SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JUDITH S. KAYE, in her official capacity as Chief Judge of the State of New York, and THE NEW YORK STATE UNIFIED COURT SYSTEM,

Index No. 400763/08

Plaintiffs,

v.

SHELDON SILVER, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, JOSEPH L. BRUNO, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, DAVID A. PATERSON, in his official capacity as Governor of the State of New York and THE STATE OF NEW YORK,

Defendants.

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BRIEF OF THE FUND FOR MODERN COURTS AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

State Court Cases

TABLE OF AUTHORITIES (Cont.)

Page

Federal Cases

State Statutes

Federal Statutes

TABLE OF AUTHORITIES (Cont.)

Page

Other Constitutional Materials

Legislative Materials

Judicial Reports and Statements

Books, Articles and Editorials

TABLE OF AUTHORITIES (Cont.)

Page

Studies and Policy Statements

TABLE OF AUTHORITIES (Cont.)

Page

Miscellaneous

INTEREST OF AMICUS CURIAE

The Fund for Modern Courts ("Modern Courts") is a private, nonprofit, nonpartisan organization dedicated to improving the administration of justice in New York State through advocacy, public education and in-court programming. Modern Courts' Board of Directors includes concerned citizens of New York, faculty members at New York law schools, and attorneys practicing in New York courts. Founded in 1955, Modern Courts is the only organization in New York State devoted exclusively to improving the judicial system, and it was established under the guiding principle, to which it has remained steadfast, of strengthening judicial independence and quality. Indeed, Modern Courts has played a role in almost every significant judicial reform effort in New York State in the last fifty years, including the creation of New York's Judicial Conference, the 1961 amendment to the State Constitution that reorganized New York's court system, the 1977 amendments to the State Constitution which provided for the qualification commission-based gubernatorial appointment of judges to the Court of Appeals, a centralized system of court management, and the creation of New York's Commission on Judicial Conduct.

Modern Courts has a vital stake in the outcome of this litigation, which concerns an issue of such importance to the administration of justice in New York that it was brought, as a measure of last resort, by the Chief Judge of the state. Modern Courts' long-held interest in adequate judicial compensation is borne out of its commitment to a judiciary that is independent, highly-qualified and diverse.[1] Modern Courts continues to believe that insufficient compensation may dissuade our most talented and committed lawyers from becoming judges. Both the judiciary and the public are ill-served by the failure to adjust judicial compensation even to keep pace with inflation. New York's

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[1] See generally Victor A. Kovner, Chair of Committee for Modern Courts on Judicial Salaries, Policy Statement on Judicial Salaries, Feb. 1, 2007, available at http://www.moderncourts.org/advocacy/salaries/kovner.html

current stretch of judicial salary stagnation is the longest in the nation, and as a result, the pay provided to New York's judges now ranks 49th nationally, once adjusted for the state's high cost of living.

In recent years, Modern Courts has supported not only an increase in judicial pay, but also Chief Judge-Plaintiff Judith S. Kaye's call for a quadrennial commission that would be charged with adjusting judicial salaries on a regular basis. By decoupling judicial and legislative compensation, this proposal offers the best prospect for achieving the desired ends of equity, regularity, objectivity and nonpolitical treatment for judicial compensation. It enjoys the support of the American Bar Association, the New York State Bar Association and The Partnership for NYC, among others, and 21 other states have already adopted similar mechanisms to insulate salary decisions from unrelated political considerations. This proposal, too, has garnered the support of New York's governmental leaders, but has fallen victim to the same linkage of irrelevant political issues that has doomed the pay increases themselves. In the interim, the relief sought by Plaintiffs will undoubtedly help ensure that New York's judiciary will enjoy the independence and respect it deserves.

I. DEFENDANTS' CONTINUED FAILURE TO RAISE JUDICIAL SALARIES IS UNCONSTITUTIONAL

A. Defendants' Undisputed Linkage of Judicial Compensation to Wholly Unrelated Issues Violates Separation of Powers and Has Resulted in an Inadequate Level of Judicial Compensation

1. As This Court Has Already Held, Defendants' Linkage of Judicial Salaries to Unrelated Political Concerns is Unconstitutional

There is no dispute among the parties that New York's judges are underpaid. As this Court recently observed in ruling on a largely identical claim brought by other members of the Judiciary, "all parties have agreed that the judiciary is entitled to an adjustment and the amount thereof." See Larabee v. Governor of the State of New York, No. 112301/07, 2008 WL 2357881, at *5 (June 11, 2008) ("Larabee II"). Notwithstanding this broad policy consensus, New York's judges have now

gone almost a decade without even a cost-of-living adjustment – the longest such stretch in the nation. This stagnation is a direct consequence of the fact that "the political branches of our State government have used the issue of judicial pay as a pawn in dealing with the unresolved political issue of legislative compensation." Id. at *7.

