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To be Argued by:
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(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

SUPPLEMENTAL BRIEF FOR RESPONDENTS-DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

Page(s)

PRELIMINARY STATEMENT 1

SUPPLEMENTAL QUESTIONS PRESENTED 5

SUPPLEMENTAL STATEMENT OF FACTS 6

A. December 15 and 16, 2020 6

B. December 17-23, 2020 9

C. December 28, 2020 10

D. Supreme Court's Impromptu Status Conference Purportedly to Discuss the Pending PI Motions 11

E. The December 30 Judgment 12

ARGUMENT 15

I. SUPREME COURT'S DECEMBER 30 JUDGMENT CONTRADICTS THE PRINCIPLES GOVERNING THE CERTIFICATION PROCESS ESTABLISHED IN MARRO AND LOEHR, MISSTATES THE FACTS, AND SUBSTANTIALLY IMPEDES THE BOARD'S ABILITY TO PERFORM ITS EXCLUSIVE FUNCTION OF ASSESSING THE NEED FOR RETIRED SUPREME COURT JUSTICES 15

A. Supreme Court Failed to Apply the Correct Standard of Review for a Challenge to the Board's Denial of Certification 15

B. Supreme Court Erred by Failing to Consider Sworn Affidavits Demonstrating that the Board Conducted Individualized Reviews of the 46 Certification Applications 17

C. The Board's Denials of Certification Were Not Arbitrary and Capricious But, Rather, Rationally Tailored to Address the Budget Crisis Now Facing the Judiciary 23

1. Supreme Court Erred by Reviewing and Granting Petitioners' Arbitrary and Capricious Claim 24
2. The Board Was Not Required to Conduct an Individualized Review of the 46 Certification Applications Under Marro/Loehr 24
3. The Board Properly Considered the Costs of Certificating an Additional 46 Justices Given the Budgetary Constraints Occasioned by COVID-19 27

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Matter of Brown v. Sawyer,
85 A.D.3d 1614 (4th Dep't 2011) 20

Konigsberg v. Coughlin,
68 N.Y.2d 245 (1986) 20

Matter of Loehr v. Administrative Board of the Courts of the State of New York,
29 N.Y.3d 374 (2017) ....*passim*

Matter of Marro v. Bartlett,
46 N.Y.2d 674 (1979) ....*passim*

Matter of Molloy v. New York State Workers' Compensation Board,
146 A.D.3d 1133 (3d Dep't 2017) 20

Matter of Office Building Associates, LLC v. Empire Zone Designation Board,
95 A.D.3d 1402 (3d Dep't 2012) 20

Ponterio v. Kaye,
25 A.D.3d 865 (3d Dep't 2006), *lv. denied,* 6 N.Y.3d 714 (2006)..............15, 24

Matter of Spence v. New York State Department of Civil Service,
156 A.D.3d 987 (3d Dep't 2017) 20

Troy Sand and Gravel Company, Inc. v. New York State Department of Transportation,
277 A.D.2d 782 (3d Dep't 2000) 20

Matter of Weissenburger v. Annucci,
155 A.D.3d 1150 (3d Dep't 2017) 20

Constituional Provisions and Statutes

N.Y. Const., Art. VI, § 25(b) 5, 16, 23, 25, 28, 29, 31

N.Y. Const., Art VI., § 30 19

N.Y. CPLR, Art. 78..20, 21

N.Y. Judiciary Law § 115 16

N.Y. Judiciary Law § 212(1), (2), 2(d) 19

PRELIMINARY STATEMENT

Respondents submit this Supplemental Brief in support of their appeal from Supreme Court's Order and Judgment, dated December 30, 2020 ("December 30 Judgment"), that annulled the Board's decision to decline the applications of four Petitioners to serve as certificated Judges for the years 2021-2022.[1]

The record before this Court reveals a pattern of result-driven proceedings and decisions in the court below. Time and again, Supreme Court weaponized procedural rules against Respondents to deliver Petitioners whatever they wanted, whenever they wanted it. For example:

- When Petitioners moved for discovery, including unprecedented depositions of the Chief Judge and Chief Administrative Judge, Supreme Court gave it to them, on an *ex parte* basis.

- When Respondents' objected, Supreme Court commenced contempt proceedings, again on an *ex parte* basis.

- When Respondents' promptly moved for a protective order, Supreme Court held that the motion was untimely.

- When Respondents moved to dismiss for failure to state a cause of action, Supreme Court refused to entertain the motion, ruling that they cited the wrong CPLR provision, when, in fact, they cited the right one.

- When Respondents moved to dismiss for lack of personal jurisdiction, Supreme Court ruled that they waived the defense, when they clearly did no such thing.

[1] For the Court's convenience, this Supplemental Brief employs the same defined terms that are used in Respondent's Opening Brief. *See* Brief for Respondents-Defendants-Appellants ("Respondents' Opening Brief" or "Resp. Opening Br.").

- When Respondents moved to change venue to Albany County, Supreme Court found that the geographic proximity of Supreme Court, this Court and the Court of Appeals rendered such forums biased.

In the face of such rulings, and others similarly meritless, this Court issued six interim orders to maintain the *status quo* and allow Respondents' appeals to be heard, without ongoing interference by Supreme Court. Three of these interim orders stayed discovery;[2] two vacated a temporary restraining order ("TRO");[3] and one denied Petitioners' motion to vacate an automatic stay.[4]

The December 30 Judgment on appeal is the culmination — indeed the quintessential example — of Supreme Court's use of procedural legerdemain to stack the deck in Petitioners' favor. In holding that the Board's denials of certification were arbitrary and capricious, Supreme Court faulted Respondents for allegedly failing to submit any evidence explaining the Board's determination except

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[2] *Matter of Gesmer v. Admin. Bd.,* Appeal No. 53245 (3d Dep't Dec. 22, 2020) (decision & order staying discovery, pending determination of Respondents' appeal from December 10 Order); *Matter of Gesmer v. Admin. Bd.,* Appeal No. 53245 (3d Dep't Dec. 16, 2020) (order to show cause signed by Hon. Michael A. Lynch staying discovery, pending hearing and determination of Respondents' motion to appeal December 10 Order by a full panel of the Court); *Matter of Gesmer v. Admin. Bd.,* Appeal No. 53245 (3d Dep't Nov. 27, 2020) (decision & order staying Supreme Court's orders for expedited discovery and related contempt proceedings).

