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To be argued by:
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Supreme Court, New York County, Index Nos. 112301/07 & 117058/08

State of New York
Court of Appeals

HON. SUSAN LARABEE, et al.,

Plaintiffs-Appellants,

-against-

THE GOVERNOR OF THE STATE OF NEW YORK, et al.,

Defendants-Respondents.

ARLENE R. SILVERMAN, &c.,

Plaintiff-Appellant,

-against-

SHELDON SILVER, &c., et al.,

Defendants-Respondents.

BRIEF FOR STATE RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT.....	1
ISSUE PRESENTED	2
STATEMENT OF THE CASE	3
A. Proceedings up to and Including This Court’s Decision in <i>Matter of Maron v. Silver</i>	3
B. The Legislature’s Subsequent Consideration and Enactment of a Judicial Salary Increase.....	5
C. The <i>Larabee</i> Plaintiffs’ Motion to Renew and <i>Silverman</i> Plaintiff’s Supplemental Complaint	6
1. Supreme Court’s rejection of plaintiffs’ claims	7
2. The Appellate Division’s affirmance	8
ARGUMENT	10
PLAINTIFFS ARE NOT ENTITLED TO MONEY DAMAGES FOR PAST COST-OF-LIVING INCREASES	10
A. There Is No Legal Basis For Plaintiffs’ Proposed Lost-Pay Damages.	11
1. <i>Matter of Maron</i> focused on separation- of-powers violations occurring from 2006 to 2008, which the Legislature has remedied.	11

2. This Court has considered and rejected plaintiffs’ arguments that the Legislature must provide them with retroactive monetary relief.	13
B. No Judicially Manageable Standards Exist For Calculating the Past Salary Adjustments Plaintiffs Might Have Received.....	17
1. Plaintiffs cannot establish an entitlement to any particular amount of additional retroactive compensation.	17
2. Because no specific entitlement exists here, plaintiffs’ cited cases are readily distinguishable.	20
C. This Court’s Precedents Support the Conclusion That Monetary Relief Would Be Inappropriate Here.	24
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Affleck v. Buckley</i> , 96 N.Y.2d 553 (2001)	26
<i>Arteaga v. State</i> , 72 N.Y.2d 212 (1988)	26
<i>Beer v. United States</i> , 696 F.3d 1174 (Fed. Cir. 2012) (en banc)	10, 21
<i>Brown v. State</i> , 89 N.Y.2d 172 (1996)	27
<i>Burns Jackson Miller Summit & Spitzer v. Lindner</i> , 59 N.Y.2d 314 (1983)	25
<i>Campaign for Fiscal Equity v. State</i> 8 N.Y.3d 14 (2006)	23
<i>Chief Judge v. Governor</i> , 25 Misc. 3d 268 (Sup. Ct. N.Y. County 2009), <i>aff'd</i> 65 A.D.3d 898 (1st Dep't 2009).....	3, 4, 13
<i>CPC Int'l, Inc. v. McKesson Corp.</i> , 70 N.Y.2d 268 (1987)	25
<i>Deutsch v. Crosson</i> , 171 A.D.2d 837 (2d Dep't 1991).....	22
<i>Dickinson v. Crosson</i> , 219 A.D.2d 50 (3d Dep't 1996).....	22
<i>Larabee v. Governor</i> , 121 A.D.3d 162 (1st Dep't 2014).....	passim
<i>Larabee v. Governor</i> , 20 Misc. 3d 866 (Sup. Ct. N.Y. County 2008), <i>aff'd</i> 65 A.D.3d 74	4, 13

