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 Nos.: 532566 532590

REPLY BRIEF FOR RESPONDENTS-DEFENDANTS-APPELLANTS

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Suffolk County Clerk's Index No. 616980/20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constituional Provisions

PRELIMINARY STATEMENT

This Reply Brief addresses key errors in the Brief for Petitioners-Plaintiffs-Respondents-Appellants ("Pet. Br.").[1]

As demonstrated in Respondents' Opening and Supplemental Briefs, this Court should reverse (1) Supreme Court's December 10 Order denying Respondents' motions to dismiss and for other relief and (2) December 30 Judgment annulling as arbitrary and capricious the Administrative Board's determination declining the applications of the Petitioner Justices to serve as certified Judges for the years 2021-2022. The Board's determination was precipitated by the financial emergency occasioned by COVID-19; authorized by the broad discretion provided for in N.Y. Const. Art. VI, § 25(b) and Judiciary Law § 115; and guided by the principles established in three controlling decisions: *Matter of Marro v. Bartlett,* 46 N.Y.2d 674 (1979), *Matter of Loehr v. Administrative Bd. of the Cts. of the State of N.Y.,* 29 N.Y.3d 374 (2017) and *Matter of Ponterio v. Kaye,* 25 A.D.3d 865 (3d Dep't 2006), *lv. denied,* 6 N.Y.3d 714 (2006) (collectively, *Marro/Loehr/Ponterio*). Accordingly, the Petition/Complaint should be dismissed in its entirety and with prejudice.

[1] For this Court's convenience, this Reply Brief uses the same defined terms that are used in Respondents Opening Brief and Supplemental Brief.

ARGUMENT

I. SUPREME COURT'S DECEMBER 30 JUDGMENT IS CLEARLY ERRONEOUS AND SHOULD BE REVERSED

Petitioners, in a failed attempt to support Supreme Court's December 30 Judgment, fail to cite the controlling precedent from this Court; misconstrue the Court of Appeals' decisions governing the certification process; invoke an inapplicable arbitrary and capricious standard and non-existent "individualized evaluation" requirement for Board determinations; ignore all inconvenient facts in the record; cite nothing that supports Supreme Court's inexcusable truncation of the record so as to avoid consideration of Judge Marks' December 28 Affidavit, and discount all his testimony describing the process and reasoning behind the determination at issue.

A. *Marro/Loehr/Ponterio* Establish the Standard of Review

The highly deferential standard of review for challenges to the denial of certification is not open to debate. It is set forth in a trilogy of cases: *Marro/Loehr/Ponterio.* The arbitrary and capricious standard urged by Petitioners, and invoked by Supreme Court, is inapplicable. (*See* Pet. Br. at 19-22.) The phrase "arbitrary and capricious" is nowhere to be found in *Marro*/*Loerh/Ponterio,* which

confer on the Board great deference in recognition of the administrative and policy-making expertise of its members.[2]

This Court definitively articulated the applicable standard of review in *Ponterio* — a controlling case that Respondents fail to cite, let alone attempt to distinguish. This Court held that a challenge to the denial of certification "is redressable only in a CPLR article 78 proceeding, subject to the standard of review set forth in *Marro v. Bartlett.*" 25 A.D.3d 865, 867 (3d Dep't 2006), *lv. denied,* 6 N.Y.3d 714 (2006). Quoting *Marro,* this Court continued:

> In *Marro,* the Court of Appeals stated that "the Administrative Board . . . [ha[s] 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 has[s] been [a] violation of statutory proscription or promotion of a constitutionally impermissible purpose, unrelated to the certification process."

Id. at 881-82 (quoting *Marro* 46 N.Y.2d at 681-82) (emphasis added); *see also Marro,* 46 N.Y.2d at 679 ("[The Board] may determine in its discretion which applicants to certify to meet the need for additional judicial services, and that its exercise of such discretion is not subject to judicial review in the absence of proof that its determination was contrary to law or constitutional mandate, independent of the certification process itself.") (emphasis added).

[2] Thus, the case law cited by Respondents defining the traditional arbitrary and capricious standard under CPLR 7803(3) is inapposite. (Pet. Br. at 20-21.) Not one of these decisions has anything to do with the certification process or the authority of the Board in any context.

As construed by this Court, *Marro* draws a line between (1) challenges to the denial of certification that go to the Board's process or the conclusion reached as a result of that process and (2) challenges that a determination is violative of a statute or constitutional mandate "unrelated to" or "independent of" the certification process. *See Ponterio*, 25 A.D.3d at 865 (finding not cognizable claim that Board breached fiduciary duty owed to Petitioner, because such claim was "directed primarily at the Board's determination"). These kinds of claims do not lie because Board determinations concerning whether additional Judges' services are "necessary," or whether they may "expedite court business," within the meaning of N.Y. Const. Art. VI, §25(b), are decisions exclusively within the competence of high-level court administrators duly designated to address these policy issues by the Legislature. *See Marro,* 46 N.Y.2d at 682.

