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April 22, 2026

BY EMAIL
New York Court of Appeals
20 Eagle Street
Albany, New York 12207-0365

Re: *Miller et al. v. State of New York*, APL-2026-00033

To this Honorable Court:

We are counsel to Appellants Robert J. Miller, Richard J. Montelione, and Orlando Marrazzo Jr. We respectfully submit this letter brief in support of their appeal from the decision and order of the Appellate Division, First Department, dated March 12, 2026, affirming the dismissal of Appellants' Petition. Appellants ask this Court to reverse the decision below and declare that (i) New York State Constitution ("NY Constitution") Article VI, §25 has been voided by the recent passage of the Equal Rights Amendment incorporated into NY Constitution Article I, §11 (the "ERA"), or in the alternative, (ii) Article VI, §25 and its enacting statutes

are subject to and cannot withstand the strict scrutiny the ERA requires for a law circumscribing an individual's exercise of civil rights based solely on age.

For more than a century, the NY Constitution has required judges to retire at the age of 70 based on age alone. Article VI, §25(b) not only mandates retirement at age seventy, it also bars further certificated service after age seventy-six, without regard to ability, performance, or fitness. The rule was adopted shortly after the Civil War, in a very different era when most people did not reach the age of fifty, let alone work into their seventies. Although advances in medicine and lifestyle have substantially increased life expectancies and evolved social ideals about aging – even the age at which people can collect social security has been creeping up – the NY Constitution still requires all judges to retire upon reaching the age of 70 solely based on age.

In November 2024, however, the People of the State of New York changed the constitutional landscape. New York voters overwhelmingly approved an amendment to Article I, §11 of the NY Constitution by adopting the ERA, which added age to the state constitution's enumerated protected categories and made explicit that no person shall, because of age, be subjected to discrimination in their civil rights by the State "pursuant to law." The framers of the amendment were clear that it was not enacted as a symbolic restatement of the law. Rather, the amendment

was enacted to ensure the state constitution provides expanded, comprehensive and enforceable protection against discrimination. Once the People added age to Section 11's protected categories, age-based distinctions in a person's civil right imposed by the State could no longer be accepted without scrutiny.

This Court's prior decisions confirm why that change matters. The last time this Court considered whether Article VI, §25(b), and the implementing statutes for judicial mandatory retirement age, were constitutional, it did so on the premise that age was not a suspect classification and that age-based retirement laws therefore were not subject to strict scrutiny. *See Maresca v. Cuomo*, 64 N.Y.2d 242 (1984); *Diamond v. Cuomo*, 70 N.Y.2d 338 (1987). Those decisions reflected the constitutional framework that existed at the time, but the ERA has dismantled that framework. Once age was added to the enumerated categories in Article I, §11, the governing constitutional review for age-based laws necessarily changed, and the constitutionality of Article VI, §25(b) and Judiciary Law §§23 and 115 must be reassessed under the Constitution as amended.

This appeal also presents the question of whether Article VI, §25(b) irreconcilably conflicts with amended Article I, §11. The State's argument that the provisions can be reconciled is contrary to the plain language of the provisions. Article I, §11, as amended, prohibits the State from engaging in age-based

discrimination against a person's civil rights pursuant to law. In direct conflict, Article VI, §25(b) requires the State to do exactly that by disqualifying judges from continued judicial employment solely because of age. The Appellate Division nevertheless held that the mandatory retirement scheme survives, reasoning in substance that the ERA did not disturb this older constitutional command. The Appellate Division's conclusion cannot be squared with the text the People adopted. The amendment contains no carve-out for Section 25(b), no exceptions for judges and no indication that a clear form of age discrimination in New York law was meant to remain untouched.

This case does not seek any special entitlement to judicial office, nor does it seek a mandate prohibiting all age-based classifications under law. The question is whether the State may continue to impose a categorical age-based disqualification on otherwise qualified judges under law, after the People amended the Constitution to forbid age discrimination in a person's civil rights by the State pursuant to law. Appellants' position is that the State may not do so. The civil right at issue here is the right to be free from state-imposed discrimination in employment, a civil right otherwise declared in law, on the basis of an expressly protected characteristic. If Article I, §11 does not impact the analysis of a constitutional rule that forces judges from office solely because of age, then the ERA's addition of age as a protected

category is meaningless. The same cannot be said of every age-based classification in the law. Contrary to the State's hyperbolic arguments, drinking alcohol is not a civil right, and preventing children from engaging in labor is a generally accepted social more. There is no danger to accepted social structures in acknowledging that the amended Article I, §11 cannot be reconciled with Section 25(b).

Even if Article VI, §25(b) and the implementing statutes are not deemed superseded by the later amendment, they cannot be sustained without constitutional scrutiny under Article I, §11 as it now exists. Once the ERA added age to the NY Constitution's enumerated protected classes, the age-based classification in Section 25(b) and its implementing statutes must be subject to strict scrutiny review. The State can no longer rely on generalized assumptions about aging to justify a blanket rule of exclusion. Yet the State offered no record basis establishing that mandatory retirement at age seventy, or the complete bar on service after age seventy-six, is necessary to preserve judicial quality, nor did it show that age-neutral alternatives are unavailable. To the contrary, New York already has multiple mechanisms to address incapacity, misconduct, lack of fitness, or poor performance without resorting to a conclusive age bar.

In sum, the ERA means what it says. It prohibits age discrimination in a person's civil rights by the State pursuant to law. Article VI, §25(b) requires exactly

that discrimination. The NY Constitution cannot be read to command and forbid the same thing at once. If the older provision is allowed to stand unchanged, then judges will remain the only class of employees in the State whom the Constitution not only fails to protect from age discrimination, but affirmatively subjects them to it. The NY Constitution, as amended by the People in 2024, does not permit that result. This Court should reverse the Appellate Division, First Department's judgment, declare that the ERA at a minimum requires strict scrutiny of laws that abridge a person's civil rights on the basis of age, and determine that Art. VI, §25 of the NY Constitution does not pass strict scrutiny and must be voided.

Allegations in the Petition

I. The Current Mandatory Retirement Age for New York Judges – 70 Years Old – Was Set in 1869, When Men Had an Average Life Expectancy of 41 Years Old

When the NY Constitution initially was enacted in 1777, it contained a provision setting the judicial retirement age at 60, which was increased to 70 years in 1869. The NY Constitution, Article VI, §25(b), currently provides:

> Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court **shall retire on the last day of December in the year in which he or she reaches the age of seventy**. Each such former judge of the court of appeals and justice of the supreme court may thereafter 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. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. **A retired judge or justice shall serve no longer than until the last day of December in the year in which he or she reaches the age of seventy-six. . .**

(emphasis added).

