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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF MILLER,

Appellant,

-against-

NO. 64

STATE OF NEW YORK,

Respondent.

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20 Eagle Street  
Albany, New York  
May 20, 2026

Before:

ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 JUDGE RIVERA: Matter of Miller v. State of New  
2 York.

3 MR. LEVENTHAL: Good afternoon - - - or good  
4 evening. May it please the court, John Leventhal for  
5 appellants Miller, Montelione, and Marrazzo. We  
6 respectfully request the court to rule on three issues. We  
7 ask the court to rule that the ERA creates a freestanding  
8 civil right with immediate enforceability against  
9 governmental discrimination.

10 We also ask the court to rule that the later  
11 adopted ERA supersedes the earlier conflicting - - -

12 JUDGE GARCIA: Answer question - - - Counsel, if  
13 we answer question two - - -

14 MR. LEVENTHAL: - - - constitutional position.

15 JUDGE GARCIA: - - - that it doesn't.

16 MR. LEVENTHAL: I'm sorry?

17 JUDGE GARCIA: If we answer question two, which I  
18 think you're getting to, that it doesn't supersede, why do  
19 we have to answer question one?

20 MR. LEVENTHAL: Well, can I get to my question  
21 three and you'll see whether - - -

22 JUDGE GARCIA: Well, let's stick with one and  
23 two. If we say it didn't supersede, and that's still a  
24 valid provision of the Constitution, why do we need to  
25 answer question one?

1 MR. LEVENTHAL: Be - - - well, you may not have  
2 to answer question one, except - - - except that the  
3 legislature said that it's a freestanding claim.

4 JUDGE GARCIA: Well, they may have said many  
5 things, but why would we need to answer it in this  
6 litigation?

7 MR. LEVENTHAL: Well - - - well, that goes to the  
8 third issue that that's why you have to - - -

9 JUDGE GARCIA: Let's hear it.

10 MR. LEVENTHAL: - - - reach it if I can - - -

11 JUDGE GARCIA: Please.

12 MR. LEVENTHAL: Okay. So even assuming arguendo,  
13 the court should find that ERA can coexist with Article 6,  
14 Section 25(b), we asked the court to find that age  
15 discrimination is now subject to strict scrutiny review.

16 JUDGE GARCIA: So you're asking us then, to apply  
17 the ERA to a separate freestanding provision of the State  
18 Constitution?

19 MR. LEVENTHAL: Yes.

20 JUDGE HALLIGAN: Why is - - -

21 JUDGE GARCIA: What's your authority for that?

22 MR. LEVENTHAL: Well, first of all, Article 1,  
23 Section 11, it cannot exist with Article 6.

24 JUDGE GARCIA: Well, that's a supersedure  
25 argument, but let's say it - - -

1 MR. LEVENTHAL: Not supersede.

2 JUDGE GARCIA: - - - but let's say it does.

3 Let's say it does. They didn't repeal it. So what would  
4 the authority be to push that amendment, that specific  
5 language of the Constitution, about 70 years old, through  
6 the lens of the ERA when this is a pure state  
7 constitutional claim? It's not a federal claim, so there's  
8 no supremacy issue. So why would we subject a freestanding  
9 constitutional provision to the ERA?

10 MR. LEVENTHAL: Because it says pursuant to law.  
11 There's no discrimination pursuant to - - -

12 JUDGE CANNATARO: I think the point is the other  
13 - - - the other provision, the judge retirement provision,  
14 is constitutional law as well.

15 MR. LEVENTHAL: Yes, but if - - -

16 JUDGE CANNATARO: So what - - - what subordinates  
17 that to the ERA?

18 MR. LEVENTHAL: Okay. You have - - - you have -  
19 - - if you look at page 214 and 215 of the record, I cite  
20 numerous constitutional provisions that say, subject to  
21 other provisions of this Constitution, subject to other  
22 statutes of the Constitution.

23 JUDGE RIVERA: Can I just - - - I'm sorry,  
24 Counsel, I just need to be clear, because I thought your  
25 argument was that the ERA repealed Article 6, Section 25.

1 Your position is not that it repeals, that it merely  
2 supersedes which - - -

3 MR. LEVENTHAL: Well - - -

4 JUDGE RIVERA: I'm not sure exactly what you mean  
5 by that, but we can explore that.

6 MR. LEVENTHAL: You say it explicitly repeals it  
7 - - -

8 JUDGE RIVERA: Okay.

9 MR. LEVENTHAL: And - - - and - - -

10 JUDGE RIVERA: So what's this argument about  
11 superseding?

12 MR. LEVENTHAL: But even - - - even alternatively  
13 - - -

14 JUDGE RIVERA: Okay.

15 MR. LEVENTHAL: - - - if they can coexist - - -

16 JUDGE RIVERA: I see.

17 MR. LEVENTHAL: - - - it supersedes it as opposed  
18 to - - - judges would be the only one who would not subject  
19 to age discrimination.

20 JUDGE RIVERA: Well, I don't understand - - - I  
21 don't understand this argument. You're saying, well, let's  
22 say the court says they can coexist.

23 MR. LEVENTHAL: Right.

24 JUDGE RIVERA: If they can coexist, that's the  
25 end of the argument; is it not?

1 MR. LEVENTHAL: Well, I'm not sure it can coexist  
2 because one provision - - -

3 JUDGE RIVERA: Right. No, I understand those.  
4 I'm trying to understand this argument because I'm not  
5 clear on what you mean by somehow it supersedes, but they  
6 can coexist. Either they can or they can't. Right? And  
7 if they can't, that's your argument about repeal.

8 MR. LEVENTHAL: Right.

9 JUDGE RIVERA: And if they can - - -

10 MR. LEVENTHAL: That's my primary argument.

11 JUDGE RIVERA: - - - then, I don't understand the  
12 argument about supersession. So I'm trying to understand  
13 what's your view of - - - of coexistence?

14 MR. LEVENTHAL: Okay. Okay. What - - - you can  
15 do one or two things.

16 JUDGE RIVERA: Okay.

17 MR. LEVENTHAL: Number one, you could find that  
18 the 70-year-old - - -

19 JUDGE RIVERA: Yes.

20 MR. LEVENTHAL: - - - is a compelling state  
21 interest. I'm not saying that we agree with that. You can  
22 say there's a compelling state interest because you want to  
23 bring newer judges - - -

24 JUDGE CANNATARO: Wait a minute, now.

25 JUDGE HALLIGAN: But that's only if - - -



1 JUDGE CANNATARO: You're doing strict scrutiny  
2 review. We're still trying to figure out whether - - -

3 JUDGE GARCIA: Why we review it at all.

4 JUDGE CANNATARO: - - - why we would review it.

5 JUDGE RIVERA: We're trying to be clear on the  
6 argument. So you are taking a position that it implicitly  
7 repeals. Okay. I got that.

8 MR. LEVENTHAL: Right.

9 JUDGE RIVERA: But now we're talking - - - or at  
10 least I was trying to ask you about this argument that  
11 you're saying, well, if the court disagrees and thinks it  
12 coexists, now, I want to go right into strict scrutiny, but  
13 I don't understand what your version is of coexist, because  
14 coexist would mean that you can have the mandatory  
15 requirement.

