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Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Respondents-Cross-Appellants,

—against—

THE GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

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

Defendants-Appellants-Cross-Respondents.

BRIEF FOR ZACHARY W. CARTER, CHAIRMAN OF THE MAYOR'S ADVISORY COMMITTEE ON THE JUDICIARY FOR THE CITY OF NEW YORK, AS *AMICUS CURIAE*

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I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

Zachary W. Carter, in his capacity as Chairman of the Mayor's Advisory Committee on the Judiciary for the City of New York (the "Committee"), respectfully submits this brief as *amicus curiae*. This brief is submitted in opposition to the brief of Defendants-Appellants-Cross-Respondents New York State Senate, New York State Assembly and State of New York ("Defendants-Appellants"), as joined by Defendant-Respondent the Governor of the State of New York, and in support of the brief of Plaintiffs-Respondents-Cross-Appellants Hon. Susan Larabee, Hon. Michael Nenno, Hon. Patricia Nunez and Hon. Geoffrey Wright ("Plaintiffs-Respondents").

The Committee recruits, evaluates and nominates candidates for judicial appointments and reappointments by the Mayor of the City of New York to the Criminal Court, Family Court and Civil Court of the City of New York.[1] These Courts are among the busiest in the State: collectively

[1] Judges of the New York City Criminal Court and Family Court are appointed by the Mayor to 10-year terms. New York Const. Art. VI, § 13(a), 15(a). Judges of the New York City Civil Court are elected to 10-year terms; however, vacancies occurring otherwise than by expiration of a term are filled by Mayoral appointment for a one-year term. New York Const. Art. VI, § 15(a); Civil Court Act § 102-a(3). Pursuant to Section 4(a) of Executive Order 8 of the Mayor of the City of New York, dated March 4, 2008, the Mayor may not appoint a Judge unless nominated by the Committee, and may not reappoint an incumbent Judge unless recommended for reappointment by the Committee. Under Mayor Bloomberg's Administration, the Committee has nominated or

they include over twenty percent of the judges in the State judicial system, and represent over forty percent of the new cases filed annually in the trial Courts of the Unified Court System. [2] The judges of these courts render decisions of extraordinary consequence both to the interested parties and to the general public. Judges of the Criminal Court decide issues of pretrial release, evidentiary sufficiency, sentencing and the protection of victims and witnesses, while judges of the Family Court determine matters affecting child custody, the disposition of neglect and abuse allegations and the adjudication of juvenile offenses, all of which require the highest degree of legal acumen, experience and practiced judgment. [3]

An obvious source of judicial candidates "highly qualified" for appointment to the Criminal and Family Courts are attorneys who have enjoyed distinguished careers with the agency, government and institutional law offices that practice before those courts. Quite often the careers of these attorneys have been marked by promotions to supervisory, administrative

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recommended for appointment approximately 100 Judges to the Criminal Court; 35 Judges to the Family Court, and 34 Judges to the Civil Court.

[2] Figures based on New York State Unified Court System Filings in the Trial Courts from 1998 through 2008, and New York State Judicial System: Authorized Number of Judges, December 31, 2006 (excluding Town and Village Justice Courts), in *New York State Unified Court System 29th Annual Report of the Chief Administrator* (2006).

[3] With rare exceptions, judges appointed to the Civil Court by the Mayor are assigned to either the Criminal or Family Court.

and executive positions within those organizations. However, the experience of the Committee suggests that the dramatic gap between judicial salaries and the compensation paid to senior agency and government attorneys often presents an untenable choice for highly qualified practitioners, notwithstanding their demonstrably strong commitment to public service, because of competing obligations to their dependent families. This compensation disparity is the indisputable product of the Legislature's "linkage" of judicial compensation adjustments to Legislative pay raises and the Legislature's consequent failure to enact cost-of-living adjustments in judicial salaries over the past decade. During that period, the salaries of judges of the Unified Court System – including judges of the New York City Civil, Family and Criminal Courts – have decreased by approximately thirty percent relative to the cost of living.

As the First Department found below, the political artifice of linkage has frustrated the broad consensus among all critical actors that substantial salary increases for the judges of New York's Unified Court System are long overdue. *Larabee v. Governor*, 65 A.D.3d 74, 93-94 (1st Dep't 2009). Defendants concede as much. But in a prolonged exercise in brinkmanship, "the legislative branch, rather than being solely engaged in a legislative function, was using the Judiciary tactically in a political battle with the

[former] Governor . . . - making a judicial salary increase contingent upon its own success in achieving a legislative pay increase." *Id.* at 93.

While fair judicial compensation is at the heart of this matter, preservation of the Judiciary's independence in a system that honors the separation of powers is of equal moment. Under the New York Constitution, "the Judiciary was not intended to be subordinated to legislative whim on matters of compensation, notwithstanding the legal necessity that salary increases must be appropriated as part of the budgetary process. . ." *Larabee,* 65 A.D. 3d at 94. And in a system that permits its part-time legislators to earn outside income, including from the practice of law before the very judges whose compensation they control, the independence of the Judiciary is particularly vulnerable.

For these reasons and those more fully set forth below, we urge the Court to affirm the decision of the First Department finding the practice of "linkage" in violation of the New York Constitution and directing the Defendants-Appellants to proceed to adjust judicial compensation to reflect increases in the cost of living since 1998.

II. FACTUAL BACKGROUND

As noted above, the relevant facts in this case are remarkably undisputed. Judges in the State of New York last received a cost of living

salary adjustment in 1999. *See Larabee v. Governor*, 850 N.Y.S.2d 885, 886 (N.Y. Cty. 2008). Since that time, based solely on the national rate of inflation, it is estimated that the real value of judicial salaries has declined by approximately thirty percent. *See Larabee*, 65 A.D.3d at 77; *Larabee v. Governor*, 860 N.Y.S.2d 886, 890 (N.Y. Cty. 2008). Moreover, the disparity between current judicial salaries and the salaries paid to supervisors, managers and executives at public law offices engaged in practice before the Criminal and Family Courts has become dramatic. The pursuit of a judicial career – often an occasion for some reasonable level of financial sacrifice – has become for some a practical impossibility. Current judicial salaries do not permit many talented, experienced attorneys to maintain a standard living – a decent home, educational opportunities for their children and the prospect of a comfortable retirement – that the general public would expect and not begrudge. [4]

[4] The inflation adjusted salaries of judges of the New York City Civil Court, Criminal Court and Family Court may have decreased to an even greater degree than thirty percent, because these Judges must live in the City of New York. *See* New York Const. Art. IV, § 13(a) and 15(a). As the New York City Comptroller noted in 2006, "[s]ince October, 2001, consumer prices in the NYC metro area have increased about 30 percent faster than the national average. Except for medication and private transportation, prices in our region have increased more rapidly across the board, with the CPI for food consumed at home rising 40 percent faster than the national average. [T]he biggest factor behind New York's relative cost-of-living increase has been housing, the cost of which has grown by 22 percent since late 2001 . . ." *See* Economic Notes, v. XIC, n. 2 (Office of the New York City Comptroller, June 2006).

Defendant-Appellants concede, as they must, that an adjustment in judges' compensation is long overdue, and specifically acknowledge that establishing salary parity with Federal District Court judges is appropriate. *Larabee*, 850 N.Y.S.2d at 888. Defendants-Appellants concede, as well, that the drastic decline in real judicial salaries for New York State judges has caused, at a minimum, "widespread demoralization" in the Judiciary. *Larabee*, 860 N.Y.S.2d at 890.

The sole reason no adjustment in judicial salaries has occurred over the past ten years is because of "the Legislature's insistence on linking any judicial pay increase to a simultaneous legislative pay increase, with the result that if no legislative pay increase was implemented, judicial pay increases were likewise postponed." *Larabee,* 65 A.D. 3d at 82. "Defendants have essentially conceded linkage was the causative factor in this case." *Id* at 91.[5]

It is noteworthy that at least twenty-one States have decoupled judicial compensation from Legislative compensation decisions by creating special committees to make regular, necessary adjustments in judicial compensation. *See Judicial Compensation in New York: A National*

[5] The State Constitution treats Legislative and Judicial salaries as distinct in terms of the procedures and limitations governing any change in such compensation. *Compare* Const. Art. III § 6 with Art. VI § 25).

Perspective (National Center for State Courts, 2007) ("NCSC Report"), at R-408-9.

Comparative Compensation Since 1999

In 1999, New York was first among States nationally in nominal judicial compensation, and approximately 12th in inflation-adjusted judicial compensation.[6] Moreover, at that time New York judges' pay was commensurate with the compensation levels of Federal District Court judges and attorneys in senior attorney leadership positions in the public sector. *See* NCSC Report, at R-400; Reply Aff. of Thomas E. Bezanson, Ex. 1-2, at R-579-591. Today, however, not only have State judicial salaries declined by approximately thirty percent relative to the cost of living, but they have fallen well behind the salaries of (1) judges in other States, (2) Federal District Court judges, and (3) attorney positions in the State which the compensation of State judges previously equaled or exceeded. Specifically:

- Over the past 10 years, the judges of other states generally have had their salaries adjusted with inflation. *See* NCSC Report, at R-399-400. As a result, today, the salary of New York's judges has fallen to

[6] Nominal salary data for 1999 is from *Survey of Judicial Salaries*, National Center for State Courts (NCSC) (Fall 1999). Inflation-adjusted salary data for 1999 was computed from that nominal data on the basis of a formula set forth in the NCSC's October, 2002 *Survey of Judicial Salaries*, the earliest NCSC publication that could be located containing that formula.

12th among States in nominal terms, and 48th in inflation-adjusted terms. *See id.* at R-399. "New York represents one of the most extreme examples of judicial pay erosion that NCSC has observed over the past 33 years of studying state judicial compensation trends." *See id.* at R-413.

- New York State judges today earn almost $30,000 less than District Court judges in New York. *See* NCSC Report, at R-400.
- A wide array of State-funded attorney positions that, in 1999, paid far less than State judicial positions, today pay far more than State judicial positions.[7] In fact, New York judges today earn less than many of the non-judicial employees who work for them. *See* NCSC Report, at R-400.
- New York judges earn significantly less today than many attorneys serving in the non-profit sector in the State, such as the general

[7] Such positions include Consulting Clerk, Court of Appeals; Deputy Counsel, Department of Correctional Services; Deputy Commissioner and Counsel, Department of Tax and Finance; Counsel, New York State Police; Counsel, Office of Temporary and Disability Assistance; Assistant Attorney General, Office of the Attorney General; Special Assistant Attorney General, Medicaid Fraud Control Unit, Office of the Attorney Genearl; Deputy Attorney General, Medicaid Fraud Control Unit, Office of the Attorney General; Counsel, Governor's Office of Regulatory Reform; Counsel, Office of Child and Family Services; Capital Defender, Capitol Defender Office; Special Counsel, Department of Civil Service; Deputy Commissioner and Counsel, Office of General Services; Assistant Counsel, Office of the State Comptroller; Assistant Deputy Counsel, Office of the State Comptroller; Associate Counsel, Office of the State Comptroller; Counsel, State Department of Health; Assistant Counsel, State Department of Health; and Counsel, Department of Agriculture and Markets. *See* Reply Aff. of Thomas E. Bezanson, Ex. 1-2, at R-579-591.

counsel of the City University of New York (*see* NCSC Report, at R-392) and the deans of New York's two public law schools (*see id.* at R-401).

- Despite the recent downturn in law firm salaries, New York judges earn less than first year associates at many law firms, who typically have not yet been admitted to the Bar. *See* NCSC Report, at R-402.

The Committee's data confirms these State-wide trends. The salary for judges at the New York City Criminal Court and Civil Court is $125,600. The salary for judges at the New York City Family Court is $136,700. These salary levels have remained unchanged since 1999. In recruiting judges for these Courts from the public sector, the Committee traditionally solicits applications from senior attorneys at such offices as the five District Attorneys Offices within New York City; the Legal Aid Society, and the New York Corporation Counsel. Historically, the salaries of State judges have been commensurate with the salaries of the most senior attorneys at these offices, thus facilitating recruitment of judges from the senior ranks of those offices. Today, however, the salaries of judges of the New York City Civil Court, Criminal Court or Family Court before whom these attorneys appear are from $64,400 to $81,400 less than the salaries of the highest level supervisory positions at those offices; are tens of thousands

of dollars less than the salaries of mid-level supervising attorneys at those offices; and are on par with or barely exceed the salaries of junior supervisory attorneys at those offices.[8] This presents a significant recruitment challenge for the Committee. Given the age demographic of its candidate pool (minimum ten years admission to practice), a significant number of potential applicants are currently supporting or anticipate supporting children in college. Combined with other financial obligations, the severe reduction in compensation to a judicial salary is often unsustainable. In addition, the Judiciary's ability to recruit judges from a diversity of racial, cultural, socio-economic, professional and academic backgrounds presents a greater challenge.

III. LINKAGE AND THE RESULTING DIMINISHMENT OF JUDICIAL COMPENSATION VIOLATE THE SEPARATION OF POWERS DOCTRINE

This Court has "consistently recognized that [the] principle of separation of powers among the three branches is included by implication in the pattern of government adopted by the State of New York." *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344, 355 (1985). The principle of separation of powers is intended

[8] The salaries for supervisory attorneys at the New York Corporation Counsel range from $118,951 to $205,180; at the District Attorneys Offices in New York City range from approximately $100,000 to $190,000; and at the Legal Aid Society range from $173,000 to $207,000. Detailed salary data for these offices is set forth in Appendix A.

to preserve "a system in which governmental powers are distributed among three co-ordinate and coequal branches. . . Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when any one of the coordinate branches absorbs or interferes with another." *Matter of County of Oneida v. Berle*, 49 N.Y.2d 515, 522 (1980).

The principle of separation of powers prevents any one branch from (1) arrogating excessive authority to itself or (2) interfering with the equality, independence or Constitutional prerogatives of another branch.

> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others-independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. . . . and 'should be free from the remotest influence, direct or indirect, of either of the other two powers.'"

O'Donoghue v. U.S., 289 U.S. 516, 530 (1933). *See also Loving v. U.S.*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair

another in the performance of its constitutional duties."); *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282 (1898) ("The safety of free government rests upon the independence of each branch and the even balance of power between the three. Unite any two of them and they will absorb the third with absolute power as a result. Weaken any one of them by making it unduly dependent upon another and a tendency toward the same evil follows. . . It is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others.")

The principle of separation of powers "especially" protects the judicial branch of government, as the branch most easily undermined by the others. *O'Donoghue*, 289 U.S. at 531. *See also* Federalist No. 78 ("The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. . . . [T]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.")

Thus, "[e]ven relatively minor and remote threats to impartial [judicial] decisionmaking should not survive constitutional objection if they

do not enhance substantial government interests." Irving R. Kaufman, *The Essence of Judicial Independence*, 80 Colum. L. Rev. 671, 697 (1980) ("Kaufman"). *See also Burby*, 155 N.Y. at 282 ("Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power. Not a contract is made except in reliance upon their ability to afford redress if it is violated. Men part with property upon the promise of their fellows, walk the streets by day and sleep in peace at night in the confidence that the silent and unseen power of the judiciary is always ready to protect their rights. Any legislation that hampers judicial action or interferes with the discharge of judicial functions is in conflict with the principles of the Constitution.")

This case involves a grave violation of the principle of separation of powers. Linkage, and the resulting approximately thirty percent reduction in judges' inflation-adjusted salaries, undermine the judicial branch as a separate, equal and independent branch of government. Moreover, linkage has no actual, or purported, justification in public policy terms – rather, it uses the Judiciary's legitimate funding needs to advance legislators' self-serving political and monetary interests.

Linkage and the resulting diminishment in judicial salaries violate the principle of separation of powers in at least three specific ways. *First*, linkage empowers the Legislature to withhold necessary funds from the Judiciary for no policy reason. Linkage thereby (1) undermines the Judiciary as a coequal, self-functioning branch of government by forcing the Judiciary into a supplicant's position in which it is dependent, financially, on Legislative whim; and (2) treats the Judiciary's funding needs as having no weight independent of legislators' interests, thus diminishing the Judiciary's stature as a branch of government with authority and dignity commensurate with that of the Legislature. *See Kelch v. Town Bd. of Davenport*, 36 A.D.3d 1110, 1111-12 (3d Dep't 2007) (where town legislature set meager salary – subject to increase – for local justice, separation of powers violation was presented, as "legislation cannot be sustained where 'the independence of the judiciary and the freedom of the law will depend upon the generosity of the legislature.'")

Second, linkage opens the door to Legislative attempts to manipulate real judicial compensation to influence the outcomes of cases – thus at a minimum creating an appearance of a conflict inconsistent with judicial independence. *See Catanise v. Town of Fayatte*, 148 A.D.2d 210, 212-13 (4th Dep't 1989) (reduction of the salary of a town justice during justice's

term in office violated "fundamental principles of separation of powers," as "[t]he mere existence of the power to interfere with or to influence the exercise of judicial functions contravenes the fundamental principles of separation of powers embodied in our State Constitution and cannot be sustained."); *Kelch*, 36 A.D.3d at 1112 ("[a]n appearance of impropriety, if not an actual concern, would arise that the scales of justice could be tipped by political influence."); *Roe III v. Bd. of Trustees of the Village of Bellport*, 65 A.D.3d 1211 (2d Dep't 2009) (same; citing *Catanise* and *Kelch*). *See also* Kaufman at 691 ("The constitutional power to decide cases fairly in accordance with law can be exercised effectively only if the deliberative process of the courts is free from undue interference by the President or Congress.") Much more than an appearance of a conflict is presented when the same individuals who, as legislators, hold judges' salaries hostage, appear as advocates before those judges.

Third, the approximately thirty percent reduction in inflation-adjusted judicial salaries that linkage has caused significantly shrinks the pool of highly qualified applicants for the bench. That, in turn, is threatening the quality and diversity of the Judiciary. A threat to the Judiciary's ability to function at an acceptable level of quality has been held to violate the principles of separation of powers. Thus, in *N.Y. Cty. Lawyers Ass'n v.*

State, 763 N.Y.S.2d 397 (N.Y. Cty. 2003), the Court found that a 17-year history of grossly inadequate salaries for assigned counsel constituted a separation of powers violation because it threatened the courts' ability to function. The Court granted a permanent injunction increasing those salaries. As the Court had already noted in granting a preliminary injunction in that case:

> "This court, as any court of competent jurisdiction, is vested under the inherent powers doctrine 'with all powers reasonably required to enable it to: perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective . . . .'. . . Accordingly, when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the Constitution by order of a mandatory preliminary injunction."

N.Y. Cty. Lawyers Ass'n v. State, 745 N.Y.S.2d 376, 436 (N.Y.Cty. 2002).

Twenty-one States have established special committees to determine judicial compensation outside of the normal legislative process. This Court is urged to adopt this reform.

Defendants-Appellants have raised no objections on the merits to such a judicial compensation committee, nor could they. Instead, Defendants-Appellants raise deeply flawed notions of Legislative privilege to suggest, incorrectly, that this Court may not decide the merits of the separation of

powers issue in this case. Defendants-Appellants' position is without support in the applicable law. It is also is not reconcilable with the fact that this action was one of last resort. The former Chief Judge of this Court and other judges over many years went to great lengths in attempting to persuade the Legislature to address the judicial compensation crisis. *See, e.g., Statement of Chief Judge Kaye*, Apr. 9, 2007, at R-212-222. The Legislature's refusal to heed those pleas necessitated this legal action. Defendants-Appellants cannot now argue that the Court is powerless to grant a remedy.

Each of Defendants-Appellants' arguments regarding the separation of powers issue in this case is a misguided attempt to prevent this Court from addressing that issue on its merits. *First*, Defendants-Appellants argue that linkage is not a reviewable "decision," but merely a "legislative process" that is "intended to resolve conflicting priorities and agendas through political compromise." Def. Br. at 3, 40. They contend that this "legislative process" does not permit judges to "fix their own salaries." Def. Br. at 16. This argument conflicts with Defendants-Appellants' failure in the lower courts to submit any evidence denying the existence of the linkage policy. Defendants- Appellants' characterization of that policy as part of a "legislative process" cannot shield it from review. *People v. Allen*, 301 N.Y.

287, 290 (1950) ("It is axiomatic that the Legislature in performing its law-making function may not enlarge upon or abridge the Constitution.") This lawsuit is a straightforward challenge to that policy and its consequences pursuant to the State Constitution – not an attempt by judges to "fix their own salaries."

Second, Defendants-Appellants contend that the separation of powers doctrine does not apply here because, Defendants-Appellants argue, the Compensation Clause is the exclusive standard by which a constitutional challenge relating to judicial compensation may be determined. Def. Br. at 41-44. This argument has no support in the text of the State Constitution nor in any case cited by Defendants-Appellants, nor do Defendants-Appellants cite any approach to Constitutional interpretation that would support their theory. To the contrary, New York Courts often have looked to the doctrine of separation of powers in adjudicating cases involving judicial compensation. Such cases illustrate that the Compensation Clause does not limit the separation of powers doctrine – rather, it informs it, specifically by signifying a concern for a potential threat to judicial independence from, as in this case, a Legislative abuse of power with respect to judicial compensation. *See Burby*, 155 N.Y. 270; *Kelch*, 36 A.D.3d 1110; *Catanise*, 148 A.D.2d 210.

Third, Defendants-Appellants argue that this case is immune from judicial review because it relates to Legislative "budgeting" decisions. Def. Br. at 44-48. This case does not challenge a Legislative "budget," however, but rather challenges a Legislative policy, linkage, that has prevented cost of living adjustments in judicial salaries. *See N.Y. Cty. Lawyers Ass'n*, 196 Misc.2d 761. Defendants-Appellants have neither argued nor presented evidence suggesting that such cost of living adjustments were denied due to financial constraints in a budgeting process. Defendants-Appellants' reliance on *Urban Justice Center v. Silver*, 66 A.D.3d 567 (1st Dep't 2009) does not bolster their argument. In *Urban Justice Center*, the Court dismissed a challenge to certain internal "rules and practices" of the Legislature that, the Court determined, did not violate any Constitutional doctrine. The Court did not hold that a Legislative policy that violated the principle of separation of powers could be immunized from judicial review on the ground that it was related to funding.[9]

Fourth, Defendants-Appellants argue that any determination that linkage is unconstitutional would be "unworkable in practice," because it would "require the Legislature to consider the Judiciary's budgetary requests

[9] Defendants-Appellants' citation to *Campaign for Fiscal Equity v. State of New York*, 8 N.Y.3d 14 (2006) also is far off point, as the claims in *Campaign* were not based on the separation of powers doctrine.

in isolation from the needs of any other part of State government." Def. Br. 53, 56-57. This argument is belied by, among other things, the Record evidence that at least twenty-one States do exactly that, specifically by using compensation commissions to set judicial salaries in a mechanical, non-politicized manner. *See* NCSC Report, at R-408-9.

Fifth, Defendants-Appellants contend that Plaintiffs-Respondents have not shown that linkage has impaired the Judiciary functionally. Def. Br. at 59. However, a separation of powers violation need not cause an operational impairment to the aggrieved branch in order to be justiciable; to the contrary, the separation of powers doctrine is intended to prevent such impairments. *See N.Y. Cty. Lawyers Ass'n*, 294 A.D.2d 69, 74, 77 (1st Dep't 2002) (plaintiffs' claim showed a "prospective injury. We consider this particularly appropriate since '[t]he primary purpose of declaratory judgments is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary.' . . . [Thus], "the action will not entail proof of past cases in which a NYCLA member was unable to provide effective assistance to a client."); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977) (separation of powers violation may occur where the "potential for disruption is present"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("But the doctrine of separation of powers is

a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.") (emphasis in original); *Benjamin v. Jacobson*, 172 F.3d 144, 180 (2d Cir. 1999) (Calabresi, concurring) ("[W]hen great structural boundaries are at stake, the Court has repeatedly made clear that how something is done . . . can be at least as important as the result that is achieved.") In any event, as set forth throughout this brief, this case involves an actual erosion of the independence of the judicial branch on many levels, and therefore is justiciable even by Defendants-Appellants' standard. [10]

Defendants-Appellants also contend that any separation of powers analysis in this case is barred on the basis of the Speech and Debate Clause of the State Constitution. However, the Speech and Debate Clause in fact has no relevance in this case. The Speech and Debate Clause provides that "[f]or any speech or debate in either house of the legislature, the members

[10] Defendants-Appellants in fact "conceded that the independence of the Judiciary as a discrete branch of government could be impaired, and the doctrine of separation of powers would then be violated, by inadequate judicial compensation, although it was claimed that the present salary levels did not implicate such constitutional concerns." *Larabee*, 65 A.D.3d at 81.

shall not be questioned in any other place." *See* State Const. Art. III, § 11. The Speech and Debate Clause confers immunity on legislators for "legislative acts" such as "votes and speeches on the floor of the House as well as the underlying motivations for these activities." *People v. Ohrenstein*, 77 N.Y.2d 38, 54 (1990). The purpose of that immunity "is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves." *Powell v. McCormack*, 395 U.S. 486, 505 (1969). Thus, even where individual Congressmen were dismissed from a case on the basis of the federal Speech and Debate Clause, petitioners still were "entitled to maintain their action against House employees and to judicial review of the propriety of the [legislative act in question]." *Id.* at 506.

The instant case is not brought against any individual members of the Legislature, nor does it require inquiry into votes, speeches, similar activities, or the motives for such activities. It is a straightforward constitutional challenge to a Legislative policy, linkage, the existence and nature of which Defendants-Appellants did not dispute in the courts below.

The lower courts granted summary judgment to Plaintiffs-Respondents, thus making unnecessary any discovery that possibly could raise concerns under the Speech and Debate Clause.

Moreover, Defendants-Appellants do not cite any case holding that the Speech and Debate Clause prevents judicial review where, as here, the case involves a separation of powers question relating to an encroachment on the judicial branch. To the contrary, judicial review is essential in such a case because the judicial branch otherwise would be unable to protect itself from unconstitutional infringements on its independence. *See McCoy v. Mayor*, 342 N.Y.S.2d 83, 85 (N.Y.Cty. 1973) ("In accord with the doctrine of the Separation of Powers, the Judiciary is and shall remain a separate, independent and co-equal branch of government with the Executive and Legislative. The Judiciary has the right and power to protect itself from the impairment of its functions and it has the co-ordinate authority to make full use of its jurisdiction.")

IV. LINKAGE AND THE RESULTING DIMINISHMENT OF JUDICIAL COMPENSATION VIOLATE THE COMPENSATION CLAUSE

The Compensation Clause of the State Constitution provides that judges' compensation "shall be established by law and shall not be diminished during the term of office for which he or she was elected or

appointed." New York Const. Art. VI, § 25(a). The Compensation Clause parallels and was modeled after the similar clause found in the Federal Constitution. *See* U.S. Const. Art. III, § 1. The purpose of the Compensation Clause is to protect judicial independence by safeguarding judges against the potential diminishment of their compensation and preventing judges from becoming financially dependent on Legislative whim. *See* Declaration of Independence ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.")

> The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government. . . When the Framers met in Philadelphia in 1787 to draft our organic law, they made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution and separation.

U.S. v. Will, 449 U.S. 200, 217-19 (1980). *See also* Federalist No. 79 ("[W]e can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."); *In re Judges of the Court of Appeals*, 8 Va. 135 (Va. 1788) ("For

vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper. * * *'")

This case presents a violation of the Compensation Clause for at least two reasons. *First*, the Compensation Clause provides that judicial compensation shall not "be diminished." That passive tense language does not distinguish between different causes of diminishment. Here, judges in effect are earning approximately seventy cents today for every dollar they earned ten years ago. On its face, that is a prohibited diminishment in judicial compensation regardless of the reason it has occurred. [11]

Second, this diminishment in judicial compensation violates the intent of the Compensation Clause because of the manner in which that diminishment has occurred. Specifically, that diminishment has occurred as

[11] The Compensation Clause was promulgated in substantially its current form in 1925, and then amended to precisely its current form in 1961. Dictionaries in publication in those years indicate that the word "compensation" was understood in terms of actual value, and that the term the word "diminish" was understood to refer to any form of impairment. *See New Universal Graphic Dictionary of the English Language* (The John C. Winston Company 1925) ("compensation" defined as "amends; recompense; a set-off. *Syn.* remuneration, requital, reward."; "recompense" defined as "an equivalent given in return" or "to give back as an equivalent"; "diminish" defined as "to make less; reduce in bulk or amount; weaken; impair; detract from. . . ."; "impair" defined as "to make worse in quantity, value, excellence, or strength."). *See also The American College Dictionary* (Random House 1959) ("compensate" defined as, among other things, "to change the gold content (of the monetary unit) to counterbalance price fluctuations and to thereby stabilize its purchasing power."; "diminish" defined as "to make, or cause to seem, smaller; lessen; reduce.")

a result of a Legislative policy, linkage, that in effect holds the livelihood of judges hostage to Legislative whim, thereby undermining judicial independence in the very manner the Compensation Clause is intended to prevent. *See Burby*, 155 N.Y. at 280-1 ("When the main purpose of a statute, or of part of a statute, is to evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise the Constitution would furnish frail protection to the citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands.")

The Courts below erred in finding that the Compensation Clause did not apply in this case. In affirming the trial court's decision regarding this issue, the First Department held that the "operative consideration" was whether the legislative act in question diminished judicial compensation by "reducing wages or benefits in any direct fashion." *Larabee*, 65 A.D.3d at 86. The First Department held that that standard was not met because judicial compensation had diminished as "a consequence of inflation that affects other persons in addition to plaintiffs." *Id.* at 87. The First Department's holding was in error for three reasons. *First*, the Court's analysis incorrectly treated inflation as the relevant, causative factor. As the

First Department correctly recognized elsewhere in its decision, "linkage was the causative factor in this case." *Id.* at 91. "It is because of linkage that judges' salaries are not receiving cost of living adjustments and therefore are diminishing relative to the cost of living. *Id.*

Second, the cases the First Department relied upon do not support the Court's description of an "operative consideration" that asks only whether a "direct" reduction in judges' salaries has taken place. To the contrary, collectively these cases confirm that the Compensation Clause prohibits policies, such as linkage, that target the judicial branch and that directly or indirectly diminish judicial compensation.

Thus, the First Department erred in reading *Black v. Graves*, 257 A.D. 176 (3d Dep't 1939), *aff'd* 281 N.Y. 792 (1939) to stand for the proposition that the Compensation Clause was not violated unless a "targeted diminishment of judicial compensation" had taken place. *Larabee*, 65 A.D.3d at 86. To the contrary, *Black*'s holding was that a broad, non-discriminatory tax was not unconstitutional as applied to judges, because the Compensation Clause was not "intended as a limitation on the taxing power of the State over its residents." *Black*, 257 A.D.2d at 181. Unlike *Black*, this case (1) does not involve taxation and (2) involves a policy that targets the judicial branch, rather than a broad, non-discriminatory policy.

The First Department also relied on *Atkins v. U.S.*, 556 F.2d 1028, 1054 (Ct. Cl. 1977), suggesting that *Atkins* rejected an argument that "the protections of the Compensation Clause are necessarily invoked when judicial salaries lose real value in the face of substantial inflation." *Larabee*, 65 A.D.3d at 87. In fact, however, *Atkins* noted that the Compensation Clause may prohibit the diminishment of judicial salaries due to inflation, if such diminution results from a policy that is "of a character discriminatory against judges" and that works "in a manner to attack their independence as judges." *Atkins*, 556 F.2d at 1054.

The First Department also cited *U.S. v. Hatter*, 532 U.S. 557 (2001), concluding that *Hatter* "drew a sharp distinction between an affirmative legislative reduction of salary – an unconstitutional exercise of power – and indirect effects on judicial salaries that are not unique to, or targeted at, the Judiciary." *Larabee*, 65 A.D.3d at 87. Insofar as this Court considers *Hatter* relevant to this case, *Hatter* in fact should be understood to support Plaintiffs-Respondents' position. *Hatter* held, among other things, that a Social Security tax targeted at judges – like the linkage policy targeted at judges that is at issue in this case – violated the Compensation Clause because, in effect, it diminished judges' compensation. *Hatter* recognized that the Compensation Clause "offers protections that extend beyond a

legislative effort directly to diminish a judge's pay, say, by ordering a lower salary. . . Otherwise a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect." *Hatter*, 532 U.S. at 569. *Hatter* held that while, in general, "[t]here is no good reason why a judge should not share the tax burdens borne by all citizens," the discriminatory tax at issue was:

> "a law that is special – in its manner of singling out judges for disadvantageous treatment, in its justification as necessary to offset advantages related to constitutionally protected features of the judicial office, and in the degree of permissible legislative discretion that would have to underlie any determination that the legislation has "equalized" rather than gone too far. For these reasons the law before us is very different from [a] 'non-discriminatory' tax . . . Were the Compensation Clause to permit Congress to enact a discriminatory law with these features, it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees-characteristics which, as we have said, see supra, at 1791, the public needs to secure that judicial independence upon which its rights depend."

Id. at 576.

Hatter further held that the effect of such a policy, not its motive, was the relevant test under the Compensation Clause: "If the Compensation Clause is to offer meaningful protection . . . we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the

Judiciary." *Id.* at 577. Under *Hatter*, linkage violates the Compensation Clause because, regardless of the Legislature's subjective intent, linkage specifically targets the judicial branch and causes judges' inflation adjusted salaries to diminish.

Third, the First Department expressed concern that ruling in the judges' favor on the basis of the Compensation Clause would suggest that any diminishment, however small, in judges' compensation as a result of inflation would violate the Compensation Clause. *Larabee*, 65 A.D.3d at 86. However, such concerns should not prevent this Court from upholding Constitutional principle in this case, where judges' salaries have been diminishing for over ten years and have lost approximately thirty percent of their value. *See Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 699-700 (1970) (Harlan, concurring) ("It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without a constitutional toehold.")

In addition, even if a decision in Plaintiffs-Respondents' favor is read to require frequent adjustments in judicial compensation, that result would be both workable and appropriate. In practical terms, it would require the Legislature to establish a committee – as many other States already have

done in light of constitutional and policy concerns similar to those at issue in this case – to adjust judges' salaries regularly and on a nonpolitical basis. Such a committee, as noted, should be deemed constitutionally required in New York so long as the State's part-time legislators reserve the right to appear as advocates before judges whose compensation, absent such a committee, those legislators to any degree control.

V. CONCLUSION

For the reasons stated herein, it is respectfully requested that this Court affirm the lower courts' orders granting summary judgment to Plaintiffs-Respondents; grant the further relief sought by Plaintiffs-Respondents in their cross-appeal, and deny the relief sought by Defendants-Appellants in their appeal.

Dated: November 25, 2009

Respectfully submitted,

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APPENDIX A*

SALARIES FOR OFFICE OF CORPORATE COUNSEL

Position	Salary	Comparison to Salary Of Civil Court Judge ($125,600)
Corporate Counsel	$205,180	+ $79,580
Executive	$190,953	+ $65,353
Division Chief	$158,776	+ $33,176
Deputy Chief	$138,539	+ $12,939
Borough Chief	$129,295	+ $3,695
Deputy Borough Chief	$118,951	- $6,649

* Salary information was provided by each respective office in November, 2009.

SALARIES FOR OFFICE OF NEW YORK COUNTY DISTRICT ATTORNEY

Position	Salary	Comparison to Salary Of Criminal Court Judge ($125,600)
District Attorney	$190,000	+ $64,400
Senior staff positions including Special Narcotics Prosecutor; Chief Assistant District Attorney; Chief of Trial Division; Counsel to District Attorney; Chief of Investigations Division, and Executive Assistant District Attorney	Highest salary among such positions: $185,000 Lowest salary among such positions: $175,000	Highest salary among such positions: + $59,400 Lowest salary among such positions: + $49,400
Bureau Chiefs	High: $179,500 Low: $125,000	High: + $53,900 Low: - $600
Unit Chiefs	High: $173,000 Low: $106,500	High: $47,400 Low: - $19,100
Deputy Bureau Chiefs	High: $157,250 Low: $89,000	High: $31,650 Low: - $36,600
Deputy Unit Chiefs	High: $114,500 Low: $91,500	High: - $11,100 Low: - $34,100

SALARIES FOR OFFICE OF QUEENS COUNTY DISTRICT ATTORNEY

Position	Salary	Comparison to Salary Of Criminal Court Judge ($125,600)
District Attorney	$190,000	+ $64,400
Senior staff positions including Chief Assistant District Attorney; Executive Assistant District Attorney; Deputy Executive Assistant District Attorney, and Bureau Chief	Highest salary among such positions: $189,280 Lowest salary among such positions: $157,914	Highest salary among such positions: + $63,680 Lowest salary among such positions: + $32,314
Deputy Chiefs	High: $141,641 Low: $132,496	High: + $16,041 Low: + $6,896
Unit Chiefs and Supervisory Assistant District Attorneys	High: $132,153 Low: $105,144	High: + $6,553 Low: - $20,456
Senior Assistant District Attorneys	High: $131,955 Low: $97,864	High: + $6,355 Low: - $27,736

SALARIES FOR OFFICE OF KINGS COUNTY DISTRICT ATTORNEY

Position	Salary	Comparison to Salary Of Criminal Court Judge ($125,600)
District Attorney	$190,000	+ $64,400
Top management positions including Chief Assistant; First Assistant; Counsel to the District Attorney; Chief of the Rackets Division, and Confidential Assistant	High: $184,800 Low: $180,600	High: + $59,200 Low: + $55,000
Deputy District Attorney	$158,900 (average salary for this position)	+ $33,300
Chief	$150,250 (average salary for this position)	+ $24,650
Executive Assistant District Attorney	$143,900 (average salary for this position)	+ $18,300
Unit Chief	$109,500 (average salary for this position)	- $16,100
First Deputy Bureau Chief	$108,360 (average salary for this position)	- $17,240

SALARIES FOR OFFICE OF KINGS COUNTY DISTRICT ATTORNEY, CONTINUED

Position	Salary	Comparison to Salary Of Criminal Court Judge ($125,600)
Counsel	$107,150 (average salary for this position)	- $18,450
Deputy Bureau Chief	$106,770 (average salary for this position)	- $18,830

SALARIES FOR LEGAL AID SOCIETY OF NEW YORK

Position	Salary	Comparison to Salary Of Criminal Court Judge ($125,600)
Salaries of senior managerial staff	High: $207,000 Low: $173,000	High: $81,400 Low: $47,400

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

Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Respondents-Appellants,

—against—

THE GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

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

Defendants-Appellants-Respondents.

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

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November 24, 2009

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INTEREST OF AMICUS CURIAE

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

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

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

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

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

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

532 U.S. at 577.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. DEFENDANTS HAVE VIOLATED THE SEPARATION OF POWERS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

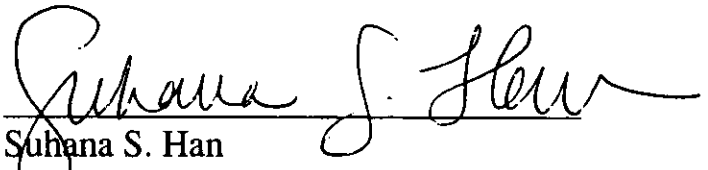
In the words of John Marshall, the "greatest scourge . . . ever inflicted . . . was an ignorant, a corrupt, or a dependent Judiciary." PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, at 616 (1830). New York's Constitution protects the citizens of New York from that scourge by ensuring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

CONCLUSION

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

Dated: New York, New York
November 24, 2009

Respectfully submitted,



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To be Argued by:
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TIME REQUESTED: 30 MINUTES

Court of Appeals

STATE OF NEW YORK

THE CHIEF JUDGE OF THE STATE OF NEW YORK and
THE NEW YORK STATE UNIFIED COURT SYSTEM,

Appellants-Respondents,

- against -

THE GOVERNOR OF THE STATE OF NEW YORK,

Respondent-Defendant,

THE SPEAKER OF THE NEW YORK STATE ASSEMBLY,
THE NEW YORK STATE ASSEMBLY, THE TEMPORARY PRESIDENT
OF THE NEW YORK STATE SENATE, THE NEW YORK STATE SENATE,
and THE STATE OF NEW YORK,

Respondents-Appellants.

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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New York County
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REPLY BRIEF FOR DEFENDANTS-RESPONDENTS-APPELLANTS

Defendants-Respondents-Appellants the Speaker of the New York State Assembly, the New York State Assembly, the Temporary President of the New York State Senate, the New York State Senate, and the State of New York ("Defendants-Appellants," and collectively with the Governor, "Defendants") submit this reply brief in support of their appeal from the

order of the Appellate Division, First Department, entered on September 15, 2009, to the extent it affirmed the order of the Supreme Court, New York County, granting summary judgment to Plaintiffs on their "linkage" cause of action.

Almost all of the arguments made in Plaintiffs' opposition have been fully answered in the four briefs already filed by Defendants in this case or the companion cases of *Larabee v. Governor* and *Maron v. Silver.* We will not burden the Court by repeating those answers again here. Instead, we respond below only to the most significant contentions in Plaintiffs' opposition.

PRELIMINARY STATEMENT

In response to our showing that the Appellate Division's order finding a "linkage" violation cannot be sustained, Plaintiffs offer only improbable generalizations and pejorative characterizations of Defendants, but have almost nothing to say about the express Constitutional provisions that govern this appeal. Plaintiffs contend, for example, that Defendants have (i) "subordinated" and "subjugated" the Judiciary; (ii) violated some imaginary "discrimination" principle against judges by declining to adopt a pay raise for all State officers; (iii) deprived judges of their "insulation" from politics; and (iv) had the temerity to deny that the Constitution guarantees judges

"adequate" compensation. Yet Plaintiffs never cite any provision in the Constitution supposedly creating any such rights or guarantee, or otherwise adopting the constitutional standards they ask this Court to apply.

Plaintiffs then attribute to Defendants a list of horribles, none of which has ever happened. They complain, for example, that, under our reading of the Constitution, Defendants have the power to fix the salary of an incoming judge at any level, "even $1"; that "legislative and executive exercises of plenary powers" are beyond judicial review; and that the Judiciary would be powerless to remedy a refusal by the political branches to fund the courts at any level.

Even as rhetoric, Plaintiffs' response is woefully inadequate. The current annual compensation of Supreme Court justices is $146,700—*i.e.*, a base salary of $136,700, *see* Judiciary Law § 221-b, plus a $10,000 allowance for expenses authorized by law and set by the Chief Judge—not including pension, medical and other benefits. Those levels of compensation are many multiples of the annual income earned by most New Yorkers. Nor do most New Yorkers enjoy a constitutional guarantee that their job cannot be eliminated or their annual compensation reduced, a guarantee that is especially significant in an economy where many citizens (and lawyers) are concerned about having any employment or income at all.

Far from refusing to fund the courts at any level, the Legislature and the Governor approved the most recent budget for the Judiciary in the amount of some $2.5 billion.

The history of our State shows that, even during deeply troubled times such as the Great Depression, the Legislature and the Governor have *never* fixed the compensation of any incoming judge at "even $1," and have *never* refused to fund the Judiciary. It is highly unlikely that those fantastical events will ever happen, but if they do, there will be time enough then to consider whether the Constitution provides a judicial remedy or instead leaves it up to the voters to replace an irresponsible government.

Nor do Defendants contend that "legislative and executive exercises of plenary powers" are beyond judicial review. Our position is that judicial review is confined to legislative enactments, not legislative motives. This case does not involve any "exercise of plenary powers"—quite the opposite, since the Legislature and the Governor never agreed on an amendment to Judiciary Law Article 7-B and left judicial compensation unchanged. The lower courts subjected that "inaction" to judicial review, by concluding that nothing in the Constitution required the Legislature or the Governor to amend Judiciary Law Article 7-B to adjust judicial compensation to account for inflation. Then, after having concluded that the legislative inaction here

presented no substantive constitutional issue whatever, the lower courts invented the doctrine of "linkage," and held that the motivation that supposedly led the political branches *not* to violate the Constitution by leaving the Judiciary Law unamended breached a hitherto unknown constitutional standard.

Not only is Plaintiffs' rhetoric inadequate to make out a constitutional violation, but it ultimately collapses into unintended ironies that eviscerate their central point about "linkage." Plaintiffs say, for instance, that by engaging in "linkage," "the State's politicians were fighting to protect their own *self-interests*—interests in obtaining higher salaries for themselves ...." Pl. Opp. Br. at p. 12 (emphasis in original). Alas, Plaintiffs' accusation runs afoul of the Great Law of Goose-and-Gander: if a proposed pay raise for legislators is merely a tawdry exercise in "self interest," how can it be that a lawsuit asking judges to decree themselves a pay raise presents a matter of high principle?

On the infrequent occasions when Plaintiffs discuss the Constitution's terms, they do so unconvincingly. In a footnote (!), they say, for example, that Article XIII, § 7 cannot apply to judges because of "the well-established rule of construction that specific provisions govern more general

provisions," pointing to Article VI, § 25(a) as the supposedly more "specific" provision. Pl. Opp. Br. at 14-15, n.11.

But the issue at hand is whether judges have a constitutional right to a pay *increase,* a subject never mentioned in Article VI, § 25(a). Instead, that provision states that judicial compensation "shall be established by law and shall not be diminished during the term of office of which he or she was elected or appointed." Any *increase* in compensation is addressed expressly only in Article XIII, § 7, which establishes a rule requiring that any increase in compensation for all "state officers named in this constitution" must take effect at the beginning of a term of office, but cannot take effect during a current officer's term of office. Article XIII, § 7 is not only the single specific constitutional provision dealing with the issue presented by this appeal, but is also an express term of the Constitution that necessarily takes precedence over Plaintiffs' theories based on implied rights.

For these reasons and those discussed briefly in this brief and our prior briefs in this case, *Larabee* and *Maron*, this Court should reject Plaintiffs' attempt to defend their "linkage" theories.

ARGUMENT

I. IN PLAINTIFFS' LATEST FORMULATION, "LINKAGE" IS AN EVEN MORE INCOHERENT AND IMPRACTICAL DOCTRINE.

In their latest attempt to defend the "linkage" doctrine invented by them and adopted below, Plaintiffs offer a tactical retreat that leaves the entire "linkage" concept even more incoherent and impossible to apply. According to Plaintiffs, "linkage" in the form of "[p]olitical compromise, horse trading, and back-room bargaining may be all well and good in other contexts," just not this one. *See* Pl. Opp. Br. at pp. 2-3. They concede that "linkage" is "often a perfectly legitimate aspect of the legislative process," and they "in no way challenge that practice generally." *Id.* at pp. 6-7. Instead, Plaintiffs say that the "nub of the 'linkage' claim ... is that the political branches may not impose conditions that are themselves unconstitutional." *Id.* The unconstitutional "condition," according to Plaintiffs, occurred when the Legislature and the Governor made "'bargains' that violate the separation of powers by relegating the Judiciary to an inferior status."

Plaintiffs' attempt to turn "linkage" into a "this-case-only" doctrine fails completely. First, the Legislature and the Governor never struck a "bargain" at the expense of the Judiciary. Instead, each of the political

branches had its own priorities and agenda, and they were unable to reach a "bargain" resolving their differences.

More fundamentally, the separation of powers doctrine is just as concerned with the "co-equal status" of the Executive Branch. Yet the Legislature is free, if it deems it appropriate, to refuse to approve the funding requested by the Executive Branch for any of its agencies or subdivisions, and may refuse to adopt a pay increase for Executive Branch officers (as it has done since 1999). The Legislature or either house separately can "link" a refusal to approve the Executive Branch's funding requests to other items on the separate agenda of the Senate or the Assembly; and, if a disagreement relating to the "linked" matter by the other house rather than the Governor results in a legislative deadlock, the Executive Branch would be just as powerless as the Judiciary to obtain approval for its requested funding. By engaging in such "linkage," the Legislature would be subjecting the Executive Branch to the same supposedly "inferior status" about which Plaintiffs complain on behalf of the Judiciary.

One could just as easily posit a conflict between the political priorities of the Governor and one of the legislative houses, having the unintended consequence of blocking action on a proposal by the other house of the Legislature that had become "linked" to an otherwise unrelated political

dispute between the other two political branches. Because Plaintiffs' latest theory of "linkage" is supposedly based on the "co-equal" status of each Branch, and each Branch's right to challenge in court any action (or, as here, inaction) that might be characterized as casting it in an "inferior status," the "linkage" theory would be available to all three Branches whenever any political roadblock stopped action on a favored priority.

Nor would "linkage," if it were ever accepted by this Court, be limited to situations involving a failure to reach agreement on a proposed bill. Political constituencies dissatisfied with the funding for their favored activity could claim, just as plausibly as Plaintiffs, that their funding was reduced (or, as here, not increased) because of "linkage," in violation of the "co-equal" status of the Branch within which that activity was administered. Because, as Plaintiffs concede, the budgeting process always involves "[p]olitical compromise, horse trading, and back-room bargaining," their "linkage" theory would inevitably propel courts deeply into political controversies, as the courts tried to sort out whether forbidden "linkage" supposedly explained the resulting compromises. In short, there is no constitutional principle or standard that a court could invoke to limit the application of Plaintiffs' "linkage" doctrine to "this-case-only".

While the difficulty of making any sense of the "linkage" doctrine and its supposed limitations is reason enough to reject it, the fundamental problem is that "linkage" has no basis whatever in the Constitution and is being used by Plaintiffs to nullify many provisions that plainly are in the Constitution. Plaintiffs' effort to rescue the "linkage" doctrine relies on generalizations about the "co-equal status" of the three branches and arguments about the "structure" of the Constitution. Plaintiffs' argument about the "equality" of the three branches misses the point entirely, while their arguments about the Constitution's "structure" brush aside the actual structure put in place by the Constitution to address the only subject matter at issue: pay increases for judges.

While the Executive, Legislative and Judicial Branches are co-equal and independent, each is pre-eminent with respect to the powers given to it by the Constitution. Thus, the Judiciary is pre-eminent among the three branches in deciding what the law is and declaring what the Constitution requires. The "co-equality" of the other two branches is not offended, nor is the Legislature or the Executive reduced to an "inferior status," when the Judiciary exercises that power.

The same is true whenever the Executive or the Legislature exercises the powers reserved to them by the Constitution. More particularly, as this

Court has recognized, the Constitution itself makes the Legislature "supreme" among the three branches regarding appropriations generally and any *increase* in compensation for all State officers specifically. *See, e.g., People v. Tremaine*, 252 N.Y. 27, 38, 168 N.E. 817, 819 (1929) ("It is ... so well settled that the state Legislature is supreme in all matters of appropriations that the recital of the details of the strife for legislative supremacy would serve no useful purpose.").

With respect to the Governor and the Lieutenant Governor, Article IV, §§ 3 and 6 state that their compensation "shall be fixed by joint resolution of the senate and the assembly ...." The compensation of all other State officers must be set by duly enacted law. *See* Article XIII, § 7. With respect to legislators, Article III, § 6 provides that "[e]ach member of the legislature shall receive for his services a like annual salary, to be fixed by law." Article VI, § 25(a) requires that judicial compensation shall be "established by law ...." Article VII, § 1 requires the Governor to transmit the Judiciary's requested budget, including any proposal for a judicial pay increase, without change to the Legislature. Article VII, § 4 requires that "appropriations for the legislature and judiciary"—which would include any increase in compensation for legislators or judges—"shall be subject to the [Governor's] approval as provided in section 7 of article IV." Article IV, §

7 states the general rule governing the enactment into law of almost all bills passed by the Legislature: "Every bill which shall have passed the senate and the assembly shall, before it becomes a law, be presented to the governor," and if the governor objects, shall become law only if "approved by two-thirds of the members elected to each house ...."

Article VII, § 7 underscores the requirement for an enacted law before any State officer can receive an increase in compensation in words that are a model of simplicity and clarity: "No money shall ever be paid out of the state treasury or any of its funds ... except in pursuance of an appropriation by law ...." In the unlikely event that any reader missed the point of these provisions, Article XIII, § 7 says it all again: for all "state officers named in this constitution," their compensation shall be "fixed by law, which shall not be increased or diminished during the[ir] term" of office.

Through these provisions the Constitution plainly adopts a structure in which the Legislature is pre-eminent—"supreme" was this Court's description—on any matter having to do with compensation of State officers. The Legislature's approval is required before a State officer in any of the three branches can receive a pay increase. The Governor is given an important but "subordinate" role: any bill to increase the compensation for all State officers must be submitted for the Governor's approval, except for

the Governor's own compensation or that of the Lieutenant Governor. If the Governor objects, the Legislature may override his objections by a two-thirds vote. Unlike the Legislature, the Governor is not empowered to increase the compensation fixed by law for State officers on his own.

The Constitution purposefully gives the Judiciary almost no role in this process. With respect to pay increases for members of the Legislative or Executive branches, the Constitution provides no role whatever for the Judiciary except for its traditional function of deciding justiciable disputes that may arise. Regarding pay increases for judges, the Judiciary's role is limited to making proposals to the Legislature and the Governor, with the protection that any such requests in the Judiciary's proposed budget must be transmitted by the Governor to the Legislature without change.

Despite the insistence, demonstrated by a rare redundancy, with which the Constitution reflects that "structure," Plaintiffs make broad assertions to the effect that "defendants' subordination of the Judiciary violates the 'structure' of the Constitution." *See* Pl. Opp. Br. at p. 9. Yet, in making that argument, Plaintiffs never take into account the actual structure established by the Constitution, or even address the many provisions in Articles III, IV, VI and VII that contradict their contentions.

Even less persuasive is Plaintiffs' claim that Defendants have violated the Constitution by failing to "insulate" the Judiciary from "the political fray." *See* Pl. Opp. Br. at pp. 12-13. Nothing in the Constitution creates an obligation on the part of the Legislature or the Governor to "insulate" the Judiciary from politics. To the contrary, the Constitution provides that Supreme Court justices and most other judges are chosen by election, just as the members of the Legislature and the Governor are, thus throwing candidates for judicial office into "the political fray" to obtain their office. *See, e.g.*, Article VI, §§ 6(c), 10(a), 12(b), 13(a), 15(a). Moreover, the Judiciary, rather than the Legislature or the Governor, is the only branch of government in a position to "insulate" the courts from politics where such insulation is required, by, for example, developing and applying the political question doctrine, standing rules and the separation of powers doctrine to prevent litigants (such as Plaintiffs) from trying to inject the courts into controversies properly addressed only to the political branches.

The federal authority Plaintiffs cite—*O'Donoghue v. United States*, 289 U.S. 516 (1933) —is irrelevant since, unlike New York, there are no elected federal judges. In all events, *O'Donoghue* stands for the proposition that "the independence of each department require[s] that *its proceedings* should be free from the remotest influence, direct or indirect, of either of the

other two powers." *Id.* at 530, quoted at Pl. Opp. Br. at p. 13 (emphasis added). Except in their capacity as litigants, Defendants have never attempted to influence, in any way, the *proceedings* of the Judicial Branch in matters pending before the courts. *O'Donoghue*'s principle cannot possibly apply to the Judiciary's *budget*, for the obvious reason that the New York Constitution, like its federal counterpart, remits the entire subject of the budget to the political branches where, as this Court observed in *Tremaine*, the Legislature is "supreme."

In sum, by exercising their powers to "establish by law" the compensation to be paid to judges, the Legislature and the Executive were not "subordinating" the Judiciary or reducing it to an "inferior status," any more than this Court was "subordinating" the Legislature or the Governor by exercising its power to decide the constitutional issues in *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 791 N.Y.S.2d 458 (2004), *Campaign for Fiscal Equity v. State*, 8 N.Y.3d 14, 828 N.Y.S.2d 235 (2006), or *Skelos v. Paterson,* 13 N.Y.3d 141, 886 N.Y.S.2d 846 (2009).

II. THE "LINKAGE" DOCTRINE CONFLICTS WITH THE SPEECH OR DEBATE CLAUSE.

Plaintiffs contend that their "linkage" doctrine is consistent with the Speech or Debate Clause because Defendants' consideration of the proposal to increase judicial compensation, and their inability to agree to an

amendment to Judiciary Law Article 7-B, fell "outside the sphere of 'legitimate legislative activity.'" *See* Pl. Opp. Br. at pp. 18-19. Once again, Plaintiffs ask this Court to ignore what the Constitution says on these subjects, and instead to apply heretofore unknown "implied" rights.

Plaintiffs' contention that Defendants were acting "outside the sphere of 'legitimate legislative activity'" when they considered but did not act on the Judiciary's proposal to increase the compensation for judges is astounding. The Speech or Debate Clause plainly covers matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). The conduct at issue here—the fact that the Legislature has not enacted legislation increasing the compensation of State-paid judges in ten years—is squarely within the scope of the "legislative functions" described in *Gravel*, *i.e.*, "the consideration and passage or rejection of proposed legislation."

Neither law nor common sense supports Plaintiffs' attempt to stand the Constitution on its head in that way, or to make Speech or Debate Clause immunity turn on the reasons supposedly explaining the "passage or

rejection of proposed legislation." This Court has long held that the immunity provided by the Speech or Debate Clause confers absolute immunity for all "legislative acts," including any acts "which are an integral part of the legislative process ... as well as the underlying motivations for these activities." *People v. Ohrenstein,* 77 N.Y.2d 38, 54, 563 N.Y.S.2d 744, 752 (1990); *accord, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (Speech or Debate Clause protects legislators from "speculation as to motives"). If consideration of a proposal to increase judicial compensation was "an integral part of the legislative process"—and it surely was—then the motivations of the Legislature and the Governor for taking no action on it are immune under the Speech or Debate Clause.[1]

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[1] Plaintiffs cite several civil rights cases that they claim stand for the proposition that courts may scrutinize legislative motivations in certain circumstances. *See* Pl. Opp. Br. at pp. 21-22. But as Plaintiffs say, the issue in those cases was whether the Legislature had improperly "establish[ed] classifications based on race or gender" by passing a particular statute or taking some other action. Plaintiffs also note that the courts' "inquiry" in those cases required a determination of "the 'purpose' of the statute" at issue. Where the Constitution or a statute made purpose or intent of a legislative enactment an element, it is hardly surprising that courts took motive into account in trying to understand that enactment. But even in those cases, the legislative action subject to judicial review was the statute that the courts were called upon to construe. Here, there was no legislative "action" at all. As in the civil rights cases, the only possible subject for judicial review is Judiciary Law Article 7-B, and the only issue is whether it had become unconstitutional because of the impact of inflation on judicial compensation since 1999. In this case, *Larabee* and *Maron,* the lower courts were unanimous in rejecting that argument.

While it is not clear how Plaintiffs think the Speech or Debate Clause applies here, Plaintiffs seem to be saying that a court may scrutinize legislative reasons or motives if the court determines that there is no need for fact-finding to determine what those legislative reasons or motives were, but may not do so if the legislative reasons or motives are disputed. *See* Pl. Opp. Br. at 21 ("But Plaintiffs do not call for scrutiny of defendants' motivations *in this particular case; there is no dispute about their motivations.*"). That distinction finds no support in the text of the Speech or Debate Clause, this Court's decisions construing it or the purpose for which it was adopted.

Because Speech or Debate Clause immunity is absolute once it is found to apply, it makes no difference whether a litigant claims that the particular legislative motives at issue are "undisputed," as Plaintiffs do here. To decide whether there was any such dispute, a court would necessarily have to inquire into who said what and when and in what context and with what authority—*i.e.*, the very inquiry that the Speech or Debate Clause was intended to preclude. Merely to entertain that inquiry would put legislative actors to a choice between contesting claims about their supposed motives or reasons—by, for example, explaining how certain statements were intended, and probably understood, as bargaining chips in a three-cornered

negotiation—or allowing their litigation opponent's claims about "undisputed" legislative motives to go unanswered. But the absolute immunity of Article III, § 11 protects legislators from being put to that choice.

The motives or reasons why Defendants never agreed on proposed amendments to Judiciary Law Article 7-B are irrelevant not only because they are immune from judicial scrutiny under the Constitution, but also because Plaintiffs were not harmed by them but instead only by the fact that Article 7-B was not amended. No one suggests that legislative enactments are shielded by the Speech or Debate Clause from judicial review. In fact, like the Third Department in *Maron v. Silver*, 58 A.D.3d 102, 871 N.Y.S.2d 404 (3d Dep't 2009), the First Department held that the Legislature's inaction, leaving Judiciary Law Article 7-B unamended, did not "diminish" judicial compensation within the meaning of Article VI, § 25(a), and therefore did not violate the Constitution. *Larabee v. Governor*, 65 A.D.3d 74, 85-87, 880 N.Y.S.2d 256, 265-66 (1st Dep't 2009). In short, the legislative "action" at issue here was subjected to judicial review, and was found constitutionally proper.

And, as history shows, "linkage" may sometimes have worked to benefit Plaintiffs. Since the adoption of the Unified Court Budget in 1977,

the Legislature has increased judicial compensation five times: N.Y. Laws 1980, ch. 881; N.Y. Laws 1984, ch. 986; N.Y. Laws 1987, ch. 263; N.Y. Laws 1993, ch. 60; and N.Y. Laws 1998, ch. 630. On only one occasion, in 1993, did the Legislature provide judicial raises without providing raises for other State officers. The fact that judicial pay raises may have been "linked" to pay raises for other State officers on the other four occasions did not harm Plaintiffs (or their predecessors in judicial office).

In short, Plaintiffs never confront the fatal weakness in their discussion of Speech or Debate Clause immunity: only legislative enactments are subject to judicial review, while legislative motives for adopting (or declining to adopt) proposed legislation are not. For all of these reasons, it does not make any difference why the Legislature and the Governor did not agree on proposed amendments to Judiciary Law Article 7-B. Nothing more is needed to reject Plaintiffs' "linkage" theory or the holding of the Appellate Division below.

III. PLAINTIFFS' THEORIES ABOUT IMPLIED RIGHTS CANNOT OVERRIDE THE EXPRESS TERMS OF THE CONSTITUTION.

In our opening brief, we showed that "linkage" cannot be squared with the Speech or Debate Clause or the separation of powers doctrine. Like the separation of powers doctrine, "linkage" is, at most, an implied

constitutional doctrine, and as such, cannot override the express terms of the Constitution.

According to Plaintiffs, "linkage" is supposed to be an aspect of the separation of powers doctrine. The New York Constitution, however, has no specific provision adopting even a "separation of powers" requirement. Instead, "this principle ... is included by implication in the pattern of government adopted by the State of New York." *Under 21 v. City of New York*, 65 N.Y.2d 344, 355, 492 N.Y.S.2d 522, 525 (1985). The separation of powers doctrine has been a fundamental constitutional principle in New York since the first Constitution of 1777. *See Pataki v. New York State Assembly*, 4 N.Y.3d 75, 100, 791 N.Y.S.2d 458, 473 (2004).

As a doctrine implied from the Constitution's structure, neither the separation of powers nor "linkage" can be invoked, as Plaintiffs do, to contradict the text of the Constitution or, even less, to subvert the Constitution's specific allocation of powers among the three branches. This Court has applied that rule in the contractual context, and its logic applies equally here. *See Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304, 461 N.Y.S.2d 232, 237 (1983) ("No obligation can be implied . . . which would be inconsistent with other terms" of the instrument giving rise to the implied obligation). The Constitution's allocation of power among the

branches is the very structure from which the separation of powers doctrine arises.

There is no conflict between the Constitution's express provisions and the separation of powers doctrine. But even if there were, any such conflict would have to be resolved by enforcing the Constitution's direct and express commands. *See Blue Cross & Blue Shield of Cent. N. Y., Inc. v. McCall,* 89 N.Y.2d 160, 168, 652 N.Y.S.2d 218, 222 (1996); *Matter of King v. Cuomo*, 81 N.Y.2d 247, 253, 597 N.Y.S.2d 918, 920 (1993); *Anderson v. Regan*, 53 N.Y.2d 356, 362, 442 N.Y.S.2d 404, 406-97 (1981) ("there is really no justification . . . for departing from the literal language of [a] constitutional provision. It has never been the law in this State that the clear and unambiguous wording of a statute or constitutional provision may be overlooked entirely when it is seemingly inconsistent with the practice and usage of those charged with implementing the laws."); *Settle v. Van Evrea*, 49 N.Y. 280, 281 (1872) ("it would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms. That

would be *pro tanto* to establish a new Constitution and do for the people what they have not done for themselves.").

Yet, to salvage their "linkage" theory, Plaintiffs and the Appellate Division are forced to treat the Speech or Debate Clause as, in the Appellate Division's words, a "cloistered notion" limited to "the Legislature's internal communications, debates, committee work, investigations and the like ...." *Larabee*, 65 A.D.3d at 92-93, 880 N.Y.S.2d at 270.

The Appellate Division's ruling and Plaintiffs' arguments are contradicted by settled law and common sense, because "all legislation is the product of political activity both inside and outside the Legislature." *Ohrenstein*, 77 N.Y.2d at 47, 563 N.Y.S.2d at 748. The Constitution clearly frames a government founded on the principle of representative democracy. As a necessary corollary, the give-and-take over proposed legislation between the Legislature and the Governor—*i.e.*, the "political activity" of representative democracy at its most basic level—is entitled to the strongest protection under the Speech or Debate Clause. Instead, Plaintiffs ask this Court to substitute some watered-down and ill-defined "cloistered notion" that would provide no protection to the "political activity" at the heart of our democratic form of government.

A second glaring and equally fatal contradiction besets the efforts by both Plaintiffs and the courts below in trying to square their "linkage" theory with settled law under the Speech or Debate Clause. The Appellate Division recognized that the Speech or Debate Clause protects the political branches against "the compulsion of injunctions directing a legislator how to vote." *Larabee*, 65 A.D.3d at 89, 880 N.Y.S.2d at 267 (quoting *Tenney v. Brandhove*, 341 U.S. 367 (1972)). But the relief ordered below did just what the Appellate Division found the Constitution forbids. Justice Lehner "direct[ed] that defendants, within 90 days ... adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998, with an appropriate provision for retroactivity," and the Appellate Division affirmed that order. *Larabee v. Governor*, 20 Misc. 3d 860, 878, 860 N.Y.S.2d 886, 894 (Sup. Ct. N.Y. Co. 2008), *aff'd*, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009). The only manner in which the Constitution allows "defendants [to] adjust" judicial compensation is by the enactment into law of a bill amending Judiciary Law Article 7-B.

The reason that Plaintiffs and the lower courts could not avoid becoming trapped in those contradictions is that there was no possibility of framing any relief that conformed to the imagined "linkage" violation. For

that reason, the lower courts decided instead to exercise the Legislature's exclusive "legislative power" themselves, by directing the legislators on how to vote on a bill amending Article 7-B to raise judicial salaries.

IV. THE RELIEF GRANTED BELOW WAS UNCONSTITUTIONAL.

Plaintiffs defend the lower courts' remedial order by claiming that Defendants "mischaracteriz[e] the relief at stake in this action." Pl. Opp. Br. at p. 29. Plaintiffs explain that, far from asking the courts to order the Legislature and the Governor to enact a law amending Judiciary Law Article 7-B, they seek only "a declaratory judgment ... as well as an injunction fixing the salaries of State judges at an amount that the political branches have agreed is appropriate." *Id.* In short, Plaintiffs defend the remedial order by claiming that they seek relief even *more* clearly unconstitutional than the unconstitutional relief already granted below.

In our opening brief, we showed that the remedial order entered below cannot be sustained under *Campaign for Fiscal Equity* because, even if there was a "linkage" violation, the power to "establish by law" judicial compensation is given to the Legislature and the Governor, not the courts. When courts go beyond the relief necessary to remedy a constitutional violation, and, worse, when they intrude into the powers given by the Constitution to the other Branches, they violate the very separation of

powers doctrine that the remedy is supposed to uphold. In *Campaign for Fiscal Equity,* this Court rejected the lower courts' funding formulas, even as it upheld the finding of a constitutional violation, for precisely those reasons. *Id.,* 8 N.Y.3d at 29-31, 828 N.Y.S.2d at 243-45.

Among the many ironies in this case is that Plaintiffs are demanding—and obtained—relief that would have been appropriate *only* if the lower courts had sustained their claim that Article VI, § 25(a) entitled judges to an automatic cost-of-living adjustment to offset the effects of inflation. But, like every federal court to consider the same claim, the lower courts rejected Plaintiffs' "inflation" argument, and instead found a purely procedural violation by accepting Plaintiffs' "linkage" theories. A procedural violation should have resulted, at most, in a procedural remedy. Instead the courts below awarded a substantive remedy by ordering the Legislature and the Governor to "adjust" judicial compensation, which under the Constitution can only be accomplished by enacting a law.

Plaintiffs now say that the lower courts should have dispensed with such niceties as directing the political branches to exercise their legislative powers, and should have issued an injunction by which the courts would have usurped those legislative powers directly. We do not understand how Plaintiffs' suggestion could possibly pass constitutional muster, or how

Plaintiffs' argument even addresses the infirmities under *Campaign for Fiscal Equity* in the remedial order entered below.

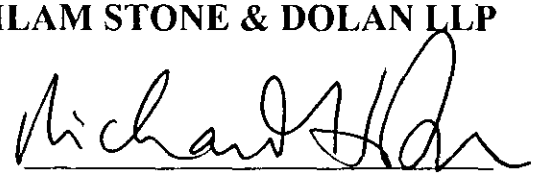
CONCLUSION

This Court should (i) reverse the Appellate Division's Order granting summary judgment to Plaintiffs on their third cause of action; (ii) dismiss Plaintiffs' appeal or alternatively affirm Supreme Court's order insofar as it dismissed Plaintiffs' second and third causes of action; and (iii) direct the entry of judgment in favor of Defendants dismissing the Complaint, together with such other relief to Defendants as this Court deems just.

Dated: New York, New York
December 22, 2009

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: 

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

Court of Appeals
STATE OF NEW YORK

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

Plaintiffs-Respondents-Appellants,

- against -

GOVERNOR OF THE STATE OF NEW YORK,

Defendant,

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

Defendants-Appellants-Respondents.

PROPOSED BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-RESPONDENTS-APPELLANTS

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November 24, 2009

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Disclosure Statement

Atlantic Legal Foundation is a Pennsylvania not-for-profit corporation with its principal office in New York State. It has no parents, subsidiaries or affiliates.

The Partnership for New York City, Inc. is a non-profit membership organization. The New York City Investment Fund Manager, Inc., New York City Partnership Foundation, Inc. and Fund for New York's Future, Inc. are subsidiaries or affiliates.

Related Litigation

- *Chief Judge of New York v. The Governor of New York*, ____ A.D.3d ____, 884 N.Y.S.2d 862 (1st Dep't 2009)

- *Maron v. Silver*, 58 A.D.3d 102 (3d Dep't 2008)

Interests of *Amici Curiae*

Atlantic Legal Foundation

The Atlantic Legal Foundation, now in its thirtieth year, is a non-profit, non-partisan organization with a history of advocating for limited, effective government, free enterprise, individual liberty, school choice, and sound science in the courtroom. Its Board of Directors includes current and former General Counsels of sixteen major corporations: American Cyanamid, American International Group, Inc., Becton, Dickinson and Company, Bethlehem Steel Corporation, Computer Sciences Corporation, Contessa Premium Foods, CPC International Inc., Crane Co., DuPont Co., GT Solar International, Johnson &

Johnson, Lockheed Martin Corporation, Monsanto, Republic National Bank of New York, Rohm and Haas Company, and Tyco International Limited. Other members of the Foundation's Board of Directors and its Advisory Council have substantial responsibility for business litigation at major law firms. The collective experience and judgment of the Foundation's Board of Directors and Advisory Council includes hundreds of years of responsibility for business litigation at major corporations and law firms as well as observation of the capabilities and performance of hundreds of judges. The Foundation has been involved in cases significant to the business community and has been recognized for its advocacy of issues that deserve responsible analysis and study. The role of the judiciary in commercial matters has been an area of particular focus.

The Partnership for New York City, Inc.

The Partnership is a non-profit organization of international and local business leaders with a mission to maintain the city's position as a global center of commerce, culture and innovation.

The Partnership was founded in 1979 in the wake of the city's fiscal crisis by business leaders who recognized that business expertise and resources could be mobilized to help the city deal with its biggest challenges and make New York City a better place to live and work.

A group of two hundred Partners, which represents the leadership of New York's top corporate, investment and entrepreneurial firms, is elected annually.

These Partners are committed to working with city and state government officials, labor groups, and the nonprofit sector to promote the interest of the city and its neighborhoods.

The Partnership has supported proposals to reform and consolidate the state court system, particularly with regard to the payment of more reasonable compensation to the judiciary and the de-politicization of compensation decisions, as a means of improving the quality of the courts. In 2006, The Partnership led a coalition of business and civic organizations in support of judicial salary reform. In addition, in 2007, The Partnership organized a meeting with then-Chief Judge Judith S. Kaye and more than 80 business leaders to discuss the need for pay raises for judges.

Preliminary Statement

The proposed *amici curiae* submit this brief to address the impact of the current level of compensation of the New York Judiciary on the State's economy and business community. This subject is of particular importance in light of New York's position as the financial and commercial capital of the United States and arguably the world, and New York's troubled current economic environment.

There is widespread agreement that judicial compensation in New York is critically inadequate. As set forth in this brief, inadequate judicial compensation adversely affects the business community and the health of the State's economy.

Judicial compensation in New York is in no sense competitive and is not adequate to continue to attract and retain jurists of the highest skill and experience; most notably, seasoned commercial lawyers in private practice are no longer attracted to the Judiciary in adequate numbers.

Lack of judicial experience and expertise in commercial matters can have a negative impact on the quality of decisions handed down in commercial cases, especially complex litigation. Thus, low compensation will likely reduce the quality of decisions in commercial cases and may increase the costs of litigation due to errors, appeals, and delays.

The business community needs an efficient, reliable judiciary to resolve controversies. Without an experienced, diverse and skilled judiciary, business activity will be diverted elsewhere, companies will incorporate or move elsewhere because they will lose faith in the ability of the State's judicial system to resolve commercial lawsuits promptly and competently, and New York State's economy will suffer.

Predictability of judicial decisions is essential to the business community because companies need to be able to anticipate the legal consequences of their business decisions to avoid litigation. If judges are not experienced and expert in commercial matters, the predictability of the judicial decision-making process will suffer and more lawsuits will result, diverting the time and attention of businesses from their primary objectives and hampering their ability to generate revenues and

profits. Needless business litigation ultimately has a negative impact on the ability of businesses to pay taxes and to fund payrolls.

Before drafting this brief *amici curiae*, the Atlantic Legal Foundation reviewed relevant statistics, specifically comparisons between the salaries of New York State judges and other public and private sector professionals in New York, and state and federal judges nationwide. The Foundation has also identified and reviewed publicly-available documents that discuss these topics, including news articles, communication from business organizations to New York State leaders, published studies by other organizations, and the pleadings and other filings in the pending litigations.

To evaluate judicial salaries in New York, the Foundation compared them to compensation of various other relevant groups. Many of the statistics set forth in this brief are derived from a study issued in May 2007 by the National Center for State Courts on judicial compensation in New York State. For close to forty years, the National Center for State Courts has provided services to the courts including research studies, consulting, a variety of educational programs, an extensive web database of information on court administration, the largest library of materials on court administration in the world, and continued assistance in the improvement of inter-branch relations through its lobbying and advocacy services.

I.

INADEQUATE JUDICIAL COMPENSATION IN NEW YORK IS DETRIMENTAL TO BUSINESS AND THE ECONOMY

New York State judges have not received a pay raise (or a cost of living adjustment) since 1999, a fact that has been singled out for criticism by a wide array of civic groups, journalists, bar associations and legal scholars. See *Larabee v. The Governor of New York*, 20 Misc. 3d 866, N.1 (N.Y. Co. 2008). Despite its place as a center of national and international commerce, New York has not kept pace with the compensation offered to other jurists nationally. The Appellate Division, Third Department, has described a troublesome scene:

> As set forth in a May 2007 report from the National Center for State Courts commissioned by the state's Chief Judge, no other state court judges have gone so long without a salary adjustment. It is undisputed that the decline in the real value of judicial pay due to inflation has been significant – the actual value of judicial salaries has declined approximately one-third since 1999. Moreover, this long delay is far from unprecedented; in fact, New York judicial compensation has been increased only twice in the past 20 years. Thus, our state's judicial salaries currently rank 49th in the nation when adjusted for statewide cost of living, despite New York's preeminence as an economic and commercial center.

Maron v. Silver, 58 A.D.3d 102 (3d Dep't 2008).

The National Center for State Courts also reports that since 1999, "the salaries of New York judges have fallen behind the salaries of hundreds of New

York public employed professionals, including many with less training and seniority," noting that:

- "District Attorneys in New York City earn $190,000 - $34,000 more than the State's Chief Judge, and at least $53,300 more than all of the trial judges before whom they and their assistants appear."
- "The Deans of New York's two public law schools earn substantially more ... – [the] Dean of the University of Buffalo Law School [earns] $232,899 [and the] Dean of the CUNY Law School [earns] $215,000."
- The "General Counsel [of the] City University of New York [earns] $220,000."
- The "New York City Corporation Counsel [earns] $189,700."
- "Attorneys [at the] State Comptroller's Office [earn] up to $160,540."

WILLIAM E. RAFTERY, DAVID B. ROTTMAN, PH.D., AMY E. SMITH, NATIONAL CENTER FOR STATE COURTS, JUDICIAL COMPENSATION IN NEW YORK: A NATIONAL PERSPECTIVE, A REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 10-11 (May 2007) ("NCSC Report").

According to a 2004 New York State Bar Association study:

> on a statewide average, partners at law firms of all sizes earned significantly more than New York State judges. At small firms with two to nine attorneys, the mean compensation for partners was $173,000. A more appropriate comparison to judges, in terms of ability and experience, may be the compensation of the more senior partners in those firms (those earning at the 75th percentile level), whose pay averaged $220,000 a year. At firms with ten or more attorneys, the mean compensation statewide is $293,000 – more than double the pay of a Supreme Court Justice elected to a 14-year term. If the comparison is to the more senior partners –

> the experience level from which judges are drawn – the average compensation is $350,000.

NCSC Report at 12.

Perhaps most embarrassing of all, newly minted law graduates, some of whom have yet to pass the New York bar, command salaries and bonuses at large urban firms that exceed the remuneration New York offers its judges. NCSC Report at 12.

In sum, there has been no dispute that judicial compensation has been woefully inadequate and it was conceded in the trial court that a salary increase was called for and that defendants "did not oppose an increase matching the salary paid to Federal District Court Judges." *Larabee v. Governor of New York*, 65 A.D.3d 74, 82 (1st Dep't 2009).

The Judiciary Has Been Negatively Impacted By Inadequate Compensation

Inadequate compensation has affected the judiciary in two important ways: judges are leaving the bench well before retirement age and there is less diversity of professional experience on the bench.

Judges are cash-strapped. "Prior to 2005, it was rare for judges to borrow against their state pensions. Only 28 judges had outstanding pension loans at the end of 2004. That number doubled within a year, and has more than quadrupled in two years. As of March 2007, there are 117 judges – about 10% of the entire Judiciary – who have outstanding pension loans." NCSC Report at 13. It is no

surprise then that judges are leaving the bench before retirement age. A January 9, 2008, New York Law Journal article reported:

> An upstate Supreme Court justice, who has not received a pay increase since he took office in 2001, plans to resign by the end of the month because of 'the present unfortunate status of New York State's judiciary.' Oneida County Supreme Court Justice Robert F. Julian signaled his intention in a letter dated Dec. 30 to Governor Eliot Spitzer and distributed by e-mail to the state's 1,300 judges.
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> ****
>
> As for himself, Justice Julian, who earns $136,700 a year, wrote, 'I am unwilling to further deplete my savings and reduce my lifestyle to continue in office.' He added, 'I believe a number of other judges have retired prematurely because of this sorry situation.'
>
> ****
>
> In 2006, County Court Judge Stewart A. Rosenwasser of Orange County announced his resignation, saying in a statement that he 'did not foresee the sacrifices my service would impose on my family' when he took office (NYLJ, March 31, 2006).

Daniel Wise, *Citing Economic Hardship, Upstate Judge Plans to Quit*, NEW YORK LAW JOURNAL, Jan. 9, 2008.

An article discussing the same phenomenon within the federal judiciary described what this loss means to those with life-time tenure, which would be equally applicable to New York Judges:

> At the same time that current compensation levels place unacceptable barriers to attracting the best possible candidates for the bench, those levels are forcing sitting

> judges to rethink their commitments. Over the past several years, dozens of competent, able federal judges have left the bench, many of them making no secret of the financial pressures which led them to do so. In the past few years, at least 10 federal judges left the bench well before normal retirement age; combined, these 10 judges had 116 years left before they reached the age of 65.
>
> ****
>
> The real cost is that those 10 judges – (and scores of others like them) had more than 100 years of prospective judicial experience now forever lost to our society; years they chose to expend in private rather than public pursuits. The loss is incalculable.

American College of Trial Lawyers, Judicial Compensation: Our Federal Judges Must Be Fairly Paid 5-6 (Mar. 2007) (footnote omitted), at Appendix 2 to the Testimony of Stephen Breyer, Associate Justice, Supreme Court of the United States, before the House Committee on the Judiciary, Subcommittee on the Courts, the Internet and Intellectual Property, Oversight Hearing on "Federal Judicial Compensation" (Apr. 19, 2007) ("Testimony of Hon. Stephen Breyer").

Lower salaries may also lead to a less qualified bench:

> The late Chief Justice William Rehnquist raised the issue of pay equity in 19 year-end reports, and grew resigned in his latter years to 'beating a dead horse.' But his successor [Chief Justice Roberts] seems ready to press the fight, noting that with salaries stagnant, more and more judges are leaving the bench in search of high-paying positions in private practice. That, in turn, raises the specter that lesser qualified judges – often those whose main qualification is affiliation with the right political party – will succeed them. If that trend

> continues, then the very concept of an independent judiciary is at stake.

Editorial, *A Judge's Pay*, ALBANY TIMES UNION, Jan. 9, 2006.

Other United States Supreme Court Justices have voiced similar concerns. Justice Breyer has stated that lower salaries have led to an "adverse tendenc[y]" of the "professionalizing" of the judiciary:

> [T]he decline in real pay levels can make a difference with respect to the pool of applicants. I do not mean that there is a shortage of applicants. I do mean, however, that a federal judgeship should not be reserved primarily for lawyers who have become wealthy as a result of private practice, or for those whose background is that of a judicial 'professional,' *i.e.*, a state court judgeship or a magistrate position followed by an Article III appointment.
>
> ****
>
> The federal bench should reflect diversity not simply in terms of race or gender, but in respect to professional background as well.
>
> ****
>
> That diversity, important as it is to the institution, is gradually disappearing. If one examines the federal district court judges at the time of President Eisenhower, one finds that only about 1/5 previously has been state court judges or magistrates. If we examine appointees in the last fifteen years, however, the percentage of those whose career has followed a judicial 'professional' path has increased, from about 20% to more than 50% of district court judicial appointments, and the percentage coming from other sectors has correspondingly declined.
>
> These figures mean that those who followed the judicial 'professional' path accounted for roughly one in five

> district court judges fifty years ago, but they now account for more than one out of every two appointments. I repeat that those who have previously served as state court judges or magistrates are typically fine judges. But the growth in the number of such appointments indicates a judiciary that has become increasingly professionalized.
>
> ****
>
> Of the adverse tendencies of a real salary decline that I have mentioned thus far, it is the loss of diversity of background and the increased administrative 'professionalizing' of the judiciary that I most fear.

Testimony of Hon. Stephen Breyer 6, 7.

In February 2007, Justice Anthony M. Kennedy testified before the United States Senate Judiciary Committee that:

> Congress needs to restore judicial pay to its historic position vis-à-vis average wages and the wages of the professional and academic community.
>
> A failure to do so would mean that we will be unable to attract district judges who come from the most respected and prestigious segments of the practicing bar. One of the distinguishing marks of the Anglo-American legal tradition is that many of our judges are drawn from the highest ranks of the private bar.

Testimony of Associate Justice Anthony M. Kennedy before the United States Senate Committee on the Judiciary, Judicial Security and Independence 9 (Feb. 14, 2007) ("Testimony of Hon. Anthony M. Kennedy"), at Appendix 3 to the Testimony of Hon. Stephen Breyer.

Three days later, on February 17, 2007, a law professor at the University of Wisconsin commented on Justice Kennedy's congressional testimony:

> Needing to present himself as an excellent judge, Justice Kennedy couldn't say anything intemperate. Think of what he didn't say.
>
> If the pay is low, the judges will be the kind of people who don't care that much about money. They might be monkish scholars, or they might be ideologues who see in the law whatever it is they think is good for us. Justice Kennedy could say that judicial work is satisfying in ways that have nothing to do with money. He couldn't say that we can't trust people who don't care enough about money.
>
> We need judges who are the kind of solid, common-sense lawyers who factor money into their decisions. These are the same people who take the kind of conventional law-firm jobs that pay a good salary and require the greatest sacrifice to leave.
>
> Low judicial pay should trouble us not because the judges will somehow lack 'excellence.' It should trouble us because the law will be articulated by ideologues and recluses.

Editorial, Ann Althouse, *An Awkward Plea*, THE NEW YORK TIMES, Feb. 17, 2007, *available at* http://select.nytimes.com/2007/02/17opinion/17althouse.html.

Low compensation means that a judicial post is no longer what a seasoned practitioner seeks as the pinnacle of his or her career. As Justice Breyer has noted: "A federal judgeship was once seen as the capstone of a long and successful career, seasoned practitioners with years of experience and accomplishment accepted appointments to the bench .... Now, sadly, the federal bench is more and more

seen, not as a capstone, but as a stepping stone ... following which the judge can reenter private life and more attractive compensation." American College of Trial Lawyers, Judicial Compensation: Our Federal Judges Must Be Fairly Paid, Appendix 2 to the Testimony of Hon. Stephen Breyer, at 6.

The American College of Trial Lawyers has reinforced this point: "It is an undeniable fact that some of the best and brightest lawyers are found in the private sector, and it is a regrettable fact that fewer and fewer of those persons are seeking appointment to the bench." American College of Trial Lawyers, Judicial Compensation: Our Federal Judges Must Be Fairly Paid 5, at Appendix 2 to the Testimony of Hon. Stephen Breyer; *see also* Charts demonstrating the decline in judicial compensation, Professional Background District Court Judges 1953-2004, at Appendix 1 to the Testimony of Hon. Stephen Breyer.

In June 2008, Honorable Myron T. Steele, Chief Justice of the Supreme Court of Delaware discussed how having the second highest paid state judiciary in the country had led to an efficient court system as well as having judges with the relevant "private sector experience:"

> Our General Assembly and governors in the last thirty years have not overlooked the importance of Delaware's court system to the economy of Delaware. They know that the court system is one of the reasons we have the chartering business and that 21 percent of our state budget comes from chartering business and another 10 percent or more from legal services.
>
> ****

> Delay is not a problem in Delaware because of the expertise and diligence of our judges. All the judges on the Supreme Court, the Court of Chancery and on the Superior Court (General Jurisdiction) have had private sector experience.
>
> ****
>
> Delaware trial judges, with the exception of two pockets in California, are the highest paid in the nation. Their compensation is on par with federal district court judges.

Seeking A Business Location? *The Attractions Of An Even-Handed Court System*, THE METROPOLITAN CORPORATE COUNSEL 59 (Jun. 2008).

The recent problems within the financial services and insurance industries have led to additional complex commercial litigation in New York. The need for a state judiciary with a background in dealing with such commercial matters is apparent.

Inadequate Judicial Compensation Negatively Impacts The New York Economy

The link between a high quality judiciary and a healthy economy seems undisputed. In May 2007, thirty-seven senior legal officers of companies with substantial presence in New York State wrote to the then governor and leaders of the legislature, saying, in part:

> We write to emphasize the importance of this issue to the business community and to the continuing economic vitality of New York. A state's legal climate, including the quality of its judges, can have a significant impact on a corporation's decisions about where to do business. As

> the heart of the international business and financial community, New York must have judges with the background and ability to handle complex commercial litigation in a just and efficient manner. Under the Chief Judge's leadership, the New York courts have become a forum of choice for business. We need to maintain that standard. With stagnating compensation, the harsh reality is that few gifted lawyers will seek to become judges and seasoned judges will be forced to leave the bench. Ultimately, New York's business community, and all New Yorkers, will pay the price.

Letter of General Counsels of Major Corporations to the Governor and Legislative Leaders, May 31, 2007, reproduced in The New York State Unified Court System, "They Deserve Better".

The State of Texas reached a similar conclusion in an economic study, finding that "[i]nvesting in the state court system by increasing the compensation for judges at the trial and appellate levels is a move in the right direction. It will lengthen jurists' tenure and increase efficiency, thereby affording Texas an excellent opportunity to enhance its economic environment and further increase its competitive advantages on a national and global scale." NCSC Report at 21.

Justice Breyer has testified about the connection between competitive compensation for the judiciary and "economic prosperity":

> ...I remember listening to Alan Greenspan tell an audience that, if he could create a single institution necessary to promote economic development and thereby create the conditions necessary for economic prosperity, it would be an independent judiciary. That institution would assure the honest enforcement of contracts, produce investment, and lead to prosperity.

Testimony of Hon. Stephen Breyer 9.

Inadequate Judicial Compensation Impacts The Business Community

The business community nationwide has complained about the lack of judges with commercial litigation experience. On February 15, 2007, General Counsels of sixty major American corporations wrote to various members of Congress, urging

> ... a substantial increase to the salaries of federal judges. . . . We agree with Chief Justice Roberts that the shrinking percentage of federal judges drawn from the private bar, as opposed to the public sector, creates serious concern, as does the number of judges resigning from the bench with years of active practice still before them. . . . Each of our companies has a significant litigation docket and thus we share a deep interest in the quality of the civil justice system, both federal and state. . . . [W]e urge that congressional and judicial salaries be decoupled . . . .

Letters by Vice Presidents and General Counsels of Corporations to Congress Members Robert C. Byrd, David Obey, Richard Durbin, Jose E. Serrano, Thad Cochran, Jerry Lewis, Sam Brownback, Ralph Regula, Harry Reid, Mitch McConnell, Nancy Pelosi, John Boehner, Patrick J. Leahey, Arlen Specter, John Conyers, Lamar Smith, James C. Duff (Feb. 15, 2007). http://www.uscourts.gov/judicialcompensation/gencounselletter.pdf

In April 2008, John H. Martin, Partner at Thompson & Knight in Dallas, Texas, and President of the Defense Research Institute, noted that among other

repercussions of underfunded state court systems are "intolerable case backlogs." *Preserving Our Collapsing Judicial Function: DRI Officers Speak Out*, THE METROPOLITAN CORPORATE COUNSEL 13 (Apr. 2008). Such backlogs are bound to motivate businesses to change their behavior by, for instance, operating in states with more efficient systems for resolving commercial disputes. In California, a privately-compensated judge noted that:

> [o]ne of the factors driving the trend [of an increased use of privately compensated judges] is the manner of appointment and assignment of state court judges .... They may or may not have experience in the legal field to which they are assigned. This is particularly an issue in counties where the bulk of new appointees are former prosecutors who must learn not only civil procedure but also complex areas of civil law in a short time.
>
> ****
>
> As the state courts struggle to find new sources of funding at a time when they are already seriously overburdened, short-term options are few. Private judging may be a short-lived phenomenon if the state courts find the systems and resources to allow them to address the needs of all litigants adequately. If not, it is likely that more and more litigants will find alternative means to resolve their legal issues.

