To Be Argued By:
Y. David Scharf
Time Requested: 30 Minutes

Suffolk County Clerk's Index No. 616980/20
Appellate Division, Third Department Docket Nos. 532566 and 532590

Court of Appeals

STATE OF NEW YORK

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-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-Respondents.

BRIEF FOR PETITIONERS-PLAINTIFFS-APPELLANTS

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

and

HERNSTADT ATLAS PLLC
45 Main Street, Suite 1030
Brooklyn, New York 11201
212-809-2501
ed@heatlaw.com

Attorneys for Petitioners-Plaintiffs-Appellants

Of Counsel:
Y. David Scharf
Edward Hernstadt

Date Completed: September 22, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

STATUTES

OTHER AUTHORITIES

Petitioners-Plaintiffs-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 brief in support of their appeal of the Supreme Court, Appellate Division, Third Judicial Department's Opinion and Order (the "Opinion"), dated March 9, 2021, which found in favor of Respondents-Defendants-Respondents the Administrative Board of the New York State Unified Court System (the "Administrative Board"), Chief Judge Janet DiFiore, and Chief Administrative Judge Lawrence K. Marks (collectively, the "Respondents"), and reversed the judgment of Supreme Court, Suffolk County (Hon. Paul J. Baisley, Jr.) ("Supreme Court"), dated December 30, 2020 (the "Judgment"), insofar as it granted the Verified Article 78 Petition and Complaint, dated November 5, 2020 (the "Petition"), and annulled Respondents' denial of certification to the Petitioner Justices.

PRELIMINARY STATEMENT

This appeal goes to the very heart of New York constitutional and statutory law and asks a crucial question: are New York's highest judicial representatives bound to carry out the plain language of the Constitution and the governing statutes, or instead may they choose to disregard their legal obligations? For almost a year now, Respondents have maintained that, although this State's Constitution and

Judiciary Law require individualized evaluations of justices applying for certification, and although the New York court system is facing severe backlogs, and although judges are the crucial engines of our court system, Respondents were nevertheless entitled to deny en masse the certification applications of almost all the justices who applied to serve after they had turned seventy (70) years of age. Respondents still maintain this position even now, even though (1) the record conclusively demonstrates that Respondents did not carry out the required individualized assessments of the Petitioner Justices, and (2) Respondents' original proffered rationale for their actions—a budget crisis—was never shown to have existed.

In response to Respondents' defiance of their constitutional and statutory responsibilities, this Court must enforce the plain language of Section 25(b) of Article VI of the Constitution and Section 115 of the Judiciary Law by reversing the Opinion, which itself reversed Supreme Court. Supreme Court had correctly held that Respondents failed to follow this Court's requirements that the Administrative Board must individually evaluate (1) each justice's mental and physical capacity, and (2) whether each justice is "necessary to expedite the business of the court," and that Respondents had instead denied certification to the Petitioner Justices and others solely on the basis of vaguely-stated budgetary concerns. Unlike the Third Department's Opinion, Supreme Court's Judgment was based on the record, in

which Respondents failed to produce any evidence that Respondents had individually evaluated the Petitioner Justices as required by the Constitution and Judiciary Law. In fact, Respondents only produced heavily-redacted meeting minutes and affidavits that, while purporting to describe the Respondents' determinations, did little more than repeat Respondents' amorphous, mechanical budgetary calculations as justifications for their actions and demonstrated that there had been no individualized evaluations. Accordingly, this Court must take this opportunity to hold that not even New York's highest judicial representatives are free to disregard the plain language of this State's Constitution and Judiciary Law, as interpreted by this Court.

This appeal also represents a significant opportunity for this Court to affirm New York's stance against age discrimination. When the Third Department summarily dismissed Petitioners' age discrimination claims under the New York Human Rights Law, N.Y. Exec. L. §§ 290 et seq. ("NYHRL"), it failed to engage in the requisite analysis of Petitioners' claims. In fact, neither Supreme Court nor the Third Department recognized that Petitioners successfully made out a prima facie case of age discrimination based upon the undisputed facts that (1) all of the forty-six judges whose certification applications the Administrative Board disapproved were over seventy (70) years old, and (2) Respondents justified their actions on the grounds that it permitted them not to lay off other, younger, employees. When

considered in conjunction with Petitioners' clear allegations that Respondents' actions were pretextual, as well as recent amendments to the NYHRL that broaden and strengthen its protections, the failure of the Courts below to meaningfully analyze Petitioners' sixth cause of action is clear grounds for reversal.

Finally, Respondents themselves seem to recognize that they have placed themselves in an untenable position. This is evidenced by Respondent Chief Judge DiFiore's unilateral announcement on April 14, 2021 that senior justices could reapply for certification. *See* Ryan Tarinelli, *NY Court System Changes Course on Ousted Older Judges Who Were Denied Certification*, Law.com (Apr. 14, 2021), https://www.law.com/newyorklawjournal/2021/04/14/ny-court-system-changes-course-on-ousted-older-judges-who-were-denied-certification/?slreturn=20210713002810 (last visited September 20, 2021). In notifying the Petitioners of this change of direction, Respondent Chief Administrative Judge Marks pointedly noted the backlogs in Housing and Family Courts, hinting that Respondents might send senior Appellate Division (and other) justices to those courts if they chose to seek certification. Under the procedures Respondents created, Petitioners were not permitted to resume their judicial duties until June 15, 2021, two months after Respondents acknowledged that the Petitioner Justices could return to work, despite the fact that the Petitioner Justices had not been paid and were deprived of other benefits since January 1, 2021. Thus, by not permitting Petitioners to resume judicial

duties until June 15, 2021, Respondents kept Petitioners without pay or pension for close to six months.

By bringing this action on November 5, 2020, Petitioners sought to be certificated effective January 1, 2021, with all the duties, rights and privileges that would accompany certification. This appeal presents the Court with an opportunity to reject Respondents' unilateral actions which deceptively seem to give Petitioners what they wanted, but in actuality do not address the relief Petitioners requested. By this action, Petitioners sought a determination that the Petitioner Justices would be certificated effective January 1, 2021, and not a pronouncement granting certification six months later. Moreover, because Respondents' denial of the Petitioners Justices' applications for certification constituted blatant age discrimination, there is all the more reason not to permit Respondents to rely on their restoration of the Petitioner Justices on June 15, 2021 to escape a declaration that Petitioners should have been individually evaluated and certificated effective January 1, 2021.

For all of these reasons, and additional reasons expanded upon below, this Court should reverse the Third Department and (1) reinstate Supreme Court's holding that Respondents' certification determinations were arbitrary and capricious, and (2) reverse Supreme Court's dismissal of Petitioners' sixth cause of

action, which alleges that Respondents discriminated against the Petitioner Justices on the basis of age in violation of the NYHRL.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Department err in reversing Supreme Court and holding that the Administrative Board's denials of certification to the Petitioner Justices complied with Section 25(b) of Article VI of the New York State Constitution and Section 115 of the Judiciary Law?

2. Did the Third Department err in upholding Supreme Court's dismissal of the Petitioner Justices' discrimination claim?

3. Are Petitioners' claims justiciable in light of changed circumstances?

4. Can Respondents avoid review of their actions by having certificated the Petitioner Justices on June 15, 2021, even though the point of Petitioners' action was for the Petitioner Justices to be certificated as of January 1, 2021?