16 MR. LEVENTHAL: No, we - - - we don't think you  
17 can have the mandatory - - -

18 JUDGE RIVERA: Okay. So then that's the repeal.  
19 That's not - - -

20 MR. LEVENTHAL: Right.

21 JUDGE RIVERA: - - - in any shape or form that  
22 they can coexist.

23 MR. LEVENTHAL: No. So no, you're absolutely  
24 correct. It cannot coexist.

25 JUDGE RIVERA: Okay.

1 MR. LEVENTHAL: And - - -

2 JUDGE RIVERA: Okay. So now let's start - - -  
3 now, let's move to - - - to the arguments about why it is  
4 or is not repealed, and repealing by implication, of  
5 course, is disfavored. Why do you think in this case it  
6 should - - -

7 MR. LEVENTHAL: Yes, but if it cannot be  
8 reconciled - - - if it cannot be reconciled, then the - - -  
9 the protocol - - -

10 JUDGE RIVERA: So why can't it be reconciled in  
11 the following way?

12 MR. LEVENTHAL: Because one - - -

13 JUDGE RIVERA: Why can't it be reconciled in the  
14 following way?

15 MR. LEVENTHAL: Okay.

16 JUDGE RIVERA: That age discrimination writ large  
17 against all New Yorkers is indeed covered by the ERA, but  
18 there is this one particular amendment that applies to a  
19 subclass that is not sub in the - - - in a - - - in a way  
20 that's disparaging, just a particular class of New Yorkers,  
21 because that's the way the Constitution stands for just a  
22 particular area, because at the time that the ERA was  
23 passed, the understanding that the legislature was working  
24 with is the civil rights of judges are already limited by  
25 that constitutional provision.

1                   Why isn't that the way one would harmonize this?  
2                   I may not have articulated it well, but I think you know my  
3                   point.

4                   MR. LEVENTHAL: I don't think it can be  
5                   harmonized because the - - - the legislature, if I can read  
6                   from page 85 and 90 of the record.

7                   JUDGE RIVERA: Okay.

8                   MR. LEVENTHAL: 75, I apologize.

9                   JUDGE RIVERA: Yes.

10                  MR. LEVENTHAL: This section prohibits  
11                  discrimination in civil rights and has been interpreted by  
12                  New York courts to be non-self-executing. So they knew  
13                  about Dorsey, Kern and - - - and Brown when they passed it.  
14                  And they said, "However, in the absence of specific  
15                  executing legislation, the section operates to prohibit the  
16                  application of laws and governmental action that  
17                  discriminates on the basis of enumerated protected  
18                  category".

19                  JUDGE RIVERA: Sure.

20                  MR. LEVENTHAL: So I think it supersedes.

21                  JUDGE CANNATARO: But there has to be some  
22                  limiting principle of that, because we have so many laws  
23                  that discriminate on the basis of age in New York all over,  
24                  so that can't - - - it can't be that simple.

25                  MR. LEVENTHAL: Those laws may survive strict

1 scrutiny. This law - - -

2 JUDGE CANNATARO: What if they don't?

3 MR. LEVENTHAL: - - - does not survive strict  
4 scrutiny.

5 JUDGE CANNATARO: What if - - - what if you have  
6 a constitutional right under the federal Constitution to  
7 carry a gun, and New York makes a law that says you have to  
8 be over twenty-one to carry a gun? Is that going to  
9 survive strict scrutiny?

10 MR. LEVENTHAL: It may or may not.

11 JUDGE CANNATARO: It may not.

12 MR. LEVENTHAL: It may not.

13 JUDGE CANNATARO: It may not.

14 MR. LEVENTHAL: It may not, it may not. But  
15 that's not before this court now. And what's before this  
16 court now - - -

17 JUDGE CANNATARO: What is before this court is  
18 whether this equal rights amendment that was enacted  
19 subjects every other statute, including constitutional  
20 provisions to that discriminate on the basis of age,  
21 sometimes for good reasons, sometimes for other reasons,  
22 makes them all subject to scru - - - strict scrutiny, which  
23 sounds remarkable to me.

24 MR. LEVENTHAL: Well, it - - - if you go to page  
25 eighty also, the Assembly talks about the reality is the

1 New York State Legislature, through the passage and  
2 expansion of the human rights laws, has expanded that the  
3 State defines as a civil right and is provided fundamental  
4 anti-discrimination protections for those rights. And  
5 while constitutionally guaranteed rights can be, and often  
6 are, expanded upon the passage of laws, a modern vision of  
7 equality demands comprehensive equal protection.

8 JUDGE GARCIA: That may, and the legislature  
9 clearly said that there, and I think it's not that clear  
10 the way you're reading it, but assume it might indicate  
11 what you're saying. This is a constitutional amendment,  
12 right, that went out to the people of the State of New  
13 York, and the people of the State of New York, when they  
14 adopted this provision, had a clear constitutional  
15 provision that they have refused to change fairly recently,  
16 still in the State Constitution, and they adopt this.

17 And where is there any indication that the people  
18 of the State of New York, when they adopted this provision  
19 of the State Constitution, were impliedly, repealing - - -  
20 we don't like to impliedly repeal statutes, but that the  
21 people of the State of New York were impliedly repealing a  
22 provision that they have refused to amend on a number of  
23 occasions.

24 MR. LEVENTHAL: I would say that the Appellate  
25 Division inverted the drafting protocol, and I - - - and I

1 think that's - - -

2 JUDGE GARCIA: How so?

3 MR. LEVENTHAL: Again, if you look at page 214  
4 and 215 of the record, the ERA could have added the term  
5 subject to other constitutional provisions or laws.

6 JUDGE GARCIA: Right. Then, the people of the  
7 State of New York would have known that that's what it was  
8 doing when they voted for it.

9 MR. LEVENTHAL: Well, there's a number of  
10 constitutional amendments where the drafting protocol  
11 requires it. There's no carve outs here. No carve outs  
12 for - - -

13 JUDGE GARCIA: But I don't - - - I just don't - -  
14 -

15 JUDGE RIVERA: But look - - - look - - - look at  
16 the history. If I can just add one point to Judge Garcia's  
17 point, it's not just what has happened in the past is  
18 raising the age. It's not raising the age. Your argument  
19 is that without having said a thing, putting it in a  
20 completely different section of the Constitution, the  
21 drafters and the voters understood that they were now  
22 eliminating a job criteria. It - - - it sounds astounding  
23 to make such an argument.

24 MR. LEVENTHAL: Well, if - - -

25 JUDGE HALLIGAN: And to pick - - -



1 MR. LEVENTHAL: I'm sorry.

2 JUDGE HALLIGAN: To pick up on that if I can. If  
3 we think about what the words of the provision are, which  
4 is what the people understand when they go to the ballot  
5 box, when we look at the amendment, we decide how to vote,  
6 right? There are a number of other examples where there  
7 have been explicit repeals of constitutional provisions.  
8 Why wouldn't the public understand that that's what they  
9 would expect to read if there was going to be a repeal of  
10 the mandatory age for judges provision, as opposed to no  
11 reference at all, and as Judge Garcia said, in fact, a  
12 thwarted effort to do the same thing? Why would - - - why  
13 would someone read this to have that effect?

14 MR. LEVENTHAL: Because this is age  
15 discrimination. The other statutes that, I think, Judge -  
16 - - I think was Judge Garcia alluded to, correct me if I'm  
17 wrong. It was Judge Cannataro? One of those judges  
18 alluded to - - -

19 JUDGE CANNATARO: It's so hard to tell the  
20 difference.

21 JUDGE RIVERA: This one that way.

22 MR. LEVENTHAL: Those were - - - those were - - -  
23 were not discriminating, I mean, those were - - -

24 JUDGE HALLIGAN: I'm trying to get at a different  
25 question, I think, which is I believe your argument, at

1 least as I understand it, is that Section 11 implicitly  
2 repeals or at least subjects to strict scrutiny, Section 25  
3 of the Constitution, right? And - - - and so given that at  
4 other points in time when the people have decided to repeal  
5 a constitutional provision or to change it, that's been  
6 explicit, why would we expect them to understand Section 11  
7 as doing that, just implicitly?