M. Sue Talia, *Developments in Private Judging – The California Experience* 98-99, http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/adr&CISOPTR=40.

II.

THE NEW YORK LEGISLATURE HAS FAILED TO RESPOND TO INADEQUATE JUDICIAL COMPENSATION

It is undisputed that adequate judicial compensation has been withheld solely because of "entirely extraneous issues, irrelevant to the merits of the salary increase." *Larabee v. Governor of New York*, 65 A.D.3d 74, 83 (1st Dep't 2009).

Challenges to the use of the Legislature's linkage and the inadequate level of judicial compensation first reached the appellate level in *Maron v. Silver*, 58 A.D.3d 102 (3d Dep't 2008), which dismissed for failure to state a cause of action because "petitioners have failed to allege a discriminating attack on the judicial branch that has impaired or imminently threatened the Judiciary's independence and ability to function..." 58 A.D. 3d at 123.

The First Department panel in *Larabee* disagreed with the *Maron* rationale insofar as the Third Department "looked for evidence of a present impairment of the judicial system as a prerequisite to the viability of a separation of powers claim." 65 A.D.3d at 98. While such evidence would be sufficient to state a claim, the panel concluded, it was not necessary. Other factors, including the retention and attraction of qualified judges and the prospective harm to the court system are relevant. The court summarized its conclusion:

> Thus, it is the manner in which the Legislature employed linkage that implicates the separation of powers doctrine. The absence of evidence of undue influence, or of current systemic operational deficiencies, is not dispositive. We

> are also mindful of the many concerns set forth in the record about the future retention of qualified jurists and the attraction of highly qualified attorneys to the bench as judges retire or otherwise leave. However, we are concerned with not only the prospective harm of the functioning of the court system, but also with the manner in which linkage distorted the relationships among the branches of government implicit in New York's constitutional framework. Our conclusions in this latter regard proceed from the consequential exploitation of the Judiciary, not any present impairment in its operations. The constitutional defect is predicated on the manifest affront to the Judiciary's structural independence....

65 A.D.3d at 99.

Separation of Powers and judicial independence concerns are best protected, we submit, by the approach adopted in *Larabee*.

Business in New York, and its economy, must be able to rely on a skilled and experienced judiciary if New York is to retain its place as an international center of commerce. The New York judiciary must not be impaired by woefully inadequate compensation.

CONCLUSION

Judicial compensation in New York is inadequate and the independence of its judiciary is threatened. The decision and order of the Appellate Division, First Department, insofar as it affirms the trial court's order awarding summary judgment to Plaintiffs – Respondents – Appellants, should be affirmed.

Dated: Larchmont, NY
November 24, 2009

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AFFIRMATION OF SERVICE

BRISCOE R. SMITH, an attorney admitted to practice in New York State, makes the following statement under penalty of perjury:

I served one copy of the within Proposed Brief of Amici Curiae dated November 24, 2009 by overnight delivery service on November 24, 2009:

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November 24, 2009

COURT OF APPEALS
STATE OF NEW YORK

HON. SUSAN LARABEE, HON. MICHAEL NENNO, HON. PATRICIA NUNEZ, and HON. GEOFFREY WRIGHT,	:	**ORAL ARGUMENT REQUESTED FOR JOSEPH L. FORSTADT: 10 MINUTES**
Plaintiffs-Respondents-Cross-Appellants,	:	
- against -	:	
THE GOVERNOR OF THE STATE OF NEW YORK, NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, and STATE OF NEW YORK,	:	M-3563 New York County Index No: 112301/07
Defendants-Appellants-Cross-Respondents.	:	
EDWARD A. MARON, ARTHUR SCHACK and JOSEPH A. DeMARO,	:	
Petitioner-Appellants,	:	
- against -	:	
SHELDON SILVER, as Speaker of the New York State Assembly, NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, as the Temporary President of the New York State Senate, NEW YORK STATE SENATE, GEORGE PATAKI, as Governor of the State of New York, JOHN DOE, as the Acting Comptroller of the State of New York, and the OFFICE OF COURT ADMINISTRATION	:	Albany County Index No: 07-004108 App. Div. 3d Dept. Index No.: 504084
Defendant-Respondents.	:	
CHIEF JUDGE OF THE STATE OF NEW YORK,	:	
Plaintiffs-Respondents-Cross-Appellants,	:	
- against -	:	
GOVERNOR OF THE STATE OF NEW YORK,	:	New York County Index No. 400763/08
Defendants-Appellants-Cross-Respondents.	:	

BRIEF OF PROPOSED *AMICI CURIAE*: THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. AND THE NEW YORK STATE ASSOCIATION OF CITY COURT JUDGES

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PROLOGUE

> [T]here is a reason of statesmanship for the provision that the judicial salary shall not be diminished. What is that reason? It is, that if you place the salaries of your judges at the mercy of the Legislature, you have then put one department of your government, which above all others ought to be perfectly independent, at the mercy of another. That is the reason why, in framing fundamental laws, we provide for the independence of the Judiciary, by preventing the Legislature, from decreasing their salaries....

Underhill, Proceedings and Debates of the Constitutional Convention of the State of New York, 1867 and 1868, at p. 2440 (1868).

PRELIMINARY STATEMENT

The Association of Justices of the Supreme Court of the State of New York, the Supreme Court Justices Association of the City of New York, Inc. and the New York State Association of City Court Judges (collectively, the "Proposed *Amici*") appear specially as *amici curiae* in support of: (i) Plaintiffs-Respondents-Cross-Appellants in Larabee v. Governor, et al. on appeal from the Appellate Division, First Department ("Larabee Plaintiffs"), (ii) Plaintiffs-Appellants in Maron v. Silver, et al. on appeal from the Appellate Division, Third Department ("Maron Plaintiffs"), and (iii) Plaintiffs-Respondents-Cross Appellants in Chief Judge of the State of New York v. Governor, on appeal from the Appellate Division, First Department ("Chief Judge Plaintiffs") (collectively, "Plaintiffs").

For the reasons more fully addressed by each of the Plaintiffs in their briefs to this Court, and for the additional reasons presented herein, we urge the Court to

find that the Defendants have violated their constitutional and statutory duties to provide the Judiciary with the salary adjustments necessary to offset the effects of inflation and the increased cost of living that have diminished Judicial compensation. This Court should exercise its inherent power, under the doctrine of Separation of Powers, to prevent any further interference with the independence of the Judiciary.

Further, with respect to Plaintiffs' claim that their salaries have been diminished in violation of Article VI, Section 25(a) of the New York State Constitution, the undisputed facts establish that, indeed, the Judiciary has been "singled out." The Third Department's findings to the contrary are wrong. While the Legislative branch has not received any salary adjustments during the same period of time that the Judiciary has been without a raise, Legislators, unlike the Judiciary, have been, and are, able to supplement their income from other sources. Any diminishment felt as a result of the Legislators' failed attempts to negotiate their own raises can be offset with the ability to earn unlimited outside income. The Judiciary, on the other hand, is ethically proscribed from holding any other position or earning an outside income (except under very limited circumstances). Other government employees, whose salary adjustments (like the Judiciary) are subject to Legislative approval, have received upward adjustments of approximately 24% in the aggregate since 1999.

Moreover, as a result of having received no upward adjustments, Judges have suffered an almost 30% downward adjustment in their compensation due to the effects of inflation. To hold, as the courts below did, that Defendants have acted constitutionally by failing to offset the devaluing effect of inflation on Judicial compensation, renders meaningless the letter and the spirit of the Compensation Clause. In this regard, this Court should overrule the First and Third Departments' findings that inflation has not caused an unconstitutional diminishing effect on Judicial compensation.

With respect to Plaintiffs' Separation of Powers claim, the Proposed *Amici* urge that by linking the approval of Judicial salary adjustments to the approval of legislative salary adjustments and/or unrelated issues advanced by the Governor – facts that are not disputed anywhere in the record and which have been openly and widely discussed – Defendants have unconstitutionally abused their power. As correctly found by the First Department in Larabee, this abuse of power violates the doctrine of the Separation of Powers and unconstitutionally interferes with the independence of the Judiciary. The Third Department's finding to the contrary should be reversed.

For these reasons, and the reasons advanced by Plaintiffs in their papers, this Court should exercise its authority to end Defendants' flagrant disregard of the no-diminishment clause and the doctrine of the Separation of Powers. See Jorgensen

v. Blagojevich, 811 N.E.2d 652, 668 (Ill. 2004), ("[T]he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.")

Accordingly, the Proposed *Amici* respectfully urge the Court to reverse the Third Department's decision in Maron, in its entirety, affirm the holding of the First Department's decision in Larabee and Chief Judge, which found that the Legislature violated the Separation of Powers doctrine, but reverse the First Department's decision to dismiss the Governor, reinstate the Governor as a proper party, and hold that the Governor and the Legislature have violated their Constitutional duties.

INTEREST OF THE PROPOSED *AMICI*

The Association of Justices of the Supreme Court of the State of New York is a statutory association representing all of the elected Supreme Court Justices of the State of New York. The Supreme Court Justices Association of the City of New York, Inc. is a membership corporation representing the elected Supreme Court Justices in the City of New York. The New York State Association of City Court Judges is a membership association representing the City Court Judges sitting in 61 counties outside of the City of New York. The Proposed *Amici* have

the responsibility to advocate on behalf of their members, particularly on issues that impact fundamental constitutional principles such as the Judiciary's independence and the doctrine of the Separation of Powers.

Here, because the independence of the New York State Judiciary and the principle of the Separation of Powers are at stake, the Proposed *Amici* have a strong interest in seeing to it that Defendants in Larabee v. Governor, et al., Maron v. Silver, et al., and Chief Judge of the State of N. Y. v. Governor comply with their constitutional and statutory obligations to ensure that the Judiciary is adequately compensated.

DISCLOSURE STATEMENT PURUSANT TO RULE 500.1(c)

The Association of Justices of the Supreme Court of the State of New York, the Supreme Court Justices Association of the City of New York, Inc. and the New York State Association of City Court Judges each hereby disclose that they have no parents, subsidiaries or affiliates.

ARGUMENT

POINT I

BY MAKING LEGISLATIVE SALARY INCREASES AND OTHER UNRELATED ISSUES A CONDITION TO APPROVING JUDICIAL SALARY INCREASES, DEFENDANTS HAVE ABUSED THEIR POWER AND THREATEN THE INDEPENDENCE OF THE JUDICIARY

It is widely known that Defendants' refusal to grant any Judicial salary increases for almost 10 years is solely due to jockeying on unrelated matters between and among the Executive and Legislative branches of New York State government.[1] However, holding Judicial salaries hostage to unrelated issues is an abuse of power, a violation of the doctrine of the Separation of Powers, and a threat to New Yorkers' right to an independent Judiciary.

A. New Yorkers Have A Constitutional Right To An Independent Judiciary

Alexander Hamilton was indeed prescient when he wrote that: "The independence of the judges once destroyed, the constitution is gone, it is a dead letter; it is a vapor which the breath of faction in a moment may dissipate." The Papers of Alexander Hamilton, Volume XXV 525 (Columbia University Press 1977). The guarantee of an independent Judiciary and the admonition against the

[1] Humbert, "*Bruno: No pay raise for judges just yet,*" AP State and Local Wire (June 22, 2005); Hakim, *"Raise for State Judges Gets Caught in Crossfire Between Spitzer and Bruno"*, N.Y. Times, May 1, 2007, B-3; Stashenko & Wise, "*Judges' Raises Out of Budget After Last-Minute Bargaining,*" 237 N.Y.L.J. 1 (col.4) (Apr. 2, 2007); Stashenko, *N.Y. Governor: "Judges Should Know Better Than to Sue for Raise,*" 237 N.Y.L.J. 1 (col.1) (June 25, 2007).

loss of that independence is fundamental to our system of government. The Framers of the Constitution recognized that:

> The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive, and the judicial, in separate departments, each relatively independent of the others; and it was recognized that without this independence – if it was not made both real and enduring – the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

Evans v. Gore, 253 U.S. 245, 249 (1920), *overruled on other grounds*, sub nom, United States v. Hatter, 532 U.S. 557 (2001). Hamilton, in The Federalist, No. 78, warned against the danger of the Judicial branch becoming impotent.

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and the rights of every citizen are to be regulated. The Judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment. . . . This simple view of the matter suggests several important consequences. It proves incontestably, that the Judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

The Federalist No. 78 (Hamilton)(emphasis in original).

As noted in the Prologue (p. 1), the framers of the New York Constitution cautioned against the excessive power of the Legislative branch over the finances of the Judiciary.[2]

As the United States Supreme Court stated in O'Donoghue v. United States, 289 U.S. 516 (1933), the purpose of ensuring that the Judiciary is sufficiently paid is to:

> attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.
>
> Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle.

Id. at 533. (internal quotation omitted).

As Federal and New York State case law instruct, any interference with the fundamentally necessary independence of the Judiciary is a violation of the

[2] This point applies with equal force to the power of the Governor.

Separation of Powers doctrine. Williams v. United States, 535 U.S. 911, 914 (2002) (The Founders believed that permitting the Legislature to diminish Judicial compensation would allow the Legislature to threaten Judicial independence); County of Oneida v. Berle, 49 N.Y.2d 515, 522 (1980) (a foundation of free government is imperiled when any one of the coordinate branches [the Governor or the Legislature] interferes with another); People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898) (the safety of free government rests upon the independence of each branch and the even balance of power among the three, [and if] any one is weakened by making it unduly dependent upon another, a tendency toward evil follows); Kelch v. Town Bd. Of Davenport, 36 A.D.3d 1110 (3d Dep't 2007) (sufficient that the action taken by the Legislature was merely likely to affect or impinge upon the independence of the Judiciary); Catanise v. Town of Fayette, 148 A.D.2d 210, 212 (4th Dep't 1989) (The threat to independence of the Judiciary presented by the power to diminish a Justice's salary during his term of office is obvious).

B. **Defendants Have Conditioned Judicial Salary Increases Upon Approval Of the Legislature's Own Salary Increases And Upon the Governor's Unrelated Issues: This Interferes With The Independence Of The Judiciary**

The integrity of New York's system of government rests upon the independence of each of the three branches of government and a balance of power

among the three branches. Thus, among their duties, the Legislative branch and the Executive branch must ensure the independence of the Judiciary and provide for adequate compensation for the Judiciary to maintain that independence. The Legislature is required to draft the legislation for the Judiciary's compensation, and the Governor's approval is required in order to enact such Judicial compensation legislation into law.

The failure of either the Legislature or the Governor to abide by this constitutional duty violates the framework of the constitutionally established doctrine of Separation of Powers among the three branches of government. Justice Lehner in Larabee v. Governor, et al correctly stated: "by reason of the practice of linkage ... [and] denying ... the entire Judicial branch of government a pay adjustment for almost a decade,... the political branches of our State government have used the issue of Judicial pay as a pawn in dealing with the unresolved political issue of Legislative compensation, and ... this linkage is an abuse of power ... and constitutes an unconstitutional interference upon the independence of the Judiciary." Larabee v. Governor of New York, 20 Misc. 3d 866, 877 (Sup. Ct. N.Y. County 2008). The First Department, Appellate Division, was correct in affirming Larabee: "When Judicial compensation becomes politicized, a line has been crossed in contravention of the warnings long articulated in what has become a deeply rooted constitutional jurisprudence. The basic tenet of the separation of

powers doctrine, to promote and maintain the independence and stability of each branch of government, has been violated." Larabee v. Governor of New York, 880 N.Y.S.2d 256, 274 (1st Dep't 2009).

While the New York State Constitution vests the power to set Judicial compensation with the Legislature, and the approval of such legislation with the Governor, those powers must be properly exercised, consistent with these principles and the oaths of office that each representative takes. There is no dispute here that the sole reason for ten years of Judicial salary stagnation has been the infighting between the two political branches of government, all the while holding Judicial salary adjustments hostage. The Legislature has used its power to control Judicial salaries as a bargaining tool with the Executive branch to advance the passage of unrelated matters, and vice-versa. This practice and behavior threatens to disrupt the constitutionally necessary balance of power of our tripartite system of government and is inimical to the independence of the Judiciary.

The last raise that the Judiciary received was in 1999 when the Legislature also received a raise. In 2004, with no increase in the Judiciary's compensation for six years, it was clear that there would be no judicial compensation increases without linkage to legislative salary increases. See John Caher, *Judiciary Submits Hold-The-Line Budget*, 231 N.Y.L.J. 1 (col.4) (December 1, 2004). In June 2005, then-Governor Pataki proposed to increase Judicial salaries to restore parity with

federal Judges. See John Caher, *Pataki Introduces Bill To Raise Judicial Pay*, 231 N.Y.L.J. 1 (col.4) (June 6, 2005). However, the Legislature was unwilling to approve that proposal without a corresponding raise for themselves. In 2006, the budget provided for Judicial raises, but, again, as a result of infighting between the Legislature and the Governor, the Judiciary did not receive its raise. See Hakim, "*Raise for State Judges Gets Caught in Crossfire Between Spitzer and Bruno*", N.Y. Times, May 1, 2007, B-3.

In 2007, then-Governor Spitzer and the Legislature entered into another round of bargaining over Judicial and Legislative compensation. At that time, the Legislature, with the support of the Chief Judge, sought the creation of a commission to establish salary adjustments; Governor Spitzer in turn conditioned his approval upon the passage of campaign finance reform. Hakim, *"Raise for State Judges Gets Caught in Crossfire Between Spitzer and Bruno"*, N.Y. Times, May 1, 2007, B-3. Judicial pay raises, which were tied to the proposed agreement, failed to be approved as no agreement was reached. See id. Again, in March 2007, the Assembly approved a bill for Judicial salary adjustments, but due to failed negotiations between the Senate and Governor, the proposal went no further. See New York State Assembly Bill No. A. 4306-B (2007); New York State Senate Bill No S. 6550 (2007); see also, Stashenko & Wise, "*Judges' Raises Out of Budget After Last-Minute Bargaining*," 237 N.Y.L.J. 1 (col.4) (Apr. 2, 2007).

The same pattern continued in April 2007 when the Senate passed a bill that would have restored judicial pay parity with the federal bench and created a commission for Legislative and Judicial salary adjustments. See New York State Senate Bill No. S. 5313 (2007); New York State Assembly Bill No. A. 07913 (2007). However, Governor Spitzer again announced his refusal to approve the bill unless he got approval for his campaign finance reform proposal. The Legislature again refused, and no bill was passed. See Hakim, *"Raise for State Judges Gets Caught in Crossfire Between Spitzer and Bruno,"* N.Y. Times, May 1, 2007, B-3. Finally, in December 2007, the Senate approved another bill for Judicial salary increases without any tie to Legislative salary increases. However, the Assembly failed to act, and the Judiciary endured yet another year without a raise. See New York State Senate Bill S. 6550 (2007). The Office of Court Administration has sought judicial compensation increases in the Unified Court System's budget in each year from 2005 through 2009 without success. See Budget of the Unified Courts System, 2005-2010.[3]

Officials from both political branches have indisputably acknowledged, in sum and substance, that (1) New York's Judiciary's salaries have reached an

[3] • Budget Year 2006-2007 in the amount of $69.5 million
• Budget Year 2007-2008 in the amount of $41.9 million
• Budget Year 2008-2009 in the amount of $31.6 million

unacceptably low level, and (2) that the salary stagnation is due to infighting between the Legislative and Executive branches, linked to unrelated matters which have been openly and widely discussed.[4] Indeed, the First Department in Larabee noted that during oral argument before Justice Lehner on the motion for summary judgment, Defendants in Larabee "reiterated the acknowledgment that members of the New York Judiciary deserved a salary increase, even conceding that defendants did not oppose an increase matching the salary paid to Federal District Court judges." Larabee, 880 N.Y.S.2d at 262. Yet, Judicial salaries continue to be held hostage to the Legislature's and the Governor's disparate agenda.

In the current cases, therefore, judicial review of the Governor and the Legislature's actions is appropriate. In Larabee, the First Department affirmed the lower court's finding that by linking judicial salary increases to their own salaries the Legislature had violated the doctrine of the separation of powers. Larabee, 880 N.Y.S.2d at 270-271. Although the First Department's reasoning was focused on legislative conduct, the reasoning applies with equal force to the actions of the Executive branch. For the same reasons stated in the Larabee, the First Department in Chief Judge similarly declared "that through the practice of linkage the defendants have unconstitutionally abused their power by depriving the judiciary of any increase in compensation since 1998." See Chief Judge of State of

[4] See articles cited at n.2, supra.

New York v. Governor of State of New York, 2009 WL 1652845 (Sup. Ct. N.Y. County, June 15, 2009), aff'd. 65 A.D.3d 898 (1st Dep't 2009). And although the Third Department in Maron determined that the petitioners had not set forth allegations sufficient to sustain their claim for breach of the Separation of Powers doctrine, that court noted, importantly, that it could not bar judicial intervention in the face of an adequately stated claim that established harm or the threat of imminent harm to the Judiciary's ability to function. See Maron, 58 A.D.3d 121.

We have finally reached a point where this Court must exercise its independent judgment to put an end to the flagrant disregard of the doctrine of Separation of Powers. Short of court intervention, the current threat to Judicial independence will continue, and likely worsen. If the Judiciary does not receive the salary adjustments to which it is plainly entitled, it will become harder and harder to attract and retain quality judges, especially when judges can make significantly higher salaries if they leave the Judiciary for private practice, where compensation is far more likely to remain in step with inflation. See e.g. New York Law Journal, August 4, 2009, "Second Department Judge Quits Over Lack of a Raise" (Appellate Division, Second Department Justice Robert A. Spolzino announced that he will return to private practice, citing the fact that state judges have not received a raise in more than a decade: "[I would not leave a] job I love

so much if it were not for the Judicial salary situation in New York" but "can no longer ask" his family to endure the financial sacrifice.)

The court system in New York has long suffered from a severe backlog of cases. See Nat'l Crt. For State Courts, Judicial Compensation In New York: A National Perceptive (May 2007) ("NCSC Report") at 5. The numbers are staggering. As the salaries of judges have declined, their caseloads have increased. New York's judges are effectively paid less than their counterparts in states with smaller populations who are less likely to hear cases with the complexity and potential impact of those heard in New York's courtrooms. The longer the Judiciary goes without a salary adjustment, the harder it will become for it to adequately perform its constitutional and statutory duties.

Surely, if Defendants are permitted to continue to abuse their power and threaten the independence of an essential branch of government, the third branch of our government will atrophy. Justice Lehner in Larabee correctly reasoned:

> The Legislature, by subordinating the Judiciary to its whims and caprices in matters of salary adjustments, brings the Judiciary closer to the world of politics than is tolerable for the disinterested functioning of a court system that must act for the benefit of the whole people. The fact that salary adjustments for the third branch of government became politicized as the byproduct of an interbranch conflict removes this case from the otherwise mechanical processes for adjusting judicial compensation. When judicial compensation becomes politicized, a line has been crossed in contravention of the warnings long articulated in what has become a deeply rooted constitutional jurisprudence. The basic tenet of the separation of

powers doctrine, to promote and maintain the independence and stability of each branch of government, has been violated.

Larabee, 880 N.Y.S.2d at 274.

C. The Speech And Debate Clause Does Not Foreclose The Court's Inquiry Into The Question Of Unconstitutional Linkage

While the Speech and Debate Clause of the State Constitution[5] is a broad, and essential, grant of privilege, the First Department in Larabee correctly found that the scope is not so broad as to preclude inquiry into unconstitutional acts of the Legislature. Larabee, 880 N.Y.S.2d at 268-69. By extension, the First Department's sound reasoning applies also to the office of the Governor. Indeed, to read the Clause so elastically as to preclude any inquiry especially on these facts, would take the Clause well beyond its intended purpose, making Members of the Legislature and the Governor, when performing their governmental duties, super-citizens and beyond all reproach; that is not the goal of the protection offered by the Speech and Debate Clause. Importantly, the Clause must be applied in a manner consistent with the overriding doctrine of Separation of Powers that is inherent in our system of government. Thus, the argument that the Speech and Debate Clause forecloses the issues at bar before this Court is unsupportable.

[5] "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." N.Y. Const., Art III, § 11.

1. The Court's Inquiry Into the Legislature's Unconstitutional Linkage Is Proper

The Separation of Powers claim under consideration here does not simply inquire into Members' motivations; more particularly, the critical issue is whether this Court should hold the Legislature to its Constitutional obligation to fund the Judiciary. Here, the Legislature's failure to ensure that Judicial salaries are not diminished is fundamentally related to ensuring the Judiciary's independence. By conditioning unrelated matters to the passage of Judicial salary increases, and permitting through deliberate inaction an almost 30% reduction in purchasing power, the Legislature has abdicated its Constitutional obligations to properly fund the third part of our tripartite government. This failure is unconstitutional and undermines the very principles under which our system of government is established. Accordingly, under these circumstances, this Court should affirm the First Department's finding in Larabee that the Speech and Debate Clause affords no protection here, and reject the Third Department's finding in Maron v. Silver, 58 A.D.3d 102 (3d Dep't 2008) to the contrary.

Pennsylvania State Ass'n of County Comm'rs v. Commonwealth, 681 A.2d 699 (Pa. 1996), is particularly instructive and uniquely analogous to the instant case. In that case, the Supreme Court of Pennsylvania considered an action in mandamus, seeking to compel the General Assembly to abide by a previous order of that Court, which declared a statutory scheme for county funding of the Judicial

system to be unconstitutional, and required the enactment of a new scheme. 681 A.2d at 701. Mindful of its duty to act in cooperation with the General Assembly, a coordinate branch of government, the Pennsylvania Supreme Court stayed its prior judgment to give the General Assembly an opportunity to enact funding legislation that would cure the constitutional defect. Id. However, at the time of the 1996 decision, the General Assembly had failed to enact an alternate system of funding for ten years. Id. In the 1996 case, Respondents argued, inter alia, that the Speech and Debate Clause of the Pennsylvania Constitution shielded the Legislative branch from the Court's authority. Id. Rejecting that argument and granting mandamus, the Pennsylvania Supreme Court held:

> In this case, ... where the legislature has been directed by this court to act in order to remedy a constitutional defect in the scheme which funds the court system, funding of which is necessary for the continued existence of the Judicial branch of government, the legislature is not insulated from suit by the speech and debate clause. If it were, this court's duty to interpret and enforce the Pennsylvania Constitution would be abrogated, thus rendering ineffective the tripartite system of government which lies at the basis of our constitution.

681 A.2d at 702.

The bases for the Pennsylvania Supreme Court's finding that the Legislature is not insulated from suit under the Speech and Debate Clause apply with equal force to the cases before this Court. The Pennsylvania Court reasoned that the basic precept of the tripartite system of government is the crucial checking power

each branch has over the others to prevent one branch from usurping the powers committed to the other branches of government. 681 A.2d at 702. In that regard, because state finances rest with the Legislature, subject only to constitutional limitations, the efficient administration of the Judicial branch would be impaired or destroyed if that branch were to neglect or refuse to furnish sufficient funds for the Judiciary. 681 A.2d at 702. The Pennsylvania Supreme Court concluded:

> Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches.... It follows, therefore, that since the destruction of one branch of Government by another would be antithetical to the constitutional scheme of separation of powers, any Legislative action which impairs the independence of the Judiciary in its exercise of the Judicial power and the administration of justice would be similarly abhorrent.... [A]t issue is the continued existence of an independent Judiciary. The Speech and Debate clause does not insulate the Legislature from this Court's authority to require the Legislative branch to act in accord with the Constitution.

681 A.2d at 703. Similarly here, the Legislature's continued failure to fund the Judiciary to account for an almost 30% loss in purchasing power, unless and until the Legislature's special interests are first approved, threatens the independence of the Judiciary and is antithetical to the doctrine of Separation of Powers.

Significantly, there is no dispute in the record that the single reason that the Judiciary has not received a salary increase for over 10 years now is because the Legislators and the successive Governors during that period have used Judicial

salary increases as leverage to secure their own unrelated issues. Public statements and numerous news articles bear this out. In 2007, statements made by legislators confirmed that Senate bills S5315 and S6550, which sought to bring the salaries of New York trial judges in line with the salary of Federal District Court judges, failed to be enacted due to the "contentious relationship between the Governor and the respective legislative bodies." See Larabee, 880 N.Y.S.2d at 260, 269; S5315 § 3.

The Assembly declined to pass the bill A7913, the companion to S5315, because the Governor threatened to veto the bill unless the Legislature agreed to the Governor's demand for campaign finance reform. See Hakim, "Raise for State Judges Gets Caught in Crossfire Between Spitzer and Bruno," N.Y. Times, May 1, 2007, B-3; Hakim, "Spitzer Seeks Raise for Judges, Not Legislators," N.Y. Times, April 26, 2007; Stashenko, "Senate Passes Raises for Judges But Future of Bill is in Doubt," 237 N.Y.L.J. 1, (col. 1) (May 1, 2007). Similarly, although S6550 was passed without any overt linkage to legislative compensation, the Assembly's response was that it "would not raise judges' or top executive branch officials' pay unless lawmakers also [received] a raise." Palazzolo, "*U.S. Judge Pay Bill Moves Past House Panel*," 238 N.Y.L.J. 1 (col. 3) (December 13, 2007).

Judicial compensation has not been increased in ten years and will not be increased without intervention by the Court. Hence, in May 2009, Governor Paterson stated that "while judges clearly deserve raises, he could not see them getting more money until the economy 'stabilizes.'" Stashenko, "*Chief Judge Steps Up Lobbying to Obtain Pay Raises for Judges*," 242 N.Y.L.J. 1 (col. 4) (August 3, 2009). Although, this Governor purportedly supports a raise for the Judiciary, the current stated reason for declining to do so is that "the state is in no position to raise anyone's pay." Walder, "*First Department Backs Judicial Pay Raise*," 241 N.Y.L.J. 1 (col. 3) (June 3, 2009). Notwithstanding the more than 10 years of withholding all judicial salary increases, this Governor seeks to preempt further action using the pretext of budgetary shortfalls even though a raise for the Judiciary had been provided for in the Court System's budget, and had been approved with only an infinitesimal impact on the State's overall budget.

2. The Legislature's Actions Do Not Stand Alone In Bearing Scrutiny; This Court's Inquiry Into the Governor's Activities Is Also Proper

The First and Third Departments erred in dismissing the Governor from each of the actions on appeal before this Court. Just as the office of the Legislature is not protected by the Speech and Debate Clause, neither is the office of the Governor so protected.

This Court may properly inquire into the Governor's activities since the Speech and Debate Clause, even if it applied to the Governor's actions, does not provide the Executive with immunity from carrying out its essential constitutional role to assure the independence of the Judiciary. Since the Governor sought a quid pro quo deal with the Legislature in order to approve Judicial salary legislation, no immunity is deserved as such conduct cannot pass constitutional muster. The First Department correctly found that the Speech and Debate clause is a personal immunity, and as such, protects individuals not institutions, and thus a suit against the Governor of the State of New York, in his official capacity, is properly brought here. Accordingly, the Speech and Debate Clause does not preclude the Governor from being a party to each of the actions on appeal here and his conduct must also be held to account.

Assuming *arguendo* that the Governor's conduct is a legislative activity, the immunity must fail where it clashes with the Separation of Powers doctrine. Thus, since the Governor's conduct here directly threatens the doctrine of the Separation of Power, it does not qualify for protection. See Matter of Straniere v. Silver, 218 A.D.2d 80, 85 (3d Dep't 1996) (judicial review must be limited to determining whether the action constitutes a legitimate legislative activity), aff'd. 89 N.Y.2d 825 (1996) (emphasis added).

In Gravel v. U.S., 408 U.S. 606, 621 (1972), for example, the Supreme Court held that the unlawful discharge of an immunized decision might not itself be within the circle of immunity. See Larabee, 880 N.Y.S.2d at 269 (citing Gravel, 408 U.S. at 621). In that case, Senator Gravel convened a meeting of a subcommittee, read extensively from a copy of the Pentagon Papers and then placed the papers into the public record. Gravel, 408 U.S. at 610. Senator Gravel also arranged for the papers to be published. See id. Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers was determined to not be protected under the Speech or Debate Clause. Id. at 622 (discussing Dombrowski v. Eastland, 387 U.S. 82, 84 (1967) (legislative privilege did not shield Senator from "answering as yet unproved charges of conspiring to violate the constitutional rights of private parties"). The Court concluded that the Speech or Debate Clause has not been extended beyond the legislative sphere, and while, "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies – they may cajole, and exhort with respect to the administration of a federal statute – but such conduct, though generally done, is not protected legislative activity." Id. at 625 (relying on U.S. v. Johnson, 383 U.S. 169, 171-172 (1966) (where Congressmen were found guilty of exerting influence on the Department of Justice to obtain the dismissal of pending indictments)

In contrast, in Straniere v. Silver, the court illustrates that "the line separating protected from unprotected legislative activity is ultimately one between purely 'legislative activities' and 'political' matters". See Larabee, 880 N.Y.S.2d at 268 (citing Straniere, 218 A.D.2d at 83). In Straniere, legislation was introduced providing for the secession of the Borough of Staten Island from the City of New York. See Straniere, 218 A.D.2d at 81. The bill did not authorize secession, but rather prescribed a procedure designed to inform the Legislature that the voters of Staten Island were committed to secession. See id. The legislation was challenged because it was determined that a home rule message under the New York Constitution was required. See id. The court determined that the record established "that home rule determinations are part and parcel of the legislative process and are routinely made by the Speaker of the Assembly." Straniere, 218 A.D.2d at 84. Therefore, "the Speaker's decision to require a home rule message for the Secession Bill was an integral part of the legislative process, and thus a legislative act." Id. Here, where Governor Spitzer had inserted himself into the legislative process, ahead of the ordinary process, by threatening to veto Judicial and Legislative compensation legislation unless unrelated legislation on campaign finance is concurrently agreed to by the Legislature, the Governor's acts are not protected.[6]

[6] Spitzer's successor is also not protected as the Speech and Debate clause has no application to his conduct.

There is no dispute that that is exactly what occurred here. The record is replete with press releases and public statements that categorically establish that the conduct of three successive Governors was driven by unrelated issues. In the circumstances, such conduct is not immunized by the Speech and Debate clause. See Straniere, 218 A.D.2d at 83, Hutchinson v. Proxmire, 443 U.S. 111, 131-132 (1979). As the First Department astutely recognized in Larabee, any concerns about inquiring into the motivations of the Legislature here are academic because the public record contains many statements by legislators explaining why judicial salary increases were abandoned at the eleventh hour. Larabee, 880 N.Y.S.2d 269. Incontestably, there have been numerous public statements by three successive Governors that they would veto judicial salary increases due to unrelated issues. It follows that no inquiry is needed into the Governors' motivations as that plainly would be academic.

(a) The Speech and Debate Clause Is A Personal Immunity and Does Not Protect the Office of the Governor.

Since its inception, immunity under the Speech and Debate clause was designed to combat the historical concerns that a legislator might be harmed by the prospect of civil or criminal liability as a consequence of his or her unfettered discharge of legislative duties. See Larabee, 880 N.Y.S.2d at 269. As such, the immunity has always only protected legislators in their individual capacity. It does

not, as the trial court in Larabee acknowledged, protect the Legislature as a body. By extension, it similarly does not protect the office of the Governor, as a separate branch of government. See Larabee, 880 N.Y.S.2d at 269.

The Larabee court reasoned that no individual member of the Legislature was a named defendant, thus, the historical concern was unfounded. See Larabee, 880 N.Y.S.2d at 268-269. Similarly, in each of the actions on appeal, the Governor was not named in his individual capacity as a defendant; rather, the actions were rightly brought against the Governor of the State of New York, acting in his official capacity. Thus, the immunity does not apply as the individual is not at risk for his or her actions.

Moreover, while the Governor, as the chief executive officer of the State, is immune from process or suit and from judicial interference in his ministerial and discretionary acts, the Courts do not lack jurisdiction to review and determine whether the Governor may have acted contrary to the provisions of the Constitution of the State of New York. See Levitt v. Rockefeller, 69 Misc.2d 337, 339 (Sup. Ct. N.Y. County 1972). Therefore, "only in the absence of a clear violation of the Constitution does [the Governor] enjoy immunity as the Governor of the State." See id. Here, the Governor is not protected by sovereign immunity because his actions are unconstitutional as they are in violation of the Separation of

Powers doctrine. Thus, the Governor cannot enjoy legislative immunity or sovereign immunity in the case at bar.

(b) The Speech and Debate Clause Fails As a Defense When the Separation of Powers is at Issue.

The Speech and Debate Clause was not meant to be interpreted so broadly as to negate the Separation of Powers doctrine. Although the Speech and Debate Clause protects the independence of the Legislature, the Speech and Debate Clause must be applied "without altering the historic balance of the three co-equal branches of Government." See U.S. v. Brewster, 408 U.S. 501, 508 (1972).

Since, the Legislature and the Governor violated the Separation of Powers doctrine, the Speech and Debate Clause should not be interpreted to bar inquiry into their actions. See Office of the Governor v. Select Committee of Inquiry, 858 A.2d 709, 722 (Conn. 2004) (Speech or Debate Clause does not immunize from judicial review a violation of the separation of powers); State Ass'n of County Commissioners, 681 A.2d at 702 (Speech and Debate Clause does not protect the Legislature from this court's authority to require the legislative branch to act in accord with the Constitution).

The Speech and Debate Clause must not be interpreted to bar suit by the judicial branch against the legislative and executive branches. Select Committee

of Inquiry, 681 A.2d at 725 ("[i]t would be paradoxical to allow the clause to be used in a manner that categorically forecloses judicial inquiry into whether the legislature itself violated the separation of powers. Permitting the shield to extend that far would allow the clause to swallow the very principle that it seeks to advance.").

In the case at bar, the Legislature and the Governor have unconstitutionally suppressed the judicial branch by failing to increase the Judiciary's compensation for over ten years. Therefore, this Court's inquiry into the actions of the Legislature and the Governor is proper because neither co-equal branch of government is protected by the Speech and Debate Clause because their actions violate the Separation of Powers doctrine.

In sum, it is undisputed that the combined acts of the Governor and the Legislature have lead to the diminishment of Judicial compensation over the past ten years. Under the circumstances, neither the Legislative branch nor the Executive branch can be afforded immunity from judicial inquiry. Each branch has acted with impunity, capriciously holding Judicial salary increases hostage to unrelated matters. The conduct at issue before this Court has gone beyond the purview of legitimate legislative activity, and now calls into question the proper balance of power among the three branches of government. Judicial review is not

only appropriate, it is necessary because the fundamental principles of our system of governance are threatened.

D. The Threat to Judicial Independence Arises When Issues Unrelated to the Propriety of Judicial Compensation Increases are Allowed to Erode The Institutional Protections Of The Tripartite System In Violation Of The Doctrine Of Separation Of Powers

In correctly finding that the doctrine of the Separation of Powers is breached by "the consequential exploitation of the Judiciary, not any present impairment in its operations", Larabee, 880 N.Y.S.2d at 275, the First Department decision in Larabee recognized that the absence of evidence showing undue influence or current systemic operational deficiencies is not dispositive of whether there has been a violation. The issue is not whether there was actual harm caused to the functioning and independence of the third branch of government; instead, the issue is whether there is a threat to that independence.

The United States Supreme Court decision in Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972), is instructive on this issue. In Ward, plaintiff challenged the constitutionality of an Ohio statute that authorized mayors to sit as judges in cases of ordinance violations and certain traffic offenses. 409 U.S. at 57. Pursuant to the state law, the Mayor of Monroeville had vast executive powers including matters dealing with the village budget and finances, of which a

major part was derived from fines, forfeitures, costs and fees imposed by the Mayor when serving in a quasi-Judicial capacity. 409 U.S. at 58. Conceding that the revenue produced from the Mayor's court provided a substantial portion of the municipality's funds, the Supreme Court of Ohio nonetheless held that such fact alone does not mean that the Mayor's impartiality was so diminished that he could not act in a disinterested fashion in a Judicial capacity. 409 U.S. at 59. The United States Supreme Court reversed, holding:

> [T]he mere union of the executive power and the judicial power in him cannot be said to violate due process of law, the test is whether the mayor's situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. Plainly, that possible temptation may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

409 U.S. at 60 (internal citations and quotations omitted). The Supreme Court thus held that, even though no actual bias or prejudice was shown, the potential for such impartiality was sufficient to find the statute unconstitutional. 409 U.S. at 61-62. See also, Tumey v. Ohio, 273 U.S. 510 (1927) (reversing convictions for prohibition law violations rendered by the Mayor of North College Hill, Ohio, as violative of due process and the Fourteenth Amendment because a defendant's

liberty or property was subject to the judgment of an adjudicator who would have a pecuniary interest in reaching a decision against the defendant.)

Here, there is no dispute, and the evidence is striking, that the power vested in the Legislature to fund the Judicial purse has been used as a bargaining tool with the Executive branch to advance the passage of unrelated matters, and vice-versa. There has been no suggestion, nor can there reasonably be, that the Legislature or Executive branches have considered the question of Judicial salary increases objectively and on the merits – all parties agree, that the only reason for over 10 years of salary stagnation is the infighting between those two branches of government. As the First Department astutely recognized in Larabee:

> [W]e are concerned with the integrity, in a structural sense, of the Judicial system as an independent institution, in that New York's constitutional architecture prohibits the subordination of the Judicial branch to the other branches of government either in practice or in principle. More significantly, the political maneuvering by the other branches of government, by reducing the issue of Judicial compensation to a tactical weapon, consequentially subordinated the status of the Judiciary to that of an inferior governmental entity. Linkage, as employed in these circumstances, manifested an abandonment of any pretense to an objective consideration of Judicial compensation unimpeded by extraneous political considerations. These acts and their ramifications necessarily undermine the carefully constructed architecture of New York government.

Larabee, 880 N.Y.S.2d at 274. The Third Department holding to the contrary – that absent allegations of fraud, corruption, oppression, illegality, unconstitutionality or a violation of public policy, courts do not inquire into the

wisdom, reasons or motives for legislation and, thus, the mere existence of a threat to the separation of powers – is insufficient to establish a violation of that doctrine, Maron, 58 A.D.3d at 119 – should be rejected.

POINT II

JUDICIAL SALARIES, CURRENTLY STALLED AT 1999 RATES, HAVE DIMINSHED IN VALUE BY ALMOST 30%, AND THAT LOST PURCHASING POWER IS AN UNCONSTITUTIONAL DIMINUTION THAT VIOLATES THE COMPENSATION CLAUSE

A. Law And Policy Against Diminution

"Without adequate compensation, a competent Judicial system is not possible." Goodheart v. Casey, 555 A.2d 1210, 1213 (Pa. 1989).

The policies governing a prohibition against Judicial salary diminishment are rooted deeply in our nation's history. The Framers knew firsthand of a country where the King controlled the courts and made judges dependent upon his will for the tenure of their office and the payment of their salaries. Thus, Alexander Hamilton cautioned in The Federalist No. 79, that "a power over a man's subsistence amounts to a power over his will." For that reason, Hamilton recognized that "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support" because "beyond comparison [the Judiciary is] the weakest of the three branches" of government, having "no influence over either the sword or the purse." The Federalist No. 78 (Hamilton). Hence, a proscription against manipulating Judicial

compensation was included in the United States Constitution (Art. III, § 1) to protect the independence of the Judicial branch from invasion by the political branches.

Consistent with this constitutional guarantee, the New York State Constitution protects Judicial compensation against diminishment by the Legislative or Executive branches of government. The Compensation Clause of the New York State Constitution, Article VI, § 25(a), provides:

> The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of a court for the city of New York ..., a judge of the district court or of a retired judge or justice 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 Legislature is not only proscribed from enacting laws that directly cause a diminishment of Judicial salaries, it is also precluded from doing so indirectly. Without a prohibition against legislation that indirectly causes a diminishment, the United States Supreme Court has stated that "a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect." United States v. Hatter, 532 U.S. 557, 569 (2001); see also Miles v. Graham, 268 U.S. 501 (1925) (indirect assaults on Judicial compensation are proscribed.); Point I, supra at 8-9.

B. **The Judiciary Has Been Treated Discriminatorily And Its Salaries Have Been Significantly Diminished**

Contrary to the Third Department's finding that the Maron Plaintiffs failed to show a discriminatory attack on the Judicial branch that impaired or imminently threatened the Judiciary's independence and ability to function, Maron, 58 A.D.3d at 123, the Judiciary has been treated in a manner unlike the other branches of government. Here, Defendants have failed to adhere to the Constitutional directive, which ensures that Judicial salaries suffer no diminishment. Instead, for more than a 10-year period, while inflation has eaten away almost 30% of the buying power of Judicial salaries, Defendants have singled out the Judiciary as the only victim of a salary "freeze."

While there is general authority for the proposition that the normal effects of inflation, without more, do not constitute unconstitutional diminishment, in none of those cases was the effect as dramatic as in this case, nor was the treatment of the Judiciary so disparate. Here, the almost 30% loss of purchasing power over a full decade of stagnant salary levels crosses the line between a difference in degree and a difference in kind. And that is especially so when the Judiciary is severely restricted from earning outside income while the Legislature's members, in that decade, have had the opportunity to earn vast sums of "additional" earnings by virtue of non-government employment.

The Supreme Court's ruling in United States v. Hatter, 532 U.S. 557 (2001) is directly on point. In Hatter, the Federal Judiciary brought an action challenging the constitutionality of two taxes, a Medicare tax and a Social Security tax. With respect to the Medicare tax, the Court found that because it applied to all employees and the Judiciary alike, the indirect diminishment was constitutional because it did not uniquely disadvantage the Judiciary. The Court reasoned that "the Compensation Clause offers no reason for exonerating a judge from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge." Id. at 569-570 (quotations and citations omitted). In contrast, and of particular relevance here, the Court found that the Social Security tax did single out the Judiciary and caused a diminishment of its salary that others did not incur. The Court held that the Social Security tax was "very different" from the Medicare tax:

> Were the Compensation Clause to permit Congress to enact a discriminatory law [that indirectly reduced Judicial salaries], it would authorize the Legislature to diminish, or to equalize away, those very characteristics . . . , the public needs to secure that Judicial independence upon which its rights depend.

Id. at 576. The Court held that the Social Security tax, which provided for a mandatory retroactive application upon the Judiciary that resulted in additional withholdings, was unconstitutional because it imposed an additional financial

burden upon the Judiciary from which all other public employees could opt out. Id. at 573.

Hence, unlike the other branches of government, or even any New York State government employee, the Judiciary has been uniquely affected by inflation over the past ten years: it, and it alone, has lost almost 30% of its purchasing power. Under Hatter, this amounts to an unconstitutional diminishment in violation of the Compensation Clause.

1. **The Judiciary Has Been Singled Out**

The facts support a finding that Defendants have singled out the Judiciary for unfavorable treatment. While refusing to approve any upward salary adjustments for the Judiciary, the Legislature has granted, and the Executive has approved raises for approximately 195,000 government employees amounting to upward adjustments in compensation of 24% in the aggregate over the past ten years. These increases have essentially tracked the rate of inflation, which has risen almost 30% during the same period. See NCSC Report at 10.

While Legislators, like Judges, have not received increases since 1999, they have not had to bear the effect of that freeze. New York Legislators are among the best paid in the Nation and are permitted to earn unlimited incomes outside of their part-time political office. New York's Judiciary, on the other hand, is among the lowest paid in the Nation. NCSC Report at 9. More significantly, pursuant to the

Code of Ethics, the members of the Judiciary are not permitted to hold any other position or earn income from any other source of employment (with some very limited exceptions). See Code of Judicial Conduct, Canon 4, McKinney Consol. Laws 2009. Unlike the Legislature, therefore, the Judiciary has no opportunity to offset any lost income, while the Legislators can redress the effects of inflation through outside earnings.

These undisputed facts reveal that due to Legislative and Executive inaction, the Judiciary alone has been forced to operate on a salary that was set according to the 1999 economic environment, with little or no opportunity to supplement that income.

2. **Judicial Salaries Have Been Diminished**

Judicial salaries have been diminished by nearly 30% due to Defendants' failure to make adjustments for the increased cost of living. This dramatic reduction in purchasing power, affecting only the Judiciary, is an unconstitutional indirect diminishment. The First Department incorrectly held in Larabee that "[t]he present action does not provide a basis for [this Court] to determine, as a general principle, the point at which salary 'diminishment' occurs within the meaning of article VI, section 25(a), because salaries have lagged behind inflation and the cost of living," without setting forth a bright line rule. No such bright line rule is necessary. This Court may properly acknowledge that the current 30%

reduction is beyond that which is constitutionally permissible. Wherever the line is, this case is beyond it. Indeed, historically, constitutional law has developed through decisions that determined certain conduct to be unconstitutional without the need to draw definitive lines because the conduct was so egregious or so clearly impermissible. This is such a case.

(a) The Impact Of Inflation On Judicial Salaries Must Be Considered In Assessing Diminution

It is axiomatic that inflation affects purchasing power. This is no less true when we consider the value of Judicial salaries.

As early as 1846, the cost-of-living was a factor in determining Judicial compensation. Then, in the Debates and Proceedings of the Convention for the Revision of the Constitution, the drafters debated whether Judicial compensation should be fixed. One of the drafters stated that, "$3,000 was little enough for a judge who had to travel over the whole state, leave his family, and his affairs to be managed by others, and to live a good part of the time in your large cities, where he must pay the high prices which transient persons had to pay there." State Of New York, Report Of The Debates And Proceedings Of The Convention For The Revision Of The Constitution, Section 6, at 778 (1846).

In 1868, in the aftermath of the Civil War, the New York State Constitution's drafters again debated the impact of the cost of living on Judicial compensation. In opposition to freezing Judicial compensation, it was argued that:

> [h]ow can any man tell whether that which is adequate to the support of himself and his family to-day will be so five years or fourteen years hence? . . . We live at a time and in a country where the currency and values are constantly changing from year to year, from month to month, and almost from day to day. Who can say today what the standard of value will be six months or one year hence?

Proceedings and Debates of the Constitutional Convention of the State of New York, 1867 and 1868, at p. 2440 (1868).

The issue was again addressed by the New York State Judiciary Constitutional Convention of 1921 in its Report to the Legislature in a section of the report that recommended that the compensation of the Judiciary be left entirely to the Legislature. That convention was unhappy with the then current compensation of the Judges of the Court of Appeals and of the Justices of the Supreme Court, stating:

> Since this compensation was fixed, the cost-of-living and rents, etc., have greatly increased in every part of the State. The inadequacy of compensation deprives the public of the benefit of the services as judges of exceptionally trained and competent lawyers of the highest character and independence because the cost of maintaining their families cannot be met out of the present compensation.

See State Of New York, Judiciary Constitutional Convention Of 1921: Report To Legislature, Section 19, at 29 (1922).

The issue of the effect of inflation on Judicial salaries was again addressed when the courts were asked to consider the constitutionality of paying judges of the same court across New York State different salaries. Notably, in those cases, the

varying costs of living across the state were factored into the analysis of whether it was constitutional to pay judges of the same court different wages. For example, in Edelstein v. Crosson, 187 A.D.2d 694, 696 (2d Dep't 1992), the court held that "because it has been demonstrated that it is more expensive to live in Westchester County than in Rockland, Dutchess, and Orange Counties, a rational basis was established for the retention of geographically disparate salaries between the plaintiffs and the Westchester County Court Judges." See also, Buckley v. Crosson, 202 A.D.2d 972, 973 (4th Dep't 1994) ("[w]e agree with Supreme Court that the significantly higher cost of living in those counties, as compared to Oneida County, provides a rational basis for the geographically disparate salaries."); Barth v. Crosson, 199 A.D.2d 1050, 1051 (4th Dep't 1993) ("[w]e agree with both courts that the significantly higher cost of living in those First and Second Department counties, as compared to Onondaga and Oneida Counties, provides a rational basis for the geographically disparate salaries.")

Similarly, other States have considered inflation's impact upon Judicial salaries under the Compensation Clause. In Overton County v. State, 588 S.W.2d 282 (Tenn. 1979), the Court discussed the impact of inflation on judges' compensation in a case where nine county officials brought suit to collect the annual salary adjustments that had been provided by the Legislature and were tied to the consumer price index. The Court noted that "[t]he theory behind hinging an

annual change in salary to the consumer price index is that the index accurately measures the change in the purchasing price of the dollar, with the result that by 'indexing' judicial salaries, the 'compensation' remain constant. That theory has a solid foundation in fact." Id. at 289.[7]

In short, history and case law demonstrate that inflation, and more specifically, the loss of purchasing power, can and does result in a diminishment in salary.

(b) The Degree To Which Inflation Has Affected Judicial Salaries Is Relevant To The Question Of Diminution (Distinctions In Degree Are Significant When They Become Differences In Kind)

The members of the Judiciary currently operate under a salary that is nearing 70% of the value of the salary they earned in 1999. As inflation rises, the value of the Judicial dollar diminishes at a corresponding rate. Even accepting that mere inflation, in and of itself, would not be sufficient in ordinary circumstances to amount to an unconstitutional diminishment in salary, there comes a point at which failure to account for continuing diminishment as a result of inflation shall pass the line of what is constitutional. For example, if a judge's salary is reduced by 95%

[7] See also, Schultz v. Harrison Radiator Div. General Motors Corp., 90 N.Y.2d 311, 319 (1997) (recognizing that an inflation adjustment on a structured settlement award does not provide additional compensation for a plaintiff above and beyond the damages already awarded; rather, it ensures that the passage of time will not devalue the award because of a general rise in prices for goods and services. Consequently, some adjustment for inflation, whether made by a jury and incorporated in the verdict, or made by a court after the verdict has been rendered, should occur.)

of its original value, it is clear that such a reduction would be unconstitutional, even if inflation is the reason for that reduction. The question remaining is, at what point does a diminishment in purchasing power due to inflation become unconstitutional. Although there is no bright-line test, given the exigencies of today's financial crisis, an almost 30% loss is surely constitutionally prohibited.

This type of line-drawing is not unfamiliar to the Courts that have considered analogous constitutional questions. See Harrison v. Schaffner, 312 U.S. 579, 583 (1941) (Justice Stone writing for the Court stating "'Drawing the line' is a recurrent difficulty in those fields of law where differences in degree produce ultimate differences in kind."). In Buckley v. Valeo, 424 U.S. 1 (1976), Plaintiffs brought suit challenging, inter alia, the constitutionality of the Federal Election Campaign Act of 1971, as amended, which limited campaign contributions to $1,000.00. Plaintiffs argued that the limitation violated the freedom of political association under the First Amendment, and discriminated against candidates opposing incumbent officeholders and against minor-party candidates in violation of the Fifth Amendment. Id. at 24. Finding that the $1,000.00 contribution limit was not unconstitutional, the Court noted, without elaboration, that:

> if it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind.

Id. at 30 (citations omitted).

The Supreme Court, in Randall v. Sorrell, 548 U.S. 230 (2006), utilized its Judicial scalpel to find a difference in kind that made the limit unconstitutional. In Randall, petitioners challenged Vermont legislation that limited campaign contributions to $57 per election. Id. at 246-250. The parties disputed whether, despite the Buckley court's general approval of statutes that limit campaign contributions, the Vermont Act's contribution limits were so severe that, under the facts and circumstances in Vermont, the limits violated the First Amendment. 548 U.S. at 246. In reviewing the Buckley reasoning, the Randall Court noted that while the contribution limit in Buckley was not unconstitutional, that decision also:

> [R]ecognized that, in determining whether a particular contribution limit was closely drawn [to match a sufficiently important interest], the amount, or level, of that limit could make a difference. Indeed, ... contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.

548 U.S. at 247 (emphasis added) (internal quotations omitted). The Randall Court recognized that while it would not ordinarily probe each possible contribution level (that in practice the Legislature is better equipped to make such judgments), it must recognize the existence of some lower boundary because at some point the constitutional risks to the democratic electoral process become too great. Id. at 248.

> [C]ontribution limits that are too low can ... harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote. Thus, we see no alternative to the exercise of independent judicial judgment as a statute reaches those outer limits. And, where there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts ... must review the record independently and carefully with an eye . . . toward assessing the proportionality of the restrictions.

Id. at 248-249.

The Supreme Court considered this concept earlier in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), where an action was brought to prevent the Pennsylvania Coal Company ("PCC") from mining under plaintiffs' property in such way as to remove the supports and cause subsidence of the surface and plaintiffs' house. Id. at 412. The deed that conveyed the land to plaintiffs reserved the right to remove all the coal under the surface and Plaintiffs waived all claims for damages that might arise from that mining. However, with the enactment of the Kohler Act, which proscribed the mining of coal if such mining resulted in subsidence of, inter alia, dwellings, plaintiffs sought a declaration that PCC's mining was an unconstitutional taking that required the payment of compensation for the loss of plaintiffs' property. Id. Although the Court found that there was no

unconstitutional taking because plaintiffs had waived all rights under principles of contract law, it cautioned that, from a constitutional perspective:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.... [W]hen this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Id. at 415. See also Exxon Shipping Co. v. Baker, No. 07-219, 2008 WL 2511219, at *16 (U.S. June 25, 2008) (stating that "[a]lthough we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, we have determined that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process; when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee...."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (in declining to impose a bright-line ratio on which a punitive damage award cannot exceed, the Court stated that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process .... Single-digit multipliers are more likely to comport with due process.)

It follows from these cases that a bright line rule is not always available to test constitutionality, but the courts will find conduct unconstitutional nonetheless if the limits are stretched too thinly.

Thus, even under a general rule that the effects of inflation do not constitute a diminishment, here where purchasing power has been reduced so significantly, the failure to account for the increased costs of living is an unconstitutional diminishment. It is noted, also, that the diminishing effects of inflation are compounded by increases in State and local taxes over the past 10 years, which have also served to the reduce the value of the Judicial dollar.

As these cases illustrate, courts must assess the facts of a particular case to determine whether the conduct at issue has reached beyond a statute's outer constitutional limits. While the Compensation Clause speaks generally in terms of "diminishment," these cases illustrate that it is within a court's purview to quantify what that term means in line with the statutes' intent. Contrary to the First and Third Departments' findings in Larabee and Maron, the time is ripe for the Court to exercise its independent judgment and use its Judicial scalpel under the egregious circumstances presented herein.

(c) Prior Periods In Which Judicial Salaries Were Stalled Do Not Justify The Unconstitutional Diminishment That Is Occurring Today

As noted by the Third Department in Maron, 58 A.D.3d at 105, there have been periods in our Nation's history in which the Judiciary did not receive a legislatively enacted increase in salary. However, a closer look at the economic climate of those times and its corresponding impact on the purchasing power of those salaries belies that court's conclusion that today's stagnated salaries, reduced by almost 30%, must nonetheless be constitutional. See also, Larabee, 880 N.Y.S.2d at 264-66. Many factors effect the value of money at a given period of time, such as whether it is a period of inflation or deflation.[8] Unlike Judicial salaries today, many of those periods in which no upward adjustments were granted were periods in which the value of money was rising due to deflation.[9]

For example, in 1887, the nominal salary of a Court of Appeals Associate Judge was $10,000, which, in today's terms, is $228,418. For a period of approximately 35 years, that salary remained unchanged, though its value fluctuated slightly at times due to periods of depression in 1893 to 1896 and 1907. During the World War I years, the value then declined rapidly, and so in 1926 the

[8] Periods of economic depression have occurred in the United States in 1819, 1837 to 1842, 1873 to 1877, 1893 to 1896, 1907, and from 1929 to 1939.

[9] The dollar amounts used in this subsection are taken from Exhibits A and B, annexed to the Brief for Plaintiffs-Appellants-Respondents in Chief Judge v. Governor, Index, No. 400763/08, filed in this Court on or about October 29, 2009.

lost purchasing power was corrected by an increase to $269,260 in today's dollars. Even during the next period of depression beginning in 1929, the value of the dollar continued to increase, not decrease, and it was raised again in 1933 to a current value of $366,608.

Periods of decline followed during World War II and during the oil crisis years in which no adjustments were made, but the declining salary was adjusted in 1975 with an increase to a comparative purchasing power today of $243,912.

These numbers reveal the fallacy of justifying today's stalled salaries by the fact that Judicial salaries have been stalled in the past. During most of those periods of stalled increases or fixed salaries, the impact of deflation caused the Judiciary's purchasing power to increase. During the periods in which inflation had a negative impact on purchasing power, the Legislature stepped in and made the necessary adjustments. Thus, the absence of any legal challenges during those periods does not mean that those periods of stagnated salaries and declining value were constitutional. History shows that it is not uncommon for unconstitutional conduct to continue for many years before an action is brought challenging it, finding ultimately that the conduct is (and thus has been) unconstitutional. See, e.g., Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

The Proposed *Amici* recognize that we are currently in an economic crisis of epic proportions, and that a request for an upward adjustment to Judicial salaries,

to bring them in line with today's cost of living, comes at an unfortunate time. Nevertheless, the integrity of the Judiciary demands this constitutionally required – and modest – salary increase. Moreover, the United States Supreme Court has, in the past, held that ensuring the integrity and independence of the Judiciary is paramount, even during economically difficult times. See Evans v. Gore, 253 U.S. 245, 254 (1920) (reasoning that "the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect to tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which its proceeds."); accord O'Donoghue v. United States, 289 U.S. 516 (1933).

The spirit and principle on which the "no diminishment provision" exists mandates a finding that today's significant reduction in purchasing power has exceeded the limits of what is constitutional. The risks associated with the threat to Judicial independence, by a shifting of power that enables one branch of government to exercise control over another, are present and serious. See Point I,

supra. The circumstances at issue here have created a crisis situation which imperils the Judiciary's many important functions. While under N.Y. Constitution Art. VI, § 29 the question of funding lies within the sound discretion of the Legislative and Executive Branches, in an instance such as this one, where the Executive and Legislative Branches have denied funding so as to force the Judiciary to operate under a deficit in income nearing one-third of its former value, this Court has the inherent power to say "enough."

POINT III

BY FAILING TO PROVIDE ADEQUATE JUDICIAL COMPENSATION, BY SINGLING OUT JUDGES FOR ESPECIALLY UNFAVORABLE TREATMENT, AND BY LINKING JUDICIAL SALARIES TO LEGISLATIVE SALARIES AND UNRELATED MATTERS, DEFENDANTS HAVE VIOLATED ARTICLE VI OF THE NEW YORK STATE CONSTITUTION

The Proposed *Amici* respectfully adopt and support the legal arguments of the Larabee Plaintiffs, the Maron Plaintiffs, and the Chief Judge Plaintiffs, as set forth in their papers filed in this Court.

CONCLUSION

For the foregoing reasons, and those set forth in the Larabee Plaintiffs, Maron Plaintiffs, and Chief Judge Plaintiffs' papers to this Court, the Proposed *Amici* respectfully submit that this Court should order Defendants to comply with their constitutional and statutory duties to provide the Judiciary with adequate compensation. Defendants' failure to do so is unconstitutional and requires that this Court exercise its inherent power, under the doctrine of Separation of Powers, to prevent any further interference with the independence of the Judiciary.

RELIEF SOUGHT

The Proposed *Amici* respectfully urge that the Court:

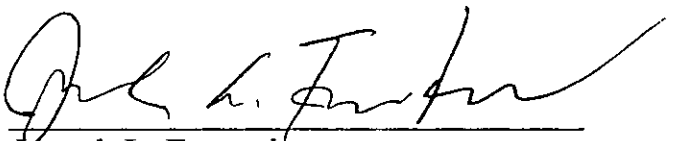
- reverse the Third Department's decision in Maron in its entirety;
- affirm in part, the First Department's holding in Larabee and Chief Judge that the Legislature violated the Separation of Powers doctrine;
- reverse the decision to dismiss the Governor from each of the actions;
- enter judgment against the Legislature and the Governor for violating their Constitutional duties; and
- direct that judgment be entered increasing the Unified Court System's budget as reflected in its budgetary requests, retroactive to the applicable budgetary years for: Budget Year 2006-2007 in the amount of $69.5 million; Budget Year 2007-2008 in the amount of

$41.9 million; and Budget Year 2008-2009 in the amount of $31.6 million. And,

- directing that such increased sums be paid to the judges of the Unified Court System, including payments to those judges who have retired since the date the budgets would have been adjusted, and make any further adjustments to their pensions as would be appropriate in the ordinary course.

Dated: New York, New York
November 24, 2009

STROOCK & STROOCK & LAVAN LLP

BY 

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Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Respondents-Appellants,

-against-

THE GOVERNOR OF THE STATE OF NEW YORK

Defendant-Respondent,

NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, AND THE STATE OF NEW YORK,

Defendants-Appellants-Respondents.

BRIEF OF PROPOSED AMICUS CURIAE THE ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK, THE BRONX BAR ASSOCIATION, THE DOMINICAN BAR ASSOCIATION, THE LATINO LAWYERS OF QUEENS, THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER LAW ASSOCIATION OF GREATER NEW YORK, INC., THE METROPOLITAN BLACK BAR ASSOCIATION OF NEW YORK, THE MUSLIM BAR ASSOCIATION OF NEW YORK, AND THE PUERTO RICAN BAR ASSOCIATION OF NEW YORK

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December 4, 2009

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Proposed amicus curiae the Asian American Bar Association of New York, the Bronx Bar Association, the Dominican Bar Association, the Latino Lawyers of Queens, the Lesbian, Gay, Bisexual, and Transgender Law Association of Greater New York, Inc., the Metropolitan Black Bar Association of New York, the Muslim Bar Association of New York, and the Puerto Rican Bar Association of New York ("Proposed Amicus Curiae") respectfully submit this brief in support of the position of Plaintiffs-Respondents-Cross Appellants, Honorable Susan Larabee, Honorable Michael Nenno, Honorable Patricia Nunez, and Honorable Geoffrey Wright (the "Plaintiffs"). Proposed Amicus Curiae write in support of the unanimous decision and order of the Appellate Division, First Department entered June 2, 2009 (Luis A. Gonzalez, P.J., Peter Tom, Eugene Nardelli, Karla Moskowitz, Diane T. Renwick, JJ.) (the "Appellate Division Ruling") (CA6-CA54), as affirmed the order of the Supreme Court, New York County (Edward H. Lerner), entered, June 11, 2008 ("June Order"), as granted Plaintiffs' motion for summary judgment on the second cause of action in Plaintiffs' Verified Complaint, which alleges that the Defendants, Governor of the State of New York, New York Senate, New York State Assembly and the State of New York ("Defendants") have violated the doctrine of separation of powers. Proposed Amicus Curiae endorse the positions in the brief of proposed amicus curiae the New York County Lawyers Association and submit the following additional positions.

INTEREST OF AMICUS CURIAE

The Proposed Amicus Curiae are minority bar associations or general purpose bar associations which represent substantial numbers of attorneys who are members of minority groups. Collectively, the Proposed Amicus Curiae represent the interests of thousands of judges and law students. Each of the Proposed Amicus Curiae takes positions on issues of interest to their constituencies and to the legal community in general. Each of the Proposed Amicus Curiae has previously taken advocacy positions, sometimes in the form of amicus curiae briefs, in cases that raise significant issues for that bar association and/or issues that concern the independence of the judiciary. For example, the Asian American Bar Association of New York and the Metropolitan Black Bar Association of New York submitted amicus curiae briefs in *New York State Board of Elections v. Lopez Torres*, 128 S. Ct. 791 (2008), a case involving the constitutionality of New York's system for the selection of Supreme Court justices.

Each of the Proposed Amicus Curiae shares an interest in strengthening and maintaining the independence of New York State's judiciary. Each shares a concern that a failure to provide adequate compensation for judges violates

principles of Separation of Powers and discourages qualified individuals from seeking the state court bench.[1]

The Proposed Amicus Curiae hereby submit this amicus brief to urge this Court to affirm the ruling of the Appellate Division, First Department that Defendants' continuing failure to properly address judicial compensation violates the New York Constitution and must be remedied.

PRELIMINARY STATEMENT

Proposed Amicus Curiae are concerned about the crisis in judicial compensation and the resulting corrosive impact on the administration of justice.

As core principles of economics would dictate, devoting fewer resources to judicial compensation decreases the quality of candidates --including minority candidates -- who opt for a judicial career and correspondingly reduces the quality of justice administered by our courts. And requiring our judges to go hat-in-hand to the legislature for judicial salary increases degrades our judges and impairs their independence. This is particularly true when the legislative response invariably is to hold judicial salaries hostage to legislative salaries -- in violation of separation of powers principles. As the First Department correctly held:

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[1] Officials of some of the Proposed Amicus Curiae have written editorials and made public speeches in support of the goal that New York's judiciary be accorded fair compensation. *See, e.g.*, Asian Am. Bar Association of New York Statement, Asian Bar Supports Judicial Pay Suit," *New York Law Journal*, April 17, 2008; Vincent T. Chang, "Asian Bar Cares About Judicial Pay," *New York Law Journal*, April 18, 2007. (Both are available at http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=900005477716).

> "[T]he political maneuvering by the other branches of government, by reducing the issue of judicial compensation to a tactical weapon, consequently subordinated the status of the Judiciary to that of an inferior governmental entity. . . These acts and their ramifications necessarily undermine the carefully constructed architecture of New York government."

Larabee v. Governor, 65 A.D.3d 74, 97, 880 N.Y.S.2d 256, 274 (1st Dep't 2009).

Tellingly, the Petitioners do not meaningfully dispute the need for fair judicial compensation. R. 318-19. Rather, their principal response to the well-reasoned decision of the First Department is to contend that the other two branches of government – and those two branches alone – have the authority to dictate judicial salaries. But this facile point is defeated by Petitioners' admission below that at some point declining judicial salaries unconstitutionally impair judicial independence. R. 323-25. The Proposed Amicus Curiae submit that the State of New York has passed that point. That we face a true crisis in judicial compensation is demonstrated by the fact that New York's real judicial salaries have sunk below the levels of every other state in the nation -- including states with far less wealth. R. 160. And as their pay has eroded, the workload of our judges has soared. This Court must intervene to address this crisis, which grows worse each year.

BACKGROUND

The statistics defy belief and only grow even more dire as each year passes with no increase in judicial salaries, resulting in a corresponding diminution in judicial purchasing power.

- Some New York state judges make as little as $108,000 per year. National Center for State Courts, *Judicial Compensation in New York: A National Perspective* at 5 (May 2007). Even some senior law clerks in New York State can earn more than this $108,000 figure. Starting associates in large law firms can make 50% more than this figure. *Id.* at 12.
- New York state judges have not had a raise (or any salary adjustment such as a cost of living increase) in over ten years despite a more than 30% increase in the cost of living. *Larabee*, 65 A.D.3d at 85.
- No other group of judges in the United States has gone longer without a pay raise. National Center for State Courts, *supra*, at 9. In fact, it is hard to think of any group of workers in the entire economy that has suffered for so long with no increase in compensation.
- Since 1978, New York state judicial salaries have declined 40% in real terms. During that same time span, the average judges' case load has increased dramatically. *Id.*

- When adjusted for the cost of living, New York state judges, by some measures are among *the worst paid judges in the entire country.* National Center for State Courts, *supra*, at 9.

Proposed Amicus Curiae submit that this judicial compensation crisis has had a profound effect on the administration of justice and a disproportionate effect upon minority groups. Accordingly, for the reasons stated in the amicus brief of the New York County Lawyers Association and those stated below, we respectfully ask this Court to affirm the decisions of the First Department and the Supreme Court below.

I. Inadequate Judicial Compensation Disproportionately Reduces the Pool of Minority Group Members Who are Willing and Able to Serve as Judges

Proposed Amicus Curiae, like other bar associations, are deeply concerned about the detrimental effect on the quality of the candidates for judicial office if judicial salaries are not maintained at a fair level. Inadequate judicial compensation adversely affects the recruitment of talented lawyers to the judiciary -- and minority group members are often among the most affected.

Evidence is mounting that the lack of an increase in judicial compensation is causing hardship among our judges. For example, prior to 2005, it was rare for judges to borrow against their state pensions. However, between 2005 and 2007 alone, the number of judges engaging in such borrowing more than quadrupled to

an astounding 10% of the entire judiciary. Atlantic Legal Foundation, Report, *Adequate Compensation for Judges is Essential for New York's Business and Economy* (Oct. 2008) (www.atlanticlegal.org).[2] As former Chief Justice Judith Kaye has noted, "[e]xperienced judges increasingly talk of resigning so they can afford to live in New York and educate their children." Judith S. Kaye, *Free judges Pay*, N.Y. Times, June 7, 2007.

Of course, those who are considering careers in the judiciary are well aware of the hardships endured by our judiciary and, as Judith Kaye correctly put it, judicial compensation has reached such a "level of unfairness and disdain [that] our Judiciary cannot attract and retain the very best lawyers at the pinnacle of their careers." It is to avoid such a consequence that both the United States and New York constitutions protect judicial compensation "to induce learned men and women to 'quit the lucrative pursuits' of the private sector." *United States v. Hatter*, 532 U.S. 557, 568 (2001).

In recognition of the wisdom of these words, several minority bar association have over the years passed resolutions supporting higher judicial pay at the state and federal level because these bar associations are concerned that low levels of judicial pay will further erode the number of minority judges. Attorneys from minority groups typically come from less wealthy families and thus qualified

[2] This 2007 number is undoubtedly much higher today.

minority group candidates often cannot make the financial sacrifice necessary to become a judge. Indeed, Judge J. Brock Hornby of the U.S. District Court for the District of Maine wrote in 2007 that:

> The salary discrepancy may also impair the judiciary's racial, ethnic and gender diversity as qualified candidates not to forego highly lucrative alternatives. For example, anecdotal evidence from Asian American lawyers suggests that some of their colleagues have turned down federal judgeships because of the salary (the nature of the appointment process makes it impossible to gather statistics), and some African American judges have left the bench for other, more financially rewarding opportunities.

J. Brock Hornby, *The Metropolitan Corporate Counsel* at 8 (Sept. 2007).

Thus, the largest national bar association for African Americans, the National Bar Association, through its Judicial Council, recently enacted a resolution that made the observation that:

> African American lawyers who have a successful private practice or who are the general counsel or in other high-paid sectors can ill-afford to make the personal financial sacrifice of opting for a judicial appointment where the salary is only $165,000 annually [for federal judges], which is below that of some first-year law associates right out of law school;
>
> WHEREAS, attracting and retaining first-rate African American legal talent is a concern and more than a few experienced and well-regarded African America jurists have resigned from the federal bench to take higher paying positions, pointing to a dangerous trend of diminishing numbers of African American jurists on our federal benches at a time when we need more, not fewer, African American judges.

National Bar Assoc. Judicial Council, *Resolution in Support of Federal Judicial Salary Restoration Action of 2007.*

(http://www.uscourts.gov/judicialcompensation/nba.pdf)

The Asian American Justice Center, writing on behalf of a number of organizations, urged the House Judiciary Committee to enact fair judicial compensation, noting that:

> Judicial compensation is a significant barrier to the recruitment of African American, Asian American, Latino, and Native American candidates . . . in our discussions with minority members of the Bar, the issues of compensation is cited as a significant reason in their decision not to seek a federal bench appointment. Most recently, an Asian American litigation department chair in one of the nation's most prominent law firms carefully considered applying to the bench but declined because of the pay disparity . . . It is imperative that our federal judiciary be able to recruit a diverse pool of the best and brightest and not be hindered by the current level of judicial compensation.

Asian Am. Justice Center Letter to the Chairman of the House Jud. Comm., Apr. 19, 2007 (http://www.judgingtheenvironment.org/assets/pdf/Minority-Bars-Letter-Berman.pdf).

Accordingly, Proposed Amicus Curiae urge affirmance of the decisions below.

II. Threats to Judicial Independence Disproportionately Affect Minority Group Members

As this Court has long noted, "[t]he safety of free government rests upon the independence of each branch and the even balance of power between the three." *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282 (1898); *Under 21, Catholic Home Bureau for Dependent Children v. New York*, 65 N.Y.2d 344, 356 (1985); *see Larabee*, 65 A.D.3d at 93.

Unless steps are taken to provide judges with reasonable financial security, the very judicial independence that is the foundation of our rule of law – and the protection of minorities -- is at risk. Fair judicial compensation is designed "to benefit not the judges as individuals, but the public interest in a competent and independent judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). In the *Federalist Papers,* Hamilton explained the importance of fair compensation: "[I]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." *Federalist Papers* No. 79.

It is beyond cavil that the practice of holding judicial salaries hostage to the political will of the Legislature impairs judicial independence. *Larabee*, 65 A.D.3d at 77-79; *id.* at 84 ("[t]his outcome necessarily denigrated the third branch of government and subordinated it to the competing political strategies of the other branches of government. That dynamic impinged upon the impendence of the

Judiciary as a discrete branch of New York government"). As Chief Justice Roberts wrote in his 2006 Year End Report on the Federal Judiciary:

> Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain the strength and independence judges need to uphold the rule of law even when it is unpopular to do so will be seriously eroded. And as Alexander Hamilton explained "[t]he independence of the judges, once destroyed, the constitution is gone, it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate."
>
> Justice John Roberts, 2006 Year End Report on the Federal Judiciary

(quoting *Commercial Advertiser* (Feb. 26, 1802) (reprinted in the *Papers of Alexander Hamilton*, Volume XXV 525 (Columbia Univ. Press 1977).

The First Department's opinion upholding judicial independence through its enforcement of principles of separation of powers is of special importance to minorities, for the doctrine of separation of powers specifically aims to prevent a tyranny of the majority. The separation of powers was designed to support "the [F]ramers' antipathy to the exercise of arbitrary power" and "to prevent the mischief of factions and the tyranny of passionate majorities or ambitious politicians." Wright, *The Modern Separation of Powers: of Powers: Would James Madison Have Untied Ulysses*?, 18 Cumberland L. Rev. 69, 72 (1987); *see Loving v. United States*, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny.") (citing Baron de Montesquieu, *The Spirit of the Laws* 151-152 (T. Nugent transl. 1949).

The foregoing principles are not mere abstractions to minorities. Rather, from the very beginning of our Republic, the Founders recognized that the dissipation of judicial independence would have the most profound effect on minorities. As Judge J. Clifford Wallace wrote, the founders recognized:

> the protections of an independent judiciary to be critical to protect the rights of minorities, stating that "independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves."

Judges' Forum No. 2, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. Ann. Surv. Am. L., 241, 255 (*quoting The Federalist* No. 78 (231)).

As another commentator put it, "[m]inority rights are always at risk in a majority-driven world; an independent judiciary is a crucial part of a structure that protects, on a basis of equality, the rights of those who lack power in majoritarian politics." Martha C. Nussbaum, *The Supreme Court: 2006 Term: Foreword Constitutions and Capabilities: "Perception" Against Lofty Formalism"* 121 Harv. L. Rev. 4.

In New York State, inadequate judicial compensation strikes particularly hard at minority groups. Here, the state judiciary plays a unique role in dispute resolution in minority and low income communities. For example, New York City's Civil Court -- a court known as the "People's Court" because of its coverage

of housing disputes, small claims, foreclosures, credit disputes, and other cases under $25,000 – hears nearly *one million cases* annually – nearly the same number of cases that the *entire federal judicial system* hears. And as its dockets continue to burgeon, the salaries of its overburdened judges remain constant. This divergence of diminishing real salaries and skyrocketing caseloads cannot persist indefinitely. Unless action is taken to remedy the judicial compensation crisis, the administration of justice – particularly to minority groups in New York – will suffer grave (and potentially irremediable) consequences.

CONCLUSION

For the foregoing reasons, Proposed Amicus Curiae the Asian American Bar Association of New York, the Bronx Bar Association, the Dominican Bar Association, the Latino Lawyers of Queens, the Lesbian, Gay, Bisexual, and Transgender Law Association of Greater New York, Inc., the Metropolitan Black Bar Association of New York, the Muslim Bar Association of New York, and the Puerto Rican Bar Association of New York urge affirmance of the decisions below.

Dated: New York, New York
December 4, 2009

Respectfully submitted,

VTC /AHC

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To Be Argued by:
Steven Cohn Esq.
Time Requested: 30 Minutes

State of New York
Court of Appeals

EDWARD A. MARON, ARTHUR SCHACK, and JOSEPH A. DeMARO,

Petitioners-Appellants,

-against-

SHELDON SILVER, as Speaker of the New York State Assembly, NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, as the Temporary President of the New York State Senate, NEW YORK STATE SENATE, ELIOT SPITZER, as Governor of the State of New York, THOMAS DiNAPOLI, as the Comptroller of the State of New York,

Respondents-Respondents,

-and-

THE OFFICE OF COURT ADMINISTRATION,

Respondent,

For a Judgment Pursuant to CPLR Article 78 and Related Relief.

BRIEF FOR PETITIONERS-APPELLANTS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case because it is an appeal from a final order of the Appellate Division, Third Department. The said order is final in that it dismissed all claims against the Respondents. All arguments raised on this appeal have been made to the Courts below and are, therefore, preserved for review by this Court.

QUESTIONS PRESENTED

QUESTION 1. Did the Legislature's "linkage" of judicial salary adjustments to Legislative salary increases, coupled with the Legislature's power struggle with the Governor, resulting in the adjustment in judicial salaries being held "hostage" to this power struggle, violate the doctrine of Separation of Powers under the New York Constitution.

ANSWER OF THE COURT BELOW: In contrast to the decision of the First Department in *Larabee v. Governor*, (hereinafter, "Larabee") ____ A.D.3d ___, 880 N.Y.S.2d 256 (1st Dept. 2009), and to the holding of the Supreme Court of New York County in that case, the Third Department held that the Legislature's insistence on linking the Judges' salary adjustments to their own, and the consequent use of the Judiciary as a pawn in its power struggle with the Governor, did not violate the doctrine of Separation of Powers.

QUESTION 2: Did the linkage of Judicial salary adjustments to Legislative salary increases deny Judges the equal protection of the Laws under the New York State Constitution, in that it created a suspect class of State employees singled out for disparate salary treatment.

ANSWER OF THE COURT BELOW: The Third Department held that the Judges did not constitute a separate class, in that they were treated the same way as the Legislators.

QUESTION 3. Does Article VI, §25(a) of the Constitution prohibit the diminution of the compensation of New York's judges by reason of protracted inflation, and require periodic salary adjustments to the extent necessary to provide them with the real economic value of the compensation previously established by legislation enacted in 1998, and does the failure to enact such adjustments violate the judges' right to equal protection of the law guaranteed by the Constitution?

ANSWER OF THE COURT BELOW: The Third Department held that the Compensation Clause did not guarantee against the diminishment of Judicial salaries by the operation of inflation; no matter how much the salaries were diminished over time.

QUESTION 4. Was the inclusion of the Judiciary's $69.5 million budget provision for "Judicial Compensation Reform" for payment of an increase in the compensation of each judge of the Unified Court System ("UCS") in Chapter 51 of the Laws of 2006 (the "2006 Act"), complete by itself and immediately effective, so as to require payment in 2006 as allocated by the Judiciary, without the enactment of

further legislation amending provisions of Article 7-B of the Judiciary Law that fixed judicial salaries at a lower level in 1998?

ANSWER OF THE COURT BELOW: The Third Department affirmed the lower court's holding that the 2006 Act made payment contingent on amending Article 7-B. In so ruling, the court erred in disregarding the 2006 Act's express appropriation of and authorization for payment of such increases. Such error resulted in the failure to compel the Comptroller to pay the enacted increase in judicial compensation to the Judiciary for allocation.

QUESTION 5. Is a contingency in an appropriation statute authorizing payment of funds appropriated for the Judiciary, which conditions the making of payment on the enactment of further legislation, invalid and without effect, requiring payment to be made as authorized by the enacted appropriation statute?

ANSWER OF THE COURT BELOW: The Third Department affirmed the lower court's holding that an appropriation statute may make payment of funds appropriated for the Judiciary contingent on enactment of further legislation. Appellants contend that such a contingency is impermissible under New York's Constitution and must be disregarded.

QUESTION 6. Would the Office of Court Administration ("OCA"), by administratively implementing the Judiciary's "Judicial Compensation Reform" program for salary increases under the 2006 Act, to provide pay parity for the UCS judges with federal district court judges, legislatively "establish" the compensation of the UCS judges within the meaning of Article VI, §25(a)?

ANSWER OF THE COURT BELOW: The Third Department affirmed the lower court's holding that OCA could not constitutionally implement the 2006 Act by allocating among the judges the funds it appropriated, on the ground that OCA's allocation would "legislatively establish" the judges' salaries, in violation of Article VI, §25(a). Appellants contend that the lower court erred because the 2006 Act itself "established" the judges' compensation. OCA's mathematical calculation of the adjusted salary for each judge to place their pay on parity with that of federal district court judges, is merely ministerial.

PRELIMINARY STATEMENT

This case concerns whether the State of New York is constitutionally responsible to assure that the members of Judicial Branch of the Government receive adequate compensation. The stark facts are that judicial pay has not increased in 11 years; New York has gone from having the highest judicial compensation in the nation in 1975, to having among the lowest (if not the lowest) judicial compensation in the nation. By 2007, judicial pay had declined, relative to inflation, by 25%, and that decline continues to the present, with real compensation decreasing each year. At the same time, the caseload of the New York State Unified Court System has increased by 15%; by 2006, the case load in the New York courts was three times that of the caseload of the entire Federal judicial system. Haig, *Adequate Compensation for Judges is Essential for New York's Business and Economy,* Atlantic Legal Foundation, October, 2008 at pp. 4-5.

However, beyond the question of the adequacy of the pay of the Judges as individuals, this case concerns more profound issues regarding the importance of the Judicial Branch to the overall functioning of the State of New York and to the economic and personal well-being of its citizens. The Atlantic Foundation noted in its report, *op.*

cit., that the inadequacy of Judicial salaries has resulted both in the early retirement of experienced judges[1], and the failure to attract the qualified candidates to the bench. This, in turn, threatens to reduce the quality of decisions rendered. The business community in New York State relies upon the predictability of judicial decisions, and upon the thoughtful and correct resolution of the disputes that are brought to the Courts. In times of business upheaval, the volume of commercial cases will inevitably increase, and the necessity for correct resolutions becomes even more critical. If the Judicial branch loses or fails to attract qualified judges, the State of New York will suffer as a business center. The Foundation noted [*Id.* at 20]: "The inadequate compensation of New York Judges and its unfortunate present and impending impact on New York's economy is an undisputed fact, recognized by an unusually broad array of journalists, legal advocacy groups and civic organizations."

In addition, the refusal of the legislative and executive branches to assure the adequacy of judicial

[1] Indeed, one of the plaintiffs in this case, Joseph DeMaro, declined to seek an additional term, in large part because of the low judicial salaries. Judicial notice can also be taken of the recent departures of Hon. Robert Spolzino of the Appellate Division, Second Department and Hon Robert Julian of the Fifth Judicial District. Both of these well-publicized departures were for the stated reason of inadequate compensation. It is difficult to calculate the actual number of those who have decided not to seek nomination, or renomination, because of this issue.

compensation, and the consequent degrading of the judiciary as a co-equal branch of the government also erodes the judiciary's function as the protector of the rights of individual citizens from arbitrary governmental action[2]. An independent judicial branch is essential to the functioning of the American system of government and to the assurance that the other, co-equal branches respect the constitutional rights of the individual. In the Declaration of Rights of the Constitution of Massachusetts, Article XXIX, drafted by John Adams and passed in 1780, is found the following:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

Similarly, in *United States v. Will*, 449 U.S. 200, 217-218 (1980), the Supreme Court stated:

> A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

More recently, in his Statement to the House Committee on the Judiciary, in its Oversight Hearing on "Federal Judicial Compensation" regarding Judicial Compensation and

[2] Indeed, the Executive and Legislative branches look to the Judicial Branch to resolve their disputes. See, e.g., *Skelos v. Paterson*, 2009 W.L. 2528624 (2d Dept.); *Pataki v. Silver*, 4 N.Y.3d 75 (2004).

Judicial Independence, United States Supreme Court Justice Stephen Breyer made a statement which is no less true of New York State Judges:

> An independent federal judiciary plays an important rule in maintaining [the] rule of law. But the judges cannot act alone. Trust and confidence in the institution on the public's part; integrity, competence, and sometimes courage, on the judges' part; respect and understanding on the part of others in public life - all have important roles to play. The importance of the end result, an effort by the Nation to realize the promises of its Constitution, justifies the institution. And, in my view, the importance of that end helps to explain why it is unwise to run a significant risk of harming or weakening the judicial institution.

The unconstitutional insistence, by the Legislative and Executive Branches, of tying Judicial pay adjustments to irrelevant political considerations weakens the respect and power of the judicial branch.

It must be plainly understood that plaintiffs herein do *not* seek a raise in pay, as the amount of Judicial pay is the province of the Legislature. They seek, rather, to maintain the viability of the salary set by the Legislature in 1998. The 2006 Act was passed to maintain that viability. Plaintiffs urge that the Court enforce that act in accordance with the Legislative intent. In addition, by deciding this appeal on the ground that the 2006 Act is a final, effective and complete grant of a pay increase for the judges, this Court would not need to resolve the

serious constitutional issues posed by these appeals, and could grant relief to the judges without having to order the Legislature and the Governor to enact legislation, a type of relief that courts may be reluctant to grant.

STATEMENT OF THE CASE

Everyone agrees that an increase in compensation for the more than 1,200 judges of this State is long overdue. The Judges have not received a salary adjustment since January 1, 1999.

Legislative action had been promised repeatedly, and when finally taken in 2006, the funds were appropriated and authorized for payment to the judges[3] but were never disbursed by the Comptroller. Payment of those funds has been withheld from the judges ever since. In the face of the continuing violation of their constitutional and statutory rights to receive increased compensation, the Petitioners were compelled to bring this proceeding.

The Governor[4] and the leaders of the State Senate and State Assembly, and even the Attorney General, who, as the attorney for the Respondents, has vigorously opposed this action, have all publicly declared that: (a) the judges of this State are underpaid, (b) adjustment of judicial pay is essential to maintain the high quality of the Judiciary and to keep and attract the best possible candidates to serve as judges, (c) sound public policy requires that the judges receive salary adjustments and (d) salary adjustments for

[3] Laws of 2006, Chapter 51.
[4] References herein to the "Governor" are to former Governors Pataki and Spitzer, or both, as indicated by the context.

the judges is a matter of fairness. If salary adjustments have not occurred due to respondents' inaction, the letter and spirit of multiple provisions of the New York Constitution is violated.

As set forth in a May 2007 study commissioned by the Chief Judge of the Court of Appeals [R493], the salaries of New York's judges ranked 48th nationwide when adjusted for the varying cost of living in the various States, and was far below the pay received by many fledgling lawyers and other professionals.[5] That 2007 study also revealed that the cost of living has increased 32% since the compensation of New York's judges was last increased in 1998, whereas the pay of the judges in every other State was increased by an average of 3.2% annually during that period, representing a cumulative increase of over 24%; almost enough to offset the increase in the cost of living.