At the time the Constitution was amended in 1869, the average life expectancy was only 41 years of age for men, and 43 years of age for women. At the 1867 constitutional convention, delegates debating the judicial retirement age argued that those over the age of 70 – an "extreme age" before which "most men die" – lose their physical abilities such as hearing, sight and ability to sit for long hours. Some delegates making this argument mocked the elderly for alleged disabilities.

Today, average life expectancy at birth is 78.4 years, nearly four full decades longer than in 1869. Attitudes towards older workers also have changed. Nationally, discrimination against workers on the basis of age was legal until the passage of the Age Discrimination in Employment Act in 1967. New York followed in 1975, amending the state's Human Rights Law ("NYSHRL") to include age as a protected characteristic. Expectations around the working life of attorneys have changed even more substantially. Lawyers are, on average, older than other workers, and today nearly one in seven attorneys working is over the age of 65.

In the federal courts, many older judges continue to actively serve with distinction, bringing their decades of experience and wisdom to the bench. Similarly, many members of the state legislature are over the age of 70 and/or 76. There is no age limitation for members of the legislature or the executive branch.

II. In Keeping with Changing Social Mores, New York Voters Overwhelmingly Approve the New York State Equal Rights Amendment, Which Prohibits Discrimination in a Person's Civil Rights Based on Specific Categories Including Age

In 2024, the ERA amended Article I, §11 of the NY Constitution to expand the civil rights guaranteed to the state's inhabitants. The ERA was enacted by legislative proposal, a rigorous process requiring both legislative and electoral support under NY Constitution Art. XIX, §1. The ERA first was introduced as a concurrent resolution in the New York State Assembly and Senate during the 2021-2022 session and passed both houses. As required by law, the ERA was reintroduced in the 2022-2023 session and again passed both houses.

The legislative sponsorship memos demonstrated the protective nature of the ERA. The sponsorship memorandum for Senate bill S.108 (the "Senate Memo") stressed the amendment would extend "the right to be free from discrimination" to all New Yorkers by "expanding the list of classes affirmatively protected by the New York Constitution in recognition of the need for comprehensive, enforceable, and intersectional equality under the law," and would "provid[e] legal protections that

go above and beyond the protections of the Federal Constitution." Similarly, the sponsorship memorandum for A.1283 (the "Assembly Memo") trumpeted the legislative intent to enhance protections for disadvantaged groups, explaining, "our modern vision of equality demands comprehensive equal protection."

After twice being approved by the Legislature, the ERA was put to the voters as a special ballot question during the 2024 general election. On November 5, 2024, New Yorkers overwhelmingly voted, by a majority of 62.5% to 37.5%, to approve the ERA and amend the Constitution. The abstract explaining the ERA on the ballot provided:

> **Amendment to Protect Against Unequal Treatment**
>
> This proposal amends Article 1, Section 11 of the New York Constitution. Section 11 now protects against unequal treatment based on race, color, creed, and religion. The proposal will amend the act to also protect against unequal treatment based on ethnicity, national origin, age, disability, sex, sexual orientation, gender identity, gender expression, pregnancy, and pregnancy outcomes, as well as reproductive healthcare and autonomy. The amendment allows laws to prevent or undo past discrimination.[1]

In total, there were six ballot proposals to amend the New York City Charter or State Constitution on the ballot in 2024, but not a single other proposal passed. Further, the ERA faced an intensive opposition campaign. Nonetheless, the ERA garnered broad support from the electorate.

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[1] *See* https://elections.ny.gov/2024-statewide-ballot-proposal (last visited Apr. 20, 2026).

Prior to passage of the ERA, Art. I, §11 of the NY Constitution read as follows:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Following the amendment, the provision now reads in full:

> a. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, **age**, disability, creed or, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive health care and autonomy, be subjected to any discrimination in his or her their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, **pursuant to law**.

(emphasis added).

III. Procedural History

Appellants are justices of the Supreme Court, who were forced to retire and are certified as retired justices of the Supreme Court with terms that ended or are ending at the end of 2025, 2026 or 2027, pursuant to Section 25(b) and New York Judiciary Laws §§23 and 115.

Before the Motion Court, Appellants sought a declaratory judgment that the ERA rendered the Section 25(b) null and void, and that that Judiciary Laws §§23

and 115 violate Article I, §11 of the NY Constitution, the NYSHRL and the New York City Human Rights Law ("NYCHRL"). They further sought to enjoin further enforcement of the Judiciary Laws mandating retirement based solely on age. Because Appellant Miller turned 76 during 2025, and accordingly his judgeship would terminate at the end of 2025, Appellants sought a preliminary injunction enjoining his forced retirement.

Respondents cross-moved to dismiss the Petition for failure to state a claim. The Motion Court dismissed the Petition on the grounds that Appellants could not demonstrate that the ERA explicitly or implicitly repealed Section 25(b). The Motion Court held that in order to establish that Section 25(b) has been overturned by the ERA, Appellants would need to demonstrate that the ability to remain a judge was a civil right, but that Appellants had not made such a showing. The Motion Court likewise dismissed Appellants' claims for a declaratory judgment that Judiciary Laws §§23 and 115 violated Article I, §11 of the NY Constitution. Rather than conducting analysis under either strict scrutiny or rational basis review, the Motion Court simply decreed that Appellants had not demonstrated that Judiciary Laws §§23 and 115 are unconstitutional. As to Justice Miller's request for injunctive relief, the Motion Court denied the request, holding that he could be compensated with money damages and so would not suffer irreparable injury.

The Motion Court's decision contrasts with two recent Supreme Court decisions addressing the ERA. In *Saltarelli v. State of New York,* the court held that Judiciary Law §23 – which prohibits judges, including City Court judges serving outside of New York City, from holding office after December 31 in the year they turn 70 years old –violates the ERA. *Saltarelli v. State of New York*, 2026 WL 100302 (Sup. Ct. Madison Cty. 2026). The *Saltarelli* case was limited to an analysis of the Judiciary Law because the *Saltarelli* Court held that Article VI, §25(b) did not apply to City Court judges outside of New York City. The *Saltarelli* Court recognized that the ERA elevated age to a suspect classification, which required strict scrutiny of the Judiciary Law. From there, the *Saltarelli* Court concluded that Judiciary Law §23 could not pass constitutional muster. By contrast, the Motion Court found that the ERA simply did not apply to the judicial retirement laws because the ERA protects individuals from "discrimination in their civil rights," mandatory judiciary retirement does not concern a civil right because there is no right to be a judge, and thus that the ERA did not allow for a cause of action challenging the judicial retirement laws.

