftel*, 402 A.2d 359 (Del 1978). The Rule of Necessity would prevent any recusals that would leave litigants without a judge. Thomas McKevit, *The Rule of Necessity: Is Judicial NonDisqualification Really Necessary?* Hofstra Law Review 818, Vol 24 (1996).
[343] *See* 49-State Survey, Appendix.

complete its work on the reapportionment and file its order with the secretary of state not later than August 31 of the same year."[344] The Legislature must approve the order.[345]

The following states have implemented measures similar to those that New York has adopted to address shortages of judges:

Like New York, the New Hampshire Supreme Court, the highest court, may certify to the governor the need to convert a part-time judgeship into a full-time position.[346]

Like New York and federal courts, the Legislature in Georgia has authorized the court and the governor to call upon senior judges after their retirement to supplement the permanent judges.[347]

As noted above, the system of raising lower court judges to the state's constitutional trial court of general jurisdiction is not unique to New York, but the scale and longevity of such appointments is unique. While Illinois has a similar procedure, it is limited to authorizing Associate judges, who tend to hear misdemeanor criminal cases and any civil cases, to hear felony cases.[348] Also like New York's Chief Administrative Judge, the Illinois Judicial Conference reports to the Legislature annually on the state of the judiciary and proposes improvements, but they are not required to address a change in the number of judges.

In 2022, NCSC issued recommendations for using the weighted caseload analysis including lessons from the pandemic.[349] For example, courts should track hybrid, remote and in-person proceedings and regularly assess backlogs.[350]

2. The Federal Courts

The number of circuit and district judges in the federal system is set by statute—28 USC § 41 for circuit courts and 28 USC §§ 132, 133 for district courts—and Congress also sets out which states shall be divided into individual districts and in which states the district is comprised—*e.g.*, New York, Connecticut, and Vermont.[351] An Act of Congress created the federal courts specifying the number of judges appointed to that court and from time-to-time,

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[344] Tex. Const. Art. 5, § 7a(e).
[345] Tex. Const. Art. 5, § 7a(h).
[346] NH Rev. Stat Stat. 490-F:7.
[347] GA Code § 15-1-9.2 (2020).
[348] *Id. See also* Illinois, 49-State Survey, Appendix.
[349] Recommendations for Using Weighted Caseload Models in the Pandemic, March 31, 2022, https://www.ncsc.org/__data/assets/pdf_file/0034/75589/Recommendations-for-WCL-in-Pandemic.pdf.
[350] *Id.*
[351] 28 U.S.C. §41

additional Acts of Congress have added new judgeships to specific courts, the last judgeship bill passing Congress in 2002 preceded by a bill in 1990.[352]

Every two years, the Administrative Office of the United States Courts surveys each circuit and district court regarding the need for new judgeships.[353] The request for new judgeships is based on a national caseload threshold determined by the Judicial Conference of the United States ("JCUS") through the JCUS Committee on Judicial Resources (the "JRC").[354] A request for new judgeships must be approved by the court's board of judges (all the active judges and those senior judges involved in court governance), the circuit judicial council, the JRC Subcommittee on Statistics, the full JRC and then the full JCUS. The JCUS then transmits this request to Congress.[355]

Congress determines the numbers of judgeships based on statistical data from the Administrative Office of the U.S. Courts (the "Administrative Office").[356] The Administrative Office's professional staff uses algorithms to convert raw caseload data into weighted cases, which are the basis for determining whether a court is entitled to additional judgeships.[357] Each Circuit has a representative to the JRC.

In March 2017, based on the Administrative Office's latest survey, the JCUS recommended that Congress create five new judgeships in one court of appeals and 52 new judgeships in 23 district courts.[358] The JCUS also recommended that Congress convert eight existing temporary judgeships to permanent status. Since Congress enacted the last comprehensive bill for the U.S. courts of appeals and district courts, the number of cases filed in those courts grew by 40 percent and 38 percent, respectively.[359]

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[352] In 1990, Congress increased the number of Article III judges by 85 which was an 11% increase. Jud. Conf. of the U.S.: Hearing before Subcomm. On Bankr. and the Cts. Of the Comm. on the Jud., 113 Cong. (September 10, 2013) (Statement of Hon. Timothy M. Tymkovich, Chair, Comm. on Jud. Res.)

[353] United States Courts, *Federal Court Finder*, https://www.uscourts.gov/federal-court-finder/search.

