New York County Clerk's Index No. 112301/07

Court of Appeals

STATE OF NEW YORK

HON. SUSAN LARABEE, HON. MICHAEL NENNO, HON. PATRICIA NUNEZ, and HON. GEOFFREY WRIGHT,

Plaintiffs-Respondents-Appellants,

—against—

THE GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, and STATE OF NEW YORK,

Defendants-Appellants-Respondents.

BRIEF OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION AS AMICUS CURIAE

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November 24, 2009

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INTEREST OF AMICUS CURIAE

The New York County Lawyers' Association ("NYCLA") is a non-profit public service association dedicated to promoting the public interest throughout the legal system. Founded in 1908, NYCLA has grown from a small community of practicing lawyers into one of the largest county bar associations in the nation, with thousands of lawyers, judges, and law students as members.

NYCLA's key institutional purposes, as articulated in its mission statement, include (1) promoting the administration of justice and reforms in the law to advance the public interest; and (2) advocating for a strong and independent judiciary. Since its inception, NYCLA has been at the forefront of some of the most far-reaching and tangible reforms in the American legal system, and has continuously sought to strengthen and maintain the independence of New York's judiciary. For example, NYCLA spearheaded the effort to enact a unified civil and criminal court system in New York City, and led efforts to reform the nomination process for New York State Supreme Court Justices.

As part of its dedication to the strength and independence of New York State's judiciary, NYCLA has historically been concerned that judges be compensated fairly. The failure of the legislature to provide adequate judicial pay has now reached crisis proportions, threatening the administration of justice in New York and undermining public confidence in the legal system. Over four years

ago, NYCLA's Board of Directors passed a resolution warning that increasing pay disparities between federal district judges and judges and justices of the New York Unified Court System were demoralizing New York's judiciary, and that allowing those disparities to persist would ultimately discourage the most qualified individuals from seeking the state court bench.[1] In the ensuing period, steady inflation in New York has further eroded judicial compensation in the State.

NYCLA—which also appeared as amicus curiae before the Appellate Division—submits this amicus brief to urge this Court to affirm the ruling of the Appellate Division, First Department that Defendants' continuing failure to properly address judicial compensation violates the New York Constitution and must be remedied.

PRELIMINARY STATEMENT

For the last ten years, the real economic value of New York judges' compensation has been reduced by over 30%, while the salaries of nearly all state government personnel and most privately employed New Yorkers have risen with the cost of living. New York judges now receive less in compensation than many government attorneys, far less than privately employed attorneys, nearly 35% less

[1] *See* New York County Lawyers' Association Board of Directors, *Resolution Concerning New York State Unified Court System's Legislative Proposal to Adjust Judicial Compensation*, Apr. 11, 2005, *available at* http://www.nyclamail.org/siteFiles/Publications/Publications30_0.pdf.

than federal district court judges, and, in real economic terms, significantly less than what judges have received throughout most of this State's history. Shockingly, the most junior attorneys at top New York City law firms—some of whom are not even called to the bar—now earn significantly more than any New York State judge. As the court below found, Defendants concede that judicial pay should be raised. The reason that has not happened lies not in any legitimate issue of policy, but rather due to Defendants' unconstitutional practice of tying or "linking" judicial pay to legislative pay increases.

Defendants' conduct and ten years of steady inflationary diminution of judicial salaries have now led to four suits being brought by the state's judiciary, including the Chief Judge, three of which are now before this Court. New York cannot afford to have the strength and independence of its judiciary—the third branch of its government—compromised by legislative and executive wrangling and inaction, and the New York Constitution does not permit that outcome for at least two reasons:

First, the Compensation Clause, N.Y. CONST. art. VI, § 25(a), expressly commands that judicial compensation "shall not be diminished." That provision alone precludes the over 30% diminution in judicial salaries that Defendants have allowed to occur. While the court below accepted Defendants' argument that the Compensation Clause protects only nominal compensation, the

principles underlying this provision demand a more robust application of its express terms. The Clause's purpose is to protect the public's right to a competent and independent judiciary by ensuring that the other branches of government will not be able to use their "power of the purse" to create a dependent judiciary.

Second, as the court below correctly held, the separation of powers embedded in the Constitution's structure requires that the judiciary be treated as an independent and co-equal branch of State government. For this reason, Defendants' practice of using the judiciary as a political football in unrelated policy disputes, as the First Department held, unconstitutionally "subordinated the status of the Judiciary," violating the separation of powers. In addition, the separation-of-powers doctrine requires that judicial pay be "adequate" in amount, which at a minimum requires pay at least comparable to that of similarly experienced attorneys in practice elsewhere in government or in the private sector. By this standard, it is clear that New York's judicial pay does not even come close to meeting this constitutional requirement.

Defendants' position rests on the premise that they alone may decide when a decade's erosion in state judicial salaries will come to an end. Defendants are wrong. New York's Constitution protects the state judiciary as a separate and independent branch of government. That constitutional protection requires affirmance of the Appellate Division to the extent it upheld Plaintiffs' claims under

the separation-of-powers doctrine, and reversal to the extent it affirmed the Supreme Court's denial of Plaintiffs' Compensation Clause claims.

BACKGROUND

Until relatively recently, judges in New York were fairly paid. Earlier legislatures consistently provided judges "with a level of remuneration proportionate to their learning, experience and [the] elevated position they occupy in our modern society." *Goodheart* v. *Casey*, 521 Pa. 316, 322, 555 A.2d 1210, 1212 (1989). In real terms, historical judicial salaries far exceeded what New York State judges earn today. For example, Justices of the New York Supreme Court received $17,000 in 1909 (approximately *$406,000* in 2008 dollars), $25,000 in 1935 (approximately *$395,250* in 2008 dollars), $48,998 in 1975 (approximately *$197,500* in 2008 dollars), and $95,000 in 1987 (approximately *$181,450* in 2008 dollars). L. 1887, ch. 76; L. 1926, ch. 94; L. 1975, ch. 152; L. 1987, ch. 263.[2]

Times have, to put it mildly, changed. As of today, a New York Supreme Court Justice is paid $136,700—in real economic terms about a third of what the same judge would have earned 70 years ago. Judges in New York State

[2] Inflation-adjusted figures were calculated by multiplying historical salaries by the ratio of the 2008 Consumer Price Index (CPI) to CPIs in the relevant years, using CPI data published in HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ON LINE 3-158 tbl.Cc1-2 (Susan B. Carter et al. eds., Cambridge Univ. Press 2006) (pre-1913 data) and U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data, *available at* http://www.bls.gov (1913 and later).

now earn considerably less than other professionals with comparable education and experience. The highest judicial office in the state—Chief Judge of the Court of Appeals—pays $156,000, far less than the $1 to $5 million earned by the 2,700 partners of the twenty most profitable law firms in New York City, about half the $293,567 earned by the average partner at a New York law firm with ten or more lawyers, and, astonishingly, less even than a first-year associate straight out of law school at a major New York City law firm. *See, e.g.*, Aric Press & John O'Connor, *The Am Law 100: Lessons of the Am Law 100* (May 1, 2007).