The rightful constitutional position of the Judiciary as a co-equal branch of government has been trammeled because of years of political infighting. The Legislature has refused to enact a pay adjustment for the judges without one for the legislators. The Governor and his

[5] See Judicial Compensation in New York: A National Perspective - A Report to the Chief Judge of the State of New York (May 2007), prepared by the National Center for State Courts (the "National Center Study") [R506-R507]. Since the study by the National Center Study was completed, Oregon, one of the two lower ranked states, raised the salary of its judges dropping New York to 49th out of the 50 states.

predecessor have refused to agree to a pay adjustment for the Legislators absent adoption of their agenda items, which have nothing to do with the Judiciary. The Legislature and Governor have thus refused to affirmatively address the immutable constitutional right of the judges not to have their compensation diminished. The Judiciary and the public they serve have been made the victims.

Respondents' inaction not only violates the judges' constitutional guarantee against the diminishment of their compensation, but also constitutes an impairment of the constitutional status of the Judiciary as a co-equal branch of the government and of the independence of the judges under the doctrine of separation of powers.

This appeal entails important and novel questions arising under New York's Constitution. It also poses the need to interpret provisions of New York's Constitution and the appropriations statute for 2006-07. That statute, the 2006 Act, passed by the Legislature and signed by the Governor on April 12, 2006, appropriated $69.5 million for "Judicial Compensation Reform," and expressly provided that the amounts it appropriated were "*authorized to be paid.*"[6]

[6] *The 2006 Act was enacted as Chapter 51 of the laws of 2006. Section 2 thereof enacted the "Judicial Compensation Reform" provision thereof and authorized a $69.5 million appropriation to be paid.* [R155, R161, R167]

(emphasis provided). That Act used the following language in § 2:

JUDICIAL COMPENSATION REFORM

JUDICIAL COMPENSATION REFORM.....69,500,000

General Fund/State Operations
State Purposes Account - 003

For expenses necessary to fund adjustments in the compensation of state-paid judges and justices of the unified court system pursuant to a chapter of the laws of 2006... 69,500,000

Program account subtotal 69,500,000

The Judiciary's Budget Request for the 2006-2007 fiscal year [R88] sought the $69.5 million appropriation under its "Judicial Compensation Reform" program in order to pay salary increases to the judges of the New York's Unified Court System ("UCS") retroactive to April 1, 2005, aggregating $69.5 million. The Judiciary's stated budgetary purpose was to place New York's judges on parity with federal district court judges. A 21% pay adjustment for 2006 under that program for each UCS judge, although much less than the 32% reduction in the real value of their pay since 1999 caused by inflation, would have, at least,

provided parity for them with the federal district court judges' pay level.[7]

These appropriated funds have been withheld from the judges despite the fact that, as provided by the 2006 Act, such money was "authorized to be paid". The Comptroller apparently took the position (advanced by Respondents below) that because the 2006 Act stated that the appropriated money was "for expenses necessary to fund adjustments in the compensation of [the UCS judges] pursuant to a chapter of the laws of 2006," somehow the express authorization for payment in the 2006 Act was not final or effective and that its provision for payment had no legal effect absent enactment of still another statute.

Petitioners Edward A. Maron, Arthur Schack and Joseph A. DeMaro (hereafter collectively "Petitioners") are

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[7] As discussed in Point II -A.3,E and F, *infra*, pay parity for UCS judges under "Judicial Compensation Reform" consists of raising the UCS judges' compensation by the percentage by which the compensation of a federal district court judge exceeded that of a New York Supreme Court Justice. In 2006, a federal district court judge's compensation of $165,300 exceeded the $136,700 salary of a New York Supreme Court Justice by 21%. Each UCS judge was entitled under the 2006 Act to be paid a 21% increase in the 2006 fiscal year. By way of example, a mathematical application of that 21% pay parity percentage results in the following adjustments that should have been paid in 2006 to the following levels of UCS judges, as an addition to the compensation previously fixed under Art. 7-B of the Judiciary Law: Associate Judge of Court of Appeals -- $31,752; Supreme Court Justices--$28,707; Presiding Justice of the Appellate Division -- $30,996; Associate Justice of the Appellate Division -- $30,240; Presiding Judge of the Court of Claims -- $30,240; Family Court Judge (Albany County)-- $25,158. The later acts added language calculating salaries by reference to percentages of Supreme Court salaries. See, Legislature and Judicial Budget, 2007-2008.

justices or judges of the UCS.[8] They contend that they are entitled to relief as a matter of law.

In this combined Article 78 and declaratory judgment action, Petitioners seek an order directing the Comptroller to release the appropriated $69.5 million for payment of such pay adjustments to the judges, as provided by the 2006 Act. Such compensation has been increased and fully appropriated each year since enactment of the 2006 Act. In fact, in the 2009-2010 Budget, $163 million was appropriated and ordered to be paid immediately. They also seek a judgment based upon Article VI, §25(a) declaring that they have a right to a salary adjustment to the extent necessary to provide them with the real economic value of the salaries established for them by legislation enacted in 1998.

This Court and the Appellate Divisions have on several occasions ruled on issues involving the constitutional powers, authority and obligations of the Legislature and Governor in connection with appropriations and the separation of powers. While prior decisions bear on issues posed by this appeal and provide support for Petitioners' contentions, none has addressed these questions in the

[8] Justice DeMaro's term as a Justice of the Supreme Court expired on December 31, 2007 and he did not seek reelection. See footnote 1, supra.

context of appropriations for the State's Judiciary. Nor has any decision by a New York court ruled on whether New York's judges are protected by Article VI, §25(a) from the diminishment of their compensation caused by unchecked protracted inflation.

In the Supreme Court, respondents moved to dismiss the amended petition under CPLR 3211(a)(7) and 7804(f).[9] The lower court rendered judgment dismissing substantially all of Petitioners' claims. Petitioners appealed both from such dismissal and from the limitations imposed upon its third and fifth causes of action. Respondents also appealed, arguing that the lower court should have dismissed the third and fifth claims as well.

The Appellate Division, Third Department ruled that all of the Petitioners' claims should be dismissed. The Court rejected the Petitioners' arguments regarding statutory interpretation, separation of powers and the interpretation of the Compensation Clause. *Maron v. Silver,* 58 A.D.3d 102 (3d Dept. 2008).

The failure to adjust judicial compensation has spawned more than one action. Four members of the New York

[9] By stipulation, the sixth cause of action in the amended petition which addressed respondent OCA and the reduction in health benefits for the members of the judiciary was severed and not addressed by the decision and order below. OCA is accordingly not an aggrieved party and the sixth claim remains for subsequent adjudication by the lower court.

State Judiciary commenced an action entitled *Larabee v. Spitzer*[10] in the Supreme Court of New York County. Justice Edward H. Lehner found that the linkage of Judicial and Legislative salary adjustments violated the Separation of Powers Doctrine. *Larabee v. Spitzer,* 19 Misc.3d 226 (Sup. Ct., N.Y. Co. 2008). The Appellate Division, First Department affirmed the finding that linkage violated the Separation of Powers. However, both Courts rejected additional arguments regarding the interpretation of the Compensation Clause, and other arguments made by those plaintiffs. *Larabee v. Governor,* _____A.D.3d _____, 880 N.Y.S.2d 256 (1st Dept. 2009). The appeal and cross-appeal of that decision are being heard together with this appeal.

In addition, the Chief Judge commenced an action in the Supreme Court of New York County entitled *Chief Judge of the State of New York v. Governor of the State of New York,* 2009 W.L. 1652845 (Sup. Ct., N.Y. Co.) On June 15, 2009, Justice Lehner in that case again ruled that linkage violated the doctrine of Separation of Powers. He also repeated his ruling that the operation of inflation did not render judicial salaries inadequate.

[10] The title of the action was changed based upon the change in Governor.

ARGUMENT

POINT I

NEW YORK'S JUDGES HAVE A RIGHT UNDER THE CONSTITUTION TO A SALARY ADJUSTMENT UNDER THE CIRCUMSTANCES OF THIS CASE

The amended petition sought declarations that Respondents' actions and inaction regarding judges' compensation, and particularly linkage of Judicial raises to legislative raises, violate each of the Constitutional doctrines of separation of powers, the Compensation Clause, the Equal Protection Clause of the New York Constitution and the fundamental requirement of an independent Judiciary. This is factually based upon: (1) the Legislature and Governor having permitted an indirect and substantial diminishment of judicial compensation by failing to enact reasonable, periodic cost of living increases to offset the effect of extended inflation in violation of the Compensation Clause; and (2) the reasons why the Legislature failed in its constitutional duty to protect the real value of the judicial compensation it established, including: (i) acknowledged linkage of judicial raises to politically unpopular raises for legislators and members of the executive branch; (ii) linkage to other unrelated political initiatives such as

campaign finance reform, civil confinement and charter schools to judicial pay raises; (iii) retaliation for unpopular decisions concerning, *inter alia*, the relative power of the Governor and Legislature respecting various budgetary issues, capital punishment and school funding, and (iv) as a political weapon used by the Governor and Legislator to achieve their own agenda, which had nothing to do with Judicial compensation.

In addition, there is nonfeasance in the failure of the Legislative and Executive branches to perform their constitutional duty to prevent diminishment in judicial compensation. Each of these alleged reasons constitutes an attack on the Judiciary's independence, on the doctrine of separation of powers and on the judges' right to equal protection, as well as constituting actionable diminishment of compensation.

A. Linkage of Judicial and Legislative Pay Violates the Separation of Powers Doctrine

As has been noted by every commentator since Alexander Hamilton in the Federalist Papers, the Judiciary is the weakest of the three branches of Government. As Hamilton observed in Federalist Number 78:

> The judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly

> be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. (Emphasis in original).

However, the United States and New York Constitutions have established the Judiciary as a co-equal branch of the government with the Legislative and Executive branches, and the continuing proper function of the government requires that the Judiciary remain an independent and co-equal branch. Thus, any Legislative action that "hampers judicial action or interferes with the discharge of judicial functions is in conflict with principles of the Constitution." *People ex. rel. Burby v. Howland,* 155 N.Y. 270, 282 (1898).

One of the necessary incidents of a co-equal judiciary is that neither of the other two branches can use threats to judicial pay to retaliate for decisions displeasing to those branches. The framers of the New York Constitution enacted the protection of judicial salaries currently set forth in Article VI §25(a), stating:

> [T]here is a reason of statesmanship for the provision that the judicial salary shall not be diminished. What is that reason? It is, that if you place the salaries of your judges at the mercy of the Legislature, you have then put one department of your government, which above all others ought to be perfectly independent, at the mercy of another. That is the reason why, in framing fundamental laws, we provide for the

> independence of the judiciary, by preventing the Legislature, from decreasing their salaries….

Underhill, *Proceedings and Debates of the Constitutional Convention of the State of New York, 1867 and 1868*, at p. 2440 (1868).

It is undisputed that, for the past 11 years, judicial pay increases have been held hostage in an internecine struggle between the Legislature and a succession of Governors. In a nutshell, the Legislature refuses to approve Judicial pay adjustments except in conjunction with Legislative pay raises, and the Governors have refused to allow Legislative pay raises unless the Legislature acquiesced in the Governors' legislative priorities, such as campaign finance reform. The linkage is well known and has been publicly acknowledged. Respondent Senator Joseph Bruno, the then-leader of the State Senate, when asked about linkage during an interview held on December 14, 2006 on radio station WROW, made the unqualified response that "[pay increases] for judges, [have] been universally linked with legislators." [R61, R139]. The net effect of this standoff is that the pay of New York judges has been frozen for an unconscionably long time; New York judges have been without a pay adjustment for an astounding eleven years,

longer than any other State Court judges in the United States.

It is this linkage, and the use of judicial pay as a pawn in struggles unrelated to issues of adequate pay, that implicates Separation of Powers issues. The Judiciary, a branch with no power to enact law or spend state money, is powerless to protect itself from this governmental warfare and political gamesmanship. As the First Department stated in *Larabee, supra,* holding that the constitution had been violated, 880 N.Y.S.2d at 264:

> The concern is not just that individual jurists are experiencing increasingly diminished economic security. Rather, our constitutional concern, as set forth below, is that the Legislature's self-serving grip on judicial compensation ultimately compromises the operation of the court system and thereby diminishes the Judiciary as a self-functioning, and thus independent, branch of government. After so many years of legislative inaction, and no indication that the Legislature seems inclined to abandon its customary practice of linkage, we are persuaded that the constitutional claim is ripe for review.

1. The Speech or Debate Clause

Initially, the Respondents in this case, and the defendants in *Larabee,* argued that the Courts cannot inquire into the motive of the Legislature in refusing to enact Judicial pay raises, as a result of the immunities set forth in the Speech or Debate Clause, New York Constitution Article III §11. The Third Department

accepted this argument, stating that the Speech or Debate clause confers absolute immunity upon the Legislature, preventing inquiry into the motives of the Legislature in acting, or refusing to act, on legislation. The Third Department acknowledged, however, that the Speech or Debate Clause preserves legislative independence, not supremacy (*United States v. Brewster,* 408 U.S. 501, 508 [1972]), stating (58 A.D.3d at 121-122) that that Clause:

> could not bar judicial intervention in the face of an adequately stated claim that the Legislature had violated separation of powers principles by working harm or threatening imminent harm to the Judiciary's ability to continue functioning. (footnote omitted). Petitioners, however, have not stated any such claim and, thus, the Speech or Debate Clause bars inquiry into the motives of the Governor or members of the Legislature in failing to take action on judicial pay raises.

The Third Department found that the petitioners failed to state such claim because petitioners allegedly failed to plead actual, provable interference with the functioning of the judiciary as a prerequisite to making a claim of a Separation of Powers violation[11].

In *Larabee,* the First Department correctly rejected both the bar of the Speech or Debate clause and the necessity of proof of actual interference with the role of the judiciary as a prerequisite to establishing a

[11] See discussion in subdivision 2, *infra.*

Separation of Powers claim. The Court noted that a too-strict interpretation of the immunity conferred by the Speech or Debate clause would "eviscerate" the fundamental purpose of judicial review of legislative enactments, which often involves review of, *inter alia*, legislative debates. *Larabee,* at 268. It further noted that the Speech or Debate clause protected purely legislative action, but not political action. Thus, actions by legislators, such as press releases and public statements, even if tangentially related to speech or debate, are not immunized by the Speech or Debate Clause. *Hutchinson v. Proxmire,* 433 U.S. 111. 131-132 (1979); *United States v. Johnson,* 383 U.S. 169, 172 (1966). In this instance, as noted by the First Department, the record contains numerous public statements by legislative leaders explaining why judicial compensation adjustments have been abandoned over the course of the last eleven years. Thus, the deliberations of the legislature, which are the subject of the protection of the Speech or Debate clause, are not implicated by the review of the constitutionality of the Legislature's eleven-year inaction.

2. The Separation of Powers Claim

The linkage between Judicial and Legislative pay raises violates the doctrine of Separation of Powers. The

facts, as conceded by the Respondents, show that the actions of the Legislature, in linking judicial and legislative pay raises, threaten the functional independence of the judiciary.

The doctrine of Separation of Powers applies by implication in the pattern of government adopted by this State, and serves to prevent one branch of government from maximizing its power at the expense of the others. *Under 21, Catholic Home Bur. for Dependent Children v. City of New York,* 65 N.Y.2d 344, 355-356 (1985); *Subcontractors' Trade Assn. v. Koch,* 62 N.Y.2d 422, 427 (1984). As this Court stated in *Oneida County v. Berle,* 49 N.Y.2d 515, 522 (1980): "[H]istory teaches that a foundation of free government is imperiled when any one of the coordinate branches absorbs or interferes with another."

Indeed, the foundation of the Compensation Clause is to preserve the independence of the Judicial branch by protecting judges from retaliation by the legislature for unpopular decisions through diminishment of their salaries,

> in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support.

O'Donoghue v. United States, 289 U.S. 516, 530 (1993). Because the judiciary has no power to assert its interests through the political process, the acts of another branch threatening its functioning can render its separateness, and its independence illusory. *Larabee,* at 273.

As the First Department found, the Legislative and Executive branches reduced the issue of judicial compensation to a tactical weapon, consequentially subordinating the Judiciary to an inferior governmental entity. This linkage took the issue of proper judicial compensation out of objective consideration, and undermined the status of the Judiciary as a co-equal branch of government. *Larabee* at 273-274.

In rejecting this argument, the Third Department found that there was no evidence of a weakening of the judicial branch. According to the Third Department, without massive resignations of judges, or proof of direct retaliation for an unpopular decision, the actions of the Legislative and Executive branch in using the salary of the Judiciary as a pawn in their struggle for dominance are not actionable. 58 A.D.3d at 118-120. The Court denigrated the significance of the linkage argument, observing that "nothing in the N.Y. Constitution forbids the political

branches from engaging in politics when carrying out their political function." *Id.* at 122.

In correctly rejecting this argument, the First Department found that proof of actual impairment of judicial function is not necessary. Moreover, while it may be that the Legislative and Executive branches are empowered to play politics:

> The Legislature, by subordinating the Judiciary to its whims and caprices in matters of salary adjustments, brings the Judiciary closer to the world of politics than is tolerable for the disinterested functioning of a court system that must act for "the benefit of the whole people" *(O'Donoghue*, 289 U.S. at 533, 53 S.Ct. 740). The fact that salary adjustments for the third branch of government became politicized as the byproduct of an interbranch conflict removes this case from the otherwise mechanical processes for adjusting judicial compensation. When judicial compensation becomes politicized, a line has been crossed in contravention of the warnings long articulated in what has become a deeply rooted constitutional jurisprudence. The basic tenet of the separation of powers doctrine, to promote and maintain the independence and stability of each branch of government, has been violated.

Larabee, at 275.

The actions of the Legislature in linking Judicial and Legislative raises, and refusing to consider salary adjustments on their own merits, clearly violate the constitutional doctrine of Separation of Power. This Court should reverse the holding of the Third Department, and

make its ruling consonant with that of the First Department in *Larabee*.

B. Petitioners have Adequately Set Forth a Cause of Actions for Violation of the Equal Protection Clause

1. The Wrong Threshold Question was Addressed Below

In addition to violating the doctrine of Separation of Powers, the actions of the Legislature, in linking Judicial salary increases to Legislative salary increases, violates the rights of the judges to equal protection of the laws under the Bill of Rights of New York's Constitution, Art. I, § 11. Petitioners contend that they have been denied such protection because the law of New York discriminates against them in various ways. The lower court, affirmed by the Third Department, ignored the threshold question that goes to the heart of the State's contention, and erroneously awarded the State a declaratory judgment to the effect that the facts alleged or that could have been alleged in Petitioners' pleading did not state a cause of action for violation of the Equal Protection Clause. [R32-R34]

The proper threshold issue to be determined is whether the challenged statute or action establishes a classification which burdens Petitioners' rights. *Golden v. Clark*, 76 N.Y.2d 618, 623 (1990). An inquiry as to whether

the questioned statute or action targets a "suspect class" or implicates a "fundamental right", the equal protection question addressed by the lower court [R33], goes to the standard or scope of judicial review; *i.e.*, "strict scrutiny" or the less rigorous, "rational basis" test. *Nelson v. Lippman*, 271 A.D.2d 902, 903 (3rd Dept.), *rev'd on other grds.* 95 N.Y.2d 952 (2000); *Maresca v. Cuomo*, 64 N.Y.2d 242, 250 (1984); *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 332-333 (1976) (hereafter "*Alevy*"). Petitioners contend that they must prevail under either test.

2. The Admitted Linkage Constituted Actionable Discrimination

In New York, the Legislature has placed the judges in the same class as the legislators in terms of salary increases, requiring that any pay increase for the judges must be tied to an increase for the legislators. Contrary to the holding of the Third Department, this is a classification that burdens Petitioners' rights. *Golden v. Clark, supra.* Moreover, although plainly misapprehended by the Third Department, it is this "suspect classification" that impacts Petitioners' constitutional rights under the fundamental principles of judicial independence and

Separation of Powers, resulting in a violation of the judges' right to equal protection of the law.

The Third Department, in rejecting this argument, stated, in essence, that since the Legislature treats itself and the Judges alike, in that neither received raises, there is no violation of the Judges' right to equal protection. That court further stated that the Judges do not constitute a "suspect class" because they were not saddled with disabilities, subjected to a history of purposeful unequal treatment, or in a position of political powerlessness. 58 A.D.3d at 123-124. In these findings, the Third Department erred. *United States v. Will, supra;* Federalist No. 78.

The Judges are not properly placed in the same class as the Legislators because the work requirement for full-time judges is vastly greater than for the part-time legislators. Judges are required to devote substantially all of their work time to the performance of their judicial duties whereas the legislators work only part time. Judges are only permitted to engage in outside writing, teaching and related academic work during non-work hours and are ethically constrained to eschew all other income-producing activities. The legislators, by contrast, are permitted to engage in any outside gainful activities that enable them

to earn substantial, unlimited income such as law practice, financial consulting, farming, owning a business, or any other income-producing endeavor. Legislators and judges thus have very different needs. They are not properly regarded as being in the same class. Legislative/Executive linkage disregards this basic difference.

The linkage improperly disadvantages the judges, and violates their right to Equal Protection under the Constitution for another reason. The Legislature has enacted legislation that is used by the legislators to provide themselves with other means to increase their base pay of $79,500 per year. The other means consist of various unvouchered "allowances" paid to legislators pursuant to Legislative Law §5(2), which provides for the automatic and regular increase in the amount of these allowances in order to keep pace with inflation. To do so, §5(2) ties the increases in allowances to a federal cost of living index. Under the published federal cost of living index adopted by §5(2), for example, the per diem allowance paid to a legislator increased each year from 1999 through 2007, from $110 per day in 1999 to $152 in 2007, representing a cumulative increase of 38% during that period. In addition, both Governors Spitzer and Paterson raised the

pay of senior staff, in order to attract and retain the best talent.

No increase whatever has been paid to the judges during the same nine plus year period. Existing legislation favoring the legislators with such cost of living adjustment, while providing none for the judges, discriminates against the judges and violates their constitutional right to equal protection of the law. Moreover, Legislative Law §5(2) constitutes an acknowledgment by the Legislature that an amount of money promised today will not be the same in the future, and that in order to keep such promise, an adjustment must be made for its inflationary decrease. Once the legislators elect to give themselves the benefit of that principle, they cannot constitutionally withhold its application to judges' pay.

Not only have the legislators favored themselves with yearly cost of living adjustments, but such an adjustment has also been provided to many other groups of state employees, including employees working within the Judiciary. The judges, however, have been denied such protection from inflation, which constitutes a violation of their constitutional rights.

Moreover, based upon the facts and principles set forth in Part A, *supra*, the judiciary is a "suspect class" as defined by the Third Department. Judges are the only State employees who have been without a salary adjustment of any kind for the past eleven years. Moreover, the Judiciary, which is the weakest of the three coordinate branches and is dwarfed by the others, and is without power to affect its compensation without compromising its independence. *Evans v. Gore*, 253 U.S. 245, 249 (1920), overruled in part by *United States v. Hatter*, 532 U.S 557 (2001); *Larabee*, 880 N.Y.S.2d at 272. Ethical rules forbid any Judicial foray into the political process. The Judiciary is thus completely at the mercy of the other branches. *United States v. Will, supra;* Federalist No. 78. In short, the Separation of Power violation is also an equal protection violation.

This historical and continuing linkage between Judicial and Legislative salaries meets the threshold classification question. *Golden v. Clark, supra.* This suspect classification required justification by the State that Respondents <u>never</u> attempted to offer below. On the other hand, if Petitioners were not members of a "suspect class" and their claim did not involve a "fundamental right", a conclusion reached by the lower courts and

disputed by Petitioners on this appeal, the "rational basis" test would be applicable. See *e.g.*, *Maresca v. Cuomo*, 64 N.Y.2d at 250.

3. Respondents' Position Fails the "Rational Basis Test

As no basis has yet been officially proffered by Respondents, it was error for the lower courts to summarily grant a declaratory judgment in favor of the State and dismiss Petitioners' equal protection claim. [R32-R33] If, as all parties have repeatedly acknowledged, the rationale for not granting judicial raises was that the Governor refused to permit raises for the legislators, that reason cannot pass the rational basis test. There is no relationship that has been suggested by any person between the linkage of Judicial salary adjustments and Legislative pay raises that bears any relationship to any legitimate governmental purpose, as is required for the Court to find that the rational basis test has been satisfied. *Heller v. Doe by Doe,* 509 U.S. 312, 319-320 (1993). For that reason alone, the linkage violates the Judges' right to equal protection of the law.

4. The Strict Scrutiny Test is Applicable

Moreover, since both Separation of Powers[12] and judicial independence[13] constitute fundamental rights and/or interests,[14] the much more stringent "strict scrutiny" test should be applied. See *e.g., Alevy; Clark v. Jeter,* 486 U.S. 456, 461 (1988); *Matter of Aliessa v. Novello*, 96 N.Y.2d 418, 430, 435 (2001).

Strict scrutiny requires the State to show that the classification at issue is tailored to promote a compelling governmental interest, *Brown v. State*, 250 A.D.2d 314, 321 (3rd Dept. 1998), which it has failed to do. That is the test that should be applied to Petitioners' constitutional claims.

Thus, it is apparent that the lower courts misapprehended the threshold Constitutional question of whether there was a classification that burdened Petitioners' rights, and then improperly applied the rational basis test rather than that of strict scrutiny.

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[12] *Cohen v. State of New York*, 94 N.Y.2d at 11. Indeed, the lower court acknowledged that "fundamental constitutional issues are raised" in Petitioners' pleading. [R148]

[13] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982); *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933). The lower court acknowledged that judicial independence is a "fundamental constitutional principle". [R31]

[14] The lower court addressed this issue in conclusory terms stating: "the alleged linkage between increases in legislative and judicial salaries does not create a suspect class or involve a fundamental right". [R33]

Respondents' motion should have been denied with respect to Petitioners' equal protection claims and the declaratory judgment summarily granted in favor of the State must be reversed. Instead, judgment should be granted to Petitioners that they should be paid the increase.

C. Petitioners have Set Forth a Claim under Article VI §25(a) of the New York Constitution

The real value of the compensation last established for New York's judges at the end of 1998 has been drastically diminished by inflation. For example, mathematically, the present value today of the $136,700 that has been paid each year since January 1, 1999 to New York's Supreme Court Justices approximated only $108,000 in 1999 dollars at the time of the commencement of this proceeding, representing a 21% reduction. The passage of additional time without a raise has further reduced the real value of judicial compensation. Although inflation is the source of such diminishment, the failure of the Legislature and Governor to provide a remedy by increasing the judges' pay is the cause of the continuing erosion of Judicial compensation.

When the political branches fail to remedy the situation, the courts have the inherent power to bring about compliance with the Constitution's guarantee against

diminishment of the judges' compensation. *Kelch v. Town Board of Town of Davenport*, 36 A.D.3d 1110, 1112 (3d Dept. 2007) (hereinafter "*Kelch*"). *See, A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986); and *Brown v. Board of Education*, 347 U.S. 483, 495 and note 13 (1954) (where an individual's constitutional rights have been violated, the courts will fashion appropriate relief to bring about compliance).

The Constitutional rights of the Judges have been violated by the continued refusal of the Legislature to increase judicial compensation at any point during the past 10 years. Article VI, §25(a) not only protects Judges' compensation as established by statute, but also guarantees that the amount fixed by law will not be diminished due to *any* cause, including inflation, while they are in office. [R143, R149]

Both the First and Third Departments held that the provisions of Article VI, §25(a) do not protect Judicial salaries from diminution by the operation of inflation. Those holdings contravene the plain meaning of §25(a). In addition, the fact that it has been eleven years since the last judicial salary adjustment, and that the Judges' salaries have been significantly diminished by the operation of inflation, also lead to the conclusion that

current judicial compensation is constitutionally inadequate.

4. The Plain Text of Article VI §25(a) Entitles the Judges to an Increase to Offset the Impact of Protracted Inflation

Section 25(a) should be read and enforced as written. The current version of Article VI, §25(a), enacted in 1925, and in force since then, reads in relevant part:

> The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of a court of the city of New York established pursuant to section fifteen of this art, a judge of the district court or of a retired judge or justice shall be established by law and ***shall not be diminished*** during the term of office for which he or she was elected or appointed. [Emphasis added.]

Section 25(a)'s expansive language prohibits every type of direct and *indirect* diminishment of judges' compensation. There are no restrictions or limitations in the words used. Under its plain text, §25(a) guarantees against the diminishment of judges' compensation from **any** cause, not just a direct reduction caused by means of a statute enacted by the Legislature.

The language used in §25(a) was carefully written to cover two different situations - (1) legislative enactment of judges' compensation, and (2) once established by legislation, diminishment of their compensation from *any*

cause. Thus, §25(a) provides that judges' compensation "shall be established by law." Then, it separately guarantees that the judges' compensation, once fixed by law, "*shall not be diminished.*"

This guaranty against diminishment is not limited by any words in the Constitution to a diminishment caused "by law;" *i.e.* by legislation.

Limiting protection against the diminishment of the judges' compensation only to reduction enacted "by law," would improperly add those words to §25(a), where its authors plainly chose not to include them. The framers of §25(a) obviously knew how to write "by law" into its diminishment prohibition if they wished to do so. They did just that in the first part of that very provision. The Courts are not free to cure a perceived omission in a statute by supplying what the legislature choose not to include. *Pajak v. Pajak*, 56 N.Y.2d 394 (1982); *Prego v. City of New York*, 147 A.D.2d 165 (2d Dept. 1989). This principle applies with more force to the provisions of the New York Constitution.

Section 25(a) should be read, as written, to guarantee against any diminishment of judges' compensation, including the diminishment of real value caused by protracted and substantial inflation.

5. Section 25(a) Should be Interpreted Broadly in Accordance with Its Purpose

Section 25(a) should be construed liberally and with regard to its fundamental aim and object. *Matter of Carey v. Morton*, 297 N.Y. 361 (1948); 20 N.Y. Jur.2d Constitutional Law, §22, p. 74 (2006). The object and language of §25(a) are plain.

It is undisputed that §25(a)'s basic object is to ensure that judges, as members of a co-equal branch of the government, have complete financial independence from the other branches of the government. *Oneida County v. Berle*, 49 N.Y.2d at 522; *Matter of Nicholas v. Kahn*, 47 N.Y.2d 24, 30 (1979); *Saxton v. Carey*, 44 N.Y.2d 545, 552 (1978); *People ex rel. Burby v. Howland*, 155 N.Y. at 283; *Kelch*, 36 A.D.3d at 1112.

In emphasizing that the fundamental importance of the federal Constitution's guaranty against the diminishment of judges' compensation is to ensure that there will be an independent Judiciary, the United States Supreme Court stated:

> The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of the government. Our Constitution promotes that independence

> specifically by providing: [that] 'The Judges [shall receive] … a Compensation, which shall not be diminished during their Continuance in Office.' Art. III, Section 1.

United States v. Will, 449 U.S. 200, 217-218 (1980).

In its strongly worded decision last year, the Third Department, in *Kelch,* unequivocally held that discriminatory and inadequate compensation for a judge is unconstitutional. *Kelch* involved the fixing of a judicial salary at an extremely low level ($500 per year). The Third Department held that there is a basic notion that judges should not be put in fear of the possibility of salary retribution by the Legislature for rendering decisions not to the liking of the legislators. The *Kelch* court stated:

> A real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions. An appearance of impropriety, if not an actual concern, would arise that the scales of justice could be tipped by political influence.

36 A.D.3d at 1112. In *Kelch*, the Third Department was not only concerned with actual retribution, but found that a threat to the independence of judges lies in the possibility for retribution through the way in which a legislative body exercises its power to fix judges' compensation.

That is precisely the concern Petitioners raise herein. Petitioners contend that the Legislature has acted unconstitutionally by declining, for a protracted period of time, to maintain the real value of the judges' compensation. This is unconstitutional because the Legislature should not be allowed to put judges in the position of being influenced in their decisions by "political" considerations through deferring consideration of the judges' salary needs; *i.e.*, that they cannot hope for such consideration if they offend the Legislature or fail to do its bidding. See, *Matter of Catanise v. Town of Fayette*, 148 A.D.2d 210, 212 (4th Dept. 1989), where the Court stated:

> Legislation cannot be sustained where 'the independence of the judiciary and the freedom of the law will depend on the generosity of the legislature' (*People ex rel. Burby* v. *Howland*, 270, 283, 49 N.E. 775, supra,). *The mere existence of the power to interfere with or to influence the exercise of judicial functions contravenes the fundamental principles of separation of powers embodied in our State Constitution and cannot be sustained.* [Emphasis added.]

The courts below, and the First Department, improvidently rejected this reasoning.

In its thoughtful decision interpreting the compensation clause of Pennsylvania's Constitution, the Pennsylvania Supreme Court in *Goodheart v. Casey*, 521 Pa.

316 (1989), directed that the state's legislature exercise its constitutional duty to provide compensation for judges that was adequate in amount and commensurate with their responsibilities. The predicate for its decision was the imperative "to ensure the independence of the judicial (as well as the executive) branch." The Court stated:

> [T]he legislature is obligated to provide adequate compensation. [In *Glancy v. Casey*, 447 Pa. 77 (1972] we explained" '[E]ven though the Constitution of 1968 simply mandates that judicial compensation be 'fixed by law' unlike the much wiser and salutary mandates of the constitutions of 1790, 1838 and 1874, which provided that judges should 'receive for their services as adequate compensation,' it is the constitutional duty and obligation of the legislature in order to insure the independence of the judicial (as well as the executive) branch of government, to provide compensation adequate in amount and commensurate with the duties and responsibilities of the judges involved. To do any less violates the very framework or our constitutional system of government.

521 Pa. at 320-321. In *Kelch*, the Third Department adopted that reasoning, although they failed to apply it in this case.

In *United States v. Will, supra*, the United States Supreme Court reviewed statements made during the Constitutional Convention for its understanding of the Constitution's Compensation Clause. We need not readdress that history here other than to note that the issue of inflation was strongly debated. As concluded by the Court:

> [The Compensation Clause represents a] balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation...The Constitution ...of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.

449 U.S. at 227. In considering judges' needs, the Framers were concerned that the exercise of power over a judge's compensation should not be a means for the legislative body to control the Judiciary. 449 U.S. at 216.

In the present case, the withholding of increases for the judges by the Legislature for a protracted period of inflationary diminishment of their pay, should not be countenanced because it may be or could become an instrument for controlling the judges. To permit such behavior to continue unabated defies logic, reason and all notions of good government by failing to foster an independent Judiciary. It is thus unconstitutional.

Consequently, if changing conditions demand an increase in judges' compensation, such as the cumulative effect of protracted and substantial inflation, the Legislature has a duty under the Constitution, embodied in Art. VI, § 25(a), to enact legislation meeting such demand, and the courts must enforce that duty where, as here, the Legislature has failed to fulfill its constitutional obligation.

D. Judicial Compensation is Constitutionally Protected Against Indirect Diminution by Reason of Inflation

4. The Evans Decision and §25(a)

It is clear and uncontroverted that §25(a) protects the judges from "indirect" as well as "direct" diminution of compensation. *Evans v. Gore*, *supra* at 254 (1920) (hereafter "*Evans*"); *Hatter v. United States*, 532 U.S. 557, 569-570 (2001) (hereafter "*Hatter*").

In 1920, the Supreme Court held that the Federal Compensation Clause protected the Judiciary from indirect assaults on their compensation. *Evans*, 253 U.S. at 254. Specifically addressing the applicability to sitting judges of the new income tax, the Court stated:

> [D]iminution [of judges'] compensation may be effected in more than one way. *Some may be direct and others indirect, or even evasive* as Mr. [Alexander] Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition.

253 U.S. at 254. (Emphasis added).

More recently, in *Hatter*, while holding that the federal constitution was violated by a discriminatory provision regarding judges' compensation, and overruling *Evans'* specific holding that judges' were constitutionally exempt from an income tax statute enacted after taking

office, 532 U.S. at 567, the Supreme Court carefully noted that it did not overrule *Evans* in its entirety, but only to the extent of upholding the imposition of a nondiscriminatory income tax on sitting judges, and carefully reaffirmed *Evans'* basic principle of broadly prohibiting direct and indirect diminution of judges' compensation of all kinds. 532 U.S. at 569.

In that light, §25(a) must be read to carry out its clear purpose to protect the independence of the Judiciary and its judges. Such reading requires a conclusion that §25(a) guarantees against a diminishment of judges' compensation caused by inflation because protection from inflationary impairment of judges' compensation is essential to ensure that the judges have independence from the other branches of the government, and do not become their supplicants. The unqualified language of §25(a) should be read to protect the judges against the protracted and severe diminishment of their compensation caused by inflation.

The authors of New York's current §25(a) did not write on a "clean slate" when they wrote that provision. It was written in 1925, five years after *Evans* was decided. The principle holding of *Evans* prohibiting indirect diminishment thus has a substantial impact on the

interpretation and enforcement §25(a). Its framers must have been aware of the *Evans* decision when they enacted the revised provision against diminishment into New York's Constitution.

The principle of *Evans* is thus applicable to the interpretation of New York's provision against diminishment of judges' compensation. See *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 949, 501 (1986) (If the legislative body "intends for legislation to change the interpretation of a judicially created concept, it must make that intent specific."). There is no indication whatsoever that the drafters of that constitutional protection for judges intended to depart from the concept enunciated in *Evans*.

In sum, the authors of §25(a) wrote unqualified language against diminishment of judges' compensation as enunciated in *Evans* - not restricting it to a diminishment "by law" - and guaranteed the judges against diminishment caused by protracted and substantial inflation that the Legislature and Governor have refused to address for more than a decade.

5. The Undisputed Impact of Inflation

There is another reason that supports reading §25(a) broadly in the context of *Evans*. There can be no dispute

but that the value of a dollar received at one time is worth less at a later time if inflation has intervened. *Cf., Schultz v. Harrison Radiator Division of General Motors*, 90 N.Y.2d 311, 319 (1997). Consequently, where, as here, inflation ensues after judges' compensation has been legislatively established, such compensation unquestionably has been diminished. Further, the impact of a reduction in judges' compensation caused by protracted inflation has no lesser impact on the judges than would a comparable reduction by affirmative act of the Legislature. Those two causes of diminishment of judges' compensation are basically the same. They both stem from the Legislature, in one instance by its action, and in the other by its inaction. The Constitution's guarantee against such diminishment should not be read out of the unqualified language of §25(a) because it is caused by inaction of the political branches of the Government.

6. Atkins Does not Implicate §25(a) Analysis under United States v. Will

Petitioners' research reveals only one case that specifically addressed the question of whether judges' pay is constitutionally protected from diminishment by inflation. *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert den*, 434 U.S. 1009 (1978) (hereafter "*Atkins*")

was rendered by the federal court of claims which held that the federal judges failed to establish a right to receive an inflation adjustment under the United States Constitution's Compensation Clause. *Atkins* is not controlling and is distinguishable.

Critical to the analysis in *Atkins* was a conclusion that there was no showing of a discriminatory attack on the judiciary by Congress as the result of its failure to increase the nominal amount of judicial salaries, the Court ruling that: "Indirect, *nondiscriminatory diminishments* of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation Clause …." 556 F.2d at 1045 [emphasis added].

But 22 years after *Atkins*, the United States Supreme Court, having denied *certiorari* in *Atkins*, construed the Compensation Clause to the effect that "the Constitution makes no exceptions for 'nondiscriminatory' reductions…." *United States v. Will*, 449 U.S. at 226. This nullified a significant and material underpinning of the *Atkins* analysis.

Moreover, in addition to having been undermined by the decision in *Will*, *Atkins* is distinguishable for several additional reasons. First, it relies on the extensive and

unique history of the federal Constitution's Compensation Clause to discern its meaning and scope. 556 F.2d at 1048. New York's provision, enacted in its present form in 1925, has a different history and should be interpreted so as to prohibit the direct or indirect diminishment of judges' pay by any means, a concept emphasized in the Supreme Court's 1920 decision in *Evans*, upon which New York's Compensation Clause was predicated, and reaffirmed in its 2001 decision in *Hatter*. In any event, and as set forth in Part B of this Point, *supra*, the diminishment of Judicial salaries by the operation of inflation has been discriminatory. The Legislature has provided that Legislators' extra payments are indexed to inflation, and all of the other State employees, including other employees of the judicial branch, have received raises of some kind in the past eleven years. Thus, the judges constitute the sole class of State employees whose salaries have been frozen. This freeze, resulting in a diminution of nearly one-quarter in judicial pay, has been far from "nondiscriminatory." The Judiciary has been uniquely affected by the failure to adjust their salary for more than a decade. Alone among State employees, the Judiciary has suffered more than a 30% *diminution* in compensation. Even the *Atkins* Court suggested that when such diminishment rises to the level of

"an assault upon the independence of the third branch or any of its members," the Compensation Clause is, in fact, implicated. *Atkins,* at 1046.

Second, *Atkins* expressly stated that the test for determining whether a particular diminishment of judges' compensation violates the Constitution is whether the legislative body's exercise of its financial power tends to be an attack on the independence of the third branch and its members. 556 F.2d at 1049. Here, as recognized by New York case law and by the *Larabee* Court, the Judiciary's independence is compromised by legislative control over the Judiciary's compensation. Specifically, in *Larabee, supra* at 271, the First Department found that it was undisputed that "the legislative branch … was using the Judiciary tactically in a political battle with the Governor." In holding linkage to violate the Separation of Powers, the First Department also found that the failure to enact judicial salary adjustments was an assault on the independence of the judicial branch, in that the interests of the judicial branch were subordinated to the internecine warfare between the legislative and executive branches.

Third, *Atkins* is a trial level decision by a court in another jurisdiction, and the only decision of any court rejecting or limiting judicial protection from inflation

that has been found. To the extent that it can be read as a rejection of Petitioners' fundamental claim, it is urged that it should not be followed.

The present case is also different from *Hatter*, where the United States Supreme Court held that sitting judges were not exempt from income taxation. Here, the wrongful refusal by the Legislature and Governor to give any consideration over many years to the judges' need for adequate, equitable compensation poses a severe threat to the independence of the Judiciary. Such refusal by those other branches of the government to consider raising the judges' pay has forced them to continually seek a dispensation from the Legislature and Governor, which has a natural, inevitable tendency to impair their independence. Judges should not be placed in fear that if their rulings on legal issues were considered by the Legislature to be contrary to its policies or otherwise not to the liking of the legislators or its leaders, consideration of their salary needs may be deferred endlessly, until they come around to support the policies and agenda of the legislative leaders.

The long-established institutional propensity of the Legislature and Governor to put the needs of the Judiciary on hold amidst their political wrangling, dramatically

affects judicial independence and distinguishes *Hatter's* conclusion that the judges should pay their taxes from the protracted refusal of New York's Legislature and Governor to even consider providing them with relief from inflation. Further, *Hatter's* theory can also be understood in light of the fact that a provision requiring judges to pay income taxes is effected by a one-time statute, whereas long term deferral by the Legislature of increases for judges imperils their independence by forcing them to continuously seek a dispensation from the Legislature and avoid the displeasure of Legislature and/or Executive.

4. Black v. Graves

The question of whether New York's sitting judges were immune from the payment of income taxes under a new tax law by reason of the provision in New York's Constitution against diminishment of judges' compensation was addressed in only one reported decision, rendered almost 70 years ago. In two concurring opinions yielding a plurality decision of three Justices, the Third Department held in *Black v. Graves*, 257 A.D. 176 (3rd Dept.), *aff'd*, 281 N.Y. 792 (1939), that the "compensation" of New York's sitting judges was not diminished by a statute requiring them to pay income taxes. The question of whether inflationary reduction unconstitutionally diminished judges' pay was

neither before the Court, nor was it mentioned in the two concurrences or the dissenting opinion.

The theories of the two opinions that combined to produce a three judge majority do not bear on the inflation issue. A two judge concurrence authored by Justice Bliss turned on the "fiction" that payment of an income tax by a judge does not come out of the judge's salary, but instead is supposedly paid from another source - the judge's private funds. 257 A.D. at 786. That opinion also stated that when the income tax issue was before the Third Department in 1939, *Evans* had been greatly weakened by the then recently decided *O'Malley v. Woodrough*, 307 U.S. 277 (1939), and concluded with the notion that requiring judges to pay taxes as good citizens did not tend to impair their independence.

The decision in *O'Malley v. Woodrough*, however, did not reject *Evans'* basic principle that the indirect diminishment of judges' compensation was unconstitutional. Likewise *Hatter*, more than 70 years later, expressly reaffirmed that principle. Justice Black's second concurring opinion was based solely on the view that *Evans*

had in essence been overruled by *O'Malley v. Woodrough*. *Black v. Graves*, 257 A.D. at 790.[15]

The true significance of *Black v. Graves*, however, is found in the careful reasoning of the dissenting opinion by Justice McNamee, predicated on the fundamental principle that the Constitution protects "the integrity and independence" of the Judiciary from the Legislature and Executive Department, as a co-equal branch. 257 A.D. at 791.

Justice McNamee's reasoning explains why the authors of Article VI §25(a) intended it to be broadly interpreted under the principle of *Evans*. As Justice McNamee carefully explained, at the time New York's present constitutional provision prohibiting such diminishment had been written in 1925, the virtually identical non-diminishment provision in the federal constitution had already been broadly interpreted by the Supreme Court in *Evans*, and its authoritative pronouncements had not been questioned by that Court until it rendered its 1939 *O'Malley* decision, which was 14 years after New York's constitutional provision had been written against the background of *Evans*. Justice McNamee thus reasoned that the authors of New

[15] *Evans'* tax ruling was not expressly overruled until *Hatter* did so over 60 years later.

York's constitutional prohibition against diminishment of judges' compensation, written in 1925, must have intended that what they wrote be construed in accordance with *Evans'* broad principle prohibiting direct and indirect diminution of judges' pay *by any means*. 257 A.D. at 792-793 (Emphasis added).

In powerful language, Justice McNamee stated:

> The judicial branch of the government is the weakest of the three; not only is this true as to the numbers, it is without political power. It is quite without power to defend itself, and must rely on such protection as the Constitution throws about it. It must act not only openly and uprightly, but without fear as between the many and the few, between the powerful and the weak, in popular and unpopular causes, with no cloak of security except the justness of its decision and the Constitution which creates and maintains it. Plaintiff's case [for protection against salary diminution] will be regarded in some quarters and by many as an unpopular one, but this will not relieve the courts from upholding the Constitution as written by the people, and from asserting its clear mandate.

257 A.D. at 792-793.

Justice McNamee's reasoning is compelling. It is in the context of *Evans'* anti-diminution holding that §25(a) was written in 1925. The authors of §25(a), consistent with the rationale of *Evans*, meant that New York's constitutional prohibition against impairment of judges' pay must be broadly interpreted to guarantee their independence, and that the language employed in §25(a) can

only be interpreted to provide that Judicial compensation would not be directly or indirectly diminished from any cause.

Moreover, the diminishment of Judicial salaries by the payment of income taxes simply does not constitute the harm that Article VI §25(a) was meant to prevent. That section was not enacted to prevent the judges from adhering to the general obligations of citizenship, such as the payment of income taxes. The purpose of the Compensation Clause was to keep the independence of the judges vis-à-vis the other two branches, and to prevent threats to judicial independence caused by the exercise or, in this case, non-exercise of the power of the purse. Requiring Judges to pay income taxes, as do the Governor, the Legislators, and every other citizen of New York State, does not weaken the judges in comparison to the other branches. Freezing their compensation for 11 years as part of a power struggle between the other two branches most clearly does.

Most certainly, the question of salary diminution by virtue of income taxes has long been resolved. However, the independence of the Judiciary must now be protected by requiring the Legislature and the Governor to take such action as is necessary to provide Petitioners and all other UCS judges with the real economic value today of the

compensation established for them by the 1998 legislation. New York constitutional history demonstrates that the anti-diminution imperative enunciated in *Evans* remains at the bedrock of New York jurisprudence. Even *Atkins*, which rejected the constitutional challenge relating to short-term inflation,[16] does not ameliorate the substance of Respondents' continuing violation of the constitution. The court below was wrong in rejecting Petitioners' claims .

E. Judicial Compensation is Constitutionally Inadequate

Both the Compensation Clause and the doctrine of Separation of Powers guarantee not only unreduced compensation, but also objectively adequate compensation to the Judiciary of the State of New York. If, as has been the case herein, compensation of the judges has been allowed to diminish, by the operation of inflation, so far that it becomes inadequate, both the principle of Separation of Powers and the provisions of the Compensation Clause have been violated,

In *Kelch*, the Third Department found a judicial salary of $500 to be inadequate, and that the very inadequacy of

[16] The *Atkins* court left unanswered the question squarely placed before this court, to wit: Do the unchecked ravages of inflation arising from ten years of legislative and executive inaction constitute a violation of New York's Compensation Clause? Petitioners urge that only an affirmative response will give meaning to the plain language and intent of New York's Compensation Clauses since its adoption in 1925.

the salary affected the independence of the judiciary. In *Larabee,* the First Department noted that the long-term linkage of Judicial and Legislative salaries, and consequent refusal to adjust judicial salaries, was diminishing the judiciary "as a self-functioning and thus independent" branch of the government. Those Courts recognized that the requirements of §25(a) and the doctrine of Separation of Powers, go beyond the formulaic guarantee that the absolute dollar value of Judicial compensation will not be decreased. Indeed, the *Kelch* Court, in its adoptions of the opinion of the Supreme Court in *Goodheart v. Casey, supra,* also adopted the concept that the Judiciary is entitled to constitutionally adequate compensation. As shown herein, the salary of the judges, in real dollars, has been diminished by one-quarter to one-third. At this point, the salary of the judiciary is less, in both absolute and real dollars, than many of the fledgling attorneys appearing in front of them. As the Atlantic Legal Foundation noted in the Haig Report, *Adequate Compensation for Judges is Essential for New York's Business and Economy,* at pp. 4-5, the failure to pay a constitutionally adequate salary curtails the ability of the Judiciary to attract the best and the brightest, and to maintain them in office. This, in turn, affects both the

quality of decisions and the ability of the Judiciary to fulfill its constitutional role as the protector of the populace against the abuses of the political process. In short, both the First Department in *Larabee,* and the Third Department in *Kelch,* (although, ironically, not in this case), recognized that the confluence of the Compensation Clause and the doctrine of Separation of Powers requires that the salary of judges be sufficient. The current salary of New York State judges, diminished as it has been by 11 years of inflation, and with no remedy in sight but the further diminishment of judicial salaries by inflation, has come to the level of being constitutionally inadequate.

POINT II

APPELLANTS ARE ENTITLED TO MANDAMUS BECAUSE THEY HAVE A CLEAR LEGAL RIGHT TO THE INCREASED COMPENSATION GRANTED BY THE 2006 ACT, WHICH WAS COMPLETE, IMMEDIATELY EFFECTIVE, AND COULD NOT LAWFULLY BE MADE CONTINGENT ON THE ENACTMENT OF FURTHER LEGISLATION; THEY ARE ALSO ENTITLED TO DECLARTORY RELIEF DECLARING THEIR RIGHT TO INCREASED COMPENSATION UNDER THE 2006 ACT

In Point I, the appellants, together with the plaintiffs in the *Larabee* and *Chief Judge* cases, raise difficult constitutional issues addressed to the relationship among the three co-equal branches of government. However, these constitutional issues need not be reached because, as set forth hereinafter, in 2006, the Legislature allocated funds to adjust the compensation of the New York State Judiciary, and to bring their pay in line with the Federal Judiciary. A large part of the reason that this case is currently before the Court is that the Comptroller improperly and erroneously impounded the funds allocated by the 2006 Act, and has refused to pay them. If this Court finds that the 2006 Act has already adjusted the compensation of the Judges, the issues raised by Point I need not be determined at this time. Such an interpretation would provide the judges with a salary adjustment without the Court being required to order the Legislature and Governor to enact legislation to remedy the

constitutional violations described above. As stated in *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 845 (1999), a statute should be interpreted in a manner that avoids raising "serious constitutional concerns."

A. The Language of the 2006 Act

Chapter 51 of the laws of 2006 (the "2006 Act") was enacted to provide payment of $69.5 million of salary increases under the Judiciary's "Judicial Compensation Reform" program for the judges of New York's Unified Court System ("UCS judges"). [R155, R161, R167].

The 2006 Act, passed by the Legislature and thereafter signed by the Governor on April 12, 2006, expressly provided in Section 2 that the appropriated funds were for increasing the UCS judges' compensation by the amount of $69,500,000. Section 2 of the 2006 Act also expressly provided that "to accomplish the purposes designated" [R120], the appropriated $69.5 million was "authorized to be paid." In that regard, Section 2 specifically provided: "The several amounts named in this section … *are hereby appropriated and authorized to be paid as hereinafter provided, to the respective public officers and for the several purposes specified...*" [Emphasis added]. [R161].

The Legislature and Governor understood that by passing the 2006 Act they were providing a pay adjustment

for the judges, and the 2006 Act should be interpreted to carry out their intent. The budgetary documents submitted by the Judiciary to the Governor and Legislature during the 2006-2007 appropriation process made clear to them that the Judiciary's appropriation request for "Judicial Compensation Reform," which the 2006 Act adopted *verbatim*, was to fund its "pay parity" program to raise the UCS judges' salaries to the level of federal district court judges, whose annual salary was in 2006, and continues to be, $165,300. [R88]. As stated by the Judiciary in §2, Part VI, of its 2006-2007 Budget Request, the $69.5 million appropriation was "to fund this initiative" for payment to the UCS judges of such amounts that provide

> (1) pay parity between justices of the Supreme Court and Federal District Court Judges, along with proportionate adjustment in the rates of pay for appellate level judges, [and] (2) corresponding pay adjustment for judges of trial courts of limited jurisdiction. [R93, R203].

The salary adjustments were to be retroactive to April 1, 2005. Of the $69.5 million appropriation, $32.6 million was for 2005, and the balance was to fund the increase for the 2006-2007 fiscal year. [R93]. The allocation of the $69.5 million lump sum appropriation was to be accomplished by a simple mathematical computation by the Judiciary -- the salary of each of the approximately 1,200 UCS judges

would be increased by the amount necessary to increase each judge's pay to $165,300 per annum.

However, the Comptroller impounded the funds for the salary adjustment, claiming that the appropriation was not self-effectuating but, rather, that it required an additional act by the Legislature to appropriate the funds. In this, the Comptroller was mistaken.

B. Mandamus is the Appropriate Remedy

Mandamus should be granted against the Comptroller because he has no right to withhold payment of the amounts authorized for salary adjustments to which the Petitioners have a clear legal right. The "clear legal right" test is the governing standard for mandamus relief under *Klosterman v. Cuomo,* 61 N.Y.2d 525, 539 (1984). In the present case, if Appellants' interpretation of the 2006 Act is sustained or if any of their constitutional contentions are upheld, the Comptroller's obligation to pay the appropriated fund to the Judiciary is ministerial and the Comptroller thus has no discretion to withhold payment. He should be ordered to release the appropriated money. *Matter of County of Oneida v. Berle,* 49 N.Y.2d 515, 523 (1980).

In the present case, Appellants' right to relief is based on several independent grounds:

(a) The 2006 Act, properly construed, did not make Appellants' right to the increased salary contingent on enactment of further legislation. Moreover, as shown herein, even if construed as contingent, such contingency was satisfied.

(b) The statute should be construed to avoid raising serious constitutional concerns.

(c) A contingency in the 2006 Act's lump sum appropriation for judges' raises would be invalid and must be disregarded. When the Legislature appropriates a lump sum for one of the other two coordinate branches of the state government, in this case the Judiciary, the Legislature cannot lawfully retain the administrative power to allocate the appropriated money. *People v. Tremaine*, 252 N.Y. 27 (1929) (hereinafter "*Tremaine*").

(d) Even if the 2006 Act were interpreted to make payment of the judges' raises contingent on further legislative action, the principle pronounced by *Tremaine* requires that such a contingency be disregarded because it would be void, and that the appropriated money be paid.

C. Declaratory Relief Should be Granted as an Alternative to Mandamus.

Appellants alternatively seek a declaration that the 2006 Act requires the immediate appropriation of the money

allocated by the 2006 Act. This approach is in accord with this Court's decision in *Klosterman v. Cuomo*, 61 N.Y.2d at 537. In the present case, the Supreme Court read Appellants' Petition as alleging claims against the State [R25], and their rights against the state should be interpreted and declared.

D. The 2006 Act's "pursuant to" Clause Did Not Make the Salary Adjustments Contingent.

1. *Interpretation of the "Pursuant To" Clause*

Section 2 of the 2006 Act stated that the $69.5 million of judicial compensation adjustments were to be funded "pursuant to a chapter of the laws of 2006." This is the clause upon which the Comptroller relied in impounding the funds, claiming that a further act of the Legislature was necessary before the judges' salary could be adjusted.

However, the 2006 Act did not contain any language stating that further legislative action was required to effectuate the salary adjustment passed by that Act. It is significant that the 2006 Act did not say that raises could be paid only pursuant to a chapter law *"to be enacted."* Such language is used by the Legislature when it intended an appropriation to be contingent on further legislative action. *See, e.g., Pataki v. New York State Assembly*, 4 N.Y.3d 75, 86 (2004) (hereinafter *"Pataki"*), a

case involving the funding of public education, where this Court observed that the Legislature "passed a bill providing that the funds would be available *only when authorized by* ***later*** *legislation.*" (Emphasis added). No such language is found in the 2006 Act.

Indeed, the "pursuant to" language was the very wording of the Judiciary in its 2006-2007 Budget Request, and was adopted *verbatim* by the Legislature in passing the 2006 Act. A strong inference arises from the language knowingly adopted by the Legislature for wording the "pursuant to" clause that that Clause was not intended to make the 2006 Act contingent upon further legislation. For this and the other reasons set forth herein, the 2006 Act should be interpreted as not contingent.

In 2006, the Legislature well knew that obtaining raises for the judges was the prime goal of the leadership of the Judiciary, which was publicly endorsed by the leadership of the Legislature and by the Governor. They should not now be heard to say that the language chosen by the Judiciary to obtain salary adjustments and adopted by the Legislature in the 2006 Act was not intended to provide the salary adjustments for the judges, and that the raises were intended to be contingent on passage of further legislation raising the judges' pay.

After the Comptroller impounded the $69.5 million appropriated for judges' salary adjustments by the 2006 Act, an appropriation statute providing funds for raising the judges' salaries was enacted for the 2008-2009 fiscal year. Significantly, the Legislature made clear by its express language in that later appropriation statute that the funds it appropriated for the judges' raises were not to be disbursed until enactment of "a subsequent chapter of law specifying such salary levels." (Emphasis added). The inclusion of that language in the later act raises a strong inference that the 2006 Act was self-effectuating. *See People ex rel Westchester Fire Ins. Co. v. Davenport,* 91 N.Y. (Sickels) 574, 591 (1883) ("While a declaratory act has no conclusive force in the construction of prior statutes by the judiciary, yet it has usually been regarded as entitled to some consideration and weight.")

Ambiguous language, such as the vague wording of the "pursuant to" clause in the 2006 Act, should not be interpreted as a contingency requiring further legislative action for a lump sum appropriation for judges' salary adjustments to be paid. That is particularly true in this case, as such an interpretation would produce a result that conflicts with the unanimous view of "[p]olitical leaders, including several governors and the leadership of each

house of the Legislature … [who] in fact agreed on the necessity" to adjust the judges' salaries. *Larabee,* 880 N.Y.S. 2d at 260.

The "pursuant to" clause in the 2006 Act ensured that the money it appropriated would be used for Judicial Compensation Reform, by expressly providing that the appropriated funds be paid "for expenses necessary to fund adjustments in the compensation of state-paid judges." [R127]. Such assurance was appropriate in view of the lump sum character of the appropriation made by the 2006 Act. A lump sum appropriation is permissible under New York law, as is clear from *Tremaine,* at 33, and more recently from *Pataki,* where this Court stated that the choice of appropriating funds as a lump sum or by itemizing the appropriation on the legislation itself, "is best left to the Legislature." *Pataki,* 4 N.Y.3d at 96; *see also Public Service Comm. v. New York Cent. R.R.Co.,* 193 A.D. 615, 618 (3rd Dep't), *aff'd,* 230 N.Y. 149 (1920).

In its decision below, the Third Department held that the "pursuant to" clause of the 2006 Act had to be read as requiring further legislation for the $69.5 million appropriation for judges' salary adjustments to have any effect. The Third Department erred in so holding, and thereby misinterpreted the "pursuant to" clause. Rather,

under *Tremaine,* the allocation of the funds appropriated by the 2006 Act is to be made by the head of the Judicial branch, for which the appropriation was made. As stated in *Tremaine*: "The result of our decision is that it devolves upon the heads of the departments to which the lump sum appropriations … were made,… to apportion and allocate the funds under such appropriations in accordance with law…." *Tremaine*, 252 N.Y. at 52. Every year since 2006, the Legislature has renewed this appropriation of the unused funds. See, Chapter 51, §2, Laws of 2007; Chapter 51, Section 2 Laws of 2008. The 2009-2010 budgetary allocation has no language limiting this appropriation by requiring another act (See Chapter 51 §2, Laws of 2009), providing:

> The sum of one hundred sixty-three million dollars ($163,000,000), or so much thereof as may be necessary **is hereby appropriated … and made immediately available to the administrative office of the courts for payment pursuant to the provisions of this act….**

(emphasis added). In spite of this clear language, the money remains unspent, perhaps in reliance on the prior erroneous rulings on this issue. This Court should carry out the clear intent of the Legislature.

2. *Construing the 2006 Act to be Contingent on Further Legislative Action Would Raise Serious Constitutional Concerns.*

This Court should interpret the 2006 Act to be final and complete legislation for a pay adjustment for the

judges, rather than as being contingent on further legislative action, because interpreting that Act to be contingent would raise serious constitutional concerns in both appeals now before the Court. There are several grounds upon which this Court could interpret the 2006 Act not to be contingent. Such interpretation is to be favored. *Ortiz v. Fireboard Corp., supra.*

3. *Statements by a Few Legislators are Not Indicative of a Statute's Meaning.*

The Third Department relied upon statements made by a few legislators in debate of the appropriations bill in interpreting that bill. *Maron* at 125-126.[17] This was error. It has long been recognized by this Court that statements by a few legislators are not a basis for determining legislative intent. As stated by this Court in *Woollcott v. Schubert,* 217 N.Y. 212, 221 (1916), "opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statues." In *United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897), the United States Supreme Court explained why statements by a few legislators are not relevant to interpret a statute:

[17] Such reliance is particularly ironic in light of the Third Department's interpretation of the Speech or Debate clause as forbidding appellants from relying upon the statements of the Legislators. See Point I, *supra.*

> [I]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of the individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ with each other.

166 U.S. at 318. *See also People v. Newman,* 32 N.Y.2d 379, 390 (1973); *Mattoili v. Casseles,* 50 A.D.2d 1013 (3rd Dep't 1975).

The Third Department also mischaracterized the statements by a few legislators as "legislative debates," when they were nothing more than the expressed personal view of the few who spoke, who offered no analysis or basis for their cryptic and conclusory statements. In the absence of any reliable basis for finding that the Legislature intended the 2006 Act to be contingent, reliance on the brief statements by a few individual legislators was clear error.

Moreover, the Third Department failed to recognize that the language of the 2006 Act was the precise wording used by the Judiciary to make its 2006-2007 budget request, and that its pay parity program was transmitted by the Judiciary to the Governor and, in turn, by him to the Legislature. The Legislature as a whole knew exactly what it was requested to enact when it passed the bill, as did

the Governor when he signed it. The Legislature and the Governor did so knowingly and intentionally.

The entire leadership of the State's government knew that obtaining the long overdue and sorely needed salary adjustments for the judges was a prime goal of the Chief Judge and the Judiciary. The heads of the government, by their public statements, strongly supported the enactment of the legislation for judicial pay increases. Thus, if the history of the statute is be a guide, the interpretation of the 2006 Act should be guided by the unanimous statements of intent by the governmental leaders, and not remarks by a few legislators.

4. The *Two-Year Payment Provision Does Not Bar Payment of the Salary Adjustments.*

The Third Department erroneously relied on Article VII, §7 of the Constitution as a basis for denying relief. That section states that payment of state funds shall not be made "unless payment be made within two years next after passage of [an] appropriation." There are, however, significant reasons why that provision is not a bar to the payment of the raises granted by the 2006 Act.

First, the funds were illegally impounded by the Comptroller. This extra-legal act cannot, by force majeure, contrary to law, render the failure to expend the money

legal. Under these circumstances, the two-year provision in Article VII, §7, is not applicable. If this provision is applied to bar the judicial salary increase granted by the 2006 Act, it would result in a violation of the fundamental and specific guaranty made by Article VI, §25(a) of the Constitution that judges' salaries shall not be diminished while in office. Once enacted, the increased compensation cannot constitutionally be diminished by the passage of time during which payment is not made. That is particularly true where this mandamus action was commenced within two years of the appropriation.

Second, the reason for the two-year provision demonstrates that it does not apply to this situation. The two-year time frame was intended to require a legislative look at whether the appropriation was necessary and the money should be spent where funds had been unused for the two year period. In the circumstance, as here, where lawfully appropriated money has been unlawfully withheld, there is no purpose in requiring another legislative look at whether the appropriated funds should be disbursed.

In any event, the requirements of the two-year provision have been fulfilled, because, in every year since 2006, the Legislature has re-authorized the expenditure of the funds. The appropriation for the judicial salary

adjustment has been passed again, and the salary adjustments re-authorized, as part of the 2006-2007 Legislature and Judiciary budget; as part of the 2007-2008 Legislature and Judiciary budget, as part of the 2008-2009 Legislature and Judiciary budget, and as part of the 2009-2010 Legislature and Judiciary budget. Thus, although the money has not been expended, two years has not passed since the Legislature has reviewed and re-authorized the funds. Therefore, the amounts appropriated have not escheated to the State under Article VII §7.

5. *A Specific Amendment to the Judiciary Law, Article 7-B is Not a Requisite to Payment of the Raises Granted by the 2006 Act.*

Because the 2006 Act was final, complete and effective lump sum legislation, a specific amendment to the salary schedule for the judges set forth in Judiciary Law, Article 7-B, was not required in order to adjust the judges' salaries. Rather, the specific allocation is to be made administratively by the Judiciary. The existence of a prior practice of increasing judges' compensation by amending Article 7-B, does not mean that that is the only way in which the Legislature may adjust judicial salaries. In other instances, the legislation funding various expenses by means of appropriation statutes have been upheld even though such funding was previously accomplished

by amending a specific substantive statutory article of New York law. For example, in *Pataki,* this Court upheld an appropriation statute that provided funds for the operation of local school districts without amending the Education Law, which historically had been the manner in which such provisions were made. *Pataki,* 4 N.Y.3d at 96. It was argued in *Pataki* that the appropriation bill was invalid because it was not accomplished through an amendment to the Education Law. In rejecting that contention, this Court made it clear that the fact that there had been a historical practice of allocating appropriated funds by means of specific provisions added to a particular substantive statute, was not a basis for invalidating an appropriation statute which used an alternate means of appropriation. The Court stated:

> *Nothing in the Constitution says or implies that, once it becomes customary to deal with a particular subject either in appropriation bills or other legislation, the custom must be immutable.* On the contrary, it was an important part of executive budgeting to enable budgets to be adjusted to the changing needs of an increasingly complex society. *Also, it would involve courts in endless difficulties if they had to determine, whether the particular subject of the bill was being dealt with in accordance with historical practice.*

Pataki, 4 N.Y.3d at 98. (Emphasis added).

Likewise, the fact that adjustments to compensation for judges may have been accomplished in the past by

amendments to the Judiciary Law does not mean that in addition to enacting the 2006 Act, passage of an amendment to the Judiciary Law is essential to raise the judges' salaries.

It is thus clear that, notwithstanding that the Judiciary Law has not been amended, the 2006 Act, as a legitimate appropriation, must be enforced. It was and continues to be unlawful for the Comptroller to impound the $69.5 million funds for judicial salary adjustments, and he should be ordered release the funds for payment to the judges.

There is another basic reason why the 2006 Act should be construed to be complete and effective legislation. In writing for this Court in *People v. Mancuso*, 255 N.Y.473 (1931), Chief Judge Cardozo, quoting from *People ex rel. Alpha Portland Cement Co v. Krupp*, 230 N.Y. 48, 60 (1920), observed that a court should construe a statue in a manner that enables carrying it into effect. "Our duty is to save unless in saving we pervert." 255 N.Y. at 474. Clearly, granting the salary adjustment called for therein does not "pervert" the 2006 Act.

The 2006 Act should thus be construed as an effective salary increase for the judges, and the Comptroller should be ordered to appropriate the money called for therein.

E. The 2006 Act Was a Final and Complete "Lump Sum" Appropriation for Salary Increases, and the Appropriated $69.5 Million is to be Allocated by the Judiciary and Paid to the Judges.

The principle is well ingrained in New York law that appropriation legislation can itself allocate the appropriated fund, or that the Legislature may appropriate a lump sum for a general purpose without providing any specific allocation in its statute. In the latter case, the allocation shall be made administratively by the governmental agency for which the appropriation was made. *Tremaine* at 43, 52. As recently held by this Court in *Pataki*, relying on *Tremaine*, the choice of appropriating funds as a lump sum, rather than by itemized appropriation legislation, "is best left to the Legislature." 4 N.Y.3d at 96. In the present case, the Legislature chose to make payment of the salary adjustments for the judges from the lump sum of $69.5 million.

When the Legislature enacts a lump sum appropriation for a co-ordinate branch of the government, as it did by the 2006 Act, the Legislature cannot retain control over the expenditure of the appropriated funds, and a provision in the appropriation legislation for retained legislative control is invalid and disregarded. The reason for these principles was carefully explained in Judge Crane's

concurring opinion in *Tremaine*, 252 N.Y.at 52-59. The tri-partite form of government is structured on the principle that:

> the Legislature cannot become an administrative body or … perform the work of the Executive or the Judiciary … [W]e should be alive to the imperceptible but gradual increase in the assumption of power properly belonging to another department.

252 N.Y. at 57-58 [Crane, J., concurring, citing, *e.g.*, *Matter of Davies*, 168 N.Y. 89 (1901)]. In this regard, the majority in *Tremaine* pointed out that, although the Legislature could segregate the appropriated funds itself if it so chooses, it cannot retain the administrative power to make the allocation where the appropriation statute does not itself do so. It explained that this is because allocating a lump sum is an "administrative," not a "legislative" function. The Legislature cannot aggregate to itself the duties of a coordinate branch by the simple expedient of retaining the power to appropriate funds designated as a "lump sum" expenditure. As held in *Tremaine*, the apportionment of the appropriation in that case, which the statute assigned to two legislators, "are administrative duties," and the Legislature has no constitutional authority to perform such duties. *Tremaine* at 43, *see also*, *New York Public Interest Research Group, Inc. v. Carey*, 86 Misc.2d 329, 332 (Sup. Ct. Albany Co.),

aff'd 55 A.D.2d 274 (3rd Dep't 1976) (allocating a lump sum is an administrative/ministerial function, not a legislative one). Here, the Legislature appropriated the funds to adjust Judicial salaries as a lump sum. The Legislative function was thus fulfilled; the only action left is the ministerial action of apportioning the funds among the Judges, according to a formula established by the appropriation. Under *Tremaine*, this administrative function is not dependent upon further legislative action.

This principle is especially essential in this case, involving issues of Separation of Power, and of the specific place of the Judiciary in relation to the other two coordinate branches. As stated almost 150 years ago, the Constitution was intended to prevent judges "from being placed under obligation to the legislature." *People ex rel. Mitchell v. Haws*, 20 How. Pr., 32 Barb. 207 (1860). The Legislature's usurpation of this administrative function, endorsed by the Comptroller in illegally impounding these authorized funds, has resulted in the "erosion of the functional independence of the Judiciary" and has impaired "the judicial system as an independent institution," and there thus "has been a violation of the doctrine of separation of powers." *Larabee*, at 273-274.

As Judge Crane stated in his concurring opinion in *Tremaine:*

> All *of us know from experience that he who has control of the spending of the money, when the money is there to be spent, exercises real power for good or for ill.*
>
> Personally I can see no escape from the position that the Legislature has absolute control over appropriations. It may make appropriations also upon such conditions and with such restrictions as it pleases. It can create or limit the power of executive offices. *There is one thing, however, it cannot do* and that is implied, if not expressed, in our Constitution. It cannot exercise the functions of the Executive. *It cannot administer the money after it has been appropriated.*

252 N.Y. at 58-59 (Emphasis supplied).

Similarly, the Legislature cannot "administer the money after it has been appropriated" to the Judiciary for judicial pay adjustments. The 2006 Act should thus be interpreted as final legislation, and this Court should direct the Comptroller to release those funds forthwith.

F. Even if the 2006 Act is Interpreted to be Contingent on Passage of Further Legislation, Such a Contingency is Unconstitutional Under the Circumstances of this Case.

1. Tremaine is Controlling Authority.

The constitutional issues raised by Tremaine, like those in the present appeals, were triggered by a long attempt by the Legislature "for control of the public

moneys," for the Executive branch in *Tremaine* and for the Judiciary in the cases at bar. *Tremaine*, at 38.

In *Tremaine*, this Court held that the precondition to the disbursement of funds appropriated by budget legislation for a co-ordinate branch of the state government in that case was unconstitutional and void. It ruled that the appropriation therein was final, complete and effective legislation when passed by the Legislature and signed by the Governor. As stated in *Tremaine*: "The [lump sum] legislation is complete when the appropriation is made." *Tremaine* at 44. This Court further held that the appropriated funds had to be disbursed to the co-ordinate branch of the government for which the appropriation had been made, to be allocated by the head of the co-ordinate branch in accordance with the purposes of the legislation. *Tremaine*, 252 N.Y. at 52.

Applying these principles to this case, even if the Third Department correctly interpreted the 2006 Act to make payment of the judges' salary adjustments contingent on further legislative action, that condition was unconstitutional and must be disregarded. Thus, the $69.5 million fund established by that act must be disbursed to the Judiciary for allocation by the Chief Judge.

In *Tremaine*, an annual appropriation statute appropriated lump sums for the operation of the Law and Labor Departments of the State government, but conditioned payment of the appropriated funds on approval by the Chairmen of the Senate Finance and Assembly Ways and Means Committees. This Court held that the contingency for approval by the legislative leaders was unconstitutional under Article III, §7 of the Constitution (which prohibited a legislator from receiving a "civil appointment"), and upheld the appropriation as final and complete legislation despite the contingency. Significantly, the *Tremaine* Court further held that the heads of the departments for which the funds had been appropriated would allocate the appropriated funds, without any further legislative action.

Thus, even if the 2006 Act were correctly interpreted to require further legislation, such contingency is unconstitutional under the circumstances of this case, and must be disregarded. *Tremaine's* principle is clear. If the Legislature intends to condition the payment of appropriated funds on the happening of a contingency, an unconstitutional contingency will be disregarded and the appropriated funds must be disbursed without further legislative action. In *Tremaine*, the Court stated:

> The Legislature may not attach void conditions to an appropriation bill. If it attempts to do so, *the attempt and not the appropriation fails. Matter of Brennan v. Board of Education*, 250 N.Y. 570.

252 N.Y. at 45. (Emphasis supplied).

Although *Tremaine* was extensively briefed by Appellants in their brief to the Third Department, that Court's decision did not discuss *Tremaine*. Moreover, the Supreme Court's attempt to distinguish *Tremaine* was erroneous and should be disregarded. The Supreme Court apparently misunderstood the nature of the allocation at issue. It thought that in allocating the funds disbursed to it, the Judiciary would act "legislatively" to establish the judges' compensation which, as provided in Article VI, §25(a), is to be done by the Legislature. However, the allocation of a lump sum appropriation is purely of an "administrative" character, and is not "legislative." As stated in *Tremaine*:

> The head of the department does not legislate when he segregates a lump sum appropriation. The legislation is complete when the appropriation is made.

252 N.Y. at 44. See also *Tremaine* at 43.

In the present case, allocation of the $69.5 million fund is clearly administrative. In this regard, all that is required to allocate the $69.5 million fund is an arithmetical calculation of the amount that would adjust

each judge's pay to the salary level of the federal district court judges, thereby providing pay parity between them. Such allocation by the Judiciary would not "establish" the judges' compensation. The judges' pay increase in this case was "established by law," as required by Article VI, §25(a), by the bill passed by the Legislature and signed by the Governor, providing pay parity with federal judges.

Tremaine and the present case share a common feature. The nature of the unconstitutional condition both in Tremaine and in the present case (assuming that the 2006 Act is interpreted to be contingent) is one purportedly requiring further legislative action as a condition to disbursement of an appropriated lump sum -- in *Tremaine*, the contingency was post-appropriation approval of disbursements by heads of the Legislature, and in the present case, the purported contingency is the enactment of additional legislation. These contingencies posed a threat by the Legislature to the independence of the Executive Department in *Tremaine* and would likewise pose a threat to the Judiciary in the present case if the 2006 Act were interpreted to have such contingency. The unassailable principles of *Tremaine* govern the present case.

2. The Legislature's Retention of Control over Payment of Salary Increases to the Judges from Funds Already Appropriated is Unconstitutional

The retention of post-appropriation control by the Legislature over funds appropriated for the Judicial branch violates the constitutional doctrine of Separation of Powers under the circumstances of this case, and is inconsistent with our constitutional form of government because it erodes the functional independence of the Judiciary.[18]

The separation of powers doctrine is of particular importance in a case such as the present one, in which the Third Department interpreted the 2006 Act as permitting ongoing control by the Legislature over whether the judges would ever realize the salary adjustments provided for them by the 2006 Act. Although Article VI, §25(a) of the Constitution allows the Legislature to determine the amount of a judge's compensation, it does not give the Legislature the constitutional power to control whether the judges will receive money already appropriated. If a contingency in the 2006 Act requiring further legislative action is upheld, it would enable the Legislature to continue its unconstitutional pattern of linking judicial raises to whether legislators' salaries are increased, for reasons

[18] See generally, Point I, *supra*.

having nothing to do with judicial compensation, and would permit the Legislature to continue to dangle the possibility of a pay raise for the judges as a means to accomplish its own agenda.

In sum, the 2006 Act was a final, complete and effective statute providing funds that must be disbursed to the Judiciary for its allocation and payment to the judges as increased compensation. To the extent that the 2006 Act is interpreted to be contingent on enactment of further legislation, such a contingency would be unconstitutional and void.

Based on the foregoing, a mandamus order should be issued requiring the Comptroller to disburse the appropriated $69.5 million to the Judiciary, or, alternatively, that Appellants' rights be declared as herein requested.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the order below should be reversed insofar as it dismissed the Petition. The Petition should be reinstated, and the Court should grant the Petitioners' summary judgment directing the Legislature and the Governor to grant the Justices of the New York State Courts a salary adjustment, or directing the funds appropriated for Judicial Salary Adjustments be released to the Judiciary.

Dated: Carle Place, New York
August 25, 2009

Respectfully submitted,

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TIME REQUESTED: 30 MINUTES

Court of Appeals

STATE OF NEW YORK

EDWARD A. MARON, ARTHUR SCHACK, and JOSEPH A. DeMARO,

Petitioners-Appellants,

- against -

SHELDON SILVER, as Speaker of the New York State Assembly, NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, as the Temporary President of the New York State Senate, NEW YORK STATE SENATE, ELIOT SPITZER, as Governor of the State of New York, THOMAS DiNAPOLI, as the Comptroller of the State of New York,

Respondents-Respondents,

- and -

THE OFFICE OF COURT ADMINISTRATION,

Respondent.

For a Judgment Pursuant to CPLR Article 78 and Related Relief.

BRIEF FOR RESPONDENTS-RESPONDENTS GOVERNOR OF THE STATE OF NEW YORK AND COMPTROLLER OF THE STATE OF NEW YORK

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-and-

THE OFFICE OF COURT ADMINISTRATION,

Respondent.

Albany County
Index No. 4108/2007

BRIEF FOR RESPONDENTS-RESPONDENTS GOVERNOR DAVID A. PATERSON AND COMPTROLLER THOMAS DiNAPOLI

Respondents-Respondents Governor David A. Paterson and Comptroller Thomas DiNapoli submit this brief in opposition to the appeal by Petitioners-Appellants from the order of the Appellate Division, Third Department (Mercure, P.J., Peters, Rose, Lahtinen and Kane, JJ.), entered on

November 13, 2008. The order appealed from modified an order of the Supreme Court, Albany County (Thomas J. McNamara, J.S.C.), and directed the dismissal of all claims in the Article 78 Petition filed by Petitioners-Appellants.

PRELIMINARY STATEMENT

This case is *not* about whether, as a matter of public policy, New York State judges should receive a pay increase. The principal issue is whether, under the New York Constitution, a *court* may order the Legislature to pass, and the Governor to sign, legislation increasing the compensation currently paid to the State's judges, where the Constitution quite plainly vests *exclusive* authority to increase judicial salaries in the political branches.

The decision below, *Maron v. Silver*, 58 A.D.3d 102, 871 N.Y.S.2d 404 (3d Dep't 2008), should be affirmed in all respects.

First, the Appellate Division properly held that the Legislature and the Governor did not violate the New York Constitution by engaging in "linkage," i.e., by "linking" legislation to raise judicial salaries to the passage of other legislation, such as increasing state legislators' salaries or campaign finance reform. The Third Department was correct in declining to adopt this unprecedented constitutional theory because "linkage" is simply a

pejorative term for the political back-and-forth more usually called the legislative process.

A pejorative label does not change the fact that the Legislature and the Governor did here what the people of New York elected them to do—engage in the traditional give-and-take of the legislative process, in an effort (not always successful) to find a political compromise in allocating the State's limited resources. By declining to fault the political branches for "linkage," the Appellate Division recognized that the Constitution framed a system of government under which the Legislature and the Governor are inevitably—and quite properly—active participants in a process intended to resolve conflicting priorities and agendas through political compromise.

Nothing in the Constitution permits or sanctions any attempt by the Judicial Branch to (a) dictate the content of any bill, (b) require that any "separate" bill be introduced, or (c) mandate legislative action to amend any particular law (including the Judiciary Law). The Appellate Division acted properly, and well within its discretion, in refusing Appellants' demand that the Judiciary should inject itself into such matters that the Constitution plainly reserves exclusively for the political branches.

Second, the Third Department correctly held that the Speech or Debate Clause precluded the inquiry demanded by Appellants into the

alleged motives of the members of the Legislature or the Governor in declining to adopt a law increasing judicial compensation. In all events, the only alleged harm to Appellants arose from the fact that the Legislature did not adopt a statute increasing judicial compensation. Once the Third Department concluded that there was no basis in the Constitution for Appellants' claim that they were entitled to a pay increase, the motives of the political branches in failing to reach agreement on a bill increasing judicial compensation became irrelevant.

Third, the Appellate Division properly found that the inability of the Senate, the Assembly and the Governor to reach a political compromise acceptable to all on a bill raising judicial salaries did not give rise to a violation of the separation of powers doctrine. Nothing in the Constitution's text or framework supports the unprecedented separation-of-powers theories on which Appellants rely, and the Appellate Division was wise to reject them. Indeed, as the Third Department implicitly found, Appellant's theory was based on the notion that courts could usurp the separate powers reserved by the Constitution exclusively to the Legislature and the Governor, an approach that would defeat rather than advance the objectives of the separation of powers doctrine. By rejecting Appellants' separation of powers challenge, the Appellate Division's ruling also upholds the "checks

and balances" component of the separation of powers doctrine as it applies to the subject of judicial compensation.

Moreover, this case does not involve the "the vested rights of a specifically protected class," which is the only situation in which this Court has *ever* approved judicial scrutiny of budgetary priorities set by the Legislature and the Governor.

Fourth, the Appellate Division properly rejected Appellants' Equal Protection Clause challenge. Specifically, the Third Department concluded that Appellants did not state a cognizable Equal Protection claim because, rather than alleging that they had been treated differently from any similarly situated group or class, Appellants instead merely pointed to the differences between judges and legislators that supposedly made their similar treatment on the issue of compensation politically unwise. Based on well-settled law, the Third Department correctly found that such allegations do not state an Equal Protection Clause claim.

Indeed, because New York's judges, unlike New York's other constitutional officers, benefit from a unique constitutional protection prohibiting any legislative diminishment but permitting increases of their compensation during their terms of office, the Third Department properly concluded that New York's judges are not similarly situated to other

constitutional officers, thereby negating an essential element of an Equal Protection Clause claim.

Fifth, the Appellate Division correctly held that Respondents' inability to agree on a measure acceptable to the Senate, the Assembly and the Governor that would adjust judicial salaries for inflation did not result in a violation of the Compensation Clause. The Third Department analyzed the history of the adoption of the Compensation Clause, and concluded that the Framers' primary concern was preserving judicial independence from the political branches—a fact that explains why the Framers included an express limitation on legislative power immediately after granting the Legislature discretionary authority over judicial compensation. By contrast, nothing in the Constitution or in the concerns of the Framers about preserving judicial independence supports the argument that the Compensation Clause was structured to protect judges from the effects of inflation impacting the public generally. The Third Department correctly declined to equate a prohibited legislative diminishment in judicial compensation with legislative inaction on proposals to increase a judge's compensation to account for inflation. Indeed, as the Third Department noted, every court to have considered that argument has rejected it.

Sixth, the Third Department properly found that Appellants were not entitled to a writ of mandamus. Specifically, the Third Department held that Article VII, § 7 of the Constitution bars this relief because more than two years had elapsed since the passage of the appropriation in question. In any event, the two alternative statutory bases for the Third Department's decision—*i.e.*, Appellants' failure to demonstrate a clear legal right to the relief sought, and the undisputed fact that the Legislature never adopted the required chapter law providing for increases in judicial salaries—make it unnecessary for this Court even to reach that constitutional question.

QUESTIONS PRESENTED FOR REVIEW

1. Are Respondents entitled to legislative immunity under the Speech or Debate Clause from claims related to their alleged practice of "linking" consideration of legislative proposals to increase judicial compensation to other subjects on their legislative agendas, which in fact is a core legislative function involving the budgeting of the State's limited resources?

Answer below: Yes.

2. Did the "linkage" allegedly engaged in by Respondents constitute an unconstitutional abuse of power that violated the doctrine of separation of powers, even though the petitioner-judges have no

constitutional right to a pay increase or "adequate" pay, and there is no evidence of actual impairment of the judiciary's operations?

Answer below: No.

3. Did Respondents treat New York's judges differently from other State officers, or otherwise violate the Equal Protection Clause of the State Constitution?

Answer below: No.

4. Did the Compensation Clause of the State Constitution require Respondents to enact a statute increasing judicial compensation from the salary levels in effect since 1999, and codified in Judiciary Law §§ 221 *et seq.*, to offset the effects of inflation or to redress any constitutional inadequacy of judicial salaries?

Answer below: No.

5. Were Appellants entitled to a writ of mandamus to compel the Comptroller to disburse $69.5 million appropriated in a 2006 chapter law to fund adjustments to judicial compensation, where the chapter law expressly conditioned disbursement on the enactment of additional legislation adjusting judicial salaries which never occurred, and in all events the appropriation has expired by operation of law?

Answer below: No.

STATEMENT OF THE CASE

A. The Four "Judicial Compensation" Cases

This appeal concerns one of four actions currently pending before the New York courts alleging that the Legislature, certain legislative leaders, the State, and the Governor have violated the New York Constitution by declining to adopt or approve a law increasing judicial salaries since 1999.

In the action giving rise to this appeal, the Third Department rejected all of the petitioner-judges' constitutional claims and directed the dismissal of the Complaint. In *Larabee v. Governor* and *Chief Judge v. Governor,* the First Department dismissed all of the plaintiff-judges' claims except for a separation of powers claim based on the "linkage" principle, as to which it found a constitutional violation. *See Larabee v. Governor*, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009); *Chief Judge v. Governor,* __A.D.3d __, 884 N.Y.S.2d 862 (1st Dep't 2009). All three of these cases are currently pending in this Court, on appeals from the orders by the Third Department and the First Department.

The last of these actions was commenced in December 2008, by Acting Justice Arlene Silverman. *Silverman v. Silver,* N.Y. Co. Index No. 117058/2008. The complaint makes essentially the same allegations as in *Maron, Larabee* and *Chief Judge,* and adds a claim with respect to the

plaintiff's pension. That action has been assigned to Justice Lehner, but has been on hold pending the outcome of these appeals.

B. The Proceedings Below

This action was commenced with the filing of an Article 78 petition in the Supreme Court, Nassau County, after which the action was transferred to Albany County on consent. Respondents then moved, pursuant to CPLR 3211(a)(7), to dismiss the Petition for failure to state a claim.

On November 30, 2007, the Supreme Court, Albany County (Thomas J. McNamara, J.S.C.) dismissed all the claims in the petition, except for the claim that Respondents had violated the separation of powers doctrine by failing to adopt a law increasing judicial compensation. All parties appealed to the Appellate Division, Third Department.

By order entered on November 13, 2008, the Third Department (Mercure, P.J., Peters, Rose, Lahtinen and Kane, JJ.) rejected all of Appellants' constitutional arguments and modified the Supreme Court's order to grant Respondents' motion to dismiss in all respects. After the Third Department's decision, the parties stipulated to sever the claims by Appellants against the Office of Court Administration relating to certain benefits; those claims remain pending below.

C. The Appellate Division's Order

The Third Department held that the Compensation Clause, Article VI, § 25(a) of the Constitution, did not require the Legislature or the Governor to propose, adopt, or approve a law increasing judicial salaries to offset the effects of inflation, because Section 25(a) only prohibits legislation diminishing a judge's compensation during the judge's term of office. Thus, the Third Department rejected Appellants' argument that the Compensation Clause requires periodic increases in judicial salaries to compensate for the effects of inflation on judicial salaries.

Second, the Appellate Division rejected Appellants' contention that Respondents had violated the separation of powers doctrine. Absent an allegation that the lack of a pay increase had impaired the functioning of the Judiciary or was part of a plan by Respondents to intrude upon the independence of the Judiciary, the Third Department held that Appellants had failed to allege a claim for relief. The lower court also concluded that any inquiry into the motivations of the Legislature or the Governor would itself violate Article III, § 11 of the Constitution. Finally, as to the alleged "linkage" between Respondents' consideration of proposals to increase judicial salaries and other public policy initiatives unrelated to judicial compensation, the Court held that such "linkage" is part and parcel of the

political give-and-take with respect to any legislation and does not state a claim for relief.

Third, the Appellate Division held that the inability of the Senate, the Assembly and the Governor to agree on a law raising judicial salaries did not violate the Equal Protection Clause of the Constitution because New York's judges are not similarly situated to other Constitutional officers in that judges enjoy unique constitutional protections for their compensation during a term of office from which other State officers do not benefit, and in all events do not form a "suspect class" for purposes of triggering heightened constitutional review.

Fourth, the Third Department held that a writ of mandamus would not lie to compel the Comptroller to release funds allegedly appropriated in the 2006-2007 State Budget for a judicial pay raise because the Legislature never adopted the required chapter law providing for increases in judicial salaries, and in all events, any such relief is barred by Article VII, § 7 of the Constitution in that more than two years had elapsed since the date of the alleged appropriation. Thus, Appellants had failed to allege facts that, if proven, would establish a clear right to the requested mandamus relief.

Accordingly, the Appellate Division modified the Supreme Court's order and directed that the petition be dismissed in its entirety. On

December 16, 2008, Petitioners appealed to this Court from the Third Department's order.

