To Be Argued By:
BERNARD W. NUSSBAUM
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New York County Clerk's Index No. 400763/08

Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Appellants-Respondents,

—against—

THE GOVERNOR OF THE STATE OF NEW YORK,

Defendant-Respondent,

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

Defendants-Respondents-Appellants.

BRIEF FOR PLAINTIFFS-APPELLANTS-RESPONDENTS

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PRELIMINARY STATEMENT

Over a decade has now passed since New York last adjusted the compensation of its judges. Much has happened in that decade. We have had three Presidents; three Governors; shifts in legislative power; times of prosperity; times of hardship. Throughout it all, the cost of living went up. By 2006, essentially everyone in this State's government "*agreed* on the *necessity*" of adjusting "judicial compensation to a level commensurate with [the Judiciary's] responsibilities"[1]—that six, eight, ten years is just too long to ask judges to go without a cost-of-living adjustment. Every other state in the Nation reached the same conclusion. But they, unlike New York, did something about it. Every last one of those forty-nine states increased their judges' salaries at least once—and, in some cases, more than once—in the last ten years.

New York, alone, did not. And so, now, New York ranks last—dead last—among the fifty states in its level of judicial compensation, after adjusting for the cost of living.

It was not for any valid reason that New York failed to act. In Supreme Court, the Governor and Legislature "*conceded* that a judicial pay increase was in order."[2] Indeed, the political branches actually agreed on the amount of the necessary salary adjustment—they agreed that a Supreme Court Justice should receive

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1 *Larabee* v. *Governor*, 65 A.D.3d 74, 78 (1st Dep't 2009) (emphasis added).

2 *Id.* at 81 (emphasis added).

the same amount that a federal district judge is paid.[3] And defendants acknowledged that "no governor or member of the legislature" had "spoken to the contrary."[4] As the First Department observed, on the merits, a pay adjustment was "uncontroversial, has the support of the other branches of government and was even poised for final legislative action."[5]

Yet no pay adjustment passed. As the First Department correctly concluded in *Larabee*—and as defendants did not dispute—the *only* reason for the political branches' failure to act had *nothing* to do "even *remotely* . . . [with] the *merits* of an adjustment in judicial compensation."[6] Nor did the failure have anything to do with the amount of the adjustment or fiscal constraints: implementing a pay adjustment putting State judges on par with federal judges would cost about $50 million per year; that is 0.04% of an overall State budget that exceeded $130 *billion* last year.[7] Rather, the Legislature turned the compensation of members of a constitutionally co-equal branch "into a *political weapon*" against the Governor, and by linking that compensation to unrelated political disputes, used its "self-serving grip on judicial compensation" to treat the "the Judiciary as a pawn" in its

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[3] *Id.* at 82; *Larabee* v. *Governor*, 20 Misc. 3d 866, 870 (Sup. Ct. N.Y. Co. 2008); R. 687-88. This amount approximately equals (or is slightly less than) the 1999 salary of a Supreme Court Justice, adjusted for inflation over the last ten years.

[4] *Larabee*, 20 Misc. 3d at 870.

[5] *Larabee*, 65 A.D.3d at 83.

[6] *Id.* (emphasis added).

[7] This $50 million would amount to 2% of last year's $2.5 billion Judiciary budget.

"interbranch conflict with the Governor."[8] This conduct, ruled the Appellate Division, "necessarily denigrated the third branch of government," constituted a "manifest affront to the Judiciary's structural independence," and "violated" "[t]he basic tenet of the separation of powers doctrine"—which is "to promote and maintain the independence and stability of each branch of government."[9]

Applying *Larabee*, the Appellate Division in this case affirmed Supreme Court's judgment on an identical separation-of-powers claim—the claim that there was improper linkage between judicial salaries and other unrelated matters, particularly legislative salaries. Defendants have appealed from the Appellate Division's decision on that claim, and, as necessitated by the procedural posture of the various appeals in this matter, the merits of that ruling will be addressed in the Chief Judge and Unified Court System's separate responding brief (to be filed on December 14). *This* brief will address plaintiffs' claims of error on their separate, direct appeal from Supreme Court's dismissal of two *separate, independent* claims for relief.

1. The first claim on the direct appeal from Supreme Court is that judicial compensation in New York has become inadequate and thereby violates the separation of powers created and guaranteed by the State Constitution. The separation of powers is, of course, by no means a novel concept. It arises from the text of the Constitution, which creates three separate and co-equal branches of govern-

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[8] *Larabee*, 65 A.D.3d at 82-84 (emphasis added).

[9] *Id.* at 84, 99.

ment: the Legislature, the Executive, and the Judiciary. The doctrine has been re-affirmed by this Court time and again, going back at least a century, when the Court made clear that the separation of powers is necessary "for the preservation of liberty itself."[10]

Out of these deeply rooted principles arises the proposition that, in order to protect the independence of the Judiciary and its status as a co-equal branch of government, the legislative and executive branches must provide judges adequate compensation. Defendants actually *conceded* this point in open court in *Larabee*. "*Yes*," an Assistant Attorney General unequivocally responded, when Justice Lehner asked whether, "[w]ithout any proviso," "there is a stage where the salary could be so low that it could be constitutionally objected to."[11]

And the case law makes clear that the Attorney General's office was right to concede this. As the highest court of a sister state has held, "it is the constitutional duty and the obligation of the legislature, in order to insure the independence of the judicial . . . branch of government, to provide compensation adequate in amount and commensurate with the duties and responsibilities of the judges involved."[12] "To do any less," that court went on, "violates the very framework of our constitutional form of government."[13]

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[10] *People ex rel. Burby* v. *Howland*, 155 N.Y. 270, 282 (1898).

[11] R. 692 (emphasis added).

[12] *Glancey* v. *Casey*, 447 Pa. 77, 86, 288 A.2d 812, 816 (1972).

[13] *Id.*

The cases also establish how adequacy is determined. To be constitutionally adequate, judicial pay must suffice "to insure the public's right to a competent and independent judiciary," which means it must be enough to allow the Judiciary to "maintain its ability to attract and retain the most qualified people."[14] Compensation thus must be "sufficient to provide judges with a level of remuneration proportionate to their learning, experience and [the] elevated position they occupy in our modern society."[15] Assessing the constitutional adequacy of judicial compensation—whether it is enough to allow the Judiciary to "attract and retain the most qualified people"—thus requires comparative analysis: a court must look to what judges make elsewhere, to what other lawyers and other professionals make in both the private and public sectors, and then must decide whether judicial pay is commensurate, given what judges do and what is expected of them. Courts may also look to historical levels of judicial pay to decide whether pay today is adequate.

It is no doubt true that, even after years of stagnation, the judges of this State earn a salary—$136,700 for a Supreme Court Justice—that many individuals and families would happily accept, particularly in today's economic climate. But that is not the relevant legal inquiry if the constitutional mandate to create and preserve the Judiciary as an independent, co-equal branch of government is to be fulfilled. Making the proper comparison to other lawyers and judges, present and past, leads to the conclusion that judicial salaries in New York today are unconsti-

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[14] *Goodheart* v. *Casey*, 521 Pa. 316, 323, 555 A.2d 1210, 1213 (1989).

[15] *Id.* at 322, 555 A.2d at 1212.

tutionally low. Virtually every comparable legal professional, from judges in other states, to federal judges, to senior public-sector lawyers, to partners in law firms large and small, to first-year associates in large New York City law firms, receives a salary higher than a New York judge.

History sadly highlights how appalling the situation has become, as New York judges today now earn less than they have at almost any time in at least a century. Indeed, at some times in this State's history, even very hard times, judges made (in real terms) *more than twice*—indeed, almost *thrice*—what they do today. Amidst the Great Depression in 1936, for example, Supreme Court Justices in New York City made $25,000 (the equivalent of about *$389,625* today), and Associate Judges of this Court made $22,000 (about *$342,871* today).[16] Even as recently as 1975, Associate Judges of this Court made $60,575 (about *$243,912* today)[17]—far more, of course, than any State judge is paid, or is even *asking* to be paid, today.

Never, ever have defendants contested any of these facts; never, ever have they argued that judicial pay is adequate and should not be raised. The numbers do not lie, and almost all State leaders have admitted publicly that a judicial pay raise is not only appropriate, but also necessary. As the First Department put it in *Larabee*, "[p]olitical leaders, including several governors and the leadership of each house of the Legislature, who often disagreed about many issues of government, in

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[16] R. 414, 416, 638.

[17] R. 639.

fact agreed on the *necessity* of such a measure."[18] Thus, there can be little dispute about either the legal requirement of adequate judicial compensation or the fact that judicial compensation is inadequate today.

2. The second cause of action presented on this direct appeal is equally grounded in controlling precedent and undisputed fact. It alleges that defendants have violated the Compensation Clause in Article VI, Section 25(a) of the State Constitution by discriminating against judges in setting compensation. Plaintiffs' Compensation Clause argument—unlike those in the other two judicial-pay cases now before the Court—rests on the United States Supreme Court's seminal decision in *United States* v. *Hatter*,[19] which confirms 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."[20] *Hatter* makes clear that actions that have the indirect effect of reducing pay may also violate the clause if they, whether purposely or not, "effectively single[] out . . . judges for unfavorable treatment" in comparison to other government employees.[21]

As demonstrated below, that is precisely—indisputably—what defendants have done here. In the last decade, the political branches have regularly approved salary increases for virtually all other State employees—approximately 195,000 of

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[18] 65 A.D.3d at 78 (emphasis added).

[19] 532 U.S. 557 (2001).

[20] *Id.* at 569.

[21] *Id.* at 561.

them—to account for inflation, but they have repeatedly refused to adjust judicial salaries. As also demonstrated below, under *Hatter*, the fact that the salaries of legislators (who can take lucrative outside jobs) and a small number of high State officials (who generally serve for a limited number of years and often leave for high-paying private-sector positions) have also been frozen makes no difference at all.

3. As previously noted, defendants' principal response to plaintiffs' claims has not been to argue that judicial compensation is adequate. Rather, they contend that plaintiffs' claims are precluded, specifically, by the Speech or Debate Clause of the State Constitution and, more generally, by the separation of powers doctrine. This response is but a thinly disguised—and deeply misguided—attempt to immunize defendants' unconstitutional conduct from judicial review. The Speech or Debate Clause indisputably does not apply. It only protects legislators and legislative deliberations; it does not preclude claims against non-legislative defendants, such as the State; and it certainly does not preclude plaintiffs' adequacy and discrimination claims, which turn solely on the fact of, and not the motives behind, what the Legislature has and has not done. Even apart from this, the Speech or Debate Clause has no application in cases—like this one—that present a separation-of-powers challenge brought by one co-equal branch of government against another. The clause must always be applied "in such a way as to insure the independence of the legislature without altering the historic balance of the three co-

equal branches of Government."[22] As a result, in a case of inter-branch conflict, the clause "does not immunize from judicial review a colorable constitutional claim, made in good faith, that the legislature has violated the separation of powers [and thereby] conducted itself outside the sphere of legitimate legislative activity."[23]

Finally, defendants' more direct invocation of the separation of powers as a defense to their separation-of-powers violations proves equally meritless. Defendants claim that the Court lacks power in any way to consider the budgetary and appropriations powers that the Constitution grants to the political branches; in effect, they claim that these powers lie beyond the power of judicial review. But nothing in the Constitution or this Court's precedent supports such a radical view. Judicial review does *not* "by any means suppose a superiority of the judicial to the legislative power."[24] It presupposes only what none can dispute: that "the constitution is superior to any ordinary act of the legislature."[25]

Sadly it has fallen to this Court to bring about a final resolution to this seemingly unending crisis involving judicial compensation. Plaintiffs recognize this case may present sensitivities, particularly at a time when the State and so many New Yorkers are facing financial challenges. But whatever the prevailing

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[22] *United States* v. *Brewster*, 408 U.S. 501, 508 (1972).

[23] *Office of the Governor* v. *Select Comm. of Inquiry*, 271 Conn. 540, 559-60, 858 A.2d 709, 722 (2004).

[24] THE FEDERALIST NO. 78 (Hamilton).

[25] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

sensitivities, "[i]t is emphatically the province and duty" of this Court "to say what the law is."[26] And that is what this case asks the Court to do: to determine whether defendants have violated their obligations to the Judiciary under the State Constitution and, if they have, to remedy that violation by setting a salary schedule that the Executive and the Legislature have conceded is appropriate.

QUESTIONS PRESENTED

1. Did defendants violate the independence of the Judiciary and the separation of powers created and guaranteed by the New York State Constitution by failing to provide adequate judicial compensation?

Supreme Court ruled in the negative, and plaintiffs contend that this ruling was erroneous.

2. Did defendants violate the Compensation Clause in Article VI, Section 25(a) of the New York State Constitution by discriminating against judges in setting compensation?

Supreme Court ruled in the negative, and plaintiffs contend that this ruling was erroneous.

STATEMENT OF JURISDICTION

Plaintiffs appealed directly to this Court from the portion of Supreme Court's order that dismissed their first and second causes of action, which asserted

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[26] *Id*. at 177.

that the judicial salaries codified in Article 7-B, sections 221 through 221-i, of the New York Judiciary Law are unconstitutional because (1) defendants failed to provide adequate judicial compensation, and (2) defendants discriminated against judges in setting compensation. *See* R. xv-xvi, 276-79. This Court has jurisdiction to hear this direct appeal on these constitutional issues under CPLR 5601(b)(2), which provides that "[a]n appeal may be taken to the court of appeals as of right . . . from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States." Because the only question presented on plaintiffs' appeal is the constitutionality of the salary provisions in the Judiciary Law, the Court has jurisdiction pursuant to CPLR 5601(b)(2).

Plaintiffs are also "aggrieved parties" within the meaning of CPLR 5511 because they did not receive all of the relief they sought below, even though Supreme Court ruled in plaintiffs' favor on their cause of action alleging that defendants violated the separation of powers by improperly linking judicial salary increases to legislative raises and other unrelated political issues. As this Court has held, "the successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief," such as where "the successful party received an award less favorable than he sought or a judgment which denied him some affirmative claim or substantial right." *Parochial Bus Sys., Inc.* v. *Bd. of Educ.*, 60 N.Y.2d 539, 544-45 (1983) (ci-

tations omitted); *see also Becker* v. *Becker*, 36 N.Y.2d 787, 789 (1975) ("[W]here important rights may turn on the grounds upon which a judgment is based, the nominally successful party might in a practical sense be aggrieved when on appeal one of those grounds is stricken."). Here, apart from an order adjusting judicial compensation,[27] plaintiffs sought three distinct and independent declaratory judgments declaring the parties' legal rights and obligations on each of the three claims.[28] *See* R. 281-82. Supreme Court granted only *one* of the three requested declaratory judgments, ordered no relief on the other two causes of action, and did not order a specific salary adjustment as sought by plaintiffs. *See* R. xxiv.[29] This failure to order complete relief aggrieved plaintiffs.