New York judges have now gone nearly ten years without an increase in nominal salary—longer than any other judges in the country. NAT'L CENTER FOR STATE COURTS, JUDICIAL COMPENSATION IN NEW YORK: A NATIONAL PERSPECTIVE 9 (May 2007) ("NCSC REPORT") (R. 160). During this time, inflation has eaten away approximately 30% of the real value of New York judges' compensation. (R. CA23-24, reported at *Larabee* v. *Governor*, 65 A.D.3d 74, 85, 880 N.Y.S.2d 256, 264 (1st Dep't 2009).) Today, when the cost of living is taken into account, New York ranks *last* among the 50 states when it comes to judicial compensation.[3] And while in 1999 New York judges were paid on par with their

[3] In 2007, the cost-of-living-adjusted compensation of New York judges ranked 48th among the 50 states, after only Oregon and Hawaii. NCSC REPORT 9 & nn.21-22. (R. 160.) Since then, both Oregon and Hawaii have increased their judicial pay. Thus, New York apparently now ranks *dead last* in judicial compensation.

federal counterparts, in 2009 United States District Court Judges are paid $169,300, over $32,500 more than judges of the New York Supreme Court. That disparity is particularly shocking in light of the widespread concern that the substantially higher rates of federal compensation are inadequate to such a degree that the Chief Justice of the United States Supreme Court has described the failure to raise federal judicial pay as a "constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." 2006 Year-End Report on the Federal Judiciary at 1.

In defense of their own inaction with respect to judicial pay, Defendants do not suggest that a pay increase is undeserved or inappropriate. Indeed, Defendants claim to support such an increase, and even agree with Plaintiffs as to the amount of increase that is appropriate—to restore parity with federal District Court judges. (*E.g.*, R. 318-19.) Nor have Defendants previously suggested that their failure to raise judicial pay was actually the result either of budgetary constraints or of a legislative judgment that the State's funds would be better used elsewhere. To the contrary, Defendants conceded before the Supreme Court, New York County that proposals for judicial pay increase—which Defendants claim to support—have consistently "foundered on the combination of the Assembly's refusal to act unless legislative pay increases were linked to any enhancement of judicial compensation, the Governor's refusal to approve any

legislative salary increase unless his demands for [policies including] campaign finance reform were satisfied, and the Senate's refusal to agree to the Governor's demands." (R. CA20-21, 65 A.D.3d at 83, 880 N.Y.S.2d at 263; *see also* R. 318-19.)

The end result of Defendants' failure to raise judicial salaries for a decade is that New York's uniquely low compensation now threatens the continued ability of the State's Bench to attract and retain qualified judicial candidates and thus to "insure the public's right to a competent and independent judiciary." *Goodheart*, 521 Pa. at 323, 555 A.2d at 1213. And the practice of the legislative and executive branches to enforce a "linkage" of judicial pay with the pay of legislators themselves and other extraneous issues has generated needless friction between the branches of New York government that now rises to the level of a constitutional crisis and undermines public confidence in government and the judiciary. *See, e.g.*, Mark Fass, *Schack Cites Judicial Pay Stall as Reason for Recusal*, N.Y.L.J., Mar. 10, 2009 ("A Brooklyn judge has recused himself from a receivership case where the plaintiff is represented by a law firm that employs two state lawmakers, one of whom voted against a judicial pay raise."); Editorial, *Stop Stalling on Judicial Raises*, N.Y. TIMES, Dec. 11, 2007 ("These shamefully low salaries hurt the quality of justice."); Derek P. Champagne, *All Parts of Criminal Justice System Need Review*, N.Y.L.J., Dec. 6, 2007 ("I know of several superb

candidates for the judiciary who did not bother to run for office in the face of an obvious 'cut' in pay. Losing out on these qualified candidates will harm the judicial system for years to come."); Judith S. Kaye, *Free Judges' Pay*, N.Y. TIMES, June 7, 2007 ("Experienced judges increasingly talk of resigning so they can afford to continue to live in New York and educate their children."); Kenneth Lovett, *Pol Slaps Top Court on Ethics*, N.Y. POST, May 11, 2007 ("A furious upstate assemblyman yesterday accused the state's chief judge of killing a lawsuit against legislative leaders in order to not jeopardize a possible judicial pay raise."); Editorial, *Justice on the Cheap*, N.Y. TIMES, Apr. 8, 2007 ("A few judges are letting their anger show beyond chambers. Several have refused to hear cases argued by lawyers with any connection to the State Legislature, citing a conflict of interest."); Editorial, *Judges, Deserving and Otherwise; Rewarding the Good Ones*, N.Y. TIMES, May 15, 2005 ("[K]eeping judicial salaries at a depressed level . . . is not a strategy destined to attract and retain top-quality judges.").

In urging reversal of the lower court, Defendants argue primarily that the courts are powerless to stop their intransigence because the legislative and executive branches of government have "*exclusive* authority" to determine whether and when judicial compensation will be adjusted. (Defs.' Br. 2.) In essence, Defendants take the position that notwithstanding the constitutional prohibition on diminution of judicial compensation and the constitutional requirement that the

judiciary be recognized as an independent, separate, and co-equal branch of the government, the continuing failure of the State and the legislative and executive branches to adjust judicial salaries in response to real economic diminution and manifest inadequacy is solely a political matter. Defendants are wrong. The New York Constitution does not allow the State or the legislature limitless discretion to undermine the strength and independence of the judiciary through control of the public purse.

ARGUMENT

I. THE 30 PERCENT DECREASE IN JUDICIAL SALARIES SINCE 1999 IS AN UNCONSTITUTIONAL DIMINUTION OF JUDICIAL COMPENSATION.

A. The Constitution Precludes Diminution of Judicial Compensation to Protect the Public Interest.

The New York State Constitution commands that "[t]he compensation of a judge . . . *shall not be diminished* during the term of office for which he or she was elected or appointed." N.Y. CONST. art. VI, § 25(a) (the "Compensation Clause") (emphasis added); *see also* U.S. CONST. art. III, § 1 (equivalent federal Compensation Clause). The constitutional values underlying this prohibition against diminution of judicial pay are uncontroversial and rooted deeply in our Nation's history. As the court below noted, "New York's provision, [has its] 'roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if

there is a right to have claims decided by judges who are free from potential domination by other branches of government.'" (R. CA25, 65 A.D.3d at 85, 880 N.Y.S.2d at 265 (quoting *United States* v. *Will*, 449 U.S. 200, 217-18 (1980)).) *See also People ex rel. Burby* v. *Howland*, 155 N.Y. 270, 282 (1898) ("Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power.").

As Alexander Hamilton noted in The Federalist, "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution" and, "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." THE FEDERALIST NOS. 78, 79 (Alexander Hamilton). Moreover, judges are uniquely in need of protection from incursions on their independence by the coordinate branches, because "beyond comparison [the judiciary is] the weakest of the three [branches]," with "no influence over either the sword or the purse." THE FEDERALIST NO. 78 (Alexander Hamilton). Because of these natural weaknesses, the proscription against manipulating judicial compensation is necessary to protect the independence of the judicial branch from incursions by the political branches through their power over "the purse."

The purposes of the constitutional protection of judicial pay embodied in the Compensation Clause thus go beyond merely preventing invidious or coercive action against judges. These protections also serve to "'promote the public weal' . . . by helping to induce 'learned' men and women to 'quit the lucrative pursuits' of the private sector." *United States* v. *Hatter*, 532 U.S. 557, 568 (2001) (quoting *Evans* v. *Gore*, 253 U.S. 245, 248 (1920), and 1 J. KENT, COMMENTARIES ON AMERICAN LAW *294). Diminution of judicial pay is forbidden by the Constitution in order "to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *Will*, 449 U.S. at 217; *see also O'Donoghue* v. *United States*, 289 U.S. 516, 533 (1933) (diminution forbidden "not as a private grant, but as a limitation imposed in the public interest").

