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

JUDITH S. KAYE, in her official capacity as Chief Judge of the State of New York, and THE NEW YORK STATE UNIFIED COURT SYSTEM, *Plaintiffs,* *- against -* 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.*	Index No. 400763/08 (Lehner, J.)

AFFIRMATION OF CHIEF JUDGE JUDITH S. KAYE

JUDITH S. KAYE, an attorney duly admitted to practice in the Courts in the State of New York, hereby affirms under penalty of perjury:

1. I am the Chief Judge of the State of New York and a plaintiff in this action, and I am Chief Judicial Officer of the New York State Unified Court System ("UCS"), also a plaintiff in this action. I respectfully submit this affirmation in opposition to the defendants' motions to dismiss under CPLR Rule 3211(a)(7) and for summary judgment, and in support of plaintiffs' request pursuant to Rules 3211(c) and 3212(b) that the Court grant summary judgment in favor of plaintiffs.

The Inadequacy of Judicial Salaries in New York

2. It has been almost ten years since the State of New York last adjusted the compensation of State-paid judges. The current pay of these judges is set by L. 1998, ch. 630, which amended Article 7-B of the Judiciary Law as of January 1, 1999. Under Article 7-B, the annual salary of a Justice of the Supreme Court is $136,700, which in 1999 was the salary of a United States District Judge. JUDICIARY LAW § 221-b; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL SALARIES SINCE 1968, at 1 (2008) (attached as Exhibit A hereto), *available at* http://www.uscourts.gov/salarychart.pdf. Since 1999, due to inflation and the political branches' failure to adjust the salaries of New York's judges, those salaries have declined in real terms by at least one-third. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data (attached as Exhibit B hereto), *available at* http://www.bls.gov. As a result, by any reasonable standard, the judicial salaries set in 1999 by Article 7-B are clearly inadequate today. They are clearly inadequate in light of, among other things, (1) the salaries of our federal judicial counterparts, (2) the pay of other public-sector employees, both legal and non-legal, (3) judicial salaries in other states, (4) compensation in the nonprofit sector, and (5) the pay received by lawyers in the private sector. Additionally, when one considers what New York judges were paid historically, in inflation-adjusted dollars, the levels of inadequacy today become manifest.

3. *Judicial Salaries in Other States.* As is reflected in the attached report of the National Center for State Courts, judges in every other state have received pay raises since 1999. NAT'L CENTER FOR STATE COURTS, JUDICIAL COMPENSATION IN NEW YORK: A NATIONAL PERSPECTIVE 1 (2007) (attached as Exhibit C hereto) [hereinafter NCSC REPORT], *available at* https://www.nycourts.gov/publications/pdfs/NCSCJudicialCompReport.pdf. Thus, "[o]f the 50

states, New York's judges have gone the longest without any salary adjustment." *Id.* at 1; *accord id.* at 9. From 1999 through the publication of the *NCSC Report* in May 2007, judges in other states received pay raises averaging 3.2 percent annually, amounting to a cumulative increase of over 24 percent. *Id* at 10.

4. As the *NCSC Report* observed in May 2007:

> Historically, New York had been a leader among the states with regard to judicial compensation, roughly maintaining parity with Federal District Court judges. *In 1975, . . . New York State ranked first, with a salary of $48,998 for a justice of the Supreme Court*—a status commensurate with the State's status as a global economic and commercial center and its very high cost of living. Since that time, New York's position has steadily eroded.
>
> Today, New York ranks 12th among the states based on the nominal salary paid to a judge of the trial court of general jurisdiction. *However, when New York's high cost of living is taken into account, the ranking drops to the bottom nationally. In fact, judicial pay in New York now ranks 48th nationwide when adjusted for statewide cost of living.* The only two states in the nation that rank lower than New York on an adjusted cost-of-living basis are Hawaii and Oregon.

Id. at 9 (emphasis added; footnotes omitted).

5. That was a year ago. Since then, in July 2007, Oregon's legislature raised judicial salaries there by 16 percent. *Legislature Raises Judicial Salaries*, CAPITOL INSIDER (Or. St. Bar Pub. Affairs Comm., Tigard, Or.), July 9, 2007, at 1 (attached as Exhibit D hereto), *available at* http://www.osbar.org/_docs/lawimprove/capinsider/ci_070709.pdf. *As a result, New York has fallen to 49th among the states.* Even this woeful ranking may not fully reflect the inadequacy of the compensation of many New York judges, because the ranking presupposes a statewide weighted average cost of living, and many of New York's judges live in New York City and surrounding counties in which the cost of living is higher than the statewide average.

6. In addition, the *NCSC Report* illustrates that New York judicial salaries began lagging even before 1999:

> A judge serving since 1995 has received only one pay increase, in 1999. A judge serving since 1988, 19 years ago, has received only two salary adjustments, in 1993 and 1999. Judges in other states have seen their pay rise with inflation. For the period 1986-1996, state judicial salaries increased nationally by 49%, compared to 38% for New York Supreme Court Justices; between 1996 and 2006, judicial salaries nationally increased by 34%, compared to 21% in New York. Over the full 20 years, judicial salaries nationally increased by 100%, compared to 67% in New York.

NCSC REPORT (Ex. C) at 9-10.

7. In their opening brief, defendants try to justify the recent stagnation in New York judicial salaries by pointing to even longer judicial pay freezes in the past. Putting aside whether the earlier pay freezes were themselves unconstitutional, they are readily distinguishable from the present situation. As calculated by my counsel in the accompanying Affirmation of Graham W. Meli, judicial salaries in these earlier periods were considerably higher, in real dollars, than they are today. For example:

- In 1887, a Judge of the Court of Appeals earned $10,000, and the Chief Judge earned $10,500. L. 1887, ch. 76. Those salaries are equivalent to approximately $228,418 and $239,839 today.

- In 1926, a Judge of the Court of Appeals earned $22,000, and the Chief Judge earned $22,500. L. 1926, ch. 94. Those salaries are equivalent to approximately $269,260 and $275,379 today.

- In 1947, a Judge of the Court of Appeals earned $25,000, and the Chief Judge earned $25,500. L. 1947, ch. 462. Those salaries are equivalent to approximately $242,860 and $247,718 today.

- In 1952, a Judge of the Court of Appeals earned $32,500, and the Chief Judge earned $35,000. L. 1952, ch. 88. Those salaries are equivalent to approximately $265,680 and $286,117 today.

- In 1975, a Judge of the Court of Appeals earned $60,575, and the Chief Judge earned $63,143. L. 1975, ch. 152. Those salaries are equivalent to approximately $243,912 and $254,252 today.

See Meli Aff. ¶ 2 & Ex. A. Moreover, defendants ignore important economic differences between the earlier periods they cite and recent years. The period beginning in 1887, for example,

was marked by protracted *deflation*; prices did not return to 1887 levels until nearly 25 years later. *See* HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ON LINE 3-158 tbl.Cc1-2 (Susan B. Carter et al. eds., Cambridge Univ. Press 2006) (attached as Exhibit E hereto). It was during this period of deflation, in 1894, that the State Constitution was amended to prohibit increases in judicial salaries. Judicial salaries thus remained constant until the Constitution was amended in 1925 to again allow salary increases. Shortly after the amendment, the economy again experienced decades of deflation. *Id.* Although judicial salaries remained constant during this period of deflation, when inflation returned in the mid-1940s, the State quickly raised judicial salaries. *See id.*; L. 1947, ch. 462.

8. *Federal Judicial Salaries.* Federal district judges today make $169,300, over $32,000 more than their trial-court counterparts in New York State, and since 1999 they have had their annual pay raised by 23.8 percent. *See* Ex. A at 1. Historically, however, the salaries of New York Supreme Court Justices have been at least on par with those of federal district judges. Indeed, for many years, the pay of Supreme Court Justices was substantially *higher* than that of federal district judges. In 1909, Supreme Court Justices in New York City were paid $17,500 per year, whereas federal district judges earned only $6,000. *The Salaries of the Judges*, N.Y. TIMES, Jan. 24, 1909 (attached as Exhibit F hereto); *see also* RUSSELL R. WHEELER & MICHAEL S. GREVE, HOW TO PAY THE PIPER: IT'S TIME TO CALL DIFFERENT TUNES FOR CONGRESSIONAL AND JUDICIAL SALARIES 12 (attached as Exhibit G hereto) (table reflecting historic compensation of federal judges), *available at* http://www.uscourts.gov/judicialcompensation/paythepiper.pdf.

9. Likewise, in 1936, during the Great Depression, New York State Supreme Court Justices in New York City earned $25,000 per year, while federal district judges earned

only $10,000 per year. *Pay Rises Listed in Court Budgets*, N.Y. TIMES, Sept. 11, 1936 (attached as Exhibit H hereto); Ex. G at 12. (The $25,000 that Supreme Court Justices received in 1936 would be the equivalent of over $389,000 in today's dollars. *See* U.S. Dep't of Labor, CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (printout attached as Exhibit I hereto.) Even as recently as 1975, New York judicial salaries exceeded federal salaries: a state Supreme Court Justice's annual salary then was $48,998, and a federal district judge's salary was only $42,000. NCSC REPORT (Ex. C) at 9; Ex. G at 12. (The 1975 state salary of $48,998 would amount to over $197,000 in today's dollars. *See* Ex. I.)

10. Today, the tables have turned. From 1986 to 2006, federal district judges' salaries increased by 110 percent, while New York State Supreme Court Justices increased by only 67 percent. NCSC REPORT (Ex. C) at 10. As a result, as noted above, the $169,300 annual salary of United States District Judges now exceeds that of a State Supreme Court Justice by $32,600. And the Chief Justice of the United States 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." CHIEF JUSTICE JOHN G. ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1-2 (2007) (attached as Exhibit J hereto), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf. Similarly, Associate Justice Anthony Kennedy testified to a congressional committee that "[w]e are at a crisis" over federal judicial pay, and that "[w]e are losing our best judges; we can't attract them; we can't retain them." Tony Mauro, *Justice Kennedy Turns Up the Heat on Judicial Salaries*, LEGAL TIMES, Mar. 14, 2008 (attached as Exhibit K hereto).

11. *Salaries of Other Public Officials and Public-Sector Employees in New York.* The inadequacy of judicial salaries in New York is also clear when those salaries are com-

pared to the salaries of many other public officials and public-sector employees in the State. Thus, for example, as reported in the *NCSC Report*:

a. District Attorneys in New York City earn $190,000, some $53,300 more than the Supreme Court Justices before whom they appear (Ex. C at 10);

b. The deans of New York State's two public law schools, the University of Buffalo Law School and the City University of New York Law School, earn $232,899 and $215,000, respectively, almost $100,000 and $80,000 more than a Supreme Court Justice (*id.* at 11);

c. The Corporation Counsel of the City of New York earns $189,700, more than $50,000 more than a Supreme Court Justice (*id.*);

d. Attorneys in the State Comptroller's Office earn up to $160,540, over $20,000 more than a Supreme Court Justice (*id.*);

e. The General Counsel of the City University of New York earns $220,000, over $80,000 more than a Supreme Court Justice (*id.* at 11);

f. More than 1,350 professors in the State and City University systems earn more than a Justice of the New York State Supreme Court, and over 1,000 of these professors are paid more than $150,000 (*id.* at 10);

g. The Chancellors of the City University of New York and the State University of New York, respectively, earn $395,400 and $340,000, well more than double what Supreme Court Justices make (*id.* at 11);

h. Over 1,250 public school administrators, including elementary school principals, earn more than a Supreme Court Justice, and "[m]any earn signifi-

cantly more" (*id.*), such as, for example, the Levittown Superintendent of Schools ($292,642), the Chancellor and Deputy Chancellor of the New York City Department of Education ($250,000 and $212,960), and the Rochester Superintendent of Schools ($230,000) (*id.*).

12. As the *NCSC Report* points out, these salary figures "provide a frame of reference to evaluate the 'going rate' in the State for highly trained and experienced public sector professionals entrusted with significant responsibilities." *Id.* Nevertheless, although these figures suffice to establish the inadequacy of judicial salaries in comparison to that going rate, they may actually understate that inadequacy: as the *NCSC Report* also makes clear, "[m]any state-employed professionals, such as professors, doctors, and legislators, are permitted to supplement their public income by engaging in outside employment and consulting." *Id.* at 10 n.26. Judges, of course, are not permitted to earn outside income, except in very limited circumstances. In particular, the State Constitution provides, among other things, that judges may not "engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or engage in the conduct of any other profession or business which interferes with the performance of his or her judicial duties," N.Y. CONST. art. VI, § 20(b)(4), and may not "hold any other public office or trust except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or of the State of New York," *id.* § 20(b)(1); *see also* 22 N.Y.C.R.R. § 100.4.

13. Even some *non*judicial employees in the New York Judiciary now earn more than judges. In fact, hundreds of such employees receive salaries greater than those of the State's lowest-paid full-time judges and, in some cases, employees earn more than the judges for whom they directly work.

14. Although New York judges are eligible for health insurance and other benefits in addition to their base salaries, most other State employees receive comparable benefits. By law, all full-time New York State employees are eligible to receive health insurance benefits, with the State paying 90 percent of the premium for employee coverage and 75 percent of the premium for dependent coverage. CIV. SERV. LAW §§ 163(1), 167(1). According to a study by the National Conference of State Legislatures, in 2006 New York State paid premiums of approximately $830 per month—almost $10,000 per year—for each State employee enrolled in a standard family health insurance plan. NAT'L CONFERENCE OF STATE LEGISLATURES, STATE EMPLOYEE HEALTH BENEFITS—MONTHLY PREMIUM COSTS (May 2006) (attached as Exhibit L hereto), *available at* http://www.ncsl.org/programs/health/stateemploy.htm. In addition to insurance, some State employees also receive other fringe benefits on top of their salaries. Every New York legislator, for example, is entitled to reimbursement of travel expenses and payment of a per diem stipend during legislative sessions. *See* LEGIS. LAW § 5.

15. *Compensation in the Nonprofit Sector.* New York judicial compensation also compares very unfavorably to salaries paid by nonprofits. As the *NCSC Report* details, based on data from a 2006 survey by Charity Navigator, the *average* compensation of a CEO for a not-for-profit charitable organization in the Northeast is $173,267. NCSC REPORT (Ex. C) at 12 n.29. And many not-for-profit officers earn much more than that each year:

a. The president of the New York Public Library earns $600,280;

b. The director of the Brooklyn Museum, $467,280;

c. The CEO of the YMCA of Greater New York, $404,641;

d. Executive Director, Human Rights Watch, $288,750;

e. President, NAACP Legal Defense & Education Fund, $248,406; and

f. Executive Director, Lambda Legal, $214,000.

Id.

16. *Private-sector attorney compensation.* Finally, a comparison with private-sector legal compensation likewise illustrates the inadequacy of judges' pay in New York. As the *NCSC Report* states, the compensation of lawyers in private firms is of somewhat "limited value" in determining judges' pay, because no lawyer joins the bench expecting to make as much as some successful lawyers do in private practice. Ex. C at 12. But the gap between judges' pay and law-firm pay remains relevant, as it reflects the financial sacrifice that many judges make by joining and remaining on the bench, and it affects the willingness of lawyers to become and to remain judges.

17. A study released in 2004 by the New York State Bar Association makes clear that, on average, partners in law firms typically earn significantly more than judges. The mean compensation of partners in firms with ten lawyers or more was $293,567, more than twice the pay received by a Supreme Court Justice. NEW YORK STATE BAR ASSOCIATION, THE 2004 DESKTOP REFERENCE ON THE ECONOMICS OF PRACTICE IN NEW YORK STATE 48 (2004) (excerpt attached as Exhibit M hereto).

18. As the *NCSC Report* points out, however, "[a] more appropriate comparison to judges" would be with "the more senior partners" in private law firms, Ex. C at 12, because the average New York State judge was admitted to the Bar 29 years ago and has been a judge for more than 10 years. If judges' salaries are thus compared with those of their relative peers in private law firms, the results are stunning.

19. According to the May 2008 *American Lawyer*, 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. *See The Am Law 100 2008*, AM. LAW., May 2008, at 200, 211 (attached at Exhibit N hereto). Using statewide data from 2004, in firms with ten or more lawyers, the top quartile of partners in terms of compensation made at least $350,000. Ex. M at 48. And the top five percent made $694,500—five times what Supreme Court Justices make. *Id.* Even at the smallest law firms, firms with 2 to 9 lawyers, partners were better paid than judges: the mean was $173,643, the top quartile received $220,000, and the top five percent made $350,000. *Id*.

20. And in the largest New York City firms today, first-year associates—new law school graduates, many of whom have not yet passed the bar—now earn a $160,000 base salary annually, and often receive significant bonuses in addition to that salary. Ex. C at 12. As this Court recognized in *Larabee* v. *Spitzer*, 19 Misc. 3d 226, 233 (Sup. Ct. N.Y. Co. 2008), the total compensation that many of these young lawyers receive is greater than the pay I receive as Chief Judge. At these New York City firms, even *interns* are paid at a higher rate than judges: the "summer associates," law students working during their summer vacations, receive pay at the $160,000 per annum starting-salary rate.

21. The salaries and bonuses the young lawyers receive go up quickly with each year of experience. According to a recent survey conducted by *American Lawyer* magazine, third-year associates at the major New York City firms receive median salaries of $185,000 and median bonuses of $40,000, for a total compensation of $225,000; and fourth-year associates receive median salaries of $210,000 and median bonuses of $45,000, for a total of $255,000. *Associates Survey*, AM. LAW., Sept. 2007 (attached as Exhibit O hereto), *available at*

http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Cover%20Story&id=1188378153076. For fifth-year associates, the median salary is $230,000 and the median bonus is $50,000, for a total of $280,000—more than *twice* the $136,700 earned by a Supreme Court Justice. *Id.*

22. Even outside New York, young lawyers at the top firms make more than Supreme Court Justices in New York. Nationally, the median total compensation (including bonuses) for third-, fourth- and fifth-year associates in the *American Lawyer* survey was $200,000, $222,100, and $245,000. *Id.* That new lawyers should make so much more money than judges with decades of legal experience is stunning indeed.

23. I have long believed, and have stated publicly, that the growing gap between the compensation of New York judges and other lawyers threatens the effectiveness of the Judiciary. In my 2005 State of the Judiciary address, for example, I stated:

> We must ensure that the finest individuals continue to be drawn to judicial service, and that our outstanding bench is justly compensated on an ongoing basis. That is difficult to achieve when a Judge's salary is eroded by an increase in the cost of living by 20 percent or more between sporadic salary adjustments.

Hon. Judith S. Kaye, The State of the Judiciary 2005, at 20 (Feb. 7, 2005) (attached as Exhibit P hereto), *available at* http://www.courts.state.ny.us/admin/stateofjudiciary/soj2005.pdf. In my 2006 State of the Judiciary address, I again noted that the effectiveness of the Judiciary was at risk:

> Seven years without any increase in compensation is counterproductive in another sense. We are a society that needs and depends on an effective Judiciary, but this diminishes our ability to attract and retain the very best lawyers and judges, and thus ultimately is harmful to the public interest.

Hon. Judith S. Kaye, The State of the Judiciary 2006, at 2 (Feb. 6, 2006) (attached as Exhibit Q hereto), *available at* http://nycourts.gov/admin/stateofjudiciary/soj2006.pdf. I echoed this point the following year, stating that the financial sacrifice of holding judicial office had long ago be-

come unreasonable, "threatening the excellence of the state bench." Hon. Judith S. Kaye, The State of the Judiciary 2007, at 2 (Feb. 26, 2007) (attached as Exhibit R hereto), *available at* http://www.courts.state.ny.us/admin/stateofjudiciary/soj2007.pdf. And at an April 2007 news conference, I again noted that the judicial pay freeze threatened the excellence and independence of the Judiciary:

> No society can expect its courts to function with the excellence the public deserves when the issue of judicial compensation reaches such a level of unfairness and disdain, when our Judiciary can no longer expect to attract and retain the very best lawyers at the pinnacle of their careers. No judiciary can maintain public confidence in its independence if the public can question whether decisions are influenced by efforts to encourage pay raises or retaliate for their denial.

Statement of the Chief Judge of the State of New York, Apr. 9, 2007 (attached as Exhibit S hereto), *available at* http://courts.state.ny.us/press/JSKJudicialSalaryStatementApr9.pdf.

Defendants' Discrimination in Setting Judicial Salaries

24. At the same time that they have refused to adjust judicial salaries, the Legislature and the Executive have repeatedly increased the salaries of other State employees over the past nine years. Many of these employees are compensated under collective bargaining agreements concluded by the State, ratified by the Legislature and approved on the State's behalf by the Governor then in office. *See generally* CIV. SERV. LAW art. 14; *id.* § 130. Likewise, the State routinely grants senior attorneys in the legislative and executive branches periodic compensation increases. In total, approximately 195,000 New York State government employees have received regular salary increases in the past decade. The State has explicitly disqualified UCS judges from the periodic salary-review system applicable to other State employees. S*ee id.* § 201(7)(a).

25. The State has increased other State employees' salaries by at least 24 percent since 1999, ensuring they would keep pace with inflation. NCSC REPORT (Ex. C) at 10. Some State employees have received even larger pay increases. For example, in January 1999 the highest salary on any of the State's published salary schedules was approximately $116,000. *See* CIV. SERV. LAW § 130 (1999). By 2008, the salary at that pay grade had increased over 30 percent to about $152,000, and the Legislature has already approved additional annual raises to take effect in 2009 and 2010. *See* CIV. SERV. LAW § 130 (2008). Attached as Exhibit T hereto is a document compiled by the plaintiffs in *Larabee* v. *Governor*, Index No. 112301/07 (Sup. Ct. N.Y. Co.), showing the salaries of selected State employees in 1999 and 2007 and how those salaries essentially leapfrogged judicial salaries during that time.

26. 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 State legislators are already among the best paid in the Nation. Their salaries rank third in absolute terms among those states that pay legislators an annual salary. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATOR COMPENSATION 2007, http://www.ncsl.org/programs/legismgt/about/07_legislatorcomp.htm (attached as Exhibit U hereto). Even when adjusted for cost of living, New York legislators' salaries still rank sixth in the Nation, compared to 49th in the Nation for New York judges.

27. In addition to their already-competitive base salaries, many legislators earn thousands more for their service on committees and in other leadership posts; these allowances range from $9,000 for the ranking minority members of various committees to $41,500 for the leaders of each House. *See* LEGIS. LAW § 5-A. Moreover, New York legislators are able to hold outside jobs. But again, judges constitutionally and ethically are prohibited from offsetting

their stagnating salaries with additional employment, except in limited circumstances. *See* N.Y. CONST. art. VI, § 20(b)(4); 22 N.Y.C.R.R. § 100.4. Judges also are the only high State officers 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. Additionally, legislators and executive officials have the capacity directly to engage the political process to increase their salaries. By contrast, judges do not have a direct appropriation power and ethically must refrain from most political activity. Judges are thus virtually the only State employees whose salaries have been frozen without any meaningful recourse.

Defendants' Linkage of Judicial Salaries to Legislative Salaries and Other Unrelated Matters

28. Attempts to implement judicial salary increases over the past several years have repeatedly fallen victim to unrelated disputes among the State's politicians. Legislators have refused to adjust judicial salaries unless their own salaries are increased at the same time, and a series of Governors have refused to approve legislative pay raises unless legislators agree to an oft-changing raft of initiatives reported to include campaign finance reform, charter schools, congestion pricing, and other unrelated initiatives.