In Larabee, four New York judges brought suit against the defendants named in this action, alleging, inter alia, that the Legislature improperly "linked" judicial compensation to legislative compensation so that legislators would also benefit from the much-needed adjustment to judicial pay. Larabee v. Spitzer, 850 N.Y.S.2d 885, 886, 892 (Sup. Ct. N.Y. Cty. 2008) ("Larabee I"); Larabee II, 2008 WL 2357881, at *7. While acknowledging that courts should not interfere in legislative policy disputes, this Court found that there was in fact "no open policy issue" as to the merits of a judicial pay increase, and thus held that the practice of "linkage" was "an abuse of power by defendants and constitutes an unconstitutional interference upon the independence of the judiciary." Id.; see also Stilp v. Commonwealth, 905 A.2d 918, 978-79 (Pa. 2006) (holding that nonseverability clause in legislation that linked an increase in judicial compensation with an unconstitutional provision violated separation of powers because the linkage would intrude upon the independence of the judiciary). [2]

[2] In the context of legislative salaries, the New York Court of Appeals has held that a statute that allowed for the withholding of salaries until passage of the state budget was constitutional because, inter alia, there was a valid state interest in passing the budget promptly. See Cohen v. State, 94 N.Y.2d 1 (1999). Cohen is distinguishable. First, Cohen concerned a dispute that was "self-imposed" and thus only impacted the legislative branch. Id. at 3, 14 ("the Legislature has decided to restrict itself and discipline its own work and power in this fashion; that is not a cognizable separation of powers problem"). Here, the judiciary has been innocently dragged into the infighting between the other two branches of New York state government. Second, in Cohen, there was an important state interest that the legislation was intended to further – the prompt passage of the budget. See Cohen, 94 N.Y.2d at 14. Here, both the legislature and executive have conceded that there is no policy rationale whatsoever underlying their failure to increase judicial compensation.

This Court's holding in Larabee II, and its underlying factual findings, have equal force and application here: as Chief Judge Kaye's complaint alleges, the judiciary has been "caught in the middle of controversies that have no relationship to the merit of judicial pay increases." See Complaint ("Complt."), at ¶¶ 41-48. [3] New York's judiciary has been asking the Legislature to increase judicial salary levels in each year since 2003. See NAT'L CTR. FOR STATE COURTS, JUDICIAL COMPENSATION IN NEW YORK: A NATIONAL PERSPECTIVE at 7 (May 2007) ("NCSC Report").[4] The Legislature and Executive do not dispute that a pay increase is warranted. In 2007, for example, the State Senate twice passed bills providing for a judicial pay that would bring a Supreme Court justice's salary up to that of a federal court judge, consistent with Chief Judge Kaye's prior proposals on this issue. Larabee II, 2008 WL 2357881, at *3. The second such bill (S. 6550) was passed almost unanimously, but the Assembly never reconvened to act on that measure. Id. The State Assembly approved another variation of Chief Judge Kaye's proposal in March, 2007 (A. 4306-B), but no agreement was reached with the State Senate, and the budget as finally enacted made no provision for a judicial pay increase. See Complt. at ¶ 40, 46. Since that time, it has been widely reported, and Defendants do not contest, that the Assembly will not pass a bill providing a

[3] Because this Court has already ruled in Larabee II on a "decisive issue" in this case – finding that the Defendants have improperly "linked" judicial salaries to extraneous political issues – that ruling has preclusive effect on the present litigation. The doctrine of collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. See Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984). Only two elements are required: (1) that the identical issue was necessarily decided in the prior action and is decisive in the present one; and (2) that the party to be precluded had a full and fair opportunity to contest the prior determination. Id. at 500-501; D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 664 (1990). Both elements are met here.

[4] The NCSC is an independent, not-for-profit organization dedicated to improving the administration of justice through leadership and service to state courts. In April of 2007, Chief Judge Kaye asked NCSC to undertake a study of judicial compensation trends in New York and offer recommendations to establish and maintain an objective process for determining judicial compensation statewide. Id. at 1.

judicial pay increase unless a legislative salary increase is provided as well. Larabee II, 2008 WL 2357881, at *3 n.1 (citing editorials from, among others, The New York Times, Wall Street Journal, Newsday, Daily News, New York Post, decrying the "linkage" of judicial salaries to unrelated political issues).[5]

2. The Unconstitutional Practice of Linkage Has Resulted in Inadequately Low Judicial Salaries, Which Itself Violates the Separation of Powers Doctrine

The separation of powers principle is implicit in the NY Constitution, which vests the judicial power in the state courts and prohibits either the Executive or Legislative branches from abridging this authority. N.Y. CONST. art. VI; Under 21 v. City of New York, 65 N.Y.2d 344, 355-56 (1985); see also Loving v. United States, 517 U.S. 748, 757 (1996). In addition to requiring that the judicial branch of Government remain wholly independent – a mandate that has been violated by the unconstitutional practice of "linkage" described above – the principle of separation of powers also has been found to require adequate judicial compensation. See Kelch v. Town Bd. of Davenport, 36 A.D.3d 1110, 1112 (3rd Dep't 2007) (holding that payment of inadequate judicial salaries "violate[s] public policy and the constitutional principles of separation of powers"); Catanise v. Town of Fayette, 148 A.D.2d 210, 213 (4th Dep't 1989) (reduction by a town board of a town justice's salary held to be "an impermissible encroachment upon the independence of the judiciary"); see also Goodheart v. Casey, 555 A.2d 1210, 1213 (Pa. 1989) ("Implicit in the constitutional right for adequate compensation for the judiciary is the public's right to have a competent, independent judicial system supported by competent judges. Without adequate compensation, a competent judicial system is not possible."); Jorgensen v. Blagojevich, 811 N.E.2d

[5] See, e.g., Editorial, Justice on the Cheap, N.Y. TIMES, Apr. 8, 2007 ("Here is Albany's trick: increasing pay for state-judges is popular and urgently needed. Increasing pay for legislators is unpopular and questionable, since they work part-time. So [legislators] are essentially holding the Judiciary's pay hostage.").

