SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of

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

Petitioners-Plaintiffs,

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.

Index No. _____

SUMMONS

To the above-named Respondents-Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of an answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete, if this summons is not personally delivered to you within the State of New York), or on the consent of the attorney for the Petitioners-Plaintiffs, at the same time that you file a motion, opposition, answer or other response to the accompanying Verified Article 78 Petition, specifically in advance of the return as scheduled by the accompanying Order to Show Cause.

Dated: New York, New York
November 5, 2020

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TO: THE ADMINISTRATIVE BOARD OF THE
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LAWRENCE K. MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF THE
NEW YORK STATE UNIFIED COURT SYSTEM
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Index No. _____

VERIFIED ARTICLE 78 PETITION AND COMPLAINT

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioners-Plaintiffs, Hon. Ellen Gesmer, Hon. David Friedman, Hon. Sheri S. Roman, Hon. John M. Leventhal, and Daniel J. Tambasco (collectively, the "Petitioners") by their attorneys, Morrison Cohen, LLP, and Arnold & Porter Kaye Scholer LLP, allege the following as and for their Verified Article 78 Petition and Complaint against The Administrative Board of the New York State Unified Court System (the "Administrative Board"), Chief Judge Janet DiFiore as Chief Judge of the State of New York's Unified Court System, Chief Administrative Judge Lawrence Marks as the Chief Administrative Judge of the State of New York's Unified Court System (collectively, the "Respondents"):

PRELIMINARY STATEMENT

1. For decades, the Administrative Board has routinely authorized justices who have reached the age of 70 to continue to serve the people of the state of New York upon finding that (i) the judge had the mental and physical capacity to do so; and (ii) the justice's services were necessary to expedite the business of the Supreme Court. This process is specifically authorized and governed by the Constitution of the State of New York (Art. 6, Sec. 25) and Section 115 of the New York State Judiciary Law.

2. Notwithstanding this, on September 29, 2020, Respondents announced their decision to deny all but three pending requests for certification, thereby terminating the services of approximately 46 Supreme Court justices, including seven presently serving on the Appellate Divisions, all of whom are aged 70 or older, as of December 31, 2020.

3. Petitioners Gesmer, Friedman, Roman, and Leventhal (the "Petitioner Justices") are all Supreme Court justices currently serving on the Appellate Divisions who have had their requests for certification denied by Respondents despite lengthy and impressive histories of judicial service in the public interest, and despite being among the most productive members of the New York judiciary, by virtue of their experience and seniority. Petitioner Tambasco is a resident of Suffolk County and an attorney who regularly practices in the Supreme Court, Suffolk County.

4. Respondents did not come to this decision by making any individualized determinations as to whether the justices met the statutory and constitutional criteria, but justified their decision solely on alleged budgetary constraints.

5. Respondents denied certification to these judges with total disregard for the impact of their actions on the administration of justice for the citizens of this state. In particular, the

wholesale denial of certifications by Respondents will result in even greater delays in decision making by the Appellate Divisions, delays in decision making by the trial courts, a decrease in resources for the provision of justice to the state's most disadvantaged citizens, and a decrease in diversity among the state's judiciary. All of these consequences will be inflicted on a court system teetering on the edge of total dysfunction.

6. In denying certification to these judges, the Respondents have engaged in blatant age discrimination. They decided to terminate the most experienced judges in the state and have already signaled their intention to replace those judges with younger and less experienced judges, some of whom have never been elected by the voters of this state.

7. In doing so, Respondents have violated their statutory and constitutional duties, committed acts of blatant age discrimination in violation of the New York State and New York City Human Rights Law, and violated state constitutional provisions thereby creating direct conflict with the prerogatives of the other branches of our state government.

8. By this action, Petitioners seek that this Court quash and reverse this unconstitutional and illegal plan proposed by the Respondents, return the Petitioner Justices to their rightful place in the administration of Justice and restore their valuable services to the citizens of the state.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to CPLR 3001 and 7804(b), which provide that the Supreme Court of the State of New York has jurisdiction over declaratory judgment actions and Article 78 special proceedings.

10. Venue is proper pursuant to CPLR 506(b) because this county is one where the material effects of Respondents' actions were felt.

11. Suffolk County has an estimated population of approximately 1,477,000 people and is the fourth most populous county in the entire state.

12. As a result of Respondents' actions, Suffolk County will lose the services of Hon. Stephen J. Lynch, Hon. Vincent J. Martorana, and Hon. Robert F. Quinlan.

13. As a result of Respondents' actions, the Appellate Division, Second Department—the appellate court responsible for appeals from Suffolk County—is losing the services of three justices, including two of the Petitioners.

14. Upon information and belief, Respondents' actions will greatly increase the time between the filing of a complaint and the note of issue, as well as increase the time from the note of issue to jury selection.

15. Upon information and belief, Respondents' actions will increase the time it takes between the filing of an appeal and the judicial resolution of that appeal.

16. Thus, Respondents' actions are causing significant damage to the residents of Suffolk County by impairing the administration of justice in this county. Litigants in Suffolk County will be denied timely access to the courts because of the increased delays resulting from the unconstitutional decision by the Respondents.

THE PARTIES

17. Petitioner-Plaintiff Justice Ellen Gesmer is a Justice of the Supreme Court of the State of New York and has been on the bench since 2004. She was appointed to the First Department in 2016. She has participated in over 3,000 appeals. The following is a summary of her judicial experience:

> ASSOCIATE JUSTICE, APPELLATE DIVISION, FIRST DEPARTMENT
> February 2016 to present

JUSTICE, SUPREME COURT OF THE STATE OF NEW YORK,
MATRIMONIAL PART
New York County, March 2009 to February 2016
Bronx County, October 2006 to March 2009

JUDGE, CRIMINAL COURT, CITY OF NEW YORK
January to October 2006

JUDGE, CIVIL COURT OF THE CITY OF NEW YORK
New York County, 2005
Kings County, 2004
New York County, 2003
Elected 2003

18. Petitioner-Plaintiff Justice David Friedman is a Justice of the Supreme Court of the State of New York and has been on the bench since 1990. He was appointed to the First Department in 1999. He has participated in over 10,000 appeals. The following is a summary of his judicial experience:

ASSOCIATE JUSTICE, APPELLATE DIVISION, FIRST DEPARTMENT
March 1999 to Present

JUSTICE OF THE SUPREME COURT, KINGS COUNTY
Presided over a medical malpractice and criminal part of the
Supreme Court,
January 1998 to March 1999
Elected 1997, Re-elected 2011

ACTING JUSTICE OF THE SUPREME COURT, KINGS COUNTY
Presided over a criminal part of the Supreme Court,
January 1994 to December 1997

JUDGE OF THE CIVIL COURT, KINGS COUNTY
January 1990 to December 1993

19. Petitioner-Plaintiff Justice Sheri S. Roman is a Justice of the Supreme Court of the State of New York and has been on the bench since 1985. She was appointed to the Second Department in 2009. She has participated in over 8,000 appeals. The following is a summary of her judicial experience:

ASSOCIATE JUSTICE, APPELLATE DIVISION, SECOND DEPARTMENT
July 2009 to Present

SUPREME COURT JUSTICE, QUEENS COUNTY, CIVIL AND CRIMINAL TERMS,
Re-elected 2009 to 2023
1995 to 2009

JUDGE, CRIMINAL COURT OF THE CITY OF NEW YORK
1985 to 1994

20. Petitioner-Plaintiff Justice John M. Leventhal is a Justice of the Supreme Court of the State of New York and has been on the bench since 1994. He was appointed to the Second Department in 2008. He has participated in over 8,000 appeals. The following is a summary of his judicial experience:

ASSOCIATE JUSTICE, APPELLATE DIVISION, SECOND DEPARTMENT,
Brooklyn, New York
January 25, 2008 to Present

PRESIDED OVER THE NATION'S FIRST DEDICATED FELONY DOMESTIC VIOLENCE "COURT."
June 1996- January 2008

PRESIDED OVER ARTICLE 81 GUARDIANSHIP PROCEEDINGS.
2001 to January 2008

JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK
SECOND JUDICIAL DISTRICT, Brooklyn, New York
Elected November 1995

21. Petitioner-Plaintiff Daniel J. Tambasco is a resident of Suffolk County. He is an attorney, admitted to practice in the Second Department in 1989. He regularly litigates civil actions in Supreme Court, Suffolk County.

22. Respondent-Defendant Administrative Board of the New York State Unified Court System (the "Administrative Board") is an administrative board that offers advice to, and consults with, the Chief Judge of the New York Court of Appeals and the Chief Administrative Judge of

the Courts of the State of New York in overseeing and establishing administrative policies for the Courts of the State of New York. The Administrative Board is composed of the Chief Judge of the New York Court of Appeals and the four presiding justices of each Appellate Division of the Supreme Court. Currently, the Administrative Board is composed of Chief Judge Janet DiFiore, Presiding Justice Rolando T. Acosta, Presiding Justice Alan D. Scheinkman, Presiding Justice Elizabeth A. Garry, and Presiding Justice Gerald J. Whalen.

23. Respondent-Defendant Chief Judge Janet DiFiore is the Chief Judge of the Court of Appeals and of the State of New York. She took office on January 21, 2016.

24. Respondent-Defendant Chief Administrative Judge Lawrence K. Marks is the Chief Administrative Judge responsible for overseeing the day-to-day operation of the New York State Unified Court System and leading the Office of Court Administration. He was appointed to his position on July 29, 2015, and answers directly to the Chief Judge.

25. Justice Rolando Acosta is a member of the Administrative Board in his capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, First Department. He was appointed to this position by Governor Cuomo on May 22, 2017.

26. Justice Alan D. Scheinkman is a member of the Administrative Board in his capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, Second Department. He was appointed to this position by Governor Cuomo on January 1, 2018. Presiding Justice Scheinkman is retiring at the end of this year.

27. Justice Elizabeth A. Garry is a member of the Administrative Board in her capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, Third Department. She was appointed to this position by Governor Cuomo on January 1, 2018.

28. Justice Gerald J. Whalen is a member of the Administrative Board in his capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, Fourth Department. He was appointed to this position by Governor Cuomo on January 7, 2016.

FACTS COMMON TO ALL CAUSES OF ACTION

RESPONDENTS' DENIAL OF FORTY-SIX PENDING CERTIFICATION APPLICATIONS

29. Petitioner Justices, all Justices of the Supreme Court of the State of New York, were elected to their positions under Section 6 of Article VI of the Constitution of the State of New York, 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."

30. All four Petitioner Justices are designated by the Governor of the State of New York as justices of the Appellate Division in their respective Judicial Departments.

31. Section 25(b) of Article VI of the Constitution provides that "[e]ach . . . justice of the supreme court . . . shall retire on the last day of December in the year in which he or she reaches the age of seventy." This applies even if a justice has not yet completed her fourteen (14) year term of office.

32. This section further provides that:

> 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.

33. Consistent with the Constitution, Section 115 of New York's Judiciary Law delineates the procedure for a justice to be certificated to continue her service as a justice beyond

the age of seventy (70). It 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.

34. Section 115 of the Judiciary Law further provides that if a retired justice is certificated, her certification will be valid for two years, and that she may reapply for certification until she reaches the age of seventy-six (76).

35. Thus, pursuant to the Constitution and the Judiciary Law, the Administrative Board is empowered to accept applications from justices who are about to be retired and determine whether (a) each has the mental and physical capacity to perform the duties of such office, and (b) whether her services are necessary to expedite the business of the Supreme Court.

36. Before September 29, 2020, forty-nine justices, including all of the Petitioner Justices, had applied to the Administrative Board to be certificated for continued service for the two years immediately following January 1, 2021.

37. On September 29, 2020, Chief Administrative Judge Marks issued a memorandum (the "Certification Memo") to the administrative judges for each judicial district announcing that the Administrative Board had decided to deny "all but a small handful" of the pending applications for certification or recertification filed by justices of the Supreme Court.

38. In the Certification Memo, with a subject line of "Certification," Judge Marks asserted 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."

39. While Judge Marks in the Certification Memo states that the Governor has already

mandated budgetary cuts, in fact, he has not. Rather, Governor Cuomo has made it clear in public statements that the state should not make budget cuts at this time because the state might be able to avoid emergency budget measures if a substantial federal stimulus package is passed.

