In the Matter of Edward A. Maron et al., Appellants, v Sheldon Silver, as Speaker of the State Assembly, et al., Respondents, et al., Respondent. Hon. Susan Larabee, et al., Respondents-Appellants, v Governor of the State of New York, Respondent, New York State Senate, et al., Appellants-Respondents. The Chief Judge of the State of New York et al., Appellants-Respondents, v The Governor of the State of New York, et al., Respondents-Appellants.

No. 16, No. 17, No. 18

COURT OF APPEALS OF NEW YORK

14 N.Y.3d 230*; *925 N.E.2d 899*; *899 N.Y.S.2d 97*; *2010 N.Y. LEXIS 39*; *2010 NY Slip Op 1528

January 12, 2010, Argued
February 23, 2010, Decided

SUBSEQUENT HISTORY: Reargument dismissed by *Larabee v. Governor of N.Y., 16 N.Y.3d 736, 942 N.E.2d 311, 2011 N.Y. LEXIS 71, 917 N.Y.S.2d 101 (2011)*
Motion denied by *Larabee v. Governor of the State of N.Y., 37 Misc. 3d 748, 950 N.Y.S.2d 892, 2012 N.Y. Misc. LEXIS 4406 (2012)*
Subsequent appeal at, Decision reached on appeal by *Larabee v. Governor of the State of N.Y., 2014 N.Y. App. Div. LEXIS 5169 (N.Y. App. Div. 1st Dep't, July 10, 2014)*

PRIOR HISTORY: Appeal, in the first above-entitled proceeding and action, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 13, 2008. The Appellate Division modified, on the law, a judgment of the Supreme Court, Albany County (Thomas J. McNamara, J.), entered in a hybrid *CPLR article 78* proceeding and declaratory judgment action, which had (1) ruled that the allegations of the amended petition, insofar as they alleged a constitutional violation against the Assembly and Senate, would be read as alleging a claim against the State of New York; (2) granted respondents' motion to dismiss the first and second causes of action for failure to state a cause of action; (3) vacated so much of an order of the Supreme Court, Nassau County (Thomas Feinman, J.), as had restrained respondents from returning the $69,500,000 designated for judicial pay raises in the New York State budget for the 2006-2007 fiscal year to the general fund and had directed that the funds remain segregated and designated for judicial pay raises; (4) granted respondents' motion to dismiss the proceeding as against respondents Sheldon Silver, Joseph Bruno and Eliot Spitzer; (5) declared that judicial salaries as set forth in *Judiciary Law §§ 221 through 221-i* are not unconstitutional as a direct or discriminatory attack on judicial independence; (6) ruled that a determination could not be made, based on the submissions of the parties, regarding whether the failure to amend *Judiciary Law §§ 221 through 221-i* so as to increase judicial compensation is unconstitutional as having impinged on the independence of the judicial branch; and (7) declared that judicial salaries as set forth in *Judiciary Law §§ 221 to 221-i*, and the failure to amend *Judiciary Law §§ 221 through 221-i* so as to increase judicial compensation, do not violate the Equal Protection Clause of the State Constitution. The modification consisted of reversing so much of the judgment as had partially denied respondents' motion to dismiss the petition, granting respondents' motion to

dismiss in its entirety, and dismissing the petition. The Appellate Division affirmed the judgment as modified.

Cross appeals, in the second above-entitled action, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 2, 2009. The Appellate Division affirmed (1) an order of the Supreme Court, New York County (Edward H. Lehner, J.; op *19 Misc 3d 226, 850 NYS2d 885*), which had granted the motion of defendant Eliot Spitzer to dismiss the action as against him, granted the motion of the remaining defendants to dismiss the action to the extent of dismissing the first cause of action, and denied defendants' motion to dismiss as to the second cause of action, and (2) an order of that court (op *20 Misc 3d 866, 860 NYS2d 886*), which had granted plaintiffs' motion for summary judgment on the second cause of action to the extent of declaring that defendants, through the practice of linkage, have unconstitutionally abused their power by depriving the Judiciary of any increase in compensation for almost a decade, and directing that defendants, within 90 days, 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.

Appeals, in the third above-entitled action, on constitutional grounds, from a judgment (denominated decision and order) of the Supreme Court, New York County (Edward H. Lehner, J.), entered June 16, 2009, and from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered September 15, 2009. The Supreme Court judgment granted defendants' motion to dismiss the first and second causes of action and, upon searching the record at plaintiffs' request, granted plaintiffs summary judgment on their third cause of action, declaring that through the practice of linkage defendants have unconstitutionally abused their power by depriving the Judiciary of any increase in compensation since 1998, and directing that defendants, within 56 days, remedy such abuse by proceeding in good faith to adjust such compensation to reflect the increase in the cost of living since 1998, with an appropriate provision for retroactivity. The Appellate Division order affirmed so much of the judgment of the Supreme Court as had granted plaintiffs summary judgment on their third cause of action.

Chief Judge of the State of New York v. Governor of the State of New York, 65 A.D.3d 898, 884 N.Y.S.2d 862, 2009 N.Y. App. Div. LEXIS 6307 (N.Y. App. Div. 1st Dep't, 2009)

Chief Judge of State of N.Y. v. Governor of State of N.Y., 25 Misc. 3d 268, 887 N.Y.S.2d 772, 2009 N.Y. Misc. LEXIS 1468 (2009)

Maron v. Silver, 58 A.D.3d 102, 871 N.Y.S.2d 404, 2008 N.Y. App. Div. LEXIS 9745 (N.Y. App. Div. 3d Dep't, 2008)

Larabee v. Governor of the State of New York, 65 A.D.3d 74, 880 N.Y.S.2d 256, 2009 N.Y. App. Div. LEXIS 4126 (N.Y. App. Div. 1st Dep't, 2009)

DISPOSITION: Case No. 16: Order modified, without costs, by remitting to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein. Case No. 17: Order modified, without costs, by granting judgment declaring that, under the circumstances of this case, as a matter of law, the State defendants' failure to consider judicial compensation on the merits violates the separation of powers doctrine, and by allowing for the remedy discussed in the opinion herein, and, as so modified, affirmed. Case No. 18: On plaintiffs' appeal and defendants' cross appeal, judgment of Supreme Court and order of the Appellate Division modified, without costs, by granting judgment declaring that, under the circumstances of this case, as a matter of law, the State defendants' failure to consider judicial compensation on the merits violates the separation of powers doctrine, and by allowing for the remedy discussed in the opinion herein, and, as so modified, affirmed.

HEADNOTES

Judges -- Disqualification -- Rule of Necessity

1. The Court of Appeals was required, pursuant to the Rule of Necessity, to hear and dispose of the constitutional issues raised in a hybrid *CPLR article 78* proceeding/declaratory judgment action and two related declaratory judgment actions challenging the failure to adjust judicial compensation since 1998. Although members of the Court of Appeals are paid via the salary schedule delineated in *Judiciary Law § 221* and therefore will be affected by the outcome of the appeals, no other judicial body with jurisdiction exists to hear the constitutional issues raised therein.

Proceeding against Body or Officer -- Mandamus

-- Disbursement of State Funds Appropriated for Judicial Pay Raises

2. In a hybrid *CPLR article 78* proceeding/declaratory judgment action challenging the failure to adjust judicial compensation since 1998, mandamus did not lie to compel respondent State Comptroller to disburse all retroactive sums and pay the budgeted raises allocated in the 2006-2007 state budget for judicial salary reform. Chapter 51 of the Laws of 2006, addressing "JUDICIAL COMPENSATION REFORM," contained a $ 69.5 million budget item to adjust judicial compensation "pursuant to a chapter of the laws of 2006." No subsequent chapter law, however, was enacted either amending the Judiciary Law salary schedules or directing the disbursement of the funds. Because judicial compensation was constitutionally required to be "established by law" (NY Const, art VI, § 25 [a]) and no subsequent chapter law was ever enacted, mandamus did not lie.

Judges -- Judicial Salaries - Legislature's Failure to Increase Judicial Compensation -- Equal Protection

3. In a hybrid *CPLR article 78* proceeding/declaratory judgment action challenging the failure to adjust judicial compensation since 1998, Supreme Court properly dismissed petitioners' cause of action alleging that the Judiciary constituted a "suspect class" that had been denied equal protection under the law because judicial pay raises have been historically contingent on or "tied to" salary increases for legislators.

Judges -- Judicial Salaries -- Legislature's Failure to Increase Judicial Compensation -- Compensation Clause -- Failure to Address Effects of Inflation Not Per Se Violation

4. In a hybrid *CPLR article 78* proceeding/declaratory judgment action and related declaratory judgment action challenging the failure to adjust judicial compensation since 1998, the failure to address the effects of inflation did not equate to a per se violation of the Compensation Clause (NY Const, art VI, § 25 [a]). Although the Compensation Clause plainly prohibits the diminution of judicial compensation by legislative act during a judge's term of office, there was no evidence in the history of the Clause's enactment or subsequent amendments that supported a broad interpretation embracing indirect diminishment by neglect, and therefore no evidence that the "no diminishment" rule was intended to affirmatively require that judicial salaries be adjusted to keep pace with the cost of living. The diminution in value of judicial compensation by inflation was a concern when the clause was enacted and amended, but the drafters decided that the best way to combat the effects of inflation was to count on the Legislature to assure the fair and appropriate compensation of the Judiciary.

Judges -- Judicial Salaries -- Legislature's Failure to Increase Judicial Compensation -- Compensation Clause -- No Discrimination against Judiciary in Violation of Compensation Clause

5. In a declaratory judgment action challenging the failure to adjust judicial compensation since 1998, Supreme Court properly dismissed plaintiffs' cause of action alleging that defendants discriminated against the Judiciary in violation of the Compensation Clause (NY Const, art VI, § 25 [a]) by freezing judicial salaries while repeatedly increasing the salaries of almost all of the remaining state employees to keep pace with the cost of living. Relief was not warranted under *United States v Hatter (532 US 557, 121 S Ct 1782, 149 L Ed 2d 820 [2001])*, which involved a Social Security tax law that discriminated against federal judges by reducing the compensation of judges only. The situation here did not involve any legislative enactment that directly or indirectly diminished judicial compensation. Moreover, although other state employees had received adjustments to account for inflation, judges were not the only state employees whose salaries have not been adjusted since judicial salaries were last increased.

Legislature -- Immunity from Prosecution -- Immunity under Speech or Debate Clause Not Available in Action Challenging Legislature's Failure to Increase Judicial Compensation

6. In a hybrid *CPLR article 78* proceeding/declaratory judgment action and two related declaratory judgment actions challenging the failure to adjust judicial compensation since 1998, the Assembly, Senate and the State were not immune under the Speech or Debate Clause from plaintiffs' violation of separation of powers claims. The Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts, and applies to only "members" and to "any speech or debate in either house" (NY Const, art III, § 11). Such immunity does not apply to either house of the

Legislature as a whole. Moreover, no inquiry into acts that occurred in the regular course of the legislative process or the Legislature's motives for such acts was necessary here, as all of the parties acknowledged that the Judiciary was entitled to an increase in compensation, and the State defendants had made proclamations outside of the legislative and executive chambers as to why such an increase had not occurred.