The Motion Court's decision is also inconsistent with another Supreme Court's reasoning in *Williams v. New York*, 239 N.Y.S.3d 435 (Sup. Ct. Wayne Cty. 2025). In *Williams*, sitting County Court judges sought a declaratory judgment

stating that the ERA invalidated Article VI, §25(b), and Judiciary Law §23. While the *Williams* Court denied the judges' motion for injunctive relief, its reasoning differed materially from the Motion Court's reasoning. The *Williams* Court held that courts are required to harmonize even irreconcilable constitutional provisions because "there does not appear to be a recognized basis for a petitioner to use one part of the Constitution to strike down a separate part of the same Constitution."[2] 239 N.Y.S.3d at 442. In dicta, though, the *Williams* Court acknowledged that if the question were solely whether the ERA invalided the Judiciary Law, the Judiciary Law likely would not survive strict scrutiny. *Id.*

On appeal, the Appellate Division, First Department affirmed the Motion Court's judgment. Specifically, the First Department held that the ERA did not implicitly repeal Article VI, §25(b), and that the Judiciary Law §§23 and 115 were constitutional. The First Department declined to decide whether the ERA made Article I, §11 self-executing or whether strict scrutiny applies to age-based statutory classifications.

[2] Petitioners believe that the *Williams* Court was incorrect in this determination, as discussed below, given New York's established doctrine of implicit repeal.

ARGUMENT

I. Laws Classifying People Based on Age Now Face Strict Scrutiny Review and the State Cannot Demonstrate That the Age-Based Mandatory Retirement for Judges in Art. VI, §25(b) and Judiciary Laws §§23 and 115 Are Narrowly Tailored to Meet a Compelling State Interest

The Appellate Division expressly declined to consider whether Article I, §11 as amended, is self-executing or whether the mandatory retirement scheme is subject to and can survive strict scrutiny review, treating the questions as academic. This was clear error. The standard used to review a statute is often the key to whether that statute will pass legal muster. Far from academic, this issue will arise time and again as courts are asked to apply the ERA, so it is critical for this Court to address this issue at its earliest opportunity.

A. Appellants Have a Private Right of Action Under the ERA to Challenge Article VI, §25(B) and Judiciary Laws §§23 and 115

Appellants have challenged the constitutionality of Article VI, §25(b), Judiciary Laws §§23 and 115, based on the ERA. While the Appellate Division declined to address whether Article I, §11 is self-executing, the Motion Court rejected the argument. The Motion Court reasoned that the second sentence of the ERA (the "Civil Rights Clause"), which lists age as an enumerated class, only creates causes of action for discrimination concerning civil rights elsewhere declared by Constitution, statute or common law. From there, the Motion Court held that Appellants were seeking to preserve a purported right to continue judicial service,

but that no laws grant an individual the right to serve as a judge. Through that prism, the Motion Court concluded that the Civil Rights Clause is not self-executing, and dismissed the Petition. This Court should reject the Motion Court's myopic view of the issues at stake in this proceeding, and find that an individual challenging a statute governing employment that makes a distinction between employees based solely on the suspect categorization of age can assert a cause of action under the ERA.

Both the NYSHRL and the NYCHRL provide that individuals may not be subject to discrimination in employment. *See* Exec. L. §§291, 292(5)(a)[3]; NYC Admin. Code §8-107 (1)(a)(2). Moreover, individuals have a constitutional right not to be excluded from public service or denied access to the ballot as a candidate. *See Turner v. Fouche*, 396 U.S. 346, 362-63 (1970); *Bullock v. Carter,* 405 U.S. 134, 141 (1972). New York's mandatory retirement laws deny Appellants their rights as public officials to continue to serve or to be considered again as judicial candidates in future elections. This is different than the right to continue in a judgeship, and the Motion Court incorrectly circumscribed Appellant's claims with this description.

[3] "The term 'employer' shall include all employers within the state. For the purposes of this article, (a) the state of New York shall be considered an employer of any employee or official, including any elected official, of the New York state executive, legislature, or judiciary, including persons serving in any judicial capacity, and persons serving on the staff of any elected official in New York state [.]"

Appellants have alleged that their civil rights are being impeded by the State based on the NY Constitution's mandatory judicial retirement provision.

The text of Section 11 also clearly provides a direct cause of action to challenge discriminatory state action based on an enumerated protected category. The provision commands, through unambiguous and mandatory language, that no person *shall* be subjected to discrimination in their civil right. *See Matter of Brusco v. Braun*, 84 N.Y.2d 674, 680 (1994) (the word "shall" is a command). Nothing in the text of Section 11 suggests that its prohibition depends on further legislative action. *See People v. Carroll*, 3 N.Y.2d 686, 691 (1958) (constitutional provisions are presumed self-executing unless their language indicates otherwise).

Though the language of the ERA is clear and unambiguous, the mandatory and enforceable nature of the rights created under the ERA is further reinforced by the legislative record. The Sponsors' Memorandum explains that the amendment was enacted "to ensure that [the] State Constitution extends … the right to be free from discrimination" and to provide "comprehensive, enforceable … equality under the law," and further states that, "even in the absence of specific executing legislation," Section 11 "operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category." The ballot language similarly informed New Yorkers that a "YES" vote

would "protect against unequal treatment" on the basis of age and other enumerated characteristics by placing those protections in the State Constitution. Those representations would be meaningless if the amendment did not create enforceable protections against discriminatory state action. Courts must construe constitutional amendments in a manner consistent with the understanding conveyed to the electorate, not in a way that renders those protections illusory.

B. Under the ERA, Laws that Draw Distinctions Solely Based on Age Are Now Subject to Strict Scrutiny Review

By including age as an enumerated category in Section 11, the ERA elevated laws that draw distinctions based solely on age to strict scrutiny review. That position follows from the text of the ERA itself. The amendment added age to the Constitution's protected categories and placed it alongside the other classes that have historically received the Constitution's highest solicitude. Section 11 lists all its protected categories together and does not distinguish among them. There is therefore no basis to classify only some enumerated categories as suspect classes while treating others, listed in the same sentence, as if the amendment had effected no change. State actions that disadvantage a suspect class are subject to strict scrutiny, the highest level of judicial review. *See People v. Aviles*, 28 N.Y.3d 497, 502 (2016).