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[27] Plaintiffs sought an order fixing the salaries of the judges of each State-paid court, retroactive to no later than April 1, 2005, such that Justices of the State Supreme Court would receive salaries equal to the salaries of United States District Judges, with corresponding salary adjustments for the judges of the other State-paid courts. R. 281-82.

[28] Plaintiffs sought declarations (1) that defendants violated the independence of the Judiciary and the separation of powers by failing to provide adequate judicial compensation, (2) that defendants violated the Compensation Clause in Article VI, Section 25(a) of the State Constitution by treating judges in a discriminatory fashion, permitting judicial salaries to diminish by virtue of inflation while raising the salaries of virtually all other State employees, and (3) that defendants violated the separation of powers and the independence of the Judiciary by improperly linking judicial salaries to unrelated issues and thereby refusing to enact into law reforms of judicial compensation that defendants had conceded to be necessary. R. 281.

[29] Supreme Court declared that "through the practice of linkage the defendants have unconstitutionally abused their power" and ordered defendants to "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." R. xxiv.

Another potential impediment to this appeal, asserted by defendants in correspondence with the Court, has now been resolved. Defendants argued that this case could not proceed while their separate appeal from Supreme Court's ruling for plaintiffs on their third cause of action (the "improper linkage" claim) was pending in the Appellate Division. But the Appellate Division has now rendered a decision affirming Supreme Court's order, and defendants have appealed that decision to this Court. There is no dispute that the Court has jurisdiction to hear defendants' appeal, and the Court has scheduled briefing on that appeal to commence next month. The Court thus now has before it all of the issues that it needs to decide this case in its entirety.[30]

STATEMENT OF THE CASE

A. Defendants' repeated failures to adjust judicial compensation

New York State last adjusted the compensation of its State-paid judges over a decade ago, on January 1, 1999. *See* L. 1998, ch. 630 (amending JUDICIARY LAW art. 7-B). In the years since then, New York judges have not received so much as a cost-of-living adjustment, despite steady inflation that has eroded the real value of their salaries by at least 33 percent. *See* R. 303. No other state in the Nation has subjected its judges to such a lengthy period of stagnant compensation. The judges in every other state, as well as all federal judges, have received one or

[30] A more detailed explanation of the bases for this Court's jurisdiction over this appeal is set forth in plaintiffs' letters to the Clerk of the Court of Appeals dated July 24, 2009 and July 27, 2009.

more pay increases since 1999, with an average increase of over 3.2 percent per year. R. 303, 345.

As a result, New York judges' salaries—which once ranked first in the Nation—have fallen far behind those of their colleagues in other states. *See* R. 303-05. According to a May 2007 report of the nonpartisan National Center for State Courts ("NCSC"), the State of New York had the dubious distinction of ranking 48th in the Nation in judicial pay when the State's high cost of living is taken into account. R. 344. Since the report was issued, the two states that ranked behind New York—Oregon and Hawaii—raised their judicial salaries. *See* R. 304, 389-90; Nat'l Ctr. for State Courts, National Ranking by Position (Most Current), http://bit.ly/1Cm3Tz. So now New York ranks *last* among the States. *See* R. 304.

Although a casual observer might attribute these woeful statistics to the fiscal constraints that New York now faces, in truth economic circumstances have never been to blame for defendants' intransigence on judicial compensation. The last decade has seen both highs and lows for the State and national economies, and it was during relatively good times in 2005 that former Chief Judge Kaye began pressing for judicial pay adjustments with more urgency. *See* R. 315. At that time, already six years after the last salary increase, then-Governor Pataki conceded the need to adjust judicial pay, noting that "[w]e need to continue to do everything we can to attract the highly skilled professionals that have served our state so well" and promising that "we can address this issue before the end of the legislative ses-

sion, and provide our judges and justices with the support they have earned and deserve." R. 316-17, 567.

When the promised pay raise did not come in 2005—or 2006, or 2007, or 2008—it had nothing to do with the State's ability to pay. Indeed, at the same time that New York's politicians were refusing to do anything to relieve judges' deteriorating financial circumstances, they were regularly increasing the salaries of virtually all other State employees to compensate for increases in the cost of living. R. 314. In total, approximately 195,000 New York State government employees received regular salary increases in the past decade. *Id.* According to the NCSC, these salary increases for State employees totaled over 24 percent between January 1999 and May 2007, R. 345, and some State employees have now received raises of over 30 percent. *See* R. 315.

The sums of money that would have been required to end the judicial pay freeze are small in comparison to what New York has paid to raise other government employees' salaries, and they are utterly miniscule in comparison to the State's overall budget. Indeed, the Legislature included appropriations for judicial pay increases in two of its budgets—$69.5 million in 2006 and $48 million in 2008—further demonstrating that this dispute was never about fiscal constraints. *See* R. 318, 323.[31] But in both of those years, the Legislature and Executive re-

[31] Former Governor Spitzer also announced a budget proposal in January 2007 that included $111 million for judicial pay increases, but the Legislature removed that appropriation from the budget at the last minute. R. 318-19.

fused to pass subsequent legislation necessary to implement the judicial pay adjustments that had been included in the budget. *See id.*

Just as those refusals were not caused by any inability to pay, they were not caused by any disagreement about the merits of a judicial pay increase. Like Governor Pataki, subsequent Governors and leaders of the Legislature publicly voiced their support for judicial pay increases. Governor Spitzer said that "the judges in the State of New York deserve a pay raise, they deserve to be paid a sufficient sum not only so we can persuade lawyers in the private sector to join the ranks of our judiciary, but also to compensate those who are on the bench now for the hard work they do." R. 581. Governor Paterson, too, has acknowledged that the State must "find a way to raise . . . [judicial] salaries because we are trying to get the best and the brightest to stay on the bench, knowing that their salaries sometimes are not even up to first year associates at major law firms." R. 622. Speaker Silver has also said that judges "absolutely" deserve a pay raise, R. 586, and former Senate Majority Leader Bruno led the Senate vote in favor of pay raises for judges, R. 323-24.

There was even widespread agreement among defendants that a judicial pay raise should restore parity between the salaries of Supreme Court Justices and United States District Judges. In 2005, Governor Pataki proposed to increase the salaries of all State-paid judges, with the salaries of Supreme Court Justices to be set at parity with those of their federal counterparts. R. 316-17, 566. In 2006, as noted, the Legislature and the Executive agreed to an appropriation for judicial sal-

ary increases of $69.5 million, the full amount requested by Chief Judge Kaye in a budget proposal that called for restored parity with federal salaries. *See* R. 318, 574. And in 2007, the Senate passed two judicial-pay bills that would have set the salaries of Supreme Court Justices at $165,200, which was then the salary of a U.S. District Judge. *See* R. 45, 129, 321-22, 329. Justice Lehner thus correctly found that "here there is no open policy issue to be resolved as all parties have agreed that the judiciary is entitled to an adjustment and the amount thereof." *Larabee* v. *Governor*, 20 Misc. 3d 866, 874 (Sup. Ct. N.Y. Co. 2008).[32]

Despite the absence of any policy dispute or any meaningful fiscal constraint, judicial pay increases were repeatedly derailed. Judicial compensation became a pawn—a hostage—in completely unrelated political squabbles between the legislative and executive branches. Legislators refused to adjust judicial salaries unless their own salaries were increased at the same time, and a series of Governors refused to approve legislative pay raises unless legislators agreed to an oft-

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[32] Justice Lehner also noted: "At the argument on this motion, defendants' counsel stated that: 'There is a great deal of positive feeling in favor of an increase [in the salary of Supreme Court Justices] to the current salary of federal judges [$169,300] [and] no governor or member of the legislature, to my knowledge, has spoken to the contrary.'" *Larabee*, 20 Misc. 3d at 870 (alterations in original); *see also Larabee* v. *Governor*, 65 A.D.3d 74, 82 (1st Dep't 2009) ("During oral argument on the summary judgment motion, defendants reiterated the acknowledgment that members of the New York Judiciary deserved a salary increase, even conceding that defendants did not oppose an increase matching the salary paid to Federal District Court judges . . . ."); R. 687-88 (statement of Assistant Attorney General in *Larabee* that "the judges deserve a raise," that the Senate passed a bill providing for "parity with federal judges," and that "there is no dispute as to the amount").

changing raft of initiatives reported to include campaign finance reform, charter schools, congestion pricing, and other unrelated matters. R. 316.

Defendants have publicly conceded that these conflicts between the Executive and the Legislature were at play in their refusals to act on judicial compensation. In 2005, for example, Senator Bruno explained that the Legislature would not support Governor Pataki's proposal to adjust judicial salaries without a corresponding raise for legislators. He said: "Historically, things have been, sort of, you know, gone together. . . . Previously, we did things together. OK? Previously. There's been no discussion and that's why, frankly, we have no bill and nothing's getting done." R. 569. Speaker Silver made a similar admission in 2007, stating that the Legislature would not adjust judicial pay without the creation of a commission empowered to increase the salaries of judges and legislators: "[S]tate judges 'absolutely' deserve a pay raise. But [Speaker Silver] said his members 'were not prepared to deal' with a judicial pay raise bill without the salary-increase commission also being created. 'There were no votes for it,' he said." R. 586. One senator put it even more bluntly: "'There's no question about it; if you want to call it Albany politics, there are certain forces that want to make sure the Legislature gets its pay raise too.'" R. 592.

B. The effects of the judicial pay freeze

After more than ten years without any adjustment, New York judicial compensation has fallen to new lows. As noted above, New York now ranks *last* among all states in judicial compensation after adjusting for cost of living. But that

sorry statistic barely begins to tell the story of how inadequate New York judicial salaries have become.

New York judges now also earn far less than federal judges. Historically, Supreme Court Justices have been paid on par with, or more than, United States District Judges. *See* R. 306-07. In January 1999, both groups of judges earned the same salary. R. 303, 329. By 2008, however, federal district judges' salaries had increased by about 24 percent, placing them more than $32,000 ahead of their New York counterparts. R. 306-07; *see also* Exhibit B to this brief. And even these significantly higher federal judicial salaries have been deemed inadequate by the Chief Justice of the United States, who has stated that "the failure to raise judicial pay" for federal judges "has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." R. 307, 417-18.

Within New York State, judges now earn considerably less than other professionals with comparable education and experience, even in the public sector. The list of government employees that earn tens, if not hundreds, of thousands of dollars more than judges is long and growing—from District Attorneys in New York City, to the deans of New York's public law schools, to professors in the State and City University systems, to public school administrators. R. 307-08, 345-46; *see also* Exhibit C to this brief. Even some nonjudicial employees in the judicial branch now earn more than the judges for whom they work. R. 309. New

York judicial salaries also lag well behind those who lead many not-for-profit organizations. R. 347 n.29; *see also* Exhibit D to this brief.

The disparity between judges and other public-sector employees has only grown as the State has approved raises for others while denying any pay adjustment to judges. For example, in January 1999 the highest salary on any of the State's published salary schedules was approximately $116,000—about $20,000 less than a Supreme Court Justice's salary. *See* CIV. SERV. LAW § 130 (1999). By 2009, the salary at that pay grade had increased 35 percent to about $157,000—now thousands more than the stagnant salary of a Supreme Court Justice. *See* CIV. SERV. LAW § 130 (2009). That example is hardly unique. Numerous State employees who earned less than judges in 1999 have now leapfrogged over them, earning more than judges today. *See* R. 554-61. (A pair of scatter graphs presenting the salaries of 160 state employees who have leapfrogged over judges in the last decade is attached to this brief as Exhibit E.)

Although judges cannot and do not expect to make what they could make in private practice, the magnitude of the disparity between judges and attorneys in law firms is striking. According to the May 2008 *American Lawyer*, no fewer than twenty major firms in New York City (with a total of 2,700 partners) had profits per partner ranging from over $1 million to slightly under $5 million. R. 447, 452. The following year, with the economic downturn in full swing, profits per partner still topped the $1 million mark at nineteen New York City firms. *See The Am Law 100, 2009*, AM. LAW., May 2009, at 174. At such firms, first-year associ-

ates—new law school graduates, many of whom have not yet passed the bar—now earn a $160,000 base salary, more than any New York State judge, including the Chief Judge. R. 312, 347. Even at smaller firms in New York State, compensation far outstrips judicial salaries. A statewide study released in 2004 by the New York State Bar Association found that the annual compensation of partners at firms with ten or more lawyers averaged $293,567, more than twice the pay received by a Supreme Court Justice. R. 311, 441; *see also* Exhibits F & G to this brief.

The current salaries of New York judges also pale in comparison to historical judicial compensation. For example, in 1909, salaries of Supreme Court Justices in New York City were $17,500, the equivalent of *over $400,000* today, and in 1936, in the middle of the Depression, they were $25,000, the equivalent of about *$390,000* today—both almost *three times* what Supreme Court Justices earn today. *See* R. 306-07, 393-95, 414, 416. Historical Court of Appeals salaries tell the same story. In 1926, for example, a Judge of the New York Court of Appeals received a salary of $22,000 (*see* L. 1926, ch. 94), the equivalent of over *$269,000* today, *see* R. 305, 634. In 1952, a Judge of the Court of Appeals received a salary of $32,500 (*see* L. 1952, ch. 88), the equivalent of over *$265,000* today. *See* R. 305, 634. And in 1975, a Judge of the Court of Appeals earned $60,575 (*see* L. 1975, ch. 152), the equivalent of about *$244,000* today. *See* R. 305, 634.

Attached as Exhibit A to this brief is a graph illustrating these historical salaries. It shows New York judicial compensation over a 120-year period in 2008 dollars, and it demonstrates that, over this lengthy period of time, real judicial pay

was well in excess of what it is today, and that it is now near an historic low—the lowest it has ever been without prompting a significant remedy by the Legislature.

C. Procedural history of this action

After years of unsuccessful efforts to persuade the legislative and executive branches to fulfill their obligations to the Judiciary, former Chief Judge Judith Kaye was left with no option but to commence litigation. On April 10, 2008, the Chief Judge filed a complaint in Supreme Court, New York County, in her official capacity and on behalf of the New York State Unified Court System, which is the independent judicial branch of the State's government. Named as defendants were the other two co-equal branches of government—the Governor, the two houses of the Legislature, and their respective leaders—and the State of New York.