Judges -- Judicial Salaries -- Legislature's Failure to Increase Judicial Compensation -- Separation of Powers Doctrine

7. In a hybrid *CPLR article 78* proceeding/declaratory judgment action challenging the failure to adjust judicial compensation since 1998, petitioners sufficiently stated a cause of action for violation of the Separation of Powers Doctrine. Petitioners alleged that by tying judicial compensation to unrelated legislative objectives and policy initiatives, as opposed to conducting an independent assessment of judicial compensation, the Legislature had disregarded the separation of powers doctrine and threatened the independence of the Judiciary. The compensation provisions in the State Constitution for each branch of government are separately addressed in the article for each respective branch, and not in the article where the powers of the legislative branch are articulated. Although a function of the Legislature is to approve the compensation of each of the three branches, the compensation to be paid to members of each particular branch must be determined separately and distinctly from the others. Whether the Judiciary is entitled to a compensation increase must be based upon an objective assessment of the Judiciary's needs if it is to retain its functional and structural independence. By failing to consider judicial compensation increases on the merits, and instead holding them hostage to other legislative objectives, the Legislature weakens the Judiciary by making it unduly dependent on the Legislature.

Judges -- Judicial Salaries -- Legislature's Failure to Increase Judicial Compensation -- Separation of Powers Doctrine

8. In two related declaratory judgment actions challenging the failure to adjust judicial compensation since 1998, plaintiffs were entitled to a declaration that, as a matter of law, the State defendants' failure to consider judicial compensation on the merits violated the Separation of Powers Doctrine. The compensation provisions in the State Constitution for each branch of government are separately addressed in the article for each respective branch, and not in the article where the powers of the legislative branch are articulated. Although a function of the Legislature is to approve the compensation of each of the three branches, the compensation to be paid to members of each particular branch must be determined separately and distinctly from the others. Whether the Judiciary is entitled to a compensation increase must be based upon an objective assessment of the Judiciary's needs if it is to retain its functional and structural independence. By failing to consider judicial compensation increases on the merits, and instead holding them hostage to other legislative objectives, the Legislature weakened the Judiciary by making it unduly dependent on the Legislature.

Judges -- Judicial Salaries -- Legislature's Failure to Increase Judicial Compensation -- Separation of Powers Doctrine - Remedy for Violation of Separation of Powers Doctrine

9. In two related declaratory judgment actions challenging the failure to adjust judicial compensation since 1998 resulting in a declaration that, as a matter of law, the State defendants' failure to consider judicial compensation on the merits violated the Separation of Powers Doctrine, it was not necessary to order specific injunctive relief. Deference to the Legislature regarding whether judicial compensation should be adjusted, and by how much, was necessary because it is in a far better position than the Judiciary to determine funding needs throughout the State and priorities for the allocation of the State's resources. Appropriate and expeditious legislative consideration of judicial compensation is, however, expected, and when addressed in present and future budget deliberations it cannot depend on unrelated policy initiatives or legislative compensation adjustments.

Judges -- Judicial Salaries -- Legislature's Failure to Increase Judicial Compensation -- Separation of Powers Doctrine -- Constitutional Inadequacy of Compensation

10. The Legislature has a constitutional duty and obligation to provide the Judiciary with compensation adequate in amount and commensurate with the duties and responsibilities of the judges involved. Moreover, adequate judicial compensation is necessary to ensure that the public will have its matters heard by competent

judges and that judges will be free to issue decisions in accordance with the law without fear of retribution by the other two branches of government. The Compensation Clause's language that compensation "shall not be diminished" (NY Const, art VI, § 25 [a]) is not the opposite of an "adequate compensation" guarantee. The argument that the current salaries are inadequate when compared to other legal positions in the public and private sectors, as raised by plaintiffs in a declaratory judgment action challenging the Legislature's failure to adjust judicial compensation since 1998, is, however, one that is best addressed in the first instance by the Legislature.

COUNSEL: *Steven Cohn, P.C.,* Carle Place (*Steven Cohn, Richard Lieb* and *Paula Schwartz Frome* of counsel), for appellants in the first above-entitled proceeding and action. I. New York's judges have a right under the Constitution to a salary adjustment under the circumstances of this case. (*People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *United States v Brewster, 408 US 501, 92 S Ct 2531, 33 L Ed 2d 507*; *Hutchinson v Proxmire, 443 US 111, 99 S Ct 2675, 61 L Ed 2d 411*; *United States v Johnson, 383 US 169, 86 S Ct 749, 15 L Ed 2d 681*; *Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 482 NE2d 1, 492 NYS2d 522*; *Subcontractors Trade Assn. v Koch, 62 N.Y.2d 422, 465 NE2d 840, 477 NYS2d 120*; *Matter of County of Oneida v Berle, 49 NY2d 515, 404 NE2d 133, 427 NYS2d 407*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*; *Golden v Clark, 76 NY2d 618, 564 NE2d 611, 563 NYS2d 1*.) II. Appellants are entitled to mandamus because they have a clear legal right to the increased compensation granted by chapter 51 of the Laws of 2006 (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 declaratory relief declaring their right to increased compensation under the 2006 Act. (*Ortiz v Fibreboard Corp., 527 US 815, 119 S Ct 2295, 144 L Ed 2d 715*; *Klostermann v Cuomo, 61 NY2d 525, 463 NE2d 588, 475 NYS2d 247*; *Matter of County of Oneida v Berle, 49 NY2d 515, 404 NE2d 133, 427 NYS2d 407*; *People v Tremaine, 252 NY 27, 168 NE 817*; *Pataki v New York State Assembly, 4 NY3d 75, 824 NE2d 898, 791 NYS2d 458*; *People ex rel. Westchester Fire Ins. Co. v Davenport Trustees, 91 NY 574*; *Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *Public Serv. Commn., Second Dist. v New York Cent. R.R. Co., 193 App Div 615, 185 NYS 267, 230 NY 149, 129 NE 455*; *Woollcott v Shubert, 217 NY 212, 111 NE 829*; *United States v Trans-Missouri Freight Assn., 166 US 290, 17 S Ct 540, 41 L Ed 1007*.)

Schlam Stone & Dolan LLP, New York City (*Richard H. Dolan, David J. Katz* and *Erik S. Groothuis* of counsel), for respondents in the first above-entitled proceeding and action. I. The statutes setting judicial salaries are entitled to a presumption of constitutionality. (*Elmwood-Utica Houses v Buffalo Sewer Auth., 65 NY2d 489, 482 NE2d 549, 492 NYS2d 931*; *INS v Chadha, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317*; *McGowan v Burstein, 71 NY2d 729, 525 NE2d 710, 530 NYS2d 64*; *Matter of Wolpoff v Cuomo, 80 NY2d 70, 600 NE2d 191, 587 NYS2d 560*; *Cohen v State of New York, 94 NY2d 1, 720 NE2d 850, 698 NYS2d 574*.) II. "Linkage" is a core legislative function protected by the Speech or Debate Clause. (*Matter of Rivera v Espada, 98 NY2d 422, 777 NE2d 235, 748 NYS2d 343*; *People v Ohrenstein, 77 NY2d 38, 565 NE2d 493, 563 NYS2d 744*; *Matter of Straniere v Silver, 218 AD2d 80, 637 NYS2d 98289 NY2d 825, 675 NE2d 1222, 653 NYS2d 270*; *Gravel v United States, 408 US 606, 92 S Ct 2614, 33 L Ed 2d 583*; *Matter of Urbach v Farrell, 229 AD2d 275, 656 NYS2d 448*; *Campaign for Fiscal Equity v State of New York, 179 Misc 2d 907, 687 NYS2d 227, 265 AD2d 277, 697 NYS2d 40*; *Bogan v Scott-Harris, 523 US 44, 118 S Ct 966, 140 L Ed 2d 79*; *State Empls. Bargaining Agent Coalition v Rowland, 494 F3d 71*; *Campaign for Fiscal Equity v State of New York, 271 AD2d 379, 707 NYS2d 94*; *Urban Justice Ctr. v Pataki, 10 Misc 3d 939, 810 NYS2d 826, 38 AD3d 20, 828 NYS2d 12, appeal dismissed sub nom. Urban Justice Ctr. v Spitzer, 8 NY3d 958, 868 NE2d 218, 836 NYS2d 537*.) III. New York's Constitution does not prohibit "linkage," and the practice does not violate the Separation of Powers Doctrine. (*Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *Urban Justice Ctr. v Pataki, 38 AD3d 20, 828 NYS2d 12, appeal dismissed sub nom. Urban Justice Ctr. v Spitzer, 8 NY3d 958, 868 NE2d 218, 836 NYS2d 537*; *Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 861 NE2d 50, 828 NYS2d 235*; *Matter of New York State Inspection, Sec. &Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo, 64 NY2d 233, 475 NE2d 90, 485 NYS2d 719*; *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *Cohen v State of New York, 94 NY2d 1, 720 NE2d 850, 698 NYS2d 574*; *INS v Chadha, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317*; *Matter of Prospect v Cohalan, 65 NY2d 867, 482 NE2d 1209, 493*

NYS2d 293; *Pataki v New York State Assembly, 4 NY3d 75, 824 NE2d 898, 791 NYS2d 458*; *Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 482 NE2d 1, 492 NYS2d 522*.) IV. Appellants' equal protection claim was properly dismissed. (*Bower Assoc. v Town of Pleasant Val., 2 NY3d 617, 814 NE2d 410, 781 NYS2d 240*; *San Antonio Independent School Dist. v Rodriguez, 411 US 1, 93 S Ct 1278, 36 L Ed 2d 16*; *Affronti v Crosson, 95 NY2d 713, 746 NE2d 1049, 723 NYS2d 757*; *Washington v Glucksberg, 521 US 702, 117 S Ct 2258, 117 S Ct 2302, 138 L Ed 2d 772*; *People v Isaacson, 44 NY2d 511, 378 NE2d 78, 406 NYS2d 714*; *Kimel v Florida Bd. of Regents, 528 US 62, 120 S Ct 631, 145 L Ed 2d 522*; *Heller v Doe, 509 US 312, 113 S Ct 2637, 125 L Ed 2d 257*; *Minnesota v Clover Leaf Creamery Co., 449 US 456, 101 S Ct 715, 66 L Ed 2d 659*; *Dalton v Pataki, 5 NY3d 243, 835 NE2d 1180, 802 NYS2d 72*; *Port Jefferson Health Care Facility v Wing, 94 NY2d 284, 726 NE2d 449, 704 NYS2d 897*.) V. Respondents have not violated the Compensation Clause of the State Constitution. (*Clark v State of New York, 142 NY 101, 36 NE 817*; *People v Tremaine, 252 NY 27, 168 NE 817*; *People v Ohrenstein, 77 NY2d 38, 565 NE2d 493, 563 NYS2d 744*; *Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 861 NE2d 50, 828 NYS2d 235*; *United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *Williams v United States, 240 F3d 1019*; *Atkins v United States, 556 F2d 1028, 214 Ct Cl 186*; *Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *Matter of Catanise v Town of Fayette, 148 AD2d 210, 543 NYS2d 825*; *Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 829 NYS2d 250*.) VI. Mandamus does not lie to compel the Comptroller to disburse the funds appropriated in chapter 51 of the Laws of 2006. (*Klostermann v Cuomo, 61 NY2d 525, 463 NE2d 588, 475 NYS2d 247*; *Matter of Kupersmith v Public Health Council of State of N.Y., 101 AD2d 918, 475 NYS2d 619, 63 NY2d 904, 472 NE2d 1039, 483 NYS2d 211*; *Matter of United Methodist Retirement Community Dev. Corp. v Axelrod, 110 AD2d 292, 494 NYS2d 495*; *Matter of Rodriguez v Goord, 260 AD2d 736, 688 NYS2d 722, 93 NY2d 818, 719 NE2d 926, 697 NYS2d 565*; *Matter of Malik v Berlinland, 158 AD2d 836, 551 NYS2d 421, 76 NY2d 704, 559 NE2d 677, 559 NYS2d 983*; *People v Tremaine, 252 NY 27, 168 NE 817*; *Matter of Blyn v Bartlett, 39 NY2d 349, 348 NE2d 555, 384 NYS2d 99*; *Cohen v State of New York, 94 NY2d 1, 720 NE2d 850, 698 NYS2d 574*.)

