No. APL-2015-00125

To be argued by:
JUDITH N. VALE
15 minutes requested

Supreme Court, New York County, Index No. 156160/2012

State of New York
Court of Appeals

EILEEN BRANSTEN, Justice of the Supreme Court
of the State of New York, et al.,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK,

Defendant-Appellant.

BRIEF FOR APPELLANT AND ADDENDUM

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PRELIMINARY STATEMENT

The issue in this appeal is whether New York's Judicial Compensation Clause prohibits the Legislature from applying to judges and justices[1] a modest increase in the prices of the State's health insurance plans. Because such a price increase does not directly diminish judicial compensation, and because the increase has been applied in a nondiscriminatory manner to nearly all state employees, this Court should hold that the Judicial Compensation Clause does not bar the Legislature from acting, and reverse the decisions below holding to the contrary.

The Civil Service Law gives all state employees, including judges, the option of purchasing health insurance through the State's health benefit plan. For employees who choose to buy a state plan, the State provides a substantial discount by covering a portion of the cost of the participating employee's health insurance premium. These premium contributions are not given directly to the participating employee, but instead are paid to the relevant

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[1] This brief refers to all judges and justices covered by the Compensation Clause as "judges" unless otherwise indicated.

health insurance program. As a result, the sole effect of the State's premium contributions is to reduce the price of health insurance plans by lowering the biweekly premiums that participating employees must pay.

In 2011, in response to ever-rising health care costs and a historic fiscal crisis, the Legislature enacted statutes (and the Department of Civil Service promulgated regulations) providing that the State would reduce its contribution toward insurance premiums by two or six percentage points for the overwhelming majority of state employees, including judges. Both Supreme Court, New York County (Edmead, J.) and the Appellate Division, First Department held that this reduction in the State's contribution percentage unconstitutionally diminishes protected judicial compensation.

This Court should reverse. The Judicial Compensation Clause does not prohibit the Legislature from enacting laws that have only an indirect and nondiscriminatory effect on judicial salaries. The Legislature acted well within its authority under this standard when it authorized the 2011 reductions in the

State's premium contributions. The changes to the State's premium contributions did not directly affect any constitutionally protected compensation at all. Instead, these changes merely increased the price of health insurance for those judges who chose to buy a state health insurance plan. This rise in premium prices did not affect judges' statutorily defined salaries, nor did it eliminate any payment given directly to judges. At most, such a price increase indirectly affected judicial compensation by requiring judges to pay a little more out of their salaries if they chose to purchase health insurance from the State. But it is well-settled that such purely indirect effects on judicial salaries do not implicate the Compensation Clause at all.

Moreover, the indirect effect of the 2011 changes on judicial pay comports with the Compensation Clause because the Legislature did not discriminate against judges. The contribution changes apply equally to ninety-eight percent of all state employees, including many state employees who, like judges, cannot collectively bargain. Because judges have thus not been singled out, plaintiffs' Compensation Clause claim fails.

QUESTIONS PRESENTED

1. Whether a 2011 law authorizing reductions in the State's contribution to the health insurance premiums of all state employees violates the Compensation Clause, when the statute only indirectly affects judicial salaries by increasing the prices charged for purchasing an optional health insurance plan?

The First Department and Supreme Court answered in the affirmative.

2. Whether the 2011 law and implementing regulations single out judges for discriminatory treatment, when judges are subject to the same rules as the overwhelming majority of other state employees?

The First Department and Supreme Court answered in the affirmative.

STATEMENT OF THE CASE

A. The New York Judicial Compensation Clause

New York's Judicial Compensation Clause establishes a legislative mechanism for setting judicial salaries and protects that compensation from any direct diminishment during a judge's term of office. The current version of the Compensation Clause provides that:

> The compensation of a judge . . . or of a retired judge . . . shall be established by law and 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 history of this clause demonstrates that the framers intended it to protect judicial salaries and other similarly fixed and permanent payments from direct diminishment.

The Compensation Clause was first enacted in 1846 to establish a salary-based structure for compensating judges. At that time, judges had been collecting fees for their services directly from litigants appearing before them. The framers feared that this fee-based system made judges dependent on attracting "business" from the bar, which created bad incentives and made

judicial income too uncertain. *See* N.Y. Const. Convention, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* 484, 494, 823-25 (1846) ("*1846 Convention*"). To resolve these concerns, the framers provided that judges would receive "a compensation[] to be established by law," N.Y. Const. art. VI, § 7 (1846), thus setting "an inflexible rule that all judicial officers … shall be compensated by fixed salaries, and shall not receive fees or perquisites of office,"*1846 Convention, supra* at 484. The framers "left to the legislature" the task of fixing "the salaries of the judges under the new arrangement." *Id.*

The framers understood that this legislative authority to set judicial salaries could create a new problem—namely, the potential for the Legislature to attempt to influence judges by decreasing or increasing their salaries as punishment or reward for particular decisions. *Id.* at 332; *see id.* at 778-79. The framers guarded against such undue influence by providing that a judge's compensation could not be "increased or diminished" during his term of office. N.Y. Const. art. VI, § 7 (1846); *see 1846 Convention*,

supra at 840-41. Similar concerns about undue influence by the Legislature led the framers to provide that other constitutional officers besides judges would also receive a "fixed" compensation for their services that could not be "increased or diminished" during their terms of office. N.Y. Const. art. V §§ 4, 8 (1846); *id.* art. V, § 1 (1846); *see 1846 Convention*, *supra* at 286-88, 309, 332, 517-518. Later, constitutional amendments allowed the Legislature to increase judicial salaries, while continuing to prohibit diminishments. *See* N.Y. Const. art. VI, § 14 (1869).

This Court made clear in two early cases that the Compensation Clause protects salaries and other fixed payments from diminishment, but does not cover reimbursements for expenses voluntarily incurred by judges. In *People ex rel. Bockes v. Wemple*, the Court held that a fixed, annual payment of $1,200—intended to defray expenses—constituted protected compensation, explaining that the payment was a "permanent addition to [a judge's] stated salary" regardless of whether (or in what amount) the judge incurred any costs. 115 N.Y. 302, 309-10 (1889). By contrast, in *People ex rel. Follett v. Fitch* , the Court held that a

statute providing for the ad hoc reimbursement of actual expenses incurred by a judge did not "deal with compensation for services" and thus did not implicate the Compensation Clause. 145 N.Y. 261, 265-66 (1895).

Subsequent amendments reinforced this distinction between fixed payments and expense reimbursements. In 1909, for example, the People approved an amendment that specified fixed salary and per diem amounts as the compensation of justices of the Supreme Court, and prohibited the Legislature from providing judges with any additional compensation or allowance.[2] *See* N.Y. Const. art. VI, § 12 (1909); *see also Matter of Maron v. Silver*, 14 N.Y.3d 230, 251 (2010). The amendment thus protected these specified, fixed payments—and only those payments—from any

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[2] The 1909 amendment did not fix salaries for the judges of the Court of Appeals, and this omission meant that their salaries were governed by the provision protecting the "compensation" of "State officers named in the Constitution" from increase or diminishment during their terms of office. *See* N.Y. Const. art. X, § 9 (1909); N.Y. Law Soc'y, An Historical Analysis of the Judiciary Article of the New York State Constitution, *reprinted in* 9. N.Y. Const. Convention Comm., *Reports*: *Problems Relating to Judicial Administration and Organization* 338 (1938) ("*Problems*").

increase or decrease absent constitutional amendment. *See* N.Y. Const. art. VI, § 12 (1909).

In 1925, after two failed attempts to raise judicial salaries, the People ratified an amendment that reauthorized the Legislature to set judicial salaries. The amendment eliminated the fixed salaries listed in the Constitution so that the Compensation Clause again provided only that judges would "receive for their services such compensation as is . . . established by law" and that "such compensation shall not be diminished during" a judge's term of office. N.Y. Const. art. VI, § 19 (1926). The delegates made clear that the protected compensation encompassed the "permanent pay of the official," including salaries and "any fixed lump sum allowance," but did not encompass reimbursements for costs incurred. Proceedings of the Judiciary Constitutional Convention of 1921, *reprinted in Problems*, *supra*, at 593 ("*1921 Proceedings*"). As one delegate explained, "actual expenses are not [a judge's] compensation, they are reimbursement for money expended." *Id.* at 594; *see id.* at 595 ("Payment for expenses is merely a matter of reimbursement. It is not compensation at all.").

In 1961, a constitutional amendment reorganized the state courts, and carried forward the then-existing Compensation Clause in its present form. *See* Temporary Commission on the Courts, *A Plan for a Simplified State-Wide Court System*, 52 (1956); *see* Robert A. Carter, *New York State Constitution: Sources of Legislative Intent*, at 84-85 (2d ed. 2001).

B. Judicial Compensation Set by Law

In keeping with the Compensation Clause's command to establish by law the compensation that judges receive for their services, the Legislature has for over eighty years enacted session laws that set salary schedules for judges.[3] In 1979, the Legislature enacted article 7-B of the Judiciary Law to specify the salaries to be paid to all judges in the Unified Court System and effectuate "compensation increases" for judges by adjusting their salaries upwards both retroactively and prospectively. Budget Report on Bills, *reprinted in* Bill Jacket for ch. 55 (1979), at 7. *See generally*

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[3] *See, e.g.*, Ch. 94, 1926 N.Y. Laws 250; Ch. 155, 1926 N.Y. Laws 311; Ch. 45, 1949 N.Y. Laws 40; Ch. 195, 1949 N.Y. Laws 379; Ch. 150, 1975 N.Y. Laws 198; Ch. 152, 1975 N.Y. Laws 202.

Ch. 55, 1979 N.Y. McKinney's Laws 270 (codified in Judiciary Law §§ 220-223). Since 1979, the Legislature has increased judicial compensation five times, each time by enacting a session law explicitly stating that it amended the salary schedules set forth in Judiciary Law article 7-B.[4]

In 2010, the Legislature established a special commission on judicial compensation "to evaluate and adjust judicial salaries." Message of Necessity, *reprinted in* Bill Jacket for ch. 567 (2010), at 5. Every four years, the commission convenes to determine whether the "annual salaries" for judges warrant adjustment and make recommendations accordingly. *See* Ch. 567, § 1(a)(ii), 2010 N.Y. Laws 4988, 4988. Although the commission is also permitted to make recommendations regarding judges' nonsalary benefits, only its annual salary recommendations have the force of law and supersede any inconsistent provisions in the article 7-B salary schedules, unless modified by the Legislature. *See id.* § 1(a)(*i*), (h),

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[4] *See* Ch. 881, §§ 14-16, 1980 N.Y. Laws 2153, 2156; Ch. 986, 1984 N.Y. Laws 3587; Ch. 263, 1987 N.Y. Laws 2027; Ch. 60, §§ 32-34, 1993 N.Y. Laws 2391, 2400-05; Ch. 630, 1998 N.Y. Laws 3614.

2010 N.Y. Laws at 4988-89. In 2011, the commission recommended that justices of the Supreme Court receive $160,000 in fiscal year 2012-2013, $167,000 in 2013-2014, and $174,000 in 2014-2015. (R. 150-151.) These three increases have become effective, and thus active justices, including most plaintiffs here, currently receive $174,000 in annual salary.

C. State Employee Health Insurance Benefits

While judicial salaries are established by specialized statutes and procedures applicable only to judges, the state health insurance plans that judges may choose to purchase are part of a larger system available to all state employees. Judges generally receive the same health insurance benefits as "the other 220,000 state employees and 1.2 million local government employees." Coal. of N.Y. State Jud. Ass'ns, *Presentation to the New York State Judicial Compensation Commission* 8 (June 10, 2011).

Currently, the State offers its employees, including judges, the option of buying one of several different health insurance plans. *See*, N.Y. State Health Ins. Program, *Health Insurance Choices for 2016,* at 3, 12-13 (Nov. 2015) ("*2016 Choices*"). The

health insurance program is completely voluntary; employees are not required to join or contribute to a state plan, and many do not if they prefer to obtain their health insurance coverage through a spouse or elsewhere. *See* Civil Service Law § 163(1) (plans available to employees "who elect to participate"). . Different plans have different cost and benefit terms, including the types and extent of coverage provided and the amounts that an employee must pay in annual premiums or other costs, such as annual deductibles that must be met before full coverage applies or copays for particular doctor's visits. *See id.* at 18-43; N.Y. State Health Ins. Program, *NYSHIP Rates & Deadlines for 2016*, 4-5 (Nov. 2015) ("*2016 Rates").*

Throughout the history of this health insurance program, the State has preserved legislative flexibility to alter the cost and benefit terms of the insurance plans it offers in order to respond to changes in health care costs, insurance markets, or applicable regulations. Prior to 1956, the State—like most private employers—played no substantial role in its employees' health care expenses. During this time, many people simply paid doctors

or hospitals directly for the costs of medical care. But as the expense of health care services rose dramatically in the early twentieth century, companies began to offer a new insurance product: in exchange for a premium, the company would pay for medical care provided to the insured individual by doctors or hospitals participating in the insurance plan. Until the 1940s, most employees who chose to purchase health insurance paid the entire premium price themselves. *See* Laura D. Hermer, *Private Health Insurance in the United States: A Proposal for a More Functional System*, 6 Hous. J. Health L. & Pol'y 1, 6-10 (2005).

Employer-based group health insurance, under which employers offer their employees the option of purchasing insurance through the employer at a discounted price, developed during World War II. Employers began offering to contribute to their employees' insurance premium costs because such contributions did not count as salary and were thus not subject to wartime wage controls. *See id.* at 10-11. After the war, the federal government altered the tax code so that employers' contributions to employees' health insurance coverage would remain excluded

from the employees' taxable income. *Id.* at 10; *see* John Sheils & Randall Haught, *The Cost of Tax-Exempt Health Benefits in 2004*, Health Affairs, Feb. 2004, W-106, W-107 (2004). As a result, an employee is not subject to income tax on the amounts that her employer contributes to her insurance premium costs. Hermer, *supra*, at 10-11; Sheils & Haught, *supra*, at W-107. The employer is also freed from income tax on its premium contributions because it may deduct these payments as business expenses.[5] Sheils & Haught, *supra*, at W-107.

In 1956, the State joined the growing number of private employers offering a group health insurance plan to provide employees with the option of buying insurance at a lower price than was generally available in the individual insurance market. Ch. 461, 1956 N.Y. Laws 1164 (recodified as amended as Civil Service Law §§ 160-170); s*ee* Governor's Mem., *reprinted in* Bill Jacket for ch. 461 (1956), at 3. The Legislature authorized the

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[5] Under the tax code, employers can also create plans that allow employees to deduct the amounts that they pay for their health insurance premiums from their income on a pretax basis, thus providing a further tax benefit. *See 2016 Choices*, *supra* at 1.

president of the Civil Service Commission "to establish a health insurance plan" that employees could choose to join. *See* Civil Service Law § 161.

The 1956 act provided considerable discretion to the administrator of the health insurance program to determine the details of the plans offered to employees. To ensure that "[t]he law [w]ould be flexible enough to make it possible to contract for the best service at the lowest cost," Governor's Mem., *supra*, at 3-4, the plan administrator was given authority to negotiate the terms of contracts with insurance carriers, *id.* at 3. The administrator was also authorized to discontinue insurance contracts and enter into new agreements at the end of a fiscal year. *See* Letter from State Department of Civil Service, *reprinted in* Bill Jacket for ch. 461, *supra*, at 25.

The act further provided the Commission with extensive flexibility to determine the extent to which the State would contribute towards the costs of insurance incurred by employees opting into the program. Governor Averell Harriman specifically urged the Legislature to leave that determination to the

administrator of the plan. *See* Governor's Mem., *supra*, at 3-4. The Legislature agreed, providing only that the program must provide a "reasonable relationship" between benefits and costs to employees. *See* Civil Service Law § 161. As a result, employees remained responsible for paying any portion of their insurance premiums that the State chose not to cover. *See* Governor's Mem., *supra*, at 4. They could also be required to pay additional amounts, such as deductibles or portions of medical expenses in order to reduce the premiums charged to all employees. *See id.*; Letter from State Department of Civil Service, *supra*, at 24.

To administer and pay for group insurance plans covering many employees, the Legislature created a centralized state health insurance fund. Ch. 461, 1956 N.Y. Laws at 1168-69 (recodified at Civil Service Law § 167(6)-(7)). Amounts charged to employees for their premium costs are deducted from their paychecks and deposited into this state health insurance fund. *Id.* The State's contributions towards employees' premium expenses are also deposited into the fund. *Id.* The monies in the fund are then used to pay the premiums charged by the insurance

companies or the costs of medical services charged by providers. *Id.* at 1169.

In keeping with the needed flexibility in administering its health insurance plan, the State has at times altered the balance of costs and benefits offered to employees through the program. For example, the State has increased the total premium rates, resulting in employees having to pay more for health insurance. *Compare* N.Y. State Ins. Program, *NYSHIP Rates & Deadlines for 2008*, at 2-3 (Nov. 2007), *with* N.Y. State Ins. Program, *NYSHIP Rates & Deadlines for 2011*, at 2-4 (Nov. 2010). The State has also increased employees' annual deductibles. (*Compare, e.g.*, R. 170 ($185 deductible for Empire Plan in 2004), *with* R. 160 ($225 deductible in 2005), *and* R. 177 ($250 deductible in 2010). And copay amounts for particular benefits have also risen. (*Compare, e.g.*, R. 163, *with* R. 183 ($10 increase in copay for nonpreferred brand-name medicines under 2005 Empire Plan compared to 2004 plan). Moreover, the State routinely alters the type and scope of benefits offered under its plans, such as: changing the lists of in-network health care providers and the amounts that employees

must pay if they use out-of-network services (R. 159, 164, 171); requiring preauthorization for certain services (R. 184); and adopting a flexible formulary that excludes certain medications from coverage (R. 78).

