



New York's Constitution has included a mandatory retirement age for judges since it was first adopted in 1777. Did the recent adoption of the New York Equal Rights Amendment, which protects against age discrimination, among many other things, impliedly abrogate that age-based restriction on judicial service? The Court of Appeals tackled that interesting question recently. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

COURT OF APPEALS

CONSTITUTIONAL LAW, JUDICIAL MANDATORY RETIREMENT

Matter of Miller v State of New York, 2026 NY Slip Op 03907 (Ct App June 18, 2026)

Issue: Was the constitutional mandatory retirement age for judges implicitly repealed by the Equal Rights Amendment of 2024, which amended article I, § 11 of the New York Constitution to add age to the classes protected from discrimination in the exercise of civil rights?

Facts: A “retired Appellate Division Justice who reached the maximum constitutional certification age of 76 at the end of December 2025, and two currently certified Supreme Court Justices” brought a declaratory judgment action against the state, arguing that the adoption of the New York Equal Rights Amendment in 2024 implicitly repealed article VI, § 25 (b) of the New York Constitution, which mandates judicial retirement at 70 years old, with opportunities for judges to be recertified to serve at courts other than the Court of Appeals for up to six additional years until age 76. Supreme Court denied the judges preliminary relief and dismissed the proceeding.

The Appellate Division, First Department affirmed, holding that “article I, § 11, as amended by the ERA, did not implicitly repeal article VI, § 25 (b)’s pre-existing mandatory age requirement. In reaching that holding, the Court considered that the ERA contains no reference to article VI, the eligibility of persons to serve as judges or justices, or the judicial retirement age.”

Holding: The Court of Appeals affirmed, holding that the “purpose, and history of these constitutional provisions establish that they operate independently: article VI, § 25 (b)’s retirement mandate addresses a different constitutional matter than the ERA, and the two provisions are not antagonistic and may be harmonized.” The Court explained that New York’s constitutional mandatory retirement age for judges has existed since the state’s first constitution in 1777, and “reflects the will of New York’s voters that judges and justices shall retire upon reaching a specified age. The voters have reaffirmed that constitutional design—last amended in 1961—that judges and justices shall not serve past the age of 70; in 2013, the voters rejected, by a wide margin, a proposed constitutional amendment to raise the retirement age for certain judges and justices to age 80. Significantly, no ballot measure has ever sought to eliminate the age requirement.”

The Equal Rights Amendment, in contrast, was adopted to “ensure that the State Constitution extends to all New Yorkers, particularly those who have faced severe and pervasive injustice, the right to be free from discrimination. The ERA was designed to achieve this aim by expanding the list of classes affirmatively protected by the New York Constitution in recognition of the need for comprehensive, enforceable, and intersectional equality under the law and guaranteeing the validity of efforts to prevent or dismantle structural forms of inequality or discrimination against protected classes. The Legislature noted that the ERA was necessary because article I, § 11 was last amended to address this topic in 1938 . . . , prior to the civil rights movement, the movement for gender justice, the LGBTQ movement, the disability rights movement, and the many developments in anti-discrimination law, and that New York’s Constitution must reflect our broad conception of justice, equal rights and the duty to protect all people in the state against discrimination.”

Noting generally that “an amendment to the State Constitution repeals only the particular provision actually changed, as the very purpose and effect of an amendment is to amend the relevant portion of the Constitution, effectively repealing and voiding any prior version of the particular section so amended,” the Court acknowledged that implicit repeal of a constitutional provision is possible where a later one is adopted that it “antagonistic to it, although the original provision may in terms remain unaltered.” The Court explained, however, that repeal by implication is not favored: “Even where two constitutional provisions are in tension, a new amendment will not implicitly repeal a preexisting provision unless the fact of its opposition to the former provision and the intent to displace it by the amendment adopted, is so plainly shown by the provisions themselves that there can be no rational doubt in regard to it.”

Here, the Court explained, the ERA did not “expressly repeal article VI, § 25 (b). Importantly, the ERA makes no mention of article VI, § 25 (b). Indeed, the ERA amends a different provision of the Constitution, article I, § 11, which was drafted to address wholly different, broader concerns. The plain texts of these two provisions provide no support for express repeal.”