As a result, the political branches are barred not only from actively diminishing judicial salaries, but also from causing diminution indirectly. In the absence of such a bar, "a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect." *Hatter*, 532 U.S. at 569; *see also Miles* v. *Graham*, 268 U.S. 501 (1925) (holding that indirect assaults on judicial compensation are proscribed), *overruled on other grounds by O'Malley* v. *Woodrough*, 307 U.S. 277 (1939).

New York's Constitution "is to be given the effect and meaning contemplated by its framers and by the people who adopted it, to be gathered, if possible, from the plain and ordinary meaning of the words used." 21 N.Y. JUR. 2D *Constitutional Law* § 21 (2007); *accord Carey* v. *Morton*, 297 N.Y. 361, 366 (1948). Here, the "effect" contemplated by the Constitution's prohibition on diminution and allowance of increases in compensation is a matter of historical record—"the chief impulse [in] back of [the 1925 Amendment]" enacting the current version of the Compensation Clause was to enable the legislature to increase judicial salaries following a period of significant inflation. *See* TWENTY-FIRST ANNUAL REPORT OF THE COMMITTEE ON LEGISLATION OF THE CITIZENS UNION FOR THE REGULAR SESSION OF 1925, at 22 (R. 145).

The Framers understood that, in the event of significant erosion of the real value of judicial salaries due to inflation, it would become necessary for the legislature to increase those salaries in order to preserve judicial independence and thus protect the public's right to a competent and independent judiciary. And the Framers trusted that the legislature would satisfy its obligation to take the required measures to preserve judicial independence and, thus, the balance of our constitutional system. *See* JUDICIARY CONSTITUTIONAL CONVENTION OF 1921: REPORT OF THE LEGISLATURE 29 (1922) (R. 209) (supporting provision to enable legislature to increase judicial compensation because "the cost of living and rents,

etc., have greatly increased" and the resulting "inadequacy of compensation deprives the public of the benefit of the services as judges of exceptionally trained and competent lawyers of the highest caliber and experience"); *see also* THE FEDERALIST NO. 79 (Alexander Hamilton) ("fluctuations in the value of money and in the state of society . . . from time to time . . . shall require" Congress to increase judicial compensation); *Glancey* v. *Casey*, 447 Pa. 77, 86, 288 A.2d 812, 816 (1972) ("[I]t is the constitutional duty and the obligation of the legislature, in order to insure the independence of the judicial . . . branch of government, to provide compensation adequate in amount and commensurate with the duties and responsibilities of the judges involved.").

Here, the legislature has failed to live up to its end of that constitutional bargain and, instead, has allowed judicial pay to become so eroded as to threaten judicial independence. Under such circumstances, there can be no doubt that the effect of inflation has been to so diminish judicial compensation as to violate the Compensation Clause. Indeed, in the only published federal decision to directly address diminution in judicial compensation caused by inflation, the Federal Court of Claims "rejected the view that real economic value plays no part in measuring what the [Compensation] Clause protects," adding that:

> Absolute deference to Congress in the prescription of the number of nominal dollars judges are to receive would eviscerate the Clause as a safeguard against a discriminatory attack on judicial independence.

Atkins v. *United States*, 556 F.2d 1028, 1049 (Ct. Cl. 1977).[4]

Courts in sister states, construing analogous clauses of their state constitutions, have also recognized that those clauses serve to protect not only the nominal value, but also the economic value of judicial compensation—and that to contend otherwise, as Defendants do here, is to elevate form over substance in a way that would undermine the purpose of the Compensation Clause. For example, the Supreme Court of Tennessee has long held that, where the Tennessee Constitution's Compensation Clause forbade any *increase* in judicial compensation, that Clause was nevertheless not violated by an increase in *nominal* salaries to offset inflation, finding the theory that such increases are, in fact, *required* in order to maintain fixed *real* compensation to have "a solid foundation in fact." *Overton County* v. *State of Tennessee*, 588 S.W.2d 282, 289 (Tenn. 1979). More recently, the Illinois Supreme Court held that a state constitution's anti-diminution provision was violated by the cancellation of scheduled cost-of-living increases, explaining that "the protections afforded by [the] compensation clause do not merely prohibit the direct reduction of a judge's salary. They also forbid actions that indirectly result in an improper diminution in judicial

[4] As discussed at Part I.B, *infra*, the *Atkins* court erred both in holding that such a claim cannot be stated absent allegations of actual discrimination against judges, and in finding that such discrimination was not adequately alleged in that case.

compensation." *Jorgensen* v. *Blagojevich*, 211 Ill. 2d 286, 302, 811 N.E.2d 652, 661-62 (2004).

While the broad principle is essentially unchallenged (R. 323-35), Defendants argue that the lack of a sharp dividing line between adequate and inadequate compensation precludes the courts from fashioning a remedy for even an acknowledged constitutional violation. (Br. of Resp'ts at 77-79, *Maron* v. *Silver*, Albany County Index No. 4108-07 (N.Y. Oct. 30, 2009) ("Defs.' *Maron* Br.").) A measure of practical uncertainty, however, is no reason to fail to remedy a constitutional violation.

Contrary to Defendants' position, the difficulty of establishing the boundaries of a constitutional rule does not render the courts powerless or incompetent to remedy violations of that rule. Here, where inflation has reduced the value of judicial compensation by over 30%, it is clear that relief is warranted. To ignore the effects of such substantial inflation would be to ignore economic reality, and thus allow Defendants to "circumvent even the most basic Compensation Clause protection . . . [and] precisely but indirectly achieve[] the forbidden effect." *Hatter*, 532 U.S. at 569. Moreover, even if this Court is unable to draw a bright line between permissible fluctuations and unconstitutional diminution, there must be a line, and the drastic reduction presented in this case

falls on the unconstitutional side of it.[5] Line drawing under such circumstances is, indeed, a core judicial function. *See, e.g.*, *Randall* v. *Sorrell*, 548 U.S. 230, 248-49 (2006) (holding that, even in the absence of a clear lower limit for constitutionally permissible restrictions on campaign donations, some such boundary must exist); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").[6]

B. Discriminatory Impact Is Not Required to Establish Unconstitutional Diminution of Judicial Compensation Due to Inflation.

Despite the underlying purposes and unqualified language of the Compensation Clause, the court below held that the more than 30% reduction in real judicial compensation caused by inflation, with no offsetting salary increase, does not violate that Clause because such a claim requires proof of discrimination, and the effects of inflation are not discriminatory. (R. CA26-29, 65 A.D.3d at 86-87, 880 N.Y.S.2d at 265-66.)

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[5] Defendants do not dispute the principle that were judicial compensation to fall sufficiently low, it would become unconstitutional. (R. 323-25.) It logically follows that were the cost of living to rise sufficiently high while judicial compensation remained fixed, that compensation would similarly become unconstitutional.