In addition, as relevant here, the Legislature has several times altered the amount by which the State subsidizes the costs of health insurance premiums for its employees. In 1967, the Legislature provided that the State would pay one-hundred percent of the cost of premiums incurred by state employees and retired state employees who chose to enroll in the State's basic insurance plan.[6] Ch. 617, § 6, 1967 N.Y. Laws 1425, 1426 (recodified as amended at Civil Service Law § 167(1)(a)). Sixteen years later, in 1983, the Legislature changed course because "burgeoning cost[s] of employee health insurance premiums" were "severely strain[ing] the financial resources of the State." Governor's Program Bill, *reprinted in* Bill Jacket for ch. 14 (1983),

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[6] For employees who enrolled in an optional plan other than the basic plan, the State would contribute the same dollar amount as it would have contributed for the basic plan premiums. Ch. 617, § 6, 1967 N.Y. Laws at 1426-27.

at 7. To provide the State with "immediate financial relief" from these high insurance costs, the State effectuated collective-bargaining agreements with employee unions that reduced the State's contribution for the basic health insurance plan from one-hundred percent to ninety percent of active employees' premium expenses. *Id.*; *see* Ch. 14, 1983 N.Y. Laws 71.

D. The 2011 Amendments to the State's Premium Contributions

In 2011, the State again confronted intense strain on its financial resources. Faced with the possibility that the State would otherwise be forced to lay off employees, many unions representing state employees agreed to salary freezes, unpaid furloughs, and—as relevant here—a reduction in the percentage contribution that the State pays to offset employees' health insurance premium costs. *See* Mem. from M. Volforte, Acting General Counsel, to M. Denerstein, Counsel to the Governor, *reprinted in* Bill Jacket for ch. 491 (2011), at 23-24.

To carry out these agreements, the Legislature amended the Civil Service Law to authorize reductions in the State's

contribution to employee health insurance premiums for those employees covered by a union agreement. *See* Ch. 491, pt. A, § 2, 2011 McKinney's N.Y. Laws 1363, 1365-66 (codified at Civil Service Law § 167(8)). The Legislature also authorized the president of the Civil Service Commission to extend the same premium-contribution modifications to all nonunionized employees, thus continuing to offer these employees health benefits on par with most other state employees. *Id.* Such nonunionized employees included approximately 1,200 judges and more than 12,000 other employees classified as "managerial" or "confidential" ("M/C employees"), all of whom were nonunionized because they are prohibited under the Taylor Law from engaging in collective bargaining. (R. 294.) *See* Civil Service Law §§ 201(7)(a), 202, 214.

Effective October 1, 2011, the acting head of the Department of Civil Service promulgated a regulation that reduced the State's premium contribution from ninety to eighty-eight percent for those active employees receiving the equivalent of "salary grade 9 or below," and from ninety to eighty-four

percent for those active employees receiving the equivalent of "salary grade 10 or above." 4 N.Y.C.R.R. § 73.3(b). For all state employees who elected to participate in the State's plan and retired between January 1, 1983, and January 1, 2012, the State reduced its premium contribution from ninety to eighty-eight percent, irrespective of the employees' salary grade at retirement.[7] *Seeid.*. These provisions are inapplicable to the members of unions that have not yet agreed to renegotiate their collective-bargaining agreements, s*ee id.* § 73.12, but to date, only two percent of unionized state employees (fewer than 3,900 employees) fall in that category. (R. 293-294.)

In a separate part of the 2011 session law that authorized the change in contributions, the Legislature amended the Civil Service Law to authorize various salary increases for M/C

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[7] Judges, who are not assigned pay grades, receive the premium contribution rate of unionized employees with equivalent annual salaries. For example, all Supreme Court justices receive a salary that is greater than "salary grade 10," and therefore, for such judges who are in active state service and have elected to enroll in the state plan, the State pays eighty-four percent of their health insurance premium costs. (R. 293.)

employees. The authorized increases included: two-percent increases to basic annual salaries for fiscal years 2013 and 2014; lump sum payments of $775 in 2013 and $225 in 2014; and advances for performance, merit, and longevity for certain employees. *See* Ch. 491, pt. B, § 3, 2011 McKinney's N.Y. Laws at 1377-79. These payments were designed to provide these nonunionized employees with salaries comparable to those of unionized employees. Introducer's Mem. In Support, *reprinted in* Bill Jacket for ch. 491, *supra*, at 13. The Legislature viewed such pay parity as "essential" to "assur[ing] productivity, maintain[ing] good morale, and . . . allow[ing] for the recruitment and retention of competent staff." *Id.* There is no indication in the legislative history that these salary increases were intended as an exchange for the reduction in the State's contribution to health care premiums, which applied to nearly all employees.

The salary-related amendments for M/C employees also provided that many of the authorized compensation increases could be withheld at the broad discretion of the Director of the Division of the Budget. *See* Ch. 491, pt. B, § 13, 2011 McKinney's

N.Y. Laws at 1382-83. In November 2011, the Director of the Division of the Budget authorized advances for performance, merit, and longevity to implement a preexisting budget policy from 2008. (R. 313 & n. 1 & 2.) However, he declined to authorize the two lump sum payments. To date, the State has not made either of these lump sum payments to M/C employees. (R. 312-313.)

E. Procedural History

More than a year after the acting head of the Department of Civil Service reduced the State's percentage contribution toward almost all state employees' health insurance premium costs, plaintiffs brought this lawsuit against the State of New York. Plaintiffs are thirteen current and retired justices of New York Supreme Court. (R. 31-32.) They seek a declaration that Civil Service Law § 167(8), which authorizes the modification to the State's premium contribution for all state employees, is unconstitutional as applied to judges under the New York's Judicial Compensation Clause. (R. 37.)

The State moved to dismiss the complaint for failure to state a claim pursuant to C.P.L.R. 3211(a)(7). The State argued that the challenged statute and implementing regulations comported with the Compensation Clause because they did not directly reduce judicial salaries and instead only indirectly affected judges' pay by raising a voluntary cost in a nondiscriminatory manner.

Supreme Court (Edmead, J.) denied the motion to dismiss. The court held that health benefits constitute constitutionally protected "compensation," declining to accept a distinction between laws that directly reduce judicial salaries and laws that only indirectly affect salaries by increasing the prices charged for insurance products that judges choose to purchase. (R. 17-19, 21.) Despite concluding that the reduction in the State's premium contribution for most employees had "not single[d] out judges," the court also held that plaintiffs had stated a Compensation Clause claim because they were required to contribute more towards their premium costs. (R. 19-22.)

The State timely appealed this interlocutory order to the Appellate Division, First Department. The Appellate Division

affirmed, holding that "compensation" within the meaning of New York's Compensation Clause "includes all things of value" that the State provides to its employees, including health insurance benefits. (R. 250.) The court also held that the change in the State's premium contribution "discriminates against judges," who were ineligible for collective bargaining and thus, unlike unionized employees, were not "otherwise compensated" for the reduced premium rate.[8] (R. 251.) The Appellate Division subsequently denied the State leave to appeal its interlocutory order to this Court.

The case then returned to Supreme Court, where the parties made additional submissions and cross-moved for summary judgment. Supreme Court granted summary judgment to plaintiffs and issued a decision and order declaring that Civil Service Law § 167(8) and its implementing regulations are

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[8] The Appellate Division also erroneously stated that the State had not challenged on appeal whether the changes to premium contribution rates directly reduced judicial compensation (R. 250), even though the State had explicitly made this argument in its appellate briefs (R. 327-329, 332-333).

unconstitutional as applied to judges. (R. 403.) Relying on "the Appellate Division's pronouncement" in the interlocutory appeal that the Compensation Clause extends to health benefits (R. 396-397), Supreme Court held that the State's reduced premium contribution both directly diminished judicial compensation and discriminated against judges in violation of the Constitution (R. 397-402). Supreme Court subsequently entered its decision and order as a final judgment. (R. 408.)

The State timely appealed Supreme Court's final judgment to this Court under C.P.L.R. 5601(b)(2). (R. 427.) This appeal includes review of the Appellate Division's prior nonfinal order because that order necessarily affects the final judgment and has never been reviewed by this Court. C.P.L.R. 5501(a)(1); *see* David D. Siegel, New York Practice § 530 (5th ed. 2011).[9]

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[9] Members of this Court are eligible for the State's health insurance plan and therefore could be affected by the outcome of this appeal. However, the Rule of Necessity dictates that the Court should hear the appeal rather than recuse because there is "no other judicial body with jurisdiction … to hear the constitutional issues" that are raised herein. *See Matter of Maron*, 14 N.Y.3d at 248-49.

ARGUMENT

THE CHANGES TO THE STATE'S PREMIUM CONTRIBUTIONS DO NOT IMPROPERLY DIMINISH PROTECTED JUDICIAL COMPENSATION

The sole effect of the premium-contribution reductions challenged here is to raise the price of state health insurance plans for employees who choose to purchase such plans. As a result of the reductions, the ninety-eight percent of state employees covered by the 2011 amendments and regulations—including judges—will pay slightly more for the State's health benefit plan, if they choose to buy a state plan. The incidental effect on judicial salaries caused by this nondiscriminatory policy does not violate the Judicial Compensation Clause.

New York's Compensation Clause, like its federal counterpart, "does not erect an absolute ban on all legislation that conceivably could have an adverse effect on" the constitutionally protected salaries of judges. *United States v. Will*, 449 U.S. 200, 227 (1980) (federal); *see Matter of Maron*, 14 N.Y.3d at 253-54. Rather, to protect the independence of the judiciary, the Compensation Clause prohibits only laws that "*directly* reduce

judicial salaries" during judges' terms of office—for example, a law that cuts sitting judges' annual salaries in half. *United States v. Hatter*, 532 U.S. 557, 571 (2001); *see Matter of Maron*, 14 N.Y.3d at 253-54 (adopting reasoning of *Hatter*). By contrast, the Compensation Clause does not bar legislation that only indirectly affects judges' take-home pay, so long as such a law does not single out judges for discriminatory treatment. *See Hatter*, 532 U.S. at 571; *see Matter of Maron*, 14 N.Y.3d at 252-54.

As the U.S. Supreme Court has recognized, such indirect, nondiscriminatory effects on judicial salaries do not trigger the concerns about undue legislative influence on judges that justify the Compensation Clause's protections because the likelihood that such burdens are "a disguised legislative effort to influence the judicial will is virtually nonexistent." *Hatter*, 532 U.S. at 571; *see Robinson v. Sullivan*, 905 F.2d 1199, 1202 (8th Cir. 1990) (explaining that "[i]ndirect, nondiscriminatory diminishments of judicial compensation … do not amount to an assault upon" judges). Absent a threat to the independence of the judiciary, it is only fair that judges share equally the burdens borne by others

subject to the same nondiscriminatory policy. *See Hatter*, 532 U.S. at 570. Thus, for example, the U.S. Supreme Court has held that a Medicare tax increase that applied to all federal employees, including judges, did not implicate the federal Compensation Clause at all because it did not single out judges and only "affect[ed] [judicial] compensation indirectly" by increasing a financial cost that judges, like all other government employees, paid out of their salaries. *Hatter*, 532 U.S. at 571.

Here, as with the tax increase upheld in *Hatter*, the reductions in the State's percentage contribution to health insurance premiums apply broadly to the overwhelming majority of state employees, and only indirectly affect judicial salaries by requiring judges to pay a little bit more if they choose to purchase health insurance through the State. Such a policy does not implicate the Compensation Clause at all because the Legislature "has not enacted legislation that has directly diminished judicial compensation … nor has it enacted discriminatory legislation that

has indirectly resulted in the diminution of judicial compensation."[10] *Matter of Maron*, 14 N.Y.3d at 254.

A. The Changes in State Premium Contributions Do Not Directly Diminish Judicial Compensation.

1. The premium contribution reductions only indirectly affect judicial salaries by increasing the price of optional health insurance plans.

The State's premium contributions are in effect a form of discount pricing for optional health insurance. If employees elect to join a state health insurance plan—which they are not required to do, *see* Civil Service Law § 163(1) (plans available to employees "who elect to participate")—the State reduces the price of that plan by covering a large portion of the premium costs. The State's

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[10] The Appellate Division erroneously concluded that the State had failed to argue in its interlocutory appeal that reducing premium contributions "did not directly diminish judges' compensation." (R. 250.) The State explicitly made this argument in its appellate briefs, supported by discussions of relevant judicial precedent. (R. 327-329, 332-333.) In any event, because the State raised this argument before Supreme Court both originally and on remand (R. 55-59, 352), the issue is preserved for this Court's review. *See Matter of State v. Rashid*, 16 N.Y.3d 1, 13 (2010).

premium contributions have never been paid directly to employees. Instead, the State deposits its premium contributions into the centralized state health insurance fund, which moneys are then used to pay premiums charged by insurance companies or claims submitted by health care providers. *See* Civil Service Law §§ 166, 167(7). The sole practical effect of these contributions is thus to lower the price of the health insurance plans that state employees may opt to purchase.

The 2011 legislative amendment at issue here simply authorized an increase to the prices charged for state plans by reducing the State's subsidization of those plans. Put another way, the State has changed its discount on premium prices from ninety percent to eighty-eight or eighty-four percent. Because of this lower discount and correspondingly increased price, employees opting to purchase a state plan had to pay a small amount more in premiums each month after the 2011 changes. For example, the biweekly premium price for active judges who chose to buy the State's individual-coverage Empire Plan rose by approximately $21.00. *See NYSHIP Rates & Deadlines for 2011*, *supra*, at 2-4

(Nov. 2010) (listing biweekly premium charge as $28.01); N.Y. State Health Ins. Program, *NYSHIP Rate Changes*, at 2-4 (Sept. 2011) (listing biweekly premium charge as $49.00).

For employees, the price increase effectuated by this reduction in premium contributions works no differently than if the State had simply informed employees of new premium prices charged for each plan—*e.g.*, telling employees that the Empire Plan now costs $49.00 per biweekly period instead of $28.01. In fact, state employees routinely face such price increases when they annually decide whether to participate in a state insurance plan. Every year, employees are given a list of the premium prices for each state plan and its corresponding health insurance benefits. *See, e.g.*, *2016 Rates*, *supra*, at 4-5. As the costs and coverage of medical care and health insurance have steadily increased over time, the premium prices listed have often increased from year to year even when the State's contribution percentage remained the same. See *supra* at 18.

However these price increases are effectuated—whether through increases in the underlying premiums themselves, or, as

here, through a reduction in the State's subsidization of premium costs—they have only an indirect effect on judges' constitutionally protected salaries, and accordingly do not implicate the Compensation Clause. When the Legislature reduces the premium discount it offers, it does not direct that judges receive a lower salary, but instead increases a collateral financial cost that employees bear—just as it does when raising taxes. *See Hatter*, 532 U.S. at 571; *Matter of Maron*, 14 N.Y.3d at 252-54. And just like higher taxes, higher premium prices "simply claim a portion of [a] judge's compensation" in order to cover the increased costs. *See McBryde v. United States*, 299 F.3d 1357, 1368 (Fed. Cir. 2002). Such indirect effects on judicial pay do not implicate the Compensation Clause at all. *Id.* at 1368-69 (declining to cover judge's voluntarily incurred litigation expenses indirectly affected compensation); *Suttlehan v. Town of New Windsor*, 31 Misc. 3d 290, 293-94 (Sup. Ct. Orange County 2011) (reduction in municipality's contribution to town employees' health insurance premiums did not violate Compensation Clause), *aff'd*, 100 A.D.3d 623 (2d Dep't 2012).

This Court has reached the same conclusion in a closely related case interpreting New York Constitution article V, § 7, which provides in part that pension or retirement "benefits . . . shall not be diminished." In *Matter of Lippman v. Board of Education*, the Court considered whether a school district's reduction in its health-insurance premium contributions unconstitutionally diminished retirees' benefits when retirees were required to pay more out of their pension income to cover the increased premium costs. 66 N.Y.2d 313, 317-19 (1985). The Court held that this reduction did not directly affect retirees' benefits. *Id.* at 317-18. It acknowledged that "a retiree will receive a smaller retirement check" because a larger share of his or her pension payments would be used to pay the costs of health insurance, but concluded that "this is no more a change in retirement benefits than would be an increase in the price of eggs at the supermarket . . . . The retiree has less to spend, but there has been no change in his *retirement benefit*." *Id.* at 318-19.

That reasoning applies equally here: the recent premium contribution reductions increase the price of health insurance to

employees who join a plan by diminishing the State's discount, but that change does not directly affect protected judicial *compensation*. To be sure, as in *Lippman*, the increased premium prices for judges who join a state plan are paid out of a judges' salary. But the only relationship between the premium costs and judicial salaries "is the purely incidental one that the latter provides the means by which the former is paid in those instances where the employer has elected to pay less than the full premium." *Id.* at 318.

Indeed, any time the State raises the price of an optional benefit provided to employees, the salaries of those employees who choose to purchase that benefit, including judges, will at most be indirectly affected by the price increase. For example, the State currently offers its employees who work in Albany the option of renting a parking spot in State-owned lots in exchange for a biweekly payment deducted directly from employees' paychecks. *See* Office of General Services, *Parking Fee Deduction Rate Increase: Downtown Albany* (listing new biweekly prices of $12.96 for surface parking and $51.84 for covered reserved parking).

When the State raises its prices for parking, those employees who purchase a spot must have more money deducted from their paychecks to pay for parking, but such deductions in no way mean that their salaries have been reduced. And the result would essentially be the same if the State sold food at a courthouse cafeteria and decided to raise its prices—judges who eat at the cafeteria would pay more out of their salaries for lunch, but their salaries would not have been directly diminished.

