To be Argued by:
HENRY M. GREENBERG
(Time Requested: 30 Minutes)

New York Supreme Court

Appellate Division—Third Department

In the Matter of the Application of

HON. ELLEN GESMER, HON. DAVID FRIEDMAN, HON. SHERI S. ROMAN, HON. JOHN M. LEVANTHAL and DANIEL J. TAMBASCO,

Petitioners-Plaintiffs-Respondents,

For a Judgment under Article 78 of the CPLR

– against –

THE ADMINISTRATIVE BOARD OF THE NEW YORK STATE UNIFIED COURT SYSTEM, JANET DIFIORE, as Chief Judge of the New York State Unified Court System, and LAWRENCE K. MARKS, as Chief Administrative Judge of the New York State Unified Court System,

Respondents-Defendants-Appellants.

Appellate Case No.: 532566

BRIEF FOR RESPONDENTS-DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Across the state and nation, the COVID-19 pandemic has brought suffering and devastation. In addition to the hundreds of thousands of lives lost to the virus, the pandemic's financial impact has been severe. Over the last 10 months, New York has seen Depression-era levels of unemployment and businesses permanently shuttered, among innumerable other financial hardships.

The resulting shortfall in tax revenues has produced an unprecedented budget crisis for New York's state government. In particular, the Judiciary had to find $291 million in budget cuts. This necessitated deep cuts to labor costs, which make up over 90% of the Judiciary's annual budget.

At issue on this appeal are the budgetary cuts made by means of the Administrative Board of the Courts of the State of New York's ("the Board") exercise of its constitutional and statutory power to certificate retired Justices of the Supreme Court. On September 22, 2020, because of the severe budgetary constraints occasioned by COVID-19, the Board denied certification to 46 of the 49 Judges who applied for that status. That painful decision saved $55 million, spared the jobs of approximately 324 non-judicial employees, and avoided the loss of services to the public and cascading effect on the courts that would have resulted from a workforce reduction of such magnitude.

Four of the 46 Justices, all sitting in the Appellate Division, commenced this proceeding against the Board, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks (collectively, "Respondents") in Supreme Court, Suffolk County (Baisley, Jr., J.), alleging that the Board lacked authority to deny certification for budgetary reasons. At the same time, by an *ex parte* Order to Show Cause, Supreme Court ordered the immediate deposition of Chief Judge DiFiore and Judge Marks and production of voluminous documents. Shortly thereafter, again by *ex parte* Order to Show Cause, Supreme Court commenced contempt proceedings against Respondents.

On December 10, 2020, through a feat of procedural acrobatics to avoid reaching the merits of Respondents' arguments, Supreme Court denied Respondents' motions to dismiss for failure to state a cause of action and lack of personal jurisdiction. Additionally, Supreme Court denied Respondents' motions for a protective order and to transfer venue to Albany County, again invoking inapplicable procedural rules.

Supreme Court's ruling was erroneous in numerous respects. The discretionary certification of Supreme Court Justices by the Board — composed of the Chief Judge and Presiding Justices of the four Departments of the Appellate Division — is the exclusive means by which Justices may serve beyond the 70-year age limitation set forth in the Constitution. The authority to appoint Justices in a

manner facilitating the needs of the courts is a unique and profound public trust allotted to the Board. The Court of Appeals and this Court in a trilogy of cases — *Marro, Loehr* and *Ponterio* — have held that the Board's authority is exceedingly broad; the Board's discretion is "very nearly unfettered" and "largely unreviewable"; and certification applicants have no due process rights or property interests in the appointment. Supreme Court ignored these principles and arrogated to itself the authority and policy judgment constitutionally assigned to the Board.

Respondents' esteem for their retiring colleagues cannot supplant the need to determine how best to set its budgetary priorities to provide judicial services during a global pandemic. The Board decided not to certificate Petitioners and other Justices because it believed that the cost savings achieved in this fashion were the best means, relative to other options, to be able to continue to provide those services. The Board did certificate a small number of Justices, reflecting its policy judgment as to which Justices whose continued service, given the budgetary constraints, is vital. That policy determination — not to certificate most Justices to preserve the jobs of non-judicial employees — lies within the Board's "very nearly unfettered discretion," and should not be disturbed here.

Additionally, this case should be dismissed because Petitioners failed to effect service of process necessary to obtain personal jurisdiction. Supreme Court blinked

away this fatal jurisdictional defect, by finding that Respondents waived personal service, when they clearly did no such thing.

If this Court does not reverse and dismiss this matter, it must set aside the discovery ordered by Supreme Court. No court has ever before ordered depositions of the Judiciary's leaders in a case challenging the denial of certification — and with good reason. A mountain of case law precludes depositions of high-ranking government officials and other comparable attempts to explore the deliberative processes of Judges.

Moreover, if discovery was permitted in this case — which raises pure questions of law and where no fair-minded person can doubt the Board's motivations given the dire budgetary reality — it will destroy the constitutional and statutory design of the certification process. Every denial of certification will not only be open to judicial review, but also searching discovery, substantially impeding the Board's ability to fulfill its duty to assess the need for retired Supreme Court Justices. As a result, future Board certification decisions and efforts to establish budgetary and operational priorities, will lie not in the hands of court administrators, but rather, trial judges that lack management expertise and statewide perspective.

Finally, venue in Suffolk County is incorrect. The Board's determination was not made there, but instead in Albany County, which is where both the challenged determination and the material events related to this case took place. Petitioners

cherry picked a venue expecting that decisions unfavorable for Respondents would be appealed to the same Court on which Petitioners sat. The Second Department found venue to be improper in the Second Department; this Court should too. If this Court does not finally resolve this litigation in Respondents' favor by reversing and granting the motion to dismiss, the matter should be transferred to Albany County.

QUESTIONS PRESENTED FOR REVIEW

1. Having determined that the services of 46 certificated justices were not necessary given the severe budgetary constraints occasioned by COVID-19, did the Administrative Board act within its constitutional and statutory power, and in a manner consistent with the principles articulated by the Court of Appeals in *Marro* and *Loehr*?

2. Did Supreme Court err in finding that Respondents waived the lack of personal jurisdiction, where (a) the defense was timely interposed in a motion to dismiss, (b) Petitioners admitted that they have not made service of process of the Petition and Complaint or Order to Show Cause, and (c) Respondents' counsel appeared to oppose a threatened charge of contempt?

3. Did Supreme Court err in ordering discovery to proceed in an Article 78 proceeding, on an *ex parte* basis, including the depositions of the Chief Judge of and Chief Administrative Judge of the State of New York, without an adequate showing of need?

4. Did Supreme Court err in finding that Supreme Court, Suffolk County, was the proper venue to challenge a determination of the Board made in Albany County with statewide import?

STATEMENT OF FACTS

A. The Budgetary Crisis Caused by COVID-19

COVID-19 has had profound financial ramifications for New York's state government. (Record on Appeal ("R.") 263-68.) With many businesses disrupted, and tax revenues dropping precipitously, New York has experienced and is expected to continue experiencing multi-billion dollar budget gaps over the next several years. (R. 263.)

As a result, the state budget became unbalanced, triggering emergency powers to cut spending in the current fiscal year that the Legislature conferred upon the Director of the Division of Budget. (R. 263, 268.); *see also* S.7503-C/A.9503-C. On April 25, 2020, in the State Financial Plan, the Director cut spending across the board by 10%, including the Judiciary's budget. (*Id.*)

For the Judiciary, this action necessitated a $291 million cut in its current budget. (R. 263) In addition, given the scope and severity of the pandemic, it is likely that the coming fiscal year will be as challenging, if not more so. (*Id.*)

To achieve the necessary spending reductions, court administrators developed an austerity plan for the current and next fiscal years. (R. 264, 277.) They weighed

the costs of all elements of the Judiciary's programs to determine where economies could be realized. (*Id*.) This included an assessment of potential cuts to labor costs, which make up over 90% of the Judiciary's annual budget. (*Id.*)

For the current fiscal year, the Judiciary found $284 million in savings from a hiring freeze, the denial of negotiated pay raises for non-judicial staff, travel restrictions, and the elimination of all non-essential non-personal services costs and compensation for Judicial Hearing Officers. (*Id.*) That amount, however, still fell short of the 10% target, and did not account for potential future cuts in the next fiscal year. (*Id.*) Accordingly, court administrators had to evaluate potential savings from discretionary labor costs, including the certificated judgeship program. (*Id.*)

B. The Certification Process

The New York Constitution requires various judges, including Supreme Court Justices, to "retire on the last day of December in the year in which he or she reaches the age of seventy." N.Y. Const., art. VI, § 25(b). However, upon retirement, a retired Supreme Court Justice (or Court of Appeals Judge) may, for terms of two years, totaling no more than six years thereafter, perform the duties of a Supreme Court Justice if certified "in the manner provided by law that the services of such . . . justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office." *Id.*

Under Judiciary Law § 115, the Legislature has vested the Board with the power to determine whether to certify former Justices for service. A certificated or recertificated Justice serves a two-year term. *Id.*

C. The Fiscal Implications of Certification

In September 2020, the Board had before it 49 pending-applications from Supreme Court Justices seeking certification or recertification for two-year terms that would take effect on January 1, 2021. (R. 264.)

Disapproval of 46 of the certifications would save $7 million in the current fiscal year and $55 million over the two-year certification period. (*Id.*) These costs include compensation and benefits for the Justices and for their statutorily-provided nonjudicial support staff (i.e., a principal law clerk and secretary or assistant law clerk for each Justice). (R. 265) Were these applicants not to be certificated, the Judiciary would be spared these costs. (*Id.*)

If, on the other hand, the Board certificated all 49 applicants, the court system would have to lay off as many as 324 non-judicial employees. (R. 266.) Workforce reduction of that magnitude would directly and significantly impact the number of court personnel available to ensure functioning of the court system statewide. (R. 109.) Fewer personnel would be available to help the public, staff court parts, and assist judges in disposing of their caseloads. (R. 109-10.) It would also have a cascading effect under the Civil Service rules, in which complex retention and

displacement rights would result in employees in eliminated positions displacing other employees with lesser rights from lower graded positions. (R. 110.)

Thus, while declining to certificate jurists may impact caseload management, the alternative loss of hundreds of nonjudicial employees would hobble the day-to-day functioning of the Judiciary statewide. (R. 266.)

D. The Board's Determination

This fiscal information was presented to the Board when it convened in Albany at Court of Appeals Hall on September 22, 2020. (R. 265, 277) With all its members physically present, and by a unanimous vote, the Board declined to certify 46 of the 49 judges applying for certification. The Board certified three judges with specialized additional assignments.