Nor can the ERA be read to have implicitly repealed the judicial mandatory retirement requirement, the Court held. “At the time of the ERA’s enactment, article VI, § 25 (b) explicitly set a 70-year-old retirement age for judges and justices with the possibility of serving until they reached 76. The State Constitution has always limited the scope of judicial service in this way, reflecting the intent of the voters for over two hundred years to impose this restriction on judicial tenure. Judges and justices are elected and appointed to set terms with the understanding the voters have expressed their desire in the strongest terms—by constitutional proscription—that judicial service ends when a judge reaches the age chosen by the voters, as set forth in article VI, § 25 (b), regardless of whether more time remains on the judge’s term. Petitioners nevertheless maintain that because the ERA prohibits all age discrimination it thus must repeal the judicial retirement mandate. There is no evidence that the Legislature and the voters would have sought to accomplish such a dramatic change to the mandatory retirement provision merely by inference, and we see no indication that they intended to do so by adopting the ERA. Given the longstanding constitutional age limitation on judicial service, the most natural and direct way to change course after two hundred years would be to amend outright article VI, § 25 (b). Or, we would expect that if the ERA were intended to eliminate the age limitation, the ERA would unambiguously declare its repeal of article VI, § 25 (b).”

Thus, the Court concluded, “[t]he voters have spoken clearly since 1777 that judges may serve until they reach the constitutional age of retirement. That age limit has never been eliminated. For more than two centuries, the voters only modified the age limit, first during the Reconstruction era by raising the age to 70, and again in 1961, when the voters approved a certification process for certain judges and justices to serve to age 76. That limit has been fixed since then, with no ballot initiative to eliminate it and a failed effort in 2013 to raise the age to 80. The retirement age is part of New York’s constitutional design. The State’s voters, Legislature, members of the bench, and judicial candidates have understood that judicial service is limited in this specific way. Article I, § 11, as amended by the ERA, did not repeal article VI, § 25 (b). The retirement mandate stands.”

Worthy of attention also is Judge Troutman’s concurring opinion, which similarly concludes that the petitioners failed to establish that the mandatory retirement age was unconstitutional in light of the ERA, but delves more deeply into what the ERA has changed about New York’s constitutional protections against discrimination. She explained, “[t]he Civil Rights Clause, as amended by the ERA, now grants people the self-executing right not to be discriminated against, ‘pursuant to law,’ on the basis of the categories set forth therein. The people of this State voted for those rights when they ratified the ERA. They were told how protective it would be of abortion and reproductive rights, and nothing in the text or history of the ERA indicates that any of the other rights created therein would receive lesser protection—including the right not to be discriminated against on the basis of age.”

She reasoned, however, “it is not the fact of a mandatory retirement age that is repulsive to the ERA. What concerns some about the retirement age is that it has not kept up with the times. Unlike race, sex, etc.—where laws discriminating against people on those bases are wholly contrary to our ideas of equality—age restrictions are judged by the degree of their discrimination. There are certainly age restrictions that people who voted for the ERA would support: e.g., voting age, driving age, or drinking age. When a legally mandated age restriction is discriminatory, it is so because of the degree of the restriction (set at either too high or too low of an age), it is not because there should never be age restrictions.

This leaves us at an impasse. We cannot rewrite this section of the Constitution to eliminate any age restriction, because we cannot say that, even today, there is no mandatory retirement age for judges that would pass heightened scrutiny. We also cannot insert into the Constitution a retirement age that we believe is appropriate. It is the exclusive job of the people and their representatives to decide what the proper mandatory retirement age should be. Thus, for petitioners, there is no remedy that can be had without this Court performing a role that goes beyond its constitutionally delegated function. For that reason, there is no remedy available to petitioners from this Court, inasmuch as petitioners have not presented sufficient proof that the ERA is antagonistic to article VI, § 25 (b), so as to overcome the presumption against implied repeal. I agree with the majority’s reasoning to that effect. As a result, the remedy for petitioners’ complaint is solely in the hands of the people of this State and their representatives. Only the people can amend the Constitution. If there is to be a change to the mandatory retirement age for certain judges and justices, it must be made by the people as a whole, not by the judges of this Court.”

SECOND DEPARTMENT

CIVIL PROCEDURE, STATUTE OF LIMITATIONS, FEDERAL PREEMPTION

Klaus v Town of Brookhaven, 2026 NY Slip Op 03669 (2d Dept June 10, 2026)

Issue: Does a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)—42 U.S.C. § 9658—preempt the limitations period provided by CPLR 214-c for toxic tort actions commenced in New York based upon exposure to hazardous substances where the plaintiffs’ allegations do not otherwise come within the purview of CERCLA?

Facts: For years, students and staff at a school approximately one mile from the Town of Brookhaven’s landfill, and other nearby neighbors, had “complained of gaseous odors emanating from the Landfill and reported health problems such as headaches, eye irritation, nausea, and asthma that they believed were caused by the Landfill. However, numerous air and water quality tests conducted by the New York State Department of Health since the 1990s found no link between the various health problems reported and emissions from the Landfill.”