29. In March 2005, the Administrative Board of the Courts issued to the State, through the executive and legislative branches, a detailed report describing the State's twenty-year history of stagnation in judicial compensation and urging the State promptly to raise judicial compensation. State leaders assured me that judicial salary reform was a priority and would be forthcoming. But these promises of reform fell victim to unrelated political disputes.

30. Thus, in June 2005, Governor Pataki proposed to increase the salaries of all State-paid judges and to restore pay parity between State Supreme Court Justices and United

States District Judges. In so doing, the Governor stated 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 he promised that "we can address this issue before the end of the legislative session, and provide our judges and justices with the support they have earned and deserve." John Caher, *Pataki Introduces Bill To Raise Judicial Pay*, N.Y.L.J., June 6, 2005 (attached as Exhibit V hereto).

31. Shortly thereafter, Senator Bruno publicly stated that the Legislature was unlikely to agree to the Governor's proposal because it did not include a pay raise for legislators: "Historically, things have been, sort of, you know, gone together." Marc Humbert, *Bruno: No Pay Raise for Judges, Just Yet*, Assoc. Press, June 22, 2005 (attached as Exhibit W hereto). Under further questioning about the possibility of a pay-increase package for both judges and legislators, Senator Bruno added: "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. If you're asking me, will it get done? My estimate would be no." *Id.* As Senator Bruno predicted, the Legislature failed to approve judicial pay increases in 2005 because legislators and Governor Pataki could not reach a deal on legislative raises. As one commentator explained:

> [B]y tradition, judges have gotten a raise only when members of the Legislature do . . . . The reality has been that the clamor for judges to get more money has been a tool New York lawmakers have used to justify their own increases.
>
> That's something New York lawmakers are generally reluctant to do, since voters, who for the most part don't have the option of voting to raise their own pay, tend to react negatively.

Jay Gallagher, *Judges' Pay Hike Not Likely*, TIMES UNION, Dec. 4, 2005, at B8 (attached as Exhibit X hereto).

32. This political dispute carried over into the State's budget process in each of the next three years. In January 2006, Governor Pataki announced a budget proposal calling

for a judicial pay increase of approximately 19 percent. John Caher, *Pataki Urges Legislature to Hike Judges' Salaries*, N.Y.L.J., Jan. 18, 2006 (attached as Exhibit Y hereto). In the commentary accompanying his budget proposal, the Governor stated: "I too support a judicial salary increase. . . . I recommend that the Legislature approve my proposal to ensure that the State continue to attract and retain the finest jurists in the country." Commentary of the Governor on the Judiciary, Fiscal Year 2006-2007 (attached as Exhibit Z hereto), *available at* http://www.budget.state.ny.us/pubs/archive/fy0607archive/fy0607app1/judcom.pdf.

33. Governor Pataki and the Legislature proceeded to approve a budget that included $69.5 million for judicial salary increases. L. 2006, ch. 51, § 2. But the law adopting the budget specifically stated that further legislation would be necessary before these increases would be paid. *Id.* The Legislature refused to adopt further legislation necessary to implement judicial pay increases because the Legislature and the Governor could not agree on legislative pay increases. Judicial salary adjustments were thus held hostage to legislators' salaries. As the *New York Law Journal* explained in early 2007:

> [L]awmakers . . . passively denied judges a pay raise, partially because they traditionally give the judges an increase only as political cover when they raise their own pay. Lawmakers have gone without a raise just as long as the judges and [in 2006] were looking for a politically palatable way to increase their pay.
>
> But former Governor George E. Pataki was unwilling to sign off on legislative pay hikes, and legislators lacked the will to risk a politically popular veto or politically devastating override—especially at a time when the Legislature is portrayed in the media and by civil groups as dysfunctional and unaccountable . . . .

John Caher, *Spitzer Puts Judge Raises in His Budget*, N.Y.L.J., Feb. 1, 2007 (attached as Exhibit AA hereto).

34. Shortly after he was inaugurated in January 2007, Governor Spitzer announced a budget proposal that included $111 million for judicial pay increases. In a press con-

ference, the new Governor "said that a pay raise is warranted 'as a matter of fairness to judges and their families and as a matter of public policy.'" Ex. AA. He added: "'I have said for quite some time 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." *Id.* The Governor "urge[d] the Legislature to take action" on his proposal for judicial pay increases, noting that such reform had "languished too long." Commentary of the Governor on the Judiciary, Fiscal Year 2007-2008 (attached as Exhibit BB hereto), *available at* http://www.budget.state.ny.us/pubs/archive/fy0708archive/fy0708app1/judcom.pdf.

35. By the time the Governor and the Legislature reached a budget agreement at the end of March 2007, however, it contained no funding for judicial pay increases. Governor Spitzer publicly stated that he "wish[ed] there were" a judicial pay increase in the budget but that the Legislature removed the funding he had proposed. Joel Stashenko & Daniel Wise, *Judges' Raises Out of Budget After Last-Minute Bargaining*, N.Y.L.J., Apr. 2, 2007 (attached as Exhibit CC hereto). Judicial salary adjustments were taken out of the budget, because legislators insisted on tying judicial salaries to legislative salaries, and the Governor was unwilling to tie judicial salaries to legislative salaries unless legislators agreed to other unrelated political issues, including campaign finance reform, which they refused to do.

36. Legislative leaders publicly acknowledged that they had refused to approve a judicial pay increase without creation of a commission empowered to increase salaries of judges and legislators. Speaker Silver "said . . . that state judges 'absolutely' deserve a pay raise [but that] 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." Ex. CC.

For his part, Senator Bruno "blamed Mr. Spitzer for balking at creating the pay-raise commission" and "said the Senate was still prepared to pass the judicial pay raise legislation if the commission bill accompanied it." *Id.* As another senator put it, "'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.'" James M. Odato, *Kaye Willing To Sue for Pay*, TIMES UNION, Apr. 10, 2007, at A1 (attached as Exhibit DD hereto).

37. The political stalemate continued throughout 2007. In April, Speaker Silver and Senator Bruno again publicly expressed their support for judicial pay raises, but only if tied to a commission that would set future salary increases for legislators, judges, and top executive branch employees. Joel Stashenko, *Kaye Prepared To Sue for Judicial Raises,* N.Y.L.J., Apr. 10, 2007 (attached as Exhibit EE hereto). As I stated in a news conference I held on April 9, 2007:

> These most recent days have been distressing and infuriating for me, and for all my colleagues on the bench, as we struggle to comprehend why, yet again, the measure has failed for no reason related to its merit, or to us, and then to determine what we must do.
>
> As to the why, yesterday's newspapers offered some insight. For starters, as a column on State budget deliberations in the Gannett papers reminds us, nobody is saying that the judges don't deserve the raise, and nobody is saying that the State can't afford it. A *New York Times* editorial explains that the legislative leaders are essentially holding the judges "hostage" for their own pay increase, while the Governor seeks greater reform in the way the Legislature operates. Do these and other similar commentaries make any sense to our beleaguered judges? Do they make any sense at all as a reason for denying judicial pay raises? Of course not! Linkage to reform measures in State government, and linkage to a legislative pay increase, are not of our making, and not remotely within our power to change.

Ex. S. The *Times* editorial to which I referred described the situation this way:

> In New York, judicial salaries rank near the bottom of the national salary scale for state judges, and the reason is particularly galling. New York's legislators refuse to give judges a pay raise unless they can get one themselves.

> 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 the Republican Senate majority leader, Joseph Bruno, and the Democratic Assembly speaker, Sheldon Silver, and their respective majorities are essentially holding the judiciary's pay hostage.

Justice on the Cheap, N.Y. TIMES, Apr. 8, 2007, at 9 (attached as Exhibit FF hereto).

38. That same month, the State Senate passed a bill that would have increased the salaries of all State-paid judges and restored the pay parity between State Supreme Court Justices and federal District Judges. The bill would have also created a commission responsible for reviewing and, as necessary, increasing judicial and legislative salaries in the future. *See* S. 5313 (2007). Governor Spitzer, however, again refused to go forward with a bill that increased both judicial and legislative salaries unless the Legislature agreed to campaign finance reform. As Senator Bruno explained, "Despite saying he would not link the judges' pay bill to any issue, Gov. Spitzer has done just that. . . . He has linked the bill to his proposal for campaign finance reform . . . ." Yancey Roy, *As Pay Bill Stalls, Chief Judge Scolds Lawmakers*, JOURNAL NEWS, May 1, 2007 (attached as Exhibit GG hereto). As the *New York Times* explained the situation,

> Senate Republicans insist[ed] on linking raises for judges to a proposal to create a commission to review raises for legislators, and passed legislation to that effect . . . .
>
> The governor, however, has refused to approve legislative pay raises until lawmakers pass more of his agenda, including an overhaul of campaign finance laws. Given that Mr. Bruno has rejected the campaign finance proposal, judicial pay raises appear to be in limbo.

Danny Hakim, *Raise for State Judges Gets Caught in Crossfire Between Spitzer and Bruno*, N.Y. TIMES, May 1, 2007 (attached as Exhibit HH hereto).

39. In June 2007, Governor Spitzer voiced support for a judges-only pay bill, stating that "[i]t would permit that issue to be separate from legislative pay raises, so it is not held hostage by irrelevant issues." Joel Stashenko, *Bruno: No New Bill to Boost Judges' Pay*,

N.Y.L.J., June 20, 2007 (attached as Exhibit II hereto). Senator Bruno, however, was not receptive at that time, and was reported as having "said . . . that as far back as 'anybody remembers,' salary increases for judges, legislators and top administration officials have been enacted at the same time." *Id.* As for the Governor, "Mr. Spitzer . . . promised to veto any bill providing for a legislative pay increase unless the Legislature adopts tough campaign finance reforms." *Id.*

40. In December 2007, the Senate finally changed course, passing a bill increasing judicial salaries without an accompanying increase for legislators. *See* S. 6550 (2007). But the bill was "largely symbolic," Danny Hakim, *Albany: Special Session for Senate*, N.Y. TIMES, Dec. 14, 2007 (attached as Exhibit JJ hereto), because the Assembly would not pass any bill that adjusted judicial salaries without increasing salaries of legislators.

41. This political logjam continued into 2008. In January, Governor Spitzer proposed a budget that provided for a judicial salary increase, again noting that such reform had "languished too long." Commentary of the Governor on the Judiciary, Fiscal Year 2008-2009 (attached as Exhibit KK hereto), *available at* http://publications.budget.state.ny.us/eBudget0809/agencyPresentations/pdf/judcom.pdf. Shortly thereafter, the *New York Times* reported that Speaker Silver informed his membership that Governor Spitzer would agree to a "comprehensive pay bill" that would increase salaries of legislators, judges, and executive-branch commissioners. Danny Hakim, *Spitzer Is Said To Agree to a Raise for Legislators*, N.Y. TIMES, Jan. 24, 2008 (attached as Exhibit LL hereto). In a radio interview, Speaker Silver explained the tit-for-tat bargaining over salaries in which he and the Governor were engaged: "[I]t is not inconceivable that the governor will finally understand that he needs a pay raise for the commissioners, that the judges are certainly deserving of a pay raise, that most of the legislators are full-time legislators who haven't had a pay raise in many, many years and that we can put together a good package

that takes care of all of them." Joel Stashenko & Daniel Wise, *Nussbaum Tapped by Kaye To Prepare Judicial Pay Suit*, N.Y.L.J., Jan. 28, 2008 (attached as Exhibit MM hereto).

42. On March 12, 2008, Governor Spitzer announced his resignation. The very next day, his successor, David A. Paterson, acknowledged "the need to 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." Joel Stashenko, *Citing Economy, Paterson Says Chances For Raise 'Very Difficult'*, N.Y.L.J., Mar. 14, 2008 (attached as Exhibit NN hereto). But the new Governor admitted that "obviously" there is a linkage between legislative and judicial pay increases—a linkage he would like to break but that "has not worked to this point." *Id.* Consequently, he said, it would be "very difficult" to increase judicial salaries. *Id.*

43. On April 10, 2008, the Legislature and the Governor approved a budget for Fiscal Year 2008-2009 that mentions $48 million in funds for judicial salary increases. This provision, however, is known as a "dry appropriation," because it will not be funded without additional implementing legislation. And, again, the Governor and the Legislature refuse to provide funds and adopt legislation required to implement judicial pay increases. This failure was the result of disputes over legislative raises and other unrelated issues, not any fiscal constraints or disagreements on the merits of judicial pay increases. Indeed, since passage of the budget, the Governor and leaders of the Legislature have continued to state that they believe judicial pay increases are warranted. On April 11, 2008, for example, a spokesperson for Speaker Silver said that "the speaker has long favored a pay raise for judges along with state legislators and commissioners in the executive branch" and that "the inclusion of the $48 million appropriation in the budget, though it was a 'dry' one, showed that Mr. Silver is sympathetic to judges' quest for

more money." Joel Stashenko & Daniel Wise, *Kaye Sues State Over Judicial Salaries*, N.Y.L.J., Apr. 11, 2008 (attached as Exhibit OO hereto). Senator Bruno noted that he had twice supported salary increase bills for judges. *Id.* And a spokesperson for Governor Paterson stated that the Governor "personally believed that a pay increase is warranted" for judges. *Id.*

44. As this Court is aware, despite these statements by the Governor and the legislative leaders, nothing has happened. To this day the decade-long decline in judicial compensation has been permitted to continue. That is why, most reluctantly, I have been compelled to bring this lawsuit to require the Governor and the Legislature to fulfill their constitutional responsibilities to the judicial branch and to the public.

Dated: New York, New York
July 8, 2008

HON. JUDITH S. KAYE

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

JUDITH S. KAYE, in her official capacity as Chief Judge of the State of New York, and THE NEW YORK STATE UNIFIED COURT SYSTEM, *Plaintiffs,* *- against -* 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.*	Index No. 400763/08 (Lehner, J.)

AFFIRMATION OF GRAHAM W. MELI

Graham W. Meli, an attorney duly admitted to practice in the Courts in the State of New York, hereby affirms under penalty of perjury:

1. I am an associate at Wachtell, Lipton, Rosen & Katz, counsel for plaintiffs Chief Judge Judith S. Kaye and the New York State Unified Court System in this action. I respectfully submit this affirmation in opposition to the defendants' motions to dismiss under CPLR Rule 3211(a)(7) and for summary judgment, and in support of plaintiffs' request pursuant to Rules 3211(c) and 3212(b) that the Court grant summary judgment in favor of plaintiffs.

2. In their opening brief, the Assembly defendants cite the salaries of Judges of the New York State Court of Appeals from 1887 through 1975. Assem. Br. 9. Attached hereto as Exhibit A is a chart converting the Court of Appeals salaries in each year from 1887 to the present into 2008 dollars. I calculated this information using Consumer Price Index data published in HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ON LINE 3-158 tbl.Cc1-2 (Susan B. Carter et al. eds., Cambridge Univ. Press 2006) (attached as Exhibit B hereto), and U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data, *available at* http://www.bls.gov (attached as Exhibit C hereto). Among other things, Exhibit A shows the following:

- In 1887, a Judge of the Court of Appeals earned $10,000, and the Chief Judge earned $10,500. L. 1887, ch. 76. Those salaries are equivalent to approximately $228,418 and $239,839 today.
- In 1926, a Judge of the Court of Appeals earned $22,000, and the Chief Judge earned $22,500. L. 1926, ch. 94. Those salaries are equivalent to approximately $269,260 and $275,379 today.
- In 1947, a Judge of the Court of Appeals earned $25,000, and the Chief Judge earned $25,500. L. 1947, ch. 462. Those salaries are equivalent to approximately $242,860 and $247,718 today.
- In 1952, a Judge of the Court of Appeals earned $32,500, and the Chief Judge earned $35,000. L. 1952, ch. 88. Those salaries are equivalent to approximately $265,680 and $286,117 today.
- In 1975, a Judge of the Court of Appeals earned $60,575, and the Chief Judge earned $63,143. L. 1975, ch. 152. Those salaries are equivalent to approximately $243,912 and $254,252 today.

Dated: New York, New York
July 9, 2008

Graham W. Meli

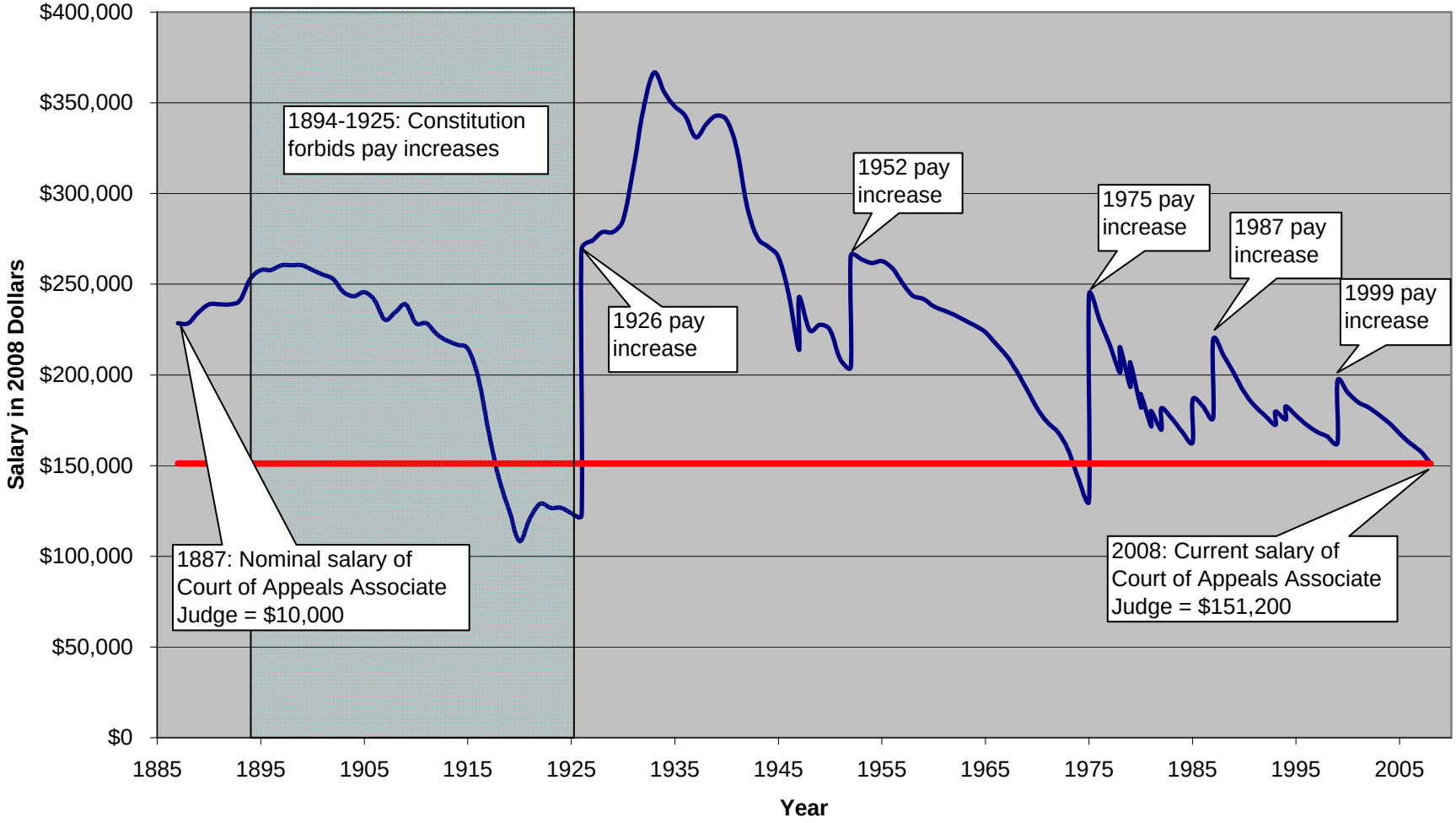
GRAHAM W. MELI

TABLE OF EXHIBITS

Exhibit	Description
A	Chart of New York Court of Appeals Associate Judge Salaries: 1887-2008
B	HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ON LINE 3-158 tbl.Cc1-2 (Susan B. Carter et al. eds., Cambridge Univ. Press 2006)
C	U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data, *available at* http://www.bls.gov.