[3] *Matter of Gesmer v. Admin. Bd.,* Appeal No. 53245 (3d Dep't Dec. 28, 2020) (decision & order vacating TRO issued on December 18, 2020); *Matter of Gesmer v. Admin. Bd.,* Appeal No. 53245 (3d Dep't Dec. 23, 2020) (order to show cause signed by Hon. Michael A. Lynch that vacated TRO issued on December 18, 2020, pending determination and hearing of Respondents' motion to appeal the December 18 order by a full panel of the Court).

[4] *Matter of Gesmer v. Admin. Bd.,* Appeal Nos. 53245, 532590 (3d Dep't Jan. 8, 2021) (decision & order denying Respondents' motion to vacate automatic stay of December 30 Judgment).

for a two-sentence entry in the minutes of its September 22, 2020 meeting. Then, applying a supposed rule of law that applicants for certification are entitled to an individualized review of their applications (a contextual review that turns only on their personal characteristics), Supreme Court concluded that the Board failed to provide such review and, instead, impermissibly considered the severe fiscal constraints on the Judicial branch of government occasioned by COVID-19.

To achieve this predetermined result, Supreme Court truncated the record to disregard inconvenient facts. Although no party requested it do so, Supreme Court refused to consider the papers submitted by the parties over the preceding two weeks, which included an affidavit from Chief Administrative Judge Marks averring that, as part of the certification process, the Board reviewed the judicial records, qualifications, recommendations, complaints, disciplinary record, and mental and physical capability of each candidate — the review that Supreme Court said did not occur. So, too, Supreme Court turned a blind eye to other affidavits from Judge Marks that provided a first-hand account of the Board's decision-making process. Under settled law, Supreme Court was obliged to consider these affidavits in order to learn the rationale for the Board's challenged action and undertake an intelligent review of it.

Further, Supreme Court violated the principles governing the certification process established by the Court of Appeals in *Marro* and *Loehr* and applied by this

Court in *Pontiero.* As discussed in Respondents' Opening Brief, the Board's authority to make certification decisions is exceedingly broad and its discretion is "very nearly unfettered" and "largely unreviewable." Morever, contrary to Supreme Court's assertions, *Loehr* held that the Board need not conduct applicant-by-applicant determinations when, as here, certification decisions are made in light of systemic budgetary and personnel issues.

Under *Marro/Loehr/Pontiero,* the Board's determination was eminently proper. The Board decided not to certificate Petitioners and other Justices because it believed that the cost savings achieved in this fashion were the best means, relative to other options (including laying off up to 324 non-judicial staff), to be able to continue to provide justice services throughout the state. The Board did certificate a small number of Justices, reflecting its policy judgment that, despite dire budgetary constraints, their service as certificated Justices was vital. That policy determination — not to certificate most Justices to preserve the jobs of non-judicial employees — lies within the Board's "very nearly unfettered discretion" and should not be disturbed here.

In the final analysis, Supreme Court encroached substantially on the Board's discretion in certification decisions. It undermined the Board's ability to formulate appointment policies that reflect broad consideration of the needs of the entire court system and instead imposed a simplistic, uninformed conception of the necessity for

additional Judges. And, it arrogated to itself the policy judgment vested with the Board by constitution and statute. While no one can doubt the utility of additional qualified Judges, it was for the Board, not Supreme Court, to weigh the millions of dollars such Judges cost against the concomitant need for the hundreds of nonjudicial employees whose loss would have a devastating impact on the courts.

Accordingly, this Court must restore the constitutional and statutory order for certification decisions articulated in *Marro/Loehr/Pontiero,* by reversing the December 30 Judgment and dismissing the Petition/Complaint.

SUPPLEMENTAL QUESTIONS PRESENTED

1. In determining that the services of an additional 46 certificated Justices were not "necessary," within the meaning of N.Y. Const., Art. VI, § 25(b), given the severe budgetary constraints occasioned by COVID-19, did the Board act within its constitutional and statutory power, and in a manner consistent with the principles articulated by the Court of Appeals in *Marro* and *Loehr*?

2. Did Supreme Court err by refusing to consider affidavits sworn by Chief Administrative Judge Lawrence K. Marks that provided a first-hand account of the Board's challenged determination and the rationale therefor, where the Board was not required to conduct an administrative hearing and the question presented in this case is not one of substantial evidence?

3. Did Supreme Court err by holding that the Board was required to, and did not, conduct an "individualized" and nonobjective assessment of each of the 46 certification applications that it denied, without regard to the severe fiscal constraints occasioned by COVID 19?

4. Did Supreme Court err by holding that the Board impermissibly applied "*ad hoc* criteria" in denying certification to 46 applicants, by taking into consideration the severe budgetary constraints occasioned by COVID-19?

5. Did Supreme Court impermissibly substitute its judgment for that of the Board, by opining that certificating additional retired Justices was required to address the growing backlog of cases occurring in courthouses across the state?

SUPPLEMENTAL STATEMENT OF FACTS

This statement of facts supplements the account in Respondents' Opening Brief, by summarizing the chaotic series of events during a two-week span, between December 15 and December 30, 2020, that culminated in Supreme Court's December 30 Judgment, which is the subject of the instant appeal.