Schlam Stone & Dolan LLP, New York City (*Richard H. Dolan, David J. Katz* and *Erik S. Groothuis* of counsel), for respondent and appellants-respondents in the second above-entitled action. I. The statutory provisions establishing the levels of judicial compensation are entitled to a presumption of constitutionality. (*Elmwood-Utica Houses v Buffalo Sewer Auth., 65 NY2d 489, 482 NE2d 549, 492 NYS2d 931*; *INS v Chadha, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317*; *McGowan v Burstein, 71 NY2d 729, 525 NE2d 710, 530 NYS2d 64*; *Matter of Wolpoff v Cuomo, 80 NY2d 70, 600 NE2d 191, 587 NYS2d 560*; *Cohen v State of New York, 94 NY2d 1, 720 NE2d 850, 698 NYS2d 574*.) II. "Linkage" is a core legislative function protected by the Speech or Debate Clause. (*Matter of Rivera v Espada, 98 NY2d 422, 777 NE2d 235, 748 NYS2d 343*; *People v Ohrenstein, 77 NY2d 38, 565 NE2d 493, 563 NYS2d 744*; *Matter of Straniere v Silver, 218 AD2d 80, 637 NYS2d 982, 89 NY2d 825, 675 NE2d 1222, 653 NYS2d 270*; *Gravel v United States, 408 US 606, 92 S Ct 2614, 33 L Ed 2d 583*; *Matter of Urbach v Farrell, 229 AD2d 275, 656 NYS2d 448*; *Campaign for Fiscal Equity v State of New York, 179 Misc 2d 907, 687 NYS2d 227, 265 AD2d 277, 697 NYS2d 40*; *Bogan v Scott-Harris, 523 US 44, 118 S Ct 966, 140 L Ed 2d 79*; *State Empls. Bargaining Agent Coalition v Rowland, 494 F3d 71*; *Campaign for Fiscal Equity v State of New York, 271 AD2d 379, 707 NYS2d 94*; *Urban Justice Ctr. v Pataki, 10 Misc 3d 939, 810 NYS2d 826, 38 AD3d 20, 828 NYS2d 12, appeal dismissed sub nom. Urban Justice Ctr. v Spitzer, 8 NY3d 958, 868 NE2d 218, 836 NYS2d 537*.) III. New York's Constitution does not prohibit "linkage," and the practice does not violate the Separation of Powers Doctrine. (*Matter of Maron v Silver, 58 AD3d 102, 871 NYS2d 404*; *Urban Justice Ctr. v Silver, 66 AD3d 567, 887 NYS2d 571*; *Pataki v New York State Assembly, 4 NY3d 75, 824 NE2d 898, 791 NYS2d 458*; *Urban Justice Ctr. v Pataki, 38 AD3d 20, 828 NYS2d 12, appeal dismissed sub nom. Urban Justice Ctr. v Spitzer, 8 NY3d 958, 868 NE2d 218, 836 NYS2d 537*; *Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 482 NE2d 1, 492 NYS2d 522*; *INS v Chadha, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317*; *Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 861 NE2d 50, 828 NYS2d 235*; *Matter of New York State Inspection, Sec. &Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo, 64 NY2d 233, 475 NE2d 90, 485 NYS2d 719*; *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *Cohen v State of New York, 94 NY2d 1, 720 NE2d 850, 698 NYS2d 574*.) IV.

The Senate should have been dismissed because it did not engage in "linkage." V. The lower court erred in affirming summary judgment on this record. (*Alvarez v Prospect Hosp., 68 NY2d 320, 501 NE2d 572, 508 NYS2d 923*; *Smalls v AJI Indus., Inc., 10 NY3d 733, 883 NE2d 350, 853 NYS2d 526*.) VI. The relief granted does not conform to the constitutional infirmity found. (*Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 861 NE2d 50, 828 NYS2d 235*.)

Cohen & Gressler LLP, New York City (*Thomas E. Bezanson, Alexandra Wald* and *Matthew V. Povolny* of counsel), and *Chadbourne & Parke LLP* (*George Bundy Smith* and *J. Carson Pulley* of counsel), for respondents-appellants in the second above-entitled action. I. Defendants' appeal should be dismissed. II. Defendants' Speech or Debate Clause argument would eviscerate the Separation of Powers Doctrine. (*Blue Grass Partners v Bruns, Nordeman, Rea & Co., 75 AD2d 791, 428 NYS2d 254*; *People v Padua, 297 AD2d 536, 747 NYS2d 205*; *Campaign for Fiscal Equity v State of New York, 179 Misc 2d 907, 687 NYS2d 227, 265 AD2d 277, 697 NYS2d 40*; *Matter of Straniere v Silver, 218 AD2d 80, 637 NYS2d 982*; *Bogan v Scott-Harris, 523 US 44, 118 S Ct 966, 140 L Ed 2d 79*; *Urban Justice Ctr. v Silver, 66 AD3d 567, 887 NYS2d 571*; *Samuels v New York State Dept. of Health, 29 AD3d 9, 811 NYS2d 136*; *Pataki v New York State Assembly, 4 NY3d 75, 824 NE2d 898, 791 NYS2d 458*; *Pollicina v Misericordia Hosp. Med. Ctr., 82 NY2d 332, 624 NE2d 974, 604 NYS2d 879*; *Matter of Malloy, 278 NY 429, 17 NE2d 108*.) III. Linkage violates the separation of powers. (*Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 482 NE2d 1, 492 NYS2d 522*; *Urban Justice Ctr. v Pataki, 38 AD3d 20, 828 NYS2d 12, appeal dismissed sub nom. Urban Justice Ctr. v Spitzer, 8 NY3d 958, 868 NE2d 218, 836 NYS2d 537*; *People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Duplantier v United States, 606 F2d 654*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*; *Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 861 NE2d 50, 828 NYS2d 235*; *Klostermann v Cuomo, 61 NY2d 525, 463 NE2d 588, 475 NYS2d 247*; *Dickinson v Crosson, 219 AD2d 50, 640 NYS2d 339*; *Nicolai v Crosson, 214 AD2d 714, 626 NYS2d 210*.) IV. The Senate engaged in linkage and should be held accountable. 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. (*Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 829 NYS2d 250*; *Matter of Catanise v Town of Fayette, 148 AD2d 210, 543 NYS2d 825*; *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*; *Briggs v 2244 Morris L.P., 30 AD3d 216, 817 NYS2d 239*; *Russell v Town of Pittsford, 94 AD2d 410, 464 NYS2d 906*; *Rotuba Extruders v Ceppos, 46 NY2d 223, 385 NE2d 1068, 413 NYS2d 141*; *Johnson v Danna Oil Co., 28 Misc 2d 651, 216 NYS2d 314*; *Yesuvida v Pennsylvania R.R. Co., 200 Misc 815, 111 NYS2d 417*; *Evans v Gore, 253 US 245, 40 S Ct 550, 64 L Ed 887*.) VI. The relief granted was proper. VII. The Appellate Division erred by affirming the order of the IAS court, dismissing plaintiffs' first cause of action for unconstitutional diminishment of judicial compensation. (*Evans v Gore, 253 US 245, 40 S Ct 550, 64 L Ed 887*; *Miles v Graham, 268 US 501, 45 S Ct 601, 69 L Ed 1067, 1925-2 CB 133, TD 3725*; *O'Malley v Woodrough, 307 US 277, 59 S Ct 838, 83 L Ed 1289, 1939-1 CB 160*; *Atkins v United States, 556 F2d 1028, 214 Ct Cl 186*; *United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *Matter of Carey v Morton, 297 NY 361, 79 NE2d 442*; *Black v Graves, 257 App Div 176, 12 NYS2d 785, 281 NY 792, 24 NE2d 478*; *Matter of Legum v Goldin, 55 NY2d 104, 432 NE2d 772, 447 NYS2d 900*.) VIII. The Appellate Division erred in declining to grant the reasonable and appropriate monetary relief that plaintiffs seek. (*United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *Atkins v United States, 556 F2d 1028, 214 Ct Cl 186*; *Matter of Gresser v O'Brien, 146 Misc 909, 263 NYS 68, 263 NY 622, 189 NE 727*; *Williams v United States, 240 F3d 1019, 535 US 911, 122 S Ct 1221, 152 L Ed 2d 15*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*; *People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Boehner v Anderson, 809 F Supp 138, 30 F3d 156, 308 US App DC 94*; *Schultz v Harrison Radiator Div. Gen. Motors Corp., 90 NY2d 311, 683 NE2d 307, 660 NYS2d 685*; *Nicolai v Crosson, 214 AD2d 714, 626 NYS2d 210*; *Deutsch v Crosson, 171 AD2d 837, 567 NYS2d 773*.)

Suhana S. Han, New York City, *Adam R. Brebner* and *Matthew A. Parham* for New York County Lawyers' Association, amicus curiae in the second above-entitled action. I. The 30% decrease in judicial salaries since 1999 is an unconstitutional diminution of judicial compensation. (*United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *People ex rel. Burby v Howland,*

155 NY 270, 49 NE 775; *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *Evans v Gore, 253 US 245, 40 S Ct 550, 64 L Ed 887*; *Miles v Graham, 268 US 501, 45 S Ct 601, 69 L Ed 1067, 1925-2 CB 133, TD 3725*; *O'Malley v Woodrough, 307 US 277, 59 S Ct 838, 83 L Ed 1289, 1939-1 CB 160*; *Matter of Carey v Morton, 297 NY 361, 79 NE2d 442*; *Randall v Sorrell, 548 US 230, 126 S Ct 2479, 165 L Ed 2d 482*; *Marbury v Madison, 1 Cranch [5 US] 137, 2 L Ed 60*; *Black v Graves, 257 App Div 176, 12 NYS2d 785*.) II. Defendants have violated the Separation of Powers Doctrine. (*People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 829 NYS2d 250*; *O'Malley v Woodrough, 307 US 277, 59 S Ct 838, 83 L Ed 1289, 1939-1 CB 160*; *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *Tenney v Brandhove, 341 US 367, 71 S Ct 783, 95 L Ed 1019*; *Powell v McCormack, 395 US 486, 89 S Ct 1944, 23 L Ed 2d 491*; *Marbury v Madison, 5 US 137, 1 Cranch [5 US] 137, 2 L Ed 60*; *New York County Lawyers' Assn. v State of New York, 294 AD2d 69, 742 NYS2d 16*; *Silver v Pataki, 96 NY2d 532, 755 NE2d 842, 730 NYS2d 482*.)