8 MR. LEVENTHAL: We - - - we had given you four or  
9 five examples in the federal Constitution.

10 JUDGE HALLIGAN: But - - - but in those cases, I  
11 think those are a little bit different, right? So for  
12 example, the 17th Amendment and the original provision for  
13 election of senators by state legislatures, you - - - you  
14 cannot reconcile those by saying one is a very small  
15 exception to a general rule. They are utterly, I think,  
16 irreconcilable. And it seems to me here, perhaps one could  
17 conclude that, you know, the - - - the - - - the provision  
18 in 11 directs that all of the listed classes are - - -  
19 receive those protections. But very specifically for this  
20 small group, I forget what Judge Rivera called it, small  
21 class of people, that rule does not apply.

22 MR. LEVENTHAL: What about the three-fifths  
23 compromise?

24 JUDGE HALLIGAN: Well, that likewise seems to me  
25 to be utterly irreconcilable. I'm just asking why you

1 think the voters would understand it.

2 MR. LEVENTHAL: Because one says there's no age  
3 discrimination, and the other one mandates it. One forbids  
4 it, the other one mandates it. And that's why it's - - -  
5 it's implicitly or explicitly overruled.

6 JUDGE RIVERA: Well, one forbids it in the  
7 context of civil rights. And again, the civil rights is  
8 already defined in a particular way by that Constitution.  
9 And again, if you're correct, one would anticipate that the  
10 language would be in that particular amendment or it would  
11 be an expressed statement in Section 1, 11, and 13, right,  
12 that this now repeals what has stood for over two centuries  
13 that no matter the efforts to raise the age other than  
14 once, that has been unsuccessful, but that now we're  
15 actually going to eliminate the requirement with - - - with  
16 the addition of one word. One word.

17 MR. LEVENTHAL: In Jerry versus - - - which both  
18 sides cited, there they changed the statute, and they  
19 implicitly removed that women were ineligible to serve as  
20 jurors in cities or towns more than 300,000 people. That  
21 was - - - that was implicit. They didn't mention women.  
22 They didn't mention - - - this is the same thing.

23 Here, what they're doing is they're saying no age  
24 discrimination, and they're not mentioning the judges.  
25 It's implicit. No - - - none means no. Shall means no.

1           There should be no discrimination by a State or - - - or  
2           political subdivision of the State pursuant to law. The  
3           Constitution is the highest law of the land. If it  
4           discriminates, then you have to show there's a compelling  
5           state interest.

6                         JUDGE CANNATARO: We - - - we started this  
7           argument by observing that repealer - - - implied repealer  
8           is highly disfavored. So can you tell me what it is about  
9           this particular enactment that evidences an intent to - - -  
10          to do an implied waiver?

11                        MR. LEVENTHAL: If - - - it can't - - - it can't  
12          be - - -

13                        JUDGE CANNATARO: Repeal, excuse me.

14                        MR. LEVENTHAL: If it can't be reconciled, if one  
15          forbids age discrimination and one commands it. I don't  
16          know how you can reconcile that.

17                        JUDGE CANNATARO: Is that all it takes? If the -  
18          - - if the - - - if the two provisions are facially  
19          irreconcilable, one waives the other. And if - - - if so,  
20          which one waives - - -

21                        MR. LEVENTHAL: If - - -

22                        JUDGE CANNATARO: - - - which?

23                        MR. LEVENTHAL: They added - - - on - - - on the  
24          civil rights provision, they added not only the enumerated  
25          protected categories, they added pursuant to law. And once

1 they add pursuant to law, then you can't have any  
2 discrimination pursuant to law, whether it's in the  
3 Constitution or not.

4 JUDGE CANNATARO: They also added civil rights,  
5 right? So what's the civil right that we're dealing with  
6 here?

7 MR. LEVENTHAL: Okay. I'm glad you brought that  
8 up, Judge, because if you look at the Human Rights Law,  
9 Section 290, 291, 292(5)(a), and 296, judges are covered.  
10 Judges are employees. The State - - - the State of New  
11 York are employers of the judiciary, including elected  
12 officials. They cannot be - - - be banned or terminated  
13 from their employment. And what we're asking is not for  
14 right to be a judge. If you look at the current case - - -

15 JUDGE CANNATARO: Are you saying that the  
16 citizens of New York, all - - - we share a civil right to  
17 hold judicial office past - - -

18 MR. LEVENTHAL: No.

19 JUDGE CANNATARO: - - - the age of 70?

20 MR. LEVENTHAL: That's where I was going. Kern  
21 doesn't say that. Kern says you don't have an absolute  
22 constitutional right to be a juror. You have the right,  
23 the opportunity to be a juror. You have a civil right  
24 opportunity to be a juror.

25 JUDGE CANNATARO: Absolutely. You - - - you can

1 run for judicial office, but anyone who has ever lost an  
2 election can tell you that you don't have the right to keep  
3 judicial office.

4 MR. LEVENTHAL: We're not asking for that. We're  
5 asking for the opportunity to finish our term that we were  
6 elected to, to finish a term that you were appointed to.  
7 We're not asking for a right to be a judge.

8 JUDGE RIVERA: Yes, but - - - but - - - but the -  
9 - -

10 MR. LEVENTHAL: Right not to be - - -

11 JUDGE RIVERA: - - - the term - - -

12 MR. LEVENTHAL: Sorry.

13 JUDGE RIVERA: - - - has always been subject to  
14 Article 6, Section 25(b), which is a job criteria. That's  
15 the way it works.

16 MR. LEVENTHAL: If you find - - - I don't think  
17 it's a criteria. I think it's a - - -

18 JUDGE RIVERA: An eligibility requirement?

19 MR. LEVENTHAL: No, I think it's a - - - a ban on  
20 - - - explicitly on age, which is unconstitutional now.  
21 And that's - - - that's what I'm arguing. And all I'm  
22 saying is that we want an opportunity - - -

23 JUDGE RIVERA: Why wouldn't they if they're  
24 irreconcilable, 25(b) controls, Article 6(25)(b), why not?  
25 It's the specific provision. Why wouldn't that control?



1 MR. LEVENTHAL: Because the case law is clear.  
2 I've cited it in my brief that when you have a general  
3 constitutional provision which contradicts a specific  
4 provision, the latter one - - - even Alexander Hamilton  
5 said that early in the Federalist Papers, the latter one  
6 prevails. And I think that's what - - - what happened  
7 here. I mean, it's really a myopic view if we say the  
8 State would - - - the State would have you believe that  
9 nothing changed when they passed Article 1, Section 11,  
10 when it came to age.

11 JUDGE RIVERA: No, I don't think that's their  
12 argument. I think they recognize that judges are protected  
13 against age discrimination. But there's another  
14 constitutional provision that has a particular area in  
15 which just this group, for just this eligibility  
16 requirement, they have to satisfy that. I think that's  
17 their position, but your red light is on, and you'll have  
18 your rebuttal.

19 MR. LEVENTHAL: I just want to finish answering  
20 your question, and Judge - - -

21 JUDGE RIVERA: Well, you can do that on the  
22 rebuttal.

23 MR. LEVENTHAL: - - - Cannataro's - - -

24 JUDGE RIVERA: Thank you. Thank you. Thank you.

25 MR. LEVENTHAL: Thank you.

1 MS. MURDUKHAYEVA: May it please the court, Ester  
2 Murdukhayeva for the State of New York. New York - - -

3 JUDGE RIVERA: Isn't now, with the enactment of  
4 the ERA, Article 6(25), just plain old age discrimination  
5 and it just cannot survive. Why aren't they right about  
6 that? It seems so basic and so obvious.