652, 668 (Ill. 2004).[6] As Alexander Hamilton cautioned in FEDERALIST NO. 79, "[w]e can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."

The courts to have considered this question have noted that while the legislative branch has the power and authority to set the salary scale for the judiciary, it can be compelled by the courts to provide money which is reasonably necessary for the proper functioning of the courts. See Goodheart, 555 A.2d at 1211-1212 (citing Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 199 (Pa. 1971)). Thus, separation of powers requires that judges receive a level of remuneration that is "proportionate to their learning, experience and elevated position they occupy in our modern society." Larabee II, 2008 WL 2357881, at *7 (citing Goodheart, 555 A.2d at 1212). This mandate is simply not satisfied by New York's current levels of judicial compensation. It is thus incumbent on the state to "lessen[] the difference in compensation between judges and lawyers with equal experience and training in the private sector" to ensure that the judiciary will be able to attract qualified individuals. Id.

3. Under the Established Doctrines of Inherent Powers and Rule of Necessity, This Court Can Remedy Defendants' Constitutional Violation

There is no bar to adjudication of this dispute. Under the inherent powers doctrine, which is implicit in the notion of separation of powers, the courts of New York have the authority "to enable [the] court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective." People v. Little, 392 N.Y.S.2d 831, 834-35 (Sup. Ct. Yates Cty. 1977). Specifically, courts can intervene in the budgetary process "to resolve

[6] See also Larry D. Thompson & Charles J. Cooper, The State Of The Judiciary: A Corporate Perspective, 95 GEO. L.J. 1107, 1113 (2007) (stating that judicial independence "is plainly compromised when Congress fails to maintain adequate judicial compensation").

disputes concerning the scope of [the budgetary] authority which is granted by the Constitution to the other two branches of the government." Saxton v. Carey, 44 N.Y.2d 545, 551 (1978). In addition, where matters affecting a judge's pecuniary interests would typically require recusal, the Rule of Necessity "allows – and even seems to require" that judges hear cases in which they have a financial interest, where it is necessary to exercise jurisdiction. Williams v. United States, 240 F.3d 1019, 1025 (Fed. Cir. 2001); accord Maresca v. Cuomo, 64 N.Y.2d 242, 247 (1984); United States v. Will, 449 U.S. 200, 213-215 (1980) (where Article III judicial compensation is at issue, judges have an "absolute duty . . . to hear and decide cases within their jurisdiction"). Thus, under the well-settled principle of the inherent powers doctrine, this Court has the authority to protect the dignity and independence of the judiciary, and the "rule of necessity" permits judges to consider the issue of judicial compensation. See Larabee II, 2008 WL 2357881, at *1-2.

B. The Current Level of Judicial Compensation Violates the Compensation Clause of the New York Constitution

The Compensation Clause of New York's Constitution commands that a judge's compensation shall not be diminished during his or her term in office:

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

N.Y. CONST. art. VI, § 25(a) (emphasis added). This provision, which protects judicial salaries against interference by the other branches of state government, has been violated here.

New York's Compensation Clause is essential to ensuring both the independence and high caliber of the state's judiciary. It "has its roots in similar language contained in the Constitution of the United States." Gresser v. O'Brien, 263 N.Y.S. 68, 71 (Sup. Ct. N.Y. Cty. 1933); U.S. CONST. art. III, § 1 (providing that federal judges "shall, at stated times, receive for their services, a

Compensation, which shall not be diminished during their Continuance in Office."). The federal Compensation Clause arises out of the Anglo-American tradition of an independent judiciary, which envisioned "[a] Judiciary free from control by the Executive and the Legislature." Will, 449 U.S. 200 at 217-18.[7] As Alexander Hamilton wrote in FEDERALIST NO. 79, "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . a power over a man's subsistence amounts to a power over his will." The Compensation Clause also serves the related purpose of assuring prospective judges that their compensation will not diminish while sitting on the bench, Will, 449 U.S. at 220-21, a guarantee which serves to "attract able lawyers to the bench and thereby enhances the quality of justice." Id. at 221. As the Pennsylvania Supreme Court has observed, "[w]ithout adequate compensation, a competent judicial system is not possible." Goodheart, 555 A.2d at 1213.