Plaintiffs' complaint asserted three causes of action. First, plaintiffs alleged that defendants violated the separation of powers and the independence of the Judiciary guaranteed by the New York State Constitution by failing to provide adequate judicial compensation. *See* R. 276-77. Second, plaintiffs alleged that defendants violated the Judicial Compensation Clause in Article VI, Section 25(a) of the New York State Constitution by discriminating against judges, increasing the salaries of virtually all other State employees to account for inflation while refusing to adjust judicial salaries. *See* R. 278-79. Third, plaintiffs alleged that defendants violated the separation of powers and the independence of the Judiciary guaranteed by the New York State Constitution by holding judicial compensation hostage to issues unrelated to the Judiciary, improperly linking judicial salary in-

creases to legislative raises and other unrelated political issues. *See* R. 279-80. Plaintiffs sought declaratory judgments on each of these causes of action, as well as an injunction fixing the salaries of all State-paid judges. *See* R. 281-82.

In June 2008, defendants moved to dismiss the complaint and for summary judgment in their favor. Plaintiffs opposed the motions and also requested that the court search the record and grant summary judgment in their favor pursuant to CPLR 3211(c) and 3212(b), submitting affidavits in support of that request. R. 302-646. Justice Lehner heard argument on the motions on July 17, 2008. R. 740-893.

Instead of ruling on the motions immediately, Justice Lehner decided to wait for the Appellate Division, First Department's decision in *Larabee* v. *Governor*, in which Justice Lehner had previously granted summary judgment to a group of plaintiff judges on a separation-of-powers cause of action nearly identical to plaintiffs' third cause of action in this case. *Larabee* v. *Governor*, 20 Misc. 3d 866 (Sup. Ct. N.Y. Co. 2008). On June 2, 2009, the Appellate Division unanimously affirmed Justice Lehner's decision in *Larabee*, including his declaration that defendants "through the practice of linkage unconstitutionally abused their power" and his order that defendants "proceed in good faith to adjust judicial compensation." *Larabee* v. *Governor*, 65 A.D.3d 74, 100 (1st Dep't 2009).

On June 15, 2009, Justice Lehner ruled on the pending motions in this case. He granted defendants' motions to dismiss the first two causes of action, which allege that defendants violated the State Constitution by failing to provide

adequate judicial compensation and by discriminating against the Judiciary. R. xxii. On the third cause of action, Justice Lehner followed his recently affirmed decision in *Larabee* and granted summary judgment in plaintiffs' favor, "declaring that through the practice of linkage the defendants have unconstitutionally abused their power by depriving the judiciary of any increase in compensation since 1998." R. xxiv. Justice Lehner ordered that "defendants remedy such abuse by proceeding in good faith to adjust [judicial] compensation to reflect the increase in the cost of living since 1998, with an appropriate provision for retroactivity." *Id.*[33]

Plaintiffs and defendants separately appealed from Supreme Court's order. Under CPLR 5601(b)(2), plaintiffs appealed directly to this Court from the portion of the order dismissing the first and second causes of action (the adequacy and discrimination claims). Defendants appealed to the Appellate Division, First Department, from the portion of the order that granted summary judgment to plaintiffs on their third cause of action. After granting plaintiffs' request for expedition, the Appellate Division heard argument on September 10, 2009, and on September 15 issued an order unanimously affirming Supreme Court's grant of summary judgment on the third cause of action for the reasons set forth in its decision in *Larabee*. R. xxviii. On September 29, 2009, defendants appealed to this Court from the Appellate Division's order. R. xxv-xxvii.

Plaintiffs' and defendants' appeals are both currently before this Court. Pursuant to the Court's scheduling letter dated October 1, 2009, plaintiffs' appeal

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[33] Justice Lehner also dismissed the Governor from the action. R. xxii.

on the adequacy and discrimination issues is being briefed first. Defendants' appeal, relating to the third cause of action—the "improper linkage" cause of action—on which Supreme Court and the Appellate Division held that defendants violated the separation of powers, will be addressed in subsequent briefing. The appeals in this case are scheduled to be argued at the same time as the appeals in *Larabee* and a third judicial-pay case, *Maron* v. *Silver*, 58 A.D.3d 102 (3d Dep't 2008), which the Third Department decided in defendants' favor last year.

ARGUMENT

POINT I

IF THE JUDICIARY IS TO CONTINUE TO FUNCTION AS AN INDEPENDENT, CO-EQUAL BRANCH OF GOVERNMENT, JUDICIAL COMPENSATION MUST BE ADEQUATE. DEFENDANTS HAVE BREACHED THEIR CONSTITUTIONAL DUTY TO PROVIDE ADEQUATE COMPENSATION.

Plaintiffs' first cause of action asserts that judicial salaries in New York have become unconstitutionally inadequate. This adequacy claim starts with the legal proposition that the separation of powers guaranteed by the New York State Constitution requires the Legislature and the Executive to provide adequate judicial compensation, and it concludes with the demonstrable fact that judicial compensation in this State is inadequate today. *See* R. 276-77.

Justice Lehner concluded that plaintiffs' adequacy claim was foreclosed by the Appellate Divisions' decisions in *Larabee* v. *Governor* and *Maron* v. *Silver*.

See R. xxiii. But neither *Larabee* nor *Maron* involves an adequacy claim at all. Justice Lehner previously recognized this in his opinion in *Larabee*, which noted that, in that case, "plaintiffs do *not* argue that a specified amount of compensation provided by statute as fixed by the legislature can be so low as to constitute a constitutional violation." *Larabee* v. *Spitzer*, 19 Misc. 3d 226, 235 (Sup. Ct. N.Y. Co. 2008) (emphasis added). The First Department accordingly did not address the issue of adequacy in its opinion in *Larabee*. *See Larabee* v. *Governor*, 65 A.D.3d 74 (1st Dep't 2009). Likewise, in *Maron*, the Third Department explicitly noted that "[u]nlike *Larabee* or this case, *Kaye* [now *Chief Judge*] does involve a claim that judicial compensation is substantively inadequate," and the court made clear that its decision "should in no way be interpreted as expressing any opinion regarding the sufficiency of the allegations proffered by the Chief Judge." *Maron* v. *Silver*, 58 A.D.3d 102, 119 n.9 (3d Dep't 2008).

As is shown below, Justice Lehner erred in declining to grant summary judgment for plaintiffs on the adequacy claim in this case. Judicial compensation in this State has become inadequate as a matter of law, and there is no disputed issue of fact in this regard.

A. The Constitution requires the State to provide adequate judicial compensation.

Plaintiffs' adequacy claim is based on a straightforward proposition: that there is some minimum level of judicial compensation below which it becomes so inadequate as to violate the Constitution. Defendants actually conceded this

proposition in *Larabee*, where plaintiffs were not asserting an explicit adequacy claim. Justice Lehner put the question of constitutional adequacy rather directly to the Assistant Attorney General who was then representing defendants: "*So there is a stage where the salary could be so low that it could be constitutionally objected to, right*? . . . *Without any proviso.*" The answer was unqualified. "*Yes*." R. 692 (emphasis added). Not only was there no proviso, but the Assistant Attorney General also went on to concede that "[i]f we're paying our Supreme Court justices the entry level salary for Assistant District Attorneys or Assistant Attorneys General or an agency counsel, maybe then we're at the line where it is on its face too low to comply with the separation of powers." R. 694. The principle isn't at issue, only the amount is.

The principle flows from the separation of powers. At the heart of the tripartite government established in the New York State Constitution is the separation of powers among "three co-ordinate and coequal branches." *County of Oneida* v. *Berle*, 49 N.Y.2d 515, 522 (1980); *see also LaGuardia* v. *Smith*, 288 N.Y. 1, 5-6 (1942). The Constitution's very "object . . . is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers," and "[i]t is not merely for the convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself." *People ex rel. Burby* v. *Howland*, 155 N.Y. 270, 282 (1898). Thus, "a foundation of free government is imperiled when any one of the coordinate branches . . . interferes with another." *County of Oneida*,

49 N.Y.2d at 522. Liberty is particularly endangered when the Judiciary is threatened, because

> Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power.

Burby, 155 N.Y. at 282; *see also* THE FEDERALIST NO. 78 (Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

One method by which the Constitution protects the independence of judges is through the Compensation Clause in Article VI, Section 25(a), which prohibits the diminishment of judicial pay. But it is not the only way. Often "'[t]he concept of separation of powers is not one that is capable of precise legal definition.'" 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 3.12(a), at 545 (4th ed. 2007). That is because much of the law governing the separation of powers must be implied or inferred from the *structure* of the Constitution, and not just its text. Regardless of their philosophical differences, judges and scholars of constitutional law all acknowledge that "constitutional structure is real and informative, rather than ephemeral and opaque, to the actual practice of reaching useful conclusions about live constitutional issues by working one's way patiently from the structure to be observed to specific legal propositions about the permissible and the forbidden." 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-13, at 41 (3d ed. 2000). When "there is no constitutional text speaking to [a] precise question," courts must

"turn . . . to consideration of the structure of the Constitution, to see if [they] can discern among its 'essential postulate[s],' a principle that controls." *Printz* v. *United States*, 521 U.S. 898, 905, 918 (1997) (Scalia, J.) (citation omitted).

Working one's way from constitutional structure here leads inexorably to the essential postulate that the State Constitution guarantees adequate judicial compensation. The Constitution creates an independent judicial branch, and it recognizes that in order to populate that judicial branch with qualified judges and to assure judicial independence, judicial compensation must be paid—and protected. That is the purpose of the specific command of the Compensation Clause: the federal Framers, for example, prohibited diminution of judges' pay "not as a private grant, but as a limitation imposed *in the public interest*," to ensure the independence of judges. *O'Donoghue* v. *United States*, 289 U.S. 516, 533 (1933) (emphasis added). The idea was "to attract good and competent [people] to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich." *Id.* The specific protection against diminution of judicial pay is "but a part of a more global protection of the fundamental, coequal role of the Judiciary, as provided by the doctrine of separation of powers." *Stilp* v. *Commonwealth*, 588 Pa. 539, 577, 905 A.2d 918, 940 (2006).

History confirms the point: it shows that the Framers imposed on the political branches the task of setting judicial compensation in order to guarantee *ade-*

quate compensation. The Framers of the federal Constitution specifically granted the executive and legislative branches the power to increase judicial pay in order "to meet economic changes, such as substantial inflation." *United States* v. *Will*, 449 U.S. 200, 227 (1980). In fact, to insulate judges from the influence of legislators, the delegates to the federal Constitutional Convention initially considered barring Congress from changing judges' salaries in any way—even from increasing them. But the delegates then realized that this wouldn't work, for as Alexander Hamilton put it, "What might be extravagant today, might in a half a century become penurious and inadequate." THE FEDERALIST NO. 79. To combat inflation, James Madison argued that judicial pay should be indexed, "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). In response, Gouverneur Morris and others pointed out that commodities like wheat could fluctuate so much in value, and standards of living could change so significantly, that indexing would not protect against inadequacy. *Id.*

In the end, the federal Framers chose to prohibit only legislative diminution of judicial salaries, while entrusting to Congress the power to increase salaries to make up for what Hamilton called "fluctuations in the value of money and the state of society." THE FEDERALIST NO. 79. Thus, it is to protect against inadequacy that the Constitution both prohibits diminution and allows for judicial pay "from time to time [to] be altered, as occasion shall *require*." *Id.* (emphasis

added). Ensuring adequacy, in other words, was understood to be a *requirement*—not an option.

New York's history speaks similarly: it makes clear that the Constitution imposes a duty on legislators to set judicial compensation in order to insure its adequacy. For much of this State's history, its Constitution differed from the federal Constitution in the treatment of judicial pay. *See generally Maron*, 58 A.D.3d at 113-14 (tracing history of judicial compensation provisions in New York Constitution). From 1846 to 1868, and from 1894 to 1909, the State Constitution established that judicial pay "shall not be increased or diminished"; from 1909 to 1925, judges' compensation was specifically fixed in the Constitution itself. But because these alternatives did not always ensure the adequacy of judicial pay, the State Constitution was twice amended to prohibit diminution but to allow increases. During the 1868 State Constitutional Convention, which for the first time empowered the Legislature to increase judicial pay, one delegate explained: "We live at a time and in a country where the currency and values are constantly changing from year to year, from month to month, and almost from day to day. *Who can say today what the standard of value will be six months or one year hence*?" IV PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1867-68, at 2440 (emphasis added).

Finally, in 1925, after a failed experiment with fixing judicial salaries in the Constitution itself—and after a terrible experience with wartime inflation just a few years before—the State for a second time adopted the federal formula, as re-

flected in today's Constitution. As one contemporary report of the Legislature made clear, the object of the change was to guarantee adequate compensation:

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

JUDICIARY CONSTITUTIONAL CONVENTION OF 1921: REPORT OF THE LEGISLATURE 29 (Jan. 4, 1922) (emphasis added).

Put simply, with the legislative power to set judicial compensation comes an unequivocal *duty* to set that compensation at *adequate* levels. And the case law so holds. It is the "duty and the obligation of the legislature," the Supreme Court of Pennsylvania has held, to provide judges with "compensation adequate in amount":

> We agree with the appellants that, even though the [Pennsylvania] Constitution of 1968 simply mandates that judicial compensation shall be "fixed by law," . . . *it is the constitutional duty and the obligation of the legislature, in order to insure the independence of the judicial (as well as the executive) branch of government, to provide compensation adequate in amount and commensurate with the duties and responsibilities of the judges involved*. To do any less violates the very framework of our constitutional form of government.

Glancey v. *Casey*, 447 Pa. 77, 86, 288 A.2d 812, 816 (1972) (emphasis added).

The Pennsylvania Supreme Court thus held that the Legislature had the constitutional obligation to provide "adequate" judicial pay even though, as in the New York Constitution, the text of the Pennsylvania constitution did not mention adequacy. *Id.* Indeed, the *Glancey* court observed that earlier Pennsylvania constitutions had specifically mentioned adequacy, by "provid[ing] that judges should 'receive for their services an adequate compensation.'" *Id.* That the word "adequate" had been *deleted* made no difference. "*[T]he very framework of our constitutional form of government*"—the tripartite governmental structure, the separation of powers—*required* that judicial compensation be adequate. *Id.* (emphasis added). The duty "arises by implication from the tripartite nature of our government and the importance of maintaining the independence of each of the three branches of government," and, in particular, the need "to insure the proper functioning of the judicial system in an unfettered and independent manner." *Id.* at 83-84, 288 A.2d at 815; *accord Goodheart* v. *Casey*, 521 Pa. 316, 318-24, 555 A.2d 1210, 1211-13 (1989).

