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To Be Argued By:
Y. David Scharf
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New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

Docket No. 532566

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-Appellants,

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-Respondents.

BRIEF FOR PETITIONERS-PLAINTIFFS-RESPONDENTS-APPELLANTS

ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019
212-836-8000
james.catterson@arnoldporter.com

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
212-735-8600
dscharf@morrisoncohen.com

Attorneys for Petitioners-Plaintiffs-Respondents-Appellants

Of Counsel:
James Catterson
Y. David Scharf

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Petitioners-Plaintiffs-Respondents-Appellants Justices Gesmer, Friedman, Roman, and Leventhal (the "Petitioner Justices"), as well as Daniel J. Tambasco (together with the Petitioner Justices, the "Petitioners"), through their undersigned attorneys, respectfully submit this memorandum of law in opposition to the appeal filed by Respondents-Defendants-Appellants-Respondents the Administrative Board of the New York State Unified Court System (the "Administrative Board"), Chief Judge Janet DiFiore, and Chief Administrative Judge Marks (collectively, the "Respondents") and in support of Petitioners' own cross-appeal.

PRELIMINARY STATEMENT

These appeals represent the culmination of just over two months of litigation, during which time the Respondents have, at every turn (and before this Court several times), attempted to defend a decision that threatens the judicial independence of the New York State Unified Court System. Indeed, if Respondents' denials of certification to 46 justices of the Supreme Court of the State of New York come to fruition, they would do monumental harm to the administration of justice. With fewer justices on the bench, backlogs will worsen, cases will languish, and ultimately, the public's access to the court system will be substantially lessened. This is to say nothing of the threat to judicial independence caused by Respondents' denials, as every judge approaching certification age may be left to wonder, if only subconsciously, what is required to remain part of the judiciary.

These deleterious effects can easily be avoided. On December 30, 2020, Supreme Court, Suffolk County (Hon. Paul J. Baisley, Jr.) ("Supreme Court") correctly found that Respondents' denials of certification had to be annulled as arbitrary and capricious (the "Judgment"). Crucially, Supreme Court held that Respondents, rather than heeding the Constitution's requirements that the Administrative Board must individually evaluate each justice's (1) mental and physical capacity, and (2) whether the justice is "necessary to expedite the business of the court," had denied certification to the Petitioner Justices—all of whom had been duly elected—and others on the sole basis of vaguely-stated budgetary concerns. Worse still, Respondents failed to provide Supreme Court any evidence indicating that they individually evaluated the justices who had applied for certification. Instead, Respondents merely produced heavily-redacted meeting minutes and affidavits that, while purporting to describe the Respondents' determinations, did nothing more than repeat the Respondents' constitutionally infirm basis for their determinations.

Supreme Court's Judgment that the decision to deny certification en masse was arbitrary and capricious was properly based on the record submitted by Respondents, which utterly failed to demonstrate any individualized review of the Petitioner Justices. Nevertheless, Respondents, in their two briefs, attack and disparage Supreme Court and the Judgment. Among other things, Respondents

accuse Supreme Court of "result-driven proceedings," "artificially truncating" the record before it, and predicating its Judgment on a "false narrative." Respondents also repeat their baseless contention that the proper standard of review for the Administrative Board's determinations is no judicial review whatsoever. It simply cannot be the case that the Administrative Board need not adhere to New York's Constitutional and legal requirements for certificating justices who have attained the age of 70. All of Respondents' assertions are meritless and merely represent Respondents' latest attempts at obscuring what Supreme Court saw clearly: that Respondents failed to put forward any evidence that they performed any individualized reviews of the Petitioner Justices as required by the Constitution and the Judiciary Law.

Respondents' arguments fare no better concerning Supreme Court's order on December 10, 2020 (the "December 10 Order"), which rejected Respondents' November 13, 2020 motion/cross-motion to dismiss the Petition, transfer venue, and for a protective order. In this context, Respondents again assert that the Court of Appeals cases *Marro* and *Loehr* should have resulted in the dismissal of the Petition because, in Respondents' eyes, there can be no judicial review of the Administrative Board's determinations. This, however, is nonsense. Neither *Marro* nor *Loehr* stands for the proposition that the Administrative Board's decisions are wholly insulated from any judicial review, and neither case contemplated that the

Administrative Board could deny almost all pending certification applications en masse without any individualized review of the forty-six applicants for certification. Moreover, because Petitioners have made a prima facie showing that Respondents violated a statutory proscription unrelated to the certification process itself they cannot wrap themselves in the very deferential discretion afforded by *Marro* and *Loehr*. Simply put, Respondents' reliance on *Marro* and *Loehr* is entirely misplaced.

Finally, Respondents' protestations concerning Supreme Court's jurisdiction over them must also be dismissed by this Court. The record is clear that (1) Respondents were served with process for this litigation by e-mail, (2) Respondents subsequently filed their November 13, 2020 motion/cross-motion without any objection to Supreme Court's personal jurisdiction, and (3) Respondents had no fewer than three attorneys appear before Supreme Court prior to raising any jurisdictional defense. It is well-established then that Respondents waived this defense.

For all of these reasons, and additional reasons expanded upon below, this Court should affirm the Judgment and December 10 Order, and grant Petitioners' cross-appeal insofar as it seeks the revival of several of Petitioners' causes of action that were dismissed in Supreme Court's Judgment.

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did Supreme Court err in determining that the Administrative Board's denials of certification to forty-six Supreme Court justices, including the Petitioner Justices were not beyond judicial review?

2. Did Supreme Court err when its Judgment was made on the basis of those papers submitted by the parties on or before December 16, 2020, including the Petition and Respondents' Answer?

3. Did Supreme Court err in determining that the Administrative Board's denials of certification to forty-six Supreme Court justices (including the Petitioner Justices), made on the basis of alleged budgetary constraints and without analyzing the necessity and capacity of those justices, were arbitrary and capricious?

4. Did Supreme Court err where it dismissed all of Petitioners' causes of action other than their second cause of action?

5. Did Supreme Court err in finding that the Respondents waived the defense of lack of personal jurisdiction when they failed to timely raise it in their initial motion to dismiss, admitted on the record that they had been served, and only raised it after appearing in a related motion before Supreme Court?

COUNTERSTATEMENT OF FACTS

A. New York State's Certification Program

Justices of the Supreme Court of the State of New York are elected pursuant to Section 6 of Article VI of the New York State Constitution (the "Constitution"),

which provides that: "The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of justices of the supreme court shall be fourteen years from and including the first day of January next after their election Within their elected term, justices may serve until "the last day of December in the year in which he or she reaches the age of seventy," at which point Section 25(b) of Article VI of the Constitution requires them to "retire." However, this same section of the Constitution also provides:

> Each such former judge of the court of appeals and justice of the supreme court may [after turning seventy (70)] 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.

N.Y. Const. Art. VI, § 25(b). Thus, the Constitution specifically provides that justices may be certificated to serve beyond the age of seventy.

This certification program is further codified in New York State's Judiciary Law. Specifically, Section 115 of the Judiciary Law provides that:

> 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.

Thus, pursuant to the Constitution and the Judiciary Law, the Administrative Board

is empowered to accept applications for certification and is obligated to determine whether (a) each justice has the mental and physical capacity to perform the duties of such office, and (b) whether that justice's services are necessary to expedite the business of the Supreme Court.

B. The Administrative Board Denies Certification En Masse

On September 29, 2020, Chief Administrative Judge Marks sent a memorandum to the administrative judges in which he announced that the Administrative Board had determined to "disapprove all but a small handful of pending judicial applications for certification or recertification that will take place on January 1, 2021." (Record on Appeal ("R.") 277-78.) In effect, this memorandum revealed that the Administrative Board would not certificate forty-six of the forty-nine Supreme Court justices who had applied for certification prior to September 29, 2020. (*Id.*)

In the same memorandum, Chief Administrative Judge Marks justified the Administrative Board's en masse certification denials by alleging that Governor Andrew Cuomo had "exercised the emergency powers afforded him by the Legislature by cutting the current Judiciary budget by 10 percent, or by approximately $300 million."[1] (*Id.*) Chief Administrative Judge Marks referred to

[1] That assertion, bedrock to the Administrative Board's denials, has been directly refuted by the State's budget director Robert Mujica, who recently stated that "[T]here was no directive [at] the judiciary on what they had or were required

this alleged budget cut as "dramatic" and used it as the sole justification "compelling us to implement a range of painful measures." (*Id.*) According to Chief Administrative Judge Marks, denying certification to forty-six justices therefore was necessary to save $55 million over two years and help the court system "avoid layoffs, or greatly reduce the number of layoffs should that extreme measure become unavoidable." (*Id.*) The Petitioner Justices' certification applications were all denied as a result of the Administrative Board's actions. (R. 46-47.)