In violation of this constitutional principle, Defendants have declined to increase the compensation for New York State's judges, or even provide a cost-of-living adjustment, in almost ten years (during which time inflation has aggregated approximately 27 percent). Complt. at ¶ 33. In fact, New York judges have gone the longest of any state judiciary in the nation without a salary adjustment. See NCSC Report at 9. While judicial salaries have remained frozen at inadequate levels – and have even declined by approximately 27% since 1999 because of inflation – nearly every other New York State employee has received an increase in pay. For example, "non-judicial employees of the judicial and executive branch employees in New York have received regular pay adjustments aggregating at least 24% since 1999." NCSC Report at 10; see also Cmplt. at 54. By

[7] Indeed, this principle of an independent judiciary, free of overreaching by any other branch of government, was central to the ideas underlying the nation's founding. See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("[The King] has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.").

singling out New York State judges for unfavorable treatment, Defendants have violated the Compensation Clause of New York's Constitution.

In Larabee I, this Court rejected a Compensation Clause claim, relying largely on the United States Supreme Court's decision in United States v. Hatter, 532 U.S. 557 (2001). Hatter held that a "generally applicable, nondiscriminatory tax" imposed on all salaried taxpayers, including federal judges, did not violate the Compensation Clause of the U.S. Constitution. Larabee I, 850 N.Y.S.2d at 892-93 (citing Hatter, 532 U.S. at 567)). Since the "impact of inflation affects all, the decrease in the economic value of salaries paid to judges over the past nine years has not had a particularly discriminatory impact on judges different from that upon any other person who did not receive a salary increase during that period." Id. at 893. Applying this principle, this Court ruled that a mere failure to increase salaries does not state a viable claim for a violation of the Compensation Clause. Id.

The Supreme Court in Hatter also recognized, however, 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." 532 U.S. at 569. Plaintiffs in this litigation have alleged, in contrast to the plaintiffs in Larabee I, that the judiciary has in fact suffered discriminatory treatment in the face of inflation. Cmplt. at ¶¶ 10, 15, 29-31. While there have been salary increases for virtually all other State employees to compensate for inflation, New York judges have been singled out for unfavorable treatment. Id. at ¶ 10; 49-50 (stating that Defendants in the past decade have approved regular increases in the salaries of approximately 195,000 other public employees).[8] As this Court observed in Larabee I, 850 N.Y.S.2d at 892-93, discriminatory compensation does violate the Compensation Clause under Hatter. Hatter, 532 U.S. at 569.

[8] Defendants do not identify any other employees of New York State that have not received a cost-of-living adjustment in the past decade.

The Compensation Clause bars even indirect efforts to reduce judicial salaries when those efforts discriminate. Hatter, 532 U.S. at 576-77. Evidence of legislative intent to "intimidate, influence, or punish" the judiciary is not required to prove that judges have been singled out for unfavorable treatment; thus, a court may find that judges have been singled out even where the record shows nothing other than benign congressional motives. Id. at 577. New York State's practice of freezing judicial salaries in the face of inflation – despite raises for virtually all other state employees (including non-judicial employees of the judicial branch)[9] – singles out New York judges for unfavorable treatment and thereby violates the Compensation Clause of New York's Constitution.

C. Defendants are Not Immunized by Executive or Legislative Immunity, or the Political Question Doctrine

New York's Constitution provides that legislators shall not be "questioned in any other place" concerning their "speech or debate in either house of the legislature." N.Y. CONST. art. III, § 11; see also U.S. CONST., Art. I, § 6. This protection, which exists to preserve the independence of the legislative branch, is not without boundaries. Its limits have been recognized by the courts of New York, and by other courts, state and federal, interpreting similar constitutional provisions.

First, the protection applies only to legislators engaged in "legitimate legislative activity." Bogan v. Scott-Harris, 523 U.S. 44, 55 (1988) (quoting Tenney v. Brandhove, 341 U.S. 367, 440 (1951)); see also United States v. Brewster, 408 U.S. 501, 515-16 (1972) ("In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case

[9] *See* Complt. at ¶ 51 ("Although a small number of other State officials, including legislators, have not received salary adjustments since 1999, the effect on judges has been considerably more severe. New York legislators are already among the best-paid in the Nation . . . Moreover, New York legislators are able to hold outside jobs, and in some cases, they hold quite lucrative ones. But judges constitutionally and ethically are prohibited from offsetting their stagnating salaries with additional employment, except in limited circumstances.") (citing N.Y. CONST. art. VI, § 20(b)(4); 22 N.Y.C.R.R.§ 100.4).

thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process."). The practice of "linkage" – which this Court has already found unconstitutional in Larabee II – does not fall within the ambit of the clause. "[L]egitimate legislative functions" do not include undermining the independence of a co-equal branch of government by conditioning salary increases to the judiciary upon unrelated policy interests. As this Court has found:

> [B]y reason of the practice of linkage . . ., [Defendants] have demonstrated that in denying . . . the entire judicial branch of a government a pay increase for almost a decade (during which time inflation has eroded judicial compensation by approximately 30%), the political branches of our State government have used the issue of judicial pay as a pawn . . . and that this linkage is an abuse of power by defendants and constitutes an unconstitutional interference upon the independence of the judiciary.

Larabee II, 2008 WL 2357881, at *7. The practice of "linkage" – in effect, holding the issue of judicial salaries hostage – goes beyond legitimate legislative activity and has constitutional defects that must be remedied.