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Larabee v. Governor</i> , 65 A.D.3d 74 (1st Dep't 2009)	3
<i>Lichtenstein v. State</i> , 93 N.Y.2d 911 (1999)	25
<i>Martinez v. City of Schenectady</i> , 97 N.Y.2d 78 (2001)	27
<i>Matter of Maron v. Silver</i> , 14 N.Y.3d 230 (2010)	passim
<i>Matter of Maron v. Silver</i> , 58 A.D.3d 102 (3d Dep't 2008)	3
<i>McLean v. City of N.Y.</i> , 12 N.Y.3d 194 (2009)	26
<i>Metz v. State</i> , 20 N.Y.3d 175 (2012)	25
<i>Nicolai v. Crosson</i> , 214 A.D.2d 714 (2d Dep't 1995)	22
<i>Pennsylvania State Association of County Commissioners v.</i> <i>Commonwealth</i> , 545 Pa. 324 (1996).....	23-24
<i>Rodrigues v. City of N.Y.</i> , 193 A.D.2d 79 (1st Dep't 1993)	26
<i>Ryan v. State</i> , 81 A.D.2d 947 (3d Dep't 1981), <i>aff'd</i> 56 N.Y.2d 561 (1982)	25
<i>Saarinen v. Kerr</i> , 84 N.Y.2d 494 (1994)	26

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Silverman v. Silver</i> , 119 A.D.3d 449 (1st Dep't 2014)	8
<i>Tucker v. Toia</i> , 43 N.Y.2d 1 (1977)	24
<i>Valdez v. City of N.Y.</i> , 18 N.Y.3d 69 (2011)	25
 Law	
Ch. 567, 2010 McKinney's N.Y. Laws 1460	6, 12, 20
 Miscellaneous Authorities	
Final Report of the Special Commission on Judicial Compensation 8 (Aug. 29, 2011), available at http://www.judicialcompensation.ny.gov/assets/FinalRepo rtSpecialCommissionJD.pdf	6

PRELIMINARY STATEMENT

These consolidated appeals are brought by active and retired state judges who seek a retroactive increase in their judicial salaries to cover past increases in the cost of living. The courts below properly dismissed those claims. This Court has made clear that setting the level of judicial compensation is a legislative function, and has already rejected requests to order specific adjustments in judicial pay for the period of time at issue here. *See Matter of Maron v. Silver*, 14 N.Y.3d 230 (2010).

Plaintiffs seek to distinguish *Matter of Maron* by contending that they seek “lost-pay” monetary damages, rather than an order directing the Legislature to enact any particular raise by statute. But their claims are legally and factually indistinguishable from the arguments previously considered and rejected by this Court in *Matter of Maron*. That case makes clear that although separation-of-powers principles require the Legislature to consider judicial pay on its own merits, “whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature.” *Id.* at 263.

The Legislature has established an independent commission to consider judicial compensation and, in accordance with that commission's recommendations, has provided for state judges' salaries to be prospectively increased to the compensation level of the federal bench. *Matter of Maron* does not support plaintiffs' attempt to obtain through money damages a retroactive cost-of-living increase that the Legislature has in its judgment declined to enact.

ISSUE PRESENTED

Whether plaintiffs may obtain, through money damages, a retroactive cost-of-living increase that the Legislature declined to enact when considering judicial pay on the merits.

STATEMENT OF THE CASE

A. Proceedings up to and Including This Court's Decision in *Matter of Maron v. Silver*

This Court's decision in *Matter of Maron v. Silver* resolved three separate appeals brought by current and former state judges—including the *Larabee* plaintiffs—who were challenging the Legislature's decision not to increase judicial salaries after 2000. See *Larabee v. Governor*, 65 A.D.3d 74 (1st Dep't 2009); *Matter of Maron v. Silver*, 58 A.D.3d 102 (3d Dep't 2008); *Chief Judge v. Governor*, 25 Misc. 3d 268 (Sup. Ct. N.Y. County 2009), *aff'd* 65 A.D.3d 898 (1st Dep't 2009).¹ The Court rejected plaintiffs' claim that state constitutional prohibitions against enactments diminishing judicial compensation "affirmatively require that judicial salaries be adjusted to keep pace with the cost of living." *Matter of Maron*, 14 N.Y.3d at

¹ In December 2008, while *Larabee* was initially on appeal to the First Department, Arlene R. Silverman, then a Justice of Supreme Court, New York County, brought an action in Supreme Court against the State and various executive and legislative officers, alleging similar constitutional violations to those claimed in *Larabee*, and seeking similar monetary relief. The parties agreed that proceedings in the action would be held in abeyance pending the resolution of the litigation in *Larabee* and the other pending appeals.

252. As the Court emphasized, the Constitution left it to the Legislature to address the effects of inflation on the real value of judicial compensation. *Id.* at 251-52, 254.