D. Constitutional Provisions Relating To Legislative Consideration Of Proposals To Increase Judicial Compensation

The Constitution expressly contemplates that the normal democratic process will be brought to bear on the Judiciary's requests for funding, including any request for an increase in judicial compensation. Article VII, § 1 of the Constitution requires the Governor to transmit to the Legislature, without change, the "[i]temized estimates of the financial needs" of the "judiciary, approved by the court of appeals and certified by the chief judge ...." But while the Governor may not change the Judiciary's "[i]temized estimates of [its] financial needs," the same constitutional provision authorizes the Governor to transmit them "with such recommendations as he may deem proper," whereupon the "itemized estimates of the financial needs of the judiciary ... shall forthwith be transmitted to the appropriate committees of the legislature." *See* Article VII, § 1.

The Constitution contains other provisions relating to the operations of each House of the Legislature, but none of them provides any role for the Judiciary to direct how or in what manner the Legislature should consider proposed bills. Article III, § 9, for example, provides that "[e]ach house shall determine the rules of its own procedures," while Article III, § 14

stipulates that "[n]o bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage" unless the Governor certifies the need for an immediate vote; "nor shall any bill be passed or become law except by the assent of a majority of the members elected to each branch of the legislature."

Article VII, § 7 makes it clear that an "appropriation by law" is required before any moneys may be paid out of the State treasury to fund a pay increase for State officers (or any other purpose).

Nothing in that constitutional scheme provides any role for the Judiciary to force itself into the legislative process, let alone to dictate to "the appropriate committees of the legislature" what they are allowed to consider when taking up the Judiciary's budgetary requests, including any request for a judicial pay raise.

E. Constitutional Provisions Relating To Judicial Compensation

Since the adoption of New York's First Constitution in 1777, the Framers have had the importance of judicial independence, and the resulting problem of assuring adequate judicial compensation, firmly in mind. The First Constitution quoted in full the complaint in the Declaration of Independence that King George III "has made judges dependent on his will

alone, for the tenure of their offices, and the amount and payment of their salaries." *See* Justin S. Teff, "The Judges v. The State: Obtaining Adequate Judicial Compensation and New York's Current Constitutional Crisis," 72 Albany L. Rev. 191, 202-3 (2009) (hereinafter cited as "Teff"). Yet it was not until the adoption of the Third Constitution in 1846 that the Framers addressed that subject directly. *See* Teff, 72 Albany L. Rev. at 202-3, 211-18 (detailing the constitutional history through the adoption of the Third Constitution).

Beginning in 1846, the drafters of the New York Constitution have repeatedly wrestled with its judicial compensation provisions to achieve a balance between judicial independence and fair compensation for judges. From 1846 to 1925, those provisions of the Constitution were amended on several occasions, during which time the Constitution alternated among provisions prohibiting any increase or decrease in judicial compensation, provisions permitting the Legislature to increase but not decrease judicial compensation, and provisions fixing judicial compensation in the Constitution itself. *See Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7. While that history shows that the drafters were focused intensively on the issue of judicial compensation, there was never even a suggestion that judges should

be permitted to fix their own salaries, either directly or through the kind of lawsuit at bar.

Until 1846, the New York Constitution did not contain any provisions specifically addressing judicial compensation. *See Gresser v. O'Brien*, 146 Misc. 909, 263 N.Y.S. 68, 75 (Sup. Ct. N.Y. Co. 1933), *aff'd*, 263 N.Y. 622 (1934) (analyzing the constitutional history of judicial compensation in New York through 1926); *Maron*, 58 A.D.3d at 113-14, 871 N.Y.S.2d at 7-8 (same). In 1846, when New York first adopted a constitutional judicial compensation clause, Article VI, § 7 of the Third Constitution prohibited both increases and decreases in judicial compensation:

> The judges of the court of appeals and justices of the supreme court shall severally receive, at stated times, for their services, a compensation to be established by law, which shall not be increased or diminished during their continuance in office.

The Constitution of 1846 also created the Court of Appeals, and provided that the judges of the Court of Appeals and justices of the Supreme Court would be elected for terms of eight years. *See* Constitution of 1846, Article VI, §§ 2 and 4; *see generally*, *Gresser*, 146 Misc. at 916, 263 N.Y.S. at 75; *Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7.

In 1869, the Judiciary Article in the Constitution was substantially revised and amended. The terms of judges of the Court of Appeals and

justices of the Supreme Court were extended to fourteen years. *See Gresser*, 146 Misc. at 917, 263 N.Y.S. at 76; *Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7. Article VI, § 14 was amended to eliminate the prohibition on increasing a judge's compensation during his term of office:

> [The] judges and justices hereinbefore mentioned shall receive for their services a compensation to be established by law, which shall not be diminished during their official terms....

In 1894, the Fourth Constitution was adopted. The 1894 Constitution once again prohibited both increases and decreases in judicial compensation, providing in Article VI, § 12:

> The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided in section five[1] of this article.

In addition, Article X, § 9 provided that, for "State officers named in the constitution"—a category including all constitutional judges—their compensation "shall not be increased or decreased during the term of office for which he shall have been elected or appointed."

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[1] Section 5 of Article VI abolished the Superior Court of the City of New York and certain other city courts, and provided that the judges of those courts would become Supreme Court Justices and be paid as such by the counties in which those judges had been elected or appointed.

A 1909 constitutional amendment established fixed salaries for judges. Specifically, Article VI, § 12 was amended to provide for a fixed salary of $10,000 per annum for Supreme Court Justices, plus the additional compensation theretofore allowed to those justices by local authorities.[2] *See Gresser*, 146 Misc. at 918. 263 N.Y.S. at 77; *Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7.

In 1921, a constitutional amendment that would have raised the salaries of Court of Appeals judges to $17,500 per annum was proposed but rejected by the voters. *Id.* In 1925, Article VI was amended again. The provisions that had theretofore fixed judicial salaries in the Constitution were repealed, and Article VI, § 19 was adopted: "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 ...." *See*

[2] The 1909 amendments also struck from Article VI, § 12 the express constitutional ban on increasing or decreasing judicial salaries, but did not make any change to Article X, § 9. Despite the change to Article VI, § 12, as the *Gresser* court explained, "the old rule prohibiting increases and decreases was preserved. Decrease was barred by virtue of the specific salary granted by the Constitution; increase was prohibited by dint of the continued force of article 10, § 9, which prevented an increase to an officer whose salary was fixed by the Constitution." *Id.*, 146 Misc. at 918, 263 N.Y.S. at 77.

Catanise v. Town of Fayette, 148 A.D.2d 210, 543 N.Y.S.2d 825 (4th Dep't 1989).

In providing that judicial compensation once again would be "established by law" (subject to the non-diminishment proviso), the 1925 constitutional amendment followed the recommendations of the 1921 Constitutional Convention, which had reported:

> The compensation of judges should, in the judgment of the present convention, be left entirely to the Legislature, which after all is the body always directly in touch with and responsible to the people.

Judiciary Constitutional Convention of 1921, Report to Legislature, Jan. 4, 1922, Leg. Doc. 1922, No. 37, § 19, p. 29; *see also Maron*, 58 A.D.3d at 114, 871 N.Y.S.2d at 8.

In 1961, Article VI of the Constitution was substantially revised, and the provisions relating to judicial compensation assumed their present form. Article VI, § 25(a) provides:

> The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of a court for the city of New York established pursuant to section fifteen of this article, a judge of the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office of which he or she was elected or appointed.

F. The History Of Judicial Salary Increases

The salaries paid to judges in New York have often remained unchanged for periods much longer than the 10-year period to which Appellants would attach constitutional significance. For example, Chapter 76 of the Laws of 1887 provided that the salaries of the Associate Judges and the Chief Judge of the Court of Appeals would be $10,000 and $10,500, respectively. Those salaries were not increased for 39 years,[3] when Chapter 94 of the Laws of 1926 increased them to $22,000 and $22,500, respectively. Those salaries remained set at $22,000 and $22,500 for 21 years, from 1926 to 1947, when Chapter 462 of the Laws of 1947 increased them to $25,000 and $25,500, respectively. *See Maron*, 58 A.D.3d at 114 n.6, 871 N.Y.S.2d at 8 n.6. As the example of Court of Appeals judges

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[3] For much of that period, moreover, some justices of the Supreme Court received substantially higher salaries than the $10,000 per annum paid to Court of Appeals judges. As the court noted in *Gresser*, the 1909 amendments fixed the salaries of Supreme Court Justices at "$10,000 per annum, plus the additional compensation theretofore allowed to such justices by local authorities." 146 Misc. at 918, 263 N.Y.S. at 77. In 1918 and again in 1921, constitutional amendments were proposed that would have set the compensation of Court of Appeals judges "at a sum not less than the highest compensation allowed by law to any other judicial officer in the state." *Id.* Those proposed amendments were defeated by the voters. *Id.* Despite the salary disparity during that period, there is no report that any Court of Appeals judge suffered from a bout of "demoralization" or otherwise was adversely affected in carrying out his judicial duties.

shows, a 10-year period without a salary increase is hardly unusual. *See id.* ("[e]ven after the Compensation Clause was amended in 1925 to restore the Legislature's discretion, compensation often remained unchanged for long periods of time—21 years, from 1926 to 1947, and 18 years, from 1957 to 1975").

Until 1975, the State paid only part of the compensation received by Supreme Court justices, with additional compensation being paid to the justices sitting in the City of New York by the respective counties of the City. By N.Y. Laws 1975, ch. 150 and 152, the State assumed responsibility for the compensation of all Supreme Court justices. As of April 1, 1977, the State assumed responsibility for paying the full operational costs of all courts, including the compensation paid to judges, except for the Town and Village Justice Courts. *See* N.Y. Laws 1976, ch. 966 (enacting the Unified Court Budget Act, effective April 1, 1977).

In 1979, implementing Article VI, § 25(a), the Legislature adopted what is now Article 7-B of the Judiciary Law (N.Y. Laws 1979, ch. 55), providing for new and retroactive pay raises for judges and justices. After 1979, the Legislature increased judicial compensation five times: N.Y. Laws 1980, ch. 881; N.Y. Laws 1984, ch. 986; N.Y. Laws 1987, ch. 263, N.Y. Laws 1993, ch. 60; and N.Y. Laws 1998, ch. 630. These laws

variously provided for retroactive increases and prospective increases, giving raises that ranged from 5% to as much as 27%, with the 1998 law providing for a 21% increase for all judges. On only one occasion, in 1993, did the Legislature provide judicial raises while making no provision for raises for other State officers. Judiciary Law §§ 221 to 221-*i* set forth the base salaries currently paid to judges in New York.

Of course, in addition to these base salaries, all judges are entitled to participate in the State pension system, as well as various medical, health and other insurance programs. The State's judges also receive an annual allowance for expenses, which the Chief Judge has recently increased to $10,000. *See* Noeleen G. Walder, "Citing Lack of Raise, Lippman Boosts Judge Allowance To $10,000," *N.Y.L.J.*, p. 1 (Oct. 15, 2009).

G. Constitutional Provisions Relating To Compensation Of Other State Officers

The New York Constitution also provides for the compensation of other State officers, and those provisions, too, support the holding below. For example, Article III, § 6 provides that "[e]ach member of the legislature shall receive for his services a like annual salary, to be fixed by law.... Neither the salary of any member nor any allowance so fixed may be increased or diminished during ... the term for which he shall have been elected ...." In contrast, Article IV, § 3, dealing with the Governor,

provides: "He shall receive for his services an annual salary to be fixed by joint resolution of the senate and assembly ...." Similarly, the Lieutenant Governor's "annual salary [shall] be fixed by joint resolution of the senate and assembly." *See* Article IV, § 6. For "State officers named in this constitution," Article XIII, § 7 provides that each shall "receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed ...."[4]

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[4] This Court has never decided whether Article XIII, § 7 applies to judges. Since 1926, the Governor and the Legislature have consistently acted as if it did not. In 1945, the Attorney General issued an opinion concluding that the prohibition on salary increases in Article XIII did not apply to judges because then-Article VI, § 19 said that judicial salaries shall "be established by law, provided only that such compensation shall not be diminished ...." The basis for the opinion was that "by the words 'provided only' [Article VI] clearly makes an exception to the general prohibition contained in Article XIII ...." *See* Opinion of the Attorney General, 1945 N.Y. Op. Att'y Gen 122 (April 11, 1945). When Article VI was amended in 1961, however, the "provided only" limitation was repealed.

This Court's most recent decision construing Article XIII, § 7 held that the constitutional prohibition on salary increases during a State officer's term does not apply to district attorneys in light of the Home Rule provisions of the Constitution, under which they are more properly regarded as local officials. *See Kelley v. McGee,* 57 N.Y.2d 522, 457 N.Y.S.2d 434 (1982). It seems doubtful that *Kelley*'s rationale could apply to judges in light of Article VI, § 1 creating the unified court system.

The lower courts have reached inconsistent results on whether Article XIII, § 7 applies to judicial compensation. In *Gresser,* for example, the Court noted that Article X, § 9 (the predecessor to today's Article XIII, § 7)

The structure—and especially the differences—among those provisions are instructive. First, in each instance, the Constitution makes an

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"operated to prevent a change in either direction of the compensation of sitting judges of the Court of Appeals," but stated that as a result of the 1925 amendments, "the limitation existing under article 10, § 9, prohibiting increases of salaries of state offices, no longer included within its scope judicial compensation." *Id.*, 146 Misc. at 917-19. The court did not say whether it was relying on the "provided only" limitation (repealed in 1961), or something else. The issue had arisen during the debates in the 1921 Constitutional Convention, when the chairman of the Convention's Executive Committee urged that the then-proposed amendment should explicitly provide that judicial compensation "may be increased" in order to address the possibility that then-Article X, § 9 could be deemed to prohibit such increases during a judge's term. But that suggestion died when Judge Pound "observed that the question to be decided" was only whether to omit the provisions in Article VI setting judicial salaries in the Constitution. *See* Report of the Sub-committee on Judicial Powers and Administration of the 1938 New York State Constitutional Convention, "Problems Relating to Judicial Administration and Organization," at 340.

The more recent decisions of the lower courts have applied inconsistent rationales in addressing the issue. *Compare Pfingst v. State*, 85 Misc.2d 689, 693, 381 N.Y.S.2d 201, 204 (Ct. Cl. 1976) (Article XIII, § 7 applies to Supreme Court Justices to prevent diminishment of compensation), *aff'd*, 57 A.D.2d 163, 393 N.Y.S.2d 803 (3d Dep't 1977), *with Broome County v. Bates*, 197 Misc. 88, 91, 95 N.Y.S.2d 248, 251 (Sup. Ct. Albany Co. 1950) (increase not prohibited; while "Supreme Court Justices are state officers" they are not "specifically named in the Constitution as State officers"), *aff'd mem.*, 302 N.Y. 587, 96 N.E.2d 892 (1951). The 1961 revision of Article VI listed the judges covered by the Constitution, and makes it doubtful that the rationale of *Broome County* could still be applied. *See also Albert v. City of New York*, 250 A.D. 555, 555, 295 N.Y.S. 1005, 1006 (1st Dep't) (Register of Bronx County is "a state officer named in the Constitution" whose salary may not be reduced under former Article X, §9 (now Article XIII, §7)), *aff'd mem.* 275 N.Y. 484, 11 N.E.2d 308 (1937) (per curiam).

act of the Legislature a necessary prerequisite in fixing the salary of every State officer. *See also,* Article VII, § 7 (requiring an "appropriation by law" to expend money from the State treasury). Any increase in legislative salaries can be accomplished only by a duly enacted bill, which must be submitted to the Governor for approval or veto. In contrast, the salaries of the Governor and the Lieutenant Governor are fixed by joint resolution of the Senate and the Assembly, thus depriving the Governor and the Lieutenant Governor of any role in the consideration or approval of their own salaries. Second, as Article III, § 6 makes clear, no salary increase for legislators may be effective during the current term of office of the legislators voting for it. Similarly, Article XIII, § 7 prohibits any "State officer named in this constitution" from receiving a salary increase during the officer's term of office.

By adopting that structure, the Constitution reflects a policy of disallowing those empowered to increase the salaries of State officers from benefitting from their own actions, and a rejection of the notion that State officers other than legislators should have any role in increasing their own salaries. The Constitution also adopts a policy disfavoring salary increases during a State officer's term of office. Nothing in the Constitution's text or structure is compatible with Appellant's argument that it permits judges to

usurp an exclusively legislative power by granting themselves an immediate pay raise.

ARGUMENT

I. STANDARD OF REVIEW

When deciding a motion to dismiss for failure to state a claim, the facts alleged in the Petition must be accepted as true and construed in a light most favorable to Appellants. *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19, 832 N.Y.S.2d 26, 31 (2005).

II. THE PRESUMPTION OF CONSTITUTIONALITY

The gravamen of Appellants' petition is that the compensation fixed by law for State-paid judges—which includes the salaries set forth in Article 7-B of the Judiciary Law—is constitutionally deficient. Appellants seek, *inter alia,* an order effectively amending Judiciary Law §§ 221, 221-a, 221-b, 221-bb, 221-c, 221-d, 221-e, 221-f, 221-g, 221-h, and 221-*i*, by deleting the base salaries specified therein and substituting different base salary levels as directed by the court.

Like all legislative enactments, the statutes setting judicial salaries are entitled to a presumption of constitutionality:

> Legislative enactments carry an exceedingly strong presumption of constitutionality, and while this presumption is rebuttable, one undertaking that

> task carries a heavy burden of demonstrating unconstitutionality beyond a reasonable doubt.

Elmwood-Utica Houses, Inc. v. Buffalo Sewer Auth., 65 N.Y.2d 489, 495, 492 N.Y.S.2d 931, 933 (1985); *see also I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained").

Moreover, because Appellants are seeking to strike down these statutes on their face, they must prove that there are *no circumstances* in which paying the salaries fixed by statute are constitutional. This Court has explained the high hurdle that Appellants must overcome:

> In seeking facial nullification, plaintiffs bear the burden to demonstrate that "in any degree and in every conceivable application," the law suffers wholesale constitutional impairment (*McGowan v Burstein*, 71 N.Y.2d 729, 733, 530 N.Y.S.2d 64 [1988]).
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> Statutes are quintessentially the product of the democratic lawmaking process. These threshold hurdles are, therefore, erected in the public interest to provide a prudent set of procedural safeguards for enactors and defenders of statutes. They are set in place doctrinally and precedentially because of a fundamental premise that "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature ..., the elective representatives of the people" (*Matter of Wolpoff v Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560 [1992]).

Cohen v. State, 92 N.Y.2d 1, 8, 698 N.Y.S.2d 574, 575 (1999).

III. "LINKAGE" IS A CORE LEGISLATIVE FUNCTION PROTECTED BY THE SPEECH OR DEBATE CLAUSE

Article III, § 11 of the New York Constitution provides that, "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." The immunity provided by Section 11 extends to "any proceeding challenging lawful action taken [by a legislator] in his or her official capacity," *Rivera v. Espada,* 98 N.Y.2d 422, 428, 748 N.Y.S.2d 343, 346 (2002), and confers absolute immunity for all "legislative acts," including any acts "which are an integral part of the legislative process ... as well as the underlying motivations for these activities." *People v. Ohrenstein,* 77 N.Y.2d 38, 54, 563 N.Y.S.2d 744, 752 (1990).

The Speech or Debate Clause serves to "preserve the integrity of the Legislature by preventing other branches of government from interfering with legislators in the performance of their duties." *Id.* This Court has ruled that New York's Speech or Debate Clause was intended to provide "at least as much protection" as the comparable provision in the Federal Constitution. *Id.*, 77 N.Y.2d at 53, 563 N.Y.S.2d at 752. The United States Supreme Court has interpreted the Federal Speech or Debate Clause broadly, holding that any acts by members of Congress within the performance of their legislative functions are beyond judicial scrutiny. *See Straniere v. Silver,*

218 A.D.2d 80, 83, 637 N.Y.S.2d 982 (3d Dep't), *aff'd*, 89 N.Y.2d 825, 653 N.Y.S.2d 270 (1996). The Clause shields legislators from both the consequences of litigation as well as the burden of defending themselves in court. *Id.*

The Appellate Division cited and applied those decisions, in concluding that the Speech or Debate Clause barred Appellants' claims relating to Respondents' inaction on proposals to increase judicial pay. First, the Appellate Division found that there was nothing unconstitutional about "linking" an increase in judicial salaries to the passage of other legislation, and thus there was no basis to inquire into the legislators' motives for any such "linkage." As the Third Department explained:

> It is fatal to [P]etitioners' linkage argument that nothing in the N.Y. Constitution forbids the political branches from engaging in politics when carrying out their political functions. Again, the New York Compensation Clause reflects the view that "[t]he compensation of judges should . . . be left entirely to the [L]egislature, which after all is the body always directly in touch with and responsible to the people . . . ." The Compensation Clause leaves the power to increase judicial salaries entirely to the discretion of the political branches and, absent any allegations of an imminent threat to the continued functioning of the judicial branch, "it is not the province of the courts to direct the [L]egislature how to do its work."

Maron, 58 A.D.3d at 122, 871 N.Y.S.2d at 419 (internal quotation marks and citations omitted).

Second, the lower court concluded that there was nothing in the Petition suggesting that the political branches' inability to agree on a bill raising judicial salaries reflected a desire to retaliate against the State's judges for unpopular court decisions. As the Third Department explained, "petitioners' claim of a retaliatory motive is highly speculative in the absence of any affirmative acts of the Legislature—such as the enactment of a statute—from which we could discern an [improper] intent." *Maron*, 58 A.D.3d at 120, 871 N.Y.S.2d at 417. Indeed, as the Third Department noted, the fact that, like judges, the Governor, the Comptroller, the Attorney General, members of the Legislature and all other constitutional officers in the legislative and executive branches have not received a pay increase since 1999, is powerful proof that the inability of the political branches to agree on a bill raising judicial salaries was not intended to encroach on judicial independence. *Id.*

For the reasons set forth below, the Appellate Division properly found that the Speech or Debate Clause barred Appellants' claims relating to Respondents' inaction on proposals to increase judicial pay.

A. The Speech Or Debate Clause Forecloses Inquiry Into Core Legislative Functions

The Speech or Debate Clause covers matters that are "an integral part of the deliberative and communicative processes by which Members

participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Thus, the Clause encompasses a wide range of conduct beyond purely legislative "speech" or "debate." *See Straniere*, 218 A.D.2d at 83, 637 N.Y.S.2d at 985 (clause protects "a range of activities, including voting, preparing committee reports and conducting committee hearings"); *Urbach v. Farrell*, 229 A.D.2d 275, 278, 656 N.Y.S.2d 448 (3d Dep't 1997) (clause protects from judicial review the issuance of a subpoena "intended to gather information about a subject on which legislation was contemplated").

The conduct at issue here—the fact that the Legislature has not enacted legislation increasing the compensation of State-paid judges in ten years—is squarely within the scope of the "legislative functions" described in *Gravel*, *i.e.*, "the consideration and passage or rejection of proposed legislation."

The essence of the claim is that the Governor and the Legislature have never agreed upon legislation increasing judicial compensation since 1998. Such matters have always been held to be core legislative functions. *See Campaign for Fiscal Equity v. State*, 179 Misc. 2d 907, 911-12, 687

N.Y.S.2d 227, 230 (Sup. Ct. N.Y. Co.) ("It is difficult to imagine a more 'integral' legislative function than the formulation of budgetary legislation."), *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (1st Dep't 1999); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998) (mayor's budget proposal "bore all the hallmarks of traditional legislation" and was protected by the doctrine of legislative immunity because it "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents").

Because "linkage" necessarily turns on the reasons for legislative action (or inaction), the "linkage" principle requires courts to intrude impermissibly into matters committed to the Legislature. The Third Department was wise to reject it.

B. Legislative Immunity Applies Without Regard To A Legislator's Motives, Intent, Or Identity

"Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity"; therefore, the determinative factor is the nature of the acts in question, not the legislator's motive, intent, or identity. *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 82 (2d Cir. 2007) (internal quotations omitted).

Regarding motive and intent, the United States Supreme Court has recognized that the "privilege of absolute immunity would be of little value

if legislators could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Bogan*, 523 U.S. at 54 (internal quotation omitted). Yet Appellants allege, in substance, that the Legislature did not adopt a law increasing judicial compensation because the legislative leaders and the Governor improperly linked judicial compensation to supposedly unrelated issues.

Appellants' allegations about "linkage" merely provide a possible motive for the fact that the Legislature and the Governor never agreed upon a bill increasing judicial compensation. But under well-settled law, the Speech or Debate Clause forecloses any such inquiry into legislative motives. Thus, the motivation for Respondents' collective inaction on proposals to increase judicial pay is simply not a subject that may be examined in a judicial forum. *See Campaign for Fiscal Equity, Inc. v. State*, 271 A.D.2d 379, 379, 707 N.Y.S.2d 94, 95 (1st Dep't 2000) (Speech or Debate Clause precludes evidence of legislative motive).

Finally, there is no question that decisions regarding which bills to pass—and which bills should only be passed if they contain certain additional provisions, or if other bills are passed simultaneously—are part of the quintessential (and wholly proper) give-and-take of political compromise

in a representative democracy. *See Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 748 ("The Legislature is the 'political' branch of government. All of its members are elected every two years and all legislation is the product of political activity both inside and outside the Legislature."). The Third Department quite rightly rejected Appellants' demand that the Judiciary should inject itself into that process, and refused to adopt Appellants' wholly new constitutional doctrine of "linkage" dictating what subjects the Legislature may—and may not—consider when taking up appropriation bills impacting on the Judiciary.

Nor is there any doubt that the Clause's reference to "members" encompasses not only the individual members of the Legislature, but the Assembly and the Senate as institutions, which can act only through their members. *See Urban Justice Center v. Pataki*, 10 Misc. 3d 939, 950, 810 N.Y.S.2d 826, 836 (Sup. Ct. N.Y. Co. 2005), *aff'd*, 38 A.D.3d 20, 828 N.Y.S.2d 12 (1st Dep't 2006), *app. dism'd*, 8 N.Y.3d 958, 836 N.Y.S.2d 537 (2007); *Warden v. Pataki*, 35 F. Supp. 2d 354, 358 (S.D.N.Y. 1999) (doctrine of absolute legislative immunity bars actions against legislators, governors, and legislatures); *see also Rowland*, 494 F.3d at 86 (Speech or Debate Clause has been recognized as "coterminous with the doctrine of absolute legislative immunity").

C. Appellants' Reliance on the First Department's *Larabee* Decision Is Flawed

In urging this Court to reject the Third Department's analysis of the Speech or Debate Clause, Appellants ask this Court to adopt the reasoning of the First Department in *Larabee*. This Court should decline to do so for several reasons.

First, in concluding that legislative immunity was unavailable, the First Department relied primarily on a semantic distinction, labeling as "political" acts more properly characterized as the normal give-and-take of the legislative process. *See Larabee,* 65 A.D.3d at 91, 880 N.Y.S.2d at 269 ("Our focus, thus, is on the overtly political manner in which linkage was employed."); *id.*, 65 A.D.3d at 92, 880 N.Y.S. at 270 (referencing the "political" back and forth between the Governor and the respective Houses of the Legislature).

The First Department also drew a distinction between matters of "policy" and merely "political" matters, concluding that "political" matters do not merit constitutional immunity under the Clause. *Id.*, 65 A.D.3d at 91-92, 880 N.Y.S.2d at 269-70. That distinction, too, collapses upon examination and ignores common sense as well as this Court's observation that "all legislation is the product of political activity both inside and outside the Legislature." *See Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 748.

Indeed, even at the most basic level, the distinction ignores the fact that the words "policy" and "political" share a common root, reaching back to the golden age of Athens and the very birth of democracy. *See* Aristotle, *The Politics*, Book 1.

Rather than drawing ephemeral distinctions between the "policy" and "political" spheres of the Legislature's activities, the Speech or Debate Clause requires a court to limit its inquiry to whether the legislative action (or, here, inaction) concerned subjects appropriately within the legislative sphere. If so, the immunity granted to legislators by the Speech or Debate Clause applies.

Nor is there any doubt that, in making the difficult decisions involved in allocating the State's limited resources among many deserving constituencies, legislators are performing a core function of the Legislature. Whether it is called "linkage," "political," or a "legislative custom" (as it was at various points by the First Department in *Larabee*, *see* 65 A.D.3d at 92, 880 N.Y.S.2d at 270), the practice is in truth nothing more than representative democracy at work. No one suggested otherwise until these judicial pay cases were filed and the concept of "linkage" as a constitutional limitation on the consideration of proposed legislation by the political branches was invented.

Second, the First Department properly applied legislative immunity in dismissing the *Larabee* complaint against the Governor. After recognizing that the Governor, just like both Houses of the Legislature, was conditioning his support for a judicial pay increase on other policy items on his agenda—the sum of which supposedly resulted in a deadlock that caused the judicial pay increase to stall—the First Department nevertheless disentangled the Governor from the fray: "His conflict with the Legislature was in connection with legislative matters; his refusal to approve a legislative pay increase, too, was related to those matters in dispute." *Id.*, 65 A.D.3d at 84, 880 N.Y.S.2d at 264. But this is a distinction without a difference: if the Governor was refusing to approve a legislative pay increase to achieve other objectives on his agenda (according to the First Department, the dispute concerned campaign finance reform, *see* 65 A.D.3d at 78, 880 N.Y.S.2d at 260), the Governor was engaging in the very "linkage" that the First Department held to be unconstitutional. *Id.*, 65 A.D.3d at 97, 880 N.Y.S.2d at 274.

The fact that the Governor was refusing to approve a *legislative* pay increase, while this case concerns a *judicial* pay increase, is constitutionally irrelevant. Indeed, the factors cited by the First Department that warrant a judicial pay increase apply equally to the other Branches—a pay increase for

all of New York's constitutional and senior executive officers would be justified on the same grounds. For example, the First Department noted that the "sheer complexity of much of New York's litigation, and its often crushing caseloads, require a fully operational, efficient and well-informed third branch of government." *Id.*, 65 A.D.3d at 77, 880 N.Y.S.2d at 259. We think it beyond dispute that the Legislature and the Governor deal with issues involving at least as much "complexity" -- in addressing, for example, issues such as the State's current fiscal crisis -- which requires "fully operational, efficient and well-informed" Legislative and Executive Branches as well. Yet no such State officer has received a pay raise since 1999.

The point is not that the "linkage" principle now permits a court to resolve the dispute between the Legislature and the Governor over legislative pay increases, or that a court may now consider a suit by an Executive officer alleging "linkage" and seeking a pay increase by judicial fiat. Rather, the inescapable conclusion is that the "linkage" principle is unwise and unworkable in any context.

The First Department recognized that the "linkage" principle could become a veritable engine of destruction, opening up to judicial second-guessing any action (or inaction) by the Legislature and the Governor that

might be branded as "political." For that reason, it struggled both to define the newly invented constitutional doctrine of "linkage," and at the same time to cabin it so that, in effect, the "linkage" principle would apply in this context only. But the "linkage" principle, if accepted as part of New York's constitutional structure, would admit of no such limitation—precisely because "all legislation is the product of political activity both inside and outside the Legislature." *See Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 748. In short, the legislative immunity the First Department afforded the Governor should have been applied to all the *Larabee* Defendants.

Third, the First Department ruled that the historical concerns that gave rise to the Speech or Debate Clause were not applicable here because "no member of the Legislature has been named a defendant in his or her individual capacity," and therefore no individual legislator "might be harmed by the prospect of civil or even criminal liability." *Larabee*, 65 A.D.3d at 90, 880 N.Y.S.2d at 269. But the prospect of personal liability was hardly the only concern that motivated the Framers to adopt the Clause. As the First Department itself observed, when it quoted *Tenney v. Brandhove*, 341 U.S. 367 (1972):

> The immunity has expanded in recognition of the importance of allowing a legislator to independently discharge his or her duties free from the chilling effects of lawsuits seeking damages or the compulsion of injunctions directing a legislator how to vote.

65 A.D.3d at 89, 880 N.Y.S.2d at 267. Individual, separately-elected legislators are, and must be, empowered to introduce bills without judicial instructions or compulsion. As well, they are certainly empowered to vote for or against any bills that are presented for their action in committee or on the floor.

While the First Department correctly identified one of the Speech or Debate Clause's goals as protecting legislative actors from harassment caused by litigation, it then went on to conclude that the suit before it did not impede that goal because it challenged the constitutionality of legislative decisions. *Id.*, 65 A.D.3d at 90, 880 N.Y.S.2d at 268. That conclusion was doubly wrong. First, there was no legislative "decision" here—indeed, no bill was ever passed by the Legislature to increase judicial compensation. Second, the First Department's test set the bar so low that it defeated the purpose of Speech or Debate Clause immunity. If all it took to defeat the absolute legislative immunity afforded by the Clause was an allegation that a legislative decision is unconstitutional, legislators would spend more time in witness boxes and deposition rooms than the Houses of the Legislature.

Though it has been the rule since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that courts may review legislative acts for constitutionality, the Judiciary has never permitted itself to delve into the interstices of why some bills get passed and others do not. The Speech or Debate Clause was designed to give legislative actors the freedom to vote their consciences; in so doing, they must answer to the voters, but are not required to explain their votes or motives in court. *See Powell v. McCormack*, 395 U.S. 486, 505 (1969) ("The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.").

Accordingly, the Third Department properly rejected Appellants' "linkage" argument on the ground that it was foreclosed by the Speech or Debate Clause.

IV. NEW YORK'S CONSTITUTION DOES NOT PROHIBIT "LINKAGE," AND THE PRACTICE DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

In finding that there was no separation of powers violation, the lower court properly concluded that, when viewed in the light most favorable to Appellants, their Petition failed to allege that legislative inaction on

proposals to raise judicial salaries had "obstruct[ed] the judiciary's ability to function" or that "there [was] an imminent threat that such functioning would be impaired." *Maron,* 58 A.D.3d at 119, 871 N.Y.S.2d at 416. As the lower court explained, "allegations that a number of judges have resigned or intend to do so for financial reasons is not sufficient to state a claim based upon impairment of the functioning of the judicial system." *Id.*

The Third Department's holding that any supposed "linkage" between proposals to increase judicial pay and other legislative initiatives did not violate the separation of powers doctrine was correct for four reasons. First, the lower court's holding is firmly supported by the Constitution's text and framework. Second, if the Third Department had accepted this argument, it would have usurped the separate powers reserved by the Constitution to the Legislature and the Governor, thereby defeating the objectives of the separation of powers doctrine. Third, this case does not involve "the vested rights of a specifically protected class," which is the only situation in which this Court has ever approved judicial scrutiny of budgetary priorities. Fourth, the lower court's ruling upheld the "checks and balances" component of the separation of powers doctrine as it applies to the subject of judicial compensation.

A. The Constitutional Framework

The Compensation Clause is the safeguard in the New York Constitution that protects the Judiciary from improper encroachments by co-equal branches of government in the arena of judicial compensation. The lower court recognized as much when it explained that the clause "promotes independence by prohibiting diminution of judicial compensation." *Maron*, 58 A.D.3d at 110, 871 N.Y.S.2d at 5; *see also Larabee*, 65 A.D.3d at 94, 880 N.Y.S.2d at 271 (referring to the Compensation Clause as the "constitutional linchpin for compensating plaintiffs"). In other words, the check-and-balance the drafters embedded in New York's Constitution vis-à-vis judicial compensation is the fact that decisions about when, and whether, to raise judicial salaries were left exclusively to the Legislature in the first instance, while at the same time the Legislature was deprived of any power to reduce judicial salaries during a judge's term of office.

B. The Separation Of Powers Doctrine Required The Court Below To Avoid Intruding Into Legislative Prerogatives

"The doctrine of the separation of powers is grounded on the principle that each of the three branches of government, executive, legislative, and judicial, possesses distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches, and each is confined to its own functions and can neither encroach upon nor be made subordinate

to those of another. Thus, each department should be free from interference, in the discharge of its own functions and peculiar duties, by either of the others." *Urban Justice Center v. Pataki*, 38 A.D.3d 20, 27, 828 N.Y.S.2d 12, 17-18 (1st Dep't 2006) (citations and internal quotation marks omitted), *app. dism'd*, 8 N.Y.3d 958, 836 N.Y.S.2d 537 (2007). "For those reasons, it is not the province of the courts to direct the Legislature how to do its work." *Id.*, 38 A.D.3d at 27, 828 N.Y.S.2d at 18 (citations and internal quotation marks omitted).

As its name implies, the separation of powers doctrine requires each branch of State government to respect the separate powers granted to the other branches as well as the limitations on its own powers. Neither this doctrine nor anything in the Constitution permits the Judiciary to intrude into the budget-making or appropriations process reserved to the Governor and the Legislature.

C. A Court May Grant Relief Requiring The Legislature To Change Budgetary Priorities Only To Enforce "The Vested Rights Of A Specifically Protected Class."

In *Campaign for Fiscal Equity v. State*, 8 N.Y.3d 14, 28, 828 N.Y.S.2d 235, 243 (2006), this Court declared unconstitutional the funding formula pursuant to which New York City received State funds for public education. Yet the Court did so only because it first concluded that the case

required the courts "to declare the vested rights of a specifically protected class of individuals":

> While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute . . . the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government . . . When we review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy.

Id. (internal quotations omitted) (citing *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 239-240, 485 N.Y.S.2d 719 (1984)).

This Court found both the "vested rights" and the definition of the "protected class" in the Education Article of the Constitution itself, guaranteeing schoolchildren the right to an education.

Even then, this Court refused to permit the lower courts to substitute their own funding formulas for those devised by the Legislature, and went out of its way to make clear that the courts cannot intrude into the exclusive domain of the political branches in appropriating State funds or establishing State budgets. As this Court explained, the Judiciary's role was only to determine whether the funding formulas devised by the political branches were minimally reasonable when measured against the "vested rights" at

stake, rather than devising some new formula that the reviewing court might deem optimal. *Id.*, 8 N.Y.3d at 29-31, 828 N.Y.S.2d at 243-45. This Court's refusal to order a specific constitutional remedy was grounded in the separation of powers doctrine:

> Our deference to the Legislature's education financing plans is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary to the controlling economic and social facts, but also by our abiding respect for the separation of powers upon which our system of government is based. We cannot intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.

Id. (internal quotation marks and citations omitted).

In this case, unlike *Campaign for Fiscal Equity*, there are no comparable provisions in the Constitution either (a) creating a "vested right," other than the right not to have a judge's salary diminished during the judge's term of office; or (b) constituting the Judiciary as a "protected class." The Appellate Division rejected the argument here that Respondents had violated the "no diminishment" provision of the Compensation Clause, thus precluding any finding that the Appellants had any "vested right" to a salary increase. Nor could the more general concerns about the separation of powers doctrine and the independence of the Judiciary create the required "vested rights of a protected class," since those inter-branch, structural

concerns are intended for the benefit of the public at large, not judges individually. *See United States v. Hatter,* 532 U.S. 557, 568-70 (2001) ("these guarantees of [judicial] compensation and life tenure exist, 'not to benefit the judges,' but 'as a limitation imposed in the public interest.'") (citation omitted).

D. The Lower Court's Ruling Properly Upheld The "Checks And Balances" Component Of The Separation Of Powers Doctrine

The Appellate Division's holding preserved the other basic component of the separation of powers doctrine—the "checks and balances" rationale for separate branches of government. *See Urban Justice Ctr.*, 38 A.D.3d at 27, 828 N.Y.S.2d at 17; *see generally*, *Cohen,* 94 N.Y.2d at 12, 698 N.Y.S.2d at 578-79; *Chadha*, 462 U.S. at 957-58 ("To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."). By refusing to order the Legislature and the Governor "to adjust the compensation payable to members of the judiciary," the Appellate Division enforced the Constitution's carefully crafted provisions dealing with compensation for all State officers (detailed above, at pp. 14-25), all of which are incompatible with Appellants' view that the judiciary has the power to order itself a pay raise. Instead, the Constitution plainly requires that judicial compensation

must be "established by law," which in turn requires an "appropriation" to be adopted and approved by the Legislature and the Governor.

Appellants' arguments cannot be squared with that aspect of the separation of powers doctrine, because the exercise of the Legislature's power of the purse has historically been one of its most potent tools in providing "checks and balances" to the other branches of government. *See Prospect v. Cohalan,* 65 N.Y.2d 867, 874, 493 N.Y.S.2d 293, 297 (1985).

E. Appellants' Reliance on the First Department's *Larabee* Decision Is Flawed

Appellants attack the Third Department's separation of powers analysis by embracing the contrary holding of the First Department in *Larabee*, where that court found that "linkage" violated separation of powers principles. For the reasons set forth below, this Court should reject the First Department's analysis.

First, when the First Department proceeded to analyze the separation of powers question and found a constitutional violation there, it ignored its prior discussion of the Compensation Clause. The Appellate Division never explained how it could find a constitutional violation where there was no substantive constitutional right to a judicial pay raise at all, much less any

finding that the Judiciary's operations had actually been impaired.[5] *See Larabee,* 65 A.D.3d at 98, 880 N.Y.S.2d at 274 ("The absence of evidence of undue influence, or of current systemic operational deficiencies, is not dispositive."). Thus, the First Department's holding that the practice of "linkage" violated some constitutional right of the Judiciary not to have decisions about the amount and timing of judicial compensation tied to other legislative items finds no support, either in the record or in that court's own constitutional analysis.

In truth, the First Department's complaint was not with "linkage," but with the New York Constitution. What the First Department wanted is for the Legislature and Governor to consider judicial compensation in a vacuum, apart from all of the other competing demands on the State's limited resources. *See Larabee,* 65 A.D.3d at 92-93, 880 N.Y.S.2d at 274 ("Linkage . . . manifested an abandonment of any pretense to an objective consideration

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[5] In *Urban Justice Center v. Silver*, 2009 NY Slip Op 07506, __A.D.3d __, __ N.Y.S.2d __ (1st Dep't Oct. 22, 2009), the First Department recently held that the separation of powers doctrine required it to dismiss an action challenging certain rules and practices of the Senate and the Assembly which, according to the Court, raised a "substantial" claim of a violation of free speech rights. Because the issue involved the internal affairs of the Legislature, the Court found that it was without power "to direct the legislature how to do its work." *Id.,* slip op. at p. 47, *quoting People ex rel. Hatch v. Reardon,* 184 N.Y. 431, 442, 77 N.E. 970, 973 (1906). The same reasoning should have led that Court to apply the separation of powers doctrine in *Larabee* to dismiss the complaint on the same grounds.

of judicial compensation unimpeded by extraneous political considerations."); *id.*, 65 A.D.3d at 95, 880 N.Y.S.2d at 272 ("The political branches of government must discharge the responsibility of considering, and acting upon, an enhancement in judicial salaries on its objective merit.").

But New York's Constitution does not provide any standard against which "objective" consideration can even be measured. Where, as here, the Legislature is allocating resources among the State's many obligations and responsibilities, it is inevitable that the Legislature will weigh one potential use of public resources against all other demands on the State's budget. Certainly, nothing in the Constitution (or its text, history or structure, as discussed above) supports the notion that the Judiciary has some unique right to demand "objective" consideration of its compensation, but all other activities funded by the State are entitled only to some lesser consideration.

In short, if some imagined "objective" criterion were the law and courts were authorized to second-guess legislative decisions allocating the State's limited resources based on it, then every constituency would demand "objective" consideration of its narrow self interests. As this Court has warned, that regime "might produce neither executive budgeting nor legislative budgeting but judicial budgeting – arguably the worst of the

three." *Pataki v. New York State Assembly*, 4 N.Y.3d at 97, 791 N.Y.S.2d at 910.

Second, the First Department's "linkage" holding turned the separation of powers doctrine on its head by injecting the Judiciary deeply into internal legislative affairs. *See Under 21 v. City of New York,* 65 N.Y.2d 344, 356, 492 N.Y.S.2d 522, 525 (1985) (separation of powers doctrine "require[s] that no one branch be allowed to arrogate unto itself powers residing entirely in another branch."); *Chadha*, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."). The First Department's "linkage" ruling not only violated the separation of powers doctrine, but if affirmed, would also propel the Judiciary into political decision-making. The New York courts have long held that the political question doctrine precludes judicial inquiry into the internal affairs of the Legislature. As the First Department summarized the applicable law and the governing authorities in *Urban Justice Center*, 38 A.D.3d at 27-28, 828 N.Y.S.2d at 18 (internal quotation marks and citations omitted):

> [T]aking cognizance of the separation of powers doctrine, the courts have refused to intrude upon such wholly internal affairs of the Legislature as the propriety of a roll call vote in the Senate, the

> permissible scope of duties performed by legislative employees, the accuracy of Senate Journal entries, and the propriety of the Assembly Speaker's refusal to permit the use of State funds to mail an Assemblyman's letter to his constituents deemed too political.

Yet "intruding" upon the "wholly internal affairs of the Legislature" is exactly what the First Department did in *Larabee*. It adopted a new constitutional rule, pursuant to which it took upon itself the task of telling the members of the Legislature what they were entitled to think about—and what they were forbidden to think about—when considering a bill to increase judicial compensation. Nothing warranted the First Department's wholesale attempt to exercise that form of "thought control" over legislators in their conduct of the Legislature's duties.[6]

In our democracy it is normal and proper for the members of the political branches to have sharply different views about the priorities and policies that the State should adopt. How the members of the political branches resolve those policy differences, and how they reach compromises

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[6] The fact that, in *Urban Justice Center v. Silver*, 2009 NY Slip Op 07506, __A.D.3d __, __ N.Y.S.2d __, the First Department recently applied the separation of powers doctrine in a far more orthodox manner to dismiss an action challenging certain rules and practices of the Senate and the Assembly, and without even citing its decision in *Larabee*, underscores the fact that *Larabee* invented an unprecedented constitutional rule for application in the judicial pay context only.

sufficient to garner support by the majorities required for the enactment of a bill setting the State's policies and priorities, is for the members of the Legislature and the Governor, rather than any court or outside observer, to decide.

Third, contrary to the First Department's holding, nothing in the Constitution supports the notion that proposals to increase judicial compensation are exempt from the normal legislative process. While Article VII, § 1 of the Constitution requires the Governor to transmit to the Legislature, without change, the Judiciary's budgetary requests, the same provision authorizes the Governor to transmit them "with such recommendations as he may deem proper." Upon transmittal by the Governor, the Judiciary's proposed budget including any requested judicial pay increase together with the Governor's recommendations "shall forthwith be transmitted to the appropriate committees of the legislature." *See* Article VII, § 1. Nothing in the Constitution requires "the appropriate committees of the legislature" to consider the Judiciary's budget separate and apart from other matters bearing on the State's budget, or any other matter pending before the Legislature.

Nor is there anything in that constitutional scheme to support the *Larabee* court's holding that the Governor and the Legislature are required

to treat separately and "objectively" any request for a judicial pay increase that may be included in the Judiciary's budget request. By its express terms, of course, the Constitution does not require the political branches to accept the Judiciary's input as to what salary levels are "adequate," whether that judicial input occurs in the Chief Judge's certification of the Judiciary's financial needs or otherwise. Rather, the constitutional structure (as well as, again, its text and history, as discussed above) clearly subjects the Judiciary's requested budget to legislative evaluation.

Fourth, the First Department's holding necessarily brushed aside the other basic component of the separation of powers doctrine—the "checks and balances" rationale for separate branches of government. *See Urban Justice Center*, 38 A.D.3d at 27, 828 N.Y.S.2d at 17; *see generally*, *Cohen*, 94 N.Y.2d at 12, 698 N.Y.S.2d at 578-79; *Chadha*, 462 U.S. at 957-58 ("To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."). In essence, by ordering the Legislature and the Governor "to adjust the compensation payable to members of the judiciary," the First Department effectively made the Judiciary the final arbiter of its own compensation.

The structure of the Constitution's carefully crafted provisions dealing with compensation for all State officers (detailed above, at pp. 13-25), is

incompatible with the First Department's conclusion that it had the power to order itself a pay raise. Instead, the Constitution plainly requires that judicial compensation must be "established by law," which in turn requires an "appropriation" to be adopted and approved by the Legislature and the Governor. Thus, the First Department's separation of powers analysis cannot be squared with the checks-and-balances aspect of that doctrine, because the exercise of the Legislature's power of the purse has historically been one of its most potent tools in providing "checks and balances" to the other branches of government. *See generally Prospect v. Cohalan,* 65 N.Y.2d 867, 874, 493 N.Y.S.2d 293, 297 (1985).

Accordingly, nothing in *Larabee* warrants the rejection of the Third Department's contrary analysis. The Third Department's separation of powers holding should be affirmed.

V. APPELLANTS' EQUAL PROTECTION CLAIM WAS PROPERLY DISMISSED

The Appellate Division properly affirmed the dismissal of Appellants' claim under the Equal Protection Clause.

A. Appellants Did Not Allege Differential Treatment Of Similarly Situated Groups

First, the Appellate Division properly found that, rather than "alleg[ing] that they have been treated differently from any similarly situated

group or class," Appellants instead complained about "differences between judges and legislators that render their *similar* treatment on the issue of compensation politically unwise." *Maron,* 58 A.D.3d at 123, 871 N.Y.S.2d at 419 (emphasis in original). Thus, Appellants failed to state an Equal Protection claim because they failed to allege that they had been treated differently from a similarly situated group of people. *See Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 781 N.Y.S.2d 240 (2004).

Second, the Appellate Division correctly observed that, alone among New York's constitutional officers, judges benefit from a unique constitutional protection permitting a salary increase during a judge's term of office while prohibiting any legislative diminishment of their compensation during a judge's term of office. *Compare* Article VI, § 25 *with* Article III, § 6 ("neither the salary of any member [of the legislature] nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he shall have been elected."); Article XIII, § 7 ("Each of the State officers named in the constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed ...."); *see Maron,* 58 A.D.3d at 123, 871 N.Y.S.2d at 419. That indisputable difference plainly supports the lower

court's holding that New York's judges are not similarly situated to other constitutional officers, thereby precluding Appellants from establishing an essential element of their Equal Protection Clause claim. *See id.*

B. The Judiciary Does Not Constitute A Suspect Class

The Appellate Division correctly found that the Judiciary does not "bear any of the traditional indicia of a suspect class—as constitutional officers granted unique salary protection, judges are not 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28, (1973)). Thus, the lower court applied a rational basis standard of review to Respondents' inaction, *see Affronti v. Crosson*, 95 N.Y.2d 713, 723 N.Y.S.2d 757 (2001), and properly found that Appellants had "failed to negate every conceivable rational basis for the Legislature's inaction in amending article 7-B of the Judiciary Law." *Maron,* 58 A.D.3d at 123, 871 N.Y.S.2d at 419.

Appellants argue that that the Legislature's historic practice of linking legislative pay raises to judicial pay raises creates a class composed of judges and legislators, but this alleged practice does not result in disparate

treatment of Appellants. On the contrary, as the Appellate Division found, it establishes that Appellants were treated in the *same* way as the members of the Legislature and senior Executive branch officers and officials.

C. Appellants Did Not Suffer Discriminatory Treatment

Appellants contend that the Legislature has enacted legislation providing for cost-of-living adjustments to the allowances for legislators under Legislative Law § 5(2), but has provided no similar adjustments to the Judiciary.[7] They claim that this inaction is unconstitutionally discriminatory. But, as Appellants acknowledge, judges perform their duties on a full-time basis, while legislators work part time, a distinction which also disposes of Appellants' reliance on the fact that, unlike legislators, judges are prohibited from earning outside income except from a few specific sources. Thus, in the absence of any allegation of discriminatory treatment by Respondents, the Appellate Division correctly dismissed that basis as inadequate to support Appellants' Equal Protection claim.

Appellants contend that judges have been discriminated against by the failure of the Legislature to adjust judicial compensation for inflation while virtually all other employees of the State have continued to receive cost of

[7] In making that argument, Appellants ignored the Chief Judge's power to adjust the annual allowance for expenses payable to judges. The Chief Judge recently used his authority to increase that allowance to $10,000.

living adjustments. But the Constitution itself puts judges into the separate and distinct category of "constitutional officers," and has always treated judicial compensation differently from the compensation paid to the State's civil service or unionized employees. Article VI, § 25 of the Constitution provides that the compensation paid to State judges "shall be established by law," thus requiring the adoption of a statute to make any adjustments to their salaries. The Constitution provides the same treatment for all Constitutional officers: the Governor (Art. IV, § 3); the Lt. Governor (Art. IV, § 6); all members of the Legislature (Art. III, § 6); state judges (Art. VI, § 25(a)); and all other "state officers named in this constitution" (Art. XIII, § 7).

No Constitutional officers in New York have received a salary increase since 1999. Similarly, non-Constitutional officers in comparable positions of authority in the Executive Branch have not received pay increases since 1999.

D. There Is A Rational Basis For The Salaries As Set By The Judiciary Law

Even assuming that Appellants' allegations can be interpreted to allege discrimination with respect to judicial salary increases, the current pay schedule would still survive "rational basis" review. In this case, rational basis scrutiny would apply because, as the Appellate Division correctly

determined, the Judiciary is not a suspect class and there is no fundamental right to receive salary increases in order to avoid the effects of inflation.

Under both the State and federal constitutions, "where a governmental classification is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional." *Affronti*, 95 N.Y.2d at 718, 723 N.Y.S.2d at 760. While race, alienage, national origin, gender, and illegitimacy are suspect or quasi-suspect classifications, judges are not a suspect class. *See id.*, 95 N.Y.2d at 719, 723 N.Y.S.2d at 760 ("[T]he disparate judicial salary schedules in Judiciary Law §§ 221-d and 221-e do not involve suspect classes."). Nor is there any basis for creating a new suspect class to include judges. They have none of the "traditional indicia of suspectness" required to state an Equal Protection claim: they are not "saddled with disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

Moreover, no fundamental rights are at issue. *See Affronti*, 95 N.Y.2d at 719, 723 N.Y.S.2d at 760. Fundamental rights are those "which are,

objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted); *see also People v. Isaacson*, 44 N.Y.2d 511, 520, 406 N.Y.S.2d 714, 718 (1978) (fundamental rights are "personal immunities so rooted in the traditions and conscience of our people as to be ranked as fundamental" (citation omitted)). Public officials do not have a fundamental right to have their salaries adjusted to keep pace with inflation, which is the only fundamental right Appellants identified in their Petition. (R. 47, 149)

Thus, the rational basis standard of review would apply to Appellants' Equal Protection claim. The rational basis standard is "a paradigm of judicial restraint." *Affronti*, 95 N.Y.2d at 716, 723 N.Y.S.2d at 760. Under such review, a classification will be upheld unless the resulting disparate treatment is "so unrelated to the achievement of any combination of legitimate purposes that . . . [it is] irrational." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (internal quotation marks omitted). Furthermore, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)

(internal quotation marks omitted); *see also Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (challenger must persuade the court that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker" (internal quotation marks omitted)).

Indeed, "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Affronti*, 95 N.Y.2d at 719, 723 N.Y.S.2d at 760 (internal quotation marks omitted). Courts may properly hypothesize a rational basis for legislative action, whether or not the Legislature explained its motives or purpose. *See Dalton v. Pataki*, 5 N.Y.3d 243, 266, 802 N.Y.S.2d 72, 86 (2005) (quoting *Port Jefferson Health Care Facility v. Wing*, 94 N.Y.2d 284, 704 N.Y.S.2d 897 (1999)). Thus, Respondents were not required by the demands of Equal Protection to provide a justification for not agreeing on a bill to raise judicial salaries, and there is nothing to Appellants' contention that the lower court erred in dismissing their Equal Protection claim on that ground.

Here, Appellants have failed to negate every conceivable rational basis for the Legislature's inaction concerning the amendment of Article 7-B

of the Judiciary Law. The Legislature could rationally have concluded that current salary levels are sufficient to attract talented and experienced lawyers to the bench. The Legislature could also have rationally concluded in light of all the other demands placed upon the State's resources that raises were not financially prudent, especially in light of the long-term commitment imposed under the State Constitution for such raises. Indeed, as judicial terms exceed, often substantially, the terms of legislators, the Executive, and other State officials, judicial salaries necessarily impact state budgets long into the future. For that reason, when considering whether to undertake the burdens of increased judicial salaries, it would have been entirely rational for the Legislature and the Governor to have considered the long-term impact on the State's economy, other employees, and other priorities, including providing for the People's general welfare and education.[8] This Court need not agree with any of these rationales to find that one or more of them provides a sufficiently rational basis for the Legislature's action or inaction concerning the amendment of Article 7-B of the Judiciary Law over any particular time period. Having failed to dispel

[8] For example, affording a newly elected Supreme Court Justice a 25% raise would cost the State nearly half a million dollars in salary alone should he or she complete a 14-year term.

every reasonable hypothesis, Appellants have failed to set forth facts to establish their Equal Protection Clause claim.

E. The Federal Cases Do Not Support Appellants' Claim

The federal cases cited by Appellants also reject their attempt to turn the non-discrimination principle of *United States v. Hatter,* 532 U.S. 557 (2001), applicable only to measures that reduce judicial compensation, into a requirement that, if the Legislature permits cost of living increases for some State employees, it must provide the same adjustments to judges as well. If Appellants' argument had any merit, then *Will v. United States,* 449 U.S. 200 (1980), and *William v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), were wrongly decided.

Will upheld Congressional enactments differentiating between judges and legislators, on the one hand, who were denied previously scheduled but unvested cost of living adjustments, and civil service and other federal employees, on the other, who were allowed to receive them. *See Will*, 449 U.S. at 205-09 (describing the provisions adopted by Congress that denied judges and other high federal officials the benefits of cost of living adjustments but allowed almost all other federal employees to receive those adjustments). As in *Hatter*, the only constitutional issue that concerned the Court in *Will* was whether any of the Congressional enactments violated the

"no diminishment" provision in the Compensation Clause. And in *Will* the only violation found by the Court related to the Congressional enactment that would have denied the judges the benefit of a cost of living adjustment that had already vested.

Accordingly, the Third Department properly dismissed Appellants' Equal Protection Clause claim on the pleadings.

VI. RESPONDENTS HAVE NOT VIOLATED THE COMPENSATION CLAUSE OF THE STATE CONSTITUTION

Like every other court to have considered the issue, the Appellate Division dismissed Appellants' claim that Respondents violated the Compensation Clause of the Constitution by not increasing judicial salaries to keep up with inflation. As we show below, the Third Department properly rejected that argument, as did the First Department in *Larabee*.

A. The Power Of The Purse Is A Legislative Power

Article VI, § 25 provides, in relevant part, that judicial compensation "shall be established by law and shall not be diminished during [a judge's] term of office . . . ." Recognizing that the Constitution does not adopt an express mandate requiring an increase in judicial salaries under any circumstances, Appellants contend that the failure to adjust judicial salaries since 1999 amounts to a "diminishment" of judicial compensation in

violation of the Compensation Clause because inflation has eroded the purchasing power of judicial salaries in the interim.

From time immemorial, however, the power of the purse has been reserved to the Legislature, as this Court has had occasion to note:

> Long and interesting is the history of the struggle between the executive and the Legislature for the control of the public moneys. It is, however, so well settled that the state Legislature is supreme in all matters of appropriations that the recital of the details of the strife for legislative supremacy would serve no useful purpose. The New York Constitution (article 3, § 21 [now article 7, § 7]) provides: "no money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law." "The lawmaking power has the sole authority over the subject of taxation and the appropriation of money." *Clark v. State*, 142 N.Y. 101, 104, 36 N.E. 817, 818 [1889].

People v. Tremaine, 252 N.Y. 27, 38, 168 N.E. 817, 819 (1929).

As in 1929, when *Tremaine* was decided, so today the New York Constitution expressly adopts that principle. Article III, § 1 provides that the "legislative power of the state shall be vested in the senate and assembly." Article VII of the Constitution adopts a detailed scheme governing state finances, and provides for the Governor to submit and for the Legislature to consider and approve, budget bills including appropriations to fund all State operations. And Article VII, § 7 of the Constitution repeats verbatim the

provision (then codified as Article III, § 21) deemed dispositive on this issue by this Court in *Tremaine*: "no money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law."

Nothing has changed since 1929 to question this "well settled" rule "that the state Legislature is supreme in all matters of appropriations." *See, e.g., People v. Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 747 ("Under the State Constitution, the Legislature alone has the power to authorize expenditures from the State treasury, and to 'regulate and fix the wages or salaries and the hours of work or labor ... of persons employed by the State.'" (*quoting* Article XIII, § 14)); *Campaign for Fiscal Equity v. State*, 8 N.Y.3d at 28, 828 N.Y.S.2d at 243 ("Deference to the Legislature is especially necessary where it is the State's budget plan that is being questioned. Devising a state budget is a prerogative of the Legislature and Executive; the Judiciary should not usurp this power."). Against that background, we now show that the Appellate Division here properly dismissed Appellants' Compensation Clause claim on the pleadings.

B. The Framers Were Well Aware Of Inflation

As an economic phenomenon, inflation has been a fact of life for as long as governments have been issuing currency. During the debates over

the United States Constitution, for example, "the draftsmen first reached a tentative arrangement whereby the Congress could neither increase nor decrease the compensation of judges." *Will,* 449 U.S. at 219. Gouverneur Morris and others objected, arguing that "Congress should be at liberty to raise salaries to meet such contingencies as inflation, a phenomenon known in that day as it is in ours." *Id.* James Madison proposed that the ban on any increases in judicial compensation should be retained, and that the "ravages of inflation" could be dealt with "by taking for a standard wheat or some other thing of permanent value." *Id.* at 220, *quoting* M. Ferrand, The Records of the Federal Convention of 1787, p. 45 (1911).

The Constitutional Convention "finally adopted Morris' motion to allow increases by the Congress." *Will,* 449 U.S. at 220. The result was Article III, § 1, which provides that judges' compensation "shall not be diminished during their Continuance in Office" while committing any increases in judicial compensation to the discretion of Congress. *Id.*

As Alexander Hamilton later explained:

> It will be readily understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to

> the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.

The Federalist No. 79, pp. 491-92 (1818), *quoted in Will,* 449 U.S. at 220. Far from intending to mandate that judicial compensation be routinely increased, the Compensation Clause was viewed as a grant of discretionary power to the Legislature to increase judicial salaries if and when the Legislature deemed best.

C. The Constitution Does Not Require The Legislature To Increase Judicial Salaries To Offset Inflation

The federal courts have repeatedly recognized that nothing in the United States Constitution requires Congress to take into account the effects of inflation on judicial compensation. In *Will*, the Supreme Court addressed whether the Compensation Clause was offended when scheduled cost-of-living increases for federal judges, included in a complicated salary adjustment matrix, were rejected by Congress. The Court found that where a judicial pay increase had vested prior to Congress' action, the Compensation Clause prevented Congress or the President from revoking that increase even hours later. *Will*, 449 U.S. at 225-26. The Court held, however, that it was entirely permissible for Congress to stop other cost-of-living increases that had not yet vested:

> Our discussion of the Framers' debates over the Compensation Clause . . . led to a conclusion that the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges . . . . Rather, that provision embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence. The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.

Will, 449 U.S. at 227 (footnote omitted).

The Court held that since Congress had the discretion to award periodic increases, it also had the power to revoke the same provided the increases had not actually vested. The Court declared that in "no sense" did the termination of scheduled cost-of-living increases for judges diminish the compensation of judges or violate the Compensation Clause. *Id.* at 228. The Court noted that, as the Framers rejected an indexing scheme, the Judiciary could not bind Congress to adopt one. *Id.* at n.33.

In *William v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), the Federal Circuit held that the Compensation Clause was not violated when Congress interdicted the cost-of-living increases for judges in 1995, 1996, 1997 and 1999. The Court's reasoning and conclusions apply here, since the

provisions of the New York Constitution are in all relevant respects indistinguishable from the provisions in the United States Constitution applied there:

> It is, of course, profoundly disappointing to the Judges that the arrangement for future federal judicial pay increases . . . has enjoyed such an inconsistent life. While we agree with the Judges' view that the continued strength of the federal Judiciary depends in part upon a deliberate, consistent, and fair approach to routine cost-of-living salary adjustments, we cannot, consistent with established Article III principles, hold that the Constitution requires the Judges to prevail in this case.

Id. at 1040.

Similarly, in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1997), plaintiffs urged that the failure of Congress to increase judicial salaries for an extended period violated the Compensation Clause in that the "real value" of the dollar had decreased as the result of inflation. *Id.* at 1033. The court dismissed the claim, holding that the Compensation Clause affords no protection from the effects of inflation.

New York's constitutional history provides even less support for a constitutional right to increases in judicial compensation than the identical claim rejected in *Will, William,* and *Atkins.* As discussed above, the New York Constitution has consistently prohibited diminishment in judicial

compensation during judicial terms, but has alternated between prohibiting and permitting increases. At a minimum, that history shows that the Framers of the New York Constitution included express mandates regarding increases in judicial compensation when they intended the Constitution to address that issue. Contrary to Appellants' arguments, however, those mandates always prohibited any such increases in judicial compensation during a judge's term. That history is impossible to square with the claim that the Constitution now *requires* Respondents to adopt a law increasing judicial compensation during a judicial term of office.

In essence, Appellants are asking this Court "amend" the Constitution by mandating such an indexing scheme plainly not envisioned by the People when they voted to adopt the Compensation Clause. This kind of expansive theory, unsupported by constitutional text, history or jurisprudence, does not support a cause of action.

Both the court below and the First Department in *Larabee* reviewed many of the same authorities discussed above, and concluded that:

> [W]hile we agree with [P]etitioners that the failure to increase judicial salaries in the face of substantial inflation represents a policy choice that is ill-considered at best, it is the N.Y. Constitution itself that places the discretion to make such a choice with the Legislature. Hence, the diminishing force of inflation, even when other state employees have received salary increases,

> cannot be deemed a sufficient basis for a claim under New York's Compensation Clause.

Maron, 58 A.D.3d at 115, 871 N.Y.S.2d at 413-14; *see also Larabee*, 65 A.D.3d at 85-86, 880 N.Y.S.2d at 264-65 (same).

While it is true that the Senate, the Assembly and the Governor have not agreed upon a bill amending Judiciary Law Article 7-B since 1999, and that the purchasing power of judicial salaries has been impacted by inflation in the interim, that fact does not establish a constitutional violation. To the contrary, the Legislature has fulfilled its constitutional duty by providing a salary schedule in the Judiciary Law, and by not diminishing judges' salaries.

D. Judicial Salaries Are Not Constitutionally Inadequate

Appellants argue that the salaries currently being paid to judges are constitutionally inadequate. Contrary to Appellants' argument, the Constitution does not adopt any minimum level of judicial compensation below which a judge's salary becomes constitutionally inadequate. Instead, the "no diminishment" mandate in the Compensation Clause means that the salaries of all sitting Supreme Court justices cannot be reduced from the current level of $136,700 set by Judiciary Law § 221-b. But nothing in the Constitution requires that the Legislature or the Governor act to increase judicial compensation.

At the most basic textual level, a "no diminishment" guarantee is logically the opposite of an "adequate" compensation guarantee: a "no diminishment" rule draws a sharp line below which compensation cannot be reduced, but says nothing about increases above that floor. As the Supreme Court explained in *Will,* that rule protects the independence of the Judiciary as well as the legitimate expectancy rights of individual judges. *See Will,* 449 U.S. at 203-04; *see also Williams v. United States,* 535 U.S. 911 (2002) (opinion of Breyer, J., in which Scalia and Kennedy, JJ., joined, dissenting from the denial of certiorari) (discussing the expectations-related basis for the "no diminishment" provision). While the "no diminishment" guarantee sets a floor below which judicial compensation may not be reduced, it does so regardless of whether that floor might be deemed too high, too low or just right. For the same reason, the Constitution says nothing about when any increases in judicial compensation should be considered, let alone must be granted. Instead, like the United States Constitution, the New York Constitution commits the entire subject of increasing judicial compensation to the discretion of the Legislature and the Governor.

Appellants rely on two cases that they claim recognized a constitutional right to "adequate" compensation for judges. In fact, neither does. In both cases, the courts were confronted with a legislative attempt to

reduce a town justice's salary, and thus had no occasion to consider any issue about a legislature's failure to *increase* judicial salaries. In both cases, moreover, the courts held that town justices were entitled to the protection of the "no diminishment" guarantee in Article VI, § 25 of the State Constitution even though the Constitution had been amended in 1961 to delete the express reference to town justices in that provision. Thus, the only constitutional claim recognized in those cases was the implied right of New York judges not specifically mentioned in the Compensation Clause to the benefit of the Constitution's express "no diminishment" provision.

The first case, *Catanise v. Town of Fayette,* 148 A.D.2d 210, 543 N.Y.S.2d 825 (4th Dep't 1989), involved a decision by a Town Board to reduce a town justice's annual salary from $5,000 to $3,000 prior to the beginning of the third year of the judge's four-year term. As the court noted, before 1961 the State Constitution had expressly prohibited diminution of town justices' salaries but the express reference to town justices was deleted when the Constitution was amended in 1961. The court stated the question before it for decision: "The issue we are called upon to decide is whether fundamental constitutional principles of separation of powers and independence of the judiciary continue to forbid a diminution in salary of those judges or justices no longer expressly included within [the

Compensation Clause], during their term of office. We hold in the affirmative." *Id.,* 148 A.D.2d at 212, 543 N.Y.S.2d at 826. The *Catanise* court declined to "read into the 1961 revision any specific intent to abolish the constitutional protections theretofore enjoyed by justices of the peace." *Id.*

As the court also pointedly noted, the plaintiff town justice alleged that his salary had been reduced because the Town Board was unhappy with his decisions, and wanted to punish him and influence his future rulings. In *Catanise,* the court never even mentioned a concern about the "adequacy" of a $3,000 annual salary, much less found any constitutional right to an "adequate" salary.

The second case, *Kelch v. Town of Davenport,* 36 A.D.3d 1110, 1112, 829 N.Y.S.2d 250, 252 (3d Dep't 2007), also presented a situation where a town board was seeking to influence a judge by reducing his salary. In *Kelch,* the Town Board reduced the judge's salary from $5,000 to $500. While the court expressed its view that a salary of $500 was inadequate, that was not the ground on which the court based its holding. Instead, in finding the town board's actions to be improper, the court cited *Catanise* for the proposition that town justices' salaries cannot be reduced during a judge's term of office without violating the Constitution. As in *Catanise,* the court

also emphasized that its decision was based on record evidence that petitioner's salary was being tied to his performance as a town justice and that the Town Board was attempting to influence judicial decision making:

> A real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions. An appearance of impropriety, if not an actual concern, would arise that the scales of justice could be tipped by political influence. Of further concern is that qualified citizens would be discouraged from seeking judicial office by the less-than-minimum wage allocated to the position.

Id., 36 A.D.3d at 1112, 829 N.Y.S.2d at 252.

In all events, the Constitution rejected any "adequate compensation" standard for judges by making the "no diminishment" guarantee its means of protecting judicial independence. If "adequacy" were the Constitutional test, then the Legislature would be free to *reduce* judicial compensation whenever, in the Legislature's judgment, deflation had effectively increased the purchasing power of a judge's salary. Obviously, the Constitution's actual "no diminishment" mandate requires a different result.

E. There Is No Workable Or Constitutional Standard Of 'Adequate' Compensation

Nor are there any workable standards to determine when, if ever, an "adequate" compensation guarantee would be triggered. Would courts look

at the passage of time, the impact of inflation, the maintenance of the State's ranking against other states in terms of judicial compensation, a comparison with the earnings of other legal professionals, or something else to determine whether the compensation levels for judges at any given moment were constitutionally "inadequate"?

Indeed, one could just as easily invoke the "free market" test as the appropriate standard of "adequacy"—compensation for any occupation is "inadequate" when it fails to attract sufficient, qualified jobseekers to fill the available openings. No one seriously suggests, for example, that when Chief Judge Kaye's term expired recently, the State had any difficulty in attracting many highly-qualified candidates for that position (including the current Chief Judge). Similarly, even Appellants do not dispute that, whenever an opening occurs on the Appellate Division or the Supreme Court, there are many well qualified candidates seeking the opportunity to be appointed to or run for that office. Obviously, all of those seeking the office of Chief Judge or Supreme Court justice know beforehand the salaries they will receive if they are successful—because those salaries have always been "established by law," pursuant to the Compensation Clause, rather than fixed by any judicial officeholder.

Assuming *arguendo* that the Constitution adopted any such free market requirement, it has clearly been met. No one—including Petitioners here—has ever contended that the members of today's Judiciary are not "competent and independent." Every sitting judge was fully familiar with the salary he or she would be paid when that judge sought judicial office, and by the very act of seeking the office, demonstrated that judicial salary levels were not an impediment. Nor has there been any spate of judicial resignations or unfilled vacancies. Indeed, quite the opposite.

The dispositive point is not that the Constitution adopts the "free market" test but instead that the Constitution adopts no test at all against which the constitutional "adequacy" of judicial compensation can be measured.

F. Speculation Cannot Be The Basis For Relief

Since the Judiciary today does not reflect any imagined inability "to attract and retain the most qualified people," Appellants' claim is, at most, a speculative guess about what the future might hold. Guesswork about the future is an insufficient basis on which to strike down Judiciary Law Article 7-B.

Moreover, history does not validate Appellants' theory that, at today's levels, judicial pay scales threaten the public's right to a competent and

independent judiciary because the judiciary cannot maintain its ability to attract and retain the most qualified people. Indeed, history shows the opposite: the attraction of judicial office to aspiring lawyers is so great that it is almost inelastic with respect to salary levels. If Appellants' theory were correct, one would reasonably expect that it would have impacted the State's ability to attract and keep well qualified lawyers to the Judiciary during the period when judicial salary levels, as measured against the purchasing power of constant dollars, went from their historic high (1933) to their historic low (1975). This Court can take judicial notice of the fact that the Judiciary was staffed with able and conscientious judges throughout that period.

In short, there is no reason to believe that current levels of judicial compensation threaten the independence of the Judiciary, or its ability to attract many well-qualified candidates for judicial office.

No case has ever invalidated an entire statutory scheme on the basis of a guess about the future. Thus, there is no reason to do so here, particularly where the State has been able to recruit and retain competent and independent judges at current judicial compensation levels.

G. Appellants' Claim Attacks The Principle Of Democracy

At bottom, Appellants' inadequacy argument attacks the principle of representative democracy on which our entire Constitutional scheme of

government is based. The power of the purse is reserved to the Legislature because it is the branch of government closest to the People. The Constitutional judgment placing that power in the hands of the political branches, and most particularly the Legislature, is at its most compelling with respect to matters relating to the salaries to be paid to public officeholders. The necessity of having to justify any such increase to the voters—who in the past have often shown a deep skepticism about arguments by political officeholders that their salaries should be raised—exercises a powerful disincentive against abuse of the Legislature's undoubted power to vote itself or other public officeholders a pay raise. The keen awareness by the Legislature's members that they are subject to election every two years makes that disincentive against abuse all the more powerful.

For all of these reasons, this Court should affirm the Appellate Division's dismissal of Appellants' Compensation Clause claim.

VII. MANDAMUS DOES NOT LIE TO COMPEL THE COMPTROLLER TO DISBURSE THE FUNDS APPROPRIATED IN CHAPTER 51

Appellants' mandamus claim, which is not a constitutional claim at all, was properly dismissed by the Appellate Division. The claim alleges that, in 2006, the Legislature granted the judiciary a raise of $69.5 million

but that the Comptroller refused to disburse it. Appellants sought a writ of mandamus compelling the Comptroller to do so. Assuming that this Court has jurisdiction to review it, the order below dismissing the claim should be affirmed.

A. Chapter 51 Did Not Require The Comptroller To Do Anything

The Third Department correctly held that Appellants failed to establish that Chapter 51, standing alone, required the Controller to disburse the $69.5 million appropriated to fund increases in judicial salaries. As the Appellate Division recognized, Chapter 51 does not authorize, much less command, the Comptroller to disburse the appropriated amount to the Judiciary immediately upon enactment of the budget. Instead, Chapter 51's plain language expressly conditioned disbursement on the enactment of additional legislation adjusting judicial salaries, an event which never occurred. Neither the language in Chapter 51 nor applicable law provides any basis for an order of mandamus compelling disbursement.

It is well settled that mandamus is an "extraordinary remedy" and is awarded "only in limited circumstances." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537, 475 N.Y.S.2d 247, 253 (1984). The writ may issue only to compel the performance of a purely ministerial act where there is a "clear legal right" to the relief. It will not be awarded to compel an act in respect

to which the officer may exercise judgment or discretion." *Id.*, 61 N.Y.2d at 538, 475 N.Y.S.2d at 254. Thus, it may not be used to compel an agency to decide a matter one way or another or to direct an officer how to perform a legal duty. *See, e.g., id.*, 61 N.Y.2d at 540, 475 N.Y.S.2d at 255; *Kupersmith v. Pub. Health Council*, 63 N.Y.2d 904, 483 N.Y.S.2d 211, *aff'ing for the reasons stated in the opinion below*, 101 A.D.3d 918, 475 N.Y.S.2d 619 (3d Dep't 1984); *United Methodist Retirement Community Dev. Corp. v. Axelrod*, 110 A.D.2d 292, 494 N.Y.S.2d 495 (3d Dep't 1985).

A petitioner seeking mandamus has an initial burden of presenting factual allegations of an evidentiary nature or other competent evidence that establishes a clear legal entitlement to the requested relief. *Matter of Rodriguez v. Goord*, 260 A.D2d 736, 736-37, 688 N.Y.S.2d 722, 723-24 (3d Dep't), *lv. denied*, 93 N.Y.2d 818, 697 N.Y.S.2d 565 (1999), *citing Matter of Malik v. Berlinland*, 158 A.D.2d 836, 551 N.Y.S.2d 421 (3d Dep't), *lv. denied*, 76 N.Y.2d 704, 559 N.Y.S.2d 983 (1990). If petitioner fails to meet that heavy burden, dismissal of the petition is required. *Matter of Altamore v. Barrios-Paoli*, 90 N.Y.2d 378, 385, 660 N.Y.S.2d 834, 837 (1997).

B. The Appropriation Expired Under Article VII, Section 7

As a threshold matter, as the Appellate Division noted here, mandamus cannot lie to compel the Comptroller to disburse the money

appropriated in Chapter 51 because the appropriation has expired. *Maron,* 58 A.D.3d at 124, 871 N.Y.S.2d at 420. Article VII, § 7 of the Constitution provides that: "No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment is made within two years next after the passage of such appropriation." Chapter 51 of the Laws of 2006 was signed by the Governor on April 12, 2006, and expired by operation of Article VII, § 7 on April 12, 2008. Thus, the Comptroller was constitutionally prohibited from disbursing the funds appropriated in Chapter 51, and mandamus could not lie to compel him to do so.

C. To Be Effective, Chapter 51 Required The Passage Of An Additional Bill

In any event, even assuming that Chapter 51 had some continuing viability, it did not provide any basis for a writ of mandamus. Chapter 51 appropriated $69.5 million "[f]or expenses necessary to fund adjustments in the compensation of state-paid judges and justices of the unified court system *pursuant to a chapter of the laws of 2006.*" (emphasis added). As this language indicates, the Legislature made money available in the budget in anticipation that a chapter law would be adopted adjusting judicial compensation by amendment of Judiciary Law Article 7-B later in 2006. Chapter 51 authorized the expenditure *if but only if* such a chapter law

increasing judicial compensation were adopted. But no subsequent chapter law authorizing adjustments to judicial salaries in any amount was enacted.

As the Appellate Division correctly found, *see Maron,* 58 A.D.3d at 125, 871 N.Y.S.2d at 421, Appellants misinterpret the meaning and effect of the conditional language of Chapter 51. They contend that the phrase "pursuant to a chapter of the laws of 2006" refers to Chapter 51 itself, and no additional legislative enactment is required to implement a pay raise. Appellants' strained construction renders the phrase "pursuant to a chapter of the laws of 2006" meaningless surplusage. *See id.* (noting that such a construction would violate the canon of statutory construction that "courts must give effect to every word of a statute"). If the Legislature had intended Chapter 51, standing alone, to adjust judicial compensation, there would have been no need to include the "pursuant to" language.

Indeed, no other appropriation authorization in Chapter 51 contains that language. As the Appellate Division explained: "If the Legislature had intended the budget to be self-executing regarding compensation adjustment, there would have been no need to reference 'a chapter of the laws of 2006.' Given that '[t]he statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain

meaning ...', chapter 51, on its face, cannot be said to provide a basis for the relief sought by petitioners here." *Id.* (citations omitted).

Appellants' strained reading of the "pursuant to" phrase in Chapter 51 also ignores the settled meaning and usage of that language in the context of legislative appropriations. When the Legislature enacts an appropriation authorizing funding "pursuant to a chapter of the laws of" the current session, it is simply ensuring that funding will be available if separate legislation is adopted to turn the proposed use into an actual program. Here, the additional legislation contemplated by Chapter 51 would have amended the specific salaries for various judicial offices set forth in Article 7B of the Judiciary Law. But no such legislation was ever passed.

Significantly, the same process was followed to implement earlier judicial pay raises. *See, e.g.,* L. 1979, chs. 51 and 55; L. 1993, chs. 55 and 60. Indeed, the Legislature has not authorized any judicial pay raise since the unification of the court system budget without amending Article 7-B of the Judiciary Law. Accordingly, this Court should reject Appellants' assertions that the "pursuant to" language is meaningless.

Furthermore, Appellants' construction of the "pursuant to" phrase in Chapter 51 is at odds with the statutory scheme set forth in Article 7-B of the Judiciary Law because Chapter 51 does not provide for an allocation of the

lump sum increase among the various statutory categories of judge. In the absence of such an allocation, there is no indication that the Legislature intended Chapter 51, standing along and without any subsequent legislative action, to revise the Article 7-B judicial salary schedules that have been in place since 1998. On the contrary, the relevant legislative debates firmly establish that the Legislature did not believe that Chapter 51 was, in fact, authorizing raises for the Judiciary. *See Maron*, 58 A.D.3d at 125-26, 871 N.Y.S.2d at 421-22; *see also* R. 376-80 and 385.

D. Conditional Appropriations Are Constitutional

Contrary to Appellants' contention, there is no constitutional impediment to conditional appropriations like Chapter 51. Appellants overstate the holdings of *Tremaine*, 252 N.Y. 27, 168 N.E. 817, and *Matter of Blyn v. Bartlett*, 39 N.Y.2d 349, 384 N.Y.S.2d 99 (1976). *Tremaine* does not hold that contingent, or conditional, appropriations are unconstitutional. Rather, this Court simply held that a provision in a lump-sum appropriation bill that conferred power on an individual member or committee of the Legislature to divide up the lump sum or control the manner in which it was disbursed was unconstitutional because it unlawfully delegated the legislative power to make appropriations and amounted to the making of a "civil appointment" by the Legislature, in violation of Article III, § 7.

That is not what happened here. Chapter 51 did not empower any individual legislator to allocate the $69.5 million appropriation among the State's judges. Rather, the Legislature expressly retained to itself as a body its power under the Compensation Clause to "establish" judicial compensation by allocating the appropriated amount in a subsequently enacted chapter law. This was entirely proper. As Judge Crane explained in his concurring opinion in *Tremaine*, "the Legislature has absolute control over appropriations. It may make appropriations also upon such conditions and with such restrictions as it pleases . . . If it makes lump sum appropriations, whatever conditions it may attach to its expenditure, it cannot make one of those conditions the approval by one of its own members." 252 N.Y. at 59, 168 N.E. at 828.

Blyn is similarly inapposite. *Blyn* involved a New York City Charter provision that empowered the New York City Council to approve lump-sum appropriations to fund the courts in the First Judicial Department, but not individual line items. Because the City Council's power was restricted in this way, this Court stated that "[o]nce the appropriating body arrives at its 'final determination,' it may not dictate how the appropriated money is to be spent." 50 A.D.2d at 446, 379 N.Y.S.2d at 620. Appellants incorrectly rely on this quoted language to support their contention that appropriation

legislation is complete when enacted, and that the legislative body cannot determine how the appropriated funds are to be spent. The Legislature's power is not restricted in the same manner as the New York City Council's was. On the contrary, the Legislature has the constitutional power to establish judicial salaries and, thus, can reserve to itself in an appropriation bill the power to enact additional legislation allocating the appropriated funds.

Thus, the conditional nature of the appropriation in Chapter 51 did not render it unconstitutional. There is no support for Appellants' argument that the legislative function was necessarily complete when the Legislature passed Chapter 51 and it was then up to the Office of Court Administration to allocate the appropriated funds among the State's judges. Moreover, Appellants' argument flies in the face of the constitutional mandate in the Compensation Clause that compensation for judges in the unified court system must be "established by law." The Legislature did not "establish" judicial compensation when it enacted Chapter 51 making the 'dry' appropriation of $69.5 million. Nothing in Chapter 51 specified the compensation of any judge, or indicated how the lump sum was to be divided. Appellants contend that the Legislature must have intended to divide the lump sum in accordance with the formula proposed in the

Judiciary's Budget Request, which would have provided "pay parity" between justices of the Supreme Court and federal district court judges. But there is absolutely no support for the contention that the lump sum appropriated in Chapter 51 supplanted the detailed and long-standing salary schedules in Article 7-B of the Judiciary Law.

On the contrary, there is ample and unequivocal support in the language of the appropriation, legislative history, and the floor debate establishing the need for a separate, subsequent chapter to legislate specific judicial salary changes via amendment of Article 7-B of the Judiciary Law. That legislation would have determined whether the adjustments would have been retroactive, which judges would have gotten salary raises, how much those salary increases would have been for each type of judge and justice, whether a formula to address future inflation would have been adopted, and if so, what the measure of inflation would have been and how often it would have been applied. No such legislation was ever enacted. The Legislature's inaction did not give its imprimatur to the "pay parity" concept proposed by the Judiciary. The Comptroller therefore was under no mandate to disburse the amount appropriated in Chapter 51.

E. Legislative Law § 5(1) Is Irrelevant

Finally, the Appellate Division properly rejected Appellants' argument that the fact that the Legislature acted on all of the Governor's 2006-2007 budget bills and adopted a budget in accordance with Legislative Law § 5(1) somehow proves that the Legislature intended the funds appropriated in Chapter 51 to be immediately disbursed, without any amendment to Article 7-B of the Judiciary Law. *See Maron,* 58 A.D.3d at 126, 871 N.Y.S.2d at 422-23. The purpose of Legislative Law § 5(1) is to encourage timely passage of the budget. *See Cohen*, 94 N.Y.2d 1, 698 N.Y.S.2d 574. As Appellants concede, all of the 2006-2007 budget bills were passed and it was not necessary to pass any additional bills in order to enact the appropriations included in the budget. Chapter 51, like all the other appropriations in the budget, was simply an authorization to spend funds, up to the specified amount for the specified purpose, and subject to any specified conditions. Chapter 51 contained very specific conditions. It expressly required enactment of legislation to authorize the expenditure of the amount budgeted for a potential increase in judicial salaries. Nothing in Legislative Law § 5 prohibits additional legislative activity after the budget has passed. But the legislation contemplated in Chapter 51 was never

enacted and, thus, expenditure of the appropriated amount was never authorized.

In sum, as the Appellate Division correctly found, *see Maron,* 58 A.D.3d at 126, 871 N.Y.S.2d at 422, Appellants' attempt to compel the Comptroller to disburse the $69.5 million appropriated in Chapter 51 must fail because the appropriation merely made funds available for an event that never occurred, and created no duty that the Comptroller can be compelled to fulfill. In the absence of any clear and unequivocal legislative directive to change the salary structure adopted in Article 7-B of the Judiciary Law, the Comptroller was authorized to comply only with the existing salary schedule. Appellants have failed to identify any nondiscretionary duty that the State Comptroller owed to them but did not fulfill, and therefore, as the Appellate Division correctly held, fail to state a cause of action for mandamus.

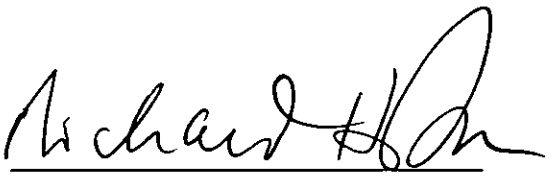
CONCLUSION

The Appellate Division's order should be affirmed, with such other and further relief to Respondents as this Court deems just.

Dated: New York, New York
October 30, 2009

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: 

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Time Requested: 30 Minutes

State of New York
Court of Appeals

EDWARD A. MARON, ARTHUR SCHACK, and JOSEPH A. DeMARO,

Petitioners-Appellants,

-against-

SHELDON SILVER, as Speaker of the New York State Assembly, NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, as the Temporary President of the New York State Senate, NEW YORK STATE SENATE, ELIOT SPITZER, as Governor of the State of New York, THOMAS DiNAPOLI, as the Comptroller of the State of New York,

Respondents-Respondents,

-and-

THE OFFICE OF COURT ADMINISTRATION,

Respondent,

For a Judgment Pursuant to CPLR Article 78 and Related Relief.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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Date Completed: November 13, 2009

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Time Requested: 30 Minutes

State of New York
Court of Appeals

EDWARD A. MARON, ARTHUR SCHACK, and JOSEPH A. DeMARO,

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-against-

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COURT OF APPEALS

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In the Matter of
EDWARD A. MARON, ARTHUR SCHACK, and
JOSEPH A. DeMARO,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

SHELDON SILVER, as Speaker of the New York State Assembly, NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, as the Temporary President of the New York State Senate, NEW YORK STATE SENATE, ELIOT SPITZER, as Governor of the State of New York, THOMAS DINAPOLI, as the Comptroller of the State Of New York, and the OFFICE OF COURT ADMINISTRATION,

Respondents-Respondents.

----------x

REPLY BRIEF FOR APPELLANTS

Preliminary Statement

Appellants submit this brief in reply to the Respondent's brief in opposition, in which the Respondents brazenly seek to cloak the Legislature in the mantle of absolute supremacy over the other two branches of New York State Government. Appellants in this case also join in the arguments presented by the petitioners-respondents in the companion cases of *Larabee v Governor* and *Chief Judge v Governor* (collectively, "the

Companion Cases"), which are being heard together with this case.

This appeal along with the Companion Cases place this Court in a difficult situation because it is being asked to determine a case affecting the compensation of its members as well as each and every Justice and Judge of New York State.[1] In reality, this Court is merely being asked to perform the ordinary functions of the Judiciary, that is, to review the actions of the Legislature and Governor and to determine whether those actions are in accord with their constitutional duties (*See* Point I), and also to compel the Comptroller to disburse payments previously authorized by the Legislature and approved by the Governor (*See,* Point II, *infra*). This Court regularly performs the function of reviewing and determining the constitutionality of the acts of the Legislative and Executive branches. *See, e.g., Pataki v. New York State Assembly,* 4 N.Y.3d 75 (2004); *Campaign for Fiscal Equality v. State,* 86 N.Y.2d 307 (1995). Viewed in that light, and in the light of the clear precedent cited by the Appellants herein, the Respondents in the Companion Cases, and the First Department in *Larabee v. Governor,* ("*Larabee*") 65 A.D.3d 74 (1st

[1] Of course, under the Rule of Necessity, it is appropriate for this Court to rule upon the issue of Judicial compensation, because the case will not otherwise be heard. *See, United States v. Will,* 449 U.S. 200, 213 (1980); *Larabee v. Governor,* 20 Misc.3d 866, 867-869 (Sup. Ct., N.Y. Co. 2008).