Indeed, determinations of need and allocation of resources are discretionary decisions, and courts do not sit in judgment upon such questions of administrative discretion. *See Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980) (courts do not have supervisory power over "acts of appointive and elective officials involving questions of judgment, discretion, allocation of resources and priorit[y]"). It has therefore long been settled that the decision whether to fill a particular job opening, based upon the needs of the government employer to effectively operate their agency, cannot be reviewed. *See, e.g., Love v Bronstein,* 43 A.D.2d 426, 429 (1st Dep't 1974) ("courts

lack the power to review the determination and discretion of an agency head as to the time when vacancies shall be filled and the number of eligible who should be then appointed").

Petitioners' seek to evade the strict standard of judicial review established in *Marro* and applied in *Pontiero* by asserting that the Board failed to conduct an "individualized evaluation" of all 49 applications. But this claim is not cognizable because it is "directed primarily at the Board's determination." *Ponterio,* 25 A.D.3d at 443 (citing *Marro,* 46 N.Y.2d at 681-82). Petitioners attempt to escape this conclusion by arguing that the Board's alleged violation of statute and constitutional mandate does not challenge the certification process itself, but rather, how the Board "carried out the certification process." (Pet. Br. at 23-24.)[3] This distinction, to the extent it is comprehensible (which it is not), appears akin to requiring courts not only to decide how many angels can dance on the head of a pin, but also to determine which angels have the right to do so. Nothing in *Marro/Loehr* suggest that lower courts should draw so abstract a distinction or scrutinize how the Board reached a determination. Rather, these cases give effect, and provide substance, to the Court of Appeals' unambiguous holding that the Board has "broad, largely unreviewable

[3] Petitioners' assert that judicial review of its arbitrary and capricious claim is available because they "credibly allege that Respondents actions were discriminatory on the basis of age." This self-serving assertion is a non-sequitur. Moreover, not even Supreme Court found any merit to Petitioners' age discrimination claim. (SR. 14.)

discretion." *Loehr,* 29 N.Y.3d at 382; *see also Marro*, 46 N.Y.2d at 677 ("nearly unfettered discretion which is not subject to judicial review"). It is inconsistent with controlling precedent and common sense to constrain the operational decision making of the Judiciary at any time, much less where, as here, the Board is contending with an unprecedented financial emergency brought on by a global public health crisis. *See Blyn v. Bartlett,* 39 N.Y.2d 349, 358 (1976) (upholding decision by Board to abolish positions of confidential attendant and law secretary where extreme financial emergency left no alternative but to make drastic budgetary reductions).

B. The Board Was Not Required to Conduct an Individualized Evaluation of Every Certification Application

There is no merit to Petitioners' argument that *Marro* required the Board to conduct an individualized evaluation of all 49 applicants for certification, notwithstanding the severe financial constraints occasioned by COVID-19. (*See* Pet. Br. at 32-34.) As a threshold matter, this dispute is academic, since the Board, in fact, reviewed each application. It was on this basis that three Justices were certificated. (R. 265, 277-78; SR. 169, 211.) The Board balanced the qualifications of the individual applicants against the limited resources available and determined that the services of three Justices nonetheless merited the substantial expense of certification. (*See* Resp. Opening Br. at 23.)

In any event, *Marro,* on which Petitioners incorrectly rely, does not impose on the Board any process, steps or standards when reviewing certification applications. In fact, the Court of Appeals held that the Board need not (1) promulgate a set of criteria against which to measure individual applications; (2) hold hearings; or (3) even provide applicants a statement of reasons why certification was denied. *Marro,* 46 N.Y.2d at 681, 683. The Court explained:

> The adequate, conscientious discharge of the obligation of the board necessarily demands that it be vested with the very broadest authority for the exercise of responsible judgment. This is an instance in which assurance as to results must depend on the confidence reposed in the individuals making the determinations and their collective probity and wisdom rather than on any predetermination specification of the standards they are to apply or to the procedural steps they must follows.

Id. at 681 (emphasis added).