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to CPLR 5601(a) because the Third Department's Opinion and Order had "a dissent by at least two justices on a question of law in favor of the party taking such appeal." (R. 1211-19.)

STATEMENT 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(c) 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 Section 25(b) of Article VI 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.

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(1) 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 each justice's services are necessary to expedite the business of the Supreme Court.

The certification program plays a vital role in maintaining this State's judiciary. By allowing justices to apply for certification for three two-year terms (until they reach the age of seventy-six), the program ensures that this State's judiciary is able to retain its most senior and experienced jurists who can still meaningfully contribute to the legal system and can help mitigate the case backlogs that have grown to staggering levels in many areas in the State.

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.") 124-25.) Specifically, this memorandum revealed that the Administrative Board had decided not to certificate

forty-six of the forty-nine Supreme Court justices who had applied for certification in 2020. (*Id.*)

In the same memorandum, Chief Administrative Judge Marks justified the Administrative Board's en masse denial of certification 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 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 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 by the Administrative Board's actions. (R. 46-47.)

[1] That assertion, bedrock to the Administrative Board's denials, has been directly refuted by the State's budget director Robert Mujica, who stated that "[T]here was no directive [at] the judiciary on what they had or were required 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 visited September 20, 2021).

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 claims that she 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 Court, Suffolk County or appeared, despite receiving advance 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 a 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 with 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 this action, 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 that the Petitioner Justices had "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 made by the Governor or his representatives. (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.) After reviewing the papers, Supreme Court signed Petitioners' order to show cause (the "November 5 Order"), which (1) set the return date of the Petition on December 7, 2020; (2) granted Petitioners their requested expedited discovery; and (3) required 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 a copy of the signed order to show cause and the papers filed in support. (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 Refuse Discovery

After the commencement of this action and receiving 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, explaining why venue was proper in Suffolk County and countering Respondents' suggestion, included in their demand for a change of venue, that Albany County had a 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. (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 Petitioners' entirely appropriate

question as to when and where the individual Respondents would like to be deposed. (R. 587.)

E. Respondents Move To Dismiss The Petition

Later that day, still on November 13, 2020, Respondents responded to the Petition. Respondents 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 claimed rationale for the Administrative Board's actions that he had asserted 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 this affidavit, to the extent he described the Administrative Board's September 22, 2020 meeting, Chief Administrative Judge Marks did not suggest that any individualized evaluations were performed by the Administrative Board with respect to the capabilities or necessity of the justices who had applied for certification.

F. Petitioners Move To Hold Respondents In Contempt

In response to Respondents' refusal to engage in discovery and Respondents' request for 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 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 the Third Department the next day, on November 24, 2020. (R. 550.) On November 27, 2020, the Third Department 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

On December 10, 2020, Supreme Court denied all of Respondents' cross-motions filed on November 13, 2020. (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 create an 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.*)

The Respondents then moved before the Third Department, seeking permission to appeal the December 10 Order and to stay all the proceedings below. On December 22, 2020, the Third Department granted Respondents' motion for leave to appeal the December 10 Order and set a briefing schedule. (R. 16.)

I. Respondents Answer The Petition

On December 16, 2020, 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 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 also claimed that the one Appellate Division justice who had not been denied certification was "recertificated based upon her own merit." (R. 85.)

In their Answer, 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 that the sole reason for the Board's denial of certification to 46 of the 49 judges applying for certification was the "current severe budgetary constraints occasioned by the coronavirus pandemic." (R. 101-03.) Moreover, Respondents 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.) Once again, to the extent he described the Administrative Board's September 22, 2020 meeting in this affidavit, Chief Administrative Judge Marks did not detail or describe any individualized evaluations or reviews of those justices who had applied for certification. This omission was notable because Petitioners' claims had singled out this failure as one of the main grounds for relief.

J. Supreme Court Grants Petitioners A Temporary Restraining Order

On December 16, 2020, Petitioners filed an order to show cause seeking a preliminary injunction that would enjoin 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. 689-1185.) As interim relief, Petitioners also sought a temporary restraining order preventing the Respondents

from enforcing any such determination, policy or law. (R. 689-91.) After hearing argument on December 18, 2020, 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.") 96-98.) This temporary restraining order was to stay in place until the resolution of Petitioners' motion for a preliminary injunction. (*Id.*) On December 23, 2020, Respondents filed an order to show cause with the Third Department, seeking (1) leave to appeal Supreme Court's temporary restraining order, and (2) to vacate the temporary restraining order. (SR. 110.1-110.3.)

On December 28, 2020, Respondents filed papers in opposition to Petitioners' motion for a preliminary injunction that was still pending. (SR. 114-204.) The only document purporting to set forth new facts was the affidavit of Chief Administrative Judge Marks, dated December 28, 2020 (the "December 28 Affidavit"). (SR. 166-198.) In the December 28 Affidavit, Chief Administrative Judge Marks claimed to recall for the first time (despite having already submitted two affidavits on the same topic that said the opposite) that at the September 22, 2020 meeting of the Administrative Board, "the [Administrative] 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.)

K. Petitioners Prevail On Their Second Cause Of Action

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, made in an affirmation submitted in support of their motion to vacate the temporary restraining order, that the proceeding was ready for determination on the merits. (SR. 220, ¶ 39.) The next day, on December 30, 2020, Supreme Court entered the Judgment, which granted Petitioners' second cause of action and annulled Respondents' denial of 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.) Thus, Supreme Court concluded that the Administrative Board had failed to evaluate the Petitioner Justices individually

under the two criteria 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.) In addressing the other claims brought by Petitioners, Supreme Court held that, in light of its finding on Petitioners' second cause of action, "the remaining causes of action need not be addressed or are without merit." (SR. 14.)

On December 31, 2020, Respondents filed a notice of appeal of the Judgment (SR. 7-8.) On January 4, 2021, Respondents moved the Third Department to consolidate their appeal of the Judgment with their pending appeals of Supreme Court's prior orders. (SR. 3-6.) On January 5, 2021, Petitioners moved for a temporary restraining order and vacatur of the automatic stay imposed by CPLR 5519. On January 8, 2021, the Third Department granted Respondents' motion for consolidation, denied Petitioners' motion to vacate the automatic stay, and put Respondents' and Petitioners' appeals on for the February 2021 term (the "January 8 Order"). On January 15, 2021, Petitioners filed their notice of cross-appeal to the Third Department with respect to Supreme Court's denial of their remaining causes of action.

L. The Third Department's Opinion

On February 9, 2021, Petitioners and Respondents appeared for oral argument before the Third Department with a mixed panel of Justice Michael C. Lynch, Justice

Christine M. Clark, and Justice Molly Reynolds Fitzgerald (all from the Third Department), and Justice Nancy E. Smith and Justice John M. Curran, who were designated to sit on the panel from the Fourth Department.