The Board concluded it would be unwise and all but impossible for the Judiciary to absorb the two-year cost commitment associated with certificating the 46 Justices this year. This decision enabled the court system to avoid hundreds of layoffs from the non-judicial corps and the associated disruption to the court system. (R. 45-48, 90, 265-66.)

On September 29, 2020, the Board's determination was memorialized in a memorandum issued to all Administrative Judges. (R. 45, 277-78)

E. This Article 78 Proceeding/Declaratory Judgment Action

On November 5, 2020, Petitioners commenced this hybrid CPLR Article 78 proceeding and declaratory judgment action, seeking a declaration that Respondents acted illegally and unconstitutionally, by presenting to Supreme Court, Suffolk County (Hon. Paul J. Baisley, Jr.), a proposed order to show cause ("11/5 OSC") together with a verified Petition and Complaint ("Petition/Complaint"). (R. 35-76.) Additionally, Petitioner sought the depositions of Chief Judge DiFiore and Chief Administrative Judge Marks and production of voluminous documents, including all documents relating to the Judiciary's budget for a two-year period. (R. 127-50.)

Four Petitioners served as Justices in the First and Second Department and were denied certification. (R. 38) The fifth Petitioner was a Suffolk County legal practitioner. (R. 42.)

The Petition/Complaint sets forth seven causes of action, alleging that the denials of certification: (1) violated Judiciary Law § 115; (2) were arbitrary and capricious; (3) eliminated the certification process and negated the State Constitution and Judiciary Law § 115; (4) violated Petitioners' due process rights; (5) interfered with the Appellate Division's authority to certify the continuing need for Justices previously designated by the Governor for Appellate Division service; (6) violated New York City Human Rights Law § 8-107; and (7) violated Executive Law § 296(a)(1). (R. 58-71.)

Neither before nor on November 5, 2020 did Petitioners provide Respondents notice of the relief sought by the 11/5 OSC, the nature of the case, or the application on which it was based. (R. 361.) Further, the 11/5 OSC and Petition/Complaint was never personally served on Respondents or the Office of the Attorney General. (R .225, 289, 291, 357, 504, 515.)

Nevertheless, on an *ex parte* basis, Supreme Court signed the 11/5 OSC, thereby ordering extraordinary pre-answer discovery, including the depositions of Chief Judge DiFiore on November 16, 2020 and Chief Administrative Judge Marks on November 18, 2020 and requiring Respondents to respond to both the Petition/Complaint and Petitioners' document requests on November 13, 2020. (R. 163-66.)

On November 10, 2020, Respondents filed a demand for a change of venue to Albany County, and three days later moved to dismiss the Petition/Complaint for failure to state a cause of action pursuant to *Marro* and *Loehr* under CPLR 3211, for a protective order, and reconsideration and vacatur of the 11/5 OSC. (R. 198-200, 207-83.) Respondents made a supplemental motion to dismiss for lack of personal jurisdiction on November 24, 2020. (R. 285-94.)

On November 19, 2020, Supreme Court signed another Order to Show Cause ("11/19 OSC"). It ordered the depositions of Chief Judge DiFiore on December 2, 2020 and Chief Administrative Judge Marks on December 4, 2020, and Respondents

to respond to Petitioners' document requests on November 30, 2020. (R. 674-76.) Additionally — notwithstanding six days earlier Respondents moved for a protective order and, thus, were entitled to a stay of discovery pursuant to CPLR 3214(b) and 3103(b) — Supreme Court commenced contempt proceedings against Respondents, directing them to demonstrate why they should not be held in contempt on Sunday, November 29, 2020. (R. 680-82.)

On November 23, 2020, Respondents moved in the Appellate Division, Second Department, for permission to appeal the 11/5 and 11/19 OSCs, and stay discovery (R. 683-88.) The Second Department, in turn, transferred the motion to this Court. (R. 550.)

On November 27, 2020, this Court issued a Decision and Order that treated Respondents' motion for permission to appeal as seeking review pursuant to CPLR 5704(a), which governs appellate review of *ex parte* orders. This Court then enjoined the expedited discovery and related contempt proceeding ordered by the 11/5 and 11/19 OSCs, pending Supreme Court's determination of Respondents' pending motions. (R. 551.)

F. Supreme Court's December 10 Order

On December 10, 2020, Supreme Court issued a Short Form Order ("December 10 Order") denying all of Respondents' motions. (R. 9-15.)

With respect to the motion to dismiss, Supreme Court refused to address any substantive legal issues or arguments raised by Respondents. (*Id*.) Instead, Supreme Court stated that the motion was brought under the wrong CPLR section, and, in any event, was not procedurally appropriate apparently because Respondents' arguments addressed the "merits" of Petitioners' claims — *i.e.,* the lack of viability under *Marro* and *Loehr*. (R. 12.)

Similarly, Supreme Court refused to consider the merits of Respondents' personal jurisdiction defense, holding that they waived it by defending Petitioners' threatened contempt charge and moving to dismiss "on the merits" prior to timely asserting the lack of personal jurisdiction in a supplemental motion to dismiss. (R. 14-15.)

As for Respondents' motion for a protective order and reconsideration of the 11/5 OSC, Supreme Court declined to address the need or propriety of the discovery it ordered *ex parte* at the outset of the proceeding. (R. 13-14.) Furthermore, Supreme Court held that, by dint of its decision, this Court's injunction of discovery expired "on its terms," and directed Respondents to "proceed expeditiously" with "the expedited discovery previously ordered by this Court." (R. 14.)

Finally, Supreme Court held that venue was proper in Suffolk County because the "termination" of Supreme Court justices in Suffolk and on the Second Department "will significantly delay the resolution of cases, thereby greatly

prejudicing litigants and their counsel." Supreme Court found that "material events" occurred in Suffolk County because three Supreme Court Justices in Suffolk County applied for certification, although none of them are Petitioners here. (R. 11-12.) Supreme Court also agreed with Petitioners that Albany County, where the denials of certification occurred, was an inappropriate forum because of the "geographic proximity" that exists between Albany Supreme Court, this Court and the Court of Appeals. (R. 12.)

On December 22, 2021, this Court granted Respondents' motion for permission to appeal Supreme Court's December 10 Order, established an expedited briefing schedule, and stayed discovery. (R. 16.)

ARGUMENT

I. SUPREME COURT'S DENIAL OF RESPONDENTS' MOTION TO DISMISS CONTRADICTS THE PRINCIPLES UNDERLYING THE CERTIFICATION PROCESS ESTABLISHED IN *MARRO* AND *LOEHR,* AND SUBSTANTIALLY IMPEDES THE BOARD'S ABILITY TO FULFILL ITS DUTY TO ASSESS THE NEED FOR RETIRED SUPREME COURT JUSTICES

In its December 10 Order denying Respondents' motion to dismiss, Supreme Court ignored the broad principles of certification established by the Court of Appeals in *Marro* and *Loehr,* making no effort to apply them to the instant case. Instead, Supreme Court contrived procedural reasons not to consider whether the

Petition/Complaint presented a cognizable claim and ordered discovery for which there is no precedent in New York history.

Supreme Court's decision is clearly erroneous. Discretionary certification of Supreme Court Justices by the Board is the exclusive means by which Justices may serve beyond the 70-year age limitation set forth in the Constitution. Under *Marro/Loehr,* the Board's discretion is virtually unfettered and not subject to judicial review absent a viable claim that the Board violated statutory proscription or promoted a constitutionally impermissible purpose, unrelated to the certification process. That standard of review applies to the Board's decision here and compels dismissal of Petitioners' meritless lawsuit.

A. The Principles of Certification Articulated in *Marro* and *Loehr*

A challenge to the Board's authority to certificate Supreme Court Justices is subject to the standard of review set forth in *Matter of Marro v. Bartlett,* 46 N.Y.2d 674 (1979) and *Matter of Loehr v. Administrative Bd.,* 29 N.Y.3d 374 (2017).

In *Marro,* addressing a claim that a certification applicant had been denied due process, the Court of Appeals first examined the nature of a retired Supreme Court Justice's interest in certification under N.Y. Const. art. VI, § 25(b):

> Our consideration starts with analysis of the applicable constitutional provisions. First comes the mandate that each Justice of the Supreme Court shall retire on the last day of December in the year in which he reaches the age of 70. At that time his entitlement to serve as a Justice terminates irrespective of other considerations, and he becomes a "former justice." Absent some further constitutional authorization he

> would be ineligible to serve as a Judge. Such further authorization, however, is found in the provision — "Each such former . . . justice . . . may thereafter perform the duties of a justice of the supreme court . . . provided, however, that it shall be certified," etc.

46 N.Y.2d at 680. From this premise the Court reached the following conclusion:

> We interpret the verb, "may," as a term of enablement but not of entitlement. Rather than connoting some form of continuation of prior judicial service, the Constitution recognizes a complete break — termination of the previous judicial status, and the inauguration by the required certification of a new judicial designation.

Id.

The Court then turned to the Constitution's implementing provision, Judiciary Law § 115:

> For all material purposes section 115 of the Judiciary Law conforms to the substantive constitutional provisions with some difference of diction which no one suggests is significant. As contemplated by the Constitution it is the statute which prescribes the procedure by which the required certification shall be made. The only prescription made by the Legislature is very simple — that the certification shall be "by the administrative board"; no further particulars are specified and no procedures are detailed. In this circumstance, inasmuch as the function of certification is that of an initiatory action, rather than that of determining a continuing entitlement, due process requirements are virtually nonexistent.

Id. at 681.

Given this constitutional and statutory scheme, the Court concluded that the Board is "vested with the broadest authority" and "very nearly unfettered discretion in determining whether to grant applications of former Judges for certification." *Id.* The Board's "discretion," the Court elaborated, is "not subject to judicial review in

the absence of claims of substance that there had been violation of statutory proscription or promotion of a constitutionally impermissible purpose, unrelated to the certification process." *Id.* at 681-82.

In *Loehr,* the Court extended *Marro* to uphold a determination that prospectively barred from certification an entire category of applicants, without regard to their individual circumstances, based on policy and budgetary concerns. The petitioning justices in *Loehr* challenged the Board's policy not to certificate any retired justices who, while remaining in judicial service, would receive their public pensions (a practice commonly referred to as "double-dipping"). Petitioners argued that the Board's policy was arbitrary and contrary to law. The Court of Appeals disagreed, reasoning:

> Whether the services of a particular Justice are "necessary to expedite the business of the court" [within the meaning of Judiciary Law § 115] encompasses much more than a mechanical inquiry into the size of the courts' docket divided by the number of Justices. Viewed in isolation, the services of an additional mentally and physically able Justice will always expedite the business of the courts. Were the inquiry merely mechanical, the Board would need no broad, largely unreviewable discretion. But the impact of any certification, as the Constitution's use of the word "necessary" implies, must be determined with the costs — including non-monetary costs — of that certification in mind. The Constitution and the Judiciary Law entrusted this determination to "the integrity and collective wisdom of a carefully selected, high level certifying authority endowed with peculiar experience and expertise" (*Marro,* 46 NY2d at 682), rather than to functionaries responsible for the court's docket or budget, for precisely that reason.