New York Court of Appeals Associate Judge Salaries: 1887-2008

(in 2008 dollars)



Sources: Historical Statistics of the United States, Millennial Edition On Line (Susan B. Carter et al. eds., Cambridge Univ. Press 2006);
U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data, *available at* http://www.bls.gov

Year	Judge of Court of Appeals - Nominal Salary	Chief Judge of Court of Appeals - Nominal Salary	Historical CPI Value	Inflation Adjustment Factor (2008 CPI Value / Historical CPI Value)	Judge of Court of Appeals - Inflation-Adjusted Salary	Chief Judge of Court of Appeals - Inflation-Adjusted Salary
1887	**$ 10,000.00**	**$ 10,500.00**	**9.48**	22.84	$ 228,418.39	$ 239,839.31
1888	$ 10,000.00	$ 10,500.00	9.48	22.84	$ 228,418.39	$ 239,839.31
1889	$ 10,000.00	$ 10,500.00	9.24	23.46	$ 234,577.15	$ 246,306.01
1890	$ 10,000.00	$ 10,500.00	9.07	23.89	$ 238,897.22	$ 250,842.08
1891	$ 10,000.00	$ 10,500.00	9.07	23.89	$ 238,897.22	$ 250,842.08
1892	$ 10,000.00	$ 10,500.00	9.07	23.89	$ 238,897.22	$ 250,842.08
1893	$ 10,000.00	$ 10,500.00	8.99	24.11	$ 241,104.06	$ 253,159.27
1894	$ 10,000.00	$ 10,500.00	8.57	25.28	$ 252,808.96	$ 265,449.41
1895	$ 10,000.00	$ 10,500.00	8.40	25.78	$ 257,803.17	$ 270,693.32
1896	$ 10,000.00	$ 10,500.00	8.40	25.78	$ 257,803.17	$ 270,693.32
1897	$ 10,000.00	$ 10,500.00	8.32	26.04	$ 260,406.30	$ 273,426.61
1898	$ 10,000.00	$ 10,500.00	8.32	26.04	$ 260,406.30	$ 273,426.61
1899	$ 10,000.00	$ 10,500.00	8.32	26.04	$ 260,406.30	$ 273,426.61
1900	$ 10,000.00	$ 10,500.00	8.40	25.78	$ 257,803.17	$ 270,693.32
1901	$ 10,000.00	$ 10,500.00	8.49	25.53	$ 255,281.64	$ 268,045.72
1902	$ 10,000.00	$ 10,500.00	8.57	25.28	$ 252,808.96	$ 265,449.41
1903	$ 10,000.00	$ 10,500.00	8.82	24.56	$ 245,642.36	$ 257,924.48
1904	$ 10,000.00	$ 10,500.00	8.90	24.34	$ 243,352.06	$ 255,519.66
1905	$ 10,000.00	$ 10,500.00	8.82	24.56	$ 245,642.36	$ 257,924.48
1906	$ 10,000.00	$ 10,500.00	8.99	24.11	$ 241,104.06	$ 253,159.27
1907	$ 10,000.00	$ 10,500.00	9.40	23.04	$ 230,435.06	$ 241,956.81
1908	$ 10,000.00	$ 10,500.00	9.24	23.46	$ 234,577.15	$ 246,306.01
1909	$ 10,000.00	$ 10,500.00	9.07	23.89	$ 238,897.22	$ 250,842.08
1910	$ 10,000.00	$ 10,500.00	9.48	22.84	$ 228,418.39	$ 239,839.31
1911	$ 10,000.00	$ 10,500.00	9.48	22.84	$ 228,418.39	$ 239,839.31
1912	$ 10,000.00	$ 10,500.00	9.73	22.26	$ 222,551.88	$ 233,679.47
1913	$ 10,000.00	$ 10,500.00	9.90	21.88	$ 218,820.20	$ 229,761.21
1914	$ 10,000.00	$ 10,500.00	10.00	21.66	$ 216,632.00	$ 227,463.60
1915	$ 10,000.00	$ 10,500.00	10.10	21.45	$ 214,487.13	$ 225,211.49
1916	$ 10,000.00	$ 10,500.00	10.90	19.87	$ 198,744.95	$ 208,682.20
1917	$ 10,000.00	$ 10,500.00	12.80	16.92	$ 169,243.75	$ 177,705.94
1918	$ 10,000.00	$ 10,500.00	15.10	14.35	$ 143,464.90	$ 150,638.15
1919	$ 10,000.00	$ 10,500.00	17.30	12.52	$ 125,220.81	$ 131,481.85
1920	$ 10,000.00	$ 10,500.00	20.00	10.83	$ 108,316.00	$ 113,731.80
1921	$ 10,000.00	$ 10,500.00	17.90	12.10	$ 121,023.46	$ 127,074.64
1922	$ 10,000.00	$ 10,500.00	16.80	12.89	$ 128,947.62	$ 135,395.00
1923	$ 10,000.00	$ 10,500.00	17.10	12.67	$ 126,685.38	$ 133,019.65
1924	$ 10,000.00	$ 10,500.00	17.10	12.67	$ 126,685.38	$ 133,019.65
1925	$ 10,000.00	$ 10,500.00	17.50	12.38	$ 123,789.71	$ 129,979.20
1926	$ 10,000.00	$ 10,500.00	17.70	12.24	$ 122,390.96	$ 128,510.51
1926	**$ 22,000.00**	**$ 22,500.00**	**17.70**	12.24	$ 269,260.11	$ 275,379.66
1927	$ 22,000.00	$ 22,500.00	17.40	12.45	$ 273,902.53	$ 280,127.59
1928	$ 22,000.00	$ 22,500.00	17.10	12.67	$ 278,707.84	$ 285,042.11
1929	$ 22,000.00	$ 22,500.00	17.10	12.67	$ 278,707.84	$ 285,042.11

Year	Judge of Court of Appeals - Nominal Salary	Chief Judge of Court of Appeals - Nominal Salary	Historical CPI Value	Inflation Adjustment Factor (2008 CPI Value / Historical CPI Value)	Judge of Court of Appeals - Inflation-Adjusted Salary	Chief Judge of Court of Appeals - Inflation-Adjusted Salary
1930	$ 22,000.00	$ 22,500.00	16.70	12.97	$ 285,383.47	$ 291,869.46
1931	$ 22,000.00	$ 22,500.00	15.20	14.25	$ 313,546.32	$ 320,672.37
1932	$ 22,000.00	$ 22,500.00	13.70	15.81	$ 347,876.20	$ 355,782.48
1933	$ 22,000.00	$ 22,500.00	13.00	16.66	$ 366,608.00	$ 374,940.00
1934	$ 22,000.00	$ 22,500.00	13.40	16.17	$ 355,664.48	$ 363,747.76
1935	$ 22,000.00	$ 22,500.00	13.70	15.81	$ 347,876.20	$ 355,782.48
1936	$ 22,000.00	$ 22,500.00	13.90	15.59	$ 342,870.79	$ 350,663.31
1937	$ 22,000.00	$ 22,500.00	14.40	15.04	$ 330,965.56	$ 338,487.50
1938	$ 22,000.00	$ 22,500.00	14.10	15.36	$ 338,007.38	$ 345,689.36
1939	$ 22,000.00	$ 22,500.00	13.90	15.59	$ 342,870.79	$ 350,663.31
1940	$ 22,000.00	$ 22,500.00	14.00	15.47	$ 340,421.71	$ 348,158.57
1941	$ 22,000.00	$ 22,500.00	14.70	14.74	$ 324,211.16	$ 331,579.59
1942	$ 22,000.00	$ 22,500.00	16.30	13.29	$ 292,386.75	$ 299,031.90
1943	$ 22,000.00	$ 22,500.00	17.30	12.52	$ 275,485.78	$ 281,746.82
1944	$ 22,000.00	$ 22,500.00	17.60	12.31	$ 270,790.00	$ 276,944.32
1945	$ 22,000.00	$ 22,500.00	18.00	12.04	$ 264,772.44	$ 270,790.00
1946	$ 22,000.00	$ 22,500.00	19.50	11.11	$ 244,405.33	$ 249,960.00
1947	$ 22,000.00	$ 22,500.00	22.30	9.71	$ 213,717.67	$ 218,574.89
1947	**$ 25,000.00**	**$ 25,500.00**	**22.30**	9.71	$ 242,860.99	$ 247,718.21
1948	$ 25,000.00	$ 25,500.00	24.10	8.99	$ 224,721.99	$ 229,216.43
1949	$ 25,000.00	$ 25,500.00	23.80	9.10	$ 227,554.62	$ 232,105.71
1950	$ 25,000.00	$ 25,500.00	24.10	8.99	$ 224,721.99	$ 229,216.43
1951	$ 25,000.00	$ 25,500.00	26.00	8.33	$ 208,300.00	$ 212,466.00
1952	$ 25,000.00	$ 25,500.00	26.50	8.17	$ 204,369.81	$ 208,457.21
1952	**$ 32,500.00**	**$ 35,000.00**	**26.50**	8.17	$ 265,680.75	$ 286,117.74
1953	$ 32,500.00	$ 35,000.00	26.70	8.11	$ 263,690.64	$ 283,974.53
1954	$ 32,500.00	$ 35,000.00	26.90	8.05	$ 261,730.11	$ 281,863.20
1955	$ 32,500.00	$ 35,000.00	26.80	8.08	$ 262,706.72	$ 282,914.93
1956	$ 32,500.00	$ 35,000.00	27.20	7.96	$ 258,843.38	$ 278,754.41
1957	$ 32,500.00	$ 35,000.00	28.10	7.71	$ 250,553.02	$ 269,826.33
1958	$ 32,500.00	$ 35,000.00	28.90	7.50	$ 243,617.30	$ 262,357.09
1959	$ 32,500.00	$ 35,000.00	29.10	7.44	$ 241,942.96	$ 260,553.95
1960	$ 32,500.00	$ 35,000.00	29.60	7.32	$ 237,856.08	$ 256,152.70
1961	$ 32,500.00	$ 35,000.00	29.90	7.25	$ 235,469.57	$ 253,582.61
1962	$ 32,500.00	$ 35,000.00	30.20	7.17	$ 233,130.46	$ 251,063.58
1963	$ 32,500.00	$ 35,000.00	30.60	7.08	$ 230,083.01	$ 247,781.70
1964	$ 32,500.00	$ 35,000.00	31.00	6.99	$ 227,114.19	$ 244,584.52
1965	$ 32,500.00	$ 35,000.00	31.50	6.88	$ 223,509.21	$ 240,702.22
1966	$ 32,500.00	$ 35,000.00	32.40	6.69	$ 217,300.62	$ 234,016.05
1967	$ 32,500.00	$ 35,000.00	33.40	6.49	$ 210,794.61	$ 227,009.58
1968	$ 32,500.00	$ 35,000.00	34.80	6.23	$ 202,314.37	$ 217,877.01
1969	$ 32,500.00	$ 35,000.00	36.70	5.90	$ 191,840.33	$ 206,597.28
1970	$ 32,500.00	$ 35,000.00	38.80	5.58	$ 181,457.22	$ 195,415.46
1971	$ 32,500.00	$ 35,000.00	40.50	5.35	$ 173,840.49	$ 187,212.84

Year	Judge of Court of Appeals - Nominal Salary	Chief Judge of Court of Appeals - Nominal Salary	Historical CPI Value	Inflation Adjustment Factor (2008 CPI Value / Historical CPI Value)	Judge of Court of Appeals - Inflation-Adjusted Salary	Chief Judge of Court of Appeals - Inflation-Adjusted Salary
1972	$ 32,500.00	$ 35,000.00	41.80	5.18	$ 168,433.97	$ 181,390.43
1973	$ 32,500.00	$ 35,000.00	44.40	4.88	$ 158,570.72	$ 170,768.47
1974	$ 32,500.00	$ 35,000.00	49.30	4.39	$ 142,810.14	$ 153,795.54
1975	$ 32,500.00	$ 35,000.00	53.80	4.03	$ 130,865.06	$ 140,931.60
1975	**$ 60,575.00**	**$ 63,143.00**	**53.80**	4.03	$ 243,912.33	$ 254,252.68
1976	$ 60,575.00	$ 63,143.00	56.90	3.81	$ 230,623.61	$ 240,400.60
1977	$ 60,575.00	$ 63,143.00	60.60	3.57	$ 216,542.63	$ 225,722.68
1978	$ 60,575.00	$ 64,313.00	65.20	3.32	$ 201,265.08	$ 213,684.87
1978	$ 64,815.00	$ 67,563.00	65.20	3.32	$ 215,352.81	$ 224,483.25
1979	$ 64,815.00	$ 67,563.00	72.60	2.98	$ 193,402.25	$ 201,602.04
1979	**$ 69,352.00**	**$ 72,292.00**	**72.60**	2.98	$ 206,940.25	$ 215,712.96
1980	$ 69,352.00	$ 72,292.00	82.40	2.63	$ 182,328.43	$ 190,057.77
1980	$ 72,000.00	$ 75,000.00	82.40	2.63	$ 189,290.10	$ 197,177.18
1981	$ 72,000.00	$ 75,000.00	90.90	2.38	$ 171,589.70	$ 178,739.27
1981	**$ 75,600.00**	**$ 78,750.00**	**90.90**	2.38	$ 180,169.19	$ 187,676.24
1982	$ 75,600.00	$ 78,750.00	96.50	2.24	$ 169,713.77	$ 176,785.18
1982	$ 80,892.00	$ 84,262.50	96.50	2.24	$ 181,593.74	$ 189,160.14
1983	$ 80,892.00	$ 84,262.00	99.60	2.18	$ 175,941.72	$ 183,271.54
1984	$ 80,892.00	$ 84,262.00	103.90	2.09	$ 168,660.21	$ 175,686.68
1985	$ 80,892.00	$ 84,262.00	107.60	2.01	$ 162,860.56	$ 169,645.41
1985	**$ 92,500.00**	**$ 95,000.00**	**107.60**	2.01	$ 186,231.04	$ 191,264.31
1986	$ 92,500.00	$ 95,000.00	109.60	1.98	$ 182,832.66	$ 187,774.09
1987	$ 92,500.00	$ 95,000.00	113.60	1.91	$ 176,394.89	$ 181,162.32
1987	**$ 115,000.00**	**$ 120,000.00**	**113.60**	1.91	$ 219,301.76	$ 228,836.62
1988	$ 115,000.00	$ 120,000.00	118.30	1.83	$ 210,589.01	$ 219,745.05
1989	$ 115,000.00	$ 120,000.00	124.00	1.75	$ 200,908.71	$ 209,643.87
1990	$ 115,000.00	$ 120,000.00	130.70	1.66	$ 190,609.64	$ 198,897.02
1991	$ 115,000.00	$ 120,000.00	136.20	1.59	$ 182,912.48	$ 190,865.20
1992	$ 115,000.00	$ 120,000.00	140.30	1.54	$ 177,567.21	$ 185,287.53
1993	$ 115,000.00	$ 120,000.00	144.50	1.50	$ 172,406.09	$ 179,902.01
1993	**$ 120,000.00**	**$ 124,500.00**	**144.50**	1.50	$ 179,902.01	$ 186,648.33
1994	$ 120,000.00	$ 124,500.00	148.20	1.46	$ 175,410.53	$ 181,988.42
1994	$ 125,000.00	$ 129,000.00	148.20	1.46	$ 182,719.30	$ 188,566.32
1995	$ 125,000.00	$ 129,000.00	152.40	1.42	$ 177,683.73	$ 183,369.61
1996	$ 125,000.00	$ 129,000.00	156.90	1.38	$ 172,587.64	$ 178,110.44
1997	$ 125,000.00	$ 129,000.00	160.50	1.35	$ 168,716.51	$ 174,115.44
1998	$ 125,000.00	$ 129,000.00	163.00	1.33	$ 166,128.83	$ 171,444.96
1999	$ 125,000.00	$ 129,000.00	166.60	1.30	$ 162,539.02	$ 167,740.26
1999	**$ 151,200.00**	**$ 156,000.00**	**166.60**	**1.30**	**$ 196,607.19**	**$ 202,848.69**
2000	$ 151,200.00	$ 156,000.00	172.20	1.26	$ 190,213.46	$ 196,251.99
2001	$ 151,200.00	$ 156,000.00	177.10	1.22	$ 184,950.64	$ 190,822.09
2002	$ 151,200.00	$ 156,000.00	179.90	1.20	$ 182,072.03	$ 187,852.10
2003	$ 151,200.00	$ 156,000.00	184.00	1.18	$ 178,014.99	$ 183,666.26
2004	$ 151,200.00	$ 156,000.00	188.90	1.15	$ 173,397.34	$ 178,902.02

Year	Judge of Court of Appeals - Nominal Salary	Chief Judge of Court of Appeals - Nominal Salary	Historical CPI Value	Inflation Adjustment Factor (2008 CPI Value / Historical CPI Value)	Judge of Court of Appeals - Inflation-Adjusted Salary	Chief Judge of Court of Appeals - Inflation-Adjusted Salary
2005	$ 151,200.00	$ 156,000.00	195.30	1.11	$ 167,715.10	$ 173,039.39
2006	$ 151,200.00	$ 156,000.00	201.60	1.07	$ 162,474.00	$ 167,631.90
2007	$ 151,200.00	$ 156,000.00	207.34	1.04	$ 157,974.55	$ 162,989.61
2008	$ 151,200.00	$ 156,000.00	216.63	1.00	$ 151,200.00	$ 156,000.00

Notes: Nominal salaries were taken from page 9 of the Assembly Brief and from the following New York statutes: L. 1887, ch. 76; L. 1926, ch. 94; L. 1947, ch. 462; L. 1952, ch. 88; L. 1975, ch. 152; L. 1979, ch. 55; L. 1980, ch. 881; L. 1984, ch. 986; L. 1987, ch. 263; L. 1993, ch. 60; and L. 1998, ch. 630.

Historical CPI values from 1887 through 1912 were taken from HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ON LINE 3-158 tbl.Cc1-2 (Susan B. Carter et al. eds., Cambridge Univ. Press 2006). Historical CPI values from 1913 through 2008 were taken from U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data, available at http://www.bls.gov. The value used for 2008 is as of May 2008. The data series used was the Consumer Price Index for all urban consumers, with 1982-1984 = 100 (Series id. CUUR0000SA0).

CONSUMER PRICE INDEXES

Peter H. Lindert and Robert A. Margo

TABLE Cc1-2 Consumer price indexes, for all items: 1774–2003

Contributed by Peter H. Lindert and Richard Sutch

Year	BLS-based Cc1 Index 1982–1984 = 100	David–Solar-based Cc2 Index 1860 = 100
1774	8.070	97
1775	7.654	92
1776	8.735	105
1777	10.649	128
1778	13.810	166
1779	12.230	147
1780	13.727	165
1781	11.065	133
1782	12.146	146
1783	10.649	128
1784	10.233	123
1785	9.734	117
1786	9.484	114
1787	9.318	112
1788	8.902	107
1789	8.819	106
1790	9.151	110
1791	9.401	113
1792	9.567	115
1793	9.900	119
1794	10.982	132
1795	12.562	151
1796	13.228	159
1797	12.729	153
1798	12.313	148
1799	12.313	148
1800	12.562	151
1801	12.729	153
1802	10.732	129
1803	11.314	136
1804	11.814	142
1805	11.730	141
1806	12.230	147
1807	11.564	139
1808	12.562	151
1809	12.313	148
1810	12.313	148
1811	13.145	158
1812	13.311	160
1813	15.973	192
1814	17.554	211
1815	15.391	185
1816	14.060	169
1817	13.311	160
1818	12.729	153
1819	12.729	153
1820	11.730	141
1821	11.314	136
1822	11.730	141
1823	10.483	126
1824	9.651	116
1825	9.900	119
1826	9.900	119
1827	9.983	120
1828	9.484	114
1829	9.318	112
1830	9.235	111
1831	8.652	104
1832	8.569	103
1833	8.403	101
1834	8.569	103
1835	8.819	106
1836	9.318	112
1837	9.567	115
1838	9.318	112
1839	9.318	112
1840	8.652	104
1841	8.735	105
1842	8.153	98
1843	7.404	89
1844	7.488	90
1845	7.571	91
1846	7.654	92
1847	8.236	99
1848	7.903	95
1849	7.654	92
1850	7.820	94
1851	7.654	92
1852	7.737	93
1853	7.737	93
1854	8.403	101
1855	8.652	104
1856	8.486	102
1857	8.735	105
1858	8.236	99
1859	8.319	100
1860	8.319	100
1861	8.819	106
1862	10.067	121
1863	12.562	151
1864	15.724	189
1865	16.306	196
1866	15.890	191
1867	14.809	178
1868	14.226	171
1869	13.644	164
1870	13.062	157
1871	12.230	147
1872	12.230	147
1873	11.980	144
1874	11.398	137
1875	10.982	132
1876	10.732	129
1877	10.483	126
1878	9.983	120
1879	9.983	120
1880	10.233	123
1881	10.233	123
1882	10.233	123
1883	10.067	121
1884	9.817	118
1885	9.651	116
1886	9.401	113
1887	9.484	114
1888	9.484	114
1889	9.235	111
1890	9.068	109
1891	9.068	109
1892	9.068	109
1893	8.985	108
1894	8.569	103
1895	8.403	101
1896	8.403	101
1897	8.319	100
1898	8.319	100
1899	8.319	100
1900	8.403	101
1901	8.486	102
1902	8.569	103
1903	8.819	106
1904	8.902	107
1905	8.819	106
1906	8.985	108
1907	9.401	113
1908	9.235	111
1909	9.068	109
1910	9.484	114
1911	9.484	114
1912	9.734	117
1913	9.900	119
1914	10.000	120
1915	10.100	121
1916	10.900	130
1917	12.800	153
1918	15.100	180
1919	17.300	207
1920	20.000	240
1921	17.900	214
1922	16.800	200
1923	17.100	204
1924	17.100	204
1925	17.500	210
1926	17.700	211
1927	17.400	208
1928	17.100	205
1929	17.100	205
1930	16.700	200
1931	15.200	182
1932	13.700	163
1933	13.000	155
1934	13.400	160
1935	13.700	164
1936	13.900	166
1937	14.400	172
1938	14.100	169
1939	13.900	166

TABLE Cc1–2 Consumer price indexes, for all items: 1774–2003 *Continued*

Year	BLS-based Cc1 Index 1982–1984 = 100	David–Solar-based Cc2 Index 1860 = 100
1940	14.000	168
1941	14.700	176
1942	16.300	195
1943	17.300	207
1944	17.600	210
1945	18.000	215
1946	19.500	233
1947	22.300	267
1948	24.100	288
1949	23.800	285
1950	24.100	288
1951	26.000	310
1952	26.500	317
1953	26.700	320
1954	26.900	321
1955	26.800	320
1956	27.200	325
1957	28.100	336
1958	28.900	346
1959	29.100	348
1960	29.600	354
1961	29.900	358
1962	30.200	362
1963	30.600	366
1964	31.000	371
1965	31.500	377
1966	32.400	388
1967	33.400	399
1968	34.800	416
1969	36.700	438
1970	38.800	464
1971	40.500	484
1972	41.800	500
1973	44.400	531
1974	49.300	589
1975	53.800	643
1976	56.900	680
1977	60.600	724
1978	65.200	779
1979	72.600	867
1980	82.400	984
1981	90.900	1,086
1982	96.500	1,153
1983	99.600	1,190
1984	103.900	1,241
1985	107.600	1,286
1986	109.600	1,309
1987	113.600	1,357
1988	118.300	1,413
1989	124.000	1,481
1990	130.700	1,562
1991	136.200	1,627
1992	140.300	1,676
1993	144.500	1,726
1994	148.200	1,771
1995	152.400	1,821
1996	156.900	1,875
1997	160.500	1,918
1998	163.000	1,947
1999	166.600	1,990
2000	172.200	2,057
2001	177.100	2,116
2002	179.900	2,149
2003	184.000	2,198

Sources

1774–1974, Paul A. David and Peter Solar, "A Bicentenary Contribution to the History of the Cost of Living in America," *Research in Economic History* 2 (1977): 1–80 (Table 1, pp. 16–17). 1913–2003, U.S. Bureau of Labor Statistics (BLS) consumer price index for all urban consumers (also called CPI-U, Series CUUR0000SA0). The BLS data are available from the BLS's Internet site.

Documentation

The user should refer to series Cc2 (base year 1860) to reduce rounding error for the pre-1913 era, when the absolute numbers were small. For more recent comparisons, refer to series Cc1 (base year 1982–1984).

David and Solar's consumer price index is calculated from multiple underlying price series using the following expenditure weights:

For 1774–1851: David and Solar modified the farm and urban expenditure weights for the 1830s from Dorothy Brady, with cross reference to those for working-class families in the early 1830s from Matthew Carey (their Appendix A, pp. 40–3).

For 1851–1880: David and Solar drew weights from Ethel Hoover, "Retail Prices after 1850," in *Trends in the American Economy in the Nineteenth Century: A Report of the National Bureau of Economic Research,* Studies in Income and Wealth, volume 24 (Princeton University Press, 1960), Table 4, p. 150.

For 1880–1890: David and Solar used weights from Clarence Long, *Wages and Earnings in the United States, 1860–1890* (Princeton University Press, 1960), Table B-3, column 2, pp. 158–60.

For 1890–1914: The weights are from Albert Rees, *Real Wages in Manufacturing, 1890–1914* (Princeton University Press, 1961), Table 42, row 4, p. 114.

For 1914–1924: The David–Solar weights are from U.S. Department of Labor, *The Cost of Living in the United States*, BLS Bulletin number 357 (1924), Table 2, row 16, p. 5.

For 1924–1930: A simple average of the weights in U.S. Department of Labor (1924) and U.S. Department of Labor, *Handbook of Labor Statistics*, BLS Bulletin number 1,790 (1973).

For 1930–1974: David and Solar used the weights from U.S. Department of Labor (1973), Table 125, p. 290. The weights came from its columns 1–4 for the following year ranges, respectively: 1930–1949, 1949–1953, 1953–1963, and 1963–1974.

The BLS calculates the CPI-U using expenditures of urban wage earners and clerical workers, professional, managerial, and technical workers, the self-employed, short-term workers, and the unemployed, retirees, and others not in the labor force. User fees (such as water and sewer service) and sales and excise taxes paid by the consumer are also included. Income taxes and investment items (such as stocks, bonds, and life insurance) are not included. Prices for the goods and services used to calculate the CPI-U are collected in eighty-seven urban areas throughout the country and from about 23,000 retail and service establishments. Data on rents are collected from about 50,000 landlords or tenants. The weight for an item is derived from reported expenditures on that item as estimated by the BLS Consumer Expenditure Survey.

Series Cc1. For 1774–1912, this series is the David–Solar series (series Cc2) divided by 12.02, to splice at the year 1913 to a base of 1982–1984 = 100. For 1913–2003, it is the BLS consumer price index for all urban consumers.