Pre-ERA cases such as *Maresca v. Cuomo*, 64 N.Y.2d 242 (1984), and *Diamond v. Cuomo*, 70 N.Y.2d 338 (1987), do not change that result. Those decisions applied rational-basis review when age was not a suspect classification under New York constitutional law.[4] Thus, critically, they did not – and could not – address the effect of the ERA's subsequent prohibition on age discrimination "pursuant to law." Moreover, those decisions followed federal precedent in holding that age was not a suspect classification and therefore laws that discriminated based on age were only subject to rational basis review. However, the framers of the ERA expressly stated that the amendment was designed to "go above and beyond the protections of the Federal Constitution" and it does so by expanding the list of suspect categories affirmatively protected by the NY Constitution from four – race, color, creed, and religion – to a comprehensive list that includes age. (Senate Memo, Purpose by Sponsor Kruger, R74). If the ERA's explicit inclusion of "age" as a protected category does not change judicial review of laws that draw age-based distinctions, then the amendment accomplishes nothing. Courts must avoid readings

[4] Other state courts have consistently held that state equal rights amendments provide protections beyond those afforded by the federal Equal Protection Clause, and, accordingly, laws targeting the enumerated protected groups face strict scrutiny review. See *Allegheny Reproductive. Health v. Pennsylvania Dep't of Human Servs*., 309 A.3d 808 (Pa. 2004); *Silver State Hope Fund v. Nevada*, Case No. A-23-876702-W, 2024 WL 5716730, at *6 (Nev. Dist. Ct. Aug. 8, 2024); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 853-57 (N.M. 1998*); Doe v. Maher*, 515 A.2d 134, 157-62 (Conn. Super. Ct. 1986); *In the Interest of Unnamed Baby McLean,* 725 S.W.2d 696, 697-98 (Tx. 1987)*; Op. the of Justices to the House of Representatives,* 371 N.E.2d 426, 428 *(*Mass. 1977); *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974).

that render constitutional language redundant or superfluous. *See People v. Galindo*, 38 N.Y.3d 199, 205 (2022).

C. The State Has Not Established that Age-Based Disqualification of Serving Judges Is Necessary to Serve a Compelling State Interest

To survive strict scrutiny review, the State must show a compelling interest in drawing a suspect classification and that it adopted the least restrictive means to achieve that compelling interest. *See Avery v. Downstate Medical Center,* 39 N.Y.2d 326, 332-33 (1976). The State can do neither here.

Even assuming that the State's asserted interest in maintaining the quality of the judiciary is compelling, that does not end the inquiry.[5] As Appellants argued in their Appellate Brief, the State does not satisfy strict scrutiny by simply stating a compelling government interest. Rather, the State must demonstrate that there is a compelling interest that warrants drawing the suspect classification in the first place. That standard requires the State to provide a firm evidentiary basis showing that the

[5] The Appellants agree that the State has an overriding interest in the integrity, impartiality and quality of the judiciary. *See, In re Rabb,* 100 N.Y.2d 305, 313 (2003) and *In re Watson,* 100 N.Y.2d 290, 301 (2003) (Rules that prohibit judges and judicial candidates from engaging in certain political activities are constitutionally permissible because, even applying strict scrutiny review, they are narrowly tailored to further a number of compelling state interests, including preserving the impartiality and independence of the state judiciary and maintaining public confidence in New York State's court system); *see, Nicholson v. State Commn. on Jud. Conduct,* 50 N.Y.2d 597, 607 (1980) ("Judges may not actually or appear to make the dispensation of justice tum on political concerns. The State's interest is not limited solely to preventing actual corruption through contributor-candidate arrangements. Of equal import is the prevention of the 'appearance of corruption stemming from public awareness of the opportunities for abuse.'").

use of the protected classification is necessary to achieve the stated goal. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 498-500 (1989) The recitation of a benign or legitimate purpose is inadequate. *Id.*

The State here has not met its burden of setting out a compelling State interest to require judges to retire at a set age. The State relied on general statements from prior opinions, most notably *Nicholson v. State Commn. on Jud. Conduct*, 50 N.Y.2d 597, 607 (1980), for the proposition that there is hardly a higher governmental interest than the State's interest in the quality of its judiciary. But as argued by Appellants, another court's conclusionary statement is not evidence. The State did not submit data, studies, or record proof showing that a categorical age cutoff is necessary to ensure judicial quality. Nor did it establish that age, as opposed to individualized fitness, performance, or competence, is a constitutionally adequate proxy after age has been made an expressly protected category in the Constitution itself.

The State's lack of evidentiary support that an age cutoff is necessary to ensure judiciary quality is confirmed by looking at the treatment of comparable public officials. Federal judges continue to serve well past age seventy without any mandatory age cutoff and without evidence that the quality of the federal judiciary

has thereby diminished. Nor do officials in the legislative and executive branches, where judgment and capacity are likewise central, face a comparable age bar.

The State's argument, reduced to its essence, is that age may be used as a conclusive proxy for diminished judicial capacity. But that is precisely the type of categorical reasoning that is prohibited under a "strict scrutiny" analysis. The ERA elevated age into a protected classification. The State can no longer justify a blanket age-based exclusion by resting on generalized assumptions about the effects of aging, but rather must prove that the classification is directly tied to the legitimate goal the State is attempting to achieve. The State has utterly failed to carry its burden.

D. The State Has Not Demonstrated that an Age-Based Mandatory Retirement Scheme Is Narrowly Tailored to Achieve the State's Goal of a Capable Judiciary, and Multiple Age-Neutral Alternatives Already Exist to Achieve this Goal

New York's mandatory judicial retirement laws also fail the second prong of strict scrutiny. Even if the State has set out a compelling interest that is met by discriminating among judges based solely on age,[6] Art. VI, §25(b) and Judiciary Laws §§23 and 115 would still be unconstitutional because the State has not shown

[6] Although we disagree, the State may argue that it has a compelling state interest in upholding Article VI, §25(b) and Judiciary Law §23 as applied to 70-year-old judges, as the retirement of judges permits new people to be appointed as judges. However, there is no arguable compelling state interest present to apply Article VI, §25(b) and Judiciary Law §115 to 76-year-old justices. The existing certification process ensures the continued integrity, competence, and excellence of the judiciary for older justices.

that categorical age-based retirement is the least restrictive means practically available to achieve the goal of a competent judiciary. *Aliessa ex rel. Fayad,* 96 NY2d 418, 431 (2001).

A categorical prohibition on judicial service over the age of 70 and 76 is a blunt method of screening judges. Going further, age-neutral alternatives already exist and are in use in New York. Supreme Court justices are already subject to election and reelection; judges may already be removed or disciplined for cause, incapacity, lack of fitness, or misconduct under Article VI, §22 and Judiciary Law §§40-48; and impeachment remains available. There also exists the certification framework that could be continued in some form and expanded to evaluate judicial ability going forward. All of these mechanisms target the State's stated concerns, demonstrating that a blanket age cutoff is not the most narrowly tailored method of achieving the State's interest in a capable judiciary.

The State has dismissed individualized procedures "with a hand wave," without providing the courts with any evidence that such alternatives would be unduly burdensome or humiliating to judges. Given the use of individualized mechanisms in other settings and the absence of record evidence of administrative burden, it is difficult to see how a law that disqualifies from the judiciary all persons over a stated age could qualify as the least restrictive means, regardless of health,

background, record, or current circumstances. The NY Constitution does not permit the State to use an age classification as a blunt instrument when less restrictive and more precise alternatives are already available and already in use.

