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May 12, 2026

BY EMAIL
New York Court of Appeals
20 Eagle Street
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Re: ***Miller et al. v. State of New York*, APL-2026-00033**

To this Honorable Court:

We respectfully submit this letter on behalf of Appellants Robert J. Miller, Richard J. Montelione, and Orlando Marrazzo Jr. in reply to the State's response dated May 6, 2026, and Office of Court Administration's (OCA) response[1] dated May 7,2026.

The State's short letter submission does not address the real issues before this Court: (1) can the plain language of the Equal Rights Amendment ("ERA") be reconciled with the strict judicial retirement requirement contained in Article VI, §25(b), and (2) even if the two provisions can co-exist, what level of scrutiny should courts apply to laws that draw distinctions between categories of people based solely on age?

A. The ERA Cannot Be Reconciled with Article VI, § 25(b), as the Former Prohibits Discrimination on the Basis of Age, and the Latter Requires Serving Justices to Retire Based Solely on Their Age

[1] Although the Office of Court Administration states that petitioners are no longer seeking preliminary injunctive relief, Appellants are in fact seeking a permanent injunction.

From the start of its letter, the State attempts to shift the Court's focus toward policy concerns, assumptions about legislative intent, and generalized principles disfavoring implied repeal. However, this Court's analysis must begin with the constitutional text itself, as courts should not travel "beyond the borders of [a] statute . . in search for the meaning of the lawmakers." See *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932) (Cardozo, J.). This principle applies with even greater force in constitutional interpretation. As this Court and others have repeatedly recognized, the "most compelling" indicator of constitutional meaning is the language itself. See *Hernandez v. State of N.Y.*, 173 A.D.3d 105, 111 (3d Dep't 2019); *People v. Carroll*, 3 N.Y.2d 686, 689 (1958). The State's submission begins and ends with policy and treats the constitutional text as something to be navigated around rather than enforced. That approach cannot be reconciled with this Court's settled methodology, which requires that interpretation begin and, where the text is clear, end with the words the People adopted. *See Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019) ("Where . . . that examination yields a *clear* answer, judges must stop.") (emphasis in original).

The constitutional language here is direct and unequivocal. Article I, §11 provides that "[n]o person shall because of … age … be subjected to any discrimination in his or her civil rights by … the state … pursuant to law." By any ordinary read, Article VI, §25(b) mandates precisely the sort of age-based discrimination the ERA now prohibits. As Appellants previously demonstrated, "[o]ne provision prohibits age-based discrimination by the State pursuant to law; the other commands it. Both cannot stand together." The text bans age discrimination, full stop.

Rather than reconciling the two obviously conflicting provisions, the State argues that the ERA only amended the Civil Rights Clause, and that Appellants must first prove that Article VI, §25(b) impacts their civil rights. (State Br. at 2). From there, the State attempts to diminish the

rights Appellants claim are abrogated by Article VI, §25(b), arguing that Appellants are seeking to enforce a right to hold public office "without meeting certain minimum qualification criteria." (State Br. at 3). Taking these arguments in turn, the State is wrong on all fronts.

1. This Court Must Try to Read the ERA Together with Article VI, §25(b), and In Doing So Must Find that the ERA Irreconcilably Conflicts with Article VI, §25(b)

While the State mentions harmonization principles, it makes no real effort to harmonize the ERA and Article VI, §25(b). Appellants have never disputed that constitutional provisions should be harmonized where reasonably possible. But the obligation to harmonize "has its limitations, and courts are not required to reconcile the irreconcilable." The State's proposed reconciliation is not harmonization at all. It requires judicial insertion of an unstated carve-out exempting preexisting constitutional age discrimination from the ERA's scope. Yet the ERA contains no such exception.