C. Petitioners Commence This Action

On November 4, 2020, Petitioners' counsel sent an e-mail to the individual Respondents, notifying them of Petitioners' intention to commence this action on the following day and to move for expedited discovery. (R. 589.) It is uncontested that Respondents' counsel received this notice from the Respondents, but rather than inquire for further information from the Petitioners, Respondents' counsel purportedly only made vague, unspecified "inquiries" into the matter (but not of opposing counsel or Supreme Court), based upon her "mistaken impression" that the application would be taken on submission or that she would be further contacted by someone. (R. 280.) Ultimately, Respondents' counsel never contacted the Supreme

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to do." Ryan Tarinelli, *NY Budget Director Argues State Did Not Force Cuts on Court System*, Law.com (Jan, 20, 2021), https://www.law.com/newyorklawjournal/2021/01/20/ny-budget-director-argues-state-did-not-force-cuts-on-court-system/?slreturn=20210021182134 (last viewed on January 22, 2021).

Court, Suffolk County or appeared, despite receiving advanced notice of the hearing occurring the next day. (R. 13.)

On November 5, 2020, Petitioners commenced this action by presenting to Supreme Court a proposed order to show cause that was accompanied by Verified Article 78 Petition and Complaint (the "Petition"). (R. 35-76.) The Petition included both Article 78 and plenary claims, alleging that Respondents' denials of certification: (1) violated the lawful procedures for certification outlined by the Constitution and the Judiciary Law; (2) were arbitrary and capricious; (3) unconstitutionally negated the certification program outlined by the Constitution and the Judiciary Law; (4) denied the Petitioner Justices due process; (5) unconstitutionally interfered the Appellate Division's authority to certify to the Governor the continued necessity of those justices designated for service at the Appellate Division; (6) discriminated against the Petitioner Justices on the basis of age in violation of New York's Human Rights Law (NYHRL) (as codified in Article 15 of New York's Executive Law); and (7) discriminated against the Petitioner Justices on the basis of age in violation of New York City's Human Rights Law (NYCHRL) (as codified in Title 8 of the Administrative Code of the City of New York). (R. 58-72.)

Simultaneous with commencing the Petition, Petitioners also moved for expedited discovery into their Article 78 claims. (R. 128-29.) Specifically,

Petitioners produced to the Supreme Court proposed discovery requests and deposition notices for Chief Judge DiFiore and Chief Administrative Judge Marks, and requested that this discovery be completed prior to the return date for the Petition. (*Id.*; *see also* R. 131-51.) Petitioners submitted both an affirmation of urgency and a memorandum of law in support of their request for expedited discovery. (R. 131-34; 152-62.) Collectively, these papers laid out that the Petitioner Justices' forced retirement was imminent and demonstrated the Petitioner Justices' "ample need" for the expedited discovery given, *inter alia*, the nature of the Petitioners' claims and the fact that Chief Administrative Judge Marks' rationale for the certification denials in the September 29 memorandum had been contradicted by public statements of the Governor. (R. 131-34; 152-62.)

When Petitioners appeared before Supreme Court on November 5, 2020, Respondents did not appear, allegedly as a result of their counsel's admitted "error." (R. 281.) Thereafter, after reviewing the papers, Supreme Court signed Petitioners' order to show cause (the "November 5 Order"), thereby (1) setting the return date of the Petition on December 7, 2020; (2) granting the Petitioners their requested expedited discovery; and (3) requiring Respondents to respond to the Petition by November 13, 2020. (R. 127-30; 163-68.)

After Justice Baisley's signed order to show cause was electronically-filed, on November 6, 2020, Petitioners e-mailed Respondents the papers filed in support of

their order to show cause and a copy of the signed order to show cause. (R. 590.) On this same date, Petitioners attempted to serve the Respondents at the Office of Court Administration (OCA) at 25 Beaver Street, New York, New York 10004, but their process server was turned away after being told by security that "everyone [was] working remotely" and that "there [was] no one in the building to accept service of legal documents." (R. 360.)

D. Respondents' Counsel Appears And Refuses Discovery

Following the commencement of this Petition, and having received notice of the expedited discovery ordered by Justice Baisley, Respondents first filed a Demand for Change of Venue on November 10, 2020. (R. 198-99.) In this demand, Respondents alleged that a change of venue was required in part because "the interests of justice so require because a change of venue will avoid the appearance of impropriety, bias, or favoritism." (*Id.*) Petitioners filed an affirmation in response on November 12, 2020, outlining why venue was proper in Suffolk County and countering Respondents' suggestion, included in their demand for a change of venue, that Albany County had any special relationship to the "material events" underlying the Petition. (R. 201-05.) Petitioners also noted the irony of Respondents' request for a change in venue on the basis of "impropriety, bias, or favoritism" when the Respondents were demanding that the venue be transferred to

the county where Chief Judge DiFiore presides over the Court of Appeals. (R. 204-05.)

The next morning, on November 13, 2020—the date by which Respondents were supposed to produce documents and respond to the Petition—Respondents' counsel reached out to the Petitioners for the first time to meet and confer concerning discovery. (R. 585-88; 606-08.) In the conversations that followed, Respondents' counsel repeatedly asserted that, despite Supreme Court's order, they were under no obligation to produce documents, that any discovery was inappropriate until after the return date of the Petition, and that Respondents did not have the capabilities to produce electronically-stored information. (*Id.*) Respondents' counsel further maintained that they had no authority to answer concerning when and where the individual Respondents would like to be deposed. (R. 587.)

E. Respondents Move To Dismiss The Petition

Later that day, Respondents filed several motions and cross-motions in response to the Petition. Choosing not to answer the Petition, Respondents instead moved the Supreme Court to change the venue of the action, to dismiss the Petition, and to enter a protective order with respect to the discovery that Supreme Court had just authorized the week before. (R. 207-283.) Not included in Respondents' submissions on November 13 was any objection to Supreme Court's personal jurisdiction over Respondents. Instead, Respondents only made this argument in a

supplemental motion filed on November 24, 2020 (eleven days later), asserting that, although Respondents' counsel had demanded a change of venue and had appeared before Supreme Court, the court nevertheless did not have personal jurisdiction over the Respondents. (R. 285-92.)

In moving to dismiss the Petition, Respondents included the affidavit of Chief Administrative Judge Marks, sworn to on November 13, 2020. (R. 261-67.) In this affidavit, Chief Administrative Judge Marks repeated the rationale for the Administrative Board's actions that he had alleged in the September 29 memorandum. Specifically, he again asserted that the Governor had acted to reduce the Judiciary Budget by ten percent and that denying certification to forty-six justices would save $55 million over two years. (R. 263-65.) He further swore that this fiscal information had been presented to the Administrative Board in Albany on September 22, 2020, and that the vote to deny certification on this basis had been unanimous. (R. 265.) In his affidavit, Chief Administrative Judge Marks did not state that the Administrative Board had even considered the capacity of each justice nor the necessity of the justices before it decided to deny certification.

F. Petitioners Move To Hold Respondents In Contempt

In response to Respondents' refusal to engage in discovery and Respondents' seeking of a protective order from the November 5 Order, Petitioners moved by order to show cause on November 18, 2020, to hold the Respondents in contempt

and provide Petitioners, as interim relief, the expedited discovery that they had already been granted by the November 5 Order. (R. 554-615.) Over the course of the two days (November 18 and 19, 2020), Supreme Court heard argument from both the Petitioners and the Respondents. (R. 362-444 (transcripts of the proceedings).) Moreover, on the night of November 18, 2020, Respondents filed an affirmation in opposition to Petitioners' request for interim relief. (R. 616-73.) Following all of these proceedings, Supreme Court signed Petitioners' order to show cause on November 19, 2020 (the "November 19 Order"), setting a contempt hearing for November 30, 2020, and ordering the Respondents, in the interim, to comply with Supreme Court's November 5 Order on an updated discovery timeline. (R. 674-76.)

G. Respondents Move Before The Second Department

Following Supreme Court's November 5 Order and November 19 Order, Respondents moved before the Appellate Division, Second Department, on November 23, 2020, for permission to appeal the November 19 Order and for the Second Department to "confirm" that Respondents' discovery obligations were stayed by CPLR 5519(a). (R. 683-88.) The Second Department transferred Respondents' appeal and application to this Court the next day, on November 24, 2020. (R. 550.) On November 27, 2020, this Court granted Respondents' motion, but "only to the extent that pending determination by Supreme Court, Suffolk

County of the motions returnable before that court on December 7, 2020, the expedited discovery directed in the orders to show cause signed November 5, 2020 and November 19, 2020 and the related contempt proceedings are temporarily enjoined." (R. 551.)

H. Supreme Court's December 10 Short Form Order

Following this Court's order, Supreme Court ruled on Respondents' cross-motions filed on November 13, 2020. In a short-form order, on December 10, 2020, Supreme Court denied all of Respondents' motions. (R. 9-15.) Specifically, Supreme Court found that (1) venue was proper in Suffolk County because "material events" occurred there and that venue in Suffolk County would not give the possible appearance of "impropriety, bias or favoritism"; (2) Respondents' motion to dismiss was procedurally improper because it was brought under CPLR 3211, not CPLR 7804(f), and failed to address the relevant pleading standards; (3) Respondents had not identified any facts or law warranting leave for Respondents to renew or reargue their opposition to Petitioners' request for expedited discovery; and (4) Respondents had waived the defense of personal jurisdiction. (*Id.*)

Following the December 10 Order, the Respondents again moved before this Court, seeking permission to appeal the December 10 Order and to stay all the proceedings below. On December 22, 2020, this Court granted Respondents' motion for leave to appeal the December 10 Order, set a briefing schedule and ordered that

only the discovery ordered by Supreme Court, Suffolk County was stayed pending the determination of this appeal. (R. 16.)