Briscoe R. Smith, Larchmont, and *Martin S. Kaufman* for Atlantic Legal Foundation and another, amici curiae in the second above-entitled action. I. Inadequate judicial compensation in New York is detrimental to business and the economy. (*Matter of Maron v Silver, 58 AD3d 102, 871 NYS2d 404*.) II. The New York Legislature has failed to respond to inadequate judicial compensation.

Dorsey & Whitney LLP, New York City (*Zachary W. Carter* of counsel), and *Eric B. Epstein* for Zachary W. Carter, amicus curiae in the second above-entitled action. I. Linkage and the resulting diminishment of judicial compensation violate the Separation of Powers Doctrine. (*Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 482 NE2d 1, 492 NYS2d 522*; *Matter of County of Oneida v Berle, 49 NY2d 515, 404 NE2d 133, 427 NYS2d 407*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*; *Loving v United States, 517 US 748, 116 S Ct 1737, 135 L Ed 2d 36*; *People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 829 NYS2d 250*; *Matter of Catanise v Town of Fayette, 148 AD2d 210, 543 NYS2d 825*; *Roe v Board of Trustees of Vil. of Bellport, 65 AD3d 1211, 886 NYS2d 707*; *New York County Lawyers' Assn. v State of New York, 196 Misc 2d 761, 763 NYS2d 397*; *People v Allen, 301 NY 287, 93 NE2d 850*.) II. Linkage and the resulting diminishment of judicial compensation violate the Compensation Clause. (*United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Black v Graves, 257 App Div 176, 12 NYS2d 785, 281 NY 792, 24 NE2d 478*; *Atkins v United States, 556 F2d 1028, 214 Ct Cl 186*; *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *Walz v Tax Comm'n of City of New York, 397 US 664, 90 S Ct 1409, 25 L Ed 2d 697*.)

Wollmuth Maher & Deutsch LLP, New York City (*Vincent T. Chang* of counsel), for Asian American Bar Association of New York and others, amici curiae in the second above-entitled action. I. Inadequate judicial compensation disproportionately reduces the pool of minority group members who are willing and able to serve as judges. (*United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*.) II. Threats to judicial independence disproportionately affect minority group members. (*People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 482 NE2d 1, 492 NYS2d 522*; *United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *Loving v United States, 517 US 748, 116 S Ct 1737, 135 L Ed 2d 36*.)

Wachtell, Lipton, Rosen & Katz, New York City (*Bernard W. Nussbaum, George T. Conway III, Graham W. Meli* and *Kevin S. Schwartz* of counsel), and *Michael Colodner* for appellants-respondents in the third above-entitled action. I. If the Judiciary is to continue to function as an independent, coequal branch of government, judicial compensation must be adequate. Defendants have breached their constitutional duty to provide adequate compensation. (*Larabee v Spitzer, 19 Misc 3d 226, 850 NYS2d 885, affd sub nom. Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *Matter of Maron v Silver, 58 AD3d 102, 871 NYS2d 404*; *Matter of County of Oneida v Berle, 49 NY2d 515, 404 NE2d 133, 427 NYS2d 407*; *Matter of LaGuardia v Smith, 288 NY 1, 41 NE2d 153*; *People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Printz v United States, 521 US 898, 117 S Ct 2365, 138 L Ed 2d 914*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*; *United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 829 NYS2d 250*; *Matter of Catanise v Town of Fayette, 148 AD2d 210, 543 NYS2d 825*.) II. Defendants have violated the Compensation

Clause by discriminating against judges. (*United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *O'Malley v Woodrough, 307 US 277, 59 S Ct 838, 83 L Ed 1289, 1939-1 CB 160*; *Evans v Gore, 253 US 245, 40 S Ct 550, 64 L Ed 887*; *United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *Williams v United States, 535 US 911, 122 S Ct 1221, 152 L Ed 2d 153*; *Matter of Maron v Silver, 58 AD3d 102, 871 NYS2d 404*; *Atkins v United States, 556 F2d 1028, 214 Ct Cl 186*.) III. Neither the Speech or Debate Clause nor the Separation of Powers Doctrine bars relief. This Court has the power to set the amount of judicial compensation that the Executive and the Legislature have conceded is appropriate. (*Larabee v Spitzer, 19 Misc 3d 226, 850 NYS2d 885*; *Powell v McCormack, 395 US 486, 89 S Ct 1944, 23 L Ed 2d 491*; *Marbury v Madison, 5 US 137, 1 Cranch [5 US] 137, 2 L Ed 60*; *Bogan v Scott-Harris, 523 US 44, 118 S Ct 966, 140 L Ed 2d 79*; *People v Ohrenstein, 77 NY2d 38, 565 NE2d 493, 563 NYS2d 744*; *Kilbourn v Thompson, 103 US 168, 26 L Ed 377*; *Dombrowski v Eastland, 387 US 82, 87 S Ct 1425, 18 L Ed 2d 577*; *Matter of Straniere v Silver, 218 AD2d 80, 637 NYS2d 982, 89 NY2d 825, 675 NE2d 1222, 653 NYS2d 270*; *Cass v State of New York, 58 NY2d 460, 448 NE2d 786, 461 NYS2d 1001*; *Tenney v Brandhove, 341 US 367, 71 S Ct 783, 95 L Ed 1019*.)

Schlam Stone & Dolan LLP, New York City (*Richard H. Dolan, David J. Katz* and *Erik S. Groothuis* of counsel), for respondents-appellants in the third above-entitled action. I. The statutory provisions establishing the levels of judicial compensation are entitled to a presumption of constitutionality. (*Elmwood-Utica Houses v Buffalo Sewer Auth., 65 NY2d 489, 482 NE2d 549, 492 NYS2d 931*; *INS v Chadha, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317*; *McGowan v Burstein, 71 NY2d 729, 525 NE2d 710, 530 NYS2d 64*; *Matter of Wolpoff v Cuomo, 80 NY2d 70, 600 NE2d 191, 587 NYS2d 560*; *Cohen v State of New York, 94 NY2d 1, 720 NE2d 850, 698 NYS2d 574*.) II. The First Department's order finding that "linkage" violates the Constitution should be reversed. (*Matter of Rivera v Espada, 98 NY2d 422, 777 NE2d 235, 748 NYS2d 343*; *People v Ohrenstein, 77 NY2d 38, 565 NE2d 493, 563 NYS2d 744*; *Matter of Straniere v Silver, 218 AD2d 80, 637 NYS2d 982, 89 NY2d 825, 675 NE2d 1222, 653 NYS2d 270*; *Gravel v United States, 408 US 606, 92 S Ct 2614, 33 L Ed 2d 583*; *Matter of Urbach v Farrell, 229 AD2d 275, 656 NYS2d 448*; *Campaign for Fiscal Equity v State of New York, 179 Misc 2d 907, 687 NYS2d 227, 265 AD2d 277, 697 NYS2d 40*; *Bogan v Scott-Harris, 523 US 44, 118 S Ct 966, 140 L Ed 2d 79*; *State Empls. Bargaining Agent Coalition v Rowland, 494 F3d 71*; *Campaign for Fiscal Equity v State of New York, 271 AD2d 379, 707 NYS2d 94*; *Urban Justice Ctr. v Pataki, 10 Misc 3d 939, 810 NYS2d 826, 38 AD3d 20, 828 NYS2d 12, appeal dismissed sub nom. Urban Justice Ctr. v Spitzer, 8 NY3d 958, 868 NE2d 218, 836 NYS2d 537*.) III. The Senate should have been dismissed because it did not engage in "linkage." (*Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*.) IV. The lower court erred in affirming summary judgment on this record. (*Alvarez v Prospect Hosp., 68 NY2d 320, 501 NE2d 572, 508 NYS2d 923*; *Smalls v AJI Indus., Inc., 10 NY3d 733, 883 NE2d 350, 853 NYS2d 526*.) V. The relief granted does not conform to the constitutional infirmity found. (*Larabee v Spitzer, 19 Misc 3d 226, 850 NYS2d 885*; *Larabee v Governor of State of N.Y., 20 Misc 3d 866, 860 NYS2d 886, 65 AD3d 74, 880 NYS2d 25*; *Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 861 NE2d 50, 828 NYS2d 235*.) VI. Supreme Court's order holding that compensation paid to judges was not constitutionally inadequate should be affirmed. (*United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *Williams v United States, 535 US 911, 122 S Ct 1221, 152 L Ed 2d 153*; *Matter of Catanise v Town of Fayette, 148 AD2d 210, 543 NYS2d 825*; *Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 829 NYS2d 250*; *Roe v Board of Trustees of Vil. of Bellport, 65 AD3d 1211, 886 NYS2d 707*; *Haggerty v City of New York, 267 NY 252, 196 NE 45*.) VII. Supreme Court's order dismissing plaintiffs' discrimination claim should be affirmed. (*United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *O'Malley v Woodrough, 307 US 277, 59 S Ct 838, 83 L Ed 1289, 1939-1 CB 160*; *Larabee v Spitzer, 19 Misc 3d 226, 850 NYS2d 885, affd sub nom. Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *United States v Will, 449 US 200, 101 S Ct 471, 66 L Ed 2d 392*; *Williams v United States, 240 F3d 1019*.)

Stroock & Stroock & Lavan LLP, New York City (*Joseph L. Forstadt, Ernst H. Rosenberger, Burton N. Lipshie, Jerry H. Goldfeder, Sandra J. Rampersaud* and *Linda M. Melendres* of counsel), for Association of Justices of the Supreme Court of the State of New York and others, amici curiae in the first above-entitled proceeding and action and the second and third above-entitled actions. 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. (*Evans v Gore, 253 US 245, 40 S Ct 550, 64 L Ed 887, overruled on other grounds sub nom. United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*; *Williams v United States, 535 US 911, 122 S Ct 1221, 152 L Ed 2d 153*; *Matter of County of Oneida v Berle, 49 NY2d 515, 404 NE2d 133, 427 NYS2d 407*; *People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 829 NYS2d 250*; *Matter of Catanise v Town of Fayette, 148 AD2d 210, 543 NYS2d 825*; *Larabee v Governor of State of N.Y., 20 Misc 3d 866, 860 NYS2d 886, 65 AD3d 74, 880 NYS2d 256*; *Matter of Straniere v Silver, 218 AD2d 80, 637 NYS2d 982, 89 NY2d 825, 675 NE2d 1222, 653 NYS2d 270*; *Gravel v United States, 408 US 606, 92 S Ct 2614, 33 L Ed 2d 583*.) II. Judicial salaries, currently stalled at 1999 rates, have diminished in value by almost 30%, and that lost purchasing power is an unconstitutional diminution that violates the Compensation Clause. (*United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820*; *Miles v Graham, 268 US 501, 45 S Ct 601, 69 L Ed 1067, 1925-2 CB 133, TD 3725*; *Edelstein v Crosson, 187 AD2d 694, 590 NYS2d 277*; *Buckley v Crosson, 202 AD2d 972, 609 NYS2d 493*; *Barth v Crosson, 199 AD2d 1050, 607 NYS2d 200*; *Schultz v Harrison Radiator Div. Gen. Motors Corp., 90 NY2d 311, 683 NE2d 307, 660 NYS2d 685*; *Harrison v Schaffner, 312 US 579, 61 S Ct 759, 85 L Ed 1055, 1941 CB 321*; *Buckley v Valeo, 424 US 1, 96 S Ct 612, 46 L Ed 2d 659*; *Randall v Sorrell, 548 US 230, 126 S Ct 2479, 165 L Ed 2d 482*; *Pennsylvania Coal Co. v Mahon, 260 US 393, 43 S Ct 158, 67 L Ed 322*.) 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, § 25 of the New York State Constitution.