[6] Defendants have also argued that a ruling for Plaintiffs would effectively write into the Constitution an indexing scheme that the Framers consciously chose to reject. (Defs.' *Maron* Br. 72.) This is simply not the case. Again, while there is clearly a line beyond which inflationary diminution without a corresponding salary increase becomes a constitutional violation—Defendants in effect concede as much, and to hold otherwise would be to eviscerate the Compensation Clause and the policies underlying it—that line will not be tripped by every inflationary fluctuation. Given that, the legislature may choose from numerous options, including indexing, to remedy its constitutional violation.

The holding below was in error. The court relied on the concurrence of Justice Bliss in *Black* v. *Graves*, 257 A.D. 176, 12 N.Y.S.2d 785 (3d Dep't 1939), and the decision of the United States Supreme Court in *United States* v. *Hatter*, 532 U.S. 557 (2001), both of which it described as supporting the proposition that "paying *taxes* is merely an incident of citizenship, universally applicable, and is not a targeted diminishment of judicial compensation." (R. CA27, 65 A.D.3d at 86, 880 N.Y.S.2d at 266 (emphasis added).) The Appellate Division found the reasoning in these decisions with respect to taxes to have "logical force for the present case in that the absolute salaries are not being reduced. Rather, only the relative value of the net compensation has been affected, a consequence of inflation that affects other persons in addition to plaintiffs." (*Id*., 65 A.D.3d at 86-87, 880 N.Y.S.2d at 266.) The court concluded that "[i]nflation only presents a nonactionable 'indirect, nondiscriminatory lowering of judicial compensation.'" (*Id*. at CA28, 65 A.D.3d 87, 880 N.Y.S.2d at 266 (quoting *Atkins*, 556 F.2d at 1051).)

However, neither *Black* nor *Hatter* has "logical force" where judicial compensation is diminished by inflation, rather than taxation or other such legislative action. Neither *Black* nor *Hatter* suggested a blanket "non-discrimination" escape hatch for any form of reduction in judicial compensation. To the contrary, both cases applied the principles underlying the state and federal

Compensation Clauses to the specific situation of a "non-discriminatory tax," *Hatter*, 532 U.S. at 571; *accord Black*, 277 A.D. at 177, 12 N.Y.S.2d at 786; and their broader reasoning in applying those principles suggests that New York's legislative inaction challenged here does violate the Compensation Clause.

In *Black*, a New York Supreme Court Justice brought suit challenging, under the Compensation Clause, an amendment to the New York Tax Law that, during his term of office, eliminated the statutory exemption of judicial salaries from the state income tax. In a three-to-two per curiam decision rendered without a majority opinion but with separate concurrences submitted by two justices, the Appellate Division, Third Department rejected the plaintiff's challenge. Among the three majority justices, only Justice Bliss submitted a detailed opinion, holding that a "tax [that] is nondiscriminatory and imposed on all residents alike" does not violate the Compensation Clause. 257 A.D. at 177, 12 N.Y.S.2d at 786 (Bliss, J., concurring).

In *Hatter*, eight federal Article III judges brought suit challenging under the Federal Compensation Clause a new application of Medicare and Social Security taxes to judicial salaries. As a starting point, the *Hatter* Court recognized that the Federal Compensation Clause "offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by ordering a lower salary." *Id.* at 569. The Court went on to find, however, that "the Compensation

Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax . . . upon judges," *id*. at 571. Under this standard, the Court found that the Medicare tax provision—which was generally applicable to all government employees—was lawful. The Court found that the complex Social Security tax provision, however—which "effectively singled out . . . judges for unfavorable treatment" compared to almost all other federal employees—ran afoul of the Compensation Clause. *Hatter*, 532 U.S. at 561.[7]

Both the concurring justices in *Black* and the *Hatter* Court criticized the United States Supreme Court's earlier decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), which had held that the application of the new (nondiscriminatory) federal income tax to the salaries of sitting judges violated the Federal Compensation Clause. The *Hatter* Court—while reaffirming the principles of safeguarding judicial independence that *Evans* declared as underlying the Federal Compensation Clause and guiding the analysis of claims brought thereunder—expressly overruled its specific holding, finding that those principles are not implicated by a nondiscriminatory tax. *Hatter*, 532 U.S. at 567-70. The *Black* court, over sixty years earlier, had also declined to follow *Evans*, with Justice Bliss reasoning similarly that a nondiscriminatory tax does not implicate the judicial independence

[7] Of course, neither the *Hatter* Court's view of the Federal Compensation Clause, nor the views of Justice Bliss in *Black*, are binding authority here.

principles underlying the Compensation Clause and that the *Evans* Court's contrary conclusion rested on faulty logic. *See Black*, 257 A.D. at 178-80, 12 N.Y.S.2d at 787-89.[8]

Both Justice Breyer, writing for the majority in *Hatter*, and Justice Bliss in *Black* rested their decisions to deviate from *Evans* and uphold a "generally applicable, nondiscriminatory tax," *Hatter*, 532 U.S. at 567; *accord Black*, 257 A.D. at 177, 12 N.Y.S.2d at 786, on three justifications: 1) judges should not be exempt from the duties of citizenship; 2) judges, like all citizens, can fairly be required to pay for the support of public institutions from which they receive reciprocal benefits; and 3) a generally applicable tax cannot be used as an instrument to attack judicial independence. *Hatter*, 532 U.S. at 570-71; *Black*, 257 A.D. at 177-78, 180, 12 N.Y.S.2d at 786-87, 789.[9]

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[8] Justice Heffernan, the only justice other than Justice Bliss to submit a written concurrence in *Black*, rested his decision solely on the view that *Evans* had been effectively overruled by the United States Supreme Court's decision in *O'Malley*, 307 U.S. 277. *See Black*, 257 A.D. at 181, 12 N.Y.S.2d at 790 (Heffernan, J., concurring). A third justice, Justice Hill, joined in the majority's decision to rule for defendants but did not expressly join either concurring opinion or submit his own.

[9] Justice Bliss in *Black* additionally argued that an income tax does not implicate the Compensation Clause because it does not affect judicial income directly, but rather, only indirectly by imposing an obligation to pay subsequent to the receipt of income. *Black*, 257 A.D. at 177, 181, 12 N.Y.S.2d at 786, 790. This kind of argument was soundly rejected by the *Hatter* Court, which correctly held—reaffirming the same holding in *Evans*—that "the Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's . . . salary. Otherwise a legislature could circumvent even the most basic Compensation Clause protection . . . ." 532 U.S. at 569. This rationale, in any event, has no pertinence to inflation, which does reduce the real economic value of judicial pay itself, and not subsequently—in Justice Bliss's sense, such diminishment *is* "direct."

While the reasons given by Justice Bliss in *Black* and Justice Breyer in *Hatter* for grafting a discrimination element onto the Compensation Clause analysis may be perfectly sound in the context of taxation, they have little or no applicability in the context of inflation.[10]

First, while the *Hatter* Court reasoned "that the Compensation Clause offers 'no reason for exonerating' a judge 'from the ordinary duties of a citizen, which he shares with all others,'" *Hatter*, 532 U.S. at 570 (quoting *Evans*, 253 U.S. at 265 (Holmes, J., dissenting)); *see also Black*, 257 A.D. at 180, 12 N.Y.S.2d at 788 (taxation is one of the "common duties of citizenship"), that justification loses all meaning when applied to inflation. Paying one's taxes is indeed a "duty of citizenship." Having one's salary worn away by inflation is not.[11]

Second, *Hatter* reasoned that "judges are not 'immun[e] from sharing with their fellow citizens the material burden of the government,'" 532 U.S. at 570 (quoting *O'Malley*, 307 U.S. at 282), and thus, "there is no good reason why a judge should not share the tax burdens borne by all citizens," *id*. at 571; *see also*

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[10] Justice Scalia apparently did not find them convincing even as to taxation in *Hatter*. In his partial dissent in that case, he wrote that "we are dealing here with a 'Compensation Clause,' not a 'Discrimination Clause.'" 532 U.S. at 582. He further noted that "'the Constitution makes no exceptions for "non-discriminatory" reductions' in judicial compensation." *Id*. (quoting *Will*, 449 U.S. at 226). Nor did Justice McNamee find analogous considerations convincing in *Black*. "To say that the tax is nondiscriminatory does not add virtue to the proposal; it is irrelevant. We are dealing with the Constitution." 257 A.D. at 185, 12 N.Y.S.2d at 793 (McNamee, J., dissenting).

