Office of the New York State Attorney General

Letitia James Attorney General

May 6, 2026

Honorable Heather Davis
Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Matter of Miller v. State of New York*, APL 2026-33

Dear Ms. Davis:

I write on behalf of respondent State of New York in response to the Court's April 8, 2026, letter, which advised that this appeal will be determined on the Appellate Division record and briefs, and directed the parties to file supplemental letter briefs in advance of oral argument.[1]

In this case, several current or former state court judges challenge the validity of the age-based judicial retirement requirements set forth in article VI, § 25(b) of the New York Constitution and codified in Judiciary Law §§ 23 and 115.[2] According to appellants, the recent Equal Rights Amendment (ERA) to article I, § 11 of the State Constitution supersedes the Constitution's long-standing judicial retirement provision, and renders the analogous statutory provisions unlawful. Supreme Court, New York County (Frank, J.) rejected that argument, holding that the ERA did not affect the validity of the judicial retirement provisions. The Appellate Division, First Department unanimously affirmed, holding that the ERA neither explicitly nor implicitly repealed article VI, § 25(b), and therefore did not render the statutory provisions unconstitutional. *See Matter of Miller v. State*, 247 A.D.3d 502, 503-04 (1st Dep't 2026).

[1] This letter is filed solely on behalf of the State of New York. Respondent New York State Office of Court Administration is separately represented.

[2] The legal background, factual background, and procedural history of this case are set forth at pages 3-11 of the State's Appellate Division brief and will be supplemented as necessary in this submission.

This Court should affirm on the ground that the ERA did not repeal article VI, § 25(b), and accordingly, the constitutional and statutory provisions governing mandatory judicial retirement remain valid. If the Court affirms on that ground, it can and should decline to resolve questions of first impression about the application of the ERA and allow those disputes to be litigated in cases where the issue is directly presented. If, on the other hand, this Court determines that the ERA repealed article VI, § 25(b), it should nevertheless hold that Judiciary Law §§ 23 and 115 are constitutional, because they comply with article I, § 11(a) of the New York State Constitution as amended by the ERA.

I. This Court Should Affirm on the Same Grounds as the Appellate Division.

A. The Equal Rights Amendment (ERA) Did Not Repeal Article VI, § 25(b).

It is well settled that "an amended Constitution must be read as a whole and as if every part had been adopted at the same time and as one law, and effect must be given to every part of it, each clause explained and qualified by every other part." *People ex rel. Killeen v. Angle*, 109 N.Y. 564, 575 (1888) (quotation marks omitted). The lack of express language in a provision for the repeal of an earlier provision "gives rise to a presumption that repeal was not intended." *Cimo v. State*, 306 N.Y. 143, 148-49 (1953). While a provision may be repealed by implication, this doctrine is "heavily disfavored in the law." *Ball v. State*, 41 N.Y.2d 617, 622 (1977). Accordingly, courts will only find that a provision impliedly repeals another provision where there is "clear" evidence that such repeal was intended. *People v. Newman*, 32 N.Y.2d 379, 389 (1973); *Cimo*, 306 N.Y. at 148 (quotation marks omitted). Implied repeal "may be resorted to only in the clearest of cases." *Ball*, 41 N.Y.2d at 622.

The Appellate Division correctly found that there is no basis in text, legislative history, or elsewhere supporting a finding that the ERA expressly or impliedly repealed the age-based judicial retirement provisions set forth in article VI, § 25(b). *See Matter of Miller*, 247 A.D.3d at 503-04. This Court should affirm, for the many different reasons explained in the State's Appellate Division brief (at 12-22). As explained in more detail below, none of appellants' arguments challenging the Appellate Division's ruling has merit.

First, appellants miss the mark in arguing that the court must presume that the ERA, as the later enacted amendment, supersedes article VI, § 25(b) absent affirmative evidence that the Legislature and voters intended to preserve the mandatory judi-

cial retirement provision.[3] *See* Letter Br. for Appellants (Letter Br.) at 27-30, 34-42. That standard would flip the rules of constitutional interpretation on their head. The Court's role is to harmonize the State Constitution's various sections, not to elevate one over another based on textual silences. *See McMahon v. Michaelian*, 38 A.D.2d 60, 62 (2d Dep't 1971), *aff'd*, 30 N.Y.2d 507 (1972). Throughout the State's history, repeals of constitutional provisions have been explicit. Likewise, every repeal of a federal constitutional provision has either been express or accompanied by overwhelming indicia of an intent to repeal. See Br. for State Respondent at 13 n.4. *See Matter of Miller*, 247 A.D.3d at 503. Appellants' doctrinal approach would turn implied repeal from a principle that is "distinctly not favored in the law," *Alweis v. Evans*, 69 N.Y.2d 199, 204 (1987), into the constitutional presumption.