A. December 15 and 16, 2020

On December 15, 2020, Respondents moved for permission to appeal and a stay of Supreme Court's December 10 Order, which denied Respondents' pre-answer motion to dismiss and ordered expedited discovery. (R. 26-27; Doc. No. 4.) The next day, at 10:26 a.m., the Chief Motion Attorney for this Court advised the

parties that Justice Michael A. Lynch was available to hold a virtual conference at 2:00 p.m. to hear Respondents' motion. (Supplemental Record on Appeal ("SR.") 18-20.) Counsel for both parties immediately confirmed their availability for the 2:00 p.m. conference. (SR. 18-20.) At 12:02 p.m., however, another attorney for Petitioners sent an e-mail to Respondents stating that at 2:00 p.m. (when the parties were scheduled to appear before Justice Lynch) Petitioners would be presenting to Supreme Court, in person, a motion for a TRO and preliminary injunction ("PI"). (R. 689-741; SR. 22-23.)

In response to the email, Respondents immediately alerted this Court to Petitioners' gamesmanship — their attempt to bring an application in Suffolk County while a hearing in this Court was proceeding — and sent an e-mail to Supreme Court apprising it of the scheduling conflict and requesting an adjournment of Petitioners' TRO/PI application. (SR. 21-22.) Despite Respondents' request, Supreme Court permitted Petitioners' counsel to appear before it and present, on an *ex parte* basis, a proposed order to show cause for a TRO and PI. (R. 1186.) No transcript or record exists of what Petitioners' counsel said to Supreme Court, if anything, during that appearance. However, the parties received a "Court Notice" from Supreme Court's law clerk stating that a hearing on the TRO/PI application was adjourned, "pending the result of this afternoon's hearing in the Appellate

Division, Third Department on Respondents'—Defendants' pending application in that Court." (SR. 1186.)

Meanwhile, at 2:00 p.m., Justice Lynch heard oral argument on Respondents' motion for permission to appeal and a stay. (SR. 18.) Shortly thereafter, Justice Lynch signed an order to show cause making Respondents' motion returnable on December 21, 2020 and staying all discovery, pending a hearing and determination by a full panel of this Court. (R. 1195-97; SR 25-27.)

Later that evening, five days after entry of the December 10 decision denying Respondents' motion to dismiss, Respondents filed a Verified Answer to the Petition/Complaint, which was accompanied by the relevant portion of the minutes of the Board's September 22, 2020 determination denying certification to 46 of 49 applicants, and a certification by counsel that the redacted portions of the minutes had nothing to do with the challenged certification determination. (R. 77-126.) Respondents' Answer also attached and incorporated by reference an affidavit from Judge Marks that provided a first-hand account of the Board's determination and the rationale therefor, a memorandum from Chief Administrative Judge Marks to Administrative Judges memorializing the Board's decision, and the Financial Plan prepared by the Governor for the relevant time-period (both of which documents had been previously supplied to Supreme Court). (R. 104-125.)

B. <u>December 17-23, 2020</u>

On December 17, 2020, in a separate lawsuit challenging the Board's determination, entitled *Supreme Court Justices Association of the City of New York, et al. v. Administrative Bd., et al.*, Index No. 618314/2020 (hereinafter, "*SCJ Association*"), which was also brought in Supreme Court, Suffolk County, before the same Justice hearing the present case (Baisley, Jr., J.), the petitioners moved for a TRO and PI against Respondents. The *SCJ Association* petitioners also sought to consolidate that case, with the present case (hereinafter, *"Gesmer*"). (SR. 34-36; *SCJ Association*, Doc. Nos. 66, 67.) Supreme Court, in turn, advised the parties in both cases that it would entertain argument on the TRO/PI applications the next day.

On December 18, 2020, following oral argument, Supreme Court signed orders to show cause in *SCJ Association* and *Gesmer* granting TROs against Respondents and setting the same briefing schedules and return date (December 29, 2020) for both PI motions. (SR. 96-97; *SCJ Association,* Doc. No. 71.) The TROs in both cases required "Respondents to allow Petitioners and their staffs to continue to serve as Supreme Court Justices and remain in office pending the hearing of the motion or further order of the Court." *Id.*

Respondents immediately moved in this Court for permission to appeal and a stay of the TROs, or to vacate them. (SR. 98-109.) On December 23, 2020, Justice Lynch signed orders to show cause that made Respondents' motions returnable on

December 28, 2020 and vacated the TROs, pending a hearing and determination by a full panel of this Court. (SR. 110.1-110.3.).

C. **December 28, 2020**

On December 28, 2020, this Court vacated the TROs in *Gesmer* and *SCJ Association,* pending Supreme Court's determination of the PI motions that were returnable the following day. (SR. 203-04.)

Also on December 28, Respondents filed their opposition papers to the pending PI motions in Supreme Court. These submissions included an affidavit from Judge Marks (the third he submitted in *Gesmer*), confirming that, in resolving the applications for certification, the Board had, contrary to Petitioners' speculation, reviewed individual information relating to each of the 49 applicants for certification. (SR. 166-76.) Judge Marks' affidavit further recounted the adverse impact that a decision granting Petitioners' injunctive relief would have on statewide court operations. (SR. 172-76.)

The same day, the petitioners in *SCJ Association* sent a letter to Supreme Court, arguing that Respondents made a significant concession regarding the "procedural posture" of that case in a prior submission to this Court in the *Gesmer* case. (SR. 205.) Specifically, the petitioners quoted from an affirmation of the Counsel to the Office of Court Administration stating that, "at this juncture, the Petition has now been answered, and Supreme Court is free to make a determination

immediately on the legal validity and merits of the claims in both matters." (SR. 220.) This statement, according to the *SCJ Association* petitioners, made in the context of the *Gesmer* case, amounted to an admission that *SCJ Association* was "ripe for adjudication." (SR. 205.)

D. Supreme Court's Impromptu Status Conference Purportedly to Discuss the Pending PI Motions

On December 29, 2020, Supreme Court informed the parties in *Gesmer* and *SCJ Association* that oral argument would not be heard on the PI motions, but that a "status conference" would be held in both cases, "on the record," later that afternoon. (SR. 222-25.) At the status conference, Supreme Court referenced the letter submitted by the *SCJ Association* petitioners the day before and repeatedly sought to extract a concession from Respondents that they were waiting for a decision from Supreme Court on the merits in both *SCJ Association* and *Gesmer.* (SR. 230-32, 235, 237-39.) In response, Respondents stated (at least twice) that they agreed to nothing, conceded nothing, and stipulated to nothing. (SR. 233, 238, 240.) Respondents urged Supreme Court to hold off making a decision and not "jam" this Court with yet another ruling requiring appeal, given that this Court would soon be hearing, on an expedited basis, Respondents' appeal from the December 10 Order in *Gesmer* that would resolve the underlying issues of law in the matter, and that this Court had already issued interim orders staying discovery and vacating TROs previously issued by Supreme Court. (SR. 232, 234-35, 238.)