29 N.Y.3d at 382.

For more than three decades, the Board has made its certification determinations guided by the principles articulated in *Marro/Loehr* — namely, that certification results in a new status and is not a continuation of service;[1] that certification candidates have "no right to be certified at all";[2] that the Board may properly base its certification determinations upon the cost to the Judiciary;[3] that the Board is vested with "very nearly unfettered discretion";[4] and that a denial of certification is beyond judicial review absent extraordinary circumstances.[5]

Applying these principles to the case at hand, compels the conclusion that the Board's denial of certification was eminently proper. The severe budgetary constraints occasioned by the coronavirus pandemic left the leaders of the court system with the need to cut $291 million from its budget, 90% of which consists of labor costs. (R. 263-64) After weighing available options, the Board denied certification to 46 Justices, saving $55 million, rather than lay off 324 nonjudicial employees to find equivalent savings. (R. 265, 277.) Layoffs of this magnitude in the nonjudicial corps would significantly reduce the number of personnel available

[1] *Loehr,* 29 N.Y.3d at 384; *Marro,* 46 N.Y.2d at 682.

[2] *Loehr,* 29 N.Y.3d at 384.

[3] *Loehr,* 29 N.Y.3d at 383.

[4] *Loehr,* 29 N.Y.3d at 377, 381-82; *Marro,* 46 N.Y.2d at 681-82.

[5] *Loehr,* 29 N.Y.3d at 382; *Marro,* 46 N.Y.2d at 681-82.

to help the public, staff court parts, and assist Judges in disposing of their caseloads; and otherwise cause significant disruption to the court system. (*Id.*) The Board, therefore, concluded that the services of the retired Justices, on balance, were not necessary to expedite its business. (*Id.*)

The Constitution and Legislature entrusted the Board with the responsibility to make this painful decision, which was based on the monetary and non-monetary costs of certifying 46 additional Justices. *Compare Loehr,* 29 N.Y.3d at 383 (holding that the Board appropriately considered non-monetary costs of certifying "double dippers," including the impact on the courts' public prestige). As such, under *Marro/Loehr,* the Board's determination is beyond judicial review.

B. Supreme Court Erred by Failing to Apply the Principles Set Forth in *Marro/Loehr*

Supreme Court erred by refusing to apply the *Marro/Loehr* standard in considering the merits of Respondents' dismissal motion under CPLR 3211. The stated justification was that Respondents' motion should have been made under CPLR 7804(f) and neither *Marro* nor *Loehr* were decided in the context of a pre-answer motion to dismiss. But these rationales are meritless.

Supreme Court's invocation of CPLR 7804(f) and case law relating to it is misplaced because they involve Article 78 proceedings seeking substantial evidence review of a determination made after a hearing required by law, where any substantial evidence issue must be transferred to and decided by the Appellate

Division. *See, e.g., Matter of Hull-Hazard, Inc. v. Roberts,* 129 A.D.2d 348, 350-51 (3d Dep't 1987) (trial court limited to addressing certain threshold issues in Article 78 proceeding seeking substantial evidence review that was transferred to the Appellate Division for determination on the merits); *but cf., Matter of Jimenez-Reyes v State of New York,* 122 A.D.3d 1172, 1174 n. (3d Dep't 2014) ("Before transferring this matter, Supreme Court should have first considered whether, as alleged in the first cause of action, petitioner was deprived of his constitutional due process rights, as the resolution of said issue could have terminated the entire proceeding (*see* CPLR 7804 [g])").

The instant case, however, is a hybrid Article 78 proceeding and declaratory judgment action, commenced by the filing of a petition and complaint and it does not involve substantial evidence review of a determination made upon a hearing required by law. In a case such as this, respondents/defendants may move to dismiss under either CPLR 3211 or CPLR 7804, and reviewing courts are obliged to entertain such motions on the merits to determine whether the pleading states a cognizable claim. *See Matter of Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities,* 81 A.D.3d 145, 148 (3d Dep't 2011) (reviewing on the merits appeal from pre-answer motion to dismiss in a hybrid Article 78 proceeding/action, and stating that, "[o]n a motion to dismiss, under CPLR 7804(f) or CPLR 3211(a)(7), the court must look at the petition/complaint itself, accepting

all of its allegations as true, to determine whether a cause of action exists.") (internal quotation marks & citations omitted), *mod. on other grounds,* 19 N.Y.3d 106 (2012).

In fact, in *Loehr,* a hybrid Article 78 proceeding/declaratory judgment action, the trial court dismissed the petition/complaint for failure to state a cause of action on a CPLR 3211 motion. *See Matter of Loehr v. Administrative Bd.,* Index No. 6818-13, slip op. at 2, 4-5 (Sup. Ct., Albany County May 5, 2014) (decision & order; copy attached hereto), *rev'd,* 130 A.D.2d 89 (3d Dep't 2015), *rev'd,* 29 N.Y.3d 374 (2017).

Likewise, in *Ponterio v. Kaye,* this Court affirmed the dismissal of a challenge to the Board's denial of certification on a CPLR 3211 motion. 25 A.D.3d 865, 867-68 (3d Dep't), *lv. denied,* 6 N.Y.3d 714 (2006). In so doing, this Court resolved the motion by applying the *Marro* standard of review. *See Id.* ("a challenge to the Administrative Board's decision to deny recertification . . . is . . . subject to the standard of review set forth in *Matter of Marro v Bartlett*").

Thus meritless is Supreme Court's assertion that Respondents' motion to dismiss was deficient because it failed to "undertake any analysis of the pleading requirements [under CPLR 7804(f)] for the claims asserted in the petition and fail to make any arguments that the allegations do not sufficiently set forth the required elements of the various causes of action." (R. 31-2.) Respondents asserted that the Petition/Complaint must be dismissed because it failed to state a cognizable cause

of action that could yield Petitioners the relief they seek. Also baseless is Supreme Court's assertion that it could not reach the merits because Respondents did not file a "transcript of the record of proceedings" pursuant to CPLR 7804(e). (R. 32.) It is well established that such a transcript is not necessary for the Court to decide a pre-answer dismissal motion. *See Rosioreanu v. New York City Off. of Collective Bargaining,* 78 A.D.3d 401, 402 (1st Dep't 2010) (absence of certified transcript of the administrative proceedings did not bar review of merits because "respondent filed a dismissal motion in lieu of an answer") (internal citations omitted), *lv. denied,* 17 N.Y.3d 702 (2011). Finally, Supreme Court's implication that there may be issues of fact requiring a "trial" is absurd. (R. 31.) There are no disputed issues of fact that could be material to the viability of Petitioners' claims. Moreover, no court deciding a certification challenge has ever granted a trial, notwithstanding the existence of disputed facts (as was the case in *Marro/Loehr*). Indeed, *Marro* holds that certification applicants are not even entitled to a hearing by the Board or any statement of reasons why certification is denied. *Marro,* 46 N.Y.2d at 674.

C. Petitioners Contest Conduct That Falls Within The Board's "Unfettered Discretion" And is Thus Beyond Judicial Review

Pursuant to *Marro/Loehr,* virtually every cause of action alleged by Petitioners in their Petition/Complaint involves a direct attack on the Board's exercise of its constitutional and statutory certification power — a decision over which the Board has "unfettered discretion" — and is thus beyond judicial review.

As noted, the Board has "very nearly unfettered discretion in determining whether to grant applications of former Judges for certification, a discretion which [is] not subject to judicial review in the absence of claims of substance that there had been violation of statutory proscription or promotion of a constitutionally impermissible purpose, unrelated to the certification process." *Marro,* 46 N.Y.2d at 681-82 (emphasis added); *see also Pontiero,* 25 A.D.3d at 868 (quoting & applying *Marro* standard of review).

In light of this standard of review, Petitioners' conclusory allegations that the Board misapplied the constitutional and statutory provisions that govern the certification process to the facts; administered such process in an arbitrary and capricious manner; and violated Petitioners' due process rights by denying certification do not state a viable claim.[6] *See Loehr,* slip op. at 2, 9-10 (finding "per *Marro*" causes of action challenging denial of certification beyond judicial review); *see also Marro*, 46 N.Y.2d at 682 (rejecting due process claims arising from denial of certification). *Marro/Loehr* generally precludes a reviewing court from second guessing certification decisions or interfering with the broad policy choices intrinsic to the Judicial branch's ordering of priorities and allocation of scarce fiscal resources.

[6] Even assuming *arguendo* that the traditional CPLR Article 78 standard of review applied (which it does not), the determination of the Board at issue cannot be said to be arbitrary and capricious, irrational or contrary to law.

D. Even if Certain Claims are Reviewable, They are Meritless

To the extent the Petition/Complaint alleges claims that are arguably reviewable, they fail as a matter of law.

For example, Petitioners' Fifth Cause of Action posits an imaginary conflict between the Board's exercise of constitutional powers relating to certification and the Governor's authority to designate Justices to serve on the Appellate Division pursuant to N.Y. Const., art. VI, § 4(e). (R. 65-7.) The Petition/Complaint alleges that, in denying certification to Petitioners who serve on the Appellate Division pursuant to gubernatorial designation, the Board has unconstitutionally interfered with the legal powers of the Appellate Division. (R. 67.)

However, this claim ignores the constitutional requirement that a person must be a Justice of the Supreme Court to serve on the Appellate Division. When Supreme Court Justices reach the end of the year in which they turn age 70, they cease to hold that office by operation of the State Constitution. *See Marro,* 46 N.Y.2d at 680. Certification for post-retirement service supplies the single exception to this rule. And the Board is the sole body authorized to determine if a Justice can serve after the age of mandatory retirement.

Thus, the denial of certification does not interfere with any powers delegated to the Appellate Division and Governor. That a retired Justice denied certification must step down from the bench does not limit the Appellate Division's ability to

certify to the Governor the need for additional Justices, nor the Governor's authority to designate them from the pool of Justices then eligible for such an appointment. Such determinations by the Appellate Division and Governor are separate and legally independent from the Board's certification decisions.