7 MS. MURDUKHAYEVA: They are not right about that,  
8 Your Honor, and that's because Section 1 - - - Article 1,  
9 Section 11 added age to the list of categories in which  
10 discrimination and civil rights is prohibited, and the term  
11 civil rights has a particular meaning. This court  
12 articulated that meaning in Kern.

13 What it said is that a civil right is those  
14 rights which appertain to a person by virtue of his  
15 citizenship in a state or community. Being a judge is not  
16 a right that appertains a person - - -

17 JUDGE HALLIGAN: Do you - - - do you think - - -

18 JUDGE RIVERA: Well, what about - - - what about  
19 having a job that you're not subject to age discrimination.

20 MS. MURDUKHAYEVA: Your Honor, I think - - -

21 JUDGE RIVERA: Why isn't that the civil right?

22 MS. MURDUKHAYEVA: I think there is a separate  
23 question of whether discrimination in employment is a civil  
24 right, but that question is not presented here.

25 JUDGE RIVERA: Of course it is.



1 MS. MURDUKHAYEVA: Okay.

2 JUDGE RIVERA: How can it not be? It's already  
3 in the State Human Rights and Civil Human Rights Law.

4 MS. MURDUKHAYEVA: I agree. I think.

5 JUDGE RIVERA: If it's a human right, it must be  
6 a civil right.

7 MS. MURDUKHAYEVA: I agree with you, Your Honor.  
8 I think in this case the question is not did the State take  
9 a discriminatory action in its proprietary capacity as an  
10 employer. This is a constitutional provision that creates  
11 a constitutional requirement to hold a public office.

12 JUDGE TROUTMAN: So are you focusing on civil  
13 right, that there is no civil right here. Let me ask you  
14 this question with respect to the ERA, it lists, "No person  
15 shall, because of race, color, ethnicity, national origin,  
16 age, disability, creed, religion or sex, including sexual  
17 orientation, gender identity, gender expression, pregnancy,  
18 pregnancy outcomes, and reproductive health care and  
19 autonomy be subjected to any discrimination." In their  
20 civil rights is the latter part, yes. Is one group treated  
21 differently from the other, or does the - - - those words  
22 mean what they say or nothing at all?

23 MS. MURDUKHAYEVA: Well, Your Honor, I think that  
24 question goes to the level of scrutiny that applies to a  
25 particular claim under the - - - under the civil rights

1 clause of the ERA. But this court need not reach that  
2 question to resolve this case.

3 JUDGE TROUTMAN: What is the point of the ERA?  
4 As it's listed, these groups, they're all listed in  
5 parallel. Why is one group being, as you're suggesting,  
6 treated differently than another?

7 MS. MURDUKHAYEVA: I don't think any group is  
8 being treated differently, Your Honor. I think what we're  
9 looking at is, is the issue in a particular case, does it  
10 involve discrimination in a civil right.

11 JUDGE TROUTMAN: Okay. So in this particular  
12 case, does Article 6, Section 25 conflict with the ERA?

13 MS. MURDUKHAYEVA: It does not, Your Honor. And  
14 that is - - -

15 JUDGE TROUTMAN: And how - - - how is it  
16 reconcilable?

17 MS. MURDUKHAYEVA: So the way that you can  
18 reconcile it is that being a judge holding that office is  
19 not a civil right, because that is not - - - and it's not  
20 discrimination in employment to impose that requirement on  
21 a judge. That is because the State is not acting as a  
22 proprietary - - - in its proprietary capacity as an  
23 employer.

24 JUDGE HALLIGAN: Do you need - - - do you need to  
25 go that far? It seems to me you're hinging your argument

1 on one, maybe two points. One, is whether or not serving  
2 as a judge is a civil right, and the second, I hear you  
3 saying, is whether the State is acting in its capacity, its  
4 proprietary capacity as an employer.

5 But - - - but could you - - - could you look  
6 simply at the two provisions side by side? And I realize  
7 there are competing canons, you could say, you know, later  
8 and earlier, but you could also say general and specific,  
9 and you could also look, perhaps I know we tend not to  
10 credit much failed legislative attempts, but one could  
11 perhaps look at the fairly recent attempt to raise the age  
12 and take from that perhaps some understanding of what the -  
13 - - the Constitution means, and wonder why there would not  
14 be some explicit reference to Section 25 if, in fact,  
15 Section 11 was intended to cover that.

16 So - - - so can you - - - can you answer the  
17 question with resort to - - - to that sort of analysis and  
18 the general specific canon, or in your view, do you need to  
19 additionally consider whether or not this particular  
20 service is a civil right?

21 MS. MURDUKHAYEVA: I think you do need to address  
22 the tension between the two statutes, and there does need  
23 to be an explanation for it.

24 JUDGE HALLIGAN: But do you need to do so by  
25 answering the civil rights question or - - -



1 JUDGE CANNATARO: Can you be agnostic on whether  
2 being a judge is a civil right and still answer the  
3 question just by looking at these two provisions of the  
4 Constitution and trying to reconcile them, even though your  
5 adversary says they're irreconcilable?

6 MS. MURDUKHAYEVA: Yeah. So I think one way you  
7 might be able to - - -

8 JUDGE TROUTMAN: Well, inasmuch as you focused on  
9 it's not a civil right, what is a civil right?

10 MS. MURDUKHAYEVA: So I guess if I can answer the  
11 questions - - -

12 JUDGE TROUTMAN: I wish you would.

13 MS. MURDUKHAYEVA: I will - - - I will start with  
14 that one. I think what a civil right is, is what Kern  
15 said. It's a right that appertains to a person by virtue  
16 of his citizenship in a state or community. Being a judge  
17 is something just very different. What the Supreme Court  
18 said in Gregory v. Ashcroft is that the constitutional  
19 limitations on holding public office, that's an exercise -  
20 - - an exercise of a fundamentally sovereign nature, right,  
21 that the State gets - - -

22 JUDGE TROUTMAN: But with respect to not simply  
23 being a judge, but a class of people and discrimination,  
24 how does the ERA operate with respect to being a judge,  
25 staying a partner in a law firm, anything? Why is age

1 different? And there was some suggestion that if we were  
2 to say otherwise, that it would necessarily impact  
3 adversely with respect to other age restrictions. Gun - -  
4 - gun - - - the right to carry a gun, et cetera?

5 MS. MURDUKHAYEVA: Well, Your Honor, I do think  
6 judges and other and partners at law firms are differently  
7 situated, again, because a judgeship is created by the  
8 Constitution as a public office of the State and a law firm  
9 partner is not. If this court does reach the question - -  
10 -

11 JUDGE TROUTMAN: So privately, there can be  
12 discrimination, but publicly because of Section 25, you're  
13 saying by operation of law it is legal because the  
14 Constitution provides that section, even though they're in  
15 tension with one another, it is an authorized  
16 discrimination?

17 MS. MURDUKHAYEVA: Not - - - no, Your Honor.  
18 It's not that it is an authorized discrimination, but that  
19 the provision does not implicate a civil right.

20 JUDGE TROUTMAN: Then why don't you go to strict  
21 scrutiny? Why is it - - - why do you not answer the strict  
22 scrutiny question here?