The Court did hold, however, that the Legislature had violated structural separation-of-powers principles by tying consideration of judicial pay increases to unrelated legislative initiatives—agreeing with the lower courts in the *Chief Judge* and *Larabee* actions. *Id.* at 257-61. But the Court parted ways from those courts on the question of remedy. Those courts had sought to provide relief for the separation-of-powers violation by ordering the Legislature to adjust judicial salaries to account for inflation, including retroactively. *Larabee v. Governor*, 20 Misc. 3d 866, 878 (Sup. Ct. N.Y. County 2008), *aff'd* 65 A.D.3d 74; *see also Chief Judge v. Governor*, 25 Misc. 3d 268 at 273, *aff'd* 65 A.D.3d 898 (same). This Court expressly declined to adopt that remedy.

In place of the lower courts' orders requiring the Legislature to provide judges with prospective and retroactive salary increases, this Court substituted a declaration that "the State defendants' failure to consider judicial compensation on the merits

violates the Separation of Powers Doctrine.” *Matter of Maron*, 14 N.Y.3d at 263-64, 265. The Court emphasized that while the Legislature was required to undertake independent consideration of whether to enact judicial pay increases, “whether judicial compensation should be adjusted, and by how much” remains “within the province of the Legislature.” *Id.* at 263. The Court cautioned that the courts “must avoid intrusion on the primary domain of another branch of government,” and that in this context “deference to the Legislature . . . is necessary because it is in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State’s resources.” *Id.* at 261 (quotation marks omitted).

**B. The Legislature’s Subsequent Consideration
and Enactment of a Judicial Salary Increase**

Following this Court’s decision in *Matter of Maron*, the Legislature concluded that the best way to determine appropriate adjustments to judicial salaries was through an independent commission on judicial compensation. The Legislature accordingly established such a commission and gave it the power to

recommend prospective pay increases that would have the force of law unless otherwise modified by statute. Ch. 567, 2010 McKinney's N.Y. Laws 1460. By law, the commission would convene in April 2011 and periodically thereafter. *Id.*

After several meetings and a public hearing, the commission determined in August 2011 that the salaries of active state judges should be increased prospectively over a three-year period to reach a level comparable to federal judicial salaries. *See* Final Report of the Special Commission on Judicial Compensation 8 (Aug. 29, 2011); *see also Larabee v. Governor*, 121 A.D.3d 162, 169 (1st Dep't 2014) (Sweeny, J., concurring). That recommendation became law on April 1, 2012. (*Larabee* R. 14.)

C. The *Larabee* Plaintiffs' Motion to Renew and *Silverman* Plaintiff's Supplemental Complaint

In the spring of 2011, the *Larabee* plaintiffs moved for leave to renew their action pursuant to C.P.L.R. 2221. (*Larabee* R. 20-21.) They did not dispute that the commission considered judicial compensation wholly on the merits; instead, they argued that the Legislature was constitutionally required to enact retroactive, as

well as prospective pay increases. Plaintiffs asserted, just as they had previously, that they were entitled to monetary relief addressing increases in the cost of living between 2000 and 2009, for all state judges serving during that period—approximately \$312 million, with interest. *Larabee Br.* at 2 & n.2; *Larabee R.* 335-337.

In the fall of 2011, Justice Silverman, now retired, brought a supplemental complaint on consent in which she similarly alleged that the Legislature was required to provide retroactive pay increases. Her supplemental complaint sought monetary damages addressing cost-of-living increases from January 1999 onward, and a retroactive increase in pension payments based on that retroactively increased salary. (*Silverman* Appendix (“*Silverman A.*”) 33-35.)

1. Supreme Court’s rejection of plaintiffs’ claims

Supreme Court (Braun, J.) granted the *Larabee* plaintiffs’ motion to renew but held on renewal that they had failed to establish that the Legislature’s enactment of a prospective pay increase contravened this Court’s analysis in *Matter of Maron*. (*Larabee R.* 11.) In a separate decision, Supreme Court dismissed

the *Silverman* supplemental complaint. (*Silverman* A. 20-21.) Supreme Court observed that *Matter of Maron* required only that the Legislature address judicial compensation on its own merits, which “[t]he Legislature has now done.” (*Silverman* A. 20-21.) Supreme Court concluded that the enactment of a solely prospective salary increase following such consideration was within the discretion of the Legislature. (*Larabee* R. 17-19.)