40. On October 5, 2020, only days after the Certification Memo was issued, Governor Cuomo stated that he was going to avoid any "irreversible" cuts to the state budget in the hopes that the 2020 Elections would make conditions more favorable to a substantial federal stimulus.

41. Despite the fact that the Governor has not mandated a Judiciary budget cut and may not do so, Chief Administrative Judge Marks referred to the alleged budget cut in the Certification Memo as "dramatic" and used it as the sole justification "compel[ing Respondents] to implement a range of painful measures."

42. In particular, Judge Marks explained that "the Administrative Board has decided to disapprove all but a small handful of pending judicial applications for certification or recertification that would take effect on January 1, 2021."

43. In the Certification Memo, Judge Marks asserted that these denials of certification applications would save $55 million over the next two years and would help the court system to "avoid layoffs, or greatly reduce the number of layoffs should that extreme measure become unavoidable."

44. Essentially, in the Certification Memo, Judge Marks announced that the Administrative Board decided to eliminate Supreme Court justices in an attempt to preserve the jobs of the support staff for the courts.

45. Ultimately, the Certification Memo effected the Administrative Board's decision to issue a blanket denial of certification applications (with exceptions made for three justices) with no justification other than to purportedly save money. The Petitioner Justices' certification

applications were all denied as a result of the Administrative Board's decision.

46. Upon information and belief, the vote by the Administrative Board to deny certification was initially not unanimous. Originally, the straw vote was 3-2 against the plan to deny certification with only the Chief Judge and Justice Whelan of the Fourth Department initially voting in favor of the plan. The swing vote in favor of the plan to deny certification ultimately was Justice Scheinkman of the Second Department, who had previously stated to justices for the Second Department that he would support certification given the necessity of their continued service. Justice Scheinkman was originally elected in Westchester County, Ninth Judicial District, which is Judge DiFiore's home district. Judge DiFiore was his mentor when he was appointed as Presiding Justice of the Second Department.

47. Upon information and belief, in voting to deny certification, Judge Marks and the Administrative Board did not act in accordance with the statutory or Constitutional criteria for denying certification. They neither evaluated the mental and physical capacities of the particular justices applying for certification (including Petitioners), nor reached a determination that the services of these justices, deemed necessary to expedite the business of the Supreme Court for decades, are no longer necessary.

48. At the time the Respondents elected to deny Petitioners' certification, all of the Petitioner Justices were approved by the New York City Bar Association and their local bar associations for continued certificated service at the time of the Certification Memo.

49. Moreover, at the time the Certification Memo was issued, all but one of the Petitioner Justices had in fact passed the medical exam required to demonstrate their physical and mental capacity to be certificated. With respect to the Petitioner Justice who had not yet passed the medical exam, this only occurred because her appointment to take the necessary exams was

postponed until October 2020 by the temporary closing of the medical provider due to the pandemic, and then cancelled by the Office of Court Administration after Respondents' denials of certification.

50. Respondents' denials of forty-six (46) of forty-nine (49) pending applications for certification from justices of the Supreme Court, including those of the Petitioner Justices, threatens the administrative and constitutional underpinnings of the New York Unified Court System and will further slow an already overburdened and underfunded court system, with the inevitable result of denying justice to the citizens of New York State.

THE HISTORICAL NECESSITY OF APPELLATE DIVISION JUSTICES

51. As a result of constitutional convention of 1894, the State of New York amended Article VI of the New York State Constitution to make major changes, including the creation of the Appellate Divisions. These changes were made to remedy two evils: the great delay in bringing cases to trial and in securing the final disposition of cases on appeal. The decision of the Administrative Board to eliminate the certification of senior judges has in practice largely undone these changes and will cause the court system to revert to the inefficient, wasteful and inadequate system of 1894.

52. The original constitutional convention provided for five justices to sit in each Department. In 1925, this allocation was increased to seven justices for each Department who would form what is known as the Constitutional Court. Every additional justice appointed to the Appellate Division, has been appointed by the Governor on certification of need by each Department's presiding justice with the consultation of the justices of the Constitutional Court. N.Y. Const. Art. VI, § 4(e). Thus, since 1925, the presiding justices have certificated to the

Governor that the additional justices, in addition to the seven members of the Constitutional Court, were and are necessary to the functioning of their respective Departments.

53. Petitioner Justices are all justices who were appointed to the Appellate Division because their appointments were necessary to ensure the speedy disposition of business before the court.

54. Upon information and belief, the workload in each Department has grown exponentially over the years. At no time has any Department requested that the Governor reassign any justice because the justice was no longer needed on the court. The current workload is consistent with the presiding justices' repeated certifications to the Governor that the judges in addition to the Constitutional Court were necessary to handle the workload of the respective Departments.

55. The workload of the courts has certainly not decreased as a result of the temporary COVID-19 shutdown of the court system. Rather, that temporary shutdown has caused a backlog in the First Department and exacerbated the backlog in the Second Department. While both Departments added additional sittings in order to diminish the backlogs, neither department will be able to continue to conduct the additional sittings if the respondents' decision to terminate the petitioners is permitted to stand.

56. Indeed, Justice Acosta has verified that, at least for the First Department, there are an insufficient number of judges on the Court to handle the existing workload. Similarly, Justice Scheinkman has also certified to the Governor that additional, designated justices are necessary for the speedy disposition of the business before it.

57. Thus, all four Appellate Division Departments have not departed from their prior attestations of the necessity of the current complement of justices to expedite the business of the courts.

58. Respondents' actions here, denying certification to the Petitioner Justices, all Appellate Division justices who have for decades been deemed to be necessary to the efficient administration of justices in the States, will have incalculable repercussions on justice system in this State.