Dept. 2009), it is clear that the Justices and Judges of New York State are entitled to the relief requested herein.

ARGUMENT

POINT I

THE FAILURE OF THE LEGISLATURE TO ADJUST JUDICIAL COMPENSATION VIOLATES THE JUDGES' CONSTITUTIONAL RIGHTS

The inherent weakness of the Respondents' arguments can readily be discerned from the fact that they rely primarily upon distortions of the facts in this case and misrepresentations of the law. When the facts and the law are properly viewed, the Appellants' right to the relief sought, that is, the proper adjustment of their salary, is manifest.

The theme of the Respondents' argument is that the Legislature has the final say regarding legislation, and that, right or wrong, their actions are not subject to review by any of the other branches of government.

To the contrary, our rich Constitutional history strives for and insists upon the absolute and inherent equality of the three branches mandated by the doctrine of Separation of Powers. Respondents take the attitude manifested in George Orwell's *Animal Farm*: all branches of government are equal, but some branches are more equal than others.

This is certainly a surprising position, given the fact that the Respondent's brief is filed solely on behalf of the Comptroller and the Governor; the Legislature has opted not to submit its own opposition to the relief requested. It is

obviously Respondents' position that the Judicial branch is powerless and unequal; a proposition that would have our Founding Fathers rolling in their graves. The Respondents seek to justify the shabby, unconstitutional denigration of the Judicial branch that has characterized the actions of the Legislature and the Governor in the past eleven years by resting upon the self-proclaimed constitutional superiority of the Legislature.

The First Department, in *Larabee,* courageously and correctly ruled that the Legislature violated the Separation of Powers doctrine by linking Legislative raises with Judicial salary adjustments, and holding those adjustments hostage in the power struggle between the Legislature and the Governor over unrelated policy and political issues. This Court should similarly rule that the Governor's and Legislature's actions are unconstitutional, and grant the Judges the salary adjustment to which they are entitled.

Another theme of Respondents' brief is that the Appellants and the Respondents in the Companion Cases (as well as the First Department) are attempting to fix their own salary. Respondents absurdly claim that Appellants are attempting to amend the Judiciary Law "by deleting the base salaries specified therein and substituting different base salary levels as directed by the Courts" (Respondent's Brief at p.26). Nothing could be further

from the truth! This contention is a distortion of both the record and the requests for relief of the Petitioners in each of the cases. The fact is that the Legislature has, since 2006, repeatedly and annually embraced and adopted ever - increasing sums for Judicial salary adjustments[2] (see Point II, *infra*); the salary that the Legislature annually finds to be adequate and appropriate is considerably higher than the 1999 based salary currently being paid the Judiciary at this point. Each year, the Governor has approved the budget in which the Legislature included ever-increasing appropriations for Judicial Compensation adjustments, retroactive to 2005. That is, Petitioners merely request that the Court direct the Comptroller to disburse the amounts that the Legislature previously determined to be proper judicial compensation and establish a constitutionally acceptable method of determining judicial compensation in the future.

Contrary to Respondents' mischaracterization, the First Department in *Larabee* did not direct the Legislature to pass any particular level of salary for the Judges. Rather, the Court merely directed the Legislature to undertake its constitutional duty by "proceeding in good faith to adjust judicial compensation" to reflect the increase in the cost of living.

---

[2] This fiscal year, 2009-2010, the Legislature appropriated the sum of $163,000,000, and directed that it be "made immediately available to the administrative office of the Court for payment…." Chapter 51, §2, Laws of 2009. No language of limitation is contained in this appropriation.

(*Larabee*, 65 A.D.3d at 100)(see, footnote 6, *infra*). This Court is now called upon to restore the constitutional balance among the branches of the government by directing the Legislature, the Governor and the Comptroller, to meet their unquestionable constitutional obligations.

1. Under the Doctrine of Separation of Powers, the Speech or Debate Clause Does Not Diminish or Negate This Court's Absolute Authority to Review the Constitutionality of Legislative Actions

The core of Respondents' brief in this case is an impossibly expansive reading of the Speech or Debate Clause of the New York State Constitution, Article III §11. Under Respondents' reading, the immunity granted the Legislature in the Speech or Debate Clause constitutes a *carte blanche* for the Legislature to do as it pleases, no matter how unconstitutional or even corrupt their actions, without any of the other branches having any right to question or limit its actions. In order to support this anti-constitutional proposition, Respondents take cases out of context and overstate their holdings.

First, the United States Supreme Court has not given the Speech or Debate Clause of the United States Constitution, which provides the same protection for Legislators as the New York Constitution, the expansive reading that the Respondents advocate here. In *United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court explained that the Speech or Debate

Clause had its origin in English common law. However, the English common law differs from the American constitutional model, in that, in the English Parliamentary model, Parliament is, unlike New York's Legislature, the supreme authority. The English common law precedent upon which the Speech or Debate Clause is based sought to preserve that supremacy. In contrast, the American Constitutional Speech or Debate Clause was designed to "preserve legislative independence, not supremacy." *Id.* at 508.

The task of a Court, in applying the Speech or Debate Clause is to apply it in such a way as to "insure the independence of the legislature without altering the historic balance of the three co-equal branches of the Government." *Id.* at 507-508. Accordingly, the Supreme Court found that the clause did not confer immunity upon a legislator indicted for accepting bribes to pass legislation even though the indicted conduct involved, in some sense, the legislative process. Moreover, in discussing the relationship between the Speech or Debate Clause and the principle of Separation of Powers, the Court emphasized the importance of the Judiciary in curtailing the potential for abuse of legislative authority embedded in the Speech or Debate Clause. It stated that the Legislature and the Executive did not engage in abuses of their power because "the third branch has intervened with neutral authority." *Id.* at

523. Thus, unlike the Respondents here, the Supreme Court has manifested a respect for the constitutional role of the Judiciary in preventing unchecked abuse of power by the Legislature.

Similarly, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court discussed the place of the Speech or Debate Clause in ensuring that the principle of Separation of Powers is upheld. In that case, the Court was asked to review the action of the Legislature in refusing to seat one of its members. Quoting *Kilbourn v. Thompson,* 103 U.S. 168, 199 (1881), the Court stated that "no branch or department of the government is supreme," and that it is:

> the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. (Emphasis added).

Thus, the *Powell* Court reviewed the acts of the Legislature in refusing to seat Representative Powell. This constituted, to an extent, interfering in the responsibilities of an co-equal branch of the Government. However, that "interference" consisted of no more than an interpretation of the Constitution, which is the traditional function of the Court in our American constitutional system. Thus, in justifying its interference, the Court stated:

> Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

Powell v. McCormack, supra, 395 U.S. at 549.

In reviewing the actions of the Legislature in this case, the Court is merely exercising its constitutional function to interpret the Constitution. It is not usurping the function of the Legislature. The fact that the case involves Judicial compensation is incidental to the Court's review, which must proceed in this case as it proceeds in every case in which the Court is called upon to review legislative actions.

In any event, it is hardly necessary for the Court to intrude into the deliberative process of the Legislature to discern the existence of linkage. Members of the Legislature, including then-Majority Leader Joseph Bruno, have publicly proclaimed that Legislative raises and Judicial salary adjustments are linked. Those undenied statements are not protected by the Speech or Debate clause, and can certainly be considered by the Court in evaluating legislative action. *Straniere v. Silver,* 218 A.D.2d 80 (3d Dept.) *aff'd,* 89 N.Y.2d 825 (1996).

Continuing their meritless attempts to distinguish the First Department decision in *Larabee,* Respondents ridicule the

First Department's conclusion that the Speech or Debate Clause does not protect purely political activity and the results thereof. In this case, political activity is the warfare between the Legislature and the Governor regarding legislative priorities wholly unrelated to Judicial compensation, which currently holds Judicial compensation unconstitutionally hostage. In *Straniere v. Silver, supra,* 218 A.D.2d at 83, the Third Department, affirmed by this Court, found that the line separating protected and unprotected legislative activity is ultimately one between "purely legislative activities," which are protected, and "political matters," which are not. The Third Department cited *United States v. Brewster* as authority for this distinction (*supra,* 218 A.D.2d at 512). The Respondents rely heavily upon *Straniere.* They should be bound by the totality of its holding, including its holding that political matters are not protected by the Speech or Debate Clause. Put another way, the Legislature and Governor can be as political as they care to be so long as they do not cross or blur constitutional boundaries and limits.

Respondents also rely upon *Urban Justice Center v. Silver,* 2009 WL 3379955 (1st Dept.), in which the First Department declined to review the internal franking procedures of the Legislature. The First Department initially stated that the plaintiffs in that case did not have standing to challenge the

actions of the Legislature, and declined to act for that reason. However, in dictum, the Court also found, on Separation of Powers grounds, that it should not interfere with internal procedural practices of the Legislature. *Id.* at *2. In contrast, the Court in this case is not reviewing the Legislature's internal procedures, but rather the substance of its actions (or inactions). That is the Court's proper constitutional function.

In addition to claiming that the Speech or Debate Clause forecloses this review, the Respondents contend that the Court system cannot interfere in the manner in which the Legislature chooses to carry out its functions, and is powerless to pass upon the constitutional relationship among the branches of the Government. Unfortunately for the Respondents, this contention, like their others, does not comport with the law. In *Campaign for Fiscal Equality v. State,* 86 N.Y.2d 307 (1995) (*CFE I*), this Court directed the Legislature to reallocate education funding to give adequate funding to New York City schools based upon a finding that the Legislature's allocation of education funding was unconstitutional. In a later case on the same issue, *Campaign for Fiscal Equality v. State,* 8 N.Y.3d 14 (2006) (*CFE* II), the Court ultimately directed the Legislature to expend an additional $1.93 billion on New York City schools, adopting the Governor's funding plan. Clearly, this Court has previously

determined that it is within its power to direct that the Legislature make constitutionally-required expenditures, especially where the Court does not, itself, set the expenditures.

The CFE cases are far from the only example in which the Courts have adjudicated the relationship among the branches of Government. In *Pataki v. New York State Assembly,* 4 N.Y.3d 75 (2004), this Court adjudicated a dispute between the Governor and the Legislature about budgetary powers. In that case, the Legislature purported to alter the purposes for certain expenditures submitted by the Governor in his budget bill, and to delete conditional language. This Court interpreted the constitution, ultimately holding that the Legislature had exceeded its power and intruded into the functions and failings of the Governor. Thus, it is certainly within the bailiwick of this Court to adjudicate the constitutional functioning of the other two branches, and to direct them to undertake the duties and obligations they have abrogated. That is all the Appellants have requested this Court to do.

Moreover, this Court can direct the Legislature to undertake its function in regard to Judicial compensation without itself legislating. It can take the approach of the First Department in *Larabee*, as this Court did in *CFE I*, and direct the Legislature to proceed in good faith to bring

Judicial compensation within constitutional boundaries. Additionally, it should adopt the approach requested by Appellants herein, as this Court did in *CFE II*, and direct disbursement of the compensation previously passed by the Legislature and signed by the Governor. (See, Point II, *infra*, and Footnote 2 and 6, *supra*.)

In short, the Appellants herein, and the Respondents in the Companion Cases, urge this Court to undertake its constitutional duty to review the actions of the Legislature, the Governor and the Comptroller in order to insure that they fulfill their constitutional obligations. On the other hand, the Respondents seek to destroy the very concept of Separation of Powers, by causing an affirmance of the Third Department and reversal of the Companion Cases. In so doing they seek nothing less than establishing the Legislature as the supreme authority, not answerable to either of the other two branches. Only this Court stands in its way.

2. The Judges Have Been Deprived of Equal Protection

It is also clear that, by refusing to adjust Judicial compensation, the Respondents are depriving the Judges in New York State of the Equal Protection of the Law. In fact, the very arguments made by the Respondents underscore the issue in this case. The Respondents have argued that the Judicial Branch

is powerless to review the constitutional functioning of the other branches in regard to Judicial compensation. Thus, although the Courts, and its constituent Judges, are allegedly a co-equal branch of the Government, they are entirely dependent upon the other branches. Federalist No. 78; *United States v. Hatter,* 532 U.S. 557, 567-568 (2001).

As has been pointed out in the Appellant's main brief, the other branches of the Government have the power to increase their compensation, and have made sure that there have been increases to their benefits, if not to their salary. Indeed, Legislators are free to obtain outside income. Beyond teaching and writing, Judges are not. It ill-behooves the Respondents to point to the recent increase in expense allowances for Judges, which has done nothing to alleviate the inflationary effect on their salaries since 1999. This allowance constitutes a belated and hollow attempt to address the Legislature's and Executive's abject abdication of their Constitutional duties. It does not restore the rightful constitutional place of the Judiciary. Their treatment by the Legislature and Governor has deprived the Judiciary of equal protection.

Because the Judiciary is a Suspect Class, the Court should review the actions of the Legislature and Governor under the strict scrutiny standard. However, even if the Court reviews the Legislature's actions under the rational basis standard, its

actions are unconstitutional. The Respondents have suggested no rational basis for the actions of the Legislature in repeatedly establishing the proper level of Judicial compensation, and then refusing to expend the money to bring the compensation up to that established level. The ongoing political war between the Legislature and the Governor, which catches the Judiciary in its cross-fire, is certainly not a rational basis, although the Legislature plainly and stridently maintains that somehow this is constitutionally acceptable.

3. Judicial Compensation is Constitutionally Inadequate

The Appellants have demonstrated, both that the law requires a minimum level of Judicial compensation, and that the current compensation does not meet that level[3]. Significantly, upon being questioned by the Appellate Division First Department in the *Larabee* companion case, the Assistant Attorney General representing the Legislature conceded that at some level of compensation the salary of a Judge becomes unconstitutionally inadequate. See, *Larabee* Record on Appeal, pp 323 - 325.

The Respondents, in answering this argument, first attempt to set up a "straw man" and then knock it down. The Respondents correctly note that the neither the Judiciary, nor any other officer of the State, is constitutionally entitled to a yearly cost of living increase. However, they incorrectly state that the Appellants have demanded a yearly cost of living increase. Rather, the Appellants, and the Respondents in the Companion Cases, have contended that, because of the passage of time (more than 11 years) and the operation of continuing inflation, the Judges' compensation has been reduced, in real dollars, below the level of constitutional adequacy. *Atkins v. United States,* 556 F.2d 1028 (Ct. Cl. 1997). This is an argument that the Respondents have been unable to meet.

---

[3] Even the Court in *Atkins v. United States,* 556 F.2d 1028 (Ct. Cl. 1997) recognized that pervasive inflation over many years can rise to the level of unconstitutional diminution of Judicial compensation.

The Respondents apparently recognize that, in *Kelch v. Town Board of Town of Davenport,* 36 A.D.3d 1110 (3d Dept. 2007), the Third Department squarely held that the level of judicial compensation can be so low as to violate the principles of Separation of Powers. In that case, the legislature fixed the salary of one of the two town judges at $500 per anum, which the Court found to be constitutionally improper. Respondents seek to distinguish the situation therein from this case by citing the Third Department's criticism of a comment of a legislator during the budget process that the Judge's salary could be increased "based upon his performance."[4] However, the Legislative interference with Judicial decisions, reprehensible as that is, was not the reason that the Third Department directed the Town Board to reconsider petitioner's salary, and set an adequate salary. Rather, the Court specifically held that it was obligated to interfere in the legislative prerogative of setting salary because the Town Board "violated public policy and the constitutional principals [sic] of separation of powers in setting petitioner's exceedingly meager salary." *Id.* at 1112. In support of its holding, the Third Department cited *Goodheart v. Casey,* 521 Pa. 316 (1989), in which the Pennsylvania Supreme Court directed the State

[4] Ironically, this is just the kind of comment that the Respondent contends the Court is foreclosed from considering under the Speech or Debate clause.

Legislature to do its constitutional duty and provide adequate compensation to Pennsylvania's State Judges.

While there is no objective standard by which the adequacy of Judicial compensation can be measured, the Appellants in this case, and the Respondents in the Companion Cases, have demonstrated that the constitutional standards have been violated. Therefore, this Court should direct an adjustment in judicial compensation.

POINT II

APPELLANTS' STATUTORY CLAIM SHOULD BE SUSTAINED

1. The 2006 Act Provides for Payment, and Properly Interpreted, it is Not Conditioned on the Enactment of Additional Legislation

Chapter 51 of the Laws of 2006 (the "2006 Act") provided a $69.5 million fund to increase the compensation of each New York judge in the Unified Court System ("UCS"). In urging that the 2006 Act was not effective to fund raises for the judges, Respondents' brief misapprehends the text of the 2006 Act, which was designed to provide long awaited and sorely needed salary relief for New York's judges. Their brief disregards the fact that the *Judiciary* itself wrote the language providing that adjusted compensation for the judges "be paid," and that *the Judiciary's* language was adopted by the Legislature and the Governor *verbatim* as chapter 51 of the Laws of 2006, under the aegis of "Judicial Compensation Reform." The Judiciary wrote that language to provide for prompt payment; not to have a pay increase put on hold until there was additional legislative action that might never be taken.

The Legislature should not be permitted to now hijack that language as its own and transmogrify its clear meaning and intent. The only "chapter" to which the Judiciary could have reasonably been referring when it drafted this budget request is

what ultimately became Chapter 51 on the passage of the budget and its approval by the Governor.

This 2006 legislation carried out the Judiciary's Budget Request for $69.5 million, the amount mathematically necessary to pay a *pro rata* raise to each of the UCS judges that would provide pay parity, based upon the salary of United States district court judges, under the Judiciary's "Judicial Compensation Reform" program. That program was presented by the Judiciary to the Governor as part of his Budget Request, and in turn it was forwarded by him to the Legislature. The Judiciary's program was knowingly and intentionally adopted by the Legislature and signed into law by the Governor when it authorized payment of the $69.5 million fund, the exact amount mathematically necessary to increase the UCS judges' compensation on the basis of the salary of United States district court judges.

The 2006 Act both "appropriated" the funds, and expressly provided that the appropriated funds "be paid." [R161, 167].[5]

---

[5] Section 2 of the 2006 Act provided that the increased compensation "be paid" to implement the Judiciary's "Judicial Compensation Reform" program:

"JUDICIAL COMPENSATION REFORM

JUDICIAL COMPENSATION REFORM 69,500,000

General Fund/ State Operations
State Purposes Account - 003

For expenses necessary to fund adjustments
In the compensation of state-paid judges
and justices of the unified court system
pursuant to a chapter of the laws of 2006 69,500,000

Respondents, like the Third Department never addressed, or even acknowledged, that the 2006 Act expressly provided that the funds appropriated to adjust the judges' compensation were to "be paid." Without even mentioning that clear statutory language, Respondents urge that the legislation be interpreted on the basis of only one part of the statute, namely the Judiciary's proposed language, "pursuant to a chapter of the laws of 2006" which can only have meant that the Act became effective upon the Governor's assent and it became Chapter 51.

Respondents' argument violates a cannon of construction they urge the Court to apply. In that regard, Respondents argue that "courts must give effect to every word of a statute," quoting from the decision of the Third Department, which likewise failed to recognize that the Act provided that the funds "be paid." Respondents' Brief P 85. Appellants agree that the Court should give effect to each word of the statute. McKinney's Statutes §94. They thus urge that the legislation should be interpreted on the basis of the specific phrase authorizing that the funds "be paid" in accordance with Chapter 51. *Id.*

It is also significant that the "pursuant to" clause did not expressly state that further legislation providing for a pay raise had to be enacted in order to increase the judges'

Program account subtotal .....69,500,000"

compensation. There are, however, instances in which appropriation legislation expressly conditioned payment of the appropriated funds on enactment of further legislation. *See, e.g., Pataki v. New York State Assembly, supra,* 4 N.Y.3d at 86. By contrast, the 2006 Act does not say that further legislation is required, but merely refers to "a chapter of the laws of 2006." **Significantly, the "pursuant to" clause, by focusing directly on the year 2006, must be read to require payment of the salary increases during 2006 and thereafter, rather than as purposely deferring payment to await enactment of a second statute, as urged by Respondents. In light of the purpose of the 2006 Act and its provision that the raises "be paid," it is more plausible to read the "pursuant to" clause to ensure that the judges would be paid the increase in compensation during 2006, than to read it as requiring the enactment of a second statute. That more plausible reading harmonizes the "pursuant to" clause with the 2006 Act's provision that the funds "be paid."**

The Legislature has always known how to condition payment of appropriated funds on the passage of additional legislation, but chose not to include such language to that effect in the 2006 Act. In the absence of express language in that clause conditioning payment on further legislation, the clear language in Chapter 51, that the Judiciary drafted, mandates that upon

adoption of the budget, funds "be paid" over a strained inference from the "pursuant to" clause that further legislation was required.

For their interpretation of the statute, Respondents also rely on a supposed history of providing raises for judges by amending Article 7-B of the Judiciary Law as a symbolic finalization of its salary appropriation but fail to address this Court's decision in *Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004), analyzed in Appellants' opening brief at p. 77. There, this Court rejected the argument that an appropriation bill to fund educational expenses was invalid because such appropriations were historically effected by amending the Education Law and there had not been an amendment to the Education Law. *Id.* at 96, 98. Thus, the Legislature is not bound by past practice to continue to pass appropriations or to make them effective in any particular manner, nor is this Court.

Respondents have also disregarded the history of the 2006 Act. Appellants' opening brief carefully pointed out at p. 64, that the Judiciary's "Judicial Compensation Reform" program was intended to increase the pay level of the UCS judges based upon the level of Federal District court judges, and that the Judiciary's 2006 Budget Request, quoted in footnote 5 *supra*, was written to provide for payment of salary increases based on such

parity. Respondent's proffered interpretation of the "pursuant to" clause conditioning payment of a raise only if a future chapter law were passed after enactment of the 2006 Act, is premised on the erroneous assumption that *the Legislature* carefully chose the wording of that clause to require as a precondition that additional legislation granting raises to the judges be enacted. As demonstrated above, such interpretation is patently false. It cannot be emphasized enough that the 2006 Act adopted *verbatim* the very language drafted *by the Judiciary* to provide such raises for the judges, which was overlooked by the Third Department and ignored by the Respondents. That language was written by the Judiciary in order to realize an immediate pay raise for the judges, not to condition the pay raise on some future legislative action. Contrary to Respondents' contention, the Legislature did not write the "pursuant to" clause as a "dry" appropriation that would be meaningless in the absence of Legislative largesse. The Legislature did not draft that language at all! This Court should reject Respondents' reading of the statute as conditioning payment of the funds on enactment of further legislation when the Judiciary, as the author of the language, wrote it to get the judges paid.

Respondents also urge that the phrase "pursuant to a chapter of the laws of 2006" must mean that the appropriated

fund could be paid "if but only if" a chapter law increasing judicial compensation "by amendment of Judiciary Law Article 7-B" were adopted "later in 2006." (Respondents' Brief, pp 84-85). The "pursuant to" clause, however, does not refer to Article 7-B at all. It does not state anything about a "later" anticipated enactment. It refers to only one statute, namely "a chapter," not a second chapter law enacted in 2006 after passage of the first one. **As noted earlier, because the "pursuant to" clause focuses on the year 2006, it is more plausible to read it as ensuring payment during 2006 and thereafter than to defer it pending enactment of a second statute that may never be passed.** Respondents' interpretation of the "pursuant to" clause is strained, and should not prevail over the interpretation urged by Appellants based on the text of the statute and the Legislature's adoption of the Judiciary's "Judicial Compensation Reform" program in the very language written by the Judiciary.[6]

Appellants' proffered interpretation of the 2006 Act is preferable when considered in the context of the disgraceful state of judicial compensation for New York's judges, and the uniform support for the Judiciary's call for judicial

[6] Significantly, as noted (footnote 2, *supra* and this Point II) the Legislature has not only, since 2006, annually reappropriated the sums necessary to increase Judicial compensation, it has also increased such appropriation to the point that, in the 2009-2010 budget, the appropriated amount is $163,000,000. That provision contains no "pursuant to" clause, providing instead that the amount be "made immediately available to the administrative office of the Court for payment…." Chapter 51, §2, Laws of 2009. It should be noted that in each annual budget allocation for Judicial Compensation Reform after the 2006 Act, there has never been mention made of an amendment of the Judicial Law 7-B.

compensation reform by the Governor and the leaders of the State Senate and Assembly. *See, King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."), citing *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) [Learned Hand, J.] ("Words … in their aggregate take their purport from the setting in which they are used").

As recognized by the Third Department, New York's UCS judges have not had a salary increase for 11 years and no other state court judges have gone so long without a salary adjustment. The value of their salaries has declined by approximately one-third due to the ravages of inflation during those years. New York's Judicial compensation now is among the lowest, if not the lowest, in the nation when adjusted for statewide cost of living.

Any doubt about the interpretation of the 2006 Act should be resolved in favor of an interpretation that carries out the central, and uniformly recognized important, purpose of the 2006 Act to pay increased compensation to the New York State judges. It should not be construed to be a mere predicate for an amendment to Article 7-B of the Judiciary Law that has not been enacted for years since the passage of that Act and that might not be enacted for years to come. Such a position is plainly wrong. (See, Subdivisions 2 and 3 hereof, *infra*).

Respondents ask this Court to close its eyes to the clear intention of the statute and its drafter, and instead to rely on statements by a few legislators that they thought that additional legislation would be required.[7] Respondents, however, have disregarded what this Court ruled long ago in *Woollcott v. Schubert*, 217 N.Y. 212 (1916) and other decisions cited in Appellants' brief at pp. 72-73. In *Woollcott*, this Court made clear that "opinions of legislators uttered in the debates are not competent aides to the court in ascertaining the meaning of statutes." *Id.* at 221. In this case, there was no report by a legislative committee or other indication that what a few legislators said reflected the view of the Legislature as a whole. It would be clearly wrong to attribute to the entire Legislature the view expressed in brief words of a few legislators in light of the clear purpose of the Judiciary, reflected in the statute, as drafted.

2. *People v. Tremaine* Strongly Supports Appellants' Position That if the 2006 Act Were Interpreted as Conditional, Such Condition is Impermissible and Must Be Disregarded

If the 2006 Act were interpreted to make payment of the $69.5 million fund for increasing the judges' compensation

[7] In any event, Respondents' reliance upon the statements of Legislators is inconsistent with its position regarding the Speech or Debate clause, wherein they posit that a Court cannot interpret the will of the Legislature by resort to the statements of Legislators. See Point I, *supra*.

conditional on the enactment of additional legislation, such a condition would be impermissible and must be disregarded. *People v. Tremaine*, 252 N.Y. 27 (1929). Respondents however, fail to understand the significance of *Tremaine* and its bearing on this case.

In *Tremaine*, this Court upheld lump sum appropriations by the Legislature for a coordinate branch of the State government as effective and complete, holding that it was impermissible for the Legislature to retain continuing control over the funds appropriated for another governmental branch, in that case, the Executive Department. This Court sustained the lump sum appropriation for the Executive Department, but **voided** the condition requiring further legislative action before the appropriated lump sum funds could be disbursed. Although the condition went afoul of the "civil appointments" provision of the Constitution, the underlying theory of the decision was that once an appropriation for a coordinate branch of the state government is made by the Legislature, the Legislature cannot exercise control over the particular allocation and manner of expenditure of the funds by the other department. [8]

Tremaine is clear that the condition for continuing control by the Legislature over the other Department's use of the money

[8] Despite its protect to the contrary, the Legislature approved such a lump sum payment for allocation to judges by the Administrative Office of the Court (Office of Court Administration) in the 2009-10 budget. (See footnote 6, *supra*).

must be disregarded, and the lump sum appropriation is deemed to be complete and effective by itself, without further legislative action. In the present case, if the 2006 Act were interpreted as conditioning expenditures by the Judiciary on enactment of additional legislation, such a provision for continuing control of the Judiciary by the Legislature would be invalid as a violation of the doctrine of Separation of Powers and of the independence of the Judiciary guaranteed by Article VI, § 25(a) of the Constitution, and must be disregarded.

Instead of coming to grips with the relevance of *Tremaine*, Respondents contend, incorrectly, that by allocating the $69.5 million fund in accordance with its "Judicial Compensation Reform" program, the Judiciary would be performing the legislative function of fixing the judge's compensation, a function reserved by Article VI, § 25(a) for the Legislature. Their argument, however, is flawed. Contrary to Respondents' view, the legislative action is taken when the funds are appropriated, and the allocation of the funds for expenditure within the general purpose of the appropriation constitutes an administrative function, to be performed by the Department for which the appropriation was made and into which the Legislature cannot intrude. *Tremaine*, 252 N.Y. at 44 ("The head of the department does not legislate when he segregates a lump sum appropriation. The legislation is **complete** when the

appropriation is made." [emphasis added]). Respondents have ignored this holding, as well.

Respondents also relied heavily on Judge Crane's concurrence in *Tremaine*. But just as they misapprehended the import of the majority opinion in *Tremaine*, they fail to comprehend that the doctrine of Separation of Powers was the foundation of Judge Crane's concurrence. In a crucial sentence, Judge Crane stated:

> The importance of maintaining the independence of the three departments of our republican form of government has often been stated and, as occasion arose, enforced by the courts.

252 N.Y. at 56. Judge Crane made clear that because that doctrine provides for independent departments of the government, the Legislature cannot "...after having made an appropriation, [and] having authorized an expenditure ... follow it up and ... control the manner in which the appropriation shall be disbursed." *Id.* at 58. Respondents also rely heavily on a portion of a paragraph of Judge Crane's concurrence which they quote, but have omitted key language of that paragraph stating that the Legislature "cannot administer the money after it has been once appropriated." *Id.* at 59, and ignore a like statement that the Legislature "cannot become an administrative body or ... perform ... the work ... of the Judiciary." 252 N.Y. at 57.

Under *Tremaine's* express holding, the lump sum appropriation was complete and effective by itself, and no

further legislative action was required. 252 N.Y. at 44. As a result, it devolved on the Department head to allocate the appropriated funds, i.e., to provide additional judicial compensation, by its mathematical application of its program for pay parity of the UCS judges based upon the salary of United States district court judges. In doing so, the Judiciary would perform a purely administrative function in conformity with the 2006 Act and as recognized in the 2009-10 budget.[9]

In the present case, therefore, even if the 2006 Act were interpreted as conditional on enactment of additional legislation, such condition must be disregarded because it would constitute impermissible on-going control by the Legislature over the expenditure of funds appropriated for the operation of the Judicial Department. *Tremaine's* holding prohibiting such control by the Legislature over expenditures by the Executive Department as a coordinate branch of the State government is even stronger with respect to preserving the independence of the Judiciary than for that of the Executive Branch. The reason is that while each department is to be protected from domination by the other under the doctrine of separation of powers, the Constitution was written to protect the independence of the Judiciary as an institution for the benefit of the people, as

[9] Respondents appear to assert in their discussion at pages 87-88 of their brief that Appellants rely on *Matter of Blyn v. Bartlett*, 39 N.Y.2d 349 (1976). However, Respondents have not read Appellant's brief carefully because Appellants did not cite that decision in their brief to this Court.

embodied in Article VI, § 25(a)'s provisions for compensation of judges. *See also,* Federalist No. 78. Such protection was not accorded the Executive branch by the Constitution. Moreover, there is a time-honored principle underpinning the constitutional doctrine of separation of powers as applicable to the Judicial Department, namely that the New York Constitution was designed to prevent judges "from being placed under obligation to the legislature." *People ex rel. Mitchell v. Haws,* 20 How. Pr., 32 Barb. 207 (1860).

To allow the Legislature to appropriate funds for *increasing the compensation of judges, while retaining the power* to decide at some unknown date in the future, if any, how, when and whether to release the funds, would erode the independence of the Judiciary as an independent institution. If this Court were to read the 2006 Act to be conditional on the enactment of additional legislation, these basic principles make it more imperative to void such condition, as it would erode the independence of the Judicial Department. Indeed, to read the 2006 Act as conditional on the enactment of additional legislation would violate the constitutional doctrine of Separation of Powers. This Court should not interpret the 2006 Act in a manner that would give rise to a violation of the Constitution.

3. The Annual Re-enactment and Increase In The Funds Appropriated for Judicial Compensation Negates Respondent's Argument that The Two Year Provision of Article VII §7 Bars Payment of Compensation Adjustments

Appellants' Brief sets forth their analysis of why the two year provision of Article VII, § 7 of the Constitution does not bar payment of funds where they have been wrongfully impounded. (Appellants Brief pp. 74-76). Respondents, however, have chosen not to address Appellants' analyses. Instead, they assume that Article VII, § 7 must be rigidly read to preclude disbursement of funds even where the State, contrary to law, impounds the funds. This could not have been the intention of that provision, which was enacted to require another legislative look at whether appropriated funds that have not been spent should be used after passage of two years from the time of appropriation. Here, as urged by Appellants, the funds were fully spoken for and were to be paid, with the legislative purpose frustrated by the impounding of the funds.

Article VII, § 7 was not written to bar disbursement when legal action to free the funds succeeds, even after two years from the appropriation. Nor was it intended to cleanse the wrongful withholding of funds where the illegal withholding has persisted for two years. That would make no sense. Respondents fail to offer any justification in law or logic to interpret that provision to mean that a right to receive appropriated

funds is vitiated if the State illegally withholds payment of appropriated funds for two years after they have been appropriated.

In addition, this action for the disbursement of the funds was commenced within two years of the original appropriation of the fund. Therefore, since the Appellants had brought legal action within two years of the appropriation, the two year provision should be held to have been fulfilled.

In any event, the two year provision has been satisfied because the funds for Judicial salary adjustments have been reappropriated every year since 2006. The salary adjustments have been rolled over, revived, and increased (most recently to $163,000,000) every year since 2006. (See footnote 6, *supra*). Each subsequent appropriation contains funds to make the adjustments retroactive to 2005. Thus, this Court can direct that the appropriation in the most recent budget be promptly released by the Comptroller, thereby rendering the two year limitation irrelevant by reason of the Legislature's own acts.

In this regard, it is significant that the Respondents did not mention the annual reauthorization of the funding in their brief.

4. Appellants are Entitled Either to Mandamus or Declaratory Relief

Respondents ignore the fact that this action not only seeks mandamus, but alternatively requests declaratory relief. In that regard, the Appellate Division recognized that Appellants sought mandamus relief against the Comptroller and declaratory relief against the State of New York. Appellants urge that if the Court upholds their substantive position on their statutory claim they are entitled to relief, either in the form of mandamus or of a declaratory judgment. Respondents' lengthy discussion of mandamus case law correctly assumes that such relief is predicated on a clear legal right, but ignores the fact that if Appellants' position is sustained they do have a clear legal right to relief. Moreover, Respondents do not dispute that Appellants have a right to declaratory relief with respect to their claim against the State.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the order below should be reversed insofar as it dismissed the Petition. The Petition should be reinstated, and the Court should grant the Petitioners summary judgment directing the Legislature and the Governor to grant the Justices of the New York State Courts a salary adjustment, direct that the funds appropriated for Judicial Salary Adjustments be released to the Judiciary and establishing a Commission to determine future salary adjustments.

Dated: Carle Place, New York
November 12, 2009

Respectfully submitted,

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December 3, 2010

Hand-delivered

Hon. Andrew W. Klein
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207-1095

RE: Larabee v. Governor
AD Nos. 4761-4761A
NY Co. Index No. 112301/2007
OAG Nos. 07-065135

Dear Mr. Klein:

I represent defendants-appellants-cross-respondents New York State Senate and New York State Assembly in the above referenced matter. This is to advise you that I join in the arguments advanced in the brief filed by counsel for the State of New York and Governor in opposition to plaintiffs' motion for reargument.

Respectfully submitted,

JULIE M. SHERIDAN
Assistant Solicitor General

cc: Thomas E. Bezanson, Esq.
George Bundy Smith, Esq.
Richard H. Dolan, Esq.

COURT OF APPEALS
STATE OF NEW YORK

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

Plaintiffs-Respondents-Cross-Appellants,

- against -

THE GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

-and-

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

Defendants-Appellants-Cross-Respondents.

New York County
Index No. 112301/2007

OPPOSITION TO PLAINTIFFS' MOTION FOR REARGUMENT ON BEHALF OF DEFENDANTS GOVERNOR OF THE STATE OF NEW YORK AND THE STATE OF NEW YORK

Defendant-Respondent the Governor of the State of New York, and Defendant-Appellant-Cross-Respondent the State of New York (collectively, "Defendants") submit this opposition to the motion by Plaintiffs-Respondents-Cross-Appellants ("Plaintiffs") for "reargument on the merits" or other relief.

For the reasons explained below, Plaintiffs' motion should be dismissed as untimely, or if the Court reaches the merits, denied in all respects.

First, the motion was made out of time. Rule 500.24(b) requires that any motion for reargument shall be made "not later than 30 days after the appeal ... sought to be reargued has been decided, unless otherwise permitted by the Court." This Court has not "otherwise permitted" a late motion for reargument, and no grounds for doing so have been advanced by Plaintiffs. In these circumstances, the Court has often dismissed a motion for reargument as untimely without addressing its merits. *See, e.g., People v. Lapetina,* 13 N.Y.3d 855, 891 N.Y.S.2d 689 (2009); *Credit-Based Asset Servicing & Securitization, LLC v. Chaudry,* 11 N.Y.3d 892, 873 N.Y.S.2d 261 (2008).

Second, Rule 500.24(d) provides that the "motion shall not be based on the assertion for the first time of new arguments or points of law, except for extraordinary and compelling reasons." Yet Plaintiffs' motion is based entirely on the assertion of new facts and new arguments, and should be denied for that reason. *See, e.g., Simpson v. Loehmann,* 21 N.Y.2d 990, 990, 290 N.Y.S.2d 914, 915 (1968) (per curiam) ("A motion for reargument is not an appropriate vehicle for raising new questions ... which were not previously advanced either in this court or in the courts below."); *People v. Bachert,* 69 N.Y.2d 593, 597, 516 N.Y.S.2d 623, 626 (1987) (quoting and adhering to *Simpson* standard).

Third, as Rule 500.24(c) provides and the case law confirms, a motion for reargument is intended only to call the Court's attention to "points claimed to have been overlooked or misapprehended by the Court," not new matters that have supposedly occurred after the Court's decision. *See Simpson v. Loehmann, supra; see also* CPLR Rule 2221(c)(2) (motion for reargument "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court ... but shall not include any matters of fact not offered on the prior motion."). Plaintiffs' motion does not point to any matters in the record or any controlling principle of law that the Court supposedly overlooked or misapprehended. Thus, reargument is inappropriate and should be denied. *See Simpson v. Loehmann, supra.*

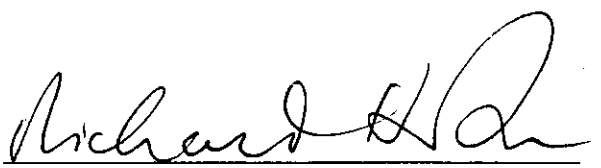
CONCLUSION

For all of these reasons, Plaintiffs' motion for reargument should be dismissed as untimely, or alternatively denied in all respects.

Dated: New York, New York
December 2, 2010

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: 

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07-065135-A3

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

Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents-Cross-Appellants,

– against –

GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

– and –

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

Defendants-Appellants-Cross-Respondents.

MOTION FOR REARGUMENT ON THE MERITS

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COURT OF APPEALS
STATE OF NEW YORK

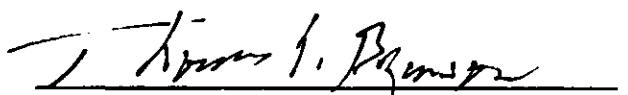
HON. SUSAN LARABEE, HON. MICHAEL NENNO, HON. PATRICIA NUNEZ, and HON. GEOFFREY WRIGHT, Plaintiffs-Respondents-Cross Appellants, - against - THE GOVERNOR OF THE STATE OF NEW YORK, Defendant-Respondent, - and - NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, and THE STATE OF NEW YORK, Defendants-Appellants-Cross-Respondents.	:	New York County Index No. 112301/07 **NOTICE OF MOTION FOR REARGUMENT OF APPEAL PURSUANT TO RULE 500.24**

PLEASE TAKE NOTICE that upon the annexed brief, dated November 16, 2010, and upon all the prior pleadings and proceedings had herein, the plaintiffs-respondents-cross-appellants Honorable Susan Larabee, Honorable Michael Nenno, Honorable Patricia Nunez, and Honorable Geoffrey Wright will move this Court, pursuant to Section 500.24 of the Court of Appeals Rules of Practice, on the 6th day of December, 2010, or at such other time as the Court may direct, at its courthouse at Court of Appeals Hall, 20 Eagle Street, Albany,

New York 12207-1095, for an order granting reargument of appeal in the manner set forth in the accompanying brief, and for such other and further relief as this Court may deem just and proper.

Dated: November 16, 2010
New York, New York

COHEN & GRESSER LLP



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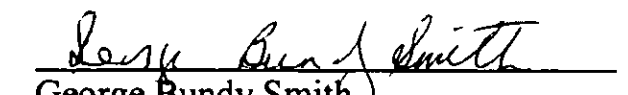

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COURT OF APPEALS
STATE OF NEW YORK

HON. SUSAN LARABEE, HON. MICHAEL NENNO, HON. PATRICIA NUNEZ, and HON. GEOFFREY WRIGHT, Plaintiffs-Respondents-Cross Appellants, - against - THE GOVERNOR OF THE STATE OF NEW YORK, Defendant-Respondent, - and - NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, and THE STATE OF NEW YORK, Defendants-Appellants-Cross-Respondents.	:	New York County Index No. 112301/07

BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS' MOTION FOR REARGUMENT OF APPEAL AND TO AMEND THE OPINION

Plaintiffs-Respondents-Cross-Appellants Honorable Susan Larabee, Honorable Michael Nenno, Honorable Patricia Nunez, and Honorable Geoffrey Wright (the "Plaintiffs"), respectfully submit this brief in support of their motion for reargument pursuant to Court of Appeals Rule § 500.24 and for the Court to amend its opinion and judgment to provide for monetary relief to Plaintiffs as set

forth below. An extension of time to move for reargument is necessary in this matter because the Court gave the Legislature the opportunity to remedy its constitutional violation. Now that the opportunity has been ignored, the time is ripe for reargument. Alternatively, in the event this Court denies Plaintiffs' motion, Plaintiffs respectfully request that this Court remand this case to the Supreme Court, New York County for a hearing on damages. Plaintiffs have abided the legislative session pending since this Court's Opinion and Order of February 23, 2010, entrusting the defendants to fulfill their duty. The legislative budgetary session has now ended, and once again, patience was a frustrated exercise in futility.

* * *

"We therefore expect appropriate and expeditious legislative consideration." *Larabee v. Governor*, 14 N.Y.3d 230, 263 (2010). With these words in its February 23, 2010 opinion, this Court unambiguously required the legislative branch to remedy its violation of the New York State Constitution by considering judicial compensation on its merits. Despite the resounding clarity of this Court's opinion, however, the legislative branch has ignored the mandate of this Court in its entirety. After more than eight months since this Court's opinion, the legislative branch has utterly failed to consider judicial compensation. Instead, the Legislature has chosen to ignore its constitutional violation that has already lasted

more than 11 years. The Court afforded the legislative branch every opportunity to appropriately and expeditiously consider judicial compensation on its merits. The Legislature has now seen fit to add approximately $2.9 billion to the budget without any remedy for their constitutional violations of separation of powers and judicial compensation.[1] Once again, and still, the legislative branch has ignored its constitutional obligations despite, indeed in defiance of, this honorable Court's clearly stated expectation that the Legislature would act appropriately and expeditiously to consider judicial compensation.

As expressed by Chief Judge Lippman in his most recent State of the Judiciary, "The time for action is long overdue."[2] The time for the legislative branch to remedy its own constitutional violation has passed. The time for this Court to enforce the State's constitutional obligations is now. The Court of Appeals is the last, best hope for the judges and justices of this State.

I. THE STATE HAS FAILED TO ACT APPROPRIATELY AND EXPEDITIOUSLY IN CONSIDERING JUDICIAL COMPENSATION

In its February 23, 2010 opinion, this Court held that "as a matter of law, the State defendants' failure to consider judicial compensation on the merits violates the Separation of Powers Doctrine." *Larabee v. Governor*, 14 N.Y.3d 230, 261

[1] *See* New York State 2010-11 Enacted Budget Financial Plan, p. 61, available at http://publications.budget.state.ny.us/budgetFP/2010-11FinancialPlanReport.pdf.

[2] Chief Judge Jonathan Lippman's 2010 State of the Judiciary Report, p. 17, available at http://www.courts.state.ny.us/admin/stateofjudiciary/soj2010.pdf.

(2010). In doing so, the Court specifically recognized that the Separation of Powers Doctrine "is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Id.* at 260-61 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (emphasis in original). Consistent with the structural safeguards of the tripartite state government, the Court declined to order immediate injunctive relief. Instead, the Court graciously deferred to the Legislature to remedy its own constitutional violation. This proved to be futile. This Court's opinion was premised on the belief that "[w]hen this Court articulates the constitutional standards governing state action, we presume that the State will act accordingly." 14 N.Y.3d at 261. The State has failed to even attempt to "act accordingly." Now, more than eight months since this Court recognized the constitutional violation perpetrated against the Judiciary, the Legislature remains unwilling to address any remedy for its violation. Without a remedy, the structural safeguards between the three branches of state government continue to decay. Now is the time for this honorable Court to stand up for the Judiciary and our Constitution. The defendants have failed to do so.

Immediately following the Court's February 23, 2010 opinion, the leadership of both the New York State Assembly and Senate issued statements

contravening the Court's directive for action. As New York State Assembly Speaker Sheldon Silver confrontationally stated:

> Today's decision by the Court of Appeals regarding judicial pay recognizes that the Legislature retains the constitutional and statutory power to determine judicial compensation. Further, the decision does not mandate any action by the Legislature at this time. I have said in the past and I continue to believe that judicial salaries in New York State should be increased. The Assembly will consider this matter when economic conditions improve.[3]

Similarly, in spite of the Court's express declaration for the Legislature to "act appropriately and expeditiously," Senate Majority Conference Leader John L. Sampson stated that "during the worst fiscal crisis in decades, it is difficult to justify pay raises for anyone in public service. Controlling spending among all sectors of government is not an easy decision, but it is the right decision at this time for the people of New York."[4] In the more than 265 days that have followed since the Court's opinion and these statements, the Legislature has wholly neglected any discussion of judicial compensation. At the same time, the legislative branch has drafted legislation to create a commission commemorating the 200th anniversary of the War of 1812,[5] debated legislation that would merge

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[3] Statement from Assembly Speaker Sheldon Silver Regarding Court of Appeals Decision on Judicial Pay, February 23, 2010, available at http://www.assembly.state.ny.us/Press/20100223/.

[4] Statement from Senate Majority Conference Leader John L. Sampson, February 23, 2010, available at http://www.nysenate.gov/press-release/statement-senate-majority-conference-leader-john-l-sampson-9.

[5] *See* A. 10027, 233rd Sess. (N.Y. 2010).

the State's real property services office into the State's department of taxation and finance,[6] and discussed the merits of whether to allow a school district to print its website on the side of school buses.[7] At no point has the legislative branch even addressed judicial compensation.

The constitutional violation persists without remedy in this case. In another case, however, the State helpfully has conceded that the Court has the power to remedy an enduring constitutional violation. In defending against the issuance of a preliminary injunction enjoining the State from imposing a pay freeze against employees of the New York State Public Employees Federation, the New York Attorney General asserted, "This Court may not order the appropriation of state funds without a final judgment holding that a constitutional violation has occurred." Defendant's Memorandum of Law in Opposition to Motion for Preliminary Injunction at 41, *Brynien v. Paterson*, No. 1:10-CV-00544 (LEK)(DRH) (N.D.N.Y. May 19, 2010), 2010 WL 3350481.[8] By the State's own admission, this Court may order the remedy of the legislative branch's constitutional violation in the present case because a final judgment of a

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[6] *See* S. 8080, 233rd Sess. (N.Y. 2010).

[7] *See* S. 6826, 233rd Sess. (N.Y. 2010).

[8] The Court may take judicial notice of the record in another court proceeding. *See MJD Constr., Inc. v. Woodstock Lawn & Home Maint.*, 293 A.D.2d 516, 517 (2d Dep't 2002) (recognizing ability of court to take judicial notice of the record and judgment in a related bankruptcy proceeding); *see also Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992) (court may take judicial notice of the existence of documents filed in another court proceeding).

constitutional violation has conclusively been established. In short, the State has conceded that, by virtue of this Court's February 23, 2010 opinion, the Court may exercise its remedial powers and order the State to implement the appropriate relief. Indeed, this position is consistent with prior case law, where New York courts have awarded back pay as monetary damages for constitutional violations involving judicial compensation. *See Nicolai v. Crosson*, 214 A.D.2d 714, 715 (2d Dep't 1995) (affirming award of back pay as monetary damages for unconstitutional disparity in judicial compensation in violation of judges' right to equal protection); *see also Deutsch v. Crosson*, 171 A.D.2d 837, 838-39 (2d Dep't 1991) (same); *Dickinson v. Crosson*, 219 A.D.2d 50, 54-55 (3d Dep't 1996) (same).

Simply put, the Legislature's response to the Court's opinion perpetuates the very practice that this Court recognized as violative of the New York State Constitution. With every passing day, the Legislature continues to allow the erosion of the "structural safeguard" of the Separation of Powers Doctrine. By granting Plaintiffs' motion for reargument and to amend the opinion and judgment to provide for specific monetary relief, this Court can restore the balance between the three co-equal branches of the State government and reestablish the structural safeguards required by the New York State Constitution. As this honorable Court concluded in its February 23 opinion earlier this year, "It [the Legislature] should

keep in mind, however, that whether the Legislature has met its constitutional obligations [regarding judicial compensation] . . . is within the province of this Court." 14 N.Y.3d at 263. Now is the time.

II. THE CURRENT BUDGET CRISIS DOES NOT EXCUSE THE STATE'S FAILURE TO ACT IN ACCORDANCE WITH THIS COURT'S OPINION

The State's current budgetary difficulty likewise does not excuse its violation of the New York State Constitution. As noted by Chief Judge Lippman, Defendants' unconstitutional treatment of the judicial branch "simply cannot be ignored if the Judiciary is to remain a strong, independent and co-equal branch of government. Raising judicial salaries to the federal level . . . would represent but 3/100ths of one percent of the State budget – surely not in any way impacting the State's overall fiscal situation."[9] The State cannot evade the Court of Appeals' requirement for an "appropriate and expeditious" response to its Opinion in this case, particularly in view of the unfortunate fact that the Judges and Justices of this State have already endured an 11 year pay freeze. For those 11 years, the State has had the use of funds that rightfully belong to Plaintiffs.

As a matter of law, economic hardship neither supersedes nor excuses a failure to remedy a constitutional violation. In 1933, during the darkest hours of the Great Depression, the United States Supreme Court held in *O'Donoghue v.*

[9] Chief Judge Jonathan Lippman's 2010 State of the Judiciary Report, p. 16, available at http://www.courts.state.ny.us/admin/stateofjudiciary/soj2010.pdf.

United States that the United States Congress could not reduce the compensation of federal judges. 289 U.S. 516, 530-32 (1933). Moreover, New York courts have consistently held as a matter of law that economic hardship is never an excuse for a governmental entity to unilaterally abrogate agreements. *See Pettinelli Elec. Co., Inc. v. Bd. of Educ. of the City of N.Y.*, 56 A.D.2d 520, 521, 391 N.Y.S.2d 118, 119 (1st Dep't 1977) (holding that financial emergency existing in the City of New York did not excuse the Board of Education from unilaterally terminating a contract); *see also Piro v. Bowen*, 76 A.D.2d 392, 399, 430 N.Y.S.2d 847, 852 (2d Dep't 1980) (holding that city's financial difficulties did not excuse city from liability in damages for breaching collective bargaining agreement).

More recently, in *Brynien v. Paterson*, the United States District Court for the Northern District of New York enjoined the State from implementing appropriation provisions that would result in a pay freeze for members of a public employees union, finding the State's assertion of a fiscal crisis legally deficient.[10] As noted by the court in *Brynien*, "That the State has made choices about funding and that a fiscal crisis remains today surely cannot, without much more, be sufficient justification for a drastic impairment of contracts to which the State is a party." No. 1:10-CV-00544 (LEK)(DRH), 2010 WL 2178749, at *10 (N.D.N.Y.

[10] State employee unions refused to accept a one-time compensation freeze which would have prevented a 4% increase. Judges and Justices have, up to now, been forced to endure an 11 year pay freeze, amounting to a pay cut of over 30%.

May 28, 2010). The Judiciary, no less than the unions, is entitled to fair treatment.[11] *See Condell v. Bress*, 983 F.2d 415, 420 (2d Cir. 1993) ("It cannot be said that a lag payroll for only judicial employees was *essential* in order to finance the expansion of the court system. The state could have shifted the seven million dollars from another governmental program, or it could have raised taxes.") (emphasis in original); *see also Haley v. Pataki*, 883 F. Supp. 816, 822 (N.D.N.Y. 1995) ("the alleged failure of the Governor to make appropriations for the payment of wages to legislative workers . . . can hardly be classified as part of a statutory or regulatory scheme, and has, at best, attenuated and dubious connections to the public interest.").

Furthermore, the 2010-2011 State budget recently enacted by the defendants provides the State with reserves totaling approximately $1.2 billion to furnish the State's General Fund.[12] Thus, the State's budget plainly belies any argument that the defendants cannot afford to act in accordance with this Court's opinion, as the budget expressly provides the funds through which the defendants may remedy their constitutional violation.

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[11] Moreover, as stated by the U.S. Supreme Court in *O'Donoghue*, 289 U.S. 516 at 533, "[T]here rests upon every federal judge affected nothing less than a duty to withstand any attempt, . . . in contravention of the Constitution, to diminish this compensation . . . ."

[12] *See* New York State 2010-11 Enacted Budget Financial Plan, pp. 25 and 162, available at http://publications.budget.state.ny.us/budgetFP/2010-11FinancialPlanReport.pdf.

For over 11 years, the State has had the use of millions of dollars that could have – and should have – been devoted to pay increases for the Judiciary. Instead, for over 11 years, the State spent these funds on myriad appropriations, never once considering an increase in judicial compensation on the merits. The State cannot now, when faced with a final judgment of a constitutional violation, hide behind fiscal problems that it created and that it alone can resolve. Therefore, as a matter of law, the Court must find the State's fiscal crisis unavailing as an excuse for its non-compliance with the Court's opinion.

* * *

Plaintiffs shared in this Court's hope that its February 23, 2010 holding would "permit [the Legislature] to consider, in good faith, judicial salary increases on the merits." 14 N.Y.3d at 262. As the Court noted in its opinion, "[t]he Legislature might find the record compiled in the *Chief Judge* case to be helpful" in the Legislature's consideration of increases in judicial salary. 14 N.Y.3d at 262; *see* Brief for Plaintiffs-Appellants-Respondents in *Chief Judge v. Governor*, p. 18-21, Ex. A-G; *see also* Record on Appeal in *Chief Judge v. Governor*, R. 303, 306-12, 345-47, 554-61. Similarly, Plaintiffs believe that the State employee compensation data and the historical compensation record compiled in the *Larabee* case may serve as useful tools for the consideration of judicial compensation and "the financial hardship that results from stagnant compensation over the years." 14

N.Y.3d at 263; *see* Brief for Plaintiffs-Respondents-Cross-Appellants, pp. 16-26, 83-90, Ex. 1-3; *see also* Record on Appeal in *Larabee v. Governor*, R. 372-84, 579-91. Because Plaintiffs' compensation has been frozen for so many years at such cost, however, Plaintiffs respectfully request reargument of this appeal with regard to the Court's determination of monetary damages for "the lack of a cost-of-living increase for more than 11 years." 14 N.Y.3d at 262. To be clear, Plaintiffs are not asking this Court to order the Legislature to increase judicial compensation, but to order the State, like any other liable defendant, to pay compensatory damages for the harm caused to Plaintiffs by 11 years of the defendants' constitutional violation. A constitutional violation, absent any remedy, undermines the very fabric of the Constitution itself.

Alternatively, if the Court does not grant Plaintiffs' motion for reargument, Plaintiffs respectfully request that the Court remit this matter to the Supreme Court, New York County for a hearing on the assessment of damages for Defendants' 11 years of constitutional violation. Citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court's opinion recognized that the Legislature "should keep in mind, however, that whether the Legislature has met its constitutional obligations in that regard is within the province of this Court." 14 N.Y.3d at 263. The tripartite system of state government has been unconstitutionally imbalanced, and it is the province of the Judiciary to restore the

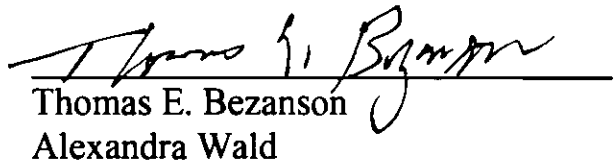
structural safeguard of the Separation of Powers to its rightful place within the New York State government.

CONCLUSION

For the reasons stated herein, Plaintiffs-Respondents-Cross-Appellants respectfully request that the Court grant Plaintiffs' motion for reargument pursuant to 22 N.Y.C.R.R. § 500.24 and to amend the Court's opinion and judgment by ordering appropriate monetary relief. Alternatively, Plaintiffs respectfully request that this Court remit this matter to the Supreme Court, New York County for a hearing regarding damages resulting from Defendants' failure to comply with its constitutional obligations as articulated by the Court.

Dated: November 16, 2010
New York, New York

COHEN & GRESSER LLP



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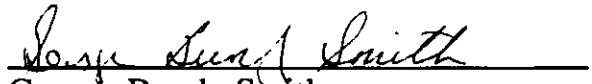

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To be Argued by:
RICHARD H. DOLAN
TIME REQUESTED: 30 MINUTES

Court of Appeals

STATE OF NEW YORK

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

Respondents-Appellants,

- against -

GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

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

Appellants-Respondents.

BRIEF FOR DEFENDANT GOVERNOR OF THE STATE OF NEW YORK AND APPELLANT-RESPONDENT STATE OF NEW YORK

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Dated: October 30, 2009

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Defendants-Appellants-Cross-Respondents.

New York County
Index No. 112301/2007

BRIEF FOR DEFENDANT-APPELLANT THE STATE OF NEW YORK

Defendant-Appellant the State Of New York submits this brief in support of its appeal from the order of the Appellate Division, First Department (Luis A. Gonzalez, P.J., Peter Tom, Eugene Nardelli, Karla Moskowitz, Diane T. Renwick, JJ.), entered on June 2, 2009, to the extent it affirmed the order of the Supreme Court, New York County (Edward H.

Lehner, J.S.C.), granting summary judgment to Plaintiffs-Respondents on their second cause of action.

This brief is also submitted on behalf of the Governor of the State of New York, the only Defendant dismissed from the action below, to the extent that the Governor's constitutional powers are implicated by the First Department's rulings. The Governor is a Respondent on the cross-appeal by Plaintiffs from the same order of the Appellate Division.

PRELIMINARY STATEMENT

This case is *not* about whether, as a matter of public policy, New York State judges should receive a pay increase. The only issue is whether, under the New York Constitution, a *court* may order the Legislature to pass, and the Governor to sign, legislation increasing the compensation currently paid to the State's judges, where the Constitution quite plainly vests *exclusive* authority to increase judicial salaries in the political branches.

The decision below, *Larabee v. Governor*, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009), held that the Legislature violated the New York Constitution by engaging in "linkage," which the Appellate Division defined as the practice "whereby the political branches of New York government combined the consideration of legislation for judicial pay raises with unrelated matters." *Id.*, 65 A.D.3d at 80, 880 N.Y.S.2d at 261. The

court below concluded that because both New York's Constitution and statutory law are "silent" on the practice, "linkage . . . does not benefit from any particular legal imprimatur." *Id.*, 65 A.D.3d at 92, 880 N.Y.S.2d at 270.

This was error. "Linkage" has in fact enjoyed "legal imprimatur" since the founding of this State. It has simply been known by another name: the legislative process. A pejorative label does not change the fact that the Legislature and Governor did here what they have always done—engage in the traditional give-and-take of the legislative process, in an effort (not always successful) to find a political compromise acceptable to the Senate, the Assembly and the Governor. In faulting the political branches for "linkage," the Appellate Division lost sight of the fact that the Constitution framed a system of government under which the Legislature and the Governor are inevitably—and quite properly—active participants in a process intended to resolve conflicting priorities and agendas through political compromise. Nothing in our constitutional framework permits the Judicial Branch to dictate the content of any bill, require that any separate bill be introduced or mandate legislative action to amend any particular law (including the Judiciary Law).

Yet the Appellate Division concluded that such "political jousting erode[d] the institutional barricades which protect the judicial branch" and

resulted in a violation of the separation of powers doctrine, notwithstanding the facts—as that court itself acknowledged—that (a) Plaintiffs enjoyed no substantive constitutional right to a judicial pay increase under Article VI, § 25(a) of the New York Constitution, and thus there was no constitutional requirement that the Legislature or the Governor agree to one; and (b) there had been no showing of a "present impairment" in the Judiciary's operations. *Id.*, 65 A.D.3d at 85-87, 97-99, 880 N.Y.S.2d at 265-66, 274-75.

But even putting aside the lower court's creation of a constitutional violation based on a practice that had never before even been *identified* in constitutional jurisprudence as a limitation on legislative prerogative, "linkage" does not fit the facts here. The record establishes decisively that, far from engaging in "linkage," the Senate adopted two separate bills in 2007 that, had they become law, would have raised judicial salaries to the levels requested by the Chief Judge. By adopting those bills, the Senate was not "jousting" at the expense of the Judiciary, and did not "link" the proposals to increase judicial compensation to anything else.

Indeed, the court below discussed the Senate bills, and even noted that "[o]ne Senate bill (S5313) also sought to untangle the ritual of linking judicial salary increases to legislative salary increases by the expedient of appointing a commission to recommend legislative compensation

adjustments on a routine basis." *Id.* 65 A.D.3d at 78, 880 N.Y.S.2d at 260. Later, the Senate passed a second bill, omitting the proposed commission. Even accepting *dubitante* the newly-minted constitutional doctrine of "linkage," it cannot sustain the relief granted below.

Moreover, since the "linkage" principle is focused on process and not substance, any remedy for a violation of the "linkage" principle should have been similarly limited. Assuming *arguendo* that "linkage" is a valid constitutional constraint enforceable against the Legislature and the Governor, the lower courts' finding of a "linkage" violation should have resulted, at most, in a direction to the political branches to consider the proposal to increase judicial compensation without engaging in "linkage." But that remedy is no longer possible, for at least three reasons.

First, the bills adopted by the Senate in 2007 lapsed when that session of the Legislature ended. An order directing the Assembly to consider the now-lapsed Senate bills without "linkage" is thus pointless, and even if there were some point to it, the Assembly has no power to adopt a law on its own. Second, there is a new Senate majority, and nothing requires the new majority to re-enact those lapsed bills. Third, there is a new Governor, and in all events the Governor was dismissed as a party. Even if the Assembly

could take up the now-lapsed Senate bills, the dismissal of the Governor leaves a court with no means to grant effective relief.

The fundamental reason why no effective relief can be granted is that the Constitution itself requires an "appropriation by law" before State judges could be paid a salary increase: "No money shall ever be paid our of the state treasury or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after passage of such appropriation act ...." *See* Article VII, § 7. The process of arriving at an "appropriation by law" necessarily involves both Houses of the Legislature as well as the Governor, but the Governor has been dismissed and the Legislature plainly did not engage in "linkage."

As we show below, the "linkage" principle is fraught with many such contradictions and cannot be applied even in the context for which it was invented. Accordingly, this Court should reverse the Order appealed from insofar as it granted summary judgment to Plaintiffs on their second cause of action, and remand the matter with directions to enter judgment in favor of Defendants and against Plaintiffs dismissing the complaint.

QUESTIONS PRESENTED FOR REVIEW

1. Did Defendants violate the New York Constitution by "linking" consideration of legislative proposals to increase judicial compensation to

other subjects on their legislative agendas, when "linkage" is just a pejorative term for the normal give-and-take of the legislative process?

Answer below: Yes.

2. Did the "linkage" allegedly engaged in by Defendants violate the doctrine of separation of powers, even though the plaintiff-judges have no constitutional right to a pay increase or "adequate" pay, and there is no evidence of actual impairment of the Judiciary's operations?

Answer below: Yes.

3. Are the Defendants entitled to legislative immunity under the Speech or Debate Clause from claims related to their alleged practice of "linkage," which in fact is a core legislative function involving the budgeting of the State's limited resources?

Answer below: No.

STATEMENT OF THE CASE

A. The Four "Judicial Compensation" Cases

This appeal concerns one of four actions currently pending before the New York courts alleging that the Legislature, certain legislative leaders, the State, and the Governor have violated the New York Constitution by declining to adopt or approve a law increasing judicial salaries since 1999.

In *Maron v. Silver,* the Third Department rejected all of the petitioner-judges' constitutional claims and directed the dismissal of their Article 78 petition. *See Maron v. Silver*, 58 A.D.3d 102, 871 N.Y.S.2d 404 (3d Dep't 2008). In this case and in *Chief Judge v. Governor,* the First Department dismissed all of the plaintiff-judges' claims except for a separation of powers claim based on the "linkage" principle, as to which it found a constitutional violation. *See Larabee v. Governor*, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009); *Chief Judge v. Governor,* __A.D.3d __, 884 N.Y.S.2d 862 (1st Dep't 2009). All three of those cases are currently pending in this Court, on appeals from the orders by the Third Department and the First Department.

The last of these actions was commenced in December 2008, by Acting Justice Arlene Silverman. *Silverman v. Silver,* N.Y. Co. Index No. 117058/2008. The complaint makes essentially the same allegations as in *Maron, Larabee* and *Chief Judge,* and adds a claim with respect to the plaintiff's pension. That action has been assigned to Justice Lehner, but has been on hold pending the outcome of these appeals.

B. The Complaint

This action was filed in New York County on September 12, 2007. Plaintiffs are a Family Court judge, a County Court judge, a Civil Court

judge and a Criminal Court judge. The Complaint seeks declaratory relief and alleges, in substance, that Defendants violated the New York Constitution, and particularly its separation of powers component, by (i) failing to adopt a law raising judicial compensation to offset inflation since 1999; (ii) "impounding" a 2006 budget appropriation; and (iii) "linking" legislative consideration of proposals to increase judicial compensation with other, unrelated legislative concerns such as campaign finance reform.

Specifically, the Complaint alleges that Defendants "failed to approve salary increases for the judges and justices of the State of New York since 1998, and [have] improperly linked increases in judicial compensation to increases in legislative compensation." (R. 65-66). According to the Complaint, "[s]ince 1999, the cost of living in New York has increased 26%," which has effectively diminished judicial compensation during Plaintiffs' terms of office, in violation of Article VI, § 25(a) of the New York Constitution. (R. 68-69).

The Complaint further alleges that "the Governor and the State Legislature submitted appropriations bills in 2006 and 2007 which sought to increase judicial compensation," but never adopted or approved subsequent legislation increasing judicial compensation because of "political in-fighting between the Governor and State Legislature regarding proposed salary

increases for the Legislature, as well as other, unrelated, executive and legislative initiatives, such as campaign finance reform." (R. 75-76). The Complaint claims that Defendants' practice of "linking" proposals to increase judicial compensation to other subjects, such as increases in legislative compensation or campaign finance reform, violated the separation of powers doctrine and "undermined and attacked the independence of the Judiciary" by "subject[ing] determinations of judicial compensation to political influences and considerations that the framers of the Constitution sought to avoid." (R. 76-77).

Based on these allegations, Plaintiffs assert two causes of action. The first alleges, in substance, that Defendants violated Article VI, § 25(a) of the New York Constitution by not adopting or approving an increase in judicial salaries to offset the effects of inflation. (R. 79-81). The second cause of action alleges, in substance, that Defendants violated the separation of powers doctrine implicit in the Constitution, by linking proposals to increase judicial compensation to other matters. (R. 82-83).

C. The Rulings Below

Before issue was joined, Defendants moved to dismiss the Complaint. (R. 88-135). By order entered on February 7, 2008, the Supreme Court (Edward H. Lehner, J.S.C.) dismissed the complaint in its entirety against

the Governor and dismissed the Complaint against the other Defendants except for the "separation of powers" claim alleging "linkage." *See Larabee v. Spitzer*, 19 Misc. 3d 226, 850 N.Y.S.2d 885 (Sup. Ct. N.Y. Co. 2008). Defendants appealed and Plaintiffs cross-appealed to the First Department from that order. (R. 1-30).

Defendants answered the Complaint on February 26, 2008, (R. 275-279). On April 3, 2008, Plaintiffs moved for an order granting summary judgment on the "linkage" claim. (R. 264-65). By order entered on June 11, 2008, Justice Lehner granted Plaintiffs' motion, finding that Defendants' practice of "linking" proposals to increase judicial compensation to consideration of other matters violated the New York Constitution. *See Larabee v. Governor,* 20 Misc. 3d 866, 860 N.Y.S.2d 886 (Sup. Ct. N.Y. Co. 2008). Justice Lehner "directed that defendants, within 90 days of the date hereof, remedy such abuse by proceeding in good faith to adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998, with an appropriate provision for retroactivity. Should defendants fail to remedy such unconstitutionality within the 90-day period, an application may be made to the court for consideration of other remedies." *Id.,* 20 Misc. 3d at

878, 860 N.Y.S.2d at 894. Defendants appealed and Plaintiffs cross-appealed from that order. (R. 31-41).

The First Department consolidated the appeals, and by order entered on June 2, 2009, that Court affirmed the Supreme Court's two orders in all respects. *See Larabee v. Governor*, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009). First, the Appellate Division held that the claim against the Governor was properly dismissed, finding that the Governor's "conflict with the Legislature was in connection with legislative matters; his refusal to approve a legislative pay increase, too, was related to those matters in dispute." *Id.*, 65 A.D. 3d at 84, 880 N.Y.S.2d at 264.

Second, like the Third Department in *Maron*, the First Department held that the Legislature's inaction did not "diminish" judicial compensation within the meaning of Article VI, § 25(a) of the New York Constitution, and therefore did not violate the Constitution. *Id.*, 65 A.D.3d at 85-87, 880 N.Y.S.2d at 265-66.

Third, the First Department ruled that the Speech or Debate Clause did not afford Defendants absolute immunity from the claims against them. It reasoned that "[n]ot all acts by legislators acting in an official capacity are functionally legislative in nature," *id.*, 65 A.D.3d at 90, 880 N.Y.S.2d at 268, and held that because of the "overtly political manner in which linkage was

employed" on the facts before it, legislative immunity did not apply. *Id.*, 65 A.D.3d at 91, 880 N.Y.S.2d at 269. Key to this holding was the Court's perception that there had been a "political back and forth between the Governor and the respective Houses of the Legislature [that] manifested itself in discussions and positioning that gravitated beyond the boundaries of the Legislature's internal communications, debates, committee work, investigations and the like which rest within the legislative sphere . . . ." *Id.*, 65 A.D.3d at 92-93, 880 N.Y.S.2d at 270.

Finally, the First Department affirmed the Supreme Court's order granting summary judgment on Plaintiffs' separation of powers claim alleging "linkage." The Appellate Division held that the Legislature's conflict with the Governor over other matters had excessively politicized the process by which the Judiciary was compensated, resulting in a violation of the separation of powers doctrine. *Id.*, 65 A.D.3d at 98-99, 880 N.Y.S.2d at 275.

On July 2, 2009, all Defendants (other than the Governor, who was not aggrieved) appealed to this Court from the First Department's order. On July 10, 2009, Plaintiffs cross-appealed from the portion of the First Department's order that had affirmed the dismissal of their other claims.

D. Constitutional Provisions Relating To Legislative Consideration Of Proposals To Increase Judicial Compensation

The Constitution expressly contemplates that the normal democratic process will be brought to bear on the Judiciary's requests for funding, including any request for an increase in judicial compensation. Article VII, § 1 of the Constitution requires the Governor to transmit to the Legislature, without change, the "[i]temized estimates of the financial needs" of the "judiciary, approved by the court of appeals and certified by the chief judge ...." But while the Governor may not change the Judiciary's "[i]temized estimates of [its] financial needs," the same constitutional provision authorizes the Governor to transmit them "with such recommendations as he may deem proper," whereupon the "itemized estimates of the financial needs of the judiciary ... shall forthwith be transmitted to the appropriate committees of the legislature." *See* Article VII, § 1.

The Constitution contains other provisions relating to the operations of each House of the Legislature, but none of them provides any role for the Judiciary to direct how or in what manner the Legislature should consider proposed bills. Article III, § 9, for example, provides that "[e]ach house shall determine the rules of its own procedures," while Article III, § 14 stipulates that "[n]o bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least

three calendar legislative days prior to its final passage" unless the Governor certifies the need for an immediate vote; "nor shall any bill be passed or become law except by the assent of a majority of the members elected to each branch of the legislature."

Article VII, § 7 makes it clear that an "appropriation by law" is required before any moneys may be paid out of the State treasury to fund a pay increase for State officers (or any other purpose).

Nothing in that constitutional scheme provides any role for the Judiciary to force itself into the legislative process, let alone to dictate to "the appropriate committees of the legislature" what they are allowed to consider when taking up the Judiciary's budgetary requests, including any request for a judicial pay raise.

E. Constitutional Provisions Relating To Judicial Compensation

Since the adoption of New York's First Constitution in 1777, the Framers have had the importance of judicial independence, and the resulting problem of assuring adequate judicial compensation, firmly in mind. The First Constitution quoted in full the complaint in the Declaration of Independence that King George III "has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." *See* Justin S. Teff, "The Judges v. The State: Obtaining Adequate

Judicial Compensation and New York's Current Constitutional Crisis," 72 Albany L. Rev. 191, 202-3 (2009) (hereinafter cited as "Teff"). Yet it was not until the adoption of the Third Constitution in 1846 that the Framers addressed that subject directly. *See* Teff, 72 Albany L. Rev. at 202-3, 211-18 (detailing the constitutional history through the adoption of the Third Constitution).

Beginning in 1846, the drafters of the New York Constitution have repeatedly wrestled with its judicial compensation provisions to achieve a balance between judicial independence and fair compensation for judges. From 1846 to 1925, those provisions of the Constitution were amended on several occasions, during which time the Constitution alternated among provisions prohibiting any increase or decrease in judicial compensation, provisions permitting the Legislature to increase but not decrease judicial compensation, and provisions fixing judicial compensation in the Constitution itself. *See Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7. While that history shows that the drafters were focused intensively on the issue of judicial compensation, there was never even a suggestion that judges should be permitted to fix their own salaries, either directly or through the kind of lawsuit at bar.

Until 1846, the New York Constitution did not contain any provisions specifically addressing judicial compensation. *See Gresser v. O'Brien*, 146 Misc. 909, 916, 263 N.Y.S. 68, 75 (Sup. Ct. N.Y. Co. 1933), *aff'd*, 263 N.Y. 622, 189 N.E. 727 (1934) (analyzing the constitutional history of judicial compensation in New York through 1926); *Maron*, 58 A.D.3d at 113-14, 871 N.Y.S.2d at 7-8 (same). In 1846, when New York first adopted a constitutional judicial compensation clause, Article VI, § 7 of the Third Constitution prohibited both increases and decreases in judicial compensation:

> The judges of the court of appeals and justices of the supreme court shall severally receive, at stated times, for their services, a compensation to be established by law, which shall not be increased or diminished during their continuance in office.

The Constitution of 1846 also created the Court of Appeals, and provided that the judges of the Court of Appeals and justices of the Supreme Court would be elected for terms of eight years. *See* Constitution of 1846, Article VI, §§ 2 and 4; *see generally*, *Gresser*, 146 Misc. at 916, 263 N.Y.S. at 75; *Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7.

In 1869, the Judiciary Article in the Constitution was substantially revised and amended. The terms of judges of the Court of Appeals and justices of the Supreme Court were extended to fourteen years. *See Gresser*,

146 Misc. at 917, 263 N.Y.S. at 76; *Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7. Article VI, § 14 was amended to eliminate the prohibition on increasing a judge's compensation during his term of office:

> [The] judges and justices hereinbefore mentioned shall receive for their services a compensation to be established by law, which shall not be diminished during their official terms....

In 1894, the Fourth Constitution was adopted. The 1894 Constitution once again prohibited both increases and decreases in judicial compensation, providing in Article VI, § 12:

> The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided in section five[1] of this article.

In addition, Article X, § 9 provided that, for "State officers named in the constitution"—a category including all constitutional judges—their compensation "shall not be increased or decreased during the term of office for which he shall have been elected or appointed."

A 1909 constitutional amendment established fixed salaries for judges. Specifically, Article VI, § 12 was amended to provide for a fixed

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[1] Section 5 of Article VI abolished the Superior Court of the City of New York and certain other city courts, and provided that the judges of those courts would become Supreme Court Justices and be paid as such by the counties in which those judges had been elected or appointed.

salary of $10,000 per annum for Supreme Court Justices, plus the additional compensation theretofore allowed to those justices by local authorities.[2] *See Gresser*, 146 Misc. at 918, 263 N.Y.S. at 77; *Maron*, 58 A.D.3d at 113, 871 N.Y.S.2d at 7.

In 1921, a constitutional amendment that would have raised the salaries of Court of Appeals judges to $17,500 per annum was proposed but rejected by the voters. *Id.* In 1925, Article VI was amended again. The provisions that had theretofore fixed judicial salaries in the Constitution were repealed, and Article VI, § 19 was adopted: "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 ...." *See Catanise v. Town of Fayette,* 148 A.D.2d 210, 543 N.Y.S.2d 825 (4th Dep't 1989).

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[2] The 1909 amendments also struck from Article VI, § 12 the express constitutional ban on increasing or decreasing judicial salaries, but did not make any change to Article X, § 9. Despite the change to Article VI, § 12, as the *Gresser* court explained, "the old rule prohibiting increases and decreases was preserved. Decrease was barred by virtue of the specific salary granted by the Constitution; increase was prohibited by dint of the continued force of article 10, § 9, which prevented an increase to an officer whose salary was fixed by the Constitution." *Id.*, 146 Misc. at 918, 263 N.Y.S. at 77.

In providing that judicial compensation once again would be "established by law" (subject to the non-diminishment proviso), the 1925 constitutional amendment followed the recommendations of the 1921 Constitutional Convention, which had reported:

> The compensation of judges should, in the judgment of the present convention, be left entirely to the Legislature, which after all is the body always directly in touch with and responsible to the people.

Judiciary Constitutional Convention of 1921, Report to Legislature, Jan. 4, 1922, Leg. Doc. 1922, No. 37, § 19, p. 29; *see also Maron*, 58 A.D.3d at 114, 871 N.Y.S.2d at 8.

In 1961, Article VI of the Constitution was substantially revised, and the provisions relating to judicial compensation assumed their present form. Article VI, § 25(a) provides:

> The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of a court for the city of New York established pursuant to section fifteen of this article, a judge of the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office of which he or she was elected or appointed.

F. The History Of Judicial Salary Increases

The salaries paid to judges in New York have often remained unchanged for periods much longer than the 10-year period to which Appellants would attach constitutional significance. For example, Chapter 76 of the Laws of 1887 provided that the salaries of the Associate Judges and the Chief Judge of the Court of Appeals would be $10,000 and $10,500, respectively. Those salaries were not increased for 39 years,[3] when Chapter 94 of the Laws of 1926 increased them to $22,000 and $22,500, respectively. Those salaries remained set at $22,000 and $22,500 for 21 years, from 1926 to 1947, when Chapter 462 of the Laws of 1947 increased them to $25,000 and $25,500, respectively. *See Maron*, 58 A.D.3d at 114 n.6, 871 N.Y.S.2d at 8 n.6. As the example of Court of Appeals judges shows, a 10-year period without a salary increase is hardly unusual. *See id.*

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[3] For much of that period, moreover, some justices of the Supreme Court received substantially higher salaries than the $10,000 per annum paid to Court of Appeals judges. As the court noted in *Gresser*, the 1909 amendments fixed the salaries of Supreme Court Justices at "$10,000 per annum, plus the additional compensation theretofore allowed to such justices by local authorities." 146 Misc. at 918, 263 N.Y.S. at 77. In 1918 and again in 1921, constitutional amendments were proposed that would have set the compensation of Court of Appeals judges "at a sum not less than the highest compensation allowed by law to any other judicial officer in the state." *Id.* Those proposed amendments were defeated by the voters. *Id.* Despite the salary disparity during that period, there is no report that any Court of Appeals judge suffered from a bout of "demoralization" or otherwise was adversely affected in carrying out his judicial duties.

("[e]ven after the Compensation Clause was amended in 1925 to restore the Legislature's discretion, compensation often remained unchanged for long periods of time—21 years, from 1926 to 1947, and 18 years, from 1957 to 1975").

Until 1975, the State paid only part of the compensation received by Supreme Court justices, with additional compensation being paid to the justices sitting in the City of New York by the respective counties of the City. By N.Y. Laws 1975, ch. 150 and 152, the State assumed responsibility for the compensation of all Supreme Court justices. As of April 1, 1977, the State assumed responsibility for paying the full operational costs of all courts, including the compensation paid to judges, except for the Town and Village Justice Courts. *See* N.Y. Laws 1976, ch. 966 (enacting the Unified Court Budget Act, effective April 1, 1977).

In 1979, implementing Article VI, § 25(a), the Legislature adopted what is now Article 7-B of the Judiciary Law (N.Y. Laws 1979, ch. 55), providing for new and retroactive pay raises for judges and justices. After 1979, the Legislature increased judicial compensation five times: N.Y. Laws 1980, ch. 881; N.Y. Laws 1984, ch. 986; N.Y. Laws 1987, ch. 263, N.Y. Laws 1993, ch. 60; and N.Y. Laws 1998, ch. 630. These laws variously provided for retroactive increases and prospective increases,

giving raises that ranged from 5% to as much as 27%, with the 1998 law providing for a 21% increase for all judges. On only one occasion, in 1993, did the Legislature provide judicial raises while making no provision for raises for other State officers. Judiciary Law §§ 221 to 221-*i* set forth the base salaries currently paid to judges in New York.

Of course, in addition to these base salaries, all judges are entitled to participate in the State pension system, as well as various medical, health and other insurance programs. The State's judges also receive an annual allowance for expenses, which the Chief Judge has recently increased to $10,000. *See* Noeleen G. Walder, "Citing Lack of Raise, Lippman Boosts Judge Allowance To $10,000," *N.Y.L.J.*, p. 1 (Oct. 15, 2009).

G. Constitutional Provisions Relating To Compensation Of Other State Officers

This Constitution also provides for the compensation of other State officers, and those provisions, too, undercut the holding below. For example, Article III, § 6 provides that "[e]ach member of the legislature shall receive for his services a like annual salary, to be fixed by law. ... Neither the salary of any member nor any allowance so fixed may be increased or diminished during ... the term for which he shall have been elected ...." In contrast, Article IV, § 3, dealing with the Governor, provides: "He shall receive for his services an annual salary to be fixed by

joint resolution of the senate and assembly ..." Similarly, the Lieutenant Governor's "annual salary [shall] be fixed by joint resolution of the senate and assembly." *See* Article IV, § 6. For "State officers named in this constitution," Article XIII, § 7 provides that each shall "receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed ...."[4]

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[4] This Court has never decided whether Article XIII, § 7 applies to judges. Since 1926, the Governor and the Legislature have consistently acted as if it did not. In 1945, the Attorney General issued an opinion concluding that the prohibition on salary increases in Article XIII did not apply to judges because then-Article VI, § 19 said that judicial salaries shall "be established by law, provided only that such compensation shall not be diminished ...." The basis for the opinion was that "by the words 'provided only' [Article VI] clearly makes an exception to the general prohibition contained in Article XIII ...." *See* Opinion of the Attorney General, 1945 N.Y. Op. Att'y Gen 122 (Apr. 11, 1945). When Article VI was amended in 1961, however, the "provided only" limitation was repealed.

This Court's most recent decision construing Article XIII, § 7 held that the constitutional prohibition on salary increases during a State officer's term does not apply to district attorneys in light of the Home Rule provisions of the Constitution, under which they are more properly regarded as local officials. *See Kelley v. McGee,* 57 N.Y.2d 522, 457 N.Y.S.2d 434 (1982). It seems doubtful that *Kelley's* rationale could apply to judges in light of Article VI, § 1 creating the unified court system.

The lower courts have reached inconsistent results on whether Article XIII, § 7 applies to judicial compensation. In *Gresser,* for example, the Court noted that Article X, § 9 (the predecessor to today's Article XIII, § 7) "operated to prevent a change in either direction of the compensation of sitting judges of the Court of Appeals," but stated that as a result of the 1925

The structure—and especially the differences—among those provisions are instructive. First, in each instance, the Constitution makes an act of the Legislature a necessary prerequisite in fixing the salary of every

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amendments, "the limitation existing under article 10, § 9, prohibiting increases of salaries of state offices, no longer included within its scope judicial compensation." *Id.*, 146 Misc. at 917-19, 263 N.Y.S. at 77, 78. The court did not say whether it was relying on the "provided only" limitation (repealed in 1961), or something else. The issue had arisen during the debates in the 1921 Constitutional Convention, when the chairman of the Convention's Executive Committee urged that the then-proposed amendment should explicitly provide that judicial compensation "may be increased" in order to address the possibility that then-Article X, § 9 could be deemed to prohibit such increases during a judge's term. But that suggestion died when Judge Pound "observed that the question to be decided" was only whether to omit the provisions in Article VI setting judicial salaries in the Constitution. *See* Report of the Sub-Committee on Judicial Powers and Administration of the 1938 New York State Constitutional Convention, "Problems Relating to Judicial Administration and Organization," at p. 340.

The more recent decisions of the lower courts have applied inconsistent rationales in addressing the issue. *Compare Pfingst v. State*, 85 Misc. 2d 689, 693, 381 N.Y.S.2d 201, 204 (Ct. Cl. 1976) (Article XIII, § 7 applies to Supreme Court Justices to prevent diminishment of compensation), *aff'd*, 57 A.D.2d 163, 393 N.Y.S.2d 803 (3d Dep't 1977) *with Broome County v. Bates*, 197 Misc. 88, 91, 95 N.Y.S.2d 248, 251 (Sup. Ct. Albany Co. 1950) (increase not prohibited; while "Supreme Court Justices are state officers" they are not "specifically named in the Constitution as State officers"), *aff'd mem.*, 302 N.Y. 587, 96 N.E.2d 892 (1951). The 1961 revision of Article VI listed the judges covered by the Constitution, and makes it doubtful that the rationale of *Broome County* could still be applied. *See also Albert v. City of New York*, 250 A.D. 555, 555, 295 N.Y.S. 1005, 1006 (1st Dep't) (Register of Bronx County is "a state officer named in the Constitution" whose salary may not be reduced under former Article X, §9 (now Article XIII, §7)), *aff'd mem.* 275 N.Y. 484, 11 N.E.2d 308 (1937) (per curiam).

State officer. *See also* Article VII, § 7 (requiring an "appropriation by law" to expend money from the State treasury). Any increase in legislative salaries can be accomplished only by a duly enacted bill, which must be submitted to the Governor for approval or veto. In contrast, the salaries of the Governor and the Lieutenant Governor are fixed by joint resolution of the Senate and the Assembly, thus depriving the Governor and the Lieutenant Governor of any role in the consideration or approval of their own salaries. Second, as Article III, § 6 makes clear, no salary increase for legislators may be effective during the current term of office of the legislators voting for it. Similarly, Article XIII, § 7 prohibits any "State officer named in this constitution" from receiving a salary increase during the officer's term of office.

By adopting that structure, the Constitution reflects a policy of disallowing those empowered to increase the salaries of State officers from benefitting from their own actions, and a rejection of the notion that State officers other than legislators should have any role in increasing their own salaries. The Constitution also adopts a policy disfavoring salary increases during a State officer's term of office. Nothing in that constitutional structure is compatible with the holding below, effectively permitting judges

to usurp an exclusively legislative power by granting themselves an immediate pay raise.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews an order granting summary judgment *de novo*, but unlike the lower courts is not empowered to search the record or grant summary judgment to a non-moving party. *See Stern v. Bluestone,* 12 N.Y.3d 873, 876, 883 N.Y.S.2d 782 (2009); 4 N.Y. Jur. 2d, *Appellate Review* § 550 (2009).

II. THE PRESUMPTION OF CONSTITUTIONALITY

The gravamen of Plaintiffs' Complaint is that the compensation fixed by law for State-paid judges—which includes the salaries set forth in Article 7-B of the Judiciary Law—is constitutionally deficient. Plaintiffs seek, *inter alia,* an order effectively amending Judiciary Law §§ 221, 221-a, 221-b, 221-bb, 221-c, 221-d, 221-e, 221-f, 221-g, 221-h, and 221-*i*, by deleting the base salaries specified therein and substituting different base salary levels as directed by the court.

Like all legislative enactments, the statutory provisions establishing the levels of judicial compensation are entitled to a presumption of constitutionality:

> Legislative enactments carry an exceedingly strong presumption of constitutionality, and while this presumption is rebuttable, one undertaking that task carries a heavy burden of demonstrating unconstitutionality beyond a reasonable doubt.

Elmwood-Utica Houses, Inc. v. Buffalo Sewer Auth., 65 N.Y.2d 489, 495, 492 N.Y.S.2d 931, 933 (1985); *see also I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained").

Moreover, because Plaintiffs are seeking to strike down these statutes on their face, they must prove that there are *no circumstances* in which paying the levels of judicial compensation fixed by statute are constitutional. This Court has explained the high hurdle that Plaintiffs must overcome:

> In seeking facial nullification, plaintiffs bear the burden to demonstrate that "in any degree and in every conceivable application," the law suffers wholesale constitutional impairment (*McGowan v Burstein*, 71 N.Y.2d 729, 733, 530 N.Y.S.2d 64 [1988]).
>
> Statutes are quintessentially the product of the democratic lawmaking process. These threshold hurdles are, therefore, erected in the public interest to provide a prudent set of procedural safeguards for enactors and defenders of statutes. They are set in place doctrinally and precedentially because of a fundamental premise that "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the

> Legislature ..., the elective representatives of the people" (*Matter of Wolpoff v Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560 [1992]).

Cohen v. State, 92 N.Y.2d 1, 8, 698 N.Y.S.2d 574, 575 (1999).

III. "LINKAGE" IS A CORE LEGISLATIVE FUNCTION PROTECTED BY THE SPEECH OR DEBATE CLAUSE

Article III, Section 11 of the New York Constitution provides that, "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." The immunity provided by Section 11 extends to "any proceeding challenging lawful action taken [by a legislator] in his or her official capacity," *Rivera v. Espada,* 98 N.Y.2d 422, 428, 748 N.Y.S.2d 343, 346 (2002), and confers absolute immunity for all "legislative acts," including any acts "which are an integral part of the legislative process ... as well as the underlying motivations for these activities." *People v. Ohrenstein,* 77 N.Y.2d 38, 54, 563 N.Y.S.2d 744, 752 (1990).