The Appellate Division thus wrongly focused on the fact that any increases in the premium prices charged to judges who opt into a state plan are "withheld from judicial salaries." (R. 247-248.) Such withholding is a convenient administrative mechanism for collecting payments from state employees: it allows the State to efficiently administer and pay for group health plans that often include thousands of employees, and has the added benefit of allowing employees to pay for premium costs with pretax income. But as this Court and the U.S. Supreme Court have recognized, such withholding nonetheless produces an indirect rather than direct effect on judicial salaries that does not implicate the

Compensation Clause. *Cf. Matter of Lippman*, 66 N.Y.2d at 316, 318 (increasing withholdings from pension checks because of decreased premium contribution produced indirect effect on retirement payments); *Hatter*, 532 U.S. at 561-62, 571 (increasing salary withholdings for taxes produced indirect effect on judicial compensation).

2. The lower courts erred in viewing premium contributions as protected judicial compensation.

Ignoring the purely indirect effect that increasing premium prices has on judicial salaries, the lower courts viewed the State's premium contributions as themselves constituting judicial compensation protected by the Compensation Clause. But the courts below simply misapprehended the manner in which judges (and other employees) are benefited by the State's premium contributions. The State has never made premium contributions directly to any state employee, including judges; these contributions never appear on employees' paychecks; and these contributions have never been included as part of the judicial salaries established by the Legislature for judges. Rather, the

contributions are ultimately paid to the insurance companies for premium costs or to providers to cover claims. See *supra* at 17-18. Indeed, like other employees, judges are not required to pay income tax on the State's premium contributions precisely because these contributions are never paid directly to them and thus are not deemed to be part of judges' salaries or other taxable income. The State's partial subsidization of employees' health insurance premiums thus bears no similarity to the statutorily established salaries—or fixed, unconditional payments in the nature of a salary—that this Court and the framers have historically deemed "compensation" to judges protected by the Judicial Compensation Clause. See *supra* at 5-10.

Even if the State's premiums contributions could somehow be considered a direct payment to judges (which they cannot), that "payment" at best operates like an expense reimbursement, which fluctuates based on the amount of expenses an employee chooses to incur, rather than a fixed and permanent salary payment. Under well-settled law, such variable reimbursements do not qualify as constitutionally protected compensation. As described

above and explained by this Court, the framers protected from direct diminishment only judicial salaries and other fixed payments that made a "permanent addition" to salaries. *People ex rel. Bockes*, 115 N.Y. at 310; *see 1921 Proceedings*, *supra*, at 593. But both the framers and this Court made equally clear that reimbursements for "actual expenses" are not a part of constitutionally protected compensation because they fluctuate depending on the costs incurred by a judge and thus do not provide any fixed and permanent addition to judicial salaries. *1921 Proceedings*, *supra*, at 594. As this Court explained in *People ex rel. Follett*, reimbursements for judicial expenses do not "deal with compensation for services" because "it is only when . . . expenses and disbursements have been incurred" that any reimbursement takes place. 145 N.Y. at 264-66.

Under *Follett* and *Bockes*, even if the State paid premium contributions directly to judges, those contributions would essentially operate as partial reimbursements for fluctuating expenses, and accordingly would not fall within the Compensation Clause's scope. Judges are not required to purchase health

insurance through the State and do not benefit from the State's premium contributions unless they so elect. And judges who opt into the state program can choose from a variety of insurance plans that have different premium prices and other costs in exchange for different benefits. As a result, the premium prices incurred by judges who choose to purchase a state plan vary depending on the particular plan they select.[11] And the State's premium contributions spare judges from paying the full price of whichever plan they have chosen by essentially reimbursing them for a large portion of that total premium price. As with other reimbursements, there is no fixed and permanent payment to judges; rather, "it is only when. . . expenses" for insurance premiums have been incurred by those judges who opt into a state plan, *see id.*, that the State's premium contribution is paid into the state health insurance fund.

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[11] The State's contribution to the premium costs of those employees who chose to enroll in a health-maintenance organization plan are capped at one-hundred percent of the dollar contribution for such coverage under the Empire Plan. *See* 4 N.Y.C.R.R. § 73.3.

This Court's long-standing rule that reimbursements for judicial expenses fall outside the Compensation Clause's reach demonstrates that, contrary to the lower courts' conclusions, not "all things of value" provided to employees are constitutionally protected compensation. (*See* R. 250; *see also* R. 397-398.) Reimbursements for expenses no doubt have monetary value to judges, but this value does not transform them into the type of fixed and permanent payments that have long formed the heartland of protected compensation. Indeed, this same value-based theory was also rejected by the Supreme Court in *Hatter*: the majority declined to adopt the position of a dissenting justice that the benefit of tax exemption—an item of substantial financial value that Congress had previously given federal employees—constituted a part of judicial compensation. *See* 532 U.S. at 583 (Scalia, J. concurring in part and dissenting in part); *see also Robinson v. Sullivan*, 905 F.2d 1199, 1202 (8th Cir. 1990) (rejecting argument that eligibility for social security was part of "a package of benefits" protected as judicial compensation).

Ignoring this dispositive precedent, the lower courts reached their erroneous conclusions by relying on inapposite cases. They pointed to a reference by the First Department to "wages and benefits" in *Larabee v. Governor of State of New York*, but this case did not address health insurance or any other benefit. 65 A.D. 3d 74, 86 (1st Dep't 2009), *aff'd sub nom. Matter of Maron*, 14 N.Y.3d 230. Rather, the court in *Larabee* rejected the plaintiffs' claim that their statutory *salaries* had been diminished by inflation—making its reference to "benefits" textbook dicta. *See id.* at 86-87. In any event, a general statement that some benefits constitute protected compensation does not support plaintiffs' claim here because some benefits more directly affect judicial pay. For example, while pension payments are usually considered an employee "benefit," such payments are fixed and permanent. Likewise, if the State decided to give its employees a commuter benefit in the form of a fixed $50 payment every month, such a lump sum would likely constitute a "permanent addition" to judges' stated salaries that could not be directly diminished. *See People ex rel. Bockes*, 115 N.Y. at 309-10. Unlike these more

permanent benefit payments that bear directly on judicial pay, the costs and benefits of optional health insurance are highly flexible in nature.[12] See *infra* at 45-53.

For similar reasons, the lower courts' reliance on *DePascale v. State*, 211 N.J. 40 (2012), is also misplaced. Even if *DePascale*'s 3-2 majority opinion were persuasive authority here,[13] that decision would be distinguishable because it concerned a New Jersey law that, unlike New York's scheme, forced all judges to make *mandatory* payments to the state pension and health benefit plans. *Id.* at 45-46 & n.2. The court thus reasoned that the benefits at issue *directly* reduced judicial salaries by requiring every judge to dedicate a portion of his or her salary to state-run benefit programs. *See id.* at 45-46, 62. Here, there is no such direct salary reduction because the State's health benefit plans are

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[12] The other cases relied on by Supreme Court (R. 398) did not involve the meaning or scope of constitutionally protected judicial compensation, and are thus irrelevant.

[13] This Court should decline to follow the reasoning of *DePascale*, which is a nonbinding out-of-state decision, for the reasons persuasively stated in the dissent. *See* 211 N.J. at 65-94.

entirely *optional*. It is thus judges, rather than the State, who ultimately decide whether to dedicate a portion of their own salaries towards purchasing state health insurance, a voluntary cost that will fluctuate depending on which plan the judge selects.[14] Increasing the premium costs for these optional plans does not violate the Compensation Clause.

3. Imposing constitutional constraints on the State's flexibility to provide and fund optional health insurance undermines the proper functioning of its plans.

The lower courts' sweeping theory that "all things of value" (R. 250) are constitutionally protected compensation is further belied by the long history and importance of preserving flexibility

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[14] *Roe v. Board of Trustees of the Village of Bellport*, 65 A.D.3d 1211 (2d Dep't 2009), which the lower courts cited, likewise did not involve optional insurance expenses. Rather, the judge simply received as his "remuneration . . . an annual salary of $7,500 and health benefits," seemingly without a choice in whether to incur any particular insurance cost. *Roe v. Bd. of Tr. of the Vill. of Bellport*, Index No. 027535/08, 2008 WL 8753970 (Sup. Ct. Suffolk County, Aug. 18, 2008). Under these circumstances, the Second Department held that the total elimination of the health benefit violated separation of powers, *Roe*, 65 A.D.3d at 1212, but no such circumstances exist here.

in the State's regulation and provision of optional health insurance to its employees. The Legislature has never intended for the terms of the State's optional health benefit plans to be immune from any changes that might increase their costs to judges. From the beginning, the Legislature emphasized that the health plan administrator needed flexibility to negotiate and alter the terms of the State's insurance contracts to obtain an appropriate balance of costs and benefits for employees. *See* Governor's Mem., *supra*, at 3-4. This flexibility extended to setting the State's and employees' premium contributions as well as other health care costs that employees might have to bear, such as copays and deductibles. See *supra* at 16-20.

The Legislature expressly preserved flexibility to modify judges' health insurance benefits when it unified the court system and made more judges eligible to participate in the state health insurance plans. *See* Ch. 996, 1976 N.Y. Laws 2047; Ch. 32, § 8, 1977 N.Y. Laws 38, 44-45. The Legislature provided that a participating judge's benefits would be subject to the same flexible terms as those applicable to "nonjudicial officers," stating that

"[i]nsurance benefits . . . shall continue in effect until altered by law[or] administrative action in accordance with law." Judiciary Law § 39(6)(e)(i). In other words, the costs and benefits of health insurance could be altered to meet the changing needs of the State and its many employees, whether they are judges or not.

Although the Legislature had by this time provided that the State would cover a defined percentage of premium expenses, *see* Ch. 617, § 6, 1967 N.Y. Laws at 1426, the costs and value of state health insurance to employees remained highly variable and subject to change by the State. By their nature, the benefits and concomitant costs of health insurance are under constant flux from year to year. Over time, the costs of health care services often rise, new medical technologies and drugs are developed, and government regulations impose different insurance coverage requirements. *See* Ctrs. for Medicare & Medicaid Servs., National Health Expenditure Projections 2014-2024: Forecast Summary. For example, the Affordable Care Act recently required that most insurance plans, including the State's Empire Plan, cover one-hundred percent of many preventive care services. (R. 85, 129.)

These and many other factors affect the expense and ultimate value of the State's health insurance plans as premiums rise or fall and particular benefits are changed.

The Legislature has continued to maintain flexibility in regulating employees' health insurance to address this practical reality of ever increasing health care costs and shifting insurance requirements. As explained, the State has increased the price of premiums, which resulted in employees (including judges) paying more out of their paychecks, even when the State's percentage contribution rate remained the same. See *supra* at 18. The Legislature also acted to reduce costs in 1995, when it transitioned judges who had remained on locally funded health plans to the state plans. Finding the local plans to be "much more expensive," the Legislature withdrew judges from these plans, a change that reduced expenditures on health insurance by an estimated $500,000. *See* Bill Mem., *reprinted in* Bill Jacket for ch. 83 (1995), at 18.

Indeed, the State's ninety-percent contribution to premiums in former Civil Service Law § 167(1) which plaintiffs seek to define

as the constitutional baseline reflected the need for legislative flexibility to handle rising employee health care costs. The ninety-percent contribution level was enacted as a *reduction* in the State's contribution rate (from one-hundred percent) for the employees enrolled in the basic plan. See *supra* at 19-20. Although this amendment decreased the State's contribution to the premium costs of all active judges enrolled in the state health benefit plan, there is no indication that any of them claimed that the law was unconstitutional. Under plaintiffs' theory, however, that reduction was illegal, and the Legislature was barred from requiring judges to contribute anything to the premium costs of state health insurance plans.

The recent amendment to Civil Service Law § 167(8), which authorizes the Commission president to reduce the State's contribution to state employees' health insurance premiums, simply continues the State's decades-long history of adjusting premium contributions and other health benefit terms to account for changing conditions, while continuing to offer state employees the option of purchasing highly discounted health insurance.

Nothing in this history or the Civil Service Law suggests the creation of a fixed and inflexible health benefit that the Compensation Clause prevents the Legislature from altering for sitting judges.

Treating the costs and benefits of optional health insurance as protected judicial compensation, as the lower courts did here, would have far-reaching consequences for the State's ability to administer its health benefit plans. Because the costs and benefits of the State's plans often change (see *supra* at 16-20), the state insurance system would be open to constant attack from judges. Under plaintiffs' view, any increase in premium prices could be challenged as violating the Compensation Clause because judges who join a plan must have more money deducted from their paychecks to pay the higher prices. Increases to the amounts employees pay in copays, deductibles, and coinsurance could be attacked as unconstitutionally diminishing the "value" of judicial health benefits. And changes to the benefits offered, such as reducing the amount that a plan pays for a particular medical procedure or removing doctors from the insurance network—could

be challenged as unconstitutionally diminishing judicial compensation because the new benefit package has less value.

Moreover, the theory adopted by the lower courts here would, if accepted, have sweeping effects on the many other optional benefits that the State offers to its employees, including judges. For example, many state employees have the choice to enroll in: vision and dental insurance paid for entirely by the State; long-term care insurance funded by employees; life insurance that is covered by the State with an option to purchase more coverage; and programs that deduct funds from employees' paychecks pretax to pay for health care or commuting costs. *See* New York State Unified Court System Summary of Employee Benefits (May 2015). Under the lower courts' view, all of these optional benefits would be protected judicial compensation and the State would be barred from changing any of the cost or benefit terms in any way that could be said to reduce their "value" to judges. Such a result would hamstring the State in adjusting optional benefits that are often subject to shifting costs and regulatory schemes.

The problems that would arise from freezing for judges the terms of group employee benefits highlight the difference between such benefits and the fixed salaries and permanent payments that constitute protected judicial compensation. When the Legislature intended to set fixed salaries or payments, it unmistakably did so through judicial salary schedules. See *supra* at 10-11. And the 2010 mandate to the State Commission on Judicial Compensation was equally clear, providing authority only to adjust judges' annual salaries—authority that the Commission exercised by proposing schedules of permanent salaries. *See* Ch. 567, § 1(h), 2010 N.Y. Laws at 1461. There can be no confusion that these fixed payments are protected compensation. But this clarity would be sorely lacking if the courts must parse whether particular terms of state health plans or other group benefits fall within the Compensation Clause's scope, particularly when there is no indication that the Legislature intended for such terms to be permanent rather than flexible. The absence of clear and administrable standards to determine when a health benefit

plan's "value" has been unconstitutionally reduced further demonstrates that plaintiffs' theory should be rejected.

B. The State's Reduction in Premium Contributions Is Nondiscriminatory.

As a cost increase that only indirectly affected judicial salaries, the 2011 reductions to the State's premium contributions comport with the Compensation Clause so long as they do not "single[] out" judges. *Hatter*, 532 U.S. at 561. See *supra* at 28-31. The lower courts erred in holding that the changes to the State's contribution rate unconstitutionally discriminated against judges. To the contrary, the changes in premium contributions apply to the overwhelming majority of state employees and thus treat judges the same as nearly everybody else.

The 2011 amendments to the Civil Service Law do not subject judges to discriminatory treatment. The amendments authorize modifications to the State's contributions to the premium costs of *all* state employees. Ch. 491, pt. A, § 2, 2011 McKinney's N.Y. Laws at 1365-66. The provision does not mention judges or establish any criteria that would make it applicable

"'almost exclusively'" to judges. *Matter of Maron*, 14 N.Y.3d at 255 (quoting *Hatter*, 532 U.S. at 564).

Nor do the implementing regulations. *See* 4 N.Y.C.R.R. §§ 73.3(b), 73.12. To the contrary, the implementing regulations apply the percentage reduction in premium contributions to *all* state employees except those who belong to a union that has yet to ratify a new collective-bargaining agreement. *See id.* § 73.12. The vast majority of state employees (ninety-eight percent as of the date of this brief) are subject to the reduced premium-contribution rate—including not only members of unions that have ratified new collective-bargaining agreements, but also nonunion members of the executive, legislative, and judicial branches. (R. 293-294.) In total, approximately 185,000 active state employees—of whom approximately 1,200 (or one percent) are judges—are subject to the 2011 contribution changes, while fewer than 3,900 employees remain subject to pre-2011 contribution rates. (R. 293.) *See* N.Y. State Unified Ct. Sys., Careers—N.Y. State Courts, www.nycourts.gov (stating that court system has "almost 1,200 judges"). The fact that the regulation treats judges like almost

every other state employee demonstrates its nondiscriminatory nature. *See Hatter*, 532 U.S. at 561-62, 572 (tax applied to all federal employees did not discriminate against judges); *Suttlehan*, 31 Misc. 3d at 294 (reduction in town's health insurance premium contribution that applied to all elected officials did not discriminate against judges).

The lower courts concluded otherwise, but none of the factors they identified show that judges were discriminated against when the Legislature authorized a reduction in the State's premium contributions. First, the Appellate Division found the contribution change discriminatory because it did not apply to a small number of unionized employees who have yet to agree to new collective-bargaining agreements. (R. 254.) But as *Hatter* makes clear, discrimination sufficient to violate the Compensation Clause occurs only when judges are "singled out"—*i.e.*, treated differently from *everybody* else rather than from *anybody* else. *Hatter*, 532 U.S. at 564. Thus, in *Maron*, this Court declined to find that judges had been singled out by not receiving raises when a small number of nonjudicial constitutional officers had also not received

salary increases—even though "nearly all of the other 195,000 state employees ha[d] received" raises. 14 N.Y.3d at 256. Here, the number of comparators subject to the same policy as judges is far larger than in *Maron*. Because judges are thus treated the same as the overwhelming majority of state employees, it is immaterial that a tiny fraction of employees (currently only two percent) are treated differently.