[354] Statement of Hon. Timothy M. Tymkovich, *supra* 352.

[355] *Id.*

[356] *Id.*

[357] *Id.*

[358] *Id.*

[359] Chief Judge Lawrence Stengel, Judge Roslynn Mauskopf, and Judge Dana Sabraw testified at a Congressional hearing on "Examining the Need for New Federal Judges" on June 21, 2018. https://www.uscourts.gov/news/2018/06/21/courts-need-new-judgeships-judicial-conference-tells-congress.

Federal judges may take senior status when their years of service and age add up to 80.[360] Unless their workload is decreased, Senior Judges continue to be allocated chambers, administrative support and law clerks equal to the resources allocated to active judges.[361]

3. The Contrast to New York: Key Takeaways

The above nationwide state survey and brief examination of the federal court system led to the sobering conclusion that most other states and the federal system are far more advanced and methodical in their approaches to assessing the adequacy of judicial resources. While other states are largely data driven and staying atop current trends, New York State employs an ad hoc, speculative approach devoid of any meaningful reliance on facts—instead continuing to rely on an outdated constitutional cap based on population alone to determine the number of judges for the Supreme Court. Moreover, unlike New York, most of the approaches surveyed include a mandatory component—constitutionally by statute or otherwise—for the relevant authority or body to evaluate the need for additional judges and make recommendations, as necessary.

By contrast, while New York State's Chief Administrative Judge has the duty to keep and report data for the Unified Court System under the Judiciary Law, it merely has the option to request a change in the number of judges as needed.[362] The Chief Administrative Judge does **not** have the duty to request a change in the number of judges. Based on New York State's experience to date, without a mandate requiring the Chief Administrative Judge to evaluate and make a recommendation to change the number of judges, as needed, it is unlikely that any such request for additional judges will ever be made. Indeed, the Subcommittee has been unable to locate any such request, except for the Family Court crisis in 2007[363] and the Franklin H. William Commission in 2022.[364]

Regardless of the reason, the City Bar believes the time is right to add this important duty to Judiciary Law—specifically, section 212. Whether the courts are now performing at their

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[360] 28 U.S.C. § 371 (c); Hon. Frederic Block, *Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings*, Cornel Law Rev. 533 (March 2007) https://core.ac.uk/download/pdf/73974972.pdf.

[361] *Id.* 539-540.

[362] N.Y. Jud. Law § 212.

[363] "According to court statistics, Family Court filings have grown to 700,000 annually, an increase of 90 percent over the past 30 years. But no new Family Court judges have been added statewide since one was created in Orange County in 2005." *OCA Proposes Allocation of New Family Court Judges*, N.Y.L.J. (May 16, 2014). In 2007, Chief Judge Kaye requested 39 new Family Court Judges. *Id.* It was not until 2014, however, that 25 new Family Court seats were created statewide. *Cuomo Signs Bill for New Family Court Judgeships*, N.Y.L.J. (June 27, 2014).

[364] Franklin H. Williams Judicial Commission of the New York State Court Report on New York City Family Courts at 6 and 28, https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf.

peak efficiency should be based on science, not speculation. Further, an independent professional analysis—in-house or by NCSC—that is reported to the Legislature and the public makes the process of changing the number of judges transparent.[365] Such a report would include statistics on the length of time that the courts are taking to resolve various types of cases. For example, the report would make it possible for the Legislature and the public to compare how long it takes to resolve a custody dispute in Family Court as opposed to the matrimonial part in Supreme Court, and it would be for the Legislature to decide whether delays, if any, are tolerable or not.

Accordingly, as part of the proposals discussed more fully below, the Council recommends that Judiciary Law § 212 be amended to require the Chief Administrative Judge to (1) annually assess the need to change the number of judges to ensure the efficient resolution of all cases filed in New York using a weighted caseload analysis; (2) report the needed changes to the number of judges in any court; and (3) make a request to the Legislature for such change, as needed.

B. The Path to A Better System

1. Guiding Principles

The Council concludes each court should have the right number of judges to perform its duties and provide justice to the people of New York. An excess of judges in any court or county obviously constitutes a waste of state resources, but there must be an adequate number of judges to provide civil litigants with access to the court and to assure that all parties in criminal cases are able to pursue justice in the courts. Achieving this goal will take time and professional analysis of the statistics. Once this task is performed, it is up to the Legislature under the constitution to create more judicial seats, or not. Whether there will be a budgetary impact depends on the recommendations adopted, how they are implemented, and when (e.g., staggered implementation).[366] In the judgment of the Council, the present allocation of judges, particularly of Supreme Court judges, in the various counties of the state is the result of an idiosyncratic and woefully inadequate patchwork of appointments that are not based on data or modern methods of evaluation.