Likewise unavailing is Petitioners' Fifth and Sixth Causes of Action alleging age discrimination under Executive Law § 296(a)(1) and New York City Human Rights Law § 8-107. (R. 67-71.) Petitioners allege that the Board's denial of their applications constitutes a "firing" from their positions; Respondents could have "undertake[n] age-neutral layoffs"; and the denial of certification "ensures that Petitioners will be replaced in favor of younger justices." (R. 160-62, 173-75.) *Marro*, however, forecloses this claim because the denial of certification is not a "termination of tenure" or "denial of continuation of service." 46 N.Y.2d at 682. Further, the Board had a legitimate, non-discriminatory reason for denying the certification applications — the severe budgetary constraints occasioned by COVID-19.

It has long been settled that New York's mandatory retirement age for judges — enshrined in the New York Constitution — does not violate age discrimination

laws,[7] nor does the denial of certification by the Board.[8] The age-discrimination provisions in the New York Human Rights Law, a statute enacted by the Legislature, cannot be interpreted or applied in a manner that violates the requirements of the New York Constitution relating to mandatory retirement of Judges and discretionary certification at the sole election of the Board post-retirement. To the extent that there was tension between these two provisions (and there is not), the Constitution would trump the statute. But even assuming *arguendo* Petitioners belong to a protected class, are all qualified for certification and the denial thereof constituted an adverse employment action, and are employees within the meaning of the statute,[9] the circumstances underlying the Board's action does not give rise to an inference of discrimination. *See Domitz v. City of Long Beach,* 2018-08604, 2020 N.Y. App. Div. LEXIS 5926, at *7 (2d Dep't Oct. 14, 2020) (affirming dismissal of age

[7] *See Diamond v. Cuomo,* 70 N.Y.2d 338 (1987) (rejecting age discrimination challenge to a Board decision that appointed Judges were exempt from mandatory retirement), *appeal dismissed,* 486 U.S. 1028 (1988); *Maresca v. Cuomo,* 64 N.Y.2d 242, 249 (1984) (upholding mandatory retirement age for Judges, noting that "[t]his court is fully cognizant of the arguments that can be made against the wisdom of the challenged provisions; however, for repeal of such provisions, appeal lies to the ballot and the legislative processes of democratic government, not to the courts".), *appeal dismissed,* 474 U.S. 802 (1985).

[8] *See EEOC v. New York,* 907 F.2d 316, 321 (2d Cir. 1990) (holding decision relating to certification of judge not subject to review under federal age discrimination law).

[9] As elected officials, Petitioners are not employees within the meaning of Executive Law § 296(a)(1). While the statute does not include a definition of "employee," elected officials are generally not considered "employees" because government administrators and other agency employees do not control their election, job performance, or the terms of their employment. Additionally, Petitioners in no sense are employed by the Administrative Board of the other Respondents. Accordingly, Petitioners claim under § 296(a)(1) fails as a matter of law.

discrimination claim under § 296 because defendant refuted inference of age-based discrimination).

Indeed, Petitioners cannot show that the Board denied them certification in favor of younger candidates because of Petitioners' age. There can be no discrimination because of a person's age where the employment opportunity that is sought, but denied, is only available to the class of persons of which he or she is a member. Here, the opportunity for judicial service past age 70 applies only to former Justices between ages 70 and 76. The refusal to permit someone to engage in such service cannot, by definition, be discrimination based on age between that person and others because it is only that person's age that qualifies them for certification in the first place. Thus, because the position of certificated Justice cannot be filled by anyone who is not in the protected class, it would be impossible for Petitioners to show that they were disadvantaged in the certification process by reason of their age. *See Ponterio,* 25 A.D.3d at 869-70 (affirming dismissal of claim under Exec. Law § 296(1)(e) on ground that Judge denied certification failed to establish causal connection between Board's action and alleged protected activity).

Similarly, to the extent Petitioners allege that the certification determination was intended by the Board to replace Petitioners with younger Justices, any such design was unachievable through the denial of certification. The Board's action vis-a-vis Petitioners did not create additional judicial offices. Pursuant to N.Y. Const.

art. VI, § 25(b), Petitioners must retire from their respective judicial offices on December 31st of the year in which they turn age 70. This is so regardless of whether they are certificated for post-retirement by the Board. Once Petitioners retire, their elective Judicial positions become vacant and are to be filled by election of new Justices — again, regardless of whether they are certificated by the Board. It is retirement at age 70 that creates the vacancy and retirement is mandatory.

By contrast, the Board's denial of certification to a retiring Justice does not create any vacant judicial office to be filled by another person — younger or otherwise. The position of certificated Justice is available solely to persons who have served as Justices of the Supreme Court and must retire because they reach the mandatory retirement age. If they are not certificated, or they choose not to seek certification, it is as if the position never existed.

Petitioners are also mistaken that the court system is empowered to make "age-neutral" reductions in the total number of Judgeships in New York State, by eliminating Judgeships held by persons who have not reached the mandatory age of retirement. (R. 68, 71.) All but certificated Judges hold office through election or appointment by different appointing authorities (i.e., the Governor, Mayors and others). When, as now, the court system needs to reduce the total number of Judges owing to budgetary constraints, the only way to do so is through the denial of

certification. In all other cases the Board is powerless to address a budget crisis through the reduction of Judges.

Finally, Respondents as state officers and entities are not subject to suits brought pursuant to the New York City Human Rights Law. *See Jattan v. Queens Coll. of City Univ. of New York*, 64 A.D.3d 540, 541–42 (2d Dep't 2009) (City of New York does not have the power to waive the State's sovereign immunity by passing an anti-discrimination code applicable to the State, so State entities not subject to the provisions of the N.Y.C. Human Rights Law). Moreover, local governments may not adopt a local law that supersedes a State statute where such local law "applies to or affects the courts as required or provided by article six of the constitution." Municipal Home Rule Law § 11(e).

For all of these reasons, the Petition/Complaint failed to state any cognizable claim for relief under well-settled precedent. Accordingly, the December 10 Order should be reversed, Respondents' motion to dismiss granted, and the Petition/Complaint dismissed in its entirety.

II. SUPREME COURT ERRED IN DETERMINING THAT THERE IS PERSONAL JURISDICTION OVER RESPONDENTS AND THAT RESPONDENTS WAIVED THE JURISDICTIONAL DEFENSE

It is undisputed and undisputable that Petitioners failed to effect service of process necessary to obtain personal jurisdiction. Supreme Court blinked away this fatal jurisdictional defect in its December 10 Order, by finding that Respondents

waived personal service. That finding, however, is contrary to law and fact. Accordingly, if the Court deems it necessary to reach this issue, this case should be dismissed for lack of personal jurisdiction.

A. Petitioners Did Not Comply with the Service Directives of the 11/5 OSC

The 11/5 OSC by which Petitioners commenced this proceeding expressly required "personal service of a copy of this order, and the petition and other papers on which [the] order is granted, including the summons and petition and complaint upon the respondent(s) on or before November 6, 2020." (R. 130.)

It is well-settled that "[t]he method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with." *Matter of Zambelli v. Dillon,* 242 A.D.2d 353 (2d Dep't 1997); *see Matter of Frederick v. Goord,* 20 A.D.3d 652, 653 (3d Dep't 2005) ("orders to show cause require strict compliance with their terms"). "[T]he failure to comply with the service requirements of the order to show cause requires that the petition be dismissed for lack of personal jurisdiction." *Matter of Jones v. Dennison,* 30 A.D.3d 952, 953 (3d Dep't 2006); *see Matter of Seifert v. Selsky,* 260 A.D.2d 823, 824 (3d Dep't 1999) (dismissing petition where respondent and the Attorney General were not served in accordance with the order's directives).

Here, Petitioners did not personally serve any Respondent as mandated by the 11/5 OSC. (R. 357.) Petitioners emailed a copy of the papers; that is all. No

affidavit or other proof of service has been submitted to any court because none can be provided. Accordingly, the Petition/Complaint should be dismissed for lack of personal jurisdiction.

In the court below, Petitioners readily admitted as much, stating that they "attempted to personally serve Respondents with these papers as well but were unable to serve the Administrative Board and Chief Administrative Judge Marks, as the Office of Court Administration ("OCA"), located at 25 Beaver Street, New York, New York 10004, was closed due to the ongoing COVID-19 pandemic." (R. 357; *see also* R. 225, 289, 291, 504, 515.) However, OCA's offices at that address have been open since this past Summer, like the courts themselves, which opened in June 2020. (R. 290.) In any event, if a process server encountered difficulty in accessing the building, Petitioners could have followed the alternative procedure for service set forth in CPLR 307 or requested that Supreme Court extend or alter the service provisions in the 11/5 OSC. They did neither. Rather, they chose to ignore the service defect — even after it was repeatedly pointed out by Respondents prior to Petitioners' time to oppose the motion to dismiss. On that basis alone, Supreme Court should have dismissed the Petition/Complaint.

B. Petitioners' Failure to Effect Personal Service is a Fatal Jurisdictional Defect

CPLR 307(1) and (2) provide that personal service is required to obtain personal jurisdiction over a state officer, and that such service must be made by

delivering the summons to the officer or the chief executive officer of the agency, or by mailing the summons by certified mail, return receipt requested, and by personal service on the Office of the Attorney General. So, too, CPLR 7804(c) requires a matter, whether commenced by notice or by order to show cause, against a body or officer to be served on the Office of the Attorney General within the county in which the matter is venued. "Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person" and "a defendant's eventual awareness of pending litigation will not affect the absence of jurisdiction over him or her where service of process is not effectuated in compliance with [the] CPLR." *Wash. Mut. Bank v. Murphy*, 127 A.D.3d 1167, 1174 (2d Dep't 2015) (internal quotation marks & citation omitted).

Here, Petitioners never effected personal service in compliance with CPLR 307, and, therefore, never obtained personal jurisdiction over Respondents, regardless of Respondents' awareness of the existence of the matter. Because the initial discovery directive was made in the same 11/5 OSC that purportedly commenced the proceeding, Respondents were likewise never properly served with the directive. Nevertheless, Supreme Court erroneously found that Respondents waived the jurisdictional defense "[a]s Respondents admit to having been aware of the proceedings in this action at all relevant times, and having actively participated in the litigation prior to raising the issue of lack of personal jurisdiction for the first

time on November 24, 2020, and having argued for dismissal of the petition on the merits as a matter of law." As noted, however, Respondents' awareness of the proceedings is not a basis to find waiver of the defense of personal jurisdiction. *See Wash. Mut. Bank,* 127 A.D.3d at 1174.

