

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BROOME

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JUSTICE AND UNITY FOR THE SOUTHERN  
TIER;

Plaintiff,

ATTORNEY AFFIRMATION

-against-

DAVID HARDER, Broome County Sheriff,

Defendant,

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**JOSHUA T. COTTER**, an attorney admitted to practice law in the State of New York, declares under penalty of perjury as follows:

1. I am an attorney duly licensed to practice law in the State of New York, and am admitted to practice in the State of New York. I am employed as a Staff Attorney for Legal Services of Central New York, Inc., counsel for Plaintiff in this matter. As such, I am fully familiar with the facts and circumstances of this proceeding.
2. I make this affirmation in support of Plaintiff's motion for criminal and civil contempt sanctions.
3. On September 6, 2022 Plaintiff filed a motion to vacate the mandatory stay which took effect when Defendant Harder filed his notice of appeal.
4. In opposition to Plaintiff's motion Defendant Harder submitted affidavits from Mark Smolinsky and his counsel Robert Behnke. Attached hereto as EXHIBIT 1 is a true and correct copy of the affidavits of Robert Behnke and Mark Smolinsky.

5. The affidavits of Behnke and Smolinsky rehash the alleged safety and security concerns Defendant Harder and the Sheriff's Office has with re-opening in-person visitation. Affirmation of Robert Behnke ¶ 9, September 14, 2022; Affidavit of Mark Smolinsky ¶¶ 11-14. Only two weeks after submitting these affidavits arguing that visitation cannot be re-opened because of the safety of inmates and staff, Defendant Harder re-opened in-person visitation without any safety protocols.

6. On September 22, 2022 the Appellate Division vacated Defendant Harder's stay effective on September 29, 2022.

7. On September 27, 2022, I reached out to Defendant's counsel to see if Defendant Harder decided the safety protocols he will put in place for visitation. Attached hereto as EXHIBIT 2 is a true and correct copy of Plaintiff's counsel's e-mail chain with Defendant's counsel.

8. Defendant's counsel responded that visitation will be from 12:30 to 1:30 and 6:30-9:30. He alleged the new schedule was approved by the State Commission on Corrections that same day. *Id.*

9. In response to my question as to why Sheriff Harder is not complying with the Court's order Defendant's counsel stated the new schedule was approved by the SCOC. *Id.*

10. I then informed Defendant's counsel if Sheriff Harder did not offer visitation on the schedule ordered by the Court, JUST would be filing a motion by order to show cause to hold Sheriff Harder in contempt. *Id.*

11. On September 30, 2022 I had a phone discussion with Defendant's counsel. After our conversation it was clear we will be unable to reach a resolution of this matter and filing a motion for contempt was necessary.

12. I have expended a total of 17.6 hours in gathering facts and drafting the paperwork for Plaintiff's motion for contempt. Attached hereto as EXHIBIT 3 is a true and correct copy of my time records for this motion.

13. Based on my previous experience \$250.00 per hour is a reasonable rate for the time I have spent on this motion. Attached hereto as Exhibit 4 is a true and correct copy of my CV detailing my experience.

14. No prior application for the relief requested herein has been made to this, or any other Court.

Dated: October 7, 2022  
Syracuse, New York

Respectfully submitted,

/s/ Joshua Cotter, Esq.  
Joshua Cotter, Esq.  
LEGAL SERVICES OF CENTRAL  
NEW YORK  
221 S. Warren Street, 3rd Floor  
Syracuse, NY 13202  
Tel: (315) 703-6500  
jcotter@lscny.org

# EXHIBIT 1

STATE OF NEW YORK: SUPREME COURT  
APPELLATE DIVISION: THIRD DEPARTMENT

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JUSTICE AND UNITY FOR THE SOUTHERN TIER

Plaintiff/Respondent

**AFFIDAVIT**

vs.

**Case No. 536031**

DAVID HARDER, Broome County Sheriff

Defendant/Appellant

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ROBERT G. BEHNKE, being duly sworn, deposes n says:

1. That I am the County Attorney for the County of Broome, am familiar with the facts and circumstances of this action and make this affidavit in opposition to the Plaintiff's motion to vacate the automatic stay under CPLR §5519(a).