2. The Appellate Division’s affirmance

The *Larabee* plaintiffs and Justice Silverman each appealed to the Appellate Division, First Department, which considered the two appeals together and affirmed 3-2. *Larabee*, 121 A.D.3d 162; *Silverman v. Silver*, 119 A.D.3d 449 (1st Dep’t 2014) (affirming for the reasons stated in *Larabee*). The Appellate Division concluded that the Legislature had conformed its conduct to the constitutional standards articulated in *Matter of Maron*. See 121 A.D.3d at 166-67 (Tom, J.P., concurring); *id.* at 170-71 (Sweeny, J., concurring). And the Appellate Division observed that plaintiffs’ requested relief was inconsistent with this Court’s recognition that “devising budgets and establishing judicial

compensation” is “the primary domain of the legislature,” not the judiciary. 121 A.D.3d at 164 (Tom, J.P., concurring); *see also id.* at 164-67; *id.* at 170, 174 (Sweeny, J., concurring).

Two dissenting justices would have awarded plaintiffs compensatory damages, but only for the period from 2006 onwards, based on the separation-of-powers violations described by *Matter of Maron*. *See* 121 A.D.3d at 179 (Freedman, J., dissenting). Those justices did not suggest any metric for calculating plaintiffs’ damages, other than to disagree with plaintiffs’ assertion that “damages [could] simply be based on the past increase in the cost of living.” *Id.* at 180.

The *Larabee* plaintiffs and Justice Silverman have appealed as of right to this Court pursuant to C.P.L.R. 5601(a). (*Larabee* R. 344-345; *Silverman* A. 1.)²

² This brief, with the consent of all parties, responds both to the opening brief of the *Larabee* plaintiffs and to that of Justice Silverman.

ARGUMENT

PLAINTIFFS ARE NOT ENTITLED TO MONEY DAMAGES FOR PAST COST-OF-LIVING INCREASES

In *Matter of Maron*, this Court held that separation-of-powers principles require the Legislature to consider adjustments to judicial compensation without reference to unrelated policy initiatives such as legislative pay and campaign finance reform. 14 N.Y.3d at 257-61. The Legislature then gave judicial pay the required independent consideration, and provided for state judges' salaries to be prospectively increased to match the level of federal judicial salaries. Plaintiffs now argue that the Legislature was constitutionally required to provide retrospective increases in compensation as well—and in an amount sufficient to cover changes in the cost of living between 2000 and 2009. Those arguments misread *Matter of Maron* and are contrary to the firmly settled precedents of this Court. Nor can support for plaintiffs' position be found in *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc), or the various Appellate Division equal-protection decisions on which plaintiffs rely.

A. There Is No Legal Basis For Plaintiffs’ Proposed Lost-Pay Damages.

1. *Matter of Maron* focused on separation-of-powers violations occurring from 2006 to 2008, which the Legislature has remedied.

Plaintiffs claim an entitlement to “lost-pay monetary damages” for the period 2000 through 2009, based on *Matter of Maron*’s holding that the Legislature on several occasions violated separation-of-powers principles by tying consideration of judicial pay to unrelated policy initiatives. But *Matter of Maron* identified no wrongful conduct by the Legislature before 2006. See 14 N.Y.3d at 245; see also *Larabee*, 121 A.D.3d at 179 (Freedman, J., dissenting). And the Court’s ruling concerned an injury to the structure of state government—not a violation of plaintiffs’ personal rights.

