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November 19, 2008

Hon. Michael C. Lynch
Justice of the Supreme Court
Albany County Supreme Court
Harold L. Joyce County Office Building
112 State Street - Suite 1212
Albany, New York 12207

Via Telefax (518) 447- 7181

and c/o Hon. Charles E. Diamond, Chief Clerk
16 Eagle Street
Albany, NY 12207

Re: Bordeleau v. State of New York, Albany County Supreme Court, Index No. 6582-08
To be argued December 3, 2008

Dear Justice Lynch:

We respectfully submit this letter memorandum in response to plaintiffs' "expert" affidavit of Frostburg State Associate Professor Anderson, sworn to November 5, 2008, submitted in opposition to defendants' motion to dismiss.

As plaintiffs proffered, their expert invites this Court to substitute its judgment, or, indeed, the expert's, for that of the legislative and executive branches in reviewing appropriations designed to be in the public interest. As we noted previously, such an exercise defies the judicial restraint the Court of Appeals requires (People ex rel Hotel Dorset Co. v. Trust for Cultural Resources, 46 NY2d 358, 369-370 [1978]). Indeed, because plaintiffs' complaint seeks to declare that there are constitutional prohibitions which flatly forbid appropriations for economic development, there are no factual assertions which prevent its dispatch now, as "it is well settled" that judicial intervention in the state budget may be involved only in the narrowest of instances (Matter of Maron v. Silver, __ AD3d __, 2008 NY Slp Op 08573 [3d Dep't, November 13, 2008]) and plaintiffs' conclusory claims, however embellished by their expert, defy all the precedents cited in the movants' papers.

The associate professor candidly reveals that it is "difficult if not impossible" to measure whether the economic benefit to the State and public far exceeds the amount of the challenged expenditures (see Anderson aff. ¶¶ 6-7). In light of that admission, his bald declaration that there is no "public purpose" in governmental expenditures to preserve or expand domestic industries and development is vacuous, particularly insofar as the opinion apparently depends upon a unilateral and unprecedented redefinition of "public purpose" as "one which tends to benefit all citizens in the state

such as the prosecution of violent criminals” (see *id.*, ¶¶ 20-21). In the end, such speculation and conclusory declarations simply highlight the movants’ premise that plaintiffs have made and can make no factual assertions sufficient to meet their burden to allege facts, if true and liberally construed, sufficient to establish unconstitutionality beyond a reasonable doubt (see, e.g., *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Wolpoff v. Cuomo*, 80 NY2d 70, 78 [1992]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *In re Fay*, 291 NY 198, 207 [1943]).

As established precedent requires the Court to defer to the Legislature and Executive in the exercise of judgment in such budgetary matters, the Court would inevitably err in allowing this expert witness to usurp its function as the sole determiner of the law and thereby ignore the deference the Court owes to the other branches here (see *Marquart v. Yeshiva Machezikel Torah D’Chasidel Belz*, 53 AD2d 688, 689 [2d Dep’t 1976]; *Petru v Hertz Corp.*, 33 AD2d 755 [1st Dep’t 1969]).

The complaint must be dismissed for all the reasons previously provided. Thank you for your consideration of this matter.

Respectfully submitted,
s/ Robert A. Siegfried
Robert A. Siegfried
Assistant Attorney General

cc: Via email and regular mail

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