Series Cc2. For 1774–1974, this series is the David–Solar index from their Table 1. For 1975–2003, this series is the BLS consumer price index for all urban consumers (series Cc1) multiplied by the ratio 589/49.3 to create a splice at 1974.

David and Solar's primary sources for consumer price series are as follows: 1774–1851: David and Solar (1977), Appendix A, pp. 40–3; 1851–1860: David and Solar use Hoover (1960), Table 1, column 1, p. 142; 1860–1880: Stanley Lebergott, *Manpower in Economic Growth* (McGraw-Hill, 1964), Table A-33, column 1, p. 549; 1880–1890, Long (1960), Table B-2, column 1, p. 157; 1890–1914, Rees (1961), Table 22, column 1, p. 74; 1914–1972, U.S. Department of Labor (1973), Table 121, p. 287; 1972–1974, U.S. Department of Labor (1973), Table 22, column 1, p. 95.

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Consumer Price Index - All Urban Consumers

Series Id: CUUR0000SA0
Not Seasonally Adjusted
Area: U.S. city average
Item: All items
Base Period: 1982-84=100

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1913	9.8	9.8	9.8	9.8	9.7	9.8	9.9	9.9	10.0	10.0	10.1	10.0	9.9		
1914	10.0	9.9	9.9	9.8	9.9	9.9	10.0	10.2	10.2	10.1	10.2	10.1	10.0		
1915	10.1	10.0	9.9	10.0	10.1	10.1	10.1	10.1	10.1	10.2	10.3	10.3	10.1		
1916	10.4	10.4	10.5	10.6	10.7	10.8	10.8	10.9	11.1	11.3	11.5	11.6	10.9		
1917	11.7	12.0	12.0	12.6	12.8	13.0	12.8	13.0	13.3	13.5	13.5	13.7	12.8		
1918	14.0	14.1	14.0	14.2	14.5	14.7	15.1	15.4	15.7	16.0	16.3	16.5	15.1		
1919	16.5	16.2	16.4	16.7	16.9	16.9	17.4	17.7	17.8	18.1	18.5	18.9	17.3		
1920	19.3	19.5	19.7	20.3	20.6	20.9	20.8	20.3	20.0	19.9	19.8	19.4	20.0		
1921	19.0	18.4	18.3	18.1	17.7	17.6	17.7	17.7	17.5	17.5	17.4	17.3	17.9		
1922	16.9	16.9	16.7	16.7	16.7	16.7	16.8	16.6	16.6	16.7	16.8	16.9	16.8		
1923	16.8	16.8	16.8	16.9	16.9	17.0	17.2	17.1	17.2	17.3	17.3	17.3	17.1		
1924	17.3	17.2	17.1	17.0	17.0	17.0	17.1	17.0	17.1	17.2	17.2	17.3	17.1		
1925	17.3	17.2	17.3	17.2	17.3	17.5	17.7	17.7	17.7	17.7	18.0	17.9	17.5		
1926	17.9	17.9	17.8	17.9	17.8	17.7	17.5	17.4	17.5	17.6	17.7	17.7	17.7		
1927	17.5	17.4	17.3	17.3	17.4	17.6	17.3	17.2	17.3	17.4	17.3	17.3	17.4		
1928	17.3	17.1	17.1	17.1	17.2	17.1	17.1	17.1	17.3	17.2	17.2	17.1	17.1		

1929	17.1	17.1	17.0	16.9	17.0	17.1	17.3	17.3	17.3	17.3	17.3	17.2	17.1		
1930	17.1	17.0	16.9	17.0	16.9	16.8	16.6	16.5	16.6	16.5	16.4	16.1	16.7		
1931	15.9	15.7	15.6	15.5	15.3	15.1	15.1	15.1	15.0	14.9	14.7	14.6	15.2		
1932	14.3	14.1	14.0	13.9	13.7	13.6	13.6	13.5	13.4	13.3	13.2	13.1	13.7		
1933	12.9	12.7	12.6	12.6	12.6	12.7	13.1	13.2	13.2	13.2	13.2	13.2	13.0		
1934	13.2	13.3	13.3	13.3	13.3	13.4	13.4	13.4	13.6	13.5	13.5	13.4	13.4		
1935	13.6	13.7	13.7	13.8	13.8	13.7	13.7	13.7	13.7	13.7	13.8	13.8	13.7		
1936	13.8	13.8	13.7	13.7	13.7	13.8	13.9	14.0	14.0	14.0	14.0	14.0	13.9		
1937	14.1	14.1	14.2	14.3	14.4	14.4	14.5	14.5	14.6	14.6	14.5	14.4	14.4		
1938	14.2	14.1	14.1	14.2	14.1	14.1	14.1	14.1	14.1	14.0	14.0	14.0	14.1		
1939	14.0	13.9	13.9	13.8	13.8	13.8	13.8	13.8	14.1	14.0	14.0	14.0	13.9		
1940	13.9	14.0	14.0	14.0	14.0	14.1	14.0	14.0	14.0	14.0	14.0	14.1	14.0		
1941	14.1	14.1	14.2	14.3	14.4	14.7	14.7	14.9	15.1	15.3	15.4	15.5	14.7		
1942	15.7	15.8	16.0	16.1	16.3	16.3	16.4	16.5	16.5	16.7	16.8	16.9	16.3		
1943	16.9	16.9	17.2	17.4	17.5	17.5	17.4	17.3	17.4	17.4	17.4	17.4	17.3		
1944	17.4	17.4	17.4	17.5	17.5	17.6	17.7	17.7	17.7	17.7	17.7	17.8	17.6		
1945	17.8	17.8	17.8	17.8	17.9	18.1	18.1	18.1	18.1	18.1	18.1	18.2	18.0		
1946	18.2	18.1	18.3	18.4	18.5	18.7	19.8	20.2	20.4	20.8	21.3	21.5	19.5		
1947	21.5	21.5	21.9	21.9	21.9	22.0	22.2	22.5	23.0	23.0	23.1	23.4	22.3		
1948	23.7	23.5	23.4	23.8	23.9	24.1	24.4	24.5	24.5	24.4	24.2	24.1	24.1		
1949	24.0	23.8	23.8	23.9	23.8	23.9	23.7	23.8	23.9	23.7	23.8	23.6	23.8		
1950	23.5	23.5	23.6	23.6	23.7	23.8	24.1	24.3	24.4	24.6	24.7	25.0	24.1		
1951	25.4	25.7	25.8	25.8	25.9	25.9	25.9	25.9	26.1	26.2	26.4	26.5	26.0		
1952	26.5	26.3	26.3	26.4	26.4	26.5	26.7	26.7	26.7	26.7	26.7	26.7	26.5		
1953	26.6	26.5	26.6	26.6	26.7	26.8	26.8	26.9	26.9	27.0	26.9	26.9	26.7		
1954	26.9	26.9	26.9	26.8	26.9	26.9	26.9	26.9	26.8	26.8	26.8	26.7	26.9		
1955	26.7	26.7	26.7	26.7	26.7	26.7	26.8	26.8	26.9	26.9	26.9	26.8	26.8		
1956	26.8	26.8	26.8	26.9	27.0	27.2	27.4	27.3	27.4	27.5	27.5	27.6	27.2		
1957	27.6	27.7	27.8	27.9	28.0	28.1	28.3	28.3	28.3	28.3	28.4	28.4	28.1		
1958	28.6	28.6	28.8	28.9	28.9	28.9	29.0	28.9	28.9	28.9	29.0	28.9	28.9		
1959	29.0	28.9	28.9	29.0	29.0	29.1	29.2	29.2	29.3	29.4	29.4	29.4	29.1		
1960	29.3	29.4	29.4	29.5	29.5	29.6	29.6	29.6	29.6	29.8	29.8	29.8	29.6		
1961	29.8	29.8	29.8	29.8	29.8	29.8	30.0	29.9	30.0	30.0	30.0	30.0	29.9		
1962	30.0	30.1	30.1	30.2	30.2	30.2	30.3	30.3	30.4	30.4	30.4	30.4	30.2		
1963	30.4	30.4	30.5	30.5	30.5	30.6	30.7	30.7	30.7	30.8	30.8	30.9	30.6		

1964	30.9	30.9	30.9	30.9	30.9	31.0	31.1	31.0	31.1	31.1	31.2	31.2	31.0		
1965	31.2	31.2	31.3	31.4	31.4	31.6	31.6	31.6	31.6	31.7	31.7	31.8	31.5		
1966	31.8	32.0	32.1	32.3	32.3	32.4	32.5	32.7	32.7	32.9	32.9	32.9	32.4		
1967	32.9	32.9	33.0	33.1	33.2	33.3	33.4	33.5	33.6	33.7	33.8	33.9	33.4		
1968	34.1	34.2	34.3	34.4	34.5	34.7	34.9	35.0	35.1	35.3	35.4	35.5	34.8		
1969	35.6	35.8	36.1	36.3	36.4	36.6	36.8	37.0	37.1	37.3	37.5	37.7	36.7		
1970	37.8	38.0	38.2	38.5	38.6	38.8	39.0	39.0	39.2	39.4	39.6	39.8	38.8		
1971	39.8	39.9	40.0	40.1	40.3	40.6	40.7	40.8	40.8	40.9	40.9	41.1	40.5		
1972	41.1	41.3	41.4	41.5	41.6	41.7	41.9	42.0	42.1	42.3	42.4	42.5	41.8		
1973	42.6	42.9	43.3	43.6	43.9	44.2	44.3	45.1	45.2	45.6	45.9	46.2	44.4		
1974	46.6	47.2	47.8	48.0	48.6	49.0	49.4	50.0	50.6	51.1	51.5	51.9	49.3		
1975	52.1	52.5	52.7	52.9	53.2	53.6	54.2	54.3	54.6	54.9	55.3	55.5	53.8		
1976	55.6	55.8	55.9	56.1	56.5	56.8	57.1	57.4	57.6	57.9	58.0	58.2	56.9		
1977	58.5	59.1	59.5	60.0	60.3	60.7	61.0	61.2	61.4	61.6	61.9	62.1	60.6		
1978	62.5	62.9	63.4	63.9	64.5	65.2	65.7	66.0	66.5	67.1	67.4	67.7	65.2		
1979	68.3	69.1	69.8	70.6	71.5	72.3	73.1	73.8	74.6	75.2	75.9	76.7	72.6		
1980	77.8	78.9	80.1	81.0	81.8	82.7	82.7	83.3	84.0	84.8	85.5	86.3	82.4		
1981	87.0	87.9	88.5	89.1	89.8	90.6	91.6	92.3	93.2	93.4	93.7	94.0	90.9		
1982	94.3	94.6	94.5	94.9	95.8	97.0	97.5	97.7	97.9	98.2	98.0	97.6	96.5		
1983	97.8	97.9	97.9	98.6	99.2	99.5	99.9	100.2	100.7	101.0	101.2	101.3	99.6		
1984	101.9	102.4	102.6	103.1	103.4	103.7	104.1	104.5	105.0	105.3	105.3	105.3	103.9	102.9	104.9
1985	105.5	106.0	106.4	106.9	107.3	107.6	107.8	108.0	108.3	108.7	109.0	109.3	107.6	106.6	108.5
1986	109.6	109.3	108.8	108.6	108.9	109.5	109.5	109.7	110.2	110.3	110.4	110.5	109.6	109.1	110.1
1987	111.2	111.6	112.1	112.7	113.1	113.5	113.8	114.4	115.0	115.3	115.4	115.4	113.6	112.4	114.9
1988	115.7	116.0	116.5	117.1	117.5	118.0	118.5	119.0	119.8	120.2	120.3	120.5	118.3	116.8	119.7
1989	121.1	121.6	122.3	123.1	123.8	124.1	124.4	124.6	125.0	125.6	125.9	126.1	124.0	122.7	125.3
1990	127.4	128.0	128.7	128.9	129.2	129.9	130.4	131.6	132.7	133.5	133.8	133.8	130.7	128.7	132.6
1991	134.6	134.8	135.0	135.2	135.6	136.0	136.2	136.6	137.2	137.4	137.8	137.9	136.2	135.2	137.2
1992	138.1	138.6	139.3	139.5	139.7	140.2	140.5	140.9	141.3	141.8	142.0	141.9	140.3	139.2	141.4
1993	142.6	143.1	143.6	144.0	144.2	144.4	144.4	144.8	145.1	145.7	145.8	145.8	144.5	143.7	145.3
1994	146.2	146.7	147.2	147.4	147.5	148.0	148.4	149.0	149.4	149.5	149.7	149.7	148.2	147.2	149.3
1995	150.3	150.9	151.4	151.9	152.2	152.5	152.5	152.9	153.2	153.7	153.6	153.5	152.4	151.5	153.2
1996	154.4	154.9	155.7	156.3	156.6	156.7	157.0	157.3	157.8	158.3	158.6	158.6	156.9	155.8	157.9
1997	159.1	159.6	160.0	160.2	160.1	160.3	160.5	160.8	161.2	161.6	161.5	161.3	160.5	159.9	161.2
1998	161.6	161.9	162.2	162.5	162.8	163.0	163.2	163.4	163.6	164.0	164.0	163.9	163.0	162.3	163.7

1999	164.3	164.5	165.0	166.2	166.2	166.2	166.7	167.1	167.9	168.2	168.3	168.3	166.6	165.4	167.8
2000	168.8	169.8	171.2	171.3	171.5	172.4	172.8	172.8	173.7	174.0	174.1	174.0	172.2	170.8	173.6
2001	175.1	175.8	176.2	176.9	177.7	178.0	177.5	177.5	178.3	177.7	177.4	176.7	177.1	176.6	177.5
2002	177.1	177.8	178.8	179.8	179.8	179.9	180.1	180.7	181.0	181.3	181.3	180.9	179.9	178.9	180.9
2003	181.7	183.1	184.2	183.8	183.5	183.7	183.9	184.6	185.2	185.0	184.5	184.3	184.0	183.3	184.6
2004	185.2	186.2	187.4	188.0	189.1	189.7	189.4	189.5	189.9	190.9	191.0	190.3	188.9	187.6	190.2
2005	190.7	191.8	193.3	194.6	194.4	194.5	195.4	196.4	198.8	199.2	197.6	196.8	195.3	193.2	197.4
2006	198.3	198.7	199.8	201.5	202.5	202.9	203.5	203.9	202.9	201.8	201.5	201.8	201.6	200.6	202.6
2007	202.416	203.499	205.352	206.686	207.949	208.352	208.299	207.917	208.490	208.936	210.177	210.036	207.342	205.709	208.976
2008	211.080	211.693	213.528	214.823	216.632										

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

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

Plaintiffs,

- against -

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.

Index No. 400763/08
(Lehner, J.)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

—and—

IN SUPPORT OF PLAINTIFFS' REQUEST FOR SUMMARY JUDGMENT IN THEIR FAVOR UNDER CPLR 3211(c) AND CPLR 3212(b)

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July 9, 2008

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Preliminary Statement

Tucked away in a footnote to the Senate defendants' brief (p. 17) on these motions is what is, sadly, a most telling statement. "The legislature is currently still in session. There is no indication that there will be no resolution on the issue of judicial pay increases. Thus the issue may not be ripe for determination."

Since that brief was filed, the Legislature has recessed, again. It has recessed, again, without taking any action on judicial pay adjustments, again. Time and again, the same thing has happened, again. The promises: just wait, be patient, don't worry, it will happen, the Legislature is still in session. Next week, next month. Or, yes, the Legislature has left town, but it is coming back in September. Or after the election, or after the holidays. And *then* things will happen. It's a done deal. Never any serious disagreement about whether pay adjustments are warranted, or how much the adjustments should be. But always linkage to other, ever-shifting, extraneous issues, and never any resolution. Bills passed in one chamber, lacking support in the other. Dry appropriations, but with no pay adjustment ever authorized. Year after year, the same story, the same runaround, over and over again. Nine years, going on ten.

There was a flickering hope that this Court's wise decision last month in *Larabee* would bring an end to this disgraceful cycle. But so far it has not—and the Legislature's adjournment following this Court's decision without taking any action is, to put it mildly, not a favorable omen.

So this constitutional dispute remains for this Court to decide. The Court's ruling on the "linkage" claim in *Larabee* is dispositive of the identical "linkage" claim brought here; indeed, as this Court has already suggested, it is preclusive. But that claim is not the only claim presented here. The plaintiffs here—the Chief Judge and the Unified Court System—present two additional claims, two claims that were not presented in *Larabee* and that were not addressed in the Court's earlier decision there. It is important that these two additional claims be resolved, once and for all, here and now with finality, because—in view of the defendants' manifest strat-

egy to delay doing the right thing as long as possible—there will be appeals. And obviously justice would best be served if all of the claims and all of the arguments, both in *Larabee* and in this case, were presented to the reviewing court all at once. To that end, we ask that the Court search the record and grant summary judgment on all claims in favor of plaintiffs. This the Court may do, not only because the Court may convert defendants' motions to dismiss, but also because the Senate defendants themselves have invoked CPLR 3212 and themselves seek summary judgment here.

The first of the two additional claims we present is our claim that judicial salaries in New York have become inadequate, so inadequate as to violate the separation of powers guaranteed by the State Constitution. For the rule of law we seek to apply, the Court need look no further than its most recent opinion in *Larabee*. As we show more fully below, this Court not only relied upon the same overarching principle—the separation of powers—that underlies our adequacy claim, but also cited and quoted with approval the very separation-of-powers cases holding that judicial salaries must be adequate to pass constitutional muster. "'[*I*]*t is the constitutional duty and obligation of the legislature, in order to insure the independence of the judicial . . . branch of government, to provide compensation adequate in amount and commensurate with the duties and responsibilities of the judges involved.*'" *Larabee* v. *Governor*, Index No. 112301/07, 2008 N.Y. Slip Op. 28217, at *7 (Sup. Ct. N.Y. Co. Jun. 11, 2008) ("*Larabee II*") (emphasis added; quoting *Glancey* v. *Casey*, 288 A.2d 812, 816 (Pa. 1972)). The defendants actually conceded the basic point in open court in *Larabee*. "*Yes*," an Assistant Attorney General unequivocally responded, when this Court asked whether "there is a stage where the salary could be so low that it could be constitutionally objected to." Transcript of Hearing at 25, *Larabee* v. *Governor*, Index No. 112301/07 (Sup. Ct. N.Y. Co. Jan. 10, 2008).

The cases cited by the Court in *Larabee* also make clear what adequacy means here. For judicial pay to be constitutionally adequate, this Court wrote, it 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.'" *Lara-*

bee II, 2008 N.Y. Slip. Op. 28217, at *7 (quoting *Goodheart* v. *Casey*, 555 A.2d 1210, 1213 (Pa. 1989)). Compensation must thus 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." *Goodheart*, 555 A.2d at 1212. As we show below, this means that the Court must engage in comparative analysis: it must look to what judges make elsewhere, to what other lawyers, and other professionals, make in both the private and public sectors, and then decide whether judicial pay is commensurate, given what judges do and what is expected of them. The Court may also look to historical levels of judicial pay to decide whether pay today is adequate. As we show on this motion, by any standard—whether by comparison to what others make today or by comparison to what judges made in the past—judicial salaries in New York today are unconstitutionally low.

The principal argument that defendants make in response is not to argue that judicial pay is adequate and should not be raised. That argument is fairly well closed off to them. For not only do New York's judicial salaries compare poorly to those of federal judges, to those of other states when the cost of living is considered, to the pay of public-sector and private-sector attorneys in New York State, as well as to what the State's Judiciary made in the past, but the defendants also concede the need for judicial salaries to be upwardly adjusted. As this Court stated in *Larabee II*, "all parties have agreed that the judiciary is entitled to an adjustment," and "all parties have agreed" even agreed on "the amount thereof." 2008 N.Y. Slip Op. 28217, at *6. And, indeed, on behalf of the Assembly, the Senate, and the State of New York, the Attorney General represented to this Court in *Larabee* that "no governor or member of the legislature, to my knowledge, has spoken to the contrary." *Id.* at *3 (citation omitted).

Instead, the principal argument that defendants make on adequacy is a historical one. In essence, they argue that the current nine-year pay freeze presents no constitutional problem because the State has allowed even longer pay freezes in the past. *E.g.*, Assem. Br. 9. They point out, for example, that the State set some judges' salaries at $10,000 and $10,500 in 1887 and did not raise them again until 1926, some 39 years later. *Id.* But the defendants draw the

wrong lesson from their history books, because they overlook some rather crucial facts. To begin with, as we show below, they overlook how, for many of the years in the periods they cite, there was *no* inflation, and often even *substantial deflation*. For example, price levels went *down* for many years after 1887, and they did not return to 1887 levels until around 1910, nearly a quarter-century later. And after that, substantial inflation didn't occur until the Nation's 1917 intervention in World War I—shortly after which, in 1925, the State sensibly amended its Constitution (which from 1894 to 1925 prohibited decreases or increases in judicial compensation during a judge's term of office) to allow the Legislature to increase judges' salaries, which in 1926 the Legislature immediately did.

But the more arresting point is the level of compensation that defendants say was paid to judges during the periods of nominal salary stagnation they describe. The defendants cite salaries of $10,000 and $10,500 in 1887; *those amounts would be **$228,418** and **$239,839** today.* They note salaries of $22,000 and $22,500 in 1926; *that would be **$269,260** and **$275,379** today.* They point to salaries of $25,000 and $25,500 set in 1947; *it would take **$242,860** and **$247,718** to earn the equivalent today.* They speak of 1952 salaries of $32,500 and $35,000; *in the present day, that would be **$265,680** and **$286,117**.* Finally, they mention 1975 salaries of $60,575 and $63,143; *these equal **$243,912** and **$254,252** today.* All of these current-dollar pay figures, of course, greatly exceed what any judge in the State of New York is paid—or what *any* judge in this State is even *asking* to be paid—today.

So if the Court searches the record on adequacy, it need read no further than the Assembly defendants' brief for enough to grant summary judgment for plaintiffs. There is, of course, more evidence—all beyond serious dispute—set forth in plaintiffs' affirmations and summarized below, likewise warranting a reverse grant of summary judgment here.

The second claim that the Chief Judge and the Judiciary present, but that was also *not* raised in *Larabee*, is asserted under the Compensation Clause of the State Constitution, Article VI, Section 25. The Court did dismiss a cause of action invoking that clause in *Larabee*—but conceptually, and crucially, that was a different claim. The *Larabee* plaintiffs simply asserted,

without more, that the failure to adjust judicial salaries in the face of inflation violated Article VI, Section 25; and, addressing their claim on those terms, the Court merely "declared that allegations that assert *only* a failure to increase salaries for nine years do not state a viable claim for a violation of the no-diminution clause." *Larabee* v. *Spitzer*, 19 Misc. 3d 226, 237 (Sup. Ct. N.Y. Co. 2008) ("*Larabee I*") (emphasis added). As the Court noted, it was thus addressing a claim in which *no* "particularized discriminatory impact on judges" was alleged. *Id.*

Not so here. The Chief Judge and the Judiciary assert a different factual and legal claim: that the defendants' actions in failing to adjust salaries had a particularized discriminatory impact on judges because they adjusted salaries for virtually everyone else. As we show below, that conduct clearly violates the Compensation Clause under *United States* v. *Hatter*, 532 U.S. 557 (2001). That seminal decision of the United States Supreme Court 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." *Id.* at 569. *Hatter* makes clear that actions that have the indirect effect of reducing pay may violate the Clause, too—if they "effectively single[] out . . . judges for unfavorable treatment" in comparison to other government employees. *Id.* at 561. And, as we show below, that is precisely—indisputably—what defendants have done here. In the last nine years, the political branches have regularly approved salary increases for virtually all other State employees—approximately 195,000 of them—to account for inflation, but they have repeatedly refused to adjust judicial salaries. As we will also show below, under *Hatter*, the fact that legislators (who can engage in outside employment) and a number of high State officials have also been frozen makes no critical difference. The unwarranted and unconstitutional discrimination likewise warrants a grant of summary judgment for plaintiffs here.