The two cases cited by Supreme Court do not support its ruling that Respondents waived personal jurisdiction by participating in the November 18, 2020 hearing in which Petitioners sought to have Respondents held in contempt for failing to provide the discovery ordered by the 11/5 OSC.[10] Neither case holds that a timely asserted defense is waived by an appearance made expressly for preserving other procedural rights, such as here, the right to defend against a baseless contempt motion that sought enforcement of an order that was never properly served. To hold that a litigant must choose between the assertion of a jurisdictional defense, and

[10] *JP Morgan Chase Bank, Natl. Assoc. v. Lee*, 186 A.D.3d 685,686 (2d Dep't 2020) and *Deutsche Bank Natl. Trust Co. v. Hall*, 185 A.D.3d 1006, 1010 (2d Dep't 2020) are clearly inapposite. In *JP Morgan*, a lender sought to foreclose on a property in May 2009. Starting in 2010, the defendant participated in the proceeding for four years, asserting numerous arguments on the merits of the foreclosure action, before finally asserting the jurisdictional defense. In *Deutsche Bank*, a lender foreclosed, submitted an affidavit of service, the defendant opposed the foreclosure action on the merits, and, later, after entry of judgment, asserted lack of personal jurisdiction. Here, unlike *JP Morgan*, respondents did not litigate the merits of the Petition/Complaint for years, only to withdraw their opposition and assert lack of personal jurisdiction. Rather, the Petition/Complaint and 11/5 OSC was presented to Supreme Court on November 5, 2020, and Respondents personal jurisdictional defense was asserted by a supplemental motion to defense dated November 24, 2020, within the statutory time for answer. Unlike the plaintiffs in *Deutsche Bank*, Petitioners here did not and cannot create a rebuttable presumption that service of process was completed with the affidavit of a process server. None exists. Rather, Petitioners concede that they did not personally serve Respondents in compliance with CPLR 307.

acquiescing to improper and unprecedented discovery requests or even an order of contempt, defies common sense and is fundamentally unfair.

Under New York's "one motion" rule, set forth in CPLR 3211(e), jurisdictional defenses can be raised after an initial motion to dismiss is served, including in a reply to the opposition to a motion, so long as the objection is made before the motion is fully briefed and there is no prejudice to petitioners' ability to oppose it. As the Court of Appeals explained in *Held v. Kaufman*, "[t]hat additional grounds for dismissal were introduced in a reply affidavit on what was a single CPLR 3211 motion violates neither the letter nor the spirit of the single motion rule. . . . Moreover, plaintiff was afforded an opportunity to respond, thus obviating any danger of prejudice." 91 N.Y.2d 425, 430 (1998). Respondents here asserted the lack of personal jurisdiction as a defense well before the motion to dismiss was fully briefed, and, Petitioners opposed it, demonstrating that there was no prejudice.[11]

The single motion rule is also inapplicable where, as here, the first motion had not been decided on the merits at the time the defense is asserted. *See Rivera v. Bd. of Educ. of the City of N.Y.*, 82 A.D.3d 614 (1st Dep't 2011) (CPLR 3211 no bar to second motion where first was not decided on the merits); *Endicott v. Johnson Corp.*

[11] Supreme Court's reliance upon *Addesso v. Shemtob*, 70 N.Y.2d 689 (1987) and cases following it is misplaced, since they do not involve the same situation as *Held* and the present case — that is, the timely addition of a defense to a pending motion to dismiss.

v. Konik Indus., 249 A.D.2d 744 (3d Dep't 1998) (unless coupled with significant prejudice to plaintiff, even inordinate delay is not barrier to amendment of pleading). Indeed, Respondents could have withdrawn and refiled the same motion to include the jurisdictional defense to the same effect. *See Klein v. Gutman*, 12 A.D.3d 417, 418 (2d Dep't 2004) ("once a preanswer motion is withdrawn, CPLR 3211(e) contains no prohibition against the same party subsequently moving for the same relief.").

C. Failure to Serve the Office of the Attorney General is Another Fatal Jurisdictional Flaw

Yet another fatal defect in commencing this case was Petitioners failure to serve the Attorney General — a statutory requirement for assuming personal jurisdiction over a state officer. CPLR 2214(d) ("An order to show cause against a state body or officers must be served in addition to service upon the defendant or respondent state body or officers upon the attorney general by delivery to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated…."); CPLR 7804(c) ("In the case of a proceeding pursuant to this article against a state body or officers, . . . commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding

is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county."). Petitioners have provided no record evidence of any attempt at service on the Attorney General at any location. Such failure is a jurisdictional defect. *See, e.g., DeCarlo v. DeCarlo*, 110 A.D.2d 806, 807 (2d Dep't 1985) (plaintiff's failure to serve the Attorney General, as required under CPLR 2214(d) is a jurisdictional defect).

Inexplicably, Supreme Court failed to address the required service on the Attorney General. But this error by Petitioners was far from harmless — had Petitioners alerted the Suffolk County Office of the Attorney General, as they were required to do, that Office, which regularly represents Respondents, would have been available to assist with the response to the application in Suffolk County (80 miles from where OCA's Office is located) and with the *ex parte* 11/5 OSC.

III. SUPREME COURT ERRONEOUSLY ORDERED DISCOVERY IN THIS ARTICLE 78 PROCEEDING, ON AN *EX PARTE* BASIS, INCLUDING AN UNPRECEDENTED AND UNLAWFUL DEPOSITION OF THE CHIEF JUDGE AND CHIEF ADMINISTRATIVE JUDGE, WITHOUT EXPLANATION OR JUSTIFICATION

Supreme Court plainly erred in denying Respondents' motion for a protective order. Even if this Court permits this matter to proceed, which it should not, this Court should bar Petitioners' unreasonable discovery requests, including depositions of the two highest-ranking judicial officers in New York. The requests, which are overbroad, unduly burdensome, and not calculated to lead to the discovery of

admissible evidence, are improper under any circumstances. In the context of Judiciary policymaking in the face of an unprecedented budget crisis brought on by a global pandemic, they are beyond the pale.

Discovery in Article 78 proceedings is disfavored and should not be permitted absent a showing of "ample need." *Plaza Operating Partners Ltd. v. IRM (U.S.A.) Inc.,* 143 Misc. 2d 22, 24 (Civ. N.Y. Cnty. 1989). No such need is present here. Neither petitioners nor Supreme Court identified any disputed issues of fact that could be material to resolution of this dispute (i.e., which could give rise to a viable claim) — and there are none. As discussed, the Petition/Complaint can be decided as a matter of law. It was for this reason that Respondents moved not only to dismiss, but also for a protective order, and to vacate the extraordinary pre-answer *ex parte* 11/5 OSC granting discovery. The discovery sought by Petitioners and ordered by Supreme Court is unnecessary, unlawful, and intended to harass Respondents. Supreme Court improvidently granted it *ex parte,* without permitting Respondents' adequate notice or the ability to be heard, and this Court should vacate that portion of the December 10 Order.

Supreme Court provided no viable basis for denying a protective order. Rather than providing a reasoned basis for denying Respondents' motion, at its November 18, 2020 hearing, Supreme Court simply ordered expedited discovery to occur before even considering Respondents' arguments that discovery was both

unnecessary and unavailable. (R. 378, 390, 393-94.).) Refusing to consider the merits of Respondents' motion for a protective order prior to the return date of the motion, Supreme Court inappropriately ruled on expedited discovery without regard to the pending motion for protective order. Supreme Court incorrectly reasoned that because the motion for a protective order was not made by order to show cause, it need not consider it at that time, even as Supreme Court then simultaneously ordered the very same expedited discovery that was the subject of the motion for protective order. Supreme Court also, as it previously did, stated that Respondents' motion for a protective order, filed five business days after first receipt of an email copy of the 11/5 OSC, and made returnable as directed by the 11/5 OSC and required by CPLR 406 on December 7, was not brought quickly enough. (R. 32-3.)

Recognizing that this Court had nonetheless imposed a stay on discovery pending the determination of the motions to transfer, dismiss, and for a protective order, Supreme Court, without considering any substantive arguments on either motion, simply reinstated "expedited discovery" and ordered Respondents to comply. (*Id*.) Moreover, Supreme Court ignored the substance of this Court's November 27, 2020 directive, issued under CPLR 5704(a), indicating that the 11/5 OSC had, in fact, been issued *ex parte*, choosing instead to treat that order as one on notice (even though Respondents' received no prior notice of the application, and were never heard on it). (R. 607.)

Disclosure must be denied in proceedings where the case may readily and properly be decided on a summary basis without such disclosure, especially when such disclosure would, as here, impede the expeditious resolution of the matter. *Marshall v. Katsaros,* 152 A.D.2d 542, 543 (2d Dept. 1989). Thus, absent a showing of "ample need," discovery is denied in special proceedings. *Plaza Operating Partners,* 143 Misc.2d at 24. An Article 78 petitioner may only obtain discovery upon the demonstration of "good cause," which requires the petitioner to establish:

> (1) whether the petitioner has asserted facts to establish a cause of action (2) whether a need to determine information directly related to the cause of action has been demonstrated; (3) whether the requested disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice.

Lonray, Inc. vs. Newhouse, 229 A.D.2d 440 (2d Dep't 1996) (quotation and citation omitted); *see also Arnot-Ogden Memorial Hospital v. Blue Cross of Central New York,* 122 Misc.2d 639, 644 (Sup. Ct. Chemung Cty. 1984) ("Normally, a proceeding under Article 78 raises a question of law only. This is especially true when the claim is made that the decision subject to review is arbitrary, capricious and in violation of lawful procedure.")

Here, there is no basis for discovery. Supreme Court identified no disputed issue of material of fact requiring discovery to resolve. In fact, the depositions of the Chief Judge and Chief Administrative Judge are unprecedented. Respondents are unaware of a single instance in New York history when a Chief Judge of the

State of New York has been deposed. This is not surprising because a mountain of case law bars such depositions.

It is well established that high-ranking government officials are generally immune from depositions, and that a party may only take the deposition of a high-ranking or "apex" governmental official under extraordinary circumstances. *See, e.g., New York v. Oneida Indian Nation of N.Y,* No. 95-CV-0554 (LEK/RFT), 2001 U.S. Dist. LEXIS 21616, 2001WL 1708804, at *3 (N.D.N.Y. Nov. 9, 2001) (denying motion to compel testimony of Governor and Secretary to Governor); *Colicchio v. New York,* 181 A.D.2d 52 (1st Dep't 1992) (reversing order of Supreme Court that permitted plaintiff to take the deposition of the Commissioner of the New York City Department of Transportation); *see also Torres v. City of N.Y.,* 39 Misc.3d 558, 566 (Ct. of Claims 2013) ("Generally, a party seeking a deposition of a high-ranking official must show that the 'official has information that cannot be obtained from any other source and that a deposition would not interfere significantly with the official's ability to perform his or her governmental duties.'") (*quoting Hipolito Colon v. N.Y. City Bd. of Educ.,* 2008 N.Y. Slip Op. 31376(U), at *6 (N.Y. Cnty. 2008)).