Ignoring *Marro's* central holdings, Petitioners' selectively quote from a snippet of that decision indicating that a "two-pronged," "individualized evaluation" of an applicant's capacity and necessity was contemplated by the Constitution and Judiciary Law. (See Pet. Br. at 21, 32-35.) Read in context, however, the Court of Appeals was not dictating a required analytic process for all candidates for certification, but instead explaining the preconditions for a Justice to be eligible for certification, were the Board to exercise its discretion to do so. In other words, the two requirements for certification set out in the Constitution and Judiciary Law — that the services of the Justice seeking certification are necessary to "expedite the

business of the court" and that he or she is mentally and physically competent — are conditions that must be met before Judges may be certificated, not qualifications that must be tested before Judges may be denied certification. Nothing in *Marro* suggests that some specific process, subject to judicial review, must be applied for each candidate before certification may be declined.

Loehr, decided just a few years ago, eviscerates Petitioners' argument that such a applicant-by-applicant evaluation of every certification application is required. In a unanimous opinion, the Court of Appeals held that the Board may deny an entire category of certification applications based on budgetary and policy considerations and implement that decision through "a prospective rule rather than issue, . . . applicant-by-applicant determinations." 29 N.Y.3d at 383.

Loehr also forecloses Petitioners' conclusory argument that the Board erred because its denial of certifications was not "two-pronged," in the sense that it did not conduct a full physical and mental evaluation of each candidate. (*See* Pet. Br. at 21, 34-35.) *Loehr* upheld the Board's blanket policy denying certification to Judges who sought to double-dip because they did not meet the "necessity" criteria (29 N.Y.3d at 383), noting that "the mental and physical abilities of the Justices are not at issue" (*id.* at 382). By the same token, because the Board here found that 46 of the 49 Judges who applied for certification were unnecessary, it did not need to reach the question whether each Justice had the capacity to serve.

Petitioners, like Supreme Court, have no answer to *Loehr* other than to argue that it should be limited to its facts. (Pet. Br. at 33.) But nothing in *Loehr* supports so cramped a reading. On the contrary, the Court of Appeals strongly reaffirmed the guiding principles for certification established in *Marro* — namely, that certification results in a new status and is not a continuation of service;[4] that certification candidates have "no right to be certified at all";[5] that the Board is vested with "very nearly unfettered discretion";[6] and that a denial of certification is beyond judicial review absent extraordinary circumstances.[7]

In the final analysis, Petitioners urge on this Court what *Marro/Loehr/Ponterio* sought to avoid — a reviewing court inserting itself into the Board's internal deliberations and second guessing its determination. Petitioners would have this Court hold that, even though Judges denied certification have no right to know why the Board reached its decision, they may obtain judicial review and discovery (including, as sought here, depositions of the Chief Judge and Chief Administrative Judge) by merely alleging the absence of an individualized evaluation of their applications. More, Petitioners invite this Court to break fresh

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

[5] *Id.*

[6] *Id.* at 377, 381-82.

[7] *Id.* at 382.

ground and announce an even "lower standard of review." (Pet. Br. at 25 n. 25.) This is exactly the sort of judicial interference and oversight of the Board's policy decisions that *Marro/Loehr/Ponterio* forbids.

C. The Board Individually Evaluated All 49 Applicants

Although not required to do so as a matter of law, the Board individually evaluated the 46 certification applications it denied. Petitioners' argument to the contrary is based on the patently false assertion that "Respondents failed to provide Supreme Court any evidence indicating that they individually evaluated the Justices who had applied for certification" (Pet. Br., at 2.), and, instead, "did nothing more than make a broad policy choice on the basis of budgetary constraints" (Pet. Br. at 31). Even a cursory review of the record demonstrates that there is no substance to Petitioners' position.

In contrast to Supreme Court, Petitioners at least concede the existence not only of Respondents' Verified Answer (which denied the Petition/Complaint's allegations that no individualized review was conducted by the Board) and the relevant portion of the Board's September 22, 2020 meeting, but also Judge Marks' affidavits of November 13 and December 16, 2020 and the attachments thereto. As demonstrated in our Supplemental Brief, this evidence establishes that the Board undertook an individual review of all 49 certification applications and did certificate some Judges. (Resp. Supp. Br. at 23.)

Petitioners' relegate to a footnote their defense of Supreme Court's assertion that Judge Marks was not a proper person to explain the Board's determination, and Supreme Court's attempt to disregard his affidavits, because he was not "a member of the Administrative Board itself." (Pet. Br. at 31, n. 7; SR. 11.) Suffice it to say, the Court of Appeals expressed no dissatisfaction with the Board's evidentiary submissions in *Marro* and *Loehr,* which included affidavits from Judge Marks' predecessors (Hon. Richard J. Bartlett and Hon. A. Gail Prudenti) — and not from Board members.