I. Supreme Court Grants Petitioners A Temporary Restraining Order

On December 16, 2020, following the December 10 Order, Petitioners moved Supreme Court for an order enjoining the Respondents from "enforcing any determination, policy, or law that would prevent the Petitioner Justices from being certificated pending the outcome of this litigation." (R. 689-1186.) As interim relief, Petitioners also sought a temporary restraining order preventing the Respondents from enforcing the same. (R. 689-91.) Argument was heard on December 18, 2020, after which Supreme Court granted the Petitioners an injunction that enjoined the Respondents "to allow the Petitioners-Plaintiffs and their staffs to continue to serve as Supreme Court Justices and remain in office." (Supplemental Record ("SR.") 97.) This temporary restraining order was to stay in place until the resolution of Petitioners' motion for a preliminary injunction. Respondents thereafter moved before this Court on December 23, 2020, for (1) leave to appeal Supreme Court's temporary restraining order, and (2) to vacate the temporary restraining order. (SR. 110.1-110.3.)

J. Petitioners Prevail On Their Second Cause Of Action

Shortly after Petitioners moved for a temporary restraining order and a preliminary injunction, Respondents filed their Verified Answer to the Petition and

Complaint (the "Answer"). (R. 77-126.) In their Answer, Respondents admitted that no Appellate Division Department had certified to the Governor that any justice was no longer necessary to the business of the Court (R. 84), and that the one Appellate Division justice who had not been denied certification was "recertificated based upon her own merit." (R. 85.) Respondents also admitted that the Petitioner Justices were recommended for continued service by the City Bar, have extensive experience, and served the public with distinction. (R. 40-42, 47, 68, 79, 83, 93.)

Respondents incorporated an almost-entirely redacted version of the Minutes of the Meeting of the Administrative Board of the Courts, dated September 22, 2020, which stated as the sole reason for the Board's denial of certification to 46 of the 49 judges applying for certification the "current severe budgetary constraints occasioned by the coronavirus pandemic." (R. 101-03.) Respondents also submitted an affidavit from Chief Administrative Judge Marks, which repeated Respondents' position that the Administrative Board's decision to deny certification was based on budgetary constraints and a desire to avoid non-judicial layoffs. (R. 104-25.)

On December 29, 2020, Supreme Court had a conference with the parties to discuss the procedural posture of the litigation. (SR. 226-43). This conference followed Respondents' representation to this Court, in the course of litigating its motion to vacate the temporary restraining order, that the proceeding was ready for determination on the merits. (SR. 220.) The next day, on December 30, 2020,

Supreme Court entered a decision and order (the "Judgment"), granting Petitioners' second cause of action and annulling Respondents' actions to deny certification to the Petitioner Justices as arbitrary and capricious. (SR. 9-14.)

In reaching its Judgment, Supreme Court found that the record of the certification denials presented by Respondents "lack[ed] any information whatsoever to support a finding that the Board complied with its obligation to conduct an individualized review of each Justice applying for certification to determine whether he or she [was] 'necessary to expedite the business of the court.'" (SR. 10.) Indeed, the minutes of the Administrative Board's September 22, 2020 meeting only stated that it was denying certification on the basis of "severe budgetary constraints." (SR. 11.) As a result, Supreme Court concluded based on the record before the court that the Administrative Board had failed to evaluate the Petitioner Justices individually under the two prongs established by the Constitution and the Judiciary Law and that therefore, the Administrative Board's non-individualized certification determinations were arbitrary and capricious. (SR. 11-13.)

On December 31, 2020, Respondents filed a notice of appeal of the Judgment (SR. 7-8.) Shortly thereafter, Respondents moved before this Court to consolidate their appeal of the Judgment with their pending appeals of the Supreme Court's prior orders. (SR. 3-6.) On January 15, 2021, Petitioners filed their notice of cross-appeal.

ARGUMENT

I. SUPREME COURT CORRECTLY RULED THAT RESPONDENTS' ACTIONS WERE ARBITRARY AND CAPRICIOUS

This appeal concerns a number of rulings made by Supreme Court, but first and foremost among them is Supreme Court's Judgment, issued on December 30, 2020. In issuing the Judgment, Supreme Court correctly held that the Administrative Board's denials of certification to the Petitioner Justices were arbitrary and capricious and, as a result, the Supreme Court annulled those denials. The basis for Supreme Court's ruling, *inter alia*, was that Respondents had failed to put forth "any evidence" that the Administrative Board had conducted the required "individualized determination" with respect to each Petitioner Justice. This Judgement, insofar as it found the Administrative Board's actions arbitrary and capricious, correctly applied the relevant law, and, for the reasons expounded below, should be affirmed.[2]

[2] By virtue of Supreme Court's Judgment (and the resultant appeals), several of the issues originally appealed and briefed by Respondents—including Supreme Court's discovery orders and its December 10 Order concerning venue—are no longer primarily at issue. Nevertheless, while not expanded upon below, Petitioners maintain that (1) they adequately demonstrated "ample need" for the expedited discovery originally ordered by Supreme Court, particularly because there were no alternative sources of discoverable information (R. 127-68), and (2) venue was appropriate in Suffolk County because, pursuant to CPLR 506(b), material events took place there. (R. 311-25.)

A. Respondents' Determinations Were Arbitrary And Capricious

Petitioners commenced their action, in part, pursuant to Section 7803(3) of the CPLR, which allows a petitioner to raise in a special proceeding before a Supreme Court "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." Agency action will be overturned as "arbitrary and capricious" where "the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith.'" *Matter of Zutt v. State of New York*, 99 A.D.3d 85, 97 (2d Dep't 2012) (quoting *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005)). This is the case where the agency "undermines its own stated goals" or violates the Constitution or its statutory authority. *See Wootan v. Axelrod*, 87 A.D.2d 913, 914 (3d Dep't 1982) (upholding annulling of agency action where it exceeded statutory authority); *In re Kelly*, 192 A.D.2d 236, 242-43 (1st Dep't 1993); *see also Rosenkrantz v. McMickens*, 131 A.D.2d 389, 390-91 (1st Dep't 1987) ("While an administrative agency's construction and interpretation of its rules are entitled to 'greatest weight,' the agency may not arbitrarily disregard relevant facts bearing on such construction or interpretation.") (internal citations omitted)); *Matter of Lipani v. New York State Div. of Human Rights*, 56 A.D.3d 560, 561 (2d Dep't 2008) ("[A]n administrative determination is

arbitrary and capricious when it exceeds the agency's statutory authority or [is made] in violation of the Constitution or laws of this State.") (internal quotation marks omitted). If the grounds invoked by the agency are "inadequate or improper," then the Court "is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) (internal quotation marks and citation omitted) (agency decision to terminate employee was arbitrary and capricious where it failed to abide by the required standards for terminating an employee).

Here, Supreme Court correctly found that the Respondents' denials of certification to the Petitioner Justices—along with forty-two other justices who were denied certification—were arbitrary and capricious. Contrary to the Constitution and the Judiciary Law, Respondents did not perform any "individualized evaluation" of the individual Petitioner Justices, nor did they make any "two-pronged determination[s]" consistent with the certification criteria (capacity and necessity) put forth by the Constitution and Judiciary Law. *Marro v. Bartlett*, 46 N.Y.2d 674, 680 (1979) (*Marro*). Instead, according to the scant evidence that Respondents themselves provided in answering the Petition, Respondents determined to deny certification to forty-six justices solely owing to the "current severe budgetary constraints occasioned by the coronavirus pandemic." (R. 101.) Based on the record,

the only possible conclusion is that Respondents failed to carry out their constitutional and statutory responsibility to evaluate the Petitioner Justices' applications for certification on the basis of each justice's physical and mental capacity and necessity. As Supreme Court correctly held, this alone rendered Respondents' challenged determinations arbitrary and capricious.[3] (SR. 13); *see also Matter of Lipani*, 56 A.D.3d at 561 (annulling agency action where it violated statutory law); *Matter of New York State Tenants & Neighbors Coalition, Inc. v. Nassau Cty. Rent Guidelines Bd.*, 53 A.D.3d 550, 552 (2d Dep't 2008) (same); *Kerwick v. New York State Bd. of Equalization & Assessment*, 117 A.D.2d 65, 69 (3d Dep't 1986) (same).

Despite Supreme Court's straightforward application of the Constitution and Judiciary Law on the record before it, Respondents nevertheless assault the Judgment on a number of grounds, none of which should be credited.

B. Supreme Court Was Empowered To Review Respondents' Denials

In their Supplemental Brief, Respondents' first argument as to why the Judgment should be reversed is their contention that Supreme Court ignored the principles set forth by *Marro* and *Loehr* and applied an improper standard of review.

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[3] Supreme Court also correctly observed that Petitioners had included detailed facts showing the continued necessity of the Petitioner Justices to the business of the court and specifically to alleviate the backlog faced by New York's Unified Court System, though this was not the basis for its Judgment. (SR. 13.)