[11] Indeed, as shown *infra*, most citizens' compensation is regularly adjusted for inflation.

Black, 257 A.D. at 178, 12 N.Y.S.2d at 787 ("[Taxation] is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits."). But this rationale has no application to an inflationary reduction. It is true that by paying one's taxes a person contributes to the support of vital public institutions, and that judges, like all citizens, enjoy the benefits of those institutions. Judges do not, however, share the "material burden of government" nor the "burdens borne by all citizens" by having their sustenance eaten out by inflation, which—unlike taxation—does not confer any reciprocal benefit.

Third, the *Hatter* Court reasoned that "the potential threats to judicial independence that underlie the Constitution's compensation guarantee cannot justify a special judicial exemption from a commonly shared tax." 532 U.S. at 571. In particular, requiring a judge "to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge." *Id.* at 570 (quoting *Evans*, 253 U.S. at 265 (Holmes, J., dissenting)). Justice Bliss in *Black* went even further, arguing that "a judge . . . can be wholly independent only if he does bear his full share of the duties of citizenship, including the burden of taxation." 257 A.D. at 180, 12 N.Y.S.2d at 789. Inflationary reduction, however, is different. Unlike a broad tax applicable to all citizens, inflation *can* very easily become an insidious "instrument" to reduce the strength and independence of the judicial branch; all that is required is legislative inaction to

steadily chip away at judicial compensation. Indeed, it is difficult to conceive of a better way to place the judiciary under the thrall of the legislature while avoiding political backlash.

The reason for this is simple—most New Yorkers are actually well insulated from inflationary effects by commensurate increases in nominal income. In fact, between 1999 and 2008, average private sector income in New York grew *faster* than inflation—rising by more than 40%.[12] During the same period, the salaries of almost all of the approximately 195,000 other State employees have been increased by an average of more than 24%. (R. 161.) As a result, even without a demonstrable "discriminatory" intent, by failing to adjust nominal judicial compensation after prolonged inflation, as the Framers contemplated, the legislature can effectively use inflation to reduce judicial compensation over time in a manner simply not possible with a "non-discriminatory" tax.

As the *Hatter* Court explained, the Compensation Clause is concerned not only with actual attacks on judicial independence, but also, out of "prophylactic considerations," forbids indirect diminutions of judicial compensation that could pose "potential threats" to judicial independence.

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[12] Average private sector income was calculated by dividing total private wage and salary disbursements by total private wage and salary employment using figures for 1999 and 2008 published by the Bureau of Economic Analysis. BUREAU OF ECONOMIC ANALYSIS, REGIONAL ECONOMIC ACCOUNTS, STATE ANNUAL PERSONAL INCOME, *available at* http://www.bea.gov/regional/spi/default.cfm?selTable=SA07N&selSeries=NAICS.

532 U.S. at 571. Because inflation under the circumstances presented here quite clearly *could* be used by the legislature to attack the independence of the judiciary (for example, by explicit or implicit threat that real wages will be allowed to continue to fall absent judicial compliance), the constitutional guarantee of non-diminution in judicial salaries is implicated by the more than 30% inflationary reduction in judicial compensation irrespective of the legislature's motives or of the actual effects to date of that diminution on judicial independence.

Defendants nevertheless argue that relief in this case is inappropriate because of a supposed lack of evidence of actual impairment (Defs.' *Maron* Br. 79-80);[13] and the Third Department suggested in *Maron* v. *Silver*, 58 A.D.3d 102, 113 n.5, 871 N.Y.S.2d 404, 412 n.5 (3d Dep't 2008) (following *Atkins*), that a Compensation Clause violation can only be found where the legislature actually "punished" judges or "dr[o]ve them from office." That is simply not the correct standard for applying the Compensation Clause. The United States Supreme Court in *Hatter* described the fallacy in that argument:

> The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence. To require it is to invite legislative efforts that embody, but lack evidence of, some such intent, engendering suspicion among the branches and consequently

[13] *But see, e.g.*, pp. 8-9, *supra*.

> undermining th[e] mutual respect that the Constitution demands. . . . Nothing in the record discloses anything other than benign congressional motives. If the Compensation Clause is to offer meaningful protection, however, we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary.

532 U.S. at 577.

For a similar reason, the court below also erred in relying on *Atkins*, a 1977 Federal Court of Claims case that rejected claims of inflationary diminution brought by federal Article III judges. *Atkins* correctly held—in line with *Hatter*—that because the "chief aim" of the Federal Compensation Clause is "the furthering of judicial independence," 556 F.2d at 1045, an indirect diminution of judicial pay must be held to violate the Clause if it "can be used to attack the independence of judges," *id*. at 1044. *Atkins* was wrong, however, to hold that substantial inflation, absent a discriminatory effect on judges or a discriminatory intent on the part of Congress, cannot "be used to attack the independence of judges."[14] To the contrary, as noted above, it is easy to imagine how the other branches could employ the predictable effect of inflation to strip the judicial branch of its independence.

[14] In any event, the very facts on which the lower court based its finding that Defendants committed unconstitutional "linkage" of judicial pay to other political issues render it clear beyond doubt that the political branches *have* acted affirmatively to undermine judicial independence with respect to the issue of judicial pay.

The *Atkins* court itself provided examples of hypothetical scenarios in which Congress could use hyperinflation (or even a nondiscriminatory tax on government employees) to attack judicial independence simply by—as Defendants have done here—leaving the judiciary's salaries fixed under such conditions—and the *Atkins* court opined that in those scenarios the Compensation Clause would be violated and relief could be ordered in the form of higher judicial salaries. *Id*. at 1048, 1054. The *Atkins* court itself thus demonstrated precisely why the Compensation Clause's "prophylactic considerations" are plainly implicated by substantial inflation—and there is little difference between short-term hyperinflation and the steady erosion of ten years of what has become "normal" inflation. Under *Hatter*, the conclusion that the Compensation Clause has been violated here inexorably follows, and to the extent that *Atkins* suggests that courts must wait to enforce the Clause until it is already too late to preserve judicial independence because an actual attack has already succeeded in undermining it, *Atkins*'s holding is in error and unsustainable after *Hatter*.[15]

[15] All of this is also in accord with the more general principle announced by this Court: that "a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies . . . without awaiting actual injury." *Swinton* v. *Safir*, 93 N.Y.2d 758, 765-66, 697 N.Y.S.2d 869, 873 (1999); *see also Farmer* v. *Brennan*, 511 U.S. 825, 845 (1994) ("'One does not have to await the consummation of threatened injury to obtain preventive relief.'") (quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923)).