2. The Plaintiff's filed an Amended Complaint in this action on May 25, 2022. A copy of the Amended Complaint is attached hereto as Exhibit A.

3. As set forth in its Amended Complaint, the Plaintiff's are alleging that their organizations' right to visit inmates at the Broome County Jail has been violated. (See Amended Complaint paragraphs 62 – 71)

4. As such the sole issue before the Court below was whether the Plaintiff's constitutional rights were violated under the New York State Constitution because they could not have in-person visitation at the Broome County Jail.

5. There is no cause of action in the Amended Complaint alleging that an inmate's constitutional rights have been violated.

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GOVERNMENT PLAZA • BINGHAMTON, N.Y. 13901

6. As outlined in the Affidavit of Mark Smolinsky, the Plaintiffs are not prohibited from all forms of contact with inmates at the Broome County Correctional Facility.

7. They can talk with inmates by letter or telephone. The Plaintiffs can also meet with inmates through video conferencing.

8. All inmates have access to tablets. The Plaintiffs should they wish to meet with inmates can meet with them through video conferencing. To facilitate the ability for video conferencing visits, the Sheriff's Office provides periodic funding in the inmate commissary account to cover the cost of video conferencing and telephone calls.

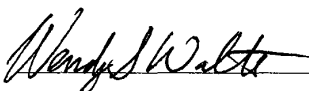
9. As explained by Mark Smolinsky, the Correctional Facility is addressing the ongoing problems with COVID-19 infections to protect the inmates and staff by prohibiting in-person visitation.

10. Pursuant to the latest data tracker issued by the Centers for Disease Control and Prevention (CDC), Broome County remains in the medium risk category for levels of infection..

WHEREFORE, your Deponent respectfully requests that an Order be entered denying the Plaintiff's motion to vacate the automatic stay under CPLR § 5519(a) with costs and disbursements together with such other and further relief as to the Court may seem just and proper.

  
ROBERT G. BEHNKE

Sworn to before me this  
13<sup>th</sup> day of September 2022

 Notary Public

WENDY S. WALTER  
Notary Public, State of New York  
No. 01WA4952378  
Qualified in Broome County  
My Commission Expires June 19, 2023

STATE OF NEW YORK: SUPREME COURT  
APPELLATE DIVISION: THIRD DEPARTMENT

JUSTICE AND UNITY FOR THE SOUTHERN TIER

Plaintiff,

**AFFIDAVIT**

vs.

**Case No. 536031**

DAVID HARDER, Broome County Sheriff

Defendant.

MARK SMOLINSKY, being duly sworn, deposes n says:

1. That I am employed by the Broome County Sheriff's Office and hold the rank of Major. I am the Administrator of the Broome County Sheriff's Correctional Facility. I am familiar with the facts and circumstances of this action and make this affidavit in opposition to the Plaintiff's motion to vacate the automatic stay.

2. At present contact visitation is not permitted at the Correctional Facility. This is to attempt to prevent the spread of COVID-19 between visitors and inmates with the goal of reducing the risk to inmates in the facility and the public.

3. Currently, the Correctional Facility provides each inmate with access to a tablet for purposes of contacting their family and other visitors. The facility also has access to another 120 tablets if the facility population were to increase.

4. The Plaintiffs have alleged that the rates for phone calls are excessive, however since 2009 these rates have been established by the Federal Communications Commission.

5. With each inmate having access to a tablet, we have not found that there have been problems or complaints about the WIFI access for the inmates.

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6. While the in-person visitation has been stopped, the Correctional Facility has been adding between \$20 and \$25 periodically to each inmate's commissary fund. The inmates can use this money to pay for phone calls and video visits.

7. The Plaintiffs have continued to be able to converse with inmates by telephone, video visits or mail while in-person visitation has been curtailed.

8. Under either the High or Medium rate of infection, the CDC recommends that Correctional Facilities use enhanced COVID-19 prevention strategies. Under these levels the CDC advises to consider restricting non-contact visitors, vendors, volunteers and tours from entering the facility. The CDC says that if visitation is suspended, facilities should find alternative ways for inmates to communicate with their families, friends and other visitors.