Sup. Br. 15-17. Respondents essentially assert that *Marro* and *Loehr*, insofar as they granted the Administrative Board broad authority and "very nearly unfettered discretion" in the context of certification, stand for the novel proposition that the Administrative Board's challenged determinations are beyond all judicial review. Sup. Br. 15-16; *see also Marro*, 46 N.Y.2d at 681; *Matter of Loehr v. Administrative Bd. of the Cts. of the State of N.Y.*, 29 N.Y.3d 374, 382 (2017) (*Loehr*). In particular, Respondents rely heavily on language from *Marro*, where the Court observed that the Administrative Board's discretion was "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." 46 N.Y.2d at 681-82. Respondents argue that this language means that the proper standard of review that should have been applied by the Supreme Court was no judicial review at all. Sup. Br. 17.

Respondents' reliance on the relevant language in *Marro*, however, is misplaced. Contrary to Respondents' suggestion (Sup. Br. 16-17), Supreme Court explicitly found that the Administrative Board had disregarded the Constitution's certification criteria in favor of its own *ad hoc* criteria for certification. (SR. 13.) A constitutionally impermissible purpose exists where the Administrative Board fails to comply with its constitutional and statutory responsibilities. Moreover, Petitioners credibly alleged that Respondents' actions were discriminatory on the

basis of age. (R. 67-69.) Petitioners' claims, and the Supreme Court's findings, fit squarely within those claims that the *Marro* Court found would be subject to review.

The final clause of that language in *Marro*—"unrelated to the certification process"—does not affect this analysis whatsoever. *Marro* involved a certification challenge in which the petitioner sought, among other things, a pretermination hearing in excess of what is provided for by the Constitution and Judiciary Law. 46 N.Y.2d at 677. Thus, throughout its opinion the *Marro* Court referred to challenges to the "certification process *itself*." 46 N.Y.2d at 679, 681 (emphasis added). By contrast, Petitioners here are not challenging the certification process itself; instead, Petitioners are challenging how Respondents carried out the certification process as created and required by the Constitution and Judiciary Law. This is a critical distinction that further underscores why Petitioners' claims were properly subject to the judicial review of Supreme Court.

Finally, the holding in *Loehr* is no different than that of *Marro* concerning judicial review. Like *Marro*, the Court in *Loehr* reaffirmed that a certification decision by the Administrative Board would only be beyond judicial review if it "*complies with the two criteria set forth in the Constitution*, and absent proof that its determination violates statutory prescriptions or promotes a constitutionally impermissible purpose." 29 N.Y.3d at 382 (emphasis added). The *Loehr* Court further analyzed the required necessity test for justices and reinforced that the

Administrative Board, when determining whether a justice was "necessary," had to do so "with the costs—including non-monetary costs—of that certification in mind." *Id.* at 382. Clearly then, the *Loehr* Court recognized that there were guidelines that the Administrative Board had to adhere to in complying with its constitutional and statutory responsibilities, and that the Administrative Board's compliance could be reviewable. Accordingly, neither *Marro* nor *Loehr* inoculates the Administrative Board's denials of certification from judicial review.[4]

C. Supreme Court's Judgment Was Based On The Proper Record

Respondents further attack Supreme Court's Judgment on the basis of the record that the Supreme Court considered in reaching its Judgment. Respondents accuse Supreme Court of "artificially truncating the record" in an attempt to predicate its Judgment on a "false narrative" by not considering any papers filed beyond December 16, 2020. Sup. Br. 17, 22. Respondents also assert that Supreme Court disregarded the affidavits submitted by Chief Administrative Justice Marks (Sup. Br. 19), even though two of his affidavits were submitted on or before December 16, 2020, the date on which Respondents filed their Answer. (R. 77-126.) However, Respondents' claims concerning the record should be rejected.

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[4] This Court should also consider whether a different, lower standard of judicial review applies here given that Respondents have denied certification en masse to substantially all of the justices who applied for certification. This is a material distinction from the facts here from those in *Marro* and *Loehr*.

First, Respondents' accusation that Supreme Court artificially truncated the record by only considering those papers filed after December 16, 2020 is false. As Respondents are aware, December 16, 2020, was when Respondents submitted their Answer, which incorporated by reference both the minutes of the September 22, 2020, meeting of the Administrative Board and Chief Administrative Judge Marks' December 16, 2020 affidavit. (R. 77-126.) Accordingly, pursuant to CPLR 7804(g), Respondents' Answer permitted Supreme Court to dispose of the issues raised by the Petition because the issues raised by Petitioners did not concern a "substantial evidence" standard. *See Matter of Halperin*, 24 A.D.3d at 769 (finding that Supreme Court should have disposed of hybrid proceeding on merits because it did not concern a hearing). And in fact, Respondents, in various filings and at oral argument, recognized that Supreme Court could decide the merits of the Petition once their Answer was filed and in fact encouraged Supreme Court to do so. (*See* SR. 48, 215-16, 220, 233.) Given Respondents' clearly articulated view that this dispute was ripe for resolution, and Supreme Court's agreement, Supreme Court acted appropriately in reaching the merits of the Petition rather than proceed further with Petitioners' application for a preliminary injunction. Unfortunately, now that Respondents are faced with a Judgment with which they disagree, they now reverse their position and disparage Supreme Court.

Ultimately, Respondents' real concern over the record has less to do with any action of Supreme Court (which again, followed Respondents' own request), but rather Respondents' preference that Supreme Court would have considered and relied upon Chief Administrative Judge Marks' December 28, 2020 affidavit, submitted in opposition to Petitioners' preliminary injunction motion. In that affidavit, for the first time in the litigation (and despite having submitted two previous affidavits), Chief Administrative Judge Marks vaguely described that Respondents had undertaken some cursory review of the justices who were denied certification. (SR. 166-76.)

Specifically, by the time of his December 28 affidavit, Chief Administrative Judge Marks appears to have had an epiphany. He now contends that the Administrative Board reviewed binders for every justice that included each justices' "judicial records, qualifications, recommendations, complaints about, disciplinary record, and mental and physical capability of each candidate." (SR. 169.) This description is dubious, however, because the Petitioner Justices expressly alleged that the Office of Court Administration cancelled one of the Petitioner Justices' scheduled physical and mental evaluations following its certification determination. (R. 47-48.) If the Administrative Board failed to gather this information, then how could the Administrative Board have evaluated this Petitioner Justices' physical and

mental capacity as required by the Constitution and Judiciary Law?[5] Viewed in this light, it is obvious that Chief Administrative Judge Marks' December 28 affidavit was nothing more than a conclusory and pretextual effort to assert new facts inexplicably not included in his two previous affidavits that each purported to describe the same meeting of the Administrative Board. This glaring omission central to the dispute would have warranted Supreme Court refusing to credit Chief Administrative Judge Marks' December 28 affidavit. *Cf. Cuccia v. City of New York*, 306 A.D.2d 2, 2 (1st Dep't 2003) (denying leave to renew where party failed to include already-known facts in original affidavit).

Nevertheless, even putting aside the content of the December 28 affidavit, Supreme Court was well within its discretion to exclude from consideration those materials that both parties submitted concerning a preliminary injunction, because Supreme Court never ruled on Petitioners' application. Respondents' own case law concerning the consideration of affidavits is not to the contrary, as the cases cited only concern whether a Court may consider affidavits submitted as an answer to a

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[5] Chief Administrative Judge Marks' December 28 affidavit is all the more curious in light of Respondents' answer, in which they denied "information or knowledge sufficient to admit or deny" Petitioners' allegation (in Paragraph 49 of the Petition) that all but one of the Petitioner Justices had satisfied the medical exams meant to evaluate their capacity. (*Compare* R. 47-48 *with* R. 83.) Again, how could Respondents' have completed the individualized review claimed by Chief Administrative Judge Marks if they did not have sufficient knowledge to admit or deny this allegation? This is just another example of Respondents' several critical reversals of direction for purposes of expediency.

petition, not affidavits submitted after the answer was filed and in connection with a motion for a preliminary injunction. *See, e.g. Matter of Weissenburger v. Annucci*, 155 A.D.3d 1150, 1152 (3d Dep't 2017) (only affirming ability of respondent to submit affidavit in response to petition). Respondents cite no case law mandating that a court consider such ancillary affidavits in an Article 78 proceeding after the answer was filed.

Altogether, Respondents' attack on the record considered by Supreme Court in reaching its Judgment is nothing more than a bad-faith and self-contradictory attempt by Respondents to introduce new, self-serving facts that it failed to include in Chief Administrative Judge Marks' first two affidavits (one of which was incorporated in their answer).

D. Respondents Presented No Evidence In Their Answer That The Petitioner Justices Had Been Individually Reviewed

Incredibly, Respondents also assert in their Supplemental Brief that, even notwithstanding Chief Administrative Judge Marks' December 28, 2020 affidavit, Respondents presented sufficient evidence to indicate that the Petitioner Justices had been individually considered by the Administrative Board. Sup. Br. 17-23. For this proposition, Respondents primarily employ two arguments: (1) the fact that three justices were certificated should have demonstrated that the Administrative Board undertook individualized reviews (Sup. Br. 17-18, 23), and (2) the minutes of the September 22, 2020 Administrative Board meeting, as well as Chief Administrative

Judge Marks' December 16, 2020 affidavit, demonstrated that the applying justices had been individually reviewed. Sup. Br. 23. Neither argument has any merit.