THE CURRENT MAKE-UP OF THE APPELLATE DIVISIONS

59. The Appellate Division, Second Department is currently composed of the following justices:

Hon. Alan D. Scheinkman, Presiding Justice
Hon. William F. Mastro
Hon. Reinaldo E. Rivera
Hon. Mark C. Dillion
Hon. Ruth C. Balkin
Hon. Cheryl E. Chambers
Hon. Leonard B. Austin
Hon. John M. Leventhal
Hon. Sheri S. Roman
Hon. Jeffrey A. Cohen
Hon. Robert J. Miller
Hon. Sylvia Hinds-Radix
Hon. Joseph J. Maltese
Hon. Colleen D. Duffy
Hon. Hector D. LaSalle
Hon. Betsy Barros
Hon. Francesca E. Connolly
Hon. Valerie Brathwaite Nelson
Hon. Angela G. Iannacci
Hon. Linda Christopher
Hon. Paul Wooten

60. Of these justices, the Constitutional Court in the Second Department is comprised of Justices Scheinkman, Mastro, Rivera, Balkin, Dillon, Chambers and Austin. The remaining

fourteen Associate Justices of the Second Department were, at the time of their respective appointments all considered to be necessary to the functioning of the Court.

61. Petitioners Justice John M. Leventhal and Justice Sheri S. Roman have been denied certification by virtue of the order effective January 1, 2021. Collectively these two justices have sat on approximately 15,000 appeals.

62. The Appellate Division, First Department is currently composed of the following justices:

Hon. Rolando T. Acosta, Presiding Justice
Hon. David Friedman
Hon. Dianne T. Renwick
Hon. Sallie Manzanet-Daniels
Hon. Judith J. Gishe
Hon. Barbara R. Kapnick
Hon. Troy K. Webber
Hon. Angela M. Mazzarelli
Hon. Ellen Gesmer
Hon. Cynthia S. Kern
Hon. Jeffrey K. Oing
Hon. Anil C. Singh
Hon. Peter H. Moulton
Hon. Lizbeth Gonzalez
Hon. Tanya R. Kennedy
Hon. Saliann Scarpulla
Hon. Manuel J. Mendez
Hon. Martin Shulman

63. Of those justices, the Constitutional Court of the First Department is comprised of Justices Acosta, Friedman, Renwick, Manzanet-Daniels, Gische, Kapnick and Webber. The remaining eleven Associate Justices of the First Department were at the time of their respective appointments, all considered to be necessary to the functioning of the Court. Given Presiding Justice Acosta's statements referred to above, all of the justices of the Court are necessary to keep pace with the current filings in the Court.

64. Despite that acknowledged need, Petitioners Justice Friedman, on the Constitutional Court, and Justice Gesmer have been denied certification by virtue of the order effective January 1, 2021. Justice Mazzarelli was recertificated as an exception to the order. Justices Friedman and Gesmer collectively have sat on approximately 15,000 appeals.

65. In addition to Petitioners, Respondents' actions denied certification to three other Appellate Division justices: (1) Hon. Jeffrey A. Cohen, Appellate Division, Second Department, (2) Hon. Eugene P. Devine, Appellate Division, Third Department, and (3) Hon. Joseph J. Maltese, Appellate Division, Second Department.

66. In addition to the justices on the Appellate Division, the following Supreme Court justices in the Second Department were denied certification by the order effective January 1, 2021:

Hon. Thomas A. Adams
Presiding Justice, Appellate Term, 9th &10th JD

Hon. Antonio I. Brandeveen
NYS Supreme Court, Nassau County

Hon. Jeffrey S. Brown
NYS Supreme Court, Nassau County

Hon. Stephen A. Bucaria
NYS Supreme Court, Nassau County

Hon. Richard Lance Buchter
NYS Supreme Court, Queens County – Criminal Term

Hon. Lawrence H. Ecker
NYS Supreme Court, Westchester County

Hon. Joseph J. Esposito
NYS Supreme Court, Queens County – Civil Term

Hon. Thomas Feinman
NYS Supreme Court, Nassau County

Hon. William J. Giacomo
NYS Supreme Court, Westchester County

Hon. Maureen A. Healy
NYS Supreme Court, Queens County – Civil Term

Hon. Daniel Lewis
NYS Supreme Court, Queens County – Criminal Term

Hon. Stephen J. Lynch
NYS Supreme Court, Suffolk County

Hon. Ira H. Margulis
NYS Supreme Court, Queens County – Criminal Term

Hon. Orlando Marrazzo, Jr.
NYS Supreme Court, Richmond County – Civil Term

Hon. Larry D. Martin
NYS Supreme Court, Kings County – Civil Term

Hon. Vincent J. Martorana
NYS Supreme Court, Suffolk County

Hon. Robert F. Quinlan.
NYS Supreme Court, Suffolk County

Hon. Bernice D. Siegal
NYS Supreme Court, Queens County – Civil Term

Hon. Bruce E. Tolbert
NYS Supreme Court, Westchester County

67. The following Supreme Court justices in the First Department were denied certification by the order effective January 2, 2021:

Hon. Lester B. Adler
NYS Supreme Court, Bronx County

Hon. Ben R. Barbato
NYS Supreme Court, Bronx County

Hon. Steven L. Barrett
NYS Supreme Court, Bronx County

Hon. Lucy A. Billings
NYS Supreme Court, New York County

Hon. Kathryn E. Freed
NYS Supreme Court, New York County

Hon. Nicholas J. Iacovetta
NYS Supreme Court, Bronx County

Hon. Robert T. Johnson
NYS Supreme Court, Bronx County

Hon. Alan C. Marin
NYS Supreme Court, New York County

Hon. Donald H. Miles
NYS Supreme Court, Bronx County

Hon. Michael J. Obus
NYS Supreme Court, New York County

Hon. Howard H. Sherman
NYS Supreme Court, Bronx County

Hon. Fernando Tapia
NYS Supreme Court, Bronx County

RESPONDENTS' ACTIONS THREATEN THE WORKING OF THE COURT SYSTEM

68. By denying the Petitioner Justices and forty-two other justices certification and removing them from the bench, Respondents' actions ensure a slowdown of the already glacial pace of litigation in the Supreme Court.

69. Indeed, because the Petitioner Justices have not been certificated, several of them are not serving on appellate panels for the balance of 2020, or will soon stop sitting. The First and Second Departments had each added an additional day of argument each week to address the backlogs caused by the pandemic. As a result of the denials of certifications, the Appellate Divisions will no longer be able to schedule the extra argument panel each week. Moreover, in some cases in the Second Department, appeals may be heard by three panels of three justices per week instead of four panels of four justices hearing appeals each week in November and December 2020.