This is especially true with respect to Judiciary Law §115. That statute imposes an absolute bar on continued service of any form for justices beyond age seventy-six based solely on age. If any provision illustrates the failure of narrow tailoring, it is that one. It allows no individualized inquiry, no assessment of actual ability, and no consideration of the very qualities that judicial service is supposed to measure (e.g., wisdom, experience, temperament, and performance.) Under strict scrutiny, such a law cannot stand merely because the State prefers administrable generalizations over individualized assessment.

To be sure, not every age-based classification necessarily fails once age is treated as a suspect class. Certain age distinctions may be justified where they are narrowly tailored to address compelling state interests, particularly with respect to minors. For example, New York law establishes minimum age requirements for operating a motor vehicle, *see* New York Vehicle and Traffic Law §502, and separately prohibits the sale and possession of alcohol by persons under the age of twenty-one pursuant to New York Alcoholic Beverage Control Law §65. These laws address immediate safety risks and regulate specific activities based on

administrable thresholds tied to youth and inexperience. The State may persuasively argue that it has a compelling state interest and there are no less restrictive alternatives to be had. But that is not the case here. Section 25(b), and Judiciary Laws §§23 and 115 impose a categorical and permanent disqualification on otherwise qualified adults holding judicial office, without any individualized inquiry into competence, fitness, or actual ability. The existence of narrowly tailored, conduct-specific regulations in other contexts only underscores the absence of tailoring here.

The State's invocation of *Burson v. Freeman*, 504 U.S. 191 (1992), does not alter the analysis. That decision arose in a materially different constitutional context and does not relieve the State of its burden here. *Burson* addressed a First Amendment challenge to a content-based restriction on electioneering in the immediate vicinity of polling places, grounded in a long-recognized and historically supported interest in protecting the integrity of the voting process. It did not involve, let alone uphold, the use of a categorical classification based on a constitutionally protected trait. The Court's observation that proposed alternatives fall short was made in that unique setting and against a developed historical record. It was not a case where the State was required to justify, with evidence, the necessity of a blanket exclusion targeting an enumerated protected class.

Here, by contrast, the State seeks to disqualify sitting judges solely on the basis of age, a classification now expressly protected under Article I, §11 as amended. Under that framework, the State cannot rely on generalized assumptions, administrative convenience, or unsupported assertions; it must demonstrate that the classification itself is necessary to achieve a compelling interest and that no less restrictive alternatives would suffice. The State has made no such showing. It has identified no empirical evidence, legislative findings, or developed record demonstrating that categorical age-based exclusion is necessary to preserve judicial competence or integrity, and it has dismissed less restrictive, age-neutral alternatives with little more than assertion. Appellants, by contrast, have identified multiple alternatives already available under New York law, including elections and reelections, disciplinary and removal mechanisms, incapacity proceedings, and the existing certification structure itself. Because the State has not shown that its chosen classification is necessary, Section 25(b), and Judiciary Laws §§23 and 115 cannot satisfy the required narrow tailoring.

E. Appellants Have Preserved Their Challenge to the Standard of Review to Use for Evaluating Laws Drawing Age-Based Distinctions

Appellants preserved, pleaded, and fully briefed an independent claim that they have an immediately enforceable cause of action to challenge the constitutionality of age-based judicial retirement laws under Article I, §11 and,

following the ERA's inclusion of age as an expressly protected category, laws mandating age-based disqualification must satisfy strict scrutiny constitutional review.[7] Because the ERA changed the governing constitutional standard of review for laws that make age-based distinctions, the Appellate Division erred in treating the strict scrutiny issue as academic. Article VI, §25(b) and the implementing statutes must be assessed under the Constitution as it now exists. The Appellate Division failed to undertake that analysis, and because Article VI, §25 and Judiciary Laws §§23 and 115 cannot pass constitutional muster, reversal is required on this independent ground.

II. The Plain Text of the Amendment Prohibits Age-Based Discrimination In a Person's Civil Rights By the State, Including Discrimination Imposed "Pursuant to Law"

The analysis should begin and end with the text of the NY Constitution as amended by the People of the State of New York. Prior to the amendment, age was not among the enumerated protected classes, and Art. 1 §11 of the NY Constitution did not contain the operative phrase "pursuant to law." The Legislature chose to add both, and the People adopted those changes by voting to ratify the ERA. Those

[7] Appellants' Petition/Complaint asserted causes of action seeking judgments that Judiciary Laws §§23 and 115 violated Article I, §11 because the laws are not justified by a compelling state interest and the laws are not the least restrictive means to do so. Even if the Court finds that the issue of strict scrutiny review of Art. VI, §25(b) was not fully preserved from the onset, purely legal arguments that are sufficient to review based on the record on appeal may be considered by the Court even if unpreserved. *See Watson v. City of New York*, 157 A.D.3d 510, 511 (1st Dep't 2018).

additions should be given meaning. Where constitutional language is clear, courts are obligated to enforce it as written; they may not dilute its effect or construe around its plain import. *See King v. Cuomo*, 81 N.Y.2d 247, 253 (1993). The amended text now prohibits age discrimination in a person's civil rights by the State, when carried out through law. There is no textual exception for preexisting provisions, nor a carve-out for judicial office. Further, there is no limitation confining the amendment to statutory enactments while exempting constitutional mandates.

A. The ERA's Prohibition Applies to State Action Taken "Pursuant to Law," Including Constitutional Mandates

Article I, §11 provides, in relevant part, that no person shall, because of age, "be subjected to any discrimination in their civil rights by . . . the state or any agency or subdivision of the state, pursuant to law."

The NY Constitution is the supreme law of the State. *See Browne v. City of New York*, 213 A.D. 18 206, 211 (1st Dep't 1925). Thus, when the State enforces a constitutional provision requiring age-based retirement, it discriminates "pursuant to law." The Appellate Division's contrary approach effectively treats the phrase "pursuant to law" as if it excludes constitutional provisions from its scope. Nothing in the text supports such a limitation. To the contrary, the Sponsors' Memorandum to the ERA confirms that, by clarifying that amended Section 11 applies to governmental action taken "pursuant to law," the amendment was intended to reach

"any action with force of law, including action by the executive or legislative branch, local governments, or any subdivision thereof." A constitutional mandate is the definitive example of such action.

The same materials confirm that the amendment is immediately operative against discriminatory legal rules. As the Sponsors' Memorandum states, even in the absence of specific executing legislation, amended Article I, §11 "operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category." Appellants' claim falls squarely within that description. The constitutional violation arises from the continued enforcement of a law that discriminates in a person's civil rights based on age, i.e., Article VI, §25(b). The ERA, by its terms, prohibits such enforcement.