First, Respondents' suggestion that because three justices were certificated, the Administrative Board must have carried out individualized reviews is nothing more than ipse dixit. At the outset, it is obvious that though the Administrative Board may have certificated three justices, this does not mean that the Respondents properly evaluated those three justices or, as is at issue here, that the Respondents properly evaluated the Petitioner Justices. In fact, even granting this argument the most generous possible reading, the minutes of the September 22, 2020 meeting of the Administrative Board—which state that the three justices were certified on the basis of their "specialized additional assignments" (R. 101)—do not include any evidence that the Petitioner Justices received any individualized evaluations consistent with the Constitution and Judiciary Law. Thus, as Supreme Court correctly observed, Respondents failed to put forth any evidence in responding to the Petition that all of the justices who were denied certification (including the Petitioner Justices) were individually evaluated.[6] (SR. 13.)

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[6] Needless to say, this Court should reject Respondents' invitation to consider an October 5, 2020 Queens Daily Eagle article in which the spokesperson for the Office of Court Administration merely stated that the three certificated justices were certificated on the basis of "additional assignments that are important to the court system." Sup. Br. 23. If Respondents wished for Supreme Court to consider this article, they were free to have incorporated it in their Answer, although it would have been extraordinary to claim that they relied for their September 22 decision on

The outcome is no different even considering Chief Administrative Judge Marks' December 16 affidavit. (R. 104-25.) In that affidavit, Chief Administrative Judge Marks laid out the budgetary and fiscal information that he presented to the Administrative Board and explained the Administrative Board's "policy choice" that it should deny certification to forty-six justices rather than commence non-judicial layoffs.[7] (R. 109-11.) However, while this may have demonstrated the advice that the Administrative Board received from Chief Administrative Judge Marks, nothing in his December 16 affidavit demonstrates that the individual justices were evaluated pursuant to the statutory and constitutional criteria. Instead, to the contrary, his December 16 affidavit demonstrates that, rather than consider each justice's capacity and necessity individually, the Administrative Board did nothing more than make a broad policy choice on the basis of budgetary constraints. Plainly, Respondents are wrong in asserting that their Answer, the September 22 minutes and/or Chief Administrative Judge Marks' December 16 affidavit demonstrated that they had undertaken an individualized review of the Petitioner Justices.

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information in an article that appeared two weeks later. Having chosen not to include this article in their Answer, it should not be considered on appeal.

[7] While Chief Administrative Judge Marks is a key advisor to the Administrative Board, Respondents failed to provide any explanatory affidavit from a member of the Administrative Board itself. This absence underscores Supreme Court's conclusion that the record lacked any evidence that Respondents had individually evaluated the certification applications of Petitioner Justices. (SR. 11.)

E. *Marro* And *Loehr* Do Not Authorize Respondents' Denials

Respondents' final arguments against Supreme Court's Judgment concern the holdings of *Marro* and *Loehr*, which Respondents assert (1) do not require individualized determinations for each justice (Sup. Br. 24-27), and (2) allowed the Administrative Board to consider the costs of certificating justices. Sup. Br. 27-31. Neither argument can withstand scrutiny.

1. *Marro* and *Loehr* require individualized determinations

First, in reaching its Judgment, Supreme Court correctly observed that the Administrative Board, consistent with the Constitution and Judiciary Law, had an obligation to conduct an "individualized evaluation" of the justices who applied for certification. (SR. 12.) Supreme Court found this requirement in the explicit language of *Marro*, which held that the Judiciary Law and the Constitution contemplated an "individualized evaluation" of each justice who applies for certification or recertification.[8] 46 N.Y.2d at 680. Nevertheless, Respondents argue that *Loehr* allowed the Administrative Board to announce a "prospective rule rather

[8] The *Marro* Court also explicitly held that "there must be a two-pronged determination," referring to both criteria of the Constitution and Judiciary Law. 46 N.Y.2d at 680. Respondents' attempts at waving away these clear descriptions of the Administrative Board's Constitutional and statutory responsibilities by describing these statements as "highlight[ing] the lack of detail contained in the Constitution and statute on certification matters" is an inaccurate and unwarranted characterization of what stands as the Court of Appeals' governing description of the Administrative Board's Constitutional and statutory responsibilities.

than issue . . . inscrutable applicant-by-applicant determinations." 29 N.Y.3d at 383; *see* Sup. Br. 25. (SR. 12.)

Respondents plainly overstate *Loehr*'s holding. While the *Loehr* Court approved of an Administrative Board prospective policy announced by an Administrative Order, it was solely in the context of evaluating whether the Administrative Board could decide to no longer certificate justices who would not forego their pensions in an attempt to "double-dip[.]" 29 N.Y.3d at 378. Moreover, the *Loehr* Court only approved of the Administrative Board's policy *after* it evaluated it in the context of the public policy of New York. *Id.* at 379-81. Thus, given the policy's future application, its status as an Administrative Order, and the public policy underlying its implementation, the Administrative Board action in *Loehr* stands in sharp contrast to the facts here, where the Administrative Board denied certification en masse—not by announcing any prospective policy—and did so without even arranging to receive an evaluation of the physical and mental capacities of one Petitioner Justice. (R. 47-48.) Crucially, Supreme Court understood and relied upon this sharp contrast in reaching its Judgment. (SR. 11-12.)

Indeed, nothing in *Loehr* suggests that, as here, the Administrative Board is empowered to deny substantially all of the certification applications it already has received without individually reviewing them pursuant to the constitutional and

Judiciary Law criteria. In fact, *Loehr* reaffirmed *Marro*'s holding that the Administrative Board only has broad discretion "[p]rovided it complies with the two criteria set forth in the Constitution." 29 N.Y.3d at 382.

2. The Constitution requires more than budgetary considerations

Respondents' final argument in their Supplemental Brief is that because *Loehr* permits the Administrative Board to consider budgetary concerns as "rationally related to whether certification is 'necessary to expedite the business of the Court,'" *Loehr*, 29 N.Y.3d at 382, then it must be the case that the budgetary concerns described by Chief Administrative Judge Marks justified the Respondents' denials of certification and prevented the Supreme Court from reviewing and annulling those same denials. Sup. Br. 27-31. However, this reading of *Loehr* is imprecise and inaccurate.

First, it is important to note that the holding and language from *Loehr* relied upon by Respondents exclusively focused on only the second criteria of the certification process because there, the first criteria, the justices' capacities, was not in dispute. *Loehr*, 29 N.Y.3d at 382. Contrary to Respondents' suggestions throughout its Supplemental Brief, the Court of Appeals has never interpreted the Judiciary Law and the Constitution as empowering the Administrative Board to entirely ignore, and not evaluate, the mental and physical capacity of a justice applying for certification. In fact, to the contrary, *Marro* explicitly held that "there

must be a two-pronged determination," referring to *both criteria* of the Judiciary Law. *See Marro*, 46 N.Y.2d at 680. Thus, that Respondents denied certification to justices en masse and did so without even arranging to receive an evaluation of the physical and mental capacities of one Petitioner Justice distinguishes this case from *Loehr*. (R. 47-48.) Accordingly, even if the Administrative Board can consider the budgetary impact of certification, this does not free it from *Marro*'s rule (and as applied in Supreme Court's Judgment) that it still should have conducted individualized evaluations of the justices applying for certification.

In any event, Respondents' insistence that "budgetary concerns" can wholly encompass their evaluation of whether the Petitioner Justices' are "necessary" is wrong and must fail. While *Loehr* approved of certain budgetary rationales put forth by Respondents, it did not conclude that budgetary concerns could suffice as the Administrative Board's sole and exclusive consideration in evaluating whether a justice was "necessary to expedite the business of the court." N.Y. Const. Art. VI, § 25(b); *see Loehr*, 29 N.Y.3d at 382. To the contrary, the *Loehr* Court merely concluded that budgetary concerns in the context of double-dipping could be considered because they were "rationally related" to the question of whether certificating a justice who already was receiving a pension was "necessary." 29 N.Y.3d at 382. Thus, *Loehr* is not an unbridled approval of the Administrative Board's practice of solely and exclusively considering costs in evaluating the

certification applications at issue in this case, nor is it a de facto amendment of the Judiciary Law or the Constitution. This much is illustrated by the fact that *Loehr* explicitly recognized that the Administrative Board, when determining a justice's necessity, had to consider both the monetary costs and the "non-monetary costs" of their policies. *Id.*

In light of the above, Respondents' assertion that budgetary constraints are "rationally related" to the issue of whether the Petitioner Justices were "necessary to expedite the business of the Court" does not warrant reversal. Sup. Br. 30. Notwithstanding Respondents' submissions as to the budgetary impact of the Governor's potential cuts to the Judiciary budget, nothing submitted by Respondents demonstrates that they adequately assessed the non-monetary costs of denying certification to the Petitioner Justices. Instead, Chief Administrative Judge Marks' December 16 affidavit suggests the opposite—that the Administrative Board *only* considered the budgetary impact of certification. Thus, to the extent Respondents claim they evaluated the Petitioner Justices' necessity on solely budgetary grounds, their arguments are in direct conflict with *Loehr*, which required that evaluations neither consist of exclusively mechanical inquiries into the "size of the courts' docket divided by the number of Justices," nor solely mechanical calculations of dollars and cents. 29 N.Y.3d at 382. Because Respondents failed to provide any evidence that they engaged in any such holistic evaluations, Supreme Court was

justified in finding that the Administrative Board failed to comply with its constitutional responsibilities.[9]

II. SUPREME COURT INCORRECTLY DISMISSED SEVERAL OF PETITIONERS' REMAINING CAUSES OF ACTION

While Supreme Court granted the Petition's second cause of action, finding that Respondents' denials of certification to the Petitioner Justices were arbitrary and capricious, it also concluded that "the remaining causes of action need not be addressed or are without merit." (SR. 14.) Though Supreme Court ruled in Petitioners' favor, it also dismissed Petitioners' remaining claims without providing a justification. This was error and, accordingly, Petitioners have cross-appealed only insofar as to seek judgment in Petitioners' favor on several of the Petition's other causes of action.