70. Currently, even with the presence of these justices denied certification, the New York Unified Court System already has struggled to expeditiously hear, try, and decide cases. There are numerous examples of these types of delay already present in the New York Unified Court System.

71. For example, the Second Department currently has a delay of at least three years from the date of perfecting an appeal until the parties have oral argument, a back log that Presiding Justice Scheinkman has tried to address by hiring additional attorneys for short, one-year terms to assist with the workload before the Second Department. With the loss of four senior judges of the Court, the retirement of the presiding justice, and two other vacancies, however, there can be no dispute that the time for hearing an appeal will continue to grow to record levels of delay.

72. This type of delay and back log in the courts system has only been exacerbated by COVID-19.

73. For example, Presiding Justice Acosta was quoted in the New York Law Journal as stating that, because of the pandemic, "we have seen a significant increase in the number of perfected-but-uncalendared cases for the first time in my tenure as Presiding Justice. The pandemic required us to suspend our April calendar of perfected appeals and adjourn those cases to subsequent months. Although we heard hundreds of appeals as a virtual court during our Special May and June terms, many appeals had to be adjourned. And, as usual, we received hundreds of newly perfected appeals for September. As a result, we currently have more than 1,100 perfected appeals for the September term. Given our typical capacity to hear fewer than 300 appeals per term, it is clear that we have a challenging road ahead."

74. Similarly Presiding Justice Scheinkman has publicly acknowledged that since the pandemic, the Second Department has dropped from hearing around 20 cases in a sitting to 16 cases in a sitting, creating an additional backlog for appeals.

75. This backlog, which will be substantially worsened by the Respondents' denials of certification, will disproportionately affect minority communities. For example, the Second Department—where the backlog of cases is worst among the four Appellate Divisions—includes Kings County and Queens County, both of which have diverse demographic makeups. In Kings County, approximately 63.8% of its residents (an estimated total population of 2,559,903) belong to minority groups and 45.4% speak languages other than English at home. Similarly, in Queens County, approximately 55.92% of its residents (an estimated total population of 2,253,858) belong to minority groups and 56.16% speak languages other than English as their primary language. Respondents' actions undeniably harm these diverse communities' access to the court system.

76. Since Respondents denied the Petitioner Justices certification, many legal organizations and associations have condemned and opposed Respondents' actions, particularly with respect to their effect on the pace of litigation in New York, including: the New York City Bar Association (Council on Judicial Administration), New York State Trial Lawyers Association, LGBT Bar Association of Greater New York, Assigned Counsel Association – NYS, Inc., New York State Assembly Committee on the Judiciary, Supreme Court Justices Association of the City of New York, Inc., the Association of Justices of the Supreme Court of the State of New York, Inc., and the Judicial Friends Association, Inc.

77. While the Chief Administrative Judge and the Chief Judge have cited budgetary constraints as requiring the denial of certification to judges deemed necessary to advance the administration of justice in this State, they have unabashedly continued to seek the designation of

civil court judges as Acting Justices of the Supreme Court, in an attempt to stem the burdensome and ever-growing caseload of the present system.

78. As of 2019, there are 333 elected Supreme Court justices and approximately 260 acting Supreme Court Justices. Seventy-three Acting Supreme Court justices were appointed from the Court of Claims. The remainder were designated acting Supreme Court justices from the lower courts such as County Court and Family Court.

79. On June 20, 2019, the Senate confirmed the Governor's appointment of ten judges to the Court of Claims. All but two of these appointments were re-appointments. Further, nine of the ten judges confirmed at that time have been appointed acting Supreme Court justices.

80. In the midst of the pandemic and ensuing budget crisis and two months before the Certification Memo denying certification to 49 elected judges for purported budgetary reasons, on July 24, 2020 the Senate confirmed the Governor's appointment of an additional four judges to the Court of Claims: Veronica G. Hummel, Charles M. Troia, Adrian N. Armstrong and Adam W. Silverman. Judges Troia, Hummel and Silverman were immediately appointed acting Supreme Court justices.

81. From the records available to the public on OCA's website, it appears that several Court of Claims judges who were appointed acting Supreme Court justices have been certificated under Judiciary Law §115. There are no legal basis for such certifications.

82. Thus, while the Chief Judge and the Chief Administrative Judge (himself a Court of Claims Judge named as an acting Supreme Court justice) have cited budgetary reasons to deny certification to the most seasoned and experienced judges in our system of justice, they nevertheless have also simultaneously sought the appointment of acting justices, undercutting the so-called budgetary justifications for denial of certification.

AS AND FOR A FIRST CAUSE OF ACTION
(For Judgement Pursuant to CPLR 7803)

83. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

84. Article 78 of New York's Civil Practice Law and Rules supersedes the common-law writs and provides a device for challenging the actions of the Respondents, administrative agencies and officers of the State of New York.

85. In particular, Section 7803(3) of the CPLR authorizes a petitioner to raise in a special proceeding before a Supreme Court "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."

86. Here, the Respondents' decisions must be guided by the requirements of the Constitution of the State of New York and Section 115 of the Judiciary Law.

87. Section 115 of the Judiciary Law provides two basis for denial of certification: each individual justice's certification or recertification application may be denied upon an assessment of (a) the mental and physical capacity to perform the duties of such office, and (b) the necessity to expedite the business of the Supreme Court.

88. As a matter of law, the determination of necessity includes consideration of the need for additional judicial capacity and whether the individual seeking certification can meet this need.

89. The Respondents did not deny the Petitioner Justices' certification applications on both or either of these requisite bases, or indeed on any individual basis. Rather, Respondents' relied on budgetary concerns for the wholesale and across the board denial of certification or

recertification, a consideration which is explicitly outside the bases set forth in the Judiciary Law.

90. Accordingly, Respondents violated the lawful procedures contemplated by the Constitution of the State of New York and required by Section 115 of the Judiciary Law.

91. Because Respondents did not comply with these procedures, their denials of certification were "made in violation of lawful procedure" as contemplated by CPLR 7803(3).

92. Accordingly, Respondents' denials of certification with respect to the Petitioner Justices must be annulled and Respondents must make determinations as to (i) the mental and physical capacity of the Petitioner Justices to continue their duties as justices of the Supreme Court, and (b) whether the Petitioner Justices' continued service is necessary to expedite the business of the Supreme Court.