The Speech or Debate Clause serves to "preserve the integrity of the Legislature by preventing other branches of government from interfering with legislators in the performance of their duties." *Id.* This Court has ruled that New York's Speech or Debate Clause was intended to provide "at least as much protection" as the comparable provision in the Federal Constitution. *Id.*, 77 N.Y.2d at 53, 564 N.Y.S.2d at 752. The United States Supreme

Court has interpreted the Federal Speech or Debate Clause broadly, holding that any acts by members of Congress within the performance of their legislative functions are beyond judicial scrutiny. *See Straniere v. Silver*, 218 A.D.2d 80, 83, 637 N.Y.S.2d 982 (3d Dep't), *aff'd*, 89 N.Y.2d 825, 653 N.Y.S.2d 270 (1996). The Clause shields legislators from both the consequences of litigation as well as the burden of defending themselves in court. *Id.*

A. The Speech Or Debate Clause Forecloses Inquiry Into Core Legislative Functions

The Speech or Debate Clause covers matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Thus, the Clause encompasses a wide range of conduct beyond purely legislative "speech" or "debate." *See Straniere*, 218 A.D.2d at 83, 637 N.Y.S.2d at 985 (clause protects "a range of activities, including voting, preparing committee reports and conducting committee hearings"); *Urbach v. Farrell*, 229 A.D.2d 275, 278, 656 N.Y.S.2d 448 (3d Dep't 1997) (clause protects from

judicial review the issuance of a subpoena "intended to gather information about a subject on which legislation was contemplated").

The conduct at issue here—the fact that the Legislature has not enacted legislation increasing the compensation of New York State-paid judges in ten years—is squarely within the scope of the "legislative functions" described in *Gravel*, *i.e.*, "the consideration and passage or rejection of proposed legislation."

The essence of the claim is that Defendants have never agreed upon legislation increasing judicial compensation since 1998. Such matters have always been held to be core legislative functions. *See Campaign for Fiscal Equity v. State*, 179 Misc. 2d 907, 911-12, 687 N.Y.S.2d 227, 230 (Sup. Ct. N.Y. Co.) ("It is difficult to imagine a more 'integral' legislative function than the formulation of budgetary legislation."), *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (1st Dep't 1999); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998) (mayor's budget proposal "bore all the hallmarks of traditional legislation" and was protected by the doctrine of legislative immunity because it "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents").

Because "linkage" necessarily turns on the reasons for legislative action (or inaction), the "linkage" principle requires courts to intrude impermissibly into matters committed to the Legislature. Thus, the "linkage" ruling is itself a clear violation of the Legislature's Speech or Debate Clause immunity.

B. Legislative Immunity Applies Without Regard To Defendants' Motives, Intent, Or Identity

"Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity"; therefore, the determinative factor is the nature of the acts in question, not the legislator's motive, intent, or identity. *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 82 (2d Cir. 2007) (internal quotations omitted).

Regarding motive and intent, the United States Supreme Court has recognized that the "privilege of absolute immunity would be of little value if legislators could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Bogan*, 523 U.S. at 54 (internal quotation omitted). Yet Plaintiffs allege, in substance, that the Legislature did not adopt a law increasing judicial compensation because the legislative leaders and the Governor improperly linked judicial compensation to supposedly unrelated issues.

Plaintiffs' allegations about "linkage" merely provide a possible motive for the fact that the Legislature and the Governor never agreed upon a law increasing judicial compensation. But under well-settled law, the Speech or Debate Clause forecloses any such inquiry into legislative motives. Thus, the motivation for Defendants' collective inaction on proposals to increase judicial pay is simply not a subject that may be examined in a judicial forum. *See Campaign for Fiscal Equity, Inc. v. State*, 271 A.D.2d 379, 379, 707 N.Y.S.2d 94, 95 (1st Dep't 2000) (Speech or Debate Clause precludes evidence of legislative motive).

Finally, there is no question that decisions regarding which bills to pass—and which bills should only be passed if they contain certain additional provisions, or if other bills are passed simultaneously—are part of the quintessential (and wholly proper) give-and-take of political compromise in a representative democracy. *See Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 748 ("The Legislature is the 'political' branch of government. All of its members are elected every two years and all legislation is the product of political activity both inside and outside the Legislature."). It was inappropriate for the lower courts to inject themselves into that process, or to seek to make determinations regarding which subjects the Legislature may consider when taking up appropriation bills impacting on the Judiciary.

Nor is there any doubt that the Clause's reference to "members" encompasses not only the individual members of the Legislature, but the Assembly and the Senate as institutions, which can act only through their members. *See Urban Justice Center v. Pataki*, 10 Misc. 3d 939, 950, 810 N.Y.S.2d 826, 836 (Sup. Ct. N.Y. Co. 2005), *aff'd*, 38 A.D.3d 20, 828 N.Y.S.2d 12 (1st Dep't 2006), *app. dism'd*, 8 N.Y.3d 958, 836 N.Y.S.2d 537 (2007); *Warden v. Pataki*, 35 F. Supp. 2d 354, 358 (S.D.N.Y.) (doctrine of absolute legislative immunity bars actions against legislators, governors, and legislatures), *aff'd mem. sub. nom., Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999); *see also Rowland*, 494 F.3d at 86 (Speech or Debate Clause has been recognized as "coterminous with the doctrine of absolute legislative immunity").

C. The Court Below Erred In Holding The Speech Or Debate Clause Inapplicable

The lower court's conclusion that the Speech or Debate Clause did not bar claims relating to Defendants' inaction on proposals to increase judicial pay was wrong for several reasons.

First, in concluding that legislative immunity was unavailable, the Appellate Division relied primarily on a semantic distinction, labeling as "political" acts more properly characterized as the normal give-and-take of the legislative process. *See* 65 A.D.3d at 91, 880 N.Y.S.2d at 269 ("Our

focus, thus, is on the overtly political manner in which linkage was employed."); *id.*, 65 A.D.3d at 92, 880 N.Y.S.2d at 270 (referencing the "political" back and forth between the Governor and the respective Houses of the Legislature).

The lower court also drew a distinction between matters of "policy" and merely "political" matters, concluding that "political" matters do not merit constitutional immunity under the Clause. *Id.*, 65 A.D.3d at 91-92, 880 N.Y.S.2d at 269-70. That distinction, too, collapses upon examination and ignores common sense as well as this Court's observation that "all legislation is the product of political activity both inside and outside the Legislature." *See Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 748. Indeed, even at the most basic level, the distinction ignores the fact that the words "policy" and "political" share a common root, reaching back to the golden age of Athens and the very birth of democracy. *See* Aristotle, *The Politics*, Book 1.

Rather than drawing ephemeral distinctions between the "policy" and "political" spheres of the Legislature's activities, the Speech or Debate Clause requires a court to limit its inquiry to whether the legislative action (or, here, inaction) concerned subject matters appropriately within the

legislative sphere. If so, the immunity granted to legislators by the Speech or Debate Clause applies.

Nor is there any doubt that, in making the difficult decisions involved in allocating the State's limited resources among many deserving uses, legislators are performing a core function of the Legislature. Whether it is called "linkage," "political," or a "legislative custom" (as it was at various points by the court below, *see* 65 A.D.3d at 92, 880 N.Y.S.2d at 270), the practice is in truth nothing more than representative democracy at work. No one suggested otherwise until these judicial pay cases were filed and the concept of "linkage" as a constitutional limitation on the consideration of proposed legislation by the political branches was invented.

Second, the Appellate Division properly applied legislative immunity in dismissing the Complaint against the Governor. After recognizing that the Governor, just like both Houses of the Legislature, was conditioning his support for a judicial pay increase on other policy items on his agenda—the sum of which supposedly resulted in a deadlock that caused the judicial pay increase to stall—the Appellate Division nevertheless disentangled the Governor from the fray: "His conflict with the Legislature was in connection with legislative matters; his refusal to approve a legislative pay increase, too, was related to those matters in dispute." *Id.*, 65 A.D.3d at 83,

880 N.Y.S.2d at 264. But this is a distinction without a difference: if the Governor was refusing to approve a legislative pay increase to achieve other objectives on his agenda (according to the lower court, the dispute concerned campaign finance reform, *see* 65 A.D.3d at 78, 880 N.Y.S.2d at 260), the Governor was engaging in the very "linkage" that the court below held to be unconstitutional. *Id.*, 65 A.D.3d at 97-98, 880 N.Y.S.2d at 274.

The fact that the Governor was refusing to approve a *legislative* pay increase, while this case concerns a *judicial* pay increase, is constitutionally irrelevant. Indeed, the factors cited by the Appellate Division that warrant a judicial pay increase apply equally to the other Branches—a pay increase for *all* of New York's constitutional and senior executive officers would be justified on the same grounds. For example, the court below noted that the "sheer complexity of much of New York's litigation, and its often crushing caseloads, require a fully operational, efficient and well-informed third branch of government." *Id.*, 65 A.D.3d at 77, 880 N.Y.S.2d at 259. We think it beyond dispute that the same "complexity" in addressing issues such as the State's current fiscal crisis requires "fully operational, efficient and well-informed" Legislative and Executive Branches as well. Yet no such State officer has received a pay raise since 1999.

The point is not that the "linkage" principle now permits a court to resolve the dispute between the Legislature and the Governor over legislative pay increases, or that a court may now consider a suit by an Executive officer alleging "linkage" and seeking a pay increase by judicial fiat. Rather, the inescapable conclusion is that the "linkage" principle is unwise and unworkable in any context.

The Appellate Division recognized that the "linkage" principle could become a veritable engine of destruction, opening up to judicial second-guessing any action (or inaction) by the Legislature and the Governor that might be branded as "political." For that reason, it struggled both to define the newly invented constitutional doctrine of "linkage," and at the same time to cabin it so that, in effect, the "linkage" principle would apply in the context of judicial compensation alone. But the "linkage" principle, if accepted as part of New York's constitutional structure, would admit of no such limitation—precisely because "all legislation is the product of political activity both inside and outside the Legislature." *See Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 748. In short, the legislative immunity the Appellate Division afforded the Governor should have been applied to all Defendants.

Third, the court below ruled that the historical concerns that gave rise to the Speech or Debate Clause were not applicable here because "no

member of the Legislature has been named a defendant in his or her individual capacity," and therefore no individual legislator "might be harmed by the prospect of civil or even criminal liability." *Larabee*, 65 A.D.3d at 91, 880 N.Y.S.2d at 269. But the prospect of personal liability was hardly the only concern that motivated the framers to adopt the Clause. As the Appellate Division itself observed, quoting *Tenney v. Brandhove*, 341 U.S. 367 (1972):

> The immunity has expanded in recognition of the importance of allowing a legislator to independently discharge his or her duties free from the chilling effects of lawsuits seeking damages or the compulsion of injunctions directing a legislator how to vote.

65 A.D.3d at 89, 880 N.Y.S.2d at 267. Individual, separately-elected legislators are, and must be, empowered to introduce bills without judicial instructions or compulsion. As well, they are certainly empowered to vote for or against any bills which are presented for their action in committee or on the floor.

While the Appellate Division correctly identified one of the Speech or Debate Clause's goals as protecting legislative actors from harassment caused by litigation, it concluded that this litigation did not impede that goal because Plaintiffs were challenging the constitutionality of legislative decisions. 65 A.D.3d at 89, 880 N.Y.S.2d at 268. That conclusion was

doubly wrong. Here there was no legislative "decision"—all agree that no bill was ever passed by the Legislature to increase judicial compensation. Second, the Appellate Division's test set the bar so low that it defeated the purpose of Speech or Debate Clause immunity. If all it took to defeat the absolute legislative immunity afforded by the Clause was an allegation that a legislative decision is unconstitutional, legislators would spend more time in witness boxes and deposition rooms than the Houses of the Legislature.

Though it has been the rule since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that courts may review legislative acts for constitutionality, the Judiciary has never permitted itself to delve into the interstices of why some bills get passed and others do not. The Speech or Debate Clause was designed to give legislative actors the freedom to vote their consciences; in so doing, they must answer to the voters, but are not required to explain their votes or motives in court. *See Powell v. McCormack*, 395 U.S. 486, 505 (1969) ("The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.").

IV. NEW YORK'S CONSTITUTION DOES NOT PROHIBIT "LINKAGE," AND THE PRACTICE DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

The Appellate Division's holding that a supposed "linkage" between judicial pay and other legislative initiatives created a violation of the separation of powers doctrine was fundamentally flawed. First, it finds no support in the Constitution's text or framework. Second, based on that holding, the lower court ended up usurping the separate powers reserved by the Constitution to the Legislature and the Governor, thereby defeating the objectives of the separation of powers doctrine. Third, this case does not involve the "the vested rights of a specifically protected class," which is the only situation in which this Court has ever approved judicial scrutiny of budgetary priorities. Fourth, the lower court's holding negated the "checks and balances" component of the separation of powers doctrine as it applies to the subject of judicial compensation. Finally, the lower court's holding is unworkable as a practical matter.

We review below each of these grounds for rejecting the Appellate Division's separation of powers analysis.

A. The Constitutional Framework

The Compensation Clause is the safeguard in the New York Constitution that protects the Judiciary from improper encroachments by co-

equal branches of government in the arena of judicial compensation. The Appellate Division recognized as much when it held:

> A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government. The Compensation Clause, providing a means by which judicial salaries may be adjusted for inflation but vesting the mechanics of doing so with the Legislature, recognizes the need to accept a limited risk of external influence in order to accommodate the need to raise judges' salaries when times change.

65 A.D.3d at 85, 880 N.Y.S.2d at 265 (internal quotations, citations, and alterations deleted); *see also id.*, 65 A.D.3d at 91, 880 N.Y.S.2d at 271 (referring to the Compensation Clause as the "constitutional linchpin for compensating plaintiffs"); *Maron*, 58 A.D.3d at 110, 871 N.Y.S.2d at 5 (clause "promotes independence by prohibiting diminution of judicial compensation").

In other words, the lower court acknowledged that the check-and-balance the drafters embedded in New York's Constitution vis-à-vis judicial compensation is the fact that decisions about when, and whether, to raise judicial salaries were left exclusively to the Legislature and the Governor. Yet when the Appellate Division proceeded to analyze the separation of powers question and found a constitutional violation there, it ignored its

prior discussion of the Compensation Clause. The Appellate Division never explained how it could find a constitutional violation where there was no substantive constitutional right to a judicial pay raise at all, much less any finding that the Judiciary's operations had actually been impaired.[5] *See* 65 A.D.3d at 98, 880 N.Y.S.2d at 274 ("The absence of evidence of undue influence, or of current systemic operational deficiencies, is not dispositive.").

Thus, the Appellate Division's holding that the practice of "linkage" violated some constitutional right of the Judiciary not to have decisions about the amount and timing of increases in its compensation tied to other legislative items finds no support, either in the record (as will be further discussed below) or in that court's own constitutional analysis.

The lower court's true complaint is not with "linkage," but with the New York Constitution. What the Appellate Division wanted is for the

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[5] In *Urban Justice Center v. Silver*, 2009 NY Slip Op 07506, __A.D.3d __, __ N.Y.S.2d __ (1st Dep't Oct. 22, 2009), the First Department recently held that the separation of powers doctrine required it to dismiss an action challenging certain rules and practices of the Senate and the Assembly which, according to the Court, raised a "substantial" claim of a violation of free speech rights. Because the issue involved the internal affairs of the Legislature, the Court found that it was without power "to direct the legislature how to do its work." *Id.*, slip op. at p. 47, (quoting *People ex rel. Hatch v. Reardon,* 184 N.Y. 431, 442, 77 N.E. 970, 973 (1906)). The same reasoning should have led that Court to apply the separation of powers doctrine in *Larabee* to dismiss the complaint on the same grounds.

Legislature and Governor to consider judicial compensation in a vacuum, apart from all of the other competing demands on the State's limited resources. *See* 65 A.D.3d at 97-98, 880 N.Y.S.2d at 274 ("Linkage . . . manifested an abandonment of any pretense to an objective consideration of judicial compensation unimpeded by extraneous political considerations."); *id.*, 65 A.D.3d at 95, 880 N.Y.S.2d at 272 ("The political branches of government must discharge the responsibility of considering, and acting upon, an enhancement in judicial salaries on its objective merit.").

But New York's Constitution does not provide any standard against which "objective" consideration can even be measured. Where, as here, the Legislature is allocating scarce resources among the State's many obligations and responsibilities, it is inevitable that the Legislature will weigh one potential use of public resource against all other demands on the State's budget. Certainly, nothing in the Constitution (or its text, history or structure, as discussed above) supports the notion that the Judiciary has some unique right to demand "objective" consideration of its compensation, but all other activities funded by the State are entitled only to some lesser consideration.

In short, if some imagined "objective" criterion were the law and courts were authorized to second-guess legislative decisions allocating the

State's limited resources based on it, then every constituency would demand "objective" consideration of its narrow self interests. As this Court has warned, that regime "might produce neither executive budgeting nor legislative budgeting but judicial budgeting—arguably the worst of the three." *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 97, 791 N.Y.S.2d 458, 470 (2004).

B. The Separation Of Powers Doctrine Required The Court Below To Avoid Intruding Into Legislative Prerogatives

"The doctrine of the separation of powers is grounded on the principle that each of the three branches of government, executive, legislative, and judicial, possesses distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches, and each is confined to its own functions and can neither encroach upon nor be made subordinate to those of another. Thus, each department should be free from interference, in the discharge of its own functions and peculiar duties, by either of the others." *Urban Justice Center v. Pataki*, 38 A.D.3d 20, 27, 828 N.Y.S.2d 12, 17-18 (1st Dep't 2006) (citations and internal quotation marks omitted), *app. dism'd*, 8 N.Y.3d 958, 836 N.Y.S.2d 537 (2007). "For those reasons," as the First Department had previously recognized in the *Urban Justice Center* case, "it is not the province of the courts to direct the Legislature how

to do its work." *Id.*, 38 A.D.3d at 27, 836 N.Y.S.2d at 5 (citations and internal quotation marks omitted).

As its name implies, the separation of powers doctrine requires each branch of State government to respect the separate powers granted to the other branches as well as the limitations on its own powers. Neither this doctrine nor any provision in the Constitution permits the Judiciary to usurp the budget-making or appropriations process reserved to the Governor and the Legislature. Yet the lower court's "linkage" holding turned this aspect of the separation of powers doctrine on its head, by injecting the Judiciary deeply into internal legislative affairs. *See Under 21 v. City of New York,* 65 N.Y.2d 344, 356, 492 N.Y.S.2d 522, 525 (1985) (separation of powers doctrine "require[s] that no one branch be allowed to arrogate unto itself powers residing entirely in another branch."); *Chadha*, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

The Appellate Division's "linkage" ruling not only violated the separation of powers doctrine, but if affirmed, would propel the Judiciary into political decision-making. The New York courts have long held that the political question doctrine precludes judicial inquiry into the internal affairs

of the Legislature. As the First Department summarized the applicable law and the governing authorities in *Urban Justice Center*, 38 A.D.3d at 27-28, 828 N.Y.S.2d at 18 (internal quotation marks and citations omitted):

> [T]aking cognizance of the separation of powers doctrine, the courts have refused to intrude upon such wholly internal affairs of the Legislature as the propriety of a roll call vote in the Senate, the permissible scope of duties performed by legislative employees, the accuracy of Senate Journal entries, and the propriety of the Assembly Speaker's refusal to permit the use of State funds to mail an Assemblyman's letter to his constituents deemed too political.

Yet "intruding" upon the "wholly internal affairs of the Legislature" is exactly what the lower court did. It created a new constitutional rule, pursuant to which it took upon itself the task of telling legislators what they were entitled to think about—and what they were forbidden to think about—when considering a bill to increase judicial compensation. Nothing warranted the Appellate Division's attempt to exercise that form of "thought control" over legislators in their conduct of the Legislature's duties.[6]

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[6] The fact that, in *Urban Justice Center v. Silver,* 2009 NY Slip Op 07506, __A.D.3d __, __ N.Y.S.2d __, the First Department recently applied the separation of powers doctrine in a far more orthodox manner to dismiss an action challenging certain rules and practices of the Senate and the Assembly, and without even citing its decision in *Larabee,* underscores the fact that *Larabee* invented an unprecedented constitutional rule for application in the judicial pay context only.

In our democracy it is normal and proper for the members of the political branches to have sharply different views about the priorities and policies that the State should adopt. How the members of the political branches resolve those policy differences, and how they reach compromises sufficient to command the support of the majorities required for the enactment of a bill setting the State's policies and priorities, is for the members of the Legislature and the Governor, rather than any court or outside observer, to decide.

Contrary to the Appellate Division's holding, nothing in the Constitution supports the notion that proposals to increase judicial compensation are exempt from the normal legislative process. While Article VII, § 1 of the Constitution requires the Governor to transmit to the Legislature, without change, the Judiciary's budgetary requests, the same provision authorizes the Governor to transmit them "with such recommendations as he may deem proper." Upon receipt of the Judiciary's proposed budget together with the Governor's recommendations, the Judiciary's budgetary requests, including any proposal for a judicial pay increase, "shall forthwith be transmitted to the appropriate committees of the legislature." *See* Article VII, § 1. Nothing in the Constitution requires "the appropriate committees of the legislature" to consider the Judiciary's budget

separate and apart from other matters bearing on the State's budget, or any other matter pending before the Legislature.

Nor is there anything in that constitutional scheme to support the Appellate Division's holding that the Governor and the Legislature are required to treat separately and "objectively" any request for a judicial pay increase that may be included in the Judiciary's budget request. By its express terms, of course, the Constitution contemplates that the Governor may recommend to the Legislature that it should reject the Judiciary's proposed budget. That constitutional scheme in Article VII plainly permits the political branches to accept, to reject or to modify the Judiciary's budgetary requests, including any request that judicial salary levels be increased, whether that judicial input occurs in the Chief Judge's certification of the Judiciary's financial needs or otherwise. Rather, the constitutional structure (as well as, again, its text and history, as discussed above) clearly subjects all aspects of the Judiciary's requested budget to legislative evaluation.

C. A Court May Grant Relief Requiring The Legislature To Change Budgetary Priorities Only To Enforce "The Vested Rights Of A Specifically Protected Class."

In *Campaign for Fiscal Equity v. State*, 8 N.Y.3d 14, 28, 828 N.Y.S.2d 235, 243 (2006), this Court declared unconstitutional the funding

formula pursuant to which New York City received State funds for public education. Yet this Court did so only because it first concluded that the case required the courts "to declare the vested rights of a specifically protected class of individuals":

> While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute . . . the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government . . . When we review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy.

Id. (internal quotations omitted) (citing *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 239-240, 485 N.Y.S.2d 719 (1984)).

This Court found both the "vested rights" and the definition of the "protected class" in the Education Article of the Constitution itself, guaranteeing schoolchildren the right to an education.

Even then, this Court refused to permit the lower courts to substitute their own funding formulas for those devised by the Legislature, and went out of its way to make clear that the courts cannot intrude into the exclusive domain of the political branches in appropriating State funds or establishing State budgets. As this Court explained, the Judiciary's role was only to

determine whether the funding formulas devised by the political branches were minimally reasonable when measured against the "vested rights" at stake, rather than devising some new formula that the reviewing court might deem optimal. *Id.,* 8 N.Y.3d at 29-31, 828 N.Y.S.2d at 243-45. This Court's refusal to order a specific constitutional remedy was grounded in the separation of powers doctrine:

> Our deference to the Legislature's education financing plans is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary to the controlling economic and social facts, but also by our abiding respect for the separation of powers upon which our system of government is based. We cannot intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.

Id. (internal quotation marks and citations omitted).

In this case, unlike *Campaign for Fiscal Equity*, there are no comparable provisions in the Constitution either (a) creating a "vested right," other than the right not to have a judge's salary diminished during the judge's term of office; or (b) constituting the Judiciary as a "protected class." The Appellate Division rejected the argument that Defendants had violated the "no diminishment" provision of Article VI, § 25(a), thus precluding any finding that the Plaintiff-judges here had any "vested right" to a salary increase. Nor could the more general concerns about the

separation of powers doctrine and the independence of the Judiciary cited by the lower court create the required "vested rights of a protected class," since those inter-branch, structural concerns are intended for the benefit of the public at large, not judges individually. *See United States v. Hatter,* 532 U.S. 557, 568-70 (2001) ("these guarantees of [judicial] compensation and life tenure exist, 'not to benefit the judges,' but 'as a limitation imposed in the public interest.'") (citation omitted).

D. The Lower Court's Ruling Negated The "Checks And Balances" Component Of The Separation Of Powers Doctrine

The Appellate Division's holding necessarily brushed aside the other basic component of the separation of powers doctrine—the "checks and balances" rationale for separate branches of government. *See Urban Justice Center*, 38 A.D.3d at 27, 828 N.Y.S.2d at 17; *see generally*, *Cohen,* 94 N.Y.2d at 12, 698 N.Y.S.2d at 578-79; *Chadha*, 462 U.S. at 957-58 ("To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."). In essence, by ordering the Legislature and the Governor "to adjust the compensation payable to members of the judiciary," the lower courts effectively made the Judiciary the final arbiter of its own compensation. But the text and structure of the Constitution's carefully crafted provisions

dealing with compensation for all State officers (detailed above, at pp. 13-26), is incompatible with the Appellate Division's conclusion that it had the power to order itself a pay raise. Instead, the Constitution plainly requires that judicial compensation must be "established by law," which in turn requires that an "appropriation by law" be adopted and approved by the Legislature and the Governor.

The lower court's order cannot be squared with that aspect of the separation of powers doctrine, because the exercise of the Legislature's power of the purse has historically been one of its most potent tools in providing "checks and balances" to the other branches of government. *See generally Prospect v. Cohalan,* 65 N.Y.2d 867, 874, 493 N.Y.S.2d 293, 297 (1985).

E. The Lower Court's "Linkage" Rule Is Unworkable In Practice

The practical implications of the lower court's novel "linkage" theory provide additional, powerful reasons to reject it. Budgetary decisions, by their very nature, always require the Governor and the Legislature to weigh the importance of one proposed use of public funds against all others: there is never enough money to fund all such uses, and thus compromises are inevitable. Each dollar allocated to an increase in judicial compensation is, by that fact alone, unavailable to be used for any other purpose. Thus, the

lower court's "linkage" analysis is not only misguided, but is also wholly unworkable as a practical matter.

The Executive Branch, no less than the Judiciary, is an independent part of State government. Whenever the Legislature tries to reach a consensus, either between the two Houses or with the Governor, about how to allocate the State's resources among all of the myriad demands on the State—public assistance; education; health care; highway construction; police, fire and other public safety agencies; local tax relief; public buildings; salaries and pensions; and many, many more—it is both inevitable and entirely proper for political considerations to be taken into account. *See Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 748 ("all legislation is the product of political activity both inside and outside the Legislature.").

If the lower court's "linkage" analysis were ever enshrined as a constitutional limitation on the Legislature's freedom to consider budgetary proposals, the Judiciary would find itself consumed in telling the Legislature what it was permitted to consider when making the inevitable compromises that the appropriations process necessarily entails. *See Pataki v. New York State Assembly*, 4 N.Y.3d at 97, 791 N.Y.S.2d at 470 ("to invite the Governor and the Legislature to resolve their disputes in the courtroom might produce neither executive budgeting nor legislative budgeting but

judicial budgeting – arguably the worst of the three"); *Saxton v. Carey*, 44 N.Y.2d 545, 550, 406 N.Y.S.2d 732, 735 (1978) ("the executive and legislative branches of government . . . are the sole participants in the negotiation and adoption of [a] budget" (internal quotation marks omitted)); *Campaign for Fiscal Equity v. State*, 29 A.D.3d 175, 185, 814 N.Y.S.2d 1, 8 (1st Dep't) ("without the ability or the authority to review the entire State budget, it is untenable that the judicial process . . . should intervene and reorder priorities, allocate the limited resources available, and in effect direct how the vast [City and State] enterprise[s] should conduct [their] affairs") (internal quotation marks omitted) (quoting *Jones v. Beame*, 45 N.Y.2d 402, 408 N.Y.S.2d 449 (1978)), *aff'd*, 8 N.Y.3d 14, 828 N.Y.S.2d 235 (2006).

These are far from merely theoretical concerns in this case. The Appellate Division explained its "linkage" holding in part as follows:

> [In 2007], the Chief Judge and others proposed a commission to regularly consider judicial salary levels as a means to, in effect, depoliticize the ritual of linkage. While both the executive and the legislative branches advocated for their respective agendas, the judicial branch was without a means to participate in the budgetary process. Compared with the other two branches of government, the Judiciary is at a disadvantage with respect to seeking public support for its interests, particularly as to pay raises.

Larabee, 65 A.D.3d at 79, 880 N.Y.S.2d at 260.

The reason that the Judiciary "was without a means to participate in the budgetary process" is, quite simply, that the Constitution assigns exclusive responsibility for the budgetary process to the *other* two Branches. Article VII of the Constitution could hardly be clearer. In short, far from being a rule derived from or consistent with the Constitution, the "linkage" principle amounts to an attack on the Constitution's allocation of responsibilities among the three Branches.

The Appellate Division criticized the political branches for allowing non-germane matters to derail the proposed judicial salary increase, but it never explained what subjects would be deemed sufficiently "germane" to pass its "linkage" test—for example, whether the "linkage" rule forbids the Legislature or the Governor from taking into account the State's financial condition whenever the political branches are considering a proposal to increase judicial compensation. Because the "linkage" principle has been announced as a constitutional rule, however, that Appellate Division's holding (if affirmed) will apply to all future situations whenever a proposal to increase judicial compensation is under consideration. Article VII of the Constitution does not mandate separate consideration of the Judiciary's requested budget, nor does it require the Legislature to consider the

Judiciary's budgetary requests in isolation from the needs of any other part of State government.

As a practical matter, the application of the "linkage" rule would require endless judicial intrusion into the internal affairs of the Legislature, along with minute scrutiny of the motives and reasons of the members of the Legislature and the Governor, to ensure that they restricted their consideration to "proper" budgetary matters rather than whatever other subjects they might be forbidden to consider under the lower court's "linkage" rule. Merely to imagine such a regime is reason enough to reject the "linkage" rule in its entirety.

V. THE SENATE SHOULD HAVE BEEN DISMISSED BECAUSE IT DID NOT ENGAGE IN "LINKAGE"

The Appellate Division's own findings show that the Senate did everything within its constitutional powers to give Plaintiffs the relief they seek, and did *not* engage in "linkage"—which nevertheless formed the basis for the First Department's affirmance of the order granting summary judgment. Remarkably, the lower court recognized that, far from engaging in purportedly-forbidden "linkage," the Senate had adopted bills that "sought to untangle the ritual of linking judicial salary increases to legislative salary increases by the expedient of appointing a commission to recommend

legislative compensation adjustments on a routine basis." *Larabee,* 65 A.D.3d at 78, 880 N.Y.S.2d at 260.

Other than passing those two bills that, had they become law, would have raised judicial salaries to the levels requested by the Chief Judge, there was nothing more that the Senate could have done to address the separation of powers concerns supposedly underlying the "linkage" principle. Thus, given the lower court's concession that the Senate had taken that action—twice—in 2007, its holding that the Senate acted unconstitutionally is itself a serious affront to the separation of powers doctrine. While the remainder of this brief amply demonstrates a myriad of reasons why the courts below should have granted summary judgment in favor of *all* Defendants, the order below granting relief against the Senate should be reversed on this ground alone, with instructions to dismiss the complaint against it.

VI. THE LOWER COURT ERRED IN AFFIRMING SUMMARY JUDGMENT ON THIS RECORD

On any motion pursuant to CPLR 3212, "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). The required "evidence," both from the proponent and (if the proponent of the motion carries its

burden, the opponent) must be in the form of "evidentiary proof in admissible form." *Id.* Those familiar standards have been applied in countless cases by this Court. *See, e.g., Smalls v. AJI Indus., Inc.,* 10 N.Y.3d 733, 853 N.Y.S.2d 526 (2008).

In granting summary judgment to Plaintiffs, the lower court swept away that requirement. Impermissible guesswork about the motives of legislative actors took the place of evidence, even though it would be wholly inadequate to sustain the grant of summary judgment even in an ordinary case. Here, the error in the lower court's reasoning is much worse. The court below stated that the "principle underlying [the separation of powers claim] is that judicial review becomes necessary when the functional independence of the Judiciary is threatened." 65 A.D.3d at 93, 880 N.Y.S.2d at 271. But, as the Appellate Division itself noted, there was no evidence that the Judiciary's independence was impaired and no such determination was made below. *Id.*, 65 A.D.3d at 85-87, 97-99, 880 N.Y.S.2d at 265-66, 274-75. Thus, it is clear that when the Appellate Division affirmed the trial court's order granting summary judgment, it did so based not on any "present impairment" in the Judiciary's operations (which the court acknowledged it did not rely upon), but rather a hypothetical one. *See* 65 A.D.3d at 98-99, 880 N.Y.S.2d at 274-75 ("The

absence of evidence of undue influence, or of current systemic operational deficiencies, is not dispositive.").

VII. THE RELIEF GRANTED DOES NOT CONFORM TO THE CONSTITUTIONAL INFIRMITY FOUND

Even accepting *arguendo* its "linkage" holding, the Appellate Division erred in affirming the Supreme Court's grant of remedial relief. In essence, the Supreme Court's "linkage" holding was a procedural ruling: the Legislature and the Governor had improperly linked the consideration of a proposal to increase judicial compensation to other, supposedly forbidden subjects. The only proper remedy for such a procedural violation (if there was one) would be to direct the Legislature and the Governor to consider the proposal to increase judicial compensation free from any such prohibited matters. That can no longer be done, since the two Senate bills passed in 2007 lapsed when that session of the Legislature ended; there is a new Senate majority and a new Governor; and the Governor has already been dismissed from the case. In any event, Article VII, § 7 of the New York Constitution provides that funds cannot be disbursed from the State treasury without "an appropriate by law" and must be disbursed within two years of the adoption of any such appropriation.

Because there was no sensible way to fashion procedural relief that would fit the "linkage" violation, the lower courts instead decided to

exercise the Legislature's exclusive "legislative power" themselves. Initially, Justice Lehner recognized that a court lacked power to order the Legislature and the Governor to adopt or approve a bill increasing judicial compensation: "While the complaint does seek the payment of money, at oral argument plaintiffs' counsel acknowledged that the court could not direct members of the legislature to vote for an increase. Accordingly, the relief sought by plaintiffs was, in essence, amended to only seek a declaration that the failure to increase judicial compensation is unconstitutional." *See Larabee v. Spitzer*, 19 Misc. 3d at 228, 850 N.Y.S.2d at 887.

Yet, when the same court decided the summary judgment motion, those limitations on judicial authority were brushed aside without comment. Justice Lehner "direct[ed] that defendants, within 90 days ... adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998, with an appropriate provision for retroactivity." *Larabee v. Governor,* 20 Misc. 3d at 878, 860 N.Y.S.2d at 894. At least one commentator has noted the "strang[e]" contradiction between the Supreme Court's two decisions on that point. *See* Teff, 72 Albany L. Rev. at 227.

Far from correcting the separation of powers violation created by the Supreme Court's usurpation of the legislative function, the Appellate Division affirmed the trial court's remedial order directing Defendants to "proceed in good faith to adjust judicial compensation to reflect the increase in the cost of living since 1998, with leave to apply for consideration of other remedies should the remaining defendants fail to act within 90 days." 65 A.D.3d at 100, 880 N.Y.S.2d at 275.

The lower court's remedial order collides directly with the express requirements of the Constitution—such as the provisions of Article III vesting the "legislative power" in the Senate and the Assembly; and those in Article VI, requiring that judicial compensation "shall be established by law," thus requiring an act of the Legislature; and those in Article VII, subjecting any budgetary requests by the Judiciary to democratic control by the Executive and Legislative branches in the ordinary course. For the same reasons, the lower courts' remedial order cannot be sustained under *Campaign for Fiscal Equity. Id.,* 8 N.Y.3d at 29-31, 828 N.Y.S.2d at 243-45. Whether or not the Legislature may "link" its consideration of proposals to increase judicial compensation to matters deemed extraneous by the Appellate Division, it is up to the Legislature to decide whether, when and by how much, to adjust judicial compensation.

In intruding into such exclusively legislative prerogatives, the lower courts plainly erred.

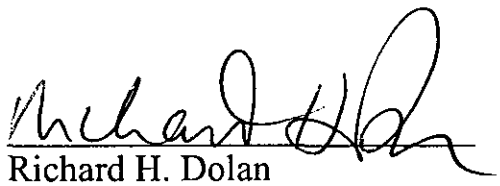
CONCLUSION

This Court should enter an order (i) reversing the Order appealed from insofar as it granted summary judgment to Plaintiffs on their second cause of action; (ii) granting Defendants' motion to dismiss the Complaint in its entirety; and (iii) directing the entry of judgment in favor of Defendants dismissing the Complaint, together with such other relief to Defendants as this Court deems just.

Dated: New York, New York
October 30, 2009

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: 

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To be Argued by:
RICHARD H. DOLAN
TIME REQUESTED: 30 MINUTES

Court of Appeals

STATE OF NEW YORK

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

Respondents-Appellants,

- against -

GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

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

Appellants-Respondents.

REPLY BRIEF OF THE STATE OF NEW YORK AS APPELLANT IN FURTHER SUPPORT OF ITS APPEAL, AND BRIEF FOR THE STATE OF NEW YORK AND THE GOVERNOR AS RESPONDENTS IN OPPOSITION TO PLAINTIFFS' CROSS-APPEAL

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Dated: December 14, 2009

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

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- against -

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New York County
Index No. 112301/2007

REPLY BRIEF OF THE STATE OF NEW YORK AS APPELLANT IN FURTHER SUPPORT OF ITS APPEAL, AND BRIEF FOR THE STATE OF NEW YORK AND THE GOVERNOR AS RESPONDENTS IN OPPOSITION TO PLAINTIFFS' CROSS-APPEAL

Defendant-Appellant the State of New York submits this reply brief in further support of its appeal from the order of the Appellate Division, First Department entered on June 2, 2009, in which the Governor of the State of New York joins to the extent that his constitutional powers are implicated by the rulings below.

This brief is also submitted on behalf of Defendants-Respondents the State and the Governor in opposition to Plaintiffs' cross-appeal. Plaintiffs appeal the dismissal of their cause of action alleging that Defendants violated Article VI, § 25(a)'s prohibition on diminishment of judicial compensation, and the rejection of their demand for specific monetary relief.

Several organizations have sought leave to file *amicus* briefs supporting Plaintiffs. Those *amici* offer public policy arguments, most of which have already been made by Plaintiffs, but advance no new constitutional argument on which this Court could grant Plaintiffs any relief. Accordingly, we do not respond separately to the arguments of Plaintiffs' *amici.*

PRELIMINARY STATEMENT

While Plaintiffs' claims purport to be based on the Constitution, both they and their *amici* brush aside the relevant provisions of the Constitution, as well as New York's unique constitutional history. Instead, Plaintiffs ask the Court to adopt a novel "separation of powers" theory that, if accepted, would result in judicial usurpation of powers *expressly* reserved by the Constitution to the political branches, thereby directly subverting the very doctrine that Plaintiffs ask the Court to uphold. To accept Plaintiffs' theory would require the Court to declare unconstitutional the Constitution's careful allocation of powers among the three

branches, precisely because the Constitution allocates the power to raise judicial compensation exclusively to the Legislature and the Governor.

In short, Plaintiffs are making the odd argument that the Constitution's express provisions governing judicial compensation are, in their view, unconstitutional. Rather than accepting novel and unworkable theories that collide with the Constitution's express terms, the Court should adhere to its long-settled practice of applying the Constitution as written. Where, as here, the text of the Constitution is clear and unambiguous, there is no need for this Court to look elsewhere to resolve this appeal. *Blue Cross & Blue Shield of Cent. N. Y., Inc. v. McCall,* 89 N.Y.2d 160, 168, 652 N.Y.S.2d 218, 222 (1996) ("The plain language of the Constitution provides the framework for our analysis.") (Smith, J.).

At bottom, the only question presented by this case is whether a court may order the Legislature and the Governor to increase the compensation currently paid to State judges. As we demonstrated in our opening brief—a showing that Plaintiffs never address—the Constitution vests *exclusive* authority to increase judicial compensation in the political branches. Thus, this Court should answer that question in the negative.

According to Plaintiffs and their *amici,* the fact that the Legislature has not increased judicial compensation since 1999 is a threat to the independence of the Judiciary as a separate branch of government. But a concern for preserving the

independence of the Judiciary has always been the justification for *denying* the Legislature any power to increase judicial compensation. For example, the Constitutions adopted in 1846 and 1894 denied the Legislature any such authority because the drafters thought that giving the Legislature the power to increase judicial compensation might make the Judiciary beholden to the political branches, threatening judicial independence. Until these judicial pay cases were filed, judicial "independence" was never suggested as a basis on which judges could *order* the Legislature to increase judicial compensation.

Putting aside the fact that New York's constitutional history contradicts their argument, Plaintiffs never explain how the Judiciary's "independence" has been put at risk. The Constitution grants the Legislature the power to increase but not decrease judicial pay, and thus the mere existence of that limited power cannot pose an unconstitutional "threat" to judicial independence. Nor is there any claim that the Legislature or the Governor has attempted to usurp a judicial function or interfere with the disposition of any matter pending before the New York courts or impair the day-to-day functioning of the State's court system.

In the same vein, Plaintiffs complain that "linkage" threatens judicial independence. But, by definition, "linkage" has nothing whatever to do with the Judiciary or its "independence"—it concerns only a time-honored method by which the political branches seek to reach compromises and resolve policy

disagreements among themselves. In all events, Article VII of the Constitution subjects the Judiciary's requests for funding to the normal political process. Nothing in the Constitution limits the subjects that the Legislature or the Governor may consider in evaluating a request by the Judiciary for an increase in compensation.

Just as obviously, it is impossible as a practical matter, and improper as a constitutional matter, for the Judiciary to attempt to censor the deliberations by the Governor and Legislature whenever the political branches are considering a proposed increase in judicial compensation. The Constitution does not limit the subjects that the Legislature and the Governor may take into consideration when evaluating the Judiciary's budgetary requests (or anything else). Nor, given the State's limited resources, is there any principled basis to distinguish between the Judiciary's proposed budget and the demands arising from the State's other competing priorities: a dollar spent on one is unavailable, by that fact alone, to satisfy the State's other obligations. In short, the new doctrine of forbidden "linkage" is as unworkable as it is baseless and misguided.

Citing a few public statements by current and former political leaders, Plaintiffs assert that there is no "policy dispute" that the Judiciary deserves an increase in compensation, and thus no constitutional impediment to a judicial order directing the Legislature to increase judicial pay. Nothing in the Constitution

supports that contention. The Constitution recognizes only one way for the political branches to resolve "policy disputes" impacting on judicial compensation: the enactment of a bill into law. *See* Article VI, § 25(a); Article VII, § 7. All agree that no such bill has ever been enacted. There is no constitutional sanction, and Plaintiffs and their *amici* offer none, for the astounding notion that a court can substitute public statements by the Governor or legislative leaders in place of the *only* action endowed by the Constitution with legal significance in this context: the enactment of a law in the manner specified in Article III and Article IV, § 7.

In all events, because State resources are finite, the balancing of competing but deserving policy goals inevitably results in disagreements about budgetary priorities, even where the political branches agree about the overall policy goals. Like Plaintiffs, for example, other litigants could claim that there is no "policy dispute" about whether the citizens of New York deserve the safest streets, the best possible educational system for their children, the lowest taxes, the cleanest environment, the most modern and efficient highways, airports and public transportation facilities, a first-class health care system, and a vibrant economy. That the political leaders of our State agree that some or all of those objectives are deserving goals hardly permits a court to decide how they will be achieved or which among them should take priority.

Instead, as this Court has frequently held, our constitutional system of representative democracy assigns responsibility for such policy matters exclusively to the Governor and the Legislature. *People v. Tremaine*, 252 N.Y. 27, 38, 168 N.E. 817, 819 (1929) ("It is ... so well settled that the state Legislature is supreme in all matters of appropriations that the recital of the details of the strife for legislative supremacy would serve no useful purpose."); *People v. Ohrenstein,* 77 N.Y.2d 38, 47, 563 N.Y.S.2d 744, 747 (1990) ("Under the State Constitution, the Legislature alone has the power to authorize expenditures from the State treasury, and to 'regulate and fix the wages or salaries and the hours of work or labor ... of persons employed by the State,'" *quoting* art. XIII, §14); *Campaign for Fiscal Equity v. State*, 8 N.Y.3d 14, 28, 828 N.Y.S.2d 235, 243 (2006) ("[w]hen we review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy"). Judicial compensation, like the compensation of other State constitutional officers, is part of the budgetary mix, all of which is left to the political branches to prioritize and address. Judges are no more empowered to set their own compensation than they are empowered to determine the State's highway budget.

Accordingly, for the reasons explained below and in our opening brief, this Court should enter an order (i) reversing the Order appealed from insofar as it granted summary judgment to Plaintiffs on their second cause of action; (ii)

granting Defendants' motion to dismiss the Complaint in its entirety; (iii) directing the entry of judgment in favor of Defendants dismissing the Complaint, together with such other relief to Defendants as this Court deems just.

ARGUMENT

REPLY IN SUPPORT OF THE STATE'S APPEAL

I. PLAINTIFFS CANNOT OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY.

As we demonstrated in our opening brief, Judiciary Law Article 7-B is entitled to the presumption of constitutionality. *See* Def. Op. Br. at Point II, pp 27-29; *Elmwood-Utica Houses, Inc. v. Buffalo Sewer Auth.*, 65 N.Y.2d 489, 495, 492 N.Y.S.2d 931, 933 (1985). The relief demanded by Plaintiffs would, if granted, strike down the judicial salaries set by Article 7-B and substitute new, judicially mandated salaries in their stead. Thus, Plaintiffs must prove that there are *no circumstances* in which the present statutory level of judicial compensation is constitutional. *Cohen v. State*, 92 N.Y.2d 1, 8, 698 N.Y.S.2d 574, 575 (1999) ("In seeking facial nullification, plaintiffs bear the burden to demonstrate that 'in any degree and in every conceivable application,' the law suffers wholesale constitutional impairment.") (quoting *McGowan v Burstein*, 71 N.Y.2d 729, 733, 530 N.Y.S.2d 64 (1988)).

In response, Plaintiffs say that their second cause of action is directed against Defendants' "unconstitutional conduct" of engaging in supposed "linkage"

rather than an attack on "a statute that makes no mention of linkage." *See* Pl. Br. at 28-29. That response might be sufficient if Plaintiffs took their own argument seriously. If the "unconstitutional conduct" is "linkage," then the remedy should be limited accordingly: at most, a direction to the political branches to reconsider the proposal to increase judicial compensation without "linkage." Defendants made that argument in their opening brief, *see* Def. Op. Br. at Point VII, pp. 60-63, but Plaintiffs decline to agree. Instead, they demand an order striking Article 7-B's salaries for judges and substituting judicial salaries as fixed by the court along with an award of back-pay pegged to the court-determined salaries. By doing so, they turn their answer about having to satisfy *Cohen v. State*'s test into a *non sequitur.*

According to Plaintiffs, "linkage" resulted in a deadlock among the political branches, with no action at all on legislative proposals to increase judicial compensation. Article 7-B was unchanged. By asking this Court to disregard Article 7-B, Plaintiffs are seeking a ruling that, in form and substance, would displace a statute on constitutional grounds. Thus, Plaintiffs must meet the same burden that any petitioner must meet when asking a court to substitute a new mandate in place of the statutorily prescribed result.

Both the Constitution and Article 7-B "mak[e] no mention of linkage" among other reasons because, until these cases were filed, no one had ever heard of "linkage" as a constitutional limitation on the Legislature or the Governor when

they consider proposed legislation. Neither Plaintiffs nor the lower courts cited, and we have not found, even a single decision by the New York courts, the federal courts or the courts in any other state mentioning, let alone analyzing or adopting, Plaintiffs' newly invented constitutional doctrine of "linkage."

II. THE SEPARATION OF POWERS DOCTRINE DOES NOT DISPLACE THE CONSTITUTION'S EXPRESS PROVISIONS.

Plaintiffs offer two arguments in support of the Order below. First, Plaintiffs say that this "case is about restoring the balance of power ... embodied in the doctrine of the separation of powers [that] has been imperiled by Defendants' unconstitutional practice of linkage." (Pl. Br. at 3). In making that argument, Plaintiffs never come to grips with the Constitution's provisions addressing the very subject at issue—judicial compensation.

Second, to avoid the Speech or Debate Clause's bar against subjecting legislative motives or reasons to second-guessing in a judicial forum, Plaintiffs say that "[i]f linkage ... were unassailably protected as 'speech or debate' despite being contrary to constitutional tenets, then nothing the Legislature ever did would be subject to judicial review." (Pl. Br at 33). The "constitutional tenets" to which Plaintiffs point (in the immediately preceding sentence of their brief) is the separation of powers doctrine. But, as defined by Plaintiffs and the lower courts, "linkage" describes only the manner in which the political branches go about attempting to resolve (sometimes, as here, unsuccessfully) their differences—

"linkage" involves the reasons or motives for passing (or not passing) proposed legislation, but not the substance of the proposed legislation itself. "Linkage" has nothing to do with any branch invading the powers reserved to another; instead, it concerns how each of the political branches exercises its own powers, in trying to reach a compromise agreeable to *all* of the political branches, to enact a law.

Plaintiffs build their entire argument on that foundation. This Court should reject their arguments as meritless.

A. The Separation of Powers Doctrine Is Implied From, Not Inconsistent With, The Constitution's Express Provisions.

The New York Constitution has no specific provision adopting a "separation of powers" requirement. Instead, "this principle ... is included by implication in the pattern of government adopted by the State of New York." *Under 21 v. City of New York,* 65 N.Y.2d 344, 355, 492 N.Y.S.2d 522, 525 (1985). The separation of powers doctrine has been a fundamental constitutional principle in New York since the first Constitution of 1777. *See Pataki v. New York State Assembly,* 4 N.Y.3d 75, 100, 791 N.Y.S.2d 458, 473 (2004).

As a doctrine implied from the Constitution's structure, separation of powers cannot be invoked, as Plaintiffs do, to contradict the text of the Constitution or, even less, to subvert the Constitution's specific allocation of powers among the three branches. This Court has applied that rule in the contractual context, and its logic applies equally here. *See Murphy v. Am. Home Prods. Corp.,* 58 N.Y.2d 293,

304, 461 N.Y.S.2d 232, 237 (1983) ("No obligation can be implied . . . which would be inconsistent with other terms" of the instrument giving rise to the implied obligation). The Constitution's allocation of power among the branches is the very structure from which the separation of powers doctrine arises.

There is no conflict between the Constitution's express provisions and the separation of powers doctrine. But, even if Plaintiffs were correct that the implied doctrine of separation of powers conflicted with the Constitution's express provisions, any such conflict would have to be resolved by enforcing the Constitution's direct and express commands. *See Blue Cross & Blue Shield of Cent. N. Y., Inc.,* 89 N.Y.2d at 168, 652 N.Y.S.2d at 222; *Matter of King v. Cuomo,* 81 N.Y.2d 247, 253, 597 N.Y.S.2d 918, 920 (1993); *Anderson v. Regan,* 53 N.Y.2d 356, 362, 442 N.Y.S.2d 404, 406-97 (1981) ("there is really no justification . . . for departing from the literal language of [a] constitutional provision. It has never been the law in this State that the clear and unambiguous wording of a statute or constitutional provision may be overlooked entirely when it is seemingly inconsistent with the practice and usage of those charged with implementing the laws."); *Settle v. Van Evrea,* 49 N.Y. 280, 281 (1872) ("it would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case

may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms. That would be *pro tanto* to establish a new Constitution and do for the people what they have not done for themselves.").

In our opening brief, we showed that beginning in 1846, the drafters of the New York Constitution repeatedly wrestled with its judicial compensation provisions to achieve a balance between judicial independence and fair compensation for judges. *See* Def. Op. Br. at pp. 14-27. From 1846 to 1961, those provisions of the Constitution were amended on several occasions, during which time the Constitution alternated among provisions (i) prohibiting any increase or decrease in judicial compensation, (ii) permitting the Legislature to increase but not decrease judicial compensation, and (iii) fixing judicial compensation in the Constitution itself. *See Maron v. Silver*, 58 A.D.3d 102, 113, 871 N.Y.S.2d 404, 412 (3d Dep't 2008).

While that history shows that the drafters focused closely on the issue of judicial compensation, there was never even a suggestion that judges should be empowered to fix their own salaries. Instead, by providing that "[t]he compensation of a judge . . . shall be established by law and shall not be diminished during the term of office of which he or she was elected or appointed," Article VI, § 25(a) plainly grants that power exclusively to the political branches.

The Constitution also provides for the compensation of other State officers, and those provisions, too, undercut Plaintiffs' claims and the "linkage" holding below. For example, Article III, § 6 provides that "[e]ach member of the legislature shall receive for his services a like annual salary, to be fixed by law. ... Neither the salary of any member nor any allowance so fixed may be increased or diminished during ... the term for which he shall have been elected ...." In contrast, Article IV, § 3, dealing with the Governor, provides: "He shall receive for his services an annual salary to be fixed by joint resolution of the senate and assembly ..." Similarly, the Lieutenant Governor's "annual salary [shall] be fixed by joint resolution of the senate and assembly." *See* Article IV, § 6. For "state officers named in this constitution," Article XIII, § 7 provides that each shall "receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed ...."

The structure—and especially the differences—among those provisions are instructive. First, in each instance, the Constitution makes an act of the Legislature a necessary prerequisite in fixing the salary of every State officer. *See also* Article VII, § 7 (requiring an "appropriation by law" to expend money from the State treasury). Any increase in legislative salaries can be accomplished only by a duly enacted bill, which must be submitted to the Governor for approval or veto. In contrast, the salaries of the Governor and the Lieutenant Governor are fixed by

joint resolution of the Senate and the Assembly, thus depriving the Governor and the Lieutenant Governor of any role in the consideration or approval of their own salaries. Second, as Article III, § 6 makes clear, no salary increase for legislators may be effective during the current term of office of the legislators voting for it. Similarly, Article XIII, § 7 prohibits the "state officers named in this constitution" from receiving a salary increase during an officer's term of office.[1]

This Court has never decided whether the provision in Article XIII, § 7, banning salary increases during a State officer's term of office, applies to judges. *But see Town of Putnam Valley v. Slutzky*, 283 N.Y. 334, 340-41, 28 N.E.2d 860, 863 (1940) (a village justice of the peace is a "constitutional officer ... [whose] office may not be abolished ... nor may his compensation, where already fixed, be increased or diminished during the term for which he has been elected to office."). This Court need not reach that issue to reject the First Department's "linkage" holding. However, it seems unlikely that this Court could uphold the order below, to the extent it was adverse to Defendants, or grant relief to Plaintiffs on their cross-appeal, without addressing Article XIII, § 7.

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[1] Plaintiffs say, inaccurately, that "[u]nlike the compensation provisions for the political branches of state government, the New York Constitution only provides the Judiciary with the constitutional protection against the diminishment of compensation." Pl. Br. at 82 n.26. Article XIII, § 7, which they never mention, extends that protection to all "state officers named in this constitution."

This Court's most recent decision construing Article XIII, § 7 held that the constitutional prohibition on salary increases during a State officer's term does not apply to district attorneys in light of the Home Rule provisions of the Constitution, under which they are more properly regarded as local officials. *See Kelley v. McGee,* 57 N.Y.2d 522, 457 N.Y.S.2d 434 (1982). It seems doubtful that *Kelley's* rationale could apply to judges in light of Article VI, § 1, creating the "unified court system for the state." For the reasons explained in our opening brief, the conflicting rationales adopted by the lower courts prior to the constitutional amendments of 1961 for concluding that Article XIII, § 7 does not apply to judges do not withstand scrutiny today. *See* Def. Op. Br. at pp. 24-25 n.4.

By adopting that structure, the Constitution reflects a policy of disallowing those empowered to increase the salaries of State officers from benefitting from their own actions, and a rejection of the notion that State officers other than legislators should have any role in increasing their own salaries. The Constitution also adopts a policy prohibiting salary increases during a State officer's term of office. Nothing in that constitutional structure is compatible with Plaintiffs' claims or the "linkage" holding below, effectively permitting judges to usurp an exclusively legislative power by granting themselves an immediate pay raise.

Remarkably, Plaintiffs never address any of those constitutional provisions, the history that led to their adoption or the conflict between them and Plaintiffs'

expansive "separation of powers" theory. Since separation of powers is an implied doctrine that cannot negate the Constitution's express provisions, that omission is hardly a small matter. In all events, nothing supports Plaintiffs' contention that this Court should ignore the Constitution's express provisions in favor of a theory supposedly implied from its structure.

B. Linkage Is Merely A Pejorative Label For The Give-and-Take Of The Legislative Process.

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it has been settled that courts may review the constitutionality of enacted legislation but not the motives of legislative actors. The Speech or Debate Clause, as it has been interpreted over the two centuries since it was adopted, codifies that rule.

In yet another novel departure from settled constitutional doctrine, Plaintiffs ask this Court to ignore the distinction between legislative enactments that are subject to judicial review, and legislative motives that are immune from judicial inquiry. Unless the Court does so, Plaintiffs contend, "nothing the Legislature ever did would be subject to judicial review." (Pl. Br at 33). Nothing supports that argument.

In this case, the legislative action at issue is only the inability of the Legislature and the Governor to agree upon proposed amendments to Article 7-B of the Judiciary Law. No one suggests that legislative action (or, as here, inaction) is shielded by the Speech or Debate Clause from judicial review. In fact, like the

Third Department in *Maron v. Silver*, 58 A.D.3d 102, 871 N.Y.S.2d 404, the First Department held that the Legislature's inaction did not "diminish" judicial compensation within the meaning of Article VI, § 25(a), and therefore did not violate the Constitution. *Larabee v. Governor*, 65 A.D.3d 74, 85-87, 880 N.Y.S.2d 256, 265-66 (1st Dep't 2009). In short, the legislative "action" at issue here was subjected to judicial review, and was found constitutionally proper.

The motives or reasons why the Legislature and the Governor never agreed on proposed amendments to Article 7-B are irrelevant, because they are immune from judicial scrutiny under the Constitution, and also because Plaintiffs were not harmed by them but instead only by the fact that Article 7-B was not amended. And, as history shows, "linkage" has sometimes worked to benefit Plaintiffs. Since the adoption of the Unified Court Budget in 1977, the Legislature has increased judicial compensation five times: N.Y. Laws 1980, ch. 881; N.Y. Laws 1984, ch. 986; N.Y. Laws 1987, ch. 263; N.Y. Laws 1993, ch. 60; and N.Y. Laws 1998, ch. 630. On only one occasion, in 1993, did the Legislature provide judicial raises without providing raises for other State officers. The fact that judicial pay raises were "linked" to pay raises for other State officers on the other four occasions did not harm Plaintiffs (or their predecessors in judicial office).

In all events, as we showed in our opening brief (at Point III, pp. 29-40), the Speech or Debate Clause plainly bars judicial inquiry into legislative motives,

which is all that Plaintiffs' "linkage" claim involves. Plaintiffs never confront the fatal weakness in their discussion of Speech or Debate Clause immunity: only legislative enactments are subject to judicial review, while legislative motives for adopting (or declining to adopt) proposed legislation are not.

III. "LINKAGE" BEARS NO RELATIONSHIP TO THE PRESERVATION OF JUDICIAL INDEPENDENCE.

Plaintiffs state repeatedly that recognition of a constitutional prohibition on "linkage" is necessary to preserve judicial independence. *See, e.g.*, Pl. Br. at 5; *id.* at 6; 9; 10 ("the threat to independence arises from the Defendants' linkage practices"); *id.* at 18 (the consequence of "linkage" is an "actual and perceived weakening of judicial independence"); *id.* at 25 ("linkage impaired the independence of the judiciary"); *id.* at 34 ("linkage...threatens judicial independence"); *id.* at 35 n.13 ("practice threatens judicial independence"); *id.* at 38-39; *id.* at 42 n.16 (linkage threatens judicial independence even if inflation does not diminish value of compensation and even if performance of judicial duties is not impaired) (quoting *Larabee*, 65 A.D.3d at 95, 880 N.Y.S.2d at 272); *id.* at 45; *id.* at 47 ("Judiciary and its members are certainly a 'protected class' to be shielded from threats to their independence"); *id.* at 48 (quoting *Larabee*, 65 A.D.3d at 99, 880 N.Y.S.2d at 275); *id.* at 53 (quoting *Larabee*, 65 A.d.3d at 98-99, 880 N.Y.S.2d at 274); *id.* at 56 ("mere threat to the independence of the Judiciary was sufficient to prove a violation of the separation of powers"); *id.* at 86, 89.

These arguments are meritless.

A. Linkage Has Nothing To Do With Judicial Independence.

Both settled law and history contradict Plaintiffs' attempt to equate judicial independence with their "linkage" theories. Judicial independence, in this context, has always focused on protecting judicial decision making from being influenced by considerations unrelated to the merits of the controversies before the courts. The First Constitution made that plain, for example, by quoting in full the complaint in the Declaration of Independence that King George III "has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." *See* Justin S. Teff, "The Judges v. The State: Obtaining Adequate Judicial Compensation and New York's Current Constitutional Crisis," 72 Albany L. Rev. 191, 202-3 (2009).

The cases cited by Plaintiff make the same point repeatedly. *See, e.g., Kelch v. Town Bd.*, 36 A.D.3d 1110, 1112, 829 N.Y.S.2d 250, 252 (3d Dep't 2007) ("'[a] real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions.'"); *Evans v. Gore*, 253 U.S. 245, 257 (1920) (judicial independence requires that judicial decision making be "'beyond the reach and above even the suspicion of any . . . influence'"; *O'Donoghue v. U.S.*, 289 U.S. 516, 530 (1933) (in rendering their

decisions, "the courts must be 'free from the remotest influence, direct or indirect, of either of the other two powers.'").

Indeed, far from contending that "linkage" was an attempt to influence judicial decision making, even Plaintiffs say the opposite—Defendants supposedly reached an impasse because of a dispute over campaign finance reform, rather than anything having to do with the Judiciary. *See, e.g.,* Pl. Br. at 18 (quoting with approval then-Chief Judge Kaye's statement that "the measure [for an increase in judicial compensation] has failed for no reason related to its merit, *or to us.*") (emphasis added). The same point was essential to the holding of the courts below. *See, e.g., Larabee*, 65 A.D.3d at 97-98, 880 N.Y.S.2d at 274 ("Linkage . . . manifested an abandonment of any pretense to an objective consideration of judicial compensation unimpeded by extraneous political considerations."); *id.*, 65 A.D.3d at 96, 880 N.Y.S.2d at 272 ("linkage" was violated because the Legislature acted "on the basis of various motives and agendas.").

History is equally dispositive of Plaintiffs' argument. Judicial independence was not threatened by the provisions in the 1846 Constitution or the 1894 Constitution prohibiting the Legislature from increasing judicial compensation—to the contrary, protecting judicial independence was the very purpose of that ban.[2]

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[2] In reaching that conclusion, New York's drafters were not alone. The lower courts relied on cases from Pennsylvania (although not for the "linkage" holding, a concept unknown there). *See Larabee v. Governor*, 20 Misc. 3d 866, 876, 860

Nor was independent judicial decision making threatened by the 39-year period without an increase in judicial compensation between 1887 and 1926, or the 21-year period between 1926 and 1947. As New York's constitutional history reflects, the drafters have often changed their minds about whether a constitutional provision that prohibits decreases but allows increases in compensation is more protective of judicial independence than one like those of the 1846 and 1894 Constitutions that prohibits both increases *and* decreases. In short, the Judiciary would not have lost its "independence" at some unspecified point between 1999 and today even if Plaintiffs were right that current judicial salaries are too low by 25% because of intervening inflation.

N.Y.S.2d 886, 893 (Sup. Ct. N.Y. Co. 2008) (quoting *Glancey v. Casey*, 444 Pa. 77, 86, 288 A.2d 812, 816 (1972); *Goodheart v. Casey*, 521 Pa. 316, 323-324, 555 A.2d 1210, 1213 (1989), *aff'd on reconsideration*, 523 Pa. 188, 565 A.2d 757 (1989)). On appeal, Plaintiffs again rely on *Goodheart*. Pl. Br. at 54. In the words of one of the delegates to the Pennsylvania Constitutional Convention of 1873:

> I firmly believe that more harm grows, or at least can grow, out of the fact that the Legislature may increase the compensation of the judges than that they may not decrease it. The judges may be interested in acts of Assembly and must be interested in their construction, and the Legislature might be induced to increase the compensation of judges in view of the possible effect it might have upon their construction of certain acts of Assembly.

4 Debates of the Convention to Amend the Constitution of Pennsylvania, 362 (1873).

B. Plaintiffs' "Linkage" Argument Collapses Into Contradictions.

Plaintiffs contradict themselves on whether Speech or Debate Clause immunity precludes judicial inquiry into legislative motives. They say, for example, that "[t]o find linkage unconstitutional, courts need not examine any underlying [legislative] motive or intent." Pl. Br. at 40. "[T]he Appellate Division," they continue, "was very clear that legislative motives were not considered." Pl. Br. at 51 (citing *Larabee*, 65 A.D.3d at 91-93, 880 N.Y.S.2d at 269-70). Plaintiffs go so far as to say that "[t]here is no need to show some nefarious motivation on the part of the Legislature in order to prove a constitutional violation, *because* the courts 'never require a legislature to articulate its reasons for enacting a statute' and those reasons 'are not subject to courtroom fact-finding.'" Pl. Br. at 39 (emphasis added) (quoting *Gboizo v. State of New York Div. of Hous. & Cmty. Renewal*, 13 Misc. 3d 714, 717, 820 N.Y.S.2d 789 (Sup. Ct. N.Y. Co. 2006) (Lehner, J.)).

Yet Plaintiffs' concession that legislative reasons "are not subject to courtroom fact-finding" makes it impossible even to articulate, let alone apply, the "linkage" doctrine they are asking this Court to adopt. While it is not clear how Plaintiffs think the Speech or Debate Clause applies here, Plaintiffs seem to be saying that a court may scrutinize legislative reasons or motives if the court determines that there is no need for fact-finding to determine what those legislative

reasons or motives were, but may not do so if the legislative reasons or motives are disputed. That distinction finds no support in the text of the Speech or Debate Clause, this Court's decisions construing it or the purpose for which it was adopted.

Article III, § 11 of the New York Constitution provides that, "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." This Court has long held that the immunity provided by Section 11 extends to "any proceeding challenging lawful action taken [by a legislator] in his or her official capacity," *Rivera v. Espada,* 98 N.Y.2d 422, 428, 748 N.Y.S.2d 343, 346 (2002), and confers absolute immunity for all "legislative acts," including any acts "which are an integral part of the legislative process ... as well as the underlying motivations for these activities." *Ohrenstein,* 77 N.Y.2d at 54, 563 N.Y.S.2d at 752.

The Speech or Debate Clause serves to "preserve the integrity of the Legislature by preventing other branches of government from interfering with legislators in the performance of their duties." *Id.* This Court has ruled that New York's Speech or Debate Clause was intended to provide "at least as much protection" as the comparable provision in the Federal Constitution. *Id.*, 77 N.Y.2d at 53, 564 N.Y.S.2d at 752. The United States Supreme Court has held that the Speech or Debate Clause covers matters that are "an integral part of the

deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

Thus, the Clause encompasses a wide range of conduct beyond purely legislative "speech" or "debate." *See Straniere v. Silver*, 218 A.D.2d 80, 83, 637 N.Y.S.2d 982 (3d Dep't), *aff'd*, 89 N.Y.2d 825, 653 N.Y.S.2d 270 (1996) (clause protects "a range of activities, including voting, preparing committee reports and conducting committee hearings"); *Urbach v. Farrell*, 229 A.D.2d 275, 278, 656 N.Y.S.2d 448 (3d Dep't 1997) (clause protects from judicial review the issuance of a subpoena "intended to gather information about a subject on which legislation was contemplated").

Among other things, the Speech or Debate Clause is meant to protect legislators from "speculation as to motives." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). Thus, the motivation for Defendants' collective inaction on proposals to increase judicial pay is simply not a subject that may be examined in a judicial forum, whether or not the court concludes that there is a factual dispute about the legislative reason or motive at issue. *See Campaign for Fiscal Equity, Inc. v. State*,

271 A.D.2d 379, 379, 707 N.Y.S.2d 94, 95 (1st Dep't 2000) (Speech or Debate Clause precludes evidence of legislative motive).

Because the immunity is absolute once it is found to apply, it makes no difference whether a litigant claims that the particular legislative motives at issue are "undisputed," as Plaintiffs do here. To decide whether there was any such dispute, a court would necessarily have to inquire into who said what and when and in what context and with what authority—*i.e.*, the very inquiry that the Speech or Debate Clause was intended to preclude. Merely to entertain that inquiry would put legislative actors to a choice between contesting claims about their supposed motives or reasons—by, for example, explaining how certain statements were intended, and probably understood, as bargaining chips in a three-cornered negotiation—or allowing their litigation opponent's claims about "undisputed" legislative motives to go unanswered. But the absolute immunity of Article III, § 11 protects legislators from being put to that choice.

In short, and however Plaintiffs may have meant it, we agree with their statement that "the courts 'never require a legislature to articulate its reasons for enacting a statute' and those reasons 'are not subject to courtroom fact-finding,'" Pl. Br. at 39 (citation omitted), because the Speech or Debate Clause prohibits any such inquiry. Thus it does not make any difference why the Legislature and the Governor did not agree on proposed amendments to Article 7-B. Nothing more is

needed to reject Plaintiffs' "linkage" theory or the holding of the Appellate Division below.

C. "Linkage" Does Not Override The Speech Or Debate Clause.

In our opening brief, we showed that "linkage" cannot be squared with the Speech or Debate Clause or the separation of powers doctrine. *See* Def. Op. Br. at Points III and IV, pp. 29-56. "Linkage" is, at most, an implied constitutional doctrine, and for the reasons explained above (Point II(A), pp. 11-17), it cannot override the Speech or Debate Clause. Yet, to salvage their "linkage" theory, Plaintiffs and the Appellate Division are forced to treat the Speech or Debate Clause as, in the Appellate Division's words, a "cloistered notion" limited to "the Legislature's internal communications, debates, committee work, investigations and the like ...." Pl. Br. at 35 (quoting *Larabee*, 65 A.D.3d at 92-93, 880 N.Y.S.2d at 270).

Neither law nor common sense supports Plaintiffs' attempt to stand the Constitution on its head in that way. As this Court has observed, "all legislation is the product of political activity both inside and outside the Legislature." *See Ohrenstein*, 77 N.Y.2d at 47, 563 N.Y.S.2d at 748. Because the Constitution frames a government founded on the principle of representative democracy, the give-and-take over proposed legislation between the Legislature and the Governor—*i.e.*, the "political activity" of representative democracy at work—is

entitled to the strongest protection under the Speech or Debate Clause. Instead, Plaintiffs ask this Court to substitute some watered-down and ill-defined "cloistered notion" that would provide no protection to the "political activity" at the heart of our democratic form of government.

A second glaring and equally fatal contradiction besets the efforts by both Plaintiffs and the courts below in trying to square their "linkage" theory with settled law under the Speech or Debate Clause. The Appellate Division recognized that the Speech or Debate Clause protects the political branches against "the compulsion of injunctions directing a legislator how to vote." 65 A.D.3d at 89, 880 N.Y.S.2d at 267 (quoting *Tenney v. Brandhove*, 341 U.S. 367 (1972)). But the relief ordered below did just what the Appellate Division found the Constitution forbids. Justice Lehner "direct[ed] that defendants, within 90 days ... adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998, with an appropriate provision for retroactivity," and the Appellate Division affirmed that order. *Larabee v. Governor*, 20 Misc. 3d 860, 878, 860 N.Y.S.2d 886, 894 (Sup. Ct. N.Y. Co. 2008), *aff'd*, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009). The only manner in which the Constitution allows "defendants [to] adjust" judicial compensation is by the enactment into law of a bill amending Judiciary Law Article 7-B.

The reason that Plaintiffs and the lower courts could not avoid becoming trapped in those contradictions is that there was no possibility of framing any relief that conformed to the imagined "linkage" violation. As we explained in our opening brief, there was no sensible way to fashion procedural relief that would fit the "linkage" violation. For that reason, the lower courts decided instead to exercise the Legislature's exclusive "legislative power" themselves, by directing the legislators on how to vote on a bill amending Article 7-B to raise judicial salaries. *See* Def. Op. Br. at Point VII, pp. 60-63.

IV. PLAINTIFFS DO NOT HAVE A "VESTED RIGHT" TO AN INCREASE IN COMPENSATION.

This Court has held that the Judiciary may intrude upon the political branches' constitutionally exclusive control of budgetary priorities only to "declare the vested rights of a specifically protected class of individuals." *See Campaign for Fiscal Equity v. State*, 8 N.Y.3d 14, 28, 828 N.Y.S.2d 235, 243 (2006) (declaring public education funding formula to be unconstitutional based on the vested right to an education held by the protected class of schoolchildren).

Even when the vested rights of a protected class are at stake, this Court has refused to permit the lower courts to substitute their own funding formulas for those devised by the Legislature. The basis for that limitation, this Court explained, is that the courts cannot exercise the powers reserved to the political

branches to appropriate State funds or establish State budgets. *Id.*, 8 N.Y.3d at 29-31, 828 N.Y.S.2d at 243-45.

In our opening brief, we cited those holdings to show that (a) judges have no "vested right" to a particular level of compensation, since the Constitution provides only that judicial compensation may not be diminished during their term of office; and (b) judges are not a "protected class." Plaintiffs' response is that "separation of powers, and the guarantee that the Judiciary maintains co-equal status, is not only a 'vested right,' it is a fundamental right whose protection is essential." Pl. Br. at 46-47.

We agree that the separation of powers doctrine and the Judiciary's co-equal status as a branch of government are fundamental and essential. But Plaintiffs miss the point of *Campaign for Fiscal Equity*. The only issue is whether judges have a "vested right" to a pay increase. Article VI, § 25(a) does not create any such right, and the Appellate Division below agreed with *Maron* that this case does not involve any violation of the rights established by that constitutional provision. To the extent Plaintiffs are suggesting that the structural protections afforded the Judiciary in the Constitution are sufficient to turn judges into a "protected class" with a "vested right" to a pay increase, the law is well settled that those aspects of the Constitution were intended for the benefit of the public at large rather than judges individually. *See United States v. Hatter,* 532 U.S. 557, 568 (2001) ("these

guarantees of [judicial] compensation and life tenure exist, 'not to benefit the judges,' but 'as a limitation imposed in the public interest.'") (citation omitted). No other source for any such imagined right is even suggested by Plaintiffs.

In like fashion, Plaintiffs claim to be a "protected class" because they are members of "one branch of New York's tripartite government with unique constitutional powers that at all times must be safeguarded" and "shielded from threats to their independence." Pl. Br. at 47. But a protected class is composed of individuals with unique constitutional *vulnerabilities*, not high-ranking State officers clothed with "unique constitutional powers." Vulnerability, not power, is the touchstone of the "protected classes" described in this Court's decisions: the impoverished schoolchildren in *Campaign for Fiscal Equity*, for example, or the mentally ill in *Klostermann v. Cuomo*, 61 N.Y.2d 525, 475 N.Y.S.2d 247 (1984).

III. THE FAILURE TO DISMISS THE SENATE WAS ERROR.

No one denies that in 2007 the Senate twice passed bills that, had they become law, would have raised judicial salaries. Nevertheless, Plaintiffs argue that the courts below properly refused to dismiss the Senate. According to Plaintiffs, "the constitutional impropriety of the linkage practice is not cured simply by the passage of a bill." Pl. Br. at 52-53. What else Defendants might do to cure "the constitutional impropriety" is a mystery since (a) the Constitution requires the "passage of a bill" to increase judicial compensation; (b) to remedy that imagined

constitutional violation, the lower courts directed the Legislature to pass just such a bill; and (c) there is no other action that the Constitution authorizes Defendants to take.

As defined by Plaintiffs, "linkage" occurred, if at all, only when a political body linked one measure to another and *refused* to pass legislation that would have increased judicial compensation unless the "linked" proposal was also adopted. The Appellate Division's own findings show that the Senate did everything within its constitutional powers to give Plaintiffs the relief they seek, and did *not* engage in "linkage"—which nevertheless formed the basis for the Appellate Division's affirmance of the order granting summary judgment.

Plaintiffs' unconvincing attempt to defend this aspect of the lower courts' ruling ends up showing only that "linkage" is incoherent, unworkable and misguided. The Order below granting summary judgment against the Senate should be reversed on this ground alone, with instructions to dismiss the complaint against it.

IV. PLAINTIFFS WERE NOT ENTITLED TO SUMMARY JUDGMENT ON THIS RECORD.

It was error for the Appellate Division to affirm the Trial Court's grant of summary judgment on an insufficient record. The record establishes that whether "linkage" supposedly impacted on judicial independence is, at best, a counterfactual guess about what might happen in the future: the lower courts

found that there was no evidence that judicial independence had been harmed at all to date. *See Larabee*, 65 A.D.3d at 85-87, 93, 97-99, 880 N.Y.S.2d at 265-66, 271, 274-75 ("The absence of evidence of undue influence, or of current systemic operational deficiencies, is not dispositive."). Summary judgment on a novel constitutional theory cannot be sustained based on a guess about the future.

Plaintiffs treat the question of the sufficiency of the record as if all they needed to show was that "linkage" occurred, without any showing that "linkage" had any impact on them. "Linkage" could have harmed Plaintiffs only if it was certain that, but for "linkage", a bill to raise judicial compensation would have been enacted. But, as the Appellate Division noted, the proposal to increase judicial compensation was never considered by the Assembly, either in committee or on the floor. *See Larabee*, 65 A.D.3d at 78, 93, 97-99, 880 N.Y.S.2d at 260. There is nothing in the record indicating how almost all of the 150 members of the Assembly intended to vote on any such proposal if it had ever come up for a vote, nor anything that would have prevented them from changing their minds even if those legislators had said how they intended to vote. Like the Appellate Division, Plaintiffs brush that fact aside as if the Constitution's detailed requirements about the consideration and "manner of passing bills," Article III, §§ 14, 23, were just a meaningless ritual.

Whether the Assembly would have voted to adopt either of the Senate bills, or one of its own, to increase judicial compensation cannot be known.[3] The courts below erred in substituting guesswork about the results of a vote that never happened on a bill that never reached the Assembly floor, for the only manner under the Constitution by which the Assembly could have demonstrated its willingness to adopt a judicial pay increase: the passage of a bill according to the procedures established by Article III. By substituting their views for the actions required by Article III, the lower courts committed the only violation of the separation of powers doctrine established by this record.

V. THERE IS NO BASIS FOR AN AWARD OF DAMAGES.

The constitutional violation found below was "linkage," and thus undoing "linkage" should have been the limit of the relief to which Plaintiffs were entitled.

The courts below went well beyond that, of course, by entering an order directing the Legislature to enact a bill granting a judicial pay raise and even setting a 90-day deadline within which such a bill must be adopted. If the Appellate Division Order stands, Defendants will be required to "proceed in good faith to adjust judicial compensation to reflect the increase in the cost of living since 1998, with leave to apply for consideration of other remedies should the

[3] Indeed, because history shows that no such vote ever happened, the entire subject is appropriate only for fiction-writers with a flair for alternative history. *See, e.g.,* Philip Roth, *The Plot Against America* (2004).

remaining defendants fail to act within 90 days." 65 A.D.3d at 100, 880 N.Y.S.2d at 275.

Plaintiffs seek to justify the relief granted below by asserting that they may recover "damages" in an action seeking to declare a statute unconstitutional. Pl. Br. at 60-61 (citing *Shields v. Katz*, 143 A.D.2d 743, 744-45, 533 N.Y.S.2d 451, 453 (2d Dep't 1988)). The assertion is incorrect and irrelevant.

First, if this case involved a claim for damages, only the Court of Claims would have had jurisdiction over the State as a defendant and only the State would have been a proper defendant. *See, e.g., Psaty v. Duryea*, 306 N.Y. 413, 417, 118 N.E.2d 584, 586 (1954).

Second, to avoid the "exceedingly strong presumption of constitutionality" under this Court's cases, *see Cohen v. State*, 92 N.Y.2d at 8, 698 N.Y.S.2d at 575, Plaintiffs asserted that this is *not* an action to declare a statute unconstitutional. *See* Point I, above. To sustain monetary relief, they claim that "damages" may be recovered in an action seeking to declare a statute unconstitutional. Which is it?

More fundamentally, the relief granted below cannot possibly be termed "damages." Instead, the lower courts ordered the Legislature to amend Article 7-B of the Judiciary Law. To obtain the relief they want, Plaintiffs had to request such an order precisely because the Constitution requires that judicial compensation

must be "established by law," Article VI, § 25(a), and forbids any payment of State funds "except in pursuance of an appropriation by law." Article VII, § 7.

Plaintiffs offer neither a basis on which the relief granted below can be sustained, nor any basis for an award of damages in this case.

OPPOSITION TO CROSS-APPEAL

I. THE COURTS BELOW CORRECTLY HELD THAT THE CONSTITUTION DOES NOT REQUIRE JUDICIAL COMPENSATION TO BE ADJUSTED FOR INFLATION.

Plaintiffs' cross-appeal contends, in substance, that the Appellate Division erred in finding that Article VI, § 25(a) contains no mandate to raise judicial compensation to account for inflation. According to Plaintiffs, Article VI, § 25(a) contains a hidden constitutional cost-of-living-adjustment clause.

Plaintiffs discuss the Founding Father's awareness of inflation when drafting the United States Constitution (*see* Pl. Br. at 78-79), as if it supports both their claim for the specific amount of monetary relief they demand (which both courts below rejected) and their argument that any diminishment in judicial compensation, whether resulting from legislative enactment or general economic conditions, is prohibited by Article VI, § 25(a). The opposite is true: while the Framers of the United States Constitution were certainly aware of inflation as a fact of life, they never even proposed, let alone adopted, a constitutional provision requiring that judicial compensation be periodically adjusted to account for

inflation. Instead, they granted discretionary power to the political branches to adjust judicial compensation, despite their countervailing concern about the potential impact on judicial independence that granting the political branches that power might have.

The Framers of the New York Constitution adopted several different approaches over the years to the problem of inflation as it relates to judicial compensation, ranging from an outright prohibition on any increase in judicial compensation during a judge's term of office, to a constitutional provision specifying the salary to be paid to judges, to today's system paralleling the federal approach. Conspicuous by its absence from those solutions—all reflecting the Framers' awareness of inflation when drafting the Constitution—was any proposal mandating that the Legislature adopt a judicial pay raise under any circumstances, or any suggestion that judges should ultimately be empowered to fix their own salaries.

Below, we show that Plaintiffs' historical argument is unfounded. We then address their argument that no discriminatory impact on judges need be shown before a diminishment in judicial compensation from generally applicable legislative enactments or other conditions could possibly raise an issue under Article VI, § 25(a). Finally, we show that, in substance, Plaintiffs' argument is

premised on a rejection of representative democracy, which is the most fundamental constitutional principle of all.

A. The Constitution Does Not Mandate An Inflation Adjustment To Judicial Salaries.

In making their argument, Plaintiffs never come to grips with either the text of Article VI, § 25(a), on which they assertedly base their claim, or the history of its many amendments over the years. Since 1846, the New York Constitution, unlike its federal counterpart, has alternated between permitting and prohibiting any increases in judicial compensation, while always prohibiting any diminution in a judge's compensation during the judge's term of office. *See* Def. p. Br. at pp. 15-20. Whether Article XIII, § 7 requires that any judicial pay increase be effective only at the commencement of a judge's term, while prohibiting a judge from receiving a pay increase during a term of office, remains an open and difficult question.

Plaintiffs point to the "no diminishment" proviso in Article VI, § 25(a) as the supposed source of their claimed right to a cost of living adjustment to offset inflation. But to accept Plaintiffs' argument would require the conclusion that the drafters of the New York Constitution intended the words used to express the "no diminishment" proviso to change meaning radically every time they inserted the "no increase" proviso. During the periods when the Constitution forbade any increase in judicial compensation, or the periods when the Constitution itself fixed

the level of judicial compensation, Plaintiffs can hardly claim that an automatic cost of living adjustment was nevertheless still required by the "no diminishment" proviso. To read the Constitution in that way would be to claim that the Constitution was internally contradictory for long periods, even though no one noticed at the time. This Court has never accepted a novel theory of heretofore unknown constitutional rights based on such methods of "interpretation."

At the most basic textual level, moreover, the Constitution's "no diminishment" guarantee is logically the opposite of an "adequate" compensation guarantee. A "no diminishment" rule draws a sharp line below which compensation cannot be reduced, but says nothing about increases above that floor.

As the Supreme Court explained in *Will v. United States,* 449 U.S. 200, 203-4 (1980), this constitutional scheme protects the independence of the Judiciary as well as the legitimate expectancy rights of individual judges. *See also Williams v. United States,* 535 U.S. 911 (2002) (discussing the expectations-related basis for the "no diminishment" provision). While the "no diminishment" guarantee sets a floor below which judicial compensation may not be reduced, it does so regardless of whether that floor is deemed too high, too low or just right. For the same reason, the New York Constitution says nothing about when any increases in judicial compensation should be considered, let alone must be granted. Instead, like the United States Constitution, the New York Constitution commits the entire

subject of increasing judicial compensation to the discretion of the Legislature and the Governor.

Recognizing that the Constitution does not adopt an express mandate requiring an increase in judicial salaries under any circumstances, Plaintiffs contend that the failure to adjust judicial salaries since 1999 amounts to a "diminishment" of judicial compensation in violation of Article VI, § 25(a), because inflation has eroded the purchasing power of judicial salaries in the interim.

As an economic phenomenon, inflation has been a fact of life for as long as governments have been issuing currency.[4] During the debates over the United States Constitution, for example, "the draftsmen first reached a tentative arrangement whereby the Congress could neither increase nor decrease the compensation of judges." *Will,* 449 U.S. at 219. Gouverneur Morris and others objected, arguing that "Congress should be at liberty to raise salaries to meet such

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[4] *See, e.g., The Cambridge Economic History of Europe from the Decline of the Roman Empire*, vol. II, Trade and History in the Middle Ages (1952), at pp. 93-120, discussing the political crisis in the Empire during the third century caused by rapid inflation, resulting in the Edict of Diocletian (AD 301), setting maximum prices for most goods. It seems that the Emperor's attempt at price controls worked no better than President Nixon's. *See also,* "Inflation and the Fall of the Roman Empire," lecture by Prof. Joseph R. Peden, Baruch College, City University of New York, on Oct. 27, 1984, discussing the impact of inflation at the rate of 1,000% on 3d century Roman rule, *available at* http://mises.org/story/3663; *see generally,* Kent, *The Edict of Diocletian Fixing Maximum Prices*, 69 U. Pa. L. Rev. 35 (1921).

contingencies as inflation, a phenomenon known in that day as it is in ours." *Id.* James Madison wanted to retain the ban on any increases in judicial compensation should be retained, and proposed to deal with the "ravages of inflation" "by taking for a standard wheat or some other thing of permanent value." *Id.* at 220 (*quoting* M. Farrand, *The Records of the Federal Convention of 1787*, at 45 (1911)).

The Constitutional Convention "finally adopted Morris' motion to allow increases by the Congress." *Will,* 449 U.S. at 220. The result was Article III, § 1, which provides that judges' compensation "shall not be diminished during their Continuance in Office" while committing any increases in judicial compensation to the discretion of Congress. *Id.*

As Alexander Hamilton later explained:

> It will be readily understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.

The Federalist No. 79, at 491-92, *quoted in Will,* 449 U.S. at 220.

Far from intending to mandate that judicial compensation be routinely increased, the Compensation Clause was viewed as a grant of discretionary power

to the Legislature to increase judicial salaries if and when the Legislature deemed best.

The federal courts have repeatedly recognized that the Constitution does not require Congress to adjust judicial compensation on account of inflation. In *Will*, the Supreme Court addressed whether the Compensation Clause was offended when scheduled cost-of-living increases for federal judges, included in a complicated salary adjustment matrix, were rejected by Congress. The Court found that to the extent a judicial pay increase had vested prior to Congress' action, the Compensation Clause prevented Congress or the President from revoking that increase even hours later. *Will*, 449 U.S. at 225-26. The Court also held, however, that, in a situation that closely parallels the one here, it was entirely permissible for Congress to stop cost-of-living increases that had not yet vested:

> Our discussion of the Framers' debates over the Compensation Clause . . . led to a conclusion that the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges . . . . Rather, that provision embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence. The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.

Will, 449 U.S. at 227 (footnote omitted).

The Court held that, since Congress had the discretion to award periodic increases, it also had the power to revoke the same provided the increases had not already vested—a power well beyond anything that Defendants have done since this case involves only legislative *inaction*. The Court declared that in "no sense" did the termination of scheduled but unvested cost-of-living increases for judges diminish the compensation of judges or violate the Compensation Clause. *Id.* at 228. The Court noted that, as the Framers rejected an indexing scheme, the Judiciary could not bind Congress to adopt one. *Id.* at 228 n.33.

In *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002), the court held that the Compensation Clause was not violated when Congress interdicted the cost-of-living increases for judges in 1995, 1996, 1997 and 1999. That court's reasoning and conclusions apply here, since the provisions of the New York Constitution are indistinguishable from the federal provisions applied in *Williams*:

> It is, of course, profoundly disappointing to the Judges that the arrangement for future federal judicial pay increases . . . has enjoyed such an inconsistent life. While we agree with the Judges' view that the continued strength of the federal Judiciary depends in part upon a deliberate, consistent, and fair approach to routine cost-of-living salary adjustments, we cannot, consistent with established Article III principles, hold that the Constitution requires the Judges to prevail in this case.

Id. at 1040.

Similarly, in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), plaintiffs urged that the failure of Congress to increase judicial salaries for an extended period violated the Compensation Clause because the "real value" of the dollar had decreased as the result of inflation. *Id.* at 1033. The court dismissed the claim, holding that the Compensation Clause affords no protection from the effects of inflation.

New York's constitutional history provides even less support for a constitutional right to increases in judicial compensation than the identical claim rejected in *Will, Williams,* and *Atkins.* As we have shown, the New York Constitution has consistently prohibited diminishment in judicial compensation during judicial terms, but has alternated between prohibiting and permitting increases. At a minimum, that history shows that the Framers of the New York Constitution included express mandates regarding increases in judicial compensation when they intended the Constitution to address that issue. Contrary to Plaintiffs' arguments, however, those mandates always *prohibited* any such increases in judicial compensation during a judge's term. That history is impossible to square with the claim that the Constitution now requires Defendants to adopt a law increasing judicial compensation during a judicial term of office.