A. Petitioners Are An Aggrieved Party To The Judgment

Pursuant to CPLR 5511, Petitioners are aggrieved parties who may cross-appeal from the Supreme Court's Judgment. Indeed, it is well-established that although a party may succeed in obtaining a judgment, they may nevertheless be "aggrieved" for the purposes of CPLR 5511 if the party "is nevertheless prejudiced because the [judgment] does not grant [them] complete relief." *Parochial Bus Sys.,*

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[9] Any holistic evaluation would have considered, for instance, that no Appellate Division Department has departed from their attestations of the necessity of the current complement of justices, as admitted by Respondents in their Answer. *Compare* R. 50 *with* R. 84.

Inc. v. Board of Ed., 60 N.Y.2d at 544-545. This includes where a party "receive[s] an award less favorable than he sought or a judgment which denied him some affirmative claim or substantial right." *Id.* (internal citations omitted); *see also Norton & Siegel, Inc. v. Nolan*, 276 N.Y. 392, 395 (1938) (finding that successful plaintiff could be aggrieved party and that "substance should prevail over form" in determining whether a successful party is aggrieved).

Here, although the Supreme Court properly concluded that the Administrative Board's actions were arbitrary and capricious and annulled their denials of certification, the Supreme Court also denied the Petitioners considerable, additional relief, including, but not limited to, declaring that Respondents' actions were made in violation of lawful procedure (first cause of action), declaring that Respondents' actions interfered with the constitutional role of the Appellate Divisions in determining the necessity of the Petitioner Justices (fifth cause of action), and declaring that Respondents' actions were discriminatory in violation of New York's Human Rights Law (sixth cause of action). Moreover, the Supreme Court dismissed these claims only upon observing that "that "the remaining causes of action need not be addressed or are without merit." (SR 14.) Thus, having had these claims dismissed without justification—despite the fact that the merits were ripe for a decision—there can be little doubt that Petitioners are an "aggrieved party" with respect to the Judgment.

B. Petitioners' First Cause Of Action Should Have Been Granted

Though the Supreme Court granted Petitioners' second cause of action, it also should have granted Petitioners' first cause of action. Specifically, Petitioners alleged as their first cause of action that the Respondents' denials of certification for the Petitioner Justices were "made in violation of lawful procedure" under CPLR 7803(3). (R. 58-59.) In support, Petitioners alleged that Respondents had failed to comply with the certification procedures outlined by the Constitution and Judiciary Law when they failed to individually evaluate the Petitioner Justices' "capacity" and whether the Petitioner Justices were "necessary to expedite the business of the court." *Id.*; *see also* N.Y. Const. Art. VI, § 25(b); Judiciary Law § 115. Moreover, Petitioners alleged that rather than conforming to these constitutional and statutory criteria for certification, Respondents had solely relied on budgetary concerns. (R. 58-59.)

Thus, the contours of Petitioners' first cause of action are nearly identical to the basis that the Supreme Court relied upon in granting Petitioners' second cause of action. In particular, the Supreme Court concluded in its Judgment that Respondents had failed to individually evaluate the Petitioner Justices' applications, as required by *Marro*, 46 N.Y.2d 674, 680, and instead utilized *ad hoc* criteria in evaluating certification applications. (SR. 12-13.) Therefore, in essence, the Supreme Court concluded that the Administrative Board made its certification

determinations "in violation of lawful procedure." For this reason alone, the Supreme Court should have granted Petitioners first cause of action. *See supra* Section I.[10]

C. Petitioners' Fifth Cause Of Action Should Have Been Granted

This Court should also reverse Supreme Court's dismissal of the fifth cause of action where Petitioners sought a declaratory judgment that Respondents' actions—denying certification en masse without a good-faith, individualized review of each justice—are unconstitutional because they interfered with the Appellate Division's constitutional authority. (R. 65-67.) The constitutional provision in question is Section 4(d) of Article VI of the Constitution, which empowers an Appellate Division to certify to the Governor that "additional justices are needed for the speedy disposition of the business." (R. 65-67.) Under the same provision, an Appellate Division may also certify "when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease." N.Y. Const. Art. VI, § 4(d). Thus, the Constitution specifically empowers the Appellate

[10] Indeed, such a finding was justified for all of the reasons explained in this memorandum's earlier discussion of Supreme court's Judgment, including that the Respondents' actions are subject to judicial review (*see supra* Section I.B), Supreme Court's Judgment was based on a proper record (*see supra* Section I.C), and that Supreme Court's Judgement was justified on the record and the law. *See supra* Sections I.A, D-E.

Division departments to determine when additional justices are, or are not, necessary to expedite their business.

In this context, Petitioners specifically alleged that Respondents' actions usurped the Appellate Division's constitutional role by purportedly determining, without the constitutionally-required individualized review (*see supra* Section I), that the Petitioner Justices (and other Appellate Division justices) were no longer necessary to their respective Appellate Division departments. (R. 65-67.) To underscore how this interfered with the Appellate Divisions' constitutional role, Petitioners also alleged that no Appellate Division department had ever departed from its attestation that a justice was necessary for the speedy disposition of its business. (R. 50.) Thus, Petitioners' allegations clearly outlined that Respondents' unconstitutional denials of certification had usurped and contradicted the Appellate Division departments' clear determinations that their justices remained necessary for the speedy disposition of the business before them.

Respondents admitted that (1) no Appellate Division department had ever reversed itself as to whether one of its justices was necessary for the speedy disposition of its business, and (2) that the First and Second Departments "continue to have additional justices designated by the Governor, as requested by them, to serve on the Appellate Division in both Judicial Departments." (R. 84.) As a result, Respondents' answer makes clear that, as Petitioners alleged, Respondents' failure

to adhere to its own constitutional and statutory constraints has interfered with and contradicted the Appellate Divisions' constitutional authority to determine the necessity of its justices. While Respondents attempt to wave away concerns by referring to the conflict between the Appellate Division and the Administrative Board as "imaginary" (App. Br. 24), the fact remains that by denying certification en masse, the Administrative Board has disregarded the Appellate Division determinations of necessity and, by doing so, have encroached upon the Appellate Division's constitutional authority.

Supreme Court should not have dismissed Petitioners' fifth cause of action. Instead, as requested by Petitioners, the Supreme Court should have declared that Respondents' failure to adhere to its own constitutional criteria unconstitutionally interfered with the Appellate Division departments' authority to determine whether or not its justices are necessary for the speedy disposition of business before them.

D. Petitioners' Sixth Cause Of Action Should Not Have Been Dismissed

Finally, Supreme Court also erred where it essentially dismissed Petitioners' sixth cause of action, which alleged that Respondents had discriminated against the Petitioner Justices in violation of New York State's Human Rights Law (NYHRL). *See* N.Y. Exec. L. §§ 290-301. In making out this cause of action, Petitioners alleged, *inter alia*, that (1) the Petitioner Justices were all employed by the New York State Unified Court System, (2) the Petitioner Justices all belonged to a

protected class on the basis of their age, (3) Respondents' actions to deny the Petitioner Justices' certification applications targeted the Petitioner Justices on the basis of their age and will affect their employment, and (4) Respondents' actions will ensure the Petitioner Justices are replaced by younger justices and staff persons. (R. 67-69.) These collective allegations made out a prima facie case sufficient to raise an inference of age discrimination under the NYHRL. *See, e.g., Mayer v. Manton Cork Corp.*, 126 A.D.2d 526, 526 (2d Dep't 1986*); see also Laverack & Haines v. New York State Div. of Human Rights*, 88 N.Y.2d 734, 739 (1996).

Respondents never disproved or rebutted Petitioners' prima facie case of age discrimination.[11] To the contrary, Respondents only reinforced it. Most critically, in Chief Administrative Judge Marks' November 13 and December 16 affidavits, he repeatedly expressed that the Administrative Board had chosen to deny certification to the forty-six justices because the Administrative Board desired to address their budgetary concerns by denying certification rather than undertaking layoffs of non-judicial personnel that would have presumably been age-neutral.[12] (R. 104-12, 261-

[11] Respondents' attempts to shield their conduct from review by using the "very nearly unfettered discretion" standard of *Marro* and *Loehr* is particularly inappropriate in light of Petitioners' age discrimination claim. Respondents are charged with violation of a statutory proscription and cannot avoid responsibility for their actions by utilizing that deferential standard.