Weil, Gotshal & Manges LLP, New York City (*Caitlin J. Halligan, Gregory Silbert* and *David Yolkut* of counsel), for Fund for Modern Courts, amicus curiae in the third above-entitled action. I. Defendants have failed to fulfill their constitutional duty of providing adequate judicial compensation. (*Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 482 NE2d 1, 492 NYS2d 522*; *People ex rel. Burby v Howland, 155 NY 270, 49 NE 775*; *Matter of Maron v Silver, 58 AD3d 102, 871 NYS2d 404*; *Plaut v Spendthrift Farm, Inc., 514 US 211, 115 S Ct 1447, 131 L Ed 2d 328*; *New York County Lawyers' Assn. v State of New York, 294 AD2d 69, 742 NYS2d 16*; *Matter of People v Little, 89 Misc 2d 742, 392 NYS2d 831, 60 AD2d 797*; *Saxton v Carey, 44 NY2d 545, 378 NE2d 95, 406 NYS2d 732*; *Silver v Pataki, 96 NY2d 532, 755 NE2d 842, 730 NYS2d 482*; *Bogan v Scott-Harris, 523 US 44, 118 S Ct 966, 140 L Ed 2d 79*.) II. Defendants' continued failure to raise judicial salaries threatens the integrity and excellence of New York's Judiciary. (*Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256*; *O'Donoghue v United States, 289 US 516, 53 S Ct 740, 77 L Ed 1356*.)

JUDGES: Opinion by Judge Pigott. Judges Ciparick, Graffeo, Read and Jones concur. Judge Smith dissents and votes to affirm in an opinion. Chief Judge Lippman took no part.

OPINION BY: PIGOTT

OPINION

[*101] [*244] [**903]** Pigott, J.

The constitutional arguments raised in these judicial compensation appeals are premised upon, among other things, alleged violations of the New York State Constitution's Compensation Clause and the Separation of Powers Doctrine. Because the Separation of Powers Doctrine is aimed at preventing one branch of government from dominating or interfering with the functioning of another coequal branch, we conclude that the independence of the Judiciary is improperly jeopardized by the current judicial pay crisis and this constitutes a violation of the Separation of Powers Doctrine.

I. Factual Background

The compensation of justices and judges of the Unified Court System, with certain exceptions not applicable here, is governed by *article 7-B of the Judiciary Law* (*see Judiciary Law §§ 221--221-i*). Article VI, § 25 (a) of the New York Constitution, also known as the "Compensation Clause," directs that the compensation of justices and judges "shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed."

The last time the Legislature adjusted judicial

compensation was in 1998, through **[**904] [***102]** the amendment of *Judiciary Law article 7-B* (*see* L 1998, ch 630, § 1 [eff Jan. 1, 1999]). That adjustment increased the annual salaries of this State's Judiciary to make them commensurate with the salaries paid their federal counterparts. [1] Now, however, New York State ranks nearly last of the 50 states in its level of judicial compensation, adjusting for the cost of living. It is estimated that, over the last 11 years, the real value of judicial salaries has declined by approximately 25% to 33%.

1 For reference, according to the Federal Judicial Center, more than 90% of the cases filed annually are in state courts, less than 10% are filed in the federal system.

At the time the roughly 1,300 judges and justices who comprise the so-called "Article VI judges" (i.e. judges covered by article VI of the New York State Constitution) received the pay raise that was enacted in 1998, they presided over 3.5 million cases. Ten years later, in 2008, the judges presided over a staggering 4.5 million cases, 38% of which were criminal (approximately 1.71 million cases), 42% civil (approximately 1.89 **[*245]** million cases), 17% Family Court (approximately 765,000 cases) and 3% Surrogates' Court (approximately 135,000 cases) (*see* New York State Unified Court System 1998 and 2008 Annual Reports).

In 2006, the Judiciary submitted to Governor Pataki, as part of its proposed annual budget, a request for $ 69.5 million to fund salary adjustments for the approximately 1,300 article VI judges, retroactive to April 1, 2005. The intention was to restore pay parity with federal judicial salaries. Although made part of the state budget (*see* L 2006, ch 51, §2), the Legislature failed to authorize disbursement of the appropriation, because the Legislature and the Governor could not agree on a pay increase for the legislators themselves.

The following year, Governor Spitzer included in his executive budget more than $ 111 million for judicial pay raises, retroactive to April 1, 2005, which, if implemented, would have placed salaries of State Supreme Court justices at an amount roughly on a par with federal judicial compensation. The Legislature removed that provision from the budget two months later.

In April 2007, the Senate passed a bill (2007 NY Senate Bill S5313) increasing judicial compensation, this time retroactive to January 1, 2007, and calling for the creation of a commission to review future salary increases for both judges *and* legislators. Governor Spitzer refused to support this legislation, however, unless the Legislature enacted campaign finance and ethics reform measures. Two months later, the Governor expressed support for a "judges only" pay bill.

Shortly thereafter, the Senate passed another bill (2007 NY Senate Bill S6550) providing for an increase in judicial salaries, this time without any corresponding increase for legislators. It also called for the establishment of a commission to examine future increases in judicial salaries taking into account the needs of the Judiciary and the State's ability to pay. The Assembly refused to act on that bill because it did not provide for an increase in legislative pay.

The following year, Governor Paterson and the Legislature approved a budget for 2008-2009 that included $ 48 million for judicial salary increases. Like the 2006-2007 appropriation, this was a so-called "dry appropriation" requiring further legislation before the salaries could be paid--legislation that was never enacted.

All parties to this litigation agree that article VI justices and judges have earned and deserve a salary increase. That is **[**905] [***103]** what **[*246]** makes this litigation unique. Although the parties have been in accord regarding the need to adjust judicial compensation, the failure of the Legislature and the Executive to come to an agreement on legislation effecting a pay increase has led to the continuing inertia underlying this dispute.

II. Procedural History

Maron v Silver et al.

The *Maron* petitioners--current and former State Supreme Court Justices and District Court Judges--commenced this hybrid *CPLR article 78* proceeding/declaratory judgment action against respondents Sheldon Silver, as Speaker of the Assembly, Joseph Bruno, then Temporary President of the Senate, Eliot Spitzer, then Governor of New York, Thomas DiNapoli in his capacity as State Comptroller, the Assembly and Senate and the Office of Court Administration (OCA). [2] The article 78 proceeding seeks mandamus relief compelling the Comptroller to disburse

all retroactive sums and pay the budgeted raises allocated in the 2006-2007 state budget for judicial salary reform. The petition also asserts violations of the Separation of Powers Doctrine, equal protection and the State Compensation Clause.

> 2 The sole claim asserted against the OCA involved judicial health benefits. That claim has been severed from this action by stipulation and is not at issue on this appeal.

Supreme Court, Albany County, partially granted defendants' motion to dismiss the petition for failure to state a cause of action, leaving intact the separation of powers claim. The court further held that Silver, Bruno and Spitzer were immune from suit because setting judicial salaries is a legislative act, and concluded that to the extent the petition alleged a constitutional violation against the Assembly and Senate, those allegations constituted claims against the State. [3]

> 3 For ease of reference, all defendants to these litigations are collectively referred to as "State defendants."

In a 4-1 decision, the Appellate Division dismissed the petition, holding, among other things, that the *Maron* petitioners' failure "to allege a discriminatory attack on the judicial branch that has impaired or imminently threatened the Judiciary's independence and ability to function" was fatal to their separation of powers claim (*Matter of Maron v Silver, 58 AD3d 102, 123, 871 NYS2d 404 [3d Dept 2008]*).

The *Maron* petitioners appealed to this Court as of right on the constitutional questions presented. This Court retained **[*247]** jurisdiction over the appeal and denied leave to appeal as unnecessary (*see Matter of Maron v Silver, 12 NY3d 909, 912 NE2d 1067, 884 NYS2d 686 [2009]*).

Larabee v Governor et al.

The *Larabee* plaintiffs--members of the New York State Judiciary--commenced this declaratory judgment action against Eliot Spitzer, in his capacity as Governor, the New York State Assembly and Senate, and the State, alleging violations of the State Compensation Clause and the Separation of Powers Doctrine.

Supreme Court, New York County, granted the State defendants' motion to dismiss the Compensation Clause cause of action but, similar to the Supreme Court in *Maron*, concluded that the *Larabee* plaintiffs had sufficiently pleaded a separation of powers claim (*see Larabee v Spitzer, 19 Misc 3d 226, 231-237, 850 NYS2d 885 [Sup Ct, NY County 2008]*). Supreme Court dismissed the complaint in its entirety as against Governor Spitzer, noting that the *Larabee* plaintiffs conceded that he was not an "essential party" to the **[**906] [***104]** action, all parties having agreed that the Assembly, Senate and State were proper parties (*see id. at 237-239*).

Supreme Court subsequently granted the *Larabee* plaintiffs summary judgment on the separation of powers cause of action (*see Larabee v Governor of State of N.Y., 20 Misc 3d 866, 877, 860 NYS2d 886 [Sup Ct, NY County 2008]*). The State defendants appealed from that order and the *Larabee* plaintiffs cross-appealed from Supreme Court's order dismissing their Compensation Clause claim.

The Appellate Division affirmed both orders (*Larabee v Governor of State of N.Y., 65 AD3d 74, 880 NYS2d 256 [1st Dept 2009]*). The *Larabee* plaintiffs and State defendants appealed as of right and we retained jurisdiction.

Chief Judge v Governor et al.

The *Chief Judge* plaintiffs--former Chief Judge Judith S. Kaye [4] and the New York State Unified Court System--commenced this declaratory judgment action asserting three causes of action against David Paterson, Sheldon Silver and Joseph Bruno, all in their respective official capacities, and the Assembly, Senate and State.

> 4 The parties have since stipulated to substitute Chief Judge Jonathan Lippman for former Chief Judge Kaye.

[*248] The complaint asserts one cause of action premised on a violation of the State Compensation Clause under a different theory than that posed by the *Maron* and *Larabee* plaintiffs; namely, that the diminution in judicial salaries has had a discriminatory effect on the Judiciary, rendering unconstitutional the salaries codified in *Judiciary Law §§ 221--221-i*. The two remaining claims are grounded on the Separation of Powers Doctrine. One of the claims is similar to those raised in the *Maron* and *Larabee* litigation; the other is

premised on the theory that the Judiciary cannot function as a coequal branch if it is not assured of receiving "adequate compensation," and that the judicial salaries codified in *Judiciary Law §§ 221--221-i* are constitutionally insufficient.

The State defendants moved to dismiss the complaint for failure to state a cause of action. Supreme Court, New York County, searched the record and granted the *Chief Judge* plaintiffs summary judgment on the separation of powers claim that was similar to the one raised in *Larabee*, but dismissed the remaining causes of action attacking the constitutionality of *Judiciary Law §§ 221--221-i* (*see Chief Judge of State of N.Y. v Governor of State of N.Y., 25 Misc 3d 268, 271-273, 887 NYS2d 772 [Sup Ct, NY County 2009]*). As in *Larabee*, Supreme Court dismissed the complaint in its entirety as against the Governor (*see id. at 271-272*). The State defendants appealed to the Appellate Division, which affirmed for the reasons stated in *Larabee* (*see Chief Judge of State of N.Y. v Governor of State of N.Y., 65 AD3d 898, 898, 884 NYS2d 862 [1st Dept 2009]*).