Temporary measures should be temporary. As the 49-state survey illustrates, many states have temporary measures to address emergencies or societal changes that impact the courts. The Council appreciates the constitutional provision for acting Supreme Court justices to be moved

[365] Both the Legislature and the OCA may have such expertise. *See* New York Legislative Task Force on Demographic Research and Reapportionment., https://www.latfor.state.ny.us/; OCA's Division of Technology, https://ww2.nycourts.gov/Admin/supportunits.shtml#su4.

[366] *Cuomo Signs Bill for New Family Court Judgeships*, N.Y.L.J. (June 27, 2014); *see also*, *New York State Association of Trial Lawyers v. Rockefeller*; *Kail v. Rockefeller, et. al*, 275 F. Supp. 937 (E.D.N.Y. 1967).

from time to time to address a temporary need. But appointing over 300 acting justices each year for over 13 years proves that there is a dire need; it is not a passing or temporary need. Indeed, the use of acting justices has flooded the Court to the point that there have been more acting justices than there are constitutional justices throughout the state, to the detriment of lower courts. The use of the acting justice approach to address temporary needs has effectively created disparities in the availability of resources between acting justices and their colleagues who are constitutionally-elected justices—thus creating two disparate levels of judges in the same court.

The Council cannot determine the financial impact of these proposals. Therefore, this Report does not include a fiscal impact analysis. Rather, once the data is collected and organized either by OCA, the Legislature, or professionals, it will be up to the Legislature to determine how many judges are needed in each judicial district and each court. Such evaluations can be done at once or on a staggered basis by court or judicial district, with the attendant fiscal impact flowing from these processes. With these guiding principles in mind, our recommendations are five-fold.

First, the constitutional cap should be eliminated. Such a change to the constitution will take time to effectuate, as the Legislature will have to vote in favor of the change in two separate Legislatures before the measure goes to the New York electorate on a ballot.

Second, the Legislature must codify a regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges—at least every ten years when there is a new census, has been consistently breached, with the Legislature increasing the number of judges only on an ad hoc basis. Other state legislatures are required to regularly evaluate the number of judges and courts needs annually, biannually, or using a formula. The Council does not recommend how often such an evaluation must be performed in New York State, as such a decision should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts. The Council, however, finds that performing such an evaluation every ten years, if at all, is insufficient. The Council's proposed statutory language appears in §V1(B)(2) (Proposal 1(C)).

Third, the Chief Administrative Judge plays a role in this process and should be tasked with the responsibility to evaluate the adequacy of current judicial resources and issue a report to the Legislature setting forth her findings and recommendations, so that the Legislature may carry out its function. The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and she thus has a significant role in this process.[367] His statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the

[367] The Chief Administrative Judge is Hon. Joseph Zayas

number of judges in each court and request changes when appropriate; this is not currently on the list of items to be reported. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats. The Council's proposed statutory language appears in § V1(B)(2) (Proposal 1(D)).

Fourth, the evaluation must be performed regularly with OCA providing the data and initial recommendation and the Legislature performing its duty to regularly evaluate the number of judges and change the number accordingly. The Legislature should adopt a formula for assessing these needs, which takes into account not only population, but also translating the various caseloads, civil, and criminal, complexity of cases, out of court time for preparation and writing decisions, and extra time for unrepresented litigants into a number representing the total judges that will be necessary at a given time to fulfill all judicial obligations—until modified upon subsequent review based on new information. Such an analysis would also take into consideration the availability of nonjudicial resources such as ADR, JHOs, special referees, and magistrates. Any determination increasing or decreasing the number of judges in any particular court or in any particular department will necessitate a correlative change in support resources, such as court personnel, courtrooms, and the like.

Fifth, there must be transparency. The results of any assessment should be published so that the public has information as to the time it takes to resolve criminal cases, small claims cases, Family Court cases, and other matters. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

2. Proposed Solutions

PROPOSAL #1

The constitutional cap on the number of Supreme Court justices should be eliminated and the Legislature should be required to devise a new method to analyze and respond to the judiciary's needs.