Second, as a protection designed to preserve the separation of powers and maintain balance among the branches of government, the Speech and Debate Clause cannot provide shelter for legislative actions that undermine the separation of powers. Such a result would be anomalous and "paradoxical." See Office of the Governor v. Select Committee of Inquiry, 858 A.2d 709, 725 (Conn. 2004) ("[T]he primary purpose of the speech or debate clause, whether on a federal or state constitutional level, is to protect legislative independence, thereby furthering the principle of the separation of powers. It 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."). Historically, the qualified immunity provided in the Speech or Debate Clause emerged from the problem of Executive encroachment into the Legislative sphere. See United States v.

Johnson, 383 U.S. 169, 178 (1966) ("Behind [the guarantees of legislative immunity in the English Bill of Rights of 1689] lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators."). Legislators' protection from encroachment—by the Executive or Judicial branches, by other legislators, and by private parties—cannot be a privilege to encroach on the other branches of government. As the Supreme Court has stated, "[o]ur speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historical balance of the three co-equal branches of government." Brewster, 408 U.S. at 508.

This litigation was brought by the highest ranking member of the judiciary, and the Unified Court System itself, against officials and entities from the other two branches of the State's government to remedy longstanding violations of vital and recognized state constitutional principles. Plaintiffs' claims go to the essence of the state's tripartite constitutional framework, and cannot be summarily dismissed by appeal to the Speech or Debate clause or any other claim to immunity. Rather, the weighty issues at stake here are fully appropriate for judicial consideration and remedy. See Pennsylvania State Ass'n of County Commissioners v. Commonwealth, 681 A.2d 699 (Pa. 1996) (holding that the state Speech or Debate Clause did not preclude issue of writ of mandamus to ensure legislative compliance with prior order concerning funding of the judiciary).

For similar reasons, the "political-question" doctrine does not shield Defendants' unconstitutional conduct from judicial review. The political-question doctrine is, itself, an outgrowth of the constitutional separation of powers; its "paramount concern is that the judiciary not undertake tasks that the other branches are better suited to perform." Klostermann v. Cuomo, 61 N.Y.2d 525, 535 (1984). The doctrine cannot be invoked to immunize Defendants' own violations

of the separation of powers principle. To decide whether a claim presents a non-justiciable political question, "a court must determine whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Powell v. McCormack, 395 U.S. 486, 517 (1969) (internal quotation marks omitted). Measured against those benchmarks, the claims presented here are properly suited for judicial determination. Indeed, this Court has already identified a distinct breach of a constitutional duty – the linkage of judicial compensation to unrelated political agendas, and the resulting threat to the independence of the judiciary – and it is, of course, the paramount responsibility of the judiciary to adjudicate constitutional questions. See People v. LaValle, 3 N.Y.3d 88, 128 (2004) ("The Court . . . plays a crucial and necessary function in our system of checks and balances. It is the responsibility of the judiciary to safeguard the rights afforded under our State Constitution."); King v. Cuomo, 81 N.Y.2d 247, 251 (1993) ("Our precedents are firm that 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.") (internal quotation marks omitted).

II. DEFENDANTS' CONTINUED FAILURE TO RAISE JUDICIAL SALARIES IN NEW YORK VIOLATES PUBLIC POLICY

A. It is Undisputed That New York's Judges Receive Inadequate Compensation

The objective statistics attesting to the basic inadequacy of judicial compensation in New York are striking and uncontested. And because the Defendants have held the issue of judicial pay raises hostage to unrelated political concerns, the resulting gridlock on this issue has grave implications for the continued vibrancy and independence of the judicial branch. The salient facts are not in dispute. New York judges have not received a cost-of-living adjustment – let alone a salary increase – since 1999. L. 1998, ch. 630 (amending Judiciary Law art. 7-B). Since that time, the cost of living in New York has increased by at least 26 percent. Complt. at ¶ 33. In other words,

once inflation is taken into account, New York judges' annual salaries are $23,700 less than they were when they last received a pay raise in 1999.[10]

1. On a Cost-of-Living Adjusted Basis, New York's Judicial Compensation Ranks Next to Last in the Nation

The erosion in New York State's judicial compensation looks especially bleak when viewed from a national perspective: judges in every other state have received pay raises since 1999 averaging 3.2% annually, for a cumulative increase of more than 24%. NCSC Report at 10. Accordingly, New York, once the nation's leader in judicial salaries,[11] now stands 49th out of 50 states on a cost-of-living-adjusted basis.[12] This figure simply cannot be reconciled with New York's status as a global economic and commercial capital.

2. New York's Judicial Compensation is Even Less Than That Provided to the Federal Judiciary

New York's judges, once paid at a higher rate than Federal District Court judges,[13] now trail their federal counterparts, who have at least received regular increases to their salaries to keep pace

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[10] See Statement of American Judges Association, American Judges Association Supports New York Pay Raises (June 27, 2007), available at http://aja.ncsc.dni.us/htdocs/AJAstatementNYsalaries%2006-07.pdf ("AJA Statement"). As one commentator has noted, "inflation has decreased judges' purchasing power and ability to maintain a constant standard of living." See Kristen A. Holt, Justice for Judges: The Roadblocks on the Path to Judicial Compensation Reform, 55 CATH. U. L. REV. 513, 515 (2006); see also American Bar Association and Federal Bar Association, Federal Judicial Pay Erosion: A Report on the Need for Reform, at 8-9 (Feb. 2001) ("ABA Report"), available at http://www.uscourts.gov/judicialpay.pdf (demonstrating that judicial salaries nationwide have not kept pace with inflation, and that "judges who live in expensive metropolitan areas," such as New York, "experience even greater erosion in the purchasing power of their salaries").