23 MS. MURDUKHAYEVA: Well, because there is no  
24 reason to answer the strict scrutiny question.

25 JUDGE TROUTMAN: Why?

1 MS. MURDUKHAYEVA: Because Article 6, Section  
2 25(b) can have independent meaning alongside Section 1 - -  
3 - Article 1, Section 11. Both can be given meaning in  
4 their particular context. I think another - - -

5 JUDGE RIVERA: Let me ask you - - - let me ask  
6 you just to clarify your position on the civil right. I  
7 understand you're saying this holding of the public office  
8 is not a civil right for judges. Is it also your position  
9 that there's not some other aspect of holding that office,  
10 of that employment that would not fall under the rubric of  
11 a civil right that would otherwise come within the anti-age  
12 discrimination provision of the ERA?

13 MS. MURDUKHAYEVA: Sorry. I don't think I  
14 understand.

15 JUDGE RIVERA: Okay. Well, let's try it a  
16 different way. So you do agree that under the New York  
17 State Human Rights Law, judges are protected against  
18 discriminatory practices? Okay. So if you agree with  
19 that, I would think your response to me would have been  
20 something along the lines, Judges, other than this one  
21 thing that's in Article 6(25) are otherwise protected from  
22 age discrimination in holding the office of a judge. Or is  
23 your position that because they're holding a public office  
24 and the State is not their employer, although I think many  
25 judges would be surprised by that one, but we'll go with it



1 for a moment that somehow what we've said about the State  
2 Human Rights Law is absolutely wrong?

3 MS. MURDUKHAYEVA: No, I understand your question  
4 now, Your Honor.

5 JUDGE RIVERA: Thank you.

6 MS. MURDUKHAYEVA: I agree with you that the  
7 State is the judge's employer. What I was saying is that  
8 in imposing this mandatory age requirement, or I guess,  
9 holding judges to that, the State is not making an  
10 independent decision as an employer. The Constitution has  
11 made that decision. There may be other things that the  
12 State does with respect to judges in that traditional  
13 employer-employee capacity.

14 JUDGE TROUTMAN: What about with respect - - -

15 JUDGE RIVERA: I'm sorry. If I can just - - -  
16 I'm sorry, Judge Troutman. I just want to be clear on this  
17 answer. My apologies, but I just want to be clear here.  
18 That - - - is your answer, then to me, that there would be  
19 other kinds of what anyone would say is age discrimination,  
20 not what Article 6(25) covers that would not be permissible  
21 against a judge because it would otherwise be part of their  
22 civil rights in employment?

23 MS. MURDUKHAYEVA: It would be - - - there would  
24 be a claim that is brought under the Civil Rights Clause,  
25 subject to whatever level of scrutiny it was.

1 JUDGE RIVERA: That's all. I'm sorry, Judge  
2 Troutman. I just needed to clarify that.

3 JUDGE TROUTMAN: When you're looking at  
4 constitutional provisions, and it was noted previously that  
5 there were efforts undertaken in the past wherein citizens  
6 did not adopt separately a provision to change the age of  
7 judges - - - and we also know that originally the age was  
8 60; then, it changed to 70 - - - but that did not work.  
9 But this provision, which the citizens did pass, it said  
10 age discrimination listed groups in parallel.

11 And it passed arguably because they weren't just  
12 looking at one group. There's an argument that other  
13 groups may not, if they were singularly put before the  
14 voters, that provision may not have been passed. So how do  
15 you suggest that just because 25 existed before, that we  
16 shouldn't consider now, today, in context with what voters  
17 know, and that they decided that they needed to enshrine a  
18 host of groups that they may not have otherwise done so  
19 before, because circumstances are such that they may not be  
20 able to depend that rights would be protected?

21 MS. MURDUKHAYEVA: So Your Honor, I think that  
22 brings me to my answer to Judge Halligan's and Judge  
23 Cannataro's questions about exactly what way you reconcile  
24 the tension between the doctrines. So long as there is  
25 some conceivable way to recognize that tension, there can

1 be no implied repeal, and that is because implied repeal is  
2 so heavily disfavored that it can be found only if there  
3 can be no rational doubt about the intent to appeal.

4 JUDGE TROUTMAN: So let's go to the  
5 reconciliation.

6 MS. MURDUKHAYEVA: Sure. So I think the  
7 reconciliation - - - there are a couple of different ways  
8 to reconcile it. I've mentioned the civil rights one.  
9 Judge Halligan mentioned, and I think Judge Rivera  
10 mentioned, the general versus specific canon as well. But  
11 the point of implied repeal analysis is to ascertain the  
12 intent of the legislature and the voters. And unless the  
13 repugnancy is so clear that there can be no rational doubt  
14 about the intent to repeal, then implied repeal cannot be  
15 found.

16 And what the petitioners are asking for is for  
17 implied repeal to be inferred from silences, right? There  
18 is no affirmative language in any of the Senate or Assembly  
19 memos that talks about the judicial age requirement at all.

20 JUDGE HALLIGAN: And I'm curious how much weight  
21 you put on that, because I - - - I took your argument up to  
22 this point to really be a pretty purely textual one. And -  
23 - - and so my question was, what weight, if any, do we put  
24 on, it looks to me like, complete silence with respect to  
25 the interplay between the proposed section, what's now

1 Section 11 and Section 25. Do you put any weight on that  
2 in terms of - - - of how we would understand the interplay?

3 MS. MURDUKHAYEVA: I don't think it has  
4 dispositive weight of - - - of its own. I do think it is a  
5 way to ascertain the legislature's intent, and there are a  
6 couple of other indicia.

7 JUDGE CANNATARO: And in this - - -

8 JUDGE TROUTMAN: So are you suggesting that if  
9 they're not, if they don't mention other - - - the other  
10 specific groups that are here during the legislative  
11 process to bring it to the voters, that only that which was  
12 discussed, that it has protection and the rest of them are  
13 just listed for no reason at all?

14 MS. MURDUKHAYEVA: I'm - - - I'm not - - - I'm  
15 not saying that there is any, I guess, black line or red  
16 line rule about like what - - - what is required to - - -  
17 to indicate an intent.

18 JUDGE TROUTMAN: Well, you spoke about the  
19 legislature and what they were discussing at the particular  
20 time. How does that impact other groups?

21 MS. MURDUKHAYEVA: I'm sorry. I don't think I  
22 understand the question.

23 JUDGE TROUTMAN: If the discussion of the  
24 legislature, if you go through the legislative history,  
25 they did not necessarily have discussion on the floor about

1 every group listed ad nauseam, but there may be one group  
2 that they did expressly discuss. So does that somehow  
3 change the status of the ERA with respect to the others,  
4 where there was no such discussion?

5 MS. MURDUKHAYEVA: I understand your question,  
6 Your Honor. I think the reason why the lack of analysis -  
7 - - the lack of discussion matters, is that you do have a  
8 preexisting constitutional provision, which either has to  
9 be given force or has to be deemed to be impliedly  
10 repealed. So I do think that there has to be some  
11 discussion or some indication of intent if it's absence of  
12 a - - -

13 JUDGE CANNATARO: I have two other areas that  
14 just to - - - really, just a yes or no answer as to whether  
15 or not you could consider these as some indication with  
16 respect to this quest for reconciliation. First is the  
17 fact that the voters rejected this very notion of letting  
18 judges, certain judges, serve past 70, I don't know, ten  
19 years ago.