On March 9, 2021, the Third Department issued its Opinion. (SR. 1204-20.) In its Opinion, a majority of the panel, consisting of the Third Department justices, concluded that Supreme Court "erred in annulling the [Administrative] Board's determination." (SR. 1208.) The majority stated that "the [Administrative] Board acted in accord with the governing standard and within the scope of its broad authority in basing its ultimate decision [to deny certification] on the overall needs of the court system." (SR. 1210.) For support, the majority primarily relied upon this Court's decision in *Loehr*,[2] which it construed as calling upon the Administrative Board to balance the costs of certification against the court system's needs. (*Id.*) On this basis, the majority concluded that Chief Administrative Judge Mark's December 16, 2020 affidavit, in which he claimed that approving certification for all of the applying justices would have necessitated layoffs of 300 non-judicial personnel, justified the Administrative Board's certification

[2] This Court's precedential decisions on certification, *Marro v. Bartlett*, 46 N.Y.2d 674 (1979), and *Matter of Loehr v. Administrative Bd. of the Cts. of the State of N.Y.*, 29 N.Y.3d 374 (2017), will be referred to as *Marro* and *Loehr*, respectively, throughout this brief.

determinations. (*Id.*) Thus, the majority reversed the Judgment, which had annulled Respondents' denial of certification to the Petitioner Justices.

The dissent—made up of the two justices designated from the Fourth Department—disagreed. (SR. 1211-1220.) The dissent took particular issue with the Administrative Board's explanation for its certification determinations because, according to the minutes of its meeting on September 22, 2020, the Administrative Board only denied certification to the forty-six justices on the basis of "severe budgetary constraints occasioned by the coronavirus pandemic." (SR. 1215-16.) In the dissent's view, this stated rationale failed to establish that the Administrative Board had conducted the required two-step evaluation process and instead demonstrated that the Administrative Board had resorted to a "blanket predetermination." Moreover, the dissent distinguished *Loehr*, arguing that, unlike in *Loehr,* (1) the Administrative Board's policy here was not prospective, and (2) the Administrative Board had given no indication that it had considered the nonmonetary costs of its determinations alongside its budgetary concerns. (SR. 1216-17.) As to the concerns about non-judicial layoffs, the dissent noted that the Administrative Board's rationale was not that it was seeking to achieve the correct "balance" for the court system and that, in any event, such a rationale would not have established the required individualized review of each justice applying for certification. (SR. 1218.) In sum, the dissent concluded that Supreme Court's

Judgment was proper, and that Petitioners' first cause of action was meritorious. (SR. 1219.)

With respect to Petitioners' remaining, non-Article 78 causes of action, only the majority addressed their merits (which the dissent joined). (SR. 1210-11, 1219.) Ultimately, the panel upheld Supreme Court's dismissal of all of Petitioners' non-Article 78 causes of action. (*Id.*) With respect to Petitioners' age discrimination cause of action under the Human Rights Law, the panel held that Petitioners had "not made a prima facie showing that the Board's decision was made under circumstances giving rise to an inference of discrimination," and the panel found Petitioners' disparate impact age discrimination claim to be "unavailing." (*Id.*)

M. Petitioners Appeal To This Court

Following the Third Department's Opinion, Petitioners filed a notice of appeal before Supreme Court on April 8, 2021. (SR. 1200.) Petitioners appeal as of right pursuant to CPLR 5601(a), which allows for appeals "where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal."

N. New York Recertificates Certain Justices

Weeks after the Third Department's Opinion and only shortly after Petitioners appealed, Respondents reversed their course on certification. Three and a half months too late, on April 14, 2021, Respondent Chief Judge DiFiore announced that

those justices who had been denied certification in 2020 could renew their applications with the Court System. *See* Ryan Tarinelli, *NY Court System Changes Course on Ousted Older Judges Who Were Denied Certification*, Law.com (Apr. 14, 2021), https://www.law.com/newyorklawjournal/2021/04/14/ny-court-system-changes-course-on-ousted-older-judges-who-were-denied-certification/?slreturn=20210713002810 (last visited on September 20, 2021). Following this announcement, on April 21, 2021, Respondent Chief Administrative Judge Marks sent out letters to those justices who were denied certification, inviting them to "reactivate the application you submitted for certification/recertification last year." He further noted that "[i]n making your decision whether to reactivate your application, please be advised that, during the pandemic, case backlogs have increased unevenly, and there are, in particular, problematic backlogs in the Family Court and Housing Court. We look forward to having the assistance of experienced justices at this critical time as we emerge from the pandemic and tackle this backlog."

Following this dramatic change of course, three of the Petitioner Justices, Justices Gesmer, Friedman, and Roman, reactivated their certification applications.[3] On May 27, 2021, the Administrative Board met to, among other things, rule upon

[3] Justice Leventhal is no longer pursuing certification.

the applications submitted by those justices who had reactivated their applications. On or around June 1, 2020, nineteen justices, including Justices Gesmer, Friedman, and Roman, were certificated. On June 15, 2021, many of those justices who were certificated, including Justices Gesmer and Friedman, began working again as Supreme Court justices for the New York State Unified Court System. Justices Gesmer and Friedman are currently serving as trial-level judges in Supreme Court. To date, Justices Gesmer and Friedman have not received any back pay, adjustments to their pension statuses, or any other compensation for the months when they were not permitted to work as justices, despite having been ready, willing and able to do so.[4] Moreover, none of the three have been redesignated by the Governor to serve as Appellate Division justices despite having been certificated.

ARGUMENT

I. PETITIONERS' CLAIMS REMAIN JUSTICIABLE BEFORE THIS COURT

At the outset, Petitioners must clarify a crucial point: though three of the Petitioner Justices have been certificated since issuance of the Third Department's Opinion, this change in circumstances does not moot Petitioners' claims or render

[4] Justice Roman chose not to return to Supreme Court in the absence of being redesignated to the Appellate Division and has filed for her pension, effective as of her last date of service in 2020, which, as a 72 year old member of the pension system, she could do. Members of the pension system who are only 70 do not have a similar right of applying for their pensions retroactively.

them non-justiciable. In fact, there remains a live controversy here that this Court can and must resolve: were Respondents' certification determinations, denying certification to forty-six (46) out of forty-nine (49) Supreme Court justices who applied, violative of administrative law principles and/or discriminatory?

A. Petitioners' Article 78 Claims Are Justiciable

According to this Court's mootness doctrine, New York courts are "generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries." *Coleman v. Daines*, 19 N.Y.3d 1087, 1090 (2012). Thus, for an appeal to this Court to be justiciable, it must appear that "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." *City of New York v. Maul*, 14 N.Y.3d 499, 507 (2010) (internal citations omitted).

There is an exception to the mootness doctrine, however, "where the issues are substantial or novel, likely to recur and capable of evading review." *Id.* (reviewing issues of foster care under mootness doctrine); *see also Matter of M.B.*, 6 N.Y.3d 437, 447 (2006) (reviewing issues of guardianship even after passage of individual); *Coleman*, 19 N.Y.3d at 1090 (reviewing issues of temporary assistance benefits even after granting of benefits). In keeping with these rules, this Court has repeatedly converted parties' causes of action—such as those seeking Article 78 or injunctive relief—into declaratory judgment actions where necessary to avoid

questions of mootness. *See Group House of Port Washington, Inc. v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 271 (1978) (converting Article 78 proceeding into declaratory judgment action where permit no longer needed); *Diamond Asphalt Corp. v. Sander*, 92 N.Y.2d 244, 253 (1998) (converting Article 78 proceeding into declaratory judgment action where contracts in question were completed); Matter *of Patrolmen's Benevolent Ass'n of City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd*., 6 N.Y.3d 563, 571 (2006) (converting settled case to declaratory judgment action and declaring portion of collective bargaining agreement invalid).

i. Petitioners' Article 78 claims are not moot.