AS AND FOR A SECOND CAUSE OF ACTION
(For Judgment Pursuant to CPLR 7803)

93. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

94. Section 7803(3) of the CPLR authorizes a petitioner to raise in a special proceeding before a Supreme Court "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."

95. Here, the blanket denials of certification issued by Respondents with respect to the Petitioner Justices were not only made in violation of lawful procedure, but are further subject to challenge because Respondents' denials were arbitrary and capricious.

96. Upon information and belief, Respondents considered criteria which bore no rational relationship to the statutory and constitutional criteria.

97. 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)).

98. Respondents' blanket denials of certification are "arbitrary, unreasonable, irrational, or indicative of bad faith."

99. The sole justification provided by Chief Administrative Judge Marks for the denial of Petitioners' certification applications were fiscal concerns arising out of an expected, but not certain, $300 million budget cut to the Judiciary undertaken by Governor Cuomo.

100. In this context, Chief Administrative Judge Marks in the Certification Memo explained that the decision to deny almost all of the pending certification applications would save the New York Unified Court System $55 million over two years.

101. Savings of $55 million over two years is an unsupportable figure.

102. The Certification Memo suggests that Respondents calculated the average savings of denying each justice's certification application as almost $1.2 million over two (2) years.

103. None of the Respondents have provided any justification or empirical basis for this expected savings figure.

104. In fact, denying certification to the Petitioner Justices and the other justices whose pending applications for certification were denied could never result in $55 million in savings over two years.

105. Respondents failed to consider the costs to the court system from denying certification. Respondents also failed to consider the non-monetary costs of denying certification which include, but are not limited to: the court system's loss of prestige for engaging in blatantly discriminatory conduct, the decline in morale among the remaining judges and justices, and the

decreased efficiency of a court system deprived of its senior bench.

106. By denying the pending certification applications for forty-six justices, these vacated seats on the Supreme Court may be filled by appointments well before any certification period would expire.

107. Moreover, these forty-six justices will receive full pension payments as opposed to their yearly salaries. Thus, the cost to the public is virtually the same. The main difference is that the retired justices will receive a near to full salary but not work as judges. The court system will lose all of the benefits of their hard work and expertise but the state will still be paying for it.

108. As a result, it is rational and reasonable to expect that the budgetary impact of Respondents' actions will not lessen the strain on New York's Judiciary budget, but could increase the strain.

109. Based upon the foregoing, the $55 million in expected savings cited by Chief Administrative Judge Marks is a non-empirical figure not rationally based on the actual expected budgetary impact of the Administrative Board's decision to deny almost all of the pending certification applications for justices of the Supreme Court.

110. Thus, Respondents' reliance on this unsupported expected savings figure in denying the Justice Petitioners' applications for certification renders their decision(s) irrational and unreasonable, and therefore arbitrary and capricious under CPLR 7803(3).

111. Moreover, because Section 115 of the Judiciary Law requires the Administrative Board to consider the "necessity" of the justices applying for certification, the budgetary savings – if indeed any exist at all – must be balanced against the current and documented necessity for justices in the New York Unified Court System.

112. As outlined above, the New York Unified Court System is currently experiencing

an extreme backlog of cases, with justice delayed becoming justice denied in far too many cases. By denying certification to forty-six justices of the Supreme Court, including Petitioners, Respondents are only ensuring that this backlog will worsen.

113. As a result, even if Respondents could demonstrate that the denial of forty-six pending certification applications could result in *de minimis* savings, these savings would be insufficient, under Section 115 of the Judiciary Law, to rationalize Respondents' choice to disapprove of the Petitioner Justices' applications for certification. This is particularly true with respect to the Petitioner Justices, justices of the Supreme Court, Appellate Division, who represent only a small fraction of any *de minimis* expected savings under Respondents' plan.

114. For all of the foregoing reasons, the Respondents' decision to deny certification to all of the Petitioners was arbitrary and capricious under CPLR 7803(3).

115. Accordingly, Respondents' denials of certification with respect to the Petitioner Justices must be annulled.

AS AND FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

116. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

117. CPLR § 3001 authorizes the Supreme Court to render a declaratory judgment "having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

118. Consistent with the Constitution of the State of New York, Section 115 of New York's Judiciary Law, a measure enacted by the legislature of the State of New York, delineates the procedure for a justice to be certificated to continue service as a justice beyond the age of seventy (70). It 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.

119. Despite constitutional and legislative enactments, Respondents have ultimately and unilaterally determined, without any amendment of this provision by the legislature, that due to budgetary concerns, the Petitioner Justices' certification applications should be denied.

120. Because Respondents have not evaluated the Petitioner Justices' certification applications on the two grounds specified by the Constitution of the State of New York and by the legislature in the Judiciary Law, Respondents have, by their actions, repealed these provisions, disregarded the judgment of the New York State Legislature, and eliminated the certification process for justices on their own accord.

121. Altogether, Respondents' actions have unconstitutionally negated Section 115 of the Judiciary Law, a legislative enactment by the New York State Legislature meant to effectuate the role and operation of the New York State Unified Court system consistent with Article 6 of the Constitution of the State of New York.

122. Respondents' actions threaten the functioning of the court and do away with the certification program's purpose of ensuring that the courts do not lose the benefit of experienced, productive and capable justices after they turn seventy (70) years old.

123. Moreover, by failing to implement the Judiciary Law, Respondents have entirely disregarded the certification program and usurped the power of the New York State Legislature.

124. As evidenced by the above, a justiciable controversy exists concerning whether Respondents actions are unconstitutional and illegal.

125. A declaration of the parties' rights under the Constitution of the State of New York

and the Judiciary Law is required.

126. Based upon the foregoing, Petitioners are entitled to a declaration that Respondents' denial of Petitioners' certification applications was unconstitutional and illegal in violation of the Constitution of the State of New York and the Judiciary Law.

AS AND FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

127. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

128. Section 6 of Article I of the Constitution of the State of New York states: "No person shall be deprived of life, liberty or property without due process of law."

129. Here, the Petitioner Justices have a property interest in their terms and continued service as justices of the Supreme Court even after their mandatory retirement age, as specifically contemplated by the procedures required by Constitution of the State of New York and the Judiciary Law.