Finally, we address below the unwieldy grab bag of meritless objections that defendants raise to all of the claims and relief that plaintiffs assert and request here. It should suffice to say that many of these objections were explicitly, or implicitly, rejected when this Court ordered summary judgment in *Larabee*. But one of the defenses asserted here and rejected in *Larabee* is so extraordinary, so stunning, that it deserves prefatory mention. It is the defendants'

argument that, because "the Constitution grants the Legislature the sole power to fix, raise or adjust judicial salaries," and because "the Constitution reserves the power of the purse exclusively to the Legislature," Assem. Br. 12, the whole matter of judicial pay utterly "*is beyond judicial review*." Sen. Br. 23 (emphasis added).

This argument is nothing less than a breathtaking repudiation of the very idea of judicial review. The defendants' own words make this quite clear. Contrast the defendants' position (Sen. Br. 19)—

> *Acts of the Executive and the Legislative branch in the exercise of their purely political function are beyond the court's power of review*. [Emphasis added.]

—with Alexander Hamilton's:

> *If it be said that the legislative body are themselves the constitutional judges of their own powers*, and that the construction they put upon them is conclusive upon the other departments, it may be answered that *this cannot be the natural presumption*, where it is not to be collected from any particular provisions of the Constitution. . . . *The interpretation of the laws is the proper and peculiar province of the courts.* A constitution is, in fact, and must be regarded by the judges, as fundamental law. *It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body*.

THE FEDERALIST NO. 78 (emphasis added).

Needless to say, throughout our Nation's history, in federal and state courts throughout the land, from *Marbury* v. *Madison* to this Court's opinions in *Larabee*, Mr. Hamilton's view has prevailed. It should prevail again here.

Statement of Facts

The essential facts underlying this controversy are obviously very familiar to this Court, as they were set forth in its opinions in *Larabee*. The defendants on their motions to dismiss and for summary judgment make no effort to contest them here; they devote their moving affidavits to establishing two largely extraneous points: first, that Unified Court System judges receive pension, medical, and other benefits, *see* Burke Affidavit ¶¶ 2-6 (submitted by the Assembly defendants), and that the Senate passed pay-adjustment bills that were not passed by the Assembly, *see* Lewis Affirmation ¶¶ 7-11 & Exs. B-I (submitted by the Senate defendants). Because the plaintiffs here request that this Court search the record and grant summary judgment in their favor, they have submitted herewith the Affirmation of Chief Judge Judith S. Kaye ("Kaye Aff."). The facts set forth in her affirmation and in the exhibits to that affirmation are summarized here.[1]

A. The inadequacy of judicial salaries in New York

As the Court is well aware, and as no one can dispute, New York State last adjusted the compensation of its State-paid judges nearly a decade ago, on January 1, 1999. *See* L. 1998, ch. 630 (amending JUDICIARY LAW art. 7-B). Since then, due to inflation and the political branches' failure to adjust the salaries of New York's judges, those salaries have declined in real terms by at least 33 percent. *See* Kaye Aff. ¶ 2. The judges in every other state in the Nation, by contrast, have received at least one pay increase since 1999, with an average increase of over 3.2 percent per year. *Id.* ¶ 3 & Ex. C at 10.

As a result, New York judges' salaries—which once ranked first in the Nation—have fallen far behind their colleagues in other states. *See* Kaye Aff. ¶¶ 3-6. According to a May

[1] Also submitted is an affirmation by counsel, Graham W. Meli, presenting a chart converting Court of Appeals salaries in each year from 1887 to the present into 2008 dollars. This information was calculated using Consumer Price Index data obtained from *Historical Statistics of the United States* (Cambridge Univ. Press 2006) and the U.S. Department of Labor Bureau of Labor Statistics.

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. Kaye Aff. Ex. C at 9. Since the report was issued, one of the two states that ranked behind New York—Oregon—raised its judicial salaries. Kaye Aff. ¶ 5 & Ex. D. New York has thus fallen to 49th among the states. *Id.* Even this woeful ranking may not fully reflect the inadequacy of the compensation of many New York judges, because the ranking presupposes a statewide weighted average cost of living, and many of New York's judges live in New York City and surrounding counties in which the cost of living is higher than the statewide average. *Id.*

New York judges also now earn far less than federal judges. Historically, New York Supreme Court Justices have been paid on par with, or more than, United States District Judges. *See* Kaye Aff. ¶¶ 8-10. In January 1999, both groups of judges earned $136,700 per year. *Id.* ¶ 2 & Ex. A at 1. Since then, however, federal district judges' salaries have increased by about 24 percent, to $169,300, placing them more than $32,000 ahead of their New York counterparts. Kaye Aff. ¶¶ 8, 10. 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." Kaye Aff. ¶ 10 & Ex. J at 1-2.

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. Kaye Aff. ¶ 11 & Ex. C at 10-11. Even some nonjudicial employees in the judicial branch now earn more than the judges for whom they work. Kaye Aff. ¶ 13. Although judges do receive health insurance and other benefits on top of their salaries, these benefits do not erase the gap

between judges and other public-sector professionals, who receive similar benefits. Indeed, all full-time New York State employees are legally entitled to health insurance, and others, including legislators, receive fringe benefits such as daily stipends and transportation reimbursements. *See* Kaye Aff. ¶ 14; CIV. SERV. LAW §§ 163(1), 167(1); LEGIS. LAW § 5; *see also* Kaye Aff. Ex. L (study finding that, in 2006, the State paid approximately $10,000 in premiums each year for each employee enrolled in family health coverage).

Judicial salaries also fall well short of the compensation of private-sector attorneys in the State. According to the May 2008 *American Lawyer*, 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. Kaye Aff. Ex. N at 200, 211. 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 New York Supreme Court Justice. Kaye Aff. ¶ 17 & Ex. M at 48.

At the largest New York City firms, first-year associates—new law school graduates, many of whom have not yet passed the bar—now earn a $160,000 base salary and often receive significant bonuses in addition to that salary. Kaye Aff. ¶ 20 & Ex. C at 12. Thus, as this Court observed in *Larabee*, the "situation has deteriorated so [much] that a 24 year old, just graduated from law school . . . would, if named Chief Judge of the Court of Appeals . . . now have to take a substantial pay cut to accept that highest position in our state court system." *Larabee I*, 19 Misc. 3d at 233; *accord* Kaye Aff. ¶ 20. To make matters worse, after only a few years of experience, the total compensation of these young lawyers can be twice what New York State Supreme Court Justices make. Kaye Aff. ¶ 21 & Ex. O.

As the gap between the compensation of New York judges and other lawyers has grown, Chief Judge Kaye has warned that the effectiveness and independence of the Judiciary is at risk. *See* Kaye Aff. ¶ 23. In her 2005 State of the Judiciary address, for example, the Chief Judge explained that declining judicial compensation threatens the Judiciary's ability to attract and retain high-quality judges:

> We must ensure that the finest individuals continue to be drawn to judicial service, and that our outstanding bench is justly compensated on an ongoing basis. That is difficult to achieve when a Judge's salary is eroded by an increase in the cost of living by 20 percent or more between sporadic salary adjustments.

Kaye Aff. Ex. P at 20. The Chief Judge sounded the same alarm in her next two State of the Judiciary addresses, arguing that the increasing financial hardships of judicial service "diminishes our ability to attract and retain the very best lawyers and judges" and "threaten[s] the excellence of the state bench." Kaye Aff. Ex. Q at 2, Ex. R at 2; *see also* Kaye Aff. Ex. S.

In their opening brief, defendants try to justify the recent stagnation in New York judicial salaries by pointing to even longer judicial pay freezes in the past. Assem. Br. 9-10. In focusing only on the length of these earlier pay freezes, however, defendants ignore other critical distinctions. In particular, judicial salaries in these earlier periods were considerably higher, in real dollars, than they are today. For example, the $22,000 salary of a Court of Appeals judge in 1926 (*see* L. 1926, ch. 94) is the equivalent of over $269,000 today, and the $32,500 salary of a Court of Appeals judge in 1952 (*see* L. 1952, ch. 88) is the equivalent of over $265,000 today. *See* Kaye Aff. ¶ 7; Affirmation of Graham W. Meli ("Meli Aff.") ¶ 2 & Ex. A. Moreover, defendants fail to point out that some of the previous judicial pay freezes coincided with long periods of *deflation*—not the steady inflation seen over the last decade. *See* Kaye Aff. ¶ 7 & Ex. E.

B. Defendants' discrimination in setting judicial salaries

At the same time that they have refused to adjust judicial salaries, the Legislature and the Executive have repeatedly increased the salaries of other State employees. Many of these employees are compensated under collective bargaining agreements concluded by the State, ratified by the Legislature and approved on the State's behalf by the Governor then in office. *See generally* CIV. SERV. LAW art. 14; *id.* § 130. Likewise, the State routinely grants senior attorneys in the legislative and executive branches periodic compensation increases. Kaye Aff. ¶ 24. In total, approximately 195,000 New York State government employees have received regular salary increases in the past decade. *Id.* According to the NCSC, these salary increases for nonjudi-

cial employees totaled over 24 percent between January 1999 and May 2007, Kaye Aff. Ex. C at 10, and some State employees have now received raises of over 30 percent. *See* Kaye Aff. ¶ 25.

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 State legislators are already among the best-paid in the Nation. Their salaries rank third in absolute terms among those states that pay legislators an annual salary. Kaye Aff. Ex. U. Even when adjusted for cost of living, New York legislators' salaries still rank sixth in the Nation, compared to 49th in the Nation for New York judges. Kaye Aff. ¶ 26. 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. New York legislators are also able to hold outside jobs. Kaye Aff. ¶ 27.

Judges, by contrast, are constitutionally and ethically prohibited from offsetting their stagnating salaries with additional employment, except in limited circumstances. *See* N.Y. CONST. art. VI, § 20(b)(4); 22 N.Y.C.R.R. § 100.4. Judges also are the only high State officers 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. Kaye Aff. ¶ 27. Additionally, legislators and executive officials have the capacity directly to engage the political process to increase their salaries. *Id.* By contrast, judges do not have a direct appropriation power and ethically must refrain from most political activity. *Id.* Judges are thus virtually the only State employees whose salaries have been frozen without any meaningful recourse. *Id.* As a result, numerous State employees that earned less than judges in 1999 have now leapfrogged over them, earning more than judges in 2008. *See* Kaye Aff. Ex. T.

C. Defendants' linkage of judicial salaries to legislative salaries and other unrelated matters

As this Court recognized in *Larabee II*, the radical diminution of New York State judicial compensation is not the result of any policy disagreement in the State about the importance of adequate judicial salaries or what specific changes are necessary to restore adequacy to the

State's judicial pay regime. Virtually every top official in New York government, including each of the last three Governors and the leaders of the Legislature, has admitted that judicial salaries should be adjusted. Governor Pataki proposed judicial pay adjustments on several occasions, explaining that they were necessary "to attract the highly skilled professionals that have served our state so well." Kaye Aff. Ex. V; *accord* Kaye Aff. Ex. Z. Governor Spitzer, too, 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." Kaye Aff. Ex. AA. And Governor Paterson 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." Kaye Aff. Ex. NN. Even Speaker Silver has said that judges "absolutely" deserve a pay raise, and Senator Bruno has voted in favor of pay raises for judges. Kaye Aff. Ex. CC; Kaye Aff. ¶ 43.

Despite this consensus on the merits, the legislative and executive branches have refused to take the necessary action. Judicial pay adjustments instead have been held hostage to completely unrelated disputes among the State's politicians. Legislators have refused to adjust judicial salaries unless their own salaries are increased at the same time, and a series of Governors have refused to approve legislative pay raises unless legislators agree to an oft-changing raft of initiatives reported to include campaign finance reform, charter schools, congestion pricing, and other unrelated initiatives. Kaye Aff. ¶ 28.

The defendants have publicly conceded that they have linked judicial compensation to unrelated issues. 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." Kaye Aff. Ex. W. 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's] 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." Kaye Aff. Ex. CC. 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.'" Kaye Aff. Ex. DD. Governor Paterson also has admitted that there is "obviously" a linkage between legislative and judicial pay increases—a linkage he would like to break but that "has not worked to this point." Kaye Aff. Ex. NN.

The defendants' ongoing insistence on linking judicial salaries to unrelated issues has led to years of broken promises and inaction that persists to this day. *See* Kaye Aff. ¶¶ 29-43. On April 9, 2008, the Legislature and Governor Paterson approved a budget for 2008–2009 that once again fails to adjust judicial salaries. *Id.* ¶ 43. Although the budget mentions funds for judicial salary adjustments, this so-called "dry appropriation" has no effect without additional legislation implementing judicial pay adjustments. *Id.* And, again, the Governor and the Legislature refuse to provide funds and adopt legislation required to implement judicial pay adjustments. *Id.*

The defendants' failure to adjust judicial salaries in 2008 was again the result of disputes over legislative raises and other unrelated issues, not any fiscal constraints or disagreements on the merits of judicial pay adjustments. *Id.* Indeed, since the passage of the budget, the Governor and leaders of the Legislature have continued to state that they believe judicial pay adjustments are warranted. On April 11, 2008, for example, a spokesperson for Speaker Silver said that "the speaker has long favored a pay raise for judges along with state legislators and commissioners in the executive branch" and that "the inclusion of the $48 million appropriation in the budget, though it was a 'dry' one, showed that Mr. Silver is sympathetic to judges' quest for more money." Kaye Aff. Ex. OO. Senator Bruno noted that he had twice supported salary-

adjustment bills for judges, and a spokesperson for Governor Paterson stated that the Governor "personally believed that a pay increase is warranted" for judges. *Id.* Yet the Governor and the Legislature still refuse to take the action that they admit is necessary.

Argument

The motions of all defendants to dismiss under CPLR 3211, and the Senate defendants' motion for summary judgment under CPLR 3212, are governed by standards well known to this Court. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction," and the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of *every possible* favorable inference, and determine only whether the facts as alleged fit within *any* cognizable legal theory." *Leon* v. *Martinez*, 84 N.Y.2d 83, 87-88 (1994) (emphasis added). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer* v. *Ginzburg*, 43 N.Y.2d 268, 275 (1977). Nevertheless, under CPLR 3211(c), "a court may freely consider affidavits submitted by the plaintiff[s]," and, in doing so, "the criterion [becomes] whether the proponent of the pleading *has* a cause of action, not whether he has stated one" in the Complaint. *Leon*, 84 N.Y.2d at 88 (emphasis added).

As for CPLR 3212, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact." *Alvarez* v. *Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). And "[f]ailure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *People ex rel. Spitzer* v. *Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008).

As we explain fully below, the defendants have not demonstrated any basis for dismissal under either CPLR 3211 or CPLR 3212; each of plaintiffs' causes of action states a cause of action, and nothing the defendants have tendered, factually or legally, shows their entitlement

to judgment as a matter of law. To the contrary, the submission that plaintiffs have made here shows that summary judgment is warranted in *plaintiffs'* favor. This Court has the power to enter such a summary judgment, of course, "to either side prior to joinder of issue." *Four Seasons Hotels* v. *Vinnik*, 127 A.D.2d 310, 311 (1st Dep't 1987). Not only can the Court convert the dismissal motions under CPLR 3211(c), but also the Senate defendants themselves have invoked CPLR 3212 and seek summary judgment here. *See* CPLR 3211(c), 3212(b); *see, e.g.*, *Vinnik*, 127 A.D.2d at 319-20; *Shah* v. *Shah*, 215 A.D.2d 287, 289-90 (1st Dep't 1995). Either way, as the Court recognized at the conference on May 23, the Court may search the record.

As we show below, the Court should do so, and should now grant judgment in favor of plaintiffs on all three of their claims. The salaries of New York's judges—and thus their patent inadequacy—are not disputed. The fact that defendants have discriminated against judges in adjusting salaries for inflation—by failing to adjust them for judges—cannot be disputed. And the fact that defendants linked judicial salary reform to extraneous political matters was not disputed in *Larabee*—and is therefore conclusive here. These facts are enough to decide this case: "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Grasso*, 50 A.D.3d at 545 (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The defendants "bear[] the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *Id.* (quoting *Zuckerman* v. *City of New York*, 49 N.Y.2d 557, 562 (1980)). They cannot meet that burden here.

POINT I

DEFENDANTS HAVE VIOLATED THE NEW YORK STATE CONSTITUTION.

The Complaint asserts three causes of action. The first two claims were *not* asserted by the plaintiffs in *Larabee*, and were *not* addressed by the Court in that case.

The first cause of action here presents a simple *adequacy* claim: it asserts that the defendants violated the separation of powers by failing to establish adequate judicial compensation. Complaint ¶¶ 61-69. The plaintiffs in *Larabee*, of course, "d[id] *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 I*, 19 Misc. 3d at 235 (emphasis added).

The second cause of action asserts unconstitutional *discrimination*: that under *United States* v. *Hatter*, 532 U.S. 557 (2001), the defendants violated the Compensation Clause, N.Y. CONST. art. VI, § 25(a), when they discriminated against judicial compensation by freezing judicial salaries for over nine years while repeatedly increasing the compensation of virtually all other 195,000 State employees during the ongoing judicial pay freeze. Complaint ¶¶ 70-76; *see id.* ¶¶ 15, 31. Unlike the Compensation Clause claim rejected in *Larabee I*, this claim does *not* assert that "the effect of inflation over the past nine years," standing alone, absent any discrimination, "has resulted in a violation." 19 Misc. 3d at 235.

The third cause of action is a "linkage" claim, and is essentially the same claim upon which the Court ordered summary judgment for plaintiffs in *Larabee II*, 2008 N.Y. Slip Op. 28217, at *4-*9. On that claim, *Larabee II* controls as a matter of collateral estoppel, and summary judgment is warranted on that basis alone.

But as is shown below, summary judgment for plaintiffs is warranted on all three claims.

A. Defendants have violated the separation of powers by failing to establish adequate judicial compensation.

1. The Constitution requires the Legislature to provide adequate judicial compensation.

This Court has already recognized the principles and, indeed, extensively relied upon the case law, controlling plaintiffs' first cause of action; they are the same principles and cases that warranted summary judgment in *Larabee II*. And for all their emphasis on their supposedly unfettered power to establish judicial compensation "by law" under Article VI, Section 25, the

defendants cannot seriously dispute what those principles and cases mean here: that there is some minimum level of judicial compensation below which it becomes constitutionally inadequate under the separation of powers.

Indeed, the defendants conceded the point in *Larabee*. The Court put the question rather directly to the defendants' counsel there. "*So there is a stage where the salary could be so low that it could be constitutionally objected to, right*?" The answer was unqualified. "*Yes*." Transcript of Hearing at 25, *Larabee* v. *Governor*, Index No. 112301/07 (Sup. Ct. N.Y. Co. Jan. 10, 2008). The defendants went on to concede: "[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." *Id.* at 27. The principle isn't at issue, only the amount.

The principle flows from the doctrine of separation of powers, which this Court addressed at length in *Larabee I* and *II*. 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). This Court in *Larabee I* remarked how 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 how "'[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 . . . .'" 19 Misc. 3d at 232 (quoting *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.'" *Id.* (quoting *County of Oneida*, 49 N.Y.2d at 522). And contrary to the Senate defendants' astonishing suggestion here,[2] the Judiciary is a full-fledged branch of this State's government established by Article VI of the State Constitution. Indeed, among the three departments of state power,

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[2] According to the Senate defendants: "The New York State Constitution does not specifically provide for a judicial branch. The vesting of the judicial power is at minimum implied. It implies but does not
(footnote continued)

> 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.

Id. (quoting *Burby*, 155 N.Y. at 282); *see also* THE FEDERALIST NO. 78 (Alexander 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 and its specific textual command. But it is not the only way. As this Court recognized in *Larabee II*, often "'[t]he concept of separation of powers is not one that is capable of precise legal definition.'" 2008 N.Y. Slip Op. 28217, at *5 (quoting 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 patiently from constitutional structure here leads inexorably to the essential postulate that defendants conceded in *Larabee*: that the State Constitution guarantees a

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(footnote continued)

state that there shall be a judicial branch of the government. . . . A fully unified court system does not actually exist in this state." Sen. Br. 13. *But see* N.Y. CONST. art. VI, and the discussion in the text below.

minimum level of adequate judicial compensation. The Constitution creates an independent judicial branch, and it recognizes that in order to populate that judicial branch and to guarantee 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.* But again, 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*, 905 A.2d 918, 940 (Pa. 2006). Indeed, even apart from the no-diminishment prohibition, the Court can infer an adequate-compensation requirement from the very fact that the Constitution contemplates the compensation of judges. For what purpose would there have been to guaranteeing salaries against diminishment if there were no requirement to pay adequate salaries in the first place?

History confirms the point: it shows that the Framers imposed on the political branches the task of setting judicial compensation in order to guarantee *adequate* 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 Founders 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. As defendants point out, for much of this State's history, its Constitution differed from the federal Constitution in the treatment of judicial pay. 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 to-day what the standard of value will be six months or one year hence*?" PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK (1867-68) (emphasis added).

Finally, in 1925, after a failed experiment with fixing the salaries of judges 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 reflected 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. This Court in *Larabee II* quoted with approval a Pennsylvania Supreme Court decision—and quoted the very paragraph from it—that reached precisely this conclusion. It is the "duty and obligation of the legislature," this Court and the Pennsylvania court observed, 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 obligation of the legislature in order to insure the independence of the judicial . . . branch of government, to provide compensation adequate in amount and commensurate with the duties and responsibilities of the judges involved*. To do any less violates the very framework of our constitutional form of government.

Larabee II, 2008 N.Y. Slip Op. 28217, at *7 (quoting *Glancey* v. *Casey*, 288 A.2d 812, 816 (Pa. 1972)).

The Supreme Court of Pennsylvania 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. *Glancey*, 288 A.2d at 815, 816. Indeed, the *Glancey* court observed that *earlier* Pennsylvania constitutions had *spe-*

cifically mentioned adequacy, by "provid[ing] that judges should 'receive for their services an adequate compensation.'" *Id.* at 816. 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 815; *accord Goodheart* v. *Casey*, 555 A.2d 1210, 1211-13 (Pa. 1989); *cf. In re Salary of the Juvenile Director*, 552 P.2d 163, 171 (Wash. 1976) ("It is axiomatic that, as an independent department of government, the judiciary must have adequate and sufficient resources to ensure the proper operation of the courts.") (quoting *O'Coin's, Inc.* v. *Treasurer of Worcester County*, 287 N.E.2d 608, 611-12 (Mass. 1972)).

Pennsylvania, of course, does not stand alone. This Court in *Larabee II* cited with approval the Third Department's recent decision in *Kelch* v. *Town Board*, 36 A.D.3d 1110 (3d Dep't 2007), and that of the Fourth Department in *Catanise* v. *Town of Fayette*, 148 A.D.2d 210 (4th Dep't 1989). As this Court observed, both cases involved town justices *not* protected by "the no-diminishment-in-compensation provision" of the state Constitution's Compensation Clause. *Larabee II*, 2008 N.Y. Slip Op. 28217, at *7. So the claims were pure separation-of-powers claims, premised on constitutional structure. And in both 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, and *Catanise* held a reduction in judicial pay to be "'an impermissible encroachment upon the independence of the judiciary,'" 148 A.D.2d at 213, *quoted in Larabee II*, 2008 N.Y. Slip Op. 28217, at *7. The *Kelch* court relied on the precedents from Pennsylvania. 36 A.D.3d at 1111-12 (citing *Good-*

heart, 555 A.2d at 1211-13, and *Commonwealth ex rel. Carroll* v. *Tate*, 274 A.2d 193, 197, 199 (Pa. 1971)).