[11] See NCSC Report at 9.

[12] According to a 2007 survey conducted by the NCSC, judicial pay in New York ranked 48th in the nation when adjusted for statewide cost of living, ahead of only Oregon and Hawaii. Id. at 9. Since that report issued, Oregon has increased its salaries, causing New York to fall to 49th. Complt. at ¶ 35.

[13] NCSC Report at 9.

with the cost of living. Thus, although the salaries of New York's State Supreme Court Justices were on par with those of Federal District Court judges as recently as 1999, federal judges now earn almost $30,000 more than their counterparts in New York. Complt. at ¶ 2. Plaintiffs' request for pay parity with Federal District Court judges is more than reasonable, especially in light of the deservedly widespread attention given to the parallel issue of *federal* judicial compensation. For example, in his 2006 Year-End Report on the Federal Judiciary, Chief Justice Roberts focused on one issue alone: the failure to raise judicial pay for federal judges. See Chief Justice of the United States John G. Roberts, 2006 Year-End Report on the Federal Judiciary 1 (Jan. 1, 2007), available at http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf (describing the pay of federal judges, which is substantially more than that of New York judges, as a "constitutional crisis that threatens to undermine the strength and independence of the federal judiciary"); see also, e.g., Statement of Chief Justice William H. Rehnquist Before the National Commission on the Public Service (July 15, 2002) ("Rehnquist Statement"), available at http://www.uscourts.gov/Press_Releases/cj.html ("inadequate judicial pay undermines the strength of our judiciary" and "seriously compromises the judicial independence fostered by life tenure.").[14] Countless judicial organizations, bar associations, law school deans and professors, and corporate

[14] Justices Alito, Breyer, and Kennedy have also expressed concern about low judicial salaries for federal judges. See, e.g., Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 7 (2007) (Statement of Justice Anthony M. Kennedy), available at http://www.uscourts.gov/testimony/JusticeKennedy021407.pdf ("The current [judicial salary] situation . . . is a matter of grave systemic concern"). As recently as March 13, 2008, Justice Kennedy noted that "we are at a crisis" over judicial pay; "we are losing our best judges; we can't attract them; we can't retain them"; and that "it is a constitutional duty" to maintain the integrity and independence of the judiciary. Complt. at ¶ 2.

counsel have echoed and amplified the concerns of these prominent jurists.[15] These assertions, significant and compelling in their own right, lend further credence to Plaintiffs' claims here.

3. New York's Judicial Compensation Falls Far Short of Private-Sector Salaries

While judges engaged in public service will of necessity receive less compensation than many attorneys in the private sector, the current gap between the pay of judges and the average compensation for private sector attorneys – even attorneys with far less experience than the state's judges – is inordinate and growing. NCSC Report at 12. As Justice Stephen Breyer has lamented with respect to federal judges, "the difference between what judges make and what lawyers make in the private sector can only be described as the 'Grand Canyon.'" Statement of Justice Stephen Breyer before the National Commission on the Public Service (July 15, 2002), available at http://www.uscourts.gov/Press_Releases/breyer.html. Indeed, according to a 2004 study of the New York State Bar Association, the average pay statewide to senior partners at firms with ten of more attorneys is $350,000.[16] By comparison, the highest paid judge in the state earns $156,000. See

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[15] See, e.g., ABA Report, supra note 10; Russell R. Wheeler & Michael S. Greve, How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries (Brookings Inst., Apr, 2007), available at http://www.brookings.edu/papers/2007/04governance_wheeler.aspx; American College of Trial Lawyers, Judicial Compensation: Our Federal Judges Must Be Fairly Paid (Mar. 2007), available at http://www.uscourts.gov/judicialcompensation/paythepiper.pdf; Letter from 60 Major U.S. Corporations to Congressional Leaders Concerning the Need for a Substantial Salary Increase for Federal Judges (Apr. 3, 2007), available at http://www.uscourts.gov/judicialcompensation/generalcounselsupporttoSenate.pdf; Letter from Corporate Counsel to Congressional Leaders Supporting Judicial Pay Increase (Feb. 15, 2007), available at http://www.abanet.org/poladv/priorities/judicial_pay/ltrcorpleaders022007.pdf; Letter from 130 Law School Deans to Senator Patrick J. Leahy, Chair, S. Comm. on the Judiciary (Feb. 14, 2007), available at http://www.abanet.org/poladv/judicial_pay/deansletter.pdf.

[16] Partners at the state's highest grossing law firms – those in the "Am Law 100" published by The American Lawyer – earn substantially more still. See, e.g., Aric Press & John O'Connor, The Am Law 100: Lessons of the Am Law 100, (May 1, 2007), available at http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Cover+Story&id=1177578266432 (noting that in 2007, average profits per partner among firms headquartered in New York was "an astonishing $2.05 million").