130. Because the Petitioner Justices have such a property interest, they were and continue to be entitled to procedural due process protections to ensure that they are not deprived of that right in a way that violates fundamental fairness.

131. Here, Respondents decision to deny Petitioners certification applications has violated fundamental fairness principles because Respondents' decision has ensured that the Petitioner Justices have been unfairly and erroneously deprived of their ability to continue to serve as justices of the Supreme Court.

132. Moreover, Respondents' chosen course of action—ignoring the guidelines and standards laid out in Judiciary Law Section 115 and denying Petitioners' applications for certification—has arbitrarily deprived the Petitioner Justices of their interest in continuing to serve

as justices of the Supreme Court.

133. Thus, Respondents have denied the Petitioner Justices procedural due process under the law.

134. As evidenced by the above, a justiciable controversy exists concerning whether Respondents' near-blanket denial of pending certification applications, including those of the Petitioner Justices, denied the Petitioner Justices due process.

135. A declaration of the parties' due process rights under the Constitution of the State of New York and the Judiciary Law is required.

136. Based upon the foregoing, Petitioners are entitled to a declaration that Respondents' denial of Petitioners' certification applications denied the Petitioners due process under the Constitution of the State of New York.

AS AND FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment)

137. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

138. Section 4(e) of Article 6 of the Constitution of the State of New York provides:

> In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease.

139. Upon a showing of necessity, this provision empowers Appellate Divisions to request that the governor designate additional justices to help expedite the business of the Appellate Division. Without these necessity designations, the Appellate Divisions would only consist of seven (7) justices, the Constitutional Court, as specified by Section 4(b) of Article 6 of

the Constitution of the State of New York. The seven justices of all four Appellate Divisions who are serving pursuant to Section 4(b) rather than Section 4(e) compose the Constitutional Court.

140. Section 4(d) of Article 6 of the Constitution of the State of New York allows that where the governor designates such an additional justice (or does so other under circumstances) to serve on the Appellate Division, and those designated justice departs the courts (i.e. a vacancy opens up) the governor thereby "shall make new designations."

141. It is pursuant to these constitutional provisions that the size of the Appellate Divisions have consistently increased well-beyond the size of the Constitutional Court to their current sizes.

142. For over a century, Appellate Divisions have continued to certify to the governor the need for additional justices, and the governor has replaced these designated justices as vacancies arise.

143. Upon information and belief, never has an Appellate Division certified to a governor that a designated additional Appellate Division justice was no longer necessary for the "speedy disposition of the business before it."

144. Thus, the absence of a certification to the Governor that necessity no longer exists, demonstrates that the Appellate Divisions have undisputedly expressed to the Governor their continued belief in the necessity of the justices serving on the Appellate Divisions.

145. However, by Respondents' actions, Respondents have superseded and disregarded the Appellate Division's determinations of necessity and determined that the Petitioner Justices, along with several other Appellate Division justices, are no longer necessary for the business of the Appellate Division.

146. Moreover, in issuing their certification denials on grounds independent of those

specified by Section 115 of the Judiciary Law, Respondents have overstepped their own constitutional authority and interfered with the Appellate Divisions' ability to certify to the Governor the continued necessity of their justices' services.

147. Thus, Respondents' almost-blanket denial of pending applications for certification from Appellate Division justices (and Petitioners)—as opposed to the good faith, case-by-case basis required by the Constitution of the State of New York—has usurped and contradicted the constitutional authority provided to the Appellate Divisions to certify to the Governor the continued necessity of those justices designated for necessary service on the Appellate Division.

148. Respondents' denials of almost all pending certification applications are therefore unconstitutional because Respondents are overstepping their constitutional authority and interfering with the constitutional relationship between the Appellate Divisions and the Governor concerning the necessity of justices.

149. As evidenced by the above, a justiciable controversy exists concerning whether Respondents' denials of almost all pending certification applications violate the Constitution of the State of New York.

150. A declaration of whether the Respondents' near-blanket denial of pending certification applications violates the Constitution of the State of New York is required.

151. Based upon the foregoing, Petitioners are entitled to a declaration that Respondents' denial of Petitioners' certification applications violated the Constitution of the State of New York.

AS AND FOR A SIXTH CAUSE OF ACTION
(Discrimination under New York's Human Right Law)

152. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

153. The State of New York's Human Rights Law ("NY HRL") is set forth in Article 15

of New York's Executive Law. Section 291 of the NY HRL provides, "The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right."

154. Moreover, Section 296(1) of the NY HRL provides that "It shall be an unlawful discriminatory practice:

> (a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

155. "Employer" is defined in Section 292 of the NY HRL as referring to "all employers within the state."

156. Section 297(9) of the NY HRL provides that individuals may seek redress for unlawful discrimination under the NY HRL by bringing suit in a court of appropriate jurisdiction, stating:

> 9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of employment discrimination related to private employers and housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section . . . .

157. Here, the Petitioner Justices are all justices of the Supreme Court of the State of New York who have extensive judicial experience and have served the public with distinction.

158. The Petitioner Justices all reside within the State of New York and are employed by the New York State Unified Court System.

159. The Petitioner Justices are all at least seventy (70) years old and by the explicit

terms of the NY HRL belong to a protected class on the basis of their age.

160. Respondents' actions to eliminate and deny the Petitioner Justices' pending requests for certification—thereby effectively firing the Petitioner Justices—targeted and discriminated against Petitioners on the basis of their age.

161. In fact, Respondents' own justifications for their actions indicated that they targeted the Petitioner Justices and forty-two other elder justices in connection with purported budgetary cuts rather than undertake age-neutral layoffs in other areas of the New York Unified Court System.

162. Moreover, Respondents' denial of the Petitioner Justices' certification applications ensures that Petitioners will be replaced in favor of younger justices.

163. Thus, Respondents' actions to deny the Petitioner Justices' requests for certification were discriminatory and illegal under the NY HRL.

AS AND FOR A SEVENTH CAUSE OF ACTION
(Discrimination under New York City's Human Right Law)

164. Petitioners repeat and reallege each and every allegation in the foregoing paragraphs as if fully set forth herein.

165. In addition to the State of New York, New York City has its own regulations in place outlawing discriminatory practices.