B. The ERA Contains No Textual Carve-Out Preserving Preexisting Age-Based Discrimination

The Appellate Division's construction is undermined by the absence of any language in the ERA preserving or excepting preexisting provisions that would otherwise fall within its prohibition. The NY Constitution demonstrates, repeatedly and consistently, that when its drafters intend to subordinate one provision to another, or to preserve existing limitations, they do so expressly. Numerous provisions employ qualifying language such as "subject to" other constitutional or statutory provisions. Appellants identified several examples:

- Local Governments, Article IX, §2(b) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution...");

- Legislature, Article III, §4(c) ("Subject to the requirements of the federal constitution and statutes and in compliance with state constitutional requirements, the following principles shall be used...");

- Officers and Civil Departments, Article V, §3 ("Subject to the limitations contained in this constitution...");

- Local Finances, Article VIII, §1 ("[S]ubject to the provisions of this constitution otherwise restricting the power of such units to contract indebtedness or to levy taxes on real estate.");

- Local Finances, Article VIII, §12 ("[S]ubject to the provisions of this constitution...").

Those examples reflect a drafting protocol, and where the Constitution intends to preserve competing provisions or create exceptions, it unmistakably says so. On the contrary, the ERA contains no such language. It does not provide that its prohibition applies "subject to the provisions contained in the constitution or statutory limitations." Furthermore, it does not exclude preexisting constitutional mandates, distinguish among categories of public service, or carve out the judiciary. Instead, it states, without qualification, that no person shall be subjected to discrimination on the basis of age. In that context, the omission of any carve-out language is significant. The Constitution demonstrates that its drafters – and here, the People who adopted the amendment – knew how to preserve existing limitations

when that was their intent. The absence of such language in the ERA indicates that no such preservation was intended.

This reading is consistent with the canon *expressum facit cessare tacitum* (i.e., "what is expressed renders what is implied silent"). By setting forth a categorical prohibition on age-based discrimination, without qualification, the ERA leaves no room for implied exceptions. To recognize an unwritten carve-out for judicial age-based retirement would require the Court to supply limiting language the Constitution does not contain. The Appellate Division's construction effectively does just that. By treating Article VI, §25(b) as exempt from the ERA's prohibition, it reads into Article I, §11 a limitation that is not present in the text. That approach is incompatible with the governing principle that constitutional provisions must be enforced according to their terms, and that courts may not add qualifications the voters did not adopt.

Accordingly, the absence of any carve-out, *particularly* in a constitutional framework where such carve-outs are routinely expressed, confirms that the ERA's prohibition applies as written, including to age-based mandatory retirement provisions imposed by law.

The Appellate Division's contrary conclusion rests on an impermissibly narrow construction of the amendment. It treats the ERA as though it left intact one

of the most explicit forms of age-based discrimination in New York law, without any textual basis for doing so. That approach not only disregards the amendment's language, but it also deprives it of meaningful effect. The People did not amend the Constitution to prohibit age discrimination in the abstract while preserving its most direct and categorical application.

III. Where Two Constitutional Provisions Cannot Be Harmonized, the Later Amendment Controls and Supersedes the Earlier Inconsistent Provisions

Once the ERA is given the effect its text requires the next question is whether Article I, §11, as amended by the ERA, can be harmonized with Article VI, §25(b). If the answer is no, the second question follows as a matter of settled law: which provision controls. New York law has long supplied that answer. In construing the Constitution, "all its provisions relating directly or indirectly to the same subject must be read together and any amendment in conflict with prior provisions must control, as it is the latest expression of the people." *People ex rel. Williams Eng'g & Contr. Co. v. Metz*, 193 N.Y. 148, 157 (1908). Appellants advanced that rule from the beginning of this case, in the Petition/Complaint, in the following memoranda submitted to the Supreme Court, and again in the Appellants' Brief in the Appellate Division.

A. Article I, §11 and Article VI, §25(b) Are in Direct and Irreconcilable Conflict

Once Article I, §11 is given the meaning its text requires, the conflict with Article VI, §25(b) is direct, patent, and irreconcilable. Article I, §11 provides that no person shall, because of age, "be subjected to any discrimination in their civil rights" by the State "pursuant to law." Article VI, §25(b) does precisely what Article I, §11 now forbids. It mandates that a justice of the Supreme Court be removed from office upon reaching a specified age. That mandate is categorical, and it is triggered solely by age. In so doing, it discriminates in Appellants' civil right to be free from discharge from employment based solely on a protected characteristic like age – a civil right long recognized under New York law and one extended to judges. *See* Exec. Law. §§296(a) (discharge from employment including involuntary retirement is a discriminatory practice under the NYSHRL); *see also* Exec. Law. §§290(2) (the NYSHRL is the fulfillment of the provisions of the state constitution concerning civil rights); 292(2), (5). Plainly stated, Section 25(b) imposes a legal disability based exclusively on an enumerated protected characteristic, and it does so through the highest form of law in the State. By any ordinary understanding of the words, Section 25(b) clearly authorizes discrimination in a person's civil rights by State on the basis of age "pursuant to law."

One provision prohibits age-based discrimination by the State pursuant to law; the other commands it. Both cannot stand together. There is no plausible reading of the ERA that does not bring it into fatal conflict with Article VI, §25(b). Article I, §11 and Article VI, §25(b) are in direct and irreconcilable conflict with each other.

The governing principles of New York law compel the same conclusion. In construing the Constitution, "all its provisions relating directly or indirectly to the same subject must be read together and any amendment in conflict with prior provisions must control, as it is the latest expression of the people." *People ex rel. Williams Eng'g & Contr. Co. v. Metz*, 193 N.Y. 148, 157 (1908). The same proposition was advanced in Appellants' initial papers, which further recognized that while repeal by implication is generally not favored, it occurs when two provisions are "irreconcilable." *See Levy v. Evans*, 103 A.D.2d 681, 682 (1st Dep't 1984). And where "the two cannot stand together," that incompatibility demonstrates legislative or popular intent to change the law. *See People v. Heath*, 77 Misc. 2d 215, 218 (Sup. Ct. Schuyler Cty. 1974).

The Appellate Division erred in concluding otherwise. At this stage of the analysis, the question is not yet the ultimate doctrinal consequence of the conflict, but whether the conflict exists, and it does. Appellants' have consistently maintained that this inconsistency is "direct," "irreconcilable," and "fatal." Nor can the two

provisions be harmonized by narrowing the ERA until it no longer does the work the People assigned to it. Appellants have already established that the ERA applies to action taken "pursuant to law," including constitutional mandates, and that the amendment contains no textual carve-out preserving preexisting age-based discrimination. Once those propositions are accepted, there is no remaining interpretive path by which Article VI, §25(b)'s categorical age-based retirement regime can coexist with Article I, §11's categorical prohibition on age discrimination by the State. To preserve Section 25(b), one would have to read into the ERA a limitation which the text does not contain, and which would constitute *revision* rather than *harmonization*.