[12] While Petitioners are sensitive to the employment status of non-judicial personnel (particularly since the Petitioner Justices have employed many such personnel), it is important to remember that judges are the linchpins of our judicial system. Without judges, the system stops working. This is not unusual—it is merely

67.) Thus, Respondents' rationale revealed that they had targeted the justices applying for certification for budget cuts, all of whom are at least seventy years old, in lieu of taking alternative budgetary actions that would not have had such a disparate impact on the Petitioner Justices' protected class. This only underscores that Petitioners, at a minimum, stated a valid cause of action for age discrimination. *People v. New York City Transit Auth.*, 59 N.Y.2d 343, 349 (1983) (approving cause of action under NYHRL on the basis of a disparate impact theory of discrimination).

In their Brief, Respondents assert in response to this cause of action that "[t]here 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." App. Br. 27. Respondents essentially assert that because only people over seventy can be certificated, the Petitioner Justices could not be discriminated against.[13] This argument misses the point of Petitioners' cause of action.

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reflective of the fact that the Judiciary is a top-down system that requires judges to exercise the power and authority of the Judiciary. Thus, for Respondents to assert that they need the employees to run the court but they do not need the justices is not a rational response to their alleged budgetary concerns.

[13] In their Brief, Respondents cite for support case law upholding New York's mandatory retirement age and interpreting the federal Age Discrimination in Employment Act (ADEA). App. Br. 25-27. While the former is not relevant here—Petitioners are not challenging New York's mandatory retirement age—the latter is an interesting citation by Respondents, as in the case that Respondents' cite to, the Southern District of New York found that the certification determination in question was discriminatory. *EEOC v. New York*, 729 F. Supp. 266, 278 (S.D.N.Y. 1990).

Petitioners' sixth cause of action does not challenge individual certification decisions at all; instead, it challenges Respondents' now-admitted choice to reduce the workforce via the almost blanket denial of certification as opposed to some other age-neutral means. Even accepting for the sake of argument Respondents' claimed need to reduce the courts' workforce, Respondents chose to do so via a mechanism that intrinsically affects only the court system's oldest employees. Moreover, though Respondents claim that their budgetary constraints justify their actions (App. Br. 25), Respondents have not shown that there were no alternative cost-cutting measures that would have avoided affecting solely those aged seventy and older. As a result, not only is it clear that Respondents' actions discriminated against the Petitioner Justices, but it is also clear Respondents cannot justify their actions with an independent and nondiscriminatory purpose. *See Laverack & Haines*, 88 N.Y.2d at 739.

Because Petitioners made out a prima facie case of discrimination that Respondents never rebutted, Supreme Court should have, at a minimum, maintained Petitioners' sixth cause of action for further proceedings. Accordingly, this Court

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This decision was overturned by the Second Circuit, but only on the basis that the ADEA explicitly excludes from its protections those persons "elected to public office." *EEOC v. New York*, 907 F.2d 316, 321-322 (2d Cir. 1990); *see also* 29 USCS § 630(f). By contrast, the NYHRL has no such limitation. Instead, Executive Law §§ 292(5)-(6) define employer and employee broadly while Executive Law § 296(1)(a) does not even speak of discrimination against employees but rather against individuals.

should reverse Supreme Court's dismissal of Petitioners' sixth cause of action for age discrimination under the NYSHRL.

III. SUPREME COURT CORRECTLY DENIED RESPONDENTS' MOTION TO DISMISS BECAUSE RESPONDENTS FAILED TO ARGUE THAT PETITIONERS DID NOT ADEQUATELY PLEAD CLAIMS FOR RELIEF

Supreme Court rightly denied Respondents' motion to dismiss because the Respondents failed to argue that Petitioners did not state a cause of action as a matter of law — a requirement for such a motion under either CPLR 3211 or CPLR 7804(f).[14] More specifically, rather than demonstrate that Petitioners had not pled a legally cognizable claim, Respondents instead alleged factual evidence to rebut Petitioners' claim that the decision to deny the certifications at issue was constitutionally or statutorily deficient. As Supreme Court correctly held, such factual arguments cannot form the basis for a successful motion to dismiss. This conclusion, rather than being a "contrived" basis on which to deny the motion, App. Br. at 14, rests on bedrock principles of procedure and should be affirmed.

Though procedurally distinct, motions to dismiss brought pursuant to both CPLR 3211 and CPLR 7804(f) are evaluated under a similar, well-established standard: in effect, the court is "limited to examining the petition to determine

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[14] As covered at length elsewhere in this brief, Petitioners also maintain that Supreme Court's December 10 Order was correct because (1) Respondents' denials of certification were not beyond judicial review (*see supra* Section I.B), and (2) Petitioners properly stated their causes of action. *See supra* Sections I.A, II.B-D.

whether it states a cause of action. *Board of Educ. v. State Educ. Dep't*, 116 A.D.2d 939, 941 (3d Dep't 1986); *see also, e.g.*, *Hondzinski v. County of Erie*, 64 A.D.2d 864 (4th Dep't 1978).[15] "Such a motion is tantamount to a demurrer, assumes the truth of the allegations of the petition, and permits no consideration of facts alleged in support of the motion." *Hondzinski*, 64 A.D.2d at 864; *see also Matter of 1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Vill. of Garden City*, 62 A.D.3d 1004, 1006-07 (2d Dep't 2009) ("[W]here, as here, there are facts in dispute that must be resolved before a reviewing court may properly determine the outcome of the proceeding under the applicable standard of review, a hearing must be conducted forthwith by the Supreme Court to resolve those factual issues.").

To succeed on their motion to dismiss, then, Respondents were required to demonstrate that Petitioners had failed to adequately plead a claim on which relief could be granted, assuming that Petitioners' allegations concerning the nature of the certification decision were true and without relying on new factual evidence alleged

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[15] Though in his December 10 order Supreme Court noted that the Respondents' motion should have been brought under CPLR 7804(f), rather than CPLR 3211, (R. 12), both rules require that the motion demonstrate that the causes of action at issue fail as a matter of law. As a result, Supreme Court's conclusion that Respondents' motion should be denied was correct under either rule. And while CPLR 3211(c) does permit conversion of a motion to dismiss into one for summary judgment — and thus consideration of factual evidence — such conversion requires "adequate notice to the parties." CPLR 3211(c). Of course, neither this nor another basis for considering any of Respondents' arguments on the merits existed, and Supreme Court was right in denying the motion to dismiss.

alongside the motion. The Respondents made no such showing. Though Respondents styled their motion as one arguing the Petitioners "fail[ed] to state a cause of action," Respondents' arguments concerning their authority to deny Petitioners' certifications were inherently factual. (R. 232–33, 235–41). For example, Respondents failed to argue that the Petition had not adequately pled Petitioners' claim that the Respondents had acted outside of the constitutional and statutory scope of the certification authority; instead, Respondents adduced factual evidence, including an affirmation from Chief Administrative Judge Marks, to support an argument that the Respondents had not, in fact, acted outside of that authority. *See, e.g.*, *id.* at 238–40. Rather than demonstrate that Petitioners had not alleged facts sufficient to prove the elements of these causes of action, Respondents challenged the veracity of the facts alleged and defended the substance of the certification decisions. Such arguments are not properly made within a motion to dismiss — again, regardless of whether the motion is brought pursuant to CPLR 3211 or CLPR 7404(f) — and Supreme Court thus properly denied Respondents' motion on that basis.

IV. SUPREME COURT CORRECTLY DETERMINED THAT RESPONDENTS WAIVED THEIR JURISDICTIONAL DEFENSE

On November 6, 2020, Respondents were served with the November 5, 2020 Order to Show Cause by email—one of the methods of service contemplated in the Order to Show Cause. Respondents then appeared in the action below and

vigorously litigated this case for weeks, including by filing a timely motion to dismiss that failed to reserve any defense based on inadequate service of process or lack of personal jurisdiction. Respondents even admitted on the record to having been served before raising an untimely jurisdictional objection. Supreme Court thus properly found that Respondents had waived their personal jurisdiction objection. Respondents' contentions to the contrary are meritless.

A. Respondents Waived Any Defense Based on Lack of Personal Jurisdiction or Inadequate Service of Process

As Supreme Court found, "a defense based on inadequate service or lack of personal jurisdiction is waived when a respondent fails to raise it *in its first pleading*." (R. 14 (citing *Matter of Ballard v. HSBC Bank USA*, 6 N.Y.3d 658 (2006) and *Addesso v. Shemrob*, 70 N.Y.2d 689 (1987)); *accord McGowan v. Hoffmeister*, 15 A.D.3d 297, 792 (1st Dep't 2005); *Lauro v. Cronin*, 184 A.D.2d 837, 838 (3d Dep't 1992). A defendant also waives its personal jurisdiction defense by appearing and "participat[ing] in a lawsuit on the merits," thus "indicat[ing] an intention to submit to the court's jurisdiction over the action." *JPMorgan Chase Bank, N.A. v. Lee*, 186 A.D.3d 685, 686 (2d Dep't 2020) (quoting *Taveras v. City of New York*, 108 A.D.3d 614, 617 (2d Dep't 2013)); *accord Urena v. Nynex, Inc.*, 223 A.D.2d 442, 444 (1st Dep't 1996) ("[W]here a defendant makes an appearance without having been served and without raising the objection, 'he becomes a volunteer' and is subject to in personam jurisdiction.") (citation omitted); *McGowan v. Bellanger*,

32 A.D.2d 293, 295 (3d Dep't 1969) (participation in discovery and pre-trial matters waived jurisdictional defense).[16]

Supreme Court correctly held that Respondents waived their personal jurisdiction defense by failing to include it in their initial pleading—a CPLR 3211 motion—and by participating extensively on the merits of this litigation. (R. 14-15.) The Court's November 5, 2020 Order to Show Cause required Respondents to respond to the petition by no later than November 13, 2020. (R. 129-130.) Respondents did so by timely filing their initial motion to dismiss, to transfer venue, for a protective order, and for reconsideration, without preserving any jurisdictional objection. (R. 207-08.)