That omission matters. As Appellants previously demonstrated by numerous examples in its opening letter and papers below, constitutional provisions routinely contain explicit qualifying language where exceptions are intended. The ERA contains none. Courts are not free to add limitations the People themselves did not adopt. The drafting protocol containing exceptions ("subject to") is consistent throughout the New York Constitution. The drafters of the ERA, working within that same Constitution, declined to adopt any analogous "subject to" language. That choice is dispositive. Under the canon *expressum facit cessare tacitum*, the explicit and unqualified prohibition leaves no room for the implied carve-out the State proposes. To accept the State's harmonization theory, this Court would have to read into Article I, §11 the very limiting language the People omitted, which is clearly a function reserved to the People themselves through Article XIX, not to the courts.

The governing interpretive principle therefore remains straightforward. "[A]ll [constitutional] 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). Likewise, where provisions "cannot stand together," the later enactment governs and the earlier provision yields. See *Alweis v. Evans*, 69 N.Y.2d 199, 204 (1987); *Cimo v. State*, 306 N.Y. 143, 149 (1953); *Matter of Baldwin Union Free Sch. Dist. V. County of Nassau*, 22 N.Y.3d 606, 625 (2014). Notably, the State invokes *Cimo* for the unremarkable proposition that the absence of express repeal "gives rise to a presumption that repeal was not intended." But *Cimo*, properly read, supports Appellants' case, not the State. *Cimo* itself instructs that, even where a later constitutional provision is more general and an earlier one more specific, the later provision must control where the conflict cannot be reconciled. 306 N.Y. at 149. That is precisely the situation here: Article VI, §25(b) is the more specific and older provision; Article I, §11, as amended, is the more general and later provision. Under *Cimo*, the conflict resolves in favor of the later expression of the People, not the earlier one. The State's selective reliance on a single sentence from *Cimo* about the presumption against implied repeal ignores the very next page of the opinion, where this Court applied the controlling rule that operates once that presumption is overcome; the rule that the later constitutional command governs.

Ironically, even the authorities relied upon by the State reinforce this principle. In *People ex rel. Killeen v. Angle*, 109 N.Y. 564 (1888), the Court recognized that constitutional provisions must be construed so as to give operative effect to amendments and warned against interpretations that would render constitutional changes meaningless or "an idle ceremony of no practical importance." Yet that is precisely what the State's position would accomplish here. If one of the

clearest and most categorical forms of age discrimination embedded in New York law survives entirely untouched after the People amended Article I, §11 to prohibit age discrimination by the State pursuant to law, then the ERA's addition of age as a protected constitutional category is dramatically diminished in one of the very contexts where its force should matter most.

The State's treatment of *Killeen* is also problematic because the language it attributes to the Court's opinion in *Killeen* does not actually appear in the decision. After careful review, it appears that the quotation instead originated from appellant counsel's argument, which quoted *Conner v. New York*, 5 N.Y. 285 (1851). But whether the language comes from appellant counsel in *Killeen* or from *Connor,* it does not alter the governing point that neither case holds that an older constitutional provision may survive an irreconcilable conflict with a later constitutional provision.

Similarly, *Conner* itself confirms the supremacy of the interpretive principle. There, the Court recognized that constitutional limitations control legislative authority where the Constitution "expressly forbidden" otherwise. Indeed, *Conner* repeatedly acknowledges that constitutional text governs and restricts governmental authority where applicable. The State cannot have it both ways. If, as the State urges by quoting language traceable to *Conner*, constitutional text controls and forbids governmental action where it speaks to the question, then the ERA's textual prohibition on age-based discrimination by the State "pursuant to law" controls and forbids the continued operation of Article VI, §25(b). The State's own chain of authority leads back to the proposition that the People's constitutional command must be enforced as written.

The State's reliance on *People v. Minucci*, 68 A.D.3d 1017 (2d Dep't 2009), and the peremptory-strike example as a supposed sufficient field of operation for the ERA actually underscores Appellants' position rather than undermining it. The State's theory reduces the ERA's

age protection to little more than a jury-selection rule and a backstop in the abortion context.[2] That cannot be what the People adopted when they overwhelmingly voted, by a 62.5% majority, to elevate age to the same protected status as race, color, creed, and religion. The ballot abstract told voters they were approving an "Amendment to Protect Against Unequal Treatment" that would "protect against unequal treatment based on … age," not an amendment confined to peremptory challenges and reproductive rights. Courts are obligated to construe constitutional amendments consistent with the understanding conveyed to the electorate. See *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993). The State's narrow construction would render the ERA's elevation of age into a protected class essentially decorative, and that result is foreclosed by the rule that courts must avoid readings that render constitutional language redundant or superfluous. *See People v. Galindo*, 38 N.Y.3d 199, 205 (2022).