Further, Respondents are unable to cite a single case that supports Supreme Court's refusal to consider Judge Marks' December 28 Affidavit, which is not only part of the record before this Court, but also describes the review conducted by the Board of all 49 applications. (SR. 166-76.) Respondents cannot cite any such case because no court, seeking to do fair and impartial justice, would purposefully ignore material evidence provided pursuant to its own judicial decree — in this case Supreme Court's December 18, 2020 order to show cause ordering Respondents to submit their opposition papers to Petitioners' motion for a preliminary injunction on or before December 28, 2020. (SR. 98.)

Indeed, the submission of supplemental affidavits, such as the December 28 Affidavit, is commonplace in Article 78 proceedings. In *Marro,* for example, the Administrator of the Board submitted to the trial court a supplemental affidavit, after

filing an answer along with his initial affidavit. *See* Record on Appeal at 45-47 (Supp. Aff. of Richard J. Bartlett), *Matter of Marro v. Bartlett,* 46 N.Y.2d 674, 682 (1979); *see also Matter of Smith v. Queen,* 120 A.D.3d 1509 (3d Dept't 2014) ("Although the Attorney General did not submit a complete certified hearing transcript with the answer (*see* CPLR 7804[e]), he has subsequently done so. Petitioner has since reviewed the complete certified transcript and alleges no prejudice. Accordingly, we will disregard any procedural defect (citations omitted)."); *Matter of Weisshaus v. Port Auth. of N.Y. & N.J.,* 49 Misc. 3d 550, 551 (Sup. Ct. N.Y. County 2015) (ordering respondents to supplement their answer to provide evidence to address material issue, where they had provided no evidentiary support for their position beyond conclusory assertion).

Likewise commonplace are Article 78 proceedings where the court grants judgment to a party, post-answer, in lieu of deciding a fully submitted motion for a preliminary injunction. *See, e.g., Matter of DC37, Local 3621, AFSCME, AFL-CIO v. City of New York,* 51 Misc.3d 1213 (A), 2016 NY Misc. LEXIS 1500 (Sup. Ct. N.Y. Cty. April 15, 2016) (dismissing petition). Research has failed to adduce a single example of a court, in such circumstances, *sua sponte* announcing its refusal to consider evidence properly filed in connection with the pending and undecided motion for a preliminary injunction.

It was an abuse of discretion for Supreme Court to refuse to consider the December 28 Affidavit, which contradicted the false narrative recited in the December 30 Judgment that the Board failed to conduct individualized evaluations of the 49 applications, when, in truth and fact, it had.[8] No fair-minded jurist would do such a thing, especially in a case, like this one, of transcendent importance to the court system. In any event, in the interests of justice, and as Petitioners can claim no prejudice, this Court should exercise its discretion and consider the December 28 Affidavit and reverse the December 30 Judgment. *See* CPLR 7804(e) ("The court may order the body or officer to supply any defect or omission in the answer, transcript or an answering affidavit.").

Finally, Respondents cannot let pass unnoticed Petitioners' scurrilous implication that Judge Marks' affidavit is inaccurate and was not provided in a good faith attempt to fairly represent the facts. (Pet. Br. at 27-28.) Such an accusation, directed at one of the two individuals responsible for the continuing operations of the State's courts, and the provision of judicial services to all the state's citizens, absent a shred of evidence, is appalling, especially coming from former Judges who hold themselves out to be upstanding members of the Bar.

[8] Petitioners misplace their reliance on an inapposite personal injury action, *Cuccia v. City of New York*, 306 A.D.2d 2 (1st Dep't 2003). (Pet. Br. at 28.) There, the court denied a plaintiff's motion for renewal given her failure to offer a reasonable excuse for the failure to submit the proffered new matter on a prior motion. *Cuccia*, 306 A.D.2d at 2-3. Here, by contrast, Respondents' timely submitted the December 28 Affidavit, on the return date specified by Supreme Court's order to show cause. (SR. 96-97, 166-76.)

D. The Board's Determination Was Based on Non-Monetary Costs as Well as Budgetary Constraints

Petitioners' concede that the Board properly took into account budgetary considerations in deciding whether additional Judges were "necessary to expedite the business of the court," but that the decision to deny certification was invalid because *Loehr* requires "holistic evaluations" of both monetary and non-monetary costs and the Board did not consider the impact of non-monetary costs (Pet. Br. at 35-36.) This argument is frivolous.

First, *Loehr* makes no reference to any such requisite holistic evaluation, nor did it rule that the Board must consider both monetary and non-monetary costs in denying certification to Judges that would not agree to defer their pensions. Rather, the Court referenced non-monetary costs, and expressly permitted their consideration, in the context of sanctioning the Board's consideration of the impact of "double-dipping" on the court system's public prestige and negotiations with the other branches of government. *See Loehr*, 29 N.Y.3d at 378, 382-83. The Court did not hold that consideration of such non-monetary costs was a legal *sine qua non*.