C. The Effects of Inflation Have Had a Discriminatory Impact on Judges in New York State.

Even assuming that the Compensation Clause does require a showing of "discriminatory impact" for unconstitutional diminution due to inflation, the record below demonstrates that such an impact indisputably exists here. As with the retroactive Social Security rules at issue in *Hatter*, New York judges have been "single[d] out for . . . specially unfavorable treatment" compared to virtually all other State employees, and to the public at large. *Hatter*, 532 U.S. at 561.

Since 1999—the last time judicial salaries were increased—Defendants have repeatedly adjusted the salaries of virtually all other State employees to compensate for inflation. But while they have regularly adjusted the salaries of approximately 195,000 other State employees (by an average of more than 24%), Defendants have refused to do the same for judges. (R. 161.) For example, at the beginning of 1999, the highest non-judicial salary in the State's published salary schedules was approximately $116,000—around $20,000 *less* than the salary of a Justice of the New York Supreme Court. *See* N.Y. CIV. SERV. LAW § 130 (McKinney 1999). As of now, the salary at that same pay grade has increased by nearly 35% to approximately $157,000, $20,000 *more* than the $136,700 paid to Supreme Court Justices, whose salaries have remained unchanged. The legislature has even approved still more raises, which will take effect in 2010. *See* N.Y. CIV. SERV. LAW § 130 (McKinney 2009). Meanwhile,

judges have been specifically disqualified from the periodic salary review system in use for other State employees. *See id*. § 201(7)(a). Similarly, as noted above, private sector wages in New York rose by over 40% from 1999-2008.

Notwithstanding the undisputed fact that judges are virtually alone among New York government employees in not having received salary increases to offset ten years of inflation, Defendants have contended that discrimination is not present here because legislators and certain senior executive officials have also been subjected to a pay freeze, and the Third Department in *Maron* agreed, citing the decision of the Federal Court of Claims in *Atkins*. *See Maron*, 58 A.D.3d at 117, 871 N.Y.S.2d at 416 ("[T]he fact that legislators and senior executive branch officials have been denied a pay raise substantially weakens petitioners' claim that the failure to enact a salary increase is designed to influence the Judiciary." (citing *Atkins*, 556 F.2d at 1055)).

Atkins, however, does not in any way support Defendants' position or the conclusion of the Third Department. In *Atkins*, literally thousands of federal employees—and more than eight times as many non-judges as judges—had their salaries frozen alongside judicial salaries. *See Atkins*, 556 F.2d at 1055 (in addition to 2,500 federal judges, 20,000 civil servants, among other federal employees, had their salaries frozen). Here, in contrast, only a very limited group

consisting of legislators and a small number of senior executive officials shares in the inflationary reduction.

In this regard, the United States Supreme Court's reasoning in *Hatter* is again instructive. In *Hatter*, the government argued that the Social Security tax at issue was nondiscriminatory because it "disfavored not only judges but also the President of the United States and certain Legislative Branch employees." 532 U.S. at 577. The Supreme Court rejected this argument, holding that it was enough that the tax was imposed on a "group [that] consisted *almost exclusively* of federal judges." *Id*. at 564 (emphasis added).[16] The same holds true here.

* * *

To secure the strength and independence of the judiciary, New York's Constitution prohibits the legislature from diminishing judicial compensation. To contend, as Defendants do, that a more than 30% economic reduction in compensation does not violate that constitutional guarantee is a drastic elevation of form over substance that simply ignores reality. The bench, bar, and citizens of

[16] Like the non-judicial federal personnel in *Hatter* who were permitted to opt out of the new Social Security tax, 532 U.S. at 572-73, state legislators here, unlike judges, can avoid the impact of inflation by engaging in private-sector employment while serving as legislators, and the fact that a small number of high State officials are similarly affected can make no critical difference. In any event, the mere fact that the political branches choose to impose some of the burden of inflation on themselves is irrelevant, as these branches lack the peculiar powers and vulnerabilities of the judicial branch. As Justice Breyer put it, "[t]he Compensation Clause . . . protects judicial compensation, not because of the comparative importance of the Judiciary, *but because of the special nature of the judicial enterprise*." *Williams* v. *United States*, 535 U.S. 911, 920 (2002) (Breyer, J., dissenting from denial of certiorari).

New York cannot afford to have the judicial branch of government stripped of its independence in this manner.

II. DEFENDANTS HAVE VIOLATED THE SEPARATION OF POWERS.

A. The Separation-of-Powers Doctrine Precludes the Other Branches of Government from Linking Judicial Pay Adjustment to Legislative Pay Adjustment and Requires That Judicial Pay Be Adequate.

The principle of separation of powers is embedded in the structure of New York's Constitution. As the court below recognized, the Constitution's very "'object . . . is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers,' in furtherance of a stability that 'rests upon the independence of each branch and the even balance of power between the three.'" (R. CA43, 65 A.D.3d at 94, 880 N.Y.S.2d at 271 (quoting *Burby*, 155 N.Y. at 282).)

Here, as the Appellate Division affirmed, Defendants have violated the separation of powers by "linking" judicial pay increases to legislative pay increases and other unrelated political matters, and by failing to provide adequate judicial compensation.

The undisputed evidence before the trial court demonstrated that Defendants agree that a judicial pay increase is warranted. (*See* R. CA12, 65 A.D.3d at 78, 880 N.Y.S.2d at 260.) Defendants did not seriously dispute (at

least initially) that the reason such an increase has not been enacted is Defendants' "linkage" of judicial pay increases to unrelated issues—primarily legislative pay hikes. (*See id*. at CA12-13, 65 A.D.3d at 78-79, 880 N.Y.S.2d at 260.) Thus, the court below found that "the facts are undisputed that the legislative branch, rather than being solely engaged in a legislative function, was using the Judiciary tactically in a political battle with the Governor" by "making a judicial salary increase contingent on its own success in achieving a legislative pay increase." (*Id*. at CA39-40, 65 A.D.3d at 93, 880 N.Y.S.2d at 271.) The court concluded that this "[l]inkage, as employed in these circumstances, . . . necessarily undermine[d] the carefully constructed architecture of New York government," constituting "a violation of the doctrine of separation of powers." (*Id*. at CA48-49, 65 A.D.3d at 97-98, 880 N.Y.S.2d at 273-74.) The court explained that:

> [W]e are concerned with the integrity, in a structural sense, of the judicial system as an independent institution, in that New York's constitutional architecture prohibits the subordination of the judicial branch to the other branches of government either in practice or in principle. More significantly, the political maneuvering by the other branches of government, by reducing the issue of judicial compensation to a tactical weapon, consequentially subordinated the status of the Judiciary to that of an inferior governmental entity.

(*Id*. at CA48, 65 A.D.3d at 97, 880 N.Y.S.2d at 274.) *See also Stilp* v. *Commonwealth*, 588 Pa. 539, 640-42, 905 A.2d 918, 978-80 (2006) (holding that non-severability clause in legislation linking increase in judicial compensation with

unconstitutional provision intruded upon independence of judiciary and violated separation of powers).