2. Even Assuming Appellants Must Demonstrate that a Law Distinguishing Solely on the Basis of Age Violates a Civil Right for the ERA to Apply, Appellants Do So Here

The State's argument that Appellants have identified no "civil right" implicated by Article VI, §25(b), rests on a false premise. Appellants do not claim a right to hold office without satisfying *lawful* qualifications. They challenge a categorical age-based disqualification that removes or bars otherwise qualified sitting judges from continued judicial service solely because of age in violation of the amended Section 11. The State's argument ignores the statutory framework already enacted

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[2] The State attempts to minimize the import of the ERA by framing it principally as an abortion-rights amendment. While reproductive autonomy may certainly have been among the public concerns motivating passage of the amendment, the enacted constitutional language is substantially broader and expressly includes "age" among the protected categories. Courts do not rewrite constitutional amendments by narrowing broad constitutional text to a single political context surrounding enactment. The People adopted constitutional language prohibiting age discrimination by the State pursuant to law, and courts are obligated to apply the language actually enacted.

by New York itself, as well as the arguments in Appellants' moving letter describing how Article VI, §25(b) impacts Appellants in the exercise of their civil rights, including the right to employment free of discrimination.

The New York Human Rights Law supplies that civil right in unmistakable terms. Executive Law §291 provides that Equal Opportunity to obtain employment without discrimination as to age is recognized as a civil right. Executive Law §292 (5) (a), defines "employer" to include all employers within the state and 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. Executive Law §296 (1) (a) makes it an unlawful discriminatory practice "[f]or an employer because of an individual's age… to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual …" And Executive Law §290 provides that the New York Human Rights Law ("NYHRL") is the "exercise of the police power of the state" and "fulfillment of the provisions of the constitution of this state concerning civil rights." Taken together, these four provisions foreclose the State's argument. Judges are covered by NYHRL. The State is an employer subject to the NYHRL. NYHRL proscribes civil rights violations. Age is a protected category and mandatory retirement or disqualification because of age is discrimination prohibited by NYHRL. Appellants therefore have asserted a civil right "elsewhere declared by" New York law.

The State's reliance on *People v. Kern*, 75 N.Y.2d 638 (1990), actually reinforces Appellants' position. *Kern* held that the Civil Rights Clause "prohibits discrimination only as to civil rights which are elsewhere declared by Constitution, statute, or common law." 75 N.Y.2d at 651. The NYHRL is exactly such a statute. Under *Kern*'s own framework, those statutory declarations satisfy the threshold the State purports to invoke. The NYHRL expressly declares age

discrimination-free employment to be a civil right, and expressly treats the State as an employer of elected judicial officials subject to the NYHRL. The purpose of the NYHRL is expressly stated to police violations of civil rights, and the NYHRL expressly prohibits employers from barring or discharging individuals because of age. The State's brief never confronts these statutory provisions. Nor does the State explain how the civil rights proscriptions in the NYHRL do not identify civil rights that belong to elected judicial officials when the statutory scheme expressly includes elected judicial officials within its coverage. That omission is dispositive.

Appellants' position is also reinforced by *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970), and *Bullock v. Carter*, 405 U.S. 134, 141 (1972), both of which were cited in Appellants' original submission. The State acknowledges that "the State cannot impose 'invidiously discriminatory' qualifications on public office," citing *Turner*. That concession matters and, in fact, should be read as fatal to the State's position. The very question presented here is whether categorical disqualification on the basis of an enumerated, constitutionally protected characteristic (i.e., age) is now "invidiously discriminatory" under the Constitution as amended. Once the People elevated age to a protected category alongside race, color, creed, and religion, the answer follows from the constitutional text.