B. Plaintiffs' Argument About the Discrimination Principle Is Premised On A Misreading Of The Federal Cases.

Plaintiffs contend that a showing of a discriminatory impact on judges is not a necessary element to prove a violation of Article VI, § 25(a) resulting from the impact of inflation, because discriminatory impact is supposedly relevant only to claims alleging that generally applicable tax laws have unconstitutionally diminished judicial compensation. According to Plaintiffs, the Constitution prohibits any diminishment of judicial compensation, regardless of cause, and is not limited by its terms to diminishment by legislative enactments reducing compensation. (Pl. Br. at 64-70). The "no discrimination" principle, they say, is limited to taxation of judicial compensation. (Pl. Br. at 72-74).

Even at a textual level, Plaintiffs' argument fails. Article VI, § 25(a)'s "no diminishment" clause appears directly after the mandate that judicial compensation "be established by law," *i.e.*, by duly enacted statute. The Clause grants a power to the Legislative branch—to "establish[h] by law" judicial salaries—and then immediately qualifies that grant of power to make it clear that the Legislature may not enact a law diminishing judicial compensation during a judge's term of office.

In adopting these constitutional provisions, the Framers were focused on preserving judicial independence from the political branches, which explains why the Framers included an express limitation on legislative power immediately after granting the Legislature discretionary authority over judicial compensation. In

contrast, nothing in the Constitution or in the concerns of the Framers about preserving judicial independence supports Plaintiffs' notion that Article VI, § 25(a) was structured to protect judges from the vicissitudes of life that impact us all.

Plaintiffs ask this Court to equate a prohibited legislative diminishment in judicial compensation with legislative inaction on proposals to increase a judge's compensation to account for inflation. Like the courts below and in *Maron*, the federal cases have uniformly rejected that argument. Indeed, the United States Supreme Court found the argument so insubstantial that it dismissed it in a footnote. *Will*, 449 U.S. at 228 & n.33.

Given the Constitution's focus on any legislative diminishment of judicial compensation during a judge's term of office, it is hardly surprising that the two federal cases on which Plaintiffs principally rely— *United States v. Hatter,* 532 U.S. 557 (2001) and *Will*—involved the constitutionality of taxes adopted by Congress that unquestionably had the effect of diminishing judicial compensation.

The issue in *Hatter* was whether Congress had adopted "a generally applicable, nondiscriminatory tax to the salary of federal judges," which was constitutionally permissible despite its effect of reducing judicial compensation or whether Congress had instead adopted a "prohibit[ed] taxation that singles out judges for specially unfavorable treatment." *Hatter*, 532 U.S. at 561, 567. *Hatter* thus involved a *reduction* in the plaintiff-judge's compensation if the tax adopted

by Congress was permissible. Consistent with the focus of the "no diminishment" provision in the Compensation Clause, the Supreme Court considered whether such a "diminishment" was valid and enforceable, and the Court concluded that as "generally applicable, nondiscriminatory tax" it was. *Id.*

Will upheld Congressional enactments differentiating between judges and legislators, on the one hand, who were denied previously scheduled but unvested cost of living adjustments, and civil service and other federal employees, on the other, who were allowed to receive them. *See Will,* 449 U.S. at 205-09 (describing the provisions adopted by Congress that denied judges and other high federal officials the benefits or cost of living adjustment but allowed almost all other federal employees to receive those adjustments). As in *Hatter,* the issue was whether the Congressional enactments violated the "no diminishment" provision in the Compensation Clause. The only violation found in *Will* related to the Congressional enactment that would have denied the judges the benefit of a cost of living adjustment that had already vested.

Justice Breyer, the author of the Court's opinion in *Hatter,* drew the ultimate conclusion from these cases that Plaintiffs try to avoid: the Constitution's "no diminishment" guarantee "is not concerned with the absolute level of judicial compensation," because under the Constitution "[i]t is up to Congress to decide what that level of [judicial] pay ought to be." *Williams,* 535 U.S. at 920.

C. Plaintiffs' Argument Is Inconsistent With The Principles Of Representative Democracy.

Plaintiffs' argument is nothing more than an attempt to have this Court amend the Constitution by mandating an indexing scheme plainly not envisioned by the People when they adopted Article VI, § 25(a). At bottom, Plaintiffs' argument is an attack on the very principle of representative democracy on which our entire constitutional structure of government is based.

The power of the purse is reserved to the Legislature because it is the branch of government closest to the people. The Constitutional judgment placing that power in the hands of the political branches, and most particularly the Legislature, is at its most compelling with respect to matters relating to the salaries paid to public office-holders. The necessity of having to justify any such increase to the voters—who in the past have often shown a deep skepticism about arguments by political office-holders that their salaries should be raised—exercises a powerful disincentive against abuse of the Legislature's undoubted power to vote itself or other public office-holders a pay raise. That the Legislature's members are subject to election every two years makes that disincentive against abuse all the more powerful. As we showed in our opening brief, *see* Def. Op. Br. at pp. 51-52, the Constitution grants the Legislature the power to award State officers a pay raise as part of the "checks and balances" aspect of the separation of powers doctrine, to

prevent any abuse of that power by vesting it in legislators who, in turn, must answer to the voters every two years.[5]

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[5] American history is replete with examples of the voters exercising their power to punish legislators for granting such pay raises. In *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford Univ. Press 2009), for example, Professor Gordon S. Wood discussed the first such instance (at pp. 718-21; all quotations below are taken from his discussion).

In March 1816, Congress passed a bill, with bipartisan support, effectively doubling the compensation of its members. When the press, both Federalist and Democratic-Republican, reported Congress' action, it "fanned the passions of people to heights rarely seen." Thomas Jefferson condemned the bill, stating that the "drudgery" of office and the bare "subsistence" provided for office holders in a republic were "a wise & necessary precaution against the degeneracy of the public servants."

In the fall elections of 1816, nearly 70 percent of the members of the Fourteenth Congress were voted out of office. In January 1817, "a chastened lame duck Fourteenth Congress met to debate the issue of exactly what representation meant, and by and large determined that the people had every right to instruct their congressmen." One congressman, William Findley, spoke passionately about the need to pay the legislators adequately. "Ordinary middling people like him, who 'have to support their families by their industry in any occupation,' needed more than just enough money to cover their expenses. 'Agreeable to all the principles of our government,' said Findley, in summing up his view of representation that he had promoted from the beginning of his career, 'all classes, and all interests ought to be represented in Congress. . . . The wages might be made so low that but one class, viz.: the wealthy who could afford the expense, and did not depend on their own personal industry would serve. But this,' he said, in defense of the middling world he had helped create, 'would change the nature of our government.' Despite Findley's plea for a decent salary, Congress at the end of the session repealed the Compensation Act."

II. REJECTION OF PLAINTIFFS' DEMAND FOR MONETARY RELIEF IN A SPECIFIC AMOUNT WAS PROPER.

The second issue raised by Plaintiffs' cross-appeal is, in substance, that the courts below supposedly erred in failing to grant retroactive monetary relief, and in refusing to fix the appropriate levels of judicial compensation themselves. This aspect of Plaintiffs' cross-appeal seeks relief that, if granted, would be unprecedented and inconsistent with the language of the Constitution and the decisions of this Court. The lower courts correctly refused to allow any such relief, even accepting *arguendo* their conclusion that the "linkage" amounted to a constitutional violation.

Above, we showed that "[u]nder the State Constitution, the Legislature alone has the power to authorize expenditures from the State treasury, and to 'regulate and fix the wages or salaries ...'" of state employees. *Ohrenstein,* 77 N.Y.2d at 47, 563 N.Y.S.2d at 747. The Constitution provides a detailed scheme for the consideration, annually, of the budget for the Judiciary, including any request for an increase in judicial salaries. Article VI, § 25(a) requires that judicial "compensation ... shall be established by law, " and Articles III and VII lay out the procedure to be followed in passing a bill to "establis[h] by law" judicial salaries. Article III, § 4 provides that "appropriations for the legislature and judiciary ... shall be subject to [the Governor's] approval as provided in section 7 of article IV."

Plaintiffs' demand that a court should fix the appropriate levels of judicial compensation cannot be squared with those provisions of the Constitution.

Furthermore, this Court has never permitted a court to substitute its decree for the "appropriation by law" which the Constitution requires before State funds may be expended from the treasury. *See* Article VII, § 7 ("no money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law"). In *Campaign for Fiscal Equity,* 8 N.Y.3d at 28, 828 N.Y.S.2d at 243, this Court was careful to note that, while "it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals," the courts will leave it to the political branches to devise appropriate "financing plans" to address any "vested rights" so "declared" by the courts. The Court explained that its refusal to sanction any intrusion into the budgeting and appropriations powers of the political branches was "justified not only by prudent and practical hesitation in light of the limited access of the Judiciary to the controlling economic and social facts, but also by our abiding respect for the separation of powers upon which our system of government is based. We cannot intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Id.*

The *Campaign for Fiscal Equity* case was not the first instance where this Court refused to intrude on the budgeting powers of the political branches of

government. For example, in *Klostermann v. Cuomo*, 61 N.Y.2d 525, 475 N.Y.S.2d 247 (1984), patients and former patients of State psychiatric hospitals claimed that their constitutional and statutory rights had been violated when they were released into the community without residential placement, supervision, and care consistent with the least restrictive conditions suitable to their needs. This Court held that it had the authority to compel the State to exercise its mandatory duties, even if those duties were to be executed through discretionary means, but that it lacked the power to direct the State to act in a particular manner. The Court could compel the State to perform a legal duty, but not direct how it should perform that duty, since "[t]he activity that the courts must be careful to avoid is the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations [and constitutional provisions] and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." 61 N.Y.2d at 541, 475 N.Y.S.2d at 255. Thus, a court could direct the State to prepare plans and programs to provide suitable treatment (a mandatory duty), which would also necessarily require the expenditure of funds, but could not dictate the specific manner in which such plans and programs operated since these were discretionary and policy decisions for the Governor and Legislature. 61 N.Y.2d at 539-541, 475 N.Y.S.2d at 254-55.

Similarly, in *Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27, 38-39, 453 N.Y.S.2d 643, 648 (1982), in upholding the constitutionality of the State's education funding system, this Court emphasized:

> The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity. This is of the very essence of our governmental and political polity. It would normally be inappropriate, therefore, for the courts to intrude upon such decision-making.

In light of this unbroken line of precedent, even if Plaintiffs were to prevail on their claim that the political branches' inability to agree on an amendment to amend Article 7-B granting a judicial pay raise was unconstitutional, the only relief they could receive would be a declaratory judgment that the State acted unconstitutionally and an order requiring the State to remedy the constitutional defect. The Judiciary has no constitutional authority to order the Legislature to fix judicial salaries at a specified amount. *Accord, e.g., Pataki v. New York State Assembly*, 4 N.Y.3d 75, 97, 791 N.Y.S.2d 458, 470 (2004) ("to invite the Governor and the Legislature to resolve their disputes in the courtroom might produce neither executive budgeting nor legislative budgeting but judicial budgeting—arguably by the worst of the three."); *Saxton v. Carey*, 44 N.Y.2d 545, 550, 406

N.Y.S.2d 732, 735 (1978)("the executive and legislative branches of government . . . are the sole participants in the negotiation and adoption of [a] budget" (internal quotation marks omitted)); *Campaign for Fiscal Equity v. State*, 29 A.D.3d 175, 185, 814 N.Y.S.2d 1, 8 (1st Dep't) ("without the ability or the authority to review the entire State budget, it is untenable that the judicial process . . . should intervene and reorder priorities, allocate the limited resources available, and in effect direct how the vast [City and State] enterprise[s] should conduct [their] affairs") (internal quotation marks omitted) (quoting *Jones v. Beame*, 45 N.Y.2d 402, 408 N.Y.S.2d 449 (1978)), *aff'd*, 8 N.Y.3d 14, 828 N.Y.S.2d 235 (2006)).

These cases establish clearly that the courts below appropriately refused to allow the Judiciary itself to fix judicial salaries or order that funds be taken from the State treasury for retroactive pay.

CONCLUSION

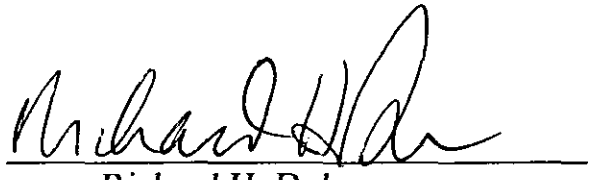
For the reasons set out above and in our opening brief, this Court should enter an order (i) reversing the Order appealed from insofar as it granted summary judgment to Plaintiffs on their second cause of action; (ii) granting Defendants' motion to dismiss the Complaint in its entirety; (iii) directing the entry of judgment

in favor of Defendants dismissing the Complaint, together with such other relief to Defendants as this Court deems just.

Dated: New York, New York
December 14, 2009

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: 

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To be Argued by:
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(Time Requested: 30 Minutes)

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

Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents-Cross-Appellants,

– against –

GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

– and –

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

Defendants-Appellants-Cross-Respondents.

REPLY BRIEF FOR PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS

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Plaintiffs-Respondents-Cross Appellants,	:	
- against -	:	New York County Index No. 112301/07
THE GOVERNOR OF THE STATE OF NEW YORK,	:	
Defendant-Respondent,	:	
- and -	:	
NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, and THE STATE OF NEW YORK,	:	
Defendants-Appellants-Cross-Respondents.	:	

REPLY BRIEF OF PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS IN FURTHER SUPPORT OF THEIR CROSS-APPEAL

Plaintiffs-Respondents-Cross-Appellants, Honorable Susan Larabee, Honorable Michael Nenno, Honorable Patricia Nunez, and Honorable Geoffrey Wright (the "Plaintiffs"), respectfully submit this reply brief in further support of their cross-appeal from that portion of the decision and order of the Appellate Division, First Department entered June 2, 2009 (Luis A. Gonzalez, P.J., Peter

Tom, Eugene Nardelli, Karla Moskowitz, Diane T. Renwick, J.J.) (the "Appellate Division Ruling"), as upheld the order of the Supreme Court, New York County (Edward H. Lehner), entered June 11, 2008 dismissing the first cause of action in Plaintiffs' Verified Complaint claiming that Defendants-Appellants-Cross-Respondents (the "Defendants") had violated New York Constitution Article VI, § 25 ("Art. VI, § 25" or the "Compensation Clause"). Plaintiffs further cross-appeal from that portion of the Appellate Division Ruling as upheld the IAS Court's order not awarding requested monetary damages in the amount of cost of living adjustments from the period beginning January 1, 2000 through the date that a final judgment is entered.

PRELIMINARY STATEMENT

"[S]hall not be diminished." Through these words the Framers of the United States Constitution and of our State Constitution provided the Judiciary with a specific constitutional protection unlike any other – compensation that cannot be diminished.[1] The intent of this provision is clear: the independence of the Judiciary, as a co-equal branch of government, must remain uncompromised and free from any encroachment based upon judicial compensation. The United States Supreme Court in *Evans v. Gore*, 253 U.S. 245 (1920), and again in

[1] The federal Compensation Clause contained in Article III, § 1 of the United States Constitution parallels Article VI, § 25 of the New York Constitution, and states "The judges, both of the supreme and inferior courts . . . shall . . . receive for their services, a compensation, which shall not be diminished during their continuance in office." U.S. Const. art. III, § 1.

O'Donoghue v. United States, 289 U.S. 516 (1933), reminded the country of the necessity of protecting judicial independence against the compensation power of the Legislature and the importance of the Compensation Clause in providing that protection. In those cases, the Supreme Court established the rule that judicial compensation must not be diminished by any means, directly or indirectly. Since *Evans* and *O'Donoghue*, the United States Supreme Court has recognized a sole exception – diminishment of judicial compensation by taxation is allowed so long as it does not discriminate against judges.[2] Defendants in the instant matter are asking this Court to apply this narrow exception, rather than the rule.

Over 10 years of neglect by Defendants has resulted in more than a 30% diminishment in state judges' compensation, which no one, including Defendants, denies. The Compensation Clause and the principles established in *Evans* and *O'Donoghue* without qualification forbid diminishment. This rule reaches diminishment in all of its forms and is not confined, for example, to legislation that would reduce nominal annual salaries. Moreover, Defendants do not contest that prohibited diminishment may be indirect as well as direct.

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[2] In *United States v. Will*, 449 U.S. 200 (1980), the Supreme Court crafted a unique vesting rule in finding that rescinding a cost of living adjustment statute after its effective date violated the Compensation Clause, but that rescinding a cost of living adjustment formula prior to the effective date was not a diminishment, as the cost of living adjustment had not become a vested right. Here, of course, Plaintiffs' vested right resides in the Compensation Clause itself which, as even the Defendants acknowledge, protects "the legitimate expectancy *rights* of individual judges." (Reply Brief of the State of New York as Appellant In Further Support of its Appeal, and Brief for the State of New York and the Governor as Respondents in Opposition to Plaintiffs' Cross-Appeal ("Def. Opp. Br."), p. 39) (emphasis added).

Instead, Defendants invoke the tax exception to the rule and claim that as inflation is nondiscriminatory, the Legislature may ignore the devastating effect of inflation on compensation – even to the extent of a 30% cut in pay.

Specifically, Defendants contend that the sole exception to the prohibition against diminishment – a nondiscriminatory tax – applies to the instant matter because inflation is nondiscriminatory. This exception, however, is deeply rooted in the principle that the payment of taxes flows from a shared civic obligation common to all citizens. Defendants offer no explanation as to why the tax exception should apply to inflation, nor do Defendants justify the absence of any civic obligation attendant in the effects of inflation.

To accept Defendants' argument is to render the constitutional protection envisioned by the Framers meaningless. Assuming, *arguendo*, that Defendants are permitted to ignore the effects of inflation upon judicial compensation, then the real value of judicial compensation can be reduced indefinitely. Despite the Compensation Clause, judges would conceivably have a salary that is "undiminished" in nominal value, but that in real value will have been reduced to a fraction of its original value – precisely what the Framers sought to avoid. Taken to its logical conclusion, Defendants contend that, despite the words "shall not be diminished," the real economic value of judicial compensation can be reduced to a penurious amount. One cannot imagine any other employer in

the United States asserting such a restrictive view of its obligation to compensate its employees. Defendants evidently contend that the constitutional protection of the Judiciary is less than the protection afforded by ordinary employment practices.

Defendants quote Alexander Hamilton in support of their contention that the Legislature is unfettered in its ability to determine judicial compensation:

> It will be readily understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.

The Federalist No. 79, at 491-92; (Def. Opp. Br., p. 41). What Defendants fail to address, however, is that the hazard Hamilton warned against has been realized in the instant matter. Defendants do not deny that judicial compensation has not been adjusted in over 10 years, resulting in more than a 30% reduction in the real value of judicial compensation for our state's judges.

Plaintiffs also appeal from the Appellate Division's order insofar as it failed to grant the monetary damages sought by Plaintiffs in the amount of cost of living adjustments to their annual compensation since January 1, 2000. Both the IAS Court and Appellate Division recognized that Defendants violated the

Constitution through their treatment of the Judiciary's compensation. Case law consistently recognizes that monetary damages are appropriate to remedy constitutional violations. In the instant matter, the Appellate Division and IAS Court determined that Defendants' "linkage" practice violated the Constitution with respect to Plaintiffs' judicial compensation. As such, Plaintiffs are entitled to back-pay damages as a remedy for Defendants' unconstitutional conduct. Defendants' violation of the Compensation Clause, Article VI, § 25 (addressed in this reply) provides an additional basis for the award of damages.

ARGUMENT

I.

ARTICLE VI, § 25 PROHIBITS THE DIMINISHMENT OF JUDICIAL COMPENSATION BY INFLATION

Defendants offer myriad arguments in opposition to Plaintiffs' cross-appeal, ranging from creative historical propositions to the contention that Defendants' violation of Article VI, § 25 is permitted under principles of representative democracy. At the root of Defendants' arguments, however, are two simple facts from which Defendants cannot escape: First, the plain text of Article VI, § 25 provides without equivocation or qualification that judicial compensation "shall not be diminished." Defendants do not contend that the compensation of our State justices and judges has not been diminished by 10 years of legislative failure to address 10 years of inflation. Second, relevant case

law demonstrates that a claim under Article VI, § 25 does not require a showing that the diminishment of judicial compensation is discriminatory. Article VI, § 25 is an unqualified anti-diminishment clause.

A. Defendants Ignore the Plain Text of Article VI, § 25

Defendants assert that "Plaintiffs never come to grips with either the text of Article VI, § 25(a), on which they assertedly base their claim, or the history of its many amendments over the years." (Def. Opp. Br., p. 38).

1. The Plain Text of Article VI, § 25

Despite numerous references to the "plain text" of Article VI, § 25, Defendants never address the ordinary and plain meaning of this constitutional provision. Article VI, § 25 of the New York Constitution unequivocally states, "[t]he compensation of a 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. It is a well-settled rule "that in construing the language of the constitution, the courts should give the language its ordinary,

natural, plain meaning." 20 N.Y. Jur. 2d Constitutional Law § 27 (2009).[3] Plaintiffs' claim of unconstitutional diminishment from inflation rests not in complex interpretation of Article VI, § 25, or even the historical evolution of the provision on its journey to the present as described by Defendants, but in the simple principle that "shall not be diminished" means exactly that – judicial compensation shall not be diminished. Defendants do not – indeed because they cannot – refute that the ordinary, natural, and plain meaning of Article VI, § 25 prohibits the diminishment of judicial compensation, without qualification. Defendants similarly do not and cannot refute that over 10 years of inflation has reduced Plaintiffs' judicial compensation. Therefore, as a textual matter, Defendants cannot dispute that the plain text of Article VI, § 25 supports Plaintiffs' claim for violation of this provision resulting from over 10 years of reduction by inflation.

[3] Defendants contend that Article VI, § 25's language that judicial compensation "shall not be diminished" qualifies the "shall be established by law" language immediately preceding it. (Def. Opp. Br., p. 45). Nothing could be further from the truth. The "shall be established by law" clause exists independently of the "shall not be diminished" clause of Article VI, § 25 and is separated by the conjunction "and" to create a separate clause. Thus, the Compensation Clause of the New York Constitution mandates: (i) that judicial compensation be established by law; and (ii) that judicial compensation not be diminished. Defendants essentially seek to insert the words "and shall be established by law" following the clause prohibiting diminishment. Had the Framers of the New York Constitution intended to prohibit only diminishment of judicial compensation that was "established by law," they certainly could have chosen to do so. Consequently, Defendants' argument depends upon an amendment to the Constitution that simply does not exist.

2. Defendants' Historical Argument Fails

Defendants argue that a cost of living adjustment conflicts with the historical periods when the Constitution prohibited any increase in judicial compensation. They say that this is tantamount to a "claim that the Constitution was internally contradictory for long periods."[4] Actually, courts have consistently recognized that cost of living adjustments for inflation do not represent increases in salary, but simply reflect the preservation of the dollar value of that salary. *See Boehner v. Anderson*, 809 F. Supp. 138, 141-42 (D.D.C. 1992), *aff'd*, 30 F.3d 156 (D.C. Cir. 1994); *see also United States v. Hatter*, 532 U.S. 557, 579 (2001) (finding that cost of living adjustments reflect an effort "to restore . . . the real compensation that inflation has eroded."); *see also Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002) (Breyer, J., dissenting) (finding that a cost of living adjustment "does not increase a judge's real salary; it simply keeps that real salary from being reduced."); *cf. Schultz v. Harrison Radiator Div. General Motors Corp.*,

[4] Defendants' speculation concerning the application of Article XIII, § 7 to judicial compensation was not addressed in the courts below and is therefore improperly raised before the Court. *See Bingham v. New York City Transit Auth.*, 99 N.Y.2d 355, 359, 786 N.E.2d 28, 30 (2003) ("As we have many times repeated, this Court with rare exception does not review questions raised for the first time on appeal. Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice."). In any event, specific provisions of the Constitution address the compensation of each of the three branches of State government, rendering discussion of the general provisions of Article XIII, § 7 immaterial. *See* N.Y. Const. art. III, § 6 (compensation provision for Legislative branch); art. IV, § 3 (compensation provision for Executive branch); art. VI, § 25 (compensation provision for the Judiciary).

90 N.Y.2d 311, 319 (1997) (finding that an adjustment for inflation on a structured settlement award does not constitute additional compensation, but ensures that the passage of time does not devalue the award). Thus, adjusting judicial compensation for inflation would not create an internal contradiction within the Constitution, even during those periods when the Constitution prohibited any increase in judicial compensation.[5] Rather, consistent with the "no diminishment" provisions that have steadfastly remained in the Constitution since 1846, cost of living adjustments protect judicial compensation against diminution from the effects of inflation.

Moreover, Defendants actually concede the crux of Plaintiffs' Article VI, § 25 claim, asserting that "the Constitution's 'no diminishment' guarantee is logically the opposite of an 'adequate' compensation guarantee. A 'no diminishment' rule draws a sharp line below which compensation cannot be reduced, but says nothing about increases above that floor." (Def. Opp. Br., p. 39). As an initial matter, Defendants' non-sequitur does not address Plaintiffs' claims before the Court, as Plaintiffs have not brought a cause of action for

[5] In contrast, Defendants' arguments often result in Defendants' asserting contradictory positions in matters before the Court. For instance, in the instant matter, Defendants stated, "The gravamen of Plaintiffs' Complaint is that the compensation fixed by law for State-paid judges – which includes the salaries set forth in Article 7-B of the Judiciary Law – is constitutionally deficient." (Def. Br. in *Larabee*, p. 27). In direct contradiction to this assertion, Defendants' stated, "Neither in form nor substance did the Supreme Court's analysis of Plaintiffs' 'linkage' claim involve the constitutionality of a state statute." (Def. Br. in *Chief Judge v. Governor*, p. 16).

constitutionally inadequate compensation.[6] Nevertheless, Defendants admit that Article VI, § 25 sets a floor, below which compensation cannot be reduced. Inflation indeed constitutes a reduction in compensation, and unchecked inflation amounts to a violation of the Compensation Clause. *See Will*, 449 U.S. at 227 (the Clause addresses "the need to increase compensation to meet economic changes, such as substantial inflation . . . ."). By any measure, over 10 years of inflation has worn away the very floor that Article VI, § 25 intended to protect. Therefore, Defendants' historical argument fails by its own terms, and actually supports Plaintiffs' claim that the diminishment of judicial compensation for over 10 years as a result of inflation constitutes a violation of Article VI, § 25 of the New York Constitution.

B. Defendants' Contention That Discrimination Is Required In An Inflation Case Fails

Defendants assert that a showing of a discriminatory impact on judges is required to prove a violation of Article VI, § 25. (Def. Opp. Br., p. 45). However, Defendants' discrimination argument misses the mark both as a matter of constitutional interpretation, and as a matter of law. Relevant case law belies Defendants' contention that a claim brought under Article VI, § 25 requires a

[6] Plaintiffs-Appellants-Respondents in *Chief Judge v. Governor* claim that judicial compensation is constitutionally inadequate. We believe that the Chief Judge correctly asserts that the current judicial compensation is constitutionally inadequate, but that issue is not before the Court in the *Larabee* case.

showing of discrimination. Defendants argue that Article VI, § 25(a) was not "structured to protect judges from the vicissitudes of life that impact us all." This ignores the precedent that the Compensation Clause protects the reasonable expectations of the Judiciary, while reflecting the practical need to adjust judicial compensation with changing economic circumstances.

1. Discrimination Is Not Required

Defendants cite to two cases, *United States v. Will*, 449 U.S. 200, 226 (1980) and *United States v. Hatter* to support their claimed discrimination requirement. Contrary to Defendants' assertion, *Will* did not involve "the constitutionality of taxes adopted by Congress that unquestionably had the effect of diminishing judicial compensation." (Def. Opp. Br., p. 46). Rather, the United States Supreme Court's decision in *Will* turned upon the application of a vesting rule to previously enacted federal statutes fixing compensation, and had nothing to do with taxes. *See Will*, 449 U.S. at 474 ("These appeals present the questions whether under the Compensation Clause . . . Congress may repeal or modify a statutorily defined formula for annual cost-of-living increases in the compensation of federal judges, and, if so, whether it must act before the particular increases take effect."). Similarly, *Will* did not depend upon "differentiating between judges and legislators, on the one hand, and civil service and other federal employees on the other . . . ." (Def. Opp. Br., p. 47).

Remarkably, Defendants overlook that the United States Supreme Court in *Will* expressly rejected the notion that only discriminatory diminishment violates the Compensation Clause. According to Chief Justice Burger, delivering the opinion of the Court:

> The Government contends that Congress could reduce compensation as long as it did not 'discriminate' against judges, as such, during the process. *That the 'freeze' applied to various officials in the Legislative and Executive Branches, as well as judges, does not save the statute, however.* . . . The inclusion of the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that Clause; *the Constitution makes no exceptions for 'nondiscriminatory' reductions*.

Will, 449 U.S. at 226 (1980) (emphasis added).

By the same token, Defendants discuss *United States v. Hatter* without addressing the underlying principles of taxation that are central to the United States Supreme Court's holding in that case – principles that are significantly not present in the instant matter. (Def. Opp. Br., p. 47). The *only* exception to the Compensation Clause that has been recognized to date is that of a nondiscriminatory tax. *See Hatter*, 532 U.S. at 567. This taxation exception is unambiguously embedded in the tenet that all citizens have a duty to share in the burden of the costs of their government. *See O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939) ("To subject them [judges] to a general tax is merely to

recognize that judges are also citizens, and their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of government whose Constitution and laws they are charged with administering."); *see also Black v. Graves*, 257 A.D. 176, 181 (1939), *aff'd*, 281 N.Y. 792 (1939) (Bliss, J., concurring) ("Enjoyment of the privileges of residence in the State and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. Taxes are what we pay for civilized society . . . ."). Defendants have never explained why the taxation-driven exception of *Hatter* should apply to the instant matter, which lacks any notion of civic obligation resulting from inflation. In the absence of taxation or the principles of civic duty necessarily related therein, the distinction of *Hatter* is distinguishable from the present matter before the Court.

2. Inflation Is Not an Exception to the No-Diminishment Rule

Article VI, § 25 does not exist in a vacuum, but rather reflects the practical reality of protecting the reasonable expectations of the Judiciary to compensation that shall not be diminished, with the need to increase such compensation in response to changing economic circumstances. Defendants argue that "nothing in the Constitution or in the concerns of the Framers about preserving judicial independence supports Plaintiffs' notion that Article VI, § 25

(a) was structured to protect judges from the vicissitudes of life that impact us all." (Def. Opp. Br., p. 46). While Article VI, § 25 does not protect judges against all of "the vicissitudes of life," it protects the Judiciary, as a separate yet co-equal branch of the State government, from a diminishment in judicial compensation.

The Compensation Clause protects the reasonable expectations of the Judiciary to compensation that shall not be diminished. *See Will*, 449 U.S. at 220-21 ("This Court has recognized that the Compensation Clause also serves another, related purpose. As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice-more often than not more lucrative than the bench-the compensation of the new post will not diminish."); *see also Williams v. United States*, 535 U.S. at 914 (Breyer, J., dissenting) (stating that the Compensation Clause's "purposive focus" is "a judge's reasonable expectations."). Article VI, § 25 further reflects the practical necessity to increase judicial compensation as economic circumstances change over time. *See Will*, 449 U.S. at 227 (finding that the Compensation Clause "embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence."). Indeed, Defendants have conceded

that the Constitution "protects the independence of the Judiciary as well as the legitimate expectancy *rights* of individual judges." (Def. Opp. Br., p. 39) (emphasis added).

Defendants further conceded, and the Appellate Division recognized, that Article VI, § 25 established this very principle. Defendants conceded that "[t]he compromise reflected in Section 25(a) thus reflects the drafters' balancing of the need to protect judicial independence, the practical *necessity* of fairly compensating judges in times of changing economic circumstances and the overriding policy of committing to the Legislature when and how much to increase any State officer's pay." (Def. Br. in *Chief Judge v. Governor*, p. 57) (emphasis added). Likewise, according to the Appellate Division in the instant matter, "The Compensation Clause, providing a means by which judicial salaries may be adjusted for inflation but vesting the mechanics of doing so in the Legislature, recognizes the need to accept[ ] a limited risk of external influence in order to accommodate the need to raise judges' salaries when the times change [ ]." *Larabee v. Governor*, 65 A.D.3d 74, 85, 880 N.Y.S.2d 256, 265 (1st Dep't 2009) (internal quotations and citations omitted). The Appellate Division, First Department, shied away from the clear "need to raise judges' salaries" referred to in this quotation. There is no need for this Court to do so as well.

The Compensation Clause also guards against direct diminishment and indirect diminishment alike. The Appellate Division erroneously determined that the "central issue" in the instant matter is "whether diminishment results only when there has been an affirmative reduction of compensation, consisting of the pay scale and benefits, below that which was available when the jurist entered office, or whether a more flexible construction is permissible which includes a gradual diminution of the relative value of wages and benefits over a period of time." *Larabee*, 65 A.D.3d at 85-86, 880 N.Y.S.2d at 265. The distinction drawn by the Appellate Division is wrong as a matter of law. Article VI, § 25 does not differentiate between direct and indirect diminution in prohibiting diminishment, and courts interpreting this provision have confirmed the broad powers of the Compensation Clause. *See Atkins v. United States*, 556 F.2d 1028, 1045 (Ct. Cl. 1977) ("*O'Malley*, then, had no disagreement with *Evans* and *Miles* insofar as they determined that indirect incursions upon judicial salaries, as much as direct ones, were not tolerable under the Compensation Clause."). Moreover, courts have agreed with the all too evident proposition that inflation exacts a toll on compensation. *See, e.g., Will*, 449 U.S. at 227 ("Rather, that provision [the federal Compensation Clause] embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such

as substantial inflation, against the need for judges to be free from undue congressional influence.").

As a practical matter, the judges of the State of New York have not been protected "from the vicissitudes of life that impact us all," due to Defendants' repeated failure to protect Plaintiffs' compensation from the changing economic circumstances of inflation. In fact, the judges of New York have uniquely experienced the ravages of inflation for over a decade. Unlike most citizens of the State employed in the private sector, the Judiciary has not received a raise since 1999. Unlike the 195,000 employees of the State, the New York State Judiciary received no cost of living adjustment in over a decade. Unlike the judiciary of every other state in this nation, New York State judges have watched month after month, year after year, as their adjusted level of compensation plummeted to dead last in the United States among state judges.

II.

PLAINTIFFS' DEMAND FOR MONETARY RELIEF IS APPROPRIATE

Defendants have never disputed the calculation or amount of damages claimed and have never challenged the appropriateness of the cost of living adjustments to judicial compensation. Instead, Defendants' argument in response to Plaintiffs' request for monetary relief with respect to either or both of Plaintiffs' causes of action can be reduced to two propositions: First,

Defendants contend that the Legislature alone has the "power of the purse," prohibiting any court from awarding these damages. Second, Defendants assert that the Court lacks the power to grant an award of the claimed back-pay monetary damages. Both of Defendants' propositions are erroneous. Defendants' first proposition concerning the powers of the respective branches of state government fails to consider that the Constitution itself bestows these powers upon the co-equal branches. The Legislature's power of the purse is subject to the separation of powers and to the Compensation Clause. Defendants' second proposition ignores well-established case law where courts have awarded monetary damages in response to constitutional violations involving judicial compensation.

A. Defendants Confuse Principles of Representative Democracy With Constitutional Duties

Defendants contend that Plaintiffs' argument that the diminishment of judicial compensation from over 10 years of inflation violates Article VI, § 25 "is an attack on the very principle of representative democracy on which the entire constitutional structure of government is based." (Def. Opp. Br., p. 48). According to Defendants, any attempt by the Judicial branch to declare or interpret the Constitution would violate principles of democratic representation, as the "power of the purse is reserved to the Legislature because it is the branch of government closest to the people." (Def. Opp. Br., p. 48). Defendants'

argument makes one glaring omission: the *Constitution itself* is what gives the three co-equal branches of government their respective powers. Indeed, the Legislature's "power of the purse" derives *from the Constitution.*[7] *See People v. Tremaine*, 281 N.Y. 1, 10-11, 21 N.E.2d 891, 895 (1939) ("The Legislature has complete power over appropriations. It does not have to make them, but when it does attempt to do so, it is obliged to follow the provisions of the Constitution."). As such, the Legislature is not unfettered, but must operate within the powers granted *by the Constitution.* It is the province of the Court to evaluate and determine when the Legislature fails to uphold its duties under the Constitution. As the United States Supreme Court has held, this is no less true with regard to judicial compensation. In *O'Donoghue v. United States*, 289 U.S. 516, 533-34 (1933), that Court forthrightly stated, even in the midst of the Depression, that "it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish compensation . . . ." Difficult economic circumstances do not excuse violation of the Constitution.

[7] Defendants also seek to avoid their constitutional violation by arguing that the Legislature is accountable to voters. (Def. Opp. Br., pp. 48-49). This argument is not relevant to Plaintiffs' claim under Article VI, § 25, but nevertheless demonstrates Plaintiffs' independent claim that Defendants' practice of linkage violates the separation of powers doctrine. The Constitution establishes the Judiciary as a separate, co-equal branch of government. Defendants' practice of linkage injected judicial compensation into the realm of politics, removing the barrier between the Judicial branch and the political branches. Defendants' citations to historical examples of voter reaction to legislators *increasing their own legislative compensation* only reinforces this point.

B. Defendants Misconstrue Case Law Relevant to Plaintiffs' Request for Damages

Defendants misunderstand Plaintiffs' request for relief in the instant matter. Contrary to Defendants' assertions, Plaintiffs do not "demand that a court should fix the appropriate levels of judicial compensation." (Def. Opp. Br., p. 51). Plaintiffs' request for damages is straightforward: As demonstrated in Plaintiffs' opening brief, Defendants have already been found to have violated the New York Constitution while allowing Plaintiffs' judicial compensation to be diminished by more than 30% over the course of more than 10 years. Six justices of this State have already rightly concluded that Defendants' "linkage" practice has threatened judicial independence, subordinated the Judiciary to the political branches, and violated the separation of powers. *See Larabee v. Governor*, 20 Misc. 3d 866, 870-78, 860 N.Y.S.2d 886, 889-94 (Sup. Ct. N.Y. Co. 2008); *Larabee v. Governor*, 65 A.D.3d 74, 93-100, 880 N.Y.S.2d 256, 270-75 (1st Dep't 2009). As a result of Defendants' constitutional violation, Plaintiffs have been damaged by diminished compensation and are entitled to back-pay equivalent to the loss. Back-pay monetary damages are an established remedy for constitutional violations. Therefore, Plaintiffs' request back-pay damages to compensate them for the real injuries they have suffered as a result of Defendants' constitutional violations.

Awarding back pay as monetary damages for constitutional violations involving judicial compensation is an established remedy. *See Nicolai v. Crosson*, 214 A.D.2d 714, 715 (2d Dep't 1995) (affirming award of back pay as monetary damages for unconstitutional disparity in judicial compensation in violation of judges' right to equal protection); *see also Deutsch v. Crosson*, 171 A.D.2d 837, 838-39 (2d Dep't 1991) (same); *Dickinson v. Crosson*, 219 A.D.2d 50, 54-55 (3d Dep't 1996) (same). When this Court examined a claim for a constitutional violation involving judicial compensation in *Weissman v. Evans*, the Court likewise awarded back-pay damages, in observation of the "long-recognized rule that a remedy should be coextensive with the wrong it is to redress." *Weissman*, 56 N.Y.2d 458, 467-69 (1982).

Additionally, Defendants' reliance on *Campaign for Fiscal Equity v. State*, 8 N.Y.3d 14, 828 N.Y.S.2d 235 (2006) is unavailing. The Court in *Campaign for Fiscal Equity* indeed "refused to intrude on the budgeting powers of the political branches of government." (Def. Opp. Br., p. 51-52). However, the case before the Court in *Campaign for Fiscal Equity* was several steps removed from the posture of the instant matter. In *Campaign for Fiscal Equity v. State*, the lower courts determined that the State had violated the Constitution by underfunding New York City's public education system. *See Campaign for Fiscal Equity v. State*, 100 N.Y.2d 893, 909-11 (2003). Once the State's

constitutional violation was established, then-Governor Pataki issued an executive order establishing a commission to recommend the proper level of funding for the education system, in compliance with the Constitution. *See Campaign for Fiscal Equity v. State*, 8 N.Y.3d at 21-22. Only *after* the political branches increased funding but departed from the findings of the commission and additional litigation ensued did the Court "refuse to intrude on the budgeting powers of the political branches of government." In other words, the Court declined to evaluate the size of the political branches' increase in funding, having already mandated that it must be increased. The instant matter is much more akin to the situation in *New York Co. Lawyers' Ass'n v. State,* 196 Misc. 2d 761, 790 (Sup. Ct. N.Y. Co. 2003), where the court "issued a mandatory permanent injunction raising the [statutory rates paid to assigned counsel in criminal and family court matters] to $90.00 an hour . . . ." *See also New York Co. Lawyers' Ass'n v. State*, 294 A.D.2d 69, 72 (1st Dep't 2002). According to the court, "Faced with 17 years of legislative inaction and proof of real and immediate danger of irreparable constitutional harm, this Court can no longer wait for the legislative branch to protect the fundamental interests of children and indigent litigants." 196 Misc. 2d at 790. In short, Defendants' assertion that an award of back-pay damages would be "unprecedented and inconsistent with

the language of the Constitution and the decisions of this Court" does not square with either the language of the Constitution or precedent.

CONCLUSION

For the reasons stated herein and in our opening brief, Plaintiffs respectfully request that the Court uphold the Appellate Division's affirmance of the IAS Court's order granting summary judgment to Plaintiffs on their second cause of action. Further, Plaintiffs respectfully request the Court deny Defendants' appeal in its entirety, and find that the Appellate Division: (1) erred by dismissing Plaintiffs' first cause of action for unconstitutional diminishment under Article VI, § 25 of the New York State Constitution; and (2) erred by denying Plaintiffs monetary damages in the amount of cost of living adjustments to their annual compensation since January 1, 2000. Plaintiffs further respectfully request that the Court enter an award of damages to Judge Geoffrey Wright in the amount of $252,453.00, to Judge Patricia Nunez in the amount of $252,453.00, to Judge Michael Nenno in the amount of $240,798.00, to Judge Susan Larabee in the amount of $274,766.00, and that the Court remand with an order to award damages to each of the other current and former state paid Judges and Justices from January 1, 2000 to date, consistent with the above awards.

Dated: December 23, 2009
New York, New York

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

Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents-Cross-Appellants,

– against –

GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

– and –

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

Defendants-Appellants-Cross-Respondents.

BRIEF FOR PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS

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BRIEF OF PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS

Plaintiffs-Respondents-Cross-Appellants, Honorable Susan Larabee, Honorable Michael Nenno, Honorable Patricia Nunez, and Honorable Geoffrey Wright (the "Plaintiffs"), respectfully submit this brief in opposition to the appeal of Defendants-Appellants-Cross-Respondents New York State Senate, New York State Assembly, and State of New York, as joined by Defendant-Respondent the

Governor of the State of New York (the "Governor")[1] (the "Defendants"), taken from that portion of the unanimous decision and order of the Appellate Division, First Department entered June 2, 2009 (Luis A. Gonzalez, P.J., Peter Tom, Eugene Nardelli, Karla Moskowitz, Diane T. Renwick, JJ.) (the "Appellate Division Ruling") (CA6-CA54), as affirmed the order of the Supreme Court, New York County (Edward H. Lehner), entered June 11, 2008 ("June Order") as granted Plaintiffs' motion for summary judgment on the second cause of action in Plaintiffs' Verified Complaint (the "Verified Complaint") (R. 60-87), which alleges that Defendants have violated the doctrine of separation of powers.[2] (R. 42-59).

Plaintiffs further submit this brief in support of their cross-appeal from that portion of the Appellate Division Ruling as upheld the IAS Court's dismissal of the first cause of action in the Verified Complaint claiming that Defendants had violated New York Constitution Article VI, § 25 ("Art. VI, § 25" or the "Compensation Clause"). Plaintiffs further cross-appeal from that portion of the Appellate Division Ruling as upheld the IAS Court's order not awarding requested monetary damages in the amount of cost of living adjustments from the period

[1] On March 26, 2008, the IAS Court issued an order to amend the caption by removing "Eliot Spitzer as Governor of the State of New York" and substituting "The Governor of the State of New York."

[2] The June Order has been published as *Larabee v. Governor*, 20 Misc. 3d 866, 860 N.Y.S.2d 886 (Sup. Ct. N.Y. Co. 2008).

beginning January 1, 2000 through the date that a final judgment is entered. Plaintiffs have not cross-appealed the affirmation of the IAS Court's dismissal of the Governor from this action.

PRELIMINARY STATEMENT

This is a case about restoring the balance of power among New York's three branches of government. That balance, embodied in the doctrine of the separation of powers, has been imperiled by Defendants' unconstitutional practice of linkage. This Court has long recognized that:

> The safety of free government rests upon the independence of each branch and the even balance of power between the three. Unite any two of them and they will absorb the third with absolute power as a result. . . . Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power.

People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898).

This case is also about how the political branches have allowed judicial salaries to suffer the effects of inflation for over ten years without providing any adjustment, despite the common practice that other state employees have routinely received appropriate adjustments to account for the diminishing value of the dollar. That failure, and the resulting diminishment of judicial compensation, constitutes a violation of the Compensation Clause. For that reason, in addition to and separate

from the separation of powers violation, this case is also about restoring substantial lost value to Plaintiffs' compensation.

The core facts in this case are undisputed. There is no policy dispute that a judicial compensation adjustment accounting for a decade of inflation is well deserved, and Defendants agree that the judges should receive a pay increase. (Def. Br. p. 2); *see Larabee v. Governor*, 65 A.D.3d 74, 82, 880 N.Y.S.2d 256, 262 (1st Dep't 2009); *Larabee v. Spitzer*, 19 Misc. 3d, 226, 230, 850 N.Y.S.2d, 885, 888 (Sup. Ct. N.Y. Co. 2008). There is no dispute that the nominal value of judicial compensation has been reduced by the effects of inflation. *Larabee*, 65 A.D.3d at 84, 880 N.Y.S.2d at 264 ("The concern is not just that individual jurists are experiencing increasingly diminished economic security."). And as the Appellate Division found, there is also no legitimate question that:

> the only reason why the Legislature declined to finalize any measure to enhance judicial compensation, after such a lengthy delay, was that it perceived itself locked into an interbranch conflict with the Governor and was using the judicial branch to advance its own salary increase while simultaneously resisting campaign finance reform.

Id. at 83, 880 N.Y.S. at 263.

For the past decade, the facts show that Defendants have persisted in committing two separate constitutional violations. *First*, they have allowed judicial compensation to be greatly diminished by the effects of nearly 30%

inflation since January 1, 2000. *See Larabee*, 65 A.D.3d at 77, 880 N.Y.S.2d at 259. This violates the proscription against diminishment set forth in the Compensation Clause. *Second*, as both the IAS Court and the Appellate Division properly found, through the undisputed practice of linking the Judiciary's compensation to the Legislature's compensation and other political initiatives unrelated to the Judiciary, Defendants have contravened their constitutional duty. Specifically, this linkage practice subordinates the Judiciary to the political branches and threatens judicial independence in violation of the doctrine of separation of powers. Defendants must finally be compelled to cease these violations, abide by the Constitution, and accept the Judiciary as a co-equal branch.

Defendants' Appeal

Defendants' appeal is without merit. Unable to deny that the Judiciary should be granted a raise, and recognizing that linkage has resulted in the denial of a salary increase to the Judiciary, Defendants assert alleged Speech or Debate Clause immunity, grasp at irrelevant constitutional provisions, and engage in historical musings, among other meritless arguments, to avoid accountability. Defendants seek to have this Court (like Defendants) forever turn a blind eye to unconstitutional conduct merely because such conduct is perpetrated by the political branches. To that end, Defendants seek to place their conduct within the exclusive domain of "the legislative process" and somewhat flippantly dismiss

linkage as nothing more than a "pejorative label." (Def. Br. p. 3). Contrary to Defendant's assertions (*id.* at p. 5), linking judicial salary increases to legislative salary increases and other political debates unrelated to the Judiciary has penetrating substantive consequences for New York governance. As the Appellate Division found, "the facts are undisputed that the legislative branch, rather than being solely engaged in a legislative function, was using the Judiciary tactically in a political battle with the Governor." *Larabee*, 65 A.D.3d at 93, 880 N.Y.S.2d at 271. Bringing the constitutional significance of the undisputed facts into perfect focus, the Appellate Division held that

> [t]his outcome necessarily denigrated the third branch of government, and subordinated it to the competing political strategies of the other branches of government. That dynamic impinged on the independence of the Judiciary as a discrete branch of New York government.

Id. at 84, 880 N.Y.S.2d at 264.

Lacking a relevant legal defense to their separation of powers violation, Defendants twist and distort Plaintiffs' actual claim. They incorrectly assert that this action seeks to have the judicial branch "dictate the content of [a] bill, [and] require that [a] separate bill be introduced or mandate legislative action to amend [a] particular law . . . ." (Def. Br. p. 3). Plaintiffs seek nothing of the kind. In this action, Plaintiffs seek to compel the political branches to discharge their

constitutional duty,[3] by considering judicial compensation on its independent and objective merit without linkage, and, separately, by not permitting judicial compensation to be reduced as a casualty of politics. Directing parties to follow the Constitution is the essence of what courts do. *See, e.g., Klostermann v. Cuomo*, 61 N.Y.2d 525, 538-39 (1984); *Samuels v. N.Y. State Dep't of Health*, 29 A.D.3d 9, 12 & n.3 (3d Dep't 2006). The courts of New York are empowered to compel the other branches to adhere to the Constitution and declare acts by the other branches to be unconstitutional—it is the chief means by which the Judiciary acts as an effective check on the Legislature and the Executive. *See Urban Justice Ctr. v. Silver*, 2009 N.Y. Slip Op. 07506, __ A.D.3d__, ___ N.Y.S.2d ___, 2009 WL 3379955, *2 (1st Dep't Oct. 22, 2009) ("The doctrine of separation of powers is grounded on the principle that each of the three branches of government, executive, legislative, and judicial, possesses distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches, and each is confined to its own functions and can neither encroach upon nor be made subordinate to those of another.") Defendants' arguments, and in particular their misplaced reliance on the Speech or Debate Clause, would strip the Judiciary

[3] *See* N.Y. Const. art. XIII, § 1. (Oath of Office: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York . . . .").

of that power, elevate the political branches above the Constitution itself, and make the separation of powers doctrine a dead letter.

As part of their campaign of distortion, Defendants argue that there can be no separation of powers violation where there is no "substantive constitutional right to a judicial pay increase under Article VI, § 25(a) of the New York Constitution, and thus there was no constitutional requirement that the Legislature or the Governor agree to one." (Def. Br. p. 4). Defendants' argument artificially conflates two distinct constitutional protections afforded the Judiciary. Separate and apart from the text of the Compensation Clause, the practice of linkage violates the separation of powers. *See Larabee*, 65 A.D.3d at 91, 880 N.Y.S.2d at 269 ("Defendants essentially conceded that linkage was the causative factor in this case."); *Larabee v. Governor*, 20 Misc. 3d 866, 874, 860 N.Y.S.2d 886, 892 (Sup. Ct. N.Y. Co. 2008) ("The plain and simple reason that the adjustment has not occurred is due to . . . linkage . . . ."). Regardless of the financial outcome, judicial pay should not be systematically held hostage by the Legislature. Though the unconstitutional diminishment of judicial compensation in violation of the Compensation Clause provides a wholly independent basis for holding the Defendants accountable for their constitutional neglect, (*see* pp. 62-77, *infra*), Plaintiffs' separate undisputed right, which Defendants have consistently ignored, is the protection provided by the separation of powers doctrine.

Defendants also incorrectly contend that there is no separation of powers violation because there has been no showing of "present impairment in the Judiciary's operations." (Def. Br. p. 4). But no such showing is necessary, nor have Plaintiffs ever asserted that it is. *See New York Co. Lawyers' Ass'n v. State of New York*, 294 A.D.2d 69, 73-74, 742 N.Y.S.2d 16, 19-20 (1st Dep't 2002). As with Defendants' other stifled interpretations of the separation of powers, the requirement of actual impairment strips the separation of powers of its clearly intended prophylactic effect. The separation of powers doctrine functions as a barrier against improper conduct of the political branches, whether in the form of linkage or some other proscribed practice, that would threaten the independence of the Judiciary. As the United States Supreme Court has held:

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.

O'Donoghue v. United States, 289 U.S. 516, 530 (1933). Of course, this precept is no less recognized in New York. *See Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344, 355-56 (1985). In *Plaut*

v. Spendthrift Farm, Inc., 514 U.S. 211, 239-40 (1995), the Court further explained:

> [T]he doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or *risk* of specific harm, can be identified. (emphasis in original).

The structure of a tripartite government depends upon the absolute exclusion of any threat to independence. Here, the threat to independence arises from the Defendants' linkage practices. This linkage has necessarily resulted in (1) the political branches improperly holding the judicial branch hostage; and (2) the Judiciary's subordination to the political risk that legislators attach to increases in their own compensation.[4] As the Appellate Division held below:

> [T]he political maneuvering by the other branches of government, by reducing the issue of judicial compensation to a tactical weapon, consequentially subordinated the status of the Judiciary to that of an inferior governmental entity. Linkage, as employed in these circumstances, manifested an abandonment of any pretense to an objective consideration of judicial compensation unimpeded by extraneous political considerations. These acts and their ramifications necessarily undermine the carefully constructed architecture of New York government.

Larabee, 65 A.D.3d at 97, 880 N.Y.S.2d at 274.

[4] Notably, it also constitutes a violation of the explicit structure of the New York Constitution by imposing upon the judicial branch certain express limitations and conditions to compensation increases that are placed on the legislative branch alone. N.Y. Const. art. III, § 6 (salaries of members of the legislature cannot be increased with respect to the current term of office). No such limitation applies to the Judiciary. N.Y. Const. art. VI, § 25.

Defendants also argue that a violation has not occurred because the Senate passed two bills in 2007 that would have raised judicial salaries. (Def. Br. p. 4). That argument ignores reality: no raise was given in 2007 or in nine additional years because other unrelated political considerations, namely campaign finance reform and legislative salary increases, were linked to the bills. *See Larabee*, 65 A.D.3d at 83, 880 N.Y.S.2d at 263. The Senate was extensively involved in these failings.

None of Defendants' misplaced arguments, including, *inter alia*, that the Speech or Debate Clause bars this claim, that certain legislative procedures give the Legislature "exclusive authority" to take actions that are beyond the scope of judicial review, that New York's constitutional history negates the lower courts' findings, or that the determination that linkage is unconstitutional was "unworkable in practice," support reversing the IAS Court or the Appellate Division. Defendants' appeal should be dismissed in its entirety.

Plaintiffs' Cross-Appeal

On their cross-appeal, Plaintiffs make two requests of this Court: *First*, Plaintiffs ask that this Court reverse that part of the Appellate Division's order affirming the order of the IAS Court, entered February 7, 2008, which granted Defendants' motion to dismiss Plaintiffs' first cause of action for violation of Article VI, § 25 of the New York Constitution. The courts below, for the first

time, limited the scope of the unqualified constitutional protection of judicial independence and compensation. They did so by concluding that the prohibition of diminishing judges' compensation under Article VI, § 25 may be avoided by simultaneously diminishing the compensation of others, even though the Constitution has no such exception. The clause makes no distinction between direct or indirect diminishments or between diminishments caused by legislative acts or legislative neglects. Both of the courts below erred by requiring judges to demonstrate a direct reduction, or a discriminatory impact, in order to state a claim under Article VI, § 25, which is unqualified in its prohibition against diminishment. Specifically, the IAS Court erred in dismissing Plaintiffs' claim for failure to show some "particularized discriminatory impact" in the reduction of the real value of Plaintiffs' compensation due to inflation. *Larabee v. Spitzer*, 19 Misc. 2d 226, 237, 850 N.Y.S.2d 885, 893 (Sup. Ct. N.Y. Co. 2008). The Appellate Division likewise erred by concluding as its "operative consideration" that only a cut in Plaintiffs' pay scale – as opposed to a reduction in real value – constitutes diminishment actionable under the Compensation Clause. *Larabee*, 65 A.D.3d at 86, 880 N.Y.S.2d at 265.

Second, Plaintiffs appeal from the Appellate Division's order insofar as it failed to grant the monetary damages sought by Plaintiffs in the amount of cost of living adjustments to their annual compensation since January 1, 2000. The

Appellate Division erred because such relief is appropriate and necessary in a declaratory judgment action such as this, and the Appellate Division possessed the requisite authority to direct back pay damages as a remedy for Defendants' constitutional violations.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Plaintiffs' cross-appeal because Plaintiffs are directly aggrieved under CPLR § 5511 from a final order of the Appellate Division. *See Parochial Bus Sys., Inc. v. Bd. of Educ. of New York*, 60 N.Y.2d 539, 544-45 (1983) ("[t]he successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief. This exception would include those situations in which the successful party received an award less favorable than sought or a judgment which denied him some affirmative claim or right."); *see also In re DeLong*, 89 A.D.2d 368, 369-70 (4th Dep't 1982) (holding that a party is "aggrieved" and can appeal under CPLR § 5511 when "the party has a direct interest in the controversy which is affected by the result and that the adjudication has a binding force against the rights, person or property of the party."). The Court further has jurisdiction to entertain Plaintiffs' cross-appeal pursuant to CPLR § 5601(b)(1) because this appeal is taken from an order of the Appellate Division that finally determined this action and that directly involves the construction and application of Article VI, §

25 of the New York Constitution. The Appellate Division's order disposes of all the issues in this case and finally determines this action in accordance with CPLR § 5611. The order is final in that it affirmed the IAS Court's ruling dismissing Plaintiffs' first cause of action for breach of New York Constitution Article VI, § 25 and failing to grant Plaintiffs monetary relief in the form of cost of living adjustments since January 1, 2000. All arguments raised on this cross-appeal have been made to the courts below and are, therefore, preserved for review by this Court.

QUESTIONS PRESENTED

QUESTIONS PRESENTED ON DEFENDANTS' APPEAL

Plaintiffs take exception to Defendants' three statements of their questions on appeal. All three of their statements are argumentative and self-serving. (Def. Br. p. 6-7.) Plaintiffs submit that a more accurate statement of Defendants' actual and sole question on appeal would be:

1. Did Defendants violate the separation of powers by linking judicial compensation to legislative salaries and to other political initiatives unrelated to the Judiciary?

Answer below: "Yes."

Questions 2 and 3 are, at best, subsets of the overarching question facing the Court on Defendants' appeal regarding the unconstitutionality of linkage. More

accurately, those Questions are thinly veiled efforts to improperly inject Defendants' legal arguments into that single issue.

QUESTIONS ON PLAINTIFFS' CROSS-APPEAL

1. Does the Verified Complaint, alleging that Defendants failed to adjust the Judiciary's annual compensation since January 1, 1999 in the face of over ten years of inflation (now exceeding 30%) state a cause of action for unconstitutional diminishment in violation of the Compensation Clause, Article VI, § 25 of the New York Constitution, which mandates that the "compensation of a judge . . . shall not be diminished during the term of office for which he or she was elected or appointed"?

Answer below: "No."

2. Are Plaintiffs entitled to monetary damages in the amount of cost of living adjustments to their annual compensation for the period beginning January 1, 2000 through the date that a final judgment is entered?

Answer below: "Monetary damages not awarded."

PLAINTIFFS' STATEMENT OF THE CASE
FACTUAL OVERVIEW

I

PROCEDURAL BACKGROUND

Plaintiffs respectfully refer the Court to the Statement Pursuant to CPLR § 5531 (CA 1) and Defendants' Brief at pages 10-13 for an account of the procedural history in this case.

II

JUDICIAL COMPENSATION IN NEW YORK STATE AND THE HISTORIC PRACTICE OF LINKAGE[5]

This action arises from a fact that should be as embarrassing for Defendants as it is demoralizing for Plaintiffs: the Judges and Justices of this State have not received a compensation adjustment since 1999. During this ten year period, inflation has reduced members of the Judiciary's constant purchasing power by over 30%. (R. 269, 391, and Exhibits 1 and 3 attached). New York has denied its judges a raise longer than any other state and now ranks at the bottom of the nation in judicial pay when adjusted for New York's high cost of living. (R. 399); *see Larabee*, 65 A.D.3d at 77-79, 880 N.Y.S.2d at 259-61.

[5] The underlying facts as articulated in the orders by the courts below have not been disputed by Defendants in this case. *See Larabee*, 19 Misc. 3d at 229-31, 850 N.Y.S.2d at 888-89; *see also Larabee*, 20 Misc. 3d at 870-75, 860 N.Y.S.2d at 889-92.

A. Loss of Even Comparable Pay

The ten-year interval between 1999 and the present is by far the longest without a pay raise for judges of this State since 1977, when the State began funding New York's Unified Court System. *See* N.Y. Judiciary Law § 39.[6]

New York's exceptional Judges and Justices are now paid even less than many non-judicial employees working under them, because those employees have received regular salary adjustments since 1999 that kept pace with inflation. (R. 400, 579-591). New York judges are paid less than others in other State legal occupations: District Attorneys earn $34,000 more than Chief Judge Kaye had been paid and at least $53,300 more than trial judges; the Corporation Counsel for New York City earns $189,700; attorneys in the State Comptroller's Office earn up to $160,540. (R. 400-401). The list goes on and on. (R. 377-384).

B. Linkage Holds Judges Hostage to Politics

Judicial compensation has remained at the 1999 rate because of continued political disputes within the legislative and executive branches, more recently, campaign finance reform. *See Larabee*, 19 Misc. 3d at 229, 850 N.Y.S.2d at 888; *see also Larabee*, 20 Misc. 3d at 870-71, 860 N.Y.S.2d at 889. Citing a litany of

[6] Defendants point to longer periods prior to 1977 where judicial compensation was not adjusted. (*See* Def. Br. p. 21-23). Those periods were during times when the salaries being paid were significantly more valuable in 2009 dollars than the current 1999 judicial salaries, exceeding even $350,000. (*See* Brief for Plaintiffs-Appellants in companion case, *Chief Judge v. Governor*, pp. 6, 21).

news publications, the IAS Court recognized that the Judiciary has been held "hostage" by the political issues of the other branches. *Larabee*, 20 Misc. 3d at 871, 860 N.Y.S.2d at 889-90.

Defendants do not dispute, and both the IAS Court and Appellate Division found, that judicial compensation increases have been stalled because they have been linked to legislative pay raises that have nothing to do with the Judiciary. (R. 397-398); *Larabee*, 65 A.D.3d at 91, 880 N.Y.S.2d at 269; *Larabee*, 20 Misc. 3d at 874-75, 860 N.Y.S.2d at 892. Former-Chief Judge Kaye has recently lamented that linkage has resulted in the judicial branch, through no fault of its own, being implicated in and potentially influenced by politics, the consequence being the actual and perceived weakening of judicial independence. The then-Chief Judge stated:

> No Judiciary can maintain public confidence in its independence if the public can question whether decisions are influenced by efforts to encourage pay raises or retaliate for their denial. . . . These most recent days have been distressing and infuriating for me, and for all my colleagues on the bench, as we struggle to comprehend why, yet again, the measure has failed for no reason related to its merit, or to us. . . .

(R. 532-533).

In 2005, following a recommendation by then-Chief Judge Kaye, then-Governor Pataki proposed legislation providing raises to judges, which did not link

such raises to legislative salaries.[7] (R. 473). In response to this proposal, then-Senator Bruno objected to the proposal because it did not include raises for legislators in tandem with the Judiciary, as the 1999 pay raises had done. He invoked the practice of linkage by stating that "[h]istorically, things have . . . gone together," and further stated:

> Listen very carefully. Previously, we did things together. OK? Previously. There's been no discussion [of pay raises for legislators] and that's why, frankly, we have no bill and nothing's getting done. If you're asking me, will it get done? My estimate would be no.

(R. 473).

More recently, in 2007 two bills were passed in the Senate that would have provided judicial compensation adjustments, but neither bill became law because of the persistence of political disputes by Defendants. *See Larabee*, 19 Misc. 3d at 229-30, 850 N.Y.S.2d at 888. Consistent with historic practice, the first bill linked increased compensation for the Judiciary with legislative pay. That bill (S 5313 and A 07913) passed in the Senate on April 30, 2007, but unfortunately, it was not approved by the Assembly because of threats by the Governor to veto the bill if there was not favorable action on campaign finance reform.[8] Both then-Governor

[7] Salaries would have risen to $162,100 for Supreme Court Justices, $175,068 for the Associate Judges for the Court of Appeals, and $178,310 for the Chief Judge. (R. 473).

[8] The bill would have increased the compensation of justices of the Supreme Court to $165,000, retroactive to January 1, 2007 (other judges would receive a percentage increase of that sum

Spitzer and then-Senator Bruno claimed to support judicial pay raises, and made statements blaming the other "side" for the bill's failure. (R. 476).

Sadly, legislators favored linking judicial pay raises to legislative pay raises because, "giving [raises] to judges provides political cover for lawmakers to increase their own future pay." (R. 481). For his part, then-Governor Spitzer continued to insist that he would not authorize legislative increases unless the Legislature acted to reform campaign finance. (R. 477); *see Larabee*, 19 Misc. 3d at 231-33, 850 N.Y.S.2d at 889-90. Confirming the impasse, Senator Malcolm A. Smith, the New York State Senate Minority leader at that time, stated that,

> Pay raises for state lawmakers are not appropriate until we reach a consensus on such critical issues as campaign finance reform, pay equity and paid family leave.

(R. 503). Time and again, linkage has made judicial pay a casualty of legislative pay disputes. It goes without saying, these controversies have nothing to do with the Judiciary except to hold it hostage to politics. *Larabee*, 65 A.D.3d at 83, 880 N.Y.S.2d at 263; *Larabee*, 20 Misc. 3d at 870-72, 860 N.Y.S.2d at 889-90; *Larabee*, 19 Misc. 3d at 231-33, 850 N.Y.S.2d at 889-90.

On December 13, 2007, the Senate passed a second bill, S 6550, that would have provided judicial salary increases comparable to those in the April bill, but it did not include increases to legislative compensation. *See* S 6550; *see also*

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depending on their respective judicial positions). *See* S 5313; *Larabee*, 20 Misc. 3d at 870, 860 N.Y.S.2d at 889.

Larabee, 19 Misc. 3d at 229-30, 850 N.Y.S.2d at 888. The Assembly again refused to pass the bill due its unwillingness to provide judicial compensation increases without increases for the Legislature. (R. 507-508).

No one denies that judges deserve a raise. (Def. Br. p. 2); *Larabee*, 65 A.D.3d at 82, 880 N.Y.S.2d at 262; *Larabee* 20 Misc. 3d at 870, 860 N.Y.S.2d at 889; *Larabee*, 19 Misc. 3d at 230-31, 850 N.Y.S.2d at 888-89. Still, through linkage, the Judges have been subordinated as political hostages, while the continued disputes among the political branches have, as admitted by Defendants, demoralized the judicial branch. (R. 365); *Larabee*, 19 Misc. 3d at 234, 850 N.Y.S.2d at 891. Then-Chief Judge Kaye recognized the very real and present danger that this will lead to an ever-weakening attraction of the judicial branch for qualified potential jurists, stating:

> No society can expect its courts to function with the excellence the public deserves when the issue of judicial compensation reaches such a level of unfairness and disdain, when our Judiciary can no longer expect to attract and retain the very best lawyers at the pinnacle of their careers.

(R. 532). Regrettably, Judges and Justices have indeed begun to articulate their frustration and the feeling of being subjugated by the other branches as a reason for leaving the bench. (R. 411-12, 514-19).

It is this long and unfortunate history of broken promises, demoralization, and the general practice of abusing the Judiciary as a political pawn that has made this action necessary.

C. The Clear, Undisputed Operative Facts

Defendants go to great lengths attempting to mask what this case is about. The operative facts, however, are clear and undisputed as found by the courts below.

First, Plaintiffs, as well as all Judges and Justices of the Unified Court System, have not received an increase in their judicial compensation since 1999. *See Larabee*, 19 Misc. 3d at 229, 850 N.Y.S.2d at 888 ("There has been no adjustment in the salary paid to judges since the increase enacted in 1998 (ch. 630) effective January 1, 1999.").

Second, inflation has reduced the real value of Plaintiffs' judicial compensation by over 33% since 1999. See *Larabee*, 20 Misc. 3d at 877, 860 N.Y.S.2d at 894 ("[B]y reason of the practice of linkage . . . they [Plaintiffs] have demonstrated that in denying them and the entire judicial branch of government a pay adjustment for almost a decade (during which time inflation has eroded judicial compensation by approximately 30%), the political branches of our State government have used the issue of judicial pay as a pawn in dealing with the unresolved political issue of legislative compensation . . . .").

Third, Defendants conceded that as a matter of policy, Plaintiffs deserve an increase in their compensation. (R. 318-19, Def. Br. p. 2); *Larabee*, 65 A.D.3d at 81, 880 N.Y.S.2d at 262 ("During the January 10, 2008 oral argument on the CPLR 3211 motion, defendants conceded that a judicial pay increase was in order . . . "); 65 A.D.3d at 82, 880 N.Y.S.2d at 262 ("The [IAS] court found that there was no policy dispute, since defendants agreed that judicial compensation should be increased."); 65 A.D.3d at 78, 880 N.Y.S.2d at 260 ("Political leaders, including several governors and the leadership of each house of the Legislature, who often disagreed about many issues of government, in fact agreed on the necessity of such a measure."); *Larabee*, 20 Misc. 3d at 870, 860 N.Y.S.2d at 889 ("It was acknowledged by the Assistant Attorney General at the prior oral argument held on January 10, 2008 that each of his clients had publicly indicated support for an increase in judicial compensation, and had even agreed that the amount of a Supreme Court justice's salary should be equal to that of a federal District Court judge.").

Fourth, Defendants have conceded an amount of a judicial salary increase. Specifically, Defendants acknowledged that the Judges and Justices of the Unified Court System should have their compensation increased to the level of federal District Court judges, which is currently $169,300. (R. 318-19, 332-33, 611-13); *Larabee*, 65 A.D.3d at 81, 880 N.Y.S.2d at 262 ("During oral argument on the

summary judgment motion, defendants reiterated the acknowledgement that members of the New York Judiciary deserved a salary increase, even conceding that defendants did not oppose an increase matching the salary paid to Federal District Court judges, but again, insisted that achieving that goal remained the exclusive province of the Legislature.").

Fifth, Defendants' practice of linkage caused the failure to adjust judicial compensation. *See Larabee*, 20 Misc. 3d at 874, 860 N.Y.S.2d at 892 ("[H]ere there is no open policy issue to be resolved as all parties have agreed that the judiciary is entitled to an adjustment and the amount thereof. The plain and simple reason that the adjustment has not occurred is due to the linkage referred to above."); *Larabee*, 65 A.D.3d at 82, 880 N.Y.S.2d at 262 ("Defendants also conceded the basic aspects of plaintiffs' linkage claim."); 65 A.D.3d at 82, 880 N.Y.S.2d at 263 ("The [IAS] court found that the only reason why there had been no adjustment in judicial compensation during the past decade was the Legislature's insistence on linking any judicial pay increase to a simultaneous legislative pay increase, with the result that if no legislative pay increase was implemented, judicial pay increases were likewise postponed."); 65 A.D.3d at 91, 880 N.Y.S.2d at 269 ("Defendants essentially conceded that linkage was the causative factor in this case."); 65 A.D.3d at 83, 880 N.Y.S.2d at 263 ("[W]e agree with Supreme Court that it is manifestly clear that the only reason why the

Legislature declined to finalize any measure to enhance judicial compensation, after such a lengthy delay, was that it perceived itself locked into an interbranch conflict with the Governor and was using the judicial branch to advance its own salary increase while simultaneously resisting campaign finance reform."); 65 A.D.3d at 93, 880 N.Y.S.2d at 271 ("[T]he facts are undisputed that the legislative branch, rather than being solely engaged in a legislative function, was using the Judiciary tactically in a political battle with the Governor. . . . making a judicial salary increase contingent on its own success in achieving a legislative pay increase.").

Last, Defendants' practice of linkage impaired the independence of the judiciary by subordinating the judicial branch to disputes between the political branches of state government. *Larabee*, 65 A.D.3d at 98, 880 N.Y.S.2d at 274 ("Judicial compensation, rather than being independently addressed, became contingent on the Legislature's treatment of its own members."); 65 A.D.3d at 81, 880 N.Y.S.2d at 262 ("[D]efendants eventually conceded that the independence of the Judiciary as a discrete branch of government could be impaired, and the doctrine of separation of powers would then be violated, by inadequate judicial compensation, although it was claimed that the present salary levels did not implicate such constitutional concerns."); 65 A.D.3d at 82, 880 N.Y.S.2d at 263 ("Supreme Court found that the constitutional infirmity arose from the abuse of

power by which the political branches of government used the Judiciary as a pawn, thereby impermissibly infringing on its independence."); *Larabee*, 20 Misc. 3d at 872, 860 N.Y.S.2d 890 ("[D]efendants acknowledge that there is a widespread demoralization amongst the judges, who feel deeply let down by this failure of the legislature and the Governor to remedy the erosion of their financial situation."); *Larabee*, 19 Misc. 3d at 234, 850 N.Y.S.2d at 891 ("[D]efendants acknowledge that the inactivity on the compensation issue has resulted in a demoralization of the judicial branch of government (tr at 67) . . . ."). (R. 365).

ARGUMENT

STANDARD OF REVIEW

This Court reviews an order granting summary judgment *de novo* with regard to questions of law. The New York State Constitution and the CPLR limit the scope of this Court's review to questions of law. *See* N.Y. Const. art. VI, § 3(a) ("The jurisdiction of the court of appeals shall be limited to the review of questions of law except where . . . the appellate division . . . finds new facts and a final judgment or a final order pursuant thereto is entered . . . ."); N.Y. C.P.L.R. § 5501(b) ("The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division . . . has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."); *see*

also 12 Weinstein Korn & Miller, New York Civil Practice § 5501.14 (2009). The Appellate Division did not find any "new facts" in this case.

Accordingly, this Court has routinely declined to review factual findings of the trial court where, as here, they were affirmed by the Appellate Division, so long as those findings were supported by "some evidence." *See Estate of Canale v. Binghamton Amusement Co.*, 37 N.Y.2d 875, 877, 378 N.Y.S.2d 362, 362 (1975); *see also In re Infant D.*, 34 N.Y.2d 806, 807-08, 359 N.Y.S.2d 43 (1974); *Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 10, 330 N.Y.S.2d 33, 39 (1972).

As set forth above, the IAS Court found that linkage was a fact that had caused a failure to increase judicial salaries, and the Appellate Division agreed. *Larabee*, 65 A.D.3d at 83, 880 N.Y.S.2d at 263. Affirming the factual findings of the IAS Court, the Appellate Division found that it was "undisputed" that through linkage "the legislative branch, rather than being solely engaged in a legislative function, was using the Judiciary tactically in a political battle with the Governor." *Id.* at 93, 880 N.Y.S.2d at 271. These factual findings, which are not new and which are amply supported by evidence in the trial court, are outside the scope of this Court's review.

NO PRESUMPTION OF CONSTITUTIONALITY IS APPLICABLE HERE

Defendants attempt to impose upon Plaintiffs a heightened burden by inaccurately stating that the "gravamen" of Plaintiffs' action is a challenge to Judiciary Law Article 7-B and the level of judicial salaries as set forth therein. (Def. Br. pp. 27-29). Based on that false premise, Defendants argue that Plaintiffs must surmount a "presumption of constitutionality" and show that "there are no circumstances in which paying the levels of judicial compensation fixed by statute are constitutional." (*Id.* at 28).

Plaintiffs have never claimed that Article 7-B is itself unconstitutional.[9] Indeed, as the Appellate Division recognized, "these facts [regarding linkage] do not present merely a pedestrian pay dispute involving state employees who happen to work for the Judiciary . . . , or even the *judicial pay scales set forth in the Judiciary Law*." *Larabee*, 65 A.D.3d at 83, 880 N.Y.S.2d at 263 (emphasis added). Plaintiffs' "linkage" cause of action is about the Defendants'

[9] If anything, Judiciary Law Art. 7-B supports Plaintiffs' claim. The Bill Jacket for 1998 S.B. 7876, Ch. 634, which ultimately passed into law as L.1998, Ch. 630 and amended Judiciary Law Art. 7-B, notes that the legislation "provides acceptable compensation for the duties performed by legislators, commissioners and judges, which in turn will be useful in attracting public-spirited individuals to perform valuable public services." "[A]cceptable compensation" useful in attracting public servants cannot survive ten years of stagnant neglect caused by linkage.

unconstitutional *conduct*, not about attacking a statute that makes no mention of linkage.[10] [11]

Neither the IAS Court nor the Appellate Division ever held Plaintiffs to the "high burden" Defendants propose, and neither should this Court.

RESPONSE IN OPPOSITION TO DEFENDANTS' APPEAL

I

DEFENDANTS' APPEAL SHOULD BE DISMISSED

The IAS Court's order granting summary judgment on Plaintiffs' second cause of action for violation of separation of powers should be upheld. This order was correctly affirmed by the Appellate Division. For the reasons set forth below, Defendants are (1) incorrect that the Speech or Debate Clause precludes Plaintiffs' claim; (2) incorrect that finding linkage unconstitutional subverts the objectives of the separation of powers doctrine or that the ruling is unworkable in practice; (3) incorrect that the Senate should be dismissed; (4) incorrect that the record here does not support granting summary judgment; and (5) incorrect that the relief here

[10] *Elmwood-Utica Houses, Inc. v. Buffalo Sewer Auth.*, 65 N.Y.2d 489 (1985) and *Cohen v. State*, 94 N.Y.2d 1 (1999), cited by Defendants, do not support Defendants' misplaced contention that Plaintiffs must make a heightened showing of unconstitutionality here. (Def. Br. p. 27-29). In striking contrast to this case, in those cases, the plaintiffs expressly and directly challenged the constitutionality of certain New York laws. *See Elmwood-Utica Houses, Inc.*, 65 N.Y.2d at 494 (chapter 862 of the Laws of 1981); *Cohen*, 94 N.Y.2d at 6 (chapter 635 of the Laws of 1998).

[11] Plaintiffs' Compensation Clause cause of action is also not based upon the 1999 salary levels of Article 7-B, but on the failure of Defendants to adjust these levels to keep even with inflation.

is inappropriate to correct Defendants' violation of the separation of powers doctrine.

II

DEFENDANTS' SPEECH OR DEBATE CLAUSE ARGUMENT WOULD EVISCERATE THE SEPARATION OF POWERS DOCTRINE

A. Linkage Is Not a Core Legislative Function

The IAS Court and the Appellate Division were right to conclude that linkage is not a legislative act that is subject to Speech or Debate Clause immunity. *See Larabee*, 65 A.D.3d at 90-93, 880 N.Y.S.2d at 269-70; *see also Larabee*, 19 Misc. 3d at 239, 850 N.Y.S.2d at 894. In order to bring the Defendants' linkage practices under the umbrella of legislative activity that is immunized by the Speech or Debate clause, Defendants argue that linkage is a "core legislative function." (Def. Br. pp. 30-32). That position is not supported by fact or law.[12] The Appellate Division rejected that contention, and found that:

[12] Defendants never argued in the trial court that the Houses of the Legislature should be dismissed as immune under the Speech or Debate Clause. 850 N.Y.S.2d at 894 (citing oral argument hearing transcript and holding that "There is no dispute that the remaining defendants (the State of New York, the Senate and the Assembly) are proper parties, and counsel on both sides agreed that a dismissal of the action as against the Governor would not be a bar to the declaratory relief sought.").) Instead, they only argued that the Governor was immune from the action under the common law analogue to the Speech or Debate Clause, not that it was a ground for dismissing any claim or any other party. (See S.R. 27-29, 91-94, 133-160). Defendants cannot raise this new Speech or Debate argument for the first time on appeal. *See Blue Grass Partners v. Bruns, Nordeman, Rea & Co.*, 428 N.Y.S.2d 254, 256 (1st Dep't 1980); *see also People v. Padua*, 297 A.D.2d 536, 538 n.2 (1st Dep't 2002). Defendants' new argument is barred as unpreserved.

> Linkage as applied seems to be merely a legislative custom that served no legitimate legislative purpose other than to facilitate the personal remunerative goals of its members. Thus, the practice of linkage does not enjoy any particular recognition as a legislative function in and of itself.

Larabee, 65 A.D.3d at 92, 880 N.Y.S.2d at 270.

According to Defendants, the "essence of the claim is that Defendants have never agreed upon legislation increasing judicial compensation since 1998" and that such has "always been the core of legislative functions." (Def. Br. p. 31). Linkage is not the mere inability to agree. Indeed, Defendants *have* agreed that Plaintiffs deserve a raise. But that concession to truth has not resulted in legislation granting the deserved and uncontroversial raise because linkage thwarts it for reasons other than its objective merit.

Defendants misconstrue the holding in *Campaign for Fiscal Equity v. New York*, 179 Misc. 2d 907 (Sup. Ct. N.Y. Co. 1999), *aff'd Campaign for Fiscal Equity, Inc. v. New York*, 265 A.D.2d 277 (1st Dep't 1999), a case regarding common law immunity as applied to the Executive branch, to support their overly expansive view of legislative immunity. (Def. Br. p. 31). In that case, plaintiffs appealed an order "barring plaintiffs from seeking disclosure respecting contacts between [an employee of a New York State executive agency] and . . . executive . . . officials." 265 A.D.2d at 278. The Appellate Division affirmed "pursuant to the

common-law legislative privilege inasmuch as the communications in question were undertaken by [the employee] to assist executive branch officials in their performance of a legislative function." *Id.* As a threshold matter, *Campaign for Fiscal Equity* is of questionable value because in that case the assertion of a *testimonial* privilege was at issue, while here, Defendants seek immunity from *suit*. In so doing, they seek to create a rule that would immunize all legislative decision-making from judicial scrutiny.

But more fundamentally, that case provides no support for the proposition that linkage is a core legislative function. As the Appellate Division made clear in *Campaign for Fiscal Equity*, at issue there were communications regarding "formulation of budgetary legislation." *Id.* Here, the Appellate Division correctly found, that is not what this case is about. *See Larabee*, 65 A.D.3d at 83, 880 N.Y.S.2d at 263 ("Nor is this a challenge to a state budgetary and funding scheme."). The *Campaign for Fiscal Equity* court never suggested that the political branches perform a "legislative act" by engaging in conduct that is even similar to linkage.

Furthermore, the *Campaign for Fiscal Equity* case illustrates that "formulation of budgetary legislation" requires that Legislators engage in debate regarding the independent merits of budgetary proposals, but that the immunity goes no further than discovery of such communications, not the merits. *See*

Campaign for Fiscal Equity, 179 Misc. 2d at 911-912 ("To the extent that [the Executive branch employee] assisted legislators or their staff in determining the State's allocation of funds to public schools the work she did for them is privileged and may not be sought through discovery.") By contrast, in this case, the Appellate Division held that "none of these matters [*i.e.*, legislative pay increases and campaign finance reform] are even remotely related to the merits of an adjustment in judicial compensation, if those merits were to be independently considered." *Larabee*, 65 A.D.3d at 83, 880 N.Y.S.2d at 263.

Defendants' reliance on *Straniere v. Silver* is also misplaced. 218 A.D.2d 80 (3rd Dep't 1996); (Def. Br. p. 30). That case is only applicable if the Legislature's actions constitute "legitimate legislative activity" such as voting, preparing committee reports and conducting committee hearings. 218 A.D.2d at 83, 85 (rule for reporting bill out of committee is legislative). Linkage is none of these things. The failure to abide by the separation of powers doctrine through the practice of linkage cannot be a "legitimate legislative activity." If linkage or all other practices or customs of the Legislature were unassailably protected as "speech or debate" despite being contrary to constitutional tenets, then nothing the Legislature ever did would be subject to judicial review. In that case, the Judiciary would be irreparably subjugated and separation of powers eviscerated. That cannot be the case if the doctrine is to have any vitality.

Even assuming that linkage is cognizable as a "legislative" act, it was not an "integral step[] in the legislative process." *See Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (holding that a mayor's "introduction of a budget and signing into law an ordinance" was legislative activity entitled to common law legislative immunity). As the Appellate Division held, Defendants' continued reliance on that case is without merit because unlike the circumstances in *Bogan*, "the failure to increase judicial compensation can only be explained by reference to the political conflicts between the Legislature and the Chief executive, which had no relation to budgetary considerations pertaining to judicial compensation." *Larabee*, 65 A.D.3d at 92, 880 N.Y.S.2d at 270.

In short, the undisputed facts here prove that there is nothing "integral" to the legislative process about linking one co-equal government branch's salary increase to that of another. It is clear that linkage, which threatens judicial independence and subordinates the Judiciary to political wrangling between the other branches, is not a core legislative act subject to any protection under the Speech or Debate Clause. To the contrary, linkage turns the constitutional separation of powers on its head.

B. Defendants' Speech or Debate Clause Argument Is Without Merit on Multiple Grounds

The Appellate Division did not err by finding the Speech or Debate Clause inapplicable. Aside from being founded on the incorrect presumption that linkage is a core legislative function, Defendants' Speech or Debate Clause argument is substantively meritless on several other grounds. Defendants' attempt to denigrate the Appellate Division's well reasoned decision as having "relied primarily on a semantic distinction" belies its objective integrity and logic. (Def. Br. p. 34). Based on undisputed facts regarding the nature and effect of Defendants' linkage practices, the Appellate Division correctly held that:

> the political back and forth between the Governor and the respective Houses of the Legislature manifested itself in discussions and positioning that gravitated beyond the boundaries of the Legislature's internal communications, debates, committee work, investigations and the like which rest within the legislative sphere, as that cloistered notion has traditionally been understood.

Larabee, 65 A.D.3d at 92-93, 880 N.Y.S.2d at 270.[13]

Tellingly, Defendants argue that linkage is part of the "give-and-take of political compromise in a representative democracy." (Def. Br. p. 33). Subjecting

[13] The Appellate Division's recent ruling in *Urban Justice Ctr. v. Silver*, 2009 N.Y. Slip. Op. 07506, 2009 WL 3379955 (1st Dep't Oct. 22, 2009), illustrates that court's astute awareness that the immunity applies when the conduct involves the "internal practices of the Legislature." That case, which Defendants misguidedly cite in support of their Speech or Debate argument (Def. Br. n.5), shows the striking contrast between a proper case for the immunity (*i.e.*, where internal rules regarding what constituted "official mail" were challenged (2009 WL 3379955 at * 1)), and this case, where an unofficial practice threatens judicial independence. The Appellate Division discussed this distinction in its ruling below. *Larabee*, 65 A.D.3d at 95, 880 N.Y.S.2d at 272.

the Judiciary to such political give-and-take is precisely one of the problems with linkage, and, further, it is why the Speech or Debate Clause immunity has no application in an action for violation of the separation of powers. In effect, Defendants' argument is that the Speech or Debate Clause trumps the separation of powers doctrine and bars the Judiciary from ever claiming that the political branches have violated the Constitution. There is no such limitation on judicial authority. *See Samuels*, 29 A.D.3d at 12 & n.3 ("[I]f the Legislature runs afoul of well ingrained precepts of the Constitution, court intervention—no matter how unpopular—is proper."); *see also Pataki v. New York State Assembly*, 4 N.Y.3d 75, 96 (2004) ("The courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government."). Accordingly, it was not "inappropriate for the lower courts to inject themselves into that process" as Defendants contend (Def. Br. p. 33), but rather, Courts have historically intervened to defend the Judiciary when the Legislature violated the separation of powers. *See, e.g., Pollicina v. Misericordia Hosp. Med. Ctr.*, 82 N.Y.2d 332, 339 (1993) ("The Supreme Court is a court of general jurisdiction. . . . The Legislature cannot by statute deprive it of one particle of its jurisdiction . . . .") (quoting *Matter of Malloy*, 278 N.Y. 429, 432 (1938)).

Relying on that clear judicial authority, the Appellate Division correctly held that "Courts are empowered to determine the constitutional boundaries of each branch of government . . . and whether an action is within the purview of legitimate activity." *Larabee*, 65 A.D.3d at 91, 880 N.Y.S.2d at 269 (citing *Pataki*, 4 N.Y. at 96 and *Straniere* 218 A.D.2d at 85). This Court's holding in *Pataki* provides an insightful discussion of the circumstances under which Speech or Debate immunity does not apply and the Judiciary may exercise its authority to intervene when the political branches have violated the Constitution. In *Pataki*, this Court recognized that when "it appears that a Governor has attempted to use appropriation bills for essentially nonbudgetary purposes, we may have to decide whether to enforce limits on the Governor's power in designing 'appropriation bills' or to leave that issue, like the issues of itemization and transfer, to the political process." 4 N.Y. at 97. *Pataki* thus recognized that even an appropriation bill may lose any claim to immunity when done in service of political ends beyond their proper legislative scope. Again, as set forth above, the lower courts have found that linkage is not about an underlying budgetary concern, but rather is about utilizing the Judiciary as a political pawn. *See Larabee*, 65 A.D.3d at 93, 880 N.Y.S.2d at 271 ("the facts are undisputed that the legislative branch, rather than being solely engaged in a legislative function, was using the Judiciary tactically in

a political battle with the Governor."); *Larabee*, 20 Misc. 3d at 877, 860 N.Y.S.2d at 894.[14]

As another effort to raise issues unrelated to this case, Defendants suggest that finding linkage unconstitutional will result in a parade of horribles. First, citing *Bogan*, Defendants maintain that the immunity is designed to ensure that legislators are not "subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." (Def. Br. p. 32). Defendants also propose that "[i]f all it took to defeat the absolute legislative immunity afforded by the clause was an allegation that a legislative decision is unconstitutional, legislators would spend more time in witness boxes and deposition rooms than the Houses of the Legislature." (*Id.* p. 40). These warnings ignore the reality of this case and the nature of Defendants' linkage practice. There was no need for a trial or any inquiry whatsoever into legislative motives in order for the IAS Court to find that the Judiciary had been improperly subordinated and its independence threatened. Legislators' testimony was unnecessary given that the core facts were not in dispute, and no legislator was deposed or called to testify. No individual

[14] Defendants' argument that linkage is "nothing more than representative democracy at work" misses the point. Defendants' constitutional duties extend to the electorate as well as to the Judiciary and the Constitution is paramount. (Def. Br. p. 36).

legislator even faces personal liability in this action. The Appellate Division was correct that:

> immunity is unavailable to shield defendants from plaintiffs' separation of powers claim. Since no member of the Legislature has been named as defendant in his or her individual capacity, we need not be concerned with the historical and entirely appropriate concern that a legislator might be harmed by the prospect of civil or even criminal liability as a consequence of his or her unfettered discharge of legislative duties.

Larabee, 65 A.D.3d at 91, 880 N.Y.S.2d at 269.

Nevertheless, much of Defendants' argument rests on the incorrect premise that the IAS Court's ruling required it to delve into the decision-making process of the Legislature and to evaluate its motives and intentions. (Def. Br. pp. 32-34, 40). Proof of legislative intent is not necessary in judicial compensation cases where judicial independence is threatened. *See United States v. Hatter*, 532 U.S. 557, 577 (2001) ("The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence."). There is no need to show some nefarious motivation on the part of the Legislature in order to prove a constitutional violation, because the courts "never require a legislature to articulate its reasons for enacting a statute" and those reasons "are not subject to courtroom fact-finding." *See Gboizo v. State of New York Div. of Hous. and Cmty. Renewal*,

case."); *Larabee*, 20 Misc. 3d at 874, 860 N.Y.S.2d at 892 ("The plain and simple reason that the adjustment has not occurred is due to . . . linkage . . . .").