The obligation to harmonize different constitutional provisions has its limitations, and courts are not required to reconcile the irreconcilable. To permit Article VI, §25(b) to continue operating unchanged would be to permit one of the most explicit and categorical forms of age discrimination in New York law to survive the very amendment that included age within the protection of the State Constitution. Indeed, if Article VI, §25(b)'s mandatory-retirement rule was proposed today, it could not be enacted in light of the ERA. That reality demonstrates the mutual inconsistency of the two provisions and confirms that the ERA, as the later-adopted amendment and more recent expression of the People, must control.

The Appellate Division recognized the strength of our argument that there are numerous instances where amendments to the US Constitution impliedly overrode other provisions of the US Constitution.[8] The Appellate Division's inexplicable response to this argument was that the United States Constitution provisions were of the same subject matter while the Equal Rights Amendment barring age discrimination is a "different subject matter from the provision" mandating age discrimination against judges. This argument makes no sense, i.e. one provision bars age discrimination and the other mandates age discrimination for judges.

B. Once Article I, §11 and Article VI, §25(b) Are Found to be Irreconcilable, the Equal Rights Amendment Controls as it is the Latest Expression of the People; the Appellate Division's Contrary Analysis Cannot Be Sustained

Once the conflict between Article I, §11 and Article VI, §25(b) is recognized, the governing principle is straightforward and dispositive. In construing the

[8] The Fourteenth Amendment §2 implicitly overrode Art. I, §2, cl. 3 (Three Fifths Compromise) without the latter being explicitly repealed; Art. I, §2, cl. 3 and§9, cl. 4 of the U.S. Constitution prohibits the imposition of direct taxes unless made in proportion to the population of the states, interpreted by the Supreme Court to prohibit income taxes, which is implicitly repealed by the Sixteenth Amendment, which gives Congress the power to impose income taxes without apportionment; Art. I, §3, cl. 1-2 of the U.S. Constitution states that state legislatures "shall" select members of the Senate, while the Seventeenth Amendment provides for the election of Senators by the people overriding by implication their selection by state legislatures. The Nineteenth Amendment to the U.S. Constitution gave women the right to vote. This implicitly overrode that part of the Fourteenth Amendment, §2 allowing the reduction of representation in the House of Representatives to those states who deny males, but not females, twenty-one years of age the right to vote. There is only one explicit repeal of a provision of the Constitution-the Twenty-first Amendment repealing the Eighteenth that outlawed the sale, manufacture or transportation of liquor. All other nullification of prior provisions of the Constitution did not result in an explicit repeal of the provision that was nullified or reversed.

Constitution, "all its provisions relating directly or indirectly to the same subject must be read together and any amendment in conflict with prior provisions must control, as it is the latest expression of the people." *People ex rel. Williams Eng'g & Contr. Co. v. Metz*, 193 N.Y. 148, 157 (1908). Appellants invoked that rule from the outset, and it remains controlling here. The very purpose and effect of a constitutional amendment is to alter the preexisting constitutional arrangement, thereby superseding prior provisions to the extent of any inconsistency. *Matter of Baldwin Union Free Sch. Dist. v. County of Nassau*, 22 N.Y.3d 606, 625 (2014). Thus, where a later constitutional amendment and an earlier constitutional provision cannot be reconciled, the later provision must control as the more recent expression of the People. *Alweis v. Evans*, 69 N.Y.2d 199, 204 (1987); *Cimo v. State*, 306 N.Y. 143, 149 (1953).

While the Appellate Division did not meaningfully dispute these principles, inexplicably it failed to apply them. Thus, after acknowledging the obligation to read the Constitution as a whole, it concluded that the ERA did not repeal Article VI, §25(b) because the ERA does not expressly reference judicial retirement and because, in its view, there was insufficient evidence that the Legislature or the voters intended repeal. That analysis effectively inverts the proper sequence. As stated earlier, constitutional provisions routinely expressly refer to carve-out exceptions,

which was not done here. Once two constitutional provisions cannot be fairly harmonized, the question is no longer whether the later amendment employed explicit words of repeal, but which provision controls. Under *Metz*, the later amendment must control because it is the latest expression of the People.

Nor does the general rule disfavoring implied repeal alter that conclusion. Appellants have never disputed that repeal by implication is ordinarily disfavored. But that principle has a settled corollary indicating that where provisions "cannot stand together due to irreconcilable conflict," the later provision governs and the earlier one yields. *Alweis*, 69 N.Y.2d at 204. The principle against implied repeal promotes harmony where coexistence is possible, but it does not license a court to preserve an earlier constitutional rule by draining a later constitutional amendment of its operative force. Once conflict is established, the canon yields to the rule that the People's latest constitutional command controls.

The Appellate Division's reliance on the absence of express repeal is therefore misplaced. A later constitutional amendment need not identify each prior inconsistent provision to displace it. "[T]here is no rule of law which prohibits the repeal of a special act by a general one without the express use of words." *People ex rel. Lucas v. Warden of N.Y.C. Penitentiary*, 174 Misc. 494, 495 (Sup. Ct. Bronx Cty. 1940), citing *People v. Jaehne*, 103 N.Y. 182 (1886). If the constitutional text,

fairly read, conflicts with earlier law, that conflict controls the result, with no need to entertain the absence of a clear cross-reference.

Nor does the specificity of Article VI, §25(b) preserve it. While that provision speaks specifically to judicial retirement, specificity does not authorize contradiction. As Appellants have shown, even a more specific provision must yield where the conflict with a later enactment is clear and the two cannot stand together. *Cimo*, 306 N.Y. at 149. The question is not which provision is more detailed, but whether both can operate simultaneously – and we firmly submit that they cannot.

The Appellate Division's reliance on legislative history, both before and after the amendment, fares no better. That Court's dependence on post-ERA legislative proposals regarding amending Article IV, §25(b) is unavailing. That one Senator and one Assemblymember introduced legislation after the passage of the ERA is not evidence of the intent of the Legislature that enacted the ERA as a whole. Post-hoc statements and action do not constitute legislative intent. See *Fernandez v. New York State Bd. of Elections*, 85 Misc.3d 872 (Sup. Ct. Albany Cty. 2024) (citing *Matter of Consolidated Edison Co. of NY, Inc. v. Dep't of Envtl. Conservation*, 71 N.Y.2d 186, 195 n.4 (1988); *Lorie Co. v. St. Lawrence Cty. Dep't of Social Servs*., 49 N.Y.2d 161, 169 (1980); *Matter of State of New York v. Parker*, 38 A.D.2d 542 (1st Dep't 1971)).