Defendants' argument for reversal of the lower court's separation-of-powers holding is premised on the entirely incorrect assumption that the judiciary is merely one among many interest groups, all equally entitled to consideration in legislative budgeting. (*See, e.g.*, Defs.' Br. 44, 54.) Defendants argue that "nothing in the Constitution . . . supports the notion that the Judiciary has some unique right to demand 'objective' consideration of its compensation." (*Id*. at 44.) Defendants assert therefore that they may properly take "political considerations . . . into account" in deciding "how to allocate the State's resources among all of the myriad demands on the State—public assistance; education; health care; highway construction; police, fire and other public safety agencies; local tax relief; public buildings; salaries and pensions; and many, many more," including the judiciary. (*Id*. at 54.) Indeed, Defendants even go so far as to argue that the judiciary has no "vested rights" under the Constitution. (*Id*. at 51-52.) Defendants conclude by suggesting, in "parade of horribles" fashion, that the lower court's rule would result in "every constituency [] demand[ing] 'objective' consideration of its narrow self interests" (*id*. at 45), with the courts taking the place of the political branches as the final arbiters of budgetary compromise. (*Id*. at 54-55, 57.)

In so arguing, Defendants both misconstrue the lower court's holding and ignore that the judiciary *is*, in fact, unique among "interest groups" claiming budgetary priority in that it is, unlike, for example, the highway department, an *independent* and *co-equal branch* of the State's government. Contrary to Defendants' argument, the independence and co-equal status of the judiciary, of course, are protected by the Constitution both explicitly, *see*, *e.g.*, N.Y. CONST. art. VI, § 25; *see also id.* art. VI, § 29, art. VII, § 1, and implicitly through the well-accepted structural architecture of the separation of powers.

Tellingly, Defendants' argument refuses to acknowledge the constitutionally protected status of New York's judiciary. Indeed, it was precisely this same kind of denigration of the judiciary's status—in which Defendants continue to engage—that underlay the conduct that the lower court correctly found to have violated the separation of powers by "consequentially subordinat[ing] the status of the Judiciary to that of an inferior governmental entity." (R. CA48, 65 A.D.3d at 97, 880 N.Y.S.2d at 274.)

As this Court held over a century ago, "the independence of the judiciary and the freedom of the law" cannot be allowed to "depend upon the generosity of the legislature." *Burby*, 155 N.Y. at 283. To the contrary, because the "even balance of power between the three [branches]" is necessary "for the preservation of liberty itself," *id.* at 282, the Constitution, by its text and structure,

does not countenance Defendants' suggestion that the budgetary needs of the judiciary—including judicial salaries—may be wholly subordinated to the whims of the political branches, even if such subordination may be permissible with respect to ordinary administrative departments of government like the education, health care, and highway departments. *See, e.g.*, *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. 45, 52, 274 A.2d 193, 197 (1971) ("[T]he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.").

Defendants' position is also fundamentally flawed because it fails to recognize that the separation-of-powers doctrine is violated not only by Defendants' structural subordination of the judiciary through the practice of "linkage," but also because those frozen judicial salaries themselves are constitutionally inadequate. While the Compensation Clause explicitly protects judicial independence by prohibiting the diminution of judicial pay, the separation of powers embedded in the structure of New York's Constitution also provides an implicit guarantee of a baseline of adequate judicial compensation.

New York courts have already recognized that the separation-of-powers doctrine imposes a duty to provide adequate judicial compensation. The

court below cited with approval the Third Department's decision in *Kelch* v. *Town Board*, 36 A.D.3d 1110, 829 N.Y.S.2d 250 (3d Dep't 2007), which involved a town justice, who was not protected by the Compensation Clause and thus asserted a pure separation-of-powers claim premised entirely on constitutional structure. The *Kelch* court held that the judge's "meager salary" "violated public policy and the constitutional princip[les] of separation of powers." 36 A.D.3d at 1112, 829 N.Y.S.2d at 252.

Indeed, Defendants conceded this principle at oral argument before the trial court (*see* R. CA17, 65 A.D.3d at 81, 880 N.Y.S.2d at 262), while arguing that *current* salaries do not fall short of constitutional adequacy. Thus, while the amount may be disputed, the principle is not. (*See also* R. 325 (conceding that salary of entry-level government attorney would be constitutionally inadequate as judicial compensation).)[17]

Despite Defendants' argument, however, it is abundantly clear that the present level of judicial compensation in New York is constitutionally inadequate. Decisions of courts in sister states offer persuasive guidance as to how this Court should evaluate the constitutional adequacy of judicial compensation. For example, the Pennsylvania Supreme Court has held that "it is the constitutional

[17] Defendants have apparently sought to backtrack since making this concession, and now argue both that current judicial salaries are constitutionally adequate, and that a constitutional adequacy requirement is "unworkable" and so cannot be enforced. (Defs.' *Maron* Br. 73-79.)

duty and obligation of the legislature, in order to insure the independence of the judicial . . . branch of government, to provide compensation *adequate in amount and commensurate with the duties and responsibilities of the judges* involved. To do any less violates the very framework of our constitutional form of government." *Glancey*, 447 Pa. at 86, 288 A.2d at 816 (emphasis added).[18]

In order to be "adequate in amount and commensurate with the duties and responsibilities of the judges involved," judicial compensation must be sufficient to "insure the public's right to a competent and independent judiciary," and allow it "to attract and retain the most qualified people." *Goodheart*, 521 Pa. at 323, 555 A.2d at 1213. Specifically, this Court should consider

> the difference in compensation between judges and lawyers with equal experience and training in the private sector. Otherwise judicial service will no longer be viewed as a viable alternative to the private sector. Traditionally, government service offers pay scales to some extent lower than private industry for comparable positions requiring equivalent training, experience, responsibility and expertise. This disparity is deemed to be offset by the opportunity to render public service and to participate directly in the government process. However, this laudable motive cannot be reasonably expected to overcome the stark realities of the market place. *Compensation . . . appreciably lower than the expected value of those services will inevitably result in the inability to obtain the quality of performance required*.

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[18] In *Glancey*, the court held that Pennsylvania's legislature had the constitutional obligation to provide "adequate" judicial pay, even though—as in the New York Constitution—the text of the Pennsylvania constitution did not explicitly mention adequacy. 447 Pa. at 85, 86, 288 A.2d at 815, 816.

Id. at 323-24, 555 A.3d at 1213 (emphasis added).

In sum, for judicial compensation to be constitutionally adequate, it must be "sufficient to provide judges with a level of remuneration proportionate to their learning, experience and [the] elevated position they occupy in our modern society." *Id*. at 322, 555 A.3d at 1212 (citation and internal quotation marks omitted). This standard is rooted in one of the Framers' primary concerns in protecting judicial compensation: "to secure a succession of learned men on the Bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station." *O'Malley*, 307 U.S. at 286 (Butler, J., dissenting) (quoting 1 J. KENT, COMMENTARIES ON AMERICAN LAW *294).

As set forth in detail in the non-partisan NCSC REPORT (R. 148-204), the current rates of judicial compensation in New York do not come close to satisfying this standard by any measure or comparison to public or private salaries or historical compensation. Rather, "judicial pay levels *are inadequate* and unlikely to continue to attract and retain highly qualified members of the legal profession to serve on the State's bench." (R. 152 (emphasis added).)

Defendants do not argue that New York judges are paid what they deserve. As the court below noted, Defendants "conceded [at oral argument] that a judicial pay increase was in order" (R. CA16-17, 65 A.D.3d at 81, 880 N.Y.S.2d at

262); indeed, Defendants even agreed on the amount, conceding that judicial pay should be raised to the level of United States District Judges. (R. 318-19.)[19] This Court must not allow Defendants to remain in breach of their constitutional duty to provide adequate judicial compensation.