E. **The December 30 Judgment**

The very next day, December 30, 2020, Supreme Court ignored the pending PI motion, and, without having ever heard oral argument on the merits, issued a final Order and Judgment in *Gesmer.* (SR. 9-14.) Specifically, Supreme Court (1) granted Petitioners' second cause of action in the Petition/Complaint, annulling as arbitrary and capricious the Board's determination not to certificate 46 of 49 applicants; (2) declared Petitioners were entitled to withdraw, without penalty, any previously filed application to receive pension and health care benefits in connection with their retirement as Supreme Court Justices; and (3) declined to address Petitioners' remaining causes of action as either unnecessary or without merit. (SR. 9, 14.)

The December 30 Judgment began by inaccurately asserting that the facts of the case were "undisputed" and that Supreme Court did not consider any papers filed over the preceding two weeks, starting from December 16, 2020, "the submission date of the Petition." (SR. 10.) As a result, Supreme Court excluded from the record the parties' submissions on the TRO and PI motions that were filed at Supreme Court's direction in its December 18, 2020 order to show cause. (SR. 10-11.) Supreme Court also entirely discounted Judge Marks' affidavits, stating that, despite his acknowledged expertise and participation in all the events at issue, he was not a member of the Board. (SR. 11.)

Having so truncated the record — and notwithstanding Judge Marks' affidavits, two of which were submitted prior to the date on which Supreme Court arbitrarily cut off the record — Supreme Court found that the only evidence presented by Respondents regarding the denials of certification was a two-sentence entry from the minutes of the Board's September 22, 2020 meeting. (SR. 11, 13.) From this incorrect factual premise, Supreme Court leapt to the conclusion that the Board did not comply with its supposed obligation "to conduct an individualized review of each Justice applying for certification to determine whether he or she is 'necessary to expedite the business of the court.'" (SR. 10-13.) Instead of an individualized consideration of the applications, Supreme Court continued, the Board made "a broad policy determination," "decided that the Constitution does not apply;" and, instead, applied "*ad hoc* criteria." Supreme Court held that such action by the Board was arbitrary and capricious. (SR. 13.)[5]

[5] On December 31, 2020, Supreme Court issued a Decision and Order in *SCJ Association*, (1) denying Respondents' pre-answer motion for a change of venue and cross-motion to dismiss; (2) granting the second cause of action in the petition annulling as arbitrary and capricious the Board's determination to deny the 46 applications for certification, for the reasons set forth in the December 30 Judgment in *Gesmer*. In reaching the merits of the petition (rather than the pending motion to dismiss on the pleadings), depriving Respondents of their right to file an answer, Supreme Court determined that the facts had been fully presented, there were no facts in dispute, and Respondents conceded that the matter was ripe for final determination. *SCJ Association*, Doc. Nos. 86, 87. As noted, Respondents made no such concession. Respondents' position throughout these proceedings has been — and remains (as is evident from Respondents' Opening Brief) — that, even accepting petitioners' allegations as true for purposes of the motions to dismiss, they failed to state a cognizable claim for relief. But Respondents never waived the right to answer, nor did they ever agree to a resolution of either case on a truncated record that ignored Respondents' submissions.

Additionally, citing with approval materials submitted by Petitioners, Supreme Court volunteered its opinion that the state needed the services of the Petitioner Justices as well as other additional experienced justices to address "the growing backlog of cases occurring in courthouses across the state." (SR. 13.) Supreme Court also took a personal swipe at Respondents, likening their legal position to that of "the divine right of kings and papal infallibility." (SR. 12.)

On January 4, 2021, Respondents filed a Notice of Appeal from the December 30 Judgment, and moved this Court to consolidate this appeal with Respondents' earlier appeal from Supreme Court's December 10 Order. By decision and order dated January 9, 2020, this Court consolidated the two appeals and authorized Respondents to file this supplemental brief and an accompanying supplemental record on appeal.

ARGUMENT

I. SUPREME COURT'S DECEMBER 30 JUDGMENT CONTRADICTS THE PRINCIPLES GOVERNING THE CERTIFICATION PROCESS ESTABLISHED IN *MARRO* AND *LOEHR,* MISSTATES THE FACTS, AND SUBSTANTIALLY IMPEDES THE BOARD'S ABILITY TO PERFORM ITS EXCLUSIVE FUNCTION OF ASSESSING THE NEED FOR RETIRED SUPREME COURT JUSTICES

The December 30 Judgment is wrong on the law, wrong on the facts and result oriented in its blatant attempt to find a way to rule for Petitioners. Supreme Court ignored the principles governing the certification process that were established in *Marro* and *Loehr.* It misstated the facts by creating a purposefully truncated record. And, by arrogating to itself power reposed in the Board, Supreme Court improperly substituted its judgment for the "collective wisdom of a carefully selected, high level certifying authority endowed with peculiar experience and expertise," during the worst budget crisis in state history. *Matter of Marro v. Bartlett,* 46 N.Y.2d 674, 682 (1979).