Pennsylvania does not stand alone. In New York, there are the decisions of the Third Department in *Kelch* v. *Town Board*, 36 A.D.3d 1110 (3d Dep't 2007), the Fourth Department in *Catanise* v. *Town of Fayette*, 148 A.D.2d 210 (4th Dep't 1989), and the Second Department in *Roe* v. *Board of Trustees*, 65 A.D.3d 1211, 2009 N.Y. Slip Op. 06674 (2d Dep't Sept. 22, 2009). These cases involved town and village justices, who are *not* protected by the no-diminishment provision of the State Constitution's Compensation Clause. So the claims in those cases

were pure separation-of-powers claims, premised on constitutional structure. And in all three cases, the Appellate Divisions concluded that the challenged judicial compensation violated the Constitution anyway, despite the inapplicability of the Compensation Clause, and even though the judicial posts were obviously only part-time jobs: *Kelch* held that a judge's "meager salary" "violated public policy and the constitutional princip[les] of separation of powers," 36 A.D.3d at 1112; *Catanise* held a reduction in judicial pay to be "an impermissible encroachment upon the independence of the judiciary," 148 A.D.2d at 213; and *Roe* held that a reduction in benefits "violate[d] the separation of powers among our branches of government," 2009 N.Y. Slip Op. 06674, at *2. The *Kelch* court relied on the precedents from Pennsylvania. 36 A.D.3d at 1111-12 (citing *Goodheart*, 521 Pa. at 320-22, 555 A.2d at 1211-13, and *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. 45, 52-53, 274 A.2d 193, 197, 199 (1971)).

The Appellate Divisions recognized the critical point, set forth by this Court long ago and still deeply rooted in its precedent: "Legislation cannot be sustained where 'the independence of the judiciary and the freedom of the law will depend on the generosity of the legislature.'" *Kelch*, 36 A.D.3d at 1111 (quoting *Catanise*, 148 A.D.2d at 213 (quoting *Burby*, 155 N.Y. at 283)). The same principle controls here.

B. Defendants have breached their constitutional duty to provide adequate judicial compensation.

The principle of adequacy having been established and conceded, the question becomes the amount needed for adequacy. Again, the Pennsylvania cases give guidance. To meet the standards of the Constitution, judicial compensation must be "adequate in amount and commensurate with the duties and responsibilities of the judges involved." *Glancey*, 447 Pa. at 86, 288 A.2d at 816. The level of pay must suffice to "insure the public's right to a competent and independent judiciary," which means it must be enough to allow the Judiciary to "maintain its ability to attract and retain the most qualified people." *Goodheart*, 521 Pa. at 323, 555 A.2d at 1213. In part, this means that adequacy must be considered in light of private-sector pay—specifically,

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

Id. at 323-24, 555 A.2d at 1213 (emphasis added).

In short, for judicial compensation to be constitutionally adequate, it must be

> sufficient to provide judges with a level of remuneration proportionate to their learning, experience, and [the] elevated position they occupy in our modern society. Inherent in this definition is the increasingly costly obligations of judges to their spouses and families, to the rearing and education of their children and to the expectation of a decent, dignified life upon departure from the bench.

Id. at 322, 555 A.2d at 1212. This follows directly from what Chancellor Kent described as one of the Framers' primary concerns in protecting judicial compensation: "to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuit of private business for the duties of that important station." *O'Malley* v. *Woodrough*, 307 U.S. 277, 286 (1939) (Butler, J., dissenting) (quoting 1 KENT COM. 294).

To determine what is "a level of remuneration proportionate to [judges'] learning, experience, and [the] elevated position they occupy," and to find what is needed "to secure a succession of learned men" and women to the bench, thus requires a comparative analysis. The separation-of-powers analysis must look to what judges make elsewhere, to what other lawyers, and other professionals, make in both the private and public sectors, and inquire whether judicial pay is commensurate, given what judges do and what is expected of them. Also relevant are historical levels of judicial pay. *Goodheart*, for example, looked to "the salary offered in the federal judicial system," in part because state courts "compete" with

that salary. 521 Pa. at 325, 555 A.2d at 1214. The court also considered "the compensation [that had been] established as adequate by the legislature" in the past. *Id.* at 327, 555 A.2d at 1215.

Once inadequacy is established using these comparative metrics, it is not necessary to establish further that the inadequate compensation is impairing the Judiciary's ability to function. The Pennsylvania Supreme Court in *Goodheart* rejected that state's argument that a showing of constitutional inadequacy "requires a demonstration that the increased [compensation was] reasonably necessary for the administration of justice, and without such increases, the independent functioning of the judicial branch is impaired." *Id.* at 322, 555 A.2d at 1213. It was enough to show that "[c]ompensation [was] appreciably lower than the expected value of [judicial] services," as that "will inevitably result in the inability to obtain the quality of performance required." *Id.* at 324, 555 A.2d at 1213. As Justice Lehner aptly put it in declining to impose an "impairment" requirement in *Larabee*, "[j]udges do not have to violate their oath of office, by which they commit themselves to perform their duties 'to the best of their ability,' in order to be able to establish that the defendants have violated the Constitution." 19 Misc. 3d at 234. By the time actual impairment of the judicial system is visible, it is already too late to preserve the Judiciary's constitutionally protected status as an independent, co-equal branch of government. *Cf. Swinton* v. *Safir*, 93 N.Y.2d 758, 765-66 (1999) ("a threatened

deprivation of constitutional rights is sufficient to justify prospective or preventive remedies . . . without awaiting actual injury.").[34]

By any reasonable comparative standard—whether judged by what other lawyers and judges make today or by what judges made in the past—judicial salaries in New York State fail to pass constitutional muster. As summarized above in the Statement of the Case, judicial salaries in New York today are plainly inadequate when compared to compensation for other positions, in both the private and public sectors, that require equivalent training, experience, responsibility, and expertise. New York judges are paid less than—and, in many cases, significantly less than—for example:

- United States District Judges;
- Judges in all other states, when cost of living is taken into account;
- District Attorneys in New York City;
- Deans of New York's public law schools;
- Professors in the State and City University systems;
- Public school administrators;
- Partners at large and small law firms throughout the State;
- First-year associates at many New York City law firms.

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[34] The Third Department in *Maron* quoted a 1980 decision of the Pennsylvania Commonwealth Court for the proposition that a separation-of-powers claim related to diminishment of judicial compensation requires "proof that the judicial system's proper functioning has thereby been impaired." 58 A.D.3d at 117 (quoting *Kremer* v. *Barbieri*, 48 Pa. Cmwlth. 557, 567, 411 A.2d 558, 562, *aff'd without opinion*, 490 Pa. 444, 417 A.2d 121 (1980)). But any such requirement of impairment was repudiated by the Pennsylvania Supreme Court in its subsequent decision in *Goodheart*.

R. 303-13. The list could, and does, go on. *See id*; *see also* Exhibits B, C, D, F & G to this brief.

Faced with this overwhelming evidence of inadequacy, defendants have never contended that judicial pay is adequate or that judges are paid what they deserve. Defendants have publicly conceded the contrary. As Justice Lehner noted in *Larabee*, "all parties have agreed that the judiciary is entitled to an adjustment," and "all parties have agreed" even on "the amount thereof." 20 Misc. 3d at 874. The First Department made the same finding in its opinion in *Larabee*: "Political leaders, including several governors and the leadership of each house of the Legislature, who often disagreed about many issues of government, in fact agreed on the *necessity* of such a measure [increasing judicial compensation]." 65 A.D.3d at 78 (emphasis added). And the Third Department in *Maron* found that it is "undisputed" that "New York's judges deserve a pay raise." 58 A.D.3d at 108. In short, there is "no open policy issue to be resolved" here. *Larabee*, 20 Misc. 3d at 874.

Unable to contest the legal or factual underpinnings of plaintiffs' adequacy claim, defendants attempted to convince Supreme Court that inadequacy was somehow acceptable because New York has had even longer judicial pay freezes in the past. This argument was misguided from the start. Plaintiffs' adequacy claim never depended on the *duration* of the current pay freeze, in itself, but on the low *level* to which judicial salaries have sunk. And even if duration were relevant to the constitutional adequacy claim, it certainly would be no answer to

say that current unconstitutional conduct should be forgiven because similar, or worse, conduct occurred in the past.

Defendants' historical argument was not only fallacious, it also inadvertently proved the adequacy claim that it sought to refute. Focusing on history, as defendants asked Supreme Court to do, makes clear just how inadequate judicial salaries are in New York today—and just how unprecedented has been defendants' failure to remedy that problem. The true story to be gleaned from the history of New York judicial salaries is that those salaries have almost always been higher, in real terms, than they are today, and the political branches have, until recently, almost always taken action to increase judicial salaries *in periods of inflation*.

Defendants' story began by pointing out that salaries of the Associate Judges and the Chief Judge of the Court of Appeals were set at $10,000 and $10,500, respectively, in 1887, and that those salaries were not increased again until 1926, when they were set at $22,000 and $22,500, respectively. *See* L. 1887, ch. 76; L. 1926, ch. 94. But in focusing merely on the time between salary increases, defendants missed the key point—that the $10,000 and $10,500 salaries in 1887 would be worth *$228,418* and *$239,839* today. R. 305, 634. As for the 39 years of salary stagnation that followed, much of that period was marked by substantial *deflation*. Price levels *fell* for many years after 1887, and they did not return to 1887 levels until 1910—*nearly 25 years later*. R. 305-06, 393-94. It was during this period of *deflation*, in 1894, that the State Constitution was amended to prohibit increases in judicial salaries during judges' terms in office. R. 306. Even

as late as 1916, the year before the United States entered World War I, $10,000 was still worth *$198,744*. R. 637.

And then wartime and post-wartime inflation—extreme inflation—struck. By 1918, the purchasing power of $10,000 dropped to $143,464 in today's dollars; by 1920, it was only $108,316. *Id*. *In other words, most of the inflation that occurred in the 39-year period defendants cited below occurred in four years*. By 1925, prices had stabilized—$10,000 was worth $123,789 in today's currency—but the people of the State of New York, with painful inflation fresh on their minds, quickly and wisely changed the Constitution that year to allow the Legislature to increase judicial salaries. The Legislature acted quickly to exercise its new power. In 1926, salaries of Associate Judges and the Chief Judge of the Court of Appeals were raised to $22,000 and $22,500. Those salary figures would be the equivalent of *$269,260* and *$275,379* today. R. 305, 634.

Defendants, again missing the relevant point, noted that Court of Appeals salaries were not raised again until 1947; but again, the story is similar. There was deflation during the Great Depression; and when inflation did return during World War II, the Legislature promptly remedied it not long after the troops started coming home. *See* R. 305. In 1947, the Legislature set Court of Appeals salaries at $25,000 and $25,500 (L. 1947, ch. 462), which would be worth *$242,860* and *$247,718* today. R. 305, 634. And over the next quarter century, the political branches continued to fulfill their obligation to set salaries at similarly adequate levels. In 1952, Court of Appeals salaries were set at $32,500 and $35,000 (L.

1952, ch. 88), which would be *$265,680* and *$286,117* today. R. 305, 634. And in 1975, those salaries were set at $60,575 and $63,143 (L. 1975, ch. 152), which would amount to *$243,912* and *$254,252* today. R. 305, 634. It was only in relatively recent years that New York allowed its judicial salaries to fall below these historical levels, and today's judicial salaries are near historic lows, as the chart in Exhibit A to this brief demonstrates.

Plaintiffs cite these historical judicial salaries not because they expect—or even ask—to receive so much today. But history demonstrates beyond any doubt the conclusion that was already evident from the other evidence marshaled above: that defendants have violated their constitutional duty to provide adequate judicial compensation—they have failed to provide a level of compensation needed "to secure a succession of learned men" and women to the bench. *O'Malley*, 307 U.S. at 286 (quoting 1 KENT COM. 294).

POINT II

DEFENDANTS HAVE VIOLATED THE COMPENSATION CLAUSE BY DISCRIMINATING AGAINST JUDGES.

All three judicial-pay cases currently before this Court involve claims that defendants violated the Compensation Clause in Article VI, Section 25(a) of the New York State Constitution, which provides that the compensation of a judge "shall not be diminished during the term of office for which he or she was elected or appointed." Plaintiffs' Compensation Clause claim in this case, however, is different from the claim that the First and Third Departments rejected in *Maron* and

Larabee. Plaintiffs in those cases asserted that defendants' failure to adjust judicial salaries in the face of inflation, by itself, resulted in an unconstitutional "diminishment" of those salaries. In this case, the Chief Judge and the Judiciary assert a narrower claim under the Compensation Clause, a claim that is premised upon unconstitutional *discrimination*. The claim is that under *United States* v. *Hatter*, 532 U.S. 557 (2001), defendants violated the Compensation Clause when they discriminated against the Judiciary by freezing judicial salaries for a decade *while, at the same time, repeatedly increasing the compensation of virtually all other 195,000 State employees.*

Hatter was a challenge brought by federal Article III judges against the withholding of Medicare and Social Security taxes from their salaries. In ruling in part for the plaintiffs, the United States Supreme Court held that the federal Compensation Clause, which mirrors New York's,[35] "offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by ordering a lower salary." *Id.* at 569. Because a tax diminishes the real value of judges' salaries, only "a generally applicable, *nondiscriminatory* tax to the salaries of federal judges" is permitted by the Compensation Clause. *Id.* at 567 (emphasis added); *see also O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939) ("[A] *non-discriminatory* tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the

[35] Article III, Section 1 of the U.S. Constitution provides that judges shall receive a "compensation, which shall not be diminished during their continuance in office."

Constitution." (emphasis added)). A nondiscriminatory tax on judges is constitutional because it does not undermine the judicial independence that the Compensation Clause is designed to protect: "To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge." *Hatter*, 532 U.S. at 570 (quoting *Evans* v. *Gore*, 253 U.S. 245, 265 (1920) (Holmes, J., dissenting)); *see also id*. at 571 (concluding that "the potential threats to judicial independence that underlie the Constitution's compensation guarantee cannot justify a special judicial exemption from a commonly shared tax"). The Court thus found that the Medicare tax—which was generally applicable to all government employees—was lawful.

But the Social Security tax violated the Compensation Clause. The reason: it "effectively singled out . . . judges for unfavorable treatment" as compared to virtually all other federal employees. *Id*. at 561. Congress had extended participation in Social Security to all incoming federal employees, but among then-current employees nearly all could choose not to participate *and* any of the small group of employees who were required to participate could choose to do so *without* paying the Social Security payroll tax—"so long as they previously had participated in other *contributory* retirement programs." *Id.* at 564 (emphasis added).