Second, and relatedly, the lower courts found that judges were treated unequally because unionized employees were able to collectively negotiate for layoff protections in exchange for accepting the 2011 premium-contribution reductions, whereas judges are prohibited by the Taylor Act from collectively bargaining. (*See* R. 251, 400.) This reasoning is wrong on several levels. For one thing, because the New York Constitution already protects judges from "layoffs," *see* N.Y. Const. art. VI, § 23, unionized employees did not obtain any benefit that judges do not already enjoy—thus undermining the claim of unequal treatment. In addition, the relevant inquiry under the Compensation Clause is whether judges have been singled out to bear a "financial

burden" that other employees are not required to shoulder, *Hatter*, 532 U.S. at 573, not whether judges' employment terms are identical to other state employees' in every material respect. Here, the relevant financial burden is the same: the State's premium contribution rate for judges is *identical* to the contribution rate for all unionized employees who agreed to new collective-bargaining agreements.

In any event, even assuming that some state employees were able to collectively bargain for better terms in exchange for accepting the premium-contribution reductions, judges would still not have suffered unconstitutional discrimination because a substantial number of other state employees have not received any collectively bargained benefits either. In addition to judges, more than 12,000 state employees designated "M/C"—approximately six percent of the state workforce—are prohibited under the Taylor Law from collective bargaining, and thus had no ability to negotiate for other employment changes when the Legislature authorized the premium-contribution reduction. (R. 294.) *See* Civil Service Law § 214. Because judges were treated the

same as this substantial body of other state employees (R. 294), they have not been singled out in violation of the Compensation Clause. *See Matter of Maron*, 14 N.Y.3d at 256.

Third, the lower courts reasoned that the premium reductions were discriminatory because they did not apply to "all citizens" and were instead limited to state employees (R. 402; *see* R. 254.) But the State could not have reduced premiums for all citizens because it does not make contributions toward every citizen's health insurance. And *Hatter* disposed of the notion that a law primarily concerned with government employees must apply to all citizens or all private employees to be nondiscriminatory: in that decision, the Supreme Court upheld a tax increase that applied only to government employees (including judges), recognizing that in such circumstances, the category of government employees "is the appropriate class against which we must measure the asserted discrimination." 532 U.S. at 572.

Finally, Supreme Court concluded that judges had been discriminated against because it accepted plaintiffs' theory that M/C employees, but not judges, had been promised two lump sum

payments as a specific quid pro quo for the premium-contribution changes. (*See* R. 400.) That holding misapprehends the nature and effect of these payments. There is no evidence in the statutory text or legislative history that the lump sum payments were authorized as an exchange for reduced premium contributions. See *supra* at 22-23. To the contrary, the legislative history makes clear that the lump sum payments were simply part of a broad effort by the Legislature to provide M/C employees with higher *salaries* (not health benefits).[15] Indeed, the awards for performance, merit, and longevity that the Director of the Division of the Budget authorized in 2011, implemented a salary plan for M/C employees from 2008—three years before the premium rate change. (R. 313-314.) In any event, the lump sum payments have never actually been paid to M/C employees because the Director of the Division of the Budget has not exercised his discretion to

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[15] Unlike M/C employees, judges had no need for the pay parity provisions contained in the 2011 amendments because their salary levels were already being examined and adjusted in 2011 by the State Commission on Judicial Compensation. See *supra* at 11-12.

approve the payments. (R. 314.) Judges could not have suffered discrimination based on payments to other state employees that never materialized.

Ultimately, plaintiffs miss the mark when they attempt to identify discrimination against judges based on other employees receiving benefits unrelated to health insurance premiums. The dispositive fact instead is this: both before and after the 2011 premium-contribution changes, nearly all employees who choose to join the state health benefit plan must pay the same range of prices for the same selection of state-subsidized health insurance plans. This evenhanded treatment is precisely the type of nondiscriminatory policy that the Compensation Clause does not disturb.

CONCLUSION

For the reasons set forth above, this Court should reverse the interlocutory order of the Appellate Division, First Department and the judgment of Supreme Court, New York County, and dismiss plaintiffs' complaint or grant summary judgment to defendants.

Dated: New York, NY
November 23, 2015

Respectfully submitted,

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ARTICLE VI, SECTION 19 OF THE PRESENT CONSTITUTION

(As amended and in force April 1, 1938)

General provisions as to judges; district attorneys and certain judges not to appear for defendant in criminal case.—Sec. 19. **All judges, justices and surrogates shall receive for their services such compensation as is now or may hereafter be established by law, provided only that such compensation shall not be diminished during their respective terms of office. * * ***

THE CONSTITUTION OF 1846

ARTICLE VI

Sec. 7. The Judges of the Court of Appeals and Justices of the Supreme Court, shall severally receive, at stated terms, for their services, a compensation to be established by law; which shall not be increased, or diminished during their continuance in office.

Sec. 14. * * * The county judge shall receive an annual salary, to be fixed by the board of supervisors, which shall be neither increased nor diminished during his continuance in office. * * *

SECTION 7

At the time of the Convention of 1846 the salaries of the chancellor and of a justice of the Supreme Court were $3,000 each. (Lincoln, Vol. IV, p. 590.)

In the convention a section was reported by the Judiciary Committee as follows:

> "They [the judges of the court of appeals and justices of the supreme court] shall severally at stated times receive for their services a compensation to be established by law; which shall not be diminished during their continuance in office." (*Debates,* p. 777.)

Subsequently, there were rejected (*Debates,* pp. 778–9) amendments (1) to strike out the prohibition against a decrease; (2) to allow the Legislature to reduce the salary to a point where it stood when a judge took office, and to prevent any increase taking effect within two years thereafter; (3) to prohibit an increase

tice of the Supreme Court. This exception was necessary because the Legislature was to continue to fix the compensation of these judges, as had been the case since the amendment of 1909, and the committee recommended that their compensation "should be fixed at a sum at least equal to that paid to any other judicial officer." (*Revised Record,* Vol. III, p. 2655.)

Mr. Deyo opposed the increase from $10 to $20 per day for expenses to be allowed to a justice elected in the third or fourth department, who was required to hold court in a judicial district other than that in which he was elected. Mr. Wickersham, on behalf of the committee, noted that the Legislature had passed a statute providing for such an increase, and that the committee had included the same provision in the section to remove doubts as to its constitutionality. (*Revised Record,* Vol. III, p. 2653.)

Because objection was made to a justice from the first or second department also receiving such additional compensation when holding court in up-State districts, Mr. Buxbaum moved to amend by striking out "in a judicial district other than that in which he is elected" and inserting in its stead "in the first or second department." The latter case was the only one where the extra compensation was needed. (*Revised Record,* Vol. III, p. 2655.) Although this amendment was at first defeated (*Revised Record,* Vol. III, p, 2658), it was accepted on the third reading of the section. (*Revised Record,* Vol. IV, p. 3685.)

THE JUDICIARY ARTICLE OF 1925

ARTICLE VI [1]

> *General provisions as to judges; district attorneys and certain judges not to appear for defendant in criminal case.* —Sec. 19. All judges, justices and surrogates shall receive for their services such compensation as is now or may hereafter be established by law, provided only that such compensation shall not be diminished during their respective terms of office. * * *

The provisions in this section relating to compensation of judges, or justices, were previously contained in sections 12 and 15 of Article VI of the Constitution of 1894. It will be recalled that section 12, as amended in 1909, dealt with the compensation of

[1] This provision of sec. 19 of Art. VI, as adopted in 1925, is the provision now in force. It is printed on p. 323 and reprinted here for convenience.

Supreme Court justices, fixing their salary at $10,000 per year. Justices assigned to the Appellate Divisions in the Third and Fourth Departments receive $2,000 additional, and the presiding justices $2,500. Justices elected in the first and second departments were entitled to receive from their respective localities such additional compensation as would make their aggregate compensation equal to that which they were then receiving. Further, there were provisions dealing with the expenses and additional compensation to be paid to justices serving in another judicial department. Section 15, dealing with surrogates' courts, contained a sentence, "The compensation of any county judge or surrogate shall not be increased or diminished during his term of office."

The compensation of judges of the Court of Appeals was not mentioned in the amendment of 1909, but under the terms of Article X, section 9, since they were State officers named in the Constitution, their compensation could not be increased or diminished during the term for which they were elected. This meant that a judge elected in 1906 had to continue to serve at the same compensation for the fourteen-year term ending in 1920. The great increase in the cost of living during that period made the salary fixed for Court of Appeals judges inadequate. Increased compensation could have been voted by the Legislature for newly elected judges, but that would have created the anomaly of judges sitting in the same court receiving different salaries.

There were attempts made to remedy this situation by means of constitutional amendments, but they were defeated by the people. In 1918 (S. Int. No. 1126, Pr. No. 1444), and in 1919 (S. Int. No. 29, Pr. No. 29), a proposed amendment passed both houses of the Legislature, providing that the compensation of judges of the Court of Appeals as established by law should not be less than the highest compensation allowed to any other judicial officer in the State. This amendment was rejected by the people by a majority of 80,000 votes.

In 1920 (S. Int. No. 1669, Pr. No. 2137), and in 1921 (S. Int. No. 122, Pr. No. 1787), it was proposed to amend the Constitution by providing that judges of the Court of Appeals shall receive the sum of $17,500 per year. The amendment passed both houses but was rejected by the people in 1922 by more than 300,000 votes.

This proposal was again introduced in 1923 (S. Int. No. 282, Pr. No. 282). It passed the Senate but remained in committee in the Assembly.

PROCEEDINGS OF THE JUDICIARY CONSTITUTIONAL CONVENTION OF 1921

[EXPLANATORY NOTE—The convention, meeting as a whole to consider the report of the Executive Committee, took up the proposed draft section by section, making changes in some sections and adopting others without change. Only one section, that dealing with the Court of Claims, was rejected.

For the purpose of clarifying the debates of the convention, the minutes, which are reprinted verbatim, have been interpolated by setting out at the beginning of the discussion the text—so far as it was able to be ascertained—of each section of the Executive Committee's draft.]

BAR ASSOCIATION, 42 WEST 44TH ST., NEW YORK CITY

December 5, 1921, at 10 o'clock A. M.

The Chairman: The convention will be in order. The secretary will call the roll. If any excuses or explanations as to absence are presented, you will note them as the names are called.

The secretary called the roll. The following were present: Mr. Benedict, Mr. Borst, Mr. Cole, Mr. Crouch, Mr. Dykman, Mr. Guthrie, Mr. Kellogg, Mr. Newburger, Mr. Newton, Mr. Putnam, Mr. Rogers, Mr. Sawyer, Mr. Sutherland, Mr. Whitley, Mr. Chairman.

The Chairman: We have not a quorum.

Mr. Dykman: I have a letter from Mr. Cobb saying he is just recovering from an illness.

Mr. Crouch: I spoke to Judge Cobb last night, and he is out and back to his office, but he will be unable to be here this morning, but hopes to be here by Wednesday morning.

Mr. Guthrie: Mr. Chairman, I propose that we fix the hours of the sessions, and that we convene at ten, as the call was for today, and that we adjourn at one, until two-thirty, and that we then sit until four-thirty. I suggest this limited number of hours, because it will enable the Executive Committee to meet in the recesses, and later in the afternoon if necessary. I think that it would be objectionable to have night sessions, and that five hours of continuous work at this most important and difficult task that requires

The Chairman: Judge Clearwater's name will be added to those who were here this morning. Judge Borst has left, and left his vote. Attorney-General Newton is not hereat present. Otherwise, we are the same as we were this morning. Are we not, Mr. Secretary? We will call the roll for absentees. The question is on the adoption of section 19, and the Secretary will call the roll, ayes and noes.

(Roll call.)

Mr. Marcus: I desire to record my vote against

The Chairman: We will entertain an amendment from you to strike out.

Mr. Marcus: I move to strike out that part of the section which extends the jurisdiction.

The Chairman: Is there a second?

Motion seconded.

The Chairman: The question will arise on the amendment offered by Judge Marcus to strike out all mention of the extension of the territorial jurisdiction of inferior local courts in cities. Those wishing to be recorded in the affirmative will say "aye", opposed "no." The amendment appears to be lost. It is lost.

The roll call will be resumed on the section as reported.

(Roll call resumed.)

The Chairman: As the name of the gentlemen who are absent are called, their proxies will vote for them.

Ayes, 19.

The report of the committee is adopted.

Shall we go back, Mr. Guthrie, to sections 15 and 16?

Mr. Guthrie: I would prefer not. Senator Burlingame has promised to be here this afternoon at three o'clock, and as he is very much interested and represents Brooklyn, it would be, I think, unwise to proceed in his absence, if we can avoid it.

Section 20 of the Executive Committee's Draft provided:

> "All judges, justices and surrogates shall receive for their services such compensation as is now or may hereafter be established by law, but which shall not be diminished during their respective terms of office. Except as in this article provided, all judicial officers shall be elected or appointed at such times and in such manner as the Legislature may

direct. No one shall be eligible to the office of judge of the Court of Appeals, justice of the Supreme Court, surrogate, or judge of any other court of record who is not an attorney and counselor of this State except in the county of Hamilton as to the office of county judge or surrogate. No judge or justice shall sit in any Appellate Court in review of a decision made by him or by any court of which he was at the time a sitting member. No person shall hold the office of judge or justice of any court or the office of surrogate longer than until and including the last day of December next after he shall be seventy years of age. The judges of the Court of Appeals and the justices of the Supreme Court shall not hold any other public office or trust, except that they shall be eligible to serve as members of a constitutional convention. All votes for any such judges or justices for any other than a judicial office or as a member of a constitutional convention, given by the Legislature, or the people, shall be void. No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office. A judge of the Court of Appeals, a justice of the Supreme Court, a judge of the Court of General Sessions of the City of New York, a justice of the City Court of the City of New York, a judge of the Court of Claims and a county judge or surrogate hereafter elected in a county having a population exceeding one hundred thousand, shall not practice as an attorney or counselor in any court of record in this State nor act as referee in any action or proceeding. The Legislature may impose a similar prohibition upon county judges or surrogates in other counties. No district attorney or assistant to or deputy of a district attorney shall appear or act as attorney or counsel for the defendant in any criminal case or proceeding in any court of the State, nor shall any county judge, special county judge, surrogate, or special surrogate appear or act as counsel for a defendant in any criminal case or proceeding pending in his own county or in any adjacent county."

The Chairman: We will proceed to section 20, unless objection is made. Unless the preparation of these revised sections—

Mr. Guthrie: The Executive Committee had a meeting today and has agreed to accept an amendment, so that it will read as follows: "All judges, justices and surrogates shall receive for their

services such compensation as is now or may hereafter be established by law,"—and providing that such compensation shall not be diminished during their respective terms of office.

I take it we can take a vote upon that provision without taking up the others at the present time. I move the approval of that amended form.

The Chairman: The principle of it has been approved already. This is a matter of style, and it has been thought over very carefully by the Executive Committee. It makes it very plain that the Legislature has full power in the matter, except that it may not diminish salaries as established.

Mr. Putnam: The committee made consistent use in its report of the word "compensation," using it as a better word than the word following, but I am interested in the apparent repeal of all provisions for expenses, because evidently the word "compensation" here which shall not be increased or diminished means the permanent pay of the official. Now the exigencies of trial in different parts of the State call for judges to leave their homes and perform those services. At the present time the judge from our own part of the State who goes to St. Lawrence county, Herkimer county, Onondaga county or Jefferson county, as one of the judges has done in the past year, has to do all of that at his own expense, so I suggest, in order that there shall be no question about that, some expression—I don't believe in any *per diem* amount, as formerly used, but actual traveling expenses might perhaps well be put in as within the power of the Legislature to fix in addition to this general word "compensation," which here I think would be interpreted to mean salary.

The Chairman: The point raised by Judge Putnam seems to me to be a pertinent one, as a matter of construction if you turn to pages six and seven, you will see that provision is made for certain *per diem* allowances for expenses; *per diem* allowances or any fixed lump sum allowance are all a part of the compensation, they cannot be anything else. It does not make any difference whether the judge spends any part of it or spends twice or three times as much, that is "compensation" and the present section provides that all compensation hereafter provided shall be in lieu of and shall exclude all other compensation and allowance to a justice for any expenses whatever. In other words, it was a prohibition on any appropriation for necessary expenses. That pro-

hibition being taken off, would it not follow that the Legislature must next provide for necessary expenses not by *per diem*, but by bills audited, as ours were, provided in the adoption of this change in the present provision and paid by the Comptroller? I cannot speak dogmatically about it, but it does occur to me that the Legislature may provide for any judge at any time for his necessary expenses when called upon to hold court away from his official residence, that that shall be provided for. That is how we understand the rule with regard to the Court of Appeals. As long as our official residence is Albany, there is no object in allowing us our actual expenses, but if the law required us to maintain an official residence elsewhere in the State, there would be nothing to prevent, as there is no prohibition in the Constiution, the Legislature from making an allowance for our actual expenses while traveling from Albany to some other place, where we were obliged to sit, to hear applications for reasonable doubt, and other matters. I express that merely as my judgment in the matter, and perhaps by way of certainty, we might use some word to indicate that "compensation" did not include actual expenses.

Mr. Clearwater: But your actual expenses are not your compensation, they are reimbursement for money expended.