Specifically:

A) (The following language in Article VI, Section 6(d) of the N.Y. Constitution should be deleted:

The Legislature may increase the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The Legislature may decrease the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be less than the number of justices of the Supreme Court authorized by law on the effective date of this article.

B) Article VI, section 6 (b) of the constitution should be rewritten as follows (new language
in red):

At least once every ten years, the Legislature shall consider whether to increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered, provided that each judicial district shall be bounded by county lines. The Legislature shall also, at least once every ten years, consider whether to increase or decrease the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be less than the number of justices of the Supreme Court authorized by law on the effective date of this subdivision as amended.

(These amendments would have to be approved by the current Legislature and the Legislature elected in 2023, and then submitted to the voters for ratification.)

C) A new section of the Judiciary Law should be enacted, to read in substance:

"In exercising its powers pursuant to Article VI, subd. (6)(b) of the constitution, the Legislature shall seek to ensure that each district and court therein shall have sufficient numbers of justices to perform its functions in a thorough and efficient manner, considering the number of cases filed in each court, the complexity of such cases, the extent of delays in the disposition of cases in each court, and any other factors used by recognized national or state authorities who study the proper allocation of judicial resources."

D) A new subdivision should be added to Section 212 of the Judiciary Law, "Functions of the chief administrator of the courts," directing the chief administrator to compile data to assist the Legislature in performing its functions under [the new section of the Judiciary Law, above] and to provide such data, and analyses thereof, with a specific request to change the number of judges in each court, in such manner as the Legislature may direct.

PROPOSAL #2

The constitution should be amended so that the case-handling capacity of the Supreme Court shall not be diminished by the appointment of Supreme Court justices to any appellate division.

Specifically:

Article VI, section 4(e) of the constitution shall be amended to read (new language in red):

In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease. Designation of an additional justice pursuant to this subdivision shall be deemed to create a vacancy in the Supreme Court position previously held by said justice. Said vacancy shall be filled pursuant to Section 21(a) of this Article.

(Notes: this amendment would have to be enacted simultaneously with the other proposed amendment. Otherwise, implementation of this amendment may conflict with the cap on the number of Supreme Court justices.

This amendment would not preclude other changes regarding the composition of the appellate divisions that the Council, or the Legislature, may wish to adopt.

3. Immediate Interim Measures

In the interim, less time-consuming statutory changes are immediately available. Unlike the New York Supreme Court, the number of judges in the lower civil and criminal courts is not subject to a constitutional cap on the number of judges. For example, the shortage of Criminal and Civil Court judges created by the transfer of acting justices may be addressed by the legislative authorization of additional judges to the citywide courts. Since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts and change the number accordingly. But any such change must be based on actual data and modern methods of evaluation. Indeed, the weighted caseload analysis could be performed and implemented in Housing Court immediately without any statutory change. The evaluation of whether the number of judges in the lower courts and calculation of weighted caseloads need not await a constitutional or legislative change. Rather, all that is needed is the raw data and the skills to evaluate it. The calculation of case weights, however, requires cooperation of court participants to determine the time it takes to perform certain tasks.

CONCLUSION

In the almost 60 years since 1962, when the constitutional formula changed to one judge per 50,000 people and the creation of the civil and criminal lower courts, there has been no change in the calculus of Supreme Court justices. Despite the constitutional obligation to reconsider the need for more justices every ten years based upon newly collected census data, the failure to increase the number of Supreme Court positions in light of the significant interim population growth has forced OCA to implement *ad hoc* mechanisms in order to provide the jurists needed to actually carry out the critical obligations of the third branch of government. Based on the assignment of at least 300 such acting justices for over ten years, the time has come to lift the cap and begin calculating the number of judges in all of New York's courts using actual data and modern methods of evaluation.

Council on Judicial Administration
Fran Hoffinger, Chair[368]
Constitutional Cap Sub-Committee Members[369]

Robert Calinoff*[370]
Hon. Steven L. Barrett*
James P. Chou*
Michael Graff
Hon. Andrea Masley* – Subcommittee Chair
Robert C. Newman*
Maria Park
David H. Sculnick
Steven B. Shapiro*
Hon. Philip Straniere*
Raymond Vanderberg
Daniel Wiig

*Primary Authors of Final Report

This report is supported by:

Alternative Dispute Resolution Committee, Philip Goldstein, Chair
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