Judges and the President of the United States did not have that option, however, because their pensions were noncontributory. As a result, even though the Social Security tax was imposed broadly, the real effect—in violation of the Compensation Clause—was to impose *almost exclusively* on judges the require-

ment to participate in Social Security without the choice to avoid paying its payroll tax. The Supreme Court explained that imposing such a disparate burden on judges does implicate the concerns about judicial independence that underlie the Compensation Clause:

> Were the Compensation Clause to permit Congress to enact a discriminatory law . . . it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees—characteristics which, as we have said, the public needs to secure that judicial independence upon which its rights depend.

Id. at 576. Thus, *Hatter* confirms that the Compensation Clause "does not prevent Congress from imposing a 'non-discriminatory tax laid generally' upon judges and other citizens, but it *does prohibit taxation that singles out judges for specially unfavorable treatment.*" *Id.* at 561 (quoting *O'Malley*, 307 U.S. at 282) (emphasis added; citation omitted).[36]

The case at bar squarely implicates the protections of the Compensation Clause under *Hatter*. Inflation has precisely the same impact on compensation as a tax, and the failure to remedy it—in and of itself—arguably would not violate the Compensation Clause if salaries for no one had been adjusted. In that case,

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[36] *Hatter* applies the Supreme Court's previous holdings that the Compensation Clause "bars indirect efforts to reduce judges' salaries through taxes when those taxes discriminate." *Hatter*, 532 U.S. at 576-77 (citing *United States* v. *Will*, 449 U.S. 200, 226 (1980)); *O'Malley*, 307 U.S. at 282; *see also* Brief for United States at 36 n.27, *United States* v. *Will*, 449 U.S. 226 (Nos. 79-983 and 79-1689) (acknowledging that indirect and discriminatory diminution would violate the Compensation Clause).

"[s]ince clearly the impact of inflation affects all," inflation would "not [have] had a particularized discriminatory impact on judges different from that upon any other person who did not receive a salary increase." *Larabee*, 19 Misc. 3d at 237. But here, others *did* receive salary adjustments, and so there *has* been a "particularized discriminatory impact." *Id.*

As in *Hatter*, New York judges have been "single[d] out for specially unfavorable treatment" vis-à-vis nearly all other State employees. As set forth in the Statement of the Case, while the political branches have regularly approved salary increases for virtually all other State employees—approximately 195,000 employees—to account for inflation, they have refused to adjust judicial salaries. Instead, defendants have perpetrated the longest judicial pay freeze in the Nation, effectively reducing judicial salaries by one-third in real terms since 1999. At the same time, the Executive and the Legislature continued to grant nearly all other New York State employees raises that, as of the NCSC's report in May 2007, averaged over 24 percent—a number that is considerably higher today. *See* R. 315, 345. Numerous State employees who earned less than judges in 1999 now earn more than judges. *See* R. 554-61. And the State has explicitly disqualified judges from the periodic salary-review system applicable to other State employees. *See* CIV. SERV. LAW § 201(7)(a).

Presented with this overwhelming legal and factual support for plaintiffs' discrimination claim, Justice Lehner's only response was to "note[] that the failure of the Legislature to adjust judicial salaries is equally true with respect to salaries

of the state-wide elected officials, the members of the Legislature, and commissioners appointed by the Governor whose salaries are fixed by statute." R. xiii-xxiv. This observation was hardly a valid basis for dismissing the claim. The freeze on the salaries of legislators and a small number of other State officials does not eliminate the charge of discrimination. For many reasons, the effect on judges has been considerably more severe. State legislators are not in the same category as judges. They are already among the best paid in the Nation, ranking third in absolute terms and sixth when adjusted for cost of living, among those states that pay legislators an annual salary. *See* R. 315, 562-64.

And of course, many legislators earn much more than these amounts. In addition to their already-competitive base salaries, many legislators earn thousands or tens of thousands of dollars more for their service on committees and in other leadership posts. *See* LEGIS. LAW § 5-A. Even more critically, they are free to hold outside jobs. Judges, of course, cannot. They are constitutionally and ethically prohibited from supplementing their frozen salaries with additional employment, except in highly limited circumstances. *See* N.Y. CONST. art. VI, § 20(b)(4); 22 N.Y.C.R.R. § 100.4. Judges are also the only high State officials to serve lengthy terms of office—up to 14 years, sometimes extended—and thereby assume the unique public trust of continuing in service without timely pay adjustment over the many years of their terms.

Beyond this, legislators and executive officials have the capacity to engage the political process directly to increase their salaries. Judges do not. They

lack appropriation power and ethically must refrain from most political activity. Judges uniquely bear (i) the constitutional and ethical limitations against supplementing State-paid income with outside employment, (ii) the constitutional and ethical restrictions against engaging the political process to seek redress for their frozen compensation, and (iii) the public trust of serving long terms of office despite the State's persistent failure to adjust their compensation during the pendency of such terms. Judges are the only State employees whose salaries have been frozen without any meaningful recourse.

In any event, the fact that legislators' salaries and those of some other high State officials have been frozen for a decade makes no constitutional difference under *Hatter*. In *Hatter*, the government argued that the Social Security tax was non-discriminatory because it "disfavored not only judges but also the President of the United States and certain Legislative Branch employees." 532 U.S. at 577. The Supreme Court rejected that argument. The Court held that "the category of 'federal employees' is the appropriate class against which we must measure the asserted discrimination." *Id.* at 572. In the context of that broad comparison, it was enough that the tax burden fell on a "group [that] consisted *almost* exclusively of federal judges." *Id*. at 564 (emphasis added). The indirect pay reduction discriminated against judges, the *Hatter* Court stated, because legislative employees were permitted (by joining a covered retirement plan) to avoid paying the new Social Security tax. *Id.* at 577-78. And the Court went on to say, "we do not see why . . . the separate and special example [of] the President, should make a

critical difference here." *Id.* Here, too, State legislators can avoid the impact of inflation by engaging in outside employment, and the fact that a limited number of high State officials (who generally serve for limited periods of time and often leave for more lucrative employment in the private sector) have also been frozen should, as in *Hatter*, make no critical difference.

This construction of the Compensation Clause has deep precedential roots. Nearly two centuries ago, the Pennsylvania Supreme Court ruled that a tax imposed on public officials, including judges, was an indirect and discriminatory diminution of judicial compensation. In *Commonwealth ex rel. Hepburn* v. *Mann*, the court stated that while a tax imposed on the general public does not violate the Compensation Clause, a tax that targeted public officials *rendered judges "with others*, . . . *a special object of taxation*, contrary to the [constitutional] charter which [the judge] has solemnly sworn to support." 5 Watts & Serg. 403 (Pa. 1843) (emphasis added).

The Compensation Clause's protection against discrimination therefore bears no less constitutional urgency if the political branches impose some fraction of the burden on themselves as well. To the contrary, as Justice Breyer (the author of *Hatter*) has concluded, even if the Legislature is deemed to have treated its own members' salaries "no worse than" those of judges—thereby working "similar harm upon all Federal Government institutions"—the Compensation Clause nonetheless guarantees a "special" protection to the compensation of judges that is inviolable based on the independence of the Judiciary. *Williams* v. *United States*,

535 U.S. 911, 920-21 (2002) (Breyer, J., dissenting from denial of certiorari). As Justice Breyer put it:

> The Compensation Clause . . . protects judicial compensation, not because of the comparative importance of the Judiciary, but because of the *special nature of the judicial enterprise*. That enterprise, Chief Justice Marshall explained, may call upon a judge to decide "between the Government and the man whom that Government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular." Proceedings and Debates of the Virginia State Convention of 1829-1830, p. 616 (1830). Independence of conscience, freedom from subservience to other Government authorities, is necessary to the enterprise. The Compensation Clause helps to secure that judicial independence.

Id. (emphasis added).

The Third Department appeared to reach a different conclusion in *Maron*, stating that "the diminishing force of inflation, even when other state employees have received salary increases, cannot be deemed a sufficient basis for a claim under New York's Compensation Clause." 58 A.D.3d at 115. That conclusion is incorrect. First, the *Maron* court did not have before it a discrimination claim under *Hatter*. Plaintiffs in *Maron* argued that "the inaction of the Legislature in the face of the erosion of their salaries' real value by inflation," by itself, violated the Compensation Clause. *Id.* at 109. The court accordingly did not discuss how *Hatter*'s antidiscrimination principle might apply to the case before it, nor did the court even purport to rule on the legal merits of a *Hatter* claim. The conclusion quoted above is thus *dicta* at best—*dicta* pronounced without any consideration of the legal argument presented in this case.

Second, and more fundamentally, the *Maron* court's conclusion cannot be squared with *Hatter*. As discussed above, the *Hatter* Court measured discrimination by comparing judges to the class of all other "federal employees," holding that such discrimination existed even though judges were not the *only* employees subject to the Social Security tax. 532 U.S. at 572, 577-78. The Third Department ignored this aspect of *Hatter* altogether, instead resting its conclusion principally on the Supreme Court's earlier decision in *United States* v. *Will*, 449 U.S. 200 (1980). *See Maron*, 58 A.D.3d at 115. But *Will* is not contrary to *Hatter*. *Will* dealt with a discrimination argument in the opposite context: the government contended that the Compensation Clause permitted Congress to reduce judicial salaries, even *directly* (by rescinding vested cost-of-living adjustments), provided that such reductions were nondiscriminatory because they also applied to legislative and executive branch officials. *See Will*, 449 U.S. at 226. The *Will* Court rejected this argument, holding that the absence of discrimination could not save a statute that *directly* reduced judicial salaries; that is barred by the Compensation Clause. *See id.* But the Court recognized that *indirect* reductions, such as by a tax, are constitutionally permissible if they are nondiscriminatory—suggesting implicitly that discriminatory indirect reductions are not constitutionally permissible. *See id.* (citing *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939)). That is why the *Hatter* Court was able to cite *Will* in support of its holding that indirect reductions in compensation—there by taxation, here by inflation—are unconstitutional when they discriminate. *See Hatter*, 532 U.S. at 576-77 (citing *Will*, 449 U.S. at 226).

The Third Department erred in its reliance upon a decision of the U.S. Court of Claims, *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), for the proposition that "the fact that legislators and senior executive branch officials have been denied a pay raise substantially weakens petitioners' claim that the failure to enact a salary increase is designed to influence the Judiciary." *Maron*, 58 A.D.3d at 118 (citing *Atkins*, 556 F.2d at 1055). Under *Hatter*, there is no requirement that the Legislature's "design" or intent be to "influence the Judiciary." The *Hatter* Court held that Congress engaged in unconstitutional discrimination even though, in that case, "[n]othing in the record disclose[d] anything other than benign congressional motives." 532 U.S. at 577. As the Court explained: "If the Compensation Clause is to offer meaningful protection . . . we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary." *Id.* Discriminatory *effect* is all that is required under *Hatter*.[37]

In short, *Hatter* controls. The discriminatory treatment inflicted on the judges of this State over the last decade violates the Compensation Clause.

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[37] The Third Department also quoted a line from *Atkins* suggesting that plaintiffs must "demonstrate the existence of a plan fashioned by the political branches, or at least of gross neglect on their part, ineluctably operating to punish the judges qua judges, or to drive them from office." *Maron*, 58 A.D.3d at 117 (quoting *Atkins*, 556 F.2d at 1054). *Hatter* makes clear, however, that the Compensation Clause is violated by discrimination in fact, regardless of whether legislators had a "plan" to "punish" judges.

POINT III

NEITHER THE SPEECH OR DEBATE CLAUSE NOR THE SEPARATION OF POWERS BARS RELIEF. THIS COURT HAS THE POWER TO SET THE AMOUNT OF JUDICIAL COMPENSATION THAT THE EXECUTIVE AND THE LEGISLATURE HAVE CONCEDED IS APPROPRIATE.

Defendants' principal response to plaintiffs' claims below was to argue that those claims are barred by the Speech or Debate Clause in Article III, Section 11 of the State Constitution, as well as by the principle of separation of powers generally. Except (perhaps) in its dismissal of the Governor from this action,[38] Supreme Court did not reach either of these arguments in dismissing the two causes of action that are the subject of this appeal. Plaintiffs wish to refute these meritless

[38] Supreme Court erred in dismissing the Governor. In his opinion in this case, Justice Lehner did not explicitly set forth the grounds for dismissing the Governor, other than to refer to his previous decision in *Larabee*. *See* R. xx, xxii. In *Larabee*, Justice Lehner asserted two reasons for dismissing the Governor. First, plaintiffs' counsel in that case apparently conceded that they were not seeking any relief against the Governor. *See Larabee* v. *Spitzer*, 19 Misc. 3d 226, 239 (Sup. Ct. N.Y. Co. 2008). Plaintiffs here, by contrast, do seek relief against the Governor and all other defendants, rendering this ground for dismissal inapposite. Second, Justice Lehner concluded in *Larabee* that "if plaintiffs had continued to seek relief against the Governor," that would "warrant dismissal on immunity grounds." *Id.* To the extent this immunity holding was the ground for dismissal of the Governor in this case, it was incorrect. All of the arguments made in this point as to claims against the Legislature apply at least as forcefully to the claims by the Chief Judge and the Judiciary against the Governor. These claims are, of course, also brought by one co-equal branch of government against another and are thus not barred by the Speech or Debate Clause or the related doctrine of executive immunity.

arguments here, however, as defendants will almost certainly raise them again in this Court.

A. The Speech or Debate Clause does not bar relief.

1. The Speech or Debate Clause does not bar claims against defendants who are not legislators.

As a preliminary matter, in addressing defendants' contentions under the Speech or Debate Clause, it is important to remember that the clause bars only claims against legislators, and sometimes their aides—and does *not* bar claims against others, including the State.[39] The constitutional text of the clause is clear: "For any speech or debate in either house of the legislature, *the members* shall not be questioned in any other place." N.Y. CONST. art. III, § 11 (emphasis added). Precedent also confirms this point. The United States Supreme Court has explained that "[l]egislative immunity does not, of course, bar all judicial review of legislative acts," as "[t]he purpose of the protection afforded legislators is *not* to forestall judicial review of legislative action." *Powell* v. *McCormack*, 395 U.S. 486, 503, 505 (1969) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)) (emphasis added).[40] Rather, the purpose of the Speech or Debate Clause is "to insure that legislators are not distracted from or hindered in the performance of their

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[39] Executive officials sometimes also enjoy immunity when they are performing "legislative functions." *Bogan* v. *Scott-Harris*, 523 U.S. 44, 55 (1998).