NEW YORK STATE BAR ASSOCIATION, THE 2004 DESKTOP REFERENCE ON THE ECONOMICS OF LAW PRACTICE IN NEW YORK (Aug. 2004); AJA Statement ("Judges in New York often make embarrassingly little when compared to the parties before them.").

New York judges have traditionally been among the most experienced and qualified members of the New York Bar. This is not surprising, as "there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges." FEDERALIST NO. 78 (Alexander Hamilton). In New York, State Supreme Court Justices, for example, are required to have been a member of the bar for at least 10 years, and new Justices currently have an average of more than 18 years of experience. Complt. at ¶ 53. Currently, however, even first-year attorneys at the state's largest law firms are paid substantially more than the state's judges, even before their admission to the state's Bar. Id. While some disparity in pay between the private and public sectors is unavoidable, the widening chasm in pay between New York attorneys, and the judges before whom they appear, can have no legitimate rationale. See ABA, Independence of the Judicary: Judicial Salaries (2007), available at http://www.abanet.org/poladv/priorities/judicial_pay.

4. New York's Judicial Compensation Trails Many Other State Employees, Including Non-Judicial Employees Working in the Judicial Branch

Finally, in the past decade of salary stagnation and erosion, hundreds of New York state employees, including those with demonstrably less seniority and expertise, have enjoyed salary adjustments and increases. For example, District Attorneys in New York City, as well as New York City's Corporation Counsel, earn $34,000 more than the Chief Judge of the state, and over $53,000 more than all of the trial judges before whom they argue. NCSC Report at 10. More than 1,350 professors in the SUNY and CUNY systems earn more than a State Supreme Court Justice, as well as more than 1,250 public school administrators employed by the state. Id. These figures provide

one measure of the salaries provided to other individuals charged with commensurate or lesser responsibility within New York State's governance.

Moreover, non-judicial New York State employees have, almost without exception, received regular cost-of-living increases. Id. It is worth noting, for example, that non-judicial employees of the judicial branch have received regular pay adjustments aggregating to at least 24 percent since 1999. Id. Thus, many state employees who assist the state's judges in administering justice now, incongruously, earn more than the judges themselves. Id.; Editorial, Frayed Judicial Robes, N.Y. TIMES, Nov. 11, 2007 ("There are even non-judicial employees in the state judiciary system who can earn as much or more than the person who is up there making the most important decisions in the entire courthouse.").

B. Defendants' Failure to Raise Judicial Salaries Has Unacceptable Consequences

The consequences of Defendants' refusal to provide adequate judicial compensation are also well-documented. First, such paralysis threatens to subvert the judicial independence that is a hallmark of the judicial system. "The people of the State of New York are entitled to an independent judiciary and any improper interference not only adversely affects the judges, but is repugnant to our tripartite form of government and the liberties intended to be secured thereby." Larabee II, 2008 WL 2357881, at *7; see also NCSC Report at 22 ("the average citizen should have confidence that judges will decide cases with complete independence – free of any hint that decisions are influenced by judicial interest in accommodating governors and legislators who hold judges' financial wherewithal in their hands"). In relation to federal judicial compensation, Chief Justices Rehnquist and Roberts have also condemned the threat to judicial independence posed by inadequate salaries. See Section II.A.2, supra. This threat looms especially large in an environment in which judges are forced to publicly plead with the legislative and executive branches for much-

needed pay increases.[17] For example, the NCSC has noted that because the legislative process is the sole mechanism by which judges can seek pay increases, issues related to judicial pay can easily be unduly influenced by differences between the political branches of government on other issues, or even by dissatisfaction with specific court decisions. See NCSC Report at 19, 22. For these reasons, this Court recognized in Larabee II that even without "specific interference" in the daily performance of judges, the Defendants' practice of "linkage" still "constitutes an unconstitutional interference upon the independence of the judiciary." Larabee II, 2008 WL 2357881, at *3.

Second, judicial salary stagnation undermines the critical policy goal of maintaining a state judiciary of the highest caliber. Fair compensation is needed in order to maintain the excellence that has always been the hallmark of New York's state judiciary, as well as to recruit future generations of New York judges. The NCSC has argued that "a career on the Bench is no longer an attractive option for highly qualified lawyers without independent financial means." NCSC Report at 21. Chief Justice Rehnquist, commenting on the state of federal judicial pay, noted in 2002, "many of the very best lawyers, those with a great deal of experience, are not willing to accept a job knowing that their salary will not even keep pace with inflation. Our judges will not continue to represent the diverse face of America if only the well-to-do or mediocre are willing to become judges." Rehnquist Statement, Section II.A.2, supra.[18]

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[17] See, e.g., Chief Judge Judith S. Kaye, State of the Judiciary? Pay Crisis is Taking its Toll, 1/28/2008 N.Y.L.J. 11 ("The Judiciary's independence of the political branches is a strength of our democracy. Yet here we are, once again begging and pleading before the Executive and Legislature, on bended need, hat in hand, no seat at the negotiating table, nothing to trade or barter with them. Is this the posture of judicial independence? I think not.").