166. New York City's Human Rights Law ("NYC HRL") is set forth in Title 8 of the Administrative Code of the City of New York. Section 8-101 of the NYC HRL states New York City's policy as follows:

> In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin,

> immigration or citizenship status, gender, sexual orientation, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, uniformed service, any lawful source of income, status as a victim of domestic violence or status as a victim of sex offenses or stalking, whether children are, may be or would be residing with a person or conviction or arrest record.

167. Section 8-107 of the NYC HRL provides:

> 1. Employment. It shall be an unlawful discriminatory practice:
> (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person:
> (1) To represent that any employment or position is not available when in fact it is available;
> (2) To refuse to hire or employ or to bar or to discharge from employment such person; or
> (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

168. Section 8-102 of the NYC HRL defines "employer" for the purposes of Section 8-107(1) as any employer with four or more persons in its employ.

169. Section 8-502 of the NYC HRL governs the right of individuals to enforce the terms of the NYC HRL by civil action. It provides:

> a. Except as otherwise provided by law, any person claiming to be a person aggrieved by an unlawful discriminatory practice as defined in chapter 1 of this title or by an act of discriminatory harassment or violence as set forth in chapter 6 of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence. For purposes of this subdivision, the filing of a complaint with a federal agency pursuant to applicable federal law prohibiting discrimination which is subsequently referred to the city commission on human rights or to the state division of human rights pursuant to such law shall not be deemed to constitute the filing of a complaint under this subdivision.

170. Here, the Petitioner Justices are all justices of the Supreme Court of the State of

New York who have extensive judicial experience and have served the public with distinction.

171. The Petitioner Justices all reside in New York City and were elected as Supreme Court justices in a county within New York City. The Petitioner Justices are all employed by the New York State Unified Court System, an agency with more than four employees.

172. The Petitioner Justices are all at least seventy (70) years old and by the explicit terms of the NYC HRL belong to a protected class on the basis of their age.

173. Respondents' actions to eliminate and deny the Petitioner Justices' pending requests for certification—thereby effectively firing Petitioners—targeted and discriminated against Petitioners on the basis of their age.

174. In fact, Respondents' own justifications for their actions indicated that they targeted the Petitioner Justices and forty-two other elder justices in connection with purported budgetary cuts rather than undertake age-neutral layoffs or budgetary cuts with respect to other areas of the New York Unified Court System and its budget.

175. Moreover, Respondents' denial of the Petitioner Justices' certification applications ensures that Petitioners will be replaced in favor of younger justices.

176. Thus, Respondents' actions to deny the Petitioner Justice' requests for certification were discriminatory and illegal under the NYC HRL.

WHEREFORE, Petitioners respectfully request that this Court grant judgment in its favor as follows:

(a) On the first cause of action, finding that Respondents' actions were in violation of lawful procedure under CPLR 7803(3);

(b) On the second cause of action, finding that Respondents' actions were arbitrary and capricious under CPLR 7803(3);

(c) On the third cause of action, a declaration that Respondents' actions were unconstitutional and illegal;

(d) On the fourth cause of action, a declaration that Respondents' actions denied Petitioners' due process under the Constitution of the State of New York;

(e) On the fifth cause of action, a declaration that Respondents' actions were unconstitutional;

(f) On the sixth cause of action, finding that Respondents' actions were discriminatory in violation of New York's Human Rights Law;

(g) On the seventh cause of action, finding that Respondents' actions were discriminatory in violation of New York City's Human Rights Law;

(h) Granting such further and additional relief as the court deems just and proper.

Dated: New York, New York
November 5, 2020

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Attorneys for Petitioner-Plaintiffs

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ELLEN GESMER, being duly sworn, deposes and says:

I am Petitioner-Plaintiff Justice Ellen Gesmer in this action. I have reviewed the foregoing Verified Article 78 Petition and Complaint and know the contents thereof, and the same are true and correct to the best of my knowledge, except as to those matters that are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Dated: New York, New York
November 4, 2020

Hon. Ellen Gesmer

Notarization was made pursuant
to Executive Order 202.7
Sworn to me before this
4th day of November, 2020

Notary Public

LUCY MAHECHA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6384242
Qualified in Rockland County
My Commission Expires 12-10-2022

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF Kings)

DAVID FRIEDMAN, being duly sworn, deposes and says:

I am Petitioner-Plaintiff Justice David Friedman in this action. I have reviewed the foregoing Verified Article 78 Petition and Complaint and know the contents thereof, and the same are true and correct to the best of my knowledge, except as to those matters that are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Dated: Kings, New York
11/4/2020

David Friedman
Hon. David Friedman

Notarization was made pursuant
to Executive Order 202.7
Sworn to me before this
4th day of November, 2020

Lucy Mahecha
Notary Public

LUCY MAHECHA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6384242
Qualified in Rockland County
My Commission Expires 12-10-2022

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF Queens)

SHERI S. ROMAN, being duly sworn, deposes and says:

I am Petitioner-Plaintiff Justice Sheri S. Roman in this action. I have reviewed the foregoing Verified Article 78 Petition and Complaint and know the contents thereof, and the same are true and correct to the best of my knowledge, except as to those matters that are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Dated: Queens, New York
November ~~3~~ 4, 2020

Sheri S. Roman
Hon. Sheri S. Roman

Notarization was made pursuant
to Executive Order 202.7
Sworn to me before this
~~4th~~ day of November , 2020

Lucy Mahecha
Notary Public

LUCY MAHECHA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6384242
Qualified in Rockland County
My Commission Expires 12-10-2022

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF New York)

JOHN M. LEVENTHAL, being duly sworn, deposes and says:

I am Petitioner-Plaintiff Justice John M. Leventhal in this action. I have reviewed the foregoing Verified Article 78 Petition and Complaint and know the contents thereof, and the same are true and correct to the best of my knowledge, except as to those matters that are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

Dated: 11-4-2020 New York
11/4/2020

Hon. John M. Leventhal

Notarization was made pursuant
to Executive Order 202.7
Sworn to me before this
4th day of November , 2020

Notary Public

LUCY MAHECHA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6384242
Qualified in Rockland County
My Commission Expires 12-10-2022