Here, Petitioners' first and second causes of action, both brought under Article 78 to challenge Respondents' September 2020 certification determinations, are not moot. Although three of the Petitioner Justices have since been certificated pursuant to Respondents' invitation to "reactivate" their applications, the fact remains that, were Supreme Court's Judgment reinstated, the rights of the Petitioner Justices would be "directly affected" in several respects. *City of New York*, 14 N.Y.3d at 507.

Petitioners commenced this litigation shortly after Respondents' September 2020 denials of certification and two months before the commencement of Petitioner Justices' mandatory retirement in December 2020. (R. 35-76.) When Petitioners prevailed in Supreme Court (SR. 9-14), Respondents appealed and, in its January 8

Order, the Third Department denied Petitioners' motion to vacate the automatic stay pursuant to CPLR 5519. As a result, from that date until June 15, 2020, the Petitioner Justices were mandatorily retired, denied an income for almost six months and deprived of the opportunity to accrue credit toward their pensions. Moreover, certificating them in June has the effect of truncating their overall potential period of certification by almost six months. In addition, since Petitioner Justices Friedman and Gesmer were certificated, they have been given different and changed benefits, and required to sit in the trial court instead of the Appellate Division, at a substantially reduced salary. Thus, by Respondents' actions, the Petitioner Justices were not only denied the individualized review that they were entitled to (*see infra*), but they were also effectively denied salary, benefits, and, in at least one Petitioner Justice's case, the accrual of time served towards NYSLRS's twenty (20) year retirement benefit. Accordingly, meaningful and substantial interests of the Petitioners were affected by this litigation.

As a result, though all three of the Petitioner Justices are now certificated as Supreme Court justices, it is not the case that their interests would be unaffected were this Court to declare that Respondents' September 2020 determinations were arbitrary and capricious and/or violative of lawful procedure. Such a determination by this court would mean that the Appellate Division Third Department erred in reversing Supreme Court's Judgment. That in turn would mean that the Petitioner

Justices should never have been removed from the payroll and that the Third Department erred in staying Supreme Court's preliminary injunction. It would follow that Respondents would be expected to follow the law and restore petitioners' status, pay and benefits retroactive to January 1, 2021. At a minimum, such a declaration would provide the Petitioner Justices the ability to seek additional, meaningful relief including, for example, amending the complaint to seek a declaration that the Petitioner Justices should have been paid at their Appellate Division salaries from January 1, 2021.[5] Were this Court to uphold the Third Department's Opinion by dismissing this appeal, however, the Petitioner Justices might very well be barred from seeking that relief. Thus, even though this appeal is not necessary in order for the Petitioner Justices to obtain certification, its determination nonetheless directly affects their rights and interests. Stated otherwise, Petitioners sought certification for the Petitioner Justices in November 2020, effective as of January 1, 2021, and not as of June 2021. This alone defeats any mootness argument raised by Respondents.

[5] As discussed above, to the extent annulling Respondents' original determinations (as Supreme Court did) is no longer necessary in light of the three Petitioner Justices having been certificated, this Court can and should convert Petitioners' Article 78 claims into declaratory judgment actions in which this Court can grant relief. *See* CPLR 103(c).

ii. Petitioners' Article 78 claims should be ruled upon by this Court.

In the event this Court disagrees and finds that Petitioners' Article 78 causes of action have been mooted by the three Petitioner Justices having been recertificated, Petitioners' appeal should nevertheless be heard pursuant to this Court's well-recognized exception to the mootness doctrine, which allows a moot case to nevertheless proceed "where the issues are substantial or novel, likely to recur and capable of evading review." *City of New York*, 14 N.Y.3d at 507.

Here, Petitioners' Article 78 claims meet all three prongs of this Court's mootness exception test. First, with respect to substantial or novel issues, there is little doubt that the meaning and interpretation of the Constitution and Judiciary Law, and the extent of the Administrative Board's discretion in carrying out its obligations, are substantial and novel questions. Prior to this litigation, only two cases from this Court (*Marro* and *Loehr*) have meaningfully interpreted the relevant provisions and, as illustrated by the three to two split vote at the Third Department on these claims, there remains a substantial divergence in views as to the precise meaning of their language and import. As a result, Petitioners' Article 78 claims raise serious and grave questions as to (1) the extent of Respondents' discretion in carrying out the certification program, and (2) those circumstances and rationales that can render Respondents' certification determinations arbitrary and capricious. Altogether, Petitioners' Article 78 claims are undoubtedly substantial and novel.

Similarly, the issues presented by Petitioners' Article 78 claims are likely to recur. As Respondents and this Court are aware, the Respondents have the responsibility to carry out the certification program annually. Since certification terms are only for a two-year period, there are a substantial number of applications that Respondents must evaluate every year. In 2020, as has been discussed, there were forty-nine (49) certification applications. This number of applications shows that certification disputes will undoubtedly continue to recur in the future. Moreover, the specific facts that purportedly animated Respondents' actions here—fears of a budgetary crisis—are sure to repeat themselves and will likely create future litigation surrounding certification. In fact, as demonstrated by *Marro*, *Loehr*, and this litigation, it is a near-certainty that Respondents' discretion under Judiciary Law Section 115 will be challenged again, especially in view of oft-occurring budget constraints. Accordingly, this Court should evaluate Petitioners' Article 78 claims and create binding precedent that will further clarify this Court's interpretation of the Constitution and Section 115 of the Judiciary law.

Finally, as the mootness concerns about Petitioners' Article 78 claims amply demonstrate here, cases like this are capable of evading review. After all, Respondents' proffered justification for their original certification denials (and then their reversal of their original determinations) had been budget constraints, but according to Respondents' own statements, the purported budget constraints

evaporated in mere months. *Compare* (R. 124-25) *with* Ryan Tarinelli, *NY Court System Changes Course on Ousted Older Judges Who Were Denied Certification, Law.com* (Apr. 14, 2021), https://www.law.com/newyorklawjournal/2021/04/14/ny-court-system-changes-course-on-ousted-older-judges-who-were-denied-certification/?slreturn=20210713002810 (last visited September 20, 2021). Thus, there is a real risk that future certification cases may also implicate budgetary concerns, but similarly evade review once those purported budget concerns dissipate or change, thereby allowing justices to reactivate their certification applications after a few months of being denied the opportunity to work.[6] Because this risk threatens both this case and future cases, this type of case is undeniably capable of evading review.

Altogether, even if this Court finds that Petitioners' Article 78 claims are moot, this Court must take this opportunity to address Petitioners' Article 78 claims. Petitioners' claims (1) raise serious questions of statutory interpretation that will affect all future justices of this State, (2) are likely to recur, and (3) may evade review, particularly if budgetary concerns are the proffered justification by

[6] If this Court does not take up the merits of this case on the grounds of mootness, this may present Respondents with a tactic which would permit them to issue blanket denials of certification, utilize these denials for leverage in budget negotiations with the State government, and then reverse course months later, allowing justices to reactivate their applications and arguably mooting any litigation analogous to this suit. This possibility further counsels in favor of this Court taking up Petitioners' Article 78 claims for review even if they are moot.

Respondents for their certification determinations (as they are here). For all of these reasons, Petitioners' Article 78 claims remain justiciable here before this Court.