"It is a well-settled and basic tenet of constitutional and statutory interpretation that the clearest and 'most compelling' indicator of the drafters' intent is the language itself." *Hernandez v State of NY*, 173 A.D.3d 105, 111 (3d Dep't 2019), citing *People v. Carroll*, 3 N.Y.2d 686, 689 (1958). There is no need to resort to legislative history to clarify statutory language that is already clear. That approach departs from the settled principle that where constitutional text is clear, courts do not look beyond it in search of alternative intent. See *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932) (Cardozo, J.) ("We have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."); *see also*, *Food Mktg. Inst. v. Argus Leader Media*,588 U.S. 427, 436 (2019) ("In ***statutory*** interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a **clear** answer, judges must stop.") (Emphasis in original and internal citation omitted).

Appellants invoked the Sponsors' Memorandum to confirm that the ERA applies to "any action with force of law" and operates, even absent implementing legislation, to prohibit the application of laws and governmental action that discriminate on enumerated grounds. Those statements refute the premise that the ERA was intended to stop short of inconsistent legal commands already embedded

in the Constitution. The Appellate Division's reliance on the silence of legislative history to preserve Article VI, §25(b) therefore misconstrues the very materials it seeks to interpret. "The amendment allows laws to prevent or undo past discrimination."[9]

Importantly, the Appellate Division's approach would reduce the ERA to a partially operative amendment which prohibits age discrimination in general, but not where the Constitution itself previously required it. It seems rather clear that the ERA was adopted to alter the constitutional command itself, not to leave intact entrenched forms of discrimination already codified elsewhere. There is no blanket carve-out for preexisting constitutional discrimination, and courts are not obliged to reconcile the irreconcilable by limiting the scope of a later amendment to preserve an earlier rule.

This is a question of constitutional hierarchy. That hierarchy reflects a foundational principle of constitutional governance: where constitutional provisions conflict, the later enactment controls, particularly where it expands or secures fundamental rights. *See The Federalist No. 78*, at 468[10] (Alexander Hamilton)

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[9] Senator Brad Hoylman-Sigal's statement on September 10, 2024 in favor of the Equal Rights Amendment. *See* Proposal 1: Equal Rights Amendment | NYSenate.gov (last visited Apr. 20, 2026).

[10] "The rule which has obtained in the courts for determining [conflicting statutes or constitutional provisions] relative validity is, that the last in order of time shall be preferred to the

(Clinton Rossiter ed., 1961). This same principle has long guided New York courts in reconciling statutory and constitutional conflicts. As courts have explained, "a general statute will repeal special or local acts without expressly naming them, where they are inconsistent with it, and where it can be seen from the whole enactment that it was the intention of the legislature to sweep away all local peculiarities thus sanctioned by special acts, and to establish one uniform system." *Gerry v. Volger,* 252 A.D. 217, 219 (4th Dep't 1937) (citations omitted)

Article I, §11, as amended in 2024, is the most recent expression of the People on the permissibility of age-based discrimination by the State. Article VI, §25(b), by contrast, is an older provision that requires precisely such discrimination. To allow the earlier provision to remain operative despite the later amendment would invert the constitutional order and subordinate the will of the People to a prior one. Thus, it results in nullification rather than interpretation.

Accordingly, once Article I, §11 and Article VI, §25(b) are recognized as irreconcilable, the conclusion follows as a matter of settled New York law: the later

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first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference." *Id*. (emphasis in original).

amendment controls as the latest expression of the People, and the earlier, inconsistent, provision must yield to the extent of the conflict. The Appellate Division erred in holding otherwise.

CONCLUSION

For the foregoing reasons, and based upon the record and authorities set forth herein, the order of the Appellate Division, First Department, should be reversed in its entirety. The constitutional amendment adopted by the People in 2024 is a direct and enforceable command that the State shall not subject any person to discrimination in their civil rights on the basis of age, including where such discrimination is imposed "pursuant to law." Article VI, §25(b), and the implementing provisions of the Judiciary Law, mandate precisely the type of categorical, age-based disqualification that the amended Constitution now forbids.

The Appellate Division's determination clearly fails to provide operative effect to the plain language of Article I, §11 as amended. Further, it fails to apply the heightened scrutiny required once age is elevated to an enumerated protected classification. Lastly, it disregards settled principles governing irreconcilable constitutional provisions, under which the later expression of the People must control. If this Court were to affirm under these circumstances, it would nullify the

amendment's central guarantee and render its inclusion of age as a protected category devoid of practical meaning.

As such, Appellants respectfully request that this Court (i) reverse the judgment below, (ii) declare that Article VI, §25(b), and Judiciary Law §§23 and 115 are unconstitutional as applied under the amended Constitution, (iii) enjoin the State from requiring Petitioner Miller to retire or be denied certification pursuant to Judiciary Law §115 and Article VI, §25(b) of the State Constitution, and (iv) grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF NEW YORK

ROBERT J. MILLER, RICHARD J. MONTELIONE, ORLANDO MARRAZZO,
Petitioners-Plaintiffs-Appellants,

-against-

THE STATE OF NEW YORK,
Defendant-Respondent,

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,
Nominal Defendant-Respondent.

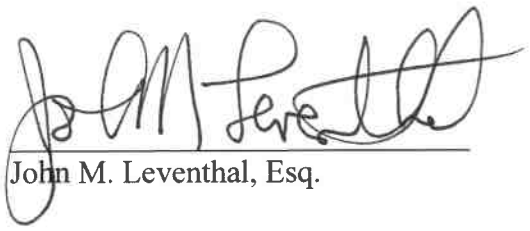
Certification of Compliance with Word Limits

APL 2026-00033

I, John M. Leventhal, Esq., do hereby certify that the attached Appellants' Letter Submission contains 10,162 words, excluding those parts of the document that are exempted by 22 N.Y.C. R. R. § 202.8-b(b). This certification was prepared in reliance on the word-count function of the word-processing system Microsoft Word used to prepare the document.

I certify that the foregoing statements made by me are true. I am fully aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: New York, New York
April 22, 2026



John M. Leventhal, Esq.

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NEW YORK STATE OFFICE OF COURT ADMINISTRATION,
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Affirmation of Service

APL-2026-00033

I, John M. Leventhal, Esq., of full age, do hereby affirm, under penalty of perjury, as follows:

I am over 18 years of age, I am not a party to the action, and I reside in New York County in the State of New York. On April 22, 2026, a true copy of the annexed

Appellants' Letter Submission

was served on the following parties, who consented to service by email:

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I certify that the foregoing statements made by me are true. I am fully aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: New York, New York
April 22, 2026

John M. Leventhal, Esq.