In any event, as clearly set forth in Judge Marks' affidavits, the Board considered the non-monetary costs of denying certification to 46 retiring Justices (who were in position to secure lucrative positions in private law firms), rather than lay-off 324 nonjudicial employees during the pandemic. (R. 263-65, 267; SR 182-83.) By any measure, that decision was a humane and compassionate one, in

addition to a fiscal one. Likewise, Judge Marks' described the non-monetary impact of layoffs of this magnitude to the public and the ongoing operation of the court system — another kind of non-monetary cost (R. 266-67, 277; SR. 182-85.)

II. THE REMAINING CAUSES OF ACTION IN THE PETITION/COMPLAINT ALSO FAIL

A. Petitioners Have no Basis for a Cross-Appeal

Petitioners, via what they have styled as a cross-appeal, now claim Supreme Court incorrectly dismissed their First, Fifth and Sixth Causes of Action.[9] However, no cross-appeal lies because Petitioners were not aggrieved by any failure of Supreme Court to decide these claims. CPLR 5511; *see Lincoln v. Austic*, 60 A.D.2d 487, 490 (3d Dep't 1978) (holding aggrievement requirement jurisdictional in nature). A party that has received his or her requested relief is not aggrieved and, therefore, has no basis and no right to appeal. *Parochial Bus Sys., Inc. v. Bd. of Educ. of City of New York*, 60 N.Y.2d 539, 544-45 (1983). Having obtained "the full relief sought," (i) mere "disagree[ment] with the particular findings, rationale or the opinion supporting the judgment" or (ii) a "fail[ure] to prevail on all the issues that had been raised" does not give rise to any right to appeal. *Porco v. Lifetime*

[9] Petitioners have abandoned their Third, Fourth, and Seventh Causes of Action. *See Isabell v. U.W. Marx, Inc.*, 299 A.D.2d 701, 701-02 (3d Dep't 2002) (failure to address in appellate brief dismissal of causes of action constituted abandonment of such causes of action). Petitioners also do not raise in their opposition brief any substantive arguments regarding (and thus waive) their prior claims alleging the propriety of venue and the need for discovery. (*See* Pet. Br. at 19, n. 2.)

Entertainment Services, LLC, 176 A.D.3d 1274, 1276 (3d Dep't 2019) (citing *Parochial Bus Sys., Inc.*, 60 N.Y.2d at 544-45).

Thus, Petitioners' cross-appeal must be dismissed, because they received all the relief sought in the Petition/Complaint — that is, a declaration and determination annulling the Board's September 22, 2020 determination. (R. 71-72; SR. at 9). *See Dolomite Prod. Co. v. Town of Ballston*, 151 A.D.3d 1328, 1331 (3d Dep't 2017) (right to appeal "does not hinge upon a court's reasons underpinning why relief was granted or denied"). At most, those claims not decided by Supreme Court, may be considered as alternative grounds for affirmance. *McCormick v. Bechtol*, 68 A.D.3d 1376, 1378 (3rd Dep't 2009).

B. The First Cause of Action Fails

1. No Procedures for Review of Certification Applications Are Dictated

Petitioners' First Cause of Action alleges, under CPLR 7803(3), that Respondents did not follow required procedures under the Constitution and Judiciary Law. (R. 58-59.) Such claim, however, is not cognizable under *Marro/Loehr/Ponterio*, because it is "directed primarily at the Board's determination" (*Ponterio*, 25 A.D.3d at 443) and, thus, does not allege a "statutory proscription or promotion of a constitutionally impermissible purpose, unrelated to the certification process" (*Marro*, 46 N.Y.2d at 681-82).

In any event, Petitioners' claim that they were entitled to additional procedures fails because no such procedural rights flow from the certification statutes or constitutional provisions. *Marro* explicitly so held in a case where the petitioning Judge claimed that required procedures relating to review of his qualifications and the need for his services had not been followed and sought a hearing and judicial review of the determination. As discussed above, the Court of Appeals ruled that no specific criteria, standards or procedures were required to be employed by the Board in deciding not to grant certification. *Marro,* 46 N.Y.2d at 681. Thus, contrary to Petitioners' contention, a determination not to certificate does not require rigid procedural steps or any formulaic analysis.

2. Supreme Court's Refusal to Consider the Legal Merits of the Claims Alleged in the Petition/Complaint on Respondents' Motion to Dismiss Was Improper

Equally meritless is Petitioner's claim that Respondents' arguments in their motion to dismiss, including with regard to *Marro* and *Loehr*, were factual ones, and that Supreme Court therefore properly declined to so much as consider any portion of the motion to dismiss. (Pet. Br. 46-48.) Petitioners, however, now at least admit that the motion was correctly brought under CPLR 3211, and that it could be treated, to the extent appropriate, as one for summary judgment. Moreover, any examination of that motion indicates that the arguments on the motion were not inherently factual — rather they were legal arguments based on the face of the Petition/Complaint. In

short, nothing prevented Supreme Court from deciding the motion to dismiss, as framed, based on the face of the Petition and the applicable law.