The *Chief Judge* plaintiffs appealed Supreme Court's order directly to this Court pursuant to *CPLR 5601 (b) (2)* and we retained jurisdiction over the appeal. Because the *Chief Judge* plaintiffs challenged the constitutionality of the judicial salaries set forth in *Judiciary Law §§ 221--221-i*, the direct appeal from the order of Supreme Court was proper. [5] The State defendants **[**907] [***105]** appealed as of right from the Appellate Division's affirmance of Supreme Court's order granting the *Chief Judge* plaintiffs summary judgment on the separation of powers claim.

> 5 Based on these conclusions, the State defendants' contention that the *Chief Judge* plaintiffs' appeal from Supreme Court should be dismissed for lack of jurisdiction is without merit.

III. Rule of Necessity

[1] Members of the Court of Appeals are paid via the salary schedule delineated in *Judiciary Law § 221* and therefore will be **[*249]** affected by the outcome of these appeals. Ordinarily, when a judge has an interest in litigation, recusal is warranted. But this case falls within a narrow exception to that rule. Because no other judicial body with jurisdiction exists to hear the constitutional issues raised herein, this Court must hear and dispose of these issues pursuant to the Rule of Necessity (*see Maresca v Cuomo, 64 NY2d 242, 247, 475 NE2d 95, 485 NYS2d 724 n 1 [1984], appeal dismissed 474 US 802, 106 S Ct 34, 88 L Ed 2d 28 [1985]* [addressing a challenge to the State Constitution's mandatory retirement age requirements for certain state judges], citing *Matter of Morgenthau v Cooke, 56 NY2d 24, 29, 436 NE2d 467, 451 NYS2d 17 n 3 [1982]*).

IV. Nonconstitutional Statutory Claim (*Maron* Petitioners Only)

The *Maron* petitioners assert that the constitutional issues raised on these appeals can be avoided should this Court find that they are entitled to relief in the nature of mandamus compelling the Comptroller to pay the $ 69.5 million appropriated in the 2006-2007 state budget. As support for this argument, petitioners focus on section 2 of chapter 51 of the Laws of 2006 addressing "JUDICIAL COMPENSATION REFORM." That provision contained a $ 69.5 million budget item "[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 supplied). Petitioners claim that the Comptroller improperly impounded these funds and should be ordered to release them to provide for judicial salary increases.

[2] A *CPLR article 78* proceeding seeking mandamus to compel the performance of a specific duty applies only to acts that are ministerial in nature and not those that involve the exercise of discretion (*see Matter of Gimprich v Board of Educ. of City of N.Y., 306 NY 401, 406, 118 NE2d 578 [1954]*; *see also* Siegel, NY Prac § 558, at 958 [4th ed]). Because of the constitutional requirement that judicial compensation be "established by law" (NY Const, art VI, § 25 [a]), mandamus does not lie in this instance because no subsequent chapter law was enacted either amending the Judiciary Law salary schedules or directing the disbursement of the funds.

The $ 69.5 million referenced in the judicial budget was explicitly made contingent upon the adoption of additional legislation, i.e. a chapter of the Laws of 2006. Had the Legislature intended that the judicial compensation appropriation be self-executing, as petitioners claim, there would have been no **[*250]** need for the qualifying language. Moreover, a mere provision calling for a lump-sum payment of $69.5 million without repeal or revision of the *Judiciary Law article 7-B* judicial salary schedules is further evidence that

additional legislation was required before the funds could be disbursed. We, therefore, conclude that the Appellate Division properly dismissed petitioners' cause of action seeking mandamus against the Comptroller.

V. Constitutional Claims (All Litigants)

A. Equal Protection

The Judiciary as a "Suspect Class" (*Maron* Petitioners)

[3] The *Maron* petitioners are the only litigants in these appeals who have alleged **[**908] [***106]** that the Judiciary constitutes a "suspect class" that has been denied equal protection under the law because judicial pay raises have been historically contingent on or "tied to" salary increases for legislators. They also assert that the State defendants' rationale for refusing to increase judicial salaries fails to pass the "strict scrutiny" test or the less stringent rational basis test. For the reasons set forth in the Appellate Division order, we conclude that Supreme Court properly dismissed that cause of action (*see Maron, 58 AD3d at 123-124*).

B. Compensation Clause

The *Maron* petitioners and the *Larabee* plaintiffs assert Compensation Clause causes of action that are premised on their claims that judicial salaries have been unconstitutionally diminished because of inflation. The *Chief Judge* plaintiffs posit an additional argument, asserting that the Legislature's act of freezing judicial salaries while increasing the salaries of 195,000 other state employees amounted to discrimination against the Judiciary.

Diminution by "Pure Inflation" (*Maron* and *Larabee*)

The State Compensation Clause provides, in relevant part, that the compensation of members of the Judiciary "shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed" (NY Const, art VI, § 25 [a]). The purpose of this "Compensation Clause" is the same as its federal counterpart: to promote judicial independence and ensure that the pay of prospective judges, who choose to leave their practices or other legal positions for the bench, will not diminish (*see United States v Will, 449 US 200, 221, 101 S Ct 471, 66 L Ed 2d 392 [1980]*).

[*251] The *Maron* petitioners and *Larabee* plaintiffs base their Compensation Clause arguments on an identical theory: By failing to increase judicial compensation, the Legislature has allowed inflation to considerably diminish the "real value" of judicial salaries, violating the State Compensation Clause's prohibition against diminution. They further claim that the State Compensation Clause's prohibition against diminishment should include the diminishment of compensation by any cause, including inflation.

Since the inception of our State Constitution, this State has grappled with the issue of how best to establish the parameters of judicial compensation. In 1846, the Constitutional Convention adopted the phrase "shall not be increased or diminished" (1846 1846 NY Const, art VI, § 7); an 1869 amendment (1846 Const, art VI, §14, as amended), however, deleted the words, "increased or," allowing for the increase of compensation, but not a decrease (*see* Carter, New York State Constitution: Sources of Legislative Intent, at 85 [1988]). Article VI, § 12 of the 1894 Constitution restored the 1846 "shall not be increased or diminished" language, which was thereafter deleted in its entirety in 1909 and adopted a specific constitutional provision fixing salaries for certain judges at $10,000 per year (*see Matter of Gresser v O'Brien, 146 Misc 909, 917-918, 263 NYS 68 [Sup Ct, NY County 1933], affd 263 NY 622, 189 NE 727 [1934]*). In 1921, a Judiciary Constitutional Convention was held to consider, among other things, amendments to the State Constitution concerning judicial compensation (*see* Judiciary Constitutional Convention of 1921: Report to Legislature, at 3 [Jan. 4, 1922]). The Convention criticized the 1909 Compensation Clause amendment's inclusion of a salary schedule in the Constitution, stating that judicial compensation " 'should, in the judgment of the present convention, be left entirely to **[**909] [***107]** the Legislature, which after all, is the body always directly in touch with and responsible to the people' " (*Problems Relating to Judicial Administration and Organization*, 1938 Rep of NY Constitutional Convention Comm, vol 9, at 341, quoting Judiciary Constitutional Convention of 1921: Report to Legislature, at 29).

[4] In recommending removal of the salary schedule, the Convention considered the deleterious effects of inflation on judicial compensation and how it could negatively impact the independence and effectiveness of the Judiciary, ultimately concluding that the Legislature was in the best position to address that issue (*see*

Judiciary Constitutional Convention of **[*252]** 1921: Report to Legislature, at 29). In 1925, the State Compensation Clause's "shall not be diminished" language was reinstated (1894 NY Const, art VI, § 19, as amended) and remains unchanged (*see* Carter, at 85). It is evident from the events predating the 1925 amendment that the concept of diminution of compensation was of paramount concern, and the final outcome was to authorize the Legislature to remedy any deficiencies; notably, the Legislature was precluded from diminishing salaries in recognition of the risk that salary manipulation might be used as a tool to retaliate for unpopular judicial decisions. Although the State Compensation Clause plainly prohibits the diminution of judicial compensation by legislative act during a judge's term of office, there is no evidence in the history of the Clause's enactment or subsequent amendments that supports a broad interpretation embracing indirect diminishment by neglect. Thus, there is no evidence that the State Compensation Clause's "no diminishment" rule was intended to affirmatively require that judicial salaries be adjusted to keep pace with the cost of living. [6]

> 6 That being said, as indicated later in this opinion, we do not rule out the possibility that a total neglect by the Legislature to consider or address judicial salaries could never, depending on the passage of time and changes in the value of money, cause salaries to dip so low that they fall below a constitutionally permissible floor. To choose an extreme example, if the Legislature had not raised salaries since 1909 when certain judges earned an annual salary of $ 10,000, a very different case would be presented.

In this regard, the state provision is comparable to the Federal Compensation Clause (*US Const, art III, § 1*) which also contains the same "shall not be diminished" language. Like the drafters of the State Compensation Clause, the Framers of the Federal Constitution were cognizant of the effects of inflation on judicial compensation, but nonetheless left that determination to the discretion of the legislature.

At least two proposals concerning inflation were offered at the federal Constitutional Convention. One suggestion was that the fluctuations in the value of judicial compensation could be accounted for "by taking for a standard wheat or some other thing of permanent value" (2 M. Farrand, The Records of the Federal Convention of 1787, at 45 [1911]). The other suggestion left judicial compensation to the discretion of the legislature, which was in a better position to address inflationary concerns (*see Will, 449 US at 219-220*; *see also* Hamilton, Federalist No. 79 ["It (is) therefore necessary to leave it to the discretion of **[*253]** the legislature to vary (compensation) 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 latter approach carried the day, with the Convention adopting a motion to allow an increase of judicial compensation by Congress and, as a result, **[**910] [***108]** "accepting a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed" (*Will, 449 US at 220*).

Contrary to the contention of the *Maron* petitioners and *Larabee* plaintiffs, federal jurisprudence does not support their assertion that the State and *Federal Compensation Clauses* prohibit "indirect" diminution of compensation due to inflation. Although the cases cited support the general proposition that judicial compensation may not be either "directly" or "indirectly" reduced, none of them stands for the proposition that the Legislature's failure to adjust compensation to account for inflation constitutes an indirect attack on judicial compensation.

In *Evans v Gore*, a federal judge challenged, on *Federal Compensation Clause* grounds, Congress's authority to include sitting federal judges within the scope of a federal income tax law that the *Sixteenth Amendment* had authorized years earlier, claiming that the imposition of such a tax constituted a diminishment in salary (*see 253 US 245, 247, 40 S Ct 550, 64 L Ed 887, 1920-3 CB 93, TD 3037 [1920]*, overruled by *United States v Hatter, 532 US 557, 121 S Ct 1782, 149 L Ed 2d 820 [2001]*). In finding the tax violative of the *Federal Compensation Clause*, the *Evans* court noted that

> "diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive . . . 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" (*id. at 254*).