The Appellate Divisions recognized the critical point—that "'[l]egislation 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 *People ex rel. Burby* v. *Howland*, 155 N.Y. at 283)).

This "essential postulate[]," *Printz*, 521 U.S. at 918, controls here as well.

2. Defendants have breached their constitutional duty to provide adequate compensation.

The principle of adequacy having been established and conceded, the question becomes the amount needed for adequacy. Again, the Pennsylvania cases upon which this Court relied in *Larabee II* 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.'" *Larabee II*, 2008 N.Y. Slip Op. 28217, at *7 (quoting *Glancey*, 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.'" *Larabee II*, 2008 N.Y. Slip Op. 28217, at *7 (quoting *Goodheart* v. *Casey*, 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 government process. However, this laudable motive cannot be reasonably expected to overcome the stark realities of the market place. *Compensation . . . appreciably lower than the expected value of those services will inevitably result in the inability to obtain the quality of performance required.*

Goodheart v. *Casey*, 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 1212 (citation and internal quotation marks omitted). This statement of law 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).[3]

To thus determine what "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, the Court must engage in a comparative analysis. It must look to what judges make elsewhere, to what other lawyers, and other professionals, make in both the private and public sectors, and decide whether judicial pay is commensurate,

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[3] The Pennsylvania Supreme Court found meritless the argument that the number of applicants willing to serve as judges could demonstrate the adequacy of judicial pay: "We are not convinced that a large number of applicants for judicial vacancies demonstrates the availability of qualified applicants for judicial service. Indeed, the mere fact that one has a law degree does not show that he is competent to be a judge." *Goodheart*, 555 A.2d at 1213. The court also rejected the 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.* It was enough to show, as is shown here, that "compensation [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.* In so holding, the Pennsylvania Supreme Court necessarily rejected the Pennsylvania Commonwealth Court's suggestion nine years earlier in *Kremer* v. *Barbieri*, 411 A.2d 558, 563 (Pa. Commw. Ct.), *aff'd without opinion*, 417 A.2d 121 (Pa. 1980), relied upon by the Senate defendants (Sen. Br. 131-32), that there must be a showing that the proper functioning of the judicial system has already been impaired. New York law also does not require a showing of actual impairment. The Court of Appeals has held in other contexts that "a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies . . . without awaiting actual injury." *Swinton* v. *Safir*, 93 N.Y.2d 758, 765-66 (1999). And of course this Court held in *Larabee I* that "no such allegations [of impairment] are necessary." 19 Misc. 3d at 234.

given what judges do and what is expected of them. The Court may also look to historical levels of judicial pay to decide whether pay today is adequate. The *Goodheart* court, for example, looked in particular to "the salary offered in the federal judicial system," in part because state courts "compete" with that salary. 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 1215. By any reasonable comparative standard—whether judged by what others make today or by what judges made in the past—judicial salaries in New York State fail to pass constitutional muster.

Specifically, as set forth in the Kaye Affirmation, and as summarized above in the Statement of Facts, judicial salaries today in New York 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. Supreme Court Justices in New York are paid less than—and in many cases, significantly less than—for example:

- United States District Judges;
- Judges in 49 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;
- First-year associates at many New York City law firms.

Kaye Aff. ¶¶ 3-22. The list could, and does, go on. *See id.*

The defendants' response to all this is not to argue that judges are paid what they deserve. They do not say that because they cannot say that: as this Court found in *Larabee II*, "all parties have agreed that the judiciary is entitled to an adjustment," and "all parties have agreed" even on "the amount thereof." 2008 N.Y. Slip Op. 28217, at *6. On behalf of the Assembly, the Senate, and the State of New York, the Attorney General represented to this Court in *Larabee* that "[t]here is a great deal of positive feeling in favor of an increase [in the salary of State Su-

preme 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." *Id.* at *3 (quoting Transcript of Hearing at 9, *Larabee* v. *Governor*, Index No. 112301/07 (Sup. Ct. N.Y. Co. May 29, 2008)). The Senate defendants in their brief here echo the point: "Judicial officers of the state have a *legitimate grievance*." Sen. Br. 2 (emphasis added); *see also* Kaye Aff. ¶¶ 29-43.

Instead of tackling plaintiffs' adequacy claim head-on, the defendants make two arguments that are beside the point. The first is that "in addition" to their salaries, judges "are entitled to participate in certain pension, medical and other benefit programs." Burke Aff. ¶ 6; *see* Assem. Br. 6. "[T]hese additional fringe benefits," they claim, "increase the total compensation to Supreme [Court] Justices to $152,600 and $162,900." *Id.* (citing Burke Aff. ¶ 6). But the affidavit they submit from the State's Chief Budget Examiner makes no effort to compare these benefits with anyone else's—not any other employee of the State, and not any private-sector employee. It thus sheds no light on adequacy, because, as we have shown, adequacy, under the separation-of-powers case law, is substantially a comparative analysis. And obviously, judges are not alone in receiving significant benefits. By law, all full-time New York State employees are eligible to receive health insurance benefits, with the State paying 90 percent of the premium for employee coverage and 75 percent of the premium for dependent coverage. CIV. SERV. LAW §§ 163(1), 167(1). According to a study by the National Conference of State Legislatures, in 2006 New York State paid premiums of approximately $830 per month—almost $10,000 per year—for each State employee enrolled in a standard family health insurance plan. Kaye Aff. Ex. L. In addition to insurance, some State employees also receive other fringe benefits on top of their salaries. Every New York legislator, for example, is entitled to reimbursement of travel expenses and payment of a per-diem stipend during legislative sessions. *See* LEGIS. LAW § 5.

But the argument that defendants push the hardest on the question of adequacy is far more significant. It is significant because it actually demonstrates how *inadequate* judicial salaries are today. Specifically, the Assembly defendants try to justify the current nine-year pay freeze by pointing to even longer pay freezes in the past: "The salaries paid to judges in New

York have often remained unchanged for much longer than the 10-year period to which Plaintiffs would attach constitutional significance." Assem. Br. 9. Stripped to its essentials, the argument is that since the Constitution tolerated inadequate salaries in the past—and indeed, since past Constitutions prohibited judicial salary increases during judges' terms in office—the Constitution must tolerate inadequate salaries today.

The premise of this argument is wrong—and it is roundly refuted by the historical salary figures that defendants themselves cite. For example, defendants point out that under "Chapter 76 of the Laws of 1887," "the salaries of the Associate Judges and the Chief Judge of the Court of Appeals [were] $10,000 and $10,500, respectively," and that "[t]hose salaries were not increased for 39 years, when Chapter 94 of the Laws of 1926 increased them to $22,000 and $22,500, respectively." *Id.* at 9. What defendants do not ask themselves, or tell the Court, is this: what would $10,000 and $10,500 in 1887 dollars be worth today? The answer happens to be ***$228,418*** and ***$239,839***. Kaye Aff. ¶ 7; Meli Aff. ¶ 2 & Ex. A. As for the 39 years of salary stagnation that followed, what the defendants fail to tell the Court is that 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*. Kaye Aff. ¶ 7 & Ex. E. 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. *Id.* ¶ 7. Even as late as 1916, the year before the United States entered World War I, $10,000 was still worth ***$198,744***. Meli Aff. Ex. A.

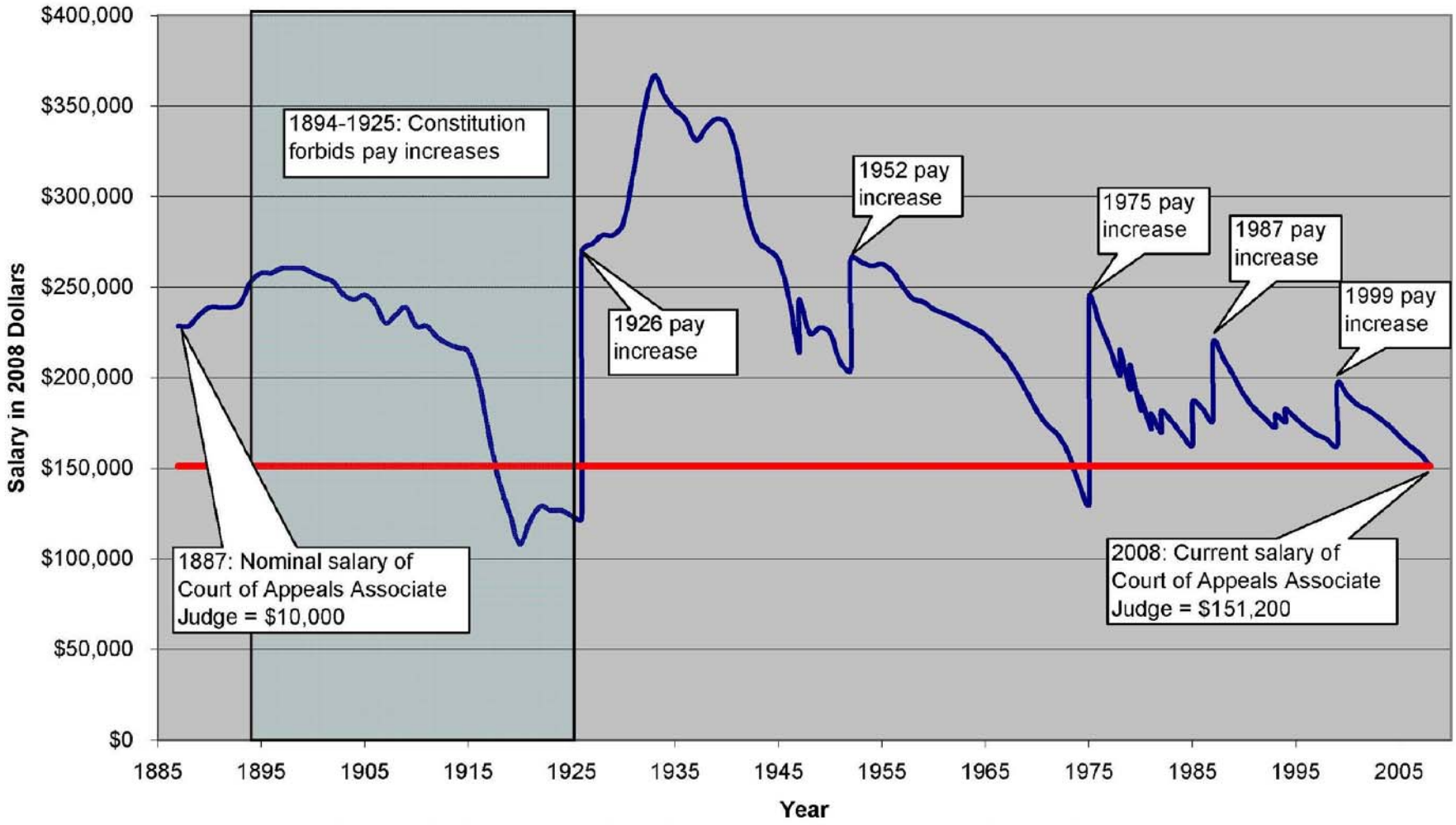
And then wartime and post-wartime inflation—extreme inflation—struck. By 1918, the purchasing power of $10,000 dropped to $143,464 in today's dollars; by 1920, it was only $108,316. Meli Aff. Ex. A. *In other words, most of the inflation that occurred in the 39-year period cited by defendants occurred 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. And as defendants note, the Legislature acted quickly to exercise their 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. Kaye Aff. ¶ 7; Meli Aff. ¶ 2 & Ex. A.

Similarly, the defendants note that salaries were not raised again until 1947, Assem. Br. 9; but again, the story is similar. There was deflation during the Great Depression; and during World War II, inflation, which the Legislature promptly remedied not long after the troops started coming home. *See* Kaye Aff. ¶ 7. The $25,000 and $25,500 salaries set in 1947 (Assem. Br. 9) would be worth ***$242,860*** and ***$247,718*** today. Kaye Aff. ¶7; Meli Aff. ¶ 2 & Ex. A. The 1952 salaries of $32,500 and $35,000 cited by defendants (Assem. Br. 9) would be ***$265,680*** and ***$286,117*** today. *Id.* Finally, the 1975 salaries of $60,575 and $63,143 (Assem. Br. 9) would amount to ***$243,912*** and ***$254,252*** today. *Id.*

The graph (on the following page) of judicial compensation from 1887 to 2008 (the 121-year period referenced by defendants, *see* Assem. Br. 9) demonstrates that over this lengthy period of time real judicial pay was well in excess of what it is today, and is now near an historic low—the lowest it has ever been without prompting a significant remedy by the Legislature:

New York Court of Appeals Associate Judge Salaries: 1887-2008
(in 2008 dollars)



Sources: Historical Statistics of the United States, Millennial Edition On Line (Susan B. Carter et al. eds., Cambridge Univ. Press 2006);
U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index Data, *available at* http://www.bls.gov

In short, the defendants' resort to history proves just the *opposite* of what they claim it proves. It shows that salary adjustments occurred less frequently in the past because there was less inflation—or because there was deflation or no inflation—and because salary levels, in real terms, were more than adequate. Indeed, for example, in 1909, salaries of State Supreme Court Justices in New York City were $17,000 (the equivalent of ***$406,130*** today) and in 1936 in the middle of the Depression they were $25,000 (the equivalent of ***$389,625*** today). *See* Kaye Aff. ¶¶ 8, 9 & Exs. E, I. And history shows that the Framers of the current Compensation Clause, which dates back to the 1925 Constitution, acted quickly to respond to sudden inflation, and acted so that the Legislature could promptly restore judicial salaries to real levels far greater than what plaintiffs ask for today. Given this history that defendants themselves invoke, and given the other record evidence, there can be no dispute that judicial salaries in New York State are constitutionally inadequate.[4] Plaintiffs, not defendants, are entitled to summary judgment.

[4] Nor can there be any dispute that the inadequacy of judicial salaries unconstitutionally threatens to harm the Judiciary. This threat need not take the form of an actual impairment of judges' ability to decide cases in an unbiased and competent manner. As this Court held in *Larabee I*, "[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; *see also supra* note 3. But even though judges can and do continue to perform their duties, inadequate salaries and the ongoing political squabbles over judicial pay undermine the public's confidence in the independence, neutrality, and merit of judicial decisions. *See, e.g.*, Kenneth Lovett, *Pol Slaps Top Court On Ethics*, N.Y. POST, May 11, 2007 ("A furious upstate assemblyman yesterday accused the state's chief judge of killing a lawsuit against legislative leaders in order to not jeopardize a possible judicial pay raise."). The Appellate Division has recognized that inadequate salaries pose this threat to public confidence: "An appearance of impropriety, if not an actual concern, would arise that the scales of justice could be tipped by political influence." *Kelch*, 36 A.D.3d at 1112; *see also Bush* v. *Vera*, 517 U.S. 952, 1048 n.2 (1996) (quoting *Baker* v. *Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting)) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."). By undermining the public's confidence in the Judiciary and its decisions, defendants have harmed the Judiciary's status as an independent and co-equal branch of government.

B. Defendants have violated the Compensation Clause by discriminating against judges in setting compensation.

Over the past decade, the defendants repeatedly have adjusted the salaries of virtually all State employees to keep pace with inflation. But they have refused to do so for judges. That is discrimination, and it is the crux of the Compensation Clause[5] claim asserted by the Chief Judge and the Judiciary in this case. As a consequence, *Larabee I* in no way is "dispositive" of that claim, as the defendants assert here. Assem. Br. 19; *accord* Sen. Br. 123. As even the defendants admit, *Larabee I* merely "'declared that allegations that assert *only* a failure to increase salaries for nine years do not state a viable claim for a violation of the no-diminution clause.'" Assem. Br. 18 (emphasis added; quoting *Larabee I*, 19 Misc. 3d at 237). The Court's holding addressed a claim in which *no* "particularized discriminatory impact on judges" was alleged. 19 Misc. 3d at 237; *see* Verified Complaint ¶¶ 35-43, *Larabee* v. *Spitzer*, Index No. 112301/07 (Sup. Ct. N.Y. Co. filed Sept. 12, 2007).

That is not the argument plaintiffs make here. What the Chief Judge and the Judiciary contend—and what the *Larabee* plaintiffs did not—is that under *United States* v. *Hatter*, 532 U.S. 557, 576-77 (2001), indirect diminution of judicial compensation is unconstitutional if it singles out judges for specially unfavorable treatment, and that *this* prohibition—against discriminatory indirect diminution—applies here, where the defendants have acted to protect virtually every State employee except judges from inflation.

Specifically, as the Court is aware, *Hatter* was a challenge brought by federal Article III judges against the withholding of Medicare and Social Security taxes from judicial salaries. In ruling in part for the plaintiffs, the Supreme Court held that the Compensation Clause "offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by or-

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[5] The Compensation Clause of the New York Constitution provides that the salary of each judge shall not be diminished during the term of his or her office: "The compensation of a judge . . . shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed." N.Y. CONST. art. VI, § 25(a). It mirrors the protection established in the federal Constitution, which guarantees that judges shall receive a "Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

dering 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, 283 (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 Constitution."). By this measure, the Court 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. *Hatter*, 532 U.S. 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). But judges and the President of the United States did not have that option, 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 requirement to participate in Social Security without the choice to avoid paying its payroll tax. The Supreme Court explained:

> 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 while the Compensation Clause "does not prevent Congress from imposing a 'non-discriminatory tax laid generally' upon judges and other citizens, it

does, however, prohibit taxation that singles out judges for specially unfavorable treatment." *Id.* at 561 (emphasis added).[6]

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, "[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 I*, 19 Misc. 3d at 237. But here, others *did* receive salary adjustments, and there *has* been a "particularized discriminatory impact."

As in *Hatter*, New York judges have been "single[d] out for specially unfavorable treatment" vis-à-vis nearly all other State employees. 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 33 percent in real terms since 1999. Nearly all New York State nonjudicial employees have received, on average, cumulative increases of more than 24 percent, ensuring that they would not fall behind the cost of living, and these pay increases were ratified by the Legislature and approved by the Executive. *See* Kaye Aff. Ex. C at 10; *see also* CIV. SERV. LAW art. 14; *id.* § 130. Likewise, the State routinely has granted periodic compensation increases to senior attorneys in the legislative and executive branches. In fact, some State employees have received even larger raises. 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 Jus-

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[6] *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).

tice's salary. *See* CIV. SERV. LAW § 130 (1999). By 2008, the salary at that pay grade had increased over 30 percent to about $152,000—now thousands more than the stagnant salary of a Supreme Court Justice—and the Legislature has already approved additional raises to take effect in 2009 and 2010. *See* CIV. SERV. LAW § 130 (2008). The State has explicitly disqualified judges from the periodic salary-review system applicable to other State employees. *See id.* § 201(7)(a).

The freeze on the salaries of legislators and a small number of other State officials does not eliminate plaintiffs' charge of discrimination. First, the effect on judges has been considerably more severe. State legislators are not in the same category as judges and other full-time State employees. 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* Kaye Aff. Ex. U. State legislators also can and do hold outside jobs. But judges are constitutionally and ethically prohibited from offsetting their frozen salaries with additional employment, except in limited circumstances. *See* N.Y. CONST. art. VI, § 20(b)(4); 22 N.Y.C.R.R. § 100.4. Judges also are 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 directly to engage the political process to increase their salaries. Judges do not. They lack a direct 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) 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. That argument was rejected by the Supreme Court. 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. 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." 532 U.S. at 577-78. 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 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, . . . the 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).[7]

[7] The Senate defendants' reliance (Sen. Br. 133) on an intermediate appellate decision from Pennsylvania, *Kremer* v. *Barbieri*, 411 A.2d 558 (Pa. Commw. Ct.), *aff'd without opinion*, 417 A.2d 121 (Pa. 1980), is misguided. Although the Pennsylvania Commonwealth Court rejected a claim that judges' salaries had been unconstitutionally diminished by inflation, it did so because the state's "General Assembly has not unconstitutionally *singled out* the judiciary for either a direct or an *indirect* reduction in compensation." *Id.* at 563 (emphasis added). *Kremer* is thus perfectly consistent with the decision of the Supreme Court of the United States in *Hatter*.

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 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).

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

C. Defendants have engaged in unconstitutional "linkage."

The third cause of action in this case is identical to the "linkage" claim that this Court sustained in *Larabee II*. As a result, the defendants here are precluded from contesting the linkage issue here. New York has long recognized the offensive use of collateral estoppel or issue preclusion. *E.g.*, *B.R. DeWitt, Inc.* v. *Hall*, 19 N.Y.2d 141, 147 (1967). For preclusion to occur, "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and . . . there must have been a full and fair opportunity to contest the decision now said to be controlling." *Schwartz* v. *Public Adm'r of the County of Bronx*, 24 N.Y.2d 65, 71 (1969). And "[i]t is fundamental that a judgment in a prior action is binding not

only on the parties to that action, but on those in privity with them." *Green* v. *Santa Fe Indus., Inc.*, 70 N.Y.2d 244, 253 (1987).

These black-letter standards have been met here. Certainly there is identity of issue. Just as the *Larabee* plaintiffs alleged that "[t]he practice of linking Plaintiffs' salary increases to legislative salary increases (as well as other, unrelated, legislative and executive initiatives) violates the separation of powers doctrine," Verified Complaint ¶ 46, *Larabee* v. *Spitzer*, Index No. 112301/07 (Sup. Ct. N.Y. Co. filed Sept. 12, 2007), the Complaint here alleges that defendants' "linking [of] judicial compensation to political issues unrelated to the Judiciary . . . subverts the independence of the Judiciary, and violates the separation of powers," Complaint ¶ 81. The issue was also decisive: the Court found that the "issue before me comes down to whether . . . linkage . . . demonstrates an abuse of power and an unconstitutional interference with the independence of the judiciary." *Larabee II*, 2008 N.Y. Slip Op. 28217, at *4-5.

There is also no question that the defendants in *Larabee* had a full and fair opportunity to litigate the linkage claim there. Represented by the Attorney General's office, they were warned by this Court in *Larabee* "that an adverse finding against the defendants would appear to be binding res-judicata-wise on the defendants in Judge Kaye's case." Transcript of Hearing at 3, *Larabee* v. *Governor*, Index No. 112301/07 (Sup. Ct. N.Y. Co. May 29, 2008). The defendants thus had the ability and every incentive to fight. *See*, *e.g.*, *Gilberg* v. *Barbieri*, 53 N.Y.2d 285, 292-93 (1981) (considering, among other factors, "the competence and experience of counsel" in prior action and the "forseeability of future litigation" in determining whether "full and fair opportunity to litigate a prior determination" existed). Finally, "to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding." *Green*, 70 N.Y.2d at 253. That rule means, for example, that a determination in a prior action involving "a union [is] binding in a subsequent action [involving] a member," *id.*, so it means that *Larabee*'s judgment against the State, the Assembly, and the Senate is binding against all of the defendants here.