B. Petitioners' Age Discrimination Claim Is Justiciable

In addition to Petitioners' Article 78 claims, Petitioners' sixth cause of action, alleging age discrimination in violation of the New York Human Rights Law, N.Y. Exec. L. §§ 290 *et seq.* ("NYHRL"), is also justiciable. By virtue of their allegations, Petitioners, if they prevail on their claims, will be entitled to the remedies provided under the NYHRL including, but not limited to, back pay for the period they did not work and were not paid, as well as other appropriate damages. *See* N.Y. Exec. L. § 297(9). Thus, Petitioners' discrimination claim is very much a live dispute that this Court should resolve.

II. THE THIRD DEPARTMENT ERRED WHEN IT FOUND THAT RESPONDENTS' CERTIFICATION DETERMINATIONS WERE LAWFUL

Turning to the merits of Petitioners' claims, this appeal arises from the Third Department's divided Opinion, in which the majority held that Supreme Court's Judgment—which originally annulled Respondents' certification determinations as arbitrary and capricious—was erroneous and that "the [Administrative] Board acted in accord with the governing standard and within the scope of its broad authority in basing its ultimate decision on the overall needs of the court system." By contrast, the dissent would have upheld Supreme Court's Judgment on the basis that

Respondents had failed to conduct the necessary "two-pronged determination" and instead had resorted to a "budget-driven, categorical consideration" inconsistent with Judiciary Law Section 115 and this Court's precedent. For the reasons set forth below, the dissent's rationale and conclusion were correct. Therefore, this Court should reverse the Third Department and declare that Respondents' certification determinations were arbitrary and capricious.[7]

A. Respondents' Determinations Were Arbitrary And Capricious

Pursuant to Section 7803(3) of the CPLR, a petitioner may 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 analysis includes where the agency "undermines its own stated goals" or violates the Constitution or its statutory

[7] For all of the reasons included herein, Respondents' actions were not only arbitrary and capricious, but also violative of lawful procedure, *see* CPLR 7803(3), and thus merited the granting of Petitioners' first cause of action (as the dissent correctly noted).

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). This Court "is powerless to affirm [] administrative action by substituting what it considers to be a more adequate or proper basis." *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. 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, whether Respondents' denials of certification to the Petitioner Justices were arbitrary and capricious boils down to a straightforward question: did Respondents comply with their obligations under the Constitution and Judiciary

Law, as well as this Court's precedent in *Marro* and *Loehr*, in reaching their certification determinations? The answer is a resounding no.

i. The Constitution, the Judiciary Law, and this Court's precedent require Respondents to review applicants individually.

Section 25(b) of the Constitution, which includes the mandatory retirement age for justices, states unambiguously that justices applying for certification must be reviewed individually when they apply for certification. In fact, it states that "[e]ach such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of the supreme court . . . 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" (emphasis added). Similarly, Section 115 of the Judiciary Law states 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" (emphasis added). Thus, both the Constitution and Judiciary Law plainly require the Administrative Board to make specific findings concerning both

the capacity and the necessity of each applying justice, prior to approving or denying that justice's certification applications. Given these unambiguous texts, it is no surprise that this Court has found (and emphasized) that the Constitution and Section 115 require an individualized review of each justice applying for certification.

In *Marro*, this Court held that the Constitution and Section 115 requires a "two-pronged determination" and that "[a]n individualized evaluation [of each justice] is contemplated." 46 N.Y.2d at 680. In reaching this conclusion, the *Marro* Court was particularly persuaded that both the Constitution and the Judiciary Law specified that whether or not an applying justice was "necessary to expedite the business of the supreme court" was to be determined by considering "the services of such judge or justice," not just any hypothetical justice's (or justices') "services." *Id.* In this sense, the *Marro* Court correctly focused on the plain language of both the Constitution and the Judiciary law and their requirement that each individual applying justice be considered individually.

The *Loehr* Court found no reason to deviate from this interpretation. It specified that both the Constitution and the Judiciary Law had vested the Administrative Board with determining whether those "two criteria are met," 29 N.Y.3d at 381, a clear reference to the individualized, two-pronged determination that the *Marro* Court required. Moreover, while *Loehr* ultimately approved of a prospective rule concerning pension double-dipping, *id.* at 378, the *Loehr* Court did

not so much as hint that individualized, two-prong evaluations were no longer required for certification applications. In fact, tellingly, the *Loehr* Court did not address *Marro*'s requirement of individualized evaluations in reaching its determination, a clear indication that *Marro* was not modified by its decision. Therefore, it is evident that this Court's precedent, just like the Constitution and Judiciary Law, required Respondents to evaluate the Petitioner Justices' applications individually, with respect to both their capacity and necessity.

ii. Respondents failed to individually evaluate the Petitioner Justices.

The record, however, demonstrates, that Respondents failed to carry out these requisite, individualized evaluations of the Petitioner Justices. In Respondents' Answer, they primarily addressed the grounds and process of their certification determinations by submitting and incorporating: (1) the minutes of the September 22, 2020, meeting of the Administrative Board (when their determinations were made), and (2) Chief Administrative Judge Marks' December 16, 2020 affidavit. These two documents were the only extrinsic evidence of Respondents' determinations included with their Answer.

Plainly though, these submissions did not detail any individualized evaluations that Respondents performed with respect to the Petitioner Justices. In fact, the minutes of Respondents' meeting only briefly describe the grounds for their certification determinations as follows:

> The Board declined to certify 46 of the 49 judges applying for certification, owing to current severe budgetary constraints occasioned by the coronavirus pandemic. Three judges, having specialized additional assignments were certified.

The minutes include no additional detail demonstrating that individualized evaluations were done, nor describe any individualized process undertaken by Respondents. This lack of any individualized evaluation of the applying justices was further supported by Chief Administrative Judge Marks' December 16 affidavit. There, he emphasized that Respondents' actions were precipitated by the "severe budgetary constraints occasioned by the coronavirus pandemic," and he asserted that, by denying certification to forty-six (46) out of forty-nine (49) justices, the Judiciary was going to save approximately $55 million over the two-year certification period and avoid certain layoffs of non-judicial personnel. Nowhere in his December 16 affidavit did Chief Administrative Judge Marks provide any detail describing individualized reviews of the Petitioner Justices (or other justices).[8]

Therefore, based upon Respondents' own submissions with their Answer, Respondents failed to establish that they performed any individualized reviews of the applying justices. Compelling proof of that is provided by the fact that when Respondents announced that they would permit the justices to reactivate their

[8] It was only weeks later, in his December 28 Affidavit, that Chief Administrative Judge Marks recalled the relevant facts differently. Petitioners address Chief Administrative Judge Marks' December 28 Affidavit *infra* in Part II.D.

applications, it took them two months before any justice was permitted to go back to the bench, apparently because Respondents needed that much time to effectuate an individualized determination as to each justice who applied. Rather, as correctly observed by the Third Department's dissent, Respondents' evidence instead only demonstrated that Respondents had relied upon "budget-driven, categorical consideration[s]," a showing plainly insufficient to meet *Marro*'s requirement that a "two-pronged determination" based upon an "individual evaluation" be performed with respect to each justice applying for certification. Because Respondents failed to comply with the Constitution and Section 115 as interpreted by this Court, their certification determinations were clearly arbitrary and capricious, as Supreme Court originally held. *See 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). Accordingly, this Court should reverse the Third Department and declare that Respondents' September 2020 certification determinations were arbitrary and capricious.