In *Miles v Graham*, the United States Supreme Court extended the *Evans* holding to those judges who assumed office after the tax had become law (*268 US 501, 508-509, 45 S Ct 601, 69 L Ed 1067, 1925-2 CB 133, TD 3725 [1925], overruled in part by O'Malley v Woodrough, 307 US 277, 59 S Ct 838, 83 L Ed 1289, 1939-1 CB 160 [1939]*). The *O'Malley* court overruled *Miles*, but left the core holding of *Evans*intact (*see O'Malley, 307 US at 282-283*). However, the Supreme Court in *United States v Hatter* overruled *Evans* **[*254]** "insofar as it holds that the *Compensation Clause* forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax" (*Hatter, 532 US at 567*). The *Hatter* court agreed with *Evans*, however,

> "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" (*id. at 569* [emphasis supplied]).

The evolution of Supreme Court jurisprudence from *Evans* to *Hatter* establishes that a nondiscriminatory tax that treats judges the same as other citizens is permissible, but direct diminution of compensation or the discriminatory taxation of judges is not. In either case, it is the diminishment of salary by Congress, be it direct or indirect, that is prohibited.

Here, the Legislature has not enacted legislation that has directly diminished judicial compensation in violation of the State Compensation Clause, nor has it enacted discriminatory legislation that has indirectly resulted in the diminution of judicial compensation. The claim is that inflation has had this effect. However, at least as far as the Federal *Compensation Clause* is concerned, the intention of the **[**911] [***109]** Framers was that Congress would serve as the fail-safe that prevents inflation from eating away at the real value of judicial salaries (*see Atkins v United States, 556 F2d 1028, 1048, 214 Ct Cl 186 [US Ct Cl 1977], cert denied 434 US 1009, 98 S Ct 718, 54 L Ed 2d 751 [1978]* [addressing inflation]).

There is no reason for this Court to depart from that rationale, because it is evident from the history surrounding the enactment of our State Compensation Clause that, although the diminution in value of judicial compensation by inflation was a concern, the drafters decided that the best way to combat the effects of inflation was to count on the Legislature--the body directly accountable to the public--to assure the fair and appropriate compensation of the Judiciary. We therefore determine that the Legislature's failure to address the effects of inflation in this case does not equate to a per se violation of the Compensation Clause.

[*255] Compensation Clause--Discrimination (*Chief Judge*)

The *Chief Judge* plaintiffs' Compensation Clause argument is distinctly different from the claims raised by the other litigants. Rather than contending that inflation resulted in the unconstitutional diminution of judicial salaries, they assert that by freezing judicial salaries while repeatedly increasing the salaries of almost all of the remaining 195,000 state employees to keep pace with the cost of living, the State defendants discriminated against the Judiciary in violation of the State Compensation Clause.

This argument is premised exclusively on the Supreme Court's holding in *Hatter (532 US 557, 121 S Ct 1782, 149 L Ed 2d 820 [2001], supra)*, which involved a Social Security tax law that, at the time of its enactment, mandated that all newly-hired federal employees participate in the Social Security program. The law also offered almost all of the then-currently employed federal employees (96%) the option to participate without any additional financial obligation. But it created an exception for the remaining four percent of currently employed federal employees, however, which required members of that class--who contributed to a "covered" retirement program--to participate in the system *without* any further additional financial obligation. The legislation left those who did not participate in a "covered" program (i.e., a group consisting "almost exclusively" of federal judges) without a choice; their financial obligations and payroll deductions would increase as a result of the imposition of the new tax (*id. at 562-564*).

In finding the law violative of the Federal *Compensation Clause* as discriminatory against judges,

the *Hatter* court noted that the Social Security legislation was

> "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" (*id. at 576*).

It was these elements that made the Social Security tax distinctly different from a nondiscriminatory tax (*id.*).

According to the *Chief Judge* plaintiffs, just as the Social Security tax law in *Hatter* imposed a discriminatory tax on the **[*256]** Judiciary, inflation has the same impact on judicial compensation as a tax and, although the failure to remedy it in and of itself may not violate the State Compensation Clause, in this case the Judiciary has been singled out because nearly all of the other 195,000 state employees have received **[**912] [***110]** salary increases to compensate in part for inflation.

[5] We are unpersuaded that relief is warranted under the *Hatter* analysis. First, *Hatter* involved a legislative enactment that discriminated against federal judges by reducing the compensation of judges only; the situation here does not involve any legislative enactment that directly or indirectly diminishes judicial compensation. Second, although other state employees have received adjustments to account for inflation, judges are not the only state employees whose salaries have not been adjusted; the Governor, Lieutenant Governor, members of the Legislature and other constitutional officers have also not received salary increases since 1999. We therefore cannot say that judges have been disadvantaged in a manner comparable to the discriminatory treatment in *Hatter*. Therefore, Supreme Court properly dismissed this cause of action.

C. Separation of Powers

Speech or Debate Clause Defense (State Defendants)

Before we address plaintiffs' separation of powers arguments, we consider the legislative defendants' primary defense that both houses of the Legislature and their leaders are immune from any such claim under the Speech or Debate Clause. The State Speech or Debate Clause provides that "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place" (NY Const, art III, § 11). The scope of immunity this provision bestows upon members of the Legislature provides "as much protection as the immunity granted by the comparable provision of the Federal Constitution" (*People v Ohrenstein, 77 NY2d 38, 53, 565 NE2d 493, 563 NYS2d 744 [1990]* [citation omitted]), and "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts" (*United States v Brewster, 408 US 501, 525, 92 S Ct 2531, 33 L Ed 2d 507 [1972]*).

The Appellate Division in *Maron* dismissed the separation of powers cause of action because, to the extent the Legislature failed to either increase judicial compensation due to inaction or because it tied such increases to "political wrangling over unrelated issues," such failure constitutes a legislative function **[*257]** protected by article III, § 11 (*Maron, 58 AD3d at 121-123*). The courts in *Larabee* and *Chief Judge*, however, concluded that the Speech or Debate Clause did not bar review.

[6] The Speech or Debate Clause applies to only "members" and to "any speech or debate in either house." Nowhere does the Clause state that such immunity applies to either house of the Legislature as a whole, and therefore, it does not apply to the Assembly or the Senate. For the same reason, the State may not assert this defense.

In any event, all of the parties acknowledge that the Judiciary is entitled to an increase in compensation, and the State defendants have made proclamations outside of the legislative and executive chambers as to why such an increase has not occurred (*see e.g. Ohrenstein, 77 NY2d at 54* [issuance of press releases and newsletters deemed not protected legislative acts]; *see also Matter of Rivera v Espada, 98 NY2d 422, 428, 777 NE2d 235, 748 NYS2d 343 [2002]* [same]; *Hutchinson v Proxmire, 443 US 111, 99 S Ct 2675, 61 L Ed 2d 411 [1979]*). As a result, this Court need not inquire "into acts that occur in the regular course of the legislative process" or the Legislature's motives for such acts (*see Brewster, 408 US at 525*), **[**913] [***111]** eliminating the danger of the

Judiciary intruding upon the independence of the legislative branch.

We therefore address the merits of the separation of powers arguments.

Failure by Legislature to Independently and Objectively Consider Compensation Increases (*Maron*, *Larabee* and *Chief Judge*)

The *Maron* petitioners and the *Larabee* and *Chief Judge* plaintiffs all make the same separation of powers argument: By tying judicial compensation to unrelated legislative objectives and policy initiatives, as opposed to conducting an independent assessment of judicial compensation, the Legislature has disregarded the Separation of Powers Doctrine and threatened the independence of the Judiciary.

The State defendants counter that there is nothing in the constitutional text or framework prohibiting the Legislature from considering judicial compensation along with other prerogatives. Furthermore, any declaration condemning that practice as unconstitutional would itself constitute a separation of powers violation by the Judiciary through intrusion into budgetary and appropriations processes.

[*258] In *Maron*, the Appellate Division dismissed petitioners' claim on the ground that their failure "to allege a discriminatory attack on the judicial branch that has impaired or imminently threatened the Judiciary's independence and ability to function" was fatal to the claim (*Maron, 58 AD3d at 123*). This claim met with greater success in *Larabee* and *Chief Judge*, where the Appellate Divisions in each of those cases upheld the Supreme Court's award of summary judgment to those plaintiffs (*see Chief Judge, 65 AD3d 898, 899, 884 NYS2d 862 [2009]*; *Larabee, 65 AD3d at 74*).

The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions (*see generally Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 355-356, 482 NE2d 1, 492 NYS2d 522 [1985]*; *Matter of County of Oneida v Berle, 49 NY2d 515, 522, 404 NE2d 133, 427 NYS2d 407 [1980]*). The Constitution's aim "is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers," thereby ensuring "an even balance of power [among] the three" (*People ex rel. Burby v Howland, 155 NY 270, 282, 49 NE 775 [1898]*). The separation of the three branches is necessary " 'for the preservation of liberty itself,' " and " '[i]t 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' " (*Berle, 49 NY2d at 522* quoting *Burby, 155 NY at 282*). To accomplish this important goal, articles III, IV and VI of the State Constitution address the respective powers conferred upon, and respective compensation of, the Legislature, Executive and Judiciary.

Article III states that "[t]he legislative power of this state shall be vested in the senate and the assembly" (NY Const, art III, § 1), and that "[e]ach member of the legislature shall receive for his or her services a like annual salary, to be fixed by law . . . [but] the salary of any member ... may [not] be increased or diminished during, and with respect to, the term for which he or she shall have been elected" (NY Const, art III, § 6).

[*112]** **[**914]** Article IV states that "[t]he executive power shall be vested in the governor, who shall hold office for four years" (NY Const, art IV, § 1), and who "shall receive for his or her services an annual salary to be fixed by joint resolution of the senate and assembly" (NY Const, art IV, § 3).

[*259] Article VI states that "[t]here shall be a unified court system for the state" (NY Const, art VI, § 1 [a]) and that the compensation of judges and justices within that system "shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed" (NY Const, art VI, § 25 [a]).

We find it significant that the compensation provisions for each branch of government are not contained in article III where the powers of the legislative branch are articulated, but rather are separately addressed in the article for each respective branch. Although a function of the Legislature is to approve the compensation of each of the three branches, this fact underscores only the checks and balances of the system; it does not rebut the fact that the compensation to be paid to members of each particular branch must be determined separately and distinctly from the others. Indeed, whether the Judiciary is entitled to a compensation increase must

be based upon an objective assessment of the Judiciary's needs if it is to retain its functional and structural independence. Simply put, by failing to consider judicial compensation increases on the merits, and instead holding them hostage to other legislative objectives, the Legislature "[w]eaken[s the Judiciary] by making it unduly dependent" on the Legislature (*Burby, 155 NY at 282*).

Separate budgets, separate articles in the Constitution, and separate provisions concerning compensation are all testament to the fact that each branch is independent of the other. This, of course, does not mean that the branches operate without concern for the other. Both the Legislature and the Governor rely on the good faith of the other and of the Judiciary for the good of the State. As members of the two "political" branches, the Governor and Legislature understandably have the power to bargain with each other over all sorts of matters including their own compensation. Judges and justices, on the other hand, are not afforded that opportunity. They have no seat at the bargaining table and, in fact, are precluded from participating in politics. The judicial branch therefore depends on the good faith of the other two branches to provide sufficient funding to fulfill its constitutional responsibilities. Given its unique place in the constitutional scheme, it is imperative that the legitimate needs of the judicial branch receive the appropriate respect and attention. This cannot occur if the Judiciary is used as a pawn or bargaining chip in order to achieve ends that are entirely unrelated to the judicial mission.