Accordingly, there is no need for an extensive discussion of the merits of the linkage claim. The defendants here are bound by their "failure" in *Larabee* (and in this case) "to submit an affidavit denying the existence of the practice of" linkage, and they are bound by the Court's finding that "linkage is an abuse of power by defendants and constitutes an unconstitutional interference upon the independence of the judiciary." *Larabee II*, 2008 N.Y. Slip Op. 28217, at *4-5. To make the record complete in this case, however, the main affirmation submitted by plaintiffs here lays out the factual basis for our linkage claim. *See* Kaye Aff. ¶¶ 28-44. Applying the law set forth by this Court *in Larabee II* to this record, even apart from preclusion, leads to the same result as in *Larabee II*.[8]

POINT II

NEITHER THE SEPARATION OF POWERS NOR THE SPEECH OR DEBATE CLAUSE BARS THE RELIEF SOUGHT HERE.

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

The defendants' principal, overarching defense to all three causes of actions is a purported separation-of-powers defense. They argue that the political branches' setting of judicial compensation is unreviewable, because "the Constitution grants the Legislature the sole power to fix, raise or adjust judicial salaries," and because "the Constitution reserves the power of the purse exclusively to the Legislature." Assem. Br. 12, 20. To review the political branches' setting of judicial salaries here, say the defendants, "will upend the constitutional arrangement between branches who maintain the power of the public fisc, blasting away at the very doctrine of separation of powers upon which [plaintiffs] base their complaint." Sen. Br. 2. And so the whole matter of judicial pay, they argue, "*is beyond judicial review*." *Id.* at 23 (emphasis added).

[8] Linkage of judicial salaries to extraneous issues is not only unconstitutional in itself, as this Court recognized in *Larabee*, but it also demonstrates that the defendants have unconstitutionally discriminated against the Judiciary: the defendants have singled out judicial salaries, unlike those of any other State employees, to serve as a pawn in their political games.

Not only are these contentions wrong, but this Court has also already said they are wrong. The Attorney General made the same submissions in *Larabee*: that review of judicial compensation "itself would represent a judicial encroachment and interference with the constitutional powers and duties of the Executive and Legislative branches and would violate the separation of powers."[9] And this Court, of course, held squarely to the contrary: it proceeded to engage in judicial review, and held that the *defendants* had "abuse[d] [their] power and . . . unconstitutional[ly] interfere[d] [with] the independence of the *judiciary*." *Larabee II*, 2008 N.Y. Slip Op. 28217, at *8 (emphasis added).

This Court's decision in *Larabee* was correct. Compare, for example, what the defendants say (Sen. Br. 19),

> Acts of the Executive and the Legislative branch in the exercise of their purely political function are beyond the court's power of review.

with what Alexander Hamilton said in *The Federalist No. 78*:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions of the Constitution. . . . The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

THE FEDERALIST NO. 78. As this juxtaposition makes clear, the defendants' position in this case is nothing less than a sweeping denial of the power of judicial review.

The question of who is violating the separation of powers in this interbranch dispute—the political branches, or the Judiciary—boils down to who is doing what to whom, and what the effect on each branch is. Which "'of the coordinate branches [is] interfer[ing] with another'"?

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[9] Mem. of Law of Defts. in Supp. of Mot. for Change of Venue and To Dismiss at 22, *Larabee* v. *Spitzer*, Index No. 112301/07 (Sup. Ct. N.Y. Co. filed Oct. 30, 2007); *accord* Defts. Mem. of Law in Opp. to Mot. for Summ. Judg. at 23-24, *Larabee* v. *Governor*, Index No. 112301/07 (Sup. Ct. N.Y. Co. filed Apr. 29, 2008).

Larabee II, 2008 N.Y. Slip Op. 28217, at *5 (quoting *County of Oneida* v. *Berle*, 49 N.Y.2d at 522). Which branch is "'encroach[ing] upon'" or "'be[ing] made subordinate to . . . another'"? *Urban Justice Ctr.* v. *Pataki*, 38 A.D.3d 20, 27 (1st Dep't 2006), *appeal dismissed*, 8 N.Y.3d 958 (2007). Or, to borrow the Senate defendants' phrasing: which "branch is [being] aggrandized . . . or diminished by the actions of another branch"? Sen. Br. 43-44. To ask "who threatens whom?" in this fashion can lead to only one answer in this case, for contrary to defendants' hyperbolic contentions, no serious threat exists that "the Judiciary [will] usurp the budgetary and appropriations powers granted expressly to the Legislature." Assem. Br. 20.

As a general, constitutional matter, even after this Court's decision in *Larabee II*, the Judiciary remains, as it always has been, "beyond comparison the weakest of the three departments of power" and "in continual jeopardy of being overpowered, awed or influenced by its coordinate branches"; it can still "never attack with success either of the other two"; the "natural feebleness of the judiciary" persists. THE FEDERALIST NO. 78 (Alexander Hamilton), *quoted in Larabee II*, 2008 N.Y. Slip Op. 28217, at *6. The Judiciary still "may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST NO. 78 (Alexander Hamilton). As one court recently put it:

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

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

As a specific factual matter, moreover, no serious infringement of the legislative or executive powers has occurred or will occur by this Court's ordering of a judicial pay adjustment. This action concerns only *one* discrete subject under the political branches' purview, a subject over which, as this Court held, 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." *Larabee II*, 2008 N.Y. Slip Op. 28217, at *6. For this reason as well, this action, and the relief it seeks, hardly threatens the overall power of the political branches "to balance the needs of various competing public interests," Sen. Br. 28, or to "usurp the separate powers reserved by the Constitution to the Legislative and the Executive," Assem. Br. 19. On one specific subject, this action simply invokes the principle of judicial review, a principle that, as Hamilton recognized, and as Americans have recognized ever since, does *not* "by any means suppose a superiority of the judicial to the legislative power." THE FEDERALIST NO. 78.

As for the flip side of the question of "who threatens whom?"—namely, do the political branches threaten the Judiciary?—merely expressing defendants' separation-of-powers "defense" likewise leads ineluctably to the answer. If, as defendants posit, all executive or legislative acts deemed "political" were deemed "beyond the court's power of review," Sen. Br. 19, our tripartite system of government would threaten to become a bipartite one. And even if judicial review were excluded simply from the power of the purse, the result would be the same:

> A Legislature has the power of life or 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*, 274 A.2d 193, 199 (Pa. 1971).

In short, the Legislature cannot exercise its power to appropriate in a manner that undermines a co-equal branch, and its exercise of that power may be reviewed judicially to ensure compliance with constitutional constraints. As one commentator explains, "[t]he legislature cannot use its appropriation authority to impede the judiciary from exercising the powers assigned to it any more than the legislature can use its appropriation authority to eliminate the office of the governor." Michael L. Buenger, *Of Money and Judicial Independence*, 92 KY. L.J. 979, 1031 (2004). And if the general legislative power to appropriate funds for the judicial branch is subject to the constitutional limitations and judicial review, so too is the power to set judicial pay.

Accordingly, New York decisions establish that the Legislature and the Executive cannot exercise their power to set compensation of judges and others in such a manner as to undermine the Judiciary. In *McCoy* v. *Mayor of the City of New York*, 73 Misc. 2d 508 (Sup. Ct. N.Y. Co. 1973), Mayor Lindsay invoked his plenary power over a legislatively created city housing court. This Court rejected the claim that the executive branch's discretion over resource allocation validated its refusal to adequately fund the housing court. It held: "Such a grasp of power is both illegal and unconstitutional"; "[t]he duty to fund cannot be avoided or subverted because budgetary modifications or future appropriations entail some degree of discretion. . . . The limits of [the executive's] discretion are constitutionally proscribed." *Id.* at 511 (citing *Tate*, 274 A.2d 193).

And 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. The State argued 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 court *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)).

The highest courts in several 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 concluded:

> It is clear beyond question that there is vested in the legislative branch of our government the power and authority to set the salary scale for the judicial branch of government. . . .

> The only limitation on the legislative authority to do so—and that only 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.

Glancey v. *Casey*, 288 A.2d 812, 814 (Pa. 1972) (emphasis added).

The Colorado Supreme Court also endorsed this limitation to discretion in legislative funding, holding that the adequacy of funding for the court system must be maintained in the midst of a State's difficult financial circumstances:

> 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, coequal 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 Court of the Second Judicial District*, 681 P.2d 953, 956 (Colo. 1984) (emphasis added) (quoting *Tate*, 274 A.2d at 202 (Pomeroy, J., concurring)); *see also O'Coin's, Inc.* v. *Treasurer of Worcester County*, 287 N.E.2d 608, 612 (Mass. 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.").

In short, defendants' contention that, under the separation of powers, fiscal matters generally, and judicial compensation specifically, are somehow beyond judicial review, is without merit.

B. This Court has the power to order relief.

Similarly without merit is defendants' related argument that granting relief in this action would unconstitutionally "usurp the Legislature's exclusive power to appropriate state funds." Assem. Br. 43. Part and parcel of judicial review is the power to order relief, and the fact that compliance with the Constitution may require the State to expend funds has never been a bar to such relief.

Again, this Court in *Larabee* decided the point. And other decisions are in accord. In *New York County Lawyers' Association* v. *State*, this Court held that "when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the Constitution by order of a mandatory . . . injunction." 192 Misc. 2d 424, 436 (Sup. Ct. N.Y. Co. 2002). The Court determined that the State's existing compensation rates resulted in deficiencies in the assigned private counsel system that "seriously impaired the courts' ability to function" and violated indigent citizens' constitutional right to representation. 196 Misc. 2d 761, 775 (Sup. Ct. N.Y. Co. 2003). Accordingly, "[f]aced with 17 years of legislative inaction and proof of real and immediate danger of irreparable constitutional harm," this Court could "no longer wait for the legislative branch" and issued a mandatory permanent injunction to the State, directing that assigned private counsel be paid the increased compensation of $90 per hour. *Id.* at 790.

New York County Lawyers' Association does not stand alone. In 1973, in *McCoy* v. *Mayor of the City of New York*, 73 Misc. 2d 508, 513 (Sup. Ct. N.Y. Co. 1973), the Court ordered executive branch officials "to take the necessary action to make available the funds which are required to properly staff and operate" a housing court established in the City of New York. And, as recently as last year, in *Kelch* v. *Town Board*, the Appellate Division affirmed this Court's exercise of the inherent power to order the State to make higher salary payments:

> 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*, 555 A.2d at 1211-1213).

Likewise, the highest courts of other states have redressed constitutional violations by compelling the State to remit funds for the Judiciary. In a seminal decision widely cited by

state courts across the Nation, the Supreme Court of Pennsylvania upheld an order compelling increases in funding of the courts:

> 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.

Commonwealth ex rel. Carroll v. *Tate*, 274 A.2d 193, 197 (Pa. 1971) (emphasis added in part). The court concluded that not only does the Judiciary possess this inherent power, but the Constitution also compels its invocation to repel a constitutional breach: "[T]he Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." *Id.*

The Supreme Court of Pennsylvania has on a number of occasions affirmed this inherent power—and obligation—that is vested in the Judiciary to repel threats to its independence by the political branches. In 1989, that court ruled that the 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." *Goodheart* v. *Casey*, 555 A.2d 1210, 1212 (Pa. 1989). Once again in 2006, the court applied *Tate*'s "settled precepts" to conclude that "the legislative reasoning for reducing judicial compensation is generally irrelevant to the constitutional inquiry." *Stilp* v. *Commonwealth*, 905 A.2d 918, 944 (Pa. 2006).

In Illinois, the 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 judicial salaries required by law. *Jorgensen* v. *Blagojevich*, 811 N.E.2d 652, 667 (Ill. 2004).

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. *Judges for the Third Judicial Circuit* v. *County of Wayne*, 190 N.W.2d 228, 231 (Mich. 1971). The court stated: "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." *Id.*

In Massachusetts, the Supreme Court announced the Judiciary's authority to compel the disbursement of funds to meet its reasonable and necessary needs as a co-equal branch of government. *O'Coin's, Inc.* v. *Treasurer of Worcester County*, 287 N.E.2d 608 (Mass. 1972). In its decision, the court stated:

> It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty, and property of every citizen while, at the same time, denying to the judges authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel. Such authority must be vested in the judiciary . . . .
>
> We hold, therefore, that among 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, including arranging himself for their purchase and ordering the responsible executive official to make payment.
>
> *It is not essential that there have been a prior appropriation to cover the expenditure. Where an obligation is thus legally incurred, it is the duty of the State . . . to make payment.*

Id. at 612 (emphasis added).

Echoing these findings, the Supreme Court of Washington recognized:

> The separation of powers . . . dictates that the judiciary be able to ensure its own survival when insufficient funds are provided by the other branches. To do so, courts possess inherent power, that is, authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties.

In re Salary of the Juvenile Director, 552 P.2d 163, 171 (Wash. 1976).

In Colorado, reviewing the Judiciary's power to order that its employees be paid certain salaries by the State, the Supreme Court confirmed that the courts must possess the "inherent

power to carry on their functions . . . and may incur necessary and reasonable expenses." *Smith* v. *Miller*, 384 P.2d 738, 741 (Colo. 1963). And the court held that "it is the plain ministerial duty of those who control the purse to pay such expenses except only where the amounts are so unreasonable as to affirmatively indicate arbitrary and capricious acts." *Id.*

Finally, the Supreme Court of Indiana has held that the Judiciary possesses the authority to order funding for reasonable and necessary operating expenses. Noting that "courts frequently have to rule upon the acts or refusal to act of those controlling the purse strings in rendering justice," the court stated that "[t]hreats of retaliation or fears of strangulation should not hang over such judicial functions." *Carlson* v. *State ex rel. Stodola*, 220 N.E.2d 532, 536 (Ind. 1966). Consequently, the "court ha[s] authority to provide for the payment of expenses necessary for its proper functioning in the absence of any showing of abuse of such discretion." *Id.* The Indiana Supreme Court even concluded the court has inherent power to fix the salary of its probation officer despite the express refusal of the local council to appropriate such funds:

> [T]he authority of this court to appoint a probation officer, fix his salary and require payment thereof, does not rest upon mere legislative fiat. The 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. The necessity of such authority in the courts is grounded upon the most fundamental and far reaching considerations.

Noble County Council v. *State ex rel. Fifer*, 125 N.E.2d 709, 713 (Ind. 1954).

Defendants do not identify any case that rejects this inherent judicial power to order relief, including expenditures, when the other branches have violated their constitutional obligations to the Judiciary. Instead, they rely on the general proposition that the courts should not intrude on the political branches' power to set budget policy. *See* Assem. Br. 43-46; Sen. Br. 43-45, 63. This proposition is sound in other contexts, but it does not apply when the other branches have unconstitutionally violated their obligation to provide funds for the Judiciary itself. As this Court explicitly stated in *New York County Lawyers' Association*, "longstanding maxims rooted in the doctrine of separation of powers must yield in equity on a showing that the State's failure

to raise the current compensation rates adversely affects the judiciary's ability to function." 192 Misc. 2d at 436-37. The Pennsylvania Supreme Court has likewise noted that the Legislature's power to set judicial salaries does not prohibit the courts from ordering relief when the Legislature has abdicated its responsibilities to the Judiciary:

> Although the legislative branch of our government has the power and authority to set the salary scale for the judiciary, as a co-equal branch of our tripartite form of government, the "[j]udiciary *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 . . . ." Therefore it follows that this Court 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.

Goodheart, 555 A.2d at 1212 (quoting *Tate*, 274 A.2d at 197) (citations omitted); *accord Kelch*, 36 A.D.3d at 1111-12 (noting "tension between competing legal principles, both based on the separation of powers," but holding that court had the power to interfere with legislative action that affects the independence of the Judiciary).

Defendants point to cases in which courts have declined to order specific relief, but these rulings are distinguishable: they did not involve a threat to the Judiciary itself, and the violations in those cases involved disputed *policy* decisions which are not at stake. Assem. Br. 43-46; Sen. Br. 43-45, 63. In *Campaign for Fiscal Equity* v. *State*, 8 N.Y.3d 14 (2006), the Court of Appeals emphasized its restraint in fashioning relief for constitutionally inadequate education financing across the State. It did so based on the longstanding 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." *Id.* at 28 (citation omitted). At stake in the education financing remedy was the design of an immensely complex scheme, from the amount of funding to the proper allocation among schools in diverse districts across the State. Yet despite its deference in compelling remedial action, the Court of Appeals ordered the State (i) to conduct within one year a massive review of the costs of providing a basic education, (ii) to reform the existing system of financing, and (iii) to require "the new scheme [to contain] 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 (2003). These prescriptions can hardly be said to reflect rejection of the court's responsibility to compel redress of constitutional transgressions.

Defendants' other citations are also inapposite. In *Klostermann* v. *Cuomo*, 61 N.Y.2d 525 (1984), which involved a dispute over policies governing State psychiatric hospitals, the Court of Appeals granted plaintiffs' request for declaratory judgment that their rights were violated and ordered that the State fulfill its mandatory duties. The court said that "to the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties." *Id.* at 541. Nowhere did the court disavow its power to order redress of ongoing constitutional violations.

Likewise in *Saxton* v. *Carey*, 44 N.Y.2d 545 (1978), in rejecting a citizen lawsuit against the constitutionality of the budget, the Court of Appeals made clear that "[w]e do not suggest by our decision today that the budgetary process is per se 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." *Id.* at 551 (emphasis added).

And in *Pataki* v. *New York State Assembly*, 4 N.Y.3d 75 (2004), a dispute between the Governor and Assembly over the executive budget, the Court of Appeals expressed its "ambivalence" about resolving executive-legislative budget disputes, but the court did not say it could not decree that the State expend funds to redress ongoing constitutional violations.

The relief that plaintiffs seek here does not require this Court to make any policy judgment that is more properly made by the political branches. As the Court held in *Larabee*, "there is no open policy issue to be resolved" among the State's politicians about the need for judicial salary adjustments or the specific policy of restoring pay parity between New York Supreme Court Justices and federal district judges. *Larabee II*, 2008 N.Y. Slip Op. 28217, at *6. All plaintiffs ask is for this Court to order the political branches to implement the policy they al-

ready have determined to be appropriate but have refused to implement for reasons unrelated to its merits. In the face of the constitutional violations that exist here, this Court has the power and the responsibility to order the relief necessary to vindicate the independence and co-equal status of the judicial branch.

C. Neither the Speech or Debate Clause nor executive immunity applies here.

Defendants also contend that this action is barred by the Speech or Debate Clause and by the analogous immunity enjoyed by the executive. Assem. Br. 33-42; Sen. Br. 64-103. These arguments were rejected in *Larabee* and should be rejected here.

Article III, Section 11 of the State Constitution grants immunity to legislators from being "questioned in any other place" based on their "speech or debate in either house of the legislature." The New York Court of Appeals has construed the scope of this privilege to comport with the protections established in the Speech or Debate Clause in the federal Constitution. *See People* v. *Ohrenstein*, 77 N.Y.2d 38, 54 (1990). Executive officials also enjoy this immunity based on their performance of "legislative functions." *Bogan* v. *Scott-Harris*, 523 U.S. 44, 55 (1998). But this grant of immunity is not absolute. The Speech or Debate Clause does not prevent the executive or legislators from being questioned about actions that are outside "the 'sphere of legitimate legislative activity.'" *Id.* at 54 (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)); *see also Urbach* v. *Farrell*, 229 A.D.2d 275 (3d Dep't 1997). The Supreme Court has also held that "[l]egislative immunity does not . . . bar all judicial review of legislative acts." *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)).

While rarely presented to the courts, the unique nature of a separation-of-powers challenge brought *by one co-equal branch against another* squarely implicates the United States Supreme Court's circumscription of legislative immunity. Noting that the Speech or Debate Clause was "not written into the Constitution simply for the personal or private benefit of Members of Congress," the Court stated in *United States* v. *Brewster*, 408 U.S. 501 (1972):

> Our 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 historic balance of the three co-equal branches of Government.*

Id. at 507-08 (emphasis added); *see also id.* at 517 ("[T]he shield does not extend beyond what is necessary to preserve the integrity of the legislative process.").

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*, 858 A.2d 709 (Conn. 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 722. In this setting of an interbranch conflict, the Connecticut Supreme Court rejected the Committee's contention. It concluded that the Speech or Debate Clause protections did not apply in an intra-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.

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 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." *Office of the Governor*, 858 A.2d at 724. And the Court emphasized 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 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*, 681 A.2d 699 (Pa. 1996), plaintiffs (various entities of the executive branch) filed a mandamus action seeking to compel the General Assembly (the legislative branch) 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 the General Assembly, and that it 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 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 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," 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 702.

Defendants attempt to distinguish these decisions of the highest courts in Connecticut and Pennsylvania. They observe that *Office of the Governor* ultimately upheld the legislative subpoena as a proper exercise of its subpoena power. But that part of the court's ruling turns on the specific nature of the Legislature's impeachment authority. What is relevant to the instant action is the fact that the court found the scope of that legislative power reviewable. The Connecticut Supreme Court held that, however broad the discretion given to the Legislature in its impeachment power, the scope of that power is *not* shielded from judicial review by the Speech or Debate Clause.

Defendants also suggest that *Office of the Governor* and *Pennsylvania State Association of County Commissioners* are unique because of the underlying constitutional rights protected in each case. *Office of the Governor* involved the important "right of the Executive to protect itself from an abuse of the impeachment process by the Legislature," Assem. Br. 41; Sen. Br. 79, while *Pennsylvania State Association of County Commissioners* concerned the judicially rec-

ognized obligation of the Legislature "to provide 'adequate compensation' to the judiciary," Assem. Br. 41-42. The independent and co-equal status of the Judiciary at stake in the case at bar is no less constitutionally urgent. Here, too, an interbranch conflict based on the Legislature's conduct outside the sphere of legitimate legislative activity threatens to undermine the historic balance of powers among the branches.

Nor are defendants' other arguments under the Speech or Debate Clause meritorious. Their assertion of immunity under this Clause is substantively identical to their claim to immunity from judicial review of any matter committed to legislative discretion. They contend that the court may not review any conduct related to the "give and take" of legislative activity. Assem. Br. 37; Sen. Br. 82. They suggest that plaintiffs' linkage cause of action is merely a concern over legislators' alleged bad faith, motives, and intent in docket management and legislative horse-trading, conduct for which legislators are "absolutely immune." Assem. Br. 34; *see also* Sen. Br. 82, 86-97. But this argument already has been considered and rejected by the Court in *Larabee II*. The Court concluded that while the "legislative process often involves trade-offs and compromises," the political branches' use of "judicial pay as a pawn in dealing with the unresolved political issue of legislative compensation . . . is an abuse of power . . . and constitutes an unconstitutional interference upon the independence of the judiciary." *Larabee II*, 2008 N.Y. Slip Op. 28217, at *4, *8.

Defendants seek to characterize this lawsuit as one concerned merely with "the consideration and passage or rejection of proposed legislation," Assem. Br. 35 (quoting *Gravel* v. *United States*, 408 U.S. 606, 625 (1972)); *see also* Sen. Br. 85, or with "the privilege covering the party's individual conferences," Sen. Br. 85. *Larabee II* rejected these assertions of legislative immunity on the issue of linkage, and the same rationale dispels such arguments by defendants with regard to adequacy and discrimination. Contrary to defendants' suggestion, this suit was not commenced "to isolate one single bill . . . to be handled in a Utopian pristine fashion." Sen. Br. 88. It is the cumulative record of the political branches' undisputed conduct—as the Court recognized in *Larabee II*—that grounds plaintiffs' causes of action for violations of the

State Constitution. At issue is the political branches' conduct that falls outside the legitimate sphere of legislative activity by threatening to undermine "the historic balance of the three co-equal branches of Government." *Brewster*, 408 U.S. at 508.