A. Supreme Court Failed to Apply the Correct Standard of Review for a Challenge to the Board's Denial of Certification

In its December 30 Judgment, Supreme Court ignored the broad principles of certification articulated by the Court of Appeals in *Marro* and *Loehr,* and applied by this Court in *Ponterio v. Kaye*, 25 A.D.3d 865 (3d Dep't 2006), *lv. denied,* 6 N.Y.3d 714 (2006). *Marro/Loehr* holds that the Board has the "broadest authority" and "very nearly unfettered discretion in determining whether to grant applications of former Judges for certification" under N.Y. Const., Art. VI, § 25(b) and Judiciary

Law § 115. *Marro,* 46 N.Y.2d at 681; *Loehr,* 29 N.Y.3d 374,382 (noting that the Board has "broad, largely unreviewable discretion").[6] *Marro/Loehr* further holds that an exercise of the Board's discretion denying certification is "<u>not subject to judicial review</u> in the absence of claims of substance that there [has] been [a] violation of statutory proscription or promotion of a constitutionally impermissible purpose, unrelated to the certification process." *Marro,* 46 N.Y.2d at 681-82 (emphasis added); *Loehr,* 29 N.Y.3d at 382 (same).

Applying this standard of review to the case at hand compels the conclusion that the Board's denial of the 46 certification applications comported fully with the principles established in *Marro/Loehr.* Respondents' Opening Brief sets forth in detail the factual and legal basis for the Board's determination that the services of the 46 Justices denied certification were not necessary to expedite the business of the court. (Resp. Opening Br. at 6-9, 18-19.)

The Constitution and Legislature entrusted the Board with the responsibility for this difficult decision, based in part on the monetary and non-monetary costs of certificating 46 additional Justices. Further, Supreme Court did not find that the Board's action violated a statutory proscription or promotion of a constitutionally

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[6] Thus, there was no basis for Supreme Court's unfortunate characterization of Respondents' arguments as being similar to "such alien concepts as the divine right of kinds and papal infallibility." (SR. 12.) Contrary to Supreme Court's suggestion, it was the Court of Appeals — not Respondents — that established the principle that the Board has "very nearly unfettered discretion" in making certification decisions.

impermissible purpose, unrelated to the certification process. Accordingly, under *Marro/Loehr,* the Board's exercise of discretion is not subject to judicial review.

B. Supreme Court Erred by Failing to Consider Sworn Affidavits Demonstrating that the Board Conducted Individualized Reviews of the 46 Certification Applications

The linchpin of the December 30 Judgment is Supreme Court's erroneous assertion (thrice repeated) that a two-sentence entry in the minutes of the Board's September 22, 2020 meeting supplied the only evidence describing the denials of certification at issue.[7] Only by artificially truncating the record — and disregarding Judge Marks' explanatory affidavits — was Supreme Court able to conclude that the Board did not comply with its supposed obligation "to conduct an individualized review of each Justice applying for certification to determine whether he or she is 'necessary to expedite the business of the court.'" (SR. 10-13.)

But, even assuming *arguendo* that individualized consideration of certification applications of the type suggested by Supreme Court (i.e., a contextual review of the Justices' unique characteristics) is invariably required even in the face of an extraordinary budget or other crisis (which it is not), Supreme Court ignored

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[7] *See* SR. 11 ("the only document filed by the Respondents as constituting the certified transcript of the Board's proceedings on September 22, 2020, regarding applications for certification is the two-page "Minutes of the Meeting of the Administrative Board, *Revised*"), 11 ("This single entry in the minutes is the entirety of the relevant record presented by Respondents . . . ."), 13 ("that is precisely what was done by the Board at the September 22, 2020 meeting, as reflected in the only record of that meeting").

sworn evidence demonstrating that that is precisely what occurred in this case. That is, the Board individually reviewed all 49 certification applications that were submitted, granting three and denying 46.[8] That this occurred, even absent the numerous affidavits, is evident from the fact that some applications were granted and some were denied, making it crystal clear that individual distinctions were drawn between the applicants. Thus, Supreme Court's description of the record was not only wrong and incomplete, but also betrays its agenda-driven approach in this case.

Indeed, notwithstanding that the Petitioner Justices had no right to any statement of reasons why their applications were denied, *Marro,* 46 N.Y.2d at 674, Respondents presented to Supreme Court a detailed description of the Board's decision-making process, through three affidavits sworn by Judge Marks:

- An affidavit, with attachments, dated November 13, 2020 ("the November 13 Affidavit"), which Respondents submitted to provide background for their motion to dismiss the Petition/Complaint (R. 261-78);
- An affidavit, with attachments, dated December 16, 2020 ("the December 16 Affidavit"), which Respondents submitted with their Answer and which is incorporated by reference in the Answer (R. 77-125);
- An affidavit, dated December 28, 2020 ("the December 28 Affidavit"), which Respondents submitted in opposition to Petitioners' motion for a temporary restraining order and preliminary injunction (SR. 166-98).

[8] Significantly, Respondents' Answer repeatedly denied Petitioners' allegations that the certification applications were not given individualized consideration. (R. 77-100 ¶¶ 4, 45, 47, 89.) Thus, Supreme Court incorrectly suggested that the "facts" related to the certification process stated in the Petition/Complaint (which were based on Petitioners' speculation) were undisputed.

As even a cursory review of the affidavits reveal, Judge Marks was in the proverbial "room where it happened" and an appropriate party to explain the basis for the determination. In fact, Judge Marks' presence and contribution at the meeting was vital, given his role as chief administrator of the courts, which requires him to advise and consult with the Board and issue orders implementing its determinations; and given his unique expertise and knowledge of the Judiciary's budget and the financial impact of the Governor's request that it be drastically cut.[9]

In his affidavits, Judge Marks provided an eye-witness account of the meeting at Court of Appeals Hall on September 22, 2020, when the Board denied 46 of the 49 certification applications. (SR. 169-70.) Yet Supreme Court ignored each of them, and everything explained in them. Although acknowledging the existence of the December 16 Affidavit, Supreme Court rejected its contents because Judge Marks (a named Respondent) was "not a member of the Board and thus is unable to vote or to otherwise participate in the Board's exercise of its 'collective wisdom.'" (SR. 11.) But this excuse is nonsensical and contrary to law.