C. Petitioners' Fifth Cause of Action Is Meritless Because It Conflates Two Different Constitutional Processes — One Controlled by the Governor, the Other by the Administrative Board

Petitioners' Fifth Cause of Action alleges that a determination not to certificate Judges retired by operation of the constitution somehow interferes with the authority of each Appellate Division to certify to the Governor a need for additional Justices on those courts under N.Y. Const., Art. VI § 4(e). But the ability to the Appellate Divisions to certify a need for Justices, followed by an independent decision by the Governor to elevate a Supreme Court Justice or Justices to the Appellate Division, as contemplated by that provision, has nothing to do with the certification of Justices, once they reach the age of retirement, for *post-retirement* service under N.Y. Const., Art. VI, § 25(b). They are constitutionally and practically separate processes. (Resp. Opening Br. at 24-25.)

Petitioners argue, in effect, that it is mandatory for the Board to certificate any Justice elevated by the Governor to the Appellate Division via § 4(e) — because otherwise the Board is "encroaching" on the authority of the Appellate Division to certify a need for such Justices. (Pet. Br. 42.) But this, of course, is not what the Constitution says. Rather, Petitioners are attempting to conflate two distinct constitutional processes for which two different branches of government are

responsible. There is no conflict between a determination not to certificate retired Judges under N.Y. Const., Article VI, § 25(b) by the Board, and the powers of the Governor, at the request of the Appellate Division, to appoint additional eligible Justices to that court. Under N.Y. Const., Art VI, §§ 4(e) and 25(b), should an Appellate Division Justice retire, that court remains free to certify to the Governor that there is a need for additional Justices to assist in the speedy disposition of its business; and the Governor remains free to honor that request and designate however many Justices he deems necessary and appropriate.

Moreover, the Appellate Division does not itself appoint additional Justices; rather, the Governor alone possesses the constitutional authority and discretion to appoint Justices to fill any Appellate Division vacancy. Whenever the Appellate Division requests such appointments, the Governor may elect to do so, as he deems necessary, from the wide pool of existing and eligible Supreme Court Justices. And the Board's determination not to certificate retired Appellate Division Justices in no way circumscribes the Appellate Division's authority to petition the Governor for additional judicial appointments, or the Governor's companion discretion as to whether to provide that assistance.

D. Petitioners' Sixth Cause of Action Under the HRL Cannot Support Any Cause of Action Because Denial of Certification is Not A "Firing"

Petitioners' Sixth Cause of Action, alleging a violation of New York's Human Rights Law, N.Y. Exec. L. §§ 290-301 (the "HRL"), fails because Petitioners cannot show that the Board's determination to deny certification gives rise to an inference of discrimination. (Resp. Opening Br. at 25-28.) Petitioners claim that such an inference can be drawn from the fact that they are "employed" by the Uniform Court System ("UCS") and were "targeted" by the certification decision, when, instead, age-neutral layoffs should have been made (according to Petitioners) to less important non-judicial employees. (Pet. Br. at 43-44.) Petitioners further allege that "Respondents cannot justify their actions with an independent and non-discriminatory purpose." (*Id*. at 45.) For several reasons, however, such conclusory allegations do not state a claim under the HRL.

First, it was the Board, not the UCS, that made the decision to deny certification, and Petitioners do not and cannot allege they were employed by the Board, which had no control over the terms or conditions of their employment as elected Supreme Court Justices. As such, Petitioners' claim fails as a matter of law. *See Griffin v. Sirva, Inc*., 29 N.Y.3d 174, 186 (2017) (standard for determining whether entity is an employer).

Second, Petitioners' claim of employment discrimination is inherently circular. Petitioners argue that the denials of certification this year, without more, give rise to an inference of age discrimination, because the Board chose not to lay off other, less important (according to Petitioners) non-judicial employees. (Pet Br. at 43, n. 12.) But this offensive argument affords no basis from which to logically infer that the determinations not to certificate were made for discriminatory reasons. Judges and other court employees, as conceded by Petitioners, have different functions in the court system. Petitioners' claim amounts to no more than a conclusory allegation of discriminatory motive, which is insufficient to state a claim under the HRL. *Domitz v. City of Long Beach,* 2018-08604, 2020 N.Y. App. Div. LEXIS 5926, at *7 (2d Dep't Oct. 14, 2020).