Mr. Guthrie: Isn't it safer to leave that to the Legislature? Certainly no one would say there would be—the Legislature might say that the compensation of the Supreme Court Justice should be $12,000 a year together with an allowance for ordinary expenses, which could be a fixed amount or a *per diem* amount. It is comprehended, it seems to me, in the term "compensation," at the top of page 28, "Such compensation as is now or may hereafter be established by law, which shall not be diminished"—If you start in to add to this provision, which we want to say is taken from the Constitution of 1846, and add an allowance for traveling expenses, you will limit the nature of the allowance. The Comptroller might very well be advised that traveling expenses would not include expenses while living over a month in a city, holding court. We thought that the term "compensation" has been found broad enough in the past to cover the allowance now made to the Court of Appeals and that it with reasonable certainty would be interpreted in the future to permit the Legislature to make an allowance in addition to a fixed compensation in the way of what we might call a salary, to cover that.

Mr. Putnam: The difficulty is that that word "compensation" shall not be changed. It is fixed.

Mr. Guthrie: "Shall not be diminished."

Mr. Putnam: It seems to me you are referring to a fixed regular annual established sum.

Mr. Guthrie: Do you understand we have stricken out the words "but may not be increased"?

Mr. Putnam: I understand it now.

Mr. Clearwater: Payment for expenses is merely a matter of reimbursement. It is not compensation at all.

The Chairman: Certainly, that is right.

Mr. Guthrie: "All judges, justices and surrogates shall receive for their services such compensation as is now or may hereafter be established by law, provided only that such compensation shall not be diminished during their respective terms of office."

The Chairman: Now, what does that mean, Judge Putnam? The answer is found on page 6, where the compensation shall be $10,000 a year. That goes out, but that is what they are now getting. We say, "They shall receive for their services such compensation as is now or may hereafter be established by law, provided only that such compensation shall not be diminished during their respective terms of office." What is now established by law in the case of justices of the Supreme Court, is answered on page 6 and page —, (sic) with certain provisions for expenses while actually so engaged in holding a term outside of the judicial district.

Mr. Putnam: That is the compensation of justices who come down to New York, but not the compensation of justices of New York who go up the State.

Mr. Guthrie: The Legislature could provide it under this section as we word it.

The Chairman: The Legislature would have that power.

Mr. Newburger: Any provision there for justices who come down to New York?

The Chairman: The judges of the Third and Fourth Departments get $10,000 a year, judges of the First and Second Department, $17,500, whether that is the basis of distinction or not I do not know, and if it is, it is not a very satisfactory one in my

mind, but there it is; the compensation is in the hands of the Legislature, a lump sum allowance is compensation. I think the Legislature would have ample power if this were in the Constitution to provide that justices elected in the First and Second Departments should receive as part of their compensation an additional sum to be paid them by the State when they were holding court outside the district in which they were elected.

Now, there is only one matter that has come to my mind as I have been looking at this, we have the principle of inequality established anyway, so it is there at best. Anything further under these sections? It is only the first sentence we are discussing.

Mr. Guthrie: I move, Mr. Chairman, that the convention approve the first sentence of section 20, as amended.

The Chairman: You have heard the motion.
Motion seconded.

The Chairman: Is a division called for? If not, the secretary will record as voting in the affirmative all present in the room, including also Judge Borst and the Attorney-General, and that portion of the section is adopted. Ayes 19.

Mr. Guthrie: The next change we have made is in adding to the requirement about being an attorney and counsellor, a surrogate or judge of any other court of record. "No one shall be eligible to the office of judge of the Court of Appeals, justice of the Supreme Court, surrogate, or judge of any other court of record who is not an attorney and counsellor of this State, except in the county of Hamilton as to the office of county judge or surrogate."

Mr. Newburger: Ought we not to fix a time? According to this, all present judges admitted may be elected to any of those courts.

Mr. Guthrie: It was carefully discussed, and we were satisfied—

Mr. Newburger: Ought not we to fix ten or fifteen years practice?

Mr. Kellogg: No, the people take care of it.

Mr. Marcus: I was admitted to the bar only four years—that would not be fair.

Bransten v. State, No. APL-2015-00125

Supplement to the Addendum to the Brief for Appellant

STATE OF NEW YORK

The Plan

of

THE TEMPORARY COMMISSION ON THE COURTS

for

A SIMPLIFIED STATE-WIDE COURT SYSTEM

July 2, 1956

The Temporary Commission on the Courts
270 Broadway
New York, New York

STATE OF NEW YORK

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July 2, 1956

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III.

THE COMMISSION'S PLAN FOR A SIMPLIFIED STATE-WIDE COURT SYSTEM

The Commission's plan, summarized in the introductory portion of this Report, will vest the judicial power of the State in a unified court system. The proposed system of state-wide courts would achieve the following objectives of the Commission:

1. Administrative coordination of the entire court system, its budget and financing and its personnel.
2. Elimination of restrictive jurisdictional lines between courts and establishment of courts of broad jurisdiction to allow full justice to be done in any case properly in the courts.
3. Full-time judges, adequately compensated and prohibited from practicing law.
4. The trial of all cases to be before a judge who is a member of the bar of the State (except for minor civil and criminal matters, which may be triable on consent by a magistrate who need not necessarily be a lawyer).
5. Flexible assignment of judges within and between courts to achieve maximum use of judicial manpower.
6. Flexible transfer of cases between courts to expedite the business of the courts and to assure that every case will be disposed of as promptly as possible.

The plan is implemented by a draft revision of the Judiciary Article of the State Constitution (Article VI) which appears in Appendix A of this Report. It consists of some seventeen sections which establish the system proposed by the Commission. A short statement of the substance of each section of the draft will make clear the Constitutional provisions by which the system will be established.

Section 1 establishes the *Unified Court System* and names the courts in which the judicial power of the State is vested.

Section 2 establishes the *Court of Appeals* and states the organization, composition and jurisdiction of that court in detail.

Section 3 establishes the *Appellate Division* and the four *Judicial Departments* and states the organization, composition and jurisdiction of the Appellate Division.

Section 4 establishes the *Supreme Court* and eleven *Judicial Districts* and states the organization, composition and jurisdiction of the Supreme Court.

Section 5 establishes the *County Court* for counties outside New York City and states the organization, composition and jurisdiction of that court.

Section 6 establishes the *General Court of the City of New York* and states the organization, composition and jurisdiction of that court.

Section 7 provides for the *Magistrate's Court* and the establishment of that court outside of New York City where needed, as well as the limits of jurisdiction which may be given it.

Section 8 deals with *Judges* and provides for such matters as their qualifications, restrictions affecting them, the filling of vacancies, temporary assignments, compensation, removal and retirement.

Section 9 provides for *Administration of the Courts* and places general administrative power over the courts in the Judicial Conference and assignment of judges in the Appellate Division.

Section 10 deals with *Procedure of the Courts* and provides for regulation of practice by the Legislature and delegation of this power to a court or the Judicial Conference.

Section 11 deals with *Cost of the Court System* and provides for the initial payment of the cost of the courts by the State and provision for reimbursement of an appropriate part of the cost by counties or cities.

Section 12 provides for the *Powers of Appellate Courts* in the affirmance, reversal, modification or ordering of new trials in cases appealed.

Section 13 deals with the *Indian Courts* and provides that their status will be unchanged.

Section 14 states the *Courts Continued* and provides for the continuation of those courts which are to be independently preserved in the revised system.

Section 15 states the *Courts Abolished* and provides for the transition to the new system including such matters as the taking over of the work and the records of those courts which will pass out of existence as independent entities by the absorption of their jurisdiction in the revised system, the disposition of appeals pending, and appeals from cases pending, at the time of transition to the new system, and the fixing of the compensation of judges and magistrates by the Legislature during the transition period but in any case without reduction from compensation paid at the time of transition.

Section 16 states the *Preliminary Powers of the Judicial Conference* and vests in the Conference power, during the period after the approval of the new system but before its effective date, to take necessary administrative steps to effectuate the new system.

Section 17 provides for the *Effective Date* of the Article which at least for some matters must occur at a postponed time to allow necessary acts to be performed to put the new system into operation.

It will be noted that Sections 1 through 13 have to do with matters of substance while Sections 14 through 17 deal with the mechanics of transition from the old system to the new. After the transition period has passed those sections may be removed from the Constitution since they will have no further effect.

1. *The Unified Court System*

The Commission's plan is to place the judicial power of the State in a unified court system—one step in assuring the independence of

the judiciary, which is further assured by the specific establishment of the jurisdiction of each of the State's courts. The present Constitution does not, in terms, vest the judicial power in the courts. The Commission's plan remedies that defect.

The state-wide nature of the courts will permit the service and execution of a court's processes and mandates in any part of the State. This will not extend to the Magistrate's Court, but by legislation that court will be provided with power extending throughout a county and any adjoining county. Clearly, in making provision for such powers in the lower trial courts—the County Court and the General Court of the City of New York—safeguards must be provided by legislation to prevent harassment of defendants by plaintiffs bringing petty suits in distant parts of the State. Venue provisions, as well as necesary filing fees, now limit that problem as it might arise in the present Supreme Court, and similar protection will be provided as to the County Court and the General Court of the City of New York.

In addition, the unified court system will make possible the institution of such a uniform civil practice, forms and procedures as may be desirable throughout the State.

3. The Court of Appeals

(a) *Organization.* Since the Court of Appeals is a continuation of the present Court of Appeals, it will be as today, organized as the court of last resort on a state-wide basis.

(b) *Composition.* The court will be composed of a Chief Judge and six Associate Judges, who will be elected by the voters of the entire State. They will, of course, be subject to the qualifications, restrictions and tenure and retirement similar to those which will apply generally to all the judges of all the courts; namely full-time judicial officers who have been members of the New York bar for at least ten years and who are prohibited from practicing law. They will be elected for 14 year terms, and must retire at the end of the year in which they reach the age of seventy. Vacancies in the court will be filled by appointment by the Governor, and removal for cause may be through the Court on the Judiciary, impeachment, or concurrent resolution of both houses of the Legislature.

(c) *Jurisdiction.* Although there may well be need for a general study and restatement of the jurisdiction of the Court of Appeals, no attempt has been made to make it at this time. It is a subject of consideration by the Commission's Advisory Committee on Practice and Procedure. Meanwhile, the court structure can be dealt with without revising the jurisdiction and if found desirable some revision might be made in the future.

Therefore, the jurisdiction of the court will be the same as its present jurisdiction, although some minor changes (such as elimination of references to courts to be abolished) have been made. It will, as now, review the facts and the law in cases where the judgment is of death, and in such cases the appeal may be taken directly from the court of original jurisdiction. In other criminal cases, the

present provisions of the Judiciary Article allowing appeals fro the Appellate Division or otherwise as the Legislature may provi will remain unchanged.

In civil cases the jurisdiction of the Court of Appeals will b continued unchanged.

At present the Court of Appeals may review questions of fa as well as of law where the Appellate Division on reversing modifying a decision finds new facts and enters a final decisio This too, will be continued as will the provision that the right t appeal shall not depend upon the amount involved.

One minor change of wording may be pointed out. The presen Constitution speaks in terms of "actions" and "proceedings" and "judgments" and "orders." In the Commission's plan more gener terms are used. Thus "case" is used for "action" and "proceeding and "decision" is used for "judgment" and "order." In a revise practice and procedure code different terms may be used and there fore in the Constitution general language is needed to cover a possibilities.

(d) *Transition.* There is no problem here of transition to th new court system. There is no change in number of judges an those in office on the effective date of the new system will simpl continue as judges of the Court of Appeals in that system. As cases pending on the effective date will be carried on and disposed of in the ordinary course of events.

The Court of Appeals has been left as stated unchanged in th new system, and the Chief Judge of the Court of Appeals wi continue to be the Chairman of the Judicial Conference, a positio he now occupies by virtue of legislation. As has been noted th Commission's plan will by Constitutional provision place gener administrative power over all the courts in the Judicial Conferenc Thus the Chief Judge will, in effect, be the chief administrativ judge of all the courts.

3. *The Appellate Division*

(a) *Organization.* The four Departments into which the Stat is presently divided will be continued in the Commission's plan without any change in the counties which compose each of the The Appellate Division will be a single, state-wide intermedia appellate court, and will be a continuation as a separate court of th present four Appellate Divisions of the Supreme Court. It wil however, be organized on the basis of the four Departments, wi a separate panel of judges in each, and with a Presiding Judge the chief administrative judge of the Department.

(b) *Composition.* The Appellate Division in the First and Secon Departments will consist of seven judges. The Appellate Division the Third and Fourth Departments will consist of five judges.

It has become customary in the past few years for the Appella Division benches in some Departments to be expanded from time time by temporary designations of Supreme Court Justices to sit the Appellate Division. Thus, in the First Department eight judg

have on occasion served in the Appellate Division, while in the Third and Fourth Departments six have so served. Although the various Departments sometimes do need more judicial manpower in the Appellate Division the Commission has concluded that the number fixed in the Constitution for each Department is correct and that the occasional emergency need for additional judicial manpower may be taken care of, as now, by temporary designations.

The judges of the Appellate Division will be designated by the Governor from among the judges of the Supreme Court. As now, the Presiding Judges will serve in the Appellate Division until the end of their terms for which they were elected to the Supreme Court and associate judges will serve for five-year terms or for the remainder of their terms as judges of the Supreme Court if less than five years. The Presiding Judge must be a resident of the Department and, in addition, the majority of all the judges must be residents of the Department as is now provided in the Constitution. This point has been the subject of substantial consideration, with the alternatives suggested of (1) a reciprocal arrangement on assignments between Departments, or (2) restriction of designation to the Appellate Division to residents in the Department concerned. It was pointed out that Supreme Court Justices from outside the First and Second Departments add breadth of point of view to the Appellate Divisions there, and that a similar benefit to the upstate Appellate Divisions should be required while upstate judges are serving in downstate Departments. However, the majority of the Commission preferred to continue the present provision while a minority felt that one of the other two alternatives would be preferable.

(c) *Jurisdiction.* The Commission's plan is that the jurisdiction of the Appellate Division will continue to be as it is at present. The present constitutional provision relating to the jurisdiction of the Appellate Division states simply that it shall have such "original or appellate jurisdiction as is now or may hereafter be prescribed by law." By this language any grant of jurisdiction made by the Legislature becomes fixed as a constitutional grant of power. It has been held that this language of the Constitution makes it impossible for the Legislature to reduce the jurisdiction of the Appellate Division in any way, but that its jurisdiction may only be increased. In order to assure the idependence of the Appellate Division it was decided to continue to protect the jurisdiction of the Appellate Division by constitutional provision, not in the same manner as at present, but rather by indicating specifically in the Judiciary Article itself the jurisdiction of the court. This will give the Appellate Division the same detailed jurisdictional protection in the Constitution now enjoyed by the Court of Appeals.

Therefore the Commission's plan provides that an appeal as of right from any decision of the Supreme Court which finally determines a case may be taken to the Appellate Division as is the case today. This gives constitutional status to what are now statutory provisions. On the other hand, appeals from decisions of the

Supreme Court which do not finally determine a case are to continue to be governed by statute. This is because appeals in this type of case are not so important as to require provision for them in the Constitution and the revision of civil procedure now in progress will deal with this matter.

Appeals from the County Court will be heard in either the Appellate Division or, in some cases, in an appellate term of the Supreme Court and appeals from appellate terms will be to the Appellate Division by permission. The appellate jurisdiction of the Supreme Court, which will be exercised through appellate terms, will be complementary to that of the Appellate Division, as is described in detail on page 42.

The Appellate Division's jurisdiction over appeals from the General Court of the City of New York is more flexible. Statutes will provide that only appeals in misdemeanor cases will go to the Appellate Division, as they do today, whereas appeals in all other criminal cases and civil cases heard in the General Court will go to an appellate term.

However, the Legislature may provide that in certain other categories of cases appeal may be to the Appellate Division. These cases might be, for example, those in which a party recovers more than $3,000. Since the monetary jurisdiction of the General Court of the City of New York will be greater than that of the present City Court, many cases now tried in Supreme Court will be tried in the General Court and will be appealable to an appellate term rather than to the Appellate Division, as today. The purpose of such a provision and its flexibility would be to allow the Legislature to provide a mechanism to distribute appeals between the appellate courts in accordance with the types of cases or amounts involved.

Statutes will also provide that outside New York City most criminal appeals from the County Court, except those prosecuted by indictment, will be to an appellate term. The Legislature may provide that in certain civil cases appeals may be to the Appellate Division, while others would be to an appellate term. The appellate term will generally exercise the appellate jurisdiction now exercised by the County Courts or appellate tribunals other than the Appellate Division. The Appellate Division in counties outside New York City will hear appeals from the County Court in all those matters that it does at present—appeals in probate matters, convictions of felonies, and matters involving children and families.

(d) *Transition.* The transition from the present to the new system presents no problems as it relates to the Appellate Division. The judges serving in each Department at the effective date of the new system will become the judges of the Appellate Division as continued, and all pending cases will be carried forward and disposed of in due course.

The Appellate Division has been left substantially as it is now, in jurisdiction, composition and powers. In addition, in the Commission's plan, provision is made that the judges of the Appellate Division in each Department shall have the power to fix the times

and places for holding terms of all the courts in the Department, and to assign the judges to hold terms. The Appellate Division at present has this power only in relation to the Supreme Court. In the future the Appellate Division will be vested with the same power over the judges of the other courts in the Department, the General Court of the City of New York and the County Court. Appropriate coordination of this power with the general administrative power of the Judicial Conference will bring to the judicial system the completely flexible control of all the judicial manpower that is most desirable, while leaving at the Departmental level the actual assigning power.