Contrary to the State's arguments, Appellants are not conflating the Civil Rights Clause and the Equal Protection Clause on this latter point. The *Kern* Court itself looked to equal protection case law to determine that the claimed issue was a civil right. In *Kern,* the Court held that racial discrimination in jury service was a civil right elsewhere declared that violated the Civil Rights Clause, in part, because jury service had been recognized as a privilege of citizenship, protected by constitutional equal protection privileges under the Fourteenth Amendment, and therefore exclusion from jury service based on race was a civil right elsewhere declared by

constitutional law. *See Kern*, 75 N.Y.2d at 651-54 (*citing Smith v. Texas*, 311 U.S. 128, 130 (1940); *Batson v. Kentucky*, 476 U.S. 79 (1986); and *Taylor v. Louisiana*, 419 U.S. 522 (1975)). The *Kern* Court also rejected the same kind of reframing the State attempts here. The *Kern* Court considered, and rejected, an argument that no one has a right to sit on a jury. The Court of Appeals held that no one has the right to sit on a jury but they do have the right to "have the opportunity to serve", which cannot be denied based solely on race. *Id.* at 653. The same logic applies here. Appellants are not asserting a perpetual vested right to hold judicial office. They assert a civil right declared by statute and constitutional law not to be barred from continued public service because of a protected classification – age. The State's effort to recast Appellants' claim as seeking to hold public office without meeting relevant qualification criteria is a misdirection.[3] Appellants challenge the constitutionality of an automatic age-based disqualification regime that bars judges from continued service solely because of age, notwithstanding the State's own recognition through the certification framework that many judges over age 70 remain fully capable of serving the public effectively.

Notably the Sponsors were aware of *Dorsey*, *Kern* and *Brown* when they proposed the amendment to Article I, §11. The Sponsors pronounced that "even in the absence of specific executing legislation, the section operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category." (R75) Thus, Equal Protection is now a freestanding standalone civil right under the State Constitution.

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[3] As previously noted, the State's reliance on *People ex rel. Killeen v. Angle* on this point is problematic because the language the State attributes to *Killeen* does not appear in the Court's opinion; it appears instead to have come from appellant counsel's argument quoting *Conner v. New York*. In any event, neither *Killeen* nor *Conner* stands for the proposition stated by the State.

Nor does Appellants' position necessarily void the minimum-age requirements for the Governor, Lieutenant Governor, Attorney General, and Comptroller. Those threshold age provisions are not before the Court, and Appellants have never suggested they are constitutionally infirm. These age-based distinctions do not categorically and permanently disqualify or terminate otherwise qualified individuals from continued service in offices they already lawfully hold. The distinction between a minimum eligibility threshold tied to maturity, on the one hand, and a categorical mandatory removal of sitting officials based solely on chronological age, on the other, is fundamental and quite evident. Under the State's argument, judges are the only class of State employees unprotected against age discrimination

That misstatement of Appellants' position is part of a broader straw man argument. The State suggests that enforcement of the plain language of the ERA could void all laws making age-based distinctions. To be clear, Appellants are not arguing that every age-based distinction in New York law automatically fails constitutional scrutiny. Indeed, Appellants expressly acknowledged in their principal submission that age-based classifications involving minors, driving restrictions, alcohol consumption, or administrable youth-based thresholds may well survive heightened scrutiny because they do not concern discrimination against an individual's civil rights elsewhere declared, they address distinct public safety and developmental concerns, and they are tailored to meet those compelling state interests. The issue before this Court focuses solely on whether, subsequent to the enactment of the ERA, the State may categorically and permanently disqualify qualified judges from service solely because they reached a specified age, without individualized inquiry into competence, ability, or fitness. The ERA says the State may not do so.