B. That Three Justices Were Certificated Does Not Prove That Individualized Evaluations Were Performed

Although Respondents provided no evidence of individualized review with their Answer, the Third Department's majority opinion nevertheless concluded that

"[t]he Administrative Board's certification of three applicants reflects . . . an individualized assessment," seemingly suggesting that because three justices were certificated, the Administrative Board must have individually considered all of the justices who applied for certification. This was the only reference by the Third Department majority as to whether or how Respondents complied with *Marro*'s requirement of individualized evaluations and was clear, reversible error.

It is a logical fallacy to presume that because three justices were certificated, all of the justices who applied (including the Petitioner Justices) were individually evaluated. Worse yet, this leap in logic is not justified by the record whatsoever. While the Administrative Board's meeting minutes reflected that they determined to certificate three justices based upon "specialized additional assignments," without any indication that they considered the budget as to those three justices, those same minutes included no evidence of any individual evaluation of the remaining justices (including the Petitioner Justices) as to their 'specialized assignments' or any other factor. Moreover, although Chief Administrative Judge Marks' December 16 affidavit laid out the budgetary and fiscal information presented to the Administrative Board and explained their "policy choice," nothing in his affidavit demonstrated that the Administrative Board considered each justice's capacity and necessity individually. To the contrary, his affidavit only further reinforced that the Administrative Board made a broad policy choice applicable to all remaining

justices (i.e. a "budget-driven, categorical consideration") without any individual considerations taken into account.

Troublingly, were the Third Department's view to be adopted, it would mean that a determination by Respondents to certificate *any justice* would conclusively establish that the Respondents individually evaluated *every justice* who applied. Such a holding here would not only be contradicted by the record, but it would turn on its head the plain language of the Constitution and Judiciary Law, as interpreted by this Court in *Marro*. In fact, unless this Court is willing to abandon *Marro* and overrule its requirement of individualized evaluations (which it should not), it simply cannot be the case that the certification of three justices (a mere 6% of the total) suffices to demonstrate (or demonstrates at all) that the remaining forty-six justices were also individually evaluated in keeping with the Constitution and Judiciary Law.

C. Respondents' Consideration Of Costs Does Not Relieve Respondents Of The Obligation To Individually Review Justices

Beyond the Third Department majority's reference to the three justices who were certificated, the majority Opinion hardly addresses whether Respondents individually evaluated the Petitioner Justices. Instead, the majority Opinion dangerously suggests that, because the Administrative Board is charged with "balancing the costs of certification with the overall needs of the court system," the Administrative Board's consideration of the costs of certification and the alternatives (including having to lay off non-judicial personnel) sufficed to discharge

Respondents' duties under the Constitution and Judiciary Law. This is not the case and must be rejected as a dangerous precedent by this Court.

At the outset, there is a substantial distinction between individualized assessments and the almost-across-the-board certification determinations championed by Respondents. As the Third Department dissent correctly observes, Respondents' balancing or considering of the costs of certification "does not establish, much like the budget-focused reason actually contained in the minutes, that the Board conducted an individualized analysis of the necessity of each applicant's services." Therefore, even if this Court concludes that Respondents considered the budgetary and financial information in Chief Administrative Judge Marks' December 16 affidavit (as the Third Department relied upon), that still fails to establish that Respondents made the required "two-pronged determination[s]" or considered those costs with respect to each individual justice as required by the Constitution and Judiciary Law. Ultimately, Respondents simply have not demonstrated, and cannot demonstrate, that they discharged their duties to individually evaluate the Petitioner Justices and abandoning these constitutionally mandated requirements should not be allowed to stand.

Loehr—which the Third Department majority cites approvingly—also does not provide any support for Respondents' actions. While the *Loehr* Court approved of a prospective policy of the Administrative Board (announced by an

Administrative Order) that considered budgetary impact, it was solely in the context of evaluating whether the Administrative Board could decide to no longer certificate justices who refused to forego their pensions in an attempt to "double-dip[.]" 29 N.Y.3d at 378. Moreover, *Loehr* only approved of the consideration of double-dipping's budgetary impact so long as the Administrative Board determined a justice's necessity on the basis of both monetary costs and "non-monetary costs." *Id.* at 382. And, as the dissent highlights, the Administrative Board's policy in *Loehr* actually took such non-monetary costs into account. For example, the *Loehr* Court held that Respondents had specifically weighed the justices' "potential future contributions as certified Justices," and considered how "the net effect" of certifying those justices included more than the "narrow matter of annual pay." *Id.* at 382.

Here, by contrast, the Administrative Board did not consider the individualized, future contributions of the Petitioner Justices at all. Instead, 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. Accordingly, even if Respondents' budgetary concerns were rationally related to the question of the Petitioner Justices' necessity, Respondents never established that they adequately assessed the non-monetary costs of denying certification to the Petitioner Justices. Instead, Chief Administrative Judge Marks' December 16 affidavit suggests that the

Administrative Board *only* considered the budgetary impact of certification and did not holistically consider the future individual contributions of the Petitioner Justices. Thus, Respondents' reliance on solely budgetary reasoning is in direct conflict with *Loehr*, which required that evaluations of necessity 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.

Still, as discussed above, the Third Department majority tries to paint over all these flaws by emphasizing its view that the Administrative Board is "charged with balancing the costs of certification with the overall needs of the court system," and that Respondents carried out this role dutifully. But the Third Department majority overlooks that the record does not show that Respondents actually performed any such balancing. Achieving a correct balance for the court system was not a rationale provided by Respondents for their actions, and their purported rationale—denying certification to forty-six justices to avoid non-judicial layoffs—did not require any balancing. In fact, Respondents appeared to balance very little, choosing to deny certification to forty-six justices to save money rather than evaluating whether those justices' individual contributions would or should entitle them to certification, even if it meant some non-judicial layoffs. This is troubling given that judges are the engines of the court system and, by denying forty-six justices the opportunity to continue to serve, Respondents would be needlessly exacerbating existing backlogs

and delays in the court system. If an action like Respondents' were taken in other contexts, it would lead to a hospital balancing its budget by only laying off its doctors, or a school system facing a budget crunch only discharging its teachers.

Because the most generous reading of Respondents' evidence demonstrates that they neither performed individual evaluations of justices nor considered the non-monetary costs of certification (such as the Petitioner Justices' future contributions), the Third Department plainly erred when it reversed Supreme Court.

D. Chief Administrative Judge Marks' December 28 Affidavit Was Properly Excluded By Supreme Court

Finally, although the Third Department majority's opinion disclaimed its reliance on their substance, the Third Department majority also erred where it held that Respondents' submissions in opposition to Petitioners' motion for a preliminary injunction, including Chief Administrative Judge Marks' December 28, 2020 affidavit (the "December 28 Affidavit"), should have been considered by Supreme Court in its Judgment. This is particularly at issue because, in his December 28 Affidavit, Chief Administrative Judge Marks attested for the first time (despite having submitted multiple prior affidavits to Supreme Court, including one in Respondents' Answer) that Respondents had undertaken some cursory review of the justices who were denied certification. Specifically, Chief Administrative Judge Marks suddenly recalled that the Administrative Board reviewed binders for every justice that included each justice's "judicial records, qualifications,

recommendations, complaints about, disciplinary record, and mental and physical capability of each candidate."