9. As previously discussed, we have provided inmates with tablets to use to contact family, friends and visitors. The inmates can also contact these individuals by phone or mail. The inmates are provided some money by the Correctional Facility in their commissary funds to mitigate the cost of these alternatives.

10. The New York State Commission of Corrections and Department of Health have not issued any guidance that conflicts with the CDC guidance.

11. The current restrictions are in place to limit the inmate's exposure to the COVID-19 virus within the local community and to try to prevent a spike in positive COVID-19 tests among the inmate population. The success of our attempts is documented in that we have had no deaths or hospitalizations of inmates due to COVID-19 since the beginning of the pandemic.

12. On September 9, 2022, the Faculty had forty-five inmates in quarantine due to COVID-19. We also have a test pending for another inmate who was exhibiting symptoms consistent with COVID-19.



13. The Plaintiffs have referred to some County Correctional Facilities that have begun to allow contact visitation. I would point out the DOCCS did start contact visitation and then saw an increase in inmates testing positive for COVID-19. They had to stop contact visits again for a period of time. During the time DOCCS stopped contact visits, they also stopped transferring state-ready inmates to the DOCCS facilities.

14. I am aware that Chenango County Correctional Facility had a similar experience. They resumed contact visitation and saw a spike in inmates testing positive for COVID-19. Due to this spike in positive tests, Chenango County stopped contact visits again.

15. Currently Delaware County, Franklin County, Genesee County, Greene County, Madison County, Montgomery County, Onondaga County, Ontario County, Orange County, Orleans County, Oswego County, Seneca County, and Wayne County are currently not permitting in-person visitations. It appears that Tioga County, Ulster County and Westchester County only allow non-contact visitations. Similar to our facility, Greene County uses their non-contact rooms for attorney and Parole visits.

16. The Plaintiffs allege that in-person visits are better than video visits. I am not aware of any study that found a difference between the two types of visits.

17. The Plaintiffs have continued to be able to converse with inmates by telephone, video visits or mail while in-person visitation has been curtailed.

18. The Correctional Facility has not received any requests or grievances from inmates asking that in person visitation be resumed.

WHEREFORE, your Deponent respectfully requests that an Order be entered denying the motion to vacate the automatic stay with costs and disbursements together with such other and further relief as to the Court may seem just and proper.



MARK SMOLINSKY

Sworn to before me this  
12 day of September 2022

*Krystal Dillenbeck*  
Notary Public

KRYSTAL DILLENBECK  
NOTARY PUBLIC, STATE OF NEW YORK  
Registration No. 01DI6405665  
Qualified in Broome County  
Commission Expires March 16, 2024

## EXHIBIT 2

**Re: Discovery Schedule, and Re-Opening Visitation (JUST v Harder)**

Josh Cotter &lt;jcotter@lscny.org&gt;

Wed 9/28/2022 2:57 PM

To: Behnke, Robert G. &lt;robert.behnke@broomecountyny.gov&gt;

The schedule ordered by Judge Blaise is the schedule in the handbook that was attached as an exhibit to our verified complaint. There is nothing in the decision giving Sheriff Harder authority to come up with his own schedule. Whatever the commission approved is irrelevant because there is a court order dictating the visitation schedule. Pursuant to the schedule ordered by Judge Blaise there are nine total hours of visitation available to visitors at different times of the day. Sheriff Harder is now proposing to offer only four hours of visitation per day.

I am unsure how he is basing this decision on the past numbers of visits when there hasn't been visitation in over two and half years. Presumably there will be a significant number of visitors Thursday, and in the coming weeks, because in-person visitation has been denied for so long. If Sheriff Harder does not offer in-person visitation on the schedule ordered by Judge Blaise we will be filing a motion for contempt by order to show cause early next week. If you want to discuss this further let me know.