Second, appellants are wrong to argue that article I, § 11 (as amended) and article VI, § 25(b) are irreconcilable. *See* Letter Br. at 32-35. As the State explained in its brief below (at 6), article I, § 11(a) consists of two distinct parts: "[T]he first sentence . . . is an equal protection provision which, like the Federal equal protection right, is addressed to State action," while "the Civil Rights Clause contained in the second sentence prohibits private as well as State discrimination as to civil rights," *People v. Kern*¸ 75 N.Y.2d 638, 650-51 (1990) (quotation marks omitted). This Court explained in *Kern* that the "civil rights" encompassed by this second clause are "those rights which appertain to a person by virtue of his citizenship in a state or community." *Id.* at 651 (quotation marks omitted). The ERA amended the Civil Rights Clause to add certain characteristics (including age) to the list of protected classes for which "discrimination in . . . civil rights" is prohibited, A. 1283/S. 108-A, 246th Sess. (2023), but it did not modify the threshold requirement that a "civil right" be implicated in the first instance.

The ability to hold public office without meeting certain minimum qualification criteria is not a civil right within the meaning of article I, § 11(a). That is because "[p]ublic offices in this state are not incorporeal hereditaments; nor have they the character or qualities of grants . . . . They are created for the benefit of the public, and not granted for the benefit of the incumbent." *Killeen*, 109 N.Y. at 566. Like many other public offices, the judgeships at issue here are created by the State Constitution subject to myriad qualification criteria, including the age-based retirement provisions. *See* N.Y. Const. art. VI.

Appellants cite no constitutional provision, statute, or common law principle supporting the proposition that the ability to hold a judgeship without meeting the

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[3] Article VI, § 25(b) is not the only age-based classification contained in the State Constitution. If appellants were correct that the ERA repealed the mandatory judicial retirement provision, then the ERA would also have necessarily repealed constitutional provisions directing that various elected officials must be at least thirty years of age. *See* N.Y. Const. art. IV, § 2 (governor, lieutenant governor); *id.* art. V, § 1 (attorney general, comptroller).

underlying criteria is the type of civil right encompassed by article I, § 11(a).[4] *See Kern*, 75 N.Y.2d at 651 (noting that the Civil Rights Clause "prohibits discrimination only as to civil rights which are elsewhere declared by Constitution, statute, or common law" (quotation marks omitted)).

Instead, appellants contend that they have a civil right, purportedly conferred by a combination of Executive Law §§ 290(2), 291, 292(2), 292(5), 296(a), to enjoy employment free of age-based discrimination. *See* Letter Br. at 15, 32. However, this argument improperly conflates the constitutionally enumerated eligibility requirements of a constitutionally created public office with an employment dispute between the State, as an employer, and state court judges, as employees. *See id.* at 15. Article VI, § 25(b) is a constitutional mandate imposed by New York voters rather than by the State in its capacity as petitioners' employer. *See* N.Y. Const. art. XIX, §§ 1, 2. Thus, as the First Department correctly observed, to the extent the ERA implicates discrimination in employment, it "addresses a different subject matter" than the eligibility requirements for judicial office. *Matter of Miller*, 247 A.D.3d at 503.

Finally, appellants are wrong to assert that giving article VI, § 25(b) continued effect would render the ERA meaningless. Letter Br. at 4-5. Even if the ERA does not prevent the continued imposition of a mandatory judicial retirement age, it provides extensive protection not previously available against discrimination in civil rights. For example, the ERA may be used to defend against "criminal and civil consequences related" to the decision to obtain an abortion or other pregnancy outcomes—a use expressly described by the Legislature as an important purpose of the ERA. (Record on Appeal (R.) 76.) The ERA also provides protection against age-based discrimination beyond that guaranteed by the Federal Constitution by, for instance, prohibiting the exercise of peremptory strikes on the basis of age. *Compare People v. Minucci*, 68 A.D.3d 1017, 1018 (2d Dep't 2009) (peremptory strike of potential jurors on the basis of age not violative of federal equal protection holding of *Batson v. Kentucky*, 476 U.S. 79 (1986)), *with Kern*, 75 N.Y.2d at 651 (peremptory strike of potential jurors on basis of membership in protected class violates state Civil Rights Clause). That the ERA may be limited in certain contexts as the result of other constitutional provisions does not render the ERA ineffective or make its harmonization with article VI, § 25(b) implausible. *Contra* Letter Br. at 40; *see Newman*, 32 N.Y.2d at 389 (a fair construction which can give each provisions a "reasonable field of operation" must be adopted).

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[4] Of course, the State cannot impose "invidiously discriminatory" qualifications on public office. *Turner v. Fouche*, 396 U.S. 346, 362 (1970). However, challenges to such criteria are evaluated under the Equal Protection Clause of article I, § 11(a), not the Civil Rights Clause. This Court has repeatedly rejected equal protection challenges to New York's age-based judicial retirement provisions, *see Diamond v. Cuomo*, 70 N.Y.2d 338, 342 (1987); *Maresca v. Cuomo*, 64 N.Y.2d 242, 250-51 (1984), and those cases remain good law because the ERA did not alter the Equal Protection Clause.