Chief Administrative Judge Marks' December 28 Affidavit is dubious for a number of reasons and was rightfully excluded from consideration by Supreme Court, as the dissent in the Third Department persuasively discussed. First, Petitioners expressly alleged that the Office of Court Administration cancelled a scheduled physical and mental evaluations for one of the Petitioner Justices following its certification determination. If the Administrative Board chose to cancel the evaluation of a Petitioner Justice's capacity, then how could the Administrative Board have evaluated each justice's physical and mental capacity, as claimed by Chief Administrative Judge Marks and as required by the Constitution and Judiciary Law? Viewed in this light, it is obvious that Chief Administrative Judge Marks' December 28 Affidavit was a pretextual attempt to assert new facts not included in his prior affidavits, all of which purported to describe the same meeting of the Administrative Board. This glaring omission alone would have warranted Supreme Court refusing to credit or consider Chief Administrative Judge Marks' December 28 affidavit. *See Pacheco v. Halsted Communs., Ltd.*, 144 A.D.3d 768, 769-70 (2d Dep't 2016) (finding that Supreme Court "providently exercised its discretion" in denying motion based on new facts not previously provided to court); *cf. Nesterenko v. Starrett City Assoc., L.P.*, 123 A.D.3d 1099, 1100 (2d Dep't 2014)

(finding that Supreme Court properly exercised discretion where it excluded consideration of new evidence where there was no reasonable justification for not previously including it in opposition); *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).

In any event, as the Third Department dissent correctly noted, the December 28 Affidavit (and other materials in support) were also properly excluded by Supreme Court because they contained new facts and were submitted after the matter was fully submitted and Respondents' counsel had certified the record for the proceeding. *See* CPLR 2214(c) ("The moving party shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved."); CPLR 7804(e) ("The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact."). Thus, for this additional reason, it was well within Supreme Court's discretion to exclude consideration of Respondents' post-Answer submissions, including the December 28 Affidavit.

III. THE THIRD DEPARTMENT ERRED WHEN IT FOUND THAT PETITONERS FAILED TO ESTABLISH A PRIMA FACIE CASE OF AGE DISCRIMINATION

Petitioners in their Sixth Cause of Action allege that Respondents' conduct in abruptly disapproving forty-six (46) of forty-nine (49) active applications for

certification, applications that were in process and ready for approval, constituted discrimination on the basis of age in violation of the New York Human Rights Law, N.Y. Exec. L. §§ 290 *et seq.* ("NYHRL"). In its December 30, 2020, decision granting Petitioners' second cause of action, the Supreme Court disposed of, *inter alia*, their sixth cause of action in a single sentence, concluding that "the remaining causes of action need not be addressed" – in essence, that granting the second cause of action mooted them – "or are without merit." (SR. 14). This last clause is a conclusion that is unsupported by any analysis of the Petitioners' allegations supporting the discrimination claim or the law.

The Third Department, in turn, held that the sixth cause of action did not "state a viable claim" under the NYHRL because either there was no discriminatory discharge, as Petitioners' terms expired on December 31, 2020, or because there was no discriminatory refusal to hire since Petitioners failed to make out "a prima facie showing that the Board's decision was made under circumstances giving rise to an inference of discrimination." Again, this is a conclusion unsupported by any analysis of the allegations in the Petition. In particular, the Third Department failed to analyze, *inter alia*, the undisputed fact that all of the 46 of 49 judges whose certification applications the Administrative Board disapproved were over seventy (70) years old, as well as that Respondents justified their actions because it permitted them <u>not</u> to lay off other, younger, employees. Thus, the Third Department failed to

establish how or why Respondents' actions did not clearly raise an inference of different and worse treatment based on age.

The Third Department also failed to assess Petitioners' sixth cause of action in light of the 2019 amendments expanding and strengthening the protective scope of the NYHRL, including, in particular, the legislature's significant changes to Section 300 of that statute explaining how the law should be construed:

> The provisions of this article shall be construed liberally for the accomplishment of the *remedial* purposes thereof*, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.*

NYHRL § 300 (amended language emphasized). This amendment tracks the language of the New York City Human Rights Law and effectively directs courts no longer to follow federal law in assessing the NYHRL pursuant to past practice, as had been the case with the NYCHRL prior to its being amended. The amendments, which modified the NYHRL in a number of important ways, signaled a sea change in the meaning and application of the State anti-discrimination statutes.

The Second Circuit Court of Appeals assessed the impact of the almost identical amendments to the New York City Human Rights Law, which the New York State Legislature clearly tracked and intended to be a model, as follows: "[p]ursuant to these revisions, courts must analyze NYCHRL claims separately and

independently from any federal and state law claims, construing the NYCHRL's provisions broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Mihalik v. Credit Agricole Chevreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (internal citations omitted). That court further summarized the heightened standards of the NYCHRL, emphasizing its vastly more protective standards that present Federal or [former] State standards only as "a floor below which the City's Human Rights law cannot fall" and directing that the law be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof." *Mihalik*, 715 F.3d at 109 (citations omitted).

At a minimum, therefore, the Third Department should have considered whether the amendments to the NYHRL were intended to change the applicable legal standards and interpretations to track the NYCHRL rather than, as in the past, Federal law,[9] and to undertake the appropriate analysis with respect to the trial court's dismissal of Petitioners' age discrimination claim, particularly since *DeKenipp,* the only case the Third Department cited in support of its affirmation of the trial court's decision, expressly noted that "[h]istorically, New York and federal

[9] Other amendments to the NYHRL that also follow the NYCHRL, such as the elimination of the "severe or pervasive" standard for harassment claims and the elimination of the Federal *Faragher-Ellerth* affirmative defense, underscore this clear intent.

courts have employed the same framework in analyzing age discrimination claims," *DeKenipp v. State of N.Y.*, 97 A.D.3d 1068, 1069 (3d Dep't 2012).

The court's failure to undertake such an independent analysis, taking into account the recent amendments to the NYHRL, in and of itself justifies reversing the Third Department's ruling and sending Petitioners' sixth cause of action back to the trial court for further proceedings, starting with discovery. That same result, however, is also required based on a review of the Petitioners' allegations and the law.

As an initial matter, Respondents' selection of the Petitioner Justices to discharge rather than to impose layoffs of younger court system employees is so obviously based on age that it could be seen as constituting direct evidence of age discrimination, thus obviating the traditional methodology for proving discrimination set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), *aff'd*, 528 F.2d 1102 (1976) (plaintiff makes out a prima facie case, defendant articulates a legitimate non-discriminatory reason for the adverse action, plaintiff demonstrates the proffered reason is pretext). The Petitioner Justices were vulnerable to losing their jobs solely because of their age (or not having their applications for certification approved because of their age, which is functionally the same thing under the

NYHRL),[10] and Respondents freely admit that they were selected to be forcibly retired as the only court system employees who, because of their age, could be eliminated in that summary fashion. Respondents have never suggested they would not have approved all of the applications for certification but for the purported budget crisis, so it is pure sophistry to suggest that some reason other than the Petitioner Justices' age motivated them.[11] The Third Department's decision can be reversed on this ground alone.

To make out a claim of age discrimination based on indirect evidence, a plaintiff "bears the initial burden of establishing a prima facie case by showing that the claimant was a member of the protected class, that the claimant was qualified for the position, and that the claimant experienced an adverse employment action under circumstances giving rise to an inference of discrimination." *DeKenipp*, 97 A.D.3d at 1069. The First Department, in an early case interpreting the amended NYCHRL (which the NYHRL now tracks), noted that the burden to present a prima facie case

---

[10] *See* NYHRL § 296(a)(1): **"**It shall be an unlawful discriminatory practice: (a) For an employer . . . because of an individual's age . . . *to refuse to hire or employ* or to bar *or to discharge* from employment such individual." (emphasis supplied.)