[40] This Court has construed the scope of New York's Speech or Debate Clause to comport with the protections established in the parallel provision of the federal Constitution. *See People* v. *Ohrenstein*, 77 N.Y.2d 38, 54 (1990).

legislative tasks by being called into court to defend their actions." *Id.* at 505. As the First Department correctly observed in rejecting defendants' Speech or Debate defense in *Larabee*, "[s]ince the goal is to protect legislators from harassment caused by litigation, lawsuits challenging the constitutionality of legislative decisions, which do not impede that goal, are not barred." 65 A.D.3d at 90 (citing *Powell*, 395 U.S. at 504-05). If the Speech or Debate Clause shielded all legislative decisions, "the fundamental purpose of judicial review, to determine the constitutionality of governmental acts, would be eviscerated." *Id.*

This limitation on the Speech or Debate Clause means that even if claims in an action are dismissed against legislators, the same claims, if they are not otherwise barred, may still proceed against defendants who are *not* protected by legislative immunity. "Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves." *Powell*, 395 U.S. at 505. Thus, the Court in *Powell* v. *McCormack* emphasized that even when it has "dismissed [an] action against members of Congress," it "did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action" when unprotected defendants, such as "congressional employees," "were also sued." *Id.* at 506 (discussing *Kilbourn* v. *Thompson*, 103 U.S. 168, 198-200 (1880), and *Dombrowski* v. *Eastland*, 387 U.S. 82, 84-85 (1967)). Put another way, as the Third Department has explained in a decision affirmed by this Court, courts applying the Speech or Debate Clause have "proceeded to review the constitutionality of the underlying

acts [when] at least one party respondent, who was not immune under the Speech or Debate Clause, remained after the legislators were dismissed from the case." *Straniere* v. *Silver*, 218 A.D.2d 80, 85 (3d Dep't) (discussing *Powell*, *Dombrowski*, and *Kilbourn*), *aff'd*, 89 N.Y.2d 825 (1996). And as the First Department observed in *Larabee*, "'the privileged status of legislative action does not preclude its judicial review,' which may still be accomplished without formally requiring individual legislators 'to answer personally for legislative acts.'" 65 A.D.3d at 91 (quoting 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-20, at 1019 (3d ed. 2000)).

Here, the State of New York is a separately named defendant. Accordingly, even if the Speech or Debate Clause barred claims against the legislative defendants—which it does not, for the reasons explained below—the claims against the State should stand.[41]

2. The Speech or Debate Clause does not apply to plaintiffs' adequacy and discrimination claims.

It is also worth noting preliminarily that the Speech or Debate Clause defense that defendants have asserted in this case applies principally to the separation-of-powers cause of action—the "improper linkage" cause of action—on which Supreme Court and the First Department ruled in plaintiffs' favor. Defendants have argued that that cause of action, in particular, requires an inquiry into the

[41] This Court has held that the State is a proper party defendant in a declaratory judgment action challenging the constitutionality of a statute. *See Cass* v. *State*, 58 N.Y.2d 460, 463 (1983).

Legislature's "motive" for refusing to increase judicial compensation, an inquiry that defendants contend is prohibited by the Speech or Debate Clause.

Even assuming, *arguendo*, that this argument were correct with respect to plaintiffs' third cause of action, it has no application to either the adequacy claim under the separation-of-powers doctrine or the discrimination claim under the Compensation Clause—the two claims that are the subject of this appeal. These claims do not depend on legislative motives. They do not even arguably challenge why legislators have failed to do what they should have done; they straightforwardly allege that legislative and executive actions and inactions themselves violate the State Constitution.[42] That, of course, is exactly the sort of straightforward "judicial review of legislative acts" that "[l]egislative immunity does not . . . bar." *Powell*, 395 U.S. at 503. As the Supreme Court said in *Kilbourn* v. *Thompson*:

> Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

103 U.S. at 199, *quoted in Powell*, 395 U.S. at 506.

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[42] As noted above, *Hatter* explicitly held that discriminatory intent or motive is not an element of a Compensation Clause claim. *See* 532 U.S. at 577.

3. The Speech or Debate Clause does not apply to a separation-of-powers challenge brought by one co-equal branch against another.

But even apart from these prefatory points, defendants' Speech or Debate Clause defense fails entirely as to all claims brought by the Chief Judge and the Judiciary against the other co-equal branches of government. Not only does the Speech or Debate Clause not bar all judicial review of legislative acts, but the clause also does not prevent legislators from being questioned about acts that are outside "the 'sphere of legitimate legislative activity.'" *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)). "Our speech or debate privilege was designed to preserve legislative independence, not supremacy." *United States* v. *Brewster*, 408 U.S. 501, 508 (1972). Accordingly, the Court's "task . . . is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *Id.* The clause, after all, was "not written into the Constitution simply for the personal or private benefit of Members of Congress," and its "shield does not extend beyond what is necessary to preserve the integrity of the legislative process." *Id.* at 507, 517. The courts must remain "empowered to determine the constitutional boundaries of each branch of government." *Larabee*, 65 A.D.3d at 91 (citing *Pataki* v. *N.Y. State Assembly*, 4 N.Y.3d 75, 96 (2004)).

While rarely presented to the courts, the unique nature of a separation-of-powers challenge brought *by one co-equal branch against another* squarely impli-

cates these principles. Thus, while the Speech or Debate Clause protects the independence of the Legislature, it cannot be interpreted so broadly as to trump the separation-of-powers principle embodied in the tripartite structure of government. The Speech or Debate Clause is just one provision in the legislative article of the Constitution. It has never been construed to bar an action, brought by one branch of government against another, based on the broader separation-of-powers principle that forms the foundation of the State Constitution and guarantees the independence of the Judiciary.

Recent decisions by the highest courts in two sister states demonstrate that legislative immunity—the Speech or Debate Clause—does not bar a separation-of-powers challenge brought by one co-equal branch of government against another. In *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 858 A.2d 709 (2004), a House of Representatives Select Committee of Inquiry issued a subpoena for the governor to testify before it. The governor sued to quash the subpoena. The Select Committee responded that under the Speech or Debate Clause "the constitutional validity of [the] issuance of the subpoena . . . is immune from judicial review." *Id.* at 559, 858 A.2d at 722. In this setting of an inter-branch conflict, the Connecticut Supreme Court rejected the Committee's contention. It concluded that the Speech or Debate Clause protections did not apply in an inter-branch conflict to conduct that implicates a violation of the separation of powers:

> [O]ur speech or debate clause does not immunize from judicial review a colorable constitutional claim, made in good faith, that the legislature has violated the separation of powers by exceeding the bounds of

> its impeachment authority and, therefore, has conducted itself outside the sphere of legitimate legislative activity.

Id. at 559-60, 858 A.2d at 722.

The Connecticut court recognized the fundamental distinction between the legitimate exercise of legislative authority and *ultra vires* conduct that exceeds the scope of legislative authority: "[H]owever broad the legislative prerogative regarding impeachments may be, there are limits, and judicial review must be available in instances in which the impeaching authority has been exceeded." *Id.* at 565, 858 A.2d at 725. The court reasoned that while the Speech or Debate Clause itself reflects the principle of separation of powers by protecting legislative independence, "[i]t would be paradoxical to allow the clause to be used in a manner that categorically forecloses judicial inquiry into whether the legislature itself violated the separation of powers. Permitting the shield to extend that far would allow the clause to swallow the very principle that it seeks to advance." *Id.*

The Connecticut court analyzed the scope of the Speech or Debate Clause within the context of the overall constitution. Noting that the clause is only one provision of the constitution's article governing legislative powers, the court concluded that the Speech or Debate Clause cannot be construed in a way that undermines the separation-of-powers principle that forms the basis of the state constitution. The court stated that the Speech or Debate Clause "cannot be viewed . . . as categorically trumping the separation of powers provision, which forms the very structure of our constitutional order and which governs, therefore, all three coordinate branches of government." *Id.* at 564-65, 858 A.2d at 724. And the court em-

phasized that "*here, a challenge to legislative conduct [is] brought by a coequal branch of government. Indeed, we are unaware of any speech or debate case in which the clause was held to insulate . . . legislative [conduct] that had been challenged on the basis of the separation of powers*." *Id.* at 568, 858 A.2d at 726 (emphasis added).

Similarly, the Pennsylvania Supreme Court concluded that the Speech or Debate Clause does not shield the legislature from judicial review of conduct that seeks to undermine the independence of the judiciary. In *Pennsylvania State Association of County Commissioners* v. *Commonwealth*, 545 Pa. 324, 681 A.2d 699 (1996), various entities of the executive branch filed a mandamus action seeking to compel the Pennsylvania legislature to comply with the court's prior order finding unconstitutional the statutory scheme of county funding of the judiciary and requiring enactment of a new scheme. The legislature claimed that the Speech and Debate Clause prohibited the lawsuit against it, and that the clause insulated legislators from being questioned not only about "controversies over legislation which it has passed, but also over the legislature's allegedly 'contumacious conduct.'" *Id.* at 330, 681 A.2d at 702.

In rejecting this claim of immunity, the Pennsylvania Supreme Court stated that "at issue is the continued existence of an independent judiciary. The Speech and Debate clause does not insulate the legislature from this court's authority to require the legislative branch to act in accord with the Constitution." *Id.* at 332, 681 A.2d at 703. Noting that legislators' compliance with an order to provide

adequate judicial funding was "necessary for the continued existence of the judicial branch of government," *id.* at 340, 681 A.2d at 707, the court rejected the Speech and Debate Clause as a shield to suit: "If it were, this court's duty to interpret and enforce the Pennsylvania Constitution would be abrogated, thus rendering ineffective the tripartite system of government which lies at the basis of our constitution." *Id.* at 331, 681 A.2d at 702.

The Third Department in *Maron* likewise recognized the principle that the Speech or Debate Clause cannot be used to bar a valid separation-of-powers claim. Although the court held that the Speech or Debate Clause did apply in that case to bar inquiry into legislative motives—again, an issue that arises here, if at all, only with respect to plaintiffs' "improper linkage" cause of action—that holding was largely bootstrapped off the court's ruling that the petitioners had failed to state a valid separation-of-powers claim. *See Maron*, 58 A.D.3d at 120. The Speech or Debate Clause was not an independent ground for rejecting that claim:

> Nevertheless, we note that the Speech or Debate Clause "was designed to preserve legislative independence, not supremacy." Therefore, *it could not bar judicial intervention in the face of an adequately stated claim that the Legislature had violated separation of powers principles* by working harm or threatening imminent harm to the Judiciary's ability to continue functioning. Petitioners, however, have not stated any such claim and, thus, the Speech or Debate Clause bars inquiry into the motives of the Governor or members of the Legislature in failing to take action on judicial pay raises.

Id. at 121-22 (quoting *Brewster*, 408 U.S. at 508) (emphasis added; citation and footnote omitted).

Here, the Chief Judge and the Judiciary have stated valid separation-of-powers claims against the other branches of government. The Speech or Debate Clause does not bar judicial review of such claims.

B. The separation of powers does not insulate judicial compensation from judicial review.

Finally, defendants have argued that the separation of powers itself precludes plaintiffs' separation-of-powers claims because the Constitution grants budgetary and appropriations powers to the Governor and the Legislature, not the courts. In essence, defendants' argument is that judicial review of any budgetary matter violates the separation of powers.

But judicial review, even over constitutional matters that involve the expenditure of funds, cannot and does not threaten the balance of power among the branches of government. Judicial review does *not* "by any means suppose a superiority of the judicial to the legislative power." THE FEDERALIST NO. 78 (Hamilton). Even with the power of judicial review, the Judiciary remains "beyond comparison the weakest of the three departments of power," and "it can never attack with success either of the other two" branches; the Judiciary is "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches." *Id*. As one court recently explained:

> While the three branches of government enjoy equal status . . . , their ability to withstand incursions from their coordinate branches differs significantly. The judicial branch is the most vulnerable. It has no treasury. It possesses no power to impose or collect taxes. It com-

> mands no militia. To sustain itself financially and to implement its decisions, it is dependent on the legislative and executive branches.

Jorgensen v. *Blagojevich*, 211 Ill. 2d 286, 300, 811 N.E.2d 652, 660 (2004).

In particular, no serious infringement of the legislative or executive powers could occur as the result of a court order requiring a judicial pay adjustment. Judicial compensation concerns only *one* discrete subject under the political branches' purview. And on that subject, as Supreme Court recognized in *Larabee*, there is actually "no open policy issue to be resolved," since "all parties have agreed that the judiciary is entitled to an adjustment" and agreed upon "the amount thereof." 20 Misc. 3d at 874. Indeed, if the Legislature's budgetary power over the Judiciary were excluded from judicial review, our tripartite system of government would threaten to become a bipartite one. As one court put it:

> A Legislature has the power of life and death over all the Courts and over the entire Judicial system. Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches—the Executive, the Legislative and the Judicial.

Commonwealth ex rel. Carroll v. *Tate*, 442 Pa. 45, 57, 274 A.2d 193, 199 (1971).

Even the *Maron* court, relying on precedents of this Court, rejected defendants' attempt to constrain judicial review over the budgetary process:

> [S]eparation of powers principles also dictate that the courts are the ultimate arbiters of constitutional text. Thus, "the budgetary process is not always beyond the realm of judicial consideration[;] . . . the courts will always be available to resolve disputes concerning the

> *scope of that authority which is granted by the Constitution to the other two branches of the government*."

58 A.D.3d at 107 (quoting *Silver* v. *Pataki*, 96 N.Y.2d 532, 542 (2001)) (citations omitted; alteration in original). The court went on to recognize that the Judiciary has an inherent power to protect itself against the other branches of government:

> [T]he fundamental precept of the separation of powers doctrine is that "[o]ur State government, like the Federal [g]overnment, is a tripartite institution, with power variously distributed" among "three coequal branches"—including the judicial branch. Despite the textual grant of budgetary and appropriation powers to the legislative and executive branches, the judicial branch *must* retain the inherent power to protect itself from the impairment of its ability to function if it is to continue in existence as an independent, coequal branch of government.

Id. at 108 (quoting *Saxton* v. *Carey*, 44 N.Y.2d 545, 549 (1978)) (citations omitted; alterations in original); *accord Larabee*, 65 A.D.3d at 93 ("[J]udicial review becomes necessary when the functional independence of the Judiciary is threatened.").

Maron was not the first New York case to recognize that the Legislature and the Executive cannot exercise their budgetary and salary-setting powers in such a manner as to undermine the Judiciary. In *New York County Lawyers' Association* v. *State*, 294 A.D.2d 69, 72 (1st Dep't 2002), involving the crisis in New York's assigned counsel system, the State made precisely the argument that it and the other defendants make here—that

> because the Legislature has reserved to itself the task of establishing rates of compensation for assigned counsel, . . . court interference in that area would violate the separation of powers.