Josh

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**From:** Behnke, Robert G. <robert.behnke@broomecountyny.gov>**Sent:** Wednesday, September 28, 2022 2:20 PM**To:** Josh Cotter <jcotter@lscny.org>**Subject:** Re: Discovery Schedule, and Re-Opening Visitation (JUST v Harder)

He is modifying the handbook based on past numbers of visits and the commissions requirements. If the number of visits exceeds what will be available He will add time. The commission approved the change

Sent from my Verizon, Samsung Galaxy smartphone

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**From:** Josh Cotter <jcotter@lscny.org>**Sent:** Wednesday, September 28, 2022 1:59:40 PM**To:** Behnke, Robert G. <robert.behnke@broomecountyny.gov>**Subject:** Re: Discovery Schedule, and Re-Opening Visitation (JUST v Harder)

Thanks for letting me know Bob. I am a little confused about the new schedule. Judge Blaise ordered Sheriff Harder to re-instate visitation "pursuant to the terms of the Jail's own inmate handbook, namely the schedule set forth at pages 15-16 thereof (NYSCEF Doc No. 4, n 1)." *Just. & Unity for the S. Tier v. Harder*, No. EFCA2022000924, 2022 N.Y. Misc. LEXIS 4130, at \*9 (Sup. Ct. Aug. 18, 2022). The schedule in the handbook provides for significantly more visitation times than 1230 p.m.-130 p.m. and 630 p.m.-930 p.m. Is there a reason Sheriff Harder is not complying with the Court's order?

Thanks,

Josh

**From:** Behnke, Robert G. <robert.behnke@broomecountyny.gov>  
**Sent:** Wednesday, September 28, 2022 1:35 PM  
**To:** Josh Cotter <jcotter@lscny.org>  
**Subject:** RE: Discovery Schedule, and Re-Opening Visitation (JUST v Harder)

It starts tomorrow afternoon from 12:30 to 1:30 and 6:30 to 9:30 in the evening. The inmates should have been notified of the new schedule. The jail is requesting people make an appointment to insure space is available. Walk ins will be accommodated on a space available basis. The new schedule was approved by the Commission of Corrections today.

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**From:** Josh Cotter <jcotter@lscny.org>  
**Sent:** Tuesday, September 27, 2022 12:50 PM  
**To:** Behnke, Robert G. <robert.behnke@broomecountyny.gov>  
**Subject:** Re: Discovery Schedule, and Re-Opening Visitation (JUST v Harder)

Bob--

Now that the stay has been lifted, below are proposed dates for the discovery deadlines. I am pretty flexible so let me know what works best for you. Once we agree on dates, I will fill in the form the court sent us and send it to chambers.

Has the jail come up with a plan for re-opening in-person visitation Thursday? A few family members of detainees have reached out to see what the procedure will be. I have not seen anything publicized by the Sheriff's Office. Their website still indicates in-person visitation is closed and there is no mention of the 9/29 restart.

Thanks,

Josh

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All Document Disclosure: May 31, 2023  
All Depositions May 31, 2023  
All Discovery and Notice of Issue: June 30, 2023  
Dispositive Motions: July 28, 2023

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# EXHIBIT 3

Josh Cotter, Esq. Work & Time JUST v Harder  
DATE WORK

9/27/22	Convo w/ JUST and Email to R. Behnkere: Visitation	0.5
9/28/22	Email w/ R Behnkere: visits	0.4
9/29/22	Emails and convo w/ JUST re Visits	0.6
9/30/22	Phone convo with R Behnke	0.1
10/1/22	Review emails and notes from JUST	0.6
10/3/22	Review templates of contempt motions	2.1
10/3/22	Research civil v criminal contempt and elements	1.8
10/4/22	Draft Memo of Law	3
10/5/22	Draft Memo of law	3.5
10/6/22	Draft Affs and Supporting Papers	2.3
10/7/22	Final edits to papers and file	2.7

TIME

# EXHIBIT 4



**Joshua T. Cotter**  
221 S Warren St • Syracuse NY 13202  
(315) 703-6579 • [jcotter@lscny.org](mailto:jcotter@lscny.org)

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## EDUCATION/ADMISSIONS

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**Albany Law School**, Albany, NY  
Juris Doctorate, May 2012

**Publications:** “Early Intervention Services” and “Pre-School Special Education”, in *Representing People with Disabilities*, 4<sup>th</sup> Edition

**Syracuse University**, Syracuse, NY  
Bachelor of Arts: Dual major: Psychology and Political Science, May 2009

**Admissions:** New York State, Northern District of New York, and the United States Court of Appeals for the Second Circuit.