The separation-of-powers doctrine “is a *structural safeguard*,” 14 N.Y.3d at 261 (quoting *Plaut v Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995), that “is aimed at preventing one branch of government from dominating or interfering with the functioning of another coequal branch,” *id.* at 244. The Court in *Matter of Maron* found that the Legislature had “disregarded the Separation of Powers Doctrine and threatened the independence

of the Judiciary,” *id.* at 257, by seeking on several occasions to use judicial pay “as a pawn or bargaining chip in order to achieve ends . . . entirely unrelated to the judicial mission,” *id.* at 259. As the Court explained: “[W]hether the Judiciary is entitled to a compensation increase must be based upon an objective assessment of the Judiciary’s needs if it is to retain its functional and structural independence.” *Id.*

The Legislature has complied with *Matter of Maron*, and has remedied the separation-of-powers violation it identified, by creating the Commission on Judicial Compensation—an independent body with authority to recommend future salary adjustments that will take effect unless specifically rejected by the Legislature. Ch. 567, 2010 McKinney’s N.Y. Laws 1460. In 2011, after several meetings and a public hearing, the commission determined that the salaries of active state judges should be increased prospectively over a three-year period to reach a level comparable to federal judicial salaries. That recommendation became law on April 1, 2012. See *supra* at 5.

2. This Court has considered and rejected plaintiffs' arguments that the Legislature must provide them with retroactive monetary relief.

Plaintiffs' arguments for retroactive monetary relief were indisputably before the *Matter of Maron* Court, and the Court squarely rejected those arguments. Plaintiffs' assertions to the contrary (*Larabee* Br. at 17-18) are mistaken.

All three sets of plaintiffs in the appeals resolved by *Matter of Maron*—including the *Larabee* plaintiffs—sought court-ordered monetary relief to compensate them for the Legislature's decision not to raise their judicial salaries in accordance with inflation. And the lower courts in the *Larabee* and *Chief Judge* actions undertook to provide such relief for the Legislature's separation-of-powers violation, by ordering the Legislature to adjust judicial compensation prospectively and retrospectively to reflect increases in the cost of living. *Larabee*, 20 Misc. 3d at 878, *aff'd* 65 A.D.3d 74; *Chief Judge*, 25 Misc. 3d 268 at 273, *aff'd* 65 A.D.3d 898.

The *Matter of Maron* Court agreed that the Legislature's actions violated the separation of powers but nonetheless declined to affirm the lower courts' grant of monetary relief to plaintiffs.

Indeed, the Court removed the portion of the Appellate Division's decree in *Larabee* that required the Legislature to enact prospective and retrospective salary increases. See 14 N.Y.3d at 263-264.

The *Matter of Maron* Court emphasized that although separation-of-powers principles required the Legislature to give fair and independent consideration to judicial pay, “whether judicial compensation should actually be adjusted, and by how much is within the province of the Legislature.” *Id.* at 263. That analysis is in keeping with the Court's conclusion that even the state constitution's prohibition on enactments diminishing judicial compensation does not “affirmatively require that judicial salaries be adjusted to keep pace with the cost of living,” 14 N.Y.3d at 252, but rather commits to the Legislature the determination of how best “to combat the effects of inflation” on the real value of judicial compensation, *id.* at 254.

To be sure, determining whether the Legislature has afforded judicial compensation the required merits-based consideration is “within the province of this Court.” *Id.* at 263

(citing *Marbury v. Madison* 1 Cranch (5 U.S.) 137, 177 (1803)). And there is no question that courts have authority to craft remedies and award monetary relief as a general matter. See Larabee Br. at 13.

But the issue here is whether it would improperly “encroach[] on the budget-making authority of the Legislature,” 14 N.Y.3d at 263, for a court to order the addition of specific line items to the state budget—in this case, retroactive salary increases for state judges. The *Matter of Maron* Court answered that question in the affirmative. *Id.* As the Court observed, “when fashioning specific remedies for constitutional violations, [courts] must avoid intrusion on the primary domain of another branch of government.” *Id.* at 261 (internal quotation marks omitted). And here, “constitutional authority to budget and appropriate” lies with the Legislature and not the courts. *Id.*

The *Matter of Maron* Court thus declared that the Legislature should consider judicial pay on the merits, but expressly declined to require any particular outcome from the Legislature’s deliberations. As the Court explained, “deference to

the Legislature . . . is necessary because it is in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources." *Id.* at 261 (quotation marks omitted).