4. *The Supreme Court*

(a) *Organization.* The Supreme Court will be continued as it is now, a single state-wide trial court of broad jurisdiction. The present organization, however, is on the basis of ten Judicial Districts, and, as to that point, the Commission's plan provides for a change. It provides that an Eleventh Judicial District be created in addition to the present ten Districts. The Eleventh District will be made up of Queens County, which will thus be separated from the present Tenth District, and will leave that district composed of Nassau and Suffolk Counties only. The Commission recognizes that the creation of this new district will create some problems while solving others. Nevertheless, after a careful weighing of all aspects of the matter the Commission determined, without dissent, to separate Queens County from the Tenth District and make it a separate district—the Eleventh. The reasons which impelled this decision are several and are taken up at page 65.

(b) *Composition.* The judges of the Supreme Court will be elected by the people in each Judicial District for fourteen-year terms and will be subject to qualifications, restrictions, tenure and retirement provisions similar to those which apply generally to all judges in the new system.

The Supreme Court at the present time consists of the Justices in office, any additional Justices authorized by the Legislature and their successors. The Commission's plan is that the jurisdiction of the Court of Claims, the Court of General Sessions of New York County, the County Court in the other four counties in New York City, and the Surrogates' Courts in New York City will be exercised in the future by the Supreme Court, and that the judges of those courts on the transition date will be integrated into the Supreme Court. The present Constitution provides that the Supreme Court "shall consist of the justices now in office and their successors. . . ." This provision not only assures the continuance in office of present Supreme Court Justices, but, by stating that the court shall consist also of their successors, prevents the Legislature from making any reduction in the present number of Supreme Court Justices. While it is desirable in drafting the new Judiciary Article to provide that present Justices will be protected in office (including those integrated from other courts) it also seems desir-

able to make it possible for the Legislature to reduce numbers of Supreme Court Justices in the future, although not below the numbers in each Judicial District at the transition date.

Therefore the Commission's plan is that the Supreme Court shall consist of the present Justices of the Supreme Court now in office and those of the County Courts, Court of General Sessions and Surrogate's Courts in New York City which are absorbed by the Supreme Court and that the number of judges in each Judicial District may be increased or decreased by the Legislature. Any increase in judges shall in no case exceed one judge for every 50,000 or fraction over 30,000 of population for the district. The Legislature can decrease the number but in no case to less than the number of judges who will be judges of the Supreme Court at the effective date of the new system. The effect of this provision is simply to insure that no Judicial District of the Supreme Court shall ever have less Supreme Court judges than it now has (which also is the effect of the present Constitution) but that increases in numbers made by the Legislature in the future can later be reduced by the Legislature if desirable.

The Commission is satisfied from its study of the relationship of population and business to judicial workload that increased population often requires some increase of judges. Its purpose is to insure that the manpower needs of the judiciary can be met by the Legislature, and that there will be some relationship to the workload which increasing populations bring about. The grant of power to the Legislature to reduce numbers of Supreme Court judges will, of course, make it easier for the Legislature to increase the number when necessary, since it will not feel that such increases are forever.

The limitation that the Legislature shall not create more than one judgeship for each 50,000 population is designed, as is a similar provision in the present Constitution, to prevent the Legislature from creating judicial posts entirely without relationship to population and business. The present population figure in the Constitution is 60,000. The Commission has determined that 50,000 will be a proper safeguard and that it is necessary to fix a figure which will permit inclusion in the Supreme Court of all the judges that it is contemplated will be merged in, particularly in New York City. The increase of jurisdiction which the Supreme Court will exercise also makes necessary a population figure slightly lower than that in the present Constitution to aid in fixing numbers of judges. The "floor" and "ceiling" established by these provisions seem to the Commission to allow the Legislature reasonable latitude in fixing actual numbers to meet the proven needs of each district, while preserving the independence of the judiciary which could be threatened by giving the Legislature unlimited power to abolish all Supreme Court judgeships in a Judicial District, or to create hundreds.

(c) *Jurisdiction.* In Section 4(d) of the Commission's draft Judiciary Article the Supreme Court is given "original jurisdiction in all cases and the appellate jurisdiction hereafter provided."

The present constitutional provision reads: "The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or hereafter may be prescribed by law not inconsistent with this Article."

The proposed provision differs from the present provision in the following respects:

First, by stating that the Supreme Court shall exercise "original jurisdiction in all cases," *all* causes of action and proceedings become cognizable by the Supreme Court. There is, therefore, no need for superfluous words such as "unlimited" and "general," or for references to "law" and "equity." The present provision, which speaks of the Supreme Court being "continued with general jurisdiction in law and equity," in effect limits the jurisdiction of the Supreme Court so that rights of action created by statute are not necessarily within the competence of the Supreme Court. Today, for example, neither claims against the State nor adoption proceedings can be heard in the Supreme Court in spite of its "general" jurisdiction, because the Legislature has not placed them within the jurisdiction of that court. The Commission's plan provides that if any new class of cases is created by the Legislature in the future, the Supreme Court will have jurisdiction over such cases, although another trial court may also be given jurisdiction over such matters.

Any use of the word "continued" is of course unnecessary as it relates to jurisdiction. Its present use in the Constitution stems from the various changes in the Judiciary Article since 1846 in which it was desired to insure continuity of jurisdiction of the court. While this was accomplished, it did have the effect above noted of limiting the Supreme Court's jurisdiction to some degree. A simple statement as contained in the proposed provision is all that is necessary to guarantee the unrestricted original jurisdiction of the Supreme Court and the Legislature thus can in no way deprive the Supreme Court of this all-inclusive jurisdiction. To the extent it is necessary to assure continuation of the Supreme Court, this is done in specific terms in provisions for transition to the new system and stating which courts are continued.

Second, instead of excepting the jurisdiction of the Court of Appeals from the "general jurisdiction" of the Supreme Court as is done in the present Constitution, the proposed provision gives the Supreme Court its original jurisdiction and "the appellate jurisdiction hereafter provided." The scheme of court organization is clearly set out in the Constitution and the appellate jurisdiction of the Court of Appeals specifically set forth. Therefore, there is no need to except that jurisdiction from that of the Supreme Court, which has unlimited original jurisdiction, as a court of first instance, and, in addition, appellate jurisdiction specifically given to it in the draft Article.

As mentioned in the discussion of the Appellate Division, the appellate jurisdiction of the Supreme Court will be exercised through its appellate terms. The discussion of the Appellate Divi-

sion referred to the exercise of appellate jurisdiction by the Supreme Court as a power complementing that of the Appellate Division.

There are two reasons for having this appellate jurisdiction granted to the Supreme Court. One is that throughout the State, except for the City of New York, it is necessary to have an appellate forum closer to the local areas than the seat of the Appellate Division—Rochester, Albany, Brooklyn and Manhattan. This is particularly so in small cases, where the cost of taking an appeal to the Appellate Division at considerable distance from the county in which the case was tried, may be more than the case warrants. Nevertheless, small cases deserve to have appellate review as much as large ones, and so a nearby and inexpensive appellate forum is required. This forum is the appellate term of the Supreme Court which will be provided for each county or for a District or Department as needed.

A second reason for this appellate term is that the volume of appeals which will be taken from the County Court, the General Court and the Supreme Court will be more than the Appellate Division alone could handle in each Department. A large volume of appeals is now handled by the present Appellate Terms in the First and Second Departments, by the County Courts outside New York City, by the appellate part of the Supreme Court in Erie County, and by the appellate part of the Court of Special Sessions in New York City. The purpose of providing for appellate terms in the Commission's plan is to allow the same types of cases that are now appealed to appellate tribunals other than the Appellate Division to be appealed to the appellate terms. The Commission's plan insures that most cases which now are appealed to the Appellate Division will continue to be appealed there. The actual classes of cases which will be heard in the appellate terms will be for the most part defined by legislation, and thus a flexible method of adjusting the workload of the Appellate Division and the appellate terms will be available.

The Commission's plan provides for two methods of organizing the appellate terms either of which may be adopted by the Appellate Division of any Department. The two methods are: (1) an appellate term may be held as needed in each county to be presided over by a single Supreme Court judge, or (2) the appellate term may be organized on a departmental or district basis. Three to five judges would be designated to sit in such an appellate term but no less than two and no more than three judges can sit in any case. At the present time Appellate Terms are organized on a departmental basis in the First Department, and, to a limited extent, in the Second Department. In the future it would be possible for the Second Department to have the first type of appellate term in the counties of the Ninth District and the second type in the other districts. The appellate terms would also absorb the appellate jurisdiction now exercised by the County Courts outside New York City, by the appellate part of the Court of Special Sessions of the City of New York and by an appellate part of the Supreme Court in Erie County.

As is the case with the present Supreme Court, the broad jurisdiction given the proposed Supreme Court will not, as a practical matter, be exercised in all cases. The mechanism for diverting some of the cases from the Supreme Court in the past has been to establish separate courts with jurisdiction concurrent with the Supreme Court, or, as in the case of the Court of Claims, a special, limited jurisdiction. So too, in the Commission's plan the County Court and the General Court of the City of New York are created with jurisdiction concurrent with that of the Supreme Court in certain classes of cases. Unlike the present system and to insure that the division of cases between the courts thus made possible is actually effectuated, provision is made that those cases over which the County and General Courts have jurisdiction must be initiated in those courts, and that the Supreme Court through its general power to transfer cases shall have the power to transfer cases to those courts in the event they are brought into the Supreme Court.

Some limitations are placed upon the Supreme Court's power to transfer cases. Certain classes of cases must be retained in the Supreme Court and can be tried in no other court. For example, claims against the State, wherever they arise, must be brought and tried in the Supreme Court and may not be transferred to other courts. Thus the jurisdiction of the present Court of Claims will be exercised by the Supreme Court and the Court of Claims will pass out of existence. The reasons which lead the Commission to this conclusion are fully developed at page 66.

In order to understand the concept of the Commission with relation to the jurisdiction which will actually be exercised by the Supreme Court in the new court system, it is necessary to deal separately with that portion of the State outside New York City, and the five counties within the City.

(1) *Jurisdiction to be exercised in the 57 counties of the eight Judicial Districts outside New York City.*

The Commission's plan is that the Supreme Court outside New York City will be primarily a civil court, as it is now. It will deal with equity cases and all cases in which an amount more than $6,000 is involved (except that in certain larger counties the monetary jurisdiction of the County Court may be increased to $10,000). The Supreme Court will also, as stated, handle all cases involving claims against the State, the great bulk of which, as a practical matter, arise in the counties outside New York City. In addition the Supreme Court will, through its power to transfer any case to itself, handle certain cases which might ordinarily be tried in the County Court but because of the novel or important questions involved may need Supreme Court determination to insure the proper administration of justice. It will also handle the trial of such of the matrimonial matters—divorce, separation, annulment and dissolution of marriage—as are transferred to the Supreme Court from the County Court. Finally, the appellate terms of the Supreme Court in counties outside the City will handle all appeals from the

Magistrate's Court, and from those types of cases in the County Court which will not be appealable to the Appellate Division.

(2) *Jurisdiction to be exercised in the five counties in the three Judicial Districts in New York City.*

The Supreme Court in New York City will, of course, exercise the jurisdiction stated above—that is, all civil cases involving more than $10,000, such claims against the State as arise in New York City, novel and important matters transferred to it, and those appeals from the General Court of the City of New York which are to be dealt with in appellate terms. In addition jurisdiction over four types of matters which are not to be dealt with in the Supreme Court elsewhere will be handled in that court in New York City.

The matters affecting youths covered by the 1956 Youth Court Act as well as all criminal cases which are prosecuted by indictment —the present jurisdiction of the Court of General Sessions of New York County and the County Courts of Bronx, Kings, Queens and Richmond—will be handled by the Supreme Court in the future. Those courts will pass out of separate existence and their judges, personnel and cases will be absorbed into the Supreme Court.

All matters affecting the administration of decedents' estates, probate of wills and so on—the present jurisdiction of the Surrogate's Court in each county—will be handled in the future in a surrogate's division of the Supreme Court. Those courts will pass out of separate existence and the sitting Surrogates, personnel and cases will be absorbed in the Supreme Court. The skilled personnel will, of course, continue to serve in the surrogate's division in the future. Some considerations in connection with the handling of surrogates' matters are discussed in a later section of this Report at page 70.

Finally, all matters which affect the family relationship and children will be handled in a family part of the Supreme Court. This field includes at least the following matters: protection, treatment, custody, commitment and guardianship of minors; divorce, annulment, separation and dissolution of marriage; domestic conciliation between spouses; relinquishment or termination of parental rights, adoption, paternity, assault between spouses and between parent and child, support of dependents, and commission of certain crimes against children. A discussion of the considerations which led to this disposition of these matters is found in a separate section of this Report at page 85. These matters are now, of course, within the jurisdiction of several other courts, including the Surrogate's Court, the City Magistrates' Courts, the Court of Special Sessions and the Domestic Relations Court. The purpose of bringing all these matters into the Supreme Court in New York City is to put an end to the shocking fragmentation of jurisdiction over matters affecting children and families which is one of the most conspicuous faults of the present court system. A discussion of particular matters with reference to the present judges of the Domestic Relations Court will be found at page 73.

The Supreme Court in New York City will not have power to transfer to the General Court any case involving claims against the State, or, in addition crimes prosecuted by indictment, probate matters, matters affecting youths covered by the 1956 Youth Court Act or children and family matters, and the Legislature may make other provisions limiting transfer of cases from the Supreme Court to lower courts.

The Commission's plan has obviously made a sharp distinction between New York City and the balance of the State in connection with the matters which will be dealt with in the Supreme Court. Many reasons for this were pressed upon the Commission at public hearings throughout the State as well as in many private hearings and conferences. All seem to agree that in many instances the problems of New York City are unlike those of the balance of the State, although problems exist in all areas. The reasons for the different handling of children and family matters is discussed at length in the portion of this Report devoted to those subjects.

The reason for the difference as to the handling of probate matters and the higher criminal matters are largely based on (1) geography, (2) finances, and (3) local habit and custom. It was felt that the criminal and probate matters in areas outside New York City should be dealt with no further from the people than the county level, that the presence of a judge to deal with these matters in each county on a full-time basis was necessary, that the Judicial District was too large an area for the election of such judges and that a judge who is resident in the county is required to deal promptly with such matters. On the other hand, in New York City geography presents no problem, the Supreme Court is as much a local court as are the Surrogates' and County Courts, and so no factor of area or distance indicates a need to keep those matters out of the Supreme Court.

Again, outside New York City the Supreme Court Justices' salaries are substantially higher than those of County Judges and Surrogates (with very rare exceptions) and the expense involved in the transfer of such a caseload to the Supreme Court with the increase of Supreme Court judges which would be thus necessitated would be great. On the other hand, in New York City the judges of these courts are presently paid the same salary as Supreme Court Justices in the City, with the exception of the Surrogate of Richmond County who receives a slightly smaller salary, but, with the addition of a small special payment made by the State to Surrogates for estate tax work, he receives a total equal to that of the others. There is thus no great financial difference arising out of salaries for the handling of these matters transferred to the Supreme Court in the City.

Finally, outside New York City the Supreme Court enjoys a stature and prestige not approached by any of the other courts in the area. This arises in part from the financial difference and the large geographical area served, but is also a matter of the traditionally high regard that lawyers and laymen have for Supreme

Court Justices. In the City of New York the high prestige of the Supreme Court Justices is shared to a large extent by the Surrogates and by the Judges of the Court of General Sessions and the County Courts, partially because of the lack of significant salary or geographical differences, and partly because of the custom and habit of the area. The candidates for Surrogate are frequently selected from among the Supreme Court Justices or at times from General Sessions or County Court judges, and there is much more equality of prestige among them than exists in areas outside New York City.

In addition attorneys outside New York City are accustomed to a rotation of Supreme Court Justices for trials of civil cases, while probate and criminal matters are tried before judges who are resident in the respective counties.

This different handling of the City and the rest of the State in the Supreme Court and the fact that New York City covers five counties has, of course, required a different treatment of the lower trial court in the fifty-seven counties outside the City. This was outlined to some extent in the Commission's 1956 Report and has now been crystallized by the proposal that there be created two separate courts immediately below the level of the Supreme Court—the County Court to be organized in each of the counties outside New York City and a comparable court, the General Court of the City of New York, to be a city-wide court covering the five counties there. The details of those courts will appear in the sections of this Report which are devoted to those courts.

(d) *Transition.* The transition from the present system to the new system as it relates to the Supreme Court presents no major problems. The court will be a continuation of the present Supreme Court. All the present Justices of the Supreme Court will become judges of the new Supreme Court, and, as vacancies occur due to death, resignation, retirement or expiration of term, their successors will be elected in due course. In addition, the present judges of the Court of General Sessions of New York County, the County Courts of Bronx, Kings, Queens and Richmond, and the Surrogates of the five counties in New York City, will become judges of the Supreme Court in the new system and, as vacancies occur, their successors will be elected by the voters of the Judicial Districts concerned.

The judges of the Court of Claims will become judges of the Supreme Court in the new system, but due to the fact that, unlike the other judges who are elected by the people for fourteen-year terms, the Court of Claims judges are appointed by the Governor for nine-year terms, a different treatment when vacancies occur is necessary. Since appointments by the Governor are not in any way allocable to Judicial Districts the Commission has determined that as soon as possible these eight judgeships should be allowed to disappear, and that if additional Supreme Court judgeships become necessary that need can be taken care of by the creation of additional positions in Judicial Districts where necessary. In order to avoid any unfairness to the sitting judges of the Court of Claims, the Commission's plan provides that the present incumbents will

continue to serve as judges of the Supreme Court until expiration of term, death, resignation or retirement at age seventy. The Commission also has determined that in the event the term of an incumbent at the date of transition expires before he reaches age seventy, the Governor shall have the right to reappoint him for successive terms until his retirement age is reached. But if the incumbent is not reappointed, no vacancy will occur and the position will disappear as it will at any death, resignation or retirement.