20 MS. MURDUKHAYEVA: 2013.

21 JUDGE CANNATARO: 2013. Is that of any value in  
22 this analysis?

23 MS. MURDUKHAYEVA: I think that is also relevant  
24 - - - a relevant - - -

25 JUDGE CANNATARO: And if you want to expand on

1           it, you can. But let me ask you before the time runs.  
2           What about the fact that the legislature has, since the  
3           enactment of the Equal Rights Amendment, also proposed  
4           legislation, they keep putting it out there, to raise the  
5           age for judges to serve? Does - - - does that tell us  
6           something about this?

7                       MS. MURDUKHAYEVA: I think it is relevant indicia  
8           for whatever weight you want to give it. I think I have -  
9           - - I have often argued to this court that failed  
10          legislation should not be given very much weight. I think  
11          that is true as a general - - -

12                      JUDGE CANNATARO: Well, I mean, does it - - -

13                      MS. MURDUKHAYEVA: I think this is some - - -

14                      JUDGE CANNATARO: - - - tell us something about  
15          what the legislature understands the ERA does?

16                      MS. MURDUKHAYEVA: Yes. Correct. There is some  
17          indicia. And then one other thing that I would like to  
18          highlight - - -

19                      JUDGE TROUTMAN: Could it also be some indicia as  
20          to why they didn't put a singular group on - - - in the  
21          ERA, and they put a number of persons there because the  
22          likelihood of passage was greater if the list was more  
23          expansive than limited?

24                      MS. MURDUKHAYEVA: Possibly, Your Honor, and  
25          there are many different types of inferences that can be

1 drawn from silence, as I think that's exactly the reason  
2 why you generally look for indicia of affirmative intent.  
3 One other piece of relevance - - -

4 JUDGE RIVERA: Well, the one - - - one thing that  
5 is clear is that unless, you know, because I've looked as a  
6 historical matter, I couldn't find it. So maybe you or  
7 your friend on the other side knows. As far as I can tell,  
8 all the efforts have been to raise the age not to eliminate  
9 this requirement. And - - - and their reading is the ERA  
10 eliminated this requirement with one word. And I do think  
11 that that suggests that their view cannot carry the day,  
12 given that we're talking about two competing constitutional  
13 provisions.

14 MS. MURDUKHAYEVA: I agree, Your Honor. I think  
15 it would be a very broad expansion of - - -

16 JUDGE RIVERA: Okay. So I'm right about the  
17 history? There's never been an effort - - - whether it  
18 failed or not. Obviously, it would have failed - - - to -  
19 - - to actually eliminate this requirement?

20 MS. MURDUKHAYEVA: I'm not sure of every proposed  
21 failed legislation that there has been, but anything that  
22 has gone to the voters has been to increase the age.

23 JUDGE RIVERA: Okay.

24 MS. MURDUKHAYEVA: Before I sit down, if I could  
25 also just mention that this was not in our briefs, but in

1 preparing for this argument, I also noted that the Attorney  
2 General's opinion letter, which is prepared as part of the  
3 opinion of the amendment process dated July 6th, 2022,  
4 said, "In my opinion, if adopted, the proposed amendment  
5 will have no effect upon other provisions of the  
6 Constitution". So that's just another - - - again, it's  
7 not - - - none of this is dispositive, but it is all  
8 relevant indicia of the legislature's intent. Thank you.

9 MR. LEVENTHAL: I - - - I just want to - - -

10 JUDGE TROUTMAN: Could you address the issue of  
11 the failure to explicitly repeal Section - - - Article 6,  
12 Section 25(b)?

13 MR. LEVENTHAL: The protocol in amending  
14 constitutional amendments is that if they want to accept a  
15 provision, they put it in. I've - - - I've given five or  
16 six - - - I think - - - I think what the Appellate Division  
17 did, and I think what the court is suggesting, is inverting  
18 the drafting protocol. The drafting protocol is they pass  
19 an amendment, and if they want to carve-out judicial  
20 retirement, judges - - -

21 JUDGE GARCIA: But maybe they thought they  
22 already did that in the separate amendment. So I think I  
23 look at this and I think the legislature, in drafting this  
24 amendment, sending it to the people, could have written,  
25 except as provided in Article 6(25). That would have been

1 one way to make it clear that that survived, or on the  
2 other hand, they could have put in a specific repeal of  
3 Article 6, Section 25 into the ERA.

4 And those two things, and I think you would agree  
5 they could have done either of those things, right? They  
6 could have explicitly let it ride, or they could have  
7 explicitly overruled it. So it seems to me the issue we're  
8 grappling with is they did neither of those things, right?  
9 So what's the closest we can get to saying when the People  
10 adopted this amendment, what did they think it did?

11 MR. LEVENTHAL: Well, they eliminated all  
12 discrimination for all these protected - - - protected  
13 categories. All of the amici agree that it is a  
14 freestanding claim, standalone - - -

15 JUDGE GARCIA: But that sort of begs the  
16 question, did they do that completely as they could have  
17 done explicitly, and did they do that by implication, or  
18 did they by implication say no, that section, which has  
19 been around for 250 years, you - - - and you've voted not  
20 to amend fairly recently, that still stays? There are  
21 arguments on both sides and you've made good ones. But  
22 isn't really that our job here, is to determine when the  
23 People approve that amendment were they approving the ERA  
24 over Section 6(25)? Is it repealing it, or were they  
25 saying, with the exception of Article 6, Section 25?

1 MR. LEVENTHAL: I don't think they said that.  
2 They said there's no discrimination pursuant to law.  
3 Article 6(25)(b) is a law that discriminates pursuant to  
4 law. It's clear. And - - - and - - -

5 JUDGE GARCIA: But once you - - -

6 MR. LEVENTHAL: And I take issue - - -

7 JUDGE GARCIA: Could've done either thing? They  
8 could have carved out Article 6, Section 25 - - -

9 MR. LEVENTHAL: As they have in other amendments.

10 JUDGE GARCIA: They could have done that. Isn't  
11 that what we're trying to figure out, if that is what they  
12 did because they didn't do the other thing either. They  
13 didn't say Article 6, Section 25 is hereby rescinded or  
14 repealed or void. They didn't do either of those things.

15 So I think what we're struggling with is in  
16 looking at these various markers or indicators with a view  
17 that we don't like to do implied repeal when it comes to a  
18 statute. And there are cases that say we - - - it's even  
19 more disfavored with - - - with the State Constitution,  
20 that I think is what we're struggling with.

21 MR. LEVENTHAL: Unless it can't be harmonized or  
22 reconciled. I don't think this can be. One forbids age  
23 discrimination. The other mandates it. And - - - and if I  
24 may, the State does not want the court to reach whether the  
25 ERA is self-executing, freestanding, standalone civil right

1 and whether it is subject to strict scrutiny, as it knows  
2 that if you should reach it, it spells doom for their  
3 position. It really does.

4 Every provision in there is a heightened  
5 scrutiny, and I submit strict scrutiny, with race,  
6 religion, creed, and color and - - - and the - - - and the  
7 legislators said we're giving more rights than the federal  
8 counterpart. And that's what they did here. And we know  
9 that age is not a suspect classification under the federal  
10 law, but now it is. And I think you have to look - - -

11 JUDGE RIVERA: What about their argument that  
12 judges, which was my line of questioning, are judges, yes,  
13 have certain civil rights and certain civil rights that  
14 relate to their employment and conditions of employment.

15 MR. LEVENTHAL: Right.

16 JUDGE RIVERA: But that Article 6, Section 25, is  
17 of a different type. It is - - - it is not a civil right  
18 that was recognized at the time of the drafting and the  
19 voting on the ERA, because it's not about the State as an  
20 employer. It's the People of the State of New York who  
21 have had this in the Constitution for 250 years.