Defendants' reliance on *Straniere* v. *Silver*, 637 N.Y.S.2d 982, 986 (3d Dep't), *aff'd* 89 N.Y.2d 825 (1996), is unavailing. *See* Assem. Br. 39; Sen. Br. 67 n.20. In *Straniere*, the Third Department held that in an action brought by a *private party* the court may not "strip acts taken in the legislative process of their constitutional immunity by finding that the acts are substantively illegal or unconstitutional." *Id.* This case is not brought by a private party. It is brought by an independent branch of government. Claims of the improper exercise of legislative authority—"because of its adverse collateral consequences on the constitutional rights" of private parties—"*are poles apart*" from the Judiciary's assertion that defendants' authority to set judicial compensation does not extend to permitting the separation of powers to be violated and the independence of the Judiciary to be undermined. *Office of the Governor*, 858 A.2d at 726 (emphasis added). Also, unlike *Straniere*, which involved whether a home rule message was required before the Legislature could act, the claim here—that defendants have violated the separation of powers and invaded the independence of the judicial branch—involves conduct which falls outside the "sphere of legitimate legislative activity." *Straniere*, 637 N.Y.S.2d at 985.

Finally, in claiming immunity for the Senate and Assembly, *see* Sen. Br. 99, defendants cite *Kessell* v. *Purcell*, 119 Misc. 2d 449, 450 (Sup. Ct. Nassau Co. 1983). In that case, the court dismissed an Article 78 proceeding against the Legislature because the State's authorization of a local sales tax was within the "sphere of legitimate legislative activity." This decision merely restates the undisputed standard for Speech or Debate Clause immunity described above. The same is true in the cases in the other jurisdictions referred to by defendants. *See* Sen. Br. 100-102. This reiteration of the undisputed threshold for Speech or Debate Clause immunity offers no support for dismissal of the Senate or Assembly, who are charged with acting beyond the sphere of legitimate legislative activity.

POINT III

DEFENDANTS' VARIOUS PROCEDURAL OBJECTIONS ARE WITHOUT MERIT.

Defendants lodge a host of procedural challenges to the claims asserted here. None have merit.

A. The Chief Judge and the Judiciary have capacity and standing to prosecute this action.

In *Larabee*, the defendants argued that the four plaintiff judges could not sue because they were "persons suing in their individual capacities, not in their official capacities as judges or on behalf of the judicial branch of government." Defs. Mem. of Law in Opp. to Mot. for Summary Judgment at 14, *Larabee* v. *Governor*, Index No. 112301/07 (Sup. Ct. N.Y. Co. filed Apr. 29, 2008). Here they argue that neither the Chief Judge in her official capacity, nor the judicial branch may sue. Assem. Br. 46-48; Sen. Br. 103-08. Apparently, the defendants' position is that *no one* has capacity or standing to sue to vindicate the constitutional interests of the judicial branch here. That position is wrong.

Capacity. In *Community Board 7* v. *Schaffer*, 84 N.Y.2d 148, 152 (1994), invoked by the Senate (Sen. Br. 104), the issue was whether a *community board* established by the New York City Charter could sue. The case addressed the capacity to sue of "[g]overnmental entities *created by legislative enactment*." *Id.* at 155 (emphasis added). These entities, the Court of Appeals held, "present similar capacity problems" to those raised by "business corporations" because *they* are "artificial creatures *of statute*." As "such . . . [they] have neither an inherent nor a common-law right to sue." *Id.* at 155-56 (emphasis added). Yet even with such purely statutory creations, the court held that there need *not* "'in every instance . . . be express legislative authority'" for there to be power to sue. *Id.* at 156. "[P]rovided . . . 'there is no clear legislative intent negating review,'" "'capacity to sue may also be *inferred* as a 'necessary implication from [the agency's] power[s] and responsibilit[ies].'" *Id.* (quoting *City of New York* v. *City Civil Serv. Comm'n*, 60 N.Y.2d 436, 443-45 (1983)). Even with "artificial creatures of statute," all it takes

to establish capacity to sue is for the plaintiff to have "'functional responsibility within the zone of interest to be protected.'" *Id.* (quoting *City of New York* v. *City Civil Serv. Comm'n*, 60 N.Y.2d at 445).

The office of the Chief Judge and the Unified Court System are not artificial creatures of statute. They are created by the Constitution itself, and their capacity to sue inheres in the Constitution. Article VI, Section 1 provides that "[t]here shall be a unified court system for the state." Article VI, Section 28 provides that "[t]he chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system." Having been established by the Constitution, they have capacity to sue to vindicate the constitutional interests of the judicial branch. But even if the test for statutory officers and agencies were applied here, the plaintiffs would still pass: the Chief Judge and the Unified Court System have "functional responsibility for the zone of interest to be protected" here—namely, the independence of the Judicial Branch.

Nothing in *Silver* v. *Pataki*, 96 N.Y.2d 532, 538 (2001), relied upon by the Senate (Sen. Br. 105-07), holds or suggests that the Chief Judge lacks capacity to sue here. The Court of Appeals held that Speaker Silver could sue in his official capacity as an individual legislator, but could not bring suit on behalf of the Assembly as a body. The court so held because the Constitution does not give the Speaker any broad duties over the Assembly. 96 N.Y.2d at 538. It says little more than that "the assembly shall choose a speaker," N.Y. CONST. art. III, § 9, which is not enough to infer any inherent power to represent the Assembly. Even his "express statutory powers are circumscribed"—again, not "enough to confer on the Speaker any special implied authority to seek judicial review on behalf of the interests of the Assembly in general." 96 N.Y.2d at 538.

By contrast, the Chief Judge's legal authority over the judicial branch is far broader—and it is expressly conferred by *the Constitution*, not merely by statute. Article VI, Section 28 not only makes her "the chief judge of the state" and "chief judicial officer of the unified court system," but also gives her the power to "appoint a chief administrator of the courts." N.Y.

CONST. art. VI, § 28(a). Of course, it is "[t]he chief administrator [who] shall supervise the administration and operation of the unified court system." *Id.* § 28(b). But the chief administrator only does that "*on behalf of the chief judge*," *id.* (emphasis added), and "serve[s] *at the pleasure of the chief judge*," *id.* § 28(a) (emphasis added). And the Constitution provides that the chief administrator only "shall have such powers and duties as *may be delegated to him or her by the chief judge* and such additional powers and duties as may be provided by law." *Id.* § 28(b) (emphasis added). These provisions, and others, give the Chief Judge substantial authority—express constitutional authority—for the operation and well-being of the judicial branch. As a result, the Chief Judge has the capacity to sue here, just as she and her predecessors have sued in the past, just as the Chief Administrative Judge and her predecessors have sued in the past, and, indeed, just as they have been subject to suit in the past.[10]

Standing. Defendants' lack-of-standing argument fares no better. Standing doctrine is "designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome so as to 'cast[] the dispute "in a form traditionally capable of judicial resolution."'" *Community Bd. 7*, 84 N.Y.2d at 154-55 (quoting *Society of Plastics Indus., Inc.* v. *County of Suffolk*, 77 N.Y.2d 761, 772 (1991) (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974))). The requirements of standing are "closely aligned with [the courts'] policy not to render advisory opinions," and are based upon "'judicial experience of centuries, here and elsewhere, for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments.'" *Society of Plastics*, 77 N.Y.2d at 772-73

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[10] *See, e.g., In re Unified Court Sys.*, 58 N.Y.2d 876, 878 (1983) (ruling for plaintiff Unified Court System in suit challenging financial obligations imposed by the State Department of Labor's Division of Unemployment Insurance); *Morgenthau* v. *Cooke*, 56 N.Y.2d 24, 38 (1982) (resolving action against the Chief Judge in his official capacity); *Ponterio* v. *Kaye*, 25 A.D.3d 865, 870 (3rd Dep't 2006) (rejecting claim brought by former judge against the Chief Judge, Chief Administrative Judge, and Administrative Board of the Courts), *leave to appeal denied*, 6 N.Y.3d 714 (2006); *Lippman* v. *Pub. Employment Relations Bd.*, 296 A.D.2d 199, 211 (3d Dep't 2002) (granting plaintiff Chief Administrative Judge's petition to annul determination of Public Employment Relations Board); *see also Wachtler* v. *Cuomo*, No. 91-CV-1235, 1991 WL 249892, at *4 (N.D.N.Y. Nov. 21, 1991) (remanding to Supreme Court, Albany County of an action by the Chief Judge and Chief Administrative Judge, on behalf of the Judiciary, against the Governor, the Temporary President of the Senate, the Speaker of the Assembly and the Legislature).

(quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 115 (1962)).

It would beggar belief to suggest that a real controversy is lacking here, or that the Court is being asked to deliver merely an advisory view of the facts and the Constitution. And indeed, the Chief Judge and the Unified Court System here easily meet the requirement of standing. For in suing to protect the interests and the independence of the Judicial Branch, they have plainly alleged "an injury in fact—an actual legal stake in the matter being adjudicated," and their "injury in fact . . . falls within [their] zone of interest." *Silver* v. *Pataki*, 96 N.Y.2d at 539. The courts of this State have long recognized that a public officer must have standing to initiate litigation to enforce the Constitution when the alleged violation at issue affects the office or agency with which she is entrusted. *See*, *e.g.*, *Morgenthau* v. *Cooke*, 56 N.Y.2d 24, 30 (1982) (upholding, based on his duty to prosecute in the courts, the District Attorney's capacity to sue the Chief Judge for improper assignment of judges); *Graziano* v. *County of Albany*, 3 N.Y.3d 475, 481-82 (2004) (affirming election commissioner's capacity to challenge unequal representation of political party members in county board of elections staff).

The standing of the Judiciary was recently sustained when far less was at stake. A local law had purported to create an alternative adjudication bureau to hear and to determine zoning violations. Alleging a violation of the separation of powers, the Chief Administrative Judge and the UCS intervened as plaintiffs; the defendant town challenged their standing. Standing was upheld:

> The UCS clearly has standing and an interest in insuring that a local law does not usurp the exclusive authority to hear and determine cases or impede the power of the Courts as a co-equal branch of government or constitutionally deprive the Court of its powers. . . . [T]he plaintiff[] UCS [is] within the zone of interest to test the constitutionality of the [local law] . . . . Accordingly, the Town's motion to dismiss . . . the actions on the grounds of standing is denied in its entirety.

Greens at Half Hollow, LLC v. *Town of Huntington*, 15 Misc. 3d 415, 417 (Sup. Ct. Suff. Co. 2006).

Defendants cite an organizational standing case, *Dental Society* v. *Carey*, 61 N.Y.2d 330, 333-34 (1984), to argue that the UCS has no standing because "[i]t has no members." Assem. Br. 47. But the fact that the UCS has no members is precisely why private organizational standing cases do *not* apply here. The constitutionally-established third branch of the State government is not "an organization such as" a dentists' club, *Dental Society*, 61 N.Y.2d at 333, and defendants cite no authority suggesting it should be treated as though it were. Nor can defendants support their assertions that "the gravamen of the action concerns only the salaries paid to judges in their individual capacities" and "[t]he interests of the Unified Court System do not involve judicial compensation levels at all." Assem. Br. at 12, 47. The answer to that is a short one, too: the Constitution protects judicial pay "not as a private grant, but as *a limitation imposed in the public interest*." *O'Donoghue* v. *United States*, 289 U.S. 516, 533 (1933) (emphasis added).

As this Court has put it, "[t]he People of the State of New York are entitled to an independent judiciary" and "any improper interference" with that independence "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 N.Y. Slip Op. 28217, at *7. This public interest in the independence of the Judiciary falls well within the zone that the Chief Judge and the UCS have the capacity and standing—indeed, the duty and obligation—to protect.

B. All of the defendants are proper defendants.

Next defendants argue that only the State of New York can be sued here. They say that because the State is the only party that can be compelled by the Court to make the necessary payments to adjust judicial pay, only the State is an appropriate party in this action. Assem. Br. 48; Sen. Br. 138. No such rule exists. As a general matter, a plaintiff may sue any person "against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transaction or occurrences." CPLR 1002(b). And in the specific situation here—an action alleging unconstitutional conduct—all a plaintiff need do is to plead a "sufficient nexus" between a defendant and the alleged unconstitutional

conduct of the State. *New York County Lawyers' Ass'n* v. *Pataki*, 188 Misc. 2d 776, 787 (Sup. Ct. N.Y. Co. 2001), *aff'd*, 294 A.D.2d 69 (1st Dep't 2002).

Plaintiffs have done that here. They have alleged that each of the defendants—including the Governor, Speaker Silver, Senator Bruno, and both chambers of the Legislature—have been directly involved in the unconstitutional conduct and that all, acting together, have the power to remedy it. Plaintiffs have a right to relief against all defendants, including a declaration that all violated the Constitution and an injunction requiring them to remedy the situation. And so all of the defendants may be joined. *See, e.g.*, *Felder* v. *Foster*, 71 A.D.2d 71, 75 (4th Dep't 1979) (finding in a budget suit against county legislature that the county manager and the county social services director were also "necessary and proper parties" based on their administrative responsibilities and implementation of a program subject to the legislature's budgetary cut); *Brooklyn Sch. for Special Children* v. *Crew*, No. 96 Civ. 5014 LAP, 1997 WL 539775, at *14 (S.D.N.Y. Aug. 28, 1997) (finding agencies and officials of the City and State of New York, as well as the City and State itself, were properly joined as parties in action seeking declaratory, injunctive, and ancillary monetary relief for statutory and constitutional violations concerning reimbursement of children's education services).

The cases cited by defendants do not support their position. For example, the court in *Cass* v. *State*, 58 N.Y.2d 460 (1983), *cited in* Assem. Br. 48, held that "the State is *a* proper party" defendant in a declaratory judgment action challenging a statute's constitutionality—not that the State is the *only* proper party defendant. *Id.* at 463 (emphasis added). The opinion of the Court of Appeals actually refers to "the State *as well as the other defendants*." *Id.* at 464 (emphasis added). As to these other defendants, the Appellate Division's opinion held that they were *proper* parties defendant:

> Both the Comptroller and the Chief Administrator of the Courts are public officers charged by plaintiffs with making allegedly unconstitutional disbursements of State funds pursuant to the Unified Court Budget Act, *and, such being the case, they are proper defendants in these declaratory judgment actions.*

Cass v. *State*, 88 A.D.2d 305, 308 (3d Dep't 1982), *modified on other grounds*, 58 N.Y.2d 460 (1983) (emphasis added). On this point, Court of Appeals *affirmed*. 58 N.Y.2d at 464 (ordering that jurisdictional dismissal of the State should be reversed but that "otherwise the order should be affirmed").[11]

New York courts have allowed declaratory judgment actions to proceed against defendants other than the State on numerous occasions. In the case at bar the defendants, other than the Governor, are collaterally estopped as a result of *Larabee I*, where this Court, after it dismissed the Governor, stated that "[t]here is no dispute that the remaining defendants (the State of New York, the Senate and the Assembly) are proper parties," allowed the lawsuit to proceed against them, and entered judgment against them. 19 Misc. 3d at 239; *accord*, *e.g.*, *Dillenburg* v. *State*, 18 Misc. 3d 789, 795-96 (Sup. Ct. Chautauqua Co. 2007) (entering declaratory judgment against the State, the Governor, the Legislature, Speaker Silver, Senator Bruno, and the Comptroller); *Courtroom Television Network, LLC* v. *State*, 1 Misc. 3d 328, 329 n.1 (Sup. Ct. N.Y. Co. 2003), *aff'd*, 8 A.D.3d 164 (1st Dep't 2004) (finding district attorney was appropriate party in declaratory judgment action that also named the State, the Governor, and the State Attorney General, because district attorney had the power to enforce the challenged statute); *Schulz* v. *State*, 152 Misc. 2d 589, 596 (Sup. Ct. Albany Co. 1991) (allowing declaratory judgment action to proceed against the State, the Governor, the Legislature, the Speaker of the Assembly, the President of the Senate, and others).

C. Plaintiffs' claims are justiciable.

As for defendants' protestations that this case is nonjusticiable (Assem. Br. 37-38; Sen. Br. 15-63), one need only look to this Court's decision in *Larabee*. This Court rightly con-

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[11] Nor do *New York County Lawyers' Ass'n* v. *Pataki*, 188 Misc. 2d 787, and *Antonetty* v. *Cuomo*, 131 Misc. 2d 1041 (Sup. Ct. Bronx Co. 1986), *cited in* Assem. Br. 49, support defendants. In *New York County Lawyers' Association*, the Court dismissed the Governor because "he play[ed] no role in the implementation of the statutes" at issue. 188 Misc. 2d at 787. And in *Antonetty*, the court similarly dismissed the Governor because he "had no legal authority" over the Urban Development Corporation's challenged decision to dedicate a park. 131 Misc. 2d at 1045.

cluded there that the high stakes in this interbranch conflict do not absolve the Judiciary of its duty "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See Larabee I*, 19 Misc. 3d at 233. Defendants' justiciability challenge, particularly their invocation of the political-question doctrine, asserts that the political branches are immunized from judicial review of any budgetary matter committed to the discretion of the political branches, even those that implicate or transgress limitations enshrined in the Constitution. Defendants assert that "[a]cts of the Executive and the Legislative branch in the exercise of their purely political function are beyond the court's power of review." Sen. Br. 19.

But that proposition defies precedent involving clashes of the branches of government. "The fact that [a] case may have political overtones, involve public policy, or possibly touch upon executive or legislative functions does not negate its justiciability." *New York County Lawyers Ass'n* v. *Pataki*, 188 Misc. 2d at 779. As the Court of Appeals has concluded, "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." *King* v. *Cuomo*, 81 N.Y.2d 247, 251 (1993) (emphasis added); *see also*, *e.g.*, *Klostermann* v. *Cuomo*, 61 N.Y.2d at 531 (interpreting political branches' statutorily created obligations concerning people with mental illnesses).

Contrary to the argument that review of the political branches' conduct is nonjusticiable, this Court already has recognized that plaintiffs do not seek to reorder legislative priorities or the discretionary allocation of resources. Rather, the case at bar seeks to vindicate the constitutional separation of powers, which protects the Judiciary's status as a co-equal branch of government:

> While clearly the legislative process involves tradeoffs and compromises on a myriad of political issues, to continue to deprive the third, supposedly coequal branch of government with a pay adjustment, on which there is no policy dispute, for nearly a decade does raise an issue as to whether the two other branches have abused their power, and thus unconstitutionally interfered with the independence of the judiciary.

Larabee I, 19 Misc. 3d at 233. Like *Larabee*, this case is justiciable.

D. Neither *Larabee* nor *Maron* require a dismissal or stay of this action under CPLR 3211(a)(4).

The defendants also move to dismiss or stay this action on the ground that "two prior pending actions, brought by other judges in their individual capacities, have already demanded the same relief." Assem. Br. 31; *accord* Sen. Br. 116-17 (citing CPLR 3211(a)(4)). But CPLR 3211(a)(4), which is discretionary in any event, allows dismissal *only* when "there is another action pending between the same parties for the *same* cause[s] of action." (Emphasis added.) And as the courts long have held, actions for declaratory judgment should be dismissed only when "*[a]ll* the parties in [the] action are parties in the prior action." *E.g.*, *Storer* v. *Ripley*, 283 A.D. 973, 973 (2d Dep't 1954) (emphasis added). "Only where there is a *complete* identity of the parties, cause[s] of action and remedy should a stay be granted." *Congress Factors Corp.* v. *Meinhard Commercial Corp.*, 129 Misc. 2d 726, 730 (Sup. Ct. N.Y. Co. 1985) (emphasis added). The cases cited by defendants reflect these rules. *See*, *e.g.*, *Canadian Imperial Bank of Commerce* v. *Canada Life Assurance Co.*, 352 N.Y.S.2d 203, 204 (1st Dep't 1974) (dismissing action because pending action implicates "all the factual and legal issues" between same plaintiff and defendant); *Bradford* v. *Brooklyn Trust Co.*, 56 N.Y.S.2d 379 (1st Dep't 1945) (finding identical claims, relief, and "identity of parties in both actions").

No such complete identity of parties, claims, and relief exists here. In the *Larabee* and *Maron* cases, various individual judges sued in their individual capacities for salaries due them personally; here the Chief Judge sues in her official capacity, along with the Judiciary itself, to remedy constitutional violations that threaten the independence and co-equal status of the courts. The claims are different; neither *Maron* nor *Larabee* asserted either a separation-of-powers claim for inadequacy of judicial compensation, or a discrimination claim under the Compensation Clause. And the declaratory and injunctive relief differs materially from that sought in the other actions.

E. This action was properly brought in Supreme Court, and not in the Court of Claims.

Finally, the Senate defendants claim that this action should have been brought in the Court of Claims. Sen. Br. 114-16. They are wrong. The Court of Claims is the exclusive forum for civil litigation seeking *damages* against the State of New York. *See* L. 1929, ch. 467; N.Y. CONST. art. VI, § 9; *Schaffer* v. *Evans*, 57 N.Y.2d 992 (1982). But this is not an action for damages. It is an action for declaratory and injunctive relief, and is properly brought in Supreme Court.

As the Court of Appeals has ruled, "[i]t is settled . . . that a declaratory judgment action in the Supreme Court is an appropriate vehicle for challenging the constitutionality of a statute" and that "the State is a proper party to such an action because of its obvious interest in and right to be heard on matters concerning the constitutionality of its statutes." *Cass* v. *State*, 58 N.Y.2d 460, 463 (1983). And it is equally well-settled that actions for declaratory and injunctive relief, even where the expenditure of funds may be necessary, are not actions for damages. In *Kendall* v. *Evans*, 100 A.D.2d 508 (2d Dep't 1984), for example, a city judge challenged the disparity between his pay and that of judges in other parts of the state and sought declaratory relief as well as pay adjustments retroactive to the beginning of the allegedly unconstitutional conduct. The judge later retired, which mooted the prospective claim for declaratory relief, which left only the claim for retrospective monetary payments. Special Term dismissed the case for want of subject-matter jurisdiction, holding that "the issue of retroactive relief was properly one for the Court of Claims." *Id*. at 508.

The Second Department reversed and held that jurisdiction was proper in Supreme Court. The Supreme Court retained jurisdiction over the claim for monetary relief because "Plaintiff's claim for retroactive relief was ancillary to, and dependent upon, a favorable judgment on the issue of the statute's constitutionality. . . . In such actions ancillary relief in the form of a money judgment may be granted." *Id*. at 508-09; *accord, e.g.*, *Anderson* v. *County of Suffolk*, 97 A.D.2d 448, 449 (2d Dep't 1983) (upholding Supreme Court's jurisdiction to hear

suit because plaintiffs' "demand for retroactive salary payments is incidental to" the primary relief of an order redressing defendants' unconstitutional conduct); *cf. Milliken* v. *Bradley*, 433 U.S. 267, 289-90 (1977) (holding that costs to an injunction to remedy school segregation are not damages).

In accordance with this settled case law, this Court has consistently exercised jurisdiction in many cases—cases such as *Larabee* and *New York County Lawyers' Association*—that potentially or actually involved the State's remedial expenditure of funds. This Court, not the Court of Claims, is the proper court to hear this case.[12]

[12] The one case upon which the Senate defendants rely, *Thaler* v. *State*, 79 Misc. 2d 621, 622 (N.Y. Ct. Cl. 1974), *cited in* Sen. Br. 116, held only that a claim of an individual judge limited to back pay owed to him is a damages action that must be heard in the Court of Claims.

Conclusion

It is respectfully submitted that defendants' motions to dismiss pursuant to CPLR Rule 3211(a) should be denied, and that, under CPLR Rules 3211(c) and 3212(b), summary judgment in favor of plaintiffs should be granted on all of plaintiffs' causes of action.

Dated: New York, New York
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