5. *The County Court*

(a) *Organization.* The County Court which the Commission's plan contemplates will, like the Supreme Court, be a state-wide court but it will be organized on the basis of counties and there will be at least one County Court judge in each county. The County Court will, however, be organized only in the 57 counties outside the City of New York, while the comparable court for the five counties in the City will be the General Court of the City of New York. For the purposes of organization of the County Court, Fulton and Hamilton Counties will be treated as one, as they are in other matters of state government. Each county of the State will be a district of the state-wide County Court and the Legislature will have the power to create additional districts of the County Court within the counties if necessary. The Commission contemplates that perhaps no such smaller districts would be created, but the flexibility provided in the plan would permit the creation of districts which might, for example, separately embrace some of the larger cities within upstate counties.

In any case, the Commission's plan contemplates that County Court judges will from time to time hold court in communities other than the county seat. The court room facilities may in some places present problems, but most towns now have adequate public buildings and future developments can be made in recognition of the needs of the new court system.

(b) *Composition.* Each district of the County Court, and hence each county, will have at least one judge of the County Court who will be elected by the voters of the district. If a district smaller than a county were created, the judge elected from such a district will nevertheless be a regular County Court judge of the county of his residence and will serve in the County Court on the same basis as judges elected from the county-wide district. There will, of course, be more than one judge in many counties, since the new County Court will consolidate the present County Court, Surrogate's Court and Children's Court and absorb some of the work of the Supreme Court and that of local inferior courts.

The number of judges of the County Court in each county will be fixed by the Legislature. However, the Commission has devised a suggested schedule of the number which might be required in each county. This schedule appears as Appendix B to this Report. The number suggested for each county, while only an estimate subject to further consideration, is based on a careful calculation of

the judicial workload that each county may be expected to have and the amount of judicial manpower which will be required to dispose of such a workload. Factors which have been considered in making this estimate are the present population and estimates for the future, the present judicial workload as reflected in the statistics prepared by the Judicial Conference as well as the trend of the workload as shown by the reports of the Judicial Council over the past twenty years, estimates of the volume of work now handled in other courts which is to be diverted into the proposed County Court, and the number of judges now required on a full-time basis to handle similar workloads in other courts. The estimates cannot, of course, be entirely accurate, in spite of the effort made to determine what the requirements of the proposed court will be. For that reason the Commission is prepared in the coming months to confer with local authorities and canvass every view possible to establish as nearly as possible the exact number which will be needed in each county.

The judges, of course, will work primarily in their own counties and in terms or divisions of work as assigned by the respective Appellaete Divisions. However, the judges of the very small counties where the amount of judicial work will not be full-time for even one judge and the judges of other counties who from time to time may have time to spare from the work of their own counties, will be subject to assignment to the County Court of other counties, the General Court of the City of New York or the Supreme Court in their own Department as the Appellate Division may direct.

The judges of the County Court will be elected for ten-year terms, will be prohibited from practicing law, will be required to be members of the bar for at least ten years, and will be subject to provisions as to qualifications, restrictions, terms and retirement similar to other judges.

(c) *Jurisdiction.* The jurisdiction of the County Court will be to deal with all those cases which are not taken into the jurisdiction exercised by the Supreme Court. The following cases must be initiated in the County Court: civil cases involving less than $6,000 (or possibly less than $10,000 in larger counties), all criminal matters including those prosecuted by indictment, misdemeanors, and those offenses less than a misdemeanor not dealt with in the Magistrate's Court as described later; all the probate matters now dealt with in the Surrogate's Court; the matters affecting youths covered by the 1956 Youth Court Act; and all the matters affecting the family relationship and children which in New York City will, as described above, be directed into the Supreme Court. As will appear in the detailed discussion of the Family Part which appears at page 85 of this Report, this grant of jurisdiction to the County Court will delegate to that court the fragmented jurisdiction over family matters now found in many places including the Children's Court, County Court, Justice of the Peace Courts, village Police Courts, Surrogates' Courts, City Courts and the Supreme Court. Thus, the County Court will also have the jurisdiction over the matrimonial

actions—divorce, separation, annulment and dissolution of marriage—now dealt with in the Supreme Court except for the trial of such of those contested matters as the Commission suggests would be transferred to the Supreme Court for that purpose. The course of appeals from the County Court has been indicated previously.

The organization and composition of the County Court in each county is designed to bring to each county a local court of substantial stature, staffed by full-time judges paid at salaries commensurate with the position. Therefore, the jurisdiction of the court, in terms of the cases required to be initiated there, is substantial also and designed to make the court one of real stature, capable of maximum service to the county. The court will have full jurisdiction over probate, felony and family and children's matters. These matters, the Commission is convinced, must be handled in a court which geographically is no more widespread than a county, which maintains a continuous term at the county seat and which is organized consistently with the county governmental organization which serves the county in other ways such as county welfare. In addition to these matters, the County Court will exercise jurisdiction over the trial of all civil matters involving less than $6,000 except those which may be dealt with in the Magistrate's Court as noted later, recovery of chattels to the amount of $6,000, foreclosure of mechanic's liens and liens on personal property, landlord and tenant matters, including actions for recovery of real property and eviction of tenants, and the trials of some cases which will originate in the Magistrate's Court.

The County Court will have such equity jurisdiction as the Legislature shall provide, designed to allow it to grant complete relief including the equitable relief now not available in local inferior courts. Its jurisdiction to enter judgment on a counterclaim shall be unlimited as to amount. The Legislature is given power to provide that in civil cases in the County Court trials may be had with a jury of six or of twelve persons. The Legislature will also have the power to provide that in criminal cases below the grade of felony a trial may be had with a jury of six persons. This will permit the continuation of the present procedure now in force in some City Courts, where six-man juries in cases of misdemeanors and lesser offenses are now permitted, if the Legislature desires. In addition, the Legislature may provide that such cases may be tried by a judge without a jury as is true in some instances at present.

The result of these jurisdictional provisions is to give to the County Court power to dispose of all the matters not handled in the Supreme Court outside New York City—that is to say for the most part, everything except equity cases, claims against the State, the large volume of civil matters involving over $6,000, and such contested matrimonial actions as may be transferred to the Supreme Court. As indicated the Legislature may, if it deems necessary, increase the monetary jurisdiction of the County Court to $10,000. This might be desirable in larger counties such Erie, Monroe, Nassau, Onondaga and Westchester.

(d) *Transition.* The judicial staff of the County Court will, on the effective date of the new court system, be all the present judges of the present County Court, Surrogate's Court and Children's Court, whether they are at present full-time judges or part-time judges permitted to practice law. Each judge who accepts a position as County Court judge in the new system will be prohibited from practicing law and will be paid on a full-time basis. In addition to the judges of all county-wide courts, the judges of the District Court of Nassau County and of those courts in cities where judges are full-time officers not permitted to practice law, will be taken into the new system as judges of the County Court.

The judges of courts in cities who are not full-time officers and who are permitted to practice law at present will not be taken into the new system and their terms will expire, as will those of Special County Judges and Special Surrogates who are not also Children's Court Judges, village Police Justices and Justices of the Peace. However, in many of the counties of the State where there are judges of city courts who will not be merged into the new system, as well as in many other counties, there will be vacancies in the County Court due to the fact that the estimated number of judges required exceeds the number of judges to be taken into the new court. There will, therefore, be a number of vacancies to be filled by election, and the judges of city courts or other judges not transferred to the new system will be natural candidates to compete for such vacancies. The effect of the transition on each county can be seen in the table attached to this Report as Appendix B.

There will be seven counties in the State (Clinton, Columbia, Fulton-Hamilton, Montgomery, Otsego, Warren and Washington) where the number of judges merged into the new system will exceed the number estimated to be needed. In those counties it is provided that until the number of judges in the county is reduced to the number fixed for the county, the death, resignation, retirement or expiration of term of any judge shall not create a vacancy. Thus, when the first judge reaches the end of his term, resigns, retires or dies, no vacancy will be created. And that judge will be unable to seek re-election until another judge dies, retires, resigns or reaches the end of a term at which time both former judges may be logical candidates for the nomination. While this is necessarily an arbitrary matter, it is less harsh than might be thought, due to the fact that all the judges involved are now permitted to practice law. Indeed, the problem may be resolved in some cases if, as may well be, some present judges will rather resign and continue to practice law than remain on the bench and be prohibited from practice.

While the salaries of Supreme Court and Appellate Court judges will continue unchanged, a tentative schedule of salaries that might be paid the full-time County Court judges in the new system is suggested by the Commission. A graduated scale by size of county has been worked out to give an adequate salary for full-time judicial work:

Counties up to 60,000 population	$12,500
Counties from 60,000 to 220,000:	
In Third and Fourth Departments	15,000
Other counties outside New York City	18,000
Counties over 220,000:	
In Third and Fourth Departments	18,000
Other counties outside New York City	25,000

This suggested salary scale is designed to maintain as nearly as possible the range of salaries now paid to full-time judges of courts of this stature and judicial business in the various areas of the State.

The Commission's plan does not require that this salary scale be established immediately on the effective date of the new court system. The Legislature is given the power to work out the salaries necessary, with the limitation that no judge taken into the new system may be paid a smaller salary than he now receives. The Commission believes that perhaps the most practical solution will be legislation which will establish a base salary for full-time County Court judges to be effective at the transition date, with provision that when such a judge is for the first time elected by the voters to office in the new system he will receive the salary at the scale established for counties of that size. Thus the balance of his present term would be served at his present or somewhat higher salary, and his new term would commence at the regular salary.

6. *The Magistrate's Court*

(a) *Organization.* The Magistrate's Court is discussed at this point since in the Commission's plan it is to be organized as an adjunct to the County Court, particularly designed to complement that court in dealing with minor criminal and civil matters in rural areas. The blunt facts of geography and small numbers of attorneys in certain large areas of the State require the only deviation from one of the basic objectives of the Commission's plan, i.e., staffing of all courts by full-time judges who are trained in the law.

The Commission is convinced that the system of County Court judges already described must be supplemented in many areas of many counties. It therefore proposes the Magistrate's Court where needed. Further, it suggests that magistrates be not required to be attorneys nor be required to be full-time judicial officers. To that end the Commission's plan makes possible one magistrate in each town or city with a possibility of one additional if the population served be over 25,000. The Commission strongly urges that towns and cities combine into districts so that the magistrate's position will be reasonably busy and thus attractive to attorneys. It also, subject to further consideration, urges that no city or town having a population in excess of 50,000 be permitted to have a Magistrate. In these populated areas as well as in the City of New York the judges of the higher courts can take care of all the judicial business. Finally, the Commission suggests that the Legislature have power

to regulate and discontinue the Magistrate's Court in any area, similar to its present power over local inferior courts. Thus the Legislature may take action where it becomes apparent that the part-time, non-lawyer magistrate is inadequate to the judicial business and a full-time County Court judge is desirable.

A more extended discussion of the considerations relating to the establishment of Magistrates' Courts appears at page 78 of this Report, with particular reference to their establishment in towns and cities of over 50,000 population.

(b) *Composition.* Magistrates will be chosen by election from the area served and for four-year terms. The numbers are, of course, fixed at one for each of the slightly less than 1,000 cities or towns, except for those few which exceed 25,000 population as to which a second magistrate may be permitted by the Legislature, and also except for such towns or cities as may combine into single districts. The magistrates will not be required to be lawyers, but if they are not they will be required to complete a course of training prescribed by the Legislature subsequent to their election but prior to being permitted to assume office. They will be permitted to engage in other business or activity and if lawyers they may practice law with appropriate safeguards. Vacancies in the office of magistrate will be filled until the next election by appointment by the Town Board or City Mayor except as to districts composed of more than one town or city in which cases vacancies will be filled by appointment by the County Board of Supervisors.

(c) *Jurisdiction.* The Commission was persuaded from its studies and the testimony at public and private hearings, that it was necessary to continue a local magistrate in areas outside New York City. It was also convinced that the present Justice Courts were ineffective in some respects and could be greatly improved. This improvement was particularly to be desired in the field of trials of cases, in improvement of the stature and training of magistrates, and in reducing the numbers. The Commission was impressed by the fact that almost all present justices who testified before it were in agreement that those improvements should and could be made. A primary goal to be reached was to have all cases which required a trial to be tried by a judge who is a member of the bar. However, it was demonstrably impossible, because of lack of lawyers in some areas, as well as impractical from the point of view of volume of business, geographical area and so on, to require that all magistrates be lawyers. Therefore, as elsewhere stated, it was determined as an alternative to reduce to a minimum the trial of cases in the Magistrate's Court but to leave the Legislature power to vest the court with jurisdiction to deal with many matters which would not require a trial.

The jurisdiction given the Magistrate's Court is in keeping with its purpose—that it is to serve outlying and rural areas where sessions of the County Court would not be held continuously or at very frequent intervals. In these circumstances the administration of justice can best be furthered by giving to the Magistrate's Court

jurisdiction over minor matters which can be handled expeditiously and do not require calling in the full machinery of the County Court.

The magistrates will perform the traditional arraignment functions of that office, issue warrants, hold preliminary examinations, fix bail and perform all the other pre-trial functions now performed by magistrates in criminal matters.

In addition, the Legislature will be empowered to confer upon the Magistrate's Court power to hear and determine cases involving traffic infractions, violations of State or local ordinances and regulations, such as regulations of the Health Department, and other violations of law of a grade of less than misdemeanor, such as disorderly conduct. Trials in such cases will be held by the magistrates upon consent of the defendant, and if such consent is not given the case will be automatically transferred to the County Court for trial.

As to civil jurisdiction, the Legislature is empowered to provide that cases in which no more than $1,000 is involved may be initiated in the Magistrate's Court. If the case is not disposed of by settlement, default judgment or other disposition before trial the magistrate may try the case on consent of the parties, or, if such consent is not given, transfer it to the County Court for trial. The Legislature can reduce the $1,000 limitation to a smaller figure as it sees fit.

These powers in the Magistrate's Court will permit magistrates to continue to act, as they do today, as local arbiters, settling the small matters which do not require a full trial, to the satisfaction of the parties, and also providing for prompt action in minor criminal matters. The grant of judicial power to the magistrates has been made flexible to permit the Legislature to assess the work of the Magistrate's Court from time to time and to adapt the jurisdiction of the court to prevailing conditions. This is especially important since the magistrates are not required to be attorneys and will not function as full-time officials.

The jurisdiction which may be granted to the Magistrate's Court is designed to make possible the best sort of teamwork between that court and the County Court. This will insure that small civil and criminal cases will be handled expeditiously and effectively and that when trials are required, except where there is consent to trial before a magistrate, that the trial will be before a County Court judge who is, of course, required to be a member of the bar. The reduction in numbers of magistrates and the training required will all contribute toward the increase in stature of that court so that it can render the maximum service in each county.

(d) *Transition.* As has been noted, no present magistrates—Justices of the Peace, village Police Justices or city judges in cities who are not full-time judges—will be taken over as magistrates in the new system. All the posts created will be filled by election after the approval of the revised Judiciary Article by the people. Of course, present Magistrates and Justices will be logical candidates for the position, especially those who have been active Justices as compared with the great number who are inactive and seldom per-

form judicial functions. The terms of present Justices will not be continued after the effective date and all the judicial functions of those offices will, of course, terminate at that time. While this may seem to be an arbitrary treatment of the present incumbents of the offices of Justice of the Peace and village Police Justice, it may be pointed out that of the 3,048 Justices in office during the year 1955 less than 50 cases were handled in that year by each of 1,990 of the Justices, and, in fact, 749 Justices handled no cases at all. Obviously, those Justices who have been making a genuine contribution to the administration of justice will have a real opportunity to serve in the improved and strengthened Magistrate's Court provided for in the Commission's plan.

7. *The General Court of the City of New York*

(a) *Organization.* The General Court is conceived of in the Commission's plan as a trial court for New York City somewhat comparable to the County Court in counties outside the City. It will be organized on a city-wide basis but with a system of districts in order to provide for an allocation of judges of the court among the five counties in the City. The districts will be not larger than a county and may be smaller, perhaps, for example, present State senatorial districts. The court may be organized into two major divisions—a civil division to succeed the present City Court and Municipal Court of the City of New York, and a criminal division to succeed the present Court of Special Sessions and City Magistrate's Courts of the City of New York. As in the Supreme Court and the County Court outside New York City, there will be other divisions of the court created to deal with particular specialized matters as may be necessary. Some of these may be a small claims division, an arraignment part, and so on.

(b) *Composition.* As with the County Court the number of judges in each district of the General Court will be fixed by the Legislature. As to the method of selection of these judges three alternatives exist —all could be elected, all could be appointed, or the judges of the civil division could be elected and the judges of the criminal division could be appointed by the Mayor, thus preserving the methods of selection which are currently in effect in the courts which are replaced by the General Court. A detailed discussion of the difference of opinion within the Commission as to the best method of providing for the selection of judges for the General Court of the City of New York will be found at page 80 with three possible methods set forth.

All judges of the General Court will be subject to the restrictions, qualifications and other provisions which affect all judges in the new system. They will be prohibited from practicing law, must be members of the bar at least ten years, and must retire at the age of seventy. They will serve for terms of ten years' duration, and any judge of the court may be assigned to serve in any division as may be necessary.