Id. The First Department *rejected* this contention, holding that where there is

> a duty of compensation "it is within the courts' competence to ascertain whether [the State] has satisfied [that] duty . . . and if it has not, to direct that the [State] proceed forthwith to do so." Even though the Legislature . . . established rates for compensation, the courts must have the authority to examine that legislation to determine whether its . . . provisions create or result in the alleged constitutional infirmity.

Id. (quoting *Klostermann* v. *Cuomo*, 61 N.Y.2d 525, 531 (1984)); *accord*, *e.g.*, *McCoy* v. *Mayor of the City of New York*, 73 Misc. 2d 508, 511 (Sup. Ct. N.Y. Co. 1973) ("The duty to fund cannot be avoided or subverted because budgetary modifications or future appropriations entail some degree of discretion. . . . The limits of respondents' discretion are constitutionally proscribed." (citing *Tate*, 442 Pa. 45, 274 A.2d 193)).

Courts of other states have similarly recognized that the constitutional separation of powers imposes limitations on legislative discretion over funding and compensation matters relating to the judiciary. The Supreme Court of Pennsylvania, for example, specifically held that while that state's legislature has "the power and authority to set the salary scale for the judicial branch," there remains a constitutional "limitation on the legislative authority to do so." *Glancey* v. *Casey*, 447 Pa. 77, 83, 288 A.2d 812, 815 (1972). That limitation, which

> arises by implication from the tripartite nature of our government and the importance of maintaining the independence of each of the three branches of government—*is that such judicial compensation be adequate to insure the proper functioning of the judicial system in an unfettered and independent manner.*

Id. at 83-84, 288 A.2d at 815 (emphasis added). And the courts of sister states have held that difficult financial circumstances do not excuse the political branches' failure to adequately provide funding to the court system:

> No evidence is required to establish that governments at all levels are experiencing severe financial strains. . . . [H]owever, *the court system . . . is not just another competing cause or need*; *it is itself a separate branch of government, co-equal with the executive and legislative branches headed by the defendants in this case*. The distinction is one not of degree, but of kind. . . . *[I]t is not for the legislative branch to deny the reasonableness or the necessity on the ground that something else is more urgent or more important.*

Pena v. *District Ct. of the Second Judicial Dist.*, 681 P.2d 953, 956 (Colo. 1984) (emphasis added) (quoting *Tate*, 442 Pa. at 67, 274 A.2d at 202 (Pomeroy, J., concurring)); *see also O'Coin's, Inc.* v. *Treasurer of Worcester County*, 362 Mass. 507, 511, 287 N.E.2d 608, 612 (1972) ("It was certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department from fulfilling its responsibilities to the people under the Constitution.").

C. This Court has the power to set the amount of judicial compensation that the Executive and the Legislature have conceded is appropriate—the amount paid to federal judges.

Moreover, the courts have the constitutional power to order relief—to set the amount of judicial compensation that is adequate. Part and parcel of judicial review is the power to order relief. For example, in *Kelch* v. *Town Board*, the

Third Department affirmed the Judiciary's inherent power to order the State to make higher salary payments to judges:

> While we do not lightly decide to involve this Court in . . . legislative actions, that body's abuse of its power on a constitutional level requires our intervention. Judicial interference in this legislative action is necessary because [defendants] violated . . . the constitutional princip[les] of separation of powers in setting petitioner's exceedingly meager salary.

36 A.D.3d 1110, 1112 (3d Dep't 2007) (citing *Goodheart*, 521 Pa. at 320-22, 555 A.2d at 1211-13); *accord, e.g.*, *N.Y. County Lawyers' Ass'n* v. *State*, 196 Misc. 2d 761, 775, 790 (Sup. Ct. N.Y. Co. 2003) (holding that compensation rates for assigned private counsel "seriously impaired the courts' ability to function" and ordering mandatory permanent injunction explicitly setting the amount assigned counsel should be paid at $90 per hour); *McCoy*, 73 Misc. 2d at 513 (ordering City executive officials to disburse funds for a housing court).

This Court has, under very different circumstances, expressed reluctance to fix specific expenditure levels for the State, citing the long-standing principle that "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches." *Campaign for Fiscal Equity* v. *State*, 8 N.Y.3d 14, 28 (2006) (citation omitted).[43] Although

[43] In an earlier opinion in the *Campaign for Fiscal Equity* case, the Court granted broad relief in the form of "detailed remedial directions" that ordered the State to (i) conduct within one year a review of the cost of providing a basic education, (ii) reform the existing system of financing, and (iii) "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." *Campaign for Fiscal Equity* v. *State*, 100 N.Y.2d 893, 930-31
(footnote continued)

plaintiffs do not dispute that general principle, the cases cited above demonstrate that courts in this State and elsewhere have recognized an exception in cases involving a threat to the Judiciary itself; the Judiciary must have the power to protect itself. As the *Larabee* court aptly explained, "it would be inappropriate for a court to sit in review of the Legislature's wholly internal affairs or practices, or, conversely, of the Governor's limited, though exclusive, quasi-legislative constitutional prerogatives," but "it follows that those branches of government may not act to the detriment of the judicial branch's own ability to function without interference." 65 A.D.3d at 95. Moreover, this case does not ask this Court to engage in the type of policymaking at issue in *Campaign for Fiscal Equity*. As noted above, defendants have agreed on the necessity and the amount of judicial compensation increases—they have agreed that a Supreme Court Justice should receive the same amount as a federal district judge. There is "no open policy issue [left] to be resolved" here. *Larabee*, 20 Misc. 3d at 874.

Courts of other states have also redressed constitutional violations by compelling the political branches to remit funds for the Judiciary. The Pennsyl-

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(footnote continued)

(2003). Once the State had responded to the Court's order, the Court held that its role was then "not . . . to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational." *Campaign for Fiscal Equity*, 8 N.Y.3d at 27. But the Court never questioned its authority to order the State to act in the first place.

vania courts, as already noted, ordered a pay adjustment for judges. In doing so, those courts recognized the general principle that

> the Judiciary *must possess* the inherent power to determine and compel payment of those *sums of money which are reasonable and necessary* to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.

Tate, 442 Pa. at 52, 274 A.2d at 197 (emphasis added in part). This inherent power is essential to the separation of powers: "the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." *Id.* at 53, 274 A.2d at 197; *accord*, *e.g.*, *Goodheart*, 521 Pa. at 321, 555 A.2d at 1212 (judicial branch "has the inherent power to ensure the proper functioning of the judiciary by ordering the executive branch of government to provide appropriate funding so that the people's right to an efficient and independent judiciary is upheld"); *Stilp* v. *Commonwealth*, 588 Pa. 539, 582-83, 905 A.2d 918, 944 (2006).[44]

So, too, the Illinois Supreme Court declared its "authority to require production of the facilities, personnel and resources necessary to enable the judicial branch to perform its constitutional responsibilities," including payment of the ju-

[44] Although *Tate* and other cases have framed this power in terms of the Judiciary's inherent authority to protect itself from impairment of its ability to function, the power need not be so limited. As discussed above, the Pennsylvania Supreme Court made clear in *Goodheart* that proof of impairment was not a prerequisite to relief on an adequacy claim. *See* 521 Pa. at 322, 555 A.2d at 1213 (rejecting argument that adequacy claim required evidence that "without [salary] increases the independent functioning of the judicial branch is impaired").

dicial salaries required by law. *Jorgensen*, 211 Ill. 2d at 312, 811 N.E.2d at 667. In Michigan, the Supreme Court compelled the political branches to provide adequate funding to meet the Judiciary's needs, which included the hiring and payment of court employees from law clerks to judicial assistants to probation officers. The court explained: "We have never doubted the inherent power of a constitutional court to sustain its existence. . . . The legislature may not abolish th[e] court. Neither is it permissible for the legislature to render the court inoperative by refusing financial support." *Judges for the Third Judicial Circuit* v. *County of Wayne*, 386 Mich. 1, 14, 190 N.W.2d 228, 231 (1971).

Still other states are in accord. *E.g.*, *In re Salary of the Juvenile Dir.*, 87 Wash. 2d 232, 245, 552 P.2d 163, 171 (1976) ("courts possess inherent power" to order funding for the judicial branch); *Smith* v. *Miller*, 153 Colo. 35, 41, 384 P.2d 738, 741 (1963) (courts possess "inherent power to carry on their functions . . . and may incur necessary and reasonable expenses"); *Carlson* v. *State ex rel. Stodola*, 247 Ind. 631, 638, 220 N.E.2d 532, 536 (1966) ("court ha[s] authority to provide for the payment of expenses necessary for its proper functioning"); *Noble County Council* v. *State ex rel. Fifer*, 234 Ind. 172, 180, 125 N.E.2d 709, 713 (1955) ("court has inherent and constitutional authority to employ necessary personnel with which to perform its inherent constitutional functions and to fix the salary of such personnel, within reasonable standards, and to require appropriation and payment therefor"); *O'Coin's*, 362 Mass. at 510, 287 N.E.2d at 612 ("[A]mong the inherent powers possessed by every judge is the power to protect his court from

impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required . . . services by appropriate means . . . .").

If courts have the inherent authority to protect the Judiciary by directing expenditures on facilities, supplies, and supporting personnel, then surely they have the power to ensure that judicial salaries not be permitted to fall to a level where they are constitutionally inadequate—especially when there is no disagreement as to the amount of an adequate salary. For the reasons set forth in this brief, the time to exercise this power is now. It is long overdue.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the order of Supreme Court, New York County, entered June 16, 2009, should be reversed to the extent that it dismissed plaintiffs' first and second causes of action. Plaintiffs' request for summary judgment in their favor pursuant to CPLR 3211(c) and 3212(b) should be granted, and Supreme Court should be directed to issue an order fixing the salaries of the judges of each State-paid court, between a date no later than April 1, 2005 and the date judgment is entered in this action, as follows: (a) the salaries of Justices of the New York State Supreme Court shall be equal to those of United States District Judges; and (b) the salaries of all other State-paid judges shall be fixed at amounts reflecting those relationships to the salaries of Justices of the Supreme Court urged by the Chief Judge in legislative proposals sub-

mitted to the Legislature between 2005 and 2008. Supreme Court should also be directed to issue an order compelling the State timely to remit such amounts to the judges of the State-paid courts.

Dated: New York, New York
October 29, 2009

WACHTELL, LIPTON, ROSEN & KATZ

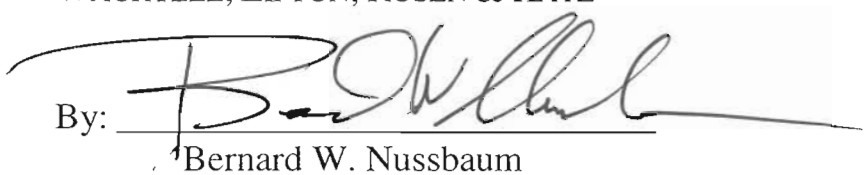

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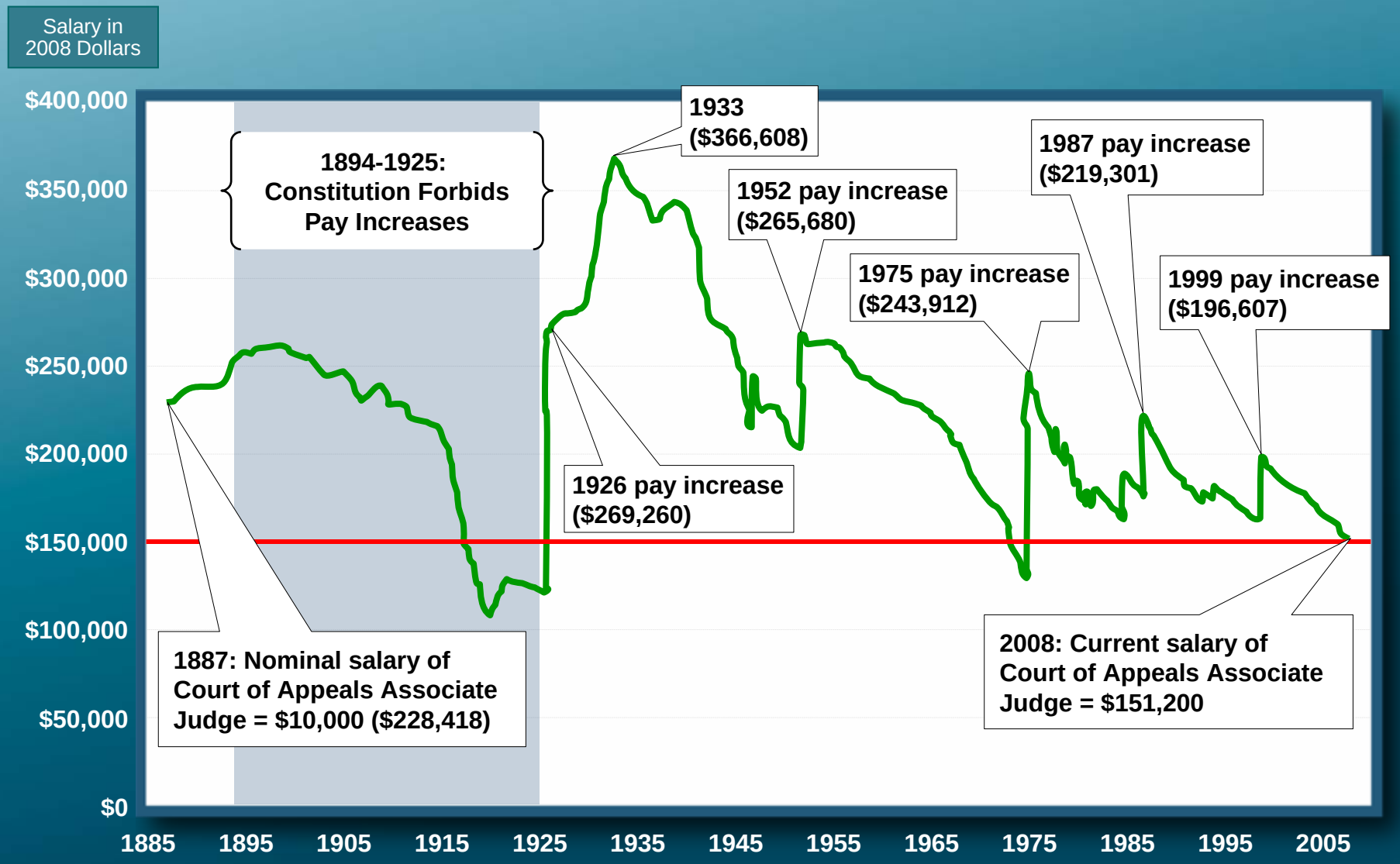
EXHIBIT A