Clearly, in order for the separation of powers doctrine to be protected, and in order for the Judiciary to have any ability to check the other branches, the Speech or Debate Clause cannot be read to trump that more fundamental doctrine. Defendants' argument should be rejected, and the lower courts' granting and affirming summary judgment on Plaintiffs' cause of action for violation of the separation of powers should be upheld.[15]

III

LINKAGE VIOLATES THE SEPARATION OF POWERS

Contrary to Defendants' assertions, the Appellate Division's ruling was not "fundamentally flawed": the holding is firmly based in the Constitution's framework; the lower court did not "end[] up usurping" the separate powers reserved by the Constitution for the political branches, it merely exercised its own powers; and the ruling did not ignore some supposed "vested rights" of a

[15] The Defendants incorrectly argue that the Appellate Division "properly applied legislative immunity in dismissing the Complaint against the Governor." (Def. Br. p. 36). In fact, the Appellate Division explicitly stated that its affirmation of the dismissal of the Governor was on different grounds, not on the basis that he was shielded from the claim by the Speech or Debate Clause. *Larabee*, 65 A.D.3d at 88, n.4, 880 N.Y.S.2d at 267. The basis of their ruling was that Plaintiffs had conceded that the Governor was not an essential party to this action, the Appellate Division did not even mention the Speech or Debate Clause in affirming that dismissal. *Id.* at 84, 880 N.Y.S.2d at 262. As such, there is no inconsistency between the Appellate Division affirming the dismissal of the Governor and its refusal to apply the Speech or Debate Clause to the Houses of the Legislature here.

"protected class" rule, negate checks and balances, or create an "unworkable" regime. (Def. Br. p. 41).

A. The Constitutional Framework Supports Finding Linkage Unconstitutional

Defendants argue that the lower courts' dismissal of Plaintiffs' cause of action for violation of the Compensation Clause should have negated any separation of powers claim. (Def. Br. p. 41-42). That argument fails to acknowledge that a violation of the separation of powers through linkage can be achieved regardless of whether there was diminishment of judicial compensation because the two protections are entirely independent.[16] As the Appellate Division explained, without need of any reference to the Compensation Clause:

> The structure of both our state and our federal government provides for three separate, co-equal, branches of government. Hence, our analysis focuses in large part on whether defendants under the circumstances of this case have distorted that carefully balanced structure.

Larabee, 65 A.D.3d at 93, 880 N.Y.S.2d at 270.

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[16] If all the facts regarding linkage were unchanged, but there had been no inflation over the past decade, there would arguably be no diminishment in the value of judicial compensation and no violation of the Compensation Clause. However, the practice of linkage would still constitute a violation of the separation of powers because judicial independence would remain threatened. Indeed, the Appellate Division noted this, stating:

"Certain general themes have emerged which underscore the delicate intragovernmental relations that are threatened when legislative bodies, on the basis of various motives and agendas, act in ways that financially burden judges as they perform their duties, even if their compensation is not nominally, 'diminished," and even if the burden does not directly distort the performance of those duties." *Larabee*, 65 A.D.3d at 96, 880 N.Y.S.2d at 272.

That holding is firmly rooted in New York jurisprudence. *See id.* at 95, 880 N.Y.S.2d at 272 (citing New York Court of Appeals case law). New York courts have "consistently recognized that this principle of separation of powers among the three branches is included by implication in the pattern of government adopted by the State of New York." *Under 21, Catholic Home Bureau for Dependent Children*, 65 N.Y.2d at 355-56. Indeed, the structure of the New York Constitution establishes that the compensation of each of the branches must be determined independently. Each branch's powers are set forth in distinct articles—Legislature at Article III, Executive at Article IV, and Judiciary at Article VI—and each separately and uniquely sets forth the compensation to be provided to members of each branch. *See* N.Y. Const. art. III, § 6; art. IV, § 3, art. VI, § 25. Based on this plain constitutional framework, the Appellate Division appropriately held that:

> This structural scheme suggests, at the outset, that the Judiciary was not intended to be subordinated to legislative whim on matters of compensation, notwithstanding the legal necessity that salary increases must be appropriated and implemented as part of the budgetary process because no state money may be spent except pursuant to a budget appropriation.

Larabee, 65 A.D.3d at 94, 880 N.Y.S.2d at 271.

Defendants' weak attempt to yoke separation of powers to the Compensation Clause is yet another effort to bring their linkage practice within the sphere of

irrelevant, but supposedly protected, budgetary deliberations. Defendants argue that their need to "weigh one potential use of public resources against all other demands on the State's budget" precludes this action. (Def. Br. pp. 44-45). But again, as the Appellate Division repeatedly made clear, although salary increases may implicate certain aspects of the budgetary process, the fundamental constitutional considerations triggered by the practice of linkage transcend state budgetary particulars. *Larabee*, 65 A.D.3d at 83-84, 880 N.Y.S.2d at 263-64. Rather, the clear concern is "with the integrity, in a structural sense, of the judicial system as an independent institution, in that New York's constitutional architecture prohibits the subordination of the judicial branch to the other branches of government either in practice or in principle." *Id.* at 97, 880 N.Y.S.2d at 274.

B. The Separation of Powers Doctrine Is Not A Shield Against Plaintiffs' Second Cause of Action

Defendants seek to shield their own unconstitutional behavior with the very doctrine they have violated. The separation of powers doctrine does not protect the Legislature or Executive alone, but protects all the branches equally—its equal application is the very essence of the doctrine.

Relying largely on *Urban Justice Ctr. v. Pataki*, 38 A.D.3d 20 (1st Dep't 2006), *appeal dismissed*, 8 N.Y.3d 958 (2007), Defendants argue that the lower court has improperly "direct[ed] the Legislature how to do its work." (Def. Br. pp.

45-46). *Urban Justice Ctr.* is distinguishable from this case. That case involved a "challenge [to] the Legislature's allocation of institutional resources to its *own members*, a classic example of *internal administrative prerogatives* that is properly left to the Legislature to make . . . ." 38 A.D.3d at 28 (emphases added). The Appellate Division in this case, citing *Urban Justice Ctr.*, explicitly recognized that "it would be inappropriate for a court to sit in review of the Legislature's wholly internal affairs or practices, or, conversely, of the Governor's limited, though exclusive, quasi-legislative constitutional prerogatives." *Larabee*, 65 A.D.3d at 95, 880 N.Y.S.2d at 272. But the Appellate Division did none of those things in this case. Rather, the Appellate Division ordered compliance with a fundamental principle of the New York Constitution. *See id.* ("those [political] branches of government may not act to the detriment of the judicial branch's own ability to function without interference. That consideration is at the heart of judicial independence from the perspective of the separation of powers.").

Contrary to Defendants' assertion, the determination that linkage (*i.e.*, making judicial salary increases contingent upon legislative salary increases or the resolution of other unrelated political disputes) violates the separation of powers, will not "propel the Judiciary into political decision-making." (Def. Br. p. 46). Indeed, the Appellate Division affirmatively stated that "[t]he judicial system is at its best when it stands above and apart from the political interactions that more

typically characterize the other two branches of government." *Larabee*, 65 A.D.3d at 95, 880 N.Y.S.2d at 272. And again, here there was no public policy dispute, and the Defendants have admitted that the Judiciary deserves a raise. (Def. Br. p. 2). As such, neither the IAS Court nor the Appellate Division exercised any "thought control" over the affairs of the Legislature. (Def. Br. p. 47). Consistent with its authority, the lower court instructed the Legislature to do its duty and abide by the constitutional framework upon which New York government is based. The political branches are not the Judiciary's teachers on matters of the Constitution.

The IAS Court, affirmed by the Appellate Division, properly exercised its authority in applying the protection embodied in the separation of powers doctrine. Defendants cannot deflect this challenge by arguing, in effect, that they are its sole beneficiaries.

C. Defendants' "Vested Rights" and "Protected Class" Argument Is Irrelevant to a Separation of Powers Case

Defendants' "vested rights" and "protected class" argument is yet another red herring. (Def. Br. pp. 49-52). First, Defendants cite no precedent showing that Plaintiffs, as members of the Judiciary, must be stripped of some "vested right" or be a member of a "protected class" to bring an action compelling Defendants to act constitutionally under the separation of powers doctrine. But even if they did, separation of powers, and the guarantee that the Judiciary maintains co-equal

status, is not only a "vested right," it is a fundamental right whose protection is essential. *See People ex rel. Burby*, 155 N.Y. at 282. By definition, the doctrine supplies each and every branch the right to co-equal status. "[T]he doctrine [of separation of powers] operates to prohibit one branch of government from unduly impeding the operation of a coordinate branch of government." *Duplantier v. United States*, 606 F.2d 654, 667 (5th Cir. 1979). The United States Supreme Court has noted that the doctrine of separation of powers "is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . . namely, to preclude a commingling of these essentially different powers of government in the same hands." *O'Donoghue*, 289 U.S. at 530.

Moreover, as one branch of New York's tripartite government with unique constitutional powers that at all times must be safeguarded, the Judiciary and its members are certainly a "protected class" to be shielded from threats to their independence. *People ex rel. Burby v. Howland*, 155 N.Y. at 282 ("Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power.")

D. The Lower Court's Ruling Was a Proper Exercise of "Checks and Balances" and It Is Not Unworkable

Defendants' argument regarding some alleged abuse by the Appellate Division of the principle of "checks and balances" again misses the point. In affirming the order granting summary judgment and directing Defendants to take appropriate remedial measures, the Appellate Division did not "effectively [make] the Judiciary the final arbiter of its own compensation." (Def. Br. p. 52). The Appellate Division was clear that it had declared the Defendants' linkage practices unconstitutional and ordered them to cure those constitutional violations.

> The fact that salary adjustments for the third branch of government became politicized as the byproduct of an interbranch conflict removes this case from the otherwise mechanical processes of adjusting judicial compensation. When judicial compensation becomes politicized, a line has been crossed in contravention of the warnings long articulated in what has become a deeply rooted constitutional jurisprudence. The basic tenet of the separation of powers doctrine, to promote and maintain the independence and stability of each branch of government, has been violated.

Larabee, 65 A.D.3d at 99, 880 N.Y.S.2d at 275.

Defendants continue to base their argument on the incorrect assumption that because the Legislature controls the budget and maintains the "power of the purse," it is immune from any action in which the remedy granted could result in a

need to appropriate funds for some purpose.[17] (Def. Br. p. 53). The critical constitutional need to balance power among the branches of government itself outweighs any supposed need to balance the budget.

Defendants spin this same irrelevant argument regarding the Legislature's budgetary authority in yet another way by claiming that the determination that linkage is unconstitutional is "unworkable in practice." (Def. Br. p. 53). Defendants' reliance on *Campaign for Fiscal Equity, Inc. v. State* for this proposition is misplaced because that case supports the IAS Court and the Appellate Division here. 8 N.Y.3d 14 (2006); (Def. Br. p. 55). In *Campaign for Fiscal Equity*, the Court of Appeals acknowledged that some deference must be given to the Legislature's financing decisions, but the Court reiterated that "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." 8 N.Y.3d at 28. The Court clarified that "[w]hen [it] review[s] the acts of the Legislature and the Executive, [it] does so to protect rights, not to make *policy*" and that it cannot "intrude upon . . . *policy-making*." *Id.* at 28 (emphases added). In this case, there is no risk of the Judiciary intruding on legislative "policy-making" because Defendants have admitted that there is no policy dispute that judicial compensation should be adjusted for inflation and have even agreed to an appropriate amount.

[17] Defendants are further incorrect because the courts have authority to direct the State to pay monetary damages. (*See* discussion pp. 77-92 *infra*.)

See Larabee, 65 A.D.3d at 83, 880 N.Y.S.2d at 263; *Larabee*, 20 Misc. 3d at 870, 860 N.Y.S.2d at 889; *Larabee*, 19 Misc. 3d at 231, 850 N.Y.S.2d at 889. Therefore, Defendants' concerns regarding the Judiciary improperly intruding into the province of the Legislature's authority is not supported by the facts of this case.

Below, the IAS Court and the Appellate Division identified a constitutional infirmity and directed that the Defendants cure it. This Court has stated that "[t]he [declaratory judgment] action contemplates that the parties will voluntarily comply with the court's order." *Klostermann*, 61 N.Y.2d at 538-39 (holding that mentally ill persons formerly or presently in State institutions were entitled to a declaration of their rights against the State).

> It is anomalous to contend that such an action should not be permitted because it may be necessary at some future date to coerce one party who has refused to act in accordance with the judicial determination. . . . Thus, the ultimate availability of a coercive order to enforce adjudicated rights is not a prerequisite to a court's entertaining an action for declaratory judgment.

Id. at 539. The IAS Court properly relied on *Klostermann* in crafting the relief it granted.[18]

[18] Plaintiffs assert, however, that the IAS Court and the Appellate Division should have gone further and awarded the monetary relief they seek. *See Deutsch v. Crosson*, 171 A.D.2d 837, 838-39 (2d Dep't 1991) (upholding award of back pay as monetary damages to judges that had been underpaid in violation of their right to equal protection); *see also Dickinson v. Crosson*, 219 A.D.2d 50, 54-55 (same); *Nicolai v. Crosson*, 214 A.D.2d 714, 715 (2d Dep't 1995) (same). (*See* discussion pp. 61-72, *infra*.)

Contrary to Defendant's assertions, the IAS Court ruling regarding linkage would not "require endless judicial intrusion into the internal affairs of the Legislature, along with minute scrutiny of the motives and reasons of the members of the Legislature and the Governor, to ensure that they restricted their consideration to proper budgetary matters . . . ." (Def. Br. p. 57). The Judiciary would not be put in that position because the Appellate Division was very clear that legislative motives were not considered, (*see Larabee*, 65 A.D.3d at 91-93, 880 N.Y.S.2d at 269-70) and that when evaluating judicial compensation adjustments, the Legislature must "discharge the responsibility of considering, and acting upon, an enhancement . . . on it objective merit." *Id.* at 95, 880 N.Y.S.2d at 272. In the rulings below, the political branches have been appropriately directed to address judicial compensation as the Constitution mandates, without being "contingent on the Legislature's treatment of its own members." *Id.* at 98, 880 N.Y.S.2d at 274. This Court should uphold the lower courts' rulings here.

IV

THE SENATE ENGAGED IN LINKAGE AND SHOULD BE HELD ACCOUNTABLE

Defendants argue that the Senate should be dismissed from this action because in 2007 it passed two bills that would have resulted in judicial compensation adjustments, and as such, "there was nothing more that the Senate could have done to address the separation of powers concerns supposedly

underlying the 'linkage' principle." (Def. Br. p. 58). Defendants' argument amounts to petty finger-pointing and ignores the undisputed record and reasons why linkage is unconstitutional. Based on the undisputed record, the Appellate Division found that

> advancement of the measure foundered on the combination of the Assembly's refusal to act unless legislative pay increases were linked to any enhancement of judicial compensation, the Governor's refusal to approve any legislative salary increases unless his demands for, inter alia, campaign finance reform were satisfied, and the Senate's refusal to agree to the Governor's demands.

Larabee, 65 A.D.3d at 83, 880 N.Y.S.2d at 263.

The Appellate Division agreed with the IAS Court that "the only reason why the Legislature [*i.e.*, the Assembly *and* the Senate] declined to finalize any measure to enhance judicial compensation, after such a lengthy delay, was that is perceived itself locked into an interbranch conflict." *Id.*

It is clear that despite the fact that the Senate passed bills in 2007, which the Appellate Division acknowledged in its recital of the facts, the record showed that the Senate was not absolved of its role in the political branches' linkage practice.[19] *See id.* at 78-79, 880 N.Y.S.2d at 260. That is because the constitutional

[19] In the February 2008 ruling on the motion to dismiss, after the 2007 Senate bills had been passed, the IAS Court found that "[t]here is no dispute that the remaining defendants (the State of New York, the Senate and the Assembly) are proper parties . . . ." *Larabee*, 19 Misc. 3d at 239, 850 N.Y.S.2d at 894.

impropriety of the linkage practice is not cured simply by the passage of a bill. It is only cured when the "political branches of government . . . discharge the responsibility of considering, and acting upon, an enhancement in judicial salaries on is objective merit." *Id.* at 95, 880 N.Y.S.2d at 272. The passage of two bills in 2007, which never made it to law, does not erase the constitutional wrongs that the Senate has committed against the Judiciary for the last decade. That is because "[t]he threat to judicial independent arises not only from specific instances of legislative or executive overreaching, but, also when political jousting erodes the institutional barricades which protect the judicial branch." *Id.* at 98-99, 880 N.Y.S.2d at 274. The Senate is properly a part of this action, and it must be held accountable for its violations of the separation of powers doctrine and its abuse of the Judiciary.

V

THE APPELLATE DIVISION CORRECTLY AFFIRMED THE IAS COURT'S ORDER GRANTING SUMMARY JUDGMENT ON THE UNDISPUTED RECORD BEFORE IT AND THE RELIEF IT GRANTED WAS PROPER

A. The Record Was Sufficient

The IAS Court properly found that the record supported finding the practice of linkage violates the doctrine of separation of powers. *See Larabee*, 20 Misc. 3d at 870-72, 860 N.Y.S.2d at 889-90; (R.614-619). Defendants accuse Plaintiffs of failing to make a *prima facie* showing of entitlement to summary judgment due to

the alleged failure to provide sufficient admissible evidence. (Def. Br. pp. 58-59). However, all parties to this case agree that the Judges of New York are long overdue for an increase in compensation. *Larabee*, 65 A.D.3d at 82, 880 N.Y.S.2d at 262. The record is clear and unchallenged that the Defendants' practice of linkage has thwarted this increase, and the toll of inflation and increased cost of living since 1999 are also unchallenged both as to fact and as bases for assessing damages. Like so many prior actions regarding issues of judicial compensation, this case was properly decided without trial, the issues turning on the application of law to commonly known and unchallenged facts. *See, e.g., Kelch v. Town Bd. of the Town of Davenport*, 36 A.D.3d 1110 (3d Dep't 2007); *Catanise v. Fayette*, 148 A.D.2d 210 (4th Dep't 1989); *Hatter*, 532 U.S. 557; *O'Donoghue*, 289 U.S. 516; *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 811 N.E.2d 652 (Ill. 2004); *Goodheart v. Casey*, 521 Pa. 316, 555 A.2d 1210 (Pa. 1989).

Having established *prima facie* entitlement to summary judgment, the "burden then shifted to [Defendants] . . . to raise a triable issue of fact to defeat summary judgment." *Briggs v. 2244 Morris, L.P.*, 30 A.D.3d 216, 216 (1st Dep't 2006).[20] The record shows that Defendants failed to put forth any proof whatsoever to refute Plaintiffs' factual allegations or to raise a triable issue of fact.

[20] Declaratory judgment cases are particularly well suited for summary judgment. *See Russell v. Town of Pittsford*, 94 A.D.2d 410, 412 (4th Dep't 1983) ("Summary judgment is proper in a declaratory judgment action where the record presents undisputed facts.").

Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978) ("[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.").

Defendants have never disputed that linkage has caused the Legislature's failure to approve cost of living adjustments to judicial compensation, they have acknowledged that this failure has demoralized the Judiciary, and have admitted (and continue to admit) that Plaintiffs deserve a salary adjustment. *Larabee*, 65 A.D.3d at 91, 880 N.Y.S.2d at 269; *Larabee*, 20 Misc. 3d at 870, 860 N.Y.S.2d at 889; *Larabee*, 19 Misc. 3d at 231, 234, 850 N.Y.S.2d at 889, 891; (R. 365; Def. Br. p. 2). Indeed, the IAS Court found that:

> [i]n light of the lack of a factual dispute, I am required, under the principles applicable to summary judgment motions, to conclude i) that plaintiffs' claim with respect to the linkage alleged has been established, and ii) that the agreed adjustment in judicial pay has not been enacted only because there has not been an agreement among the defendants with respect to a legislative pay increase.

Larabee, 20 Misc. 3d at 871, 860 N.Y.S.2d at 890. Defendants never submitted any pleading refuting the allegations contained in the Verified Complaint. The newspaper articles and editorials submitted by Plaintiffs, and Defendants as well, corroborated the undisputed allegations set forth in the Verified Complaint and the

admissions of Defendants. *See id.* at 870-71, 860 N.Y.S.2d at 889; (R. 66, 76-78, 473, 476, 510, 564, and 566).[21] The IAS Court stated that:

> plaintiffs allege in their verified complaint the linkage referred to in the footnoted newspaper editorials. Decisive to my determination as to whether any triable issue of fact exists on the claim of linkage is the failure of any member of the legislature or any executive official to submit an affidavit denying the existence of the practice.

Larabee, 20 Misc. 3d at 871, 860 N.Y.S.2d at 890. The undisputed record was more than sufficient to support summary judgment for Plaintiffs.

B. The Lower Courts' Understanding of the Threat to Independence Was Correct

The IAS Court and Appellate Division correctly applied New York legal precedent in determining that the mere threat to the independence of the Judiciary was sufficient to prove a violation of the separation of powers. Moreover, the evidence showed that under the present circumstances, the threat is real, not "hypothetical" as the Defendants would have this Court believe. (Def. Br. p. 59; R. 514-19, 566-67).

New York courts have established that the mere threat to judicial independence is sufficient to prove an unconstitutional violation of separation of

[21] These facts, which have a direct impact on the Judiciary, are not only undisputed, they are also common knowledge that may be judicially noticed. *See, e.g., Johnson v. Danna Oil Co.*, 28 Misc. 2d 651, 652 (Sup. Ct. Nassau Co. 1961); *Yesuvida v. Pa. R.R. Co.*, 200 Misc. 815, 821 (Sup. Ct. Kings Co. 1951); *Murawski v. Del. & Hudson R.R.*, 75 N.Y.S.2d 683, 685 (Sup. Ct. N.Y. Co. 1947).

powers without the need of actual, particularized proof. In *Kelch v. Town Bd. of the Town of Davenport*, a town justice was elected and "before he took office, [the town board] set . . . [his] salary at $500 annually." 36 A.D.3d at 1110. The court declared that the town board "violated the N.Y. and U.S. Constitutions" by "act[ing] in a manner likely to affect or impinge upon the independence of the judiciary." *Id.* at 1113 (emphasis added). The court observed that "[a] real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions," and that "qualified citizens would be discouraged from seeking judicial office." *Id.* at 1112. The court granted declaratory relief without requiring a trial on whether the petitioner had in fact "cater[ed] to the ideological whims of the legislature," or whether an "appearance of impropriety" was created, or whether "qualified citizens [were] discouraged from seeking judicial office." *Id.* It was enough that the conduct of the town board made likely or threatened these dangers to entitle petitioner to relief. *See id.* at 1112-13.

Other courts have also established a low evidentiary threshold for a showing of a constitutional violation that threatens the Judiciary. *See Evans v. Gore*, 253 U.S. 245, 257 (1920) (independence must be "beyond the reach and above even the suspicion of any . . . influence"); *O'Donoghue*, 289 U.S. at 530-33 (the courts must

be "free from the remotest influence, direct or indirect, of either of the other two powers") (citation omitted); *Hatter*, 532 U.S. at 577 ("The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence."); *see also Atkins v. United States*, 556 F.2d 1028, 1074-75 (Ct. Cl. 1977) (Nichols, J., concurring); *Jorgensen*, 211 Ill. 2d at 286, 811 N.E.2d at 652.

Similarly, in *Catanise v. Fayette*, the Fourth Department held that a successful claim for the violation of the separation of powers requires no proof of actual harm to judicial independence. 148 A.D.2d 210 (4th Dep't 1989). In *Catanise*, the town board reduced the salary of a town justice during his term of office, and plaintiff-justice brought an Article 78 proceeding to compel payment of his old salary. *Id.* at 211. The Appellate Division reversed the supreme court's dismissal of plaintiff's petition and directed the board to reinstate plaintiff's old salary. *Id.* at 213. The court reasoned that "[t]he threat to independence of the Judiciary presented by the power to diminish a Justice's salary during his term of office is obvious. . . . The mere existence of the power to interfere with or to influence the exercise of judicial functions contravenes the fundamental principles of separation of powers . . . and cannot be sustained." *Id.* at 212-13. The court ordered relief without requiring that plaintiff prove his allegations that "the Town

Board purposefully reduced his salary because it was unhappy with some of his decisions." *Id.* at 212.

In *Plaut*, 514 U.S. at 239-240, the United States Supreme Court further explained:

> [T]he doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features . . . it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. . . . Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors. (emphasis in original).

With regard to the judicial branch, maintaining these "high walls" is particularly important because, as both Alexander Hamilton and the Supreme Court have recognized, "the Judiciary is 'beyond comparison the weakest of the three' branches of Government," having "'no influence over either the sword or the purse'" with "'neither FORCE nor WILL but merely judgment.'" *Hatter*, 532 U.S. at 567-68 (quoting A. Hamilton, *Federalist No. 78*). In affirming the IAS Court here, the Appellate Division agreed:

> Insofar as the Judiciary has already been recognized to be the weakest of the branches of government, which might be dwarfed or swayed by the legislative . . . the concern becomes acute that it could be weakened by making it unduly dependent upon the Legislature. Legislative

> action that hampers the judicial action or interferes with the discharge of judicial functions is in conflict with the principles of the Constitution.

Larabee, 65 A.D.3d at 94-95, 880 N.Y.S.2d at 272 (internal quotations and citations omitted).

Here, Plaintiffs have shown a threat to their independence. The IAS Court's ruling was properly affirmed by the Appellate Division and should be upheld by this Court.

VI

THE RELIEF GRANTED WAS PROPER

Defendants further argue that the Appellate Division erred by affirming the IAS Court's order directing Defendants to remedy their constitutional abuse within 90 days by "proceeding in good faith to adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living" since the pay was last adjusted "with an appropriate provision for retroactivity." Defendants claim that the remedy was improper because "the lower courts decided to exercise the Legislature's exclusive 'legislative power' themselves." (Def. Br. pp. 60-61). Contrary to Defendants' argument, the IAS Court possesses ample authority to order the relief it granted, and the Appellate Division was right to affirm the IAS Court's use of that authority. "[T]he Supreme Court may properly consider claims for injunctive and monetary relief against the State which are dependent upon a

threshold claim for declaratory relief." *Shields v. Katz*, 143 A.D.2d 743, 744-45 (2d Dep't 1988) (holding that supreme court had subject matter jurisdiction in action seeking declaration of unconstitutionality of statute, an injunction directing state official to promulgate regulations, and damages); *see also Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 931 (2003) (noting that the judicial branch is "well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government . . . to assure protection of constitutional rights"). Defendants are wrong that the IAS Court appropriated their "exclusive" authority. The IAS Court, as part of a co-equal branch, can direct the Defendants to honor the Constitution.[22]

* * *

For the foregoing reasons, Defendants' appeal should be denied in its entirety.

[22] The Appellate Division noted that it makes "sound sense to delegate the issue of judicial compensation to a commission created for that purpose . . . ." *Larabee*, 65 A.D.3d at 99, 880 N.Y.S.2d at 275. Plaintiffs agree that such a commission would have utility. However, with respect to their back pay damages, Plaintiffs believe that the lower courts erred in failing to grant more. The scope of the IAS Court's authority in crafting relief, including granting monetary damages, is discussed further below. (*See* pp. 77-92, *infra*.)

POINTS AND ARGUMENTS IN SUPPORT OF PLAINTIFFS' CROSS-APPEAL

I

THE APPELLATE DIVISION ERRED BY AFFIRMING THE ORDER OF THE IAS COURT, DISMISSING PLAINTIFFS' FIRST CAUSE OF ACTION FOR UNCONSTITUTIONAL DIMINISHMENT OF JUDICIAL COMPENSATION

After nearly ninety years of litigation, the unqualified prohibition against diminishment remains, with but a sole exception for certain taxes. The Compensation Clause of Article VI, § 25 began in 1925, with the People of the State of New York providing that "[t]he compensation of a judge . . . shall not be diminished . . . ." N.Y. Const. art. VI, § 25. That absolute protection has not been eroded under New York law until now.

Breadth of the Compensation Clause

In 1920, the United States Supreme Court in *Evans v. Gore* held that the Compensation Clause prohibits any and all diminishment of judicial compensation, without qualification or condition. 253 U.S. 245, 255 (1920). In 1925, through *Miles v. Graham*, the Supreme Court extended *Evans* to strike down an income tax provision requiring judges appointed after the provision's enactment to include their judicial compensation as gross income. 268 U.S. 501, 509 (1925). This was the state of the law when New York in 1925 adopted Article VI, § 25 of the Constitution in the same terms as the federal Constitution and was therefore the

"meaning contemplated by its framers." 20 N.Y. Jur. 2d *Constitutional Law* § 21 (2007).

Later, in *O'Malley v. Woodrough*, the Supreme Court in 1939 overruled *Miles* in part, finding that a tax provision requiring the inclusion of judicial salary as gross income did not violate the Compensation Clause. 307 U.S. 277, 282-83 (1939). Thus, the United States Supreme Court in *O'Malley* carved out an exception from prohibition against diminishment – taxation.

In 1977, the United States Court of Claims in *Atkins v. United States* held that subjecting judicial compensation to inflation without an equivalent cost of living adjustment did not violate the Compensation Clause. 556 F.2d 1028, 1057 (Ct. Cl. 1977). In reaching this determination, the Court in *Atkins* concluded that the Compensation Clause did not protect judicial compensation from an indirect, non-discriminatory reduction. However, just three years later, the United States Supreme Court in *United States v. Will* rejected this analysis, stating unequivocally that the Compensation Clause does not contain an exception for non-discriminatory reductions. 449 U.S. 200, 226 (1980). Therefore, as of 1980, the protection of the Compensation Clause remained, containing only the exception for taxation recognized in *O'Malley*.

In 2001, the United States Supreme Court pared an exception from within the *O'Malley* tax exception. In *United States v. Hatter*, the Court held that a

generally applicable, non-discriminatory tax on judicial compensation did not violate the Compensation Clause, in contrast to an impermissible tax that singled out judges for unfavorable treatment. 532 U.S. 557, 571 (2001). In short, *Hatter* established a niche within the *O'Malley* taxation carve-out, declaring that only a non-discriminatory tax constituted a permissible reduction in judicial compensation under the Compensation Clause. In *United States v. Hatter*, 532 U.S. 557, 571, 581 (2001), the Supreme Court reiterated that judges may not be penalized by the legislative branch, and clarified that any such tax could not single out judges. The cumulative impact of this line of case law is, unsurprisingly, that judges stand on equal footing with other citizens in paying taxes.

Misapplication of the Compensation Clause Exception

In the instant matter, the Appellate Division determined that the niche exception to the tax exception should govern the whole. Put another way, the Appellate Division took the third-level of analysis under the Compensation Clause, and applied it as though it governed at the first, most general level. Such analysis turns the entire structure of the Compensation Clause on its head. Neither party has asserted, nor could it, that the diminishment of judicial compensation by over ten years of inflation constitutes a tax upon judicial compensation. Absent taxation, neither the exception, nor the exception to this exception comes into play under Compensation Clause analysis. Thus, what remains is the unqualified,

unconditional prohibition against the diminishment of judicial compensation established in *Evans*.

The Appellate Division committed error by assuming as a general rule that only a direct, affirmative reduction of judicial salaries constituted diminishment under Article VI, § 25. By its express terms and applicable precedent, Article VI, § 25 makes no such distinction between direct and indirect diminishment.

The Appellate Division committed further error by deciding this case on the basis of an exception allowing indirect diminishment by non-discriminatory taxation. Neither the plain language nor judicial interpretation thereof requires "discrimination" to give the constitutional prohibition effect. In the instant case, neither party has asserted, nor could it, that the diminishment of judicial compensation by over ten years of inflation constitutes a tax upon judicial compensation. Nor should Defendants succeed in transforming an attempt to *protect* judges from discriminatory taxation into a license to decrease their pay so long as such decrease is not discriminatory. The courts below converted this exception to a constitutional rule created to protect the judiciary from compensation diminishment into a rule allowing it, in effect converting a rule that compensation may not be reduced if it discriminates against judges into a rule that compensation may be reduced if it doesn't discriminate against judges.

The Appellate Division premised its determination on the United States Supreme Court's ruling in *United States v. Hatter*, which recognized a narrow exception to the prohibited diminution under the Compensation Clause for taxes. *Hatter* qualified the tax exception to apply the prohibition only to taxes that discriminate against judges. Precedent disallowing diminishment by discriminatory taxation (in effect an exception to an exception) cannot be converted into a general rule allowing diminishment. Taxation is an exception to the prohibition of diminishment and "discriminatory" taxation is an exception to that. The Appellate Division's affirmation of the IAS Court's dismissal of the first cause of action should be reversed.

A. Direct Diminishment Is Not Required to State a Cause of Action for Diminishment Under Article VI, § 25

The Appellate Division determined that "the legislative inaction did not 'diminish' judicial compensation by reducing wages or benefits in any direct fashion, and that this is the operative consideration." *Larabee v. Governor*, 65 A.D.3d 74, 86 (1st Dep't 2009). The notion that the Compensation Clause must be limited to protect the Judiciary from only affirmative, direct acts – not indirect diminishment in the form of a reduction of purchasing power by a full third – lacks any basis in the plain text of Article VI, § 25, and runs contrary to established case law interpreting the Compensation Clause.

1. The Plain Text of Article VI, § 25 Does Not Require Direct Diminishment

As amended in 1925, Article VI, § 25 of the New York Constitution provides that "[t]he compensation of a 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."[23] N.Y. Const. art. VI, § 25. It is well-settled that "in construing the language of the constitution, the courts should give the language its ordinary, natural, plain meaning." 20 N.Y. Jur. 2d Constitutional Law § 27 (2007); *see also In re Carey*, 297 N.Y. 361, 366 (1948).

The plain text of the Compensation Clause unambiguously prohibits any and all diminishment of judicial compensation, without qualification or distinction between direct and indirect diminishment. In fact, no one in this case has ever disagreed – nor could they – that more than 30% diminution in compensation constitutes diminishment in compensation. Indeed, Defendants have conceded that "This case is *not* about whether, as a matter of public policy, New York State Judges should receive a pay increase." (Def. Br. p. 2). Similarly, neither Plaintiffs nor Defendants in this case have suggested that the words "compensation" and "diminishment" have any special meaning apart from the plain, ordinary meaning

[23] Defendants repeatedly and studiously avoid using the term "compensation" in their brief, choosing instead to refer to judicial "salary." (*See, e.g.*, Def. Br. pp. 2, 6, 56-58). "Compensation" is defined as "that which is given or received as an equivalent for services." *Webster's Dictionary* 370 (2d ed. 1979). This equivalence, assuming that it existed in 1999, ceased to exist in 2000. "Salary," more narrowly, on the other hand, means "a fixed payment at regular intervals." *Id.* at 1598.

of these terms. Moreover, while Article VI, § 25 expressly requires that the compensation of judges be established "by law," such a restriction is not included with regard to diminishment.

Had the framers of Article VI, § 25 intended to limit the prohibition against diminishment to only that occurring "by law," they certainly could have done so. The Appellate Division's insertion of the word "direct" into the Constitution contravenes the ordinary, natural, and plain meaning of Article VI, § 25. Thus, the Appellate Division's interpretation of the Compensation Clause lacks any support within the plain meaning of Article VI, § 25 of the New York Constitution, and the precedent interpreting "diminishment," and should be reversed.

2. Case Law Interpreting Article VI, § 25 Confirms That the Constitution Is Not Confined to Direct Diminishment

Five years prior to the 1925 amendment of the current Article VI, § 25, the United States Supreme Court established in *Evans v. Gore* the basic principle that the federal Compensation Clause prohibits the diminishment of judicial compensation.[24] The Supreme Court in *Evans* expressly recognized that the unqualified language of the federal Compensation Clause affords broad protection against diminishment, without limitation. *See Evans*, 253 U.S. at 255 ("The

[24] The federal Compensation Clause contained in Article III, § 1 of the United States Constitution parallels Article VI, § 25 of the New York Constitution, and states "The judges, both of the supreme and inferior courts . . . shall . . . receive for their services, a compensation, which shall not be diminished during their continuance in office." U.S. Const. art. III, § 1.

prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another . . . ."). Furthermore, the Court in *Evans* held that the protection of the Compensation Clause is not limited to direct diminution alone. As the Supreme Court observed:

> Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. [Alexander] Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle.

Evans, 253 U.S. at 254. While *Evans* was subsequently overruled in part, the Supreme Court has reaffirmed *Evans* insofar as *Evans* accurately sets forth the purpose and scope of the federal Compensation Clause. *See United States v. Hatter*, 532 U.S. 557, 567-69 (2001).

Fourteen years after the amendment of Article VI, § 25 of the New York Constitution, the United States Supreme Court in *O'Malley v. Woodrough* created the sole exception to the absolute proscription against diminishment established in *Evans*, holding that the federal Compensation Clause was not violated by an income tax that did not discriminate against Article III judges and was levied on all taxpayers. *O'Malley*, 307 U.S. 277, 282-83 (1939). While the *O'Malley* decision overruled *Evans* in part, the holding of *O'Malley* did not limit the prohibition against the diminishment of judicial compensation to merely direct acts of

diminution. *Atkins v. United States*, 556 F.2d 1028, 1045 (Ct. Cl. 1977) ("*O'Malley*, then, had no disagreement with *Evans* and *Miles* insofar as they determined that indirect incursions upon judicial salaries, as much as direct ones, were not tolerable under the Compensation Clause."). Rather, *O'Malley* established the sole exception to the proscription of the Compensation Clause – taxation.

In *United States v. Hatter*, the United States Supreme Court crafted a distinction from within the *O'Malley* tax exception. Specifically, *Hatter* distinguished "taxation that singles out judges for specially unfavorable treatment," in violation of the Compensation Clause, from the permissible "'nondiscriminatory tax laid generally' upon judges and other citizens." 532 U.S. at 561. In crafting this narrow distinction within the tax exception, the Court in *Hatter* nevertheless reaffirmed that direct diminishment is not required for a cause of action under the federal Compensation Clause, stating:

> We also agree with *Evans* insofar as it holds that the Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by ordering a lower salary. Otherwise a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect.

Hatter, 532 U.S. at 569 (internal citation omitted). Therefore, the diminishment of judicial compensation by means other than taxation is controlled by the principles elucidated by the United States Supreme Court in *Evans*. Pursuant to these principles, a cause of action for violation of the Compensation Clause does not require that the diminishment of judicial compensation occur by a direct act.

Over the past ten years, Defendants have continuously violated the Compensation Clause of the New York Constitution by permitting judicial compensation to be substantially diminished by the effects of inflation. The fact that Defendants' violation of the Compensation Clause was an act of omission does not absolve Defendants under the controlling Compensation Clause analysis of *Evans*. Because the Appellate Division exclusively required a direct, affirmative act of diminution for Plaintiffs to state a cause of action under Article VI, § 25, it erred.

B. Article VI, § 25 Bars Diminishment on its Face, Regardless of Whether Such Diminishment Additionally Is Discriminatory

The IAS Court determined that Plaintiffs failed to state a cause of action for violation of the Compensation Clause, relying exclusively on *Hatter*'s requirement that tax law not single out judges for special treatment. *See Larabee*, 19 Misc. 3d at 236-37, 850 N.Y.S.2d at 892-93. The Appellate Division found that the reasoning of *Hatter* had "logical force in the present case," and implicitly analyzed the diminishment by inflation in the instant matter under the *Hatter* rubric allowing

diminishment by nondiscriminatory taxation. *Larabee*, 65 A.D.3d at 86-87. Contrary to both the IAS Court and Appellate Division's interpretations, the distinction established in *Hatter* is limited to taxation and does not constitute a license to violate the Compensation Clause with impunity in any scenario.

1. Analysis Under *Hatter* Is Limited to Taxation

The Appellate Division erred in applying the narrow, limited holding of *Hatter* to the broader issue of diminishment by inflation. In *Hatter*, federal Article III judges challenged the validity of withholdings of Medicare and Social Security taxes from judicial salaries under the Compensation Clause. The Medicare tax did not single out judges for a diminishment in compensation. On the other hand, the Social Security tax effectively targeted judges. In drawing a distinction between discriminatory and non-discriminatory taxation under the Compensation Clause, the Supreme Court in *Hatter* analyzed a discrete, narrow issue limited strictly to taxation. According to Justice Breyer, writing for the majority, "In our view, the [Compensation] Clause does not prevent Congress from imposing a 'non-discriminatory *tax* laid generally' upon judges and other citizens, *O'Malley v. Woodrough*, 307 U.S. 277, 282, 59 S.Ct. 838, 83 L.Ed. 1289 (1939), but it does prohibit *taxation* that singles out judges for specially unfavorable treatment." *Hatter*, 532 U.S. at 561 (emphases added). Moreover, the Court expressly stated that its holding in *Hatter* overruled *Evans* "insofar as it holds that the

Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges . . . ." *Id.* at 567. *Hatter* does not suggest, much less hold, that all indirect reductions involving judges as well as others pass constitutional muster by virtue of involving those others. *Id.* at 569-71. The Compensation Clause applies uniquely to judges. Except for taxes, neither *Hatter* nor any other prior case holds that this unique protection may be defeated by indirectly diminishing the compensation of unprotected others along with judges.

Additionally, the United States Supreme Court has expressly rejected the broad analysis of discriminatory impact employed by the Appellate Division in the instant matter. Prior to *Hatter*, the United States Court of Claims in *Atkins v. United States* held that "[t]o make out a case, plaintiffs need not show a direct diminution of judicial compensation, but the indirect diminution that they complain of must be of a character discriminatory against judges . . . ." 556 F.2d at 1054. However, just a few years later, the United States Supreme Court dispelled any confusion arising from *Atkins*: "the Constitution makes no exceptions for 'nondiscriminatory' reductions [in judicial compensation.]" *United States v. Will*,

449 U.S. at 226.[25] In the absence of diminution by taxation, analysis under *Hatter* is unfounded and inappropriate.

2. *Hatter*'s Distinction for Taxation Does Not Extend to Inflation

More than eighty years have passed since the People of New York adopted the current version of the Compensation Clause in the New York Constitution. Over two hundred years have passed since the ratification of the United States Constitution, including the federal Compensation Clause of Article III, § 1. Yet, the *only* exception to either Compensation Clause that has been recognized to date is that of a nondiscriminatory tax. *See Hatter*, 532 U.S. at 567. In the concurring opinion in *Black v. Graves*, 257 A.D. 176, 181 (1939), *aff'd* 281 N.Y. 792 (1939), the Appellate Division, following *O'Malley*, unambiguously recognized that the tax exception to the Compensation Clause was rooted in the civic duty that is inherently unique to taxation. As the concurring opinion stated:

> Enjoyment of the privileges of residence in the State and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. Taxes are what we pay for civilized society . . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the State to the recipient of the income in his person, in his right to receive the income and in his

[25] Similarly, as discussed *supra* in Section IA, the plain text of Article VI, § 25 is without qualification in protecting judicial compensation from diminishment.

> enjoyment of it when received. These are rights and privileges which attach to domicil within the state.

257 A.D. at 178 (internal citations and quotations omitted). This underpinning of civic duty was likewise central to the United States Supreme Court's holding in *O'Malley* that a nondiscriminatory tax does not violate the federal Compensation Clause. As stated by Justice Frankfurter, writing for the majority:

> To suggest that it [a nondiscriminatory tax] makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, s 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

O'Malley, 307 U.S. at 282. Thus, taxation, including as applied to judges, flows from the duties and obligations of citizenship that are necessary for the effective functioning of government. *See In re Legum*, 55 N.Y.2d 104, 107 (1982) ("The citizen owes to the government the duty to pay taxes, so that the latter may be enabled to perform its functions, and he thus receives his proper compensation in the protection which the government affords to his life, liberty and property.").

While the principles above reflect reasoned bases upon which to carve out an exception to the Compensation Clause solely regarding the tax treatment of

For the foregoing reasons, the allegations set forth in the Verified Complaint state a cause of action in violation of Article VI, § 25. The Defendants' failure to adjust judicial compensation to keep abreast of over ten years of inflation has resulted in more than a 30% diminishment of the real value of Plaintiffs' compensation. "Diminishment" does not lose its meaning by appearing in our constitution; Article VI, § 25 mandates that the "compensation of a judge . . . shall not be diminished . . . ."

II

THE APPELLATE DIVISION ERRED IN DECLINING TO GRANT THE REASONABLE AND APPROPRIATE MONETARY RELIEF THAT PLAINTIFFS SEEK

Plaintiffs have endured, at the hands of Defendants, progressively worse diminishment of their compensation year upon year for ten successive years. Fortunately, such neglect has a simple, direct, and fitting remedy – back pay damages. Plaintiffs, therefore, cross-appeal from the Appellate Division's order insofar as it declined to grant the reasonable and appropriate monetary relief demanded by Plaintiffs. The Appellate Division possessed the authority – both through its general authority and its inherent powers – to grant Plaintiffs the monetary relief they requested. In failing to compensate Plaintiffs for the monetary injuries suffered as a result of Defendants' constitutional violations, the Appellate Division erred.

A. Defendants' Failure to Protect Judicial Compensation from the Ravages of Inflation for Over Ten Years Constitutes Unconstitutional Diminishment Under Article VI, § 25

Defendants' neglect of judicial compensation over the course of more than ten years has resulted in the judges of New York receiving a reduction of more than 30% in the value of their compensation. Put another way, every dollar paid as judicial compensation today is worth approximately one-third less than the dollar paid in 1999.

The need to adjust judicial compensation for inflation traces back to the dawn of our nation. The Founding Fathers contemplated that it was necessary for the legislative branch to possess the ability to increase judicial salaries during a sitting judge's tenure in order to properly adjust for inflation and the reduced purchasing power of the dollar. After debating differing proposals from James Madison and Gouvernor Morris during the Constitutional Convention of 1787, the "Convention finally adopted [a] motion to allow increases by the Congress, thereby accepting a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed." *United States v. Will*, 449 U.S. 200, 220 (1980); *see Atkins*, 556 F.2d at 1074 (Nichols, J., concurring) ("[I]t is at least arguable that Article III [Compensation Clause] confers a right not just to exercise of sound discretion and to nondiscrimination, but also to effective ways and means to implement regular adjustments, for cost of living, in face of . . .

inflation . . . ."). The federal Compensation Clause resulting from the Constitutional Convention of 1787 recognized the economic reality of inflation and its impact upon judicial compensation. *See Will*, 449 U.S. at 227 ("Rather, that provision [the federal Compensation Clause] embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, *such as substantial inflation*, against the need for judges to be free from undue congressional influence.") (emphasis added).

Defendants cite *Gresser v. O'Brien* for the Compensation Clause history, but fail to note the clear message in that case. (Def. Br. p. 17). As stated in *Gresser v. O'Brien*, 146 Misc. 909, 913 (Sup. Ct. N.Y. Co. 1933), *aff'd*, 263 N.Y. 622, 189 N.E. 727 (1934), "This [the federal Compensation Clause], all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible." (quoting *The Federalist No. 79* (Alexander Hamilton)).

In the most recent case before the United States Supreme Court concerning the denial of cost of living adjustments to federal judges, the Court denied *certiorari*. *See Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002). However, Justice Breyer expressly noted in his

dissent from the denial of *certiorari* that "when the Founders considered the Constitution's specific provisions, they took inflation into account." 535 U.S. at 914 (Breyer, J., dissenting). According to Justice Breyer, "the Founders created a one-way compensation ratchet because they believed that permitting the legislature to diminish judicial compensation would allow the legislature to threaten judicial independence." *Id.* The failure to employ this "upward ratchet" in the face of more than ten years of diminishment by inflation defies the very protections created by the Founding Fathers. Justice Breyer left no doubt that the absence of cost of living adjustments is a diminishment of compensation, referring to them as a "cut" in "real salaries." *Id.* at 920-21.

Furthermore, while the legislative branch possesses the ability to increase judicial compensation, the separation of powers between the three co-equal branches of government, including the independence of the Judiciary, remains paramount. As the United States Supreme Court observed:

> The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision . . . forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States. . . . In framing the Constitution, therefore, the power to diminish the compensation of the federal judges was explicitly denied . . . ."

O'Donoghue v. United States, 289 U.S. 516, 531 (1933); *see* U.S. Const. art. III, § 1. Moreover, the power of the Legislature to control the compensation of the judiciary is not absolute, but rather subject to the preservation of the judiciary as an independent branch of the government. *See Atkins v. United States*, 556 F.2d 1028, 1048 (Ct. Cl. 1977) ("[T]he position that plaintiffs cannot state a claim . . . insofar as they seek a salary, the nominal dollar amount of which exceeds the statutory authorization. Congress has absolute power, according to defendant, to keep the nominal dollar amount of the judicial salary where it is. We think defendant's contention goes too far."); *see also O'Donoghue*, 289 U.S. at 533 ("[T]here rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this [judicial] compensation, . . . in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people.").

New York courts have likewise recognized the fundamental principle of maintaining the distinct and independent powers of the Judiciary. As early as 1898, this Court found:

> The safety of free government rests upon the independence of each branch and the even balance of power between the three. Unite any two of them and they will absorb the third with absolute power as a result. Weaken any one of them by making it unduly dependent

> upon another and a tendency toward the same evil follows. . . . Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power.

People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898). Indeed, that judicial independence is protected by the Compensation Clause, which uniquely applies to judges.[26]

According to legal historian Akhil Reed Amar, the Compensation Clause counterbalances "the need to shield judges from inflation against the need to shield them from Congress." *America's Constitution: A Biography* 220 (2005). The Legislature's neglect of duty for the last ten years has turned this counterbalancing on its head. The New York Judiciary has not been shielded from either inflation or from the irresponsibility of the Legislature. This neglect of duty has denied the protection Amar cites as the "needed authority to increase judicial salaries whenever unforeseeable inflation arose."[27] As an independent, yet co-equal branch of the state government, the Judiciary must be shielded from the

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[26] Unlike the compensation provisions for the political branches of state government, the New York Constitution only provides the Judiciary with the constitutional protection against the diminishment of compensation. *Compare* N.Y. Const. art. VI, § 25 *with* N.Y. Const. art. III, § 6 (compensation provision for Legislative branch), *and* N.Y. Const. art. IV, § 3 (compensation provision for Executive branch).

[27] Amar also noted that "prices had indeed fluctuated wildly in many states during and immediately after the Revolution, and the Philadelphia framers were acutely aware of the inflation issue as they crafted the salary rules of Articles I, II, and III. On several occasions, Madison suggested a kind of automatic cost-of-living adjustment pegged to the price of wheat or some other constitutionally designated benchmark." *America's Constitution: A Biography* 574, fn. 31 (2005) (internal citations omitted).

unconstitutional conduct of the Legislature. By granting monetary damages to Plaintiffs for their monetary injuries, this Court would restore income lost to violation of the constitution while, at the same time, create an appropriate sanction for the defendants' violations.

B. Monetary Damages Are Appropriate and Necessary

Plaintiffs sought an order compelling Defendants to pay monetary damages in the amount of cost of living adjustments to Plaintiffs' annual compensation for the period beginning January 1, 2000 through the date that a final judgment is entered. At the time of Plaintiffs' motion for summary judgment, Defendants' continued violation of the New York Constitution entitled the four named Plaintiffs, collectively, to damages totaling in 2007 approximately $651,410.00 (approximately $1,020,470.00 in 2009), which includes pre-judgment interest of 9% pursuant to CPLR § 5004. (R. 372 and Exhibits 2 and 3, attached). Defendants have never challenged the amount of damages claimed. These damages were calculated using Consumer Price Index data, of which the Court can take judicial notice, and by using formulas that have been judicially recognized. (R. 267-69). Applying the same damages calculation to the approximately 1,300 judges under the Unified Court System, the total damages amount in 2007 to

roughly $250 million, or about 0.2% of the State's budget, now over $300 million with the passage of time.[28]

Plaintiffs reiterate that they fully support the IAS Court's order affirmed by the Appellate Division, requiring Defendants within 90 days "to adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998, with an appropriate provision for retroactivity." *Larabee*, 20 Misc. 3d at 878, 860 N.Y.S.2d at 894. Nevertheless, Plaintiffs are entitled to monetary damages in the form of back pay for Defendants' unconstitutional linkage practices, which have failed to protect judicial compensation against inflation for over a decade. Contrary to the Appellate Division's order, such relief is readily calculable.

1. Monetary Damages Compensate Plaintiffs for the Real Injuries That They Have Suffered

As a result of Defendants' failure to provide cost of living adjustments to judicial compensation sufficient to offset the effects of inflation, Plaintiffs' compensation has been diminished by over 30% since January 1, 2000. Courts have recognized that it is appropriate for judicial salaries to keep pace with inflation. *See Williams v. United States*, 240 F.3d 1019, 1040 (Fed. Cir. 2001),

[28] Plaintiffs request this Court to enter a monetary judgment for the four named Plaintiffs in this matter as set forth in Exhibit 3 and remand with instructions to calculate damages for other current and former judges and justices since January 1, 2000 in accordance with Exhibit 3 calculations.

cert. denied, 535 U.S. 911 (2002). Moreover, cost of living adjustments do not constitute salary increases, but simply reflect the preservation of the dollar value of that salary. *See Boehner v. Anderson*, 809 F. Supp. 138, 141-42 (D.D.C. 1992), *aff'd*, 30 F.3d 156 (D.C. Cir. 1994); *cf. Schultz v. Harrison Radiator Div. General Motors Corp.*, 90 N.Y.2d 311, 319 (1997) (finding that an adjustment for inflation on a structured settlement award does not constitute additional compensation, but ensures that the passage of time does not devalue the award). Rather, cost of living adjustments comport with the "Compensation Clause's basic purposive focus: a judge's reasonable expectations." *Williams*, 535 U.S. at 914 (Breyer, J., dissenting). Awarding back pay as monetary damages for constitutional violations involving judicial compensation is an established remedy. *See Nicolai v. Crosson*, 214 A.D.2d 714, 715 (2d Dep't 1995) (affirming award of back pay as monetary damages for unconstitutional disparity in judicial compensation in violation of judges' right to equal protection); *see also Deutsch v. Crosson*, 171 A.D.2d 837, 838-39 (2d Dep't 1991) (same); *Dickinson v. Crosson*, 219 A.D.2d 50, 54-55 (3d Dep't 1996) (same). In *Weissman v. Evans*, this Court examined the disparity of judicial compensation among judges within the New York court system. Finding that an unconstitutional disparity existed, the Court observed the "long-recognized rule that a remedy should be coextensive with the wrong it is to redress," and determined that the calculation of damages should start with the date on which the

compensation disparity occurred, and cover the period of time during which the disparity existed. *Weissman v. Evans*, 56 N.Y.2d 458, 467-69 (1982) (internal citations omitted).

In seeking monetary damages, Plaintiffs sought merely to be made whole for the harm inflicted by Defendants over the past decade. Defendants have been afforded ample opportunity to correct this manifestly unjust situation and act in accordance with the New York Constitution. Nevertheless, Plaintiffs remain injured as a result of Defendants' inaction, shielded neither from the harmful effects of inflation nor the impingement upon their independence as a separate, co-equal branch of the state government. With every turn of the calendar page, Plaintiffs continue to bear the real and tangible effects of inflation upon their compensation. Consequently, this Court should grant Plaintiffs the monetary relief sought, thereby providing Plaintiffs with a remedy that is co-extensive with the constitutional violation committed by Defendants.

2. Monetary Damages Are Readily Calculable

The Appellate Division did not question the appropriateness of monetary relief in addressing the injuries suffered by Plaintiffs. Rather, the Appellate Division noted that if monetary damages were awarded, "some standard would have to be devised to determine at what pace, and at what point, 'diminishment' occurs because wages and benefits have slipped behind the rate of inflation."

Larabee, 65 A.D.3d at 86, 880 N.Y.S.2d at 265. Plaintiffs have provided the very standard sought by the Appellate Division – calculating the amount of damages claimed using Consumer Price Index data to account for the rate of inflation since January 1, 2000. Courts may properly take judicial notice of the consumer price index and of government inflation statistics. *People v. Toms*, 191 Misc. 2d 585, 589-90 (Co. Ct. of St. Lawrence Co. 2002) (judicial notice of consumer price index proper when legislature failed to adjust compensation for counsel appointed to represent indigent defendants to account for sixteen years of inflation); *Sommers v. Sommers*, 203 A.D.2d 975, 976 (4th Dep't 1994) ("It was proper for the court to take judicial notice of government inflation statistics because they are historical data that are readily and precisely verifiable.").[29] Plaintiffs commenced the present action out of Defendants' failure to provide cost of living adjustments to Plaintiffs' judicial compensation since January 1, 1999. Cost of living adjustments are invariably determined in both the public and private sectors on an annual basis. Thus, there is no need to determine the precise threshold for diminution by any measure other than annually.

[29] As demonstrated in Exhibit 3, Plaintiffs calculated the annual percent inflation for each year by using the Consumer Price Index and applying the standard equation set forth in *People v. Toms*, 191 Misc. 2d at 589, n. 5, ((Year 2 CPI – Year 1 CPI)/ Year 1 CPI) x 100 = Annual Percentage Inflation, rounded to the nearest hundredth of a percent. The Annual Percent Inflation for a given year was then used to adjust the judicial salary for inflation by applying the formula: ((Year 1 "Salary Adjusted for Inflation" x Year 2 "Annual Percent Inflation") + Year 1 "Salary Adjusted for Inflation") = Year 2 "Salary Adjusted for Inflation" rounded to the nearest whole dollar.

In any event, this Court should not avoid providing monetary relief to Plaintiffs because of concerns about establishing a standard for determining such relief. Irrespective of the standard utilized by the Court, more than ten years without a cost of living adjustment in the face of inflation clearly exceeds any minimum threshold. It is undisputed that inflation has reduced the real value of Plaintiffs' judicial compensation now by over 30%. Likewise, Defendants have not challenged that they have failed to provide a cost of living adjustment to Plaintiffs since January 1, 1999. In fact, Defendant have expressly conceded that a Supreme Court Justice should receive the same compensation as that currently received by Federal District Court Judge.[30] (R. 612-613). By any measure, Plaintiffs have been significantly harmed as a result of Defendants' failure to provide cost of living adjustments. Therefore, Plaintiffs are entitled to monetary relief in the present case.

C. The Court's Authority to Grant the Relief Requested by Plaintiffs

The Court has the authority to grant the demanded cost of living adjustments as redress for Defendants' continuing constitutional violations. "[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the

[30] Federal District Court judges currently receive annual compensation of $169,300. This figure is very close to the inflation adjusted compensation that is the basis for Plaintiffs' damages calculation, but still does not reach the equivalent real value of the compensation adjusted for inflation.

New York State Constitution, and order redress for violation of them." *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 925 (2003).

In *New York Co. Lawyers' Ass'n v. State*, the Court examined the legislative branch's failure to increase the rates of compensation payable to assigned counsel. 196 Misc. 2d 761, 790 (Sup. Ct. N.Y. Co. 2003); *see also New York Co. Lawyers' Ass'n v. State*, 294 A.D.2d 69, 72 (1st Dep't 2002). Rather than deferring to the legislative branch itself, the Court "issue[d] a mandatory permanent injunction raising the [statutory rates paid to assigned counsel in criminal and family court matters] to $90.00 an hour, without distinction between in and out-of-court work, and without ceilings on total per case compensation, until the Legislature addresses the issue." 196 Misc. 2d at 790. According to the Court, "Faced with 17 years of legislative inaction and proof of real and immediate danger of irreparable constitutional harm, this Court can no longer wait for the legislative branch to protect the fundamental interests of children and indigent litigants." *Id.*

In the instant case, Defendants' ten years of inaction and the resultant violation of the separation of powers and threat to the independence of the judiciary permit this Court to go further than simply declaring that Defendants' conduct violated the New York Constitution. Unlike the constitutional violations before the Court in *Campaign for Fiscal Equity*, Defendants have admitted that there is no policy dispute that judicial compensation should be adjusted for

inflation, and have even agreed to an appropriate amount. (Def. Br. p. 2); *Larabee* 20 Misc. 3d at 870, 860 N.Y.S.2d at 889; *Larabee*, 19 Misc. 3d at 230-31, 850 N.Y.S.2d at 888-89; *Larabee*, 65 A.D.3d at 82 (1st Dep't 2009); 850 N.Y.S.2d at 888, 889 (Sup. Ct. N.Y. Co. 2008). Moreover, Defendants have never contested Plaintiffs' calculation of back-pay damages based upon the Consumer Price Index. Thus, Plaintiffs in the present matter do not seek for the Court to choose from among competing calculations and budgetary policies as in *Campaign for Fiscal Equity*. Indeed, the clarity of the factual record before the Court takes the instant matter outside of the realm of *Campaign for Fiscal Equity* and discussions of policy.

Rather, consistent with the holding of *New York Co. Lawyers' Ass'n*, this Court can exercise its authority and end Defendants' disregard for its co-equal judicial branch. Therefore, the Court possesses the authority to order redress for the constitutional violations arising out of Defendants' impermissible practice of linkage. 196 Misc. 2d at 790. This Court need no longer wait for Defendants to resolve the constitutional problem created by their own neglectful conduct spanning more than ten years.

D. The Court's Inherent Power

The Court likewise possesses the authority to grant Plaintiffs' requested monetary relief through its inherent powers. Under the inherent powers doctrine, a court has all of the powers reasonably required to enable it to "perform . . . its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective." *Alvarez v. Snyder*, 264 A.D.2d 27, 35 (1st Dep't 2000). In fact, the inherent powers of the court derive precisely from the separation of powers principles at issue in the instant matter. *See People v. Little*, 89 Misc. 2d 742, 745 (Co. Ct. of Yates Co. 1977), *aff'd*, 60 A.D.2d 797 (4th Dep't 1977) ("Under the constitutionally mandated separation of powers, the three traditional branches of government--executive, legislative and judicial--are to be separate, co-ordinate and equal with each free to govern, manage and administer the business in its own sphere without restriction, supervision or interference by the other branches. In order to effect 'check and balance' the courts must have inherent powers."). As a safeguard against impairment of its functions by one of the co-equal branches of state government, courts in New York have used the inherent powers doctrine to provide necessary funding, services, and supplies for the Judiciary when the executive and legislative branches have not. *See McCoy v. Mayor*, 73 Misc. 2d 508, 512-13 (Sup. Ct. N.Y. Co. 1973) (ordering funding for city court where executive branch failed to act); *In re Spike*, 99 Misc. 2d 178, 182

(Co. Ct. of Yates Co. 1979) (ordering county sheriff to continue to provide security services for court). The Appellate Division failed to utilize its inherent powers and grant the monetary damages sought by Plaintiffs. As a result, the Appellate Division fell short of remedying Defendants' subordination of the judicial branch. The Appellate Division's denial of monetary damages should be reversed. This Court may remit this matter to the Supreme Court, New York County, for a judgment declaring that all of the Judges and Justices of the Unified Court System are entitled to back pay damages restoring their compensation to the rightful place. *See Roe v. Bd. of Trustees of Village of Bellport*, 65 A.D.3d, 1211, 1211 (2d Dep't 2009).

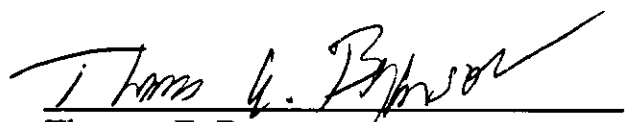
CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court deny Defendants' appeal in its entirety, and find that the Appellate Division: (1) erred by dismissing Plaintiffs' first cause of action for unconstitutional diminishment under Article VI, § 25 of the New York Constitution; and (2) erred by denying Plaintiffs monetary damages in the amount of cost of living adjustments to their annual compensation since January 1, 2000. Further, Plaintiffs respectfully request that the Court enter an award of damages to Judge Geoffrey Wright in the amount of $252,453.00, to Judge Patricia Nunez in the amount of $252,453.00, to Judge Michael Nenno in the amount of $240,798.00, to Judge

Susan Larabee in the amount of $274,766.00, and that the Court remand with an order to award damages to each of the other current and former state paid Judges and Justices from January 1, 2000 to date, consistent with the above awards.

Dated: November 20, 2009
New York, New York

COHEN & GRESSER LLP



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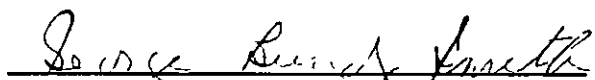

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Exhibit 1

Exhibit 1

Updated Calculations of R. 269 – Compensation Adjusted for Inflation

1. Attached hereto as Exhibit 2 is a true and accurate copy of the Consumer Price Index, All Urban Consumers, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, All items (1998-2009), as maintained by the United States Department of Labor, Bureau of Labor Statistics, Washington, D.C. (the "CPI"). *Available at* www.bls.gov. New York courts properly take judicial notice of the CPI. *Sommers v. Sommers*, 203 A.D.2d 975, 976 (4th Dep't 1994); *City of Hope, Inc. v. Fisk Bldg. Assocs.*, 63 A.D.2d 946, 947 (1st Dep't 1978); *People v. Toms*, 191 Misc. 2d 585, 589 (Sup. Ct. St. Lawrence Co. 2002).

2. Attached hereto as Exhibit 3 is a true and accurate copy of a table detailing Plaintiffs' damages. As stated at the January 10, 2008 oral argument, Plaintiffs are entitled to damages for the failure to preserve the value of the 1999 dollar by the Defendants' failure to adjust judicial compensation for inflation. (*See* R. 358).

The salaries provided in Exhibit 3 in the column with the heading "Statutory Salary" are those set forth under L. 1998, c. 630 and in Judiciary Law § 221-e for a judge of the Family Court in New York County (plaintiff Hon. Susan Larabee), in Judiciary Law § 221-d for a judge of the the County Court in Cattaraugus County (plaintiff Hon. Michael Nenno), and in Judiciary Law § 221-g for both a judge of the Civil Court for the City of New York (plaintiff Hon. Geoffrey Wright) and for a judge in the Criminal Court of the City of New York (plaintiff Hon. Patricia Nunez).

The percent inflation rate from year to year, set forth in the columns with heading "Annual Percent Inflation," was calculated by using the CPI and applying the standard equation:

> ((Year 2 CPI – Year 1 CPI)/ Year 1 CPI) x 100 = "Annual Percentage Inflation" rounded to the nearest hundredth of a percent.

See People v. Toms, 191 Misc. 2d at 589, n.5 (applying this equation).

The "Annual Percent Inflation" for a given year was then used to determine the "Salary Adjusted for Inflation," or the annual salary paid to each respective plaintiff if the salary had kept pace wit the rate of inflation for the year in question, by applying this formula:

> ((Year 1 "Salary Adjusted for Inflation" x Year 2 "Annual Percent Inflation") + Year 1 "Salary Adjusted for Inflation") = Year 2 "Salary Adjusted for Inflation" rounded to the nearest whole dollar.

The difference between the "Salary Adjusted for Inflation" for each year and the "Statutory Salary" constituted the "Base Damages." To the "Base Damages" was added a 9% rate of interest (with no compounding) as directed under New York Civil Practice Law and Rules § 5004.

Based on the calculations set forth above, and as reflected in Ex. 3, from 1999 to 2008 there was approximately a 33.2% rate of inflation. Notably, from 1999 through September 2009, there was approximately a 33.4% rate of inflation. This means that a dollar in 2008 is roughly 33.2% less valuable than a dollar in 1999, and the same dollar in September 2009 is approximately 33.4% less valuable than a dollar in 1999. Based on this rate of inflation, the below equivalents can be calculated[1]:

a) $136,700 in 1999 is equivalent to $182,466 in 2009;

b) $125,600 in 1999 is equivalent to $167,650 in 2009;

c) $119,800 in 1999 is equivalent to $159,908 in 2009;

d) $136,700 in 2009 is equivalent to $91,042 in 1999;

e) $125,600 in 2009 is equivalent to $83,650 in 1999;

f) $119,800 in 2009 is equivalent to $79,787 in 1999.

[1] The equivalents in lines a-c utilize an inflation rate of 33.4%, the precise result of the calculations described in paragraph 1 and set forth in the year 2009 column of Exhibit 3. Because 33.4% rate of inflation is an approximation that has been rounded down from the actual result of the calculations set forth in paragraph 2 and Ex. 3, the dollar equivalents in lines d-f are also an approximation based on a 33.4% rate of inflation.

Exhibit 2

Databases

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include graphs
More Formatting Options

Data extracted on: November 17, 2009 (7:09:06 PM)

Consumer Price Index - All Urban Consumers

Series Id: CUURA101SA0,CUUSA101SA0
Not Seasonally Adjusted
Area: New York-Northern New Jersey-Long Island, NY-NJ-CT-PA
Item: All items
Base Period: 1982-84=100

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1998	172.1	172.7	173.0	173.0	173.0	173.1	173.6	174.2	174.4	174.8	174.7	174.7	173.6	172.8	174.4
1999	175.0	175.1	175.5	176.0	176.1	176.8	177.2	177.6	178.2	178.9	178.8	178.6	177.0	175.8	178.2
2000	179.3	180.5	181.5	181.4	181.4	182.0	182.8	183.1	184.4	184.6	184.6	184.2	182.5	181.0	184.0
2001	184.9	185.3	186.4	186.6	187.3	188.3	187.8	188.1	188.0	187.8	187.8	187.3	187.1	186.5	187.8
2002	188.5	189.9	191.1	191.8	191.4	191.5	192.0	193.1	193.3	193.7	193.4	193.1	191.9	190.7	193.1
2003	194.7	196.2	197.1	196.7	196.8	196.9	197.7	199.1	199.6	200.0	199.4	199.3	197.8	196.4	199.2
2004	199.9	201.1	203.4	204.0	204.4	206.0	205.5	205.7	205.9	207.3	207.2	206.8	204.8	203.1	206.4
2005	208.1	208.9	212.4	212.5	211.4	210.7	212.5	214.1	215.8	216.6	215.3	214.2	212.7	210.7	214.8
2006	215.9	216.4	218.2	220.2	221.6	222.6	223.1	224.1	222.9	221.7	220.9	221.3	220.7	219.2	222.3
2007	221.767	223.066	224.551	225.780	227.146	228.258	228.628	228.326	228.308	228.552	229.504	229.395	226.940	225.095	228.785
2008	229.869	231.020	233.122	233.822	236.151	238.580	240.273	240.550	240.089	238.403	234.498	233.012	235.782	233.761	237.804
2009	233.402	234.663	235.067	235.582	235.975	237.172	237.600	238.282	238.568					235.310	

Exhibit 2, Updated Table R. 371
U.S. Department of Labor, Bureau of Statistics
Consumer Price Index - All Urban Consumers -
1998 - 2009

Exhibit 3

EXHIBIT 3

UPDATED TABLE R372, R376 - COMPENSATION ADJUSTED FOR INFLATION

			Year 2000		
	Statutory Salary (paid from 1999 to present)	Annual Percent Inflation **	Salary Adjusted for Inflation	Base Damages	Base Damages plus 9%
Judge Geoffrey Wright	$ 125,600.00	3.10%	$ 129,494.00	$ 3,894.00	$ 4,244.00
Judge Patricia Nunez	$ 125,600.00		$ 129,494.00	$ 3,894.00	$ 4,244.00
Judge Michael L. Nenno	$ 119,800.00		$ 123,514.00	$ 3,714.00	$ 4,048.00
Judge Susan R. Larabee (for YE 3/31/xx)	$ 136,700.00		$ 140,938.00	$ 4,238.00	$ 4,619.00
Total Base Damages per Year				$ 15,740.00	
Total Base Damages plus 9% per Year					$ 17,155.00
Grand Total Base Damages	$ 936,213.00				
Grand Total Base Damages plus 9%	$ 1,020,470.00				

** Calculated using the Consumer Price Index for All Urban Consumers, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, All items (1997-2009), as maintained by U.S. Department of Labor, Bureau of Labor Statistics, and the standard equation: ((Year 2 CPI - Year 1 CPI) / Year 1 CPI) x 100).

EXHIBIT 3

UPDATED TABLE R372, R376 - COMPENSATION ADJUSTED FOR INFLATION

Year 2007				Year 2008			
Annual Percent Inflation **	Salary Adjusted for Inflation	Base Damages	Base Damages plus 9%	Annual Percent Inflation **	Salary Adjusted for Inflation	Base Damages	Base Damages plus 9%
2.83%	$ 161,033.00	$ 35,433.00	$ 38,622.00	3.90%	$ 167,313.00	$ 41,713.00	$ 45,467.00
	$ 161,033.00	$ 35,433.00	$ 38,622.00		$ 167,313.00	$ 41,713.00	$ 45,467.00
	$ 153,597.00	$ 33,797.00	$ 36,839.00		$ 159,587.00	$ 39,787.00	$ 43,368.00
	$ 175,264.00	$ 38,564.00	$ 42,035.00		$ 182,099.00	$ 45,399.00	$ 49,485.00
		$ 143,227.00				$ 168,612.00	
			$ 156,118.00				$ 183,787.00

EXHIBIT 3

UPDATED TABLE R372, R376 - COMPENSATION ADJUSTED FOR INFLATION

Year 2009

Annual Percent Inflation	Salary Adjusted for Inflation	Base Damages	Base Damages plus 9%	
0.20%	$ 167,650.00	$ 42,050.00	$ 45,835.00	Judge Geoffrey Wright
	$ 167,650.00	$ 42,050.00	$ 45,835.00	Judge Patricia Nunez
	$ 159,908.00	$ 40,108.00	$ 43,718.00	Judge Michael L. Nenno
	$ 182,466.00	$ 45,766.00	$ 49,885.00	Judge Susan R. Larabee (for YE 3/31/xx)
		$ 169,974.00		Total Base Damages per Year
			$ 185,273.00	Total Base Damages plus 9% per Year
* Only January through September 2009 CPI are currently available. The inflation rate of 0.20% represents the average annual percent inflation through September 2009. This total would be adjusted for each successive month in 2009.				

EXHIBIT 3

UPDATED TABLE R372, R376 - COMPENSATION ADJUSTED FOR INFLATION

Year	Wright	Nunez	Nenno	Larabee
2000	$ 4,244.00	$ 4,244.00	$ 4,048.00	$ 4,619.00
2001	$ 7,801.00	$ 7,801.00	$ 7,441.00	$ 8,491.00
2002	$ 11,520.00	$ 11,520.00	$ 10,988.00	$ 12,538.00
2003	$ 16,076.00	$ 16,076.00	$ 15,334.00	$ 17,498.00
2004	$ 21,492.00	$ 21,492.00	$ 20,500.00	$ 23,391.00
2005	$ 27,605.00	$ 27,605.00	$ 26,331.00	$ 30,046.00
2006	$ 33,791.00	$ 33,791.00	$ 32,231.00	$ 36,778.00
2007	$ 38,622.00	$ 38,622.00	$ 36,839.00	$ 42,035.00
2008	$ 45,467.00	$ 45,467.00	$ 43,368.00	$ 49,485.00
2009	$ 45,835.00	$ 45,835.00	$ 43,718.00	$ 49,885.00
Total:	$ 252,453.00	$ 252,453.00	$ 240,798.00	$ 274,766.00

Combined Total: $ 1,020,470.00

Sheridan

FILE

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

Telephone (518) 486-5355

APPEALS AND OPINIONS BUREAU

October 30, 2009

Hand-delivered

Hon. Stuart M. Cohen
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Maron v. Silver
AD No. 504084
Albany Co. Index No. 4108-07
OAG No. 07-052129

Dear Mr. Cohen:

I represent respondents-respondents New York State Assembly, Speaker of the Assembly, New York State Senate, and President of the Senate in the above referenced matter. This is to advise you that I join in the arguments advanced in the brief filed by counsel for the Governor and the Comptroller of the State of New York, and will not be submitting a separate brief or requesting time for oral argument.

Respectfully yours,

Julie M. Sheridan

JULIE M. SHERIDAN
Asst. Solicitor General

cc: Steven Cohn, Esq.
Richard H. Dolan, Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF ALBANY SS:
CITY OF ALBANY

Alvin Kershaw being duly sworn, says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the Respondent herein.

On the 30th day of October, 2009, I served the annexed Letter upon the attorneys named below, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorneys at the addresses within the State respectively theretofore designated by them for that purpose as follows:

Richard H. Dolan, Esq.
Schlam Stone & Dolan LLP
26 Broadway, 19th Floor
New York, New York 10004

Steven Cohn, Esq.
Steven Cohn, P.C.
One Old Country Road
Suite 420
Carle Place, New York 11514

Sworn to before me this

30th day of October, 2009

Cynthia Bogardus

CYNTHIA BOGARDUS
Notary Public, State of New York
No.4826692
Qualified in Columbia County
Commission Expires March 20, 2011

Alvin Kershaw

ATTORNEY COPY

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

Telephone (518) 486-5355

APPEALS AND OPINIONS BUREAU

October 30, 2009

Hand-delivered

Hon. Stuart M. Cohen
Clerk of the Court
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20 Eagle Street
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I represent respondents-respondents New York State Assembly, Speaker of the Assembly, New York State Senate, and President of the Senate in the above referenced matter. This is to advise you that I join in the arguments advanced in the brief filed by counsel for the Governor and the Comptroller of the State of New York, and will not be submitting a separate brief or requesting time for oral argument.

Respectfully yours,

Julie M. Sheridan

JULIE M. SHERIDAN
Asst. Solicitor General

cc: Steven Cohn, Esq.
Richard H. Dolan, Esq.

Sheridan

FILE

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

Telephone (518) 486-5355

APPEALS AND OPINIONS BUREAU

October 30, 2009

Hand-delivered

Hon. Stuart M. Cohen
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Larabee v. Governor
AD Nos. 4761-4761A
NY Co. Index No. 112301/2007
OAG No. 07-065135

Dear Mr. Cohen:

I represent defendants-appellants New York State Senate and New York State Assembly in the above referenced matter. This is to advise you that I join in the arguments advanced in the brief filed by counsel for the Governor and the State of New York, and will not be submitting a separate brief or requesting time for oral argument.

Respectfully yours,

Julie M. Sheridan

JULIE M. SHERIDAN
Asst. Solicitor General

cc: Thomas E. Bezanson, Esq.
George Bundy Smith, Esq.
Richard H. Dolan, Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF ALBANY SS:
CITY OF ALBANY

Alvin Kershaw being duly sworn, says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the Respondent herein.

On the 30th day of October, 2009, I served the annexed Letter upon the attorneys named below, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorneys at the addresses within the State respectively theretofore designated by them for that purpose as follows:

Thomas E. Bezanson, Esq.
Cohen & Gresser, LLP
100 Park Avenue, 23rd Floor
New York, New York 10017

George Bundy Smith, Esq.
Chadbourne & Parke, LLP
30 Rockefeller Plaza
New York, New York 10112

Richard H. Dolan, Esq.
Schlam Stone & Dolan LLP
26 Broadway, 19th Floor
New York, New York 10004

Sworn to before me this
30th day of October, 2009

Cynthia Bogardus

CYNTHIA BOGARDUS
Notary Public, State of New York
No.4628692
Qualified in Columbia County
Commission Expires March 26, 20 11

Alvin Kershaw

ATTORNEY G

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

Telephone (518) 486-5355

APPEALS AND OPINIONS BUREAU

October 30, 2009

Hand-delivered

Hon. Stuart M. Cohen
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Larabee v. Governor
AD Nos. 4761-4761A
NY Co. Index No. 112301/2007
OAG No. 07-065135

Dear Mr. Cohen:

I represent defendants-appellants New York State Senate and New York State Assembly in the above referenced matter. This is to advise you that I join in the arguments advanced in the brief filed by counsel for the Governor and the State of New York, and will not be submitting a separate brief or requesting time for oral argument.

Respectfully yours,

JULIE M. SHERIDAN
Asst. Solicitor General

cc: Thomas E. Bezanson, Esq.
George Bundy Smith, Esq.
Richard H. Dolan, Esq.

Julie Sheridan

FILE

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

Telephone (518) 486-5355

APPEALS AND OPINIONS BUREAU

December 14, 2009

Hand-delivered

Hon. Stuart M. Cohen
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Larabee v. Governor
AD Nos. 4761-4761A
NY Co. Index No. 112301/2007
OAG No. 07-065135

Dear Mr. Cohen:

I represent defendants-appellants-cross-respondents New York State Senate and New York State Assembly in the above referenced matter. This is to advise you that I join in the arguments advanced in the reply brief filed by counsel for the State of New York, and the responding brief filed by counsel for the Governor and State in opposition to plaintiffs' cross-appeal. I will not be submitting a separate brief or requesting time for oral argument.

Respectfully yours,

JULIE M. SHERIDAN
Asst. Solicitor General

cc: Thomas E. Bezanson, Esq.
George Bundy Smith, Esq.
Richard H. Dolan, Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF ALBANY SS:
CITY OF ALBANY

_____ being duly sworn, says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the Defendants-Appellants-Cross-Respondents herein.

On the 14th day of December, 2009, I served the annexed Letter upon the attorneys named below, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorneys at the addresses within the State respectively theretofore designated by them for that purpose as follows:

Thomas E. Bezanson, Esq.
Cohen & Gresser, LLP
100 Park Avenue, 23rd Floor
New York, New York 10017-5541

George Bundy Smith, Esq.
Chadbourne & Parke, LLP
30 Rockefeller Plaza
New York, New York 10112

Richard H. Dolan, Esq.
Schlam Stone & Dolan, LLP
26 Broadway, 19th Floor
New York, New York 10004-1703

Sworn to before me this

14th day of December, 2009

William H. Collins

WILLIAM H. COLLINS
Notary Public, State of New York
Reg. No. 4694477
Qualified in Schenectady County
Commission Expires June 30, 20__

Alvin Kaufman

STEVEN COHN, P.C.

STATE OF NEW YORK: COURT OF CLAIMS

----------X

In the Matter of EDWARD A. MARON, ARTHUR SCHACK and JOSEPH A. DEMARO, Individually and on behalf of all Judges and Justices of the Unified Court System who served or are serving during the period of the statute of limitations period,

Claimants,

-against-

THE STATE OF NEW YORK,

Defendant.

----------X

CLAIM

1. The post office addresses of the Claimants are:

Edward A. Maron - c/o Supreme Court Nassau County, Matrimonial Part 400 County Seat Drive, Mineola, New York 11501;

Arthur Schack - c/o Supreme Court Kings County, 360 Adams Street, Brooklyn, New York 11201; and

Joseph A. DeMaro - 125 2nd Street, Apartment. C, Garden City, New York 11530.

2. This claim arises from the acts or omissions of the Defendant. Defendant has violated Claimants' constitutional rights under the Separation of Powers Doctrine of the New York State Constitution.

3. The place where the act took place is the New York State Capitol, and more specifically, the New York State Legislature- Senate and Assembly Chambers- and the Governor's Executive office.

4. This claim accrued on the 1st day of April, 2005 and on each subsequent passage of each annual budget for the State of New York.

5. Claimants claim damages for said breach of their constitutional rights as aforementioned.

6. By reason of the foregoing, Claimants were damaged in the amount of not less than Seven Hundred Eighty Million ($780,000,000.00) Dollars, plus appropriate interest together with amounts of not less than One Hundred Thirty Million ($130,000,000.00) Dollars per annum continuing to judgment, plus appropriate interest, and Claimants demand judgment against the Defendant for said amount.

Dated: Carle Place, New York
January 3, 2011

The Law Office of STEVEN COHN, P.C.

By: Steven Cohn
Attorneys for Claimants
One Old Country Road - Suite 420
Carle Place, New York 11514
(516) 294-6410

CLIENTS' VERIFICATION

State of New York)
) ss.:
County of Nassau)

EDWARD A. MARON, being duly sworn, deposes and says that deponent is the Claimant in the within action; that deponent has read the foregoing Claim and knows the contents thereof; that the same is true to deponent's own knowledge, excepts as to matters therein stated to be alleged upon information and belief, and that as to those matters, deponent believes it to be true.

EDWARD A. MARON

Sworn before me on this
6 day of JANUARY 20 11

Notary Public

GEORGIA GEHRLING
Notary Public, State of New York
No. 01GE4516544
Qualified in Nassau County
Commission Expires May 31, 2014

CLIENTS' VERIFICATION

State of New York)
KINGS)
County of ~~Nassau~~) ss.:

ARTHUR SCHACK, being duly sworn, deposes and says that deponent is the Claimant in the within action; that deponent has read the foregoing Claim and knows the contents thereof; that the same is true to deponent's own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters, deponent believes it to be true.

ARTHUR SCHACK

Sworn before me on this
7 day of January, 2011

Notary Public

DAWN SAJECKI
Notary Public, State of New York
No. 01SA5046982
Qualified in Kings County
Commission Expires July 24, 2013

CLIENTS' VERIFICATION

State of New York)
) ss.:
County of Nassau)

JOSEPH A. DEMARO, being duly sworn, deposes and says that deponent is the Claimant in the within action; that deponent has read the foregoing Claim and knows the contents thereof; that the same is true to deponent's own knowledge, excepts as to matters therein stated to be alleged upon information and belief, and that as to those matters, deponent believes it to be true.

Joseph A. DeMaro
JOSEPH A. DEMARO

Sworn before me on this
7th day of January, 2011

Notary Public

KATHLEEN M. WARD
Notary Public, State of New York
No. 01WA5011115
Qualified in Suffolk County
Commission Expires April 12, 2011

STATE OF NEW YORK: COURT OF CLAIMS

----------X

In the Matter of EDWARD A. MARON, ARTHUR SCHACK and JOSEPH A. DEMARO, Individually and on behalf of all Judges and Justices of the Unified Court System who served or are serving during the period of the statute of limitations period.

Claimants,

- against -

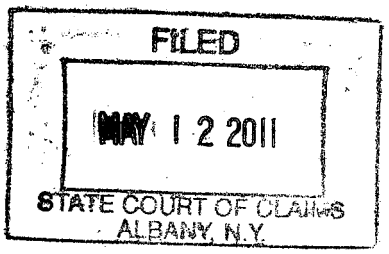
THE STATE OF NEW YORK,

Defendants.

----------X

Cla

STIPULATION OF DISCONTINUANCE
(Without Prejudice)



IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, attorneys of record for all the parties to the above entitled action, that whereas no party hereto is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action, the above entitled action be, and the same hereby is discontinued without prejudice, without costs to either party as against the other. This stipulation may be filed without further notice with the Clerk of the Court.

IT IS FURTHER STIPULATED AND AGREED, that this stipulation may be executed in counterparts and that facsimile signatures shall be accepted in lieu of an original signature.

The Law Office of STEVEN COHN, P.C.

Date: 5/6/11

By: Susan E. Dantzig
Attorneys for Claimants
One Old Country Road, Suite 420
Carle Place, New York 11572
Phone: (516) 294-6410
Fax: (516) 294-0094

ERIC T. SCHNEIDERMAN, Attorney General of the State of New York

Date: 5/9/11

By: Michael C. Rizzo
Attorneys for Defendant
The Capitol
Albany, New York 12224
Phone: (518) 402-2684
Fax: (518) 474-7172

STATE OF NEW YORK : COURT OF CLAIMS

In the Matter of EDWARD A. MARON, ARTHUR SCHACK and JOSEPH A. DEMARO, Individually and on behalf of all Judges and Justices of the Unified Court System who served or are serving during the period of the statute of limitations period,

Claimants,

- against -

THE STATE OF NEW YORK,

Defendant.

VERIFIED ANSWER

CLAIM NO.: 119352
OAG NO.: 11-123259-O

The defendant, The State of New York, by and through its attorney, Honorable Eric T. Schneiderman, Attorney General of the State of New York, as and for an answer to the claim herein, alleges, upon information and belief:

FIRST: Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "1" and "4" of the claim.

SECOND: Denies the allegations contained in paragraphs numbered "2", "3", "5" and "6" of the claim.

AS AND FOR A FIRST DEFENSE

THIRD: That the claim fails to state a cause of action against the defendant, The State of New York.

AS AND FOR A SECOND DEFENSE

FOURTH: That the actions of the defendant, The State of New York, are judicially or quasi-judicially privileged, or discretionary determinations, made by such agents or employees while acting within the scope of their duties and are, therefore, immune from liability.

AS AND FOR A THIRD DEFENSE

FIFTH: That this Court lacks subject matter jurisdiction over the claim and personal jurisdiction over the defendant, The State of New York, as the claim is untimely in that neither the claim nor a notice of intention was served within ninety (90) days of the accrual of the claim as required by Court of Claims Act Sections 10(3) and 11.

AS AND FOR A FOURTH DEFENSE

SIXTH: That the named claimant lacks the capacity to sue on behalf of all the Judges and Justices of the Unified Court System.

AS AND FOR A FIFTH DEFENSE

SEVENTH: That this claim is barred by the statute of limitations.

AS AND FOR A SIXTH DEFENSE

EIGHTH: The acts that are complained of are within the prerogative of the sovereign for which liability was not waived by Section 8 of the Court of Claims Act and for which the doctrine of sovereign immunity is invoked.

AS AND FOR A SEVENTH DEFENSE

NINTH: The claim fails to comply with the Court of Claims Act § 11 by failing to include any particularization of the State's culpable conduct and therefore there is no proper claim over which the Court has jurisdiction.

AS AND FOR AN EIGHTH DEFENSE

TENTH: The Court lacks jurisdiction over this claim as the cause of action alleged shall be brought in the nature of an Article 78 and not a claim in the Court of Claims.

AS AND FOR A NINTH DEFENSE

ELEVENTH: That this Court lacks subject matter jurisdiction over the claim and personal jurisdiction over the defendant. The State of New York, as the claim herein was not served on the Office of the Attorney General as required by Section 11(a) of the Court of Claims Act.

WHEREFORE, the defendant, The State of New York, respectfully requests that the claim be dismissed in all respects.

AND, in the event an award is made to the claimant, damages should be reduced in the proportion which the culpable conduct of the claimant bears to the culpable conduct which caused said damages.

DATED: Albany, New York
February 23, 2011

Eric T. Schneiderman
Attorney General of the
State of New York
(Michael C. Rizzo,
Assistant Attorney General)
Attorney for Defendant
New York State Office of
the Attorney General
The Capitol
Albany, New York 12224
Telephone: (518) 402-2684

TO: The Law Officers of Steven Cohn, P.C.
ATTN: Steven Cohn, Esq.
One Old Country Road, Suite 420
Carle Place, New York 11514
Telephone No.: (516) 294-6410

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

MICHAEL C. RIZZO, being duly sworn, deposes and says that he is an Assistant Attorney General in the Office of Eric T. Schneiderman, Attorney General of the State of New York. This verification is made pursuant to CPLR 3020(d)(2).

Deponent further says that he caused to have drawn the foregoing answer and knows the contents thereof and that the same is true to his own knowledge, except as to those matters stated to be alleged on information and belief, and that as to those matters he believes them to be true.

MICHAEL C. RIZZO

Sworn to before me this

23rd day of February, 2011.

Notary Public

GEORGINA MARIE MADORE VISCOSI
Notary Public, State of New York
No. 01V14675018
Qualified in Fulton County
Commission Expires May 31, 20 14