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## EXPERIENCE

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**Legal Services of Central New York, Inc.**, Syracuse, NY  
*Staff Attorney*, August 2012- Present

- Litigate civil rights and disability rights cases in federal and state courts with a focus on the rights of people incarcerated in local county jails and juvenile detention facilities.
- Litigated in state courts including Article 78 proceedings challenging the denial of Section 8 benefits, and actions challenging housing conditions.
- Supervise interns and volunteers on research and writing assignments.
- Present to, and participate on panels for, law schools, national advocacy groups and local organizations.

**Syracuse University College of Law.**, Syracuse, NY  
*Adjunct Instructor*, January 2021 – Present

- Instructor for “Constitutional Civil Rights Litigation” a course which deals with constitutional theory and interpretation, emphasizing practical aspects and procedural tactics inherent in suing or defending a civil rights claim in federal court.

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## REPRESENTATIVE MATTERS AND HONORS

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2016 Recipient of the New York State Bar Association Dennison Rey Civil Legal Services Staff Attorney Award

*Wright v. DOCCS*, 831 F.3d 64 (2d Cir. 2016), 242 F.Supp.3d 126 (N.D.N.Y. 2017), which held the New York State prison system’s blanket policy denying motorized wheelchairs to prisoners with serious mobility disabilities violated the Americans with Disabilities Act.

*Winston v. City of Syracuse*, 887 F.3d 553 (2d Cir. 2018), which held the City of Syracuse’s water shut off policies violate tenants’ constitutional right to Equal Protection and Substantive Due Process under the law.

*Brown v Mahar et al.*, (DNH-TWD), 21-cv-00794, Northern District of New York, ongoing Substantive Due Process challenge to the Plaintiff's parole conditions which keep him from living with his wife.

*Black Artists' Collective et. al. v. City of Syracuse*, (TJM-TWD), 21-cv-00794, Northern District of New York, ongoing First Amendment challenge to the Defendants' public assembly permit scheme.

*LeTray v. Watertown Police et. al.*, (GLS-TWD), 20-cv-1194, Northern District of New York, co-counsel in a case challenging the sexual assault and discrimination a transgender woman faced in the custody of the Defendants.

*Barrett v Maciol*, 20-cv-00537, (MAD-DJS), Northern District of New York, ongoing federal class action lawsuit challenging a county jail's discrimination against female prisoners held there.

*Wright v OMH*, 20-cv-00478, (MAD-TWD), Northern District of New York, successful disability rights lawsuit challenging the New York State Office of Mental Health's policy of forcing a man with a severe mobility disability to pay for repairs to his own motorized wheelchair. The case was settled after the Plaintiff received a new custom fitted motorized wheelchair and a refund of the repair payments.

*Wallace v Conway*, 19-cv-01024, (FJS-ATB), Northern District of New York, co-counsel on a disability rights lawsuit challenging a county jail's placement of a man in solitary confinement because he is blind. The case was settled shortly after it was filed and the Plaintiff moved to general population.

*Spero v. Vestal Cent. Sch. Dist.*, 427 F. Supp. 3d 294 (N.D.N.Y. 2019), co-counsel on case challenging the suspension of a student on the grounds it violated his First Amendment rights and right to Substantive Due Process. The case was settled prior to trial.

*J.B. v. Onondaga Cty.*, 401 F. Supp. 3d 320 (N.D.N.Y. 2019), successful class action lawsuit challenging Onondaga County's failure to make a private interview room available in the courthouse for attorney-client visits.

*Drake v Rome City School District*, 18-cv-1092, (DNH-ATB), co-counsel on case challenging the suspension of a student on the grounds it violated their First Amendment Rights. The case was settled shortly after filing.

*A.T. v. Harder*, 298 F. Supp. 3d 391 (N.D.N.Y. 2018) and *V.W. v. Conway*, 236 F.Supp.3d 554 (N.D.N.Y. 2017), successful class action challenges to county jails' practices of placing 16-and 17-year-olds in solitary confinement and denying them access to education.

*Williams v. Conway*, 312 F.R.D. 248 (N.D.N.Y. 2015), successful class action challenge to a county jail's failure to reasonably accommodate prisoners who are deaf or hard of hearing.