B. If this Court Finds that that ERA and the Law Requiring Judges to Retire at Age 70 Can Co-Exist, the Court Still Must Determine Whether Art VI, §25(b) Is Subject to Strict Scrutiny and Can Survive Such Scrutiny

If this Court determines that the ERA and the retirement provision can co-exist, the Court still must determine the level of scrutiny the ERA mandates for Article VI, §25(b) because it is a law that draws a distinction solely on the basis of age, and the Court must determine whether the State's justification for the retirement provision survives that level of scrutiny. Recognizing the difficulty this test poses for the retirement statute, the State attempts to sidestep this issue, arguing this Court need not decide these issues of first impression. In fact, this case squarely presents these issues for Court of Appeals review; indeed, the Court cannot determine whether Article VI, §25(b) survives the ERA without interpreting the scope and effect of the constitutional amendment itself.

The judiciary's obligation is not to avoid constitutional interpretation, but to faithfully apply the Constitution adopted by the People. The State's invitation to defer ruling on the standard of review and self-execution questions is, in effect, an invitation to issue a decision that resolves nothing. If this Court affirms without addressing whether age is now a suspect classification, lower courts will continue to divide as they already have. For this purpose, it is important to compare *Saltarelli v. State of New York,* 251 N.Y.S.3d 534 (Sup. Ct. Madison Cty. 2026) (ERA elevated age to suspect classification; Judiciary Law §23 fails strict scrutiny), and *Williams v. New York*, 87 Misc. 3d 1120 (Sup. Ct. Wayne Cty. 2025) (recognizing in dicta that the Judiciary Law likely would not survive strict scrutiny but declining to invalidate it) with the decisions below in this matter. The "percolation" the State invokes has already occurred – what is needed now is resolution by this Court. Moreover, the suggestion that this Court would issue an "advisory opinion" by reaching the strict scrutiny question is not well taken. Strict scrutiny is not a hypothetical question in this case, but rather a clear alternative ground squarely presented in Appellants' Petition, fully briefed below, and necessary to dispose of the challenge to Judiciary Laws §§23 and 115 in the event the Court does not invalidate Article VI, §25(b) outright. *See Watson v. City of New York*,

157 A.D.3d 510, 511 (1st Dep't 2018) (purely legal arguments may be reached on appeal even if unpreserved).

The rationale for the State's efforts to avoid elevated scrutiny is clear. The State's brief never offers, as it must under strict scrutiny, any record evidence that categorical age-based exclusion is necessary to preserve judicial competence. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 498-500 (1989); *Avery v. Downstate Medical Center*, 39 N.Y.2d 326, 332-33 (1976); *Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 431 (2001).

The State invokes *Nicholson v. State Comm'n on Jud. Conduct*, 50 N.Y.2d 597, 607 (1980), for the unremarkable proposition that the State has an interest in judicial quality. Appellants agree, but they dispute that a categorical age cutoff is necessary to vindicate that interest. The State has identified no study, no legislative finding, no empirical record, and no comparative analysis tying chronological age to diminished judicial capacity. Federal judges – sitting under life tenure with no mandatory retirement – have continued to serve with distinction well past 70 and 76 without harm to the federal judiciary's quality. The very existence of New York's certification framework, which presumes that judges can serve competently past 70, refutes the proposition that age alone reliably proxies for incapacity.

Under the strict scrutiny framework this Court should apply to a law mandating judicial retirement at a set age, conclusory invocation of state interest does not suffice; the State must come forward with evidence. It has not and cannot. Furthermore, the State's *Burson v. Freeman*, 504 U.S. 191 (1992), analogy from below is unavailing in this context for the reasons set forth in Appellants' principal submission. *Burson* upheld a content-based restriction in a unique First Amendment setting against a developed historical record concerning the integrity of polling places. It did not hold that a categorical classification on the basis of an enumerated, constitutionally

protected characteristic survives strict scrutiny based on conclusory assertion. To the extent the State invokes *Burson* to justify a "blanket" age-based disqualification rule, it confuses a narrowly tailored, conduct-specific, First Amendment restriction bounded by time and place with a permanent, status-based, identity-based disqualification of a class the People have just now placed under constitutional protection.