(c) *Jurisdiction.* As has been indicated before, the General Court is a consolidation of four existing city-wide courts—the Court of Special Sessions and the City Magistrates' Courts, and the City Court and Municipal Court. Its jurisdiction will be somewhat the same as the jurisdiction now encompassed by those four courts except that matters affecting the family relationship or children which now find their way into those courts will, in the future, be dealt with in the Supreme Court. The General Court will handle all matters which arise within the City of New York which are not within the jurisdiction to be exercised by the Supreme Court. It will have jurisdiction over all criminal matters except those prosecuted by indictment. It will have civil jurisdiction over all matters involving less than $10,000 and the recovery of chattels to the same amount. It will also have jurisdiction over all landlord and tenant matters, including actions for the recovery of real property and the eviction of tenants, foreclosure of mechanics liens and liens on personal property. As will the County Court, it will have such equitable jurisdiction as may be provided by the Legislature, which the Commission's plan contemplates will be broad enough to permit full disposition of parties' rights involved in or issues raised in any case within the jurisdiction of the court. In addition, its power to grant judgment on a counterclaim will, as in the present City Court, be unlimited as to amount.

The Legislature is empowered to provide that the trial of misdemeanors or offenses of a grade less than misdemeanor may be by a judge without a jury or by a panel of three judges and that it may provide that the jury in any case may be composed of six or of twelve persons. This will permit the continuation of procedures now in effect in the present courts in the City if desirable.

(d) *Transition.* There are some problems in connection with the transition from the old to the new system in connection with the General Court. Most of them are the practical ones of merging four functioning, full-time courts with separate organizations and administrations into one. The Commission's plan is that all the judges and magistrates of the present City Court, Municipal Court, Court of Special Sessions and Magistrates' Courts will be transferred and become judges of the General Court of the City of New York at the transition date. If both the elective and appointive methods of selection of judges are carried on the judges of the two present civil courts would become the judges of the civil division, and the judges of the two present criminal courts would become judges of the criminal division. The creation of vacancies by the death, resignation, retirement or expiration of term of any judge would be filled in the same manner as the original method of selection of the incumbent ceasing to serve. The non-judicial personnel of the courts will, of course, be utilized in the General Court as may be found most desirable, and, obviously, specially skilled or trained personnel will be continued in an appropriate part of the court.

The physical aspects of a merger of courts of this magnitude are many. At the outset the General Court will necessarily carry on

its functions in separate court houses in the five counties of the City. In addition, a separate housing of the criminal and civil divisions will continue to a great extent. On the other hand, in the future the court may be more and more consolidated physically as well as jurisdictionally. For example, at present plans are under way for the construction of a single court house to house the Manhattan portions of both the City and Municipal Courts. This is presently planned to be erected directly across the street from the present Criminal Court Building. Obviously, this can be carried forward in the future with the view of providing, at the very least, consolidated physical facilities for the civil division of the General Court in close proximity to the criminal division. As plans for new court houses are developed in the future, these factors of court housing can be met in recognition of the creation of the new court system.

8. *Judges—Qualifications, restrictions, vacancies, removal, retirement, compensation, and temporary assignments*

As the foregoing sections have indicated, all the judges and magistrates of the courts in the Commission's plan will be elected by the voters of the area concerned, with but two exceptions. Judges of the Appellate Division will be designated from among the judges of the Supreme Court, and the Commission's recommendation may be that judges of the criminal division of the General Court of the City of New York will be appointed by the Mayor. Judges of the Court of Appeals and the Supreme Court will be elected for fourteen-year terms, judges of the County Court and General Court will serve for ten-year terms, and magistrates will have four-year terms. There are a number of other features of the Commission's plan which apply to judges generally which are discussed below.

(a) *Qualifications.* In order to qualify to serve as a judge of any court, membership in the bar of New York State for ten years is required. At present there is no requirement as to period of membership in the bar in order to be a judge of most of the courts. For example, in theory a lawyer may be elected to the Court of Appeals immediately upon his admission to the bar. On the other hand, some courts have requirements such as that of the Court of Special Sessions of the City of New York that to become a judge of that court one must have been a member of the bar for ten years. It seems sound as a general principle to make a reasonably long period at the bar a requirement for ascending the bench. Magistrates are not required to be lawyers, but a training program for them is required to be prescribed by the Legislature.

(b) *Restrictions.* The Commission's plan provides that no judge may practice law, hold other public office, be a candidate for an office other than judicial office without resigning his judicial office, or hold office in any political organization. In addition it is provided that judges may not engage in any other profession or business which interferes with full-time performance of judicial duties or would require frequent disqualification in cases. This would allow a judge to be an officer of a corporation, for example, as long as

he did such work as it required without interfering with his full-time judicial functions. The enforcement of this rule would be through the Judicial Conference or Court on the Judiciary.

Magistrates may not hold other public office, be a candidate for public office other than judicial, or hold office in any political organization. Magistrates may, of course, engage in other business and if lawyers may practice law but they are not permitted to have executive or legislative duties and powers. The purpose of this provision is to insure that magistrates will not be made members of Town Boards while serving as magistrates.

(c) *Vacancies.* Vacancies in the Court of Appeals, Supreme Court and County Court will be filled until elections much as they are today. If the vacancy occurs more than two months before an election it will be filled until the end of December after the election by appointment by the Governor and, if the Senate is in session, with its advice and consent. As to the General Court of the City of New York, such vacancies will instead be filled by appointment by the Mayor. Vacancies in the post of magistrate will be filled by appointment of Town Boards or the mayors of cities, or, if a magistrate district embraces more than one town or city, by the County Board of Supervisors.

(d) *Removal.* The removal of judges can, as now, be brought about by action of the Court on the Judiciary which is continued as in the present Constitution. In addition judges may, as now, be removed by impeachment. A third method of removing judges of the Court of Appeals and the Supreme Court—concurrent resolution of two-thirds of each House of the Legislature—has been continued although it seems that two methods (the Court on the Judiciary, and impeachment) might be sufficient.

(e) *Retirement.* Each judge and magistrate shall retire on December 31st of the year in which he reaches the age of seventy. However, any judge, if the need for his services and his physical and mental ability to serve are certified to by the Judicial Conference, may continue to serve for one-year terms, renewable until age seventy-five, at which time all service will cease.

This provision of the Commission's plan is designed to give the judicial system the benefit, in times of need, of continuing service by judges who are qualified to continue in service past the age of seventy. The present judicial anomaly—the Official Referee—has been eliminated. The concept that at the age of seventy a judge, although permitted to work, should be paid a reduced salary and given less than the complete powers of a judge, seemed to the Commission to be incongruous. It was concluded that if the need of the services of a retired judge exists, and if the Judicial Conference certifies as to his ability to perform the duties of office, he should serve with the ordinary powers and compensation of a judge of the court from which he retired, and with the title of retired judge. Such a retired judge may be assigned to serve by the Appellate Division of the Department of his residence, but his service will cease in any case at the age of seventy-five. The purpose of this final limit is to

prevent the judicial system from relying too heavily on the continuing service of retired judges as workload increases, and to encourage the more realistic solution of manpower needs by the creation of additional judgeships, if they are needed on a long-term basis.

(f) *Compensation.* The Commission's plan provides, as now, that the compensation of a judge, retired judge or magistrate may not be decreased during his term of office. The compensation will be in all cases fixed by the Legislature, and in this connection it may be pointed out that a proper pension plan for retired judges must still be worked out.

(g) *Temporary Assignments.* As is now the case with respect to the Supreme Court, judges of the Supreme Court, the County Court and the General Court may be temporarily assigned by the Appellate Division to serve in any county. Judges of the County Court and General Court may be assigned to serve in those courts in any county and in the Supreme Court in the Judicial Department of their residence.

No provision has been made in the Commission's plan for any separate election of specialist judges to serve in the special divisions of the courts which deal with what are ordinarily regarded as specialized matters. This applies particularly to the judges of the surrogates' divisions which will succeed to the work of the Surrogates' Courts, and the judges of the family part which will succeed to the work of, among others, the present Children's Courts and Domestic Relations Court of the City of New York. The Commission believes it to be a principle of sound judicial administration that specialization of judges is desirable when the volume of any one specialty justifies it. It believes, however, that that specialization is best developed by the use of judges of broad general qualifications who will acquire expertness when assigned to special work. Therefore, the decision of the Commission was that those special divisions of the courts were to be staffed by judges assigned by the Appellate Division from among the judges regularly elected to the court concerned. This was not a unanimous decision of the Commission, nor were the considerations as to different courts the same and further discussion of these matters will be found at pages 73-74.

The purpose of all the provisions in the Commission's plan is to provide the courts with a body of generally qualified judges whose ability and experience can be utilized in the divisions of the courts for which they are best suited. The Commission believes that this purpose can best be achieved through assignments made by the Appellate Division in those courts and areas where volume of cases and number of judges make specialization appropriate and advisable.

9. *Administration of the Courts*

The Commission's plan makes major changes in the organization and structure of the courts. The unified system created, in itself, would bring about a great improvement in the administration of justice, merely by its simplification of many phases of the courts

and their procedures. One of the most important features in the Commission's plan, however, is the vesting, by Constitutional provision, of general administrative power over the courts in the Judicial Conference. Through this the entire judiciary can be operated in the most effective manner, with the Judicial Conference, composed of judges, vested with the power and the responsibility for making the whole court system function to the best advantage.

There is no need to discuss again the advantages to the court system to be derived from a sound administrative organization—they have been discussed elsewhere in this and other Reports of the Commission, and indeed they are self-evident. The Commission, in recommending the creation of the Judicial Conference, did so with the conviction that such an organization would make a great contribution to the administration of our present court system, and with the further belief that the Conference would occupy a key position in the modern court system in the future.

In the Commission's plan it is provided that the Judicial Conference will have general administrative authority over all courts. It will have the powers and duties given it by the Legislature, and it will be empowered to delegate those powers as seems most desirable, subject to the provisions of law. The Conference will be composed of the Chief Judge of the Court of Appeals as Chairman, the four Presiding Judges of the Appellate Division and such other judges as may be provided by law. The Commission contemplates that the other judges might be representatives of the Supreme Court, as are now included in the Conference, and in addition representatives of the County and General Courts. In any case, the administration of the courts will be placed in the hands of the judges who should be most able and effective in carrying out the responsibilities vested in the Conference.

The Commission determined that a completely centralized administration of all the details of the courts in a State as populous and diverse as New York is neither practical nor desirable. This determination was reflected in the original conception of the Judicial Conference which was created with a State Administrator and with a Deputy Administrator for each of the four Departments. So too, Departmental Committees for court administration were provided for in each Department. This conception is carried out in the Commission's plan as it relates to court administration by placing complementing administrative powers in the Appellate Division in each Department. It will have the power to fix terms of all the courts in the Department and to assign judges to hold terms. Coordination of this power with that of the Judicial Conference will be insured by the membership on the Conference of the four Presiding Judges of the Appellate Division, and the continuing activity of the Departmental Committees and Deputy Administrators.

The present Constitution provides that the clerks of the Court of Appeals, Court of Claims, Appellate Divisions and so on are to be appointed by those courts. The Commission's plan makes no similar provision for the reason that it is contemplated that all

administrative matters in the system will be dealt with by legislation and in conjunction with the powers and duties of the Judicial Conference.

As has been stated, the essential that the judicial system of this State lacked, prior to the creation of the Judicial Conference, was the mechanism for a strong, state-wide administration of the courts. The creation of the Judicial Conference was the first step in bringing to the courts of this State the concept of a general administrative direction. The creation of a unified court system with the power to administer the courts vested by the Constitution in the Judicial Conference brings this essential element to completion. The courts of the State will thus be equipped with the power and the organization to administer themselves. This will insure that the most effective use of the judges will be made, the personnel will be systematically chosen, trained, compensated and employed, and all the details of administration will be organized with regard to the efficient operation of the entire judicial system.

10. *Procedure of the Courts*

The Commission's plan relating to court structure has been developed with the knowledge that the Commission's Advisory Committee on Practice and Procedure is presently engaged in a thorough study, revision and simplification of the present rules and statutes of practice and procedure. This revision will, of course, as it is developed, be adaptable to the court organization recommended by the Commission, with such variations between the courts and areas of the State as well as such general uniformity as may be desirable.

It is planned that the Legislature will continue to have its present power to regulate practice and procedure but that it may delegate such power to a court or to the Judicial Conference. In addition, individual courts are granted the power to make rules consistent with the general practice and procedure in order to preserve the power to make local rules which is now inherent in each court.

The Legislature will have power to delegate the problem of continuing revision and refinement of practice and procedure to a court or the Judicial Conference. The question will be presented, when any revised practice code is submitted to the Legislature for adoption, whether it will determine to delegate that work to the Judicial Conference in the future. The conclusion of the Commission's Advisory Committee as to what is desirable in this field will, of course, be available for guidance at that time.

11. *The Cost of the Courts*

The Commission's plan is that the cost of all the courts in the new system shall, in the first instance, be borne by the State and that the Legislature may provide for the reimbursement of an appropriate part of this expense by the counties, the City of New York or other political subdivisions. The purpose is to make possible for the first time in this State the preparation of a separate budget

for the entire judicial system so that a comprehensive plan of financing and expenditure can be put into effect.

While the details of financing have not yet been worked out, it is envisaged that the Judicial Conference would be charged with preparing the budget for all the courts and that the State would furnish the funds to execute the budget. The various counties and New York City would then be called upon to repay to the State a substantial part of the cost of financing the County Courts, the General Court and the Supreme Court, which cost would be about the same as the counties and the City pay today. The towns and cities would bear the cost of the Magistrate's Court. The State would bear the expense of the Court of Appeals and the Appellate Division and a portion of the expense of the Supreme Court, the County Court and the General Court.

Although in the last analysis it is the taxpayer who pays the cost of the courts, it is still of importance which political subdivision makes the expenditure, since an increase in a county's expense will necessitate either an increase in county revenues or a reduction in other expenditures. The adjustments which will have to be made in the financing of the new system are many. It is important, however, to keep in mind that the result of the new system will be a more effective, efficient and economic judicial structure. The public will receive better judicial service and each dollar spent will be used to the fullest advantage through a state-wide and integrated budget system. The legislation which will be needed to implement this provision, as well as all the legislation establishing numbers of judges and personnel, their salaries and court facilities generally, will be drafted before the final passage of the constitutional Article. Appropriate consideration must, of course, be given to the principles of local authority with respect to finances and other local matters.

It is the Commission's conviction that the improved financing of the court system that is made possible by the unified court system is one of the major benefits to be attained from a modern court structure. It will eliminate many present incongruities such as the disturbing spectacle of the county level judiciary waiting upon local appropriating authorities to plead for adequate salaries and court appropriations, and the equally disturbing situation of some of the courts in New York City which by mandate dictate their financial requests completely unconcerned with all the fiscal problems of the City government.

12. *The Transition to the New Courts*

The transition to the new system is provided for in the Commission's plan. Some of the features of that transition have been touched on in the sections relating to the individual courts. The courts to be continued are the Court of Appeals, Appellate Division, Supreme Court and County Court. Those to pass out of existence are the Court of Claims, Surrogates' Courts, Children's Courts, Court of General Sessions of the County of New York, the County

Court of Bronx, Kings, Queens and Richmond, the City Court, Municipal Court, Domestic Relations Court, Court of Special Sessions and City Magistrates' Courts of the City of New York, the District Court of Nassau County, Justice of the Peace Courts and all other local inferior courts. Their records, seals, papers, documents and pending cases will be disposed of by deposit in the offices of the appropriate county clerks or, in some cases, the Judicial Conference.

The proposed Judiciary Article provides for the manner in which appeals will be handled and that the judges and magistrates shall receive compensation during the transition period to be fixed by the Legislature, in no case less than they receive on the transition date. It also gives the Judicial Conference the very necessary power to take any action needed between the time the Article is approved by the voters in November and its effective date to insure that all the courts are organized and prepared to function at the transition date.

In addition, the office of Official Referee is abolished and those who are in office on the effective date will continue as such for the balance of the term for which they have been appointed or certified after which they will be subject to the provisions of the plan relating to retired judges.

The Commission's plan provides that the effective date of the proposed Judiciary Article shall be January 1, 1961—one year and two months after the earliest date upon which it could be approved by the voters, November 1959. The present Constitution states that an amendment to the Constitution becomes effective on the first day of January next after its approval by the people. For the purposes of the discussion here it is assumed that the Article will be passed by the Legislature at its 1957 and 1959 Sessions, approved by the people in November 1959 and thus ordinarily would become effective January 1, 1960.

Thus, application of the present constitutional provision as to effective date would leave a period of about seven or eight weeks between the time the Judiciary Article is approved and the time it becomes effective. The Commission believes that this brief period will be too short. Accordingly it is suggested that the effective date of the Article be postponed an additional year. Postponement will be a benefit in the following circumstances:

In counties where there will be a need for additional judges of the County Court, an election must be provided for to fill the vacancy. This, of course, is on the assumption that the Legislature will already have passed a bill fixing the number of judges of the County Court which would become effective only if the Article were approved by the people. Such an election can take place in November of 1960 and the courts can start operating at full strength on the effective date.

This need for an election will also exist in the case of magistrates, who are new officers, and will be accentuated because of the

education requirement in the proposed Constitution which must be complied with before a magistrate can assume office.

In addition, while all the legislation for the new court system can and undoubtedly will be drawn in advance of approval, the administrative features of the change-over may well require more than two months for accomplishment.

For these and other mechanical reasons, the Commission decided to allow an extra year before the new Article becomes effective. This was done by providing, as part of the amendment, that its effective date is January 1, 1961 and that it amends Section 1 of Article XIX, for the purposes of this amendment only. In this manner the preparations for the change can be made throughout 1960 and the new court system would start at full strength on the effective date.

Nevertheless the Commission will consider the possibility that the new system might have an effective date of January 1, 1960 for all the courts other than the County Court and Magistrate's Court where elections to vacancies will be needed. This would allow the benefits of the new system to be realized at the earliest possible date, particularly in New York City.