"[I]f high ranking officials, such as the head of a government agency, were routinely deposed, he or she would be 'spending their time giving depositions and would have no opportunity to perform their functions.'" *Cannon v. Correctional*

Medical Care, Inc., 9:15-CV-1417 (GLS/DJS), 2017 U.S. Dist. LEXIS 98708, 2017 WL 2790531, at *5 (N.D.N.Y. June 27, 2017) (quoting *Marisol A. v. Giuliani,* No. 95 CIV. 10533 (RJW), 1998 U.S. Dist. LEXIS 3719, 1998 WL 132810, at *3 (S.D.N.Y. Mar. 23, 1998).

Here, Supreme Court never found that Chief Judge DiFiore and Chief Administrative Judge Marks possess relevant and material information or unique knowledge essential to resolve this dispute that could not be obtained from any other source. *See, e.g., Pierre v. State,* 63 Misc.3d 1231 (A), at *3 (Ct. of Claims 2010) (movants seeking to depose the Governor failed to show that "any information he would testify to would be relevant, essential, and unable to be obtained by another source").

In the midst of a global pandemic, affecting every aspect of the courts' operations, it is unthinkable that the leaders of one of the three branches of government in New York State should be called on personally to give testimony by deposition, where, as here, no "clear showing" has been made that such unprecedented discovery is essential to prevent prejudice or injustice to Petitioners. *Hipolito Colon,* at *6. Moreover, a deposition of Chief Judge DiFiore and Chief Administrative Judge Marks would be disruptive to the functions of government — including their continued and necessary ability to consider and discuss policy decisions in confidence. There was no basis here to order such depositions.

Nor did Supreme Court give any consideration to the privileged and protected information and material that Petitioners sought, including the pre-decisional thought processes of the Board and its members. Thus, Supreme Court's discovery orders violate universally recognized privileges that apply specifically to the judiciary, sometimes referred to as the judicial deliberative process privilege or mental process privilege. *See, e.g., Goetz v. Crosson, 41* F.3d 800, 805 (2d Cir. 1994) ("The inner workings of administrative decision making processes are almost never subject to discovery. Clearly, the inner workings of decision making by courts are kept in even greater confidence."); *In re Cohen's Estate,* 105 Misc. 724, 174 N.Y.S. 427 (N.Y. Surrogate's Ct. 1919) (court refused to permit deposition of the chief clerk and stenographer of the surrogate of Westchester County to consider the propriety of an award of attorney's fees in an estate due to the "confidential relation between a judge and a clerk and stenographer concerning proceedings before the court" and the adverse effect that invasion would have on the "fair administration of justice"); *see also United States v. Morgan,* 313 U.S. 409, 422 (1941) (mental processes of judge cannot be subjected to scrutiny; "[s]uch an examination of a judge would be destructive of judicial responsibility").

Supreme Court also failed to consider New York's deliberative process privilege, which recognizes that pre-decisional, confidential governmental deliberative materials and thought processes should not be disclosed where such

disclosure would harm the public interest by impinging on the free deliberations of an agency in making policy. *See Cirale v. 80 Pine Street Corp.,* 35 N.Y.2d 113, 117-18 (1974). Where, as here, the reasons for the government action taken has been "elucidated" by a public announcement of the policy at issue and its basis, (*see* R. 42-5, 265, 277-78), the government's interest in encouraging candor in policymaking is paramount over the litigants' interest in disclosure. *See, e.g., One Beekman Place v. City of New York,* 169 A.D.2d 492, 493-94 (1st Dep't 1991; *Martin A. v. Gross,* 194 A.D.2d 195 (1st Dep't 1993).

Moreover, because Petitioners seek all deliberative materials reviewed by the Board, they also seek attorney-client communications. *See* CPLR 4503(a) (exempting from disclosure confidential attorney-client communications); *United Policyholders v. Serio,* 298 A.D.2d 286 (1st Dep't 2002) (confidential intra-agency memorandum from attorneys immune from disclosure as both attorney-client privileged and intra-agency deliberative material); *New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.,* 300 A.D.2d 169 (1st Dep't 2002).

Production of the requested materials, and the depositions of the Chief Judge and Chief Administrative Judge, sought to explore their "motivations," would have long-lasting prejudice by revealing confidential thoughts and information and, more importantly, inhibiting the effective operation and decision-making of the Chief

Judge, Chief Administrative Judge, and the Administrative Board on behalf of the courts. These individuals, in deciding on policy for the state Judiciary, and considering the public's interest, must engage in discussions, be self-critical, prepare and exchange memoranda on legal and policy questions, and disseminate policy views, legal research, and opinions with a frank exchange of views on the issues raised. Compelling the production of such documents and testimony would chill discussion, improperly truncate decision-making, and impair the functioning of the courts.

Further, Supreme Court's compulsion of discovery will not speed the resolution of the present case — rather it appears designed to prolong it, since it is likely to require the extraction and analysis of potentially voluminous electronic data, production of privilege logs, *in camera* review, and further motion practice on discovery. None of this serves the interest of expedition that Petitioners ostensibly seek.

Supreme Court utterly failed to explain how or why the discovery sought by Petitioners would assist in resolving this dispute. The disclosure sought will not establish Petitioners' causes of action. Respondents' individual "motivations" are not in issue; collectively, they had the statutory and constitutional right to decline to certificate, including for budgetary reasons — and Petitioners acknowledge this was the basis for the Board's determination. In addition, Petitioners apparently seek

disclosure in order, for example, to establish that Respondent's budgetary calculation were not accurate, that Respondents were not legally required to make budgetary cuts, or that Respondents themselves critically assessed their decision, and found their choices to be less than ideal. (R. 46, 60.) Even assuming, *arguendo,* each of these assertions is true, which they are not, they are beside the point. The Judiciary was entitled to cut costs in the face of the ongoing budgetary crisis caused by the COVID-19 pandemic. The determination of which costs to cut is a quintessential policy decision, beyond judicial review under *Marro/Loehr.* To the extent Petitioners seek to establish that such a decision did not save the Courts sufficient costs given the impact of losing experienced jurists, this does not present the basis for a viable cause of action, s*ee Loehr,* 29 N.Y.3d at 382, and is not the key to the door guarding open-ended discovery.

Were claims of allegedly misplaced governmental priorities sufficient to merit discovery under Article 78, then policy could not be made at all. Allowing plenary discovery on every Article 78 petition would open the floodgates for virtually any litigant to probe any statewide policy through lawsuits. Every environmental, health, public safety, or local government decision could be stopped in its tracks and mired in years of discovery, all at taxpayers' expense, and without due regard to its rational basis. This is not, and should not be, the law. *See Pereira v. Nassau County Civil Serv. Comm'n,* 2010 WL 2754436, at *2 (Sup. Ct. Nassau Cnty. June 14, 2010) ("In

an Article 78 proceeding" the reviewing court's "inquiry is limited strictly to a determination of whether a rational basis exists for the agency's actions."); *see also Hughes v. Doherty*, 5 N.Y.3d 100, 105 (2005) (agency's decision must be upheld under CPLR 7803 if it had any "rational basis").

Accordingly, this Court should grant Respondents' motion for a protective order.

IV. SUPREME COURT ERRED IN FINDING THAT SUFFOLK COUNTY IS THE PROPER VENUE FOR THIS CASE

Supreme Court also erroneously denied Respondents' motion to change venue from Suffolk County. If this Court does not grant respondents' motion to dismiss (as it should), then it should transfer venue to Albany County, where the Board's determination was made. The plain language of CPLR 506(b) and the undisputed fact that the determination complained of occurred in Albany compel that conclusion. Notably, the last time a petitioner challenged a determination of the Administrative Board in *Loehr*, the petition was initially filed in Westchester County Supreme Court, and then transferred to Supreme Court, Albany County. This Court should follow that precedent if it needs to reach this issue. *See Loehr,* No. 6818-13, at 1.

Here, Petitioners challenge the Board's disapproval of their applications for certification. (R. 35-76.) Under CPLR 506(b), a proceeding against a body or officer:

> shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.

There is only one "determination complained of" in this matter: the Board's "determination to deny certification to 46 Supreme Court Justices." (R. 38.) That determination was made in Albany County, originated in Albany County, and all material events related to that determination occurred at Court of Appeals Hall, which is located in Albany County. Nothing related to the determination occurred in Suffolk County.

Not only is Albany County where the "determination complained of" took place, but also "where the material events otherwise took place." CPLR 506(b). The "material events" giving rise to petitioners' claims — namely, the decision to disapprove the certification applications — took place in Albany County, and lacked any nexus with Suffolk County. (R. 265.) The "material events" provision of CPLR 506(b) means that venue is properly located where "the decision-making process leading to the determination under review" occurred. *See Vigilante v. Dennison*, 36 A.D.3d 620, 622 (2d Dep't 2007) ("material events" leading to a parole determination were not the crime and sentence but the parole board's decision-making process); *N.Y. Republican State Comm. v. N.Y. State Com. on Gov't*

Integrity, 138 A.D.2d 884, 885 (3d Dep't 1988) (holding venue of proceeding to quash subpoenas issued by State Commission would be changed from Albany County to New York County where subpoenas were issued from office in New York County).

In support of its decision refusing to transfer the case, Supreme Court reasoned that, because the "termination" of Supreme Court Justices in Suffolk and on the Second Department "will significantly delay the resolution of cases, thereby greatly prejudicing litigants and their counsel," the proper venue for this dispute is Suffolk County. (R. 30.) Supreme Court also found that because three Supreme Court Justices in Suffolk County — none of whom are Petitioners — applied for certification, the "material events" occurred in Suffolk. (*Id*.) Supreme Court further found that Albany County, where the decision at issue was made, to be an inappropriate forum because Albany Supreme Court, the Third Department, and the Court of Appeals are all located in Albany and have "geographic proximity" — and that this somehow meant that the courts in Albany are not impartial, and therefore venue in Albany was improper. (*Id.*); *see* CPLR 510(2).

However, each of these findings are erroneous. First, Supreme Court was simply wrong that any "termination" occurred in Suffolk County, or in the Second Department. As noted, there was no "termination" at all. Justices must retire at age

70. Certification, if granted, permits post-retirement service for a new limited term. Again, the determination whether to certificate occurred in Albany County.