Lastly, the State claims that it would face a great administrative burden if prospectively justices were allowed to continue to be certificated past 76 and judges were allowed to continue their service past 70. The State's arguments concerning catastrophic practical consequences are substantially overstated. In reality, judges who already have retired and accepted retirement without challenge have effectively waived any claim and would not be implicated by this proceeding. Prospectively, justices and judges would be permitted to complete the terms to which they were elected or appointed. Once their elective terms were concluded, they would have the option to seek reelection or retire. If Appellants prevail, no new judges would be required to undergo age-based certification once reaching 70. The only remaining certificated judges would be those who had already received certification before relief was granted. Those judges like the Appellants who are certificated and had their term of elected office prematurely ended, would continue to be eligible for certification under the current standards without regard to age. That existing pool would naturally shrink over time as those judges leave service. In that sense, certification would be phased out by attrition over time. On the other hand, the benefits to OCA and the public of having more experienced judges continue their service would be enormous.[4]

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[4] In the alternative, assuming arguendo that this Court were to find that the State has a compelling state interest in allowing newer attorneys into judicial roles, then the Court could find that Article VI, §25(b) and Judiciary Law §23 would remain constitutional. However, there is clearly no concomitant compelling state interest for the involuntary end of judicial service at 76 years of age pursuant to Judiciary Law §115 because once justices reach 70, those justices, like

For all of the foregoing and for the reasons stated in Appellants' principal submission, the order of the Appellate Division should be reversed. The text the People adopted in 2024 is unequivocal, and the drafting choices reflected in that text – i.e., the inclusion of age as a protected category, the addition of the operative phrase "pursuant to law," and the conspicuous absence of any "subject to" carve-out for preexisting constitutional provisions – were deliberate. The State asks this Court to undo those choices through interpretation. That is not a function the Constitution assigns to this Court. Under *Metz*, 193 N.Y. at 157, *Alweis*, 69 N.Y.2d at 204, *Cimo*, 306 N.Y. at 149, and *Baldwin Union Free Sch. Dist.*, 22 N.Y.3d at 625, the later constitutional expression of the People controls. Article VI, §25(b) must yield. To hold otherwise would be to make the ERA's elevation of age to a protected constitutional category what *Killeen* itself warned against: an "idle ceremony of no practical importance." Appellants respectfully submit that this Court should reverse, declare Article VI, §25(b) and Judiciary Laws §§23 and 115 unconstitutional under the Constitution as amended, and grant the further relief requested in Appellants' principal submission.

Appellants, create vacancies for their judicial roles that are then filled with newer attorneys. *See Maresca v Cuomo*, 64 N.Y.2d 242, 251 (1984) (holding that complexity and diversity of Supreme Court caseload required adequate supply of experienced judicial personnel); *Carey v. Cuomo*, 209 A.D.2d 570, 571 (3d Dep't 1995) (Supreme Court's jurisdiction provides a rational basis to require greater experience and manpower than are necessary in other courts).

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.

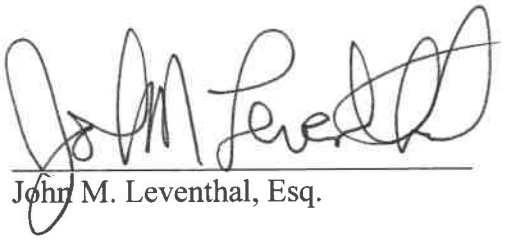
Certification of Compliance with Word Limits

APL 2026-00033

I, John M. Leventhal, Esq., do hereby certify that the attached Appellants' Reply Submission contains 4359 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
May 12, 2026



John M. Leventhal, Esq.

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-against-

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

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 May 12, 2026, a true copy of the annexed

Appellants' Reply Submission

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

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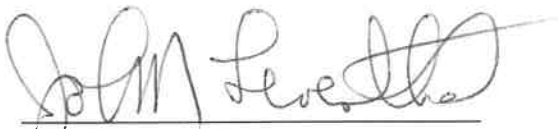
I certify that the foregoing statements made by me are true. I am fully aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: New York, New York
May 12, 2026



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