After that, no fewer than three attorneys for Respondents appeared on the record on November 18 and 19, 2020 to oppose Petitioners' application for an order to show cause why Respondents should not be held in contempt. (R. 362-444.) These proceedings took several hours over the course of two days, and were memorialized in 85 total transcript pages showcasing Respondents' unbridled litigation of this matter. (*Id.*) Respondents argued that the petition should be

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[16] Respondents contend that "[t]he method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with." App. Br. at 30 (collecting cases). This does not change the fact that a defendant may waive the defense of personal jurisdiction, even when the method of service is provided in an order to show cause. *See, e.g.*, *Gregory v. Board of Elections*, 59 N.Y.2d 668, 670 (1983).

dismissed before any further discovery was ordered (R. 373, 378, 380-82, 384-85, 386-89, 392-93, 399-400, 401, 405, 441-42), discussed the Court's power to reinstate the Petitioner Justices to their positions (R. 414-416, 423-28, 434-35), and conferred with the Court and Petitioners regarding the scope of discovery (R. 405-06, 408, 412-413, 416-17, 432-34). Rather than preserving their jurisdictional defense in those proceedings, counsel for Respondents expressly conceded that Respondents were "served on the 6th."[17] (R. 383.) It was not until 11 days after Respondents' initial pleading that they submitted their "supplemental" motion to dismiss for lack of personal jurisdiction. (R. 285.) Supreme Court thus correctly held that Respondents had waived that defense. (R. 14-15.)

Respondents incorrectly contend that Supreme Court erred in finding that Respondents' extensive participation in this litigation waived their right to contest personal jurisdiction. Respondents do not dispute that they failed to timely assert this defense in their initial pleading. Respondents also concede that they appeared in this matter in two days of proceedings at which they admitted to being "served on

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[17] Respondents also conceded that they were served by email, as the November 5, 2020 Order to Show Cause required. (R. 289 ¶ 6.) Further, as set forth in the uncontroverted affidavit of attempted service (R. 360-61), a process server attempted to serve Chief Administrative Judge Marks at 25 Beaver Street on November 6, 2020, but was advised by building security "that everyone is working home remotely and there is no one in the building to accept service of legal documents." No further service attempts were made after November 10, 2020 because Respondents appeared in this matter and contested the merits without raising any jurisdictional objection.

the 6th," though Respondents disingenuously and without citation characterize those appearances as attempts to preserve "procedural rights." App. Br. at 33.[18] Respondents instead argue that they timely raised their jurisdictional defense on November 24, 2020 when they filed their boldly titled and untimely "supplemental" motion to dismiss. (R. 285-94.) This argument must be rejected.

Respondents cite no case in which a court held that a defendant was permitted to amend their initial motion to assert a *personal jurisdiction* defense. Nor could they. When determining whether a defendant has timely asserted a personal jurisdiction defense, "[t]here is no statutory right to amend a motion that is comparable to the right to amend an answer." *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 187 (2005). Instead, Respondents claim that "[u]nder New York's 'one motion' rule … jurisdictional defenses can be raised after an initial motion to dismiss is served … so long as the objection is made before the motion is fully briefed and there is no prejudice to petitioners' ability to oppose it." App. Br. at 34. None of Respondents' authorities support that proposition or concern jurisdictional defenses.

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[18] Respondents also complain that "[t]o hold that a litigant must choose between the assertion of a jurisdictional defense, and acquiescing to improper and unprecedented discovery requests or even an order of contempt, defies common sense and is fundamentally unfair." App. Br. at 33-34. This assertion is incoherent. Respondents did not have to choose between contesting the petition on the merits—as they did—and preserving their jurisdictional defense. They simply had to timely assert that defense in their first pleading or, at a minimum, expressly reserve their rights while appearing on the record to argue the merits of Petitioners' claims. They did neither.

Respondents principally rely on *Held v. Kaufman*, 91 N.Y.2d 425 (1998), which does not address the unique waiver rules applicable to a personal jurisdiction defense. *Held* is inapposite because it found only that defendants could raise additional, non-jurisdictional grounds for dismissal: (a) in their reply papers in further support of a CPLR 3211(a) motion; (b) where "defendants' arguments could not have been submitted at an earlier juncture because of the indefiniteness of plaintiff's initial pleading." *Id.* at 430. Here, Respondents did not raise their jurisdictional defense in their reply papers. They raised it in a distinct motion, with a separate notice of motion. (R. 285.) Nothing prevented Respondents from raising this defense in their first motion. By Respondents' admission, they failed to do so only because they "had not fully investigated whether proper *in person* service of process on each of the Respondents had been made." (R. 288.)

Respondents also urge this Court to hold that they cannot have waived their jurisdictional defense "where, as here, the first motion had not been decided on the merits at the time the defense is asserted." App. Br. at 34 (citing *Rivera v. Board of Educ. of the City of N.Y.*, 82 A.D.3d 614 (1st Dep't 2011) and *Endicott v. Johnson Corp. v. Konik Indus.*, 249 A.D.2d 744 (3d Dep't 1998)).[19] This is incorrect. The Court of Appeals has unequivocally held that a defendant waives a personal

[19] Contrary to supporting Respondents' argument, *Klein v. Gutman*, 12 A.D.3d 417, 420 (2d Dep't 2004) held that a defendant could not file successive *separate and distinct* motion papers that seeks the same relief, as Respondents did here.

jurisdiction defense by failing to assert the defense in its initial CPLR 3211 motion papers *even if that motion is not decided*. *Addesso*, 70 N.Y.2d at 689; *accord Competello v. Giordano*, 51 N.Y.2d 904, 905 (1980) (defendant waived personal jurisdiction defense by making earlier CPLR 3211 motion, even though motion had been "abandon[ed]"). None of the cases Respondents cite are to the contrary.

Finally, Respondents contend that Supreme Court erred in its ruling because "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." App. Br. at 32 (quoting *Washington Mut. Bank v. Murphy*, 127 A.D.3d 1167, 1174 (2d Dep't 2015)). This is irrelevant. Supreme Court correctly held that Respondents waived their jurisdictional objection by actively participating in this case, not merely by being aware of it.

B. Attorney General Did Not Need To Be Served

Lastly, Respondents contend that service was improper because Petitioners failed to serve the Attorney General, as CPLR 2214(d) purportedly requires. App. Br. at 35-36. This argument is meritless. Petitioners were not required to serve the Attorney General because, as is clear from OCA's and Mr. Greenberg's appearances in this case, the Attorney General does not represent Respondents. *Matter of O'Brien v. Pordum*, 120 A.D.3d 993, 994 (4th Dep't 2014) (holding that "petitioner's failure to serve the Attorney General was at most a technical defect that

may be disregarded" because respondents were not represented by the Office of the Attorney General); Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2214:30, at 151–152 (If "the governmental party appears in the litigation through its own attorney, thereby evidencing that in this instance the attorney general's office is not handling the case, it would be reasonable to deem the [requirement of service on the Attorney General's office] inapplicable."). By contrast, the Attorney General represented the state bodies in the case on which Respondents rely. *De Carlo v. De Carlo*, 110 A.D.2d 806, 807 (2d Dep't 1985).[20]

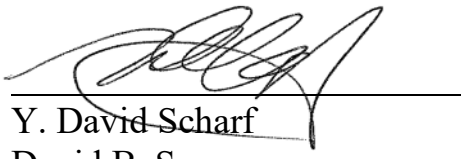
CONCLUSION

For all of the foregoing reasons, this Court should affirm the Judgment insofar as it held that Respondents' actions were arbitrary and capricious, reverse the Judgment insofar as it denied Petitioners' other causes of action, affirm the December 10 Order, and grant such other and further relief as this Court deems just and proper.

[20] Respondents claim that they were prejudiced by the lack of notice to the Office of the Attorney General because that Office could have helped Respondents respond to the petition. App. Br. at 36. This is both false and blatant gamesmanship. The Office of the Attorney General has rendered no assistance whatsoever to Respondents in this matter in the months that this case has remained pending.

Dated: New York, New York
January 22, 2021

MORRISON COHEN LLP

By: 

Y. David Scharf
David B. Saxe
Danielle C. Lesser
Collin A. Rose
909 Third Avenue
New York, New York 10022
(212) 735-8600

ARNOLD & PORTER KAYE SCHOLER LLP

James M. Catterson
250 West 55th Street
New York, NY 10019
(212) 836-8000

Attorneys for Petitioners-Plaintiffs-Respondents-Appellants

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