Second, Supreme Court erred in basing its venue decision on a speculative, future impact in Suffolk County. Under the plain language of CPLR 506(b), venue under either the "challenged determination" or "material events" provisions cannot be based on future events. CPLR 506(b) expressly applies only to past determinations and events ("where the respondent *made* the determination complained of" or "where the material events otherwise *took* place"), not determinations or events that may occur in the future. *Franklin National Bank v. Superintendent of Banks*, 40 Misc.2d 315 (Sup. Ct., Nassau Cnty., 1963) (venue properly in New York County, where respondent's determination to permit establishment of a branch office of petitioner's rival bank was made, and not in Nassau County, where petitioner's principal and branch offices were located and where the rival branch office would be established); *see also*, e.g., *Semple v. Miller*, 67 Misc.2d 545 (Sup. Ct., Monroe Cnty., 1971) (noting that proceeding challenging State Commissioner of Mental Hygiene's closure of state facility for budgetary reasons not properly brought in judicial district where facility was located and effects of the closure would be felt, but in Albany County where the determination was made). Thus, for purposes of placing venue, it is immaterial whether the Board's determination may in the future result in Suffolk County having fewer judges,

increase other Suffolk judges' caseloads, or delay having Suffolk cases and appeals heard, as Supreme Court speculated. Establishing any rule to the contrary would result in challenges to governmental decisions with statewide impact in multiple venues.

Third, Supreme Court found, without any supporting facts or evidence, that Albany County is an improper venue because there is a greater risk in Albany County that a close personal connection would exist between a litigant and the judge presiding over this case given the "close geographic proximity of Supreme Court, Albany County to the Appellate Division, Third Department, and the Court of Appeals." (R. 30.) However, if anything, the close geographic proximity to courts that will decide these matters, as well as the proximity to the location of the determination and events at issue in the Petition, militates in favor of placing venue in Albany County.

By any applicable criteria for the placement of venue under CPLR 506(b), Suffolk County is an improper location for the resolution of the issues raised in this proceeding. Supreme Court, Albany County is the proper venue because both the determination complained of and the material events giving rise to Petitioners' claims occurred in Albany County. *See, e.g., Cohen v. Department of Social Services of State*, 37 A.D.2d 626 (2d Dep't 1971), *aff'd* 30 N.Y.2d 571 (1972) (holding that special proceeding was brought in the wrong venue and directing that

it be transferred). Thus, if this Court does not grant the motion to dismiss (which it should), it should vacate or reverse that portion of Supreme Court's Order denying a transfer of venue, and transfer venue to Supreme Court, Albany County.

CONCLUSION

For the foregoing reasons, the December 10, 2020 order of Supreme Court, Suffolk County, should be reversed, and the action and proceeding should be dismissed.

Date: December 29, 2020
Albany, New York

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 12,087.

Addendum

Decision, Order and Judgment of the Honorable Gerald W. Connolly, dated May 5, 2014, Appealed From, with Notice of Entry [pp. 4 - 17]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

GERALD E. LOEHR, J. EMMETT MURPHY and WILLIAM MILLER
Plaintiffs/Petitioners

-against-

THE ADMINISTRATIVE BOARD OF THE COURTS OF THE STATE OF NEW YORK,
Defendant/Respondent.

DECISION/ORDER/JUDGMENT
Index No. 6818-13
RJI: 01-13-112282

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
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Connolly, J.:

Plaintiffs-Petitioners (hereinafter "Petitioners") in this hybrid Article 78/declaratory judgment action[1] seek an order: (i) declaring that the policy adopted by the defendant/respondent Administrative Board of the Courts of the State of New York (hereinafter "Board" or "Respondent"), barring a retired Justice of the Supreme Court who is receiving retirement benefits for judicial service in the Unified Court System from being certified for service as a retired Justice pursuant to Article VI, §25(b) of the New York State Constitution and Judiciary Law §115 is illegal and unconstitutional; (ii) vacating the Board's refusal to certify plaintiffs/petitioners Justices Loehr,

[1]Pursuant to a December 18, 2013 Administrative Order of the First Deputy Chief Administrative Judge of the Courts this matter was transferred from the Supreme Court, Westchester County, Ninth Judicial District, to the Supreme Court, Albany County, Third Judicial District.

Murphy and Miller for continued service unless they suspend receipt of their retirement and directing the Board to grant their applications for certification unconditionally; and (iii) awarding monetary relief incidental to the request for relief, plus attorneys' fees and litigation expenses. Defendant/Respondent Board has moved to dismiss the amended complaint/petition on the ground that it fails to state a cause of action and upon other grounds enumerated in its answer.[2] Oral argument was held on the motion on March 20, 2014.

Facts:

Petitioners are elected New York State Supreme Court Justices who have concurrently been receiving retirement benefits for prior public service, which included judicial service, and their judicial salary (a practice referred to by respondent as "double-dipping"). As they have each reached the age of seventy, pursuant to Article VI, §25(b) of the Constitution of the State of New York and Judiciary Law §115, they must retire at the end of the year in which they reached such age and be certificated in order to thereafter continue to perform the duties of a Justice of the Supreme Court. Certification, pursuant to such provisions, requires a finding by the Board that the services of the Judge are necessary to expedite the business of the Court and that the Judge has the mental and physical capacity to perform the duties of such office.

On October 16, 2013, Chief Administrative Judge A. Gail Prudenti signed an administrative order (AO/240/13) providing as follows:

> Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby give notice that, effective immediately, it shall be the policy

[2]Via a So-Ordered Stipulation dated December 20, 2013, the parties agreed that respondent would consider petitioner Loehr's application for certification pursuant to Judiciary Law §115 without reference to the certification policy at issue in this proceeding and petitioner Loehr would withdraw his application for preliminary relief, subject to renewal in the event respondent declines his application.

> of the Administrative Board that no judge henceforth certificated for service as a Justice of the Supreme Court pursuant to Judiciary Law §115 may receive, concurrent with receipt of a salary for such service, a retirement allowance for prior judicial service within the Unified Court System.

Upon applying for certification and/or re-certification, petitioners were informed that they would be required to comply with respondent's new policy prohibiting a certificated Supreme Court Justice from concurrently receiving a salary for such service and their retirement allowance.

On or about December 3, 2013, the Board reconsidered and adhered to such policy in a memorandum from Mr. McConnell, Esq., counsel to the Unified Court System, stating as follows:

> The Administrative Board of the Courts has directed me to report its reconsideration of, and adherence to the policy promulgated on October 17, 2013, whereby retired Justices of the Supreme Court certificated or recertificated pursuant to Judiciary Law §115 shall not concurrently receive both a salary for such certificated service and retirement benefits for judicial service within the Unified Court System. If otherwise approved for certificated or recertificated service by the Board, judges who currently receive a pension for prior judicial service will be permitted to serve if they defer or suspend such pensions during the term of certification. To avoid needless deferral or suspension - in the event an application is denied on other grounds - affected justices will be notified by the Board of their tentative approval for certification or recertification in the very near future, following closure of the period for public comment on applications.

Pursuant to the procedure outlined in such Memorandum, on or about December 3, 2013, the Board notified petitioners that their applications for certification would be granted if they suspended their retirement benefits from the New York State and Local Retirement System. Petitioner Loehr requested that the Administrative Board reconsider his application as 74% of the public service that earned him his retirement benefits occurred prior to his judicial service; such request for re-consideration was denied on or about December 9, 2013.

Because each of the petitioners had already retired and commenced collection of their benefits prior to the announcement of such policy, any "suspension" of their pension to comply with the certification policy would have adverse financial consequences to the petitioners beyond such

"suspension".

Petitioners raise eight causes of action in their Amended Verified Complaint and Petition: that Respondent's certification policy: (i) imposes a requirement for certification not found in Article VI of the New York State Constitution; (ii) imposes a requirement for certification not found in Judiciary Law §115; (iii) violates Retirement and Social Security Law §212, which permits a retired state employee who is over the age of 65 to re-enter state employment without impairing their retirement benefits; (iv) deprives petitioners of their pension rights provided under Article V, §7 of the New York State Constitution; (v) violates the Contract Clause of the United States Constitution (Article I, §10); (vi) is arbitrary and capricious as the Board is imposing allegedly new criteria not found in Article VI, §25(b) of the New York State Constitution and/or Judiciary Law §115, and is not rationally related to the purpose of such provisions; (vii) is arbitrary and capricious as petitioner Loehr's retirement benefits are derived principally from his public service performed before entering the Unified Court System; and, (viii) is arbitrary and capricious as the retirement benefits of petitioners Murphy and Miller are derived in part from their public service performed before entering the Unified Court System.

Motion to Dismiss Standard

"In the context of a motion to dismiss pursuant to CPLR §3211, the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Berry v Ambulance Serv. of Fulton County, Inc.*, 39 AD3d 1123, 1124 [3d Dept 2007]; *Matter of Manupella v Troy City Zoning Bd. of Appeals*, 272 AD2d 761, 762 [3d Dept 2000]). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory.

not whether there is evidentiary support for the complaint (*see Leon*, 84 NY2d at 87-88; *Brooks v Key Trust Co. Natl. Assn.*, 26 AD3d 628, 630 [3d Dept 2006], *lv dismissed* 6 NY3d 891).

First and Second Causes of Action

Petitioners contend that respondent's policy imposes requirements for certification not found in Article VI of the New York State Constitution or Judiciary Law §115. Respondent contends that petitioners have failed to state a claim of a constitutional or statutory violation and accordingly, such cause of action must be dismissed as petitioners are not entitled to a declaration that respondent's policy is illegal, unconstitutional and *ultra vires*.

New York State Constitution Article VI, §25(b) provides, in pertinent part:

> b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office.

Judiciary Law §115(1) provides, in pertinent part:

> 1. Any justice of the supreme court, retired pursuant to subdivision b of section twenty-five of article six of the constitution, may, upon his application, be certified by the administrative board for service as a retired justice of the supreme court upon findings (a) that he has the mental and physical capacity to perform the duties of such office and (b) that his services are necessary to expedite the business of the supreme court. A copy of such certificate shall be filed with the appellate division of the department in which such retired justice resides and in the office of court administration.

Respondent argues that it has nearly unfettered discretion in certification determinations, which discretion includes the power to set standards by which it judges whether a candidate's services are necessary to the Court, subject to challenges only on the grounds that such standards

violate statutory rights or promote constitutionally impermissible purposes unrelated to the certification process: Respondent contends that the policy set forth in AO/240/13 does not violate petitioners' statutory rights or promote a constitutionally impermissible purpose, unrelated to the certification process.