Third, Petitioners cannot maintain that they were "terminated" based on their age when others were not, because the denial of certification is not, as a matter of law, a termination of employment. In accordance with the State Constitution and Judiciary Law, the Petitioner Justices' terms in office were always set to expire at midnight on December 31, 2020, as do all Justices' terms the year they turn 70 or after a term of certification ends. *See Marro*, 46 N.Y.2d at 680 ("At that time his entitlement to serve as a Justice terminates irrespective of other considerations, and he becomes a 'former justice'"). In addition, denial of certification is not a firing or termination of employment (*id.* at 682) and retiring Justices have no entitlement to

certification (*Loehr*, 29 N.Y.3d at 384). Thus, Petitioners' HRL claim — which is premised on the assertion that the denial of certification is a termination of employment (or that Petitioners have a right to certification) — fails as a matter of law.

Fourth, to the extent Petitioners mean, alternatively, to claim that they were not "hired" as certificated Judges, while other non-judicial employees were treated differently, no one else was or is being hired now either — there is a hard hiring freeze. (R. 264; SR. 121, 143-44, 150, 170, 172, 180, 183, 197, 211.)

Finally, Petitioners now claim that, they have stated "at a minimum" a claim of "disparate impact" discrimination. But a "disparate impact" theory is not available under the HRL in this Department. *See, e.g.*, *Bohlke v. GE*, 293 A.D.2d 198 (3d Dep't 2002) (holding that for a disparate impact claim to exist under HRL facially neutral policy must affect entire protected class under HRL, consisting of all employees over 18 years of age).

Even if this theory were viable, Petitioners' HRL claim would still fail. Petitioners have not identified any "facially neutral employment practice which has a disproportionately adverse impact on a protected class" and that has no purpose other than discrimination. *See Bolke*, 293 A.D.2d at 200. Petitioners would have to demonstrate that the sole reason for the action taken was age discrimination. *See Abbey v. Bausch & Lomb*, 34 A.D.3d 1244 (4th Dep't 2006) (no disparate impact

claim lies where plaintiffs could not raise an interference that workforce restructuring could not be justified for reason other than age discrimination).

There is no basis on which to contest that there is a budgetary crisis caused by the COVID-19 pandemic, or that the Judiciary has sharply reduced its budget, or that the budgetary crisis provided a basis for the decisions at issue. Petitioners themselves allege and admit that the reason for the actions taken were the budgetary concerns expressed in Judge Marks' September 29, 2020 Memorandum incorporated in the Petition/Complaint by reference. (*See* R. 45, 57-59, 266-78.) The denials of the certifications, in fact, were only a part of the constellation of budget reduction measures taken by the Unified Court System, all of which affect employees of all ages — i.e., the strict freeze on new hiring; the deferral of collectively-negotiated pay adjustments for nonjudicial employees; and the cancellation of, and reductions to, numerous consultant and other contracts. No claim of disparate impact discrimination therefore can be established in the circumstances presented. *See, e.g., Smith v. Fed. Defs. of N.Y., Inc.,* 161 A.D.3d 506 (1st Dep't 2018) (discounting claims of disparate impact where defendant's actions were based on budgetary concerns).

III. PETITIONERS CONCEDE THAT THEY FAILED TO SERVE RESPONDENTS AND PERSONAL JURISDICTION IS LACKING

Because the interests of all the parties are best served by putting this controversy to rest, Respondents' primary argument is that this Court should reverse Supreme Court's December 10 Order and December 30 Judgment and dismiss the Petition/Complaint because Petitioners' claims are not cognizable and lack merit. Due to the strength of that argument, Respondents' anticipate it will be unnecessary for this Court to address our procedural arguments. Nonetheless, even if this Court finds that Petitioners' claims are not viable as Respondents urge, it is important that the Court make clear that its discussion of the merits should not be misinterpreted as a ratification of Supreme Court's treatment of the service, discovery and venue issues. As to the service issue, Petitioners make a lengthy and inaccurate attempt to defend their failure to serve the Petition as required by the *ex parte* order to show cause signed at the outset of the litigation on November 5, 2020 ("11/5 OSC"). This argument admits more than it proves.

It is not contested that Petitioners (1) never served respondents; (2) never served the Attorney General; (3) never sought to have Supreme Court extend or alter the terms of service, and instead (4) immediately moved for contempt (again by order to show cause) in regard to that same unserved 11/5 OSC; and that Respondents' counsel (5) informed Supreme Court at the hearing on the contempt

order that Respondents' position was that the 11/5 OSC had not been served and (6) promptly confirmed after that hearing the lack of service and supplemented their motion to dismiss to add the defense of failure to serve — a supplement served within the CPLR's 20-day statutory time for answer or motion to dismiss — which in no way prejudiced Petitioners' ability to address that claim and/or apply to Supreme Court to permit them to serve *nunc pro tunc.* Yet Petitioners never did so — claiming instead that Respondents had waived any such defense.