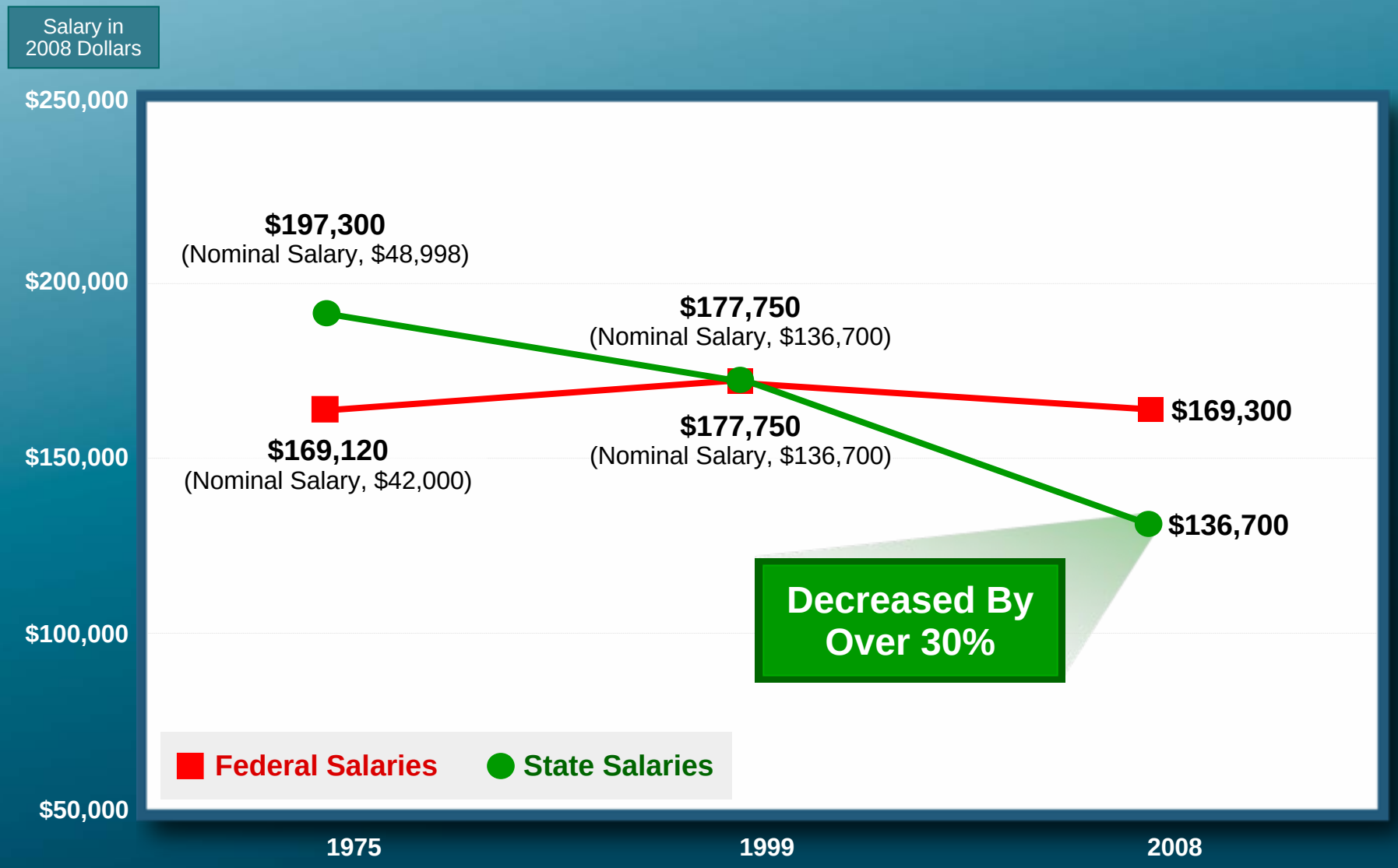
Inflation-Adjusted Salaries For NY Court Of Appeals Judge 1887 – 2008



Sources: Historical Statistics of the United States, Millennial Edition On Line (Susan B. Carter et al. eds, Cambridge Univ. Press 2006) (R. 641-42); U.S. Dept. of Labor, Bureau of Labor Statistics, Consumer Price Index Data (R. 643-46); R. 637-40

EXHIBIT B

Inflation-Adjusted Salaries For Judges Since 1975



Source: U.S. Dept. of Labor, Bureau of Labor Statistics, Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (R. 415)

EXHIBIT C

Salaries: NY Public Officials And Public-Sector Employees

Position	Salary
NYC District Attorneys	$190,000
Dean, Buffalo University Law School	$232,899
Dean, CUNY Law School	$215,000
NYC Corporation Counsel	$189,700
Attorney, State Comptroller's Office	$160,540
CUNY General Counsel	$220,000
Over 1,000 SUNY Professors	$150,000 or more
Levittown Superintendent of Schools	$292,642
Deputy Chancellor, NYC Department of Education	$212,960
Rochester Superintendent of Schools	$230,000
Acting Counsel to Governor (appointed 7/8/08)	$178,000
Acting Deputy Secretary to Governor (appointed 7/8/08)	$165,000
Interim Dir. of State Operations (appointed 7/8/08)	$178,000

Source: NCSC Report at 10-11 (R. 345-46)

EXHIBIT D

Salaries: Non-Profit Sector – 2007

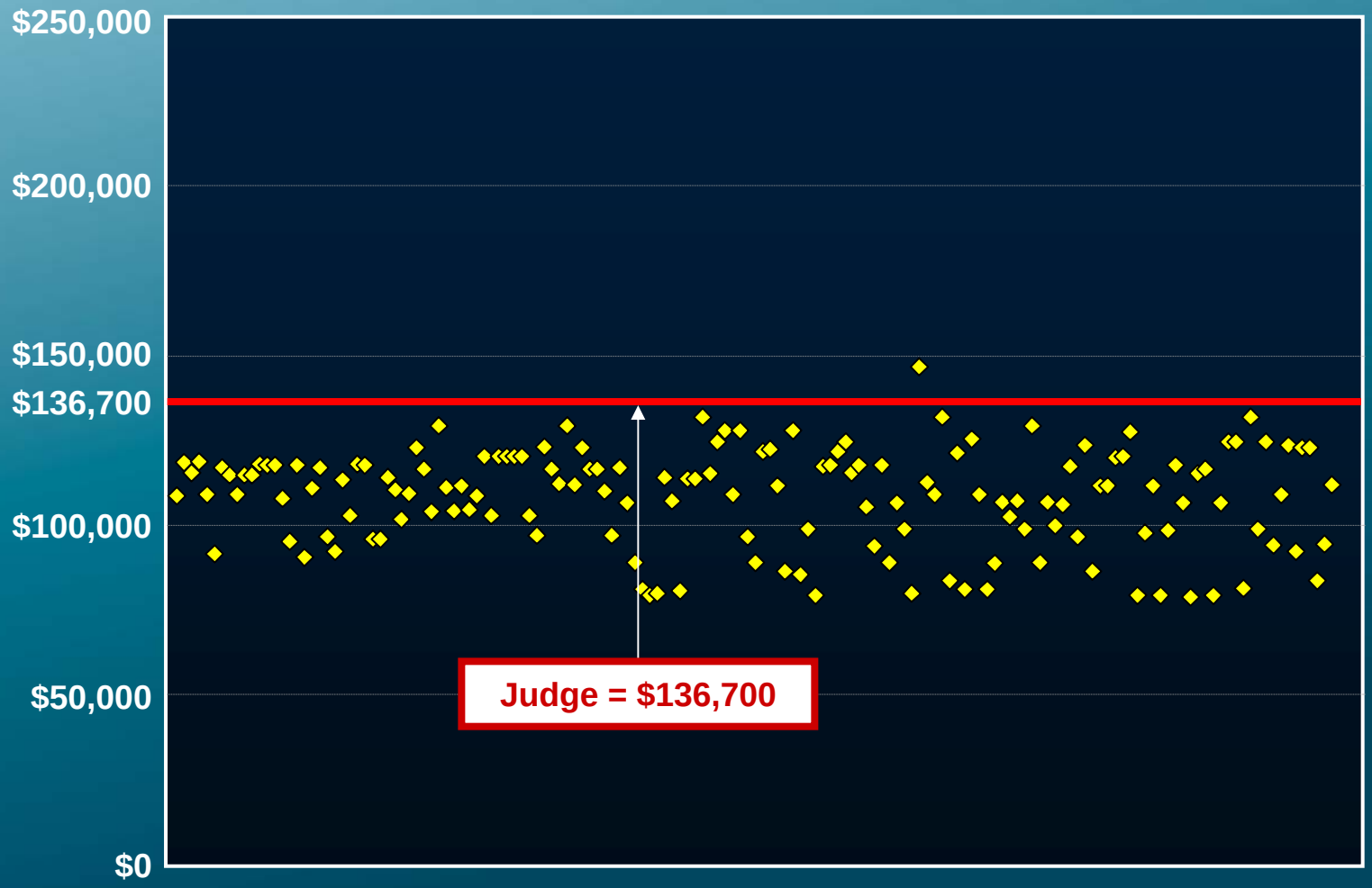
Position	Salary
Average CEO of Non-Profit, Northeast	$173,267
President, NY Public Library	$600,280
Director, Brooklyn Museum	$467,280
CEO, YMCA of Greater NY	$404,641
Executive Director, Human Rights Watch	$288,750
President, NAACP Legal Defense & Education Fund	$248,406
Executive Director, Lambda Legal	$214,000

Source: NCSC Report at 12 (R. 347)

EXHIBIT E

Selected State Employees' Salaries – 1999

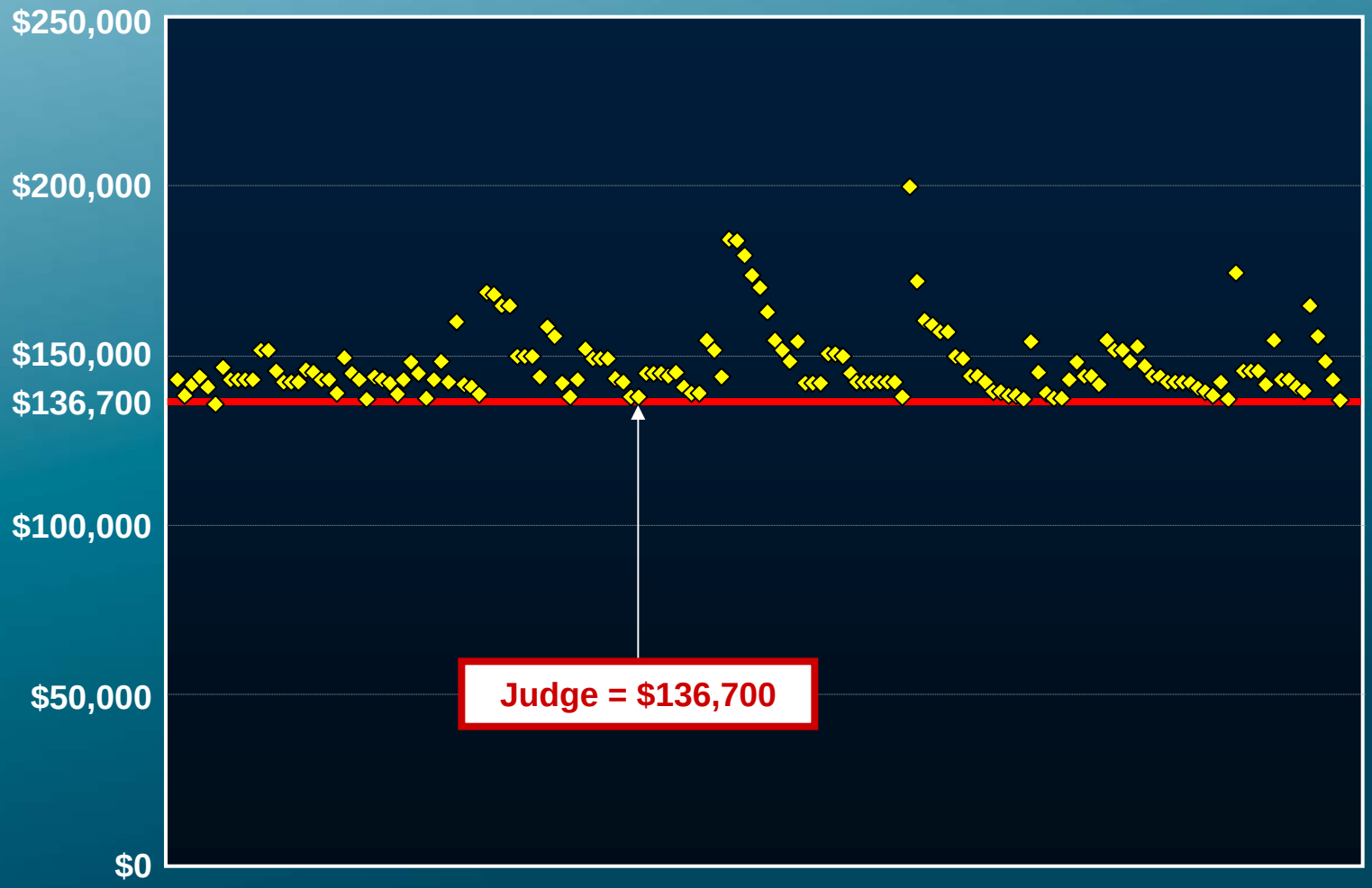
(40 State Departments or Agencies; 160 Senior Positions)



Source: R. 554-61

Selected State Employees' Salaries – 2007

(40 State Departments or Agencies; 160 Senior Positions)



Source: R. 554-61

EXHIBIT F

Salaries: NYS Private-Sector Attorneys

In **2007**, no fewer than **twenty major law firms** in New York City (with a total of **2,700 partners**) had profits per partner ranging from over **$1 million** to slightly under **$5 million**. (*American Lawyer*, May 2008)

Position	Salary	
	Average	Top 25%
Partner – Firm 10 or More Lawyers (2004)	$293,567	$350,000
Partner – Firm of 2 to 9 Lawyers (2004)	$173,643	$220,000
1st Year Associate – Large NYC Firm (2008)	$160,000	

Sources: The AM Law 100 2008, American Lawyer, May 2008 (R. 444-53); The 2004 Desktop Reference on the Economics of Law Practice in New York State (R. 438-43)

EXHIBIT G

Courtroom Salaries