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[9] *See* N.Y. Const., art VI., § 30 ("[t]he chief administrator of the courts shall exercise any such power delegated to him or her with the advice and consent of the administrative board of the courts"); Judiciary Law §§ 212(1) ("The chief administrator of the courts, on behalf of the chief judge, shall supervise the administration and operation of the unified court system."), 212(2) ("chief administrator shall also . . . [a]dopt rules and orders regulating practice in the courts . . . with the advice and consent of the administrative board of the courts . . . ."), 212(2)(d) ("The chief administrator shall . . . [a]dopt rules and orders regulating practice in the courts as authorized by statute with the advice and consent of the administrative board of the courts . . . .").

As Supreme Court concedes, the Board was not required to conduct an administrative hearing and the question presented in this case is not one of substantial evidence. (SR. 13.) Under settled law, therefore, Supreme Court was obliged to consider Judge Marks' affidavits to learn the rationale for the Board's challenged action and undertake an intelligent review of it. *See, e.g., Matter of Weissenburger v. Annucci,* 155 A.D.3d 1150, 1152 (3d Dep't 2017) ("Contrary to petitioner's contention, the affidavit can be considered despite the fact that it was not submitted during the administrative process, inasmuch as there was no administrative hearing and it was based on firsthand knowledge of the decision-making process regarding petitioner's application.") (citations omitted).[10]

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[10] *See also, e.g., Konigsberg v. Coughlin,* 68 N.Y.2d 245, 248-49 (1986) (affidavit submitted by respondents considered and relied on in dismissing Article 78 proceeding seeking to annul agency determination); *Matter of Spence v New York State Dept. of Civ. Serv.,* 156 A.D.3d 987, 988 (3d Dep't 2017) ("The record includes . . . several explanatory affidavits[, which] are properly before us, and they assist in creating a record that is sufficiently developed to provide an adequate basis upon which to review the [administrative] decision [at issue]") (internal citations and quotations marks omitted); *Matter of Molloy v. New York State Workers' Compensation Bd.,* 146 A.D.3d 1133, 1134 (3d Dep't 2017) (court may consider affidavit to permit it to "both discern the rationale for the administrative action taken and undertake intelligent appellate review thereof," because "furnished by individuals having firsthand knowledge of the decision-making process") (internal quotation marks and citations omitted); *Troy Sand and Gravel Co., Inc. v. New York State Dep't of Transportation,* 277 A.D.2d 782, 785-86 (3d Dep't 2000) (affidavits submitted by respondents considered and relied on in dismissing Article 78 proceeding seeking to annul agency determination); *Matter of Office Bldg. Assoc., LLC v. Empire Zone Designation Bd.,* 95 A.D.3d 1402, 1405 (3d Dep't 2012) ("no administrative hearing was conducted here and, hence, Supreme Court could (and this Court may) properly consider . . . affidavit — despite the fact that it was not submitted during the administrative process" (citations omitted); *Matter of Brown v. Sawyer,* 85 A.D.3d 1614, 1615-1616 (4th Dep't 2011) (court may consider affidavit submitted in opposition to petitioners' CPLR Article 78 petition despite the fact that it was not submitted during the administrative process because there was no administrative hearing and the issue here is not one of substantial evidence but, rather, the issue was whether the agency's determination had a rational basis) (citations omitted).

All the more is this so, given that Judge Marks' affidavits put the lie to any notion that the Board did not conduct an individualized review of all 49 certification applications. (SR. at 10-13.) The December 28 Affidavit, for example, averred:

> For the calendar year that will begin on January 1, 2021, 49 retiring justices of the Supreme Court applied to the Administrative Board for certification to serve on Supreme Court as retired justices. The Board determined to certificate only three of these candidates. As part of this process, the Board conducted an individual review of the judicial records, qualifications, recommendations, complaints about, disciplinary record, and mental and physical capability of each candidate. Such materials were organized into binders, divided by candidate, and circulated to the Board, who reviewed them prior to voting on certification.

(SR. 169 (emphasis added).)[11]

Supreme Court professed to be unaware of this information, claiming it did not "consider any papers filed by the parties after December 16, 2020, the submission date of the Petition." (SR. 10.) But this assertion strains credulity — and does not excuse the failure to consider the evidence squarely before it. Respondents' previous submissions and the Answer squarely indicated that an

[11] Notwithstanding the assertions in Respondents' papers on the motion to dismiss, the denials in Respondents' Answer, this statement by Judge Marks, and the other information that he provided in his three affidavits regarding the Board's decision-making process, Supreme Court incorrectly asserted in the December 30 Judgment that Respondents "admit . . . the Board failed to follow the procedures of the constitutional certification process by making a broad policy determination and not individual choices this year." (SR. 13.) Respondents made no such admission in the court below.

individual review took place — this is how three Judges were selected for certification.

In addition, Respondents filed the December 28 Affidavit on the return date established by Supreme Court, December 29, 2020, for the then-pending PI motion. (SR. 97.) The very next day, December 30, 2020, instead of deciding the PI motion, which this Court and the parties anticipated,[12] Supreme Court granted judgment to Petitioners and volunteered that, in so doing, it did not consider any papers submitted after December 16 (including the December 28 Affidavit). (SR. 10.) Supreme Court took this gratuitous step, notwithstanding that neither Petitioners nor Respondents requested that it truncate the record.

By any measure, it was improper for Supreme Court to ignore inconvenient facts provided by Respondents as a means of predicating the December 30 Judgment on a false narrative that the minutes of the September 22, 2020 Board meeting was "the only record of that meeting." (SR. 13.) Contrary to Supreme Court's assertions, there was abundant evidence explaining the Board's determination — not a lack of it — both before and after December 16.

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[12] Respondents moved for permission to appeal to this Court the December 18, 2020 order to show cause signed by Supreme Court that established the return date and also issued a TRO against Respondents. By Decision and Order dated December 28, 2020, this Court vacated the TRO, pending the expected determination of Petitioners' PI motion. (SR. 203-04.)

Even based solely on the minutes of the September 22 meeting and Judge Marks' December 16 Affidavit incorporated in Respondents' Answer, it is clear the Board undertook an individual review of all 49 certification applications and did certificate some Judges — albeit fewer than Petitioners would like. In fact, the Board certificated three applicants who had specialized assignments — and, in so doing, considered their qualifications and balanced them against the budgetary constraints occasioned by COVID-19. (R. 101, 107-10, 124.) The standard of necessity was informed by the severe budgetary crisis, and the concomitant need to limit certifications, meaning that it was more exacting than has been the case in years past. The three Judges certificated by the Board met that standard for reasons unique to their duties and responsibilities. *See* David Brand, *Here are the 46 judges being terminated by the New York court system*, Queens Daily Eagle, Oct. 5, 2020 (describing additional assignments performed by the three certificated Justices), https://queenseagle.com/all/here-are-the-46-judges-being-terminated-by-the-new-york-court-system. The others did not. That most were not approved does not mean that their applications were not individually considered.

C. The Board's Denials of Certification Were Not Arbitrary and Capricious But, Rather, Rationally Tailored to Address the Budget Crisis Now Facing the Judiciary

In any event, even though the Board reviewed all 46 certification applications, Supreme Court was mistaken that N.Y. Const., Art. VI, § 25(b) requires an

application-by-application assessment, without regard to the budgetary crisis facing the Judiciary. (SR. 12-13.)

1. Supreme Court Erred by Reviewing and Granting Petitioners' Arbitrary and Capricious Claim

As a threshold matter, Supreme Court should not have entertained, let alone granted, Petitioners' second cause of action, which alleged that the Board's denials of certification were arbitrary and capricious. (R. 59-62.) Such a claim has no place in a proceeding of this nature. As discussed above, the *Marro*/*Loehr*/*Ponterio* trilogy establish that certification decisions lie within the nearly unfettered discretion of the Board and are not subject to judicial review absent a viable claim (not present here) that the Board violated statutory proscription or promoted a constitutionally impermissible purpose, unrelated to the certification process. *Marro,* 46 N.Y.2d 674, 681-82 (1979); *Loehr,* 29 N.Y.3d at 382; *Ponterio,* 25 A.D.3d at 868. Supreme Court does not even acknowledge that standard of review, let alone apply it. Thus, because Petitioners raised no colorable claim that the Board's denial of their applications violates a constitutional or statutory imperative unrelated to the certification process, judicial review of the determination was not appropriate.

2. The Board Was Not Required to Conduct an Individualized Review of the 46 Certification Applications Under *Marro/Loehr*

Turning to the merits, Supreme Court incorrectly held that *Marro/Loehr* requires an individualized and nonobjective assessment of each certification

applicant to determine whether their continued service on the bench was necessary to expedite the business of the court." (SR. 10, 12) *Loehr* forecloses that holding, *Marro* does not support it, and, in any event, as noted, the Board conducted an individualized review of the 46 applications it denied.

In *Loehr,* the Court of Appeals upheld a prospective rule that barred from certification any retired justice who, while remaining in judicial service, would receive their public pensions (a practice commonly referred to as "double dipping"). The Board found that, owing to system-wide policy and budgetary concerns, retiring Justices covered by this rule were not "necessary to expedite the business of the court." *Loehr,* 29 N.Y.3d at 382. There, as here, the petitioning Justices argued that the Board's policy was arbitrary and capricious because it eliminated the "individualized and "nonobjective" evaluation that *Marro* purportedly envisioned would be part of an inquiry into whether a particular applicant was "necessary to expedite the business of the court," within the meaning of N.Y. Const., Art. VI, § 25(b). *See* Brief for Plaintiffs-Petitioners-Respondents at 38, 49, 55, *Matter of Loehr v. Administrative Bd.,* 29 N.Y.3d 374 (2017) (quoting *Marro,* 46 N.Y.2d at 680-81).[13] But the Court of Appeals in *Loehr* rejected that argument, holding that

[13] This brief can be accessed from the Court of Appeals' website, through its Court-PASS function, https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx, by searching the case records for *Matter of Gerald E. Loehr, et al. v. Administrative Board of the Courts of the State of New York.*

there is “no reason to curtail the Board’s power” simply because it may “chose to announce a prospective rule rather than issue . . . inscrutable applicant-by-applicant determinations.” *Loehr,* 29 N.Y.3d at 383.

Wholly unavailing is Supreme Court’s attempt to escape *Loehr’s* dispositive weight by limiting the decision to its facts relating to pensions. (SR. 11-12.) To be sure, the facts of *Loehr* involved certification applicants that sought to double-dip the system. Yet *Loehr’s* principal findings — the Board may consider the systemic costs and impact of certification decisions; the “broad, largely unreviewable discretion” of the Board as appointing authority; a “former justice has no right to be certified at all”; and the importance of the Board’s exercise of its collective probity and wisdom — arose from the Court’s analysis of the fundamental constitutional and statutory framework for certification and did not rely upon the particular facts of that or any case. These general principles are essential to any analysis of a certification determination. Yet Supreme Court ignored them, contradicting the rulings of the Court of Appeals.

Likewise misplaced is Supreme Court’s reliance on *Marro.* The language from that decision quoted by Supreme Court regarding individualized and nonobjective determinations was employed by the Court of Appeals as the starting point to highlight the lack of detail contained in the Constitution and statute on certification matters — as an indication of the correspondingly broad discretion

delegated exclusively to the Board ("the very broadest authority for the exercise of responsible judgment") in fulfilling its appointment duties. *Marro,* 46 N.Y.2d at 681. In contrast, Supreme Court employed this language to reach precisely the opposite conclusion: that the Board's determination of whether services of an otherwise competent judicial officer are "necessary" is limited to whether a specific jurist is needed in the court system and may not include assessment of any other factor or broader concern of the Board relating to court operations. (SR. 12.) In curtailing the constitutional meaning of "necessary" in this fashion, Supreme Court turned *Marro* on its head: it converted broad discretion into tight constraint and eviscerated the Board's ability to exclude applicants based on an experienced and nuanced assessment of the needs of the court system.

3. The Board Properly Considered the Costs of Certificating an Additional 46 Justices Given the Budgetary Constraints Occasioned by COVID-19

Supreme Court also erred by making the overwrought, inaccurate and pejorative assertion that "the Board decided that the Constitution does not apply and, instead, *ad hoc* criteria should control its decision." (SR. 13.) Supreme Court did not specify the "ad hoc criteria" it found problematic. It appears, though, that Supreme Court was disturbed by the fact that the Board's denials of certification were driven by the severe budgetary and fiscal constraints occasioned by COVID-19, and its misguided view that such considerations were unrelated to the criteria in

N.Y. Const., Art. VI, § 25(b) that a certificated Justice must be "necessary to expedite the business of the court." (*See* SR. 11 ["Obviously, the Board's determination was based only on 'current severe budgetary constraints occasioned by the coronavirus pandemic.'"], 13 ["The current crisis caused by the pandemic cannot be used to avoid the clear mandate of the Constitution."].) If that is the case, then Supreme Court's position is incompatible with *Loehr.*

Loehr unequivocally permits the Board to consider systemic budgetary and personnel concerns when making certification decisions. *Loehr,* 29 N.Y.3d at 378; *see also id. at* 382-83. As *Loehr* explained,

> [T]he Board concluded that the net effect of certifying pensioners — taking into account their potential future contributions as certified Justices — would be detrimental to the creation of new judgeships and thereby hamper rather than expedite the business of the courts. The Board also calculated that the cost of certifying pensioners included not only the narrow matter of annual pay, but also the impact of "double-dipping" on the courts' public prestige and other private negotiations."

Id. (emphasis added)).

Such considerations, the Court of Appeals held, are rationally related to whether certification is '"necessary to expedite the business of the court.'" *Id.* at 382 (quoting N.Y. Const., Art. VI, § 25(b)).

The Board's "largely unreviewable discretion" in making certification decisions presupposes a broad authority to assess whether and how the applicant will serve the court in light of the conditions then in effect and those anticipated during

the two-year certification period, and to measure the systemic consequences and costs of appointment from the Board's informed perspective of institutional need and based on its expertise. *See id.* ("Were the inquiry merely mechanical, the Board would need no broad, largely unreviewable discretion."). That perspective, stemming from the Board's broad administrative experience, encompasses a range of considerations extending well beyond the nonobjective qualities of an individual Judge — for example, whether the services are affordable, whether the appointment might have adverse institutional consequences outweighing its immediate benefits, whether the court system's long-term interests are served by the size and scope of the certificated judicial workforce, and similar considerations.

Loehr recognizes that the application of the "necessary to expedite the business of the court" criteria is not a mechanical inquiry — it requires judgment. *Id.* at 382 ("Whether the services of a particular Justice are 'necessary to expedite the business of the court' encompasses much more than a mechanical inquiry into the size of courts' docket divided by the number of Justices."). And the exercise of such judgment — often difficult and controversial because it is intertwined with fundamental questions relating to policy and priorities — is left to the plenary discretion of the Board. *See Loehr,* 29 N.Y.3d at 382 ("The Constitution and the Judiciary Law entrusted this determination to 'the integrity and collective wisdom of a carefully selected, high level certifying authority endowed with peculiar

experience and expertise,' . . . rather than to functionaries responsible for the court's docket or budget, for precisely that reason.") (quoting *Marro,* 46 N.Y.2d at 682).

As explained by Judge Marks in his affidavits, the Board assessed the monetary and non-monetary costs of certifying 46 additional Justices in light of the severe financial constraints imposed on the court system because of the pandemic. (*See* Resp. Opening Br. at 6-9, 18-19.) After weighing available options, the Board made the painful choice of denying the 46 certification applications, rather than lay off 324 nonjudicial employees. (R. 265, 277; SR. 169-72, 179-184.) That decision — rendered under extraordinary economic circumstances — saved the Judiciary $55 million and avoided the loss of services to the public and cascading effect on the courts that would have resulted from a workforce reduction of hundreds of non-judicial employees. (R. 107-08, 124; SR. 182-84.)

Manifestly, under *Loehr,* the Board's consideration of these costs was "rationally related to whether certification is 'necessary to expedite the business of the court.'" *Loehr,* 29 N.Y.3d at 382 (quoting N.Y. Const., Art. VI, § 25(b)). That being so, it was error for Supreme Court to second guess the Board's budgetary and fiscal analysis and seek to impose its personal view that the state needs more Judges during the pandemic. (*See* SR. 13 ["If ever there was time for additional experienced judges to address the conceded massively growing backlog of cases occurring in courthouses across the state, now is the time."].) This was a flagrant violation of the

Constitution and Judiciary Law that entrusts such judgments solely to the Board — not to a trial Judge that lacks administrative expertise and statewide perspective. *See Loehr id.* at 382 ("The Constitution and the Judiciary Law entrusted this determination to 'the integrity and collective wisdom of a carefully selected, high level certifying authority endowed with peculiar experience and expertise'") (citing and quoting *Marro*, 46 N.Y.2d at 682).

Supreme Court's reference to "the plight of these petitioners" — who are eligible for generous state pensions and can secure lucrative positions in law firms — strikes a false note. (SR. 13.) Millions have risked their lives to help others during the pandemic. We are all familiar with the selfless sacrifice by heroic medical providers, first responders, essential workers, and our court personnel. It is unfortunate Petitioners are unable to serve beyond the constitutional mandatory retirement age as they had hoped. But a "plight" addressable by Supreme Court that does not make. Nor does it relieve the Board of the obligation to address the needs of the entire court system, including the non-judicial corps, and decide how best to serve the justice needs of the public during a nationwide (indeed worldwide) pandemic.

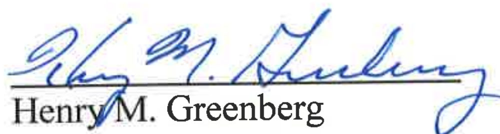
CONCLUSION

For the foregoing reasons, the December 30, 2020 order and judgment of Supreme Court, Suffolk County, should be reversed and the Petition/Complaint dismissed.

Date: January 15, 2021
Albany, New York

Respectfully submitted,

GREENBERG TRAURIG, LLP



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