22 MR. LEVENTHAL: If I may say that when they - - -  
23 I think it was Judge Cannataro asked about - - -

24 JUDGE RIVERA: Yes.

25 MR. LEVENTHAL: - - - these other amendments that

1           came forward, they haven't passed. And - - - and when I  
2           was before Judge Frank, I said, maybe we should call my  
3           senator and - - - and assemblywoman who - - - who sponsored  
4           this bill and see if this - - - this applied to judges.  
5           And the State was shocked. Counsel wasn't there, but the  
6           State was shocked when I said that because I think they  
7           think it really did apply to - - -

8                         JUDGE RIVERA: The ERA?

9                         MR. LEVENTHAL: The - - - yes, the ERA.

10                        JUDGE RIVERA: Well, they think the same. That's  
11           not the - - - that was the point of my line of questioning  
12           - - -

13                        MR. LEVENTHAL: And I wanted to - - -

14                        JUDGE RIVERA: Huh-uh.

15                        MR. LEVENTHAL: Sorry.

16                        JUDGE RIVERA: Yes. There - - - there - - - it's  
17           the scope of that civil right that is the point of  
18           disagreement here.

19                        MR. LEVENTHAL: Well, I think 296 - - -

20                        JUDGE RIVERA: So - - - so - - - so could you  
21           respond to her argument that this particular mandatory  
22           retirement age and recertification does not within - - -  
23           fit within the scope of civil rights as the ERA intended?  
24           That - - - that's it. That's the only question.

25                        MR. LEVENTHAL: Well - - -

1 JUDGE RIVERA: She's agreeing that judges  
2 otherwise have civil rights in employment.

3 MR. LEVENTHAL: Okay. All right. Well, Kern,  
4 Brown, and Dorsey.

5 JUDGE RIVERA: Okay.

6 MR. LEVENTHAL: The three cases are cited, and I  
7 think it was the Senate memo.

8 JUDGE RIVERA: Yes. And they - - - and they said  
9 they understood that there had to be a another - - - either  
10 a constitutional or statute or rule to create a civil  
11 right, but they say now they don't, it's a freestanding  
12 claim. So we're saying under 292(5)(a) that we're an  
13 employee. We get elected - - - not we. A judge gets  
14 elected. I'm no longer a judge. I know that. Judge gets  
15 elected to a term, and you should finish that.

16 JUDGE RIVERA: Some of us get appointed.

17 MR. LEVENTHAL: And the judge who gets appointed  
18 should finish that term. And what are we - - - what are  
19 the - - - what are the appellants asking for? Finish that  
20 term. They either retire. And I want to get to - - -

21 JUDGE RIVERA: Or for those eligible, they go  
22 through recertification, right?

23 MR. LEVENTHAL: Under this construct - - -  
24 there's two constructs. Under the first construct is that  
25 there won't be certification.

1 JUDGE CANNATARO: That's a form of discrimination  
2 in itself, isn't it?

3 MR. LEVENTHAL: Why?

4 JUDGE CANNATARO: I mean, wouldn't you say? No,  
5 I'm saying - - - I'm saying, I would think under your view,  
6 the certification requirement is a form of age  
7 discrimination in itself.

8 MR. LEVENTHAL: No, but can I - - - I'm going to  
9 - - -

10 JUDGE TROUTMAN: But let me ask you this. What  
11 about people who aren't judges, who aspire to be a judge?

12 MR. LEVENTHAL: Right.

13 JUDGE TROUTMAN: But they've reached the age of  
14 70? Does this - - - does this not prohibit them from  
15 seeking judicial office?

16 MR. LEVENTHAL: It might not.

17 JUDGE TROUTMAN: Currently, if we accept the  
18 premise of the Attorney General - - -

19 MR. LEVENTHAL: Oh.

20 JUDGE TROUTMAN: - - - then they are ineligible.

21 MR. LEVENTHAL: Right.

22 JUDGE TROUTMAN: It's not just about keeping a  
23 judgeship.

24 MR. LEVENTHAL: Right?

25 JUDGE TROUTMAN: It prevents others who would

1 like to perhaps seek it. You're not entitled to it, but  
2 you can't even seek it.

3 MR. LEVENTHAL: That's correct. They - - - they  
4 would have a, you know, age - - - age would - - - they  
5 would have to show whether it would be a suspect  
6 classification. But what we're - - - what we're saying  
7 there's two constructs here. One, you either let someone  
8 finish their elected term - - -

9 JUDGE GARCIA: You've said that twice now about  
10 the elected term.

11 MR. LEVENTHAL: Can I give the evidence, sir?

12 JUDGE GARCIA: But can I just interrupt you for a  
13 minute?

14 MR. LEVENTHAL: Yeah.

15 JUDGE GARCIA: In 1983, there was litigation  
16 going on federally, equal protection, I believe, and some  
17 other federal Constitution claims about the 70-year-old  
18 cap.

19 MR. LEVENTHAL: Is that Ashcroft or - - -

20 JUDGE GARCIA: Yeah, I think - - - I think it  
21 was. Hugh Jones was on this court at the time.

22 MR. LEVENTHAL: I couldn't hear you.

23 JUDGE GARCIA: Hugh Jones, elected judge of the  
24 Court of Appeals, was being litigated up to the Court of  
25 Appeals at that time. It was a state claim. And Hugh

1 Jones said. I'm leaving December. I age out because it's  
2 only right, because the voters elected me to a term with  
3 the understanding I would be finished when I was 70.

4 So there's two ways to look at the elected term,  
5 right? I vote for you. I know there's a 70-year-old cap.  
6 I think I'm getting you until you're 70, but you're  
7 claiming, and this may be another way to look at it, the  
8 voters elected me for an entire term of fourteen years,  
9 even though they knew there was a 70-year cap.

10 MR. LEVENTHAL: Well, I'm not sure they knew  
11 anything when it comes to election of judges, but assuming  
12 - - -

13 JUDGE GARCIA: That may be true.

14 MR. LEVENTHAL: Assuming - - - assuming arguendo,  
15 someone gets elected - - - let's say a Supreme Court when  
16 they're 54, right, and now they're 68. They either run  
17 again or they retire.

18 JUDGE GARCIA: But the elector - - - the voters  
19 knew they were going to elect that person until they were  
20 68. And to the idea of opening up opportunities, the  
21 people may want opportunities to come more frequently than  
22 every fourteen years, and they know they will because they  
23 know there's a cap.

24 MR. LEVENTHAL: Well, but let - - -

25 JUDGE GARCIA: In fact, the Hugh Jones slot was

1 taken by Fritz Alexander.

2 MR. LEVENTHAL: When I - - - when I started  
3 earlier when I gave you the second alternative is that the  
4 State although they never argued - - -

5 JUDGE RIVERA: Is this the second construct?

6 MR. LEVENTHAL: Second construct.

7 JUDGE RIVERA: Thank you.

8 MR. LEVENTHAL: The - - - the State never argued  
9 that. But I think their strongest argument would have been  
10 that there's a compelling state interest to let judges who  
11 are 70 leave - - -

12 JUDGE GARCIA: It isn't a compelling state  
13 interest. It's just various ways of looking at these  
14 provisions and the reasons why the public, again, the  
15 people who voted for this amendment might want a 70-year-  
16 old - - - a 70-year cap.

17 MR. LEVENTHAL: That's - - - I'm just I'm trying  
18 to answer that question.

19 JUDGE GARCIA: No, but you were going back to  
20 compelling state interest, and I don't - - - I'm not  
21 talking about compelling state interest.