The *Larabee* plaintiffs try to distinguish the relief they currently seek from the relief they were previously denied by suggesting that they are now asking for an award of "back-pay monetary damages," not an order directing the Legislature to enact any particular raise by statute. Br. at 21-24. But they cannot evade *Matter of Maron's* reasoning so easily. "[A]ccepting plaintiffs' argument and remanding for further proceedings to determine the amount of damages to be awarded in the form of back pay" would "effectively arrogat[e] the budgeting power to the judiciary under the guise of remedying a constitutional violation." *Larabee*, 121 A.D.3d at 170 (Sweeny, J., concurring). Put another way, "order[ing] a retroactive recovery, measured by cost of living increases dating to any particular year . . . would necessarily imply that the judiciary enjoys the power to establish judicial pay scales in the first place." *Id.* at 166 (Tom, J.P., concurring).

Plaintiffs’ proposed damages award therefore implicates the same concerns about encroachment and intrusion into the Legislature’s authority to budget and appropriate as their previous request for an order directing the enactment of a specific retroactive pay increase.

B. No Judicially Manageable Standards Exist For Calculating the Past Salary Adjustments Plaintiffs Might Have Received.

1. Plaintiffs cannot establish an entitlement to any particular amount of additional retroactive compensation.

Determining and awarding “lost-pay monetary damages” presupposes a legal entitlement to have received that lost pay in the first place. Thus, plaintiffs’ request rests on the premise that the Legislature was constitutionally obligated to enact judicial pay increases at some particular time in some particular amount—a notion squarely rejected by the *Matter of Maron* Court. See *supra* A.2.

Indeed, there are simply no judicially manageable standards a court could apply to determine by how much the Legislature would have adjusted judicial compensation had it actually been considering judicial pay on the merits. As this Court observed in

Matter of Maron, the lump sums referenced in various judicial salary proposals made between 2006 and 2009, *see id.* at 245, do not on their own show how the Legislature would have “amend[ed] the Judiciary Law salary schedules or direct[ed] the disbursement of the funds,” *id.* at 249.

Plaintiffs’ suggested basis for calculating their purported damages—changes in the cost of living between 2000 and 2009 (*see Larabee Br.* at 15-16, *Larabee R.* at 335-337)—assumes that the Legislature was required to increase judicial salaries to keep pace with inflation. But the *Matter of Maron* Court unequivocally held that the State Compensation Clause does not “affirmatively require that judicial salaries be adjusted to keep pace with the cost of living,” 14 N.Y.3d at 252.³ Amici for plaintiffs suggest the Court could “calculate a retroactive award for the Judiciary based upon prevailing Federal salary rates during the relevant years”

³ Plaintiffs identify no legal provision other than the Compensation Clause that could entitle them to lost-pay damages pegged to inflation, in particular.

(Br. for Amici at 8), but identify no legal provision entitling plaintiffs to that measure of damages.

Even the two Appellate Division justices that would have granted plaintiffs lost-pay damages have recognized that “the amount that would put plaintiffs in the position they would have been in were it not for defendants’ improper actions cannot be calculated based on any single factor.” *Larabee*, 121 A.D.3d at 179 (Freedman, J., dissenting) (internal citation omitted). In the view of those justices, “the multitude of factors that should be considered” include, but are not limited to, “the amounts that had been budgeted for judicial compensation reform but were never disbursed, the compensation adjustments that other New York State employees received during the relevant period, and adjustments that judges and public employees in other states and the federal government received.” *Id.* The difficulty of determining

how a court should weight even these factors highlights the unmanageability of plaintiffs' request for lost-pay damages.⁴

2. Because no specific entitlement exists here, plaintiffs' cited cases are readily distinguishable.

The judicial pay decisions cited by plaintiffs (and by the two Appellate Division justices that would have granted their request for lost-pay damages) do not support plaintiffs' position, and in fact further illustrate the fundamental problems with the remedy that plaintiffs seek here. Specifically, in each of the cited cases, the court's order of relief rested on the presence of a *legislative*

⁴ By way of comparison, the Legislature has instructed the Commission on Judicial Compensation to consider prospective judicial pay increases in light of "all appropriate factors including, but not limited to: the overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by judges, executive branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise; and the state's ability to fund increases in compensation and non-salary benefits." Ch. 567, § 1(a), 2010 McKinney's N.Y. Laws at 1460.

enactment entitling the plaintiffs there to a salary that was higher by a *specific, calculable amount* than the salary they were receiving.