While petitioners are correct that neither Article VI, §25(b) of the New York State Constitution nor Judiciary Law §115 specifically impose a requirement that a retired Justice not be receiving retirement benefits for prior judicial service in the Unified Court System in order to be certificated, such provisions each provide that a determination be made that such justice is "necessary to expedite the business of the [supreme] court" and nothing in such provisions precludes respondent's ability to impose conditions, such as the one at issue herein, as part of respondent's constitutionally and statutorily mandated determination that such candidate's services are "necessary". Respondent has "nearly unfettered discretion in determining whether to grant applications of former Judges for certification, a discretion which [is] not subject to judicial review in the absence of claims of substance that there has been a violation of statutory prescription or promotion of a constitutionally impermissible purpose, unrelated to the certification process" (*Marro v Bartlett*, 46 NY2d 674, 681-682 [1979]).

Accordingly, petitioners' contentions that respondent's policy violates Article VI, §25 of the New York State Constitution or Judiciary Law §115 is without merit, and petitioners are not entitled to the declarations it is seeking. Therefore, respondent is entitled to dismissal of petitioners' first and second causes of action.

Third and Fourth Causes of Action

Petitioners contend that respondent's certification policy impairs their pension rights under Retirement and Social Security Law §212 and Article V, §7 of the New York State Constitution.

Petitioners assert that they have a right to receive their public salary and retirement benefits concurrently.

In opposition, respondent asserts that petitioners are conflating two separate claims: (i) the right to receive a pension and (ii) the right to be appointed to a position. Respondent contends that nothing has barred petitioners' right to receive their pension benefits, but, as set forth in *Marro*, petitioners have no property interest in an appointment as a certificated judge. Accordingly, respondent contends that petitioners have no right to the concurrent receipt of their pension benefits and an appointment permitting them to remain in public employment.

Retirement and Social Security Law §212(1) provides, in pertinent part,

> 1. Notwithstanding the provisions of section one hundred one, two hundred eleven or four hundred one of this chapter or of section five hundred three of the education law, or the provisions of any local law or charter, any retired person may continue as retired and, without loss, suspension or diminution of his or her retirement allowance, earn in a position or positions in public service in any calendar year an amount not exceeding the amount set forth in the table in subdivision two of this section provided such retired person employed under this section duly executes and files with the retirement system from which he or she is receiving a retirement allowance a statement that he elects to have the provisions of this section apply to him or her. ... However, there shall be no earning limitations under the provisions of this section on or after the calendar year in which any retired person attains age sixty-five.

While RSSL §212 provides that a retired person "may" collect their retirement allowance and return to public service and receive compensation, as noted by respondent, it does not create a right to return to public service nor does it bar respondent from considering petitioners' pension statuses in determining whether an appointment will be made.

Article V, § 7 of the New York State Constitution provides as follows: "[a]fter July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

Respondent's policy however, does not affect petitioners' right to membership in the retirement system nor does it diminish or impair petitioners' right to receive their benefits, as petitioners are and remain entitled to membership in the system and receipt of their benefits. The policy rather, imposes a condition to certification to which petitioners have no right (*see Marro, supra* at 682).

Accordingly, petitioners' contentions that respondent's policy violates Article V, §7 of the New York State Constitution and RSSL §212 are without merit, and petitioners are not entitled to the declarations they are seeking. Therefore, respondent is entitled to dismissal of petitioners' third and fourth causes of action.

Fifth Cause of Action

Petitioners assert that the respondent's policy violates the Contract Clause (Article I, §10 of the United States Constitution). Respondent asserts that its policy does not constitute a law, and accordingly, such provision is not applicable; and, further, that even if such policy could be construed as law, it does not impair petitioners' rights regarding their pensions.

Article I, §10 provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts". "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals" (*New Orleans Waterworks Co. v Louisiana Sugar Refining Co.*, 125 US 18 [1888]; *see also Waltz v Board of Educ. Of Hoosick Falls Cent. School Dist.*, 2013 U.S. Dist LEXIS 129089 [Sept. 10, 2013, N.D.N.Y]). As the policy at issue is the policy of an administrative board, the

respondent's policy does not constitute a "Law" for purposes of the Contracts Clause, and Petitioners' claim fails to state a cause of action.

As noted above, however, respondent's policy does not impair petitioners' contractual pension rights but rather, imposes restrictions on the certification of petitioners for a position to which they are not legally entitled. Accordingly, even were the Court to review such policy in light of the Contracts Clause, such policy is not violative and therefore, petitioners have failed to state a cause of action.

Sixth, Seventh and Eighth Causes of Action

Petitioners assert that the Board's policy is arbitrary and capricious as it provides for certification decisions to be made on the basis of criteria that: (i) is not mentioned in Article VI, §25(b) and Judiciary Law §115 and (ii) not rationally related to the purpose of such provisions. Petitioners also assert that respondent acted arbitrarily and capriciously in applying its policy to (i) petitioner Loehr, as his retirement benefits are "derived principally from his public service before ever entering the Unified Court System", and (ii) as to petitioners Murphy and Miller, as their retirement benefits are "derived in part from their public service before ever entering the Unified Court System".

Initially, as discussed above, the Board has extraordinarily broad authority in determining applications for certification; to wit: "very nearly unfettered discretion in determining whether to grant applications of former Judges for certification, a discretion which [is] not subject to judicial review in the absence of claims of substance that there had been violation of statutory proscription or promotion of a constitutionally impermissible purpose, unrelated to the certification process" (*see Marro, supra* at 681-682 [1979][emphasis added]). As the Court has determined above that there has been no violation of statutory proscription or the promotion of a constitutionally impermissible

purpose, unrelated to the certification process, this Court is constrained to find for the respondent on these claims as the respondents' actions in denying petitioners' applications for certification, per *Marro*, are beyond judicial review. Therefore, petitioners' sixth, seventh and eighth causes of action must be dismissed for failure to state a cause of action.

Even were this Court to conduct such review, respondent has submitted, *inter alia*, the affidavit of Justice Prudenti, the Chief Administrative Judge of the Courts of the State of New York. Justice Prudenti avers that the rationale behind the respondent's policy decision, as related in the Board's discussions, was as follows:

a. its belief that the Board's grant of certification to "double-dipping" judges conveys an impression to the public that the court system is insensitive to and neglectful of the State's current fiscal distress.
b. its belief that the Board's grant of certification to "double-dipping" judges creates difficulties for court administrators and advocates in negotiating effectively with the Legislature and the Executive Branch on issues – including the court system budget, legislative initiatives, creation of new judgeships, judicial salary initiatives, judicial constitutional referenda – of crucial importance to the Judicial Branch.
c. its belief that, in the absence of such a prohibition, the new publicity on the issue of double-dipping might encourage more judges to adopt the practice at the time of certification.
d. its belief that, under these circumstances, judges who would be "double-dipping" following certification were not "necessary to expedite the business of the court" or necessary for the operation of the Supreme Court.
e. its belief that the policy should be limited to persons whose pensions included credit for judicial service - that is, those who retired from judicial office, commenced receipt of a pension, and then resumed further judicial office at full salary.
f. its belief that the policy should not serve as an absolute bar to certificated service: that is, candidates should be permitted to suspend or defer receipt of that pension while serving in certificated status.

Justice Prudenti also avers that respondent rejected reviewing past nonjudicial service of petitioner Loehr, as it "would invite arbitrary distinctions in application of the policy and would undercut its purpose: the discouragement of judicial double-dipping by judges[3] intending to seek

[3]Petitioners' contention that such policy is inconsistent with the Office of Court Administration's employment of similarly-situated non-judicial employees is insufficient to merit a determination that the policy, which is applied equally to all applicants for certification, is arbitrary or capricious.

certification by the Board." (Prudenti Aff., ¶14).

While petitioners may disagree with respondent's policy, it cannot be said that such policy is irrational, arbitrary or capricious. Justice Prudenti outlined a rational basis for the imposition of such policy. To the extent petitioners contend that respondent's certification determinations were arbitrary and capricious as they were based upon respondent's unwillingness to make differing decisions based upon analyses of what portion of petitioners' pensions are from non-judicial service, such contention is without merit. Respondent has provided a rational basis for their refusal, that being their effort to enact a policy that is applied in the same non-arbitrary manner to all applicants for certification rather than creating disparate determinations based upon differing amounts of prior judicial service.

Based upon the foregoing determinations, petitioners are not entitled to an award of incidental monetary relief, interest, attorneys' fees or litigation expenses.

Otherwise, the Court has reviewed the petitioners' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED that the respondent's policy barring a retired Justice of the Supreme Court who is receiving retirement benefits for judicial service in the Unified Court System from being certificated for service as a retired Justice pursuant to Article VI, §25(b) of the New York State Constitution and Judiciary Law §115 is neither illegal nor unconstitutional; and it is further

ORDERED that respondent's motion to dismiss is granted in its entirety and the Amended Verified Complaint and Petition is dismissed as plaintiffs/petitioners are neither entitled to the declaratory judgment relief they are seeking nor the Article 78 relief they are seeking; and it is further

ORDERED that petitioners' request for an award of incidental monetary relief, interest, attorneys' fees and litigation expenses is denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the respondent. The below referenced original papers are being mailed to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.**

SO ORDERED.
ENTER.

Dated: May 5, 2014
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Summons and Notice of Petition dated December 11, 2013; Amended Verified Complaint and Petition dated January 13, 2014; Affidavit in Support of Petition of Gerald Loehr dated January 13, 2014; Affidavit of J. Emmett Murphy dated January 13, 2014; accompanying exhibits A-D; Affidavit in Support of Petition of William Miller dated January 13, 2014; Petitioners' Memorandum of Law in Support of Amended Verified Complaint and Petition dated January 13, 2014;
2. Notice of Motion to Dismiss the Amended Complaint/Petition; Verified Answer to Amended Complaint and Petition dated January 27, 2014; Affidavit of Hon. A. Gail Prudenti dated January 27, 2014; with accompanying exhibits A-D; Affidavit of William Gilchrist dated January __, 2014; Memorandum of Defendant/Respondent Administrative Board of the Courts in Opposition to the Amended Petition and In Support of its Motion to Dismiss the Amended Complaint dated January 27, 2014;
3. Affidavit in Opposition to Motion and in Further Support of Petition of Gerald E. Loehr dated February 6, 2014; Affidavit In Opposition to Motion and in Further Support of Petition of J. Emmett Murphy dated February 10, 2014; accompanying exhibits A-B; Petitioners' Memorandum of Law in Reply to the Administrative Board's Opposition to the Amended Petition and in Opposition to the Administrative Board's Motion to Dismiss the Amended Complaint dated February 10, 2014;
4. Reply Memorandum of Defendant/Respondent Administrative Board of the Courts' in Opposition to the Amended Petition and in Support of its Motion to Dismiss the Amended Complaint dated February 18, 2014;
5. Stipulation of the Parties dated December 20, 2013.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 29, 2020

deponent served the within: **Brief for Respondents-Defendants-Appellants**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on December 29, 2020

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

Job# 300784