Petitioners assert that they sent a copy of the 11/5 OSC and accompanying submissions by email, and that this notification was enough, despite the requirement of personal service in the 11/5 OSC, because the Respondents were aware of the matter. But this is incorrect because the 11/5 OSC required both email and personal service. *See Wash. Mut. Bank v. Murphy*, 127 A.D.3d 1167, 1174 (2d Dep't 2015) (receipt of notice by defendant by means other than those specified does not excuse failure to personally serve).

Petitioners also claim that Respondents waived the service defense by appearing before Supreme Court without raising it. (Pet. Br. at 50-51.) In fact, however, Respondents raised the service issue (as well as the problem with the inadequate notice prior to the hearing on the order to show cause) and opposing counsel and Supreme Court both insisted (incorrectly) that such service had occurred. (*See, e.g.*, R. 429-30; *see also* R. 439.) The service affidavit submitted

with that motion, filed on November 18, revealed that only delivery by email had occurred. (R. 614.)

Petitioners also claim that, under CPLR 3211(e), Respondents could not, upon timely confirmation of the failure to serve, add that defense to their newly-filed motion to dismiss — a motion produced in response to the 175-paragraph complaint, as ordered by the 11/5 order to show cause, under an extraordinarily compressed time frame of just five business days.

Petitioners are wrong. Respondents promptly asserted the defense within the statutory time for answer or motion itself, to be incorporated in the same motion with the same return date, more than eight days before its return. (*See* R. 288.) *See Held v. Kaufmann*, 91 N.Y.2d 425, 430 (1998); *cf. Iacovangelo v. Shepherd*, 5 N.Y.3d 184 (2005) (jurisdictional defense may be raised via amendment to answer within the statutory time for amendment as of right under CPLR 3025(a) without violating CPLR 3211(e)). While there is no statutory period for amendment as of right with respect to motions, under *Held*, where the timely assertion of an additional defense in a motion to dismiss neither delays the proceeding, nor prejudices the plaintiff, and is made within the time frames contemplated by the CPLR for such a motion, it "violates neither the letter nor the spirit of the single motion rule."

Nor are cases such as *Addesso v. Shemtob*, 70 N.Y.2d 689 (1987) apposite. (Pet. Br. at 49.) There, the jurisdictional defense was never raised in connection

with the initial motion to dismiss and was not raised until a second motion, after the plaintiff amended the complaint. By contrast, this defense was raised by a timely application relating to the original, pending motion. (R. 288.)

Petitioners similarly attempt to sweep under the rug their failure to serve the Office of the Attorney General ("OAG"), which is required by several statutes, and which is deemed jurisdictional. (Resp. Opening Br. at 35-36.) The CPLR mandates such service — not simply in relation to orders to show cause — and it is not for Petitioners to unilaterally determine to dispense with it. *See* CPLR 307, 2214(d), and 7804(c).

The service requirement on OAG cannot be ignored here, as advocated by Petitioners, simply because Counsel to the Office of Court Administration, along with outside counsel, has represented Respondents before the courts in this matter. In these circumstances, OAG has a statutory obligation to represent Respondents. N.Y. Exec. L. § 63; N.Y. Pub. Off. L. § 17(2)(a) and (b). That statutory obligation is conditioned on the delivery of process to OAG within five days of service on the government employee. N.Y. Pub. Off Law § 17(4). Where, for any reason, upon notification or receipt of service, OAG cannot represent a state employee it may certify outside counsel, as it did in the present case, resulting in the representation of Respondents by outside counsel. *Id.* § 17(2)(b). As such, it is utterly untrue, as surmised by Petitioners, that the "Attorney General has rendered no assistance

whatsoever to Respondents." (Pet. Br. at 55 n. 20.) The current representation by outside counsel could not have happened without the timely involvement and assistance of OAG, which is otherwise required by statute to represent government officials, including the Respondents here. The failure to fulfill the statutory requirement of service on OAG, among other things, improperly complicates and short-circuits the process of ascertaining and securing representation — a matter of critical importance in cases operating on a compressed schedule such as this one — exactly the opposite of what the CPLR's requirements of service on the OAG are intended to accomplish. Such service should not properly be excused.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Respondents' Opening and Supplemental Briefs, the December 10 Order and December 30 Judgment of Supreme Court, Suffolk County, should be reversed and the Petition/Complaint dismissed.

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Albany, New York

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