In *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc), the court’s order of monetary relief was anchored in a federal statute that “set a clear formula for calculation and implementation of” cost-of-living adjustments for federal judges, *id.* at 1184, and provided for the implementation of those salary adjustments “according to a mechanical, automatic process,” *id.* at 1181; *see also id.* at 1177 (statute “provided for self-executing and non-discretionary cost of living adjustments”). *Beer* held that the terms of the federal statute provided federal judges with an entitlement to those specific salary adjustments, and that Congress’s subsequent failure to fund the adjustments violated the commitment embodied in the statute and the federal constitution’s prohibition on diminution of judicial compensation. *Id.* at 1182-83, 1184-85, 1186-87. The *Beer* court observed that Congress was not precluded from amending the statute to modify its obligations prospectively, but could not simply ignore the statute’s terms. *Id.* at 1185. In this case,

in contrast, “no such mandatory legislation has been violated.”
121 A.D.3d at 173 (Sweeny, J., concurring).

The equal pay cases cited by the *Larabee* plaintiffs (Br. at 13) are likewise readily distinguishable on the basis that the claims there rested on a legislative enactment that made the damages sought objectively discernable and “easily calculated,” *Larabee*, 121 A.D.3d at 179 (Freedman, J., dissenting). Having found that inequalities in the judicial salary schedules for certain categories of similarly situated judges violated the Equal Protection Clause, the courts there simply ordered the salaries of those judges to be equalized. *See Dickinson v. Crosson*, 219 A.D.2d 50 (3d Dep’t 1996); *Nicolai v. Crosson*, 214 A.D.2d 714, 715 (2d Dep’t 1995); *Deutsch v. Crosson*, 171 A.D.2d 837 (2d Dep’t 1991). The courts did not thereby purport to second-guess the Legislature’s policy determinations regarding the State’s budgetary needs, resources, and priorities.

Plaintiffs’ position also draws no support from the cases referenced by their amici. *See* Br. for Amici at 6-9. In *Campaign for Fiscal Equity v. State*, this Court emphasized “the necessity for

courts to tread carefully when asked to evaluate state financing plans,” in light of the Legislature’s authority to make fiscal policy, its better position to determine funding needs and priorities, and the “abiding respect for the separation of powers upon which our system of government is based.” 8 N.Y.3d 14, 28-29 (2006) (internal quotation marks omitted). And the Court carefully applied those principles when fashioning a remedy for the State’s unconstitutionally deficient financing of public education in New York City. *Id.* at 28. The Court directed the State “to ascertain the actual cost of providing a sound basic education in New York City,” reform the current system of school financing, and establish accountability measures to gauge “whether the reforms actually provide the opportunity for a sound basic education.” *Id.* at 21 (internal quotation marks omitted). The Court did not determine for itself what funding should be provided—thereby intruding “on the primary domain” of the Legislature, *id.* at 28—as plaintiffs’ amici would have it do here (Br. for Amici at 7-9).⁵

⁵ Amici rely on *Pennsylvania State Association of County*
(continued on the next page)

C. This Court's Precedents Support the Conclusion That Monetary Relief Would Be Inappropriate Here.

Plaintiffs acknowledge that their position ultimately reduces to the proposition that “once recognized, an economic injury should be followed with a coextensive legal remedy.” *Larabee Br.* at 11; *see also Br. for Amici* at 5. That proposition, however, is contrary to numerous decisions of this Court.

In the private right of action context, for example, this Court has repeatedly held that statutory violations injuring an individual plaintiff do not necessarily give rise to an individually enforceable remedy in damages, if recognizing such a remedy would be inappropriate in that statutory and factual context. *See,*

Commissioners v. Commonwealth, 545 Pa. 324 (1996) for the proposition that courts can set their own benchmarks for court financing and “direct payment out of public funds” if the Legislature disagrees. *Br.* at 7. But that case has little authoritative weight in this context in light of its plain inconsistency with this Court’s approach in *Matter of Maron*, *see supra* at 14-15, and *Campaign for Fiscal Equity*, *see supra* at 21. *See also Tucker v. Toia*, 43 N.Y.2d 1, 8 (1977) (holding that State has “an affirmative duty to aid the needy” but “our Constitution provides the Legislature with discretion in determining the means by which this objective is to be effectuated . . . [and] the amount of aid . . .”).

e.g., *CPC Int'l, Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 275-78 (1987); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 325-31 (1983). And the Court has made clear that an improper remedy does not become proper merely because it is the only one available. *Metz v. State*, 20 N.Y.3d 175, 180-81 (2012).