"[I]n or around July 2018, it was revealed that 38 of 105 staff members at the School had been diagnosed with some form of cancer, as well as a number of former students and residents of communities near the Landfill. Also at that time, in July 2018, the Department of Health announced a cancer research initiative to study 'cancer clusters' near environmental facilities in New York, which revealed higher-than-typical rates of cancer in neighborhoods surrounding certain environmental facilities throughout the state," but the Brookhaven landfill was not included in that study.

In April 2019, plaintiffs—former students and staff at the school and nearby residents—commenced this action, alleging that "Brookhaven caused or allowed dirt, debris, and toxic and noxious substances and odors to emanate from the Landfill, including volatile organic chemicals such as carbon tetrachloride, acetone, benzene, chloromethane, dichlorodifluoromethane, methylene chloride, n-bexone, propylene, and tetrachloroethylene, which invaded the School and other properties in communities surrounding the Landfill. The amended complaint further alleged that extended exposure to the toxic and noxious substances and odors emanating from the Landfill caused the plaintiffs to develop varying cancers, lesions, cysts, tumors, rashes, headaches, asthma, epilepsy, and other conditions, some of which resulted in death." The plaintiffs largely alleged that their causes of action arose in July 2018, when the DOH study gave the plaintiffs enough information to link their injuries to the exposure to the Brookhaven landfill.

Brookhaven moved to dismiss, arguing, among other things, that "the action was time-barred pursuant to CPLR 214-c and that the statute of limitations period provided by CPLR 214-c was not preempted by the statute of limitations period for state toxic tort actions provided by 42 USC § 9658 because the Landfill was not an inactive 'Superfund' site within the purview of CERCLA." Supreme Court denied the motion to dismiss, concluding that "the statute of limitations period for state toxic tort actions provided by 42 USC § 9658 applied to preempt the limitations period provided by CPLR 214-c for this action, that none of the causes of action were time-barred, and that Brookhaven was not otherwise entitled to dismissal of the amended complaint."

Holding: The Appellate Division, Second Department affirmed, holding that "42 USC § 9658 can preempt New York's accrual statute for toxic tort actions based upon exposure to hazardous substances [even] where there is no concomitant CERCLA liability." The court explained that under New York's toxic tort statute of limitations rules, a plaintiff may commence an action to "recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form," within three years from "the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." "CPLR 214-c(4) offers plaintiffs in toxic tort cases an alternative limitations period of one year measured from the date of discovery of the cause of the injury, where discovery of the *cause* of the injury occurs no later than five years after the discovery of the injury, and the plaintiffs are able to prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of the injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized."

42 U.S.C. § 9658, a provision of CERCLA, provides "a limited exception to State statutes that applies only if the state statute provides a commencement date which is earlier than the federally required commencement date. Thus, in New York, where suit was not brought within three years of the discovery-of-injury date as provided by CPLR 214-c(2), the primary effect of 42 USC § 9658 is to allow a plaintiff to bring suit within one year after the date the plaintiff knew (or reasonably should have known) the cause of an injury, even if more than five years have elapsed since discovery of the injury." Although federal courts have split on whether this provision preempts the state statute of limitations period in the absence of CERCLA liability, federal courts in the Second Circuit have held that "a plaintiff need not assert, nor be in a position to assert, a CERCLA claim in order to take advantage of 42 USC § 9658."

Noting that it was not bound by the decisions of intermediate federal courts, however, the court analyzed the plain language of 42 U.S.C. § 9658 and concluded that it does not contain any "language limiting its application to state actions involving an environmental hazard that might otherwise be actionable under CERCLA. Rather, the plain language of 42 USC § 9658 expressly provides that it 'shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.' We find that the use of the word 'all' in describing such state actions means exactly what it says, and evidences Congress's intent for the limitations period of 42 USC § 9658 to apply in all such state actions regardless of whether the environmental hazard at issue might otherwise be actionable under CERCLA . . . Therefore, with respect to those plaintiffs in this action who did not bring suit within three years of the discovery of their alleged injuries, 42 USC § 9658 applies to allow those plaintiffs to bring suit within one year after the date the plaintiff knew (or reasonably should have known) the cause of an injury, even if more than five years have elapsed since discovery of the injury." Here, the court concluded that Brookhaven failed to demonstrate that any of the plaintiffs' claims were time barred and, therefore, affirmed denial of its motion to dismiss.

CasePrepPlus | July 10, 2026

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