22 MR. LEVENTHAL: I'll leave that out, then. The  
23 second construct would be whatever the reason would be, is  
24 that someone at 70, a vacancy is created, and you fill  
25 those vacancies. Just like now, a Supreme Court judge

1 becomes 70, you fill that vacancy, and when you fill that  
2 vacancy, the one who's 70 continues on the bench until 72,  
3 74, and 76.

4 Under my - - - our argument here is that there's  
5 no reason why someone can't continue to be certificated,  
6 and you're not holding anyone out, a newer person coming in  
7 at - - -

8 JUDGE RIVERA: You're - - - you're basically  
9 arguing for lifetime appointment as long as you get - - -

10 MR. LEVENTHAL: No.

11 JUDGE RIVERA: For those who are elected, they  
12 get reelected, right? And we don't have lifetime  
13 appointments.

14 MR. LEVENTHAL: No, no. No, no. No.

15 JUDGE CANNATARO: You're not saying that they  
16 certificate until they're 76 and then they have to retire?

17 MR. LEVENTHAL: No, I'm saying - - -

18 JUDGE TROUTMAN: You're saying - - -

19 JUDGE RIVERA: That would be a discrimination.

20 MR. LEVENTHAL: They could be - - -

21 JUDGE TROUTMAN: Until the elected term is out,  
22 or the appointed term is over?

23 JUDGE RIVERA: But we don't have term limits  
24 either.

25 MR. LEVENTHAL: No, what I'm saying - - - what

1 I'm saying is that someone who is 76 - - -

2 JUDGE RIVERA: Yes.

3 MR. LEVENTHAL: - - - could be certificated until  
4 he's 78, until he's found that he's no longer fit,  
5 competent - - -

6 JUDGE RIVERA: That's what I'm saying. Your view  
7 is lifetime appointment.

8 MR. LEVENTHAL: It's not lifetime.

9 JUDGE TROUTMAN: Is it lifetime appointment, or  
10 is it if they're 78 and the fourteen - - - and the term  
11 that they were elected to has not yet expired?

12 MR. LEVENTHAL: That's - - - that - - - yes, I'm  
13 saying that as well. But I gave - - -

14 JUDGE TROUTMAN: Oh, but you are saying lifetime  
15 appointment?

16 MR. LEVENTHAL: No. I'm saying if the court - -  
17 -

18 JUDGE RIVERA: So you reached 78, it's the end of  
19 your term, you want to run again.

20 MR. LEVENTHAL: You can.

21 JUDGE RIVERA: The electors are willing to vote  
22 you in again?

23 MR. LEVENTHAL: I don't think they would get  
24 elected, but yes, I mean - - -

25 JUDGE RIVERA: So why is it lifetime appointment

1 until the voters no longer want to reelect you?

2 MR. LEVENTHAL: Is that a lifetime appointment?  
3 You - - - the electorate is the - - - are the people who  
4 choose to - - -

5 JUDGE RIVERA: Yes, but if - - - if you run, and  
6 they keep - - - and they keep reappointing you or  
7 reelecting you, there's no end. We don't have lifetime  
8 appointment. We don't have term limits.

9 MR. LEVENTHAL: That's true. But look - - -

10 JUDGE RIVERA: Under your view, if indeed Article  
11 6, Section 25(b) no longer applies or has been repealed  
12 implicitly, then - - - sorry. Someone who wishes to hold  
13 this office can continue to run for that office. If they  
14 get reelected, they can continue to hold that office.

15 MR. LEVENTHAL: Well, that's up to the people.  
16 But if I may say, I'm not saying that we should be like  
17 federal judges, but I was just at the Federal Bar Council  
18 and Judge [inaudible], he was 101 years old, and he got up  
19 and spoke for twenty-five minutes, and he's still on the  
20 bench. And I'm not saying that this should be a lifetime  
21 appointment. You go through the certification process,  
22 medical - - -

23 JUDGE RIVERA: No. But under your view, there is  
24 no certification process because it's been repealed.

25 MR. LEVENTHAL: Hold on, hold on. I'm not

1 exactly - - -

2 JUDGE RIVERA: It was 25(b) is repealed, and the  
3 judiciary sections that codified 25 are also - - -

4 MR. LEVENTHAL: There's a transition - - -

5 JUDGE RIVERA: - - - also unlawful now.

6 MR. LEVENTHAL: There's a transition period where  
7 the people who finish their terms, who are now  
8 certificated, would continue to be certificated until  
9 they're no longer certificated. Anyone new would finish -  
10 - -

11 JUDGE RIVERA: But there is no - - - where does  
12 that come from?

13 MR. LEVENTHAL: Well, you have to have a - - -  
14 what do you do - - -

15 JUDGE RIVERA: Where would that come - - - you've  
16 just knocked it out by saying 25(b) is no longer valid.

17 MR. LEVENTHAL: You're not going to have  
18 certificated for people who are finishing their terms.

19 JUDGE RIVERA: No, no, but there is no - - - my  
20 point is under your argument, there is no certification  
21 process.

22 MR. LEVENTHAL: You're right. That's correct.  
23 But what about the people who are being certificated now?  
24 You should let them continue to be certificated in a  
25 transition period.

1 JUDGE RIVERA: If we agree with you, they don't  
2 get - - - they may be in a certain - - - who knows, but  
3 prospectively, no one else gets certificated. So I don't  
4 know you're talking about.

5 MR. LEVENTHAL: That's correct. That's what I  
6 was trying to say. The - - - the - - - the - - -

7 JUDGE RIVERA: So then they just run for office  
8 and can they hold it - - -

9 MR. LEVENTHAL: The administer - - -

10 JUDGE RIVERA: - - - until the people don't - - -

11 MR. LEVENTHAL: The administrative burden that  
12 the State was saying is they're not going to face that.  
13 Certification will come to an end. So there won't be an  
14 administrative burden. People either finish their term or  
15 retire.

16 JUDGE RIVERA: And then they run again.

17 MR. LEVENTHAL: Or if they're lucky enough to run  
18 again.

19 JUDGE RIVERA: And get reappointed again.

20 MR. LEVENTHAL: If they're lucky enough to be  
21 appointed.

22 JUDGE RIVERA: Yeah.

23 MR. LEVENTHAL: Well, look, if you - - - if you  
24 think Article 1, Section 11 doesn't apply to judges,  
25 there'll be the only class - - -

1 JUDGE RIVERA: No, no, no, no. It's only with  
2 respect to Article 6, Section 25. Not that you're not  
3 otherwise - - - she's conceded that. The State concedes  
4 that. Take that win.

5 MR. LEVENTHAL: But I am saying that if you - - -

6 JUDGE RIVERA: You may want more, so take that  
7 one.

8 MR. LEVENTHAL: If you ban - - - if you ban or  
9 bar someone from continued employment because of serving,  
10 an opportunity to serve, and to finish out their term, not  
11 a right to be a judge, but if you stop someone from or ban  
12 them or prohibit them from - - - from continuing in their  
13 service just because of age, then that's discrimination.

14 JUDGE RIVERA: Thank you, Counsel.

15 MR. LEVENTHAL: And it should be subject - - -  
16 all the amici agree that it should be subject to strict  
17 scrutiny.

18 JUDGE RIVERA: Thank you, Counsel. We very much  
19 appreciate it.

20 MR. LEVENTHAL: Can I say on a personal note?  
21 Thank you. It's thirty-four years since I've been here  
22 last. I'm 77 years old and I'm still here. Thank you.

23 JUDGE RIVERA: Okay. Thank you.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Miller v. State of New York, No. 64 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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