B. Plaintiffs' Claims Are Not Precluded by the Speech or Debate Clause or the Separation-of-Powers Doctrine.

As they did before the court below, Defendants argue that the Court must turn a blind eye to their use of judicial salaries as a political football—even though Defendants do not seriously dispute the underlying facts—because legislative motives and the legislative budgeting process cannot be considered by the courts. (Defs.' Br. 29-40, 45-49.) That position, however elaborated, is simply untenable. Consider a hypothetical situation in which the record revealed that the legislature and Governor agreed that judicial compensation would not be adjusted unless, for example, the courts upheld the constitutionality of a given law. There could be no serious question that by dint of such improper "motives" the political branches violated the separation of powers. *Cf. Hatter*, 532 U.S. at 578-79

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[19] Chief Judge Kaye submitted legislative proposals for introduction by the State Legislature in each session between 2005 and 2008. *See* OCA 2005-29, OCA 2006-73 (R. 188-203), OCA 2008-88; *see also* FY 2007-2008 Budget, N.Y.S. Unified Court System; FY 2008-2009 Budget, N.Y.S. Unified Court System. Those proposals all called for pay parity between New York Supreme Court Justices and federal District Judges ($169,300 as of 2008), with other State-paid trial and appellate judges receiving specified percentages of this amount. The Senate, Assembly, and Governor have all supported these proposals at various times, and Defendants acknowledged support for them below. (R. 318-19.)

(finding that in light of purpose of subsequent increase in judicial salaries it did not cure prior diminution). While less stark, Defendants' actions here similarly reveal a clear infringement of the separation of powers.

In arguing to the contrary, Defendants rely primarily on the Constitution's Speech or Debate Clause, which provides that: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." N.Y. CONST. art. III, § 11. As the court below held, that Clause clearly does not bar Plaintiffs' "linkage" claims here for several reasons.[20]

First, the Clause does not apply because, as its terms suggest, it only immunizes "members" of the legislature from inquiry concerning their actions within the "sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. 367, 376-78 (1951), and has no applicability to lawsuits that do not threaten to "harass" individual legislators (R. CA32-33, 65 A.D.3d at 89-90, 880 N.Y.S.2d at 268 (citing *Powell* v. *McCormack*, 395 U.S. 486, 504-05 (1969))). The Clause thus does not bar claims, like those here, brought against legislative institutions or the State, nor does it prevent the courts from considering evidence, such as that relied on by the court below, of legislators' activities—such as media statements and press releases—within the public political sphere and not the

[20] In any event, the Speech or Debate Clause obviously has no relevance to Defendants' violation of the Compensation Clause or failure to provide adequate compensation.

legislative sphere. Nor is the Clause at all implicated where, as here, no inquiry into legislative "motives" is required—only the "outward manifestation" of Defendants' practice of "linkage" is relevant, and in any event the legislative motives underlying that practice are both undisputed and indisputable in light of the extensive public record the State's legislators have already chosen to create on this issue. (R. CA35-36, 65 A.D.3d at 92, 880 N.Y.S.2d at 270.)

Second, because the purpose of the Speech or Debate Clause is to protect the separation of powers by preventing incursions on legislative independence by the judiciary, that Clause has no applicability to a claim that the legislature has itself undermined the constitutional architecture through incursions on the judiciary. (*See* R. CA36-37, 65 A.D.3d at 92, 880 N.Y.S.2d at 269-70 ("linkage," because it "served no legitimate legislative purpose other than to facilitate the personal remunerative goals of its members," is not a protected "legislative function").) Indeed, even the Third Department in *Maron*, which ultimately ruled in favor of Defendants, concluded that the Speech or Debate Clause "could not bar judicial intervention in the face of an adequately stated claim that the Legislature had violated separation of powers principles by working harm or threatening imminent harm" to the judiciary. 58 A.D.3d at 121, 871 N.Y.S.2d at 418.

Defendants argue further that the separation-of-powers doctrine itself immunizes them from liability on Plaintiffs' separation-of-powers claim, because New York's constitutional framework commits budgeting and appropriations to the political branches. (Defs.' Br. 45-49.) Defendants' position in effect would place an entire category of legislative enactments off limits from judicial review, in contravention of fundamental principles of judicial review announced in *Marbury* v. *Madison* and followed for the past two hundred years by both the federal courts and the courts of this State. 5 U.S. (1 Cranch) at 177. An essential component of judicial review is the power to order relief. Thus, in a more recent case brought by the present amicus, the Appellate Division, First Department, in ordering the State to increase the fees paid to Article 18-b assigned-counsel attorneys, rejected the identical argument that Defendants make here, holding that "[e]ven though the Legislature . . . established rates for compensation, the courts must have the authority to examine that legislation to determine whether its . . . provisions create or result in the alleged constitutional infirmity." *New York County Lawyers' Ass'n* v. *State*, 294 A.D.2d 69, 72, 742 N.Y.S.2d 16, 18-19 (1st Dep't 2002). And the Third Department in *Maron* rejected Defendants' effort to exclude these same budgetary decisions from judicial review, noting that "separation of powers principles also dictate that the courts are the ultimate arbiters of constitutional text. Thus, 'the budgetary process is not always beyond the realm

of judicial consideration . . . .'" 58 A.D.3d at 107, 871 N.Y.S.2d at 408 (quoting *Silver* v. *Pataki*, 96 N.Y.2d 532, 542, 730 N.Y.S.2d 482, 489 (2001)). That relief from a constitutional violation may require the State to disburse funds has never been a bar to appropriate relief.

* * *

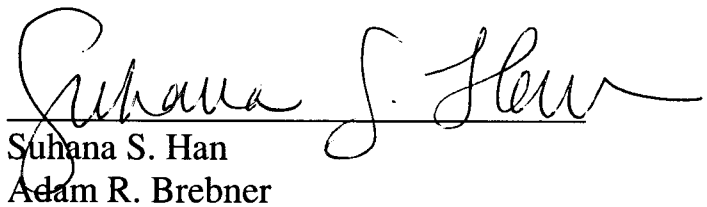
In the words of John Marshall, the "greatest scourge . . . ever inflicted . . . was an ignorant, a corrupt, or a dependent Judiciary." PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, at 616 (1830). New York's Constitution protects the citizens of New York from that scourge by ensuring that judicial compensation is not subject to the vagaries of politics or the whims of the legislative or executive branches. Those constitutional guarantees should be vindicated here.

CONCLUSION

For the foregoing reasons, the order of the Appellate Division should be 1) reversed to the extent that it affirmed the Supreme Court's order granting Defendants' motion to dismiss Plaintiffs' claims premised on Art. VI, § 25 of the New York Constitution, and 2) affirmed to the extent that it affirmed the Supreme Court's order granting summary judgment to Plaintiffs on their separation-of-powers claim.

Dated: New York, New York
November 24, 2009

Respectfully submitted,



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STATE OF NEW YORK,)
SS:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

Edward Watson being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 24th day of November 2009 deponent served 3 copies of the within

BRIEF OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION AS AMICUS CURIAE

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November 24, 2009

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No. 01GO6149165
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Case Name: Larabee v. Governor