[*260] For instance, the Constitution prohibits legislators from increasing *or* decreasing their own salaries during their two-year term of office, but there is no such prohibition against the Legislature addressing judicial compensation at any time. Moreover, state legislators are part time and may supplement their income through committee assignments, leadership positions and other outside employment. Judges are constitutionally forbidden from engaging in any employment that would interfere with their judicial responsibilities (*see* NY Const, art VI, § 20 [b] [4]). But by failing to consider judicial compensation independently of legislative compensation, the State defendants have imposed upon the Judiciary the same restrictions that have been imposed on the Legislature, and have blurred the line between **[**915] [***113]** the compensation of the two branches, thereby threatening the structural independence of the Judiciary.

The State defendants assert that it is within their legislative rights to consider judicial compensation not on the merits but relative to unrelated policy initiatives. But they overlook the fact that they are treating judicial compensation--which falls within the scope of their constitutional duties--as if it were merely another government program appropriation as opposed to compensation for members of a coequal branch.

We do not attribute the State defendants' failure to increase judicial compensation to any nefarious purpose. Indeed, it is not necessary to consider, or find, the existence of any improper motive. All parties agree that a salary increase is justified and, yet, those who have the constitutional duty to act have done nothing to further that objective due to disputes unrelated to the merits of any proposed increase. This inaction not only impairs the structural independence of the Judiciary, but also deleteriously affects the public at large, which is entitled to a well-qualified, functioning Judiciary (*see O'Donoghue v United States, 289 US 516, 533, 53 S Ct 740, 77 L Ed 1356 [1933]* [prohibition against diminution is to attract competent people to the bench, promote independence of the Judiciary, and for the public interest]).

It must be remembered 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. In its major features . . . it is a prophylactic device, establishing high walls and clear distinctions because low walls and **[*261]** vague distinctions will not be judicially defensible in the heat of interbranch conflict" (*Plaut v Spendthrift Farm, Inc., 514 US 211, 239, 115 S Ct 1447, 131 L Ed 2d 328 [1995]*).

[7, 8] Here, the allegations by the *Maron* petitioners are sufficient to state a separation of powers claim. As that case is here before us on a *CPLR 3211* motion to dismiss, our corrective action is limited to a reinstatement of that cause of action. In *Larabee* and *Chief Judge*, the procedural posture of the cases is not so limiting and we may now issue a declaration. We hold that under these circumstances, as a matter of law, the State defendants'

failure to consider judicial compensation on the merits violates the Separation of Powers Doctrine.

[9] However, when "fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government" (*Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 28, 861 NE2d 50, 828 NYS2d 235 [2006]*). Indeed, deference to the Legislature--which possesses the constitutional authority to budget and appropriate--is necessary because it is "in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources" (*id. at 29*). The Judiciary may intervene in the state budget "only in the narrowest of instances" (*Wein v Carey, 41 NY2d 498, 505, 362 NE2d 587, 393 NYS2d 955 [1977]*), and we do not believe that it is necessary here to order specific injunctive relief. When this Court articulates the constitutional standards governing state action, we presume that the State will act accordingly.

Failure to Provide Adequate Compensation (*Chief Judge*)

The *Chief Judge* plaintiffs make a separation of powers claim not raised by the **[**916] [***114]** *Maron* petitioners or *Larabe*e plaintiffs: the Separation of Powers Doctrine requires that the State defendants provide the Judiciary with "adequate judicial compensation" and, because judicial salaries are constitutionally inadequate, the State defendants have breached their constitutional duty. The constitutional inadequacy of judicial salaries, the *Chief Judge* plaintiffs posit, threatens to impair the Judiciary's ability to function as a coequal branch.

[10] The Compensation Clause was enacted to preserve judicial independence, and we agree with the conclusion of high courts in other jurisdictions that this is dependent, in part, on judges receiving adequate compensation (*see Glancey v Casey, 447 Pa 77, 86, 288 A2d 812, 816 [1972]* ["it is the constitutional **[*262]** 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"]). Moreover, adequate judicial compensation is necessary to ensure that the public will have its matters heard by competent judges (*see* Judiciary Constitutional Convention of 1921: Report of the Legislature, at 29, *supra*) and that judges will be free to issue decisions in accordance with the law without fear of retribution by the other two branches of government. Therefore, we reject the State defendants' claim that the Compensation Clause's language that compensation "shall not be diminished" is the opposite of an "adequate compensation" guarantee. Even counsel for the State defendants in *Larabee* concede that judicial compensation "could be so low that it could be constitutionally objected to."

The *Chief Judge* plaintiffs posit that the current salaries of *Judiciary Law article 7-B* judges and justices are inadequate when compared to other legal positions in the public and private sectors. This argument is one that is best addressed in the first instance by the Legislature. All of the State defendants have conceded, at one point or another, that judicial compensation must be increased. We anticipate that our holding today will permit them to consider, in good faith, judicial salary increases on the merits.

The Legislature might find the record compiled in the *Chief Judge* case to be helpful. There, plaintiffs demonstrate--without rebuttal from the State--that, in real value, New York judges' salaries now rank below judicial salaries in other states and the Federal Judiciary, despite the complexity of legal issues presented in New York--a world economic center--and the burgeoning case load faced by New York judges.

The argument for a cost-of-living increase is not that, in some objective sense, New York judges do not earn a living wage. Judges made no such argument when this litigation commenced in much better economic times and certainly do not press such a contention now. The claim is that, due to the lack of a cost-of-living increase for more than 11 years, judges no longer earn salaries that are appropriate given the significance of their position in our tripartite form of government and the role they play in ensuring the rights of all members of society. That role has increased substantially since the last compensation adjustment. For instance, the Judiciary's workload has increased by 10% **[*263]** over the past four years alone. Since 2005, Family Court's workload has increased 16%, civil filings in Supreme Court have increased more than 14%, and the caseloads in the New York City Civil Courts and those city courts outside of New York City have risen by 13% and 17%, respectively. Moreover, state courts handle over 90% of the filings as compared **[**917] [***115]** to the less than 10% handled by our

federal courts.

Judicial salaries need not be exorbitant, but they must be sufficient to attract well-qualified individuals to serve. Otherwise, only those with means will be financially able to assume a judicial post, negatively impacting the diversity of the Judiciary and discriminating against those who are well qualified and interested in serving, but nonetheless unable to aspire to a career in the Judiciary because of the financial hardship that results from stagnant compensation over the years.

VI. Conclusion

[9] It is unfortunate that this Court has been called upon to adjudicate constitutional issues relative to an underlying matter upon which all have agreed; namely, that the Judiciary is entitled to a compensation adjustment. By ensuring that any judicial salary increases will be premised on their merits, this holding aims to strike the appropriate balance between preserving the independence of the Judiciary and avoiding encroachment on the budget-making authority of the Legislature. Therefore, judicial compensation, when addressed by the Legislature in present and future budget deliberations, cannot depend on unrelated policy initiatives or legislative compensation adjustments. Of course, whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature. It should keep in mind, however, that whether the Legislature has met its constitutional obligations in that regard is within the province of this Court (*see Marbury v Madison, 1 Cranch [5 US] 137, 177, 2 L Ed 60 [1803]*). We therefore expect appropriate and expeditious legislative consideration.

Accordingly,

In *Maron*, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further proceedings in accordance with this opinion, and as so modified, affirmed.

In *Larabee*, the order of Appellate Division should be modified, and in *Chief Judge*, the judgment of Supreme Court and **[*264]** the order of the Appellate Division should be modified, without costs, by granting judgment declaring that under the circumstances of these cases, as a matter of law, the State defendants' failure to consider judicial compensation on the merits violates the Separation of Powers Doctrine, and by allowing for the remedy discussed in this opinion, and, as modified, affirmed.

DISSENT BY: SMITH

DISSENT

SMITH, J.(dissenting):

I share my colleagues' dismay at the Legislature's behavior in dealing with, or rather failing to deal with, judges' salaries, but I cannot agree that any of its actions or inactions are unconstitutional.

The majority holds that the Legislature has violated the separation of powers by its failure to consider judicial salaries "based upon an objective assessment of the Judiciary's needs" (majority op at 259) or to give "appropriate respect and attention" to the needs of the judicial branch (majority op at 259). Undoubtedly, all branches of government should evaluate each other's needs objectively and treat each other with respect, but I know no warrant for thinking that objectivity and respect are commanded by the Constitution. These qualities are so amorphous and subjective that they can provide no workable standard for constitutional decision-making.

As the Appellate Division in *Maron* put it, "nothing in the NY Constitution forbids the political branches from engaging in politics when carrying out their political **[**918] [***116]** functions" (*Matter of Maron v Silver, 58 AD3d 102, 122, 871 NYS2d 404 [3d Dept 2008]*). Separation of powers is violated not when one of the three branches acts irresponsibly -- that happens all the time -- but when one threatens the place of another in the constitutional scheme. Thus I might well agree that separation of powers was violated if the actual or imminent effect of the Legislature's conduct were to make the recruitment of competent judges impossible, or to render judges subservient to the other branches of government. I need not expand on this point; it is well explained both in the Appellate Division's *Maron* opinion (*58 AD3d at 116-23*) and in *Atkins v United States (556 F2d 1028, 1054-57, 214 Ct Cl 186 [Ct Cl 1977], cert denied 434 US 1009, 98 S Ct 718, 54 L Ed 2d 751 [1978])*, a federal case involving facts much like those before us now.

Bad as the present situation is, neither of the disastrous conditions I have mentioned -- a bench that cannot be filled with competent people, or one whose

financial dependence makes it the slave of the Legislature -- exists or is close to existing. It is a depressing truth that some of our finest judges have left, or are **[*265]** thinking of leaving, their jobs because of the Legislature's failure to deal with the salary issue; but it is also true that there are still plenty of able judges, and plenty of able people who would willingly become judges, even at today's pay levels. And I have seen no evidence of judicial subservience to the Legislature; the problem, if there is one, is to restrain judges' understandable displeasure with that branch of our government.

I would affirm the Appellate Division order in *Maron*, and would modify the orders in *Larabee* and *Chief Judge* to dismiss all claims in the complaints.

Judges Ciparick, Graffeo, Read and Jones concur. Judge Smith dissents in an opinion. Chief Judge Lippman took no part.

In *Matter of Maron v Silver*: Order modified, without costs, by remitting to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein.

In *Larabee v Governor of the State of N.Y.*: Order modified, without costs, by granting judgment declaring that, under the circumstances of this case, as a matter of law, the State defendants' failure to consider judicial compensation on the merits violates the Separation of Powers Doctrine, and by allowing for the remedy discussed in the opinion herein, and, as so modified, affirmed.

In *Chief Judge of the State of N.Y. v Governor of the State of N.Y.*: On plaintiffs' appeal and defendants' cross appeal, judgment of Supreme Court and order of the Appellate Division modified, without costs, by granting judgment declaring that, under the circumstances of this case, as a matter of law, the State defendants' failure to consider judicial compensation on the merits violates the Sseparation of Powers Doctrine, and by allowing for the remedy discussed in the opinion herein, and, as so modified, affirmed.