B. The Court Need Not Resolve Novel Questions About the ERA to Hold That Judiciary Law §§ 23 and 115 Are Constitutional.

The Appellate Division correctly concluded that, because article VI, § 25(b) and article I, § 11(a) can both be given meaning, "Judiciary Law §§ 23 and 115, which implement article VI, § 25(b) faithfully," are constitutional. *See Matter of Miller*, 247 A.D.3d at 504. This Court should affirm on the same ground and, like the Appellate Division, "decline to reach the issues of whether the ERA made the Civil Rights Clause of article I, § 11 self-executing, or whether strict scrutiny applies to age-based statutory classifications" as academic in this case. *See id.*

Petitioners argue at length that the Court should reach these questions because they "will arise time and again as courts are asked to apply the ERA." Letter Br. at 14. However, this Court lacks the jurisdiction to issue advisory opinions. *Matter of Parents for Educ. & Religious Liberty in Schs. v. Young*, 44 N.Y.3d 477, 485 (2025). It would therefore be inappropriate for this Court to opine on challenging questions of first impression about the scope and application of the ERA in a case like this, where the ERA is not implicated both because the underlying dispute does not involve a "civil right" and because the dispute is governed by another existing constitutional provision. This Court will benefit from allowing consideration and percolation of these issues in the State's trial and intermediate appellate courts, and it will have opportunities to weigh in on those questions in future cases.

II. The Judgment May Alternatively Be Affirmed on the Grounds Briefed Below and Not Reached by the Appellate Division.

If the Court concludes that the ERA repealed article VI, § 25(b), it will have to determine whether appellants have a valid claim under the ERA as to Judiciary Law §§ 23 and 115. The Court may wish to remand that question for the Appellate Division to resolve in the first instance, or it can affirm judgment in favor of respondents based on the grounds briefed below and not reached by the Appellate Division. See Br. for State Respondent at 23-34.

In their letter brief to this Court, appellants largely reiterate the same arguments they presented to the Appellate Division with respect to the application of the ERA to age-based classifications. *See* Letter Br. at 17-26. In addition to our response below, we note that appellants continue to fail to grapple with the consequences of their novel arguments on the myriad age-based classifications contained in New York's constitution and throughout its statutes. For example, appellants complain that the "blanket" judicial retirement provision is insufficiently tailored, while asserting that equally categorical age limits on the ability to drink or vote are plainly acceptable "administrable thresholds tied to youth and inexperience." Letter Br. at 23-24. In appellants' view, it is only those provisions impacting older individuals which cannot be justified on the ground of administrability, and must fail where an individualized assessment could identify

individuals capable of engaging in the activity which the provision prohibits. *Id.* at 23-25. But the ERA does not offer differing levels of protection to different age groups. An age-neutral individualized assessment will almost always be able to identify some individuals readily capable of engaging in an activity from which they are precluded based on their age. This is so equally for a mature teenager who is ready to cast a vote, *see* N.Y. Const. art. II, § 1, and for a state court judge who is capable of continuing judicial service into their eighties, nineties, or beyond.

Further, an individualized assessment alternative can be "age-neutral" (*see* Letter Br. at 5, 22, 25) only if it subjects *all* individuals to individualized assessment regardless of their age. Such a requirement would raise difficult administrability questions, including how often an individual's competence would need to be assessed, by whom, and under what rubric. It would also impose a burden of enormous and unprecedented magnitude, whether with respect to all state court judges of any age who wish to continue service or all citizens of any age who wish to vote—a burden that the Legislature and voters simply did not contemplate.

Sincerely,

Gillian Barna
Assistant Solicitor General
(212) 416-8921

Word Count: 2,429

AFFIRMATION OF SERVICE

Gillian Barna affirms:

I am over eighteen years of age and an Assistant Solicitor General in the office of the Attorney General of the State of New York, attorney for the respondent herein. On May 6, 2026, I served, with consent of opposing counsel or the opposing party, the accompanying letter brief by sending one portable document format copy by electronic mail as complete and effective personal service upon the following named person(s):

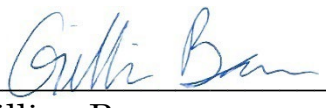
Hon. John M. Leventhal
judgeleventhal@aidalalaw.com

Y. David Scharf
ydscharf@morrisoncohen.com

Pedro Morales
pmorales@nycourts.gov

Dated: New York, New York
May 6, 2026

I affirm, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, except as to matters alleged on information and belief and as to those matters I believe it to be true, and I understand that this document may be filed in an action or proceeding in a court of law.



Gillian Barna