[18] See also Judicial Compensation and Judicial Independence: Hearing on Federal Judicial Compensation Before the H. Comm. on the Judiciary, 110th Cong. (2008) (Statement of Justice Stephen G. Breyer), available at http://www.uscourts.gov/testimony/JusticeBreyerPay041907.pdf (commenting that the inadequacy of federal judicial pay has contributed to the departure of multiple judges and has withered the pool of applicants to take their place).

Simply put, retaining and recruiting diverse and highly-qualified individuals to serve as New York judges requires an overhaul of the judicial compensation system. As one anonymous New York judge put it, "the most galling thing about all of this is that I could end these [financial] problems by simply resigning and re-entering the private sector. Barring some change in our compensation, I intend to do this next year." NCSC Report at 14; see also Daniel Wise, Citing Economic Hardship, Upstate Judge Plans to Quit, 1/9/2008 N.Y.L.J. ("I am unwilling to further deplete my savings and reduce my lifestyle to continue in office."). In one telling example, judges that want to stay in office while making ends meet have resorted to borrowing against their pension funds, a practice that has quadrupled since 2006. NCSC Report at 13. Currently, 117 judges statewide have outstanding pension loans. Id. at 14.[19] Without further action to break the logjam in Albany, New York's judges will continue to leave office, and the state will not be able to attract in their stead qualified candidates who lack the independent means to meet their own financial obligations.[20]

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[19] The financial strain faced by New York's judges is particularly striking in light of the state's teeming caseload. In 2006, for example, over 4.5 million cases were filed in New York State courts – nearly triple the number of filings for entirety of the Federal Judiciary. Id. at 5. While civil filings have increased over 35 percent since 1999, the total number of judges has increased by only one percent. Id. at 5-6. Moreover, as the ABA has noted, the nature of judicial work has exponentially changed as well. "Judges are now called upon to resolve many of the major legal, political and social disputes of our time. Rapid developments in information technology, medical science, e-commerce and globalization are spawning novel and complicated disputes . . . . In short [judges'] jobs demand more and more, but judges are effectively being paid less and less." ABA Report, supra note 10, at 15.

[20] See Kathryn Grant Madigan, President of NYSBA, Letter to the Editor, 11/27/2007 N.Y.L.J ("How long will our luck hold out? How long before judicial elections are relegated only to a few independently wealthy candidates? How many more of our judges will be forced to borrow against their pensions to pay for their children's college education? How long would you continue to work in your present setting if you went nine years without a cost-of-living adjustment, watching the value of your hard earned dollar deflate week by week?"); Kevin J. Quaranta, The Fight for Justice Demands Vigor, 5/1/2008 N.Y.L.J. 12 ("Judicial compensation of state Supreme Court judges has become so inadequate as to serve as a deterrent to any educated and accomplished lawyer willing to serve.").

Third, a weakened judiciary would have profound implications for New York's economy. Businesses rely on courts to resolve disputes efficiently and capably, and the quality of a state's court system is one factor that can attract or repel a business deciding to relocate. See NCSC Report at 21. New York's corporate and business executives, recognizing the ramifications of a weakened judiciary from a business perspective, have expressed concern about the current state of judicial compensation. Recently, the Partnership for New York City – a nonprofit membership organization comprised of a select group of two hundred CEOs from New York City's top corporate, investment and entrepreneurial firms – issued a statement urging Defendants to adopt Chief Judge Kaye's compensation proposals. "Because New York is a center of international business and finance, the commercial caseload facing our judiciary is particularly complex and demanding . . . . Along with numerous other legal, business and civic organizations, we support Judge Kaye's effort to secure both an immediate raise and the adoption of a Quadrennial Commission to determine future salary levels for State officials." Statement of Kathryn Wylde, President & CEO of the Partnership for New York City, Urging Immediate Raises for State Judges and a Commission to Determine Salaries of State Officials in the Future (Mar. 31, 2008), available at http://www.pfnyc.org/pressReleases/2008/tst_033108_judicial_salaries.html; see also NCSC Report at 21 ("A Strong Judiciary is Essential to a Healthy State Economy"); Larry D. Thompson & Charles J. Cooper, The State Of The Judiciary: A Corporate Perspective, 95 GEO. L.J. 1107, 1113 (2007) (detailing the negative impact of low federal judicial salaries on the country's corporations).[21]

[21] Corporations throughout the country have weighed in on the parallel issue of federal judicial pay, arguing that "each of our companies has a significant litigation docket and thus we share a deep interest in the quality of the judicial system, both federal and state. We are vitally interested in a high-quality, neutral and independent judiciary." Letter from 60 Major U.S. Corporations to Congressional Leaders Concerning the Need for a Substantial Salary Increase for Federal Judges (Apr. 3, 2007), available at http://www.uscourts.gov/judicialcompensation/generalcounselsupporttoSenate.pdf.

CONCLUSION

For the foregoing reasons, this Court should grant the relief demanded in the Complaint in all respects.

Dated: New York, New York
July 9, 2008

Respectfully submitted,
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