With respect to legal wrongs alleged to have been committed by governmental actors, it is bedrock New York law that not all such wrongs and associated injuries give rise to individual monetary remedies. To the contrary, the State is immune altogether from suits for damages under State law, except as it has consented to be sued—and the scope of the State’s waiver of sovereign immunity must be construed strictly. *Lichtenstein v. State*, 93 N.Y.2d 911, 913 (1999). Moreover, even in the absence of sovereign immunity, this Court has frequently recognized that considerations of public policy provide governmental actors with absolute or qualified immunity from liability in particular contexts. *See, e.g.*, *Valdez v. City of N.Y.*, 18 N.Y.3d 69 (2011) (absolute governmental-function immunity); *Ryan v. State*, 81 A.D.2d 947 (3d Dep’t 1981), *aff’d* 56 N.Y.2d 561 (1982) (absolute

prosecutorial immunity); *Arteaga v. State*, 72 N.Y.2d 212, 216-17 (1988) (absolute judicial immunity); *Rodrigues v. City of N.Y.*, 193 A.D.2d 79, 85-86 (1st Dep't 1993) (qualified investigative immunity); *Affleck v. Buckley*, 96 N.Y.2d 553, 556 (2001) (qualified traffic-design immunity); *Cf. McLean v. City of N.Y.*, 12 N.Y.3d 194, 199-200 (2009) (special-duty requirement for municipal tort liability); *Saarinen v. Kerr*, 84 N.Y.2d 494 (1994) (recklessness standard for traffic violations by emergency vehicles).

Thus, the issue here is not merely whether an individual legal wrong causing economic injury has occurred, but whether that injury may properly be redressed through a judicially implied damages remedy. In the present context, this Court already made clear that separation-of-powers concerns counsel against a court's determining the appropriate amount of a judicial pay increase and dictating that amount to the Legislature. *See Matter of Maron*, 14 N.Y.3d at 261, 263. And the Court has also already rejected the principal measure of the money damages that plaintiffs seek (changes in cost of living). *Id.* at 252; see also *supra* at 3, 17.

The *Larabee* plaintiffs attempt (Br. at 13-14) to distinguish their suit as seeking monetary damages for constitutional violations in particular, citing *Brown v. State*, 89 N.Y.2d 172 (1996), which implied a remedy in damages for certain constitutional torts. But *Brown* itself cautioned that its scope is “narrow.” 89 N.Y.2d at 192. It is *not* sufficient under *Brown* for a plaintiff to establish (1) that only monetary relief will ameliorate any injuries that they have suffered. The plaintiff must also show (2) that defendant violated a self-executing constitutional provision, which “define[s] judicially enforceable rights and provide[s] citizens with a basis for judicial relief against the State if those rights are violated,” *id.* at 186; (3) that the rights in question have “common-law antecedents warranting a tort remedy for [their] invasion,” *id.* at 189; *and* (4) that no other remedy will suffice to deter future violations of those rights. *Id.* at 191-92; *see also Martinez v. City of Schenectady*, 97 N.Y.2d 78, 83-84 (2001). Even if plaintiffs could meet *Brown*’s first requirement, they cannot meet its other requirements. *Brown* thus undermines rather than bolsters plaintiffs’ position.

For example, the very facts of this case contradict the *Larabee* plaintiffs' suggestion (Br. at 14) that lost-pay damages are needed to deter future separation-of-powers violations by the Legislature with regard to judicial pay. Following *Matter of Maron*, the Legislature has established an independent compensation commission to provide for judicial salary increases as needed in the future. That plaintiffs and *amici* would prefer the Legislature to have done more does not change the fact that, as this Court has made clear, "whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature," 14 N.Y.3d at 263, not the courts.

CONCLUSION

For the foregoing reasons, the judgments and orders of Supreme Court should be affirmed.

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