[11] In this regard, Respondents' various attempts before the Third Department to reformulate Petitioners' allegations of age discrimination should be ignored as mere straw figures. Petitioners did not allege discrimination based on other certificated judges' being favored over them; and did not contend the court system would replace them with newly created judges; Petitioners did, however, point out the many newly appointed Supreme Court Justices and the fact that they lost their positions expressly in order to save the jobs of necessarily younger court system employees.

was a "minimal showing." *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 35 (1st Dep't 2011); *see also id.* at 37 (explaining why the burden of making out a prima facie case, which under Federal law is "not onerous," is even less difficult under the NYCHRL). The Third Department effectively conceded that Petitioners satisfied the first two prongs of the prima facie case in that it took issue only with the third prong – whether the adverse action took place under circumstances giving rise to an inference of discrimination.

In undertaking its analysis of whether Petitioners made the minimal showing to satisfy this prong of the prima facie case, the court must look to the allegations in the Petition, which are deemed to be true for purposes of Respondents' motion to dismiss the sixth cause of action. (R. 207-208.) Here, Petitioners have asserted that, in response to the Governor's proposed cut to the Judiciary budget in response to the coronavirus pandemic, the Administrative Board of the Unified Court System decided to disapprove the certification requests of 46 judges over the age of 70, expressly "to avoid layoffs, or greatly reduce the number of layoffs" of employees who are all, or virtually all, of necessity younger than Petitioners in light of their age compared to that of other court system employees. That is, the court system decided to eliminate (by disapproving a certification process no one has alleged the 46 judges so affected would not have passed) a group of older employees so as not to risk laying-off a group of younger employees, some of whom, ironically, worked for the

disposed-of judges and were left without work. These allegations, which articulate clear differential treatment based on age,[12] are sufficient to meet the minimal showing required to make out a prima facie case.

Respondents, in response to Petitioners' prima facie case, tried to meet their burden "to articulate through competent evidence nondiscriminatory reasons that actually motivated defendant at the time of its action," *Bennett* at 35-36, by justifying the adverse action taken as necessitated by budget cuts in response to the pandemic. The burden then shifts to the Petitioners, who "must show those reasons to be false or pretextual." *Id.* This Petitioners clearly did: the Petition alleges that at the same time the court system eliminated 46 judges over the age of seventy (70), it was adding younger judges (R. 56-57) and that the $55 million in purported savings was fictional. (R. 60-61.) Moreover, Petitioners alerted the Third Department to the fact that the New York State Budget Director denied that the State forced the court system to cut its budget – directly contradicting and undermining the sole reason upon which Respondents justify their actions against Petitioners. *See, e.g.,* Ryan Tarinelli, NY Budget Director Argues State Did Not

[12] Under the NYCHRL, upon which the amendments to the NYHRL were based, in order to demonstrate liability, "the primary issue . . . is whether the plaintiff has proven by a preponderance of the evidence that [t]he[y have] . . . been treated less well than other employees because," in this case, of their age. *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009). Thus, all that must be alleged to survive a motion to dismiss is that Petitioners were treated less well because of their age, which is self-evident and obvious.

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/ (last visited September 20, 2021).[13]

Under the NYCHRL, which the NYHRL now tracks, Petitioners' showing of pretext is, again, sufficient in and of itself to defeat summary judgment, since this evidence "that at least one of the reasons proffered by defendant is false, misleading, or incomplete" means that:

> a host of determinations properly made only by a jury come into play, such as whether a false explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons. These will be jury questions except in the most extreme and unusual circumstances. Proceeding in this way reaffirms the principle that trial courts must be especially chary in handing out summary judgment in discrimination cases, because in such cases the employer's intent is ordinarily at issue

Bennett, 92 A.D.3d at 44 (citations omitted and emphasis supplied). Of course, this logic is even more powerful in the context of a motion to dismiss. The Third

---

[13] Relatedly, states, including New York, were well aware that Congress was working to make federal funds available to the states, specifically to obviate the need for the types of cuts that the Administrative Board anticipatorily and illegally undertook. *See e.g.,* David A. Lieb, *After pandemic concerns, many States now suddenly flush with cash*, The Westerly Sun.com (June 6, 2021) https://www.thewesterlysun.com/news/covid-19/after-pandemic-concerns-many-states-now-suddenly-flush-with-cash/article_75992f0c-c724-11eb-abfe-6fb6aadb3d14.html (last visited on September 20, 2021).

Department erred in failing to address any of these issues in summarily finding that Petitioners did not present circumstances that raised an inference of discrimination.

One of the New York City Council's goals in amending the NYCHRL, adding provisions the State Legislature carefully tracked in the new NYRHL, was to impose "the strongest possible safeguards against depriving an alleged victim of discrimination of a full and fair hearing before a jury of her peers by means of summary judgment," so that "evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied." *Id.* at 44-45. In the end, "[o]n a motion for summary judgment, defendant bears the burden of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes: under the McDonnell Douglas test, or as one of a number of mixed motives, by direct or circumstantial evidence." *Id.* at 41. The Respondents' burden, on what Supreme Court essentially treated as a motion to dismiss, is even greater.

Accordingly, this Court should reverse the Third Department and restore Petitioners' sixth cause of action for age discrimination in violation of the NYHRL.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Third Department's Opinion insofar as it reversed Supreme Court's Judgment with respect

to Petitioners' second cause of action and upheld Supreme Court's dismissal of Petitioners' first and sixth causes of action, and grant such other and further relief as this Court deems just and proper.

Dated: New York, New York
September 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

HERNSTADT ATLAS PLLC

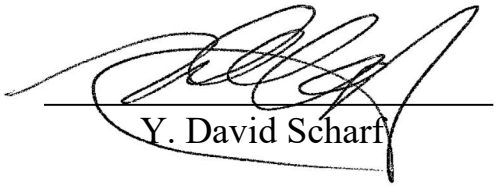
Edward Hernstadt
45 Main Street, Suite 1030
Brooklyn, New York 11201
(212) 809-2501

Attorneys for Petitioners-Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the number of words in the foregoing brief, according to the word count on the word processing program utilized, inclusive of the body of the brief (including point headings and footnotes), and exclusive of the statement of the status of related litigation, the table of contents, the table of cases and authorities, the statement of questions presented, the signature block, and this certificate of compliance is 13,411.

Dated: New York, New York
September 22, 2021



Y. David Scharf

Prepared by PrintingHouse Press, Ltd. 10 East 39th Street, New York, NY 10016
Tel No: (212) 719-0990 Fax No: (212) 398-9253

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Paul Budhu, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 9/22/2021 deponent caused to be served 3 copy(s) of the within

Brief for Petitioners-Plaintiffs-Appellants

upon the attorneys at the address below, and by the following method:

By Hand

Greenberg Traurig, LLP
Attorneys for Respondents-Defendants-Respondents
54 State Street, 6th Floor
Albany, New York 12207
518-689-1400
greenbergh@gtlaw.com
knaubz@gtlaw.com

By Hand

Eileen D. Millett
Office of Court Administration
Attorneys for Respondents-Defendants-Respondents
25 Beaver Street, 11th Floor
New York, New York 